07-044

CASE CLOSURE SUMMARY REPORT

(This summary sheet must be used as a cover sheet for the hearing officer's decision at the end of the special education hearing and submitted to the Department of Education before billing.)

School Division:
Public Schools

Name of Parents:

Name of Child:

Date of Decision or Dismissal:
May 22, 2007

Representing LEA:
David R. Clarke, Esq.
Ms. Andrea D. Gemignani, Esq.
4020 University Dr., #300
Fairfax, VA 22030-6802

Representing Parents:
Hunter C. Harrison, Jr., Esq.
1485 Chain Bridge Road, #105
McLean, VA 22101-4513

Party Initiating Hearing:
Parents

Prevailing Party:
Public Schools

Hearing Officer's Determination of Issues: (1) Burden of proof was on the parents, as they were the initiating party; (2) Certain procedural issues related to an IEP which was not the subject of the parents request for a due process hearing, and thus were not relevant; and, (3) School could provide with a free, appropriate public education.

Hearing Officer's Order's and Outcome of Hearing: Decision denying the relief sought in the Request for a Due Process Hearing.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing. The written decision from this hearing is attached in which 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.

Printed Name of Hearing Officer:
Lawrence E. Lindeman

Signature:
Lawrence E. Lindeman

VIRGINIA DEPARTMENT OF EDUCATION

SPECIAL EDUCATION DUE PROCESS HEARING

In the Matter of:

v.

Public Schools

Hunter C. Harrison, Jr., Esq., for and
David R. Clarke, Esq., and Andrea D. Gemignani, Esq., for Public Schools

Hearing Officer Decision

Preliminary

This matter was instituted by a February 28, 2007 letter from and ("parents"), parents of (" "), to School ( ) requesting a due process hearing. The Independent Evaluation Program ("IEP") team had concluded that it was in the best interests of if he were to attend School (" S"), and the parents were of the opinion that the S would not and could not provide with a free, appropriate public education ("FAPE"), as required by federal and state law. By letter dated March 6, 2007 the undersigned was appointed as the hearing officer for this proceeding.

A prehearing conference was held on March 21, 2007 in , Virginia. Hunter C. Harrison, Jr., Esq., appeared on behalf of the parents, and David R. Clarke, Esq., and Ms. Andrea D. Gemignani, Esq., appeared on behalf of . of also attended.

The primary issue identified by both parties was whether the S provides sufficient educational programs and extracurricular activities, as required by

applicable regulations, so that the overall program meets the requirements of FAPE. A procedural item was also elucidated, but the parties agreed to address this issue through a motion and reply. The parties agreed to stipulate the following three facts: (1) The notice requirements to the parents have been satisfied; (2) has a disability; and, (3) needs special education and related services.

On March 22, 2007 an amended due process hearing request was filed. This amendment provided more comprehensive facts under 34 CFR 300.507(c)(iii), (iv), and (v), by the addition of the following language:

> "(iii) last attended School, is now on home based schooling (but receiving no instruction) and the PS members of the IEP team, over objections, want to attend School."
>
> "(iv) School does not and cannot provide with the free, appropriate, public education required by federal and state law. School does not provide the variety of educational programs and services available to children without disabilities, including art, music, industrial arts, consumer and homemaking education, and vocational education, which are provided at HS (and at other equivalent general education schools). School does not provide nonacademic and extracurricular services and activities in the manner necessary to afford , a child with a disability, and equal opportunity for participation in those services and activities, which are provided at HS (and at other equivalent general education schools). (Nonacademic and extracurricular services and activities may include but are not limited to counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the local educational agency and assistance in making outside employment available.) School provides neither the physical education services that must be made available to every child with a disability receiving a free appropriate public education, nor the opportunity

> to participate in the regular physical education program available to children without disabilities, which is available at HS (and at other equivalent general education schools). School does not provide a school day comparable in length to the day provided to school-aged students without disabilities at HS (and at other equivalent general education schools)."

> "(v) The proposed resolution is for PS to place in a high school, whether public or private where the education required by law can be provided. The are not educators and are not qualified or able to identify such a school (other than HS). PS personnel are fully qualified to identify such a school and it is their responsibility to identify such a school."

By Order dated April 20, 2007 this amendment was authorized by the hearing officer.

