

### CASE CLOSURE SUMMARY REPORT



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

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

\_\_\_\_\_  
 Name of Parents

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

\_\_\_\_\_  
 Date of Decision or Dismissal

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

Pro Se  
 \_\_\_\_\_  
 Counsel Representing Parent/Child

\_\_\_\_\_, Parents  
 \_\_\_\_\_  
 Party Initiating Hearing

Public Schools  
 \_\_\_\_\_  
 Prevailing Party

Hearing Officer's Determination of Issue(s):

1. Eligibility.
2. Appropriate FAPE.
3. Content of IEP.
4. 19 allegations by parents which parents' advocate will attempt to clarify as issues.

Hearing Officer's Orders and Outcome of Hearing:

Children are not eligible for special education.  
 All reimbursements are denied.

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  
LOCAL DUE PROCESS HEARING

	)	
	)	
Complainants	)	
	)	
v.	)	In Re:
	)	
PUBLIC SCHOOLS	)	
	)	
Respondent	)	

DECISION

This matter arose as a request for a Due Process Hearing made by the parents of \_\_\_\_\_ as a result of the \_\_\_\_\_ Public School system's ( PS) finding that the children were no longer eligible for special education services.

History

\_\_\_\_\_ were born on \_\_\_\_\_, and are currently \_\_\_\_\_ years of age.

Parents had previously filed a due process hearing request and taken it to the point of hearing and then moved to dismiss effective \_\_\_\_\_. The issues in the matter in this hearing were almost identical, to-wit: 15 allegations (vice 19 in the present matter) as well as specifics of implementing IEP, no effective related services, no FAPE, lack of notice. Also challenge to finding of ineligibility.

In the previous hearing, the parents had also requested an interpreter for the hearing. The standard two were engaged both times. \_\_\_\_\_ PS was billed for their unused services. Because of the time of this hiatus the children were left in an educational limbo, the parents kept them out of school and home schooled them. This hearing officer ordered that some arrangement be made to cover them in the interlude processing of the hearing to decision. By mutual agreement \_\_\_\_\_ PS provided homebound instruction for the children. There is a long history of bitter wrangling between the parents and \_\_\_\_\_ PS. The parents insisted on being represented by a lay advocate including having \_\_\_\_\_ present their case in the instant hearing. This hearing officer, mindful of the provision of 34 CFR § 300.509, "Any party to a hearing has the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." (8 VAC 20-80-76, F.1.a.) permitted \_\_\_\_\_ to do so with provisos that insured the parents would sign, and understand all documents.



Issues

The issues accepted and agreed on in prehearing conferences were:

1. Eligibility: Are the children eligible for special education services. The other issues become moot if the finding of Issue 1 is negative.
2. Are the children receiving appropriate FAPE.
3. Procedural improprieties
4. Content of IEP
5. 19 allegations by parents which parents' advocate will attempt to clarify as issues.
6. See also page 7, paragraph 5 regarding reiteration of issues.

Findings of Fact

1. The following witnesses were qualified as experts in the indicated disciplines:
  - a. - Clinical Psychologist
  - b. - School Psychologist
  - c. - Audiologist and Speech Language Pathologist
  - d. - Auditory and Language Processing Disorders
  - e. - Occupational Therapy
  - f. - Behavior Analyst
  - g. - PS Special Education Teacher, Physical Therapist with Speciality in Assistive Technology
  - h. , Autism Specialist
  - i. , Behavior Analyst
  - j. , Special Education, Special Education Diagnostician, Certified in Regular Education at the Elementary and Middle School Levels
  - k. , Occupational Therapist
  - l. , Second Language Pre-K through 12, Early Primary Education Pre-K through 3, and Early Childhood Special Education
  - m. , Special Education for Preschool through 12, Administrator in the Field and Area of Education
  - n. , Learning Disabilities, Autism and Preschool Programs
  - o. , Autism Resource Specialist
  - p. , Director for the Special Education with Concentration in Learning Disabilities

