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

MR. & MRS. [REDACTED] )  
on behalf of their [REDACTED] )  
[REDACTED] )  
Complainants ) [REDACTED] 2002  
v. ) DUE PROCESS HEARING  
[REDACTED] ) BEFORE  
[REDACTED] SCHOOLS, ) [REDACTED]  
Respondent ) ADMINISTRATIVE HEARING OFFICER

DECISION OF HEARING OFFICER

[REDACTED]

I. PRELIMINARY STATEMENT.

The complainants were not represented by an attorney. The complainants were present throughout the hearing, with the [REDACTED] serving as advocate and the [REDACTED] and child serving as witnesses. The respondent was represented by [REDACTED] Esquire of the law offices of [REDACTED]. The respondent's Administrative Assistant for Support Services, Dr. [REDACTED], was also present throughout the hearing and testified as a witness.

This was an open hearing at the parents' request, although no members of the public attended.

This proceeding is before the undersigned administrative hearing officer for the Commonwealth of Virginia by virtue of a Complaint and Request for Due Process Hearing filed by the father on [REDACTED] 2001. S-75, p.3. The Complaint also contains a request for mediation which is not directly a part of this proceeding. My responsibility there is merely to advise the parties that mediation does not toll the Due Process

proceeding, & to monitor the progress of the mediation, making sure it is not used to delay D.P. I was appointed by the respondent as hearing officer on [REDACTED] 2001. S-75, p.1.

The SEA (State Educational Agency noted in the hearing of this decision) requires a "redacted" copy of all decisions, in which all names of individuals, schools, etc. are blacked out so that the parties can not be identified by non-parties to whom the redacted copy may be released. To lessen the amount of such censoring, I will use generic terms for the parties such as father, mother & child; LEA for the Local Educational Agency ([REDACTED] Schools); and LEA Counsel for the LEA's attorney, [REDACTED]. No disrespect for the persons involved is thereby intended.

Parents' exhibits are designated P-1, P.2, etc. followed by a page number, if appropriate. School (LEA) exhibits are designated S-1, S-2, etc. followed by a page number if appropriate. The parents filed 27 exhibits totalling 123 pages including various duplicates. LEA filed 80 exhibits totalling 475 pages including some duplicate pages. A number of parents' exhibits are duplicated by LEA exhibits. For lack of time, such duplicates were not weeded out. References herein will show duplicate exhibits in parenthesis. Thus P-3 (S-6) indicates that school Ex.6 is the same as parents' Ex.3. The transcript is referred to as TR followed by a page number.

LEA counsel objected to P-21, an undated IEP, on the grounds that it appears to [REDACTED] to be submitted as an [REDACTED] 2001 IEP; whereas [REDACTED] thinks it is either a late [REDACTED] or early [REDACTED], 2001 IEP; and pages appear to be switched. It was admitted to the record with that objection noted as a caveat. TR 9-11. It resurfaced in reference to Issues 2 & 6, and is dealt with in Finding 8. All other objections to exhibits were resolved, so all other exhibits were admitted to the record without objection.

The parents produced as witnesses the mother, child, a friend, and a physical education teacher. The LEA produced six school personnel as witnesses including teachers, specialists, an administrator, a therapist and a psychologist. Witnesses, other than the claimants & the LEA administrator, were sequestered.

No Briefs. During an initial prehearing conference on [REDACTED] the parties stated their desire to file post hearing briefs, and dates were set for their filing. At the hearing the parties reiterated their desire to file briefs but LEA counsel expressed a need for more time. I stated that if they filed briefs I wanted them to include a copy of every case, statute and regulation cited therein. LEA counsel had no problem with this,

stating it was customary in [redacted] practice. However the [redacted] said [redacted] could not afford that. [redacted] opted not to file a brief and to reserve a right to do so in case of appeal. LEA counsel then decided not to file a brief.

## II. THE ISSUES

In [redacted] Complaint And Request For Due process Hearing the [redacted] described the nature of the problem as:

I do not agree with what the LEA is proposing in [redacted] IEP. And [redacted] present Level of educational performance is wrong or misleading. S-75, p.3.

Although the record contains numerous proposed IFPs and Present Level of Education Performances, the parent did not identify by exhibit number or date which of these [redacted] was referring to.

In the same document [redacted] listed as facts relating to the problem:

I have the right to agree or disagree with portions of an IEP. This LEA will not address other matters, or emotional problems. (Emphasis added.)

No explanation was given of what other matters or emotional problems were involved.

During the initial prehearing telephone conference on [redacted], between the father, myself, LEA Administrative Assistant for Support Services, and LEA counsel, whose schedule precluded a lengthy conference, the [redacted] stated that [redacted] filed [redacted] above complaint on [redacted]. On the basis of that complaint and on information gleaned principally from the [redacted] during this conference, I prepared the following statement of issues as they thus appeared (see Initial Pre-Hearing Report of [redacted] H.O.-2).

1. Whether the child's disability classification should be changed from OHI (Other Health Impaired) to Emotionally Disturbed.
2. Does the proposed IEP address:
  - a. the child's disability, and
  - b. the child's emotional or other problems.
3. What other problems are involved?
4. Is the child's present level of educational performance at the [redacted] or [redacted] grade level?
5. Is the child being provided FAPE?
6. Is the child safeguarded from being beaten at school?
7. Should the IEP have been revised when the child was

dropped from the roll of [REDACTED] School, after a 15 day absence?

8. Should there have been written notice (to Parents) prior to changing child's placement from [REDACTED] School to [REDACTED] H.S. or [REDACTED] School?

9. Did the parents receive prior notice of the [REDACTED] IEP meeting; and is the [REDACTED] proposed IEP appropriate, and if not, why not? (See Item 9. of Parents' [REDACTED] Request for Due Process. S-75, p.3.)

a. What emotional problems and other matters are not addressed by the IEP? (See Item 10. of parents' Request for D.P., and Issues 2.b. and 3 above.)

It was brought out at the [REDACTED] prehearing conference that the [REDACTED] had filed a prior complaint with the Virginia Department of Education on [REDACTED]. A copy of that undated complaint is in the record as P-8, p.1 (S-65, p.6). The [REDACTED] stated that [REDACTED] wanted [REDACTED] issues of that complaint incorporated in this D.P. proceeding. However [REDACTED] declined to answer my request that [REDACTED] tell me what those issues were. [REDACTED] also declined to tell me what emotional & other problems were involved and which specific IEP was alluded to in Issue 7, (and reserved stating whether [REDACTED] wanted the hearing to be open or closed).

A summation of the conference is in the record as H.O.-1.

On [REDACTED] I wrote to the parties to schedule a second prehearing conference to clarify the issues; to determine what emotional and other problems were involved in issues 2,3, and 9.a; to determine what disagreement the parents have with the LEA's proposed IEP and the LEA's determination of the child's present level of educational performance (see parents' Complaint & Request for D.P., S-75, p.3, ¶9); to determine what issues the [REDACTED] wanted included from [REDACTED] Complaint; to monitor the mediation; and to ask the parents once again if they desired the hearing to be open or closed, and what relief they sought. H.O.-5.

The second prehearing telephone conference was held at 5:43 p.m. on [REDACTED].

Earlier that day I received from LEA counsel a copy of a portion of the SEA's response to the father's [REDACTED] Complaint. Ultimately the entire response was placed in the record as S-65 with portions duplicated as P-7, P-8, P-10, P-16, P-17, & P-18. The Complaint itself was missing. I received it as P-8 on [REDACTED]. The only things that approach being issues in the undated complaint itself (P-8, p.1) are the [REDACTED] statements that [REDACTED] never heard a word from LEA from [REDACTED].

until [REDACTED] and that LEA failed to revise the IEP in [REDACTED] 2001. Attached to the Complaint are a number of other documents which throw no more light on the subject, and a few which refer to safety (P-8, p.6, 18, 19, 23, 28; 29, 30, 31, 33, 34); proper notice prior to changing placement (P-8, p.9); failure to receive related services (P-8, p.17); the child's physical problems (P-8, p.23, 24, 25); and the child's medications (P-8, p.28).

From the amorphous mass of material in the 34 page complaint (P-8), the SEA hypothesized that the following three non-specific issues were indicated (S-65, p.8):

1. Provision of a free and appropriate public education (FAPE) and safety.
2. Revision of the individualized educational program (IEP) for a child with a disability.
3. Prior written notice.

These are the issues which the [REDACTED] stated in the prehearing conference of [REDACTED] that [REDACTED] wanted included in this proceeding, without stating what they were. H.O.-1, ¶5.

The LEA's detailed response to these issues is found in S-65, pp.12-28 and P-16, P-17, and P-18, p.9.

During the [REDACTED] conference a question was raised as to which IEP is alluded to in Issue 2. LEA counsel assumed it refers to the currently proposed IEP (S-71) resulting from a [REDACTED] IEP meeting. The [REDACTED] countered that [REDACTED] Complaint of [REDACTED] (P.8, p.1) to SEA, the resultant above three issues of which [REDACTED] asks be incorporated in this proceeding, refers to a proposed IEP of 10/8/01. LEA Counsel was not aware of such an IEP and in fact there is none. The [REDACTED] then stated (without further identifying it) that it was the IEP that was handed to [REDACTED] on [REDACTED]. [REDACTED] complained that that IEP does not address [REDACTED] child's emotional or other problems but did not throw any light on what those problems are, other than to state that the emotional problems started in [REDACTED] School because LEA did not provide safety in the school.

During the [REDACTED] conference the [REDACTED] raised a conflict of interest issue but in effect withdrew it. [REDACTED] stated that LEA counsel's partner represented "this family" in a Civil Service Complaint which [REDACTED] thought is a wrongful conflict of interest, stating, "It goes to public service and profit of the office." LEA counsel explained that [REDACTED] partner as a delegate to the VA General Assembly, received a phone call from the [REDACTED] re safety of the child. LEA counsel stated that [REDACTED] would request a

ruling from the VA State Bar if the [REDACTED] put [REDACTED] complaint on the record. Whereupon the [REDACTED] stated that [REDACTED] would not challenge the matter.

The [REDACTED] stated that the safety issue should be in the past tense since the child is now in homebound, and requested various other changes which are reflected in issues 2,3,5,6,7 in the following restatement of the issues.

1. Whether the child's disability classification should be changed from OHI (Other Health Impaired) to Emotionally Disturbed. (This issue is unchanged.)