On April 19, 2007 a second amended due process hearing request was filed. This amendment provided details regarding certain alleged procedural violations of PS. These alleged violations were mentioned at the prehearing conference, but no details were provided at that time. The amendment consisted of the following language:

> "(iv) Mr. & Mrs. were informed by a representative of PS, upon the suspension of , that the only way could continue to receive an education was for the to agree to and sign a 'Home-Bound IEP'. Neither Mr. nor Mrs was informed that could only be suspended from school for a maximum of ten (10) days and then would have to be returned to school, pending a possible due process request by PS to change the location of his education. Based upon this intentionally incomplete information, the 'Home-Bound IEP' was signed. In addition, once the 'Home-Bound IEP' was signed it was not properly implemented. For long periods of time received no instruction at all. One instructor provided by PS was not fluent in the English language and had an accent so thick as to be incomprehensible."

> "(v) The proposed resolution is for the 'Home-Bound IEP' to be vacated and for PS to place in a high school, whether public or private where the education required by law can be provided."

It was alleged that no prejudice would accrue to PS by this second amendment, as PS was put on notice of these specific complaints at the prehearing conference.

SP filed an objection to this motion for a second amendment on April 23, 2007. PS stated that, *au contraire* the allegations, it would be prejudiced if the second amendment is permitted. Furthermore, the matters alleged were never included in the matters discussed in the resolution process.

By Order dated April 25, 2007 this amendment was authorized by the hearing officer.

The hearing was held on May 8 and 9, 2007, at the PS facilities in , Virginia.

By letter dated May 13, 2007 counsel for the parents complained that PS did not comply with the previously issued *subpoena decus tecum* as it failed to produce the time cards for the instructors providing the homebound services for . By letter dated May 16, 2007 counsel for PS replied, stating that any objections to discovery should have been made prior to the hearing. Additionally it asserts that the documents being requested were not embraced within those sought by the *subpoena*, as they are teacher personnel records, and not part of the student's file. Finally, PS submits that the records sought are not relevant. By letter dated May 16, 2007 counsel for the parents replied, avowing that he could not have made an objection prior to the hearing because he did not know of the existence of the

documents until after the hearing, and that the documents sought were adequately covered by the *subpoena.*

The request of the parents is denied. The record already contains the unrebutted testimony of Mrs. concerning the amount of homebound instruction provided for (Tr. 36-37), and further amplification of this issue is not needed. In addition, my disposition of the homebound issue later in this decision warrants denying the relief sought.

In this decision exhibits introduced by the parents will be identified as "Ex", and exhibits introduced by PS will be identified as " PS Ex".

Statement of the Case

is a sixteen year old who was evaluated by PS in 1998 and subsequently found to be eligible for special education services (PS Exs. 19-22). While attending School in 2004 an IEP was developed and implemented for him. This IEP found him to be eligible for special education services in the areas of emotional disability ("ED") and other health impairment ("OHI"). It recommended that he primarily be placed in regular classes, with a few hours of additional educational assistance weekly. It noted that he was more successful academically and behaviorally in a structured classroom setting (PS Ex. 7).

In 2005 another IEP was prepared for at . This would be the IEP which would be followed at HS when he started classes there in the Fall of 2005. This IEP indicated that would function best in a small group setting, and be provided with certain academic accommodations and modifications, such as

extended time to complete assignments, an assignment notebook for homework review, an extra set of textbooks, etc., designed to aid his educational pursuits (Tr. 190; SP Ex. 8).

After several months at HS, and at the behest of Mrs. , the HS IEP team met on December 12, 2005 to review the situation and modify IEP. Basically, the IEP was revised to ensure more communication between the parents and the teachers, as well as to revise some of the other accommodations. At this time was enrolled in only one self contained class (Tr. 192-194; PS Ex. 9).

Approximately one month later, on January 19, 2006, again at the request of Mrs. , the IEP team met and modified IEP. was continuing to have academic and behavioral problems at HS, and it was hoped that the revised IEP would enable to better address these problems (Tr. 194-198; PS Ex. 10)

On May 8, 2006 the IEP team met once again. 's goals remained relatively the same. By this time was attending self contained classes for all of his core subjects. This is the IEP which would be followed when entered his sophomore year at HS (Tr. 202-203; PS Ex. 11).

