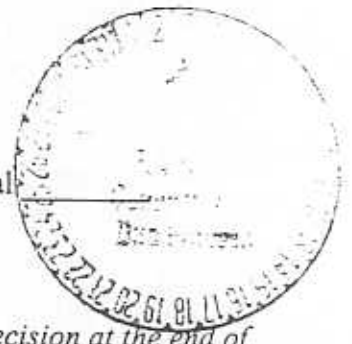


Local Hearing   X  

State Level Appeal \_\_\_\_\_



### CASE CLOSURE SUMMARY REPORT

*(This summary sheet must be used as a cover sheet for the hearing officer's decision at the end of the special education hearing and submitted to the Department of Education before billing.)*

Public Schools  
School Division \_\_\_\_\_

\_\_\_\_\_  
Name(s) of Parents(s)

\_\_\_\_\_  
Name of Child

\_\_\_\_\_  
Date of Decision

\_\_\_\_\_  
Counsel Representing LEA

\_\_\_\_\_  
Counsel Representing Parent/Child

Parent  
Party Initiating Hearing \_\_\_\_\_

Parent  
Prevailing Party \_\_\_\_\_

Hearing Officer's Determination of Issue(s)

1. Did LEA violate IDEA procedural requirements?
2. Did LEA provide student with FAPE?
3. Is the current IEP appropriate?
4. Did LEA violate §504 of Rehabilitation Act?
5. Is student entitled to compensatory education?
6. Is case moot if child moves to another school district?

Hearing Officer's Orders and Outcome of Hearing:

**LEA violated IDEA procedures and failed to timely provide student with FAPE. Although school could have provided some accommodations under 504, violation was not in bad faith and solely motivated by child's disability. Complete relief is available under IDEA. Order LEA to modify IEP to add special education services for language and related services for OT and counseling. Order compensatory services in the form of a one-on-one aide for 24 months.**

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 also advised the LEA of its responsibility to submit an implementation plan to the parties, the hearing officer, and the SEA within 45 calendar days.

\_\_\_\_\_  
Printed Name of Hearing Officer

\_\_\_\_\_  
Signature

VIRGINIA: DEPARTMENT OF EDUCATION

SPECIAL EDUCATION DUE PROCESS HEARING



v.

DECISION

Public Schools

I. INTRODUCTION

's , initiated this proceeding by filing a "Request for Due Process Hearing" on April . The undersigned was asked to serve as hearing officer on May . A prehearing conference was held in at the City Attorneys Office in City Hall on May . Present were the parent , advocate , Assistant Director, Special and Gifted Education Services and , Assistant City Attorney. The parent indicated at that time that would be represented by counsel who would not have sufficient time to review 's school records in time to prepare for the due process hearing initially scheduled for May . also indicated that school assessments had been completed and that an eligibility meeting was scheduled for May . On joint motion of both parties I granted the first continuance of the hearing.

was not found eligible for either special education or 504 services at the May eligibility meeting. Parent's counsel confirmed representation and requested an independent educational evaluation to be paid by the LEA. The hearing date was continued on

joint motion to July . On July the IEE report was still not available; consequently, the due process hearing was rescheduled to August . Parent's counsel submitted a written statement at the hearing officer's request outlining request for 504 eligibility and relief thereunder.

Following receipt of the LEA assessments for occupational therapy and assistive technology parent's counsel requested independent education evaluations in those two areas. The School's counsel took the position that since had not yet been found eligible for special education, evaluations for these two related services were not required. Counsel and the hearing officer had another telephone conference call on August . At that time the independent speech/language report had been received from and the independent psychological report from . It was agreed that any decision on the request for OT and AT independent evaluations would be deferred and the due process hearing was continued once more until September to allow the parties to participate in another eligibility meeting for both IDEA and 504 services on August .

Another telephone conference call was held on September . At that time counsel communicated to the hearing officer that had been found eligible for special education services and an IEP had been completed. Parent's counsel stated that the issues identified in letter of May were still unresolved and that client wanted to proceed with the hearing. alleged procedural errors by the LEA resulting in an untimely finding of eligibility and wanted to pursue request for compensatory services and reimbursement. Counsel for the school responded that any delay was the result of the parent requesting an IEE and/or the 's late delivery of a behavior checklist requested by the psychologist.

The hearing commenced on September and additional testimony of witnesses was taken on October , October , November and November . Parent's counsel submitted a memorandum brief on December ; school counsel provided its posthearing written argument on January and parent submitted a rebuttal brief on January . School counsel submitted an Objection to Petitioner's Rebuttal Argument and a Motion to Dismiss on January ; Parent's counsel responded to the Motion to Dismiss on January . All recorded testimony, exhibits and written arguments have been made a part of this due process hearing record.

## II. STATEMENT OF FACTS

1. was born on March after only eight months gestation; delivery was difficult as is the younger of fraternal twins. had a breech birth with fractured right arm and remained in the hospital for one week post-delivery. (P-1, P-5).

