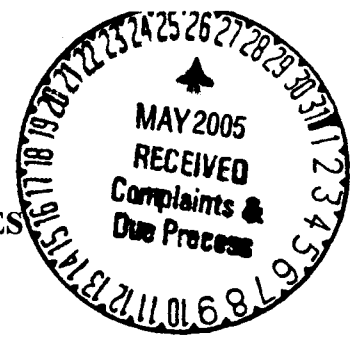


VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF INSTRUCTIONAL SUPPORT SERVICES
OFFICE OF DUE PROCESS AND COMPLAINTS



FINAL HEARING REPORT AND DECISION

("This is a copy with clerical error corrections not contained in original Hearing Report and Decision filed in this cause.")

School Division

Name of Parents

Superintendent of Schools

Name of Child

KATHLEEN MEHFOUD, ESQ.
Representing LEA

SUE ELLA E. KOBAK, ESQ.
Representing Parents/Child

LORIN A. COSTANZO
Due Process Hearing Officer

PARENTS BY COUNSEL
Parties Initiating Hearing

I. PRELIMINARY MATTERS:

A. ISSUES AND PURPOSE OF HEARING:

By letter dated October 21, 2004 and received by the School this same date, Ms. Kobak requested a due process hearing on behalf of _____ Subsequently written clarification of issues for determination was requested and received by the hearing officer.

The issues for determination at due process hearing are:

WAS THE IDENTIFICATION OF _____ "ADEQUATE"?

- A. WAS THERE A FAILURE TO IDENTIFY _____ AS AUTISTIC AS WELL AS "OTHER HEALTH IMPAIRED WITH SPEECH AND LANGUAGE DEVELOPMENTAL DELAY"?**
- B. WERE THE AUGUST 2003, MAY 2004, AUGUST 2004 IEPS AND BEHAVIOR PLANS APPROPRIATE?**

The hearing officer requested clarification of Issues in writing. The below issues were identified but were *withdrawn* prior to the due process hearing:

- 1. Was _____ denied an Independent Educational Evaluation ("IEE")? Was the IEE requested and was it required?
- 2. Was _____ provided a tri-annual ("triennial") evaluation in a timely manner?

B. TIMELINE:

October 21 Letter of this date requesting a due process hearing received by Public Schools.
October 26 Hearing Officer appointed.
October 27 Initial contact with counsel/party; Pre-hearing set for 11/3/04 and due process hearing set for 11/29/04.
November 01 Ms. Mehfoud retained by LEA and moves for continuance of pre-hearing conference which was granted.
November 03 Pre-Hearing Conference initially set this date but not held (continued to 11/9/04).
November 09 Pre-Hearing Conference continue to this date but not held. Ms. Kobak's motion for continuance granted and pre-hearing continued to November 12, 2004 on Ms. Kobak's motion.
November 12 First Pre-Hearing Conference held at 9:00 A.M. via telephone conference. A second pre-hearing conference was set for 4:00 P.M. on 12/2/04. The due process hearing is continued to 21 December 2004 and issues are required to be clarified and submitted by 11/15/04. Mediation/settlement discussed.
November 15 Issues to be clarified in writing and faxed by 5:00 P.M. this date.
December 02 Second Pre-Hearing Conference held at 4:00 P.M. this date.
December 05 Initial setting for Due Process Hearing. Due Process Hearing not held (continued to 12/21/04).
December 19 Pre-Hearing conference (via telephone) set and held to discuss weather/travel conditions.
December 21 Due Process Hearing held. A second day of hearing not required
January 05 Anticipated due date for transcript (allowing 10 business days for tender of transcript).
January 07 Written Closing Arguments/Briefs due date.
January 12 Final decision due date (allowing 5 business days for drafting of decision after receipt of transcript).

C. HEARING DATE:

The due process hearing in this cause was held on December 21, 2004 beginning at 9:00 A.M. at the School Board Conference Room, VA. By agreement, the parties and hearing officer met at 8:00 A.M. on 12/21/04 to discuss preliminary matters prior to the start of the due process hearing.

D. ONE EXTENSION OF FINAL DECISION DUE DATE:

One extension of the final decision due date was granted. At pre-hearing conference both counsel moved to extend the Final Decision Due Date in this cause. It was presented that:

- a. The parties requested opportunity to secure educational evaluations and/or testing;
- b. The parties expressed willingness to further discuss resolution and mediation; and
- c. Evaluations and/or testings are desired to provide a full and fair hearing on issues.

It is in the child's best interest that there be a full and fair hearing on all issues, that the parties have reasonable opportunity to secure evaluations/testings for presentation at the hearing in this cause, and that the parties have opportunity to resolve matters in controversy between themselves. Extension of the final decision due date was granted on the joint motion of the parties, it being found in the child's best interest for the reasons stated above. The final decision due date was extended from the initial due date of December 5, 2004 to January 12, 2005.

II. DUE PROCESS HEARING:

A. MISCELLANEOUS MATTERS:

1. The hearing was "closed" at the parents' request.
2. All exhibits were admitted "*en masse*" by the agreement of counsel for each party.
3. Both parties agree to telephone testimony by Dr. _____.
4. Both counsel agreed to written closing arguments to be submitted by Jan. 7, 2005

B. STIPULATIONS BY THE PARTIES:

The parties agreed and stipulated that the:

1. Requirements of notice to the parents were satisfied;
2. Child has a disability; and
3. Child needs special education and related services.

