

06-002



CASE CLOSURE STATEMENT

PUBLIC SCHOOLS

School division: _____

Parents: _____

Child: _____

Date: October 13, 2005

Counsel representing LEA: _____

Counsel representing _____

Bradford A. King

Philip C. Strother

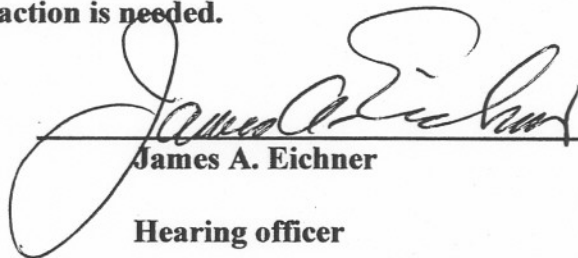
Parties initiating hearing: Parents

Prevailing party: Public Schools

Hearing officer's determination:

Proposed individual education program provided with a free appropriate public education.

In view of the above, no further action is needed.


James A. Eichner
Hearing officer



PUBLIC SCHOOLS

HEARING OFFICER'S OPINION

is an 11 ½-year-old child with autism.

During the 2004-2005 school year he attended 's

Elementary School as a fourth-grader. At the end of the year he was promoted the fifth grade. He attended part of the 2005 summer school session at . His parents, , then removed him from the public school system and placed him in the private School for Autism.

On June 28, 2005, Mr. and Mrs. requested a due process hearing, saying been denied a free appropriate public education (FAPE). They asked for private placement at public expense, and reimbursement for the tuition they had paid at School. had refused.

This hearing officer was appointed by a July 9, 2005, letter from director of special education, after an earlier telephone call from him. On June 30 I wrote to counsel for the parties. After a pre-hearing telephone conference, I issued my first pre-hearing order on July 13, confirming the agreed hearing date of August 8, setting deadlines for submission of witness lists and proposed exhibits, and stating that my opinion would be issued on or before August 17, 2005.

Later it appeared that two expert witnesses would not be

available August 8 or 9, so their testimony was taken July 25.

Shortly thereafter, as stated in the second pre-hearing order of August 11, Mrs. _____ called me to say there would be a substitution of counsel. The _____' new attorney advised he had not been retained until August 1 and, considering the mass of exhibits already submitted, he would not be properly prepared to try the case one week later. He therefore requested a continuance. It was granted over _____'s objection upon my finding that, because of the need for _____'s representation by adequately prepared counsel, _____'s best interests would be best served by granting it. Because of counsel's schedule and those of some teacher witnesses, suitable dates could not be found until September 29 and 30. The hearing was resumed and completed on those days. The August 11 order set a new decision deadline of October 17.

THE EVIDENCE

Six witnesses testified for the _____ and six for _____. More than 130 exhibits were tendered. All but two were filed, despite some objections that need not be detailed here.

I find that each witness was credible, and that all expert witnesses were qualified to testify within their stated fields of expertise. A few expressions of opinion were outside stated fields of expertise, but none that were significant.

THE INDIVIDUALIZED EDUCATION PROGRAM

The question is whether the individualized education program (IEP) which _____ offered _____ for the 2005-2006 school year would have provided him with a free appropriate educational program (FAPE).

No formal proposed 2005-2006 IEP is before me because he parents told as early as June, 2005, that they intended to be privately placed for the now current school year, as indeed he was.

The key documents before me are the IEP adopted for 2004-2005 (Ex. 3) and later adopted addenda to it (Ex. 17, 39, and 80).

At least four IEP team meetings were held during 2004-2005, all attended by the mandated regular and special education teachers, specialists, at least one parent, and others.

The basic IEP (Ex.3), dated August 17, 2004, was approved by Mrs. after several "clarifications" were added. It provided, among other things, that would receive:

- Attendance in a regular education classroom, with non-disabled children, for home room, recess, lunch, music and art.
- Academic subjects in a self-contained classroom.
- One-on-one reading, writing, and mathematics instruction.
- Occupational and speech therapy.
- A teacher's aide assigned only to him, all day.

Later addenda increased occupational therapy sessions; recited completion of a functional behavior assessment and adoption of a behavior implementation plan, and extended school year services July 5-August 11, 2005, with regular education and speech and occupational therapy.

