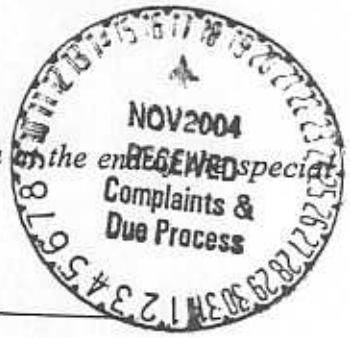
05-018

# CASE CLOSURE SUMMARY REPORT




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

Public Schools
School Division

Mr. and Mrs.
Name of Parents

Name of Child

October 18, 2004
Date of Decision

Esquire
Counsel Representing LEA

None
Counsel Representing Parent/Child

Parent
Party Initiating Hearing

LEA
Prevailing Party

Hearing Officer's Determination of Issue(s):
On September 1, 2004, the parents filed a Request for Due Process Hearing dated September 1, 2004. (1) The Parents sought monetary reimbursement for the child's placement in a private school for a period of approximately two (2) months because the parents alleged that the LEA had failed to provide the child a FAPE during the 2003-04 school year and, specifically, because the LEA allegedly failed to adequately implement the child's IEP. (2) The Parents sought monetary reimbursement for the child's private placement for a period of five (5) days over the Summer break because of the LEA's alleged failure to provide the child appropriate extended school year services for that period. (3) The Parents sought a finding that the IEP offered the child by the LEA for the 2004-05 school year was not reasonably calculated to provide the child with educational benefit and denied him the opportunity of a FAPE. Accordingly, the parents requested reimbursement for the child's private placement, beginning September 7, 2004 and continuing until the child was ready to transition back to public school. (4) The parents also asserted certain procedural violations which they contended were sufficiently serious so as to constitute a denial of a FAPE.

Hearing Officer's Orders and Outcome of Hearing:
As discussed in the decision and for the reasons provided in the decision, the hearing officer decided that the Parents had failed to meet their burden of proof concerning their claims and the relief which they sought. Additionally, the hearing officer decided that (1) the School Board had made a good faith, collaborative, coordinated, reasonable effort to implement the child's IEP; (2) the child made educational progress, received educational benefit and did not suffer any loss of educational opportunity due to any action or inaction on the part of the LEA; and (3) the Proposed IEP was developed in accordance with IDEA's procedural mandates and is reasonably calculated to provide the child educational benefit and a FAPE.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties to 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.

John V. Robinson
Printed Name of Hearing Officer

John V. Robinson
Signature


VIRGINIA:

SPECIAL EDUCATION DUE PROCESS HEARING

, et als. Complainants

v.

PUBLIC SCHOOLS Respondent.

**DECISION OF THE HEARING OFFICER**

## I. Introduction

On September 1, 2004, the parents filed with the Virginia Department of Education (the "VDOE" or the "SEA") a Request for Due Process Hearing dated September 1, 2004 (the "Request"). The parents request the relief described in Hearing Officer Exhibit 5[1] from Public Schools (the "School District" or the "LEA") concerning their disabled child. Certain issues previously raised by the parents were apparently conceded at the hearing. However, because legal counsel for the parents withdrew shortly before the hearing, the hearing officer, for purposes of this decision, will treat the issues as those specified in his Scheduling Order (HO 4) and in Ms. 's letter of September 24, 2004 (HO 5). The hearing officer was appointed to this administrative due process proceeding on September 2, 2004.

An administrative due process hearing was held on October 7 and 8, 2004. The hearing officer renders his decision based on the sworn testimony of the various witnesses, the numerous exhibits admitted into evidence and the argument of the parties.

## II. Findings of Fact

1. are the parents of the child.

2. The child was born on and his disability is identified by the School District as autism. JE 76.

3. The child's parents first suspected that he was developmentally delayed when the child was not talking at 12 months. They began private speech therapy for the child when he was 18 months old, but he made no progress over the following six months. JE 1.

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1 References to the hearing officer's six (6) exhibits will be designated HO followed by the exhibit number. References to the parties' volume of 100 joint exhibits will be designated JE followed by the exhibit number. The transcript of the 2 days of hearings was not yet available to the hearing officer at the time of his decision.

4. Dr. at the Kluge Children's Rehabilitation Center, University of Virginia, evaluated the child on March 24, 1998 when he was approximately 2-1/2 years old. JE 1. At the time, the parents did not report a behavior problem, but Dr. noted that the child threw beads and ran around the room banging drawers and the door during the exam. She diagnosed Communication Disorder in Spectrum of Mild Autism/Pervasive Developmental Disorder.

5. Amongst other things, Dr. recommended referral to the school system for eligibility for special education preschool services. JE 1.

6. The child's parents began an intensive home program of Applied Behavior Analysis ("ABA") instruction to assist their child. JE 2. The parents actually have 2 children, but unless otherwise specified, all references to the child refer to alone.

7. On March 17, 2000, the parents reported to Dr. that the ABA instruction for the child's speech was going well. JE 2. However, they also reported that outside the ABA sessions, the child had tantrums and engaged in self-stimulatory behavior and was waking up in the middle of the night and banging his head. They also reported biting and scratching directed at adults. JE 2.