2. entered kindergarten in Public Schools on September at Elementary School with teacher . received a speech-language screening on September ; it was determined that did not require a formal assessment. (J-20, J-21).

3. 's kindergarten report card indicates excellent attendance ( was absent only one day the entire school year), mastery in all six areas where was noted to be "making progress"; received "satisfactory" grades in all "social skills/work habits". Teacher's notes, however, indicate must continue to review letter sounds and high frequency words, counting and handwriting. was promoted to the first grade. (J-19).

4. 's academic difficulties were first identified by first grade teacher spoke to about 's difficulties in reading and writing

and agreed to tutor for two or three days a week for approximately two months at which time schedule changed and then another parent continued to give additional one on one help in reading and writing. (Tr III - 124-125). In first two marking periods received E's in reading and Science and D in writing. (J-31).

5. In February, referred for a "child study" for the following reasons: lack of academic progress, behavior/emotional difficulties, speech/language difficulties. notes on page 2 of the referral the intervention strategies which attempted without success. (J-17).

6. The referral was initially dated by on February ; the date was written over changing it to March . Parent had been notified of observation on February . (J-17, P-17A).

7. A child study meeting was held on March with a recommendation for "speech screening". The child study minutes note the following difficulties which prompted the referral: "talks a lot in class, moves around a lot"; "TH sounds... troublesome"; report card grades: Writing D, Reading E, math A, Science E, History C. Teacher reports is at preprimer level in communication skills and "phonetic writing stage". (J-16).

8. At this point in first grade could understand concepts; if was graded orally which was typically the case for History and Social Science tests, scored well. When tested with the accelerated reader where the teacher read a book and provided answers, successfully demonstrated listening and comprehension skills. (Tr III 167-171).

9. At the time that made the referral to child study had identified for possible retention in the first grade due to lack of academic progress. (Tr III 159).

10. The School never completed a speech screening during the remainder of the school year. School personnel testified that they did not perform the screening because [redacted] stated immediately following the child study that [redacted] would have the evaluation done at [redacted]. (Tr III 135, 162).

11. At the end of first grade, with perfect attendance, [redacted] received the following grades: Reading E, Writing E, Math D, Science D, History and Social Science C. [redacted] work skills indicate "very good" for completes homework but "needs improvement" for "listens attentively", "follows directions", "uses time wisely". [redacted] was retained in first grade according to the report card. (J-31)

12. [redacted] attended an optional summer school program following first grade; however, [redacted] grades did not improve. (Tr III 194). [redacted] did not want [redacted] retained; [redacted] believed that the inconsistency of [redacted] 's grades (i.e. A's, C's, D's and E's sometimes in the same subject) suggested to [redacted] a problem with the teacher. [redacted] reenforced [redacted] 's thinking when [redacted] stated that [redacted] was a fairly new teacher to their system. (Tr III 194 - 195).

13. [redacted] was upset about [redacted] being held back in the first grade and concerned about the affect on [redacted] self-esteem if [redacted] was left behind [redacted] twin sister. The school principal [redacted] agreed to place [redacted] in a second grade inclusion class (which included both regular and special education students) on a trial basis. [redacted] noted in an August [redacted] memo that [redacted] did not have an IEP "though [redacted] may qualify for speech" but that the smaller class size along with the accommodations used for the special education students "might benefit [redacted] in some way". (J-15). [redacted] testified that [redacted] never saw this memorandum. (Tr II 196).

14. started in the second grade at Elementary with but at the end of November left and took over as second grade teacher. was not aware that was in the class on a conditional basis. (Tr II 183). quickly recognized that was having problems with comprehension and phonological awareness. During and was sent out of class for extra reading help. (Tr II 189).

15. For the first two marking periods in second grade failed reading, writing and mathematics. (J-31A). On November , notified the parent of a second referral to child study because of "lack of academic progress" and "speech/language difficulties". noted on page 2 that despite small group and individual instruction was at times unfocused and inattentive. notes that was receiving assistance in reading from the literary specialist and from parent and that used a kindergarten test for sight and sound words to give practice with phonological skills. Although could use the breakthrough test successfully while was doing it seemed unable to generalize these skills to other areas of work. (J - 10, Tr II 220-222). The date on the child study referral was changed from January to February . testified that did not make this change. (Tr. II 196). , the building specialist and principal designee signed the referral on March . (J-10, P-17B).

16. The second child study meeting was held on March . The minutes from the March Child Study could not be located. (Tr IV 12-13). presented evaluations from which were deemed "not appropriate with the school system criteria". The minutes note lack of progress in reading and writing with skills still at first grade level. A complete evaluation was recommended. (J-9).

