



VIRGINIA DEPARTMENT OF EDUCATION
PUBLIC SCHOOLS

March 8, 2004

IN RE: _____, by _____, Parent, and
_____, Joint Legal Guardians

D E C I S I O N

Introduction

The issue in this due process proceeding is whether or not this special education student has been offered a free and appropriate public education by _____ Public Schools pursuant to the requirements of IDEA. Specifically, _____'s parent and his legal guardian ("Parents") contest _____'s placement at _____ Academy, a separate public day school in which educational services are provided to students who have a serious emotional disturbance. (_____ Academy - Day Treatment Program Pamphlet)

This due process proceeding was initiated on behalf of _____ ("_____"), by his parent, _____, on October 29, 2003. The local educational agency, _____ Public Schools ("_____") first determined _____'s special education disability on December 16, 1997, and he was originally classified as developmentally delayed/speech and language impaired (SB-3). _____'s current classification is "Other Health Impaired" ("OHI") by virtue of _____'s impulsivity, developmental delays and his inappropriate school behavior.

School records reflect a medical diagnosis of attention deficit, hyperactivity disorder ("ADHD"). (SB-51)

Parents assert primarily that _____ is not now placed into an appropriate placement in the least restrictive environment under the Individuals With Disabilities Education Act, 20 U.S.C. Sec. 1401, et seq., ("IDEA"), 34 C.F.R. Part 300 and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 8 VAC 20-80-40, et seq. ("Virginia Regulations")

This hearing occurred on December 9 & 10, 2003 in the _____, Virginia. In addition to exhibits originally submitted by each party, certain portions of the Policy and Procedure Manual of _____ Public Schools were admitted into evidence. Also, Ms. _____, M.S., completed a class observation of _____ at _____ Academy and this report was accepted into evidence. On November 5, 2003, Parents' motion for expedited hearing was overruled.

The Parents were represented by _____, Advocate, and _____, Advocate, of _____ Advocacy Group. Kathleen S. Mehfoud, Esquire, and Jason H. Ballum, Esquire, represented _____ Public Schools.

Appearing for the school system was _____, en, Director of Support Services, Special Education Department, _____ Public Schools.

Parents contend that _____'s special education needs are not being met at _____ Academy because they assert that the class serves emotionally disturbed students. Parents

assert that [redacted]'s medical profile reflects Asberger's Syndrome or Autism Spectrum Disorder. Parents assert they have informed [redacted] of a medical diagnosis of Autism. This factor, they assert, should have directed the IEP team to a substantially different program for [redacted].

Parents contend that proper placement and classification for [redacted] is essential to a satisfactory educational outcome for him. Parents have requested a due process review of

[redacted]'s placement. Parents have requested that the Hearing Officer change [redacted]'s placement at [redacted] Academy in an ED class to a placement that is designed to meet the needs of autistic students.

In the estimation of the Parents, the IEP team has erroneously rejected sound medical opinion in the refusal of the IEP team to place [redacted] in a program designed to meet his autistic needs. In fact, [redacted]'s mother has stated that she erroneously believed that her son's IEP team had recommended placement at an autism center. Parents assert that consent to the 2003-2004 IEP placement was based upon the mother's mistaken belief that [redacted] would be placed in a center for autistic children. Parents contend that they would not have knowingly consented to the [redacted] Academy placement.

By presentation of the following correspondence to the IEP team on October 29, 2003, Ms. [redacted] withdrew her consent to [redacted]'s placement at [redacted] Academy. (SB-1) Excerpts from Ms. [redacted]'s correspondence to the IEP team follow:

" is not exclusively diagnosed with with ADHD. He additionally presents a diagnosis of Autism spectrum social development disorder by two completely independent Physicians August 21, 2003 and May 15, 2003 Ronald B. David MD, of Children's Neurological Services, as well as February 10, 2003 Karl Sieg M.D. F.A.P.A. Child and Psychiatry Diplomate, American Board of Psychiatry and Neurology."

Further, Ms. alleged that "inappropriate placement in an emotionally disturbed class for a child with Autism [a]ffects the safety and welfare of my child." (-42) Ms.

reasoned that the ultimate impact of educating emotionally disturbed children in the same environment with an autistic child is that the latter will be vicariously affected: the placement "will only serve to corrupt and pollute the individual who has Autism spectrum disorder." (-42)

In support of Ms. 's apprehensions, she cites incidents of physical assault, harassment, and abuse to her son: "pushed down, scratched, cut, and [a] lump on his head" by the other students at Academy. It is entirely an "inappropriate behavioral intervention" to utilize the removal of one's shoes and socks for "time out" periods," Ms. complained in her correspondence to the IEP team. (SB-1)

Ms. does not accept the fact that the IEP team has apparently rejected, without proper explanation, the results of the IEE. Parents allege that multiple procedural violations have occurred in violation of IDEA: Parents deny that properly notified them of the July 30, 2003 Eligibility meeting during which 's IEE and re-evaluations were considered.

(-42) Parents assert that a continuum of services was never offered to to address his misbehavior and avoid his current placement at Academy. Parents contend that the FBA and BIP did not address 's deteriorated behavior over the course of the 2002-2003 school year. Parents assert that 's final suspension in May, 2003 presented a pattern of behavior. Before 's homebound placement was implemented, Parents contend, should have convened a Manifestation Determination Review because 's removal from school effectuated a change of placement for him.

Also, Parents request financial compensation for advocacy of 's due process claim, financial reimbursement for private assessments and evaluations, and relief for 's failure to provide FAPE to during homebound placements and for additional relief: a compensatory education plan for time that has spent at Academy.

Parents' concerns regarding 's placement at Academy require this Hearing Officer to examine the record and to make a determination regarding the appropriateness of 's placement as follows:

- (1) has classified as OHI. Is this label a correct one for 's special education disability?
- (2) With regard to 's special education needs, has utilized appropriate disciplinary procedures or have violations of IDEA occurred?
- (3) Is receiving a free and appropriate education in conformity with IDEA?

