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VIRGINIA:

██████████ PUBLIC SCHOOL EXCEPTIONAL EDUCATION

DUE PROCESS HEARING

IN RE: ██████████

By ██████████

Pursuant to an appointment by letter dated ██████████ from ██████████, Director of Exceptional Education, ██████████ Public Schools from the approved hearing officers' list in the Office of the Executive Secretary of the Virginia Supreme Court; and pursuant to Virginia Code Sections 22.1 – 213 et seq., 9 – 6.14:14-1 et seq. And 34 CFR part 300, et seq., an impartial due process hearing was held before the undersigned Hearing Officer on the day of ██████████ at the ██████████

██████████ At the end of the evidentiary hearing, by joint motion of the parties, the statutory and regulatory time limits were waived in the best interest of the child to allow the parties and the Hearing Officer an opportunity to review the new evaluations agreed to by the parties, which extension ultimately went to ██████████ for the Hearing Officer to render the final decision.

The undersigned Hearing Officer is required, or was requested, ultimately to determine by a preponderance of the evidence and applicable laws, rules and regulation, the following:

1. Whether or not the requirement notices to the parents were satisfied; and
2. Whether or not the child is disabled; and
3. Whether or not the child needs special education and related services; and
4. (a) Whether or not the ██████████ Public Schools are supplying a free appropriate public education (FAPE).

- (b) Whether or not the child may be returned to regular education upon request from the parent.
5. Any other questions or issues of law or fact presented during the due process hearing bearing upon the issues reviewed therein.

BACKGROUND:

[REDACTED] of [REDACTED] ("the child"), requested a due process hearing, pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq. ("IDEA") and the regulation therein seeking (1) the termination of the special education services that the child has received since [REDACTED] and (2) that [REDACTED] be returned to a regular education classroom setting. [REDACTED] Public Schools ("LEA") argues that the child's recent academic performance and serious behavioral problems, as well as the results of a recently completed reevaluation of the child, support the LEA's position that the regular education environment is not the proper one to insure educational progress nor is it the least restrictive environment that is appropriate for [REDACTED]. In order to justify assigning the child to a regular education setting the LEA argues that they would have to ignore the results of [REDACTED] recent reevaluation which discloses [REDACTED] low level of academic functioning and the severity of [REDACTED] behavioral problems. The LEA further argues that the child continues to be a child with a disability and as such, the LEA must meet its obligation to provide [REDACTED] with a free appropriate public education ("FAPE").

FINDS OF FACTS:

1. The child is currently a rising [REDACTED] grader who attended [REDACTED] School.
2. [REDACTED] has a history of severe behavior problems and poor academic achievement.

3. [REDACTED] is currently classified as [REDACTED] and [REDACTED] and receives [REDACTED] services.
4. [REDACTED] was first identified as a child with a disability in [REDACTED] while in the [REDACTED] grade. [REDACTED] had been retained in [REDACTED] and was [REDACTED]. (Tr.p. 14)
5. [REDACTED] was determined eligible for special education in the area of [REDACTED] [REDACTED] and [REDACTED] (LEA Exh. 14)
6. In [REDACTED] first Individualized Education Program ("IEP"), it was reported that the child functioned at a readiness level for [REDACTED]
7. [REDACTED] behavior required close supervision to keep [REDACTED] on task.
8. [REDACTED] had difficulty following directions and had not learned respect for adults. (LEA Exh. 16)
9. [REDACTED] was assigned to a self-contained special education classroom.
10. [REDACTED] gave [REDACTED] permission for the child's placement in [REDACTED] and [REDACTED] (LEA Exh. 21)
11. The child was reevaluated in the [REDACTED] grade by LEA personnel in [REDACTED] after [REDACTED] teacher referred [REDACTED] to the Child Study team. (LEA Exh. 26)
12. [REDACTED] was displaying explosive behaviors (LEA Exh. 27)
13. The Eligibility Committee determined that the child was [REDACTED] with [REDACTED] and recommended that the child receive homebound services until a one-to-one counselor could be secured. (LEA Exh. 46)
14. [REDACTED] IEP was modified to reflect the change to homebound instruction. (LEA Exh. 50)
15. [REDACTED] was eventually assigned to the [REDACTED] School, a private day school for students with serious [REDACTED] and [REDACTED] problems. This change in placement is reflected in and approved by [REDACTED] in the child's IEP dated [REDACTED] (LEA Exh. 53)