On October 10, 2006 the IEP team met again. 's academic and behavioral problems were persisting, so the number of hours spent in special education classes receiving ED services was increased to ninety per month (Tr. 204; PS Ex. 12).

Throughout his career in School and his freshman year at HS incurred multiple behavioral and disciplinary problems (PS Exs. 47-77). On November 1, 2006 he reached what was perhaps the nadir of his brief HS career when he refused to report to the gym for being tardy to a class, physically

assaulted an assistant principal, and fled from the school building (Tr. 165-168; PS Exs. 77-84). As a result, was suspended and it was recommended that he be expelled from HS (PS Ex. 88). After a hearing, this recommendation was adopted by the School Board by a letter dated January 19, 2007 (PS Ex. 93).

Subsequent to the suspension the IEP team met for a manifestation determination review. It was concluded that the assault by was not caused by or had a direct and substantial relationship to his disability (PS Ex. 13. This decision was later affirmed by the School Board (Tr. 205-206; PS Ex. 15).

On November 7, 2006 the IEP team again met and, because of 's suspension, placed him on homebound instruction services until the disciplinary proceeding was ultimately resolved (Tr. 208; PS Ex. 14; Ex. 3).

Subsequent to the School Board's expulsion letter (PS Ex. 93), the IEP team met on February 5, 2007 and recommended that be placed in S. However, the parents did not agree with this placement, and refused to sign off on the IEP (Tr. 211-212; PS Ex. 17; Ex. 4).

On February 26, 2007 the IEP team met again. The parents did not attend this meeting, although they were notified of it. The purpose of this meeting was simply to offer an additional three weeks of compensatory educations services, as the homebound services did not begin on the eleventh day of his suspension. This IEP was never signed by the parents (Tr. 247; PS Ex. 18; Ex. 5).

Thereafter, on February 28, 2007 the parents wrote their due process hearing request letter, and this proceeding commenced.

Testimony

is 's mother. She testified that, although there had been certain behavioral problems with in the past, such as skipped classes, profanity, etc., there had never been an incident involving violence of any kind. She also indicated that, prior to the November 1, 2006 assault incident, PS did not inform her that should be placed in an ED center (Tr. 26, 27, 28, 44, 57).

began receiving homebound instruction services on December 11, 2006. Ms. stated that the only reason she signed the IEP designating the homebound services (Ex. 3; PS Ex. 14) was due to the fact that one of the PS IEP team members, Ms. ., informed her that if she failed to sign the IEP would receive no educational services (Tr. 29, 30, 41, 62).

The homebound services provided by PS consisted of twenty-seven visits to the household by a PS instructor during the period December 11, 2006 through March, 2007. During the latter part of March, 2007 a second teacher began to come to instruct . This instructor came two to three times per week, and stayed for two hours per visit (Tr. 36-38).

Ms. testified that she refused to sign the IEP which would have placed at S (Tr. 42; Ex. 4; PS Ex. 17) because she did not agree with the placement, and did not want placed in an ED center (Tr. 48, 50, 66).

In her opinion, needs an academic environment which is conducive to learning. He needs extra time to complete his assignments. He needs assistance with some of his courses, particularly math, and he needs to work on his socialization and organizational skills (Tr. 49-50).

Mrs. admitted that had had problems at HS, such as using profanity, refusal to cooperate, leaving and cutting classes, not completing

assignments, etc. Tr. 51-53). did not have much success at HS, and she concluded that part of his problems were due to the fact that the HS teachers were not following the goals set forth in the IEP (Tr. 55, 59-60, 61).

The parents did not visit the S facility until April, 2007 (Tr. 68, 81, 85, 376-377). Although a S representative attended the February 5, 2007 IEP meeting and informed her basically what courses and services the school offered, she was of the opinion that S simply did not offer the vast panorama of courses and activities that were available at HS. She opined that HS had more teachers, including a selection of different teachers teaching the same course, so that would have a broader selection of teachers and courses at HS than he would have at S. She specifically testified that was interested in a pre-veterinary course that was offered at HS, but not at S (Tr. 69-74, 75-76).

Mrs. did not believe that should be in self contained classes, although he was in them for all of his core courses, the only general classes he attended being health and physical education. She thought that he had been very successful in general classes in the past (Tr. 75-75, 83).