C. OBJECTION TO WITNESS:

Ms. Kobak indicated she desired to call _____, grandfather of _____, as a witness in the due process hearing. _____ was not listed her "List of Witnesses" which was required to be timely exchanged. Ms. Mehfoud objected to _____ being called as he was not listed on the "List of Witnesses" provided by Ms. Kobak.

The objection of Ms. Mehfoud to receiving testimony from a witness not listed on the previously exchanged "List of Witnesses" was **sustained** by the hearing officer as his name was not listed on the "List of Witnesses" required to be timely exchanged and furnished the hearing officer. _____ was not allowed to testify.

Ms. Kobak noted her objection to the hearing officer's determination in this matter.

D. WITNESSES:

Witnesses called by the Parents:

Witnesses called by the School:

E. EXHIBITS:

Parents' Exhibits.... Parents' Exhibits are grouped within main exhibit numbers 1 through 10 and with individual sub-exhibits (listed below) alphabetically designated within each numbered exhibit. Parents' Exhibits are assembled and contained in one binder.

Main Exhibit No.

Exhibits within Main No.

| | |
|--|-----------|
| 1. PROCEDURAL HISTORY | 1A - 1C |
| 2. MEDICAL RECORDS | 2A - 2L |
| 3. RECORDS FROM WISE CO. FAPT | 3A - 3E |
| 4. PARENT CONFERENCE NOTES | 4A - 4D |
| 5. CRIMINAL MATTERS | 5A - 5H |
| 6. INDIVIDUALIZED EDUCATION PROGRAMS | 6A - 6Y |
| 7. ELIGIBILITY HISTORY | 7A - 7G |
| 8. EVALUATIONS BY SCHOOL SYSTEM | 8A - 8K |
| 9. VA SP. ED. PROCEDURAL SAFEGUARDS REQUIREMENTS | 9A |
| 10. DISCIPLINE RECORDS | 10A - 10C |

School Exhibits.... School Exhibits are numbered 1 through 65. School's Exhibits are assembled and contained in one binder.

F. DESIGNATION OF TRANSCRIPT AND EXHIBITS:

1. The transcript of the due process hearing consists of one volume, is referred to as "Tr. ___" with the page number inserted at the "___".

2. The **Parents' Exhibits** are designated as "P. Ex. ___" (with the page number inserted at "___") or as "P. Ex. ___ pg. ___" (with the exhibit number inserted at the first "___" and the page number indicated at the second "___").

3. The **School's Exhibits** are designated as "SB Ex. ___" (with the exhibit number inserted at "___").

G. FINDINGS OF FACT:

01. _____ (hereafter referred to as "____") was born on March 18, 1995. _____ lives with his mother, _____, stepfather, and six siblings and _____ is in the 4th grade at _____ Elementary School. (P. Ex. 2C) _____'s mother is a high school graduate with some college. (Tr. 46)

02. _____ falls within the moderately mentally disabled range of intellectual ability. His cognitive skills are all globally weak. _____'s achievement scores in all tested areas are significantly weak and fall well-below grade expectancy but are commensurate with his ability level. Visual- motor scores are significantly delayed and not age appropriate. P. Ex. 7B, 7C)

03. On January 22, 1999, the Public Schools Eligibility Committee found [redacted] eligible for special education and/or related services as "D.D." (ie. Developmental Delayed). Mrs. [redacted] signed indicated her support of the findings and recommendations. (P. Ex. 2D pg. 26)

04. On Nov. 14, 2000, the Eligibility Committee found [redacted] is eligible for special education and/or related services with the disabling condition of "OHI" (Other Health Impaired). [redacted] was found in the non autistic range. Mrs. [redacted] signed the Eligibility Committee Conclusions and Recommendations and checked the column indicating "Support" and left blank the column indicating "Oppose". (SB 15)

05. Eligibility Meeting was held on 4/15/02 and [redacted] was found Eligible for Special Education and/or related services with disabling conditions of Other Health Impaired Speech & Language Impaired. Mrs. [redacted] was present, participated and signed indicating her consent. She did signed on the signature line above the statement reading, "Signing above certifies that this summary reflects your conclusions. If you disagree with these conclusions, please sign below." There is no signature "below".

Additionally, Mrs. [redacted] initials were written on the line at section "IV" of the Eligibility Committee Summary, set forth below.

" As the parent or student (after age 18) you should receive a copy of the eligibility summary, *Parental Rights in Special Education* and copies of the reports used in this determination. As the parent or student, you may also have other rights including due process as outlined in the *Parental Rights and Procedural Safeguards* if you disagree with these conclusions. Initials of person verifying receipt: _____" (P Ex. 7G; SB 25)

06. On Nov. 23, 2004 an Eligibility Meeting was attended and the minutes signed by Mrs. [redacted] was determined eligible for special education services with educational disability identified as "MR, SLI" (Mental Retardation Speech & Language Impaired). Mrs. [redacted] signed under "IV. Members present, their signatures and conclusions" on 11/23/04 and did not check the box entitled "Dissenting Opinion" next to her signature and date line.

