



VIRGINIA:

SPECIAL EDUCATION DUE PROCESS HEARING



[REDACTED], et als.

Plaintiffs

v.

[REDACTED] PUBLIC SCHOOLS

Defendant.

DECISION OF THE HEARING OFFICER

I. Introduction

This proceeding is about [REDACTED] an almost [REDACTED] year old [REDACTED] student at [REDACTED] School within [REDACTED] Public Schools (the "LEA"). [REDACTED] first entered the LEA in [REDACTED] and has received all of [REDACTED] schooling within the LEA.

[REDACTED] suffers from Downs Syndrome and has been found eligible for, and received, special education services throughout [REDACTED] schooling at the LEA. To a large extent, [REDACTED] has been educated by the LEA within a mainstream classroom, where [REDACTED] has received most of [REDACTED] special education services.

However, recently the LEA initiated this administrative due process proceeding when [REDACTED]'s parents refused to consent to an IEP from an IEP Team meeting on [REDACTED] 2001, which moved [REDACTED]'s placement primarily to a resource, special education classroom. [REDACTED]'s parents contend that [REDACTED] education should continue to be primarily in a regular education classroom where they contend [REDACTED] should receive "push-in" special education services.

The administrative due process hearing was held over the course of four (4) days and the parties have submitted their briefs to the hearing officer.

The LEA, which bears the burden of proof, contends that it can only provide a free appropriate public education to [REDACTED] in the placement which it proposes for the current school year. [REDACTED]'s [REDACTED] grade.

## II. Findings of Fact

1. The LEA initiated an administrative due process proceeding because [REDACTED] and Ms. [REDACTED] (collectively, the "Parents") refused to consent to an individualized education plan ("IEP") for [REDACTED] proposed by the other members of the IEP Team on [REDACTED] 2001.

2. [REDACTED] was born on [REDACTED] 1989.

3. [REDACTED] currently attends [REDACTED] Middle School within the LEA where [REDACTED] is in the [REDACTED] grade.

4. [REDACTED] was clinically diagnosed with Downs Syndrome shortly after [REDACTED] birth and this diagnosis was subsequently confirmed by laboratory testing.

5. After being found eligible for early intervention services by the public school systems in the states of [REDACTED] and [REDACTED], [REDACTED] moved to the LEA.

6. In 1994, in [REDACTED] year, [REDACTED] transferred to the LEA from the State of [REDACTED].

7. On [REDACTED] 1994, the Parents provided written consent to the implementation of [REDACTED]'s first IEP for [REDACTED] year (the 1994-95 school year at [REDACTED] Elementary School) [SB 1].

8. [REDACTED] was identified as developmentally delayed and was placed in a full-time inclusive program with a full-time assistant at [REDACTED] Elementary School in the LEA [SB 1].

9. In [REDACTED] 1995, the LEA evaluated [REDACTED]. On the Stanford-Binet Intelligence Scale: 4th Edition, [REDACTED]'s performance consistently fell within the mentally deficient range. On a school readiness test, [REDACTED] scored slightly below the first percentile. On the Peabody Picture Vocabulary Test: Revised, [REDACTED]'s age equivalent score was 2 years, 10 months, which was commensurate with [REDACTED] cognitive potential, but much lower than [REDACTED] chronological age and [REDACTED] peers. Test results showed that [REDACTED] was exhibiting global development delays in cognition, educational achievement, language development and adaptive behavior [SB 2].

10. On [REDACTED] 1995, the LEA's Eligibility Committee found [REDACTED] eligible for continued special education services because [REDACTED] was cognitively functioning within the mildly mentally handicapped range [SB 3].