17. \_\_\_\_\_'s pediatrician gave \_\_\_\_\_ a diagnosis of "developmental delay" and referred to the Neurodevelopmental Clinic at \_\_\_\_\_ (P-7 & 8). (The referral slip is dated January \_\_\_\_\_, an obvious error since \_\_\_\_\_ was not born until March \_\_\_\_\_.)

18. A neuro-developmental evaluation obtained by the \_\_\_\_\_ from \_\_\_\_\_ at Children's Specialty Group, \_\_\_\_\_ on February \_\_\_\_\_ was provided to the child study team.

\_\_\_\_\_ diagnosed deficits in verbal development, problems with visual motor skills and graphomotor skills, resulting in a significant reading disorder. \_\_\_\_\_ reading, spelling and math scores on the WRAT were equivalent to the end of first grade. \_\_\_\_\_ noted that on the Kaufman Brief Intelligence Test the verbal component was below average but \_\_\_\_\_ scored significantly better on the performance subtests. "It is clear that if we use more visual type of learning as far as pictures, or showing \_\_\_\_\_ what we want \_\_\_\_\_ to do, then \_\_\_\_\_ was much more likely to be able to complete it". \_\_\_\_\_ recommended an IEP to address reading and writing disabilities. (P-1)

19. \_\_\_\_\_ obtained a speech/language evaluation from \_\_\_\_\_ on February \_\_\_\_\_. This report noted overall language performance at the borderline of the low average range and noted that \_\_\_\_\_ does appear to experience more success when verbal information is paired with a visual stimulus. A lisp was noted with many of the sibilant sounds resulting in diagnosis of a mild articulation disorder resulting in seventy-five percent intelligibility in conversational speech. This report states that \_\_\_\_\_ is exhibiting a mild to moderate language delay but notes that cognitive ability testing was not available to determine if \_\_\_\_\_'s language abilities were significantly below \_\_\_\_\_ general ability performance. (P-3).



20. recommended speech therapy to address articulation, receptive language and expressive language. (P-4). has been getting this therapy from with payments made by Medicaid HMO. (P-25). They work with on prepositional phrases, nouns, verbs as well as sounds. (Tr IV 21).

21. Following the child study meeting on March signed a permission to evaluate. (J-8) and the school conducted assessments in the areas of social history (J-7), speech and language (J-6) and psychological (J-5).

22. On April , went to the school at the request of Principal to pick up the due process form that was not available the previous day. met with and who asked whether there was anything they could do to prevent filing due process. (Tr IV 18-19). finally located the March Child Study minutes on April . (Tr IV 16).

23. made a written request for 's school records on April or . did not receive the records until May , after the issue was addressed with the Hearing Officer at the pre-hearing conference. (Tr III 209).

24. On May , the School conducted its first eligibility meeting for .. Minutes of the meeting note the following assessment results related to child's suspected disability:

(1) Social History - " states poor comprehension"; "immature and very sensitive (cries easily and easily upset over minor things)"; "does not care for school but will go"; "walking ..., talking and sentence formation within normal limits"; "stuttered speech"; "left arm broken during delivery"; "age 2 diagnosed with asthma"; "Age appropriate social adjustment skills in the family and at school"; "experiencing difficulty in reading and written language"

“ would like ‘self-esteem’ to be stronger”.

(2) Psychological - (A) Results of WISC -III: verbal IQ 89, performance IQ 68, full scale 76.

(B) Results of WIAT assessed current level of functioning in academic areas. Reading composite was 88 in the low average range and mathematics composite of 79 in the below average range. Notes “positive attitude towards school, likes math, gets nervous during testing, worries about something happening to ”.

(3) Speech - mild frontal lisp, average to below average receptive and expressive skills and abilities, pragmatic skills within normal limits, able to respond appropriately to conversational topics and use interactive language to communicate with others, able to contribute to grade level curriculum activities during classroom discussions. Impulsivity may have negatively impacted performance on testing.

(4) Educational - notes results on PALS testing: instructional level is 1.6 (average level for end of first grade) below average in the classroom. Difficulty reading and writing. Reading specialist indicates progress from beginning of school year. Teacher noted difficulty writing and expressing ideas, variation of sentences, weak phonological awareness, enjoys math and hands on activities, testing is frustrating. (J-2).

25. The committee determined that was not disabled because did not have a significant discrepancy between cognitive ability as evaluated by WISC-III and academic achievement as measured by WIAT. No Speech/Language representative attended the eligibility meeting. (J-2).

26. 's year end report card for second grade again showed perfect attendance with the following academic grades: Reading E, Writing E, Mathematics E, Science C, History and Social

Science D. work related skills performance showed "very good" for completes homework, "needs improvement" for completes class work, follows directions and uses time wisely and "unsatisfactory" for listens attentively. (J-31A). The Schools copy of the 20 -20 Report Card states Grade 2, "(Trial)" Retained in "First" (J-31A). The Parents copy does not contain the quoted information. (P-10A).