Harry Singleton is an attorney who was the Assistant Secretary for the Civil Rights Division at the Department of Education during the period 1982 – 1987. Among his duties was to insure compliance with the federal civil rights statutes. He was familiar with FAPE, and stated that the FAPE standards were the same for special education students as they were for non-special education students. He stated that the Rowley case[1] defined FAPE. He also stated that each special education student was entitled to personalized instruction, and that this standard

[1] Board of Education v. Rowley, 458 U.S. 176 (1982)

also applied to expelled special education students, who were the most at risk (Tr. 125-129, 138).

Mr. Singleton testified that the term "general curriculum" means that special education students are to receive the same curriculum as non-special education students, and that the curriculum available includes extra curricular activities, and other activities which would help special education students improve their socialization skills (Tr. 129-130)

In Mr. Singleton's opinion, with respect to expelled students, the student's IEP determines whether the same services have to be provided. The services which are provided do not have to be identical to those opportunities previously provided, but have to be similar. As long as the new educational setting provides FAPE, it would be sufficient (Tr. 134-135, 136).

is the principal of S. S is a public day facility serving approximately ninety students. It is in session from 7:25 am to 2:00 pm, the same as HS, and is physically adjacent to HS. It has outdoor athletic facilities, a gymnasium, and four counseling offices. All of its classes are self contained. It has more resources that the ED centers which are attached to other high schools in the area (Tr. 88, 104-105, 366-368, 370-371, 384).

S offers coursework and Standard of Learning ("SOL") that the students need to progress through the general educational curriculum as outlined by the Commonwealth. It is fully accredited by Virginia. When a student graduates from S his diploma is conferred by his base high school (Ex. 7; PS Ex. 128; Tr. 90, 372-373, 382).

S offers base courses in math, English, history, government, science, and physical education, and electives in art, music, design and technology, and other courses. It offers intramural athletics and activities, and has interscholastic athletic teams. It also has a yearbook (Ex. 8; PS Ex. 128; Tr. 91-94, 99). It does not, however, offer full extent of athletics, activities, and courses that are available at HS (Ex. 9-11; Tr. 95-97, 108-112).

Even though it has a smaller student body, S has more counselors than are on the staff at HS. The goal of S is to maximize the opportunities for the student (Tr. 100-101, 369, 378).

Mr. was of the opinion that the offerings of S match well with the goals and objectives set forth in 's IEP (Tr. 102).

is the assistant principal in charge of special education at HS. She is a licensed special education instructor in ED. She has had three years in this capacity at HS (Tr. 113, 147, 148; FCPS Ex.130C).

Ms. has known since his freshman year at HS. She met him because of his special education status, and because of his disciplinary problems. She has also had contacts with his parents, and is the principal contact between the parents and HS (Tr. 121, 150, 151-152, 172, 173).

's academic history at HS has been less than stellar. His past record indicates below average grades, and above average absences (PS Exs. 40-42, 45; Tr. 154). has demonstrated some limited progress in meeting his IEP goals and objectives (PS Ex. 43).

's behavioral history has been even more checkered. He has a lengthy discipline record, reflecting a variety of infractions at both School (PS Exs. 48-57) and at HS (Tr. 156-158, 161-163; PS Exs. 47, 58-75).

This witness testified that, contrary to the thoughts of Ms. , students are not permitted to pick and choose amongst teachers at HS. This is especially true of students in self contained classes (Tr. 155-156).

Ms. , who is familiar with the sports, clubs and activities, and physical education courses offered by HS, is of the opinion that S is the appropriate academic setting for . S offers a more therapeutic setting, and has a small student/counselor ratio (Tr. 114, 171).

is a teacher and case manager at HS. She provides services for special education students with ED. She is a licensed special education teacher, and has been at HS for two years (Tr. 186-188; PS Ex. 130E).

Ms. first met when he was a freshman at HS. He was one of the students over whom she had supervision. She was responsible for his IEP and contacting his parents (Tr. 189).

When entered HS the IEP he was using was the one that had been developed at School in the Spring of 2005 (PS Ex. 8). At this time was in only one self contained class (Tr. 191).

