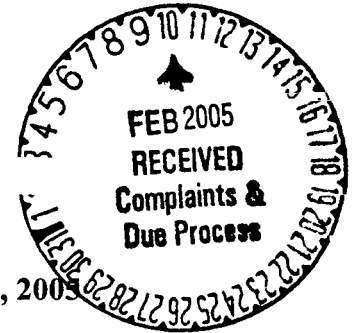


### CASE CLOSURE SUMMARY REPORT



**School Division:** County **Parents:** Mr. and Mrs.

**Child:** **Date of decision:** February 8, 2005

**Counsel for LEA:**  
Yvonne Wellford, Esq.  
Bradford King, Esq.

**Counsel for parents and child:**  
Julie Kegley, Esq.  
Jonathan Martinis, Esq.

**Party initiating:** Parents

**Party Prevailing:** [LEA]

**Hearing officer's Determination of Issues:**

1. Student and parents cannot demand change from modified standard diploma to standard diploma except as part of individualized educational plan.
2. offered a free appropriate special education.

**Officer's Orders and Outcome of Hearing:**

1. Parent's request to unilaterally demand change in diploma track denied.
2. Proposed IEP for 2004-2005 approved and declared in force; implementation plan ordered.

**This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing. The written decision from this hearing is attached in which I have advised the LEA of its responsibility to submit an implementation plan to the parties, the hearing officer, and the SEA within 45 calendar days.**

**Jams A. Eichner**  
**Hearing officer**

**SPECIAL EDUCATION DUE PROCESS HEARING**

**PUBLIC SCHOOLS**



**HEARING OFFICER'S DECISION**

**The Parties**

\_\_\_\_\_ is a 20-year-old special education student in the public school system of \_\_\_\_\_. His parents, Mr. and Mrs. \_\_\_\_\_, filed a request for a due process hearing.

**The Issue**

Is the \_\_\_\_\_ Public Schools ("\_\_\_\_\_") required to move \_\_\_\_\_ from his present modified standard diploma track to a standard diploma track?

**Summary of Decision**

The \_\_\_\_\_ have failed to prove by a preponderance of the evidence that \_\_\_\_\_ has not been offered a free appropriate public education ("FAPE"), or that \_\_\_\_\_ is required by law to put him on a standard diploma track. \_\_\_\_\_ has proved by a preponderance of the evidence that it has offered \_\_\_\_\_ a FAPE, and that it is not required by law to put him on a standard diploma track.

**The Proceedings**

This hearing officer was appointed by letter of December 1, 2004, from \_\_\_\_\_ following the request of that date for a due process hearing, stating that \_\_\_\_\_ had failed to

give his right to a standard diploma in violation of the Individuals With Disabilities Education Act (“IDEA”), other statutes and state regulations.

Their proposed resolution: “That PS allow the student to pursue a standard diploma.” In their request, the declined mediation.

Following a pre-hearing conference call on December 6, 2004, the first pre-hearing order of December 8 confirmed that the hearing would be on January 6, 2005; closed the hearing to the public at the parents’ request; advised the parties of the availability of mediation and settlement and noted that the parties agreed that: “The sole issue is whether should be changed from his present modified standard diploma track to a standard diploma track.”

The second pre-hearing order of December 20, 2004, asked the parties to include in the authorities ordered submitted before the hearing any “that deal with whether assignment to a standard or modified standard diploma track may be considered in a due process proceeding”. None were submitted. My independent research on this point, and an inquiry to the Virginia Department of Education, produced nothing.

Finally, at the outset of the January 6 hearing, it was agreed that no relevant authorities could be found, and that this case is one of first impression.

It was also agreed then that all required notices had been given, and that there had been no procedural violations.

Next all tendered exhibits were admitted into evidence without objection: Parents’ Ex. A through X, and School Ex. 1 through 100 and 1A through 40A.

On the question of burden of proof, I observed that until recently Virginia hearing officers had been largely in doubt. cited Weast v. Schaffer, 377 F. 3d 449 (4<sup>th</sup> Cir. July 29, 2004), a 2-1 decision generally putting the burden on the parents. I then declined to follow

the Weast case, explaining that the dissent in that case was more thoughtful and reasoned than the majority opinion, which noted a wide division among the federal judicial circuits on this point and did not indicate how fundamental fairness would be served by its ruling. Thus I ruled that [redacted] had the burden of proof, but that this would not determine the order of proof./

Each party gave an opening statement at the January 6 hearing. Then, finding it in the best interest of the student, [redacted] urged them to try to settle the case. After a conference lasting about 75 minutes, the parties announced they had reached an agreement in principle, but that details had to be worked out. Then, because both sides requested it and I found it in the best interest of the student, the hearing was continued until January 28, 2005, when (a) a settlement agreement would be formalized or (b) the hearing would resume.