BACKGROUND

in is a ten year old male who was born on .
(SB-32) has stated that 's
birth was relatively normal although his delivery
was complicated by having his mother's umbilical cord wrapped
around his neck. lives with his divorced parents, his
adult brother, and with his mother's fiance,
(SB-32) By court order entered in the Juvenile and
Domestic Relations General District Court, on January 22, 2004,
's mother, , and were awarded
joint legal custody of . (Court order was submitted to
the Hearing Officer after the hearing of the matter.)

has received special education services since his
pre-school years. He has a medical diagnosis of Attention
Deficit Hyperactivity ("ADHD") for which he has taken different
medications over the years. (SB-32)

first qualified to receive special education
services because of his disability pursuant to the
Individuals With Disabilities Education Act, 20 U.S.C. Sec.
1401, et seq., ("IDEA") on December 16, 1997. (SB-2)
As recited in 's IEP dated October 11, 2000, was
classified as "Developmentally Delayed." This IEP notes 's
weaknesses in "social skills, inability to stay on task, [and]
fine motor skills." In contrast, 's expressive language
and general communication skills are noted to be "clear and
meaningful" (SB-2) Accommodations included individual instruction

and preferential seating. was to receive his special education in a self-contained classroom with full-time academic instruction, with inclusion in the general curriculum for art, music, library, science, social studies, and gym. Speech/language therapy was provided to on a consultation basis. Occupational therapy was provided to for 30 minutes weekly. (SB-2) As evidence of her consent to this document, Ms. has authorized implementation of this IEP by signing her name at the end of the document. (SB-2) 's behavior is noted as "appropriate" and it "does not impede his learning or that of others." (SB-2)

On March 21, 2001 the Eligibility Committee recommended placement for as "Other Health Impaired" (OTI). He also received services in the "Occupational Therapy" (OT) and Speech Language (SLI) programs. (SB-3) Ms. executed her consent to placement in the OTI program on August 28, 2001. (SB-5)

 's IEP dated October 10, 2001, continued to note 's weaknesses in fine motor skills and his inappropriate social skills. (SB-6) As recited therein, it was reported that needed to learn how to stay on task, complete his assignments, and work independently. Social skill problems were described as "making noises, bothering other students in class, while discussion and/or classwork is being completed." (SB-6) Apparently, also had trouble in pronunciation of his "r," "f," "th," and "sw" sounds for which he received speech and language services. This IEP, however, noted "good

progress." (SB-6)

It is apparent from examination of this IEP that 's obvious behavioral concerns were not addressed, however, this IEP referenced 's inappropriate classroom activities. It appears that episodes of 's unacceptable behavior had not yet required intervention because his behavior had not yet adversely impacted his schoolwork. was classified OTI on this IEP and he was taught in a cross-categorical special education classroom, his mother, , having executed consent to this IEP. (SB-6)

This IEP was revised by follow-up occupational therapy evaluation (SB-8) which revealed 's motor skills had improved significantly. Occupational therapy was deleted as a related service offered to by revision to his IEP on June 11, 2001. (SB-8) Documentation of notice to parent reflects that Ms. changed the original day of the meeting and as recited therein, parent attended the IEP revision meeting on June 11, 2002. Apparently, the mother did not object to deletion of occupational therapy as a related service for . (SB-9)

On October 31, 2001, a bus driver reported one incident of 's poor impulse control in which a relatively minor incident occurred: crawled on the floor under the seats. Another school bus incident was not reported until May 3, 2002, and this incident might best be described as simply "annoying" behavior for . The bus driver, Ms. , reported that disobeyed her. He was observed "kicking and swinging

[his] bookbag in [his] seat area," making "animal noises," and not sitting in his seat. (SB-7) Similar behavior occurred again on May 8, 2002. These incidents were handled through conferences with . He was told that bad behavior on the school bus could cause him to be suspended from the bus. The record is unclear, however, if Ms. was aware at the end of the 2001-2002 school year that needed to control himself better on the school bus. (SB-7)

In any event, 's school bus misbehavior did result in a two day bus suspension on September 26 & 27, 2002, although was allowed to attend school. Ms. was notified by written report of the incident underlying 's bus suspension and he was reassigned to a special education bus on September 30, 2002. (SB-7)

Contemporaneously to 's school bus reassignment, Ms. was informed that 's classroom behavior was deteriorating. Via a phone message left for Ms. on September 18, 2002, she was informed that couldn't stay on task, was "extremely playful," that he spoke out, made noises, and played with his fingers instead of doing his work. (SB-10) In response to this report, Ms. informed the school that she had elected to take off his Ritalin. Philosophically, Ms. vehemently opposes the use of Ritalin to control 's hyperactivity. Upon expressing her stance regarding the use of Ritalin, the school responded to Ms. that any change in 's medications should be communicated immediately to his teachers. (SB-10)

Upon [redacted]'s return to school for the fall, 2002, semester at [redacted] Elementary School, [redacted] received a disciplinary notice on September 23, 2002 (SB-7) for an incident of misbehavior directed toward a female at school: " [redacted] pressed his [body part or object] into her rear hip area." [redacted]'s behavior appears to be directed not only toward peers but also to his teachers. Ms. [redacted] was orally notified on four occasions of [redacted]'s behavior problems. (SB-7)

Misbehavior on the school bus and in class continued to increase in intensity: [redacted] was suspended for two days on September 30, 2002, for disobedience, insubordination, and class disruption all day. (SB-7) A written notice appears on file, however, Parent has not signed off on it. On September 25, 2002, [redacted] was suspended from the school bus for standing on the seats, touching other children inappropriately, talking back to the driver, and punching the seats.

An incident report dated October 9, 2002, describes defiant behavior for a whole week: [redacted] won't follow instructions, is constantly disruptive and making noises, He would not obey teachers nor follow class rules. It is also noted that [redacted] has begun to make "growling" or "snorting" sounds "when things don't go his way." (SB-7) As a result of these behaviors, [redacted] was placed in "time-out" and denied computer game privileges. Ultimately, he was suspended for three days. Ms. [redacted] has not signed off on this incident report.