11. [REDACTED]'s IEP for [REDACTED] grade (the 1995-96 school year at [REDACTED] Elementary School) required full-time inclusion services with a classroom inclusion assistant. [REDACTED] also received related services in occupational therapy, physical therapy and speech [SB 4]. An

Addendum was added to this IEP on [REDACTED] 1996 to provide [REDACTED] with extended school year services during the [REDACTED] 1996. For three (3) hours per day, three (3) days per week, [REDACTED] participated in an activity-based program designed to maintain gross motor, language/speech, social skills and following directions skills. Academic skills were integrated into the activity-based curriculum [SB 5].

12. The Parents provided written consent to the implementation of [REDACTED]'s IEP for [REDACTED] grade (the 1996-97 school year at [REDACTED] Elementary School) on [REDACTED] 1996 [SB 6].

13. The IEP required a full-time inclusion program with a classroom assistant. Special education services were to be provided within the general education classroom. Related services of occupational therapy, physical therapy and speech were again required [SB 6].

14. The IEP was supplemented on [REDACTED] 1996, to provide [REDACTED] with extended school year services in the [REDACTED] 1997 [SB 7].

15. On [REDACTED] 1997, the IEP was amended to specify [REDACTED]'s extended school year services. The amendment required that [REDACTED] participate in an activity-based program to maintain gross motor, language/speech, social skills and following directions skills. Academic skills were integrated into the activity-based curriculum [SB 8].

16. The LEA reevaluated [REDACTED] on [REDACTED] 1997, because [REDACTED] would turn [REDACTED] on [REDACTED] and would no longer be eligible for special education under the developmentally delayed category. [REDACTED] exhibited mildly to moderately deficient skills in cognitive functioning, sequential processing, nonverbal processing, and in [REDACTED] ability process information in a holistic and sequential manner. [REDACTED] demonstrated deficient academic skills and deficient adaptive behaviors. The evaluation concluded that [REDACTED]'s overall performance placed [REDACTED] within the mentally retarded range of functioning [SB 9].

17. The Eligibility Committee met on [REDACTED] and [REDACTED] 1997. At the [REDACTED] meeting, [REDACTED] was found eligible for continued special education services. Based upon [REDACTED]'s cognitive, adaptive, academic and classroom deficiencies, [REDACTED] Elementary School personnel recommended that [REDACTED]'s disability be categorized as educable mentally retarded. However, the Parents disagreed with this disability designation, preferring instead a categorical designation of Multiple Disabilities [SB 10]. Accordingly, the Eligibility Committee reconvened and, at the Parents' request, found that [REDACTED] was eligible for special education and related services under the specific category of Multiple Disabilities [SB 11].

18. The Parents provided written consent to the implementation of [REDACTED]'s IEP for third grade (the 1997-98 school year at [REDACTED] Elementary School) [SB 12].

19. The IEP required a full-time inclusion program with an instructional assistant; special education services were to be provided in the general education classroom. Related services of occupational therapy, physical therapy and speech were again required [SB 12].

20. On [REDACTED] 1997, the IEP was amended, amongst other things, to add the modification that grades on [REDACTED]'s report cards should be given for effort rather than grade level and that a narrative should be attached to the report card covering [REDACTED] progress with the Standards of Learning (the "SOLs") and IEP goals [SB 13].

21. The IEP was supplemented on [REDACTED] 1998, to provide [REDACTED] with extended school year services in the [REDACTED] 1998, for social skills, motor skills and academics. [REDACTED] was given a full-time assistant [SB 14 and SB 15].

22. Representatives of the LEA became concerned about [REDACTED]'s unsatisfactory academic progress in the general education classroom at an early stage of [REDACTED]'s academic career within the LEA.

23. On [REDACTED] 1998, [REDACTED] and [REDACTED] wrote to the Parents on behalf of [REDACTED] Elementary School to memorialize the LEA's concerns in three particular areas (the "1998 Letter"). The LEA recommended, amongst other things, that (a) [REDACTED] needed to be immersed in an environment that would concentrate on improving [REDACTED] reading, writing, math and reasoning goals; (b) [REDACTED] should spend a larger segment of [REDACTED] day at [REDACTED] cognitive level to encourage more positive behavior; and (c) [REDACTED] should improve [REDACTED] academic progress because the material being taught in a regular [REDACTED] grade classroom was simply beyond [REDACTED]'s capabilities and [REDACTED]'s frustration could not be ameliorated by various accommodations [SB 15A].

