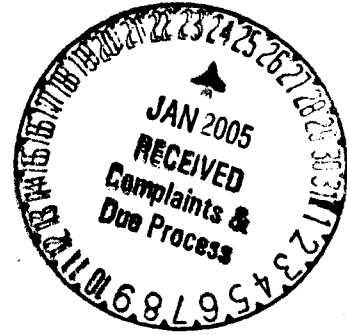


05-030

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



CASE CLOSURE SUMMARY REPORT

| | | | |
|---------------------------------|--|--|------------------------------------|
| School Division | <u>Public Schools</u> | Name of Parent | _____ |
| Name of Child | _____ | Date of Decision or Dismissal | <u>January 17, 2005</u> |
| Counsel Representing LEA | <u>Rob Stoney, Esq. & Andrea Gemignani, Esq.</u> | Counsel Representing Parent/Child | <u>William B. Reichhardt, Esq.</u> |
| Party Initiating Hearing | <u>Parents</u> | Prevailing Party | <u>LEA</u> |

Hearing Officer's Determination of the Issues(s):

1. Whether Respondent or the Complainants bear the burden of proof in this matter?
2. Whether Respondent proposed an appropriate IEP and placement for the Student in the least restrictive environment for the 2004-2005 School Year?
3. Whether the placement selected by the Complainants for the Student for the 2004-2005 school year provides him with educational benefit?
4. Whether _____ has denied the Student FAPE warranting reimbursement to Complainants for their unilateral placement at _____ ?

Hearing Officer's Order and Outcome of Hearing:

_____ is not required to fund the Student's private placement at _____. Accordingly, it is hereby **ORDERED** that this matter is **DISMISSED** and _____ is the Prevailing party in this matter.

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.

Signature, Hearing Officer
David R. Smith

1-17-05
Date

VIRGINIA:

VIRGINIA DEPARTMENT OF EDUCATION
SPECIAL EDUCATION APPEAL
DUE PROCESS HEARING



Complainants,

v.

Respondent.

IN RE:

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECISION

I. INTRODUCTION:

A. Procedural History

On September 30, 2004, the Complainants, Mr. _____ and Ms. _____

_____ through counsel, filed a request for a Due Process Hearing (“Hearing Request”) based on their contention that the _____ (“_____” or “Respondent”) had denied their son, _____ (“Student”), a Free and Appropriate Public Education (“FAPE”). Based on this contention, Complainants seek an order requiring _____ to provide FAPE in an educational setting that can provide a meaningful educational benefit, compensatory education services for addressing the Student’s reading deficits, additional

¹ Complainants will be referred to collectively as “Complainants” or “parents” and individually as “Ms _____” and/or Mr. _____.

speech and language services and assistive technology services. In the alternative, Complainants requests that fund the Student's placement at the Academy Alternative Learning Center, a private day school located in , Virginia ("").

By letter dated October 4, 2004, the undersigned was appointed by as the hearing officer to preside over the Due Process Hearing concerning the Student. The Due Process Hearing was held on November 17 and 19, 2004 at the offices of , located at , Virginia .

B. The Record:

The Record in this matter consists of the following:

1. Hearing Request dated September 30, 2004;
2. Respondent's Pre-Hearing Statement of Issues and Authorities;
3. Transcripts of each day of the Hearing, November 17, 2004 and November 19, 2004, including the testimony of thirteen witnesses;
4. Joint Exhibits 1 through 45 submitted by the parties; designated as "JE-1 through JE-45";²
5. Exhibits submitted by the Complainants, designated as C-1 through C-87³;
6. Respondent's Exhibits R-1 through R-52;⁴
7. Parent's Closing Argument dated December 13, 2004;
8. Respondent's Post-Hearing Statement of Issues and Authorities dated December 20, 2004;

² Provided by the parties on November 10, 2004

³ Exhibits 86 and 87 were added on the record.

⁴ R-51 and R-52 were added on the record.

9. Parent's Reply to Respondent's Post Hearing Brief, dated December 23, 2004.

C. Background and Summary:

1. The Student is fourteen years old and is currently attending _____ in the 8th grade (JE-20, 21, 22). The Student has been attending _____ since July 6, 2004, initially in a summer program and then continuing with the 2004-2005 school year that started in September 2004 (See C-28).

2. The Student has been receiving special education services from _____ since he was in pre-school, around five years of age. There is no dispute that the Student qualifies for special education with multiple disabilities. In the summer of 2004, two Individualized Education Program ("IEP") meetings were held resulting in the parties agreeing on the goals and objectives for the Student for the 2004-2005 school year, with the exception of the amount of hours of speech and language therapy he should receive and what would be an appropriate placement for the Student. _____ proposed that the Student be placed in the _____ ("_____") and the Complainants contending that _____ was not appropriate, but that _____ could provide the Student with educational benefit.