On October 18, 2002, the bus driver reported that

had leaned over his seat and kissed another student. As a consequence for this incident, [redacted] was required to write an essay on "inappropriate" contact with others. The record is unclear regarding Ms. [redacted]'s knowledge of this incident. (SB-7)

Similar activities occurred on the school bus on October 22, 2002, resulting in a written report by the bus driver. Also, on this date, [redacted] misbehaved so badly in class that he had to be removed bodily by the principal: He disturbed the class by loudly singing songs in which he referred to flatulence. He removed his shirt. In the principal's office, [redacted] attempted to kiss a female student. (SB-7) The following day, October 23, 2002, [redacted] continued to disrupt the class by "barking like a dog," crawling around under the table, and constantly making noises. [redacted], who refused to follow instructions, scratched the teaching assistant with his pencil. (SB-7) For the above incidents of disorderly conduct, [redacted] was suspended for three days. The parent has not signed-off on this written report, however, Ms. [redacted] was contacted and she refused to pick [redacted] up from school. A similarly defiant incident followed on January 29, 2003 for which [redacted] was suspended until January 31, 2003.

Though many of the disciplinary infraction notices were not signed by the parent, the school record documents numerous instances of written and oral communications to Ms. [redacted] to impress upon her the seriousness of [redacted]'s misbehavior during the fall, 2002: a phone conversation with

Ms. [redacted] on September 18, 2002, a phone message on September 20, 2002, a follow-up conversation at the principal's office on September 20, 2002, a phone message on September 23, 2002 in which detention was suggested because "[redacted] was not learning due to his behaviors." On September 23, 2002, Ms. [redacted] and her fiance, [redacted], ([redacted] has since become the joint legal guardian of [redacted]) appeared at an open house PTA meeting at school where an impromptu conference occurred with [redacted]'s teacher. [redacted]'s special education teacher lamented the difference between [redacted]'s progress for the prior year and the current year's academic performance. Mr. [redacted] replied, "he wouldn't give that drug [Ritalin] to his worst enemy."

(SB-10)

School personnel observed [redacted] in his classroom on October 17, 2002. His activities are documented as follows:

"11:25 the assistant took [redacted] to the Reg. Ed. class for Music. He was unable to follow the music teacher's directions in order to play the Recorder, so he was brought back to class.

12:10 [redacted] eats lunch inside the classroom.

12:35 [redacted] has become very active. He gets on the floor and beats on the seat of his chair like drums. He licks the storage cabinet.

12:45 until 1:45 [redacted] exhibited the following behaviors and made these statements:

I like to have my butt whipped. It feels good.

He would make faces at the teacher or either stuck his tongue out at her. He banged his head on the air conditioner. He banged his hands on this desk like a drum. He screamed or talked out constantly. He threatened Ms. [redacted]. He said, 'I bit my mother and I will bite you.'

The only time during the afternoon that [redacted] regained control was during the discussion of Egypt. Upon dismissal, [redacted] took off running to his bus. (SB-10)

The next day, October 18, 2002, [redacted] repeatedly kissed

a female student on the morning bus. The day progressed:
At 10:00 A.M. is "on task." With a teacher sitting next
to him, he read a story that he liked, "The Rooster," and
followed directions to complete workbook pages. Later that
day, however, became upset about redoing a writing
assignment and he became "rowdy." was given Play-Doh
which temporarily quieted him. Then the noises, speaking out,
and slamming began. yelled out, "Look, I have a French
fry and I'm going to eat it." When the Play-doh was taken
from , he began to scream again, "I'm hungry. Feed me.
Feed me." then fell out of his chair after yelling
at the assistant, "I know how to get your attention."
was then placed in "time-out" behind the classroom door. He
began to slam and bang on the door as he yelled out at students
in the hall. screamed that he had "wet his pants" even
though his pants were dry. He again yelled, "Feed me. I'm
hungry."

On this date, a BIP meeting was taking place for
in another room of the building and 's mother was present.
was brought to the BIP meeting. After entered
the room and hugged his mother, he spotted different kinds
of balls in a container inside the conference room. He pulled
out a basketball and bounced it around the room. 's
principal, Mrs. , asked to put the ball up and
sit beside his mother, however, did not obey. Mrs.
physically retrieved the ball from . Ms.
was asked to try to get to sit down but her efforts

were useless. Ms. replied that "wouldn't listen to her at home." Again grabbed the basketball and Mrs. retrieved the ball for the second time. The container of balls was then placed on top of two student desks. climbed up and retrieved a football this time. Mrs. placed the container under the conference room table. went under the table to retrieve the ball. When Mrs. said, "No!," posed like a cat, his hands held in the air as if they were paws. held his mouth open, showing his teeth, like a "cat ready to pounce on a mouse. He looked at Mrs. and growled." (SB-10) As the BIP meeting proceeded, located a nerf ball and jogged around the room as he kicked the ball against the wall. 's mother threatened him continually with disciplinary measures, however, was completely oblivious to her commands. The meeting was abruptly adjourned and bolted out the door. (SB-10)

'S SUSPENSIONS 2002-2003

<u>Date of Offense</u>	<u>Reason</u>	<u>Length</u>
9/26/02	Disorderly Conduct	1 day
9/30/02	Disorderly Conduct	2 days
10/9/02	Disruptive School, Class or Activity	3 days
10/23/02	Disorderly Conduct-Disruption Insubordination, Disobedience	3 days
11/6/02	Endangering Self & Others	5 days
1/29/03	Conduct- Endangering Self & Others	3 days
5/5/03	Threatening & Harassing Staff	7 days

's IEP dated September 27, 2002, noted that 's off-task behaviors also included making noise constantly, playing with items on his desk, and banging his feet on his

desk. The IEP noted that [redacted] had recently been taken off his medication. [redacted]'s articulation skills had improved and [redacted] only required weekly speech therapy on a consult basis. Specific behavioral goals were written into [redacted]'s IEP to address his classroom behavior: attention to task, sitting in his seat and remaining focused, refraining from making noises and talking out loud, refraining from banging his seat, refraining from talking back to the teacher. [redacted], classified OTI, was taught in a self-contained special education classroom with inclusion with his peers for non-academic classes. Ms.

[redacted] executed her consent to this IEP. (SB-12)

[redacted] records include a Functional Behavioral Assessment ("FBA") that was completed on October 18, 2002. (SB-14) A Behavioral Intervention Plan ("BIP") was completed to which Ms. [redacted] executed her consent for implementation on October 18, 2002. (SB-14)

[redacted] notified Ms. [redacted] on October 29, 2002 that the IEP team would meet on November 1, 2002 to discuss

[redacted]'s changes in behavior. (SB-15) At this point, the Parents were represented by Sheila Marble of the Parents of Children With Attention Deficit Disorder Association (PADDA). It was noted that [redacted]'s behavior had declined steadily since the beginning of the year. This meeting was continued.