2. Does the proposed IEP which was delivered to the [REDACTED] on [REDACTED] with prior notice, require revision, and if so, in what respect? (See also Issue 6, below. The identity of this IEP, by date or exhibit No. was still not established. Subsumed in this issue is whether the IEP addresses the child's emotional or other problems which were still not defined by the parents. I have listed such problems in Findings 2. and 3, below.)

3. Is the school's statement of the child's present level of educational performance misleading or incorrect? The [REDACTED] contends that this document, as yet unidentified by date or Exhibit No. is misleading because the name is wrong (no explanation was given of which name or how it is wrong), and incorrect because the child didn't start in the local school until [REDACTED] 2000, instead of at the beginning of the 2000-2001 school year.

4. Is the child being provided FAPE?

5. Was the child safeguarded from being beaten?

6. Should the [REDACTED] IEP have been revised by the IEP team? (See Issue 2, above.)

7. Should there have been prior written notice to the parents of placement offered by the school to their [REDACTED] in:

a. [REDACTED] school on [REDACTED];

b. [REDACTED] School;

c. [REDACTED] School;

d. [REDACTED] School; and/or

e. [REDACTED] School?

8. Did the parents receive prior written notice of the

IEP meeting; and is the IEP appropriate, and if not, why not? (The objects to inclusion of the second portion of this Issue. It is retained on urging of LEA, and appears relevant in respect to the relief requested--p.8 below.)

Issue 7 raised by the parent during the initial prehearing conference is: Should the IEP have been revised when the child was dropped from the roll of School, after a 15 day absence? (See bottom of p.3 above). The parent did not include this issue in the restatement of issues formulated during the second prehearing conference and it appeared to have been abandoned. (See pp.6-7 above). However at the hearing on this issue arose, hydra-like, in reference to restated Issue 6: Should the IEP have been revised by the IEP team? Amazingly the parent stated, "When I am talking about revising IEP, I am talking about when they dropped from the roll after I removed from the school in .And what I am saying is, from until they never revised IEP, that is what I have been trying to state." continued: was dropped from school in April after fifteen days of continuous absence, but what I am saying is the LEA never revised IEP." TR 21,22.

LEA counsel objected to this as a material change in the issues and proposed dropping restated Issue 6, above and substituting: Should the IEP have been revised after the removed from school in the spring of 2001 (names deleted). TR23. This proposal was not adopted.

With apparent reference to Complaint to SEA (P-8,p.1), the stated: "...this is one of the complaints that was drafted in the complaint procedure, so it is not something new..." TR24. As noted at the bottom of p.4 and the top of p.5 of this decision, that complaint does contain this complaint although neither I nor LEA council heretofore recognized it as an issue in this proceeding.

In my letter to the parties to schedule a second prehearing conference to clarify the issues I specifically stated one purpose was to determine what issues the wanted included from Complaint. (H.O.-5 described at p.4 above.) Instead of maintaining this issue which was listed as Issue 7 of the issues from the first prehearing conference (H.O.-2 & pp. 3&4 above) the dropped it all together.

Ordinarily no new issues will be allowed to be raised at a hearing. This is a borderline situation. The matter was raised in the Parents' Complaint to SEA. The stated wished issues from that proceeding to be incorporated in this proceeding & did initially list it as Issue 7. I will treat



with it, I believe without prejudice to either party, in Finding 10, relating to FAPE.

### III. RELIEF SOUGHT.

In [REDACTED] Complaint and Request for Due Process Hearing the [REDACTED] proposed the following resolution.

To use all private sector reports, and review existing data. Stop saying [REDACTED] is a bad student. And that [REDACTED] is acting like a teenage kid. S-75, p.3.

At the close of the [REDACTED] 01 prehearing conference, the [REDACTED] asked for the following relief:

Appropriate education for [REDACTED] i.e., FAPE with related services; and for the school to quit being in denial that [REDACTED] was attacked, and to quit saying [REDACTED] was a typical teenager.

At the [REDACTED] 02 prehearing conference the [REDACTED] rephrased the relief sought as:

Because of irreparable damage and injury the parents want equitable relief and jurisdictional assistance, i.e., FAPE.

### IV. FINDINGS OF FACT.

Finding 1. AGE AND DESCRIPTION OF CHILD. The child was born on [REDACTED] At the time of this hearing, [REDACTED] was 13 years, 8 months old and taller than [REDACTED]. [REDACTED] gave pleasant, polite, respectful answers and demonstrated the sensitivity reported in numerous exhibits, becoming red faced, agitated, and breaking into tears at moments that were stressful to [REDACTED] such as watching [REDACTED] under cross examination, and when questioned about altercations with and being attacked by [REDACTED] boy at school. [REDACTED] has an older, mentally retarded [REDACTED] P-1, p.1.

The parents have had an agreement since before the child was born that the [REDACTED] would handle [REDACTED] medical problems and the [REDACTED] would handle [REDACTED] education. TR 75.

### Finding 2. EMOTIONAL PROBLEMS.

The child suffers from the following Emotional Problems which will be considered in relation to Issues 1 and 2.

- (1) [REDACTED] is emotionally immature and emotionally sensitive. P-1, p.4; S-7.
- (2) [REDACTED] encopresis (physical incontinence of feces) may

be the result of [redacted] feelings of inadequacy due to [redacted] learning difficulties. Id.

(3) [redacted] displays immaturity, a strong need to please and low self-confidence. Id. p.5.

(4) [redacted] struggles with discussing [redacted] feelings and is easily overwhelmed. [redacted] becomes extremely anxious, turns red, shakes, and is often unable to speak when the topic of school is brought up. S-39. [redacted] is easily upset and can be overwhelmed in situations where [redacted] is frustrated or scared. [redacted] is emotionally sensitive and may cry when upset. S-54, p2.

Finding 3. HEALTH RELATED OTHER PROBLEMS.

The child has the following health related afflictions which constitute Other Problems in relation to Issues No. 1 & 2.

(1) [redacted] was born with three kidneys, including one on the left side and two on the right. The left kidney does not function. Testimony of [redacted] TR 125.

(2) [redacted] was born with Mehlicke Frazier Syndrome, a congenital condition with abnormalities of hearing anatomy and physiology as well as renal (kidney) abnormalities. P-2, p.1, P-21, p.2, S-31, p.3.

(3) As of [redacted] [redacted] had a history of encopresis (physically caused incontinence of feces; soiling), since [redacted] 1999, causing one accident a week at school and several a day at home. This may be the result of feelings of inadequacy due to learning difficulties. P-1, pp.1,4, (S-2, pp.1-4), Childrens Hospital psychological evaluation; Blakiston's New Gould Medical Dictionary; P-3, p.2.

(4) [redacted] has mild hematuria, a discharge of urine containing blood; often associated with diseases of the kidney. P-12, p.1, report of [redacted] pediatrician since birth; Blakiston's New Gould Medical Dictionary.

(5) [redacted] has mild cerebral palsy diagnosed at 15 months. Testimony of [redacted] TR 124; P-2, p.1, P-6, p.1.

(6) & (7) [redacted] has chronic urticaria (hives); and recurrent herpes simplex lesions, both of which are exacerbated by stress. S-4, p.1. The [redacted] states that [redacted] has a third chronic skin problem also, the name of which is too long to state. TR 125.

(8) [redacted] has headaches accompanied by vomiting precipitated daily from problems encountered when attending school. [redacted] does not have these problems on weekends or when not attending school. S-5, Letter from [redacted] Professor of Neurology and pediatrics.

(9) [redacted] has mild left otitis media (inflammation of the left middle ear). Id., & Blakiston's New Gould Medical Dictionary. [redacted] ear infections have resulted in myringotomy (incision of the tympanic membrane) and insertion of tubing.

S-2, p.9; P-2,p.3; P-8,p.23.

(10) [REDACTED] has had oral surgery and wears braces. P-6, p.1.

(11) [REDACTED] has enuresis (incontinence of urine). P-3,p.2; Blakiston's New Gould Medical Dictionary.

(12) [REDACTED] has atonic-like spells and behavior consistent with possible absence spells. Id.,p.3. With likely reference to the same affliction the [REDACTED] stated that the child has "atomic nervous disorder," that pertains to functions of the vital organs, such as the heart. TR 125.

(13) [REDACTED] suffers from severe depression (P-8, p.24) for which [REDACTED] takes amitriptyline. P-8,p.28; [REDACTED] testimony, TR 122.

(14) [REDACTED] has severe asthma requiring medicated breathing treatments twice a day at school as well as at home. A nebulizer with a mouthpiece is used to administer vaporized medication. S-1,p.2; S-12,p.2; S-22,p.1; P-12.

(15) [REDACTED] reportedly has lost [REDACTED] farsightedness. P-23,p.1 (S-52,p.1), [REDACTED] letter. See further, Finding 11.

(16) [REDACTED] walks with a flat foot gait pattern on the right, with no heel strike on the right, and markedly decreased arm swing. P-2,p.2.

(17) [REDACTED] has a blood problem: [REDACTED] white count is too high. [REDACTED] testimony, TR 124.

(18) [REDACTED] has a central auditory processing problem. S-54,p.2. This was explained as when the child hears something by the time it gets to [REDACTED] brain it is not interpreted in an appropriate manner. TR 253.

(19) For additional other problems, see Finding 7 relating to the child's classification.

#### Finding 4. PRIOR SCHOOLING.

Prior to moving to his present address in [REDACTED] 2000, the child attended [REDACTED] School in [REDACTED] where [REDACTED] was in a self-contained class and received occupational therapy and speech therapy. S-2,p.9 (P-6,p.1). [REDACTED] was in special education classes from 1991 until the [REDACTED] removed [REDACTED] from school in [REDACTED] 1999 because [REDACTED] was being harrassed by students. P-4, p.1; TR 255-257. [REDACTED] reported that while in [REDACTED] [REDACTED] encountered excessive harrassment by other children who purposely coughed in [REDACTED] face and threatened to beat [REDACTED] up and to stab [REDACTED] with scissors. S-4. [REDACTED] testified that [REDACTED] then wore glasses and was called 4-eyes, and someone jumped on [REDACTED] back. P-4,p.1; TR 121. [REDACTED] was on homebound the last part of the 99-00 year. S-9. The family moved to their present location in [REDACTED] 2000. TR 159, 256.

