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2002-2003

VIRGINIA DEPARTMENT OF EDUCATION  
DIVISION OF ACCOUNTABILITY  
OFFICE OF SPECIAL PROGRAMS



Case Closing Summary Report

Local hearing   X   State level appeal       

School Division

Parents

Name of Child

Decision date

Counsel for LEA, Esq.

Counsel for Parents/Child, Esq.

Party initiating hearing

Split  
Prevailing party

**HEARING OFFICER'S DETERMINATION OF ISSUE(S):**

1. The child is not eligible for special education and related services.
2. The child find procedures were not properly and timely carried out and resulted in, for the child, a delayed receipt of the required comprehensive evaluation.
3. The child is a disabled child, but is not a child with a disability.
4. Public Schools have denied to the child a free appropriate public education to the extent that, while has been on homebound instruction, they have not provided all the services due under Sec. 504 of the Rehabilitation Act of 1973, as amended.
5. Public Schools acted properly in putting the child in homebound, and homebound status was appropriate.
6. The Public Schools have not provided all the homebound services to which the child is entitled. In addition, provision of these services under Sec. 504 of the Rehabilitation Act of 1973, as amended, as under the IDEA, is the primary responsibility of the Public Schools and not of the Parents.

**HEARING OFFICER'S ORDERS AND OUTCOME OF HEARING:**

The Public Schools are ordered to immediately implement the Sec. 504 Plan that was effected on , whether the child is back in school or not, and to amend the Plan to include whatever assistive technology the child needs, including the Alpha Smart and Co: Writer recommended by the occupational therapist at . The Public Schools shall, as soon as practicable and convenient for the child, return from homebound instruction to School in grade class.

Issues 1 and 5 were decided in favor of the Public Schools. Issue 2 was decided in favor of the Parents. Issues 3, 4, and 6 were split between the parties.

This certifies that I have completed this hearing in accordance with the law and

Regulations. I have provided copies of my decision to the parties and their counsel, and have informed them of their appeal rights. I have also informed the LEA of its responsibility to submit an implementation plan to the parties, the hearing officer, and the SEA within 45 calendar days from my decision, which is attached.

—  
*Hearing Officer*

—  
*Date:*

VIRGINIA DEPARTMENT OF EDUCATION  
DIVISION OF ACCOUNTABILITY  
OFFICE FOR SPECIAL PROGRAMS



POST-HEARING REPORT

Public Schools School Division	Parents
Superintendent	Child
Counsel for Schools, Esq.	Counsel for Parents, Esq.
Hearing Officer	Party Initiating Hearing
Hearing requested	Hearing Officer appointed

**PURPOSE:**

The purpose of this due process hearing is to determine whether the Public Schools (Schools) has denied a free appropriate public education by failures to perform child-find and determination of eligibility for special education and services.

**ISSUES:**

1. Whether is eligible for special education and related services notwithstanding a previous determination of ineligibility;
2. Whether the Schools performed child find procedures, and both properly and in a timely manner;
3. Whether has a disability(ies);
4. Whether the Schools have denied a free appropriate public education;
5. Whether 's placement in homebound is proper and appropriate; and if so
6. Whether the Schools have provided the necessary homebound service for .

**DECISION**

**PRELIMINARY MATTERS:**

Numerous exhibits were presented by the parties, a listing of which is attached as an appendix. Chronologies of 's course through education were moved by the parties for admission into evidence. However, they were excluded as not being evidence. Such chronologies can serve as an assist to the hearing officer in sorting through the documents and

transcripts, but they have no evidentiary value.

The undersigned hearing officer has heard and read the evidence and observed the demeanor of the witnesses presented by the parties. This case presents an interesting picture of a child who, in this hearing officer's view, is right on the border between being a *child with a disability*, and being a disabled child who is not in need of special education as defined in the IDEA. I find and conclude that \_\_\_\_\_ is not a child with a disability and therefore is not entitled to special education; but \_\_\_\_\_ is a disabled child and is entitled to the services available under Sec. 504 of the Rehabilitation Act of 1973, as amended.

