

DEC 08 2005

06-019

Dispute Resolution & Administrative Services

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

DECISION

School Division

Name of Parents

Division Superintendent

Name of Child

John F. Cafferky, Esquire  
Andrea D. Gemignani, Esquire  
Counsel Representing LEA

Lynn Brownley  
Advocate Representing Parent/Child

James M. Mansfield, Esquire  
Hearing Officer

Party Initiating Hearing

PROCEEDINGS

On August 22, 2005, [redacted] requested a due process hearing on behalf of his son, [redacted] (" [redacted] "), challenging the appropriateness of [redacted] Public Schools' proposed educational placement of [redacted] for the 2005-2006 academic year in violation of the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. § 1400 *et seq.* He alleged the school system failed to provide [redacted] with a free appropriate education (FAPE) and sought reimbursement for [redacted] private placement during the 2005-2006 academic year. On August 31, 2005 this hearing officer was appointed. After the parties were unable to reach resolution within the time prescribed, a formal impartial hearing was noticed for October 26 and 27, 2005 with a pre-hearing conference scheduled for October 5, 2005.

The pre-hearing conference was convened October 5, 2005 as scheduled. At the conclusion of the conference the parties stipulated all notice requirements associated with this case have been satisfied; [redacted] has a disability; and that he is entitled to special education and

related services. These rulings, as well as rulings on other procedural matters, were memorialized in a letter dated October 7, 2005. No objection to these rulings was noted.

On October 25, 2005 Mr. Brownley, on behalf of Mr. \_\_\_\_\_ and \_\_\_\_\_, requested a continuance of the hearing. On October 26, 2005 the hearing was convened and argument was heard on Mr. Brownley's continuance motion. Mr. Brownley stated the basis of the motion was the unavailability of material witnesses. Mr. Cafferky, on behalf of \_\_\_\_\_ Public Schools, objected to bifurcating the proceeding, but otherwise did not object to the continuance. Mr. Brownley proffered the witnesses in question, Drs. \_\_\_\_\_ and \_\_\_\_\_ are material to the case and their absence would be highly prejudicial. Finding it to be in the best interest of the child and for reasons stated on the record, the motion was granted and the hearing was continued to November 21 and 22, 2005. The hearing was reconvened on November 21, 2005. The central issues presented at the hearing related to the appropriate educational services to which \_\_\_\_\_ is entitled under the law and whether or not \_\_\_\_\_ Public Schools made those services available to him; and if they were not made available, whether Mr. \_\_\_\_\_ unilateral placement of \_\_\_\_\_ in a private setting is appropriate. At the conclusion of the evidentiary presentation, at the parties request, the hearing was adjourned to November 30, 2005 for the submission of post hearing briefs and the presentation of closing arguments.

For the following reasons, I find that \_\_\_\_\_ Public Schools has offered \_\_\_\_\_ an appropriate education reasonably calculated to provide him with an educational benefit.

#### **FINDINGS**

\_\_\_\_\_ is a fourteen year old student who would be in the eighth grade if he were enrolled in \_\_\_\_\_ Public Schools (Tr. 530). \_\_\_\_\_ was found eligible for special

education in preschool due to developmental delays (See Exhibits 23-25). He attended kindergarten at [redacted] Elementary School in [redacted], Virginia and first grade at the [redacted] Elementary School in [redacted], Virginia (Tr. 531-532). Following his parent's divorce, [redacted] moved to [redacted] in 1998 to live with his father. He was enrolled at [redacted] Elementary School where he repeated first grade (Tr. 532-533). Mr. [redacted] testified that despite receiving special education services, by fourth grade [redacted] still was unable to read (Tr. 548). Consequently, in October of 2001 Mr. [redacted] enrolled [redacted] in an after school program at Sylvan Learning Center (Tr. 547-550). Mr. [redacted] reported [redacted] made some progress at Sylvan. "He went from not reading at all, to probably [a] second grade reading level . . ." (Tr. 551). However, by the fall of 2003 the director of the Sylvan Learning Center told Mr. [redacted] that they did not anticipate any further progress with [redacted] reading and that something else needed to be done (Id.).

