VIRGINIA:

SPECIAL EDUCATION DUE PROCESS HEARING

v.

School Board of the of

HEARING DECISION

This is a case about translating language, perception, cognition ability, the needs and desires of Parents to obtain educational and other services for their seriously disabled child, and about what the law allows and requires in a world of limited resources. The case seems in many ways to suggest the importance of good communication and how language should be used to promote conversation rather than argument or litigation, and the problems involved when parties talk past and over each other so that consensus decisions are no longer possible. It also suggests how hard it is to communicate sometimes even when trying to say close to the same things. Another complication in this case is that one or both of the Student's Parents (herein "Parents") are not native English speakers. Therefore almost every aspect of the case proceedings had to be translated into and from Mandarin Chinese, using different translators at different times, making the effort to talk through the case that much more time consuming and fatiguing. The Student and Parents were also not represented by an attorney, but did have some assistance from a non-lawyer lay advocate.

It was also very difficult to obtain pre-hearing agreement on the precise factual and legal questions to be decided. School counsel expressed reluctance to help the Parents understand the elements of proof that would be necessary for them to meet their

burden. The precise factual and legal questions therefore had to be developed and determined by the Hearing Officer over the course of the hearing following all presented evidence and arguments of the parties. See pre-hearing SCHEDULING ORDER AND RULINGS ON CROSS MOTIONS OBJECTING TO SUBPOENA REQUESTS, Section I., pp. 5-7.

It is uncontested that (initials are used to protect the privacy of the minor child; also herein the "Student") is a year old, grade student who is eligible for appropriate special education services under the federal Individuals with Disabilities in Education Act (IDEA). has been identified with Multiple Disabilities, including down syndrome, mental retardation, developmental coordination disorder, and autistic disorder. See also Tr. pp. 87-88. In addition, has profound sensorineural hearing loss in the right ear and mild to moderate hearing loss in the left ear. See also Parents' Exhibit 7. The Student is served in a self-contained classroom for students with an intellectual disability and receives the related services of physical therapy, occupational therapy, speech and language therapy, hearing impaired services, and special transportation. Because of what is agreed is significant hearing impairment also has an "educational interpreter" who uses American Sign Language (ASL) to work with the Student throughout the course of the instructional school day. See SCHOOL BOARD OF THE CITY OF RESPONSE TO DUE PROCESS HEARING REQUEST, p. 2. The referenced special education services are provided pursuant to the Student's Individualized Education Program (IEP). See Parents' Exhibits 11 and 12, and SB Exhibits 4, 5, 13, 14, 15, 16, 20, 24, 25, 26, 27, and 28 for copies of IEPs and special education eligibility determination. In addition, the Student has some degree of vision

loss or impairment, and may be very near sighted. See Tr. p. 271 for ordinary opinion testimony of sign language interpreter that is "...very, very nearsighted..." ("I kind of call him Mr. Magoo"). The School Board of the of (herein the "School Board" or "School Division") specifically disputes any claim that the Student is blind or "deafblind". See SCHOOL BOARD OF THE OF RESPONSE TO DUE PROCESS HEARING REQUEST, p. 4.

The Parents' request for a due process hearing raises a somewhat narrow "related services" issue that is to a degree open to interpretation. There is some discretion on the part of a hearing officer, and/or a reviewing court, to fashion equitable relief that might be found appropriate in this kind of case. There is no requirement that all or the exact relief requested be granted, nor that all grounds alleged in a Complaint ultimately support what is requested or finally ordered. In addition, there can be little doubt from review of the due process hearing provisions of the IDEA and federal and state hearing regulations that a hearing officer, and/or a reviewing court, to some degree stand in the shoes of the parents to protect the interests of potentially vulnerable minor disabled children when a case is in fact before such tribunal for decision. This may be particularly true when a student and parents are not represented by competent legal counsel and there is any question whether appropriate legal standards are being applied or argued.

The question of the allocation of the initial burden of proof regarding the adequacy of a proposed IEP has been decided in recent times by the U.S. Supreme Court in Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528 (2005). See also Tr. p. 58. However, the fact that the parents have this burden of proof does not limit the authority and discretion of a hearing officer, and/or a reviewing court, to consider the pleadings in the context of

the facts so proven, and where warranted to craft necessary appropriate relief, including appropriate limited relief.

The School Board in its initial filed response first objects to the jurisdiction of the Hearing Officer to hear what it characterized as a personnel or "staffing decision", citing Slama v. Independent School District No. 2580, 259 F. Supp.2d 880, 884 (D. MN 2003). While this federal trial court decision from Minnesota, which that court described as involving a case of "parental zeal in ensuring the best possible educational experience for their daughter" appears on many levels informative here, this Hearing Officer does not agree that either the Hearing Officer, and/or a reviewing court, would lack jurisdiction to hear this case. Jurisdiction exists and a decision on the merits in this case is required under federal and state law. A parent who disagrees with a proposed IEP, or otherwise believes that their child's education falls short of the Federal standard, is entitled to a state administrative hearing under 20 U.S.C. Section 1415(b)(1)(C), and related state and federal regulations.