THE WITNESSES

Mrs. _____

_____’s mother testified that her son was diagnosed with autism at 18 months. He was not achieving in reading, spelling, or mathematics at _____’s _____ Elementary School. Later his parents enrolled him in an applied behavior analysis (ABA) program at _____ School, which he attended 2003-2004, and where he did “remarkably well” in academics, behavior, and socialization.

An ABA program, according to Mrs. _____ and the directors of _____ School and the _____ School for Autism, features all one-on-one instruction and daily assessment, evaluation, and data collection, called discrete trials. These matters, Mrs. _____ said, were not adequately addressed in the IEP. Her main complaint was lack of ABA methodology at _____.

She also felt some _____ instructors were not adequately trained; that several “measurable annual goals” in the IEP were not appropriate, and that _____ had made little progress at attaining some of those goals. For example, Mrs. _____ said, Goal 7, to count bills and change accurately up to \$5.00, could not be achieved by her son, although the IEP note on this said “sufficient progress” was made. Under Goal 6, measuring objects with a ruler, the “sufficient progress” notation was wrong; _____ could not use a ruler at all.

Mrs. [redacted] said she had observed her son at [redacted] at least 20 times, sometimes for as long as four or five hours, and could see little socialization between him and non-disabled classmates.

She said she had offered to try to get instructors from [redacted] School, another ABA institution, to help [redacted] at [redacted] and had suggested dividing his school days into half by [redacted] staff and half by [redacted] staff, but [redacted] had refused.

Mrs. [redacted] concluded by saying her son could get an appropriate education only at [redacted] or another ABA school, but not in the [redacted] system.

Ms. [redacted], director of the [redacted] School, said she was trained in occupational therapy, specializing in the pediatric area; was certified in applied behavior analysis, and had worked at the Medical College of Virginia and the DeJarnette School in Staunton, where she had worked with children. She described the ABA program used at [redacted] which has a staff of nine teachers, including her.

Ms. [redacted] said she worked with [redacted] from the spring of 2003 until June of 2004, including overseeing development of his educational program.

When [redacted] first arrived at [redacted] she said, he was yelling and hitting himself, but this was reduced under a positive reinforcement program.

Ms. [redacted] described [redacted] as a perfectionist with a potential for learning. She illustrated this by describing gains of 61% in certain Woodcock-

Johnson testing between the start and end of his time at [redacted] and substantial percentage gains in various subjects during that time.

A big part of the ABA program at [redacted], Ms. [redacted] said, was prompt gathering and analysis of data, not found in the [redacted] program.

Based on her examination of the [redacted] IEP and other exhibits, and her own experience, she said the only appropriate placement for [redacted] was in an ABA school.

(There are no pages 7 or 8)

Ms. [redacted] is director of the [redacted] School for Autism, where [redacted] has been a student since September 12, 2005. Her school is new and small: three teachers and, now, three students. It uses the ABA method, which stresses completely one-and-one interaction between teacher and student. Her comments on the system generally resembled those of Ms. [redacted].

In addition to her regular staff, she said, occupational therapists come to [redacted], and other service providers.

The ABA method, Ms. [redacted] testified, has been around about 15 years, and is well recognized. Its discrete trial technique breaks the day down into individual steps, with data collected daily; a school does not get an accurate picture if it is not so recorded.

[redacted] does not now have basic language skills, she said; these are needed for socialization and every other area. Lack of these language skills, Ms. [redacted] says, is frustrating to [redacted]; he knows what he wants to say, but often cannot get it out.

[redacted] is following the [redacted] IEP, she said, and many of its goals are [redacted].

Several parts of the [redacted] IEP she criticized. For example, she

said, Goal 3, requiring certain comprehension “at the second grade level”, was inappropriate; [redacted] would be frustrated at that level and would not get educational benefit from it.

Videotapes, generally not permitted at [redacted], are used at [redacted] and are helpful tools. Ms. [redacted] said.

The ABA method, she admitted, does not benefit every autistic child, but [redacted] would be benefited by it. His appropriate placement, she concluded, would be at an ABA school like [redacted].

Dr. [redacted]

Dr. [redacted] is a pediatrician who has worked with children with special health care needs. She said she had treated several patients with autism, and was familiar with the applied behavior analysis method and the earlier Lovaas method, which had some similarities. [redacted] had been her patient since May, 2004, and before that was treated for three years by a former colleague in her practice, to whose notes she referred.

