VIRGINIA

DEPARTMENT OF EDUCATION (SPECIAL EDUCATION)

RECEIVED Complaints & Due Process
OCESS HEARING

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Parents		}{	DAIL DD OCECC II
v.		3 {	DUE PROCESS H
	PUBLIC SCHOOLS	}{	
IN RE:			

PRELIMINARY STATEMENT

Pursuant to an	appointment made by		Schools (LEA or
on	the undersigned Hea	ring Officer was designat	ed to hear the due
process complaint broug	ht by and	and/or	, parents of
(child)	le ·		

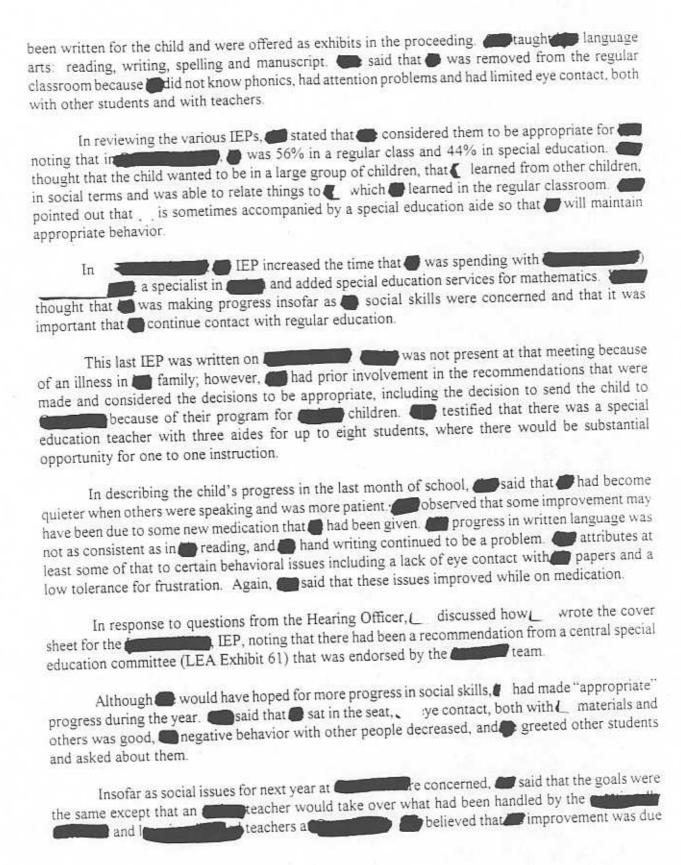
An initial telephonic pre-hearing conference was held on the learning was scheduled to be held on with an anticipated decision date of

faxed a request to the Hearing Officer that the , be rescheduled. The reasons involved the unavailability of hearing date scheduled for certain key witnesses and the possibility of seeking legal counsel. The Hearing Officer returned from and on I and called both order to deal with the request and other procedural matters. A pre-hearing telephone conference was At that time the Hearing Officer was held on that date with and and whom both parties agreed was the most critical witness in the case was advised that In light of the undisputed importance of having the availability of that unavailable on witness and the fact that a decision could be rendered prior to the beginning of the school year, the continuance was granted for good cause. The hearing was rescheduled for was also advised to retain counsel as soon as possible if earliest date available. were going to do so and have such counsel contact the Hearing Officer. At that time the anticipated Due to unforseen circumstances, the rendering of the decision date was I decision was delayed until 1

The hearing began at 8:35 a.m. on and was completed at 6:14 p.m. The LEA was represented by Esquire. The were not represented by counsel. Nine witnesses testified for the parties. All exhibits offered by both parties were admitted into evidence without objection. The Hearing Officer has reviewed the exhibits, notes taken of the testimony at the hearing and conducted appropriate research into the law governing the issues in this proceeding.