Mrs. [redacted] had requested a change of [redacted]'s disability to Autism and the labels of MR., OHI, and SLI. [redacted] was found eligible as MR and SLI and the label of Autism and OHI were refused. The school indicated, "observations and ratings specific to autism do not support a diagnosis of autism." (P. Ex. 7A, 7B, 7C)

07. [redacted] was charged in the [redacted] Juvenile and Domestic Relations District Court with:

- a. Destruction of private property belonging to [redacted] School occurring on or about 4/25/04. (P. Ex. 5E)
- b. Assaulting [redacted] Principal at [redacted] School, occurring on or about 5/11/04. (P. Ex. 5F) and [redacted]
- c. Unlawfully conducting himself in a disorderly manner at [redacted] School, occurring on or about 5/11/04. (P Ex. 5G)

08. The Juvenile & Domestic Relations District Court referred for evaluation and Dr. , Psy.D. conducted an evaluation relating to 's competency to stand trial on September 24, 2004. (P. Ex. 2C pg. 5) In September of 2004 Dr. saw to determine 's competency to stand trial. was given a diagnosis of "an unspecified autistic disorder" (atypical autistic disorder), mental retardation (IQ of 50), (Tr.11) Dr. has never observed in an educational program, has not observed interacting with his peers, and has not talked with any personnel within Public Schools. (Tr. 20)

09. An IEP addendum of 6/2/03 was made which provides for summer school for to maintain the progress he has made during the school year. He was to have the support of a teaching assistant in regular summer school setting and "new behavior plan will apply". Ms. signed under the statement that she understood what is being proposed and signed a second time indicating she gave consent and she received a copy of the *Parental Rights and Procedural Safeguards* pertaining to Special Education. (SB 34)

10. An IEP Meeting was held 6/2/03 which noted has made progress this year but he still needs maximum support. Implementation date for the IEP was August 11, 2003 and provided special education services in special education setting on a regularly scheduled basis. Behavioral needs and a Behavior Support Plan were developed. This IEP was signed by Mrs. on 6/2/04 as a participant and as giving consent to the IEP and receiving a copy of the Safeguards. (see P. Ex. 6J)

A Behavior Support Plan, addendum to IEP, (with an implementation date of August 11, 2003) provided, among other things that: will be reminded of his schedule and classroom rules; given choices whenever possible; if disruptive, staff will attempt to redirect his behavior, if unable to redirect he will be removed from classroom and allowed to calm down and he may lose privileges. The crisis plan section provides for to be sent home for remainder of day if he does not calm himself in a reasonable time and if his behavior becomes a threat to himself or others. Review was established if he is sent home more than twice in a six week period.

Mrs. signed as a Participant in the IEP meeting and signed a second time indicating she understood what was proposed, gave consent, and that she received a copy of the VA Special Education Procedural Safeguards Requirements under IDEA. (P. Ex. 6J; SB 35)

11. An IEP Addendum Meeting was held on 10/9/03 which reviewed and updated the behavior plan and
- Added a bus monitor provision.
 - Added "or a safety issue" to the provision in crisis plan which refers being sent home if his behavior becomes a threat to or others added *or a safety issue. and*
 - Added "If sent home for remainder of school day, will be given OSS determined by school administration; six days OSS,=beh. plan review. School administration has option to file charges according to s extreme behavior." (SB 36; Tr. 87)

The review was conducted due to the clause "if sent home more than 2 times in 6 week period this plan will be reviewed." was sent home two times.

Ms. signed as participant and signed a second time indicating consent and receipt of *VA Special Educational Procedural Safeguard Requirements under IDEA*. (SB 36)

12. An IEP Addendum Meeting was held on 5/19/04; there was a review of the IEP which "remained appropriate for the remainder of the year". It was also provided that "Behavior Plan will be reviewed at IEP meeting for the 2004-2005 school year."

At this addendum meeting a date and time of 8/11/04 at 1:00 P.M. was designated in writing for an IEP meeting to develop the 2004-2005 IEP. The 5/19/04 Addendum stated, "IEP for 2004-2005 school year will be scheduled for 8-11-04 at 1:00" and this was written on the same page with parent's two signatures.

On 5/19/04 Ms. signed the addendum at two locations, once as a participant in the IEP Meeting and a second time as giving Parental Consent and receiving a copy of the *VA Special Educational Procedural Safeguard Requirements under IDEA*. (SB. Ex. 39)

13. The IEP meeting of 8/11/04 was held without a parent attending the meeting. Notice of the hearing time and date were provided in the IEP Meeting and in the IEP Addendum of 5/19/04. There was no response to the notification letter nor to an attempted phone call (number disconnected). (SB 40)

The Behavior Support Plan from 10/9/03 (see SB 36) was essentially continued with the IEP of 8/11/04 excepting a note that a bus monitor is no longer needed at this time (ie 8/11/04).

14. On October 14, 1998 Dr. saw and did an "Intake summary" and concluded that "shows signs consistent with a moderately involved autistic disorder". (P. Ex. 2K pg. 45)

15. On October 14, 1998 was seen by Dr. for an Intake Interview. was approximately 3.5 years old. At that time, one of Dr. 's recommendations was that undergo a full psychological evaluation. A psychological evaluation was scheduled for 2/25/99 but was rescheduled to 5/25/99 due to hospitalization of another child in the family and mother not being able to come. That 5/25/99 appointment was canceled by 's mother and not rescheduled. (SB 41)

16. On January 18, 1999 was referred to for psychological evaluation; evaluated and indicated that, Autism was "Contraindicated". A CARS rating completed by 's Head Start Instructor yielded a total score of 19. It was noted also that, "This is consistent with those impressions derived from Dr. 's office in contraindicating a diagnosis of Autism." (P. Ex. 2K pg. 42)

17. The report of Psychological Evaluation (date of evaluation 02-20-02) by _____, Nationally Certified School Psychologist, indicated that, "As with multiple ratings from 10/00 and 1/99, the remainder classify him as non-autistic." (SB 24)