3. The Complainants contend that _____ has failed to provide the Student FAPE and therefore requests compensatory education for the Student's reading deficit and additional speech and language services and assistive technology services, because they contend that the Student has not made progress and that the services _____ proposed to provide for the 2004-2005 school year were insufficient in view of the Student's needs. They further contend that the proposed placement is inappropriate and therefore request that _____ fund the Student in a full-time special education program at _____.

4. contends that it has developed an appropriate IEP for the student that contains appropriate goals and objectives. contends further that is an appropriate placement for the Student in the Least Restrictive Environment (“LRE”).

5. Per agreement of the parties at a pre-hearing on November 1, 2004, proceeded with its presentation of the evidence first, notwithstanding its contention that the Complainants had the burden of proof, since Complainants are the ones contesting the IEP developed on June 15, 2004 and July 28, 2004 and the placement at

D. Issues:

1. Whether Respondent or the Complainants bear the burden of proof in this matter?
2. Whether Respondent proposed an appropriate IEP and placement for the Student in the least restrictive environment for the 2004-2005 School Year?
3. Whether the placement selected by the Complainants for the Student for the 2004-2005 school year provides him with educational benefit?
4. Whether has denied the Student FAPE warranting reimbursement to Complainants for their unilateral placement at ?

II. FINDINGS OF FACT:

Based on the evidence presented in this matter, I find that:

1. The Student is the adopted son of the Complainants and has been receiving special education services from since pre-school, at about five years of age (See Tr. 356;).
2. The Student was determined eligible for special education as a student with multiple disabilities, including the effects of Fetal Alcohol Syndrome, Attachment Disorder, Attention Deficit Hyperactivity Disorder (JE-3), (Tr. 601-604; Ling), significant auditory

processing problems (Tr. 696; Lucker), visual processing problems (Tr. 30; Diamond; Tr. 603; Ling). The Student functions several years below grade level expectations in his core academic subjects (TR. 30-31; Diamond), particularly reading.

3. The Student was described by his tutor, _____ as reading on a second grade level (Tr. 425). However, _____ also stated in a letter to _____ dated March 3, 2004, that the Student had made “slow but steady progress over the years in spite of his learning problems.” (JE-10) and a year’s progress every year. (Tr. 470; _____). _____ testified as an expert reading specialist (Tr. 415). Ms. _____ served as the Student’s tutor from the third grade through the seventh grade. She stopped serving as his tutor once he started at _____ (Tr. 417; _____)

4. Dr. _____ testified that the Student showed significant processing limitations; impairments in acquiring information, sequencing information and retrieving information. Dr. _____ is a licensed clinical psychologist and testified as an expert in neuropsychology (Tr. 596-597).

5. Dr. _____ testified that the Student is mentally disorganized because he has difficulties breaking information down and that “it doesn’t flow in a straight line.” Dr. _____ also testified that the Student has consistently shown difficulties with reading comprehension. (Tr. 612-613) and that the Student is reading between the third and fourth grade level (Tr. 620).

6. During the 2003-2004 school year, the Student attended the Middle School (“_____”). Prior to attending _____ the Student attended the Elementary School (“_____”).

7. Ms. _____ testified that while at _____ the Student met his instructional goals (JE-31, 34 & 36; Tr. 84 & 86; _____). Ms. _____ the Pyramid

Resource Specialist at _____ and _____ and served as the Assistant Principal at _____ when the Student was in the 6th grade (Tr. 80-81).

8. _____ serves as a “feeder” school for _____ and _____. Therefore, upon completion of _____, students attend either _____ or _____. Ms. _____

testified that the special education program at _____ and _____ are the same (Tr. 173; _____). Ms. _____ is the Special Education Chair at _____

9. Ms. _____ a special education teacher for _____ taught the student at _____ in a self-contained science class during the 2003-2004 school year. (Tr. 28; _____)

Ms. _____ testified as an expert witness for _____ Ms. _____ served as the Student’s special education case manager, requiring that she serve as the liaison between home and school and handle communication with the parents and teachers if there was a problem and to coordinate services. (Tr. 29; _____). The Complainants did not present any problems to Ms. _____ concerning the Student’s special education program or his progress prior to March of 2004 (Tr. 29; _____).

10. Special education services were provided to the Student for the 2003-2004 school year pursuant to an IEP developed at an IEP meeting held on October 23, 2003 (JE-14). Among the attendees at this meeting were Mr. _____ Mr. _____, as the principal’s designee, Ms. _____, special education teacher, Mr. _____ (sp), general education teacher and Ms. _____ (sp), occupational therapist.