ISSUES OF DUE PROCESS HEARING

The parents argue that the IEPs for their are deficient is several respects: 1) they lack sufficient goals and sufficient means of measuring whether goals have been achieved; 2) they fail to address the social issue problem which their has; 3) they do not provide sufficient services, particularly OT and speech therapy, 4) the LEA has failed to demonstrate that the child has achieved sufficient competency.
They also argue that is violating the least restrictive environment requirements by directing that their child be sent to
The parents also argue that their is not capable of achieving in a regular classroom setting and require to reimburse the parents for the cost of tuition.
FACTUAL EVIDENCE
disabled with twenty-nine years of experience in speech and language impairment, learning disability and emotionally disturbed and children taught the child language arts during this past school year, where was in the grade described the child's social problems as involving inappropriate calling out, pointing to other children's behavior, interacting little with the children and being socially sensitive to perceived criticism. By comparison to other graders asid that had an extremely short attention span and an intolerance to criticism. At the end of the year, said that had achieved mid-grade level in reading. did not believe had a problem in transitioning from regular to special education classes or vice versa.
In terms of intelligence, aid that had good recall particularly with regard to animals and science, that saw humor in other students and that had "some average abilities" attention was a big hindrance. As well, had very poor hand writing and problems with not following instruction on mechanics. did recall a statements made by an occupational therapist that would "never be able to write".
When asked to review parents Exhibits 16 and 17 which represented work at and and representative of work, although inconsistent, and that "some days", wrote as well as the information contained in the exhibit.
In response to questions as to the strategies which found effective for the child responded: 1) one on one; 2) a direct teaching approach, with lots of repetition; and 3) rapid instruction for short periods of time. further said that when on medication, could work longer periods of time. stated that did not believe could receive these strategies in a regular school setting. On cross-examination by LEA counsel, discussed the various IEPs which had



to the success of their strategies but, admitted that did not do grade level appropriate work in regular education. This was the reason why a decision was made to have repeat the grade, a decision joined in by the parents.

In response to questions from added that the two hours of prescribed occupational therapy "could be adequate" added that the occupational therapist and special education teachers needed to confer as to handwriting strategies and would like to see them continue in view of improvement after the change of medications.

is a speech language pathologist with thirty one years of experience, including who is licensed in Virginia worked with the child for the last one and one half years. Goals, stated, were to be found on page 7 of the piece of the last one and one half years focus was in a group of three persons after two others joined in the primary focus was in correcting expressive language. The eye contact issue was not listed as one of the goals with because, said, it need not be addressed in a small group setting. Said that was satisfied with progress made in the small group setting and did not have the opportunity to see in regular classes. Like had not observed any transitional problems

In response to questions from counsel for the LEA, said that believed that had made adequate progress in the goals for which had responsibility thought that had input into those goals and that they were appropriate. suggestions, said, were accepted in the IEP.

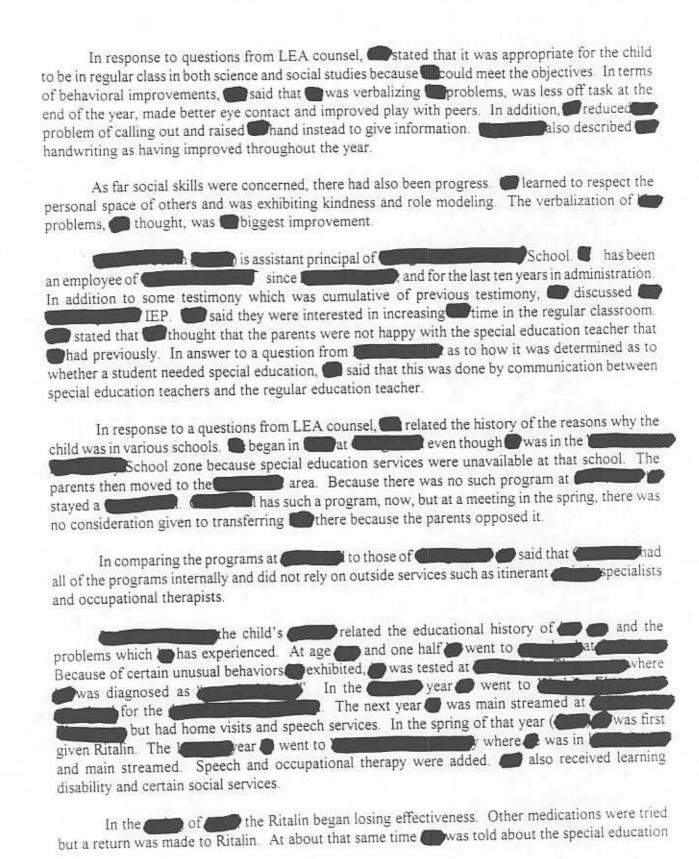
between regular and special education classes for the child.