2. are twin who were born on
3. Child Find ( PS) identified both children as developmentally delayed (DD) (Exhibits and 5 and 6, 13 and 14, 15 and 16).
4. Both children were in special education under the DD label in a preschool session for about one year.
5. The parents agreed with the DD determination for both and also with the individualized education program ("IEPs") which were developed for on (Exhibits and 17)
6. The IEPs were amended again to provide for 4 ½ days of preschool special education, two home visits and speech and language services two times a week for 30 minutes. (Exhibits 46 A & B and 46 A & B)
7. On , the filed for due process. They dismissed on . On , the refiled for due process (the instant hearing).
8. All evaluation requests made by the parents were completed by PS. (TR IV, p. 135, et seq)
9. Parents are adamant that the children are autistic and that they require special education.
10. Both perform in the low to average range. ( -87, -86)
11. The school system now, including the experts called by the parents, are unanimous in saying the children will benefit by being in a regular kindergarten class where they can interact with their peers.
12. There is insufficient evidence to support a finding of autism.
13. The children have some characteristics of the autistic spectrum.
14. The children improved during their year of pre-school to the point where the school system no longer considered them eligible for special education nor classifying as developmentally delayed.
15. The children did not meet any disability category.
16. The parents were appropriately given notice of their procedural safeguards on numerous occasions.

17. Parents were allowed to audiotape IEP meetings and were so advised (TR V, p. 20, line 22).
18. PS regulations state that there is no taping of other meetings (TR V, p. 21, Line 3).
19. The parents were notified that the meeting on \_\_\_\_\_ would be an eligibility meeting (SB Exhibit 49). The meeting was scheduled to be a dual eligibility and IEP meeting at the parent's request.
20. Outside evaluations established the fact that \_\_\_\_\_ were significantly delayed prior to receiving services by PS.
21. PS considered outside evaluations and incorporated recommendations that were appropriate (TR I, pp.56-57).
22. The parents submitted no bills for IEEs to PS.
23. While the \_\_\_\_\_ occasionally engage in stereotypical behavior such as self-stimulation, they are easily redirected.
24. PS has no motivation to declare eligible children ineligible for special education. The school system actually receives more money for children who are eligible. (TR V, pp. 50-51) Both \_\_\_\_\_ would benefit from being placed in regular kindergarten (if not already there).
25. Home bound instruction was not an option until the parents gave permission to vary from the stay put IEP. (TR IV, p.171) The parents did not give permission, would not consent to the implementation of any IEPs offered after the \_\_\_\_\_ date, until they agreed to the homebound IEP.

#### Conclusions of Law

1. An evaluation may be conducted if needed, 34 CFR 300.24, VAC 20-80-56.
2. No lay advocate should be allowed to present the case, i.e., represent a party as a lawyer would do – examination, cross-examination, presenting legal argument. The advocate should be strictly limited to provisions of 8 VAC 20-80-76, i.e., accompanying and advising. Representing in the sense of acting for the parents in this case amounts to the practice of law per In the Matter of Arons, 32 IDELR 253 (Delaware Supreme Court (2000)) and is ineffective for all concerned including the parents, the school system and the hearing officer.
3. IEP plans are determined by the IEP team using the information that is available to the team. They are not done by outside evaluators.

4. The label developmentally delayed (DD) is authorized by I.D.E.A. for children through age 9, 34 CFR §300.7b. PS does not use the developmental delay label for children entering kindergarten age (TR III, p. 53).

5. School systems may cap amounts allowed for private IEEs.

6. The caps established by PS are appropriate.

7. There is no authority for granting advocate fees.

8. It is blackletter law in this Circuit that the IDEA "limits reimbursement to a single evaluation." Hudson v. Wilson, 828 F.2d 1059, 1065 (4<sup>th</sup> Cir. 1989).

9. The basic regulation governing IEE's is 34 CFR 300.502. It provides, *inter alia*, that parents may request an IEE at public expense. 34 CFR 300.502(a). If the public agency disagrees with the parents' request for an IEE, it must, "without unnecessary delay," request a hearing. 34 CFR 300.502(b)(2). The substantive issue to be decided is whether the school system's evaluation was "appropriate." 34 CFR 300.502(b)(3). If so, the private evaluation must still be considered by the school system; it simply is not paid for by that school system. *Id.*

10. As in Broward County School Board, 35 IDELR 117 (2001), the school system's evaluation was appropriate.

11. In any event, however, "appropriate" does not mean the "best that money can buy." That is fundamentally the message of the United States Supreme Court's seminal decision concerning federal special education law, Board of Education v. Rowley, 358 U.S. 176 (1982).

12. As the U.S. Department of Education, Office of Special Education Programs has held, "Public agencies should not be asked to bear the costs of unreasonably expensive independent evaluations." Letter to Thorne, 16 IDELR 606 (1990). (See also page 7.)