The suspension dating from November 6, 2002, was particularly significant: [redacted] was suspended for pulling an air conditioner register off the unit inside the classroom. (TR-1, 78, 84) The written notice to Parents described the

incident as "serious:" endangering himself and others. At five days in length, this suspension was also greater in number of days than his prior suspensions.

convened a Manifestation Determination Review ("MDR") and the Parents were timely notified in writing of the meeting. (SB-15, -6) It was determined by the committee that 's behavior was caused by his disability. A FBA had been completed on October 18, 2002, The MDR committee then reviewed the current FBA and BIP and these were deemed sufficient to meet 's needs. At that time, another FBA and BIP were not undertaken by . (SB-14)

The IEP meeting was again convened on November 12, 2003, for the purpose of reviewing 's IEP because of 's behavioral problems that had occurred in the fall, 2002. (SB-15) The IEP team noted that 's behavior had deteriorated quickly after he was taken off medication in September, 2002. The IEP determined that

's behavior interfered with his academic progress. This IEP meeting had been continued until after the MDR on November 8, 2002, the latter having been convened in order to review the connection between 's disability and the factual circumstances of his latest suspension.

On November 12, 2002, the IEP team decided to conduct complete re-evaluation of . During the evaluation process, decided on a "shortened day" of one hour of school instruction per day and supplemental homebound

instruction of two hours weekly. received services in an emotionally disturbed classroom until the evaluations would be complete, January 24, 2003. (SB-15, SB-24, SB-26, SB-28) The Parents consented to the November 12, 2002 revised IEP and to the re-evaluation of . (SB-15) An additional IEP revision took place on December 19, 2002. This IEP increased 's school day to four hours per day. (SB-27) The Parents also executed consent to the revision. (SB-27)

Just after the implementation of the interim "shortened day" IEP, appeared to have become more controlled in class in the new location. Classroom observation of 's school performance on December 6, 2002, recorded the following: (SB-25)

" stayed seated in his desk. When he attempted to stand up. Mrs. [, 's special education teacher] would redirect him by saying "On Task!" would comply each time when redirected."

The following behaviors were "not observed:" seeking help from peers, distracting to others, influenced by peers, frequently out of seat, uncooperative, oppositional, inappropriately interacted with peers, difficulty following oral directions, easily frustrated, withdrawn." The following behaviors were frequently observed: "needed much teacher support, difficulty following written instructions." The following behaviors were seldom observed: "distracted, distracting to self and others."

A request had been made by 's pediatrician to

check for Autism. Psychological re-evaluation of [redacted] included the Asberger Syndrome Diagnostic Scale. (SB-26)

[redacted] received an overall score of 54 which places [redacted] below the first percentile in in comparison with other children in terms of Asberger's Syndrome symptoms. (SB-26)

On February 13, 2003 the Eligibility Committee met and reviewed all of [redacted]'s re-evaluations: educational/developmental, sociocultural, psychological, speech and language, classroom observation, and hearing evaluation. Based upon the psychological re-evaluation of [redacted], the Eligibility Committee determined that it was unlikely that [redacted] had Autism. [redacted]'s hearing was tested and it appeared to be in the normal range. Also re-evaluated were the following: articulation, receptive language, expressive language, fluency and voice. All appeared to be in the normal range, however, [redacted] had to be reminded continually to walk appropriately to the session and to stay on task. (SB-26, SB-32)

Results of [redacted]'s psychological profile revealed that [redacted] tests in the low average range of intellectual ability. There is a "significant disparity," however, between [redacted]'s average range verbal ability and his borderline range "non-verbal ability." The School Psychologist, [redacted], Ph.D. stated as follows at the conclusion of her report regarding [redacted]'s low average academic skills: (SB-26)

"Observation of [redacted]'s behavior in the classroom and during the assessment sessions along with behavior ratings completed by his teacher suggest that [redacted]'s educational performance is adversely impacted by his

excessive level of activity, distractibility, impulsivity, and inability to focus and sustain attention."

's re-evaluation by the school psychologist, Dr. , was one of the factors utilized by the Eligibility Committee to determine appropriate classification and placement. The Eligibility Committee also rejected emotional disturbance for 's classification because, in light of data completed by , 's psychological profile did not seem to fit this disability category. Upon consideration of the re-evaluation reports and after ruling out the other categories of special education disability, the Eligibility Committee determined that would receive special education services as "Other Health Impaired" (OTI). (SB-32)

Ms. , 's special education teacher, prepared a report for to inform of 's progress for the month of January, 2003: During the first week, was "on-task" for 70 to 90% of the time. During the second week, refused to do his work and he began to have trouble with peers. The assistant had to be near him to minimize problems. The third week, the "growling" began and he made statements to the effect that he "would do what he wanted to do." Within the last week of observation, exhibited all above behaviors. He began to taunt peers, make threats of bodily harm, stabbed children with pencils, hit them with chairs, or used karate kicks on them. She remarked, "He

admits intent to disrupt the class during lessons or activities that he does not like." (SB-29) When [redacted] was placed in "time out" he tended to yell obscenities and to make obscene gestures. Alternately, his obstreperous outbursts in "time-out" have included threats to expose himself and requests that others do obscene "things" to his body parts. "[He] refuses to do seatwork." (SB-29)

On April 30, 2003, Ms. [redacted] delivered a letter to [redacted] in which she informed the [redacted] Special Education Department that she disputed the results of the Eligibility Committee. (SB-35) Ms. [redacted] again referred to [redacted]'s physician's request that [redacted] be evaluated for "a Particular type of Autism 'high Functioning.'" Ms. [redacted] also requested, per her pediatrician, that [redacted]'s speech and IQ be tested. Ms. [redacted] requested an independent educational evaluation at public expense (IEE) which request expense was approved by [redacted], Director of Special Education, Schools on May 1, 2003. (SB-35) Ms. [redacted] provided a list of approved educational evaluators to Ms. [redacted]. By letter to Ms. [redacted] dated May 13, 2003, Ms. [redacted] was informed of [redacted]'s assent to her selection of Dr. [redacted] for this evaluation. (SB-38)