In January 2004, Mr. [redacted] enrolled [redacted] in a half-day program at the [redacted] Center in Washington D.C., while remaining at [redacted] Elementary the other half of the day (Tr. 562). [redacted] is a research based organization which offers instructional programs in reading, spelling, math and comprehension (Tr. 376-378). The programs are designed to stimulate phonemic awareness and symbol and concept imagery (Id.). Instruction is one-on-one for between two to six hours a day depending on the student's needs. The programs are offered to children as well as adults (Tr. 480-481). At any given time there are between ten and twenty students receiving instruction at [redacted] (Tr. 481). The instructors at [redacted] are not required to have any educational licensure or certification other than their own internal training (Tr. 472). [redacted] is not licensed or accredited as a school (Tr. 480). [redacted] has no approved academic curriculum, as their focus is to

stimulate students' phonemic awareness, symbol imagery, and reading comprehension so they can better access the curriculum upon their return to the traditional school setting (Tr. 508-509).

In the summer of 2004, [redacted] Public Schools developed draft IEPs for [redacted]'s seventh grade ([redacted] Exhibits 19 and 20). [redacted] was to enroll in [redacted] Middle School where he would continue to receive special education and related services (Id.). [redacted] is [redacted]'s base school (Tr. 39). Mr. [redacted] was advised that [redacted] denied his request to have [redacted] attend [redacted] on a half day basis so he could continue to receive instruction at [redacted] on a part-time basis ([redacted] Exhibit 9 and 10). [redacted] did not report for school at [redacted] in September 2004 ([redacted] Exhibit 12). Mr. [redacted] elected to have [redacted] return to [redacted] for their full day program during the 2004-2005 academic year ([redacted] Exhibit 13).

In the fall of 2004, [redacted] was referred to [redacted] Ph.D., for a neuropsychological evaluation (Tr. 274). In December 2004, Dr. [redacted] office preformed the evaluation and their report was admitted into evidence (Parent Exhibit 2). At the hearing Dr. [redacted] testified he considered [redacted] to be severely dyslexic (Tr. 286) and that in sixth grade he was reading at a first grade level (Tr. 283). He further testified that he recommends intensive [redacted] for children with severe dyslexia because most kids make progress there (Id.). Based on [redacted]'s phonetic decoding skills progressing from a grade equivalent of 2.5 in October 2003 to a 4.7 grade equivalent in December 2004, Dr. [redacted] office concluded [redacted] had benefitted greatly from the [redacted] program (Parent Exhibit 2). However, Dr. [redacted] testified that children with [redacted]'s level of ability can only be expected to attain a sixth grade reading level; and if they can achieve this goal, they have potential vocational opportunities that otherwise would be not available (Tr. 302).

With regard to eighth grade, Dr. [redacted] report recommended [redacted] continue with the [redacted] program *only* if an appropriate special education placement could not be formed

(Parent Exhibit 2). The report further recommended:

No matter how good his phonetic decoding becomes, it will not contribute to significant improvements in reading comprehension until better sight-word recognition and reading fluency are attained. In our judgment, techniques in addition to the [redacted] methods will be important for promoting skills in these areas and a variety of technical supports will be important for developing [redacted]'s ability to write. Thus, while we believe that [redacted] will continue to require placement in a small, highly structured, highly specialized, and self-contained educational environment, we would like to see him in a school program for the eighth grade year. . . .

Wherever he is placed, instructional methods should be used that have been demonstrated to work for [redacted], including the [redacted] programs. Programs for promoting fluency at word, phrase, sentence, and passage levels should also be used (*e.g. Read Naturally; Great Leaps*), and [redacted] will need an approach to comprehension that emphasizes visualization and paraphrasing strategies. [redacted] will also need highly specialized approaches to developing his math and written language skills (Id.)