On January [redacted], I was told the parties had not settled the case, so the hearing resumed on January 28

The parents had submitted a witness list with eight names, and [redacted] submitted a list of six. Five witnesses testified.

[redacted] the student's father, said autism was his son's primary disability. He said [redacted] and his parents wanted him to go to college and to have his own home. The standard diploma, he said, was what his son wanted from this due process proceeding. He said a modified diploma would make it harder for [redacted] to get into college, and to get a job.

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<sup>1</sup> /After the January 28 hearing, and while this opinion was in semi-final draft, [redacted] submitted the January 20, 2005, opinion of the Fourth Circuit in JH v Henrico County School Board, No. 04-1454, reversing the district court's ruling that the school division had the burden of proving a FAPE was provided, citing the Weast case. This proof of my error in no way affected the decision in the present case, with or without [redacted] counsel's February 1 letter accepting the burden of proof. (Footnote 7 in the JH opinion says a petition for *certiorari* was filed with the United States Supreme Court in Weast.)

himself and his mother, Mrs. \_\_\_\_\_, were listed as witnesses, but by agreement and stipulation, they were excused and it was agreed that their testimony would be substantially the same as \_\_\_\_\_'s.

\_\_\_\_\_ referred to the conclusions of the parents' two listed proposed experts, Dr. \_\_\_\_\_ and Dr. \_\_\_\_\_. They did not testify, but their statements had been introduced in evidence as Ex. V and W, respectively.

Dr. \_\_\_\_\_, Americans with Disabilities Act coordinator at Virginia Polytechnic Institute and State University, responded in her December 16, 2004, report to an inquiry by parents' counsel "regarding the impact of non-standard diplomas for a student with a disability who is seeking admission to postsecondary education." After reciting experience with, among others, autistic students, Dr. \_\_\_\_\_ concluded: "Each student has needed a very individualized approach to his or her accommodation, and we have learned from each student. Without a standard diploma, the chances of getting into college are harder. The modified standard diploma hurts a student's chance of getting into college. Thus, I recommend that students pursue the standard diploma whenever possible."

Dr. \_\_\_\_\_, professor in special education Appalachian State University, said his December 29, 2004, report "documents my support for \_\_\_\_\_'s request for an opportunity to earn a standard diploma. This support stems from the importance of high school diploma in the context of future schooling and eventual post-school employment."



After noting his “good work ethic and interest in environmental sciences, and his volunteer activities, Dr. \_\_\_\_\_ noted that “\_\_\_\_\_ earned 14 credits toward a standard diploma and is lacking 8 credits...” [It was later stipulated that \_\_\_\_\_ had earned 16 standard credits out of the 22 required for a standard diploma.]

“In conclusion,” Dr. \_\_\_\_\_ wrote, “\_\_\_\_\_ should be provided with an opportunity to earn a standard diploma using the most accommodating process as possible. Without this opportunity, he will be ill-suited to becoming a productive adult engaged in suitable employment.”

Dr. \_\_\_\_\_, director of Special Education for \_\_\_\_\_, who attended several individualized education program (“IEP”) team meetings concerning \_\_\_\_\_, agreed that one graduating with a non-standard diploma has less opportunity to get into college than one with a standard diploma, but did not agree that he would have less opportunity to get a job.

Dr. \_\_\_\_\_ said \_\_\_\_\_ has a right to receive special education services until 20 when he becomes 22 years old; that \_\_\_\_\_ and his parents had consented originally to his following a modified standard diploma track, and that \_\_\_\_\_ had completed about two-thirds of the credits needed for a standard diploma.

He was questioned about school handbooks and state regulations, particularly that part of Volume 8, Virginia Administrative Code, section 20-131-50 (D), saying “a student who has chosen a Modified Standard Diploma shall also be allowed to pursue the Standard Diploma...at any time...”(Ex. O). He agreed with the statement in a 2003 memorandum from the state

superintendent of public instruction (Ex. 38A) that: “The type of diploma a student pursues should be based on the student’s IEP (Individualized Education Program).”