18. On 11/19/04 _____, Ed.S. reported the autism rating scale showed _____ to fall within the non-autistic range but the scale dealing specifically with Asperger Syndrome showed a **possible probability** of that diagnosis (emphasis added). _____ was referred to her for a reevaluation; the School requested help clarifying his current level of functioning and educational needs and his parents requested reevaluation over concerns of OHI/SLI. (P. Ex. 8B) P Ex. 8A pg. 9)

19. Ms. _____ met with Mrs. _____ on a number of occasions to discuss parental rights, procedures, guidelines, and procedural safeguards. She explained and discussed these with Mrs. _____ Mrs. _____ was provided copies Virginia Special Education Procedural Safeguard Requirements Under the Individuals with Disability Education Act. (Tr. 113-118)

DISCUSSION AND CONCLUSIONS OF LAW:

A. Autism and Other Health Impaired with Speech and Language Developmental Delay

_____’s mother, Mrs. _____ contends that _____ should be labeled as "Autistic" and "Other Health Impaired" with "Speech and Language Development Delay".

The November 23, 2004 Eligibility meeting determined _____ was eligible for special education services with his educational disability identified as Mental Retardation ("MR") Speech & Language Impaired ("SLI"). Mrs. _____ attended and had requested change of _____’s disability to Autism and to consider labels of MR, OHI (Other Health Impaired), and SLI. _____ was found eligible as MR, SLI and the label of Autism and OHI were refused. The school indicated, "observations and ratings specific to autism do not support a diagnosis of autism." The committee viewed the current evaluations completed by _____ School Personnel, _____’s Educational file, the recent evaluation of Dr. _____ and information from the parent.

It was further noted that, "The parent was present at the eligibility meeting and agreed that _____ did not exhibit in all settings behavior consistent with autism. The eligibility committee indicated that "current assessments, which include teacher ratings specific to autism, along with observations of _____ at school, noted that he does not exhibit all behaviors necessary to fulfill a diagnosis of autism per state and local guidelines" (P Ex. 7A, 7B, 7C).

Mrs. _____ signed the IEP and did not check the box beside her signature and date line marked "Dissenting Opinion". At the meeting the parent did not have any questions or express concerns about the evaluations and did

not indicate that she disagreed with any of the evaluations or the determination of MR/SLI as the disability label. (P. Ex. 7B)

was found eligible under the dual labels of Mental Retardation/Speech Language Impaired.

His cognitive abilities lies within the range of moderate mental retardation. The Eligibility committee noted that:

“ is not observed by school personnel to exhibit any self-stimulatory behaviors, preoccupations, or nonfunctional rituals which are necessary criteria to satisfy a diagnosis of autism. His mother reported in the eligibility meeting that acts differently at home than he does at school or when he is with his stepfather or grandparents. Behaviors associated with autism would not change across settings, as those behaviors are not able to be controlled. 's primary disability at this time is his low cognitive functioning which tests in moderately mental retardation range. He furthermore does not have the high functioning ability or other criteria for the diagnosis of Asperger's Syndrome for the reasons stated above.” P. Ex. 7C pg. 10)

Dr. , Clinical Psychologist licensed in Tennessee, (Doctor of Psychology Degree and specialty in neuro psych) saw on two occasions (October 14, 1998 and September of 2004) once (in 1998) for an intake interview and a second time (in 2004) for issues involved in competency to stand trial.

On October 14, 1998 saw Dr. for an Intake Interview. was approximately 3.5 years old at that time. At that time one of Dr. 's recommendations was that undergo a full psychological evaluation which was scheduled for 2/25/99 but had to be rescheduled to 5/25/99 due to hospitalization of another child in the family and 's mother not being able to come. That 5/25/99 re-scheduled appointment was canceled by 's mother and not rescheduled. (SB 41)

In October 1998 Dr. diagnosed with “Autistic Disorder” and noted he suspected “mental retardation”. Dr. did not do an evaluation in October of 1998 nor administer any evaluations to determine whether had Autism he did not administer any assessments or any measures that would identify any particular disability. (Tr. 16)

Dr. based his diagnosis of autism to a large extent upon reports from the parent and service worker with her. (Tr.15) The service worker was from Appalachian Regional Community Head Start and not a therapist or psychologist, nor a professional in any area Dr. was aware. (Tr. 15) And, as above discussed, Dr. , set up an appointment for a full psychological evaluation, but the appointment was rescheduled then canceled and not attended..

In September of 2004 Dr. saw to determine 's competency to stand trial in relation to matters pending in the court system. was given a diagnosis of “an unspecified autistic disorder” (atypical autistic disorder), mental retardation (IQ of 50), and while it was determined he was too young to be diagnosed as “bipolar disorder” concerns were raised about this by Dr. . (Tr.11)

Dr. testified that he was trying to determine competency and not do an in depth assessment of 's behaviors (Tr. 20) He additionally indicated he has never observed in an educational program, has not observed interacting with his peers, and has not talked with any personnel within Public Schools. (Tr. 20)

On November 18, 2004 Ed.S evaluated (P Ex. 8A) was referred for a "re-evaluation by the school administration to help clarify his current level of functioning and educational needs. His parents also requested this re-evaluation over concerns of his current education labels of Other health Impaired and Speech Language Impaired (OHI/ SLD) (P. Ex. 8A)

Ms. (Licensed and Certified School Psychologist) has been employed at Public Schools since 1997 (she did her internship with Public Schools in 1997 and was employed in 1998 as a permanent certified school psychologist). (SB 57; Tr. 123)

She observed in the classroom, has viewed 's educational records, has viewed Dr. 's reports from 1998 and 2004, and has evaluated She has observed in his classroom about ten times in the 2003-2004 school year and has observed him in his classroom twice in the 2004-2005 school year prior to 10/21/04. (Tr. 123-125)

Ms. found to fall within the moderately middle disabled range of intelligence. He was described as significantly underachieving but with under achievement scores in line with his ability level.