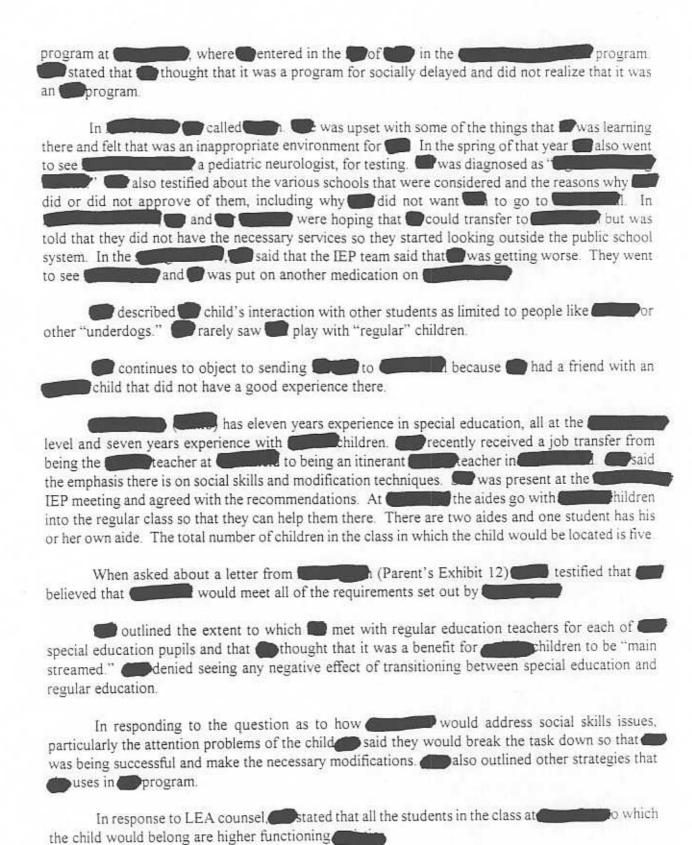
has been a teacher for thirteen years teaching children with disabilities in the standard and described problems in class as being easily distracted, a failure to maintain appropriate eye contact with teachers and peers, and that sometimes disrupted class by calling out.

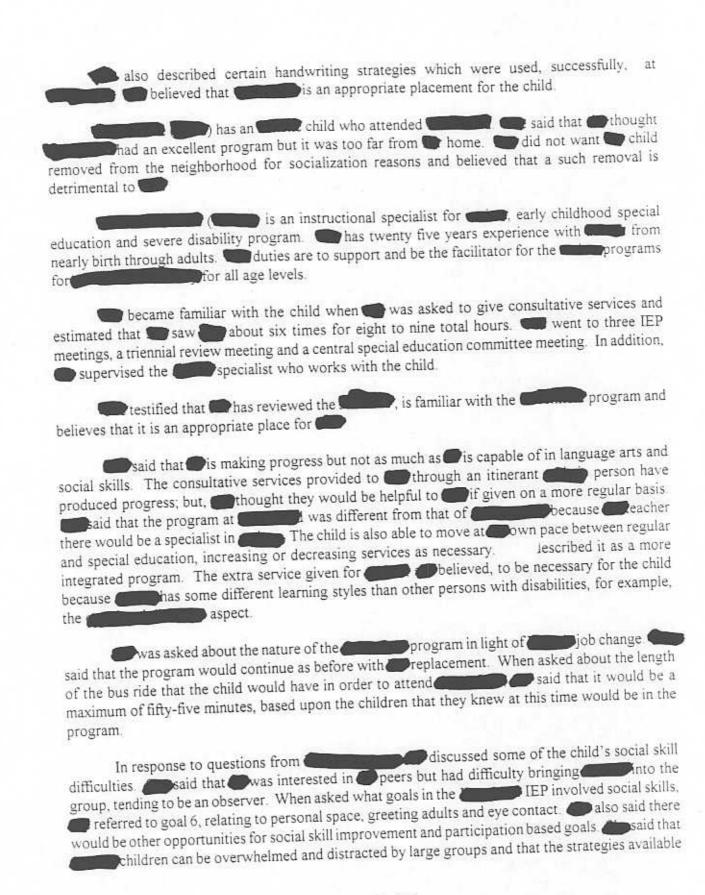
Insofar as the transition between regular and special education classes were concerned said that at the beginning it was difficult for but, by the end of the year it was "routine".