The IEP was amended on December 12, 2005 (PS Ex. 9) at the request of Mrs. was failing his classes at the time (Tr. 192).

The IEP was further modified on November 19, 2006 (PS Ex. 10), again at the request of Mrs. was refusing to meet with his speech, language, and

counseling clinicians, his social worker, was having additional behavioral problems, and was still failing his courses (Tr. 194-196).

On May 8, 2006 the IEP team met for the annual review. 's IEP goals remained relatively the same, but by the end of the year he was attending self contained classes in all his core courses (Tr. 202-203; FCPS Ex. 11).

Once began his sophomore year at HS, his IEP was modified to provide for more support hours, increasing from sixty to ninety hours per month (Tr. 204; PS EX. 12).

Ms. attended the November 7, 2006 meeting which resulted in the homebound instruction IEP (PS Ex. 14) pending the appeal of the expulsion proceeding. She claims that Ms did not tell Mrs. that would not receive any special education if Mrs. did not sign off on the IEP (Tr. 209-210).

Prior to the February 5, 2007 IEP meeting, Ms. prepared a draft IEP and provided a copy to Mrs. . In preparing this draft, Ms. considered 's past records, as well as his Psychological and Sociocultural Evaluations (Tr. 216; PS Exs. 32, 33). This was consistent with her previous *modus operendi* in providing Mrs with draft copies of the IEP prior to the meeting (Tr. 223, 250). She indicated that S was never mentioned in any of the previous IEPs because Mrs. was adamant that should not be in an ED facility, and was also unwilling to consider a self contained setting for (Tr. 229, 232, 251-252).

This witness is of the opinion that S is the appropriate setting for , as it is a smaller setting, and offers more counselors and social workers who are more readily available. S would enable to continue to progress on achieving his IEP

goals. She believes that needs a higher level of services than HS can provide (Tr. 214, 219, 221-222).

Ms. testified that the general educational curriculum is the same for both special education and non-special education students. The difference is in the method used to present the curriculum to the students. She stated that general educational curriculum can be pursued at S (Tr. 255). She also indicated that changing teachers at HS is generally not an option. Any changes are need driven, not personality driven (Tr. 199, 242-244, 258).

is a special education biology teacher at HS. She has taught since 1978, and has been at HS for the past seven years. She is certified to teach special education. entered her self contained class in the second semester of 2006. She has found him to be unpredictable, both from an academic and behavioral standpoint. Some of the accommodations which are provided to include the fact that he is in a small group, receiving one-on-one instruction at times, his tests are read aloud to him, he is given extra time to complete assignments, etc. She has spoken to and emailed Mrs. when she has encountered difficulties with (Tr. 272-275, 277-280, 284; PS Exs. 70, 85).

This witness is likewise of the opinion that S is appropriate for . S is a smaller environment, has a better teacher/student ratio than HS, and offers the core classes which requires (Tr. 283, 284).

Ms. was of the opinion that the term "general educational curriculum" was synonymous with the term "core courses" (Tr. 285).

is an instructional assistant and football coach at HS. He has been at HS for the past seven years (Tr. 286-287).

Mr. met in 2006, when was a freshman and Mr. was in the guidance department. frequently visited Mr. during his lunch period, and Mr. became a mentor to . He tried to assist in resolving his problems. He also spoke to Mr. from time to time about . He knew that was on the HS football team for approximately two weeks, but does not know why he quit (Tr. 287-290, 291-293, 302-303).

This witness was a substitute teacher at S, and is familiar with that facility. He thinks it would be an appropriate setting for because would have better access to the services he needs (Tr. 295-298).

is a licensed special education teacher who teaches algebra in a self contained class at HS. She has taught at HS for the past three years, and for the three years prior to that taught at S (Tr. 304-305, 306, 322).

She met when the latter enrolled in her class as a sophomore. She characterized him as a nice young man who needed one-on-one attention, and required patience when dealing with him. However, on several occasions she did have to call security when she was having behavioral problems with him. She spoke and emailed Mrs. concerning progress and problems (Tr. 306-307, 309-310, 318; PS Ex. 119).

attended the November 7, 2006 IEP meeting, but did no hear Ms. Tell Ms. that she had to sign the IEP or the special education services would be ended (Tr. 312-313).