#### FINDINGS OF FACT:

1. \_\_\_\_\_ is \_\_\_\_\_ year old \_\_\_\_\_ who is currently in \_\_\_\_\_ grade at \_\_\_\_\_ School for the \_\_\_\_\_ school year. \_\_\_\_\_ was in \_\_\_\_\_ school for \_\_\_\_\_ grade. \_\_\_\_\_ enrolled in \_\_\_\_\_ in \_\_\_\_\_ grade at the beginning of school in \_\_\_\_\_. \_\_\_\_\_ was placed on homebound instruction in \_\_\_\_\_ because of \_\_\_\_\_ asthma. \_\_\_\_\_ returned to school in \_\_\_\_\_, but on \_\_\_\_\_ was returned to homebound because of lingering paint fumes triggering \_\_\_\_\_ asthma. Since \_\_\_\_\_ has been on homebound instruction to date, first for medical reasons and then under a stay put order. \_\_\_\_\_ has been in regular education all along. (Ex's P 33, P 44, P 49, P 52; Tr. III, \_\_\_\_\_, pp. 550-557)
2. \_\_\_\_\_ is an open classroom environment school. There are six "communities" each of which is a grade level. Each community is divided into four sections with each section constituting a homeroom. The sections have no walls separating one from another, but are cubicles bounded by a coat closet and filing cabinets. The teachers move from one section to another in teaching their classes, so that \_\_\_\_\_ is taught in \_\_\_\_\_ homeroom. \_\_\_\_\_'s community in school year \_\_\_\_\_ has been the \_\_\_\_\_ grade and \_\_\_\_\_ homeroom is \_\_\_\_\_'s section which is a regular education environment. \_\_\_\_\_ teaches English, \_\_\_\_\_ teaches math, and there is a science and social studies teacher. (Tr. III, \_\_\_\_\_, pp. 550-552, 617-618)
3. \_\_\_\_\_ has orthopedic and other health impairments: Ehlers-Danlos Syndrome (EDS) affecting \_\_\_\_\_ joints and muscles, serious but controlled asthma, mild depression, and attention deficit hyperactive disorder (ADHD). These are disabilities which, either alone or in concert, interfere with \_\_\_\_\_'s educational performance and achievement. \_\_\_\_\_ has additional other health impairments diagnosed since kindergarten – depression, reflux, allergy, bipolar disorder, obsessive-compulsive disorder, school phobia - are either intermittent or have diminished and cause \_\_\_\_\_ little difficulty in \_\_\_\_\_ educational

- performance. (Exs A 31, P 83, & D 6.8)
4. 's teachers and the school nurse at have not always assured the carrying out of asthma plan and the use of the peak flow meter, and periodically would participate in physical education without taking medication. As a result, has returned home from school "with asthma out of control" on several occasions. (Tr. I, , pp. 189-190)
  5. Psychologists and medical doctors who have spent time with , given therapy, and tested – whether over a long or a brief period of time – are ministering to in a setting totally different from the educational setting in which the teachers and school personnel interact with in the school. The reports of psychologists and medical doctors concerning 's disabilities, and the possible or probable adverse effects on education, were orally or in writing summarized for the members of 's child study teams and eligibility committees, and some reports were read by some individual members. These reports were given second place by the members who gave prime weight to the statements of teacher reports and the members' own personal experiences with . In particular, 's teachers, guidance counselor, and the principals of School from day to day saw a different – a with some disabilities who, with accommodations, nevertheless is capable of at least average performance and achievement in the regular open class to which was assigned. (Tr. II, , pp 387-394)
  6. Accommodations provided by the school for before the Sec. 504 plan was devised for (and which had not been implemented before this hearing because was on homebound instruction) consisted of some help by the teacher or an aide with writing and completion of classwork, especial attention given to asthmatic condition, allowances for orthopedic condition in physical education, any instructions from doctors, occupational and physical therapists, and other ad hoc accommodations recognized by teachers and aides as beneficial for in overall education and school life. (Tr. III, , pp.558)
  7. PS did not provide, for the child study team or eligibility committee meetings, all 's records in PS possession for review and study by the team or committee members. Of PS exhibits D 6 through D.16 (medical information) many were not made available to them. (Tr. V, , pp. 1085-1101)
  8. has a full scale I.Q. of 106; and functions in the average to high average intellectual range. is considered to be a very bright who needs accommodations