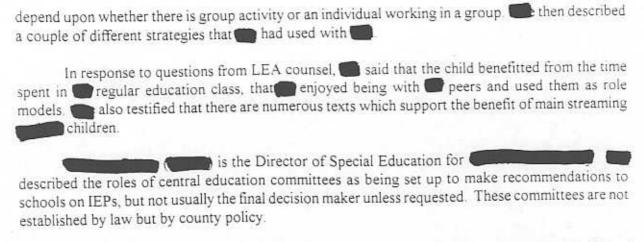
at grade level with regard to science and social studies with some acceptable modifications of testing (seating, peer tutors and hands on) In terms of interactions with peers, said that was age appropriate at both in regular and special education and had playmates at also said that at the beginning of the year had more problems with the other children in verbalizing complaints. Itended to simply repress them but by the end of the year could "tattle".

stated that did not know whether the lEP requirements for handwriting services were adequate. It depended on where else was working on it.









In response to a question as to how decisions about promotion for students not at grade level are made, said this was done by the IEP teams.

DECISION

In essence the parents argue that their child has not made adequate progress, both academically and socially, in the Schools system, whether because the strategies have been unsuccessful or its lack of necessary resources, and that should be placed in a private school with tuition reimbursement from The evidence demonstrates that the parents have been largely supportive of the efforts made by Indeed, there are few facts in dispute in this proceeding. There is no disagreement as to the nature of the medical disability of their child nor even the particular problems which experiences in the school setting. The parents simply believe that has not progressed as should, in particular that is behind grade level in performance, and that would be better served in the private school in which they want to enroll. In making this argument, they complain that the IEPs do not contain adequate goals to resolve disability issues nor the means of measuring them and that certain provided services are insufficient, particularly occupational therapy and speech therapy.

Under Federal and Virginia law, a child with disabilities who qualifies is entitled to a FAPE In determining whether a child has received the legally mandated services it first must be determined whether the legal procedures have been adequately complied with and secondly whether the IEP is reasonably calculated to enable the child to receive educational benefits. Board of Education v Rowley, 102 S.Ct.3034 (1982) The second prong of that test has been the focus of this proceeding.

Any analysis of whether a special education child is receiving a free appropriate public education begins with the Individuals with Disabilities Education Act, 20 U.S.C. § 1412(5), which provides, "to the maximum extent appropriate, children with disabilities...[should be] educated with children who are not disabled..." This requirement for "least restrictive environment" or "main streaming" is secondary and subordinate to the requirement of appropriate educational benefit. Carter v. Florence County School District Four, 950 F.2d 156, 18 IDELR 350, 352, (4th Cir. 1991)

The parents argue that lacks the resources to meet the needs of their child and that should be placed in a private school where all students have disabilities. There simply is no expert evidence which has been offered in this case to support the view that cannot and should not be having some educational experience in the regular education setting. All of teachers who testified stated that needs to be in regular education to the maximum extent possible and that has benefitted from it.

The only expert evidence offered by the parents is a letter from (Parents Exhibit 12). In letter said that needs a "high degree of structure". In argument the parents have relied on this for the proposition that needs to be entirely in a special education setting. If that were intent, has not made it clear in letter. was not available to testify, and, therefore, could not be questioned on that issue. It is unfortunate and, perhaps, all to often true that for whatever reason families have difficulty obtaining the services of an expert witness to participate in matters of this type. Nevertheless, as Hearing Officer, I can only consider the evidence before me. The parents have not met the burden of proving that their child should not be receiving any regular education benefits, whether in a public or private setting. Accordingly, I must reject the request that it is in the child's best interest to be placed at a facility where preceives only special education.