11. Mr. _____ agreed with the goals and objectives set forth in the IEP and did not have any questions or concerns about them. (Tr. 33; _____). Mr. _____ signed the IEP agreeing to the services to be provided the student (JE-14, page 1 of 10).

12. The IEP that was developed confirmed the agreement of the IEP team, including Mr. , to discontinue occupational therapy services for the Student (JE-14, page 10 of 10). The IEP required that the student not participate in general education programs for math, science, social studies and English (JE-14, page 10 of 10). The IEP also required that the Student receive one hour per week of support services for emotional disturbance (JE-14, page 1 of 10). The IEP did not provide for any speech and language services (Tr. 33; , Tr. 406;).

13. At , the student received his core academic subjects in small, self-contained classes of between 6 to 8 students. (Tr. 30;). The student initially was placed in a inclusive team taught setting for math; however, after about six weeks, he was moved to a self-contained class taught by (Tr. 31; ; Tr. 575-578;). The Student received an "A" in Mr. 's self-contained math class. (Tr. 578;).

14. The Student had received his speech and language services pursuant to IEPs until about the fourth grade. The services were discontinued, but were determined necessary for him again while he was attending the Virginia Treatment Center for Children (C-8).

15. Ms. testified that the student did well at (Tr. 30) and that "His transition from elementary school to went very well. He adjusted to changing classes, to using a locker." (Tr. 30 & 41;). At , the Student was passing his benchmarks, generally produced "B" grades and made progress toward his IEP goals. (Tr. 30, 38, 41, 45;), 131; , 577-578;).

16. On March 3, 2004, the Student was involved in a disciplinary matter involving another student. (R-33 and 34). A Manifestation Determination Review ("MDR") meeting was held resulting in a finding that the behavior was a manifestation of the Student's disability;

accordingly, it was determined that he should be transferred from _____ to another school instead of being expelled from school. Two schools were considered, the _____ and the _____ both handle students with emotional disabilities. (Tr. 226-229; _____).

17. Following the MDR meeting, _____ attempted to convene an IEP meeting to determine a placement for the student for the remainder of the school year. Complainants wanted the Student to remain at _____ (Tr. 389; Ms. Wiseman), because they felt he had made progress while attending _____ (Tr. 392; Ms. _____).

18. In an effort to convince _____ that the Student should remain at _____, Complainants requested that the Student's treating physician and private tutor send letters to _____ supporting the position that the Student should remain at _____ (JE-9 & JE-10).

19. The IEP meeting was delayed from March to June 2004 because the parents had decided to conduct private testing of the student (Tr. 393-394; Ms. _____). Therefore, _____ developed an IEP calling for the home schooling of the student (JE-17). This was rejected by Complainants (Tr. 61; Ms. _____).

20. Since Complainants rejected the home schooling, _____ offered to provide the student services after the normal school day at _____ on a one-on-one basis for 90 minutes each day. (Tr. 362; _____). This service was provided to the student for the remainder of the school year.

21. During period from March 2004 through June 2004, the _____ attempted to convene an IEP meeting. The meeting went forward on June 15, 2004 (JE-19). Participants at this meeting were Mr. and Ms. _____ the Student's Au Pair, Ms. _____, as designee for the principal, Ms. _____ special education teacher, Ms. _____ general education teacher, Dr. _____; Audiologist and speech pathologist, Ms. _____.

special education advocate for the Complainant, Ms. _____, Assistant Principal, _____ and Ms. _____, Pyramid Resource Specialist for _____ and _____ (JE-19, page 1b of 16).

22. At the June 15, 2004 meeting, the IEP team, including the parents, agreed to the goals and objectives to be included in the Student's IEP. The IEP also had a goal for the Student to take and pass the 8th grade Standards of Learning ("SOL") test (JE-19, p.13 of 16; Tr. 68-70; _____). The Student has not passed any previous SOL (C-67-70). However, it has been determined that the Student has the intellectual aptitude to pass the SOL (Tr. 610; Ling).

23. The team did not complete the IEP on June 15, 2004; consequently, a second meeting was necessary in order to discuss and determine the addition of speech and language goals and to determine an appropriate placement for the 2004-2005 school year (Tr. 397; Ms. _____).

The second meeting took place on July 28, 2004, pursuant to notice dated July 23, 2004 (R-16).

24. Complainants had begun to seek an alternative educational placement for the Student following the disciplinary action that resulted in the decision that the Student could not return to _____ (Tr. 372; Ms. _____). This resulted in the Complainants placing the Student in _____ for the summer program that began on July 6, 2004 (Tr. 372-373; Ms. _____). Complainant could not recall specifically if this was discussed at the June 15, 2004 IEP meeting (Tr. 374; Ms. _____).