for disabilities to bring educational performance up to match abilities. becomes frustrated and depressed when disabilities interfere with school and classroom/homework performance. The principal culprits in performance difficulties are the pain in joints caused by the EDS, which results in late or incomplete assigned work, and asthma. Although the ADHD is present and does interrupt both the academic and social aspects of education, 's medication makes it less troublesome. (Exs A 31, D 6.8, P 9, P 83)

9. In testing for the impact of disabilities on education, the three psychologists found that 's scores showed that reading comprehension and other academic performance is average in both the statistical and the actual aspects; and they found that psychoeducationally performs in the average range in all areas tested. (Exs A 31, P 9, and P 83; Tr. V, , pp.1069 – 1072)
10. is very limited by asthma in what can do in physical education, and that impairment also affects social and academic education. An asthma plan provided by physicians is to be followed by the school and by . There have been instances where the plan has not been followed prior to physical education classes, and has suffered crises as a result. In the plan requires interdependence between and teachers and the nurse. sometimes forgets to go to the nurse to take asthma medicine and get a reading on peak flow meter (measures the state of lungs) before PE. The teachers are to remind to do these things, but they, due to the open classroom facility in which has been placed during through grades, are able to do little else than place a note on desk to remind . The nature of 's classroom – an open class room containing four classes in one large room – doesn't allow either teachers or aides to give special attention, nor has the school nurse contacted or home room teacher in this regard. Consequently, on several occasions, has forgotten to be checked by the nurse with the peak flow meter, and has not received medication before PE. As a result, has reached a crisis point and has had to be sent home. Most of absences from school are attributed to asthma crises. (Tr. I, , pp.185 – 192; Exhibits P 1b, P 55, D 6, D 6.1, D 6.3)
11. has Ehlers-Danlos Syndrome (EDS), a disease affecting joints and muscles. EDS makes it difficult for to write and complete writing assignments. is accommodated by splints for hands and wrists, special pens and pencils, dictating to a scribe, a slant board, wax treatment, and frequent rests. (Tr. I, Foster, pp. 192-200)
12. The LEA has recognized 's eligibility for services under Sec. 504 of the

Rehabilitation Act of 1973 as amended (504) by devising a plan for [redacted] under the provisions of 504 in preparation for its implementation upon [redacted] return from homebound. The school sees [redacted] 504 Plan as not applicable while [redacted] is homebound. (Exhibit A 29; Tr. III, [redacted], pp 612-616)

13. A child coming into [redacted] grade is met with an educational process that involves more self-help and less teacher help – [redacted] is more “on [redacted] own” than in the previous grades, and moved into the class that placed on [redacted] greater responsibility than [redacted] was used to. This change, to a greater or a lesser degree, affected not only [redacted] but most of the children in [redacted] class. As a result, [redacted]’s impairments were not considered to be causing [redacted] difficulties in [redacted] grade. (Tr. III, [redacted], pp 596-600; [redacted], pp. 632-633; Tr. V, [redacted], p. 1079)
14. A Child Study Team in [redacted] ([redacted]’s grade school) on [redacted]’s referral met on [redacted], but the team did not recommend evaluation. A Child Study Team in [redacted] met on [redacted], on referral by [redacted]’s psychiatrist, to consider [redacted] and [redacted] disabilities, and again on [redacted] on another referral by [redacted]’s psychiatrist. (Exs P 1, P 17, A 48, P 57)
15. At the Child Study Team meeting on [redacted], [redacted] furnished the team with reports on [redacted]’s asthma, OT & PT (based on [redacted] EDS), and hematology. The team did not recommend evaluation because they wanted more medical information on EDS from [redacted], and upon receipt of that, they would re-screen [redacted]. PS faxed a request for report on [redacted], but [redacted] did not furnish [redacted] report, dated [redacted]. The Child Study Team did not follow up on their request with [redacted], and did not, until [redacted], inform [redacted] that FS had not received [redacted] report. [redacted] obtained and presented that report to the Child Study Team at its meeting on [redacted]. The team then recommended evaluation of [redacted], and received permission to conduct the comprehensive evaluation preliminary to an eligibility meeting. (Ex’s P 1, P 17, A 48, P 57; Tr. I, [redacted], pp. 204-220, Tr. IV, [redacted], pp. 882-903).
16. The Child Study Team, on [redacted], proceeded to find [redacted] eligible for a Sec. 504 accommodations, and wrote the Plan on [redacted]. At that time, [redacted] was again on homebound instruction but scheduled to return to school on or about [redacted]. (Ex P 58, P 61; Tr. IV, [redacted], pp. 903-904)
17. The PS did not implement the 504 Plan when or after it was executed because [redacted] was then on homebound instruction, and PS considered the Plan inapplicable to homebound instruction because it was devised as a school-based program. As a result,