8. Dr. discussed medical options with the parents. JE 2.

9. On October 10, 2000, the parents reported to Dr. that the child's hyperactivity had increased, primarily at home. JE 3. The child was attending a church preschool four mornings a week, and he received a half-day of ABA instruction seven days a week. JE 3.

10. Amongst other things, Dr. recommended that the parents continue intensive ABA instruction and speech therapy. JE 3.

11. On March 1, 2001, when the child was approximately 5-1/2 years old, Dr. and evaluated the child at the MCV Assessment Clinic for Children with Development Disorders. JE 8. The evaluation found that the child's receptive language was age appropriate but his expressive language was equivalent to a child who is two years and one month of age. The child's adaptive functioning was at the level of 2 years and nine months. The evaluation suggested that his parents explore available services in a school setting. JE 8.

12. The following day, the child's father wrote the principal of Elementary School. JE 4. He stated that the family lived in the School District, that the child had been diagnosed with autism three years earlier and more recently at VCU/MCV, and had made "great strides" in his abilities with private tutoring. He asked that the school's child study committee determine the child's special educational needs. JE 4.

13. On June 18, 2001, a Public Schools eligibility committee found the child eligible for special education and related services of speech language and occupational therapy under

the category of autism. JE 14. The committee recommended a regular classroom with resource assistance and an instructional assistant because "[the child] has had an ABA aide with him within the home and preschool environment since the age of 2-1/2 years old."

14. An August 17, 2001 letter from his personal aide, , indicated that the child had become accustomed to learning in a 1:1 environment and that it is unlikely that he is capable of independently attending to a teacher. She continued, stating that behavior "could prove difficult for him." JE 15. Ms. noted that any small change in routine "could trigger a behavioral issue for [the child]" ranging from "inappropriate giggling to a full blown temper tantrum" and stated that his assistant "will need to be well versed on how to handle these issues appropriately." Nonetheless, she recommended inclusion as "the best way to serve [the child] academically." JE 15.

15. Before the child entered school, the City Family Assessment and Planning Team met to consider a request for a "1:1 crisis counselor." JE 16. The team recommended "full participation in a regular kndg. classroom w[ith] services from an inclusion teacher + a full-time 1 – 1 crisis counselor." JE 16.

16. The child attended Elementary School during the 2001-02 and 2002-03 school years.

17. On November 5, 2002, when the child was in the first grade, Dr. saw the child in part because of disruptive behaviors. JE 20. Dr. noted "frequent jumping, pacing, flapping with arms, and 'chinning' when frustrated" and indicated "uneven cognitive skills" and "behavioral difficulties." JE 20.

18. On November 14, 20[illegible], the IEP team modified the child's IEP to provide 2-1/2 hours per day of special education in a resource classroom. JE 21, 22. The minutes of the IEP meeting only referred to frustration during class work. JE 22.

19. The parents moved into in the spring of 2003. In June 2003, the mother provided a copy of the Nove[illegible] 14, 2002 IEP prepared by Public Schools (JE 21), to the LEA.

20. On June 10, 2003, the School Board prepared an IEP for the child for the 2003-04 school year. JE 25, 26. The parents gave their permission to implement this IEP and the placement decisions. JE 25.

21. The June 10, 2003 IEP (JE 25) indicated that the child had some behavior issues at :

He can become angry or frustrated and act out. He will clench his fists, rub his chin, into his or an adult's hand and occasionally will hit an adult.

However, the IEP also indicated that the child was able to follow the class routine with some prompting to move from one activity to another and that he remained in place during group activities. JE 25.

22. The June 10, 2003 IEP recommended that the child have a 1 to 1 assistant for the entire day and that he receive 2-1/2 hours of resource classroom services each day. JE 25.

23. The child's home school for the 2003-04 school year was Elementary School (" "). The parents advised school officials that they had purposely moved to be in the attendance zone.

24. uses a collaborative model of education that teaches students in the regular classroom and provides special education services in the regular classroom. All special education students are "included" in the regular classroom. Typically, does not have any self-contained special education classrooms although the child was able to, and did extensively, utilize Room 205 as a resource classroom during the 2003-04 school year when his behavior became too disruptive for his peers in the regular classroom.

25. has had other students on the autism spectrum and has successfully included them in the regular education classroom.

26. won the U.S. Department of Education's Blue Ribbon Award for Excellence in and its student performance ranked in the top 1% in Virginia.

27. Elementary School (" "), another LEA public school, uses a different educational model. integrates autistic students in the regular classroom as much as possible, but it also has self-contained classrooms for autistic students who need more structure and supervision for cognitive or behavioral reasons. , the principal at , has extensive experience with autistic students. has had great success in dealing with disruptive and problem behaviors of autistic students.

28. After the mother delivered the November 14, 2002 IEP (JE 21) to the LEA, the IEP team scheduled an IEP meeting on July 31, 2003.