This witness thinks that S would be appropriate for . S has a more structured environment, more supervision, and psychologists on site. She stated

that the math courses that would be taking at HS are available at S (Tr. 314, 316-317).

Ms. testified that the general educational curriculum standards are the same for special education students and non-special education students, although the delivery may be different. However, the curriculum has to cover those subjects which are covered by SOL, thus the content has to be the same (Tr. 323-324).

is a licensed special education teacher in learning disabilities, has a Master's degree in special education, has been at HS for the past eight years, and is the special education department chairperson (Tr. 329-330).

She has been a member of 's IEP team since he enrolled at HS. She indicated that 's previous IEPs did not recommend placement in S because the IEP team wanted to keep in the least restrictive environment ("LRE"), and this would be self contained classes at HS (Tr. 332, 334-337).

However, she thought that, under the circumstances, S, a school she was familiar with, was the best setting for once he had been expelled from HS, as it was the best of the alternatives considered. Some of the benefits which S offers are a full day program, and the support services which needs (Tr. 339, 361).

This witness testified that not all of the courses, activities, and clubs (Exs. 9, 10, 11) are offered at HS all of the time. The offering depends upon the interest of the students (Tr. 342, 345).

Ms. opined that the general educational curriculum set forth the standards which a student needs to follow in order to graduate from high school. The content of the individual courses is the same regardless of whether a special

education or non-special education student is concerned, but the teaching methodology may differ (Tr. 351, 353).

Contentions of the Parties

PS advances several arguments in its prehearing and post hearing memorandum, and in counsel's opening and closing statements. Initially, PS states that the burden of proof is upon the parents, citing Schaffer v. Weast, 126 S.Ct. 528 (2005) (Tr. 25, 407-409).

PS avers that S can provide FAPE for , arguing that the law does not require the exact same services or setting for an expelled student, if the cause of the expulsion was not a manifestation of the student's disability. Both federal and Virginia laws and regulations specifically describe the services which an expelled student must receive in order to receive FAPE, citing 20 USC 1415 (k)(1)(D)(i) and 8 VAC 20-80-68 (C)(5)(f)(2) (Tr. 418-419; 422-428). These citations establish that the expelled student does not have to have access to all the courses and services that were available at his former school, but rather that the expelled student be able to continue to participate in the general curriculum. Furthermore, LRE is not a requirement in a disciplinary setting. Federal regulations state that expelled students are not entitled to the same services they received prior to expulsion, citing 71 Fed. Reg. 46716 (Aug. 14, 2006).

The parents argument in this regard has previously been before the courts and rejected in Reiser v. Fairfax County School Board, 44 IDELR 187 (ED, Va, 2005) (Tr. 417). PS postulates that the mere absence of extracurricular activities, vocational education, and fine arts at S does not mean that cannot

receive FAPE at that school. PS submits that the parents' interpretation of IDEA and Virginia law that expelled students are entitled to the exact same courses and activities as their non-expelled counterparts would render IDEA meaningless (Tr. 416-417). PS states that Mrs. was not "tricked" into signing the homebound IEP [Nov. 7, 2006 IEP] (Tr. 412-412), and that S is 's "stay put" school. To permit to return to HS would be of no benefit to , the faculty or other students of HS (Tr. 410, 415). Finally, PS states that S is the appropriate school for regardless of his expelled status.

In their prehearing and post hearing memorandum, and in counsel's opening and closing statements, the parents argue that Schaffer v. Weast, *supra*, is a Maryland case, and Maryland does not have a regulation equivalent to 8 VAC 20-80-76 (J)(17)(d), thus the burden of proof is upon PS (Tr. 5, 398-399).

The parents further aver that both the federal and Virginia regulations define "general curriculum", citing 34 CFR 300.320 and 8 VAC 20-80-10 (Tr. 391). Also, Board of Education v. Rowley, 102 S.Ct.3034 (1982) requires that every education opportunity provided to a non-handicapped child must be provided to a handicapped child (Tr. 9-10, 392-393). Although the law does not require the same setting for an expelled special education student, it does require that general curriculum courses be provided, regardless of the setting.