The Parent's Complaint alleges essentially that given 's language ability (including sign language) and cognitive level the use of skills and strategies in addition to those of a typical sign language interpreter are required for the Student's IEP to be implemented and for the Student to receive educational benefit. The Complaint also alleges that the Student is "deafblind" and that such students have difficulty trusting and understanding new people and that an "intervener" is required to work constantly and consistently with the Student and that the person performing that service role is not interchangeable. There is a request that a "deafblind intervener" be used rather than an ASL interpreter. The Complaint further offers a proposed remedy, per the applicable

regulations, that the Student's current sign language interpreter who is alleged to be receiving applicable training be retained or in the alternative that another deafblind intervener be hired. See REQUEST FOR DUE PROCESS HEARING on pre-printed Virginia Department of Education standard form, p. 2.

Related services under the IDEA means support services "as may be required to assist a child with a disability to benefit from special education". 20 U.S.C. Section 1401 (a)(16) and (17). In addition, under 8VAC20-81-10, Definitions, "Related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education and includes speech-language pathology and audiology services; interpreting services; psychological services; physical and occupational therapy; recreation, including therapeutic recreation; early identification and assessment of disabilities in children; counseling services, including rehabilitation counseling; orientation and mobility services; and medical services for diagnostic or evaluation purposes. Related services also includes school health services and school nurse services; social work services in schools; and parent counseling and training. Related services do not include a medical device that is surgically implanted including cochlear implants, the optimization of device functioning (e.g., mapping), maintenance of the device, or the replacement of that device. The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music and dance therapy), if they are required to assist a child with a disability to benefit from special education. (§ 22.1-213 of the Code of Virginia; 34 CFR 300.34(a) and (b)). See also Parent's filed Response to School Board's Objection to the Due

Process Hearing Request for . See also Parent's Post-hearing Brief – 9 June 2011, p.1. for some additional authority cited on this point. Therefore, as the Parents correctly argue, an "intervener" or any instructional strategy, methodology, or service provider could be an IDEA related service under some circumstances. In this case the Parents argue that a related service of an "intervener" is necessary for their child, , to receive a Free Appropriate Public Education (FAPE) as required by the IDEA. Parent's Post-hearing Brief – 9 June 2011, p.1.

The Parents in this case have the burden of proof to show that this is a case involving such particular circumstances. For purposes of the School Board's objections to the Hearing Officer even considering the questions raised by the Parents, clearly there is jurisdiction to hear the case, and the Parents are entitled under the IDEA to bring the Complaint. Given the holding of this decision, as explained below, it is unnecessary to consider the question of whether in the State of Virginia a special education due process hearing officer can order a school division to employ specific individuals, or service providers with specific training, when a particular given narrow situation might suggest this to be appropriate.

Getting now to the substance of the case, the School Board argues that it proposed an IEP for on March 11, 2011 that provides the Student with continued placement in a self-contained classroom for students with intellectual disability. See Tr. p. 147. The School Board argues that this proposed IEP provides for appropriate related services of physical therapy, occupational therapy, speech and language therapy, hearing impaired services, and special transportation. The School Division argues that the proposed IEP also provides the Student with an Educational (sign language) Interpreter throughout the

school day, and that the proposed IEP also offers updated goals and objectives that appropriately address the Student's current needs. See SCHOOL BOARD OF THE OF RESPONSE TO DUE PROCESS HEARING REQUEST, pp. 5-6.

Piecing together the School Board's essential arguments from its various filings and the hearing transcript its position is that the services it is willing to provide under the currently proposed IEP are adequate to meet its legal obligations to the Student. The School Board argues that the law presumes that these offered services are adequate. Therefore, it argues that the Parents have the burden to prove by a preponderance of the evidence that the School Division's currently proposed IEP is (in some way related to the complaints expressed in their pleading, i.e., the formal Request For Due Process Hearing) inadequate to meet the mandated legal standard.

To consider whether this is true and if so whether the parents have met their burden of proof, it is necessary to review the applicable law and to consider the evidence submitted by the parties in the case. It is also appropriate to incidentally consider some of the many objections and points of order raised by counsel for the School Board, which are a part of the case record. Logical analysis should lead to a correct finding and final order in the case.

In another coincidence that should help the parties appreciate some of the subtle legal and factual questions, and continuing the overall theme of this case of communication, it is worth noting that the leading U.S. case authority in the entire area of IDEA special education law is in a way a close analogy in issues and facts to this our current case. This leading case authority is Bd. of Ed. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), a case relied upon

by the School Division as the foundation for its entire argument. This case was cited as a matter of course by the School Division, but its facts were not expressly discussed by either party despite the contrasting similar facts. See POST-HEARING BRIEF OF THE SCHOOL BOARD OF THE OF , p. 7. The Rowley case involved a deaf child and the parents' requested relief was in fact a sign language interpreter. What the parents asked for in Rowley that was refused by the school system there is exactly the service of a sign language interpreter that in our case here is currently being provided with at no cost by the School Board. In Rowley the child was performing better than the average child in her class and was advancing easily from grade to grade even without the sign language interpreter.