27. The school psychologist testified that did not have a significant discrepancy between IQ, or intelligence scores and academic performance as measured by achievement test scores. Consequently, was not eligible for special education services. (Tr II 41-46). Achievement scores were actually higher than ability level. (Tr II 44-47).

28. Following the May eligibility meeting parent's counsel obtained an independent psychological evaluation of from at Psychiatric Associates in administered Differential Ability Scales to assess intellectual ability, Woodcock Johnson to assess academic achievement, NEPSY a developmental neuropsychological assessment battery, Intermittent Visual Auditory Continuous Performance Test and considered reporting forms completed by the and teacher. (P-5). noted that has difficulties with both auditory and visual attention for which assigned a diagnoses of attention deficit hyperactivity disorder. noted a significant language deficit, particularly in receptive language and significant difficulties with visual spatial functioning and visual motor integration and graphomotor functioning. diagnosed a learning disorder NOS with visual spatial deficits and graphomotor deficits. also found significant difficulties with phonological processing, speeded naming and verbal fluency producing a diagnosis of "mixed receptive - expressive language disorder". Finally, diagnosed a "cognitive disorder NOS, likely secondary to birth

trauma". recommended appropriate school accommodations to include occupational therapy, speech therapy, preferential seating, behavior management program, untimed testing, reduced assignments and teacher cue to redirect student's attention. (P-5).

29. Parent also obtained an independent speech/language evaluation from Pediatric Therapy and Associates in . The summary of this testing notes a mild articulation disorder with mild oral motor weakness for which condition a speech exercise program is recommended. Testing also found a significant auditory processing disorder involving auditory discrimination of sounds and words, ability to follow increasingly longer and more complex auditory directions and auditory reasoning skills, appropriate to chronological age level. Recommendations included a psychological evaluation to rule out possible learning and activity disorders and speech/language therapy. (P-6).

30. again attended the summer basic skills program following second grade year at Elementary. At the end of the program with zero days absent report card shows performance weak in all areas graded. The teacher noted " needs a great deal of assistance and one on one attention to be successful. retention of information is inconsistent and attention span is also short". (P-23).

31. Following receipt of the independent psychological and speech language evaluations Schools held a second eligibility meeting on August . At this meeting the team found eligibility for special education based on a specific learning disability which was manifested by a severe discrepancy between 's verbal score on the WISC-III of 89 found by and written language score on the Woodcock Johnson of 73 reported by . Findings stated that mild articulation concerns would also be addressed. Notes indicate that psychologist stated that

anxiety can produce the same symptoms as ADHD, that reports indicate that \_\_\_\_\_ becomes anxious when \_\_\_\_\_ is inattentive, that anxiety and lack of self-esteem are affecting \_\_\_\_\_ but that these behaviors were not present when \_\_\_\_\_ assessed the child. Classroom Teacher \_\_\_\_\_ reported that child had "difficulty starting tasks and staying on task at times". (J-27).

32. An IEP was developed on September \_\_\_\_\_ for the 20 \_\_\_\_ - 20 \_\_\_\_ school year. The IEP placement is a regular second grade classroom with resource assistance by the special education teacher to address communication skills five hours per week and speech therapy to address articulation deficits for forty minutes per week. \_\_\_\_\_ agreed that \_\_\_\_\_ child could participate in the program described in the IEP but disagreed with the IEP team's refusal to include related services for Occupational Therapy and Counseling. (J-26).

33. \_\_\_\_\_ introduced examples of \_\_\_\_\_'s recent work as a repeating second grade student with special education resource assistance. These papers suggest that \_\_\_\_\_ continues to have difficulty following instructions, that \_\_\_\_\_ handwriting is poor and that \_\_\_\_\_ performance is very inconsistent. (P-24).

34. According to \_\_\_\_\_ 8 year old \_\_\_\_\_ talks like a 4 or 5 year old. \_\_\_\_\_ does not compose sentences correctly when \_\_\_\_\_ speaks or writes (Tr IV 23, 25). \_\_\_\_\_ still does not know \_\_\_\_\_ alphabet (Tr IV 26, P-5). Other children laugh at \_\_\_\_\_ because \_\_\_\_\_ cannot pronounce words correctly (Tr IV, 27). \_\_\_\_\_'s work assignments have not been shortened, and \_\_\_\_\_ stops focusing and becomes stressed after a certain point (Tr IV 32-33). \_\_\_\_\_ is sad about getting E's, about repeating 2<sup>nd</sup> grade and about being teased because \_\_\_\_\_ cannot speak correctly (Tr III 226). \_\_\_\_\_ likes to be alone or to socialize with younger children (Tr III 226-227). \_\_\_\_\_ is a messy eater (Tr III 228); \_\_\_\_\_ has no sense of money and consequently cannot order \_\_\_\_\_ own food at McDonalds because \_\_\_\_\_ would give

all money and not expect any change. does not care about appearance, cannot dress self. (Tr 231-232).