On January 29, 2003, [redacted] was again suspended for conduct that endangered himself and others. (SB-11) This incident resulted in a three day suspension. On May 5, 2003, [redacted] was suspended for seven days for threatening and harassing a staff member. (SB-11 & SB-39)

did not convene a Manifestation Determination Review after the suspension that occurred on May 5, 2003.

has submitted a form entitled "Determination of Change in Placement/Educational Services." (SB-39) Under factors reviewed the following "boxes" are checked: "total number of previous suspensions, proximity of suspensions, length of suspension, cause for suspension, current IEP, and FBA/BIP." (SB-39)

On May 13, 2003, the IEP team met to review 's educational placement. The IEP team determined that 's behavior continued to dramatically impede the quality of 's education. The IEP team determined that would best be placed on homebased instruction for the duration of the school year while the IEE was being completed. (SB-37) was to receive homebased instruction for one hour daily during five weekly sessions. (SB-37) Parents executed consent to this IEP on May 13, 2003. (SB-37)

School records reflect weekly hours of extended services from November 21, 2002 through June 20, 2003 and Parents have signed off on these records indicating that received required hours of homebound instruction from . The Termination of Homebound Services form indicates that homebound services ended on June 26, 2003. (-25)

's final report card for the 2002-2003 school year results in a "C" average and 's conduct notes show

some improvement in his work habits but consistent failure in "putting forth best effort, is courteous in speech and action."

On July 16, 2003 a written notice was sent to the Parents to inform them of the Eligibility Committee meeting to occur on July 30, 2003. A copy of the Procedural Safeguards handbook for parents was included with the correspondence. Apparently, the Parents did not attend this meeting.

By written notice to the Parents sent to them on August 11, 2003, the parents were informed of results of the Eligibility Committee meeting that occurred on July 30, 2003. The conclusion by the Eligibility Committee was: " meets the criteria for 'Other Health Impaired.' The Eligibility Committee determined that 's behaviors were more "indicative of a child with ADHD." The Eligibility Committee referred to the letter from Dr. , M.D., dated May 15, 2003, in which Dr. stated, "[W]e have completed elements of his ['s] evaluation. does, of course meet the criteria for attention disorder." (-34) Dr. indicated that he was "suspicious" of Autism and would check further for its existence.

Subsequent testing by , M.S., Speech & Language Pathologist, based upon information provided by 's mother and by Mr. about 's home habits, gave a score of 18, a "Likely" rating, on the Autism Screener Questionnaire. A score of 14 or less indicated that did not have Autism. Further, the Parents gave

a score of 101 on the Asberger Syndrome Diagnostic Scale which was in the "Likely" range for Autism. His teacher had given a score of 54 in the "Very Unlikely" range. (-35) The IEE indicating that had Autism was rejected by the Eligibility Committee because the Autism diagnosis was made primarily upon information considered to be subjective: The Parents had provided 's out-of-school behaviors. Classroom data was not utilized. The IEE reflects, however, that had major behavior problems at home: Mr. reported that was "very mean to their dog." frequently locked his mother and Mr. out of the house. (-35)

Interestingly, Ms. reported 's behavior at the testing session to be identical to the behavior reported by school personnel: (. 35)

"During the evaluation, was extremely active He went through most of the toys in the room within the first 15 minutes of the evaluation and was asking what else there was to play with. Even though the evaluation took place in an enclosed room with limits being set, continually tested those limits and did things that he was asked not to do. He was not noted to play with the items for more than 5-10 minutes, except for the balls, which he repeatedly bounced up to the ceiling."

Ms. noted that initiated conversation only when "he wanted something" but that he did not use appropriate social skills: interrupting repeatedly, speaking loudly, speaking in a belligerent tone of voice. (-35)

An Occupational Therapy Evaluation completed on August 7, 2003 concluded that had difficulty with self-help

skills and sensory processing, and that he apparently has no difficulty with "bilateral tasks" (using his hands together) or with his grasp. (SB-43)

The Occupational Therapist researched the Parents' assertion that [redacted] had difficulty with buttons and zippers: When asked to string beads, [redacted] did so with little trouble. The examiner noted that [redacted] does demonstrate "rushed and frustrated behavior throughout fine motor tasks." (SB-43)

Parents also reported that [redacted] became "easily frustrated." Parents reported that [redacted] was "stubborn and disobedient." They were concerned that [redacted] "demonstrates hostility" and "communicates threats" towards family members. "They [Parents] were concerned about [redacted]'s "agressive behavior." [redacted] "hits and kicks." (SB-43) Parents reported that rocking, deep pressure, and sensory stimulation, especially to [redacted]'s feet, tended to calm him. (SB-43)

Parents reported that [redacted] will not, however, tolerate routines (contrary to a diagnosis of Autism) in that [redacted] objected to brushing his teeth, showering, and using the toilet.

[redacted] preferred to use his hands to feed himself, refusing to use his fork and knife, even though he clearly knows how to use these utensils. (SB-43)

The OT evaluator's conclusion was that [redacted] has "deficits in self-help skills and sensory processing" secondary to a diagnosis of ADHD and developmental delay. In order to "maximize functional independence," OT services were recommended. (SB-43)

School records document that Mr. [redacted] was contacted on

August 12, 2003 to set up an IEP meeting. (SB-45) On August 21, 2003, Parents were given an IEP "letter." School records indicated that Parents were informed that revisions would be undertaken by the IEP team. (SB-45) On that date, the IEP meeting took place and the Parents have "signed off" on the revised IEP dated August 21, 2003.

The Committee recommended placement for [redacted] in a separate public day school in light of his need for a "highly structured, small group setting because of his behavioral difficulties." (SB-45) Speech and language were to be provided on a consult basis for 15 minutes monthly. The reason for the change of placement for [redacted] to a more restrictive environment, requiring removal from general education and participation with non-disabled peers, was stated by the IEP Committee as follows: "[redacted]'s behaviors have escalated to a point where he requires educational services outside of the public school setting." (SB-45)

By referral made to [redacted] Academy, Educational Center, [redacted] was placed at the school. (SB-46) Parents gave limited consent to re-evaluation by [redacted] on August 28, 2003. (SB-47)

[redacted]'s first report card at [redacted] Academy reflects an "F" in mathematics and social studies and an "A" in science. (SB-48) Work habits reflect a general need for improvement.