The Supreme Court of the United States ruled that the school system was not required to provide a sign language interpreter in Rowley. The Court held that a FAPE is provided when the public school provides personalized instruction with sufficient support services to permit a handicapped child to benefit educationally from the instruction. Before the Rowley decision there was an argument that services provided to a handicapped student should be whatever is required to give that student the same opportunity to achieve the child's potential as if that child were not disabled. Given the potential extraordinary expense and in many cases the practical impossibilities involved in meeting that kind of standard, Rowley expresses a policy decision (presumably reflecting Congressional intent that has not been changed by subsequent legislation) that a state is not required to maximize the potential of each handicapped student commensurate with the opportunity provided to non-handicapped students. In this regard, without addressing some details, all that is required is that a disabled student receive

personalized instruction and related services calculated by school administrators to provide educational benefit.

Of course there are a lot of issues and considerations bearing upon what this means in a particular student's case, and there have been many cases to address this following Rowley. However, in essence the Rowley standard is the issue the School Board here relies upon. Presumably in 's situation, a decision was made, and agreed to by the School Board, that could not benefit educationally from his instruction if a sign language interpreter was not also provided. The same issue as Rowley but using that methodology and coming to the exact opposite conclusion based on the facts 's then circumstances. Now 's Parents wish to go a step further, and instead of, or possibly in addition to, a sign language interpreter, they argue that an "intervener" service is required so that can receive an educational benefit. As in the Rowley case the School Division here objects and argues that this is legally unnecessary. The Parents now have the same legal burden to prove this new claim as they would have had to meet if the School Board had not previously agreed to provide with a regular sign language interpreter (the record reflects that initially the School Division objected to providing a sign language interpreter, but later after a trial period changed its view and agreed this was necessary). See Tr. pp. 229-230.

The State of Virginia is located within the jurisdiction of the federal Fourth Circuit Court of Appeals. The decisions of that Court are therefore generally binding precedent that must be followed in Virginia special education cases, unless there is a contrary decision of the U.S. Supreme Court. To further support this School Board's argument that it has offered to provide with all of the current services that it can be

legally required to provide, its counsel has cited a number of Fourth Circuit cases that further explain and enforce the Rowley standard. It is often helpful to review such case decisions in the order of the dates decided since this can provide some insight into the stages of a court's thinking about an evolving standard.

Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996 (4th Cir. 1997) noted that while courts have authority to grant appropriate relief based on a preponderance of the evidence they are not to simply substitute their own notations of sound educational policy for those of school authorities which they review. Absent an infraction of statutes, the task of education belongs to educators who have been charged by society with that critical task. The case further noted that the IDEA does not require furnishing every special education service necessary to maximize each handicapped child's potential. MM by DM and EM v. Sch. Dist. of Greenville County, 303 F.3d 523 (4th Cir. 2002) held that a reviewing federal district court failed to appropriately defer to professional educators in assessing whether an IEP provided a special education student with a FAPE. The trial court disregarded the findings of the hearing officer in the state administrative proceeding which were according to the appeals Court considered *prima facie* correct unless there is adequate explanation by a reviewing court of reasons for a different view (contrast this case with a Virginia federal trial court decision in Arlington County School Board v. Smith, 230 F.Supp.2d 704 (E.D. Va. 2002) where a federal district court held that the state administrative hearing officer inappropriately substituted his own judgment for the considered judgment of education experts who uniformly testified that the student would have received at least the minimum required educational benefit from the school system's proposed placement). The Court in MM explains the IDEA requirements and the Rowley

standard. It notes that a public school district is not required to provide a disabled child with the best possible education. Once the minimum FAPE is offered, a school district need not offer any more. Under the IDEA a state must provide specialized instruction and related services sufficient to confer some educational benefit upon the handicapped child but does not have to provide every special service necessary to maximize each handicapped child's potential. Under the IDEA, a FAPE must provide handicapped children with meaningful access to the educational process. Congress did not impose upon the states any greater substantive educational standard than would be necessary to make such access meaningful. The Court instructs that this means that a FAPE must be reasonably calculated to confer some educational benefit on a disabled child. See also A.B. by D.B. v. Lawson, 354 F.3d 315 (4th. Cir. 2004) for the same points.

The requirements for what an IEP must address are found at 20 U.S.C. Section 1414(d)(1)(A). Parents or guardians of a disabled child must be notified by the school district of any proposed change to their child's IEP. Parents or guardians must be allowed to participate in discussions related to the child's evaluation and education. 20 U.S.C. Section 1415(b). If the parents or guardians are not satisfied with a proposed IEP, they are allowed, as in this present case, to demand a due process hearing. 20 U.S.C. Section 1415(f). Parents or guardians are expressly permitted by the law to disagree with the judgments of professional educators and to seek an independent impartial review that applies the appropriate legal standards to the facts proven in a case.

Before discussing the facts presented and whether either the School Board is meeting its legal obligations to or whether the Parents have met their required burden of proof to show that additional services are required, it is appropriate to rule on, or at

least discuss, some of the School Board's many objections. For example, the School Division has requested that the Hearing Officer exclude and not consider most of the evidence presented by the Parents. Therefore to the extent necessary the more significant matters and objections raised by the School Division are addressed here so that there is a clear record of the process of analysis used by the Hearing Officer in reaching the case decision and in the incidental administration of this case.