has not had the benefit of a 504 plan since . (Tr. IV, , p. 906)

## CONCLUSIONS OF LAW:

### GENERAL:

The requirements of notice to the Parents were satisfied.

has several disabilities.

does not need special education and related services.

Public Schools are providing with a free appropriate public education.

### ISSUE 1. Whether is eligible for special education and related services notwithstanding a previous determination of ineligibility.

The Parents seek to overcome the PS denial of eligibility by, among other things, pointing out an apparent erroneous application to 's disabilities of the criterion for specific learning disability. PS teachers and staff testified that could not be eligible for special education unless there was a severe discrepancy between IQ and educational performance, and since did not manifest such a severe discrepancy could not be found eligible for special education. But, say the parents, that criterion applies only to determination of a specific learning disability as ground for finding a child eligible (see 8 VAC 20-80-56G. 1. & 2.) However, subparagraph 3. of that section states:

The (Eligibility Committee) may not identify a child as having a specific learning disability if the severe discrepancy between ability and achievement is primarily the result of

- a. ... a motor impairment,
- b. ...,
- c. emotional disturbance, or
- d. ....

Thus, 8 VAC 20-80-56G itself recognizes the criterion of presence or absence of such a discrepancy as a valid measure of 's eligibility for special education due to other disabilities than specific learning disability. In other words, the application of that criterion by the members of the eligibility committee to 's disabilities was a proper use of an appropriate tool as a measure of 's eligibility for special education.

At the core of this issue, of course, is the question whether is a child with a disability as defined in the IDEA and regulations. There is no question that is a disabled child. The evidence is very clear about that. In fact, has EDS (an orthopedic impairment), plus other health impairments of a tendency toward depression,



asthma, and ADHD, all which are included in the *other health impairment* category. These impairments are included in the definition of *child with a disability* in both the Virginia regulations (Sec. 8 VAC 20-80-10) and the Federal regulations (Sec. 300.7) under IDEA. To be eligible for special education and related services, therefore, must first be a *child with a disability*. However, as stated in the definitions, each of these impairments must be an impairment that *adversely affects a child's educational performance* (another term of art).

educationally performs well in all subjects, except in social aspects of life. 's EDS definitely affects educational performance because it pains when is writing and must either dictate work or stop writing for a time. It also results in muscular pain in arms and back, and interferes with physical education (PE), limiting play to activities that do not involve throwing and catching a ball.

's asthma needs treatments that, when not received, can land in the hospital. Therefore, must take medication, use the peak flow meter, meet with the nurse before undertakes PE, and receive special attention from teachers and the nurse at any time that has an attack.

has difficulty pacing self, and will draw pictures or day-dream when is supposed to be doing class work. At times will be overactive, and is frustrated when what wants or wants to do doesn't happen quickly enough for .

The frustrations brought on by impairments not infrequently throw into depression and will just quit everything.