The evidence does support the view that the child can and should continue to be involved in some regular education and classroom instruction. It is true that the child has both academic and social problems in the regular classroom. The academic problems are being dealt with by providing with language and mathematics instruction in special education, with some specific resources diverted to handwriting problems. In terms of social issues it is true that the child has problems in the regular classroom setting involving inappropriate calling out, pointing at other children's behavior, insufficiently interacting with peers, being socially hypersensitive and others. These matters impact on academic performance in causing difficulties with insufficient eye contact with work for peers or teachers and a low tolerance for frustration. Nevertheless, teachers have testified that there have been improvements in all of these areas, although not in some cases as much as they would have liked. For example, reading progress has been better than written and handwriting continues to be a problem. There was evidence also that had done particularly better in the last quarter of the year, perhaps, because of a change in medication. Although there were earlier IEPs indicating that progress was not being made to the satisfaction of team members, the latest IEP (

As evidence that their child is not receiving an appropriate education, parents rely upon the fact that his working behind grade level. Was described as reading at mid grade level by teacher, at the end of grade year. As previously noted, his being held back to repeat the grade. According to an evaluation of the child which was done on and is functioning at a "low average range of ability with a full scale IQ of 83" (Parents Exhibit 8). While there is some difficulty in testing children with disabilities like those of this child, it was stated in the report that it was believed that the evaluations were reliable. Thus, the fact that legs behind classmates academically, is no proof of the fact that has not

constructed an appropriate program for In addition, as previously noted, report card for the year indicates substantial improvement, particularly in the fourth quarter (Parents Exhibit's 13).

Overall, I believe that the IEPs adopted for this child meet the legal requirements as reasonably calculated to enable the child to receive educational benefits. The frequency of IEP reviews and the comprehensiveness of the information contained in them demonstrate that has seriously considered its responsibility to educate this child. The IEPs reflect changes that have been made in response to lack of progress in order to address those needs. The proportion of time spent in special education and regular education has also been adjusted as appropriate to address particular disabilities. Finally, whatever arguments might be made as to the sufficiency of its education program at a new and different program is in place for for the coming year at the commended by the Central Special Education Committee which met on the commended by the Central Special Education Committee which met on the commended by the IEP team in the contained, coordinated approach for dealing with the children, which permits maximum flexibility in transitioning from special education to regular education and vice versa.

Parents also argue that the IEPs lack adequate mean of measuring progress. The parents' concern seems to be that there is a lack of formal documentation to prove that certain goals are achieved. I note that the form for IEPs changed between the one adopted in and the last one of the earlier IEPs had a less definitive means of measuring whether the goals were achieved. In the new form there are eight possible "procedures" that are used to measure progress. Each goal, then, identifies which one or more of the eight is to be used.

Witnesses explained that special education teachers are constantly evaluating their students, as well as discussing them with the regular education teachers. The child's report card is of course an important measurement. also testified that the child was graded at the same standard as other graders, excepting some modifications, previously discussed, which have been permitted in terms of testing. There is no legal requirement that the "scores" for each of the goals be produced in some uniform manner as if one were grading tests. I am not persuaded that any lack of detail as to the goals or the means by which the measurements is to made are sufficient to support an argument that the legally mandated requirements for these procedures have not been adequately complied with.

Parents argue that the IEPs have insufficient specific goals to deal with social skills.

identified a specific goal in the (Goal 6). also pointed out that strategies dealing with social skills are also interrelated with many of the other goals involving academic performance. It is not always possible to so compartmentalize each of the IEP goals. The fact that the child continues to have peer relationship problems is not proof that (The provided a plan reasonably calculated to produce educational benefits. Indeed, all the testimony is to the effect that there have been social improvements.