The School Board by counsel objected to the majority of the evidence Exhibits offered by the Parents on grounds of relevance and because the Parents, who are *pro se*, provided hard copies of Exhibits to school counsel only on the morning of the hearing (but they had provided copies on computer disk to the Hearing Officer and school counsel sufficiently in advance of the hearing). See Tr. pp. 16-17, 22-27, 30-32, 36, 38, 46. While other objections were permitted to be made during the course of the hearing and the School Board was also permitted to restate its objections, the School Division was granted leave to file written post hearing objections on the grounds of surprise (see Tr. p. 340)(and in a few cases confidentiality of information – Tr. p. 341) since the Hearing Officer was required to review lengthy Exhibits and put Exhibits in context before being able to rule on these objections. See also Tr. pp. 341-343. Although the primary basis for the School Board's objection and motion to exclude most or all of the Parents' Exhibits was unfair surprise because of the timing of delivery of hard copy (in light of certain pre-hearing email exchanges between the parties and the Hearing Officer), no objections were stated by the School Board post hearing on this basis. The School Board did state other objections. The Parents also filed a written response dated 7 June 2011 to the School Division's filed post hearing objections.

The School Board objects to the Parents' Exhibit 2, an email discussing another parent's experience with the School Division regarding his handicapped child. The Parents claim the Exhibit shows the School Division's practice of non-IEP committee members deciding related service questions. Allowing some liberty to the School Division on its relevancy basis post hearing, the School Board's objection is sustained because although in theory there could be some relevance in analogous factual situations and school policy, and the school's raised confidentiality concerns could possibly be addressed, in this case there was no showing by the Parents that there was any relevance in this email to the Parents' arguments at issue, and also the email was but one communication from one side drawn out of context of what must have been a larger dispute. To the extent there could be any relevance to the Exhibit it is unfairly prejudicial to the School Division.

The School Board objects to Parents' Exhibit 3, a general publication describing issues related to providing services to deafblind handicapped students. While evidence issues raised by the School Division might be sufficient to require exclusion of this Exhibit in a court proceeding in which formal rules of evidence are applicable, the Hearing Officer finds that it is not necessary to avoid unfairness to apply such reasoning to exclude the Exhibit in this proceeding. Some portions were relevant to explaining some background to the Parents' request for an "intervener." The Hearing Officer limited use of this Exhibit to that narrow purpose of putting the Parents' complaint into some context or perspective.

The School Board objects to Parents' Exhibit 5, a general publication describing issues related to providing services to deafblind handicapped students. The Parents argue

that the document provides a clear and concise explanation of the affect of deafblindness and the role of an "intervener." While evidence issues raised by the School Division might be sufficient to require exclusion of this Exhibit in a court proceeding in which formal rules of evidence are applicable, the Hearing Officer finds that it is not necessary to avoid unfairness to apply such reasoning to exclude the Exhibit in this proceeding. Some portions were relevant to explaining some background to the Parents' request for an "intervener." The Hearing Officer limited use of this Exhibit to that narrow purpose of putting the Parents' complaint into some context or perspective.

The School Board withdrew its objection to Parents' Exhibit 9.

The School Board objects to Parents' Exhibit 15. The Parents argue that there was testimony about the job description of a sign language interpreter requiring knowledge of the RID code of conduct. The Hearing Officer gave little if any weight to this Exhibit except to note that there may be codes of conduct of some sort accepted generally by sign language interpreters. No specifics, nor the organization publishing Exhibit 15, were considered by the Hearing Officer in reaching the case decision. There was testimony from witnesses that codes of conduct or ethics might apply to sign language interpreters and possibly to those using techniques of an intervener.

The School Board objects to Parents' Exhibit 19, Page 40, of the Public Schools Operating Budget for Fiscal Year 2010-2011. The School Board's objection is overruled and the Exhibit is admitted to be given very limited weight for what it contains. It simply states the School Board's vision and goal of maximizing all children's potential. The Hearing Officer agrees with the School Division's argument that this does not create a legal standard or obligate the School Board to provide services in

excess of the IDEA requirements. It appears to be a political document or possibly in the nature of a parliamentary report. Where the Parents' disagree with whether the School Board's policy is correlated with its political speech their recourse is to engage in the public debate and/or electoral politics. The Exhibit is relevant to this case because it tends to show that there is a budget process through which student services are funded and its slight value for that purpose is not overcome by any slight prejudice to the School Division.

The School Board objects to Parents' Exhibit 20, a CD disk of recordings of applicable IEP team meetings. The School Board's objection is overruled. Rarely does a special education hearing officer have the benefit of hearing the actual meetings and recorded words of the IEP team members showing the disagreement in context resulting in the due process hearing request. Contrary to the argument of school counsel, at the beginning of each recorded meeting the team/committee members each generally identify themselves by name. Comparing the recordings to the actual IEP documents shows that the meetings did in fact address the issues outlined and summarized in writing in the IEPs. In at least one recording there was a lengthy substantive discussion of the Parents' request for an "intervener" and the response and reasoning expressed by school personnel serving on the committee. The Hearing Officer agrees that the recordings were quite lengthy and much was irrelevant. The Hearing Officer made every effort to exclude any consideration of irrelevant portions of the recordings. There is no requirement as school counsel urges that a witness must introduce the Exhibit in this type of hearing. The Exhibit like others is simply offered for what it shows and for the weight it is due. No formal rules of evidence are applicable in this proceeding. There is no requirement for the

School Board to cross-examine any witness. The School Board has had every opportunity to review the recordings and address objections based on surprise and has raised no objection to any statement on the recording claiming a right of rebuttal proof. The portions of the recordings that are relevant are precisely relevant. The portions that are not relevant were not considered by the Hearing Officer.