The testimony of the educators is that is troubled by these impairments, yet performs educationally in the average range with the help of the accommodations provided for , which is also commensurate with full scale IQ of 106. homeroom teacher, , testifies that is able to pull out of depressions with help and go on with work. Sometimes will "shut down", in the words of one of homebound teachers, but is able to pick up and continue classwork the next time the teacher visits. also does homework with 's help.

In the end, it is noteworthy that out-of-school evaluators, whose reports are in evidence and detail impairments in a serious tone, and who have not observed in class, have not recommended special education for . teachers, most of whom have served on child study teams and on eligibility committees, testify to good educational performance in spite of disabilities and their effect on school work. It is clear from the evidence that 's disabilities affect educational performance, but

the accommodations that have been provided , and that will be provided under the 504 Plan, enable to continue to perform at average rate commensurate with 106 IQ ability. Thus there is no such adverse effect on 's educational performance as would support special education status for . (See the dissent in *Yankton School District v. Schramm*, 93 F3d 1369; 24 IDELR 704)

Therefore, is not eligible for special education and related services. This issue is decided in favor of the PS.

**ISSUE 2. Whether the Schools performed child find procedures, and both properly and in a timely manner.**

A Child Study Team (CST) has met on 's behalf in each of first grade years. The first was in of grade year at on 's referral. was reported as doing well educationally. Finding no reason for concern about performance, the team did not recommend evaluation, but did ask for medical updates.

The second CST meeting was in grade year, at , on . was referred by , psychiatrist. The team did not recommend evaluation. Instead, they told 's that they needed two more medical reports (another from and 's report) to go with the medical reports that brought to that meeting, namely, the report on asthma, OT and PT reports and the hematology report. , Building Program Specialist, faxed a request to for report of two days after the meeting. The report did not get to PS until brought it to the third CST meeting on in 's grade year, 11 months after the school requested it. But PS made no effort to follow up with , or with on their request for this report. It was the responsibility of the PS to accomplish the early reconvening of the CST meeting that the PS itself adjourned

At that third meeting on , the Team recommended evaluation and arranged for it. The CST also found a Sec. 504 plan was what needed, and formulated a 504 Plan on .

The child find procedures were followed properly, but school personnel were not as attentive to 's case as the evidence shows they ought to have been. was having increasing trouble with disabilities which was observed by teachers; but they were seeing that was making average

educational progress despite absences and impairments, and attributed much of lower grades after entry into grade to the increased self-responsibility that that grade placed upon students. This lack of close attention to 's situation is evidenced in the schools' allowing the time between the CST's adjournment of the meeting and the receipt of 's report to stretch out eleven months before the meeting was reconvened on . This delay has cost nearly a year of services under Sec. 504 while on homebound instruction.

Therefore, the child find procedures were not properly and timely carried out, and resulted in, for , a delayed receipt of the required comprehensive evaluation since .

This issue is decided in favor of the Parents.

**ISSUE 3. Whether has a disability or disabilities.**

There is no question that is disabled. has an orthopedic impairment (EDS) that requires hand splints and rest; has asthma for which needs medication and careful monitoring by the nurse and teachers; has ADHD which often interferes with school work, and has spells of depression, among other impairments. To accomplish schoolwork, must have accommodations.

But, none of these disabilities raise to the level of being a child with a disability who needs special education and related services pursuant to 8 VAC 20-80-10. It is also true that does need related services, which can be provided under Sec. 504, but does not need special education. Thus, under Sec. 300.7(a)(2)(i) and (ii) is not a child with a disability within the meaning of the IDEA. (See 8 VAC 20-80-10, *Related services and Special education*)

This issue is decided in favor of both parties

**ISSUE 4. Whether the Schools have denied a free appropriate public education.**

There have been miscommunications between the Parents and school personnel, and mistakes made by both parties. But none of them, either alone or in concert, amount to a denial of FAPE. , even while has been on homebound academic instruction, has continued average to high average educational performance. This has been due to own efforts as well as to ' and the nurse's continuing to provide some accommodations, in combination with 's helping .