13. While the parent's/advocate's Reply Brief attacked the credentials of the school personnel, these credentials are not at issue since they meet state standards. Hartmann v. Loudoun County Board of Education, 118 F.3d 996 (4<sup>th</sup> Cir. 1997).

14. Reimbursement for private school education, i.e., placement at \_\_\_\_\_, is not an option for PS unless it is proved that PS cannot provide an appropriate education for \_\_\_\_\_. This was not proven. Burlington School Committee v. Department of Education, 471 U.S. 359 (1985).

15. IDEA states that "to the maximum extent appropriate," disabled children should be educated with children who are not handicapped. 20 U.S.C. Section(s) 1412(5)(B) cited with



approval in Hartmann, supra. Ergo, even if the two had continued to be regarded as eligible, it would appear that mainstreaming would have benefitted them.

### Testimony/Discussion

This hearing took five days. The first four were devoted to the parents' case although the advocate had said would only require two. The first day of hearing comprised testimony of three experts called by the advocate, notably , Clinical Psychologist (TR I, p.17), , School Psychologist (TR I, p. 128) and , Audiologist & Speech Language Pathologist (TR I, p. 210). It is worth noting that throughout the hearing, the advocate with all the confidence of ignorance of the rules of evidence and proper hearing procedure proceeded to qualify school witnesses as experts for presentation.

The two outside experts indicated as follows: " auditory processing was normal" ( ) (TR I, p. 232); "our ultimate goal in special education is to get a child out of special education" ( ) (TR I, p. 261); in response to the question "Do you know what 's intellectual ability is?" "That it's in the average range." ( ) (TR I, p. 283) Again states

"I have no concerns about the testing tools and also looking at this – This is , 's language scores, they're all pretty even, maybe within ten points of each other or so, which still is within the normal variability of one standard deviation, which is similar to my findings that does not have a specific language disorder." (TR I, pp. 241-242)

, on reviewing the videotape (Exhibits -184, -183) styled observation as very typical of children who are in the autistic spectrum. This is the closest came to making any reference to this type of deficit (TR I, p. 266). At TR I, p. 268 again used the words autistic spectrum and indicated the need for small classes. The other outside expert, , made similar generalizations. In contrast to them, the third expert, the school psychologist, testified

"One of the criteria for having a disability under I.D.E.A. is that there is an interference or an adverse affect on the child's educational performance. There is no impact on their educational performance as judged by the different impressions that they have from the teachers, from the different testing, which has been consistent among the four different psychological reports, all of them show that these children have – functioning at a level where they would be able to participate in regular education and in school." (TR I, p. 161)

and in response to the question, "Why are not eligible for autism?"

"When you look at the criteria for autism, it's characterized by three different – three different areas and you need to have marked dysfunction in each area, and that's a significant difficulty with social interaction, a delay – significant delay in communication in addition to the stereotypic movement and repetitive behavior." (TR I, p. 161)

also pointed out that the use of English as a second language might cause them to pick up patterns which might be incorrect in grammar or syntax. In addition, when asked if this would establish a disability under the I.D.E.A., replied "no." (TR I, p. 182) commented about the homebound placement on which the parents insisted and which endorsed at their request (TR I, p.115).

"Another concern with the homebound placement is that it's very clear when you go through all of these records that the 's functioning at home is reported as being much different than it is in school in terms of that they are not as age appropriate at home so I'm – since they seem to benefit from being in the school environment and function better within the school environment, to have them within an environment where they are not as successful doesn't seem to make any sense." (TR I, p. 206)

It should be noted the hearing for this date was held in the hearing officer's offices to accommodate the 's two experts both of whom are situated within walking distance in

On the second day, Thursday, , at the Schools Administration Building in , the IEP issue was discussed (TR II, p. 18, et seq.) and the difficulty of establishing which IEP was operative because of the machinations and permutations of the procedures became apparent. The advocate insisted that the (Exhibits - 17 and -17) was the operative IEP because of the stay-put provision. The parents had signed this IEP but they still contend it was inappropriate. Additionally, PS had issued two supplemental IEPs which the parents did not sign and all this became more or less moot with the compromise provision of the homebound instruction.

In order to clarify the confusion of the multiple allegations, the advocate had been asked to translate these into simple matters that might be styled as issues. Instead, provided a group of unrelated citations (TR II, p. 22, et seq.). Therefore, it was reiterated that the issues are eligibility, FAPE and IEP. That is, were the IEPs appropriate, what did the parents want and did they make that known? (TR II, p. 23) The only clear demand made by the parents through the advocate was that of private school placement. The criteria for making Private School Placement was also explained (TR II, p. 23, et seq.). In reviewing the 's list of demands, it became apparent (TR II, p. 25) that the parents felt they should have full reimbursement for all private IEEs that they have gotten. It was indicated that this would be and , and , all of whom would or had testified (TR II, pp. 25 and 26).



