

JUN 02 2008

Dispute Resolution &  
Administrative Services

VIRGINIA:

IN THE VIRGINIA DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION DIVISION

DUE PROCESS HEARING

NAME OF PARENTS: Ms. \_\_\_\_\_ and Mr. \_\_\_\_\_

NAME OF CHILD: Miss \_\_\_\_\_

PARENT'S REPRESENTATIVE: Ms. \_\_\_\_\_

SCHOOL DIVISION: \_\_\_\_\_ Public Schools

SCHOOL REPRESENTATIVE: Mr. \_\_\_\_\_

VIRGINIA DEPARTMENT OF EDUCATION: Dr. Judith Douglas

PARTY INITIATING HEARING: Parents

HEARING OFFICER: Morgan Brooke-Devlin, Esq.

DECISION

STATEMENT OF THE CASE:

THIS MATTER arises from a due process hearing on behalf of \_\_\_\_\_, requested by her Parents, Ms \_\_\_\_\_ and Mr. \_\_\_\_\_ on January 31, 2008. On February 4, 2008, Morgan Brooke-Devlin, Esquire, was appointed to serve as the independent Hearing Officer.

On February 11, 2008, the \_\_\_\_\_ School System (hereinafter to be referred to as PS) representative served notice on the Hearing Officer that PS was, pursuant to 20 U.S.C. §1415 (c) (2) (A), objecting to the sufficiency of the notice provided by the Parents in their Notice of Appeal requesting the current due process hearing and identified the alleged deficiencies. The Parents

provided a written response to the insufficiency objection. After a review of the Parent's Notice and the applicable statutes it was determined by the Hearing Officer that the Notice of Appeal met the requirements of 20 U.S.C. §1415 subsection (b) (7) (S) and was therefore sufficient on its face, and the PS objection as to sufficiency was overruled.

The Hearing Officer advised the Parents that the only issues that would be considered at the Due Process Hearing were those in the Notice of Appeal and that any additional issues included in their response letter would not be considered. The Hearing Officer further advised the Parents of their right to amend their Appeal Notice to include issues raised in their written response that had not been included in their January 31, 2008 Notice of Appeal to the insufficiency objection but they elected not to do so.

The parties engaged in a resolution session on February 15, 2008, however, the parties were not able to reach resolution following a discussion of the issues.

The Hearing Officer conducted a telephonic pre-hearing conference on February 25, 2008. Present at the pre-trial conference were:

Morgan Brooke-Devlin, Hearing Officer  
Ms. \_\_\_\_\_ : Parent  
Mr. \_\_\_\_\_ : \_\_\_\_\_ Public Schools  
Monitoring and Compliance  
Ms. \_\_\_\_\_ : Parent's Advocate  
Mr. Reginald Frazier, Esq.: assigned by DOE as reviewer.

A Pre-Hearing Report was issued on February 26, 2008. Both parties moved that the date of the hearing be changed from March 20<sup>th</sup> to March 25<sup>th</sup>, due to the March 20<sup>th</sup> date occurring during the PS Spring Break period when

most of the parties' witnesses would not be available. The motion was granted as it did not prevent the timely resolution of the case and it was in the best interest of the child that all witnesses be available to testify. The Report included a statement of the issues contained in the Parent's Appeal and Request for a Due Process hearing. The issues identified were:

1. Is [redacted] Elementary an appropriate placement for [redacted] ?
2. Has [redacted] been denied FAPE?
3. Was [redacted] provided with the 15 hours of weekly special education only hours pursuant to her IEP?

In addition to the identification of the issues to be determined, the place and time where the hearing would be held were agreed to and dates for the exchange of witness lists and exhibits were set. PS agreed to make its documents and employees available voluntarily and the Parents were ordered to provide a list on March 10, 2008, of the PS employees that they wished to have testify. The Parent's right to amend their Appeal and the timelines of the Due Process Hearing were discussed.