29. On July 31, 2003, the IEP team, including the parents, met. The parents presented the June 10, 2003 IEP from the (JE 25) but did not provide copies of Dr. 's reports about the child's behavior issues or any other documents from the School Board.

30. The parents did not fully or adequately inform the IEP team concerning the severity and extent of the child's adverse behaviors, which could potentially have prevented the child's mainstreaming at .

31. Based upon the information made available to the IEP team by the parents, the IEP team reasonably concluded that the child could be successfully included in the regular classroom at if he had a 1 to 1 instructional assistant.

32. The IEP team adopted verbatim the present levels of performance in the June 10, 2003 IEP except for the references to , the child's former aide. JE 28. It also adopted the rest of the IEP, including the provision for a 1 – 1 aide.

33. Based upon the information in the City IEP and the comments of the parents, the IEP team discussed the and programs with the parents at the IEP meeting. The parents agreed to consider both programs but subsequently decided they wanted the child to attend . They consented to the IEP on August 4, 2003. JE 29.

34. Based on the information the parents provided to , the School Board hired Mrs. to be the child's aide in the regular education classroom.

35. Mrs. has a bachelor's degree and has experience assisting her daughter who is "very dyslexic." JE 95. Based upon the child's IEP from the City and Mrs. 's college degree and experience with her daughter, the school reasonably expected that Mrs. would be able to handle the child's educational needs in the regular educational classroom. While Mrs. did not have any training in autism or in handling severe behavior problems of autistic children before the first day of school as the child's paraprofessional, upon the commencement of the 2003-04 school year she immediately began receiving support and training in such areas.

36. During the week before the 2003-04 school year began, the child's mother brought him to school to meet , the child's regular education teacher, , and Mrs. . Mrs. and the teachers were surprised to discover that the child's behavior was far different from what they had been led to believe by the parents and the IEP. The child was out of control, even with his mother present – amongst other things, he threw a tantrum and he lay on the floor engaged in self-stimulatory behavior.

37. After seeing the child's behavior during the week before school started, the school staff prepared a token board, visual supports, signs and behavior strategies to deal with the child's behavior when he began school.

38. Mrs. has been a second grade teacher at since 1987 and has 21 years of teaching experience. JE 94. She has successfully included other autistic students in her regular education classroom. She had 22 students in her classroom during the 2003-04 school year.

39. has been a collaborative special education teacher at since 1992. JE 89. She has an extensive amount of continuing education as well as experience in providing Lovaas instruction.

40. When the child began school, he demonstrated severe behaviors that prevented his inclusion in the regular education classroom for any significant period of time. These behaviors included temper tantrums, self-stimulatory behaviors and rolling on the floor. On the first day of school, he put his head in the toilet. As a result, the child was taken out of the regular education classroom for most of the day in an attempt to control his behavior. Academic demands often triggered the child's adverse behaviors which were disruptive to his peers in the regular classroom.

41. The school staff immediately tried to get the child's behavior under control. During the first week of school, Ms. spent the majority of her time working directly with the child and Mrs. and preparing materials for them.

42. Ms. reviewed the educational records sent by , but those records did not include a behavior management plan. She asked the child's mother to identify things that triggered his problem behaviors.

43. Mrs. read extensively concerning autism and spoke to friends with experience in dealing with autistic children. She consulted daily with about suggestions on managing the child's behavior.

44. In addition to her regular occupational therapy sessions with the child, helped to set up an individual workstation for the child in Room 205, got supplies, and consulted regularly with the school staff. JE 35, 80.

45. On September 29, 2003, the IEP team met with the child's mother because the child was only able to participate in the regular classroom for 10-15 minutes a day due to his behavior.

46. The IEP team suggested that the parents visit other programs that might be appropriate for the child, such as a sc contained classroom at . JE 33. The child's mother refused to consider a different school.

47. The IEP team decided that it would collect data over the next 30 days because Hurricane Isabel had interrupted the school year for seven days. JE 33. The child's mother agreed to the collection of behavior data and to limiting the child's time in the regular classroom.

48. On September 30, 2003, the child's father wrote 's principal and blamed of "impatience" and complained about "Mrs. 's training/experience as an autism aide." JE 34. Nonetheless, he did not want to remove the child from . JE 34.

49. School psychologist Dr. , a specialist in autism, also visited the school and consulted with the staff. JE 35, 83.

50. The IEP team met again with the child's mother on November 6, 2003. JE 38. The IEP indicated that the child was increasing his time in class and was making academic progress. However, while the child's tantrums had decreased, other defiant behaviors had increased. The school was unable to pinpoint any particular pattern or trigger for the behaviors, and the parents said they had not seen one either. JE 38.

51. Because the child was continuing to struggle with behaviors, was disrupting the learning of his peers in the regular classroom and was injuring the school's staff, the IEP team again recommended that the parents consider . The child's mother refused again.

52. Given the parents' refusal to consider the placement, the school continued its efforts to make the child's program successful even though the child's behaviors were disruptive and challenging. and Dr. continued to consult with the school staff. JE 80, 40, 83. Mrs received paraprofessional training, attended an autism conference, and received training in the Picture Exchange Communications System ("PECS"). JE 95. worked daily with the child and Mrs. in Room 205. The child was increasingly taken to this separate classroom in order to focus on academic instruction.