### III. ISSUES AND ANALYSIS

A. Did Public Schools violate the procedural requirements of IDEA and if so did these violations actually interfere with the provision of a free and appropriate public education (FAPE) to ?

The parent alleges the following procedural violations under state and federal law:

1. The LEA failed in its affirmative duty under Child Find to identify as having a suspected disability when initially entered school in September, and that violation continued until the initial child study on March . The hearing officer does not find a violation in this area. The school record (J-21) indicates that screenings were timely conducted in the area of speech, voice, language, vision and hearing and that the fine and gross motor assessment was conducted within a week of the sixty day requirement. Additionally, this violation, if it had occurred, was more than two years before the parent's request for due process hearing.
2. The LEA failed to provide with notice of procedural safeguards. The hearing officer finds that Public Schools was required to provide procedural safeguards after the March Child Study, which should have included results of the speech screening. 8 VAC 20-80-50 ( C )(2).
3. The initial child study meeting on March did not include the principal or designee as required by 8 VAC 20-80-50 C (3)(a)(2). The hearing officer finds that

specific harm may have resulted from this violation as the team did not indicate how the referring teacher's concerns for "lack of academic progress" and "behavioral/emotional difficulties" would be evaluated. More importantly, the presence of a school administrator may have insured that the recommended speech screening was actually conducted.

4. The teacher's signature date for the referral was changed by an unknown individual from February to March . The child study committee did not meet until March , violating the ten day requirement. The hearing officer finds that this alteration of official school records was the first in a number of similar alterations which suggests a disregard by school personnel for the importance of federal and state timelines.
5. The speech screening recommended by the March child study team was never conducted. The hearing officer disagrees with the school's position that it was not required to conduct the screening when told school personnel following the meeting that was going to take to for further testing.  
  
denied that made such a statement but even if had the school had an affirmative legal obligation "to identify and recommend strategies to address the child's learning, behavior, communication or development". The child study committee could have referred for a complete special education evaluation; when it chose to do otherwise and recommended only speech screening, it had an obligation to insure that the assessment was completed. The harm which resulted was that received no intervention, failed first grade and one year later was

again referred by second grade teacher to child study.

6. The teacher referral to child study dated January , by teacher , which was initiated by parent notification on November , was altered by an unknown individual to February (a date which everyone agrees does not exist). The principal designee signed the referral on March and the child study meeting was held on March , again violating the ten business day requirement. (The process actually took more than four months.) The hearing officer agrees with the parent that the document dates were altered to avoid compliance with the legal timelines, resulting in a delayed evaluation process. Again, there is no signature of principal/LEA rep on the child study minutes.
7. Parent's counsel alleges that Public Schools did not evaluate in compliance with 8 VAC 20-80-54 in all areas related to suspected disability. The hearing officer agrees that the school's evaluation process was flawed. Testing was not tailored to assess 's specific deficit areas, which included receptive and expressive language, reading comprehension, writing, inattention and low self-esteem. Inordinate weight was placed on 's IQ scores, with the resulting conclusion of ineligibility for special education because composite achievement scores from the WIAT were higher than intellectual ability as shown on the WISC - III. The School Psychological Evaluation does not posit an explanation for the significant discrepancy between 's verbal IQ of 89 and performance IQ of 68. testified that the Verbal IQ score was a better predictor of 's true abilities, and that would expect the skills measured by the Performance tests



of the WISC to improve as [redacted] matured. (Tr II 58-60). Similarly, [redacted] testified that "the fact that [redacted] is... relatively young doesn't let the standard IQ achievement discrepancy analysis approach really show [redacted] weakness in ways that would become more apparent later on". (Tr V 7-8)

When the Special Education Evaluation was requested at the Child Study on March [redacted], the School had the neurological and speech /language reports from [redacted] (J-9). [redacted] had already diagnosed [redacted]'s visual motor and graphomotor deficits (P-1). Yet [redacted]'s report does not address how [redacted]'s borderline and deficient scores on the Performance Subtests might be affected by neurological impairments. [redacted] testified that on the Verbal Subtests on the WIAT questions were asked and answered orally, but that the Performance Subtests, which were all timed, required visual processing, writing, eye-hand coordination and measured spatial abilities, visual motor perceptual skills and organizational skills. (Tr II 62-64). According to [redacted], [redacted] has severe visual spatial difficulties. (Tr V 9).

State Regulations (8VAC 20-80-54(E)9) caution that test results should accurately reflect the child's aptitude or achievement level rather than reflect the child's impaired sensory, motor or communication skills. [redacted] testified: "It is clearly inappropriate to use a measure that includes one of the patient's significant areas of disability to measure [redacted] intellectual potential". (Tr V 15).

