

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

CASE CLOSURE SUMMARY REPORT

Public Schools
School Division

Name of Parents

Name of Child

April 23, 2007
Date of Decision

Kathleen S. Mehfoud, Esquire
Counsel Representing LEA

Julie Kegley, Esquire
Counsel Representing Parents/Child

[Parents]
Party Initiating Hearing

Public Schools
Prevailing Party

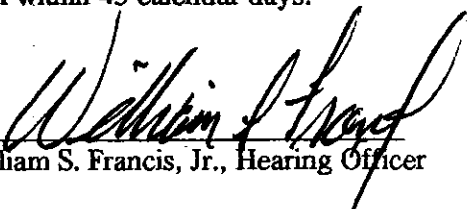
Hearing Officer's Determination of Issue[s]:

1. The Virginia Department of Education is dismissed as a party there being no evidence showing it to be in a position in this case mandating the School Board to accept its recommendation that state regulations requiring benchmarks are no longer required.
2. The due process claims of the Student against both VDOE and the School Board are dismissed with prejudice there being no evidence of a violation of the Student's right nor his receipt of a free and appropriate education.
3. No decision is made as to whether state regulations or federal law/regulations apply in regard to the necessity of the inclusion of benchmarks in the Student's IEP. Such determination is unnecessary giving the lack of evidence as to benchmark inclusion being necessary for the Student to receive a free and appropriate education as mandated either under federal law/regulations or state regulations.

Hearing Officer's Orders and Outcome of Hearing:

1. Virginia Department of Education is dismissed as a party.
2. Public Schools is the prevailing party.
3. provided with a free and appropriate public education and no decision is made as to whether state regulations or federal law/regulations apply in regard to the necessity of the inclusion of benchmarks in the Student's IEP.

This certifies that I have completed the hearing in accordance with regulations and have advised the parties of their appeal rights in writing. The written decision from the hearing is attached and I have also advised the LEA of its responsibility to submit an implementation plan to the parties, the hearing officer and the SEA within 45 calendar days.


William S. Francis, Jr., Hearing Officer

April 23, 2007
Date

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

DUE PROCESS HEARING REPORT

<u>Public Schools</u> School Division	_____ Name of Parents
_____ Acting Division Superintendent	_____ Name of Child
<u>Kathleen S. Mehfoud, Esquire</u> Counsel Representing LEA	<u>Julie Kegley, Esquire</u> Counsel Representing Parents/Child
<u>William S. Francis, Jr., Esquire</u> Hearing Officer	_____ Party Initiating Hearing [Parents]

ISSUES AND PURPOSE OF HEARING:

Due process request claiming that the Virginia Department of Education (VDOE) unlawfully denied a free and appropriate public education (FAPE) and violated the Regulations Governing Special Education Programs for Children with Disabilities in Virginia. VDOE denied FAPE and denied him needed, appropriate and required special education services and educational opportunities by failing/refusing to ensure that Public Schools (PS) complied with 8 V.A.C. § 20-80-62(F)(2) requiring the inclusion of benchmarks in Individualized Education Program (IEP).

Due process request claiming that PS denied FAPE and denied him needed, appropriate and required special education services and educational opportunities by refusing to include benchmarks in IEP, in violation of 8 V.A.C. § 20-80-2(F)(2).

Due process request claiming that PS denied FAPE and violated the Regulations Governing Special Education Programs for Children with Disabilities in Virginia by failing to conduct an Assistive Technology evaluation within appropriate timeliness or, in the alternative, by failing to issue a Prior Written Notice regarding their refusal to conduct an Assistive Technology evaluation.

OTHER ISSUES:

Propriety of the Virginia Department of Education as a party, application, effect, enforcement ability and Hearing Officer authority with regard to the application of either Federal or Virginia regulations; establishment of schedule for stipulations and expected motions and briefs in support of or reply thereto.

HEARING:

DATE	BEGINNING	DURATION OF PROCEEDINGS	CONCLUSION
April 4, 2007	10:10 A.M.	3 Hours 40 Minutes	1:50 P.M.

INTRODUCTION

This due process hearing was the result of an appropriate and proper due process request by the parents of the student, (Student), against School Board, (School Board), and the Virginia Department of Education, (VDOE). There was and is no issue as to the Student being a student under disability entitled to special education services based upon an agreed disability. The Student complained of the School Board and the VDOE not providing him with a free and appropriate public education (FAPE) as he is entitled to under the law because of their failure to include in his individual education plan (IEP) certain "benchmarks" no longer required by federal regulations of 2006 or by the 2004 IDEA statute, *Individuals with Disabilities Education Improvement Act*, 20 U.S.C. § 1400 *et seq.*, but required under the Commonwealth of Virginia regulations in place at the time of the development of the Student's IEP and at all times relevant herein. The request was set for hearing and the matter was heard on April 4, 2007.