24. Despite the LEA's request in the 1998 Letter that the Parents "review the suggestions with an open mind", the Parents have steadfastly opposed and refused to consider any placement for [REDACTED] that would require [REDACTED] to spend a large segment of [REDACTED] academic day outside of the regular classroom [See, for example, SB 18].

25. On [REDACTED] and [REDACTED] 1998, [REDACTED]'s IEP for the 1997-98 school year was amended to continue it until an IEP for the 1998-99 school year could be agreed upon [SB 16 and SB 17].

26. On [REDACTED] 1998, the Parents provided written consent to the implementation of [REDACTED]'s IEP for [REDACTED] grade (the 1998-99 school year at [REDACTED] Elementary School) [SB 20].

27. In this IEP, [REDACTED]'s present level of performance showed, amongst other things, that [REDACTED] needed repetition of directions for tasks and frequent redirection; that [REDACTED] could recognize 12 of the 26 letters of the alphabet, rote count to 20, count objects to 6 and write numbers 1 to 6. [REDACTED] could not tell time or distinguish between the days of the week.

28. This IEP also detailed for the first time the extent to which [REDACTED]'s behavior was becoming a problem for other students in the regular education classroom:

"In the regular classroom, [REDACTED] shows signs of frustration when the lesson is difficult for [REDACTED]. [REDACTED] complains of being tired, and will often put [REDACTED] head down and fall asleep. [REDACTED] behavior can be distracting to the students."

29. Because of [REDACTED]'s problematic behaviors in the 1997-98 and 1998-99 school years, a functional behavioral assessment was conducted by the School Psychologist, Dr. [REDACTED] for [REDACTED] [SB 20].

30. Dr. [REDACTED] concluded on [REDACTED] 1999 that [REDACTED]'s major problematic behaviors were off-task behavior and physical aggression towards another person or object (e.g., pushing, hitting, kicking, throwing a chair, etc.) [SB 20].

31. On [REDACTED] 1999, a Functional Behavioral Assessment and Intervention Plan was developed to increase [REDACTED]'s on-task behavior [SB 21]. Recommendations to prevent or reduce off-task behaviors included making sure that academic expectations were developmentally appropriate; ignoring inappropriate language; using lavish praise for on-task and appropriate behavior; and using visual cues and tokens.

32. In [REDACTED] 1999, [REDACTED]'s Parents approved a new IEP, which specified that [REDACTED] would spend 77% of [REDACTED] time in a regular education classroom and 23% in a special education environment. Again, [REDACTED] had a full-time assistant and was given extended school year services in the [REDACTED] 1999 [SB 22].

33. On [REDACTED] 1999, the Parents provided written consent to the implementation of [REDACTED] IEP for the [REDACTED] grade (the 1999-2000 school year at [REDACTED] Elementary School) [SB 24].

34. In this IEP, [REDACTED]'s present level of performance showed, amongst other things, that [REDACTED] could recognize 20 of the 26 letters of the alphabet, rote count to 20, count objects to 10, and label counted objects to 6 with the appropriate numeral. [REDACTED]'s speech continued to be of major concern and [REDACTED] exhibited weak expressive language skills in the regular classroom. Teachers observed that articulation and speed of speech were problematic in [REDACTED] contacts with other students. [REDACTED]'s behavioral problems also continued.

35. The fundamental impasse between the LEA and the Parents over appropriate placement for [REDACTED] continued. The Parents continued to insist that [REDACTED] is best served by a regular education classroom with children of [REDACTED] same chronological age with access to the general education curriculum and environment, peer modeling and supplementary aids, services and supports. Teachers continued to promote that [REDACTED] spend more time in a resource or special education placement, insisting that [REDACTED] learns best in a hands-on, slow-paced environment that addresses [REDACTED] individual needs.

