VIRGINIA DEPARTMENT OF EDUCATION
DUE PROCESS HEARING

IN RE:

HEARING OFFICER DECISION

This case is about . is ten years old and is a third grade student attending Elementary School in , Virginia. has medical conditions that impact his education. He receives special education services. There is no dispute that he is eligible for special education services and has been receiving those services and accommodations' in accordance with his previous Individual Education Plans, (IEP). receives special education services in a self/contained setting for math, language, arts and in what is labeled as an inclusion setting in science and social studies. He has a one on one assistant who is with him the entire school day. receives related services including adaptive P.E., physical therapy, occupational therapy and speech. has disabling conditions entitling him to special services which include encephalitis, seizure disorder, ADHD meaning "Attention Deficit Hyperactive Disorder" defined as combined type and epilepsy.

ISSUE

The sole issue is whether or not the Public Schools have provided the parents of this student with the material used to measure 's progress. There is no question that the parents are entitled to these materials, which they continually identify as "data", under the law and particularly under the Virginia Regulations, at 8 VAC 20-81-110 G.8. Also, there is no question that if the materials used by the Public Schools are

not shared with the parent that the parent would then be unable to meaningfully participate in the development of an individual education plan, and such failure would therefore be a violation of ("IDEA") by the Public Schools. The parents are clearly entitled to such materials, See Bd. Of Ed. Of Hendrick Hudson Cent. Sch. Dist. V. Rowley, 458 U.S. at 176, 207 (1982).

FINDING OF FACTS

1. I find that Public Schools has provided all of the materials that they had in any written form, periodically and properly through that portion of the school year complained about and in compliance with the Subpoena that I issued. If those materials for some unexplained reason had not been received by the parents, I find that they were again supplied as demonstrated by the School Board's complete Exhibit C.

DISCUSSION OF CASES, LAW AND BASIS OF FACTUAL DETERMINATION

Testimony and evidence in this case was presented over a three day period. In all of my years in practicing law and my approximately thirty years of hearing Special Education cases, the presentation of evidence herein was done in the most bazaar, haphazard, and confused manner that I have ever experienced. I have now reviewed the Transcript twice, reviewed my Hearing notes, listened to the recordings of what is referred to as IEP meetings and fairly considered the written closing arguments of the parties. The animosity that exists between the parties is evident . There now exists between the parents of Caleb and Schools a lack of trust of each other. My decision will not improve that lack of trust.

The student and his parents under the law; See Schaffer v. Weast, 546 U.S. 49 (2005), have the burden of proof. The standard has been properly set out to parties at the Pre-

Hearing Conference and in my prelude to the 1st Day of the actual Hearing.

Persuasive is the holding by the 9th Circuit Court of California; Redacted Child v. . Compton Unified School District, 1109 LRP 44922 (CA.SU.Ct.2007) Parents Exhibit P90 C. See Amanda Annette v.Clark County School District, 267F 3rd 877 (U.S. Ct. of Appls. 9th Cir., 2007) at, See Anchorage School District v. M.P. (U.S. Ct. of Appeals. 9th Cir. No. 10-36065 D.C. , No. 3;09 CV00189-TMB July 19, 2012) at 689F 3rd 1047, 2012 U.S. Appeals LEXIS 14791. The court, in Compton, finds the reasoning of the ALJ and the position of Compton to be wholly incomprehensible. The burden should not be put on the Redacted Child or his parents to explain or speculate how particular documents withheld by the defendants would help the case. Rather, as in this case, plaintiffs there demonstrated that the omitted records are material to the adjudication and have pointed to testimony where the withheld records were relied upon by the party withholding production therein. Therefore, if I were to be convinced by a perponderance of the evidence that the documents submitted by the Public Schools under heading Exhibit C were not provided to the parents until subpoenaed at the end of July, 2012 I would have been compelled to find that such failure affected the parent's ability to participate in the IEP process, and therefore was violation of IDEA, entitling the student to some relief. I have not made that finding.

To the contrary as indicated in my finding of facts, I have resolved the conflict of whether or not materials requested had been furnished to the parents by Public Schools in favor of the school system. I do not reach the need to decide the next step of denying meaningful participation in the IEP process nor am I required to provide any remedy. I have reviewed the testimony ,all of the exhibits and more importantly have a clear

recollection of the testimony from the parent and the teacher Mrs. and including very definitive notes. It is my consideration of the creditability of these two witnesses that primarily controlled this decision when I considered Mrs. and Mrs. appearance and manner from the witness stand, their intelligence, their interest in the outcome of the case including bias and the opportunity for knowing the truth while having observed the things to which they testified. In short, I find the witness, Mrs. more than the parent .