[redacted]'s teacher noted that [redacted] has made improvement "in all areas," that [redacted] "does all his homework," and that even though [redacted] "does not do well on tests," he is trying "very

hard." Notably, "behavior has improved since September." (SB-48) teacher noted that must be "redirected frequently" but that he will "usually get back on task." (SB-48)

Two "Critical Incident Reports" dating from September 3, 2003 and October 1, 2003 reported behavior similar to outbursts at his prior school: refusal to follow staff directions, running, kicking, throwing books on the floor, screaming, and threatening to bite and kill everyone once he got out of time-out. (SB-49)

A Functional Behavioral Assessment for was completed by Ms. on October 15, 2003. (SB-51)

's IEP was updated on October 29, 2003 to which Parents did not consent. (SB-51)

The Notice of Refusal to implement the IEP dated October 29, 2003, documented the Parent's concerns and issues regarding implementation: (SB-51) 's physical safety in that Parents allege is being physically assaulted by other students on the bus and in the hallways. 's wrongful placement in a separate ED class, and that 's disabling condition, Autism, was not being addressed in this setting. The LEA responded that the school nurse would check for bruises before and after school and that would be escorted to and from the bus at school. The LEA noted that, as a precaution, there is a camera on the bus. The Parents were assured that the teachers and staff at Academy had proper credentials to teach and to provide him OT.

Parents requested that [redacted] be provided with a one-to-one assistant who is trained to work with students who have Asberger's Syndrome and that he be placed back into a special education self-contained classroom in a regular school. (SB-51 & SB-52) Parents have stated that they erroneously believed that [redacted] was being placed in a center for Autism when they executed consent to the separate public day program.

It should be noted that the diagnostic criteria for Asberger's Disorder is included in the [redacted] Academy documentation along with minutes of Parent's refusal to implement the above IEP. Criteria for Autism, per the DSM-IV, notes a marked impairment in the use of non-verbal behavior: eye-to-eye contact, facial expression, and a failure to develop peer relationships. Autistics adhere to rituals, finger-flapping, tapping, and twisting. (SB-52)

Clinical description of the Autistic (Asberger's Syndrome) patient contrasts significantly with [redacted]'s demeanor at school: [redacted] is described as "sweet, not shy, active, likes to help, excitement." (SB-51)

According to the program description, [redacted] Academy is a [redacted] program that serves a larger geographic area:

[redacted], and [redacted]. This program was initiated in September, 1980, under the [redacted] Area Cooperative Educational Services ("PACES") as a regional day school. According to the program description, the day treatment program provides a "highly

structured, supportive, educational environment with trained staff to meet the unique needs of students with emotional disturbance." (SB-56) Related services provided are as follows: speech, art therapy, recreational therapy, psychological consultation, career awareness, and counseling. (SB-56)

The program statement contains the following objectives: "For some students, day treatment serves as a transitional placement when the student is returning from a residential setting. For others, it serves as a more restrictive placement until the student is able (through success) to return to his or her home school division. Academy provides SOL instruction, life skill instruction, positive behavior management, and social skill management. (SB-56) Behavior modification is provided primarily through a level system wherein these methods are utilized to correct behavior: individual behavior intervention (BIP), group therapy, with psychological consultation and individual counseling, as needed. (SB-56)

Referral to Academy by was based upon the recommendation of , Special Education Coordinator, who qualified at the hearing of this matter as an expert in her field. Her credentials are described in her resume. (SB-57) Credentials of school personnel who have worked with have been described by resume or by testimony. Academy personnel are highly qualified special education personnel, many of whom have extensive background in Autism. (SB-57 through SB-65)

PARENT'S POSITION

Parents assert that _____ has denied FAPE to _____ contrary to IDEA as follows:

1. Failure to conduct a Manifestation Determination Review prior to _____ being placed on homebound instruction at appropriate intervals during the 2002-2003 school year.
2. Failure to timely develop, implement, review, and revise an appropriate FBA & BIP strategies that might have assisted _____ in an effort to correct his bad behavior and avoid additional instances of improper conduct resulting in suspension or disciplinary infraction notices.
3. Failure to properly consider results of the Parents' IEE indicating Autism (Asberger's Syndrome) and to include all of _____'s disabling conditions in a properly developed IEP resulting in _____'s improper placement in an ED class and, without justification, a shorter school day.
4. Failure to include the Parents in the Eligibility Committee meeting on July 30, 2003 resulted in a denial of the Parent's procedural right to attend and participate in the eligibility decision.
5. Failure to place _____ in his LRE by placing him at Academy when _____'s needs might have been served in the neighborhood school if _____ had been provided an appropriate IEP, including proper FBA and BIP implementation and review.
6. Failure to fully inform Parents of the nature of _____'s placement at _____ Academy, causing Parents

to consent to Academy, an improper placement in a separate public day school, ED treatment program. Parents assert that they were duped by into believing that Academy was a center for Autism.

7. Failure to provide with a special education education setting in which he is safe from physical abuse.
8. Failure to properly develop, revise and assess 's IEP and to provide related education and supports in the evaluation and re-evaluation of .

POSITION

asserts that has received a FAPE and that his IDEA due process procedural rights have not been violated as follows:

1. has not violated IDEA disciplinary procedural requirements with regard to 's suspensions during the 2002-2003 academic school year.
2. has addressed all of 's special education needs, 's IEP, with accompanying FBA and BIP were properly developed, implemented, and revised. has timely notified the Parents of these changes.
3. has properly considered and appropriately rejected the results of 's IEE indicating Autism. has conducted all necessary tests, evaluations, re-evaluations, revisions, and observations necessary to make sound assessments of 's disabling conditions. Revisions to 's IEP of September 27, 2002 were prompted by changes in 's

school behavior. has afforded appropriate compensatory education and services through the extended school year hours.

4. Parents were properly notified of the Eligibility Committee meeting that occurred on July 30, 2003.

5. has made a proper placement decision for at Academy where his special education needs are currently being met. Academy provides with an educational placement in a small, structured program where his behavioral problems are being addressed. Upon consideration of the continuum of placements, the IEP team concluded that could not now be served in a neighborhood school setting.