36. The Parents' insistence again carried the day, and [REDACTED]'s IEP required that [REDACTED] spend only 20% of [REDACTED] school time in a special education placement where [REDACTED] would receive

"pull-out" services for occupational therapy, speech, language arts and math. Accordingly, [REDACTED] would spend 80% of [REDACTED] time in a regular education classroom, where [REDACTED] would continue to receive "push-in" special education services.

37. This IEP also required numerous accommodations, program modifications and supports in an effort to stimulate [REDACTED] academic progress in the regular education classroom. [See page 21, SB 24].

38. Again, the IEP required that [REDACTED] be provided a full-time assistant and extended school year services [SB 24 and SB 28].

39. [REDACTED] behavioral problems continued to escalate and in a letter dated [REDACTED] 2000 to [REDACTED] Elementary School, the Parents requested that an IEP meeting be scheduled to review and possibly revise [REDACTED] behavior intervention plan [SB 27].

40. On [REDACTED] 2000, [REDACTED] Functional Behavior Assessment and Intervention Plan was reviewed and revised [SB 31].

41. The IEP Team addressed [REDACTED] increasingly problematic behaviors at an IEP meeting on [REDACTED] 2000. Areas of concern included [REDACTED] use of inappropriate language, name calling, not being on task, not following directions, and kicking and hitting [SB 32].

42. In [REDACTED] 2000, the LEA conducted a psychological evaluation of [REDACTED] for [REDACTED] triennial review [SB 33].

43. [REDACTED] placed in the Extremely Low range in the Peabody Picture Vocabulary Test - 3rd Edition, Form IIIA. The Bracken Basic Concept Scale - Revised was administered to [REDACTED] to test [REDACTED] basic concept development. Test results indicated that [REDACTED] had not mastered basic concepts. For example, within the color subtest, [REDACTED] did not recognize the colors green, blue, purple, brown and gray. The results of tests administered to [REDACTED] concerning the Vineland Adaptive Behavior Scales, indicated that [REDACTED] overall adaptive behavior in the classroom and [REDACTED] communication domain score fell within the Low range.

44. On [REDACTED] 2000, the Parents provided written consent to the implementation of [REDACTED]'s IEP for the [REDACTED] grade, [REDACTED] first year at [REDACTED] Middle School (the 2000-01 school year at [REDACTED] Middle School) [SB 36].

45. In this IEP, [REDACTED] present level of performance indicated, amongst other things, that [REDACTED] had shown little improvement in reading and written language. Teachers reported that [REDACTED] is not an independent learner and must be guided through most activities; that [REDACTED] time on task is short; and that following oral directions is a problem.

46. [REDACTED] behaviors are addressed in the present level of performance: teachers reported that [REDACTED] response to a given direction is negative most of the time, and sometimes escalates to inappropriate behavior. Teachers reported that transitioning was particularly

problematic for [REDACTED]. Teachers also reported that in the resource room special education setting, [REDACTED] was more willing to participate in educational activities with other students and can play games and do academic activities without teacher assistance.

47. [REDACTED] significant weaknesses in receptive and expressive language and in articulation were noted. According to [REDACTED] specific assessment in the area of occupational therapy, [REDACTED] is able to participate in few classroom activities independently.

48. Alternatives considered at the IEP meeting regarding [REDACTED] placements ranged from a minimum of three periods daily in the special education classroom to full-time instruction in the regular education classroom [SB 36].

49. While the Parents' wishes again prevailed, LEA representatives felt compelled to present their position as to the most suitable placement for [REDACTED] education in the IEP:

"Justification for Placement Outside the Regular Classroom Setting

The [REDACTED] grade general education classroom and the curriculum needed to accomplish [REDACTED] goals are not congruent. As stated in the Present Level of Performance, [REDACTED] skill development is significantly below the grade placement with [REDACTED] age-appropriate peers. While social behaviors and language skills can be enhanced in this setting, [REDACTED] direct reading, math and social skills instruction are better achieved in an EMH room setting.