The advocate indicated that the parents would also want compensatory education (TR II, p. 26, et seq.). It became apparent that this was actually FAPE (TR II, p. 28). Thereafter, (TR II, p. 29, et seq) various impossible reimbursements were specified in the demands, e.g., money for them to appear and testify at their own evaluations, reimbursement for the advocate and similar irrelevant or non-reimbursable matters. Ultimately (TR II, p. 34) the parents wished to protest the caps put on the IEEs. Once again the advocate insisted that caps are improper despite the fact that [redacted] was advised that this matter has been litigated extensively and approved.

*"For example, public agencies can restrict the location of the private evaluator, require that the private evaluator possess certain qualifications, and place a cap on the reimbursement fees allowed for IEEs - within the general guidelines expressed above. If fee limits are used, the Department of Education advises that they must not prevent parents from choosing from among the qualified professionals in the area and that they are aimed at eliminating unreasonably excessive fees [emphasis added]."* Letter to Thorne, 16 IDELR 606 (1990)

Finally, (TR II, p. 39) opening statements were made, the substance of which has been covered above. Thereafter, testimony was taken from five witnesses called by the advocate, many of whom (See Findings of Fact) were qualified as experts. Note, three of them are school personnel.

The [redacted] PS speech and language therapist, [redacted], qualified as an expert in auditory and language processing disorders (TR II, p. 49), stated "their performance was in a low average to average range across all areas, both of them" (TR II, p. 88). When asked, "So in a concise statement, could you tell us about [redacted]?" [redacted] replied, ". . . all of the scores and the results of the testing do not reflect the profile of a child with a disability, because all of [redacted] scores were in the low average to average range indicative of absolutely normal speech and language skills." [redacted] stated the same was true with [redacted]. (TR II, p. 90)

When asked if the children were autistic, [redacted] stated "They don't display the characteristic of a child with autism. They engage with others. They have appropriate pragmatic skills. They smile. They initiate conversation. They can hold a conversation for four or more turns. They have appropriate sentence structure." (TR II, p. 91) When asked if [redacted] "would be appropriately placed in a regular kindergarten", [redacted] stated "in my professional opinion, absolutely yes. . . Because they're normal, typical [redacted] year old [redacted]." (TR II, p. 92) When asked if [redacted] had concerns about the children being educated in a homebound setting, [redacted] replied "I don't think that's appropriate for them. . . Because it's very isolating. There's no opportunity to interact with peers their age." (TR II, p. 93) [redacted] findings corroborated that of [redacted]

"These [redacted] skills are in the normal range as stated by [redacted] self."

"That states that they're absolutely ready for an educational environment. Then [redacted] talks about on page two that pragmatically the use of language, that where [redacted]"

falls down in for language processing. Pragmatic skills is an expressive skill, it's an expressive language skill, it's not an auditory processing skill. It might be a mixed skill at best. But that's information 's taking from and not self, so I don't know where 's getting results from."(TR II, p. 101)

pointed out "the scores are in the normal range and if the scores are in the normal range, the do not need speech therapy." (TR II, p. 103) "I did note that the seem to exhibit some dysfluency. , not near as much, but more so, during the tape. That's the only thing that I noted." (TR II, p. 104) also addressed 's stuttering problem. When asked "Did you have concerns about stuttering that required intervention?" replied, "I did not. Because exhibited normal dysfluencies that a child exhibits when they're learning the rules of language." (TR II, p. 109) In ' opinion, their language development in English would be slowed by the fact that they were in a bilingual home. (TR II, p. 115)

In order to expedite the hearing, the hearing officer requested that a curriculum vitae be provided for every person whom the advocate wished to qualify as an expert or from whom wanted to get expert opinion. Many of these were already submitted as School Board Exhibits, SB75-84 ( ) and SB80-89 ( ). The required C.V.s for the outside witnesses called for the parents had not been timely submitted, however, in the interest of efficiency and to shorten the qualification process, they were put in as hearing officer exhibits (H.O. 1, 2 and 7) instead of being submitted timely as the advocate was required to do. Hence, was qualified as an expert in occupational therapy, licensed in Virginia (TR II, p. 130 et seq). In response to the question, "Do you feel that - that qualifies for special education services.", stated, "I do." "And what would your recommendation be for the educational setting?" "The same as I would recommend for , small classroom with kids at level or a little bit above, with teachers and aides and therapist - therapy. The total program." It was noted that the testifying witness did not do the actual evaluations of the children (TR II, p. 158).