#### Finding 5. LEA INITIAL EFFORTS TO PROVIDE HOMEBOUND.

A chronology of the LEA's efforts to develop an IEP for the

child and to begin providing FAPE and related services is contained in S-65, pp.12-28. Contact between the parties began on [REDACTED]. S-8; S-65,p.17. An IEP was developed with homebound placement consistent with the child's last IEP from [REDACTED] Schools. P-8,p.3; P-21,p.2; S-12. By [REDACTED] the [REDACTED] had not signed the IEP and refused to provide LEA with documentation giving an ending date for homebound or that the child was able to return to school, and refused to meet with LEA, stating that they might have to have SEA sort it out. S-13. On [REDACTED] the [REDACTED] requested that the LEA cancel a IEP meeting scheduled for [REDACTED] to discuss the option of starting the child at [REDACTED] School or homebound; because [REDACTED] was waiting for a letter from the child's neurologist, [REDACTED] S-14, 15, & 20, p.2.

On [REDACTED] the [REDACTED] informed LEA that the child's doctor had not released [REDACTED] from [REDACTED] care, therefore the [REDACTED] wished the child to receive homebound instruction. S-16. A [REDACTED] IEP was developed and amended on [REDACTED]. The beginning date for homebound services was [REDACTED], to conclude when the child's Dr. authorized services at school. Homebound services were begun on [REDACTED]. TR 130. The [REDACTED] objection to the amount of reading service was addressed. S-19. On [REDACTED] authorization by the child's doctor for [REDACTED] return to school was presented to LEA. S-20,p.2. An IEP review was held on [REDACTED]. S-21-S-28.

Finding 6. CHILD'S HISTORY AT [REDACTED] SCHOOL.

On [REDACTED] the child started attending [REDACTED] School [REDACTED] where [REDACTED] received instruction through the Educationally Mentally Handicapped department. S-60. Cf. apparently erroneous [REDACTED] date in S-65,p.19.

In [REDACTED] 2000 the [REDACTED] called LEA counsel's partner in [REDACTED] role as delegate to the VA General Assembly, concerning their "Civil Service Complaint." TR 105-109. The delegate relayed the matter to LEA. It was this unexplained complaint and the delegate's involvement that led the [REDACTED] to broach a conflict of interest issue in our initial prehearing conference.

Between [REDACTED] and [REDACTED] the child was absent from school 41 days for illness, "doctor", or university clinic. S-78.

After altercations between the child and other students, the LEA instituted a safety procedure to separate the child and [REDACTED] primary antagonist. TR 209. On [REDACTED] when the child was again struck by that other child, the [REDACTED] withdrew [REDACTED] from the school (TR 265-266) and informed the school that [REDACTED] would not be back. TR 105. The child was dropped from the school roll on [REDACTED] after 15 days of consecutive absences. See the

[redacted] complaint at p.7 above that the IEP should have been revised at this point, but wasn't. On cross examination the [redacted] was asked: "After your [redacted] pulled [redacted] out of school in [redacted] of 2001, you did not get back in touch with the school, did you?" [redacted] replied: "I didn't have to get back in touch with the school, they supposed to get back in touch with us. And we heard nothing from them from the last year when we took [redacted] out of school until June ..." TR 104.

After the [redacted] [redacted] 2000 complaint to [redacted] VA General Assembly delegate had been relayed to LEA, LEA responded with a [redacted] 01 letter (S-36) to the parents attempting to set an IEP meeting to discuss the child's educational plans including possible summer services. There was no response. LEA renewed the offer on [redacted] 01 with the same result. S-37.

IEP meetings were scheduled for [redacted] and [redacted] 2001. S-38, S-41,p.1. Notice of the latter meeting was hand delivered to the [redacted] who, when asked to sign a receipt, asked: "What do I get out of it?" S-42,p.1. On the same date [redacted] complained that the child was not receiving [redacted] related services. P-8,p.17.

An IEP meeting and proposed IEP on [redacted] (S-44), apparently prompted the [redacted] complaint about need for Notice in respect to Issue 7. One of the participants at that meeting was a Special Ed teacher, [redacted], a [redacted] with 33 years in the school system, who had very good rapport with the child. [redacted] testified that the [redacted] terminated that meeting, by stating they were not there for an IEP meeting, & yelling and screaming at [redacted], telling [redacted] to shut up, standing up like [redacted] was coming toward [redacted] until [redacted] was very much upset and everyone left. TR 214.

At an IEP meeting on [redacted] it was decided to offer the child homebound instruction on a short term basis in order to allow the parents time they needed to get additional info and recommendations from [redacted] at the Children's Hospital in [redacted]. The concern of the parents and [redacted] was over the child's anxiety and fear about returning to [redacted] after [redacted] prior confrontations there with other students. LEA provided a homebound instruction plan S-51,52. [redacted] ultimately advised against either homebound or high school. S-52,p.3.

A draft IEP was developed on [redacted] proposing consideration of educational services at [redacted] School or [redacted] School. S-53, S-54. The [redacted] requested that homebound services that the child was receiving be continued until the child's psychiatrist, Dr. [redacted] could review the proposed IEP. S-56,p.2.

LEA incorrectly assumed at this point that the [redacted] faxed a copy of the IEP to [redacted] and that [redacted] response of [redacted] (S-57,p.2) was based thereon. TR 177-179. The [redacted] explained that although [redacted] said [redacted] was going to fax the IEP to the child's psychiatrist, when [redacted] received the 17 page IEP from LEA [redacted] didn't have the money to fax it, so [redacted] called [redacted] rather incredulously asked the LEA administrative assistant, "...I was supposed to discuss with [redacted] about academics?" [redacted] conveyed that [redacted] only interest was in discussing the safety aspects of the IEP with the psychiatrist, and that was all they talked about. Id. It appears therefore that that was all she approved in [redacted] response (S-57,p.2), and that LEA was in error in subsequently assuming that [redacted] also approved OHI classification (see Finding 7) and placement at [redacted] School (see Finding 10). LEA administrative assistant stated that since the [redacted] had pulled all permission for release of information, [redacted] did not contact [redacted], talk to [redacted] or request anything of [redacted] TR 178.

On [redacted] the [redacted] filed [redacted] complaint to SEA. P-8,p.1.

Because the [redacted] opposed placement at [redacted] (P-24,p.1) the [redacted] IEP was revised on [redacted] proposing consideration of services for the 2001-2002 school year at [redacted] School. S-58,p.2.

At an IEP meeting on [redacted] the [redacted] read a letter written by the child, which stated the school administrator had lied about safety at the school. The [redacted] also requested a new educational performance with more appropriate goals and objectives. [redacted] also requested a Review of Eligibility for [redacted], stating [redacted] felt [redacted] would qualify for ED services. S-59. This will be dealt with in reference to ISSUE 1, in Finding 7.

A male LEA Special Ed. teacher called the [redacted] on [redacted] and explained that [redacted] was glad to help with homebound temporarily but had planned on the child entering school after the [redacted] IEP meeting. The [redacted] replied: "Now that I have begun my processes, you can take it to the bank that the homebound instruction will be set up for the long term." S-63,p.13, (S-63,p.15,S-79,p.2). Cf. parents' June, 2001 complaint to their General Assembly delegate; their [redacted] 01 complaint to SEA; and this proceeding.

The eligibility meeting on [redacted] was aborted when the [redacted] who was denied a chance to speak out of turn, became abusive, and disruptive, and left after shaking [redacted] finger at the moderator and stating, "I'm filing a civil lawsuit against this county." The [redacted] and child also left after the [redacted]

stated they were suing on grounds of civil rights violations. S-63, pp.6-24.

On [REDACTED] an IEP meeting which the parents and child did not attend, produced a proposed IEP with placement at [REDACTED] School. S-71. Prior Notice was delivered to the parents' residence. The draft IEP was mailed to the parents on [REDACTED]. S-72, pp.1-2.

The parents' Complaint and Request For D.P. Hearing and for Mediation, dated [REDACTED] was delivered to LEA on [REDACTED]. S-73.

Finding 7. OHI or ED? (ISSUE 1)

This finding relates to Issue 1, Whether the child's disability classification should be changed from OHI (Other Health Impaired) to Emotionally Disturbed. The LEA Administrative Assistant testified that the parents first raised the issue of change at a [REDACTED] meeting. TR 159-160. The [REDACTED] requested change in classification is noted in a report of an IEP meeting of [REDACTED]. S-59, S-63. Cf. TR 78, [REDACTED] date.

Other Health Impairment is defined in the Regulations Governing Special Education Programs for Children with Disabilities in VA as meaning: having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that (i) is due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, attention deficit disorder or attention deficit hyperactivity disorder, and diabetes; and (ii) adversely affects a child's educational performance. 30 CFR § 300.7 (c)(9). Emphasis added.

Emotional Disturbance is similarly defined as meaning: a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

1. An inability to learn that can not be explained by intellectual, sensory, or health factors;
2. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
3. Inappropriate types of behavior or feelings under normal circumstances;
4. A general pervasive mood of unhappiness or depression; or
5. A tendency to develop physical symptoms or fears associated with personal or school problems.

The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they may have an emotional disturbance. 34 CFR § 300.7 (c)(4). Emphasis added.

The records of the [REDACTED] include the child's IEP up until 1995. At that point [REDACTED] was classified as Developmentally Delayed with secondary impairment in Speech and Language. P-3, p.2. As defined in the regs "Developmental Delay" means a disability affecting a child ages two through eight: 1. Who is experiencing developmental delays, as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development; and 2. Who by reason thereof, needs special education and related services. 34 CFR § 300.7(b); § 300.313.

An outpatient psychological evaluation of the child was performed by a licensed clinical psychologist on [REDACTED] 99. P-1(S-2) Cf. P-21, p.3. The child was then 11 years, 3 mos old. [REDACTED] non-verbal skills were in the borderline range. [REDACTED] concentration skills were normal but [REDACTED] displayed significant deficit in visual motor integration skills. The child was well known to the examiner who had evaluated [REDACTED] in 1994 and 1998. The [REDACTED] expressed concern with the child's temper as [REDACTED] sometimes balled [REDACTED] fists at home, but did not strike [REDACTED].