Instruction for articulation and practice of articulation skills should be conducted in the Speech room. Distractions are minimal in this setting for [REDACTED] instruction and for the other students in the regular classroom setting.

Occupational Therapy should be conducted in the resource room setting which allows for a minimum of distraction and allows the therapist the flexibility to use a variety of materials to instruct [REDACTED]."

50. In spite of the above "Justification for Placement Outside the Regular Classroom Setting" proclamation, the IEP required that [REDACTED] spend 83% of [REDACTED] school day in regular education classrooms, with only 17% "pull-out" into special education settings.

51. Once again, [REDACTED] IEP required that [REDACTED] be provided a full-time assistant, extended school year services and numerous accommodations, program modifications and supports in an effort to stimulate [REDACTED] academic progress [SB 36 and SB 41].

52. In its ongoing effort to stimulate [REDACTED] educational progress in the regular education classroom, the LEA commissioned a consultation concerning [REDACTED] by The [REDACTED] Technical Assistance Center. The stated reason for the consultation and resulting report was the LEA's request for assistance in providing a meaningful education experience for [REDACTED] in an inclusive environment. The consultation was performed on [REDACTED] and [REDACTED] 2000 [SB 38].

53. [REDACTED] behavioral problems continued to escalate in the middle school. On [REDACTED] 2000, the IEP Committee made certain revisions to [REDACTED] Behavior Intervention Plan to try and prevent or reduce [REDACTED] bad behaviors [SB 39]. In particular, the IEP Committee identified that transitions between classrooms was a trigger for bad behaviors (refusal to comply, inappropriate language, etc.) by [REDACTED] and developed strategies to address [REDACTED] difficulties with moving from classroom to classroom [SB 39].

54. During [REDACTED] of 2001, the LEA kept a record of the number of times [REDACTED] demonstrated inappropriate behaviors by specifically cursing, hitting and kicking [SB 40]. There were a total of 34 such incidences in [REDACTED] and 99 in [REDACTED]. [REDACTED] was absent two days in [REDACTED]. On the days that there were no such incidences, [REDACTED] often engaged in other inappropriate behaviors, such as sleeping a lot in class.

55. Concerned about [REDACTED] failure to progress academically, the LEA prepared a summary report dated [REDACTED] 2001. The report noted that [REDACTED] continued to struggle with recognition of some letters of the alphabet; that [REDACTED] had not made much improvement in writing [REDACTED] name without a model; and that [REDACTED] inconsistently recognized the names of coins [SB 43].

56. Despite several IEP Team meetings, the parties have been unable to agree upon an IEP for [REDACTED] grade (the 2001-02 school year at [REDACTED] Middle School). The basic impasse remains the conflict between the LEA's now entrenched position that [REDACTED] can only benefit educationally and receive a free appropriate public education ("FAPE") if [REDACTED] is placed in a resource, special education setting to the extent proposed in the LEA's proposed [REDACTED] grade IEP [SB 59] and the Parents' still entrenched position that [REDACTED] remain in a mostly regular education classroom placement the same or similar to that required by [REDACTED] grade IEP [SB 36].

57. The IEP proposed by the LEA on [REDACTED] 2001 [SB 59] for [REDACTED] grade (the 2001-02 school year at [REDACTED] Middle School) (the "Proposed IEP") was developed over approximately nine sessions.

58. The Proposed IEP requires [REDACTED] to receive the majority of [REDACTED] academic instruction in a special education setting.

59. [REDACTED] academic and educational skills are so low that [REDACTED] cannot benefit from instruction in a regular education classroom to the extent that the Parents mandate, no matter how many special education services, accommodations and supports are "pushed in".