Following receipt by PS of the Parent's list of school employees the PS representative noted his objection to several of the witnesses on the basis that they did not "possess any knowledge of the child's special education eligibility, her special needs, the special education services being provided to her, or any related progress towards her goals." The Parent's Advocate was asked to provide a written proffer as to the anticipated testimony of the contested witnesses and the PS responded after review of the proffer.

A second issue raised by the Parent's Advocate in communication to the PS and the Hearing Officer was whether the child's school had retained 's DRA reading tests from the previous year and, if so, why they had not been provided to the Parents. This issue was later resolved when it was determined that the school does not retain DRA reading tests. DRA tests for the current year were provided.

A second telephonic pre-hearing conference was held on March 18, 2008. Following argument and discussion by the parties the Hearing Officer ruled that the Advocate's proffer of anticipated testimony asserted a sufficient nexus between the contested witnesses and the issues to be determined. The PS objection was overruled, with the following provisions:

1. The Advocate will provide a timeline to the PS by end of business on March 20, 2008, listing the order when each witness is to be called and the anticipated length of his or her testimony, and to the extent possible, the time when each party is expected to be called to testify.

2. The contested witnesses will be permitted to testify only in regard to the issues and information identified in the Proffer of Testimony.

During the second Pre-Hearing Conference the Hearing Officer questioned the PS regarding the fact that the school system was in the process of re-evaluating the child. The PS confirmed that this had been done and that the re-evaluation had been completed and had been provided to the Parents. The Hearing Officer suggested to the Parents that they review the re-evaluation and amend their Notice of Appeal to address any issues regarding the re-evaluation because the re-evaluation might resolve an issue or issues raised in

their Appeal. It was also noted that following an amendment additional time is added to the original Due Process Timeline.

The Parents rejected any suggestion that they consider amending their Notice of Appeal. The Parent's voiced their objection to the PS being permitted to introduce a re-evaluation that occurred after they filed their Notice of Appeal on January 31, 2008, or from being discussed or introduced as an exhibit at the hearing. A ruling on this motion was deferred until the hearing. The Parents having advised the Hearing Officer that they wished the Due Process hearing to be open to the public, it was noted that the hearing would be open to the public.

This matter came for a hearing on March 25, 2008, at the PS  
, Virginia. Present at the hearing were:

Morgan Brooke-Devlin, Esquire, Hearing Officer  
Ms. \_\_\_\_\_ and Mr. \_\_\_\_\_ : Parents  
Mr. \_\_\_\_\_ : \_\_\_\_\_ Public Schools  
Monitoring and Compliance  
Ms. \_\_\_\_\_, Monitoring and Compliance Specialist for  
Public Schools  
Ms. \_\_\_\_\_ : Parent's Advocate  
Mr. Reginald Frazier, Esq.: assigned by the Virginia Department of  
Education as reviewer.

#### ISSUES PRESENTED:

1. Is \_\_\_\_\_ Elementary an appropriate placement for \_\_\_\_\_ ?
2. Has \_\_\_\_\_ been denied Free and Appropriate Public Education (FAPE) ?
3. Was \_\_\_\_\_ provided with the 15 hours of weekly special education only hours pursuant to her IEP?

## FINDINGS OF FACT:

1. The Student, \_\_\_\_\_, is an 8 year old child who was born on March 12, \_\_\_\_\_. She attends \_\_\_\_\_ Elementary School in \_\_\_\_\_, Virginia.

2. At all times relevant hereto, the Student's Parents have resided in \_\_\_\_\_, Virginia, therefore the local educational agency ("the LEA") is responsible for educating \_\_\_\_\_, and providing her with a free, appropriate public education ("FAPE").

3. The Student first qualified to receive special education services on October 30, 2003, when it was determined that she was eligible on the basis of Other Health Impairment, due to her history of seizure disorder. ( \_\_\_\_\_ PS-3). The Student requires specific conditions and related services in order to derive educational benefit from her education.