's teachers, and completed several rating scales for Ms. including an adaptive rating scale and the completed the autism rating scale. Ms. testified that fell in the "not autistic range". She indicated that did not test as a child with autism and did not qualify as having Asperger's. (Tr. 126)

When Ms. saw him in the classroom, was described as very social, not fearful of strangers, he would always want to give her a hug and did not mind her being in his personal space. He seemed to relate fairly well with children and the teacher. Ms. did not see a huge language delay noting he was very verbal and would answer questions. She, in her own observations of in the classroom, did not see any of the self-stemming type behaviors, the rocking, ritualistic kind of behaviors. (Tr. 129-130)

Ms. felt that the testings she administered in November 2004 confirmed her earlier observations in the classroom of with regard to a lack of autism. (Tr. 130)

Ms. has evaluated children with autism since 1997 and indicated she has evaluated 11 children with autism. For the period prior to October 21, 2004 Ms. didn't see the significant delay in social skills areas and noted that did not have difficulty transitioning from one activity to another or one teacher to another. He

did not show any of the self-stemming type movements. On her own observations, Ms. does not believe there is reason to change her opinion. (Tr. 133).

Ms. and Ms. 's special education teachers, completed a childhood autism rating scale and fell in the not autistic range. (Tr. 127)

Also, did not qualify as having Asperger Syndrome on the Asperger Syndrome diagnostic scale. (Tr. 128) had several behaviors that showed up on the scale but those behaviors were described as very common in children with mental disabilities, mentally retarded. (Tr. 128)

The autism rating scale showed to fall within the non-autistic range but the scale dealing specifically with Asperger Syndrome showed a possible probability of that diagnosis. (P Ex. 8A pg. 9)

A psychological evaluation was done 2/20/02 (see Psychological Evaluation, report date: 3-14-02) by Mr. noted that "Testings done in February 2002 did not indicate autism.". CARS rating by 's regular classroom teacher, individual aide, and CAPS counselor yielded raw scores of 32,23, and 28. the higher score falls within the lowest bounds of mildly autistic. As with multiple ratings from 10/00 and 1/99, the remainder classify him as non-autistic. (SB 24)

, special education teacher at Elementary (endorsed in LD ED, MR., and K-12), has worked for 3 years with Public Schools teaching LD and MR students and before that worked approximately 5 years with adults that had mental and physical disabilities. Ms. has had experience working with children with autism before this school year and has students identified as having autism.

M- is 's Teacher and has worked with in the 2003-2004 school year and in the current school year. She works with about 4 hours and 20 minutes a school day and has significant contact with. (Tr. 70-72)

Ms. does not believe has autism; she has not seen repetitive behaviors or stemming, the flapping, verbal communication difficulties. Ms notes that is not withdrawn from other students and wants affection and doesn't want to be withdrawn. (Tr. 98)

has been found eligible for special education and related services and identified with mental retardation and speech language impairment (SB 53) having been earlier determined to be eligible under OHI and SLI.

Post Meeting Written Notice provided to Mrs. concerning the 11/23/04 eligibility meeting confirmed she requested a change in 's disability label to Autism, and MR, OHI, and SLI and indicated that it was refused.

The eligibility teams met, had evaluations in support, and determined the labels. The eligibility meetings reviewed matters and did reject the label of autism noting the team reviewed assessments, observations made, and teacher rating scales. Specifically the eligibility team indicated and it was documented

- a. That does not exhibit in all settings behavior consistent with autism;
- b. That Observations and ratings specific to autism do not support a diagnosis of autism;
- c. That current assessments, which included teacher ratings specific to autism, along with observations of at school, noted that he does not exhibit the behaviors necessary for autism pursuant to state guidelines and local guidelines; and
- d. The parent did not have any questions or concerns about the evaluations and did not indicate that she disagreed with any of the evaluations or the determination of MR/SLI as the disability label.

The Hearing Officer is to give proper deference to the judgment of the educational professionals regarding a child's eligibility for special education and related services *School Board of the City of Norfolk v. Harrison*, Civ Case No. 2:03 cv 556 E.D. Va Sept 8, 2004. The educational experts, who know the student well, are entitled to deference. *MM v. Greenville Co. School District*, 303 F. 3d 523 (4th Cir. 2002) The hearing officer's role is not to substitute his/her personal notion of educational policy for those of the school authorities (*A.B. v. Lawson*, 354 F. 3d, 315 (4th Cir. 2004).

The testimony of Dr. was given consideration. Concern is expressed over his not having been able to observe in his educational setting, the limited contact, his not observing interactions with peers, and not having contacted school staff that was interacting with.