60. The Proposed IEP is designed to provide [REDACTED] with FAPE in the least restrictive environment.

61. [REDACTED] intellectual ability currently falls in the mild to moderate range of mental retardation.

62. [REDACTED] academic and educational skills are extremely low. For example, [REDACTED] still cannot identify all letters of the alphabet; [REDACTED] does not know the sounds all the letters make; [REDACTED] cannot decode words; [REDACTED] cannot tell time; and [REDACTED] cannot consistently identify coins or basic colors. [REDACTED] functions at about a pre-kindergarten to kindergarten level in reading and at a pre-kindergarten level in writing. [REDACTED] cannot independently write [REDACTED] first name legibly and cannot add numbers or write numbers without a model.

63. [REDACTED] has experienced regression in [REDACTED] educational and academic skills. This regression explains why educational skills once mastered by [REDACTED] are subsequently lost again.

64. The [REDACTED] grade curriculum at [REDACTED] Middle School requires [REDACTED] regular education peers to perform academically at a level way beyond [REDACTED] capabilities [SB 56]. For example, [REDACTED] receptive and expressive language skills are so low that [REDACTED] functions as a five to six year old. Accordingly, [REDACTED] cannot understand even the routine vocabulary used in [REDACTED] grade regular education class because of [REDACTED] low abilities and cannot participate in the instruction. In reading, [REDACTED] grade regular education class of 24 pupils is studying figurative language, including the use of similes, metaphors, oxymorons and onomatopoeia. [REDACTED] cannot enter into discussions with the class, cannot participate with the class, and generally cannot access the curriculum. Furthermore, there are no services, modifications, assistive technologies, or supports which the LEA can offer to [REDACTED] to allow [REDACTED] to participate in a meaningful way in the math, life science, and language arts/reading curricula of a regular education [REDACTED] grade class.

65. [REDACTED] still has not mastered basic academic goals and skills developed for [REDACTED] in [REDACTED] first IEPs despite [REDACTED] years of education primarily in regular education classrooms, and despite a full-time paraeducator, extended school year services and numerous other services, modifications and supports.

66. The seven transitions from classroom to classroom required of [REDACTED] in [REDACTED] Middle School are stressful to [REDACTED] and frequently result in [REDACTED] reacting inappropriately. The Proposed IEP will reduce these transition times significantly by placing [REDACTED] in the same special education classroom to receive [REDACTED] instruction in reading, language arts and math.

67. The proposed special education classroom will allow [REDACTED] to receive more individualized and flexible academic instruction at a slower pace. Instead of classes with students numbering in the twenties, the proposed special education classroom placement ranges from 5 to 12 pupils, with between 3 to 6 staff members assigned to the class at any one time.

There are 2 full-time teachers in the class. There is also a full-time assistant assigned to the class and [REDACTED] would also retain [REDACTED] one-to-one aide under the Proposed IEP.

68. [REDACTED] inability to access the general curriculum and [REDACTED] low level of functioning, both intellectually and academically, essentially require regular education teachers to develop two separate curricula: one to cover the material mandated by Virginia's SOLs for a regular [REDACTED] grade class and another for [REDACTED]. Requiring the teacher in the regular education classroom to teach two classes in the same class period imposes an impractical and untenable burden. By necessity, one grouping is destined to suffer.

69. [REDACTED] escalating inappropriate behaviors in the regular education classroom are interfering with the education of other students.

70. [REDACTED] disrupts and distracts the other students from their academic studies by sleeping in class, refusing to do work, taking off [REDACTED] shoes and socks, laying down on the floor, cursing, and being aggressive to other persons, including teachers and [REDACTED] assistant.

71. By contrast, there is marked improvement in [REDACTED] behavior in the special education classroom, where [REDACTED] is more cooperative and appears happier.

72. The testimony of expert and fact witnesses testifying on behalf of the LEA was both credible and consistent on the major issues before the hearing officer.