Dr. [redacted] rated [redacted] autism as “moderate to severe”. It is “difficult at best” for autistic children to get educational benefits from a regular classroom, she said, and [redacted] does not have the ability to benefit from being with regular students on the playground.

Autistic children, Dr. [redacted] said, generally do not socialize with other children and tend to withdraw from others. Socialization, she said, could be better taught with the ABA method.

Dr. [redacted]

Dr. [redacted] a clinical psychologist, said he conducted three psychological/educational valuations of [redacted]. The first tests were in August and September, 2003, the second in May, 2004, and the third in April, 2005. [redacted] did best in 2004, when he was enrolled in [redacted] School and the testing was done in the presence of his [redacted] teacher, [redacted], who "was very helpful". The 2004 testing showed "a significant breakthrough" in reading. [redacted] improvement from 2003 to 2004 showed he "was actually decoding words instead of just relying on sight word vocabulary".

After reviewing various test scores, Dr. [redacted] said [redacted] made generally less improvement overall" from 2004 to 2005 than he did from 2003 to 2004. An exception was that the 2005 tests showed [redacted] "was starting to grasp the meaning behind addition and subtraction".

Dr. [redacted] "recommended applied behavior analysis because, from

what I know, that's, as far as research shows, that has the best outcome".

But, he said later: "I'm not an expert in ABA."

He said one of [redacted] biggest areas of weakness was in language, and that it would be important for him to receive regular speech therapy. He understood that at [redacted] "they tend to integrate speech therapy throughout what they did", although they did not have a special speech therapist.

[redacted]

[redacted] father, an engineer, like his mother, said his son's appropriate placement would be in a school with an ABA program, "the only thing that shows progress". He has been actively involved with [redacted] education at [redacted] School for Autism, he said, and had been active at [redacted], where he attended most IEP meetings.

[redacted] felt he could not be an active participant if [redacted] returned to [redacted]. He apparently referred, among other things, to increasingly difficult communications between parents and school, documented in [redacted]'s exhibits, which need not be detailed here.

Ms. [redacted], special education lead teacher specialist for seven [redacted] schools, said she had 15 years' experience, but none as a teacher of autistic children and none teaching [redacted]. She regularly attended staff meetings and IEP team meetings, including those involving him..

She said she could not compare the [redacted] program for [redacted] with a program at an ABA school, although some ABA components, like one-on-one instruction in academics, were incorporated in [redacted]'s [redacted] program.

Ms. [redacted] said she prepared the addendum, dated June 16, 2005 ([redacted] Ex. 92), to the IEP to address some of the parents' concerns, adding additional speech and occupational therapy goals.

This addendum noted that [redacted] had received, at [redacted] Hospital, speech therapy in addition to that provided by [redacted], and the [redacted] Hospital speech-language evaluation in February, 2005, showed severe speech, language and pragmatic language disorder.

Ms. [redacted]'s regular education teacher, said he was her third autistic student. He was one of her 26 students.

Ms. [redacted] said she had tried a "buddy" system, pairing an autistic child with a regular student, which can be helpful. In [redacted] case it had not worked too well, she said; sometimes when other students sought to play with him he would prefer to play by himself on a swing.

At the start of that year, [redacted] had to be prompted to say things like "good morning" and "goodbye", but at the end he would say "goodbye" and "have a nice day" without prompting.

At the end of the 2004-2005 school year, she promoted [redacted] to fifth grade.

Neither [redacted]'s special education teacher, [redacted], nor his one-on-one daily teacher's aide [redacted], testified. She attended a three-day ABA session at the Virginia Institute of Autism in December, 2004, and he registered to ^{at} tend in February and March, 2005. ([redacted] Ex. 104). They, general education teacher [redacted], and occupational therapist [redacted], were the only [redacted] employees who saw [redacted] every day, according to his daily schedules, Monday through Friday, 8 a.m. to 2:10 p.m. (Parents' Ex.16).

Ms. [redacted] was [redacted] occupational therapist at [redacted] She had studied the ABA system during five years' work with autistic students

at [redacted] School, she said, and carried some ABA strategies with her to

[redacted].
Originally, Ms. [redacted] said, she spent 30 minutes a month on [redacted]'s occupational therapy, but this was changed by an October, 2004, IEP addendum ([redacted] Ex. 17) to 60 minutes per week.