16. The child remained at the [REDACTED] School through [REDACTED]
17. [REDACTED] behavior improved enough for [REDACTED] to leave the [REDACTED] School and [REDACTED] was assigned to the self-contained special education classroom at [REDACTED] beginning in the [REDACTED]
18. By letter dated [REDACTED], [REDACTED] requested that the child be taken out of the special education program. (LEA Exh. 72)
19. When the parties could not come to a resolution regarding the child's educational placement, [REDACTED] by letter dated [REDACTED] initiated this due process proceeding and this Hearing Officer was appointed.
20. During the course of the due process hearing, [REDACTED] granted the LEA permission to reevaluate the child. (Tr. Pp.112-114)
21. The LEA completed an educational assessment, a classroom observation, a social history and a psychological evaluation prior to [REDACTED]
22. Subsequent to the hearing, but prior to the decision, the Hearing Officer received copies of the evaluation and the Eligibility Committee's findings and recommendations.

DISCUSSION

This Hearing Officer has reviewed both pre- and post-hearing the exhibits presented by the LEA and has carefully reviewed the transcripts, the educational assessment and family background, the Psychologist's report, the Eligibility Committee's Minutes as well as the Eligibility Determination, all subsequent to the hearing. All of these factors and the transcripts were helpful to the Hearing Officer to make the required determinations in this case. The documents referred to above that were supplied post-hearing were made available to this Hearing

Officer by the LEA pursuant to agreement between the parties at the due process hearing. (Tr. pp. 112-114)

The applicable law in this case is The Individuals with Disabilities Education Act ("IDEA") 20 U.S.C. § 1412 *et seq* and related federal and state regulation and it requires local educational agencies to provide disabled students with a free appropriate public education ("FAPE") in the least restrictive environment. The student's education must be tailored to meet the unique needs of a disabled child by means of an individualized education program ("IEP"), which must contain the elements described in Section 1414(d)(1)(A) of IDEA and must be reasonable calculated to enable the student to receive educational benefits. The underpinning case on IDEA and its predecessor was Board of Educ. Of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982). Further, the LEA must ensure that, to the maximum extent appropriate, children with disabilities in public schools are educated with children who are non-disabled. In addition, special schooling or other removal of children with disabilities from the regular educational environment may occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. See 20 U.S.C. § 1412 (a)(5); 34 Code of Federal Regulation ("C.F.R.") § 300.550.

FAPE is defined in IDEA as special education and related services that: (a) have been provided at public expense, under public supervision and direction, and without charge; and (b) meet the standards of the State educational agency; and (c) include an appropriate preschool, elementary, or secondary school education in the State involved; and (d) are provided in conformity with the individualized education program required. 20 U.S.C. § 1401 (8) (1997). A

child with a disability includes a child with a serious disturbance, specific learning disabilities and speech or language impediments. 20 U.S.C. §1401(3)(A). Each state must insure that its obligation to identify, locate and evaluate all children with disabilities is met. 34 C.F.R. § 300.300(a)(2); 8 VAC 20-80-50.

In Board of Educ. V. Rowley supra, the Supreme Court determined that the statutory definition of FAPE, in addition to requiring "specially designed instruction" requires the provision of such support services as may be required to assist a handicapped child to benefit from special education. The Court in Rowley concluded that the basic floor of opportunity provided by IDEA consists of access to specialized instruction and related services, which are individually designed to provide educational benefit to the disabled child. "Insofar as a State is required to provide a handicapped child with a 'free appropriate public education', we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP". Rowley supra at 203-04. A school division has met its obligation under the Act only when it has offered a free appropriate public education to every child with a disability.

Having reviewed the applicable law and regulations, the Hearing Officer now looks at the reports and evidence of the child's abilities, analysis of progress and school records to determine how the facts in this record support, or not, the requirements of the law.