25. The IEP meeting was reconvened on July 28, 2004 as scheduled. The participants at this meeting included Mr. and Ms. _____, Ms. _____, as principal's designee, Ms. _____; special education teacher, Ms. _____ (sp), general education teacher, Ms. _____, speech and language clinician for _____, Ms. _____.

Pyramid Resource Specialist, Ms. _____, Assistant Principal,

_____, Ms. _____, Student's educational advocate and Dr. _____, Audiologist

and the Student's speech and language pathologist. The discussions focused on speech and language goals and objectives and placement.

26. With regard to speech and language services, the Student had received such services while in elementary school at _____; however, these services were discontinued in the () grade, but continued again following his stay at the Virginia Treatment Center for Children (C-8). At the July 28, 2004 IEP meeting, Dr _____'s recommendations in his report dated May 19, 2004 (JE-8) were reviewed and accepted by the IEP team (Tr. 705-708; _____) and incorporated into the IEP (Tr. 134; _____).

27. Dr. _____ recommended in his report of the evaluation of the Student, that the Student receive intervention at two levels, accommodation and treatment (JE-8, page 5). The IEP team accepted Dr _____'s recommendations. Dr. _____'s recommendations as presented in his report (JE-8) do not specify the number of hours of service the student should receive (Tr. 713; _____). In any event Dr. _____, suggested that the student be provided with eight (8) hours per month of speech and language services, plus an additional hour of counseling . on the other hand, through Ms. _____, speech and language therapist proposed five (5) hours per month, including counseling, which was placed in the IEP (JE-19) (Tr. 286). The basis of Ms. _____'s recommendation with regard to the number of hours was to avoid pulling the student out of his classes too often (Tr. 283; Coffman).

28. With regard to placement, Ms. _____, the Pyramid Resource Specialist at _____ appeared at the IEP meeting representing _____ as an optional placement for the Student (Tr. 85; _____). The IEP team discussed, but rejected _____ and

as placements for the student concluding that they were too restrictive for the Student (Tr. 86;). The team also discussed as a possible placement. The representatives on the IEP team concluded that could provide the student with the services he needed, including small, self-contained special education classes and with a reading elective class. (Tr. 86-89;).

29. is under construction and some classes, including special education classes, are being held in trailers, which can hold approximately 28 students. (Tr. 174;).

30. All the classes would have been offered to the Student at in self-contained classes with 5 to 10 students, with the exception of the science class, which is larger, with a class size that ranges from 9 to 15 students, with a teacher and an aide. (Tr. 173;). Although the special education classes are taught in trailers, the science class and a math class are taught in the main building and would require the Student to transition from the trailers to the main building and back.

31. The IEP that was drafted for the Student on July 28, 2004 called for him to receive 20 hours of special education instruction each week (Je-19; Tr. 172;). The IEP proposed that the Student receive his core academic subjects in self-contained LD classes and noted that the Student could participate in an elective (JE-19, p 16 of 16) such as a special reading class to help him with his reading comprehension goals (Tr. 176, 207;). The IEP also indicated that the Student should be referred to an assistive technology specialist to determine his need for assistive technology services (JE-19, p. 12 of 16; Tr. 332-333;).

32. The parents rejected as the placement for the Student. Among the reasons that the Complainants rejected was the contention that because of the

construction, it would be difficult for the Student to make the transition from the trailers to the main building and back again. (Tr. 328;). Dr testified that this was not so much an issue with education, but the potential for distractibility which may create a risk factor for the Student for getting into trouble (Tr. 630:). However, Ms. testified that the middle school program in which the Student would be involved is primarily in the trailers (Tr. 184-185;

). Furthermore, the Student's teachers at had observed the Student make the transition from to Initially he had some problems with his locker; however, he quickly overcame that as an issue (Tr. 42;). Ms. testified that the teachers at are trained to help students make the necessary transition (Tr. 185;).

33. Since the time of his enrollment, prepared an IEP for the Student (R-29). The goals and objectives offered by the IEP are essentially the same as the IEP (JE-19) (Tr. 724-726;) and can be implemented at (Tr. 45; , 180;). Both IEPs call for small self-contained classes in core academic subjects. IEP calls for 5 hours per month of speech and language services and the IEP calls for 8 hours per month (R-29). The speech and language services are provided to the students at on a pull-out basis (Tr. 552-553;).

III. DISCUSSION

A. Whether Respondent or the Complainants bear the burden of proof in this matter?

1. The Complainants requested a due process hearing contending that the IEP proposed by developed on July 28, 2004, as well as the proposed placement of were inappropriate. In *Weast v. Schaffer*, Case No. 03-1030 (4th Cir. 2004), the Court held that the parents who requested a due process hearing to challenge an IEP and program

proposed by the school district had the burden to prove that they were inappropriate. Based on the evidence, the Hearing Officer concludes that *Weast* is controlling here, accordingly, the Complainants have the burden to prove the inappropriateness of the proposed IEP and placement.