Contrary to school counsel's expressed concerns, the recordings although offered by the Parents show nothing more than that a full and fair opportunity was provided by the School Division for the Parents to participate in discussions related to 's evaluation and education. School personnel were courteous, professional, and focused on the Student's needs and progress. Although at times during the long meetings (also involving a Chinese language interpreter) the discussions became pointed about some disagreements, school personnel were at all times open to discussion and to the Parent sharing concerns, information, experiences with the Student, and expressing the viewpoints of the Parents and the advocate and invited meeting participants of the Parent. School personnel concisely and politely stated the School Division's positions and were firm as to what there would not be agreement to. The meetings were in most respects very professional and this evidence also shows that there is some ability for the parties to communicate and continue a useful dialog for the benefit of this Student. The disagreement seems to result from a lack of good communication about the legal standard the School Division argues applies to its obligations, perhaps some difficulty of the Parents understanding what the school is saying, and maybe some resistance of school personnel to experiment to some limited extent with what the Parents want out of professional disagreement and/or personnel or even interpersonal causes. Everyone heard

on the recordings seemed focused on 's needs and how best to meet them given available resources and their professional viewpoints (on the Parents' side based on direct observation and experience with the Student and resulting lay opinions – except the child's social worker and person providing information about interveners expressed professional opinions).

The School Board objects to Parents' Exhibit 21, Virginia's Regulations Governing Special Education Programs for Children with Disabilities in Virginia. As noted in the hearing record there is no purpose to the objection or reason to rule. Virginia's special education regulations are legal authority, not evidence. While it is not necessary that the Parents' include regulations in their case Exhibits, there is no reason why they cannot. This is sometimes done for convenience of reference. The Hearing Officer gave this Exhibit no weight as evidence and had no reason to reference it since the Hearing Officer has a working copy already of these regulations.

The School Board objects to Parents' Exhibit 22, a very general publication about special education. The Parents urge that the document references professional standards and specialized knowledge and skill set for an "intervener". The School Board's objection is overruled. The publication provided limited useful information relevant to this case in that it shows there is discussion in professional literature of a role or body of knowledge related to a concept of a deafblind intervener.

Briefly some other objections raised by counsel for the School Board are next addressed. See POST-HEARING BRIEF OF THE SCHOOL BOARD OF THE OF , pp. 23-24. In the pre-hearing stages of this case and post hearing the School Board objected to the hearing officer requesting that the School Board facilitate

service/acceptance of the Parents' subpoenas on School Division personnel or others connected with the School Division. In addition the School Board argues that the Hearing Officer should have required legal service of the Parents' subpoenas. First the Hearing Officer had no occasion to rule on whether the Parents' subpoenas were properly served, since witnesses who were school employees were voluntarily produced and the Parents in one case withdrew a witness request. It is noted that the Virginia special education due process hearing regulations expressly address the authority of the Hearing Officer to make requests of the parties to facilitate case administration, and the obligation of the School Division to comply with such requests. See pre-hearing SCHEDULING ORDER AND RULINGS ON CROSS MOTIONS OBJECTING TO SUBPOENA REQUESTS, Section C., p. 3.

Counsel may wish to consider that among the primary justifications for the rule the School Board here is relying on, expressed in Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528 (2005), placing the initial burden of proof on parents objecting to a school proposed IEP, is precisely the easy availability of discovery. The Supreme Court expressly considered the argument that since school systems have better access to information and school personnel witness testimony, that the burden of proof should be placed on the schools to show the adequacy of offered services. Precisely because of procedural safeguards and the ease of obtaining liberal discovery the justices agreed that the burden of proof could be placed on parents. It is worth noting that given the strict timelines required in these cases that delay in allowing discovery cannot be afforded and should not be an available litigation tactic of either party.

Counsel objects to the Hearing Officer's request for IEP information during a pre-hearing conference in an attempt to identify the issues in dispute. Counsel is reminded that the request was based on and was exactly worded in accordance with the Virginia Department of Education's pre-hearing conference checklist contained in that agency's primary guidance document for due process hearing officers. A member of counsel's law firm was on the drafting committee for that document.

In regard to another filed objection, the pre-hearing SCHEDULING ORDER AND RULINGS ON CROSS MOTIONS OBJECTING TO SUBPOENA REQUESTS is accurate.

Counsel objects to the Hearing Officer reserving a ruling on the School Board's Objections to all or most of the Parents' evidence Exhibits during the hearing. The Hearing Officer has ruled on those objections above because they could not be appropriately ruled on during the hearing because the Hearing Officer had to read them and consider them in the context of the case record, and because the School Board was granted leave to file post hearing objections explaining why the School Division was subject to unfair surprise. Because the hearing had to be conducted before the use of Exhibits by the Parents could possibly result in surprise it was necessary to reserve a ruling. As noted, the School Board has made no post hearing objections based on unfair surprise.