TRACKING THE CASE

Because of the extensive briefings by all parties involving a volume of motions, positions and objections by all parties a chronology tracking their respective filings is included herein for the record.

<u>DATE</u>	<u>PLEADING</u>
02-08-2007	Request for Due Process Hearing
02-14-2007	Motion to Dismiss and Notice of Insufficiency of Hearing Request
02-15-2007	VDOE Response to Due Process Complaint Naming VDOE as Party [BY LETTER TO PARENTS]
02-15-2007	VDOE Challenge to the Request for Due Process Hearing [BY LETTER TO HO]
02-16-2007	SUBPOENAS For Production of Documents [TO CHILDREN'S HOSPITAL SNOWDEN AT FREDERICKSBURG, CHILD AND FAMILY COUNSELING CENTER, TOD , O.D., ANNANDALE FLUENCY CLINIC & PSYCHOLOGICAL AND LIFE SKILLS ASSOCIATES, P.C.
02-16-2007	STUDENT Objections to Requests for Subpoenas and Motion to Quash Subpoenas
02-19-2007	STAFFORD Response to Parents' Request for Due Process Hearing
02-20-2007	STUDENT Memorandum of Law in Opposition to Motion to Dismiss/Notice of Insufficiency filed by SB
02-20-2007	STUDENT Reply to VDOE's Challenge to Parents Request for Due Process Hearing [BY LETTER TO HEARING OFFICER]
02-20-2007	VDOE Motion to Dismiss
02-20-2007	Response to Objections to Requests for Subpoenas and Motion to Quash Subpoenas
02-21-2007	ORDER [DENY OBJECTIONS & MOTION TO QUASH WITH EXCEPTION PARENTS]
02-21-2007	ORDER [ORDERING ASSISTIVE TECHNOLOGY EVALUATION BY SB OF STUDENT; [DENY SB MOTION TO DISMISS; DENY VDOE MOTION TO DISMISS]

02-21-2007 STUDENT Reply to SB's Response to Objections to Requests for Subpoenas and Motion to Quash Subpoenas

02-23-2007 STUDENT Objections to Requests for Subpoenas and Motion to Quash Subpoenas

02-23-2007 **SUBPOENAS** For Production of Documents [TO
NOTE: REVISED RETURNABLE TO OFFICE OF COUNSEL FOR STUDENT
FOR COPYING BY MARCH 5, 2007]

02-28-2007 **HEARING OFFICER** Initial Pre-Hearing Report

02-28-2007 **ORDER** [ORDERING ASSISTIVE TECHNOLOGY EVALUATION BY CONSENT OF PARTIES]

03-05-2007 STUDENT **SUBPOENAS** for Witnesses [DR. JUDITH A. DOUGLAS, H. DOUGLAS COX, BILLY K. CANNADY, JR.]

03-06/07-2007 STUDENT/ Agreed Stipulations

03-09-2007 VDOE Resubmission of Motion to Dismiss VDOE from Administrative Proceeding

03-09-2007 STUDENT Return of Services for Subpoenas

03-15-2007 VDOE Objections to and Motions to Quash Witness Subpoenas

03-15-2007 **HEARING OFFICER** Letter Ruling on VDOE's Motion to Quash Witness Subpoenas and Status of Dismissal Motion by VDOE

03-16-2007 VDOE Objections to and Motion to Quash Witness Subpoena Superintendent of Public Instruction Billy K. Cannady, Jr.

03-16-2007 VDOE Objections to and Motion to Quash Witness Subpoena Assistant Superintendent of Public Instruction H. Douglas Cox

03-16-2007 VDOE Objections to and Motion to Quash Witness Subpoena Dr. Douglas

03-16-2007 Renewed Motion to Dismiss

UNDATED VDOE List of Witnesses, Exhibit List and Exhibits

03-23-2007 STUDENT Memorandum of Law in Opposition to School Board's Renewed Motion to Dismiss

03-23-2007 STUDENT Memorandum of Law in Opposition to Virginia Department of Education's Renewed Motion to Dismiss

03-27-2007 VDOE Reply to Complainant's Opposition to Virginia Department of Education's Renewed Motion to Dismiss