53. The school team learned that the child often became disruptive whenever academic demands were placed upon him. It appeared that the child was deliberately manipulating his behavior to get out of doing work.

54. The school team also discovered that reports overstated the child's educational progress.

55. The team made a good faith, collaborative, coordinated effort to help the child learn and the parents admit that the LEA worked very hard to implement the behavioral interventions to assist the child with his learning.

56. On January 20, 2004, Dr. had an office visit about the child's biting and hitting behaviors. JE 41. Among other things, she "strongly" recommended a "very structured behavioral approach (ABA/ABA techniques) taught 1:1." JE 41.

57. The parents did not share Dr. 's recommendations with . In fact, the parents did not inform the School Board of any of Dr. 's recommendations other than her suggestion that the child take certain medication, and the School Board learned of all of her recommendations only when it subpoenaed the parents' records for this hearing.

58. The parents' failure to share Dr. 's recommendations for a very structured behavioral approach and to fully apprize the LEA at the beginning of the extent and severity of the child's adverse behaviors had a negative effect on his education by the LEA.

59. The parents' initial refusal to seriously consider the proposed placement is puzzling because such a placement would be more in keeping with Dr. 's recommendations than the mainstreaming at .

60. On February 10, 2004, of the School Board's central office talked to the child's father on the phone and again offered a visit to . JE 42. However, the parents chose not to visit .

61. The teacher at , has knowledge of ABA techniques and uses them when appropriate in the class. In fact, ABA techniques were used with some of her students during the 2003-04 school year. Ms. 's 2003-04 class consisted of 8 students and 8 adults, and Ms. 's class had the problem behaviors of all of her students under control.

62. On March 18, 2004, Mrs. assumed Mrs. 's duties with the child two days a week. Mrs. was a substitute teacher for the School Board at the time and is now teaching fourth grade at . JE 93.

63. Mrs. observed very aggressive and self-injurious behavior by the child. She also noted that the child was very inconsistent from person to person. The data supports this as well.

64. The child's negative behavior increased during the spring of 2004. The school did not know if his increase in negative behavior was related to other factors, including the child's severe allergies.

65. In May 2004, the School Board contracted with of to design a behavior management program for the child. Ms. developed a behavior intervention plan. JE 55, 56. She also advised the school team to instruct the child 1-1 in a small room free of distractions and to eliminate computer access to primary reinforcer. The school staff implemented her recommendations immediately.

66. The School Board made a good faith, collaborative, coordinated, reasonable effort to make the program successful for the child and on at least three different occasions unsuccessfully offered the program that was likely to provide a more structured academic environment to more successfully address the child's problem behaviors. The School Board offered the child an appropriate education during the 2003-04 school year. The child made educational progress, received educational benefit and did not suffer any loss of educational opportunity due to any action or inaction on the part of the LEA.

67. On April 22 and June 10, 2004, the IEP team met with the child's mother to discuss the child's summer program. On April 22, 2004, the child's mother advised the team that the parents were not interested in ESY services because they had decided to send the child to summer camp at . The IEP team offered a services plan to provide speech and occupational therapy to "wrap around" the summer camp. JE 67.

68. The child has a history of difficulties with changes in routine and transitions. *See, e.g.*, JE 11, 15. Just as at the beginning of the 2003-04 school year, the child had a difficult transition to the summer camp. He was violent and hurt an aide on the very first day, and it took two adults to restrain the child. Therefore, the child was placed in a very restrictive room at the beginning of summer camp.

69. hired as an instructional assistant in the summer camp. Although Mrs. did not work solely with the child after the first few days of summer camp, she did see him over the course of the summer.

70. Mrs. observed that the child's behavior had greatly improved at by the end of camp but the child's self-injurious and self-stimulatory behaviors continued during summer school – at a lower frequency.

71. Near the end of summer camp, hired Ms. to be a lead teacher for the 2004-05 school year. However, when a teaching position became available at , she opted to work at instead.

72. On August 16, 2004 the IEP team met with the parents to resume a June 10, 2004 meeting to develop an IEP for the 2004-05 school year.

73. The August 16, 2004 IEP (sometimes referred to as the Proposed IEP) provides for 30 hours of special education each week, speech and occupational therapy, adapted PE, and various modifications of the instructional program for the child. JE 76.

74. The IEP team and pare discussed the amount of training and experience that the child's aide would have during the 2004-05 school year as well as consultation services from an autism specialist that the School Board was seeking to hire. JE 24. At the time, neither the aide nor the autism specialist had been hired.

75. The School Board subsequently hired as a specialist to work with the School Board's autism programs.

76. Because of the nature and extent of the child's behavioral problems, now fully known to the LEA, conceded on cross-examination that the child should receive an aide with training concerning autistic issues, adding that retains several paraprofessionals, with training and experience in controlling the behaviors of autistic children. The School Board did not

hire an aide for the child because the parents never accepted the 2004-05 IEP, opting instead to keep the child in their private placement at . Accordingly, the parents cannot prove that the aide that the School Board would have provided would not have satisfactory training and experience in working with autistic students.