The counsel for the School Board objects that the Hearing Officer made no distinction between expert and fact witnesses. The Hearing Officer's actual ruling was that given the absence of applicable formal rules of evidence in this administrative hearing, no purpose was argued nor rule or authority cited requiring a witness to be

"certified" as an expert witness. All witnesses, including the basis for any opinions were considered for credibility and all testimony was given due weight. Evidence was admitted showing the professional achievements of some witnesses for both parties. Both parties were afforded the opportunity to question, cross-examine, and impeach witnesses as deemed necessary. There was no limitation on either side showing and making an argument that any witness had special insight, education, training, and/or understanding of particular issues. Testimony as to both ordinary opinions and opinions based on claimed special insight, education, training, and/or understanding of particular issues was admitted to the record and considered as appropriate by the Hearing Officer. See Tr. pp. 65-66.

The Hearing Officer in some cases questioned witnesses directly called by each party, as reflected in the case record. Both parties were given the opportunity to cross-examine these witnesses in regard to questions asked by the Hearing Officer. The Hearing Officer's concerns are identifying and clarifying issue and applying proper legal standards, as well as being sure issues are brought out when a witness is available to provide the information. It is noted that one side of this case was *pro se*, and therefore unrepresented by knowledgeable legal counsel.

School counsel objects that the Hearing Officer provided some guidance, as reflected on the hearing transcript, to the *pro se* party and non-attorney parents' advocate on how to question witnesses or present their case. As noted in the record, and in response to the request from the *pro se* party for information about proper hearing procedures, the Hearing Officer at times provided suggestions and examples of how they might ask questions in a way that would not suggest to school counsel a need for further

objections. For example, in response to school counsel's numerous objections to leading questions of the Parents' direct examination witnesses (who were by and large school employees), the Hearing Officer did suggest that the advocate try to ask more open-ended questions not tending to suggest the answers expected. See e.g., Tr. p. 76. The Hearing Officer believes that this is appropriate to the role of a presiding officer in a proceeding intended to find the truth and to lead to correct decisions.

Now as for the parties' arguments and what has been shown by the evidence, first the IEP Proposed by the School Division is presumed to be correct, subject to proof by the Parents that it is not. Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528 (2005). The School Division does not initially have to prove anything. As noted above, the Hearing Officer rejects the claim made by the Parents that the School Board has voluntarily committed itself to providing a greater level of services than required under the IDEA. See Parent's Post-hearing Brief – 9 June 2011, pp.1-2.

The Parents argue that the related service of an "intervener" is necessary for to receive a FAPE because the current position of educational interpreter is unable to do more than facilitate language translation. They claim that an intervener can use strategies to limit frustration and resulting disciplinary problems, can provide instructional assistance, and can assist with self-help skills. See Parent's Post-hearing Brief – 9 June 2011, p.1. There is little if any evidence to support the claim that is not receiving a FAPE as defined by applicable legal authority.

According to Parents' Exhibit 3, Volume 18, Issue 1, page 7, the term "intervener" refers to a person who has received training to learn specialized skills related to deaf-blindness and who works consistently with an individual who is deaf-blind. It is

noted there that an alternative to hiring someone with special training in this skill is to hire staff to serve in the role of dedicated one-on-one teacher aides or paraprofessional. See also Tr. p. 181 for similar point. See Tr. pp. 184-185 for witness' further description of the function and role of an intervener. Parents' Exhibit 3, Volume 18, Issue 1, page 7 states that this is not ideal because intensive training is necessary for the acquisition of sufficient skills to assist student to gain access to educational and environmental information and at the same time promote their independence. See also Parents' Exhibit 5 regarding the function and role of an intervener.

The School Board argues that the case is about a staffing decision, and that this is a subject within it sole prerogative, citing Slama v. Independent School District No. 2580, 259 F. Supp.2d 880, 884 (D. MN 2003). See POST-HEARING BRIEF OF THE SCHOOL BOARD OF THE OF , p. 1. This may or may not be so, but it may be unnecessary to consider it, both because it puts the cart before the horse since the threshold issue is even whether additional services are required, and because it may not be a staffing question at all.

The Parents presented knowledgeable testimony (lack of certification also argued by the School Board) that there is no recognized certification available in Virginia for an intervener but that a program funded by the U.S. and Virginia departments of education through Virginia Commonwealth University offer some free course work (Tr. pp. 189-190, 192) and supplemental resources available to school systems. See Tr. pp. 176-178. At most what is currently available in Virginia is conceptual and a body of supplemental, if not experimental, resources. See Tr. p. 182 for witness opinion regarding other states. Only eighteen people in Virginia have completed the training referenced by the Parents,

none of whom are certified interpreters. Tr. p. 193. The Parents' witness testified that many children with deaf-blindness don't sign. Tr. p. 194. It is possible that existing personnel could adapt available resources and implement in limited ways some of the strategies and techniques requested by the Parents.