She prepared [redacted]'s "sensory diet" ([redacted] Ex. 7), which is intended to "help increase awareness to the types of activities that tend to calm or organize the central nervous system". These included providing a private work space with low lights; at least 15 minutes of "relaxation time" in the daily schedule; lotion massage, and five minutes of "sensory input" by him, such as swinging, using a trampoline, and sitting in a beanbag with "fidgeting" toys.

Mrs. [redacted] is speech language pathologist for [redacted], assigned to [redacted] Elementary and [redacted] Middle School. She had experience there and earlier with autistic children. Mrs. [redacted] worked with [redacted] throughout the 2004-2005 school year.

Autistic children, she said, “need a structured environment and ample repetition”.

She added, in words not disagreed with by any professional who testified: “They need clear objectives. They need ample time to generalize concepts taught. They need to be taught those concepts in a variety of settings. And their communicative intent has to be at the forefront of therapeutic intervention.”

[redacted], she said, got speech and language instruction five times a week, some provided by her and some provided by her colleague, [redacted].

[redacted] Ex. 1, a Virginia Rehab evaluation conducted in July and August of 2004, said [redacted] “had made improvement in many areas” since his testing there in 2001, but his “functional communications skills remain profoundly decreased warranting and intense therapeutic plan for remediation”.

Mrs. [redacted] concurred in this view, and said when [redacted] arrived at

[Redacted] in September, 2004, "he was mostly just using one-word utterances, and he wasn't doing a great deal of interaction with staff or peers". [Redacted] "made sufficient progress" during the entire school year."

Mrs. [Redacted] said [Redacted] did not need to be educated in a private setting because "access to typical developing peers...and the amount of services that we provide at [Redacted] have helped him make progress toward the achievement of his IEP objectives".

She went on to say: "I feel that progress has been documented all year. I feel like he's improved in his social communication skills. And I think that his educational programming...is appropriate."

On cross examination, Mrs. [Redacted] said there are several methodologies for treating autistic children, "all valuable", including ABA and the one with which she was most familiar, TEACCH, or "Teaching Educational Autistic Children with Communication Handicaps".

What methodology was best suited for an autistic child, she said, depended on the particular child.

Ms. [redacted], who shared speech pathology treatment duties with Mrs. [redacted] had worked with autistic children during her eight years of experience; had had training in ABA, and had seen it practiced at the [redacted] and [redacted] Schools/

Ms. [redacted] did not take part in development of the IEP but was responsible, with Mrs. [redacted] with helping [redacted] achieve the speech and language goals in it.

She started working with [redacted] in September, 2004, after she reviewed the Virginia Rehab evaluation referred to above (p. 16)

At first, [redacted] had very limited verbal output, including answering "yes" and "no" questions and pronouns, and found it difficult to interact with peers.

During the school year, Ms. [redacted] said, she consulted at last once a week with Mr. [redacted] the special education teacher, and after each therapy session with Ms. [redacted], the teacher's aide.

At the parents' request, she and Mrs. [redacted] conducted a Speech-Language-Hearing Evaluation ([redacted] Ex. 83) on seven occasions in April and May, 2005. This report, she said, reflected progress

Ms. [redacted] said [redacted] did not need private placement. He needed, she said, to be around non-disabled children of the same age who could serve as models to him.

By June of 2005, she said, [redacted] had made progress on the speech and language goals in his IEP.

In her opinion, [redacted] provided [redacted] with a free appropriate public education.

Mr. [redacted], [redacted]'s school psychologist for 15 years, and once a teacher, said he had some training in autism and dealt with autistic children throughout his tenure at [redacted].

[redacted] attended the IEP meeting December 2, 2004, when revision of the behavior intervention plan for [redacted] was discussed and adopted ([redacted] Ex. 39). It addressed, among other things, [redacted]'s hitting himself and grabbing staff members. The plan was appropriate and substantially successful, he said.

[redacted] had made two formal observations of [redacted], the last in April, 2005. He had not made a complete assessment, but felt [redacted] was doing quite well.

He had some familiarity with the ABA system, which he described as suitable for developing oral communication.