was a behavior analyst allowed to give opinion. curriculum vitae also was put in as Hearing Officer Exhibit 2 (TR II, p. 172). Since there apparently is no designation of the behavior analyst expert would have to qualify under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) logic. , in response to questioning by the advocate, considered behaviors that were identified by and associate as characteristics of autism. (TR II, p. 185) During the testimony, a video taken by the parents of the children was seen (Exhibits -184, -183), presumably dated TR II, p. 187).

described this as showing "perseverative" behavior and is "typical of individuals with autistic - autistic spectrum disorders or those who display autistic-like behaviors." (TR II, pp. 188-189) It was pointed out on cross-examination that the actual observer was not Board certified and took data over three 15 minute intervals (TR II, p. 205).

The parents video (Exhibits -184, -183) showed the two under intense pressure from the being directed to do or not do various things. It would certainly not portray the at school.

, Administrative Coordinator, Special Education Department, was qualified as a special education teacher, physical therapist and with a speciality in assistive technology. The first two at the request of the advocate, the last at the request of the attorney for the school system.

The last witness for the day, , the autism specialist for the school called by the advocate was qualified as an expert in special education and an autism expert (TR II, pp. 225 and 239). said unequivocally that the are not autistic "... what I saw of their basic social readiness, I would think that they're ready for kindergarten." (TR II, pp. 246 - 247) and that had read the IEEs (TR II, p. 248).

On day three, parent's advocate called four witnesses: and . Of these, the parent's advocate qualified as an expert in special education, a special education diagnostician, and certified in regular education at the elementary and middle school (TR III, p. 65). qualified as an expert in occupational therapy (TR III, p. 87) and as an expert in three areas: second language pre-k through twelve, early primary education pre-k through three, and early childhood special education (TR III, p. 143). was qualified as a behavior analyst expert over the advocate's objection on frivolous ground. All five of these parent's witnesses stated that the children would benefit by being in regular kindergarten.

was asked what opinion was based on observations whether the children were ready for regular kindergarten from a behavioral standpoint.

"From a behavioral standpoint? I would say go for it. . . . They seem socially to engage both with each other and with adults in an appropriate manner. They were following directions, which is a critical component of kids in school. They seemed to be happy which is going to impact whether they could go to regular ed or not, but it certainly does help. And basically seemed like healthy little ." (TR III, pp. 46-47)

stated that was easily redirected (TR III, p. 82). was asked if they were ready for kindergarten based on observations. "They had good pre-reading skills. Identification of alphabet is kind of a key thing and they both could do that. They both have a pretty good base of general knowledge upon which to build, and I saw that with both ." stated that all of 's skills were rated in the average to superior range and in opinion, and 's educational needs could be met in a regular kindergarten classroom. (TR III, p. 84)

stated

"At that point after filling out an operational criteria worksheet it was determined that the children were not eligible for direct services so a plan - it was discussed with the parents that we could develop child study plans and meet periodically for

the OT to speak with them consultatively with the parents and the teacher to talk about suggestions and ideas that could be incorporated into the classroom, but it was never acted upon. . . . Because the parents did – we offered it to the parents and said this is available to you, that OT services can be done consultatively through the child study process, and my supervisor was at that meeting with me and gave the parents a lengthy discussion on how the process would work. And then it was open to them if they chose to pursue it, and it was never pursued.” (TR III, pp. 97-98)

“I believe \_\_\_\_\_ asked me many times if I had to guess how far behind I thought \_\_\_\_\_ was and I did say that \_\_\_\_\_ is probably about a year behind with \_\_\_\_\_ motor skills. As an OT in the school we look at functioning within the classroom and in their current placement. So that did not automatically concern me that \_\_\_\_\_ was behind.” (TR III, pp. 99-100)

\_\_\_\_\_ was asked if all kindergartners grasp their pens, pencils, crayons correctly. \_\_\_\_\_ stated “Absolutely not. All adults don’t.” (TR III, p. 130)

\_\_\_\_\_ was asked a direct question about delays experienced by the children. \_\_\_\_\_ indicated that the delays the children had were normal delays which would not handicap their going into kindergarten. (TR III, p. 134)

It is worth noting that \_\_\_\_\_ had one year experience with the children (TR III, p. 181) in the Head Start Program where they had little difficulty adjusting to the class (TR III, p. 173). \_\_\_\_\_ managed to adjust inappropriate use of certain toys and pointed out the inappropriateness of these toys (TR III, p. 175). The \_\_\_\_\_ made progress.