B. Whether [redacted] proposed an IEP and placement appropriate for the Student in the least restrictive environment for the 2004-2005 school year?

2. Witnesses for both Complainant and Respondent testified that the Student had made progress while at [redacted]. Ms. [redacted] who served as the Student's science teacher and case manager testified about the progress the student had made (Tr. 30; [redacted]). Mr. [redacted]; the Student's math teacher also testified about the progress the Student had made in class (Tr. 591; [redacted]). Dr. [redacted], school psychologist, testified that the Student had made better than expected academic progress (Tr. 131; [redacted]).

3. Witnesses for the Complainants also testified that the Student had made progress while at [redacted] including Complainant mother (Tr. 392; Ms. [redacted]). Additionally, Ms. [redacted] the Student's reading tutor testified that the Student had been making a full year's progress every year in reading (Tr. 470; [redacted]). The testimony of [redacted] (Tr. 156) indicates that the Student has made progress at the pace of his age peers; however, he is still several grade levels behind as testified by Dr. [redacted] (Tr. 683).

4. There was testimony from Ms. [redacted], the Student's tutor, that at the end of the fourth grade, the Student had health problems that put him back several years and that once the health crisis had ended, the Student had to effectively start over due to his regression to a first or second grade level. As a result, when he was between the fifth grade and the seventh grade, he went from the first grade and second grade level that he had regressed to as a result of his health

problem, back up to a third and fourth grade level (Tr. 425 – 426; . Ms. also testified that the Student was making a year’s progress every year (Tr. 470;), which progress Dr. : stated was the minimum acceptable progress (Tr. 714;).

5. Although there was no testimony or documentation clearly on point, it can be concluded that the health situation the Student encountered, along with his confirmed disabilities, was at least partially responsible for him being behind in his grade equivalent scores. As such, and in view of the testimony regarding the progress the Student had in fact made, there is insufficient evidence for concluding that the reason the Student is still behind with respect to his grade level scores is due solely to any inappropriate IEP or the failure to render appropriate services.

6. Of major concern at the Hearing was the Student’s deficits in reading comprehension and that he is several grade levels behind his peers. In this regard, offers a self-contained reading program in which suggests is appropriate for the Student (Tr. 87; , 180, 200;). This would be in addition to teaching reading in the class room (Tr. 39:).

7. has a reading program which, as testified by Dr. includes , teaching fluency (Tr. 511), connecting (Tr. 512), questioning (Tr. 51) predicting (Tr. 513 and visualization (Tr. 514). ’s reading program is essentially the same. (Tr. 505-508;).

8. In 1999, 2002 and 2004, the Student took a series of standardized tests, the WIAT in 1999 (JE-5), the WIAT II in 2002 (JE-6) and the Woodcock Johnson III in 2004 (JE-7). All three tests provide standard scores and grade equivalent scores (R-51 and 52). Dr. of testified that standard score is the only score that can be compared between tests to show

progress because the standard scores compare the Student's progress with children his same age. (Tr. 123, 128, 165;). In this regard, the Student's standard scores show that he is progressing at the same rate as his age peers. (Tr. 128, 131, 159, 161;). There was no dispute that the Student is keeping up with his age group and not falling behind; however, Dr. ; and Dr. testified that the concern is with the Student being able to "close the gap" as to where he is now, to be on grade level by the time he completes high school (Tr. 648; , 714-715;).

9. Complainants' witness, Dr. of , was more familiar with the Woodcock Johnson than the WIATT (Tr. 486) and testified that the grade equivalent score was more appropriate (Tr. 536-538); yet, she was not certain if the Woodcock Johnson tests used the same ages for determining the grade equivalent scores (Tr. 539). Even so, the parties disagreed as to whether the tests indicate that the Student has made progress.

10. The IDEA entitles disabled students to a Free and Appropriate Public Education ("FAPE). See 20 U.S.C. § 1412(a) (1997). Specifically, Section 1412(a) provides that, "[a] free appropriate public education is available to all children with disabilities residing in the State between ages 3 and 21, inclusive" Similar language is contained in the accompanying regulations at 34 C.F.R. § 300.121(a).

11. The IDEA does not require a maximal educational opportunity. *Board of Educ. v. Rowley*, 458 U.S. 176, 189 (1982). In fact, "the requirement that a State provide specialized educational services to handicapped children generates no additional requirements that the services be sufficient to maximize each child's potential 'commensurate with the opportunity provided other children.'" Id. at 198. Rather, FAPE only requires that a disabled student receive personalized instruction with sufficient support services to enable the handicapped child to

benefit educationally from that instruction." *Hessler v. State Bd. of Educ.*, 700 F.2d 134, 139 (4th Cir. 1983).