A battery of tests were administered. [REDACTED] immediate auditory attending skills were in the low average range. [REDACTED] visual and auditory memory skills were in the moderately impaired to mildly impaired range. [REDACTED] visual motor integration skills were in the mildly impaired range. However [REDACTED] scored in the severely impaired range on a non-motor task involving visual form-constancy involving recognizing shapes when they have been slightly altered in size or orientation. From this it was predicted [REDACTED] would have difficulty in reading hand written notes due to weakness in recognizing form constancy. Processing speed was mildly impaired. [REDACTED] [REDACTED] reported [REDACTED] communication skills, daily living skills, and socialization skills as moderately impaired.

[REDACTED] encopresis may result from feelings of inadequacy due to [REDACTED] learning abilities. Id. (See item 5 under definition of Emotional Disturbance.)

The examiner found the child did not meet criteria for Attention Deficit Hyperactivity Disorder but continued to display a Learning Disability which is defined under the VA regulations for Specific Learning Disability as meaning: a



disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell or do mathematical calculations. The term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. It does not include learning problems that are primarily the result of visual, hearing, or motor disabilities; of mental retardation; of emotional disturbance; or of environmental, cultural, or economic disadvantage. COV§22.1-213:34 CFR§300.7(c)(10). Emphasis added.

In testifying about the above [redacted] evaluation, the LEA psychologist emphasized a statement therein that the child "...is not displaying any behaviors nor are [redacted] parents endorsing any significant emotional or behavioral problems..." as evidence of no need to change [redacted] present OHI classification. P-1,p.4. (S-2,p.4); TR 188, 197. This masks the fact that the above quoted sentence ends with the words: "besides [redacted] encopresis." TR 191. It also overlooks the fact that by seeking to change the classification to ED, the parents apparently now are endorsing significant emotional behavior as a need to change to ED. It also overlooks the fact that [redacted] encopresis, and [redacted] asthma, and [redacted] chronic urticaria (hives) and herpes simplex lesions, and [redacted] shaking, redness of face, crying, inability to speak when the topic of school is brought up, and [redacted] fear of being hurt at school, are all related to school problems and feelings of inadequacy and thus would seem to fall under item 5. of Emotional Disturbance: a tendency to develop physical symptoms or fears associated with personal or school problems. The LEA psychologist dismissed some of these symptoms listed in an [redacted] memo from [redacted] a licensed clinical psychologist, as being short term, like the anxiety you might feel if you fell off a horse and were asked to get back on. This apparently overlooks the fact the child began experiencing stress from harrassment years earlier at [redacted] prior school and was removed therefrom by [redacted] for that reason. Finding 4 above at p.10.

On [redacted] the child underwent a triennial school evaluation at [redacted] VA with a primary diagnosis of Severe Speech and Language Disorder with Secondary Cerebral Palsy. P-6 (S-2,p.9) The subdiagnoses were: Severe receptive vocabulary disorder, severe receptive language disorder, severe expressive language disorder, and mild articulatory and phonological disorder.

An Educational Evaluation on [redacted] at the [redacted] [redacted] showed the child performing at the end of the 1st to mid 2nd grade levels in all broad areas, and requiring intensive individual language therapy. [redacted] stress

related headache with vomiting and skin disorder was noted. P-3,p.9. Cf. Item 5. under Emotional Disturbance, above.

On [redacted] 00 the child received an Occupational Therapy Initial Evaluation at [redacted] resulting in findings of median visual perception and motor integration of 6.6 years and with noted difficulty in handwriting indicating [redacted] would benefit from occupational therapy. P-4.

On [redacted] 01 a physical therapy evaluation provided a diagnosis of Melnick-Frazier Syndrome and mild cerebral palsy. In the balance category, [redacted] had an age equivalent of 5 years, 5 months. P-2,p.2.

On [redacted] 00 [redacted] underwent a Central Auditory Processing Evaluation at [redacted] with an average score for [redacted] age but with weakness in auditory figure ground skills indicating difficulty in listening or following directions, especially in noisy areas. P-5.

The IEP of [redacted]/01 shows the child's primary disabling condition as OHI. S-54. The LEA administrative assistant stated that from this fact and from the fact that [redacted] a licensed clinical psychologist stated on [redacted] 01 that [redacted] informed the parents that the program sounded appropriate, and that [redacted] agreed with the plan, that it was [redacted] understanding that [redacted] thereby acknowledged that OHI is the primary disabling condition. S-57,p.2; TR 160-163.

The fallacy of this conclusion has been pointed out in the first paragraph of page 13 of this decision. It appears that [redacted] never saw the IEP with its OHI classification and that the program and plan referred to was merely the safety plan the [redacted] had phoned [redacted] about, and that that is all [redacted] approved.

The LEA psychologist made the same erroneous conclusions about Dr. [redacted] 01 memo concerning endorsing a program and plan as being an endorsement of OHI, as did the LEA administrator in the preceding paragraph. TR 189. However [redacted] went one step further and stated authoritatively although erroneously:

That plan is based on the statement of performance identifying [redacted] needs as we understand them. So we have a clinical psychologist who has worked with...for sometime saying that the plan is appropriate as described in the present level of performance and services. TR 204.

Nothing can be farther from the truth. [redacted] was speaking only of the safety plan the [redacted] discussed with [redacted]. See top of p.13, above.

As stated in Finding 6 at the bottom of page 13 above, the eligibility meeting of [REDACTED] 01 to determine this classification issue was aborted when the [REDACTED] (who mistook it for an IEP meeting) became angry because [REDACTED] was not permitted to speak out of turn, and left, threatening a law suit against the county. S-63, pp.6 through 24.

The LEA psychologist testified that the above aborted [REDACTED] 01 meeting was reconvened on [REDACTED] 01. The parties agree that the child has a disability & continues to be eligible for special education services. [REDACTED] stated that the OHI designation was continued based on the child's long, complicated medical history and ongoing treatment for medical problems. TR 187,188.

[REDACTED] said that when the parent requested review of the child's classification, the team looked back and found OHI was consistent with the child's being emotionally sensitive and emotionally immature. [REDACTED] opined that emotionally sensitive does not mean Emotional Disturbance and that emotional immaturity is a delay in development whereas Emotional Disturbance relates to specific issues and points. [REDACTED] did not comment on the aforementioned LD point 5. (tendency to develop physical symptoms and fears associated with personal or school problems) or its application, if any, here. TR 188,189,190.

The LEA psychologist stated that [REDACTED] had reviewed all existing data on the child. However [REDACTED] had never done an evaluation of [REDACTED] own on the child. Because of this the parent argued speciously that [REDACTED] hadn't looked at all the data (implying there would be more data if [REDACTED] made an evaluation). TR 204.

The IEP developed on [REDACTED] 01 lists OHI as the Disabling Condition, and proposes placement at [REDACTED] School. S-70,S-71. LEA favors adoption of that IEP.

In reaching their determination of continued OHI classification the LEA team appears to have relied heavily on the erroneous conclusions of the administrative assistant and the psychologist that that classification was approved by the child's psychologist. It appears unlikely that any member of the team was aware of all of the child's emotional & other problems listed in Findings 2 & 3. Summaries of [REDACTED] history were used. TR 202. It is not evident that due regard was given to [REDACTED] psychosomatic symptoms in relation to Item 5 of the ED definition. Even though these symptoms appear to have existed for years, they were dismissed as short term, with the analogy of a thrown rider remounting a horse. It is not clear whether consideration was given to the fact that there were a long series of such "short term" incidents including those at the child's prior school, or to the cumulative effect thereof. The

legal world holds that a series of de minimus (insignificant) events add up to something that is no longer de minimus. It appears that the cumulative effect of all of the child's confrontations at school is that [redacted] fears for [redacted] life to return there. [redacted] stated, "I was scared the boy would kill me!" TR 143. This is not just like a non-handicapped person thrown by a horse. While I do not question the expertise and professionalism of the psychologist, it appears to this lay person that a more apt horse analogy would be to a vulnerable handicapped child who was threatened, hit or beaten by a series of mean horses over a long period of time until [redacted] was afraid for [redacted] life to go near such animals or the stable or compound (school) where they were.

I will not resolve this issue now but will order that a classification team make a new determination after a review of all of the applicable data including all of the child's emotional and other problems in Findings 2 & 3, above. If a resultant classification change is made, the [redacted] 01 IEP should be modified to reflect it.

This issue is not decided in favor of either party.

Finding 8. IEP REVISION NECESSARY? (ISSUES 2 & 6)

This Finding relates to Issue 2: Does the proposed IEP which was delivered to the [redacted] on [redacted] 01, with prior notice, require revision, and if so, in what respect? Subsumed in this issue is whether the IEP addresses the child's emotional or other problems.

This Finding also includes Issue 6 which the [redacted] seemed to include as an after thought: Should the [redacted] 01 IEP have been revised by the IEP team?

The greatest stumbling block to resolving these 2 issues stems from the [redacted] complete unwillingness and/or inability to identify which IEP is involved and what revisions [redacted] feels are necessary, and what emotional or other problems may be involved. See penultimate paragraph of page 5; & p.7, above.

At the outset of the hearing on [redacted] 02 I made another effort to identify the IEP referred to in Issues 2 & 6, which the [redacted] heretofore identified only as the IEP which was handed to [redacted] on [redacted] 01, or the [redacted] 01 IEP. As noted at page 5 above, there is no [redacted] 01 IEP. LEA counsel agreed with my deduction that logically the IEP in question should be the [redacted] 01 IEP (S-54), which was forwarded to the [redacted] with a transmittal letter dated [redacted] 01 (S-53,p.1) following Prior Notice of [redacted] 01, S-53,p.2(P-22). TR 24-25.

However at the hearing the [redacted] stated for the first time that the IEP in question is the undated IEP in [redacted] exhibit P-21, which [redacted] stated was delivered to [redacted] with the Prior Notice of [redacted] 01, S-53,p.2 (P-22,p.1). TR 26. This is the same exhibit which LEA counsel objected to as a non-authentic exhibit, and

which was admitted to the record with that caveat. See third full paragraph at page 2, above and TR 9,10,11.

The [redacted] stated that [redacted] discussed P-21 with LEA psychologist in an hour long telephone conversation on [redacted] 01 (TR 10,27: Cf. TR-194,195). There followed considerable unavailing discussion trying to establish the date and authenticity of P-21.