In the spring of 2004, [redacted] Public Schools wrote Mr. [redacted] advising that they were in receipt of the neuropsychological evaluation report and that they would like to convene an IEP meeting ([redacted] Exhibit 14). After meeting on June 30, 2005 a proposed IEP for [redacted] for 2005-2006 was developed (Tr. 74 and [redacted] PS Exhibit 22). [redacted], a Special Education Pyramid Resource Specialist for [redacted] Public Schools, testified that prior to drafting [redacted]'s IEP, she reviewed all of his previous eligibility data, including psychological testing, educational testing, social case history, teacher narratives, observations, work samples, private testing, and that she spoke with teachers who provided services to him in elementary school (Tr. 40). She further testified that [redacted]'s proposed IEP provided for 20 hours of special education services, with self-contained classes in reading, English, math, social studies and science (Tr. 83). In addition, the proposed IEP provided for related services of speech and

language in conjunction with other classes (Id.). She testified that the proposed IEP was vastly different from what had been provided at [redacted] Elementary (Tr. 51-52).

[redacted] a Special Education Department Chair at [redacted] Middle School, testified that [redacted] is a regular public school with a large learning disabilities program; a smaller program for students with emotional disabilities; a program for students with mild mental retardation; and a moderate and severe disabilities program (Tr. 198). Ms. [redacted] testified she collaborated with Ms. [redacted] on the goals and objectives for [redacted]'s 2005-2006 proposed IEP based in part on Dr. [redacted]'s report (Tr. 207). She believed [redacted] would do well in [redacted]'s learning disabilities program with self-contained classes in English, math, reading and a special education elective (Tr. 208). As for reading, Ms. [redacted] testified [redacted] has a program called 180 which works on increasing students' sight-word vocabulary and fluency (Tr. 212). Students work in small groups of three to four (Id.). Ms. [redacted] opined that the proposed IEP for 2005-2006 was a good one appropriate for [redacted]'s needs (Tr. 268). Mr. [redacted] did not agree with the proposed IEP and initiated this due process hearing (Parent Exhibit 3). In September 2005 [redacted] returned to the [redacted] program where he continues to receive instruction based on their methodologies. Mr. [redacted] testified that [redacted] has taught [redacted] how to read fluently, how to comprehend, and that they have improved his confidence and self esteem (Tr. 567-591). Based on their work with [redacted] he is now reading at a 6<sup>th</sup> grade level (Exhibit 42). It is the costs associated with this private placement for which Mr. [redacted] seeks reimbursement.

### CONCLUSIONS OF LAW

The U.S. Supreme Court recently held in *Schaffer v. Weast*, No. 04-698, 2005 U.S. LEXIS 8554 (Nov.14, 2005) that the moving party has the burden of proof in IDEA

administrative proceedings. Accordingly, as the challenging party, in order to prevail Mr.

\_\_\_\_\_ must establish by a preponderance of the evidence that \_\_\_\_\_ Public Schools' 2005-2006 proposed IEP for \_\_\_\_\_ is inappropriate under the requirements of IDEA, and he must further show that his placement of \_\_\_\_\_ at the \_\_\_\_\_ is an "appropriate" educational program and is one which is reasonably calculated to offer a child some educational benefit. *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Doyle v. Arlington County School Board*, 806 F. Supp. 1253 (E.D. Va. 1992), *aff'd*, 39 F. 3d 1176 (4<sup>th</sup> Cir. 1994).

Here, the school system's proposed IEP includes goals and objectives in reading and comprehension, writing, math, and self-advocacy, and it provides for instructional accommodations for \_\_\_\_\_ (\_\_\_\_\_ Exhibit 22). Specifically, the proposed 2005-2006 IEP program offers small, self-contained classes in core academic areas. The classes have only eight to ten students and they are taught by certified special education teachers with an instructional assistant (Tr. 209-211). The program would also include an even smaller and more intensive special education reading class with only three to four students taught by a certified special education teacher (Tr. 212-213). The \_\_\_\_\_ program for \_\_\_\_\_ would include speech and language therapy, as well as the opportunities for social and emotional support through teachers and professional counselors. All of the classes offer \_\_\_\_\_ the opportunity for individualized and some one-on-one instruction (Tr. 51, 233, 234). Moreover, \_\_\_\_\_ is a least restrictive setting. While it includes extensive special education programs (including the Learning Disabilities program in which \_\_\_\_\_ would participate) it is a regular middle school with non-disabled students in attendance. During lunch, in his elective, and at other school activities, \_\_\_\_\_ would have the opportunity to interact with his non-disabled peers. Moreover, as required by IDEA, \_\_\_\_\_ is the school which \_\_\_\_\_ would attend if he were not disabled.