12. Based on the evidence, even Complainants agreed with the goals and objectives of the IEP with the exception of hours of speech and language therapy. Ms. testified that whereas she agreed with Dr. s recommendations in his evaluation report, she disagreed with the amount of hours necessary in order for the Student to receive educational benefit. It was her opinion that being pulled-out of academic work for additional speech and language services would deprive the student of meaningful academic work. Also, the record indicates that teachers incorporate reading skills into their normal teaching routine.

13. Notwithstanding the expertise of Dr. , the Hearing Officer concludes that the conclusions of Ms. , being familiar with the system, were reasonable and therefore, the hours proposed appropriate for the Student. It is appropriate here to defer to the judgment of the educational professional within the school system concerning the appropriateness of the services to be provided the Student. *Hartmann v. Ludoun County School Board*, 118 F.3d 996, 1000-01 (4th Cir. 1997), cert. denied, 118 S. Ct. 888 (1998) and *A.B. Lawson*, 354 F. 3d 315 (4th Cir. 2004); *MM v. School District of Greenville County*, 303 F. 3d 53, 533 (4th Cir. 2002).

14. Based on the evidence, that includes the testimony of the witnesses whom the Hearing Officer finds credible, the staff and facilities at can provide the Student with an appropriate special education program, since there is no evidence that he is a student who requires a full-time special education program. : would provide him with FAPE in the LRE. It is noted that the evidence supports the conclusion that the Student did well at , which is the sister school to . It is further noted that since

and [redacted] have similar programs, in view of the disciplinary matter, a sound argument can be made that PS could have placed the Student at [redacted] and such would not have been considered a change of placement. However, [redacted] went forward with meetings to consider at least two school in addition to [redacted] which therefore necessitated the formal IEP placement meeting.

15. In any event, the July 28, 2004 IEP that [redacted] developed for the Student offered educational and related services to the Student that were designed to enable him to receive appropriate services at [redacted]. In preparing to draft the IEP, [redacted] developed goals and objectives that were accepted by Complainants. Furthermore, the IEP, including the goals and objectives developed by [redacted], are essentially the same as

16. [redacted] was able to incorporate the recommendations of Dr. [redacted] into its IEP for implementation at the [redacted] School. There was no evidence presented that the staff at [redacted] could not implement the July 28, 2004 IEP.

17. The July 28, 2004 IEP offered the Student appropriate classes in the LRE. He would be receiving all of his core academic classes in self-contained special education classes and participate in the general education classes for physical education. [redacted] also offered the student a special education elective in reading to assist with his basic reading and reading comprehension goals.

18. The IEP team recommended that the Student be referred to a technology specialist for a determination as to his need for assistive technology services. (JE-19, p. 12 (Tr. 332-33 [redacted])). Accordingly, [redacted] offered FAPE to the Student in the LRE; whereas the IEP offered by Accotink requires a full-time placement in only special education classes and no opportunity for the Student to participate in activities with non-disabled peers.

The IDEA requires that

[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(a); see also 34 C.F.R. § 300.550(b); 8 VAC 20-80-10.

19. The Record in this matter makes it clear that although the Student has multiple disabilities, there was no evidence that they are so severe as to require a full-time restrictive placement. It is concluded that the Student could achieve an appropriate education at the _____ offered the Student special education resources as well as the opportunity to interact with non-disabled peers in his elective classes, at lunch and in physical education. On the other hand _____ services only disabled students. Placement at _____ would eliminate the Student's opportunity to interact with non-disabled peers.

20. Based on the testimony of the _____ witnesses, the IEP developed by _____ was appropriate for the Student and appropriately dealt with his disabilities. Furthermore, _____ is equipped to meet the Student's needs, including small classes and sufficient staffing in the classrooms to further assist the Student; therefore, _____ is an appropriate placement for the Student.

21. The evidence is that the Student was promoted on the basis of the grades he received, which he received with appropriate accommodations. The conclusion that he had progressed was based not only on the grades he had received, but the scores he had received as

well on the standardized testing. All witnesses testified to the fact that the Student had progressed, the disagreement was with him not progressing more than a year within one school year in order that he may "close the gap."

22. Again, it appears that apart of the reason for there being a gap in the Student's progress, was due to the Student's health problems in elementary school, which made the Student regress. Yet, the evidence is that he was able to start over and apparently progressed from the first/second grade level back to a fourth grade level, but not at the speed satisfactory to Complainants. In this regard, there was insufficient evidence that grades were the only basis for the Student's promotion, which distinguishing this case from *Hall v. Vance County Bd. of Educ.*, 774 F2d 629 (4th Cir. 1985).