The animosity and frustration between Mrs. and Mrs. was quite obvious at this hearing. I find that it began when the student had a neuro-psychological examination on, or about January, 2012 which found a significant reduction in his IQ. Then there were discussions between Mrs. and Mrs. about the possibility of the student being transferred to a lower functioning class. From that point forward the parents demand for data was continually and repetitiously made while at the same time 's Special Education teacher was sending appropriate materials home. The reason this is important is because I find that the frustration of the Special Education teacher, Mrs. was not with Mrs. personally but was frustrated in knowing that she was supplying all materials necessary to determine the student's progress and more importantly, frustrated because she determine the student's progress and more importantly, because she believed the student was and would be making progress and receiving an appropriate education. Her testimony and my thorough consideration of the exhibits have convinced me that the agreed and proposed IEP's and educational services provided to this student, in the Extended School Year service of 2012

went far beyond the minimum standard. See Bd. Of Ed. Of Henderick Hudson Cent. Sch. Dist.v. Rowley, 458 U.S. at 176, 207 (1982). The most significant consideration that convinced me that The School System had provided the materials was the testimony of the mother, . testified on Page 30 and Pages 404-407 as indicated in the **TR** as follows: She was asked the leading question indicating that the boxes for tests and quizzes as measurement of goals was not explained to her as meaning tests and quizzes given orally before the June 13th IEP meeting. Mrs. replied, '' Actually, I believe it was at the 5/14 IEP meeting—that it was at that time that I was told that his tests and quizzes were oral.'' Another jumbled and leading question was asked which essentially asked the witness if she did, or did not, have any understanding that tests and quizzes would be administered orally before . May 14th. See Page 30 and Pages 404 through 407. At that point, I felt that the answer to that question was so critical to the credibility of the witness that I asked the witness if she was going to answer the question that she didn't know that there were oral test and quizzes. Her reply was that she did not know that there were oral tests and quizzes until May 14th. Thereafter, I have determined that her testimony about not receiving materials requested was not believable. It is absolutely and abundantly clear to me that had extreme difficulty with reading and writing and functions in that regard at or around a kindergarten level. If one disregards every bit of the evidence presented by the School System exhibits, or their testimony; that conclusion is still obvious. Mrs. Therefore I find was either unaware, ill informed, or misrepresenting the truth. No matter what the cause, the effect is the same. I cannot accept that she did not know that tests and quizzes for were oral and that was the simple reason that tests and quizzes in a written fashion were not given to her.

Also affecting my determination of the creditability of the witness Mrs. , I am influenced by her testimony on Page 31 Pages 408 to 411 of the Transcript, wherein she testified that in regard to parent's Exhibit 16S. She stated that the document, which was titled, Accommodation Page, identified that quizzes would be given to the student orally to measure progress. This document was dated January 31, 2012. Mrs. ' answer was ''that they were supposed to read his tests to him, but there is nothing that says that he wouldn't write it . down''. Mrs. then sought to distinguish that answer by testifying that her understanding, that oral testing was to apply to the SOL test. At that point in the testimony I asked Mrs. if she thought that the document she was referring to referenced reading the questions to her son on the SOLs. She answered yes. I then asked her if she still thought that he would read tests and quizzes and write the answer. Her answer was that her understanding was that the tests would be read to him, but since he had been writing his name for several years that he would write his answers as to any normal tests, but not to the SOLs. Mrs. answered another long and disarrayed question regarding what a test was in her mind by saying that her understanding of a test and a quiz is that it is a written. I simply don't accept her testimony and find it incredible factually and as a matter of law.

Also affecting my determination of credibility was Mrs. ' testimony which resulted in the admission into evidence of parent's exhibit 104. Mrs. testified that she created that exhibit on the evening after the first day of this Hearing by comparing

School System's Exhibit C which contains numerous documents and materials with documents and materials that were exhibits that she had in the parent exhibit book. She found from that review that many documents admitted as School System's Exhibit C

were not in the parent's exhibit book. Exhibit P104 demonstrates Mrs. ' comparison of the two exhibit notebooks and resulted in many items from Schools Board's Exhibit C being noted where appropriate through the comparison as'' never seen''. However, the use of words'' never seen'' may well mean ''never received''. The items were produced prior to Mrs. 's comparison of the two exhibit books. The School System's Exhibit C was produced significantly before the hearing. Inferentially the parent's exhibit book was exactly what it was meant to be since it was the parent's exhibit book produced on behalf of their son . In short, if ''never seen'' means ''not received'' it must have been known long before the evening after the first day of this Hearing and therefore affects my determination of credibility.

Also in making the credibility determination I have considered Mrs. testimony on Page 26 (388 to 391) of the transcript wherein in response to a question concerning School Systems Exhibit C42 which was the June 15th progress report. Mrs. testified that she received this on July 16th following a June 26th phone call from someone on behalf of Elementary School who had stated that left some things in the classroom. Mrs. testified that because of personal problems, she did not go to school to pick up the packet of information until July 16th. This evidence is confirmation that the teacher Mrs. , testimony that the materials were sent home was accurate. Whether they got there, how they were received or if they were reviewed or paid attention to, I believe is a separate question. However, evidence is clear that materials had been left in the classroom and were not received or to use the language of the parent, "seen" until a month later when the mother picked up the information related as having been left in the classroom.

In summary, I have accepted the testimony of the teacher Mrs. as completely dispositive.

DECISION AND ORDER

Having previously been requested by both sides to extend the due date for this decision up to September 22, 2012, and having found that extension necessary because of the required third day of evidence and having found that such extension is and having found it to be in best interest of the student, it is SO ORDERED.

IT IS FURTHER HEREBY ORDERED that the parents claim for relief through their Due Process request is DISMISSED.

RIGHT TO APPEAL

This decision is final and binding unless either party appeals in a Federal District Court within ninety (90) calendar days of the latest decision or in a state Circuit Court within one hundred eighty (180) days of the date of decision.

DATED: Richmond, Virginia, **September 22, 2012** *William S. Francis, Jr.*

WILLIAM S. FRANCIS, JR.
HEARING OFFICER

CITY SCHOOL/
SAME DECISION, REVISED FOR POSTINGS