4. \_\_\_\_\_ has a full scale I.Q. of 72-74. She is functioning within the borderline range of intelligence. ( \_\_\_\_\_ PS-15-B) (TR-230-232)

5. The Psychological evaluation performed by Children's Hospital on \_\_\_\_\_ on December 4, 2007, which included the Wechsler Intelligence Scale for Children IV, and the Wechsler Achievement Test, Second Edition (WIAT) demonstrated that \_\_\_\_\_ is functioning in terms of achievement commensurate with her cognitive ability. ( \_\_\_\_\_ PS-11&13 ) (TR-232-239)

6. \_\_\_\_\_ is benefiting from her education. She is working at her ability and above her ability in some regards. ( \_\_\_\_\_ PS-11) (TR-242-243)

7. The Student's first Individualized Education Program (IEP) meeting was conducted on October 14, 2005 and the Parent, Ms. \_\_\_\_\_ signed her agreement to the IEP on October 15, 2005. ( \_\_\_\_\_ PS-8)

8. The next IEP meetings were held on November 4, 2005, December 13, 2005, and October 25, 2006. The Parent signed her consent to all of these IEP.

9. On the "Parent Information Form" for the October 25, 2006, IEP, the Parent wrote on October 19, 2006:

"I believe that [redacted] is progressing. She may be doing it at her own pace, which may be a slower pace than your average first grader. However, she is making leaps with the help of her first grade teachers." ( [redacted] PS-17-A) (TR-298-301)

10. An IEP meeting was conducted on October 23, 2007. The Parent participated but did not sign the IEP, (however, nor did she object) therefore the 2006 IEP remains in effect. (P-5)

11. On September 5, 2007, [redacted] was left behind outside when her class left the playground and went inside to the classroom. The child's absence was noticed when the class entered the classroom. [redacted] was found in the playground in the area with other Students and teachers. [redacted] appeared disoriented and was taken to the school clinic where the clinic aide had her lie down and rest. The Parent was contacted by the clinic aide and came and picked up the child. (P-13-C, D, E, F, J, K, L, M and N)

12. [redacted] PS, the teachers and Principal of [redacted] Elementary School acted appropriately in responding to [redacted] being left behind in the playground. (P-13, C,D,E,F,J, K&M) (TR-147-151)

13. The safeguards put in place by the teachers and Principal of [redacted] Elementary School to prevent another incident where [redacted] is left behind or unsupervised, and the medical plan that was established on September 27, 2007, were appropriate and calculated to protect the well being of the child and provide her with a safe educational environment. (P-10, 13 -E-F) (TR-

14. On February 5, 2008 a Reevaluation Report was drafted that found that additional data was required to determine eligibility. The Parent agreed to have the child reevaluated. ( [redacted] PS-1 and 9)

15. 20 USC 1415 §(f)(2) requires each party, no less than 5 business days prior to a hearing, disclose to all other parties all evaluations completed by that date. The [redacted] PS disclosed all evaluations and other material regarding the school system's reevaluation of the child prior to 5 business days before the hearing.

16. 20 USC 1415 §(B) provides that “The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b) (7), unless the other party agrees otherwise. ”

17. The child received the following, or had the following considered, in accordance with the Reevaluation Report:

A Psychological Update performed by PS, March 8, 2008 (FCPS-10)  
Educational Testing PS, February 8, 2008, ( PS-11)  
Speech and Language Evaluation, March 2008, ( PS-11)  
Evaluation at the Children’s National Medical Center, December, 2007, ( PS-13)  
Cognitive Abilities Test, November 2007, ( PS-14)

18. The child demonstrated progress towards her educational goals during the 2006-2007 school year, and continues to show improvement. ( PS-23) (TR-304-317)

has progressed in three years from scoring in the low average range in speech and language skills to now scoring in the average range and no longer needs special education services in that area. ( PS-5 p. 12, (f), 14, 15 (f) ) (TR-272-283),

19. The October 25, 2006 IEP provided that receive 26.5 non categorical elementary (NCE) service hours per week and 15 special educational setting only hours per week

20. Special education only hours may appropriately be provided in a separate area of the general education classroom. (TR- 88-96) The child was provided with 15 special education hours only during all relevant periods pursuant to the requirements of the 2006 IEP. (TR- 323-331)

21. The Parents and the Advocate elected not to testify in their case. (TR. 12)

22. All witnesses were found to be credible and ’s teachers to be highly qualified.

23. There was no evidence or testimony introduced by the Parents that the child's civil rights were violated.

24. Procedural violations were alleged in the Parents' opening statement but no evidence or testimony introduced to support the Advocate's opening statement.