Finally with regard to the IEPs, the parents complained that there are inadequate resources devoted to their child's handwriting problems. According to the testimony of several of teachers, an occupational therapist who had been involved in the evaluation of that child stated would never be able to write. Whether that is hyperbole or not, it is clear that the child has a substantial problem with handwriting. A review of the recent IEPs is instructive. In the of four hours by occupational therapist was provided. This same level of service was also provided for in the IEP and the IEP. In the IEP, the service was reduced to two hours. Neither the IEP nor the witnesses testimony in this case provide a clear reason for this change. When was asked whether two hours was adequate, replied it "could be adequate" and that the occupational therapist and special education teacher at needed to confer on handwriting strategies. when asked the same question, responded that it depended on whether was working on handwriting in other strategies or goals and that "didn't know" if that was being done. said that had seen improvement in handwriting but that it was still not satisfactory in terms of their goals. also said that the techniques had not been entirely successful with regard to handwriting. Indeed in the TEP it is stated "Written Expression was not administered because of (the child's) severe printing difficulties".

In the face of a consensus that handwriting progress was unsatisfactory even in terms of their goals, the IEP team reduced the occupational therapist time by one-half. Perhaps, they concluded that occupational therapy was not going to be a successful strategy and that others needed to be utilized. The IEP is deficient in stating what, if any, other strategies would be used to supplement the occupational therapist efforts. Finding no justification in the record either by testimony or by exhibit, I am of the opinion that the IEP adopted in is deficient. Perhaps, is correct in stating that the occupational therapist and the special education teacher should confer to deal with the handwriting problem. As a part of this decision, I order the LEA to convene the IEP team as soon as reasonably possible in order to devise a strategy for meeting the needs of this child with regard to handwriting difficulties.

Parents also argue that their child should be able to go to own neighborhood school and receive all of the services which requires at that location. They further maintain that the lengthy bus ride and separation from the children in neighborhood is detrimental. There is no presumption under IDEA that the neighborhood is the least restrictive environment. Murray v. Montrose County School District, 51 F 3rd 921 (10th Cir. 1995). Moreover, placements in special education classes have been upheld despite being 50 miles from the home of a student with autism. Student v. Somerset County Bd. of Educ., 24 IDER 743 (D. Md. 1996). Itestified that the longest period of time which would be required to transport this child to is 55 minutes one way. Parents question this testimony in view of testimony that child traveled one way for one and one half hours, last year, to the school. Whatever the situation was last year, I accept the testimony as to what is to be expected for the coming year. I do not believe that this is unduly burdensome so as to deprive that child of a free and appropriate public education. In fact the private school to which the parents seek approval for placement would take nearly as long even if the child were transported by car straight from home to the school.

According to the United States Supreme Court in the case of <u>Burlington v. US Dept. of Ed.</u>, EHLR 556:389 (US Supreme Court 1985), in determining whether the parents' choice of private placement with a concomitant requirement of tuition reimbursement is mandated, there must first be a showing that the public placement was not appropriate and, only then, should the appropriateness of the private school be considered. I find that the public placement is appropriate and, therefore, need not reach the second issue. I believe that it is important, however, to point out that there is insufficient evidence in this record for that determination to have been made in any event.

First there was no oral testimony, whatsoever, as to the nature of appropriateness for this child. The only three pieces of documentary evidence were a newspaper article about (Parent's Exhibit 14), a letter from of a page and one-half, describing its general approach to education of special education students (Parent's Exhibit 15) and some academic work done by the child at in about a one week period (Parent's Exhibit 16). Even if it had been demonstrated that the child should not be in any general education classes, which I find that it has not, any conclusion that this child should be sent to would require far more information about the program than has been provided and with particular attention to the educational plan for this child, as opposed to how the program is beneficial to many students with disabilities.

ORDER

On consideration of all the evidence admitted in the hearing, I find that the Public Schools are providing a free and appropriate public education to with the exception of that portion of the IEP dealing with strategies to improve handwriting. Should the parents choose to keep in the Public School system, I direct the Public Schools to convene the IEP team as soon as reasonably possible in order to devise an appropriate strategy for addressing the needs of this child with regard to handwriting difficulties. I reject parents' request to approved transfer to with tuition reimbursement from Public Schools.
Date:
Hearing Officer

NOTICE

This Decision is final unless the party aggrieved by the finding and decision by this administrative review brings civil action in any state court of competent jurisdiction or any federal court within on (1) year.