If this kind of approach was to some degree shown to be necessary, the parties could agree or a court might shape a limited remedy tailored to the situation. This does raise a question of whether it could ever be appropriate for a court to order an experimental service, as apposed to schools and parents being mutually free to choose it. The Student's social worker testified that "has much more intense needs than many other children I have ever seen." Tr. p. 230.

The better argument on behalf of the School Division is found at POST-HEARING BRIEF OF THE SCHOOL BOARD OF THE OF , pp. 2 and 8. It is argued that has substantially increased his signing ability and has made progress towards his IEP goals and has acquired an extensive number of academic skills without the benefit of an intervener. Therefore the School Division argues that no additional service is necessary in order for the Student to receive a FAPE as defined in the controlling legal authority. If true this is Bd. of Ed. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) recast to address this new debate that seeks to step beyond standard sign language interpreting services. The School Division argues that the extent of 's progress must be judged by the Student's measured cognitive ability, which the School Board claims is below that of 99% of other students of his same age. See SB Exhibit 9, a confidential psychological report. See Tr. pp. 361, 363-366. This is certainly relevant evidence that was undisputed.

Again, the services provided by the School Board to are initially presumed to be correct.

The School Board's argument here is persuasive and is not overcome by any evidence presented by the Parents. There was un-contradicted uniform testimony that has benefited from the services he already receives. The Student has made gains in his behavior, communication, and self-help skills, and other areas. See e.g., Tr. pp. 89, 90-96, 105, 111-112, 146-153. The Parents' witness called to explain the referenced intervener program testified that, "having language through an interpreter has increased his understanding of what is going on around him. And then seeing him in the home, and mom signing to him... his understanding of what is going on was clear." It seems evident even from the evidence and testimony presented by the Parents that is being provided with some educational benefit, and depending upon the Student's actual cognitive ability and considering his acknowledged multiple disabilities, perhaps a great deal of educational benefit. Again, initially educational benefit is presumed to be occurring unless proved otherwise by the Parents, and there was little if any argument or evidence presented by the Parents here that was not making real progress. It can be presumed from the fact that they have brought this case that the Parents believe that would make greater progress and receive more benefit if the Student were provided with intervener services, but again this is the same parents' argument as in the Rowley case. If there was evidence that was not learning, or was delayed because he could not access the educational opportunity being provided, there would be a different question.

It is also necessary to consider that from the testimony of the witnesses, the evidence presented, and the arguments made by the Parents, the intervener concept is

really expressly a collection of techniques and training suggested for working with students who are both deaf and blind. See Tr. p. 96. This does not mean that it could not possibly be proven that some of this methodology could benefit a student that was not entirely blind but only had limited eyesight or even just limited hearing. Those questions do not have to be addressed here.

There is evidence that has poor eyesight and needs eye glasses. See Tr p. 271 for ordinary opinion testimony of sign language interpreter that is "...very, very nearsighted..." This does not necessarily mean the Student is blind, however. See Tr. p. 191. He can obviously see from all of the evidence but must need some accommodations for his poor eyesight. It can be presumed that his hearing loss is more of a handicap, which is why there is agreement that he needs a dedicated sign language interpreter.

There may well be a professional difference of opinion as to whether it would be beneficial for intervener techniques designed for deafblind students to be used with . At least one witness with educational experience working with expressed the opinion that the progress made so far could be hindered by such a close relationship with one individual, "because he wouldn't be able to do those things independently as he is now... fostering relationships with his peers, his teachers, other people that come into his world..." Tr. pp. 96-99. This Hearing Officer cannot and would not intend to enter into that debate. See Tr. p. 180. See also Tr. p. 183 ("There is a little bit of controversy"). If objective evidence showed lack of progress or lack of access to a meaningful educational experience then questions and lines between knowledgeable disagreement might be differently drawn. There also might be less to lose by experimenting so the parties might more easily agree.

It also appears that the parties may not really be as far apart as it might seem. There was testimony that the role of the current educational sign language interpreter is somewhat flexible to adapt to the special needs of a particular handicapped student. See Tr. pp. 219-222, 201-203, 296. The interpreter may also provide the Student direct instruction in ASL. Tr. pp. 84-85. A sign language interpreter with certain EIPA recognition can, "with guided assistance from the teacher, tutor a student." Tr. p. 222. There was also testimony that the interpreter must be mindful of boundaries (Tr. pp. 221, 199, 204, 259-260) because the sign language interpreter is not the Student's teacher and the classroom teacher has a defined role to play because of educational expertise. See e.g., Tr. p. 139. See also Tr. pp. 263-267 and 269 for witness' opinion of difference between being an interpreter and intervener versus role of the teacher. It is possible that what 's Parents are asking the school to provide is really an instructional aid or tutor or private teacher who also knows sign language so as to provide intensive one to one instruction (see the Parent's written Opening Statement, HO Exhibit1, at p. 4) without any separate need for third party translation. In an ideal world that might or might not be desirable. There is no law that appears to currently require it.

The School Board raises numerous arguments as to why the issue of blindness cannot be raised in this hearing, and if a question at all it would be for another day. See POST-HEARING BRIEF OF THE SCHOOL BOARD OF THE OF , pp. 15-16. Given the threshold Rowley question and the burden of proof assigned to the Parents under Schaffer v. Weast which presumes the educational judgments of the School Division here are correct, this issue of blindness need not be reached and is not decided here.