73. The requirements of notice to the Parents concerning this proceeding were satisfied.

74. [REDACTED] has a disability and needs special education and related services.

75. [REDACTED] is not currently receiving FAPE but the Proposed IEP is designed to provide [REDACTED] with FAPE and should be implemented without delay.

### III. Conclusions of Law and Decision

The parties do not dispute that [REDACTED] is a child with disabilities, that [REDACTED] needs special education and related services and that [REDACTED] is entitled to a free and appropriate public education pursuant to the Individuals with Disabilities Education Act ("IDEA") 20 U.S.C. §§ 1400 *et seq.*, and Va. Code Ann. § 22.1-213-221 (1950), and the regulations promulgated thereunder. The central question presented in this proceeding is whether the Proposed IEP will provide an "appropriate" education for [REDACTED]. The law does not require that [REDACTED] receive the optimal education available, nor even that the education provided allow [REDACTED] to realize [REDACTED] full potential commensurate with the opportunity provided to other children. Hendrick Hudson Cenrt. School Dist. v. Rowley, 458 U.S. 176, at 198, 102 S.Ct. 3034 (1982); Bales v. Clark, 523 F.Supp. 1366 (E.D.Va. 1981).

██████████ is deprived of a free appropriate public education under either of two sets of circumstances: first, if the LEA has violated IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon ██████████ right to a free appropriate public education or, second, if the Proposed IEP that was developed by the LEA is not reasonably calculated to enable ██████████ to receive educational benefit. Rowley, supra, 206-7 (1982); Tice v. Botetourt County School Board, 908 F.2d 1200 (4th Cir. 1990); Hudson v. Wilson, 828 F.2d 1059 (4th Cir. 1987); Gerstmer v. Howard County Public Schools, 20 IDELR 1327 (1994).

A small violation of IDEA's procedural requirements does not, without evidence of an actual loss of educational opportunity, constitute a failure to provide ██████████ with a free appropriate public education. Rowley, supra; Hall v. Vance County Board of Education, 774 F.2d 629 (4th Cir. 1985); Tice, supra; Doe v. Alabama Department of Education, 915 F.2d 615 (11th Cir. 1990); W.G. v. Board of Trustees of Target Range School District, 960 F.2d 1479 (9th Cir. 1992); Evans v. School District No. 17 of Douglas County, 841 F.2d 824 (8th Cir. 1988). As the LEA argues in its reply brief (at page 17), technical violations of IDEA procedures that do not deny the student FAPE are considered de minimis [citations omitted].

Concerning the issues before the hearing officer in this proceeding, there is no evidence of serious procedural flaws in this proceeding that rise to the level necessary to constitute a denial of FAPE to ██████████. The Proposed IEP at issue in this proceeding was developed in compliance with the procedures set forth in IDEA and under Virginia law and any technical procedural violations do not rise to the level necessary to constitute a failure to provide ██████████ with FAPE.

The Parents have also raised certain procedural or other issues in this proceeding which are not before the hearing officer for decision and over which the hearing officer might have no subject matter jurisdiction. For example, the Parents have raised the issues of a compliance complaint which the Parents filed with the Virginia Department of Education (the "Department") in ██████████ 2001. Parents' Brief, page 39. Apparently, in a letter of findings dated ██████████ 2001, the Department found the LEA had not been compliant in implementing ██████████ occupational therapy goals and objectives for the 2000-01 school year and in failing to provide ██████████ with speech therapy as required under ██████████ IEP. The LEA argues in its reply brief that all issues regarding such implementation were previously properly resolved through the state complaint procedure and are not issues to be resolved in this proceeding.

At the hearing and on page 43 of their brief, the Parents also allude to another pending compliance complaint against the LEA which they have filed with the Department concerning ██████████ program. The Parents "suggest" that the LEA filed this due process proceeding after the Parents' recent complaint to the Department in retaliation against the Parents for the Parents' advocacy efforts on behalf of their two children who receive special education services from the LEA, and in an effort to avoid further adverse findings by the Department.