25. The placement of the Student at \_\_\_\_\_ Elementary School, pursuant to the 2006 IEP, no evidence having been presented to the contrary, is appropriate.

26. The 2007 proposed IEP was introduced without objection as an exhibit by both parties. There was no evidence or testimony presented by the Parents that the 2007 IEP was not appropriate. (TR. 37)

27. The Parents' allegations of procedural and substantive violations of the 2005 IEP are time barred.

28. The Parents' allegations of procedural and substantive violations of the 2006 IEP were not supported by any evidence or testimony.

29. The Parents' allegations of procedural and substantive violations of the proposed 2007 IEP were not supported by any evidence or testimony.

30. Under IDEA appropriate placement is defined as the program and services that are provided, not the location where they are provided.

**BURDEN OF PROOF:**

In Schaffer v. Weast, 126, U. S. Ct. 528, the United States Supreme Court ruled that under IDEA in an administrative hearing, the burden of proof properly rests upon the party who seeks relief. In the instant case the Parents bear the burden of sufficiency of the evidence in this case.

**APPLICABLE LAW:**

The purpose of the IDEA is "to ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes

special education and related services designed to meet their unique needs and prepare them for employment and independent living.” 20 U. S. C. § 1400 (d) (A). To achieve this purpose, the IDEA extends federal funding to the states to provide disabled school children with a “free and appropriate public education” (“FAPE”). *Id.* at § 1412 (a) (1) (A).

A FAPE is provided by school districts in public schools in the so-called “least restrictive environment,” or the educational environment suitable for the disabled Student that is most similar to the public school environment in which non-disabled children are educated. *Id.* at § 1412 (a) (5); *Sch. Bd. of Prince William County v. Malone*, 762 F. 2d 1210, 1213, (4<sup>th</sup> Cir. 1985).

The IDEA establishes detailed procedures for IEP development and review. If a dispute arises over the sufficiency of an IEP, the statute requires the Parents to notify the school district of their complaints, enter into mediation, and if that is not successful, allows the Parents to bring a due process action before an impartial state or local administrative hearing officer. 20 U.S.C. § 1415.

A FAPE consists of educational instruction specially designed to meet the unique needs of the handicapped child... supported by such services as are necessary to permit the child to benefit from the instruction.” *Rowley*, 458 U. S. at 188-89. “A FAPE is implemented through an IEP, which is designed by a team consisting of school district educators and administrators, education experts, and, of vital importance, the child’s Parents. IEPs must contain statements concerning a disabled child’s level of functioning, set forth measurable annual achievement goals, describe the services to be provided, and establish objective criteria for evaluating the child’s progress.” *M.M. ex rel. D.M. v. Sch. Dist. of Greenville County*, 303 F. 3<sup>d</sup> 523, 527 (4<sup>th</sup> Cir. 2002); see also 20 U.S. C. § 1414 (d) (1) (A).

The FAPE requirement is satisfied when a State provides the handicapped child with “personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction.” *Doyle v. Arlington*

County Sch. Bd., 953 F. 2d 100, 106 (4<sup>th</sup> Cir. 1991) (Citing Rowley, 458 U.S. at 203). To provide an “appropriate” education within the meaning of IDEA, the school district does not have to provide the child with the best possible education. M. M., 303 F. 3d at 526. Once FAPE is offered, the school district need not offer additional educational services. Id. That is, while a state must provide specialized instruction and related services sufficient to confer some educational benefit upon the handicapped child, the Act does not require the furnishing of every special service necessary to maximize each handicapped child’s potential. Id. at 526-27.