6. has never indicated to Parents that would be placed in a center for Autism. has referred to an ED class within a separate public day program and this is 's LRE at this time. Academy was selected after consideration of a continuum of placements for .

7. has not placed in an unsafe environment. Parents have no cause for concern because adequate safety procedures are in place to prevent any instances of physical abuse or harm to .

8. has never failed to notify Parents of 's escalating behavior problems during the 2002-2003 school year. Parents have been fully informed of their IDEA due process procedural rights and the Parents have executed informed consent to eligibility and placement decisions.

FINDINGS OF FACT

1. The special education file for _____ is complete, all parties having been properly notified of IEP actions. Parents have been properly notified of their IDEA due process procedural rights.
2. _____ conducted a Manifestation Determination Review appropriately on November 8, 2002. _____ was not entitled to a MDR before removal from school after the May 5, 2003 suspension because a pattern of behavior was not evident: Suspensions were not close in proximity and _____'s removal from school was the result of his change of placement upon revision to his IEP on May 13, 2003. There are no IDEA procedural violations resulting in a denial of FAPE to _____.
2. _____ has developed an appropriate IEP with accompanying FBA and BIP, _____'s placement at _____ Academy is proper.
3. If any minor omissions have occurred, these have not resulted in any material violations of IDEA.
4. Parent's dispute with _____ concerning IDEA procedural violations and preparation of _____'s IEP, FBA and BIP is unwarranted. _____'s IEP, with successive revisions, has been developed with an optimal level of parent participation.
5. Classroom observation, teacher reports, psychological reports, sociological reports, educational reports, speech language assessments, occupational therapy assessments, did not indicate to school personnel that _____'s identification originated in Autism. The _____ IEP team and Eligibility Committee have correctly attributed _____'s behavioral

problems and his life skill deficits to his ADHD with speech/language impairment, not Autism. 's hyperactivity with associated impulsive behaviors have negatively affected 's school performance. Therefore, upon due consideration by special education experts, was correctly labeled "Other Health Impaired" since December 16, 1997.

6. was not improperly placed in an ED class by the IEP revision of November 12, 2003. 's behavior at school warranted that attempt a smaller, structured ED class where 's behavioral needs could be met. This change did not effectuate a change of placement. The IEP team determined that 's attention span and distractibility level indicated that might function better in school if he had school for a shorter period with adequate supplemental homebound instruction. 's behavior and academic performance improved briefly. The shorter school day schedule was justifiable.

7. properly notified Parents, orally and in writing, to attend the Eligibility Committee meeting on July 30, 2003. Parents elected not to attend.

8. Parents have been provided a copy of the Parents' "Procedural Safeguard Packet" to ensure compliance with IDEA. School records clearly document all of the appropriate occasions when Parents were provided copies of IDEA procedural rights and regulations. Parents have been represented at IEP meetings by members of competent advocacy groups.

9. 's placement at Academy is his least restrictive environment at the present time. 's overwhelming documentation of 's behavioral problems, social skill deficits, impulsivity, developmental delays, and 's academic record, cumulatively, have resulted in 's current placement: 's education needs cannot be met in a regular education setting. Support, BIP strategies, IEP revisions, re-evaluation have been explored, utilized, and considered in 's placement decisions.

10. 's preparation of the IEP, with revisions, FBA & BIP, have correctly addressed 's strengths and weaknesses. Current levels of performance have been considered. IEP goals and objectives have been clearly measured and identified.

11. was gradually taken off Ritalin in September, 2002. Apparently, Ritalin stabilized 's ADHD. Impulsivity and out-of-control of school behavior did not manifest until after he was no longer being medicated. In any event, his behavior has originated in his severe ADHD. 's behavior adversely impacts his school performance and results in academic deficits. He requires a more restrictive placement to address his academic needs.

With due deference to experts, 's placement at Academy is proper and in 's best interest.

12. Parents have provided informed consent to all IEP and Eligibility decisions in 's special education file.

did not mislead Parents into believing that would be placed in a center for Autism. Parents have

executed informed consent to _____'s placement at Academy.

13. _____ Academy provides behavior modification to _____, within the context of a small, structured academic setting in an ED classroom. _____'s abrupt behavioral changes during the 2002-2003 school year, together with marked academic decline, justified this change of placement.

14. _____ has enumerated accommodations, strategies, target behaviors, triggers, and necessary data for successful implementation of _____'s FBA and BIP to meet _____'s academic and psychological needs during the ED treatment program at _____ Academy.

When _____ successfully completes the day treatment program at _____, the IEP team will undertake _____'s transition back to a neighborhood school setting.

15. The Parent bears the burden of proving by a preponderance of the evidence that _____ will not derive educational benefit from the proposed placement. Parents have not met this burden.

16. Requirements of notice to the Parent have been fully satisfied in accordance with IDEA.

17. _____ is disabled: Other Health Impaired (OTI). _____ requires special education and related services. _____ has provided a FAPE to _____.

18. _____ has not placed _____ in an unsafe environment.

_____ Academy provides adequate precautionary measures to ensure the safety of its students. After the Parents asserted that _____ was physically abused at school, the nurse was

required to examine 's body twice daily.

19. is not entitled to compensatory education or services.

All compensatory educational hours and related services to which is entitled have been provided to him.

20. is not now entitled to OT as a service.

ANALYSIS

Parents' evidence does not support their request for 's removal from his current placement at Academy. 's request for compensatory education and related services, reimbursement for Parent's expenses, medical, legal, or otherwise, is unwarranted. Evidence presented by Parents does not support a denial of FAPE by .

's current IEP placement at Academy in an ED classroom, with regular transportation and speech therapy, on a consult basis, as a related service, is proper. Clearly,

's behavioral needs, once his medications no longer provided stability, resulted in adverse academic impact on school performance. Behavior modification in a small, structured educational setting in an ED classroom in a separate public day school is a proper placement from which may derive academic benefit. In a regular education setting, was unable to control the impulsivity caused by his severe ADHD. 's out of control behaviors during temper displays, coupled with 's unbridled hyperactivity, created a compelling student profile. Severe ADHD in causes behaviors that are simply overwhelming. 's behavioral concerns require

dramatic interventions and controls that are beyond the scope of the regular classroom.

who was present for a brief period during this hearing, is an engaging, amiable young man. Although he did disappear under the table a few times, communicates thoughts loud and clear. If is able to take full advantage of this treatment program, he will reap the rewards for the duration of his academic years.