The child was evaluated by [REDACTED] PhD., LEA School Psychologist, as part of [REDACTED] initial evaluation for special education services on [REDACTED] (LEA Exh. 8; Tr., p. 13). [REDACTED] utilized several evaluation tools testing intelligence, visual motion skills and social skills (Tr. pp. 13-14) [REDACTED] noted that the child was an average [REDACTED] and had repeated [REDACTED] but [REDACTED] was still not functioning on a [REDACTED] grade level. (Tr. p. 14) [REDACTED] scored a 66 on the intelligence test, where 100 is average and 70 is the cut line for mental retardation. (Tr. p. 15) The results of visual motor skills showed that [REDACTED] fine motor eye/hand coordination was that of a 5 year, 4 month to 5 year 7 month child. (Tr. p. 16) The teacher ratings placed [REDACTED] below average and were significant for aggressive kinds of behavior and hyperactive behavior. (Tr. p.17) [REDACTED] concluded in the Psychological Report that the child functioned well below average in social skills, intellectual ability and fine motor skill/visual coordination. (Tr. p. 18)

The child was evaluated again as a [REDACTED] grader in [REDACTED] by [REDACTED] another LEA School Psychologist, because of explosive, defiant, disruptive behavior and because [REDACTED] had hurt other children. (LEA Exh. 36; Tr. p. 21) [REDACTED] received a full-scale score of 65 on the intelligence test, which indicated that [REDACTED] was still in the mentally retarded range. The results of the visual motor skills test showed that [REDACTED] fine motor eye/hand coordination was that of an [REDACTED] [REDACTED] which was one year behind but within the average range for [REDACTED] age. (Tr. p. 23) An achievement test showed that [REDACTED] was at the late kindergarten level - spelling was at late first grade, and [REDACTED] math scores ranged from the late first grade to second grade. (Tr. p. 24-25)

The Teacher Report Form indicated clinically significant results in the area of aggressive behavior. (Tr. p. 26) [REDACTED] indicated that the score was beyond the 98th percentile which

was unusually high (T. p. 27) A test indicated a lack of empathy; [redacted] icked on people because it was fun and admitted that [redacted] was mean to others, but did not have bad feelings about it. (Tr. p. 28)

The child was evaluated for a third time by [redacted] on [redacted] as a part of [redacted] recent reevaluation [See Report of Psychological Services, [redacted]]. The intelligence test measured the child's mental ability at the 0.4 percentile, or in the Well Below Average range with a full-scale score of 60. [redacted] visual-motor coordination is roughly equivalent to that of an [redacted] old child, or in the 20th percentile for children [redacted] age.

To measure the child's current levels of academic functioning, [redacted] administered the Kaufman Test of Educational Achievement. [redacted] battery Composite Score was 62, and is extremely low compared to the national sample of [redacted] year olds. This score places [redacted] in the first percentile, or late [redacted] grade level. The child's score of 112 on the Social Skills Rating System, [redacted] Level, Student Form placed [redacted] at the 79th percentile for [redacted]. [redacted] self-ratings placed [redacted] in the average range for cooperation, self-assertiveness, empathy and self-control. [redacted] suggested that the child was either selecting what [redacted] believed to be the socially desirable answers or that [redacted] is not capable of accurate self-evaluation. [redacted] concluded that [redacted] verbal and non-verbal scores indicate that [redacted] requires significant additional support and intervention if [redacted] intellectual and social skills and academic performance are to improve.

[redacted], the child's classroom teacher, reported that [redacted] is one of eleven students in [redacted] self-contained classroom. (Tr. p 45) Further, the child had limited sight

vocabulary and decoding skills. [REDACTED] also had problems with blending sounds and long and short vowel sounds. Overall [REDACTED] reading was on [REDACTED] grade level. (Tr. p. 46) [REDACTED] math skills were on a [REDACTED] grade level. (Tr. p. 48) [REDACTED] grades since [REDACTED] have been C's. The child was to receive speech services, but [REDACTED] refused to go. (Tr. p. 49) [REDACTED] concluded that the child was not ready academically to return to regular education because [REDACTED] functioned on the [REDACTED] to [REDACTED] grade level and expressed that [REDACTED] was likely to experience frustration because of the inherent differences between an elementary self-contained classroom and regular education at [REDACTED] school level. (Tr. pp. 52-53) [REDACTED] believed that a self-contained classroom is the least restrictive environment in which the child can make progress. (Tr. p. 56) [REDACTED] completed an Educational Assessment of the child on [REDACTED] as part of [REDACTED] reevaluation which indicated [REDACTED] weaknesses are in the areas of language, reading and mathematics and that [REDACTED] continues to need much help in academics [See Educational Assessment [REDACTED] [REDACTED]