However, a FAPE has been denied to the extent that, while [redacted] been on homebound instruction, not *all* the services due [redacted] under 504 have been provided. (8 VAC 20-80-190; 8 VAC 20-80-60)

This issue is decided in favor of both parties.

**ISSUE 5. Whether [redacted]'s placement in homebound is proper and appropriate.**

[redacted] is not a child with a disability, but one who is disabled. Placement is a function of special education. Therefore, a child must be a child with a disability and eligible for special education and related services. [redacted] is neither. "placement" in homebound is a matter of a medical doctor's prescription and of agreement between the PS and Parents. Given [redacted]'s disabilities, "placement" in homebound instruction is proper and appropriate.

[redacted] was not placed on homebound until [redacted], when [redacted] doctor ordered it because [redacted]'s asthmatic condition was worsened by fumes from painting the interior of the school building. [redacted] doctor(s) ordered that [redacted] could return to school on or about [redacted]. Thus [redacted] was on homebound at the time of the [redacted] CST meeting at which [redacted] was found eligible for Sec. 504 instruction, and has not yet returned to school. The 504 Plan should be implemented immediately (see below under Issue 6).

Therefore, the PS acted properly in putting [redacted] on homebound, and homebound status is appropriate.

This issue is decided for the PS

**ISSUE 6. Whether the Schools have provided the necessary homebound service for [redacted]**

The PS have provided [redacted] the same *academic* services provided for homebound special education children – teachers and the management of the homebound education services called for by [redacted] impairments.

[redacted] is not a child with a disability, and thus is not entitled to special education and related services. Therefore, [redacted] is not homebound as a special education child, and can receive homebound academic instruction only by virtue of the order of a licensed physician or licensed psychologist. An IEP must determine what services a child with a disability receives. (8 VAC 20-80-10 "Homebound instruction") The same is true for homebound physical education and other services to the homebound non-special education student. (8 VAC 20-80-60).

However, the finding by the 2/25/02 CST that [redacted] is eligible for services under Sec. 504, has made a change in [redacted] situation. Sec. 504 of the Rehabilitation Act of 1973, as amended, is broader than the IDEA and enables schools to provide many, if not all, the

same services to disabled children and more. Thus, that Act requires provision of a FAPE. Therefore, even if [redacted] is not a *child with a disability*, [redacted] is a child protected by Sec. 504. So it is that the minute the CST determined that [redacted] is eligible for 504 services, and on [redacted] drew up a 504 Plan, the PS ought to have begun and continued providing [redacted], even while [redacted] is on homebound instruction, with assistive technology, physical education, appropriate nonacademic and extracurricular and other services required for provision of a FAPE to [redacted]. (8 VAC 20-80-190; 8 VAC 20-80-60).

Thus, if the PS had followed up with [redacted] about [redacted] report, and had [redacted] produced the additional medical documents before the [redacted] CST meeting, [redacted] could have received 504 services, even on homebound instruction, much earlier.

Therefore, the PS have not provided all the necessary homebound services to which [redacted] is entitled. In addition, provision of these services under 504, as under IDEA, are the primary responsibility of the LEA and not of the Parent.

This issue is decided in favor of both parties.

**ORDER:**

The [redacted] Public Schools shall *immediately* implement the Sec. 504 Plan that was effected on [redacted], whether [redacted] is back in school or not, and amend the Plan to include whatever assistive technology [redacted] needs, including the Alpha Smart and Co:Writer recommended by the occupational therapist at [redacted]. The [redacted] Public Schools shall, as soon as practicable and convenient for [redacted], return [redacted] from homebound instruction to [redacted] School in [redacted] grade class.

**NOTICE:**

The school division is required to submit an implementation plan within 45 calendar days after the date of this decision.

This decision is final and binding on the parties. Either party may appeal this decision to a Virginia circuit court within 1 year after the date of the decision, or to a Federal district court regardless of any amount of money that is in controversy.

Hearing Officer

cc: Parties and Counsel or advocate  
Virginia Department of Education