, lead special education specialist for several schools for the last four years, and before that a special education teacher in said she had worked with throughout that tenure, starting in August, 1992, when he was in elementary school. She continues to be his case manager. In addition to attending every IEP meeting except one, she said she had been in close contact with ’s teachers, and also with his parents, particularly by telephone and e-mail.

said she had attended every IEP team meeting at which the diploma track issue was discussed. In August of 2003, she testified, ’s parents had agreed to ’s change from a diploma track to a modified diploma track, “a big change”. His IEP for 2003-2004 (Ex. 2.) was declared to provide with a free appropriate public education; was declared in effect, and was ordered to be implemented, by my decision of November 12, 2003, (Ex. 3). There was no appeal from it.

Of the 16 standard credits has earned on that track, said, the courses in which they were earned (and some other courses, including horticulture) were “watered down” to meet his special needs. A standard diploma track, she said, would not allow this, or allow the transitional service he needs.

did not speak directly to whether the modified diploma would hurt ’s chances at college or work opportunities. Her testimony dealt in detail with ’s strengths and weaknesses and what accommodations were needed to deal with them.



Of the requested standard track, she said, switching to it would be “a complete disconnect of the whole process”. Such a track would be purely academic, she said, lacking in transitional services, and would add stress to [redacted]’s education program.

[redacted] said Mrs. [redacted] had agreed to [redacted]’s assessment of her son’s level of performance. That level, she said, was a major factor in determining what his IEP should contain.

[redacted] said [redacted]’s mother had instituted three due process proceedings in less than a year. (See Ex. 1, 3, 24, 41.)

During the 2003-2004 school year, she said, “he met with success”. [redacted] had good work habits and got good grades.

In her opinion, the proposed 2004-2005 (Ex. 14 A) would allow [redacted] to make academic progress, and offers a FAPE.

[redacted], a [redacted] school psychologist for almost 16 years, who has dealt with [redacted] for 15 years, when he was in both elementary and high school. [redacted] said he had attended most of [redacted]’s IEP meetings, including those dealing with the proposed 2004-2005 IEP (Ex. 14 A).

This, said [redacted], was reasonably designed to provide a FAPE.

He said [redacted]’s functional level does not support his undertaking to pursue a standard diploma, and if he did the course material would have to be modified to the extent that it would affect its integrity.

The parents concentrated their attack on the proposed IEP by saying it violated state regulations which their counsel said “give an unequivocal right to pursue a standard diploma.” Parents’ brief, p.4, citing the Virginia Administrative Code, Volume 8, section 20-131-50 D (3), which provides:

“The student who has chosen to pursue a Modified Standard Diploma shall also be allowed to pursue the Standard or Advanced Studies Diploma at any time throughout that student’s high school career, and the student must not be excluded from courses and tests required to earn a Standard or Advanced Studies Diploma.” (Ex. O, p.4)

H. Douglas Cox, assistant superintendent for special education and student services in the Virginia Department of Education, whose job includes interpretation of regulations, said that clause (3) above should be read with clause (1) of the same subsection:

“The Modified Standard Diploma program is intended for certain students at the secondary level who have a disability and are unlikely to meet the credit requirements for a Standard Diploma. Eligibility and participation in the Modified Standard Diploma program shall be determined by the student’s Individual Education Program (IEP) team and the student, where appropriate, at any point after the student’s eighth grade year.”

Cox also read from a 2003 superintendent’s memorandum (Ex. 38), including the paragraph that said:

“Students with disabilities are eligible to earn any of the four types of diplomas. The type of diploma a student pursues should be based on the student’s IEP.”

Cox said the diploma type is important and must be determined “in follow up to the entire process”.

### **Discussion**

The Individuals With Disabilities Education Act (“IDEA”), 20 U.S.C. section 1412(a)(1)(A), and Virginia Code Section 22.1-215, require each school division to provide free and appropriate education, including special education, for children with disabilities, in accordance with regulations adopted by the state board of education.

Neither statute defines a FAPE, but identical state and federal regulations say:

“Free appropriate public education: (FAPE) means special education and related services that:

- 1 Are provided at public expense, under public supervision and direction, and without charge;
2. Meet the standards of the Virginia Board of Education;
3. Include preschool, elementary school, middle school or secondary school education in the state; and
4. Are provided in conformity with an individualized education program that meets the requirements of this chapter.” 8 VAC 20-80-10; 34 CFR 8300.13

The United States Supreme Court, in an opinion that has been cited and followed innumerable times, said in Board of Education v. Rowley, 458 U.S. 176, 205-6 (1982), that there is a two-fold inquiry in deciding FAPE questions: whether there has been substantial compliance with the procedural requirements of IDEA , and whether the IEP in question is “reasonably

calculated to enable the child to receive educational benefits”. It need not “maximize” a student’s educational program. Id. at 189-190.