Setting the substantive standard, the Supreme Court has stated that an IEP is sufficient if it is “reasonably calculated to enable the child to receive educational benefits.” Rowley, 458 U.S. at 207. In making a determination of whether FAPE has been provided, deference must be provided to the educator’s decisions as long as an IEP provides the child “the basic floor of opportunity that access to special education and related services provides.” See Tice by and Through Tice v. Botetourt County Sch. Bd., 908 F. 2d 1200, 1207, (4<sup>th</sup> Cir. 1990) (quoting Rowley, 458 U.S. at 201).

20 U.S.C. § 1417, (2) Due Process Complaint Notice (A) Complaint, provides that the due process complaint shall be deemed to be sufficient unless the party receiving the notice notifies the hearing officer and the other party in writing that the receiving party believes the notice has not met the requirements of subsection (b) (7) (A), and (D), the hearing officer shall make a determination on the face of the notice of whether the notification meets the requirements of subsection (b) (7) (A), and shall immediately notify the parties in writing of such determination.

20 U.S.C. § 1417, (f) (1) (A), Impartial due process hearing, outlines the due process hearing procedure, including (2) (A) Disclosure of evaluations and recommendations. This section provides that “Not less than 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose

to all other parties all evaluations completed by that date, and recommendations based on the offering party's evaluations, that the party intends to use at the hearing.

20 U.S.C. § 1417 (3), Limitations on hearings, (B) Subject matter of hearing, provides: The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b) (7), unless the other party agrees otherwise.

#### **DISCUSSION AND CONCLUSION OF LAW:**

Evidence presented at the hearing overwhelmingly demonstrates that the LEA has provided the Student with FAPE, that she has been provided with the 15 hours of special education only time required by the 2006 IEP, and that

Elementary is an appropriate placement for the child.

The Parents failed to introduce any substantive evidence or testimony to support the issues raised by them in their Notice of Appeal. The Parents' failure to testify in their case resulted in the Hearing Officer relying upon the testimony of witnesses and the parties' exhibits to reach a decision in this matter.

The incident where the child was left behind on the playground, given her medical condition, justifiably caused the Parents a great deal of concern as evidenced by the communication between the Mother and the PS. (P-13) However, it appears from the testimony of her classroom teacher, Ms. , the Principal Ms. , and Ms. , as well as from the exhibits introduced (P-13), that the actions taken by the teacher when she realized that the child was still outside were totally appropriate. The remedial action taken by the school to prevent the child being left behind again, along with the medical plan put in place, demonstrates that this incident was an isolated event and does not constitute a pattern of neglect of the child or indifference to her well being and safety.

The Parents' assertion that the child was being denied FAPE arose primarily from their claim that the child's unique needs had not been considered in placement and that the child had never received the 15 hours per week of special education only hours required by the 2006 IEP. Although it was not at all clearly stated, it would appear that the basis for the parent's allegation that the child had never received the 15 special education only hours per week was their misunderstanding that these hours were to be provided outside the classroom, and that the special education hours provided to the child in the classroom did not count towards her 15 hours of special education.

Testimony from the classroom teacher, Ms. [redacted] and Ms. [redacted], the inclusive schools resource teacher, established [redacted]'s special needs were being considered, and that the special education only periods of time could occur appropriately in a separate area of the classroom, and that [redacted] had been provided the 15 special education only hours in a separate area of the classroom. It should be noted that IDEA requires that the child receive her special education and related services in an environment that is the least restrictive and most similar to the environment in which non-disabled children are educated. Thus, providing the 15 hours of special education only hours in a separate area of the classroom was the appropriate method of providing these services to the child.

"Actual educational progress is a factor to be considered in determining the appropriateness of an educational program under the IDEA and the objective factors such as actual educational progress are relevant in making the final determination of appropriateness under the IDEA," M. S. and Jacqueline Simchick v. Fairfax County School Board, et al., U.S. District Court for the Eastern District of Virginia, 1:05 ev 1476 (JCC), May 8, 2007.