The hearing officer does not agree with the school's position that the effect of any procedural violation was *de minimis*. [redacted] was finally found eligible for special education in

August, \_\_\_\_\_ could have been found eligible much sooner had the March, \_\_\_\_\_ child study recommendations been completed. Consequently, I find that the procedural violations of state and federal law did interfere with the provision of a free and appropriate public education to |

**B. Could \_\_\_\_\_ have been found eligible for special education and related services and at any time prior to August \_\_\_\_\_ ?**

Public Schools argues that the date of the second eligibility meeting, August \_\_\_\_\_, was the earliest possible time that eligibility could have been established. The school has consistently taken the position that unless testing shows a severe discrepancy between ability and achievement, there is no basis for finding a disability. However, Virginia regulations caution that no single procedure be used as the sole criterion for determining whether a child is eligible for special education. (8 VAC 20-80-54(E)(12). Although \_\_\_\_\_ was in fact found eligible at that meeting under the category of specific learning disability, by finding a severe discrepancy between \_\_\_\_\_ verbal IQ as tested by \_\_\_\_\_ and \_\_\_\_\_ broad written language score obtained by \_\_\_\_\_, the school board also argues that this finding was not mandated and that the eligibility committee "graciously" used this somewhat tortured analysis to secure \_\_\_\_\_ some academic assistance. It is surprising that \_\_\_\_\_ Schools had so much difficulty finding eligibility after two years of failing grades and referrals from two different teachers. Perhaps the school was influenced by a district finding reported by Principal \_\_\_\_\_ that \_\_\_\_\_ was identifying too many Black male children for special education services and consequently there was a lot of scrutiny in this area. (Tr IV - 137, 172).

As parent's counsel emphasizes in written argument, the school did not attempt to find eligibility under any other handicapping categories, which could have included (1) speech or language impairment, (2) other health impairments or (3) developmental delay. By focusing only on the standardized IQ and achievement tests and measuring the quantitative difference between the standard scores, the school failed to consider any other explanation for 's poor academic performance. explained why IQ testing is not a valid measurement of language capacity. "Verbal reasoning is different from language. It is more appropriate to use neuropsychological or speech - type measures to test language capacity." (Tr V 17).

I find it significant that has an involved parent who has almost daily contact with teachers, that has almost perfect school attendance and has not demonstrated behavior problems in class. always completes homework, is respectful of others and obeys school rules. The evidence does not suggest to me that failing grades were the result of a below average IQ. The occasional A's, B's and C's on first and second grade report cards suggest that when content is presented in a format that understands, can perform at a satisfactory level. teachers testified that when testing was oral did much better. oral classroom communication was reported to be effective. However, was graded "unsatisfactory" for listens attentively and "needs improvement" for completing classwork, following directions and using time wisely.

found that visual stimuli, like pictures, and tactile demonstration of the problem improved 's performance. In first grade mathematics is noted as a strength yet in second grade failed all four semesters in this subject. If poor grades are the result of low intelligence, I would expect consistently low grades from kindergarten on. It appears, however, that did well until reading and writing deficits adversely affected performance in all academic

areas. Because both first and second grade teachers recognized these difficulties and referred to Child Study, I find that Public Schools should have found eligible for special education at a much earlier date.

**C. Did Public Schools violate's rights under Section 504 of the Rehabilitation Act of 1973?**

This federal law prohibits discrimination against disabled persons who participate in or benefit from programs that receive federal assistance. Section 504 defines "disabled person" as one who (1) has a physical or mental impairment which substantially limits one or more major life activities, (2) has a record of such impairment or (3) is regarded as having such impairment. Major life activities includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. Public Schools eventually concluded that has a specific learning disability that affects ability to learn.

I believe that Public Schools could have found qualified as a handicapped person eligible to receive Section 504 accommodation services and modifications at the March

Child Study based on speech/language difficulties, at the March Child Study based on the reports or at the time that was found not eligible under IDEA in May. Section 504 is a broad civil rights law which can cover students not eligible for special education under IDEA. Schools are mandated to provide modifications or accommodations to insure that disabled students have equal access to public school academic and non-academic services. In this case the relief sought by the parent under both statutes is identical.

"In the special education context, the standard of proving a Section 504 claim is extraordinarily high. The Plaintiffs must first demonstrate that they have either been 'subjected to discrimination' or excluded from a program or

denied benefits 'solely by reason of their disability'. Sellers v. School Board of City of Manassas, Virginia 141 F 3d 524, 528 (4<sup>th</sup> Cir. 1998). Also, parents "must establish that the School Board's educational decisions relating to the student were so inappropriate as to constitute "either bad faith or gross misjudgment" *Id.* at 529.

I cannot find that the actions of \_\_\_\_\_ Public Schools in this case meet that standard of egregious conduct. Consequently, and because I do find relief under IDEA, I conclude that

\_\_\_\_\_ is not entitled to additional relief under 504. I therefore need not address the issue of 504 waiver raised by counsels' written arguments.