The Report of Classroom Observation, completed by [REDACTED], Instructional Specialist at [REDACTED] indicated that the child could not read the words girl, turtle, hear and paint. After reading a [REDACTED] grade reading selection, [REDACTED] could not describe what [REDACTED] read. [REDACTED] did not attempt to use any strategies to figure out words [REDACTED] did not know. [REDACTED] phonics and word identification skills were very limited. [See Report of Classroom Observation dated [REDACTED] [REDACTED] [REDACTED] also testified at [REDACTED] due process hearing that although the child could, with accommodations, be mainstreamed for physical education, music, art, field trips, assemblies and electives, (Tr. pp. 91; 95; 104-05) but [REDACTED] was not ready to participate in regular classroom education classes in English, Math, Social Studies and Science. [REDACTED] felt the child would be

overwhelmed and frustrated, and the negative behaviors that [redacted] now has under control would resurface. (Tr. pp. 104-05)

[redacted] Coordinator of Exceptional Education, stated that the child remains a child in need of special education services. [redacted] has shown some improvement, but [redacted] is still a [redacted] grade student working on a [redacted] and [redacted] grade level. (Tr. p. 111) In [redacted] opinion, the child would not be successful in a regular education setting. [redacted] self-contained classroom has a small setting with a teacher and instructional assistant. [redacted] receives one-on-one academic assistance [redacted] would not receive in a regular education classroom. (Tr. p 112)

The Eligibility Committee found that the child is eligible for special education services in the category of [redacted] and for Speech services. [redacted] continues to have significant academic delays based upon [redacted] standardized test scores and classroom achievement. [See Summary of Eligibility Committee Minutes, dated [redacted]

While some academic progress has been made and the child's grades are satisfactory (based on [redacted] IEP goals and objectives), there is consensus among LEA professionals on the committee that the child functions several grade levels below [redacted] actual grade and therefore continues to need the assistance and services provided in the special educational program.

Behaviorally, the child is currently identified as [redacted]. Clearly [redacted] behavior has improved since [redacted] reevaluation and [redacted] subsequent placement at the [redacted]. The child's classroom teacher, however, reported that the child still has behavioral issues to be addressed. In [redacted] the child was still initiating fights with

classmates and other students, as well as engaging in fights. In the Educational Assessment recently completed by [REDACTED] [REDACTED] reported that the child has been defiant at times, and has poor peer relationships. [REDACTED] engages in a lot of teasing. [REDACTED] can also be disrespectful to adults. [See Educational Assessment dated [REDACTED].] [REDACTED] also had serious problems with behavior on the school bus that caused [REDACTED] to be "put off" the bus. [REDACTED] provided [REDACTED] with alternate transportation 7 to 8 times. (Tr. pp. 96-97)

[REDACTED] believes that [REDACTED] behavior has improved because [REDACTED] is more respectful and more considerate of [REDACTED] classmates, but not to the extent that [REDACTED] is ready for regular education. (Tr. pp. 51-52) [REDACTED] concurred that the child had "come a long way" in terms of [REDACTED] behavior and that it has improved. [REDACTED] has "calmed down", is less aggressive and has formed some friendships with students in [REDACTED] classroom. (Tr. pp. 96; 98) [REDACTED], however, believes that [REDACTED] has made such significant progress in [REDACTED] behavior because of the support [REDACTED] receives. [REDACTED] confirmed that there are no limitations on the number of times the child could be suspended as a regular education student (Tr. p. 101)

[REDACTED] Coordinator of Exceptional Education, also stated that although the child has made some progress in the area of behavior, [REDACTED] has done so because [REDACTED] is in a structured classroom with a small teacher to student ratio. [REDACTED] is of the view that the child would not be successful in a regular education classroom because of the intensity of [REDACTED] behavioral difficulties.