[redacted] has been shown to have benefited greatly from the education she has been provided. She has gone from the low average range in speech and language skills to now scoring in the average range and no longer needing

special education services in that area. She has also demonstrated progress towards her educational goals in other areas.

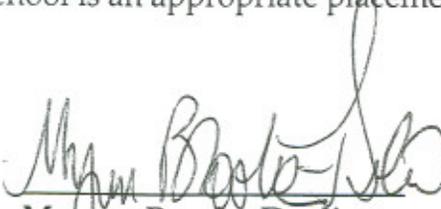
Based upon all of the evidence presented, applicable statutes, regulations, case law, and the arguments presented by the parties, the Hearing Officer makes the following conclusions of law:

1. \_\_\_\_\_ is handicapped, as Other Health Impaired, and comes within the purview of IDEA.
2. This Student requires specific conditions and related services in order to derive educational benefit from her education.
3. At all times relevant hereto, Student's Parents have resided in \_\_\_\_\_, Virginia, thus the local educational agency ("LEA"), is responsible for educating \_\_\_\_\_, and providing her with a free, appropriate education ("FAPE")

#### **PROVISION OF FAPE:**

After careful and complete review of the evidence presented, the testimony of witnesses and the exhibits introduced by the parties, it is the opinion and decision of the Hearing Officer that:

4. \_\_\_\_\_ has received, and continues to receive, 15 hours per week of special education only hours.
5. The child has been provided FAPE by the \_\_\_\_\_ Public School System.
6. \_\_\_\_\_ Elementary School is an appropriate placement for

  
Morgan Brooke-Devlin  
Hearing Officer

**DATE OF DECISION:**  
April 15, 2008

**IDENTIFICATION OF THE PREVAILING PARTY:**

Pursuant to 8 VAC 20-89 76 K.11., this Hearing Officer has the authority to determine the prevailing party on each issue as follows:

1. Is Elementary an appropriate placement for Talley?

The LEA prevails on this issue. The Student is being provided with FAPE in the least restrictive environment.

2. Has been denied FAPE?

The LEA prevails on this issue. The Student is benefiting from her education. She is working at her ability and above her ability in some regards.

3. Was provided with the 15 hours of weekly special education only hours pursuant to her IEP?

The LEA prevails on this issue. The Student has been provided with the required 15 hours of special education only hours in accordance with the current IEP.

**APPEAL INFORMATION:**

8 VAC 20-80-76 (O.1.) Right of Appeal states as follows:

1. This decision shall be final and binding unless either party appeals to a federal district court within 90 calendar days of the date of this decision, or in a state court within one year of the date of this decision.

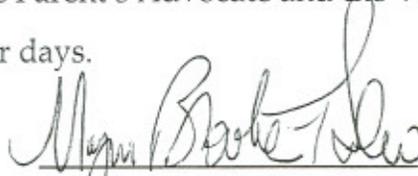
2. The appeal may be filed in either a state circuit court or a federal district court without regard to the amount in controversy.

3. If the Hearing Officer's decision is appealed in court, implementation of the Hearing Officer's order is held in abeyance except in those cases where the

Hearing Officer has agreed with the child's parent or Parents that a change of placement is appropriate in accordance with subsection E of this section. In those cases, the Hearing Officer's order must be implemented while the case is being appealed.

**IMPLEMENTATION PLAN:**

It is the LEA's responsibility to submit an implementation plan to the Parties, the Hearing Officer, the Parent's Advocate and the Virginia Department of Education within 45 calendar days.

  
**Morgan Brooke-Devlin**  
Hearing Officer

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing <sup>Corrected</sup> Decision was sent by e-mail and/or facsimile mail and by first class mail, postage pre-paid this 16<sup>th</sup> day of April, 2008 to: <sub>20</sub>

Ms. \_\_\_\_\_ & Mr. \_\_\_\_\_

\_\_\_\_\_, VA

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\_\_\_\_\_, VA

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Morgan Brooke-Devlin