B. Were the August 2003, May 2004, August, 2004 IEP's and Behavior Plans appropriate?

has exhibited behavioral problems at school including physical aggression directed towards both his peers and towards the staff and these were referenced in IEP meetings and led to implementation of behavioral support plans. The IEP of May 2001 Positive Behavior Support Plan was adopted and consented to by Mrs. 6/12/01 as evidenced by her signature. (SB 19-20)

The IEP of 12/10/01 noted 's behavior has improved and his behavior support plan has been reviewed. His time in the regular classroom has been increased and a new plan developed. (see attached)" and a Behavior Support Plan implemented 11-8-01. Mrs. signed indicating her agreement on 12/10/01. (SB 21)

In the "Sociocultural Component Statement" of 2/2/02 Mrs. is quoted as stating to the interviewer that has made a lot of wonderful progress from last year until now and that "she thinks he gets along well with his teachers and likes school." (SB 21)

At the IEP meeting on 8/11/04 no parent attended; the meeting proceeded forward. The 5/19/04 IEP addendum meeting set the next IEP meeting to be held on 8/11/04 at 1:00 and written into the papers signed by the parent was this setting. Another notice was sent on 7/28/04 to parents and a call made to parent but the number was disconnected. (see SB 40)

, Principal at , (certified Pre-K through 12 in administration and supervision, early education in K-4 and middle grades 4-8) has about 26 years experience in education. Ms. indicated she has had contact with since he came to School at the beginning of the second grade (he is now in the fourth grade). She sees off and on during most every school day and participated in the development of his behavior intervention plans and IEPs (Tr. 51-52) and is aware of 's mental retardation diagnosis and level of intellectual function (Tr. 61)

In 2003-2004 has kicked, banged, walked around the class, thrown things off into the floor, picked tables up, gone into other classrooms, and yelled at the teacher and his aide. was noted to have been singing songs in the class room as "B-i-t-c-h" to refer to his teachers. (Tr. 52) Ms. would try to re-direct , if that didn't work then Mr. or Ms. would take out of the classroom, walk him around and try to calm him. If this didn't work they would try to contact 's parents. (Tr. 52-52)

Ms. testified that 's behavior support plans (implemented 8/11/03; amended 10/9/03 and 8/11/04) are appropriate and in fact described them as "very appropriate". (Tr. 55) She considers the IEP's developed for , in August 03, the addendum in June 04, and August 04 to be appropriate for (Tr. 58).

Ms. indicates that has done a turnaround this school year in his behaviors and that he has been "remarkably better" this school year than last school year (2003-2004)

, special education teacher at (endorsed in LD ED, MR., and K-12) has worked for 3 years with Public Schools teaching LD and MR students and before that worked approximately 5 years with adults that had mental and physical disabilities. Ms. has had experience working with children with autism before this school year and has students identified as having autism.

Ms. is 's Teacher and has worked with him in the 2003-2004 and the current school year. She works with approximately 4 hours and 20 minutes a school day. (Tr. 70-72) is never with more than 3 other students in her class and has a one-on-one aide. She has a teaching assistant in the afternoon and one other student in her class has a 1-1 aide also. (Tr. 74)

Ms. describes as making progress with his academics and making progress with behavior. (Tr. 76) Last year there were more behavior problems but he still was making progress with his curriculum. During the

2003-2004 school year progress was noted with [redacted]'s goals and objectives. (SB. Ex. 35) [redacted] was making progress (Tr. 80) and she was pleased with his academic progress.

Ms. [redacted] observed that [redacted] did have several behavior issues (see SB 35) however there were several times [redacted] was able to redirect his behavior and she did not have to get assistance or ask someone to send him home. [redacted], at times, would tell Ms. [redacted] he needed a break, needed to calm down, and would go to his cubby and lay down. It was indicated as progress for [redacted] to be able to redirect behavior. (Tr. 82)

Ms. [redacted] felt the Behavior Intervention Plan appeared to work for [redacted] and was appropriate for his needs and the IEP was very appropriate for [redacted] is described as needing a lot of one-on-one assistance, his educational tasks broken down, frequent breaks, and a lot of one-to-one addressing academic needs and life skills. His IEP allowed for work with those areas. (Tr. 84)

Services in [redacted]'s 2004-2005 school year are identical to services in the 2003-2004 school year. Ms. [redacted] was present for the October 9, 2003 IEP addendum meeting (SB. Ex. 36). Ms. [redacted] was present and signed giving permission to implement the change; she did not voice any objection with [redacted]'s IEP. Ms. [redacted] was told she could either consent or not consent. She was asked and said she consented. She signed indicating consent. (Tr. 85, 86)

In the May 19, 2004 IEP meeting (SB. Ex. 39) Ms. [redacted] was present and Mrs. [redacted] was present. Extended school year was added for [redacted] Ms. [redacted] explained that Ms. [redacted] could either agree or disagree. Consent was indicated by parent's signature.

Mrs. [redacted] did not attend the 8/11/2004 IEP meeting. (SB Ex. 40) At the earlier IEP meeting of May 19, 2004 the date and time of this (ie. the 8/11/04) meeting was decided upon and it was written up within the Addendum (... "IEP for 2004-2005 school year will be scheduled for 8/11/04 at 1: 00 ") (see SB Exhibit 39). Mrs. [redacted] signed the page this was written on and was given a copy of the Addendum at the 5/19/04 meeting. Notice was additionally mailed on 7/28/2004 and telephone contact attempted (but not accomplished) to notify parent of the meeting.

Ms. [redacted] indicates her belief that the IEP dated 8/11/2004 (SB Ex. 40) is appropriate for [redacted]'s educational needs and [redacted] is making progress with his IEP. She notes that for the first time he is actually learning to read CBC words, he is putting blends together (Tr. 93) and the IEP meets [redacted]'s areas of educational needs and addresses the areas of his behavioral needs.