This Hearing Officer agrees with the argument advanced by the School Board in its closing argument at Tr. p. 370 that the Parents have not met their burden of proof under Schaffer v. Weast and that it has not been shown that is not receiving a free appropriate public education in accordance with the legal standards required by the IDEA as interpreted by the U.S. Supreme Court's Rowley decision and subsequent Fourth Circuit case decisions. At the conclusion of the Parents' case during the hearing school counsel moved to strike the Parent's evidence and for something in the nature of a summary judgment on the ground that the Parents had not met their burden of proof. See Tr. pp. 347-354. The Hearing Officer reserved ruling on this motion because the Parents had submitted various written evidence Exhibits and other evidence (including audio recordings) that had not been reviewed, and additional study of the special education due process hearing rules also seemed advisable. While the Hearing Officer believes that at times standard rules of civil procedure can provide a useful guide as to some procedural questions in administrative proceeding for which no rule has been established, it does not appear that the special education due process hearing rules applicable in Virginia contemplate the procedure requested by the School Division. In addition, granting such a motion to strike would be impractical in most Virginia administrative proceedings again because extensive study of case records is usually required and evidence Exhibits are usually not fully reviewed in the context of the full case record until post-hearing. For this reason the School Board's motion to strike the Parents' evidence is denied, but this Decision holds after review of all of the evidence that the Parents of have not met their required burden of proof. The School Division therefore shall have no obligation to

provide with an "intervener" as requested in the Parents' request for a due process hearing in this case.

This Hearing Officer does have authority on his own motion under 8 VAC 20-81-210 P. 8. to order an independent educational evaluation of to determine the extent of his eyesight to help assess whether his vision limitations tend to affect his ability to receive educational benefit, and also to order an independent educational evaluation to assess the Student's current cognitive abilities, including I.Q.. The evidence presented raises some doubt as to whether there is good current data in the Student's educational record regarding his eyesight. Current tests may prove helpful particularly to the School Division in both planning needed educational services and in possibly defending future claims that this Student is blind. In addition, the evidence presented as to the current level of the Student's cognitive ability appeared limited to tests conducted by a school psychologist employed by the School Division. While the credentials and experience of the school psychologists and the work performed seem appropriate, the Parents may find it helpful to understanding 's abilities and/or limitations and in trusting the school's judgments about his needs to see results of current standard tests conducted independently from the School Division. These two educational evaluations shall be conducted independent of both the School Division and the Parents and shall be nothing more than straight forward standard tests conducted by competent professional practitioners as the parties agree on or if they cannot agree as resolved via an applicable Virginia Department of Education complaint procedure. The purpose is to provide objective information and evidence concerning the subject matter of the tests.

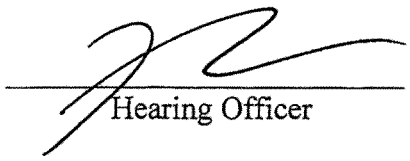
is years old and is likely to be a student of this School Division for as many more years. The conversation between the parties here is a continuing one and student IEP development is an annual process with the potential for future disagreements. The audio recorded evidence of prior IEP meetings presented in this case shows that the parties can and do talk effectively with each other and there is certainly a genuine concern on all sides for 's welfare. One problem with the procedures for special education due process hearings are the extremely arbitrarily tight mandated timelines and arbitrarily strict deadlines to complete cases from start to finish. Discovery and development of information to prepare cases is extremely difficult under such circumstances, as some pre-hearing experience in this case has shown. It is therefore in the interest of this Student that there be more data available ahead of disputes to help in the decision process.

Finally, by letter dated June 14, 2011, counsel for the School Board has moved that the Hearing Officer order that the case record be essentially sealed and that the Parents and parents' advocate be prohibited from providing information and documentation from the case to the media and/or from publishing it on the internet. No legal authority is cited as to the Hearing Officer's power to grant this request. There are references to the Family Educational Rights and Privacy Act regarding alleged unrelated student information that was not obtained from the School Division through discovery in this case or otherwise and to the confidential leave status of a School Board employee. The Hearing Officer could not consider granting any of this motion without scheduling an oral evidentiary hearing and after further consideration of the legal basis for such an order. As the required very short timeline has run for issuing the final Decision in this

case and the Decision is in fact issued, this Hearing Officer no longer has jurisdiction of the matter. 8 VAC 20-81-210. I. 2. provides that a special education hearing officer has authority over a due process proceeding only until issuance of the special education hearing officer's decision. It may or may not be appropriate for the School Board to address its requests to another forum.

The parties to this case are also herein notified of their right of appeal. A decision by the special education hearing officer in any hearing, including an expedited hearing, is final and binding unless the decision is appealed by a party in a state circuit court within 180 days of the issuance of the decision, or in a federal district court within 90 days of the issuance of the decision. The appeal may be filed in either a state circuit court or a federal district court without regard to the amount in controversy. The district courts of the United States have jurisdiction over actions brought under § 1415 of the Act without regard to the amount in controversy. See 34 CFR 300.516; § 22.1-214 D. of the Code of Virginia; 8 VAC 20-81-210.T.

Dated: 6/20/11



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