FAPE includes more than mere academics. It also includes extracurricular activities, clubs, and interest groups, all of which are included under the "general curriculum" definition (Tr. 7-8, 393). can be expelled, but PS has to continue to educate him, citing 8 VAC 20-80-60-A1, and to provide FAPE for him (Tr. 6, 395). At HS had seventy-nine offerings in clubs and activities available to

him; at S only one of these seventy-nine is available (Tr. 396-397). A Comparison of the general curriculum courses offered at HS and S shows the former offers many more than the latter (Tr. 397-398). The only difference between HS and S is not the type of instruction offered, but the array of courses, activities, and clubs available at HS but not at S (Tr. 405). S does not have a general curriculum (Tr. 406).

Mrs. testified on two occasions that PS personnel told her that for to continue to receive an education, she had to sign the homebound IEP. Had she not signed, eleven days after the suspension would have had to remain at HS (Tr. 400-402). 's homebound instruction was inadequate. During the first four months of his homebound instruction, a teacher visited the home on only twenty-seven occasions. Such limited instruction definitely impedes 's right to receive FAPE (Tr. 14, 402-404).

Discussion and Conclusions

8 VAC 20-80-76 J 17 provides that a hearing officer decision shall include a determination of whether (a) the notice requirements to the parents has been satisfied, (b) the child has a disability, (c) the child needs special education and related services, and, (d) the local educational agency is providing a free appropriate public education.

In this proceeding the parties have stipulated that (a), (b), and (c) have been met, so no further discussion of these items is warranted. However, (d) appears to be the central issue involved herein.

Initially, however, is the burden of proof issue, with each party claiming that it rests with the other. The undersigned is of the opinion that the Supreme Court put this issue to bed in Schaffer v. Weast, 126 S. Ct. 528 (2005). In that case, which dealt with the same statute as is involved herein, the Court rather succinctly stated: "The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." In this case the burden is on the parents.

The second issue which needs to be addressed is the procedural issues raised by the parents, i.e., that Mrs. was inveigled into signing the November 7, 2006 IEP involving homebound services by misstatements by PS personnel, and that the homebound services provided by PS pursuant to this IEP have been woefully inadequate.

The request for a due process hearing only mentioned the February 5, 2007 IEP which recommended that attend S. At the prehearing conference the procedural issues were first mentioned. Subsequently, in their second amended request for due process hearing, the parents reiterated and provided more detail regarding these alleged violations. PS objected, but the undersigned permitted the amendments. Upon reflection, it now appears that this decision was incorrect.

The gravaman of the request for a due process hearing is the February 5, 2007 IEP which recommended that attend S (Tr. 4, 53). However, the procedural allegations are not concerned with the February 5, 2007 IEP, but rather with the November 7, 2006 IEP. It appears to the undersigned that if the parents are desirous of contesting the validity of the November 7, 2006 IEP their remedy is to request a due process hearing regarding that IEP, rather than using alleged

defects in the November 7, 2006 IEP to collaterally attack the validity of the February 5, 2007 IEP. Therefore, I am not going to further consider these allegations in this decision.

The final issue is whether the S setting provides with FAPE. The relative positions of the parties have been set forth at another place in this decision, and will not be reiterated at this point.

IDEA, 20 USC §1400(d) *et seq,* states that the objectives of the Act are "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 USC §1400(d)(1)(A).

20 USC §1401(9) defines "Free Appropriate Public Education" as follows: "The term 'free appropriate public education' means special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 614(d)."

An almost identical definition can be found in the federal regulations at 34 CFR §300.17, and in the Virginia regulations at 8 VAC 20-80-10.

As can be seen, IDEA does not provide any substantive standard regarding the level of education to be accorded disabled children. Board of Education v. Rowley, 458 US 176, 189 (1982). In Rowley the Supreme Court held that an inquiry in determining whether a FAPE is provided is twofold: (1) Have the

procedures set forth in the IDEA been adequately complied with, and (2) Is the IEP reasonably calculated to enable the child to receive educational benefits. Rowley, pg 206-207.

Thus, the local educational authority ("LEA") fulfills the FAPE requirements by providing personalized educational instruction with sufficient support services to permit the disabled child to benefit educationally from that instruction. Rowley, pg 203.