“They became more and more verbal as the year went on. And initially they spoke maybe two, three word phrases and sentences and by the end of the year they were speaking in an average of five or six word sentences with a range up to about fourteen. They were using complex sentences, because \_\_\_\_\_ and a lot of conjunctions and appropriate markers like plurals and past tense. So their language, although it was very weak at the beginning, developed to a typical range for their age.” (TR III, p. 177, et seq).

When asked if \_\_\_\_\_ could redirect both the \_\_\_\_\_ easily, \_\_\_\_\_ replied, “By the end of the year -- usually if I just called out their name that would be enough to stop it if they were, you know, engaging in something that was inappropriate. . . . They just really seemed like they were ready for kindergarten.” (TR III, p. 181) \_\_\_\_\_ was not concerned with the stuttering indicating that it was caused by stress (TR III, p. 185). “They both really blossomed in the classroom. And I was very pleased with their progress and, in fact, I would rate them in the top four tier of the students that we sent to kindergarten.” (TR III, p. 186) \_\_\_\_\_ testified that they are ready for kindergarten and would benefit from it. \_\_\_\_\_ stated they did not meet the criteria for autism (TR



III, pp. 187-188). assessment was that as far as children with disabilities, that the parents do not understand that different children develop at different rates. (TR III, p. 189)

Day four was devoted entirely to testimony by the two indicated "So it was our understanding that could not go to kindergarten with their developmental delay label and if -- and if -- and that what we needed to do was to determine what the appropriate disability label should be since they could not have the DD label and go to kindergarten, then they had to be re-evaluated to determine a more specific disability label." (TR IV, p. 71). The hearing officer asked specifically "But that doesn't stop them from going to kindergarten, does it? Is that what you're saying that you think if they aren't special ed, they can't go to kindergarten?" testified experts determined "that a regular kindergarten class is not appropriate for ". The hearing officer responded, "That's not responsive to my question. I didn't ask that. I asked can they go to regular kindergarten?" replied "If we, the parents, concur with that, yes they could." (TR IV, p. 95)

objected to PS doing an eligibility determination. stated unequivocally that wanted evaluation and eligibility determination and in Exhibit -108 ( -107) stated unequivocally that they were not going because they want evaluations, not eligibility. (TR IV, p. 84) The school, in Exhibit -133 ( -132), the assistant principal stated

"As you have not given your consent to terminate special education for your , the remain eligible to receive services. Public Schools, therefore, proposes an interim special education placement during the pendency of the due process hearing.

"We are proposing that, as an interim placement, be placed in a regular kindergarten class in neighborhood school, Elementary School. In that setting, Autism Resource Services will be provided for 60 minutes per week to monitor academic and behavioral progress. Speech/language therapy to address expressive language will be provided two times per week in 30-minute sessions." (TR IV, p. 99)

acknowledged the interim special education placement but limited it to pendency of the due process hearing. (TR IV, pp. 112-113) On cross-examination, acknowledged that the PS had said that "private evaluation reports were not included because PS reports were more appropriate; i.e., the PS reports focused on educational areas." (TR IV, pp. 112-113)

admitted that all the evaluations had requested were done (TR IV, pp. 135-136). Following the evaluations an eligibility meeting was scheduled (TR IV, pp. 137-138) which the said they would not attend unless it was also an IEP meeting ( -112). It was agreed to in -116 ( -115), a letter from . The parents did not attend this meeting (TR IV, p. 141). "You and your wife chose not to attend the meeting; correct?"

PS offered to fund independent educational evaluations ( -124 and -123) (TR IV, p. 141). No bills were ever presented to PS for any evaluation (TR IV, p. 142). testified that was aware that the children could not be removed from special education services without either or 's consent (TR IV, p. 148, Lines 18, et seq.)

“Didn’t offer prior to for both to attend kindergarten?”

“During the pendency of our first due process complaint, that was letter from ”

“They offered the ability for both to go to kindergarten, correct?”

“During the due process hearing, yes.”

“And they also offered autism services. Why did you reject the autism services when you were contending that the had autism?”