23. Finally, although it can be concluded that all witness offered credible testimony, the Hearing Officer finds it appropriate to defer to the judgment of the educational professional at [redacted] who either taught the Student, were familiar with him and or familiar with the services that [redacted] had previously provided him at [redacted] and could have provided him at [redacted].

C. Whether the placement selected by the Complainants for the Student for the 2004-2005 School Year provides him with educational benefit?

24. Based on the Record in this case, on July 6, 2004, the Complainants placed the Student in [redacted] for the summer and had expressed an intention of keeping him there for the 2004-2005 school year. It was clear from the testimony of Ms. [redacted] that Complainants were committed to having the Student return to [redacted] for the 2004-2005 school year, even while the [redacted] IEP was being developed. Complainants were not familiar with [redacted] and had not visited the school until after the July 28, 2004 IEP meeting. The visit did not occur

until October 25, 2004 after the school year had started. (Tr. 318;) after the Student had already started classes at .

25. developed an IEP for the Student that was essentially the same as the one developed by on June 15, 2004 and July 28, 2004 (Tr. 178;). Additionally, there was testimony from Dr. of and regarding the academic program offered by . The evidence indicates that the academic programs of and for the Student would be substantially similar. however, is a full-time special education program and as such, would not provide the Student an opportunity to interact with his non-disabled peers.

26. Additionally, it is noted that there was testimony that the Student is a good athletic. Whereas provides for PE in a mixed age group, presumably at , the Student would have an opportunity to participate in PE and regular team sports. If he has an interest in sports as well as academics, then this opportunity should be afforded him. In any event, there is no question that can provide the Student with educational benefit, but then so can , with doing so in the LRE.

D. Whether has denied the Student FAPE warranting reimbursement to Complainants for their unilateral placement at ?

27. School divisions make FAPE available to students through the implementation of an IEP. See 20 U.S.C. § 1414(d)(1997); see also 8 VAC 20-80-60(B) (1999). Tuition reimbursement is not appropriate unless Complainants prove the program is inappropriate and that 's program is appropriate. An "appropriate" educational program is one that is "reasonably calculated to offer a child some educational benefit." *Doyle v. Arlington County School Board*, 806 F. Supp. 1253 (E.D. Va. 1992), *aff'd*, 39 F. 3d 1176 (4th Cir. 1994). See

Martin v. Sch. Bd., 348 S.E.2d 857 (Va. Ct. App. 1986); see also *Burlington Sch. Comm. v. Department of Educ.*, 471 U.S. 359 (1985); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

28. As stated in *Rowley*, when determining whether a child has received educational benefits from an IEP and related services, the courts must only determine whether the child has received the “basic floor of opportunity.” *JSK v. Hendry County School Board*, 941 F. 2d 1563, 1572-1573 (11th Cir. 1991). Based on the record, the program offered the Student at a minimum provides him with that “basic floor of opportunity.”

29. On the other hand, the record in this matter indicates that [redacted] can also provide the Student with educational benefit; however, the program offered by [redacted] would not be in the LRE in that it does not provide access to any non-disable peers. This is not a situation where the Student’s disability is so severe that no public placement is appropriate. *Hessler v. State Bd. of Educ.*, 700 F.2d 134 (4th Cir. 1983). Since [redacted] can provide the Student with a program that can provide “some educational benefit,” Reimbursement for the Complainants for the Student in a private placement is not appropriate *Prince William School Board, v. W.T., et al*, Case No. 02-1005-A (E.D. VA. August 12, 2003).

IV. CONCLUSION

1. In view of the Findings of Fact and Discussion above, the Hearing Officer determines that Complainants had the burden to prove that [redacted] failed to develop an appropriate IEP for the Student and also failed to determine an appropriate placement for the Student. Furthermore, Complainants had the burden to prove that their proposed placement was appropriate. Based on the evidence, it is concluded that the IEP and placement at [redacted]

were appropriate and even though [redacted] can provide the student with educational benefit, so [redacted] can [redacted] but in the LRE.

2. There is disagreement between the parties about the amount of time the Student should be receiving speech and language services. The parties also disagree about when during the course of the meeting on July 28, 2004 the team devoted to a discussion about

[redacted] as a potential placement for the Student and the amount of time they took in doing so. Even so, the record here is clear that [redacted] made known to the Complainants that it was considering [redacted] as a potential placement and that [redacted] was in fact discussed as a placement at the July 28, 2004 IEP meeting.