The primary vehicle for meeting the goals set forth in IDEA is the IEP, 20 USC §1414(d)(1)(A), which is a written statement that is developed for the unique needs of each disabled child. Significantly, an IEP is not required to maximize the educational benefit to the disabled child, nor to provide each and every service and accommodation which could conceivably be of some educational benefit. Rowley, pg 199; Gill v. Columbia 93 School District, 217 F3d 1027, 1034 (CA 8, 2000). Although an educational benefit must be more than *de minimis* to be appropriate, Doe v. Board of Education of Tullahoma City Schools, 9 F3d 455, 459 (CA 6, 1993), an appropriate educational program is one that is "reasonably calculated to enable the child to receive educational benefits. Rowley, pg 189.

In this proceeding there is an added element in that was expelled from HS, and it was subsequently determined that his expulsion was not a manifestation of his disability (PS Exs. 88, 13, 15; Tr. 205-206). The parties agree that, given this scenario, PS remains obligated to provide with FAPE (Tr. 6, 395; 418-419, 422-428); the question is whether the S setting fulfills this obligation.

S provides small, self contained classes where students are instructed in the core curriculum subjects (Ex. 7; PS Ex. 128; Tr. 90, 372-373, 382). Several of 's IEPs stated that a small group setting in a structured environment would be beneficial to him (PS Exs. 7, 8, 11, 17), and several of his teachers and case workers testified that a small group setting and self contained classes would be of benefit to him (Tr. 102, 171, 214, 219, 283, 284, 314, 316-317, 339, 361). Therefore it appears to the hearing officer that S is capable of providing an educational environment which would be highly beneficial to .

The parents' argument that S cannot and does not provide all of the courses, activities, and clubs that are available at HS, and therefore cannot provide FAPE, is an example of *reductio ad absurdum.* Taken to its logical conclusion, it would require that, in order to provide FAPE at any school in its system, PS would have to require that all the schools provide every course, activity, and club that every other school in the system offers, regardless of whether there was a need or demand for such an educational and social extravaganza at every school in the system.

In Reiser v. Fairfax County Public Schools, 44 IDELR 87 (2005) the court considered this argument and concluded that:

> "The School Board is not required to duplicate at the alternative setting every single special club, athletics, arts, Japanese emersion and here I note that Fairfax County has gone beyond what may be required in providing Jonathan with an opportunity to participate in advanced placement classes online."

I find this conclusion to be persuasive in this proceeding, and conclude that S does provide FAPE for .

Therefore I find in favor of PS on all of the issues involved in this proceeding, and deny the request for the relief sought by the parents.

Appeal Information

This decision is final and binding upon the parties. Any party may appeal this decision within one year of the date of the decision in either a state circuit court of a federal district court. See 8 VAC 20-80-76(O).

Lawrence E. Lindeman
Lawrence E. Lindeman
Hearing Officer

Dated: May 22, 2007

Certificate of Service

I certify that I have served a copy of the foregoing Hearing Officer Decision on David R. Clarke, Esq., and Ms. Andrea D. Gemignani, Esq., Blankingship & Keith, 4020 University Drive, #300, Fairfax, VA 22030-6802 and Hunter C. Harrison, Jr., Esq., 1485 Chain Bridge Road, #105, McLean, VA 22101-4513 by first class mail on May 22, 2007.

Lawrence E. Lindeman
Lawrence E. Lindeman

Lawrence E. Lindeman, P.C.
Attorney and Counselor at Law
218 N. Lee Street, #311
Alexandria, VA 22314-2631

Phone: 703.836.7561
Fax: 703.836.0116
Email: duke@his.com

October 25, 2002

Hunter S. Harrison, Jr., Esq.
1486 Chain Bridge Road
Suite 105
McLean, VA 22101-4513

David R. Clarke, Esq.
Ms. Andrea D. Gemignani, Esq.
Blankingship & Keith
4020 University Dr., #312
Fairfax, VA 22030-6802

Re: decision

Dear Messrs. Harrison and Clarke, and Ms. Gemignani,

The "Appeal Information" in my decision in this proceeding is incorrect. It should read as follows: "This decision is final and binding unless either party appeals in a federal district court within ninety (90) calendar days of this decision, or in a state circuit court within one (1) year of this decision."

I apologize for any inconvenience.

Very truly yours,

Lawrence E. Lindeman

Lawrence E. Lindeman

cc: R. Geiersbach, Esq.