These “least restrictive environment” provisions are required to the maximum extent appropriate. *Doyle*, 806 F. Supp. at 1259.

Conversely, Mr. [redacted] argues that [redacted]’s 2005-2006 proposed IEP is deficient on the basis that it does not specifically require the use of a particular instructional reading methodology. However, the courts have held that “[w]hile a school system must offer a program which provides educational benefit, the choice of the particular methodology is left to the school system.” *In re: Barnett*, 927 F.2d 146 at 150 (1991), citing *Rowley*, 458 U.S. 176 (1982). The evidence clearly supports a finding that [redacted]’s reading has improved since he has been at [redacted]; nevertheless, that progress alone cannot be the basis to mandate [redacted] Public Schools’ use of a specific instructional methodology in the delivery of special education and related services to [redacted]. Just because a parent can show that one particular methodology is *more* appropriate than another, it does not entitle that parent to reimbursement under IDEA. *Alexander K. v. Virginia Board of Education*, 30 IDELR 967 (E.D. Va. 1999). The school system cannot be forced to adopt one of several competing educational methodologies as we have been instructed by the courts that we cannot substitute our notions of a sound educational policy for those of the school authorities. *Id.* citing *Springer v. Fairfax County School Board*, 134 F.3d 659 (4<sup>th</sup> Cir. 1998).

In challenging [redacted]’s proposed IEP, Mr. [redacted] also relies on what he perceives to be [redacted] Public School’s failure to teach [redacted] to read while he attended [redacted] Elementary School. [redacted] Public Schools disputes this contention, but the question of the propriety of prior IEPs is not a proper subject of inquiry in this proceeding. Assuming Mr. [redacted] is correct, any deficiencies in [redacted]’s prior IEPs from his elementary school years are not determinative of the appropriateness of the 2005-2006 proposed IEP absent expert

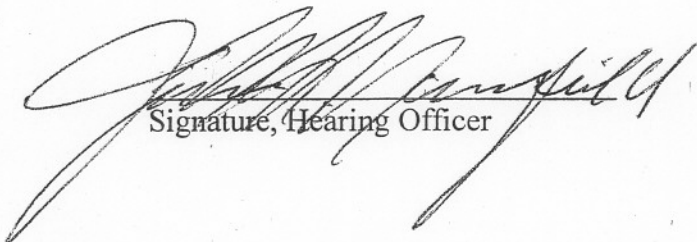


testimony establishing that the proposed IEP is similarly deficient. The focus here is exclusively on the 2005-2006 proposed IEP. In this regard no expert testimony was offered by the parent on the issue of why the 2005-2006 proposed IEP was deficient or otherwise not reasonably calculated to provide [redacted] with an educational benefit.

**DECISION**

After careful consideration of all the proceedings in this matter, I conclude that the program offered at [redacted] Middle School is an “appropriate” and the “least restrictive” placement in compliance with the mandate of IDEA. Accordingly, Mr. [redacted]’s request for reimbursement of tuition and other expenses incurred in the private placement of [redacted] for the 2005-2006 academic year is denied.

Finally, 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.

  
Signature, Hearing Officer

December 2, 2005  
Date

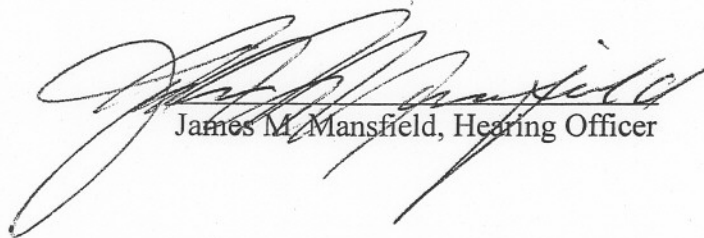
**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was sent *via* first class mail on this 8<sup>th</sup> of December, 2005 to the following:

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[Redacted]  
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