Comparison of P-21 and S-54 shows that the 2 documents use different forms to present much of the same information. Thus the first page of each is a slightly different Demographics and Educational Performance form with essentially the same data. However P-21 contains no IEP date where as S-54, p.1, shows an IEP date of [redacted] 01. Pages 2 and 3 of both exhibits, which describe the child's Present Level of Performance, contain different type and spacing but are otherwise identical except that the 4th paragraph of p.2 of S-54 contains a sentence which is missing from P-21, to the effect that the occupational therapist reports that the progress the child has been making was compromised because of inconsistent attendance at school. Page 3 of both exhibits contains an erroneous reference to an evaluation by [redacted]. The evaluation referred to, though not cited by exhibit # is actually P-1, an evaluation by psychologist [redacted].

Both IEPs recommend a full time assistant to address safety concerns while the child is in school and consideration of homebound instruction when [redacted] is absent for long periods of time for health reasons.

P-21 and S-54 both contain a number of pages of Goals and Objectives which are largely the same content although on substantially different forms. S-54 contains a number of other forms which are not contained in P-21.

Neither of these IEPs was signed by the parents who defiantly have refused to sign any IEP even when they approve them. The [redacted] states, "I don't have to!" (Initial Prehearing Conference.)

P-21 is most closely like the [redacted] 01 IEP, S-58. Page one of P-21 and page 3 of S-58 are identical. The goal forms of both are also the same. However P-21 does not contain the first 2 pages of S-58, the Present Level of Performances are different, and P-21 contains a final page on "Transfer of Rights" which is not contained in S-54.

We will likely never know the origin of P-21.

I conclude that P-21 is not an authentic IEP but a

composite of pages or altered pages from various IEP's. Issues 2 and 6 are thus bogus issues and accordingly are dismissed, as far as P-21 is concerned. Since the IEP of S-54 is passé, the concerns raised by Issues 2 and 6 will be addressed subsequently herein in relation to the IEP of [REDACTED] 01 (S-71,S-72). As far as P-21 is concerned these issues are decided in favor of LEA.

As noted at p.7 of this decision in the discussion of issues at this hearing the [REDACTED] also raised for the first time as part of Issue 6, [REDACTED] complaint that LEA dropped [REDACTED] from the roll in [REDACTED] 2001 after 15 days of absence; but until [REDACTED] 2001 never revised [REDACTED] IEP. This matter will be treated in Finding 10, relating to FAPE.

I will order that the IEP of [REDACTED] 01 be reviewed to make sure that it addresses all of the emotional and other problems listed in Findings 2 and 3, above. Any changes necessary will be made by the IEP team.

As far as P-21 is concerned Issues 2 and 6 are decided in favor of LEA.

Finding 9. PRESENT LEVEL OF PERFORMANCE MISLEADING OR INCORRECT? (ISSUE 3)

This finding deals with Issue 3: Is the school's statement of the child's present level of educational performance misleading or incorrect? The [REDACTED] contends that the statement is misleading because the name is wrong, and incorrect because the child didn't start in the local school until [REDACTED] 2000, instead of at the beginning of the school year.

A Description Of Present Level of Performance is a standard part of an IEP. The record contains twelve such documents scattered throughout the numerous exhibits: S-1,pp.2-3; S-12,pp.2-3; S-18,pp.2-3; S-46,p.2(P-8,p.21); S-54,pp.2-3; S-58,pp.4-5 & 13; S-71,pp.2-3; S-72, pp.6-7; S-76,pp.3-4; and P-21,p.2. Prior to the hearing the [REDACTED] steadfastly declined to state which of these documents this issue relates to, or how the name thereof is wrong.

At the hearing [REDACTED] pointed not to one of the above documents but to page 1 of [REDACTED] bogus exhibit P-21 (discussed in Finding 8) and stated that [REDACTED] child's name as spelled on that Demographics form [REDACTED] is wrong. [REDACTED] stated that the middle name should be [REDACTED]. The purported error is of the parents own making, and is perpetuated in numerous other documents including P-4,P-5,P-6,P-7,P-8, etc.

The LEA psychologist testified that about [REDACTED] 01 the [REDACTED] told [REDACTED] that the child's middle name was [REDACTED]. Prior

to then everything [redacted] had showed it as [redacted]. The [redacted] told the psychologist that the [redacted] misspelled the name as [redacted] at the hospital when the child was born. TR 194. It would thus seem that with [redacted] on [redacted] birth records, it is the child's legal name, and [redacted] would have to undergo a legal name change to have it corrected to [redacted]. If the child's legal name is not [redacted] but [redacted], then the [redacted] after [redacted] name should be dropped as [redacted] and the [redacted] thus would have different names.

Under the circumstances I construe [redacted] to be the correct name. Thus none of the Descriptions of Present Level of Performance is misleading on this account as no such document is involved; and even on the Demographics form, P-21,p.1, the name is correct.

It is noted that the [redacted] continued showing the child's middle name as [redacted] in other documents including [redacted] 01 complaint to SEA, P-8,p.1.

I turn now to consider whether the Present Level of Performance is incorrect because it states that the child received homebound instruction at the beginning of the 2000-2001 school year whereas [redacted] didn't begin until later.

The parent never did state which of the 12 Descriptions of Present Level of Performance [redacted] had in mind. The Description in [redacted] bogus exhibit P-21,p.2 contains the contested statement as does the IEP of [redacted] 01 (S-54).

The exhibits of record contain various conflicting and nebulous evidence about when the child began school in 2000, and no evidence at all as to when that school year began. In response to my inquiry at the hearing the LEA administrative assistant stated that the 2000 school year began in the last week of August. TR 35.

Several exhibits give the child's starting date as [redacted] 2000 (P-8,p.9(S-45,p.1); P-21,p.2), whereas the bogus P-8,p.21 states it was early [redacted] 2000. I have found based on S-60 and the [redacted] statement TR 34, that [redacted] started on [redacted] 00 (Finding 6). The LEA chronology at S-65,p.19, giving a date of [redacted]/00 appears to be in error.

I find for reasons stated in Finding 8 that P-21 is not authentic. I further find that the [redacted] 01 IEP (S-54) is passé and that the [redacted] 01 IEP which appears to be the most recommendable IEP does not contain the objected to discrepancy, stating correctly though not precisely that the child returned to public school in [redacted] 2000.

LEA presented testimony of its administrative assistant (TR

165) and its psychologist (TR 193) that the statement of Present Level of Performance in the [REDACTED] 01 IEP (S-54) is correct.

The nub of the matter was finally reached when the [REDACTED] stated that [REDACTED] thought the discrepancy of when the child began was real significant because [REDACTED] point is that the child wasn't getting [REDACTED] related services (until [REDACTED] actually began school in the fall of 2000). TR 46. This matter will be dealt with in relation to FAPE in Finding 10.

I find that the Descriptions of Present Level Of Performance which state that the child received homebound at the beginning of the 2000-2001 school year are incorrect.

This issue is decided in favor of LEA in respect to the question of whether Descriptions are misleading because the child's name was misspelled; and in favor of the complainants in respect to whether they were incorrect because the child didn't receive homebound at the beginning of the school year as stated.

Finding 10. FAPE (ISSUE 4).

This finding answers Issue4: Is the child being provided FAPE? FAPE is understood by the parties to mean a Free Appropriate Public Education as defined in the VA Regulations, 8 VAC 20-80-60.

Findings 5. & 6. above respectively outline the LEA's efforts to begin providing FAPE to the child while homebound before entering [REDACTED]; and after the child first entered that school.

Finding 5 relates the parents refusal to sign an IEP or to furnish documentation for ending homebound or to meet with LEA, and suggesting recourse to SEA to resolve problems, and LEA's satisfying parental objections to amount of reading services requested.

Finding 6 relates problems with 41 days of absence, the demoralizing effect on the child of altercation with other students, the child withdrawn from the school on [REDACTED]/01, dropped from the rolls on [REDACTED] 01; LEA development of safety programs (which were spurned by the parents); parental complaint to VA delegate; no parental response to LEA efforts to meet and plan possible summer program; [REDACTED] disrupting a meeting by yelling at and intimidating a [REDACTED] teacher; hangups in the fall of 2000 and 2001 awaiting for the child's psychiatrist to approve placement; and the [REDACTED] abusive and disruptive behavior at an eligibility meeting held at [REDACTED] request.

The child testified that the PE teacher worked with [REDACTED] in



the gym at [REDACTED] but that no aide worked with [REDACTED] TR 139.

The [REDACTED] also testified that although the child was supposed to receive adaptive PE at [REDACTED], they never gave it to [REDACTED] they had [REDACTED] in regular PE. [REDACTED] stated that the psychologist told [REDACTED] that they had an aide pulling [REDACTED] aside in PE and working with [REDACTED]; but the school secretary told [REDACTED] they had no one pulling [REDACTED] out and working with [REDACTED] in PE, [REDACTED] was in regular PE. TR 109. [REDACTED] stated [REDACTED] did not receive adaptive PE at all at [REDACTED] nor in homebound. TR 110.

In contrast the SP ED teacher, [REDACTED] testified that at [REDACTED] the children assemble in the gym and an aide or two are used to supervise them. [REDACTED] stated that for children not able to participate with a general class, adaptive PE is provided by an aide who pulls them to one side and plays games and ball with them. The child was placed in [REDACTED] PE class because [REDACTED] has an aide. TR 208,211,212.

The child testified tearfully that [REDACTED] can't make it in regular PE because [REDACTED] can't run like the rest. TR 149. [REDACTED] likes to go to the gym the way it's supposed to be--with a Sp. Ed. gym teacher. [REDACTED] wants it too. On redirect [REDACTED] stated that [REDACTED] made the above statements because [REDACTED] said [REDACTED] needed adaptive PE. TR 148-149.

The [REDACTED] testified that in homebound from [REDACTED] the child received only a teacher, a tutor and speech therapy. [REDACTED] received OT twice in [REDACTED] 2000. [REDACTED] does not believe the provision in S-55 that OT will be made up when the child enters school because they didn't do so when [REDACTED] was in school before. The school secretary told [REDACTED] that the OT teacher didn't work with [REDACTED] like [REDACTED] was supposed to. TR 112-116. The [REDACTED] stated that the [REDACTED] phonetics lady came out to the house once, 2 weeks before the hearing for 15 minutes. TR 111.

S-79 is a note from LEA vocational specialist stating the [REDACTED] called [REDACTED] on [REDACTED]/01 stating that they did not want one of the other service providers to come to their house until after Christmas.