He felt [redacted] 's plan served [redacted] well, and provided a free appropriate public education

WEIGHT TO BE GIVEN TO THE TESTIMONY
OF THE WITNESSES

As stated above (p. 3), I found all the witnesses credible, and all the experts qualified to testify within their fields. The parents do not qualify as experts. But Mrs. [redacted] 's opinions should not be ignored. She testified to extensive self-education, over several years, in autism and methodologies to handle it, including attendance at formal seminars, and attendance at, and preparation for, several IEP and other meetings. The evidence from both sides shows that she knows [redacted] better than anyone else.

There probably was bias of the witnesses on both sides as to the best methodology for [redacted]. It is equally balanced. The larger bias of the parents is explained by their commendable zeal in trying to get the best for their child.

The ABA system followed in the [redacted] and [redacted] Schools (and also, it appeared, in the [redacted] School), was said by Ms. [redacted] and Ms. [redacted], respectively, to be the better and, thus, the appropriate methodology for [redacted]. The [redacted] educators preferred theirs which, several testified, included elements of the ABA system. No comparative weighing of their testimony is appropriate because (1) each witness is entitled to her opinion and (2) there is no real conflict on relevant facts.

While the parents felt [redacted]'s IEP as amended did not provide him with educational benefit, none of their expert witnesses said so; they simply said that an ABA school would give him greater benefits.

[redacted]'s witnesses, all, except [redacted], professional educators, testified that [redacted] was making progress at [redacted] between September, 2004, and June, 2005.

THE APPLICABLE LAW

The first opinion of the United States Supreme Court on the Education of the Handicapped Act, predecessor of the Individuals With Disabilities Education Act, 20 U.S.C. section 1400 *et seq.* ("IDEA"), was *Board of Education v Rowley*, 458 U.S. 176 (1982), a split decision with a factual situation lop-sided in favor of the school district and thus factually distinguishable from the present case and, indeed, probably all or most of the later cases which cited it as controlling.

The inquiry thus must be to later, closer, cases in the United States

Courts of Appeals. Preferably, for our purposes, such cases will be those decided by the Court of Appeals for the Fourth Circuit, which are binding on hearing officers and federal courts in the Virginias, the Carolinas, and Maryland.

Some Fourth Circuit cases involves autism.

In *Hartmann v Loudoun County Board of Education*, 118 F. 3d 996 (1997), the parents' complaint (somewhat contrary to the complaint) was that their child should be returned to the regular classroom because he was not educated in a special class "to the maximum extent appropriate" as required by the "mainstreaming" provision of IDEA. His IEP team, at the end of the school year, "concluded that he was making no academic progress in the regular classroom" and therefore placed him, for academic instruction, in "a class specifically structured for autistic children...while joining a regular class for art, music, physical education, library and recess." 118 F.3d at 1000.

A hearing officer's decision upholding the Loudoun IEP was reversed by the District Court., which found the boy could receive significant benefit in a regular class and "and the Board simply did not take enough appropriate steps to include Mark in a regular class". *Id.*

The Fourth Circuit reversed, at p. 1001 quoting from the *Rowley* opinion for these principles:

“The IDEA does not deprive these educators of the right to apply their professional judgment. Rather it establishes a ‘basic floor of opportunity’ for every handicapped child...

“States must provide specialized instruction and related services sufficient to confer some educational benefit upon the handicapped child...

“the Act does not require ‘the furnishing of every special service necessary to maximize each handicapped child’s potential.’”

More recently, the same court denied reimbursement for services rendered to an autistic child in a private Lovaas program because the IEP, which appears to have included less extensive specialized services than those in the present case, provided a free appropriate public education.. The court, citing the *Hartmann* opinion above, said it is not necessary to offer the “best possible education”. *MM v School District of Greenville County*, 303 F. 3d 523, 526 (2002).

Similarly, that court in *Doyle v Arlington County School Board*, 953 F. 2d 100 (1991), had denied parents’ request for reimbursement for costs of a private Lovaas program for their autistic child.

Probably the latest decision on reimbursement for private placement of an autistic child is *Henrico County School Board v Z.P.*, 399 F. 3d 298 (2005).

The parents wanted reimbursement for enrolling their son at the ABA-method [redacted] School, one of the venues suggested by the [redacted] in their request for due process.

The court there did not made a final decision on the controversy, remanding it for further proceedings, but made these points:

“The appropriate education required, by the IDEA...should not be confused with the best possible education...”, citing the *MM* case above.

“Congress did not intend that a school system could discharge its duty...by providing a program that produced some minimal academic achievement, no matter how trivial”, quoting from *Hall v Vance County Board of Education*, 774 F. 2d 629, 636 (4th Cir. 1985).