77. The child's parents unilaterally placed him at for the 2004-05 school year, JE 81, and requested a due process hearing. JE 82; HO 1.

78. During the August 16, 2004 IEP meeting, the parents also requested that the School Board pay for the child to receive approximately one week of transition services at during the period before the school year began. The School Board declined this request because the data did not indicate any significant regression after a nine-day break in summer programming. Instead, the School Board offered a transition plan consisting of a one-hour observation at , six hours of home-based instruction provided at a public school over a two-week period, and one hour of consultation with . JE 78.

79. , Dr. , and Dr. have seen the child at since the beginning of the 2004-05 school year.

80. Ms. was there near the end of September, 2004 to see another student. While she was there, she had the opportunity to see the child for an extended period of time because the child and the other student shared a classroom. Over the course of an hour, she did not see any work on academic subjects except one math worksheet. Instead, the child was simply given the opportunity to ask to do things he wanted to do and allowed to do them when he asked.

81. Dr. testified that during her visit the child demonstrated similar behaviors at that she saw at . She and Dr. testified that they saw numerous welts on the child's arms from biting and that he demonstrated the same types of behaviors that the child exhibited at .

82. Based upon their personal knowledge of the program, their observations of the child, and their review of the child's school file, , Dr. , and Dr. testified that the child could receive educational benefit at . In fact, they recommended the program over the program because the child has received ABA instruction since he was 2-1/2 years old and needs to learn independence skills that ABA does not teach.

83. Although she has not seen the child, principal at , testified that the child would receive educational benefit at based upon her knowledge of the program and her review of the child's school file.

84. does not have any nondisabled students.

85. does not have any speech/language pathologists or occupational therapists on staff.

86. The testimony of the LEA's educational professionals was both credible and consistent on the major issues before the hearing officer and is entitled to deference from the hearing officer. The demeanor of such experts at the hearing was candid and forthright.

87. The testimony of the parents experts as a group was not as compelling or convincing because they did not review the child's school file, frequently did not observe the child in the school setting, did not speak to the LEA's representatives who worked with the child on a day-to-day basis, etc.

88. The Proposed IEP is appropriate and is reasonably calculated to provide the child with educational benefit and with a FAPE if and when it is implemented.

89. Any procedural violations were technical and did not actually interfere with the provision of a FAPE to the child.

## III. Conclusions of Law and Decision

The parties do not dispute that the child has a disability, that the child needs special education and related services and that the child is entitled to a free appropriate public education pursuant to the Individuals with Disabilities Education Act ("IDEA" or the "Act") 20 U.S.C. §§ 1400 et seq., and Va. Code Ann. § 22.1-213-221 (1950), and the regulations promulgated thereunder. In this administrative due process proceeding initiated by the parents, the burden of proof is on the parents. Weast v. Schaffer, ex rel. Schaffer, [illegible].3d 449, 456 (4th Cir. 2004).

Inevitably, any analysis of the standard of FAPE must begin with Rowley. Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982). The Rowley Court held that by passing the Act, Congress sought primarily to provide disabled children meaningful access to public education. The Rowley analysis provides that the disabled child is deprived of a free appropriate public education under either of two sets of circumstances: first, 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 free appropriate public education or, second, if the IEP that was developed by the LEA is not reasonably calculated to enable the disabled child to receive educational benefit. Rowley, *supra*, 206-7 (1982); Tice v. Botetourt County School Board, 908 F.2d 1200 (4th Cir. 1990); Hudson v. Wilson, 828 F.2d 1059 (4th Cir. 1987); Gerstmyer v. Howard County Public Schools, 20 IDELR 1327 (1994).

A small violation of IDEA's procedural requirements does not, without evidence of an actual loss of educational opportunity, constitute a failure to provide the disabled child with a free appropriate public education. Rowley, *supra*; Gadsby v. Grasmick, 109 F.3d 940 (4th Cir. 1997);

MM v. School District of Greenville County, 303 F.2d 523 (4th Cir. 2002); Dibuo v. Board of Educ., 309 F.3d 184 (4th Cir. 2002); Hall v. Vance County Board of Education, 774 F.2d 629 (4th Cir. 1985); Tice, *supra*; Doe v. Alabama Department of Education, 915 F.2d 615 (11th Cir. 1990); W.G. v. Board of Trustees of Target Range School District, 960 F.2d 1479 (9th Cir. 1992); Evans v. School District No. 17 of Douglas County, 841 F.2d 824 (8th Cir. 1988). Technical violations of IDEA procedures that do not deny the student FAPE are considered de minimis. See, e.g., Fairfax County Sch. Bd. v. Doe, Civil Action No. 96-1803-A (April 24, 1997); see also Roland v. Concord School Committee, 910 F.2d 983, 994 (1st Cir. 1990), cert. denied 499 U.S. 912 (1991); Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 982 (4th Cir. 1990); Spielberg v. Henrico County Sch. Bd., 853 F.2d 256, 259 (4th Cir. 1988); Hall v. Vance County Bd. of Educ., 774 F.2d 629, 633-635 (4th Cir. 1985); and Board of Educ. v. Brett Y, 155 F.3d 557 (4th Cir. 1998).