While under a given set of factual circumstances, such an allegation, if proven, might have some probative worth, it does not in this case. The hearing officer finds that currently [REDACTED] is not receiving FAPE and that the LEA was within its legal rights to initiate this proceeding to implement the Proposed IEP over the Parents' dissent in order that [REDACTED] might be afforded the opportunity to receive FAPE.

Accordingly, these and the other compliance issues raised by the Parents are not properly before the hearing officer in this proceeding and are more appropriately addressed by the Department through the state complaint procedure. See, 34 C.F.R. § 300, 662; 8 VAC 20-80-78.

While the Parents' strident efforts to provide what they consider is the best placement for [REDACTED] for socialization and other reasons are understandable and admirable, the placement decision must be analyzed in light of the standards and requirements imposed by law. The self-contained placement of [REDACTED] within [REDACTED] Middle School pursuant to the Proposed IEP provides [REDACTED] the support to learn and progress academically in the least restrictive environment.

After carefully considering the testimony of all witnesses concerning the implementation of the Proposed IEP, the hearing officer finds that [REDACTED] requires a placement in a more self-contained, special education environment as envisioned in the Proposed IEP to promote [REDACTED]'s educational benefits at [REDACTED] Middle School. Further, no amount of "push-in" services, modifications and supports will allow [REDACTED] to benefit educationally or receive FAPE in [REDACTED] current placement.

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

The LEA has looked at [REDACTED]'s strengths, weaknesses and progress in light of [REDACTED] multiple disabilities and has provided a Proposed IEP with greater time to be spent in a self-contained program for [REDACTED] in which [REDACTED] weaknesses, both scholastically and socially can be addressed, but where [REDACTED] academic strengths can also be developed, accommodated and built upon. The LEA's Proposed IEP also provides [REDACTED] a regular opportunity to promote [REDACTED] socialization skills and participate in activities with non-disabled students in Health and Physical Education, Chorus and Science, as mandated by the LRE requirement.

The IDEA mandates that an appropriate educational environment for a disabled student is one in which [REDACTED] is mainstreamed only insofar as it provides [REDACTED] with educational benefit. The regular education placement advanced by the Parents is not appropriate for [REDACTED] because [REDACTED] cannot receive even minimal educational benefit despite the use of numerous supplementary aids and services. See Devries v. Fairfax County Sch. Bd., 882 F.2d 876 (4<sup>th</sup> Cir. 1989).

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

Concerning [REDACTED] current placement, the LEA has clearly met its burden of proof by showing upon a preponderance of the evidence not only one, but each of the factors that (1) [REDACTED] would not receive an educational benefit from mainstreaming into a regular class, as proposed by the Parents; (2) any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in separate instructional setting; and (3) [REDACTED] is a disruptive force in a regular classroom setting. See, also, Beth B. v. Van Clay, 35 IDELR 150 (N.D. 2001), *aff'd* 36 IDELR 121 (7<sup>th</sup> Cir. 2002).

Finally, given the overwhelming evidence presented by the LEA and the potential harm to [REDACTED] from any resulting delay, the hearing officer declines to exercise his discretion to order an independent educational evaluation for [REDACTED] and, accordingly, denies the Parents' motion. The Proposed IEP should be implemented without delay.

Right of Appeal. A decision by the hearing officer in any hearing, including an expedited hearing, shall be final and binding unless the decision is appealed by a party within one year of the issuance of the decision. The appeal may be filed in either a state circuit court or a federal district court without regard to the amount in controversy. The district courts of the United States have jurisdiction over actions brought under § 1415 of the Individuals with Disabilities Act (20 U.S.C. § 1400 et seq.) without regard to the amount in controversy. 8 VAC 20-80-76(O)(1).

ENTER: [REDACTED] 2002

[REDACTED]  
[REDACTED]  
[REDACTED] Hearing Officer

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

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