“Neither a state administrative officer or a reviewing court may reject an otherwise appropriate IEP because of dissatisfaction with the educational methodology proposed in the IEP. If an IEP is ‘reasonably calculated to enable the child to receive educational benefits’ ...the hearing officer cannot reject it because it because the officer believes that a different methodology would be better for the child”, citing the *Rowley* case.

The court said nothing about the appropriateness or superiority of the ABA system at [redacted], except that it would have to be addressed if the [redacted] IEP ultimately was found not to provide an FAPE.

CONCLUSION

Because the academic achievement provided in 2004-2005, and offered for 2005-2006, is neither minimal nor trivial, and, therefore, because deciding on the best educational methodology for a child cannot be a question for a hearing officer, I must conclude that [redacted] has provided and offered a FAPE.

FINDINGS OF FACT

1. [redacted] is an 11 ½-year-old boy who is autistic. This is, of course, a disability.
2. As such, [redacted] needs special education and related services.
3. He attended [redacted]'s [redacted] Elementary School throughout the 2004-2005 school year.
4. Thereafter his parents, [redacted] and [redacted], withdrew [redacted] from [redacted] and enrolled him in [redacted] School for Autism, which he now attends.
5. They say [redacted] did not get a free appropriate public education at [redacted], and that the only proper placement for him is at a school devoted to the applied behavior analysis (ABA) method of instruction, such as [redacted] School or [redacted] School, which [redacted] attended for the 2003-2004 school year, or the [redacted] School.
6. Some of the ABA methods were employed by his teachers at [redacted]

7. The individualized education program provided by [redacted] for the 2004-2005 school year, as amended, provided among other things
- Speech and language instruction five times a week.
 - Home room, lunch, recess, and music and art instruction in a general educational classroom.
 - Specialized instruction, including occupational therapy, speech and language therapy.
 - Daily instruction by a special education teacher.
 - Daily exclusive one-on-one attendance by a paraprofessional.
8. An additional amendment at the end of the school year would have provided [redacted] in 2005-2006 with additional speech and occupational goals.
9. It also provided for extended school year services during the summer of 2005, but this program was cut short.
10. As of February, 2005, [redacted] still had a severe speech and language disorder.
11. During the 2004-2005 school year, [redacted] made progress in speech and language, behavior, and academics. (See pp.14, 17-19 above and [redacted] Ex.3.)
12. This progress was not minimal or trivial.
13. A program almost identical with the 2004-2005 IEP with addenda was offered [redacted] for 2005-2006.

14. It was refused by his parents, who withdrew him from public school and unilaterally enrolled him in private school.

15. All notice requirements and other procedural requirements were complied with.

CONCLUSIONS OF LAW

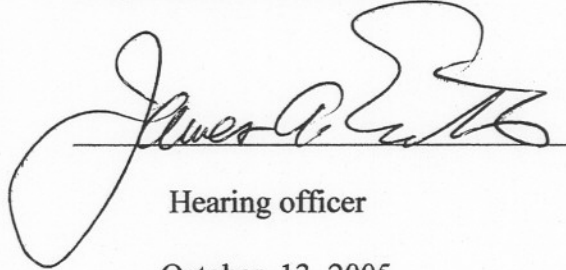
1. [redacted] Public Schools has borne its burden of proving, by a preponderance of the evidence, that it has provided to [redacted] in the 2004-2005 school year, and offered to provide him in the 2005-2006 school year, a free appropriate public education.

2 [redacted] and [redacted] have not borne their burden of proving, by a preponderance of the evidence, that [redacted] has not provided [redacted] in the 2004-2005 school year, or offered to provide him in the 2005-2006 school year, a free appropriate public education.

3. The [redacted] are not entitled to reimbursement for money they have spent in the past, or will spend in the future, on private school tuition for [redacted]

This decision is final and binding unless a party appeals it to a Virginia circuit court within one year of this date, or to a federal district court.

Respectively submitted,

A handwritten signature in black ink, appearing to read "James A. Eichner", written over a horizontal line.

Hearing officer

October 13, 2005

James A. Eichner
5 Tuckahoe Boulevard
Richmond, Virginia 23226
285-8004

Copies sent this date to:

All counsel

Dr. Judith Douglas