It is agreed that there have been no procedural violations.

The testimony of \_\_\_\_\_’s special education specialist, Mrs. \_\_\_\_\_ (p. 7 - 8 above), and the voluminous documentation provided by both sides, would be enough to prove the proposed 2004-2005 IEP provides a FAPE, if \_\_\_\_\_ were required to bear that burden. The \_\_\_\_\_ have offered no evidence to the contrary, and thus they have not carried their burden.

It was determined at the outset that none of us could find any authority establishing that a school division must offer a desired diploma track. The \_\_\_\_\_’s counsel in her post-hearing submission of February 1 contends simply that the issue is whether \_\_\_\_\_, through its denial of the diploma track request, “violated 8 VAC 20-131-50(D)(3) and, hence, \_\_\_\_\_’s rights under the Individuals With Disabilities Education Act.”

Discussion at pp. 8 – 9 above of this subsection clause and another shows that this entire section needs some redrafting, but that as presently written it does not allow the relief demanded. It would produce an absurd result to allow students and parents unilateral power to dictate an important part of the process.

Under 8 VAC section 20-80-76(K)(11), a hearing officer is empowered to:

“Enter a disposition as to every issue presented for decision and identify and determine the prevailing party on each issue that is decided.”

In a 2003 decision (Ex 3) in a proceeding instituted by \_\_\_\_\_, I ruled that \_\_\_\_\_’s proposed 2003-2004 IEP for \_\_\_\_\_ provided a FAPE, and ordered it implemented. The procedural posture in the present case is quite different. But the basic issue is the same in each case, and

form should not be exalted above substance. It was agreed January 6, and I ruled, that I have jurisdiction over the diploma question, which can only be considered in the FAPE context.

I now declare the proposed 2004-2005 IEP provides with a FAPE, and I order it implemented. An implementation plan is to be sent to the parties, their counsel, the hearing office and the Virginia Department of Education within 45 days of this date.

### **FINDINGS OF FACT**

1. was born , and will become ineligible for special education services on
2. He is disabled and in need of special education and related services.
3. His primary disabling condition is autism.
4. He is presently pursuing a modified standard diploma in the Public Schools.
5. This diploma track was requested by him and his parents.
6. They have requested that he be changed to a standard diploma track, and has refused to make this change.
7. Graduating with a standard diploma would make it easier for to be admitted to college, and to find employment
8. has benefited educationally under the program provided by , and would under the proposed 2004-2005 IEP.
9. receives federal funds for its IDEA program.

## CONCLUSIONS OF LAW

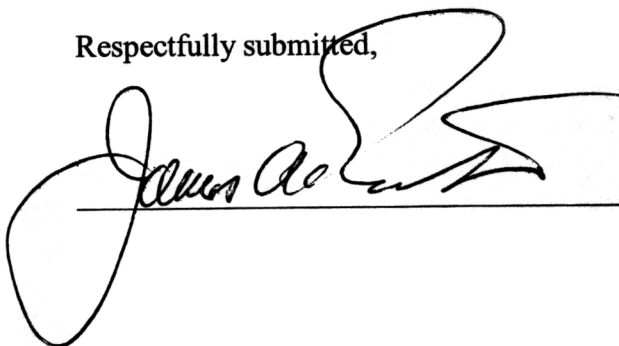
I have jurisdiction in this proceeding to determine whether [redacted] should be changed to a standard diploma track, and whether denying that would deprive him of a free appropriate public education.

2. There has been no lack of proper notice at any stage, and no procedural violations.
3. The proposed 2004-2005 IEP would provide [redacted] with a free appropriate public education.
4. [redacted]'s refusal to assign [redacted] to a standard diploma track does not violate any regulation of the Virginia Board of Education, or any other provision of law.  
[redacted] is the prevailing party on these issues.

This decision is final and binding. It may be appealed by a party within one year to a state circuit court, or to a federal district court.

It is strongly urged that an appeal would be contrary to [redacted]'s best interests. Time is not on his side. If he and his parents do not act quickly to secure the benefits of education offered for this school year and the next, he may exhaust his special education eligibility without qualifying for any diploma. He should without delay obtain the benefits of the FAPE hereby ordered implemented.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James Eichner", is written over a horizontal line. The signature is stylized and cursive.

James Eichner  
Hearing Officer

February 8, 2005