The behavior intervention plan was not changed from what had been implemented at the end of the 2003-2004 school year and remained to be appropriate and appeared to be working. (Tr. 95) Ms. [redacted] noted

has been sent home only one day, and that was at the end of the day. His behavior has been less aggressive and less oppositional than it was last year. appears to understand the strategies used.

From the time school began in 2004-2005 school year until the request for due process Ms did not voice any objection to Ms. regarding the behavior intervention plan; did not voice any disagreement regarding eligibility.

Ms. does not indicate she believes qualifies as having autism and that is appropriately designated MR with speech and language impairment. Services do not depend on the label but are based on the student's need, level of performance, and abilities. (Tr. 98-99)

Local educators are not deprived of their primary role in developing an IEP. IDEA does not deprive educators of the right to apply their professional judgment. *Hartmann v. Loudoun County Bd. of Educ.*, 118 F. 3d 996, 1001 (4th Cir. 1997) Deference is to be given. In this cause the hearing officer takes note of the training, expertise, and involvement with

C. Appropriate:

Under the IDEA, an appropriate education 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. *White et al. v. School Board of Henrico County*, 549 S.E.2d 16, 36 Va. App. 137 (2001)

Board of Education of the Hendrick Hudson Central School District et al v. Rowley, 458 U.S. 176, 206-207 (1982) provides a two prong test to determine the appropriateness of the education being provided the child. First, whether the school system has complied with the procedural requirements of the IDEA; and Second, whether the child's IEP is reasonably calculated to confer some educational benefit on the disabled child.

In that regard, the Supreme Court has defined a FAPE as providing disabled children with a "basic floor of educational opportunity, ...(which) consists of access to specialized instructions and related services which are individually designed to provide educational benefit to the handicapped child. "*Rowley*, 458 U.S. at 200-01, 102 S.Ct. 3034. The IDEA does not require a school district to provide a child with the best possible education. See *MM. v. School District of Greenville County*, 303 F.3d 523, 526 (4th Cir.2002) (citing *Rowley*)

A school district can satisfy its obligation to provide a disabled child with a FAPE by providing "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 203.

It is the School's responsibility to implement the Individualized Educational Program including any related services provided for therein. These related services are intended to support the provision of special educational services and are provided when such services are necessary for the student to benefit from special education.

Mrs. _____ expressed that she did not know her rights, wasn't made aware of her rights, and did not know that she could object when she signed the documents indicating parental consent at the IEP meetings and Eligibility meetings. She indicated she believed/assumed she was signing to indicate that she was participating in the meeting and not whether she could object or not. She further stated that she did not know her rights as of the 10/9/03 meeting which provided for additions to the behavior plan indicating charges could be brought against Ethan. (Tr. 31-32)

Mrs. _____ acknowledges receiving several documents (as set forth in Parent's Exhibit designated P Ex. 9A.) entitled "VIRGINIA SPECIAL EDUCATION PROCEDURAL SAFEGUARD REQUIREMENTS UNDER THE INDIVIDUALS WITH DISABILITY EDUCATION ACT".

Ms. _____, Family School Coordinator for _____ Public Schools, has been in education for 32 years (has a masters degree with certifications in emotionally disturbed, learning disabled, severe and profoundly handicapped and mentally retarded). Ms. _____ had a number of contacts with Mrs. _____ and _____ since 2000/2001 when _____ was at _____ Primary School. Whenever there was to be an evaluation or re-evaluation her job involved going to the family and going over procedural safeguards discussing what was to be expected of the evaluations. (Tr. 113)

In September of 2000 there was an evaluation initiated (see SB 11) and she met with Mrs. _____ and went through the pages of the procedural safeguards. She reviewed the procedural safeguards to make sure they were understood and that Mrs. _____ understood why they were needed, if Mrs. _____ wanted to give permission, and why they needed permission before they could go on. She discussed the purpose of the meeting and they discussed the rights Mrs. _____ had. It was explained to Mrs. _____, that she had a right to refuse to give permission. (Tr. 114)

Prior to the April 14, 2002 Eligibility Meeting, Ms. _____ met with Mrs. _____, again explained rights and procedures, including a biological parent's rights, and specifically discussed that with Mrs. _____ that she could refuse permission or give permission. Ms. _____ utilized and gave a copy of the "Virginia Special Education Procedural Safeguard Requirements Under The Individuals with Disability Education Act which was identical to P. Ex. 9A. She went through the entire document and went through it page by page with Mrs. _____. Ms. _____ also indicated Mrs. _____ could read. (Tr. 117)

Ms. _____ and Mrs. _____ met many times. They went over rights to initiate a due process hearing in 2002 if Mrs. _____ disagreed with any aspect of her child's education. She shared with Ms. _____ the state's

formulation process in a meaningful manner. Procedural safeguards have been observed. Mrs. [redacted] was provided copies of the procedural safeguards and they were explained to her. [redacted] specifically described going over the rights and safeguards with Mr. [redacted].

There is no evidence of any procedural violation that acted to deny [redacted] an education or prevented meaningful parental involvement.

IDEA does not require that a school maximize the potential of a disabled student but requires "personalized instruction with sufficient support services to enable the child to benefit education from that instruction. The IEPs are reasonably calculated to enable [redacted] to receive educational benefit. There is significant testimony from the witnesses and documentary evidence that [redacted] has received and is receiving "educational benefit".