“The offer was made in the context of our due process hearing. We . . . Because it was off the table when we -- when we removed our due process complaint.” (TR IV, pp. 149-150)

Parents introduced 's letter ( -20) over objection (TR IV, p. 162). It simply states opinion. As the PS attorney noted, is not subject to cross-examination which is accurate. It was unclear why 's testimony in some form was not given since this was one of the underlying exhibits for the parents (TR IV, p. 171).

When quizzed about why they insisted on homebound placement, pointed out that

“our experts told us that to put the into a big kindergarten with twenty-five kids and one teacher, that’s not an appropriate placement for them. That they will not function appropriately in that environment. So – and we were looking at making a request for services on a short-term basis while we were going through the due process hearing, so that’s why we requested homebound instruction.” (TR IV, pp. 171-172)

Previously, had testified (TR 4, p. 115) that they solicited for an opinion saying they needed homebound instruction.

, from perspective as a school volunteer who did translating work (TR IV, pp. 174-177). stated that was worried about children. testified on TR IV, p.228 that , the neuropsychologist for the children, recommended an inclusion program for the children but nobody else in the school system did.

At the end of day four, parents’ advocate rested.

Day five, last day, was devoted to school system’s case in chief. assistant principal for education qualified as an expert (TR V, p. 18, line 11, et seq).



was qualified as an expert in behavioral analysis by the parents' advocate over objection (TR V, p. 161). However, it appeared that would qualify under the Daubert v. Merrill Dow Pharmaceuticals, supra criteria as well as

, the homebound teacher pointed out at TR V, p. 139 that the children were using as a substitute for social interaction with their peers that mainstream kindergarten would and should provide for them.

After the testimony of , submitted the bills for the IEEs and other expenses wished considered and there was a discussion of issues again.

"Here's what I have, the eligibility, the FAPE and the IEP's. There were also supposed to be procedural objections, denial of the IEE, fee cap and not - - well one is really a redo, inappropriate placement, which is FAPE. So those are the three issues. I believe they've been there. The eligibility, of course if there's no eligibility, there's FAPE and IEP's are in there. Whether that comes out or not, I will make a decision on that so we've covered them." (TR V, p. 167)

The advocate requested and was granted the opportunity for rebuttal, although it appeared that witness was irrelevant. However, the parents had submitted a 10 day notice that they were transferring the children to (TR V, p. 170). The hearing officer noted he thought this (the witness request) was another frivolous request. The advocate conceded "and the opinions that we've heard from the school system have been consistent, they say that the children are not eligible for services and that they'll function fine in a regular kindergarten program." (TR V, p. 172)

stated "Well it certainly appears that both students have deficits in several areas which in my opinion would qualify them for special education services, yes." (TR V, p. 177) However, when quizzed about whether "the children qualify in the autism spectrum," said wasn't comfortable with that. (TR V, p. 178) recommendation was "They need a language-based program, one that will emphasize their deficits in the area of language and processing. They need a program that emphasizes social skills and that is a very small classroom setting." (TR V, p. 180)

In summing up their positions, pointed out "Yet they turned around and they offered the students regular kindergarten and were willing to provide them autism resources, which contradicts the whole issue that they're not eligible and that they'll do fine in a regular kindergarten class." (TR V, p. 191). The advocate's statement and argument and position that the school had compromised to keep the children in an educational situation, are willing to provide them autism resources even though the school system said they are not eligible. The law requires the children to continue receiving special education unless the parents withdraw or a hearing officer decides the eligibility question.

The school system pointed out

"It was significant that ( ) testified that placed the on homebound without seeing them other than the one evaluation did. Basically I think what we showed was that the placement on homebound and authorization by was done at parent request." (TR V, p. 193)

There are a number of inconsistencies in this whole case. Specifically, the parents solicited to state that the should be put in homebound services on the grounds that changing them back and forth as a result of the hearing would be detrimental to their well being and educational development. Homebound services, of course, are ordinarily used for juvenile delinquents who are too disruptive to be in class or for medically incapable children, neither of which factors apply to these . However, before the conclusion of the hearing, the parents sent the 10 day notice to the school that they were putting the into . This accomplished exactly, at least in theory, the result that they were dedicated not to do. The never were put in regular kindergarten and consequently were deprived of the least Restrictive Environment as well as the social support of their peers. Further, the requirement of an interpreter for someone who home schooled children is peculiar.