In Dibuo, the Court reaffirms the law in our circuit that not every procedural violation of the IDEA warrants granting the relief requested. Before any relief can be afforded, the Court (or hearing officer) must proceed beyond the finding of any procedural violation of the IDEA to further analyze whether the procedural violation actually interfered with the provision of a FAPE to a child:

> Most recently, in MM, we relied upon our decision in Gadsby v. Grasmick, 109 F.3d 940 (4th Cir. 1997) to reiterate that [HN6] "when . . . a procedural [violation of the IDEA] exists, we are obliged to assess whether it resulted in the loss of an educational opportunity for the disabled child, or whether, on the other hand, it was a mere technical contravention of the IDEA." MM, 303 F.3d 523, 533, 2002 WL 31001195 at *7.

Dibuo, *supra*, at 190.

In her letter dated September 24, 2004, the parents by counsel asserted several procedural violations. The parents at the hearing did provide some evidence concerning their requests that the aides who were assigned to the child attend at least part of the child's IEP meetings to discuss issues concerning their control of the child's behavior. See, 8 VAC 20-80-62(c). With the exception of one IEP meeting, aides did not attend but other LEA personnel were present at these IEP meetings, such as Ms. who supervised the aides, who could speak to such issues and any such asserted procedural violation simply does not rise to the level necessary to constitute a loss of educational opportunity and denial of FAPE to the child. The parents offered little if any evidence concerning any other asserted procedural violations and, similarly, have failed to meet their burden of proof concerning the serious impact of any such alleged procedural violations upon their child's education.

The parents appear to concede that the IEP for their child's 2003-04 school year to which they consented, was appropriate. In any event the hearing officer finds that such IEP was appropriate. Instead, the parents contend that their child's IEP was not properly implemented during the 2003-04 school year. The parents further contend that the LEA's failures to properly implement

the 2003-04 IEP denied the child FAPE and seek reimbursement for their private placement at

The parents' main challenge to the LEA's implementation of this 2003-04 IEP revolves around the LEA's hiring of , whom the parents allege was not up to the task of adequately controlling the child's adverse behaviors, and of assisting an autistic child in his academic pursuits. The parents point to the definition of "paraprofessional" in the Virginia Regulations:

> "'Paraprofessional' means an appropriately trained employee who assists and is supervised by qualified professional staff in meeting the requirements of this chapter." 8 VAC 20-80-10. See, also, 34 CFR § 300.7(c)(9).

There is no state certification for paraprofessionals as there is for teachers. Accordingly, what "appropriately trained" means is subject to some interpretation.

In any event, the hearing officer finds that based on the information provided to the LEA by the parents at the time Mrs. was hired by the LEA, Mrs. was appropriately trained. In any event, the hearing officer also finds that Mrs. worked diligently and consistently to acquire knowledge and training concerning the challenges (behavioral and otherwise) of autism and that once the 2003-04 school year began, the LEA provided the necessary supports needed by Mrs. to allow the child to receive educational benefit and make educational progress. These supports took many forms, including direct and indirect support from experienced, well-trained experts in autism such as Dr. and , in a good faith, coordinated, collaborative effort to further the child's education at . The parents do not question the effort expended by the LEA.

"The appropriate inquiry is whether the Board's IEP, at the time of creation, [was] reasonably calculated to provide some educational benefit." Board of Educ. of County of Kanawha v. Michael M., 95 F.Supp.2d 600, 609 (S.D.W.Va. 2000) (citation omitted) ("Courts should not judge an IEP in hindsight; instead, courts should look to the IEP's goals and methodology at the time of its creation and ask whether it was reasonably calculated to provide educational benefit").

The determination of the IEP's reasonableness at the time of its creation is limited to the information known to the IEP team when it wrote the IEP. See Adams v. State of Oregon, 195 F.3d 1141, 1150 (9th Cir. 1999) (IEP "was reasonably developed based on information available to the [multidisciplinary team] including information from the parents").

The law does not require that the child receive the optimal education available, nor even that the education provided allow the child to realize his full potential commensurate with the opportunity provided to other children. Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, at 198, 102 S.Ct. 3034 (1982); Bales v. Clark, 523 F.Supp. 1366 (E.D.Va. 1981).

In Rowley, *supra*, the Court cautioned judges against imposing their view of preferable education methods upon school districts. Noting that courts lack the wisdom and experience necessary to resolve persistent and difficult questions of educational policy, the Court limited the permissible inquiry to determining whether the specified requirements of the Act were being met. Id. at 206, 102 S.Ct. at 3051.

Subsequent court decisions have also been careful to recognize the importance of leaving the business of running schools to the considered judgment of local educators.