Sp. Ed. teacher [REDACTED] testified that [REDACTED] attempted to provide homebound services but gave only 12 hours. [REDACTED] began such services on [REDACTED] 01. The next day the child was out with a doctor's appointment. The [REDACTED] declined the teacher's offer to make up missed services on weekends. On [REDACTED] 01 the [REDACTED] asked [REDACTED] to leave because the [REDACTED] was concerned that someone may have tainted [REDACTED] mail with anthrax. The [REDACTED] advised the teacher not to come on [REDACTED]/01 or on [REDACTED] 01. The teacher only agreed to provide services on a temporary basis but the [REDACTED] wanted them on long term. TR 236-238, S-79.

The LEA speech therapist also provided homebound services for a few days in [redacted] & [redacted] 2001. On [redacted] 01 when [redacted] arrived at the child's home, the child was out with [redacted]. The therapist missed 2 days, once because [redacted] was sick, and once because [redacted] had other duties at the school. [redacted] received no response to [redacted] telephone offer to make up those days. The [redacted] said no message was left--the machine was messed up and didn't record. On [redacted] 01 the [redacted] told [redacted] not to come. On [redacted] 01 the [redacted] told [redacted] not to come as [redacted] was taking the child shopping. On [redacted] 01 [redacted] drove to the home & found no one there. TR 241-243,S-79.

S-64 is a [redacted] 01 note from a first year teacher who was unable to accept an assignment to provide homebound adaptive PE.

S-79,p.3 is a note from a homebound service provider that out of 6 days of scheduled homebound services in [redacted] 2001, only two days of service were provided. The [redacted] told the provider to leave early on the second day, and as of [redacted] 02 hadn't told the provider when to return.

The LEA administrative assistant testified that at a [redacted] 01 meeting the [redacted] asked that the child's psychiatrist and [redacted] have an opportunity to review any homebound plan as appropriate before implementing it. TR 166. S-51 is a [redacted] 01 letter from the administrative assistant to the [redacted] enclosing a homebound plan and seeking [redacted] prompt approval. There was no response. S-52,p.3 is a [redacted] 01 letter from the psychiatrist to the [redacted] stating that [redacted] would not recommend homebound instruction, & suggesting that [redacted] speak with the school to find a program to meet the child's educational, safety & social needs in an appropriate public or private school. On [redacted] 01 the administrator advised the [redacted] y letter that the staff would present IEP options including appropriate schools, at the [redacted] 01 IEP meeting. A draft IEP was enclosed. S-53.

Under leading questioning by LEA counsel the LEA administrative assistant testified that the child's psychiatrist also recommended placement at [redacted] School. TR 168. This was based on [redacted] 01 memo S-57 which doesn't say that but only that the program sounded appropriate and [redacted] agreed with the plan. This is the same document and the same sort of faulty extrapolation that the LEA psychologist made in Finding 7 above at page 17 in concluding that the psychiatrist thereby approved OHI.

The fallacy of the above conclusions by LEA administrative assistant and LEA psychologist has been pointed out in the first paragraph of p.13 of this decision and at p.17. The program and plan referred to had nothing to do with OHI or placement at [redacted] School, but only with the safety program or plan which the [redacted] called the psychiatrist about.

The LEA administrative assistant opined that the [redacted] 01 IEP

(S-71), with all its accommodations, and implementation at [REDACTED] would provide FAPE. TR 172.

The parent charged on [REDACTED] 02 that the only education [REDACTED] has received since [REDACTED] 01 is a very few days of homebound, and that [REDACTED] is not receiving related services. H.O.-8, p.3, 1st. ¶. This appears to be so, although the reasons appear in large part to be through the unavailability of the child (through sickness; absence from home for shopping, medical appointments, etc.; parental refusal for makeup instruction or services; anthrax scare; and parental refusal to receive instruction and services). LEA also appears remiss in not providing or at least proffering more instruction and services and for longer periods than it has, and in not promptly seeking to provide a homebound IEP after the child was withdrawn from school in [REDACTED] 2001.

The LEA psychologist opined that the services offered are appropriate but difficult to deliver because the child is not in school & the [REDACTED] has directed the providers not to come, or the child is not at home. [REDACTED] concluded that FAPE was not deliverable because the [REDACTED] "has not allowed service providers to come to the home or has missed a number of sessions." TR 206.

For all of the above reasons I find that the child has not been provided FAPE at all times and is not being provided FAPE. This issue is decided in favor of the parents although they should realize that they have contributed substantially to the problem.

Finding 11. WAS THE CHILD SAFEGUARDED FROM BEING BEATEN?(ISSUE5)

S-4 is a previously mentioned [REDACTED] 99 letter from the child's Dr. to [REDACTED] prior school in [REDACTED] conveying the [REDACTED] concern over harrasment the child received there including threats of being beaten up and stabbed with scissors. The Dr. expressed concern over the impact that such stress may have on [REDACTED] health problems, and concern for [REDACTED] safety. [REDACTED] referred the child to a psychologist to deal with the stress. [REDACTED]

At the [REDACTED] 02 hearing the [REDACTED] initilly played down that situation, stating: "The city schools has nothing to do with [REDACTED]" TR 92. [REDACTED] further stated the safety issue originated in [REDACTED]; and that in [REDACTED] prior school the child was only picked on, not beat on like in [REDACTED]. She also stated without reference to any school that the child had no emotional problems and would come home with a smile on [REDACTED] face until [REDACTED] "started to being beat on at school." TR 122.

In apparent self contradiction, and while maintaining that there were no safety issues at [REDACTED] prior school, [REDACTED] stated that the child's neurologist when [REDACTED] was at the prior school told [REDACTED] to move to the country because the child could never go to

[REDACTED] anymore & be depressed like [REDACTED] was with kids picking on [REDACTED] had to put [REDACTED] on Amitriptyline for stress from the kids picking on [REDACTED] in [REDACTED] Schools. TR 93,94. And when asked if [REDACTED] considered the doctor's safety concerns expressed in S-4 above were a serious issue for [REDACTED] [REDACTED] replied: "Oh yes, yes, very much so!" TR 96.

The LEA has no responsibility for the child's safety problems at [REDACTED] prior school. The above data is stated because it has a bearing on why the child's confrontations in [REDACTED] present school system were so traumatic.

Neither the [REDACTED] or child could supply the dates of the attacks [REDACTED] suffered at [REDACTED]. Those encounters were with two children: one named [REDACTED] and a [REDACTED] child named [REDACTED].

As with every issue in this case, the evidence is extremely disparate and contradictory.

The altercation with the [REDACTED] student apparently was the subject of a [REDACTED] 01 letter from the [REDACTED] to other IEP members. P-8,p.33. Therein [REDACTED] states: [REDACTED] jumps another student. The first day of school." & that [REDACTED]:  
[REDACTED] was spit on, pushed down, and hit on chest, back, and head. (Not in that order).

The letter also states that [REDACTED] son ... "is in Fear of [REDACTED] Life."

It is not clear therefrom whether this referred to one or more events or when they occurred. [REDACTED] stated that the altercation with [REDACTED] was sometime before Christmas 2000. TR 209.

LEA's response is found in a [REDACTED] 01 memo by 3 teachers and the principal, addressed to the administrative assistant. P-26,p.1 (S-50). It points out that the child in this proceeding was not enrolled in school on the first day of school of either the 2000-2001 or 2001-2002 school years. As related in Finding 6, the child's first day of school in 2000 was on [REDACTED] 00. The record does not show what [REDACTED] first day was in 2001.

The LEA's response also states that the only altercation between this child and [REDACTED] occurred after the child made several threats of legal action against [REDACTED], stating further, "You'll see what's going to happen," and called [REDACTED] a nigger. P-26.p.1. as clarified by [REDACTED] testimony: TR 222-223.

[REDACTED] stated that the argument resulted in a shoving match and the two students were separated thereafter. In the mornings instead of going to assembly in the gym with this child, [REDACTED] had to come directly to [REDACTED] room and stay. TR 209.

The LEA response (P-26) also states with apparent reference to this same incident, and in reply to the [redacted] complaint that [redacted] child was spit on, pushed down, etc., that it was a two sided fight and several witnesses attest that it was equally provoked.

The child's version was simply that one time [redacted] was sitting in the gym waiting for the bell to ring and [redacted] pushed him. [redacted] added: "Pushed me and I pushed [redacted] back, then [redacted] hit me, then we started fighting" TR 139. [redacted] denied calling the other student a bad name. TR 147.

The [redacted] stated that the first time [redacted] contacted LEA about safety for the child was in [redacted] 2001. [redacted] called the administrative assistant and the principal about [redacted] being beat on at school four different times, injured two times by the four assaults." TR 70. These assaults apparently were by [redacted]

The child gave the following account of those attacks.

One time I was eating my lunch and [redacted] got up to take [redacted] lunch tray because [redacted] was finished eating [redacted] food, and [redacted] come by & hit me in the back of my back...

One time I was going to my class, I didn't know [redacted] was out there, and [redacted] pushed me into a brick wall.

One time I was going to [redacted] class...and [redacted] was coming out...and [redacted] pushed me, I pushed [redacted] back, and I was trying to walk away because I didn't want to fight [redacted] and [redacted] hit me in the back of my head. TR 140. The child had to go to the office for an ice pack, and [redacted] hid in the bathroom. The child testified that [redacted] did not have a nose bleed or hurt [redacted] nose in anyway, and that [redacted] has told [redacted] at school to walk away. TR 141,143. The child called the LEA administrative assistant who said [redacted] would take care of the problem. The child told [redacted] that [redacted] was scared the boy would kill [redacted]. The [redacted] told [redacted] the administrative assistant was going to take care of it. TR 143. This incident apparently occurred on Thursday, [redacted]/01.

The next day the [redacted] sent [redacted] back to school and [redacted] hit [redacted] in the back of the head with [redacted] fist. TR 144.

P-15, p.1 (S-30) is a file memo by an unidentifiable LEA administrator in apparent reference to the third incident. It states that on [redacted] 01 the child was brought to the office with a nosebleed. Several student witnesses stated that the child & the other student had been calling each other names and that the other student got mad and either pushed the child into the wall or hit [redacted] on the nose, or that the nosebleed started from [redacted] falling and hitting [redacted] nose. The parents were sent for. On arrival the [redacted] stated LEA had done nothing to protect [redacted]

█ & he was tired of it. █ became loud and refused to discuss the situation.