On day three at the hearing officer's request both were brought in, talked to, placed and were observed by all parties including the hearing officer. They appeared to be perfectly normal made conversation and eye contact. It was observed that the parents encouraged them to take off their shoes, whereupon did toe walking.

Not once during the entire hearing did anybody testify that either was not receiving some educational benefit from schooling in . PS. The thrust was always we need more and better.

After the hearing, was questioned by about the transition situation on the ground that wanted to know if could stop the homebound instruction. refused to let know and stated that would let the school system know, or words to that effect.

The only conclusion that one can arrive at is that the knew full well that their children were found ineligible but could attend regular kindergarten. That they did not choose to do so and displayed the same cavalier attitude about use of government and state funds that they have done from the beginning of this process. This is well demonstrated by the fact that used Federal government time, material and equipment for own personal business (See Exhibits -83, -108, -113, -82, -107, 112). Similarly, the interpreter served only for hand-holding and was unnecessary for the parent's understanding of the proceeding. The fact that the previous hearing accrued unnecessary costs like the interpreter and then was cancelled as a form of forum shopping is indicative of the viewpoint. Obviously, the whole goal of this due process hearing was to put the two little , no matter what the cost to

them, into private school placement. Everybody knows that every child will benefit from smaller classes and more individual attention. This instance is no exception.

Throughout the hearing, the advocate asked improper questions, irrelevant questions, improperly phrased questions, improper introduction of material, improper conduct in disputes before witnesses (e.g., , TR V, p. 74, et seq), lame and misdirected, useless, pointless questions, was completely disorganized, cross-examined own witnesses, did not know how to move in material, requested testimony from witnesses regarding the work products of other people, experts and examinations of non-present people.

There were 540 exhibits, in six large volumes (4 parents, 2 school), submitted originally of which 243 were actually entered into evidence. In addition to that because of the advocate's failure to get curriculum vitae from some of witnesses in advance and because of a delay in securing some of the PS material, there were eight hearing officer (H.O.) exhibits entered. The use of exhibits was extremely complex because of the numbering systems used by both parties. Thus, 's numbers were identical for the first 75. Thereafter, different numbers made it necessary to search through material at frequent intervals burdening the record and consuming time. A similar difficulty was encountered with the School Board exhibits where only a limited number of exhibits for identical material were similarly numbered. However, PS' attorney agreed to edit and combine exhibits to diminish duplication and subsequent to the hearing did so.

At TR V, p. 201, at the close of the hearing, both parties were authorized to submit closing briefs by and did so. This was confirmed by order of which also allowed rebuttal briefs. PS submitted its rebuttal on Nothing was submitted by the parents or their advocate as rebuttal.

While ordinarily it is not necessary to delineate at length as I have done in this section, the detailed reasoning and the information which I have included does appear appropriate in this opinion because of the lengthy nature of the hearing and the complexities involved.

### Decision

is not eligible for special education. is not eligible for special education. All parties are directed to put both of these in a regular kindergarten class providing them with the education they are entitled to and need since they have not been found eligible for special education. The other issues are moot, however, for the sake of bringing closure to this matter, this is what my decision would have been if the had been eligible for special education. These findings apply to both and

1. The proposed IEPs provided opportunities for a Free Appropriate Public Education. Since these were not endorsed by the parents, they could not be implemented.

2. Individual Education Plans were sufficient to meet the Rowley, supra standard. The obviously benefitted from their previous training.

3. Procedural issues were never delineated in a format which joined issue sufficient to render them in controversy. It is apparent that PS attempted to negotiate with parents, that the parents were adamant and that there could be no resolution of the procedural issues raised and that no harm was done by them. While it appeared that the parents understood the rights and that they were given all their rights, it would be advisable in instances of this sort to get an acknowledgment that this information had been provided.

4. All reimbursements are denied.

5. None of the foregoing in any way affects the rights of the parents to put and in private school, i.e., , at their own expense.

Notice

This decision is final and binding unless appealed by a party in a State Circuit Court within one year of this decision's issuance date, or in a Federal Court.

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Hearing Officer

Dated:  
copies to:

Judith A. Douglas, Director  
Due Process & Complaints  
Virginia Department of Education  
P.O. Box 2120  
Richmond, VA 23218-2120

Special Education Department

Addendum

After this decision was drafted we were e-mailed an edited version of the Brief by the advocate per [redacted]'s request which was too lengthy to download and which was received on Monday, [redacted]. An order dated [redacted] stated brief were due with Rebuttal Briefs due one week later, or [redacted].