The Eligibility Committee, with all of this information before them, concluded that the child should not be classified as [REDACTED] at least in part, because [REDACTED] did not have

an emotional condition that had persisted to a marked degree for more than six months. They did, however, conclude that continued behavioral strategies should be addressed by the IEP team. [See Summary of Eligibility Committee Minutes dated _____]

The [REDACTED] [REDACTED] has requested termination of the child's eligibility for special education and related services and has asserted that the parent has the right to remove [REDACTED] from special education. IDEA and its related regulations, including Virginia's, does not allow the parent a veto over its mandates for FAPE when children are determined to be disabled and in need of special services. The IDEA and regulations, state and federal, require a team of professionals, along with the parent, to determine if a child is no longer in need of special services. (See 34 CFR § 300.534 and 8 VAC 20-80-58 (B) (1)) If the team of professionals disagrees with the parent, the LEA must follow the procedures set forth in Virginia's approved regulations (8VAC 20-80-56) to use other measures to insure that parental revocation of consent will NOT result in the withdrawal of FAPE for the child (See 8VAC 20-80-58(B)(3) (my emphasis)).

Upon completing the administration of tests and other evaluation materials, a group of qualified professionals (which can be the IEP team) and the parent or parents of the child must determine whether the child is, or continues to be, a child with a disability. 8 VAC 20-80-56 (B). The team must examine the evaluation data to determine whether the child has a disability. [REDACTED] present level of performance and educational needs, whether the child needs special education and related services, and whether any additions or modifications the special education or related services are needed to enable the child to meet measurable annual goals as set out in an IEP. 8 VAC 20-80-54 (D)(b)(4).

The Eligibility Committee unanimously (except for the parent) identified the child as [REDACTED] with speech services needs. The consensus of the professionals was that the child functions well below [REDACTED] actual grade, even with the individual attention, and even with low teacher to pupil ratio in special education. They believe the child's best hope of educational benefits continues to require the assistance and services provided in the special education programs, including addressing specific behavioral strategies.

Given all of the above and the uncontradicted record of the child's educational and related behavior experience to date, this Hearing Officer finds that to provide FAPE in compliance with IDEA, taking the findings and the record as a whole, the LEA has no choice; the parent has no choice and the Hearing Officer (acting in the best interest of the child to gain meaningful educational gain under the law) has no choice but to grant this child special education and the necessary related services.

CONCLUSIONS OF LAW

The Hearing Officer makes the following Conclusions of Law based upon his Finds of Facts and the application of the law as set forth hereinabove.

1. (a) That the requirement of notice to the parents was satisfied; (There is no allegation or evidence that this was not done and the parent participated in all of the proceedings and issues leading to this hearing); and
(b) That the child is handicapped; and
(c) That the child is in need of special education and related services.
2. That the LEA has provided the child with FAPE under IDEA and applicable federal and state regulations and must continue to do so given the entirety of the record of this case and the findings of the Eligibility Committee of the needs of the child in which, given the record, I concur.
3. That the LEA has substantially prevailed herein.
4. That this Hearing Officer has jurisdiction over the parties and the subject matter herein.
5. That the decision made by the Hearing Officer is final and binding on all the parties unless any party aggrieved by the findings and decisions of this due process hearing appeals to a state circuit court or a federal district court within one (1) year of the date of this hearing decision.

ORDER

Therefore, in view of all of the foregoing, it is hereby ORDERED that the [REDACTED] [REDACTED] Public Schools, with lawful notice to the parents, shall cause an appropriate IEP meeting to be held to develop an educational program for [REDACTED] for the school year – consistent with the findings of the Eligibility Committee and the information provided by the [REDACTED] evaluation of the child. The LEA shall implement that plan, consistent with the requirement of IDEA, FAPE and this decision, in time for the child to begin the – school year, with or without the consent of the parents. This order is to insure compliance with IDEA, FAPE and the least restrictive environment and to proceed into the new school year without any interruption in the child's education..

Respectfully Submitted,

Hearing Officer

[REDACTED]

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this due process decision was mailed, postage prepaid, to [REDACTED], [REDACTED], Counsel for the LEA and [REDACTED] [REDACTED] Esq., Virginia Department of Education, at their address of record.

[REDACTED]

[REDACTED]