The other student was suspended as a result of this incident. █ parent stated that the child in this proceeding also had been picking on and causing problems with other students.

S-30 also relates that a witness to the second incident stated that the other student █ was coming out of █ classroom, did not see █ & accidentally bumped █. The child pushed the other student and they pushed each other several times. █ broke it up.

The other student █ has been transferred to another school. TR 98.

The █ testified that █ kept telling █ child █ would suspend █ if █ hit █ back & █ told █ to quit threatening █ and to expel █ if █ was going to. TR 73.

P-8, p.22 is a █/00 note from █ to the █ acknowledging a conversation with █ that day & stating that the child said █ would tell █ when or if █ had any problems at school & when █ does █ will fix the problem. Apparently nothing came of this.

█ also testified that █ & the child talked to the LEA administrative assistant each of the 4 times the child was assaulted by █. The third time they talked to █ said █ would have a meeting with the principal and the █ & █ did meet with the principal. TR 98.

All three complainants felt strongly that they were wronged by relying on the word of the LEA administrative assistant that █ would take care of the problem, whereas █ failed to do so before the fourth attack. TR 99-101,123,143, S-59.

The LEA psychologist reported that the child and █ were involved in an altercation on Friday █ (01?) and the child was pushed, but no blood or swelling was evident to █. P-14,p.3. This was their fourth and last conflict.

The █ alleged that the blow to █ head in that fourth incident caused █ to lose █ eyesight & that it can't be restored. TR 101. In a letter to the LEA administrative assistant on █ 01 the █ stated that the child's physician didn't like what █ saw behind the child's eyes and made an appointment with an eye doctor who stated that the child had lost █ "far"sight-ness" and farther down the road █ would not be able to see anything. P-23,p.1 (S-52).

On [redacted] 01 after the 4th incident, the [redacted] took the child to the emergency room of the [redacted] hospital. TR 102. The examining Dr. reported no blurred vision. The [redacted] told [redacted] that the child had a ruptured right ear drum which was not affirmed. [redacted] diagnosis was: mild soft tissue contusion, occiput, with very minimal hemotoma or swelling. P-8,p.29. The [redacted] testified that the child's neurologist increased [redacted] anti-depressant medicine because [redacted] was having headaches "from the lick that [redacted] beat [redacted] with [redacted] fist on the back of [redacted] head." TR 103-104, 122-123.

The [redacted] also testified that as a result of [redacted] pushing [redacted] child down in the gym the [redacted] Hospital doctor xrayed [redacted] wrist and referred [redacted] to the [redacted] in [redacted] [redacted] was also xrayed there & told that the popping sound in [redacted] wrist came from the way [redacted] was pushed down and landed on [redacted] wrist and there is nothing they can do about it. TR 72.

The [redacted] withdrew the child from school on [redacted] 01.

On [redacted] 01 LEA presented the [redacted] with a safety plan to address the problem. S-32(S-34,p.2;P-8,p.30). The parents did not accept it because they had already taken the child out of school. TR 100.

On [redacted] 01 LEA produced a Plan to Address Safety Issues Relative to the child. S-33,p.2 (S-34,p.2;P-8,p.31). On [redacted] 01 a LEA vocational specialist made an on-site visit to the school and determined that the plan was being implemented (in the continued absence of the child). S-34,p.1.

With apparent reference to one of those plans, LEA counsel alleged without contradiction: "... there was even a safety plan developed, which was for all students, but particularly for" (this child), and the [redacted] "participated in the development of that safety plan and approved it." TR 61.

On [redacted] 01 a School Safety Audit Report based on a regularly scheduled audit, reported commendable overall safety of the school. S-35.

The parents defiantly refused to sign the [redacted] 01 IEP which addresses the child's safety concerns and recommends a full time assistant for the child to help resolve them. S-54,p.2.

S-66 is an [redacted] 01 memo from the school principal listing safety steps taken on behalf of the child. The list is part of LEA's response to the complainants' [redacted] 01 complaint to SEA.

I find that the child was safeguarded from being beaten. Obviously the safeguarding did not prevent the 5 incidents

cited. At least one of those appears to have been initiated by the child [REDACTED]. It would seem that the threats of legal action which the child made against [REDACTED] followed a familiar family pattern. Children do learn by example from their parents. Commendably the [REDACTED] told the child to walk away from trouble. With the third run-in with [REDACTED] that good advice was either ignored or the child did not realize that [REDACTED] accidentally bumped into [REDACTED]. It is tragic that in spite of the safeguarding efforts, the child was assaulted and injured. However no LEA and no individual can be an absolute guarantor of safety. Man's inhumanity to man and children's cruelty to one another are legion, and likely will never be fully preventable.

This issue is decided in favor of LEA.

Finding 12. SHOULD THERE HAVE BEEN PRIOR WRITTEN NOTICE OF PLACEMENT OFFERED? (ISSUE 7)

This finding decides Issue 7: Should there have been prior written notice to the parents of placement offered by the school to their [REDACTED] in:

- a. [REDACTED] school on [REDACTED] 01;
- b. [REDACTED] School;
- c. [REDACTED] School;
- d. [REDACTED] School; and/or
- e. [REDACTED] School.

Although the issue as originally stated by the parent at the [REDACTED] prehearing conference also included [REDACTED] School (see H.O.-8,p.5), the [REDACTED] agreed at the hearing that the latter school should be dropped from the list. TR 20.

After the [REDACTED] first raised Issue 7, but before the hearing, I [REDACTED] received and reviewed the 614 pages of exhibits in the case. Having analyzed them, I informed the parties at the hearing that it appears that this issue is fallacious because it presupposes that LEA actually offered such placement without prior notice, when in fact it hadn't offered but merely discussed such placement; with the exception of the [REDACTED] 01 IEP which proposes implementation at [REDACTED] School (S-71,p.19;S-72,p.23), for which prior notice was given (S-69,p.6;S-71,p.24). In view thereof it appeared that the issue was moot and could be dropped. TR 48-50.

LEA counsel stated that that was their position precisely, citing in support thereof, White v. School Board of Henrico County, 36 VA APP 137; 549 SE 2nd 16 (Jul 10, 2001). Id.

The court in that case held that while parents must be given prior notice to a change in placement of a child, the fact that a LEA representative brought a draft of a proposed IEP to IEP meetings, does not establish that the LEA impermissibly



determined placement prior to the IEP meetings. The court cited Doyle v. Arlington County Sch. Bd., 806 F. Supp.1253,1262 (E.D. Va.1992), aff'd 39 F.3d 1176 (1994) for its holding: "While a school system must not finalize its placement decision before an IEP meeting, it can, and should, have given some thought to that placement." The court in Henrico concluded: "The draft IEP provided a starting point for the discussion and nothing more."

The [REDACTED] stated that [REDACTED] saw what I was saying, and agreed. TR 50-51.

Accordingly I find that this issue is moot by reason of being based on a false premise, and by being dropped by the claimants.

This issue is decided in favor of LEA.

Finding 13. DID THE PARENTS RECEIVE PRIOR NOTICE OF THE [REDACTED] IEP MEETING; AND IS THE [REDACTED] PROPOSED IEP APPROPRIATE, AND IF NOT, WHY NOT.

This finding relates to ISSUE 8.

At the initial prehearing conference on [REDACTED] the [REDACTED] stated that [REDACTED] never received notice of the [REDACTED] IEP meeting. Although [REDACTED] request for this due process hearing included a request for mediation [REDACTED] refused to mediate this issue, stating he would not mediate anything that [REDACTED] knew nothing about.

S-69 is an [REDACTED] letter from the LEA administrative assistant to the parents relating numerous phone calls to try to arrange mutually acceptable IEP meeting dates, with the [REDACTED] finally stating a due process hearing would have to occur. The letter enclosed two Written Prior Notices (S-69,pp.5,6) for the [REDACTED] meeting.

S-61 is a statement by a LEA teacher that on [REDACTED] [REDACTED] delivered meeting notices, etc. to the claimants' address but that the [REDACTED] refused to sign acknowledging receipt.

S-71 is the [REDACTED] IEP. Page 24 contains the same Prior Notice as S-69,p.3.

The [REDACTED] IEP proposes placement at [REDACTED] School. The reasons for such placement are set forth at S-69,p.19(S-72,p.23). Among the advantages listed are that this placement would offer the child a least restrictive new school environment, with new teachers and the opportunity to make new friends; the school has a much smaller student population; and the two students the child had trouble with in the past are not enrolled there.

Additionally that school is closest to the child's home & the one [redacted] would attend if not disabled. TR 65,66. These two criteria should be met wherever possible.

In addition the LEA administrative assistant stated that they planned that the child would be in the same room part of the time with a special ed. teacher but that they would hire an additional teacher who would really focus mainly on the child although [redacted] has a couple of other students with similar learning problems [redacted] could perhaps work with. TR 174.

The [redacted] objected to the Prior Notice of [redacted] 01(S-53,p.2; P-22,p.1) because it lists proposed optional placement at [redacted] School or [redacted] School. [redacted] objection was that [redacted] had given LEA a letter from the child's psychiatrist allegedly recommending the child not be taught at [redacted] S-53 states that other schools were not recommended because of the psychiatrist's recommendations. The [redacted] stated the [redacted] should not have been recommended for the same reason. When I asked whether it would have been all right if LEA had merely proposed placement at [redacted] the [redacted] replied:

"Yes, sir, because that is the reason that I filed the complaint procedure with the State Board of Education for noncompliance." TR 39.

In fact the psychiatrist did not recommend that the child not be taught at [redacted], but merely stated [redacted] would not recommend homebound. S-52, TR169. The [redacted] erroneously construed this as meaning [redacted].

In any event the [redacted] 01 IEP proposed placement at [redacted] would seem to resolve the [redacted] objection thereto.

At my request LEA sent the [redacted] another copy of the [redacted] 01 IEP, after [redacted] stated at the initial prehearing conference that [redacted] hadn't received the original. S-76.

The [redacted] stated during this hearing that what LEA is proposing in the [redacted] 01 IEP "is fairly good," but that the question is whether the child's current IEP is appropriate, not whether another is going to be better. TR 41. This was not previously raised as an issue in this proceeding and will not be treated as such. See OPINION, ¶4. The only IEP issues, as such, are found in Issues 2 and 6, and were resolved in Finding 8, beginning at p.19, above.