In Hartmann v. Loudoun County, the court stated:

> Although section 1415(e)(2) provides district courts with authority to grant 'appropriate' relief based on a preponderance of the evidence, 20 U.S.C. 1415(e)(2), that section 'is by no means an invitation to courts to substitute their own notions of sound educational policy for those of the school authorities which they review.' (citations omitted)... [t]hese principles reflect the IDEA's recognition that federal courts cannot run local schools. Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment.

118 F.3d 996, 1000-1001 (4th Cir. 1997).

See also Springer v. Fairfax County, 134 F.3d 659, 663 (4th Cir. 1998) (holding that "[a]bsent some statutory infraction, the task of education belongs to the educators who have been charged by society with that critical task"); Barnett v. Fairfax County School Board, 927 F.2d 146, 151-52 (4th Cir.), cert. denied, 502 U.S. 859 (1991) (recognizing Congressional intent to leave education decisions to local school officials and recognizing the importance of giving school officials flexibility in designing educational programs for students); and Tice v. Botetourt County, supra, at 1207 (once a "procedurally proper IEP has been formulated, a reviewing court should be reluctant . . . to second-guess the judgment of education professionals" – rather, the court should "defer to educators' decisions as long as an IEP provided the basic floor of opportunity that access to special education and related services provides").

In a recent decision, the Court cautioned hearing officers not to succumb to the temptation to substitute their judgment for that of local school authorities in IEP matters. Arlington County Sch. Bd. v. Smith, 230 F.Supp. 2d 704, 715 (E.D. Va. 2002).

However, once the LEA structures an IEP which is reasonably calculated to provide FAPE, it cannot simply negate its requirements by somehow assuming that a child was not injured by its

failure to implement the IEP. The LEA must provide the special education and related services necessary to implement the IEP. The development and implementation of the IEP are the cornerstones of IDEA. Honig v. Doe, 484 U.S. at 311 (1988).

34 C.F.R. § 300.350 addresses accountability for progress under an IEP. It provides:

> (a) *Provision of services.* Subject to paragraph (b) of this section, each public agency must: (1) Provide special education and related services to a child with a disability in accordance with the child's IEP; and (2) Make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP.
>
> (b) *Accountability.* Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and benchmarks or objectives. However, the Act does not prohibit a State or public agency from establishing its own accountability systems regarding teacher, school or agency performance.
>
> (c) *Construction-parent rights.* Nothing in this section limits a parent's right to ask for revisions of the child's IEP or to invoke due process procedures if the parent feels that the efforts required in paragraph (a) of this section are not being made.
>
> (Emphasis supplied.)

The issue is precisely whether the 2003-04 IEP has been implemented. In the context of IEP implementation, the correct legal standard for determining whether FAPE has been provided involves an analysis concerning whether the LEA has implemented substantial or significant provisions of the IEP and whether the LEA has provided the necessary quantum of "some educational benefit" required by Rowley. Houston Indep. Sch. Dist. v. Bobby R., *supra*; Gillette v. Fairland Bd. of Educ., *supra*.

> The approach taken in Gillette seems reasonable, particularly in light of Rowley's flexible approach. Therefore, we conclude that to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds

> those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit.

Houston Indep. Sch. Dist. v. Bobby R., *supra.*

IDEA defines FAPE as special education and related services that (i) have been provided at public expense and under public supervision and direction; (ii) meet the standards of the state educational agency; (iii) include an appropriate preschool, elementary or secondary school education in the state involved; and (iv) are provided in conformity with an IEP. 20 U.S.C. § 1401(8).

In determining the quantum of educational benefit necessary to satisfy IDEA, the Rowley Court explicitly rejected a bright-line, single standard test. Instead, educational benefit "must be gauged in relation to the child's potential". Rowley at 185 and 202; see also, Hall v. Vance County Bd. of Educ., 774 F.2d 629, 635 (4th Cir. 1985).

The record in this proceeding establishes that the child did receive educational benefit from his 2003-04 school year. See, e.g., JE 36 and 58. Clearly, the record shows that the child received the necessary quantum of educational benefit from his education during his 2003-04 school year at . Educators exercising their considered professional judgments to implement a procedurally correct IEP should be afforded significant academic autonomy and should not be easily second-guessed by reviewing persons. Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1000-1001 (4th Cir. 1997); Johnson v. Cuyahoga County Comm. College, 29 Ohio Misc.2d 33, 498 N.E.2d 1088 (1985). In short, where the LEA has developed an IEP in compliance with applicable legal procedures, the hearing officer is required to defer to the considered educational judgment of the LEA's representatives concerning its implementation. MM v. School District of Greenville County, 307 F.3d 523 (4th Cir. 2002).

The central question in due process hearings is whether the student received an appropriate education. Rowley; Ridgewood Bd. of Educ. v. Stokley, 172 F.3d 238 (3d Cir. 1989). If a child is provided FAPE notwithstanding a technical violation of IDEA, the LEA has fulfilled its legal obligations. MM v. School District of Greenville County, 303 F.3d 523, 534 (4th Cir. 2002) (citing Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 982 (4th Cir. 1990) (citation omitted)).