03-27-2007 List of Witnesses, Exhibit List and Exhibits

03-28-2007 STUDENT List of Witnesses, Exhibit List and Exhibits

03-28-2007 Revised Witness List, Revised Exhibit List and Additional Exhibits

03-30-2007 Rebuttal Memorandum

04-11-2007 STUDENT Closing Argument

04-16-2007 VDOE Rebuttal Memorandum

04-16-2007 Closing Argument

04-19-2007 STUDENT Rebuttal to and VDOE's Closing Arguments

ISSUES

1. Was this Student's individual education program (IEP) designed so that he could receive and was and is he receiving a free and appropriate education (FAPE) as required under the law?
2. Are "benchmarks" no longer required in this Student's IEP under IDEA and 2006 Federal regulations or were and are they required under the present Commonwealth of Virginia regulations?
3. If State regulations are determined to be the law, does the non-inclusion of benchmarks amount to, in and of itself, a significant enough violation to determine the violation of IDEA and/or that same determination considering the evidence introduced?
4. Is the Virginia Department of Education a proper party in this due process hearing?

DISCUSSION AND ANALYSIS CASE AND FINDING OF FACTS

As a preliminary statement to the discussion, it is well noted that the parties have maintained throughout this short due process hearing procedure that my determination was to be that of a question of law. I have made no determination thereof prior to the hearing. Upon the conclusion of the evidence my decision is a determination of fact.

This case involved at its outset the inclusion of the Virginia Department of Education (VDOE) as a party to the due process request. From the beginning of the process VDOE objected to, argued and maintained its position that it was an improper party and should be dismissed from the proceedings. See VDOE's respective briefs as follows: 02-15-2007 Response to Due Process Complaint Naming VDOE as Party; 02-20-2007 Motion to Dismiss; 03-09-2007 Resubmission of Motion to Dismiss VDOE from Administrative Proceeding; 03-27-2007 Reply to Complainant's Opposition to VDOE's Renewed Motion to Dismiss. In summary, VDOE's argument is that they are not a provider of services.

In retrospect, and after hearing the evidence, VDOE was correct. However, there was no way that I could make that determination prior to the evidence brought before me at the hearing itself. There is essentially no discovery in the due process procedure. Despite extensive arguments made and briefed over and over again there was no evidence before me of any nature until the due process hearing itself. As a hearing officer lacking any other defined procedures I viewed the VDOE's various motions to dismiss as the legal equivalent of the combination of a demurrer, dismissal motion from the pleadings, and a summary judgment motion in a civil action at law. The due process request was not deficient on its face and since it alleged a violation of the Student's right to FAPE by the action of VDOE in its oversight position of every school board by requiring that "benchmarks" be eliminated from any students' individual education plan when the same "benchmarks" were required by state regulations, evidence thereof or its lack had to be received.

I believe I am required in such position to give the Student as the moving party with the burden of proof every inference of propriety raised by his due process request. Having done so there was certainly some probability that evidence could have been introduced at the hearing to the effect that the School Board was somehow precluded by VDOE from including benchmarks in the Student's IEP despite their possible requirement under state regulations or, and or more importantly, despite evidence demonstrating a need therefore for the Student to receive a free and appropriate education. Such was not the case. The very best that the Student does in that regard is elicited from the testimony of Dr. Billy K. Cannady, Jr., Virginia's Superintendent of Public Instruction, and in particular his testimony on pages 60, 62, 64, 65, 69 and 77 of the *Transcript*, wherein in essence he testifies that the federal law reauthorizing IDEA in 2004 effective in 2005 specifically eliminating benchmarks and the federal regulations promulgated and effective in October, 2007 to the same effect were in conflict with our state regulations from 1999, which required and still require, as they are still in effect, benchmarks in every student's IEP. More particularly H. Douglas Cox, Virginia's Assistant Superintendent for Special Education and Student Services, on the following

pages 87, 90, 96, 102, 106, 108, 129 and 136 of the *Transcript* recognized VDOE's oversight position to local school boards and recognized their guidance document as simply that; *i.e.*, advising local school boards that, in their opinion, the requirement of benchmarks is in conflict with the federal requirements under the law and the regulations and, therefore, need not be included in students' IEPs. Both witnesses testified that under the proper circumstances they could be so included. Guidance documents are defined in the 1950 Code of Virginia, as amended, under § 2.2-4001 as a document developed by a state agency that provides information or guidance to interpret or implement statutes or the agency's rules or regulations. Such definition does not make it a mandatory requirement of such a guidance document to be strictly adhered to by a local school board. That is not enough. Therefore, as a finding of fact it is my finding that the evidence does not in any way establish that the VDOE occupies a position requiring the school board to eliminate benchmarks from a student's IEP.