**D. Does the IEP developed by \_\_\_\_\_ Public Schools on September \_\_\_\_\_ provide a free appropriate public education (FAPE)?**

As indicated above, the finding that \_\_\_\_\_ Public Schools violated procedural requirements of IDEA is a sufficient basis for concluding that \_\_\_\_\_ was denied FAPE. Since I must also determine how to remedy that denial, it is necessary to review the sufficiency of the IEP which

\_\_\_\_\_ Schools did develop immediately prior to the current school year. \_\_\_\_\_'s placement is a regular classroom with special education resource assistance for communication skills one hour per day. The Special Education teacher works with \_\_\_\_\_ within the regular classroom. Additionally, \_\_\_\_\_ sees a speech therapist 40 minutes per week. Plaintiff's counsel argues that this placement is not appropriate and apparently \_\_\_\_\_ is requesting either more time in special education resource or a self contained special education placement. (Tr IV 30-31). I do not think we have sufficient experience with or evidence from the current placement to make that judgment. If it appears after the second quarter review that \_\_\_\_\_ is not making progress, a modification may be appropriate. The present IEP includes goals under communication skills for writing composition and reading. ( I cannot identify any objective measurement for determining if the student achieves

short term objectives. The teacher will determine if [redacted] has achieved 70% proficiency from examination of the child's reading and writing portfolio.) The only goal for the speech language therapist is to improve speech intelligibility.

There are no goals to address [redacted]'s auditory and visual processing disorder, improve phonological awareness, address [redacted] problems with reading comprehension, attention and distractibility and impulsivity, [redacted] graphomotor weakness, lack of self-esteem and poor social skills.

[redacted] testified that [redacted] needed to learn to trust [redacted] self and [redacted] abilities. [redacted] family should not have expectations for [redacted] based on the performance of [redacted] twin sister. [redacted] did not recommend counseling; [redacted] would wait and see how [redacted] performs under the IEP; based on the teacher's report on October [redacted], [redacted] was doing great. (Tr II 91-99). I do not understand how a child can learn to trust [redacted] abilities if [redacted] is failing all subjects. A "wait and see" approach at this point in [redacted]'s development is too risky. [redacted] needs intensive remediation in all academic areas along with counseling from a school professional who can reinforce that [redacted]'s delays are not [redacted] fault. The School need not adopt [redacted] ADHD diagnosis but it should address the underlying behaviors that interfere with the student's academic progress. [redacted]'s scores on the IVACPT and NEPSY clearly showed problems with attention, distractibility and impulsivity. (Tr V 18). These behaviors are repeatedly reported by [redacted] teachers (e.g., [redacted] Child Study, Report Cards, Thompson Speech/Language Evaluation, Meyers Occupational Therapy Evaluation) and by [redacted]. Consequently, they should be addressed in [redacted] IEP.

The Occupational Therapy Evaluation does not include any standardized testing to compare [redacted]'s writing and visual motor skills to those of [redacted] peers. Yet the teacher reported that the legibility of [redacted] written work was below [redacted] peers. The occupational therapist reported that

does not consistently form letters accurately, often intermixes upper and lower case letters and often needs reminders to take time when writing. included a full page list of "Home Program Recommendations/Accommodations for Handwriting" but recommended that OT services not be included in IEP. (J-23). The Educational Assistive Technology Evaluation was completed on July , before was found eligible for Special Education on August . The principal, teacher and all expressed concerns about 's attention span (inability to focus and high distractibility), comprehension and memory retention. Yet the reporter recommended that " requires no augmented communication or assistive technology devices to access educational opportunities. (J-22). The Hearing Officer concludes that certainly needed some special assistance to "access educational opportunities"; had just failed reading, writing and mathematics for the second year in a row. has no concept of money, is a very messy eater and has difficulty dressing self. Furthermore, had testified that successfully used the computer to access the "breakthrough test" for practicing pre-primer reading skills. I therefore find that the IEP developed on September is not designed to remedy all of 's deficiencies. needs related services to assist to benefit from Special Education.

**E. Is entitled to compensatory education and if so what services are appropriate?**

Cases submitted by both counsel hold that an award of compensatory education is an appropriate form of relief under the IDEA to cure a deprivation of a handicapped child's statutory rights. It would be unfair to deny that remedy to parents who could not afford private school tuition when they believed the public school was not providing their child a free appropriate public education. Pihl v. Mass. Dept. of Ed. 9 F3d 184 (1<sup>st</sup> Cir. 1993); Lester v. Gilhool, 916 F2d 865 (3<sup>rd</sup>

Cir. 1990). The nature of compensatory services can include tutoring, summer school, or other forms of extra assistance. Wagner v. Short, 63 F Supp 2d 672 (D. Md.1999).