Although the child testified that [redacted] wants to stay home, [redacted] also stated that [redacted] would rather go to a school that was fun for [redacted] than to have teachers come to [redacted] home. TR 146-147.

The first portion of the third sentence of paragraph 2 of S-71,p.19 is missing. This is the portion of the [redacted] 01 IEP

relating to placement. The balance of the cited sentence is based on the same fallacious statement that the child's psychiatrist recommended placement at [REDACTED] as has been debunked previously at pp.13,17 & 25 of this decision. In this respect the [REDACTED] 01 IEP is not appropriate and should be revised.

As stated in the third paragraph of p.21 of this decision this IEP should also be reviewed to make sure it addresses all of the emotional and other problems listed in Findings 2 and 3.

Additionally after the new determination of the child's classification has been performed, the IEP should be reviewed to make sure it lists the correct classification and is appropriate for that classification.

I find that the [REDACTED] 01 IEP appears to be appropriate with the exceptions stated in the above three paragraphs.

I find that the parents did receive prior notice of the [REDACTED] 01 IEP meeting.

This issue is decided in favor of LEA although hopefully implementation of the revised IEP will be achieved to the benefit of all parties.

Finding 14. THE CHILD IS NOT A TYPICAL TEENAGER.

One of the parents' complaints is that their child is not a typical teenager and they want LEA to stop saying [REDACTED] is. Initial Complaint: S-75,p.3. In [REDACTED] opening statement at the hearing the [REDACTED] charged that LEA wants you to believe the child is just a regular teen-aged student and [REDACTED] lack of progress is because of illness. I do not believe that that is LEA's intent. It is not supported by the record.

The only reference I find to the subject in the exhibits, is in S-50(P-26) where the teachers' written report on the altercation between the child and [REDACTED] states: "This type of peer arguing is typical of teen behavior, and is common among [REDACTED] age group." I assume this was meant to be placating. The parents were not placated. I sense that underlying their concern is a fear that if LEA looks on [REDACTED] as a typical teenager they do not understand [REDACTED] many handicaps and limitations and will not be interested in or able to provide FAPE and safety.

The parents' witness, [REDACTED] has known the child since birth, has attended a number of [REDACTED] IEP meetings, has taken [REDACTED] fishing, to amusement parks, flea markets, etc., and has attended [REDACTED] birthday parties. The witness has 2 sons with learning disabilities.

When asked if [REDACTED] felt the child is a typical teenage child, [REDACTED] replied: No, I feel [REDACTED] is lower, a little below a teenage

level, because I have raised two teenagers myself. [redacted] added that the child doesn't comprehend everything told or said to [redacted] if [redacted] is talked to like you would to a regular teenager. [redacted] treats the child more like a younger person, explains things, and tries to make things easier to understand. TR 133-135.

I find in view thereof and in view of the child's handicaps and [redacted] emotional and other problems, that [redacted] is not a typical teenager. This matter was not formalized as an issue.

Finding 15. THE CHILD'S NEBULIZER.

This topic was not raised as an issue but the mother was allowed to air a complaint about it because it was of great concern to [redacted].

Health problem 14. at p.10 of this decision relates that the child uses a nebulizer breathing apparatus to inhale vaporized medicine for [redacted] asthma. Initially the nebulizer was carried on the bus to and from the school daily.

The school nurse had the parents' doctor prescribe a new nebulizer and two new nebulizer "set-ups" so that one unit could be left at home and one kept at the school. The parents maintained that there was nothing wrong with the old nebulizer and that the child did not need another. They were incensed that the nurse took it upon herself to arrange for a second machine and that it was purchased from [redacted] instead of from the provider they preferred. The [redacted] alleged that the parents learned about it, after the fact when the prescription form from their doctor (P-9,p.7), which had been sent to the school nurse, was sent home in the child's book bag. TR 69.

There were actually two prescriptions for nebulizers. The [redacted] gave conflicting testimony as to which one was sent to the school and later sent home in the book bag. Initially [redacted] said it was P-9,p.6. TR69. On cross examination [redacted] said it was P-9,p.7. TR 86. LEA counsel pointed out that the latter prescription was not faxed to the school but directly to [redacted]

The nurse's account of the matter is found in S-24. She states that the [redacted] was notified of the need for an additional machine on the date of the first prescription for it, and the [redacted] said [redacted] would try to go by [redacted] with [redacted] medicaid card the next day to purchase it. The [redacted] admitted that no harm was done. TR90.

This matter would seem to point out a need for the nurse to give greater deference to the parents' wishes in such matters. (See also S-26,27,40, and 43, p.2 re nebulizer.)

Finding 16. The requirements of notice were met. The parties stipulate the child is disabled and needs special education & related services.

V. OPINION (RATIONALE & COMMENT).

The lawyer and dictionary writer Daniel Webster stated that a lawyer's chief function is to make order out of chaos. That was never more true than with the multiple complaints, issues, exhibits and record in this case.

It was like pulling teeth to get any sort of informative or accurate statement of issues from the [redacted] and even more difficult to unravel [redacted] thought processes to determine what [redacted] really meant by the issues stated. Prior to the hearing [redacted] was mercurial and evasive like a card player holding [redacted] cards close to [redacted] vest and unwilling to play them until the hearing.

I conclude that [redacted] reticence likely stemmed in part from [redacted] nearly complete inability to state accurate, meaningful issues or to flesh out what they involved. The hearing was full of surprises as to what [redacted] really meant to state as issues and what [redacted] real beefs were, and what exhibits & documents [redacted] really meant to cite.

If it weren't for the troubled minds of the complainants with their deeply felt wrongs, a number of their complaints would best be described as frivolous. Their "facts" and reasoning were often erroneous.

See for example the [redacted] contention at pp.21-22 above & in [redacted] initial complaint S-75, p.3, that some undisclosed Present Level of Performance was misleading because the name is wrong, when in fact the document [redacted] had in mind was not a Present Level of Performance, but a Demographics And Educational performance form in [redacted] non-authenticated exhibit P-21, and the error in [redacted] name thereon stemmed from the [redacted] having misspelled it. Such misstatement of issues is in itself wrong and misleading.

The reasoning and factual conclusions of LEA were seriously erroneous too, in respect to whether the child's psychiatrist approved their educational plans (IEPs), OHI and placement at [redacted] School.

If the [redacted] is still hung up in thinking that some earlier IEP rather than the [redacted] 01 IEP should be revised, [redacted] should consider that it really in substance doesn't make any difference. The [redacted] 01 IEP in essence is a revision of an earlier IEP. It has come a long way toward reflecting what the parents want so it should be easier to work with it as a base document with fewer changes necessary.

One of the tragic consequences of this case is that if the parents had been more cooperative and less independent, defiant, assertive of rights, short of temper, disruptive, litigious, etc. they likely would have long since achieved most of their

goals. It appears that before they can hope to achieve their goal of FAPE for [REDACTED] they must get off their high horse, pull in their horns and cooperate with LEA.

Perhaps the greatest tragedy of this proceeding is the tremendous expense of manpower and other hearing expenses, it has taken to resolve it. I am only one cog in this proceeding & I have spent countless long hours unraveling its numerous complexities, inaccuracies, contradictions and discrepancies and resolving the stated issues and the real beefs behind them. All the money thus expended to resolve complaints that might have been mediated if the parents were of a mind to, could much better have been spent on the education of this child and other children.

Hopefully the complainants will find that this decision provides them with the equitable relief they seek and will be willing to move onward to achieve it without further due process.

This decision is based on the preponderance of the evidence.

VI. ORDER. IT IS ORDERED:

1. That a classification team make a new classification determination of the child after a review of all of the applicable data including all of the child's emotional and other problems in Findings 2 and 3, as discussed in Finding 7, to determine if [REDACTED] is OHI or ED.

2. If a resultant classification change is made, LEA will modify the [REDACTED]/01 IEP to make sure it lists the correct classification and is appropriate for that classification.

3. LEA will modify the [REDACTED] 01 IEP by correcting the partial third sentence of paragraph 2 of S-71, p.19, to delete the erroneous statement that the proposal that the IEP be implemented at [REDACTED] is based on recommendations of the child's psychiatrist; and to make a complete sentence out of any remaining portion of that sentence which is retained.

4. LEA will effect all necessary team meetings and send all necessary advance written notices thereof to effect the above changes.

5. LEA will seek to obtain the parents' approval of and implementation of the thus revised [REDACTED] 01 IEP.

6. LEA will admonish all affected personnel to refrain from referring to the child as a typical teenager and to refrain from saying [REDACTED] is a bad student unless such should become the

case. Even then some more tactful terminology should be used.


VII. APPEAL RIGHTS.

A decision by a hearing officer is final and binding unless appealed by a party within one year of the date of the decision. The appeal may be filed in either a state circuit court or a federal district court. On appeal, the court shall: (1) receive the record of the administrative proceedings, (2) hear additional evidence at the request of a party, (3) base its decision on a preponderance of evidence, and, (4) grant relief which the court determines to be appropriate. If the hearing officer's decision is appealed in court, implementation of the hearing officer's order is held in abeyance except in those cases where the hearing officer has agreed with the child's parent or parents that a change in placement is appropriate in accordance with 8 VAC 20-80-76 E. In those cases the hearing officer's order must be implemented while the case is being appealed.

In every case within 45 days of the final decision of the hearing officer, an implementation plan must be filed by the local educational agency, 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 the decision and the decision is not an agreement by the hearing officer with the parent or parents of the child that a change in placement is appropriate as noted in the above paragraph.

If the hearing officer's decision is not so implemented, a complaint may be filed with the Virginia Department of Education for an investigation through the state's complaint system.

If the local educational agency does not file an implementation plan, the local educational agency must notify the Virginia Department of Education within 45 days of the issuance of the decision of the hearing officer, that the local educational agency is considering appealing the hearing officer's decision or either the local educational agency or the parent or parents have appealed the hearing officer's decision.

  
Administrative Hearing Officer

Dated 

SERVICE SHEET

I certify that by ordinary mail on [REDACTED] 2002, the original decision was sent to

[REDACTED]

and a copy of the decision was sent to each of the following:

[REDACTED]

Mrs. Brenda Briggs  
Coordinator of Due Process Complaints  
Virginia Department of Education  
Division of Compliance  
Office of Special Programs  
P.O. Box 2120  
Richmond, VA 23218-2120

[REDACTED]

Administrative Hearing Officer