Even if VDOE had been proven to somehow have been the responsible party for the elimination of required benchmarks from this Student's IEP VDOE would have been dismissed upon my determination to be discussed later that the evidence also failed to establish the failure of the VDOE or the School Board to comply with the requirements of law in their offering of services for this Student's free and appropriate education.

I am not going to decide whether or not federal law/IDEA applies or whether or not the federal regulations effective in October of 2006 apply or whether the Virginia regulations in place at all relevant times apply. Nor, therefore, will I decide the questions raised about my authority as a hearing officer to make such decisions. As discussed further, the simple failure of the Student to carry the burden of proof in showing the violation of his right to a FAPE make any determination as to which regulations apply unnecessary. Likewise, I also do not rule or reach any decision concerning the argued issues of preemption of state law by federal law nor do I reach any decision with regard to whether or not the state regulations exceed the federal law and regulations and are, therefore, still in effect or whether by requiring benchmarks which have been specifically eliminated under federal law and regulations they, therefore, are in conflict.

I have heard and analyzed all of the evidence, have reviewed the transcript thereof, have received all of the documents and reviewed the same that were admitted into evidence by all the parties. I am not simply deciding this case on this Student's failure to carry his burden of proof but moreover upon what I find to be a complete lack of any evidence showing that under the IEP for this Student that he is not receiving the required education.

Along with this finding of complete lack of evidence I also find a dearth of evidence showing that the contested benchmarks by not being included in this Student's IEP somehow prevent him from receiving a free and appropriate education. The very best that the evidence was on behalf of the Student in that regard is from the parents' testimony. Not only is that evidence not sufficient in carrying the Student's burden I find that it is no more than evidence of feelings, speculations, conclusions and hearsay. I have

allowed this evidence from the parents under the basis that it would be received and the objections thereto being considered as to the weight given. I find the parents' evidence relative thereto to have little or no weight and amounts to nothing more than what the parents feel might be necessary.

However, whether the state regulations requiring benchmarks or the federal law and regulations which eliminate that requirement apply, under the circumstances of this case, is a distinction without a difference. There was no evidence that the non-inclusion of benchmarks in this Student's IEP or the delivery of services thereof by the School Board deprived the Student of his right to a free and appropriate education.

Based upon a pre-hearing conference I had reasonably expected some evidence, perhaps from teachers, other specialized service providers, experts and/or evaluators to explain how and why benchmarks were necessary for this Student and how and why the non-inclusion would prohibit him from receiving special education services as required by law. No such evidence was presented and short of abject speculation based upon the parents' feelings and the hearsay testimony about other members of the IEP team who did not testify I do not know of any way that such lack of evidence could be discovered prior to the taking of evidence at the hearing.

DECISION

1. The Virginia Department of Education is dismissed as a party there being no evidence showing it to be in a position in this case mandating the School Board to accept its recommendation that state regulations requiring benchmarks are no longer required.

2. The due process claims of the Student against both VDOE and the School Board are dismissed with prejudice there being no evidence of a violation of the Student's right nor his receipt of a free and appropriate education.

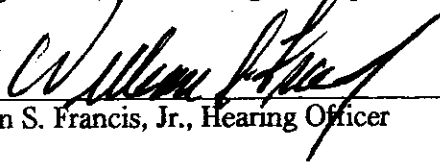
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APPEAL INFORMATION

This ruling shall be final and binding upon the parties unless the decision is appealed by either party to a state circuit court or a United States District Court within one year of the date of this ruling.

IMPLEMENTATION PLAN

Public Schools is responsible to submit an implementation plan to the parties, the hearing officer, and the Virginia Department of Education within 45 calendar days.



William S. Francis, Jr., Hearing Officer

April 23, 2007

Date

William S. Francis, Jr.

ATTORNEY AND COUNSELOR AT LAW

4/25/07

FOREST FINANCIAL BUILDING
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April 25, 2007

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DUE PROCESS HEARING

Re: *- Appeals Rights
Public Schools /
Virginia Department of Education*

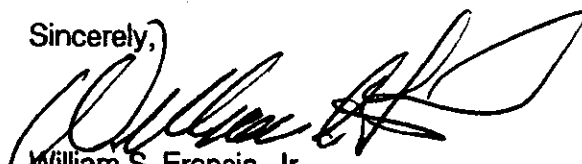
Dear Mesdames Kegley, Mehfoud and Vanterpool:

After having been counseled that my APPEAL INFORMATION was not appropriate as having been based upon language that was prior to the required language as of July 1, 2005, this is my revision of the correct appeal timelines:

APPEAL INFORMATION

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

Sincerely,



William S. Francis, Jr.

WSFjr:wbb

cc: Dr. Judith A. Douglas