I believe that \_\_\_\_\_ is entitled to compensatory education to make up for the eighteen months (March \_\_\_\_\_ to September \_\_\_\_\_) when \_\_\_\_\_ was not receiving any special education services and for the additional six months (September, \_\_\_\_\_ - March \_\_\_\_\_) when \_\_\_\_\_ IEP was not appropriate. I believe that the provision of a one on one aide to be supervised by the special education teacher can best assist \_\_\_\_\_ in all of \_\_\_\_\_ deficit areas. Testimony and exhibits suggest that individual assistance can insure that \_\_\_\_\_ understands directions, stays focused on each task, uses accommodations and manipulatives when appropriate, completes \_\_\_\_\_ classwork and does not experience further frustration and failure. The aide should continue to work with \_\_\_\_\_ for a maximum of 24 months or until \_\_\_\_\_ has obtained age appropriate benchmarks for reading, writing and mathematics.

**F. Is this case moot if \_\_\_\_\_ moves from the \_\_\_\_\_ before the end of this school year?**

There was no evidence at the hearing that \_\_\_\_\_ and \_\_\_\_\_ family were planning to move outside of the \_\_\_\_\_. This matter was raised for the first time on January \_\_\_\_\_ in a Motion to Dismiss filed by counsel for \_\_\_\_\_ School Board. I have no way of knowing as I write this Decision whether the student will remain a resident of \_\_\_\_\_. It is important to resolve the issues presented by this Due Process Hearing, at much expense to both parties. Those issues are not resolved by the student's move to another jurisdiction, and they are too significant to warrant disposal by a procedural motion.



The School Board must provide a personal aide to \_\_\_\_\_ for 24 months, to compensate \_\_\_\_\_ for the two years when \_\_\_\_\_ did not receive appropriate special education services. In the event that \_\_\_\_\_ moves, \_\_\_\_\_ Public Schools will arguably have no obligation to develop and implement a current IEP which includes the services identified herein. However, \_\_\_\_\_ would still be liable for the cost of the one-on-one aide. It could hire and pay the aide to travel to an adjoining jurisdiction, or pay the cost of an aide hired by that school district or reimburse the parent for an aide that \_\_\_\_\_ hires.

The parent may decide against moving after realizing that \_\_\_\_\_ claims prevailed. The case is not moot.

## CONCLUSION

The Supreme Court held in Board of Education v. Rowley, 458 US 176 (1982) that there is a two pronged inquiry under EAHC (Education of All Handicapped Children Act) now IDEA:

(1) Did the Public School comply with the procedural requirements of the federal law; and (2) Is the IEP designed by the School reasonably calculated to confer some educational benefit? Failure to meet the procedural requirements is an adequate ground for holding that the School failed to provide a free and appropriate public education. Hall v. Vance, 774 F 2d 629 (1985).

Public Schools violated procedural requirements of IDEA when it failed to provide the speech screening recommended in the March \_\_\_\_\_ Child Study, failed to include the required team members at Child Study meetings in \_\_\_\_\_ and \_\_\_\_\_, altered dates on special education documents to avoid compliance with federal and state timelines, failed to properly and completely evaluate \_\_\_\_\_ in all areas related to \_\_\_\_\_ suspected disability, placed an inordinate reliance on IQ scores

without properly considering the affect of the child's disabilities on those scores and took seven (7) business days rather than the required five (5) to appoint a hearing officer. The School failed to give the parent copies of the assessments until the date of the eligibility hearing and was dilatory in providing copies of the student's school records once they were requested.

The IEP developed on September is not reasonably designed to confer educational benefit, especially in light of the eighteen month delay in providing services. I am therefore **ORDERING** that the IEP team reconvene and modify the IEP to add goals and objectives for expressive and receptive language, occupational therapy to address 's visual motor and graphomotor deficits, objective measures for determining progress towards goals, and counseling to address school anxiety and lack of self-esteem. The provision of a one on one aide should be included in the IEP, for the next 24 months, to compensate for past deprivation of FAPE. The aide will shadow throughout school day to insure that understands directions, stays on task, completes work and progresses through IEP goals and objectives.

The parent has requested reimbursement for the tuition which paid to for 's speech/language therapy. Since I have found that the LEA should have provided speech/language services, I find that her request is appropriate. However, it is my understanding after reviewing Parent's Exhibit 25 and placing a telephone call to the patient account representative, that all expenses were paid by insurance. Consequently, I am not ordering reimbursement as part of this decision.

I deny the School Board's motion to dismiss on the ground that the child is moving and therefore the case is moot, for the reasons stated above.

This Decision shall be final and binding unless appealed by either party to state circuit or federal district court within one year. Public Schools shall file an implementation plan within forty-five days with copies to the parties, the Virginia Department of Education and the hearing officer, unless the school division has appealed or is considering an appeal of this decision.

DATE: \_\_\_\_\_

\_\_\_\_\_

Hearing Officer