Specific issues determined by the hearing officer were:

1. Did comply with IDEA procedural requirements regarding discipline?

The MDR occurred on November 8, 2002. was not required to create an FBA or BIP because these had already been formulated for on October 18, 2002. Results of the MDR connected 's disability to suspensions totaling over 10 days in the fall, 2002-03 school year. The IEP team reviewed the FBA and BIP and these were considered sufficient by the team. 8 VAC 20-80-68 C.2.d.1.

's suspensions on January 29, 2003 and May 5, 2003 did not constitute a pattern prompting an additional MDR before his change of placement by IEP revision on May 13, 2003. To determine "pattern," considered proximity of suspensions, length of suspensions, and the amount of time would be removed from school. The two suspensions were "isolated, short term, and unrelated" misconduct. An MDR is not required. 8 VAC 20-80-68.C.5.(a), 8 VAC 20-80-68.C.1.(b), 8 VAC 20-80-68.B.2.(a)

Has [redacted] been correctly identified as "Other Health Impaired" even though the IEE suspected "high functioning Autism?"

This Hearing Officer defers to the judgment of special education experts who have extensive background in the two disabilities: In school, [redacted] does not present characteristics generally identifiable as autistic, however, [redacted] does present the symptoms of ADHD: difficulty focusing, maintaining his attention, to react impulsively, hyperactivity. (TR-2, 90-91)

[redacted] has been correctly classified as OTI with speech/language impairment.

Did the reassignment from cross-categorical to an ED class after the November 1, 2002 IEP meeting constitute a change of placement?

[redacted] received the same services at [redacted] that he had received at [redacted]. Change of location does not constitute a change of placement.

Did [redacted] follow IDEA procedural regulations in the placement of [redacted] at [redacted] Academy?

The placement decision was made at the August 21, IEP meeting. Minutes of the meeting indicate that a continuum of placements was considered by the team. The team reviewed a mass of data: teacher observations and reports, re-evaluations, and educational testing devices. [redacted]'s FBA and BIP were reviewed. It became evident that [redacted] required a "highly structured, small group setting because of his behavioral difficulty." (SB-45) 8 VAC 20-80-64 C.1 & 34 C.F.R. Sec. 300.552.

's procedural safeguards pursuant to IDEA not having been violated, has provided a FAPE to in his placement at Academy for the 2003-2004 school year?

Federal regulations specify that must receive a FAPE in accordance with IDEA. has provided FAPE if the IEP with related supports is one in which the child may "derive educational benefit" from the instruction.

In Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176, 73 L.ED. 2nd 690, S.Ct. 3034 (1984), the United States Supreme Court stated:

"... a State is required to provide a handicapped child with 'personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction.'

has met this burden. 's IEP is appropriate. The IEP offered the services he needs to address his special education needs in the least restrictive environment available to him in light of his severe ADHD symptoms. Academy presents the small, structured group setting where behavioral difficulties can be addressed. has already made great progress academically and his behavior has improved.

Prior to placement at Academy, utilized numerous strategies, interventions, "time-out" sessions, essay assignments, oral and written communications to Parents, disciplinary notices, parent conferences, evaluation, re-evaluation of , and regular review of 's FBA and BIP. These alternatives did not work. 's

behavior escalated in intensity over the 2002-2003 school year and it became evident, ultimately, that 's needs could not be met in a general education setting. Homebound placement during the course of the 2002-2003 school year was the result of appropriate determinations regarding 's impulsivity and hyperactivity level during a shortened school day. Compensatory education and services were adequately provided to during homebound periods. School records and the evidentiary record do not reflect an effort to remove from school so that "would not have to deal with him" or as a "convenience" to .

Ms. , 's teacher at Academy, testified at length, regarding 's personal achievement since his entry into the day treatment program at Academy. Discipline is administered through a positive reinforcement "level system" comprised of five levels. At the time of this hearing, had responded well to this behavior modification system. In fact, had already mastered "level three" and was working his way toward "level four." (TR-2, 26) Successful completion of the program occurs after a student reaches "level five" and is able to maintain self-discipline for a reasonable amount of time. After sufficient maintenance, the student is transitioned back into a regular education setting. (TR-2, 25, 27)

HEARING OFFICER ORDERS

1. 's placement at Academy by is hereby AFFIRMED as his least restrictive environment.
2. 's current IEP, with FBA and BIP, with related

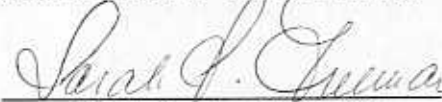
services of transportation and speech/language consultation is AFFIRMED.

3. Parents' motion for compensatory education plan is hereby DENIED for compensatory education and services during the 2002-2003 or 2003-2004 school year.
4. Parents' motion for extended school year is hereby DENIED there being no showing of actual regression by .
5. Parents' motion for reimbursement of expenses incurred in connection with this hearing, legal, medical, educational, or to obtain additional related services is hereby DENIED.
6. Parents' motion for OT services is hereby DENIED there being no requirement for to maximize 's educational performance and no showing that requires OT services.
7. Parents' motion for counseling services is hereby DENIED, it appearing that Academy students receive counseling services regularly, group and individual, as needed.
8. Parents' motion for to receive a one-to-one aide is hereby DENIED.
9. is hereby ORDERED to determine a reasonable date by which will be expected to complete the Academy program and to begin transition back into the regular education classroom. The anticipated transition date may be inserted into 's IEP as a targeted "Goal and Objective."

Date of Decision:

March 8, 2004

RESPECTFULLY SUBMITTED:



Sarah S. Freeman
Hearing Officer

NOTICE OF RIGHT OF APPEAL

A decision by the hearing officer in any hearing, including an expedited hearing, shall be final and binding unless the decision is appealed by you in a state circuit court within one (1) year of the issuance of the decision or in a federal district court. The appeal may be filed in either a state circuit court or in a federal district court without regard to the amount in controversy. The district courts of the United States have jurisdiction over actions brought under Section 1415 of the Individuals With Disabilities Education Act (20 USC Section 1400 et seq.) without regard to the amount in controversy.