A social case history (dated 9/19/00) indicates that " [redacted]'s mother has noticed that [redacted] appears to be learning more easily this year. Ms. [redacted] indicated that [redacted] had made progress to [redacted] in February of 2002 (SB 23).

A review of the evidence and testimony of the school personnel indicates progress; [redacted] has made improvement academically and behaviorally. Principal [redacted] testified to remarkable improvement in [redacted]'s behaviors in the 04-05 school yr. (Tr. 52) During the 03-04 school year [redacted] was suspended 5 times for safety issues. During the current school year [redacted] has one day of out of school suspension prior to 10/21/04. She feels the behavior support plan is appropriate and successful. (Tr. 53-55)

Ms. [redacted] testified that [redacted]'s behavior support plans (8/11/03, amended 10/9/03 and 8/11/04) are appropriate and in fact described them as "very appropriate". (Tr. 55) She considers the IEP's developed for [redacted] in August 03, the addendum in June 04, and August 04 to be appropriate for [redacted] (Tr. 58).

[redacted]'s teacher, Ms. [redacted] describes [redacted] as making progress with his academics and making progress with behavior. (Tr. 76) She noted that last year there were more behavior problems but he still was making progress with his curriculum. During the 2003-2004 school year progress was noted with [redacted]'s goals and objectives. (SB. Ex. 35) [redacted] was making progress and she was pleased with his academic progress. (Tr. 80)

Ms. [redacted] further indicated the educational program during the 2004-2005 school year is identical in services to what [redacted] received in the 2003-2004 school year and that [redacted]'s services have not changed. (Tr. 84) She indicates that as of the date the request for due process was made on October 21, 2004 the behavior plan appeared to be working and appropriate. [redacted] appears to understand the strategies used. (Tr. 95)

The evidence indicates that [redacted] is receiving a free appropriate public education and that his IEPs and his BIP are adequate and meet the requirements of IDEA.

Burden of Proof and other matters.

a. While acknowledging that there is a split between Federal Circuit Courts the Fourth Circuit has ruled that a school district does not bear the burden of proof under the IDEA in a due process hearing initiated by a parent. Weast v. Schaffer, 377 F.3d 449 (4th Cir. July 29,2004), See also Spielberg v. Henrico County Pub. Schools, 853 F.2d 256, 258 (4th Cir. 1988)

The evidence presented at due process hearing, including the testimony of witnesses and the exhibits admitted does not prove that [redacted]'s identified disability is inappropriate. The parent, in initiating this due process hearing, has the burden of proof and has not carried that burden of proof. The parent has not proved that [redacted]'s identified disability, his IEPs or his behavior plans were inappropriate.

b. Mrs. [redacted] objects to a behavior plan which states that an option exists to file criminal charges (Tr. 46) and also raised concerns about suspension issues.

A hearing officer is not able to deny the LEA a legal right concerning its ability to pursue a criminal charge. The evidence at hearing addresses safety concerns. The safety issue involved in this cause, involves [redacted]'s safety, the safety of other students, and the safety of staff. It is noted that the Behavior Plan does not mandate filing any criminal charges but indicates an "option to file charges according to [redacted]'s extreme behavior". (P Ex. 6B)

c. At the 10/9/03 meeting Mrs. [redacted] did not voice any objection with [redacted]'s IEP, did not raise that she didn't like the services [redacted] was receiving, didn't say she didn't like the behavior support plan, nor say she didn't like [redacted]'s identified disability. She did not voice any disagreement with changes made. (Tr. 86- 87) Mrs. [redacted] did not voice objection to the May 2004 IEP which added extended school year services nor did she state she did not like [redacted]'s educational services. (Tr. 88)

Mrs. [redacted] did not attend the August 2004 IEP meeting. [redacted]'s IEP was continued and updated 8/11/04 with the then current behavior plan that had been previously initiated. Placement was not changed for the 2004-2005 school year either. (Tr. 94)

The evidence indicated that not only did Mrs. [redacted] sign indicating her consent to actions but that she did not raise at the time of the respective meeting and decisions any objection.

Decision:

Upon consideration of the laws, regulations, and the evidence in this cause, for the reasons stated above, it is the **decision** of the hearing officer that:

1. The identification of [redacted] was adequate.
2. There was not a failure to identify [redacted] as autistic.
3. There was not a failure to identify [redacted] as "Other

Health Impaired with Speech and Language Developmental delay”.

4. The August 2003, May 2004, and August 2004 IEPs were appropriate.
5. The August 2003, May 2004, and August 2004 Behavior Plans were appropriate.
6. a. Requirements of notice to the parent or parents were satisfied.
 - b. has a disability.
 - c. needs special education and related services. and
 - d. The local educational agency is providing a free appropriate public education.

APPEAL RIGHTS AND IMPLEMENTATION:

1. Appeal rights: A decision by the hearing officer in any hearing shall be final and binding unless the decision is appealed by a party in a state circuit court within one year of the issuance of the decision or in a federal district court.


2. Implementation Plan: The local educational agency shall develop and submit an implementation plan within 45 calendar days of the rendering of a decision or the withdrawal of a hearing request with the following exception: the appeal or consideration of an appeal of the decision by the local school division and the decision is not an agreement by the hearing officer with the parent or parents of the child that a change in placement is appropriate.

The 45 DAY DECISION DUE DATE: January 12, 2005.

January 12, 2005

Lorin A. Costanzo, Hearing Officer

Copies of this “Final Hearing Report and Decision” mailed to:

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