3. Since it was July, the Complainants had an adequate opportunity to tour [redacted] before school started; but, such tour did not occur until late October, approximately six weeks after the school year had begun. This adds credibility to [redacted] assertion that the Complainants wanted the Student placed at [redacted] and had enrolled him at [redacted] while the parties were actively engaged in developing an IEP for the Student. Even so, the evidence is that the Complainants were actively involved with the development of the IEP and there was no evidence of any bad faith on their part with respect to the process (See *Kilchelt by Kilchelt v. Weast*, 42 IDELR 58 (D. Md. 2004)). Complainants had the burden to prove that the IEP and the proposed placement at [redacted] were inappropriate, a burden the Complainants failed to meet. *Weast v. Schaffer*, (Case No. 03-1030 4th Cir. 2004).

4. As stated above, school systems are obligated to provide students with FAPE. The right to FAPE under the IDEA consists of two parts, compliance with appropriate procedural requirements and a substantively appropriate individualized education program. As the Supreme Court observed in *Rowley*, 458 U.S. 177, 206-7 (1982), a court must answer two questions to

determine whether a child has been denied a free and appropriate public education under the requirements of the IDEA. The first question is concerned with whether the State complied with the procedures set forth in the Act. Here there were no allegations that [redacted] had violated any procedural requirements.

5. The second question is concerned with whether the individualized educational program developed is appropriate. Based on the testimony of all witnesses, the [redacted] IEP developed for the Student on July 28, 2004 contained goals and objectives that were acceptable to the Complainants with the exception of a 3 hour differential in the amount of speech and language services that should be provided. Therefore, the [redacted] IEP was substantially the same as the [redacted] IEP.

6. Complainants' primary concern in this Hearing was the amount of speech and language therapy he would be receiving. As stated earlier, the Hearing Officers defers to the judgment of Ms. [redacted] that the 5 hours and the mixture of speech and language goals within the normal academic curriculum is sufficient for the Student and additional pull-out services could hamper the Student's academic progress.

7. With regard to the Student's ability to transition from the trailers to the main building and back, the evidence was that the Student had successfully made a similar transition from [redacted], an elementary school, to [redacted], a middle school and there was no evidence that he could not do so going from [redacted] to [redacted] even with the construction work. Based on the evidence, it is clear that the July 28, 2004 IEP could be implemented at [redacted] and that [redacted] is quite capable of implementing an appropriate special education program for the Student.

8. It is noted that there was testimony at the Hearing concerning the IEP goal of the Student passing the 8th grade Standards of Learning test. The witnesses for the parties disagreed as to whether or not this is a realistic goal for the Student in view of his disabilities.

argued that the Student had the capability of passing the SOL; the Complainants witnesses however, concluded that notwithstanding the accommodations listed in the IEP, in view of where the Student is academically, he would not be able to pass an 8th grade SOL and therefore, the IEP is not reasonably calculated to enable him to do so. Since the 8th grade SOL is to take place at a future date and since both and recognize the need to prepare the Student for this test, again, to take place at a later date, it would be speculation to make a finding about the appropriateness of the goal, at this time, particularly since this goal was agreed to by the parties at the June 15, 2004 IEP meeting.

V. ORDER

Having proposed an appropriate IEP and placement for the Student, is not required to reimburse Complainants for the placement at for the 2004-2005 school year. Furthermore, there is no basis to support the awarding of compensatory education. The Complainants were actively involved in the development of all the Student's IEPs and signed all previous IEPs except the proposed Home based IEP and the July 28, 2004 IEP that is in dispute here. Accordingly compensatory education is not appropriate here. (See *New Lothrop Area Pub. Sch. Dist.* 41 IDELR 174 (SEA Mi 2004).

Furthermore, it was not until subsequent to the disciplinary action that the Complainants had expressed dissatisfaction with the services being provided to the Student, which, based on the evidence, were appropriate in view of his disabilities. Additionally, offered to home school the Student, which offer was rejected by the Complainants and the parties subsequently

compromised on an after school tutoring program, which was accepted by the Complainants and enabled the Student to receive educational benefit. Therefore, there is no basis to conclude that

should be required to fund the placement at. Accordingly, it is hereby

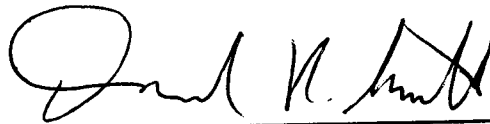
ORDERED that this matter is **DISMISSED** and is the Prevailing party in this matter.

VI. APPEAL INFORMATION

This decision is final and binding unless the decision is appealed by a party in a state circuit court within one year of the issuance of the decision or in a federal district court. The LEA shall submit an implementation plan to the parties, the hearing officer and the SEA within 45 calendar days.

1-17-05

Date



David R. Smith
Hearing Officer