Additionally, the parents seek reimbursement for the summer program which started approximately June 1, 2004 and ended approximately August 20, 2004. HO 5. The parents also seek reimbursement for the 5 day extended school year period of August 30, 2004 through September 3, 2004. The parents contend that the LEA's refusal to provide the child with these ESY services during the Summer Break denied the child FAPE. The legal standard for the provision of ESY services was established by MM v. School District of Greenville County, 303 F.2d 523 (4th Cir. 2002): "ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months." Id. at 537-38. The court went on to conclude, "[h]owever, the mere fact of likely regression is not a sufficient basis, because all students, disabled or not, may

regress to some extent during lengthy breaks from school. ESY Services are required under the IDEA only when such regression will substantially thwart the goals of 'meaningful progress.'" Id. at 538. See, also, Dibuo v. Board of Educ., 309 F.3d 184, 190 (4th Cir. 2002).

While the parents' efforts to provide the best education for the child are understandable and admirable, the IEP team's decision concerning the provision of ESY services during the Summer Break must be analyzed in light of the standards and requirements imposed by law and, more particularly, the legal principles concerning ESY services articulated above.

The parents bear the burden of proof in this proceeding and, accordingly, the parents must prove upon a preponderance of the evidence that the LEA's failure to provide ESY services other than what was offered by the LEA to the child during the Summer Break denied the child a FAPE. Weast v. Schaffer, ex rel. Schaffer, *supra*; Bales v. Clarke, 523 F.Supp. 1366, 1370 (E.D. Va. 1981); Alexander K v. Virginia Bd. of Educ., 30 IDELR 967 (E.D. Va. 1999); In re Fairfax County Public Schools, 20 IDELR 585, at 586-587 (SEA Va. 1993); Erickson v. Bd. of Educ. of Baltimore County, 162 F.3d 289, 292 (4th Cir. 1998). The parents have failed to meet their burden.

Finally, the parents seek a finding that the LEA must pay for the child's private placement at beginning September 7, 2004 "and continuing until the student is ready to transition back to public school." HO 5.

While the Parents' strident efforts to provide what they consider is the best placement for the child are understandable, again the placement decision must be analyzed in light of the standards and requirements imposed by law. The self-contained placement of the child within pursuant to the August 16, 2004 IEP (the "Proposed IEP") (JE 76) provides the child the support to learn and progress academically in the least restrictive environment.

After carefully considering the testimony of all witnesses concerning the implementation of the Proposed IEP, the hearing officer finds that the child requires a placement in a more self-contained, special education environment as envisioned in the Proposed IEP to promote the child's educational benefits at

The IDEA requires that children with disabilities be educated in the least restrictive environment ("LRE") and have the opportunity to be educated with non-disabled children to the greatest extent possible. 20 U.S.C. § 1412(A)(5); see, also 34 C.F.R. § 300.550(b). Removal of disabled children from the regular education environment should only occur when the nature or severity of the disability is such that education in regular classes with use of supplementary aids and services cannot be achieved satisfactorily. Id. LRE is a mandate to all public schools which must be considered by the appropriate multi-disciplinary IEP Team in programming for children.

The LEA has looked at the child's strengths, weaknesses and progress in light of his autism and behavioral problems and has provided a Proposed IEP with greater time to be spent in a self-contained program for the child in which his weaknesses, both scholastically and socially can be

addressed, but where his academic strengths can also be developed, accommodated and built upon. The LEA's Proposed IEP also provides the child a regular opportunity to promote his socialization skills and participate in activities with non-disabled students in certain areas, as mandated by the LRE requirement. does not offer such a great opportunity because all of the attending students are disabled.

No requirement for mainstreaming exists where "(1) the disabled child would not receive an educational benefit from mainstreaming into a regular class; (2) any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in separate instructional setting; or (3) the disabled child is a disruptive force in a regular classroom setting." Hartmann v. Loudoun County Board of Education, 118 F.3d 996, 1001 (4th Cir. 1997); see also Devries v. Fairfax County Sch. Bd., 882 F.2d 876, 879 (4th Cir. 1989); Doe v. Arlington County School Board, 41 F. Supp.2d 599, 604 (E.D. Va. 1999). The court in Doe v. Arlington County School Board, supra, went on to note that "if the evidence supports any one of these factors, 'mainstreaming' is not proper." Id.

The parents bear the burden to establish by a preponderance of the evidence that the Proposed IEP is not reasonably calculated to provide the child educational benefit and they have not sustained this burden. Similarly, the parents have not met their burden concerning their claims for the other relief which they seek.

The Proposed IEP was developed in accordance with IDEA's procedural mandates and is reasonably calculated to provide the child educational benefit and FAPE.

The LEA is reminded of its obligations concerning 8 VAC 20-80-76(I)(16) to develop and submit an implementation plan to the parties, the hearing officer, and the SEA within 45 days of the rendering of this decision.

Right of Appeal. 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 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 U.S.C. § 1400 et seq.) without regard to the amount in controversy. 8 VAC 20-80-76(O)(1).

ENTER: 10 / 18 / 04

John V. Robinson

John V. Robinson, Hearing Officer

cc: Persons on the Attached Distribution List (by U.S. Mail, facsimile and/or e-mail, where possible)