05-039

# VIRGINIA DEPARTMENT OF EDUCATION P.O. BOX 2120 RICHMOND, VA 23218-2120

# **CASE CLOSURE SUMMARY REPORT**



			4	
School Division		Name of Parents		
Name of Child		DECEMBER Date of Decis	30, 2004 sion or Dismissal	
KATHLEEN S. MEHFOUD, ESQ. Counsel Representing LEA		SUE ELLA E. KOBAK, ESQ. Counsel Representing Parents/Child		
PARENT BY SUE ELLA E. KOBA Party Initiating Hearing	K, ESQ.	Prevailing Pa	arty	
HEARING OFFICER'S DETERMINATION O	F Issues:			
1.	did not deny	a free approp	oriate public education in no	
allowing an amendment	to his IEP placing him in "A		-	
2. The proposed amendmen	nt to ' IEP	to place	in "Advanced	
Physical Education" is no	ot a necessary accommodati	on to provide FAF	PE.	
<b>3.</b> 7	is providing a free appro	priate public educ	ation to	
HEARING OFFICER'S ORDERS AND OUT	COME OF HEARING:			
Public Schools p	orevailed.			

This certifies that I have completed this matter in accordance with the regulations and have advised the parties of their appeal rights in writing. The written decision from this hearing is attached in which I have also advised the LEA of its responsibility to submit an implementation plan to the parties, the hearing officer, and the SEA within 45 calendar days.

December 20, 2004

Lorin A. Costanzo, Hearing Office

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



# Final Hearing Report and Decision

**School Division** 

Name of Parent(s)

**Superintendent of Schools** 

Name of Child

KATHLEEN MEHFOUD, ESQ.

SUE ELLA E. KOBAK, ESQ.

Representing LEA

Representing Parents/Child

LORIN A. COSTANZO

**Due Process Hearing Officer** 

PARENT BY SUE ELLA E. KOBAK, ESQ.

Parties Initiating Hearing

# A. PRELIMINARY MATTERS:

# I. Issues and purpose of hearing:

Sue Ella E. Kobak, Esquire, on behalf of

requested in writing a due process hearing by

letter dated November 10, 2004 and received by

Public Schools on November 15, 2004.

Issue for determination at due process hearing:

WHETHER PUBLIC SCHOOLS DENIED
A FREE APPROPRIATE PUBLIC EDUCATION IN THAT IT DID NOT ALLOW
AN AMENDMENT OF HIS IEP TO PROVIDE FOR A NECESSARY ACCOMMODATION?

## II. Timeline:

November 10, 2004	Date on Letter of Request for Due Process Hearing.				
November 15, 2004	Request for Due Process Hearing received by	Public Schools.			
November 16, 2004	Hearing Officer appointed.				
November 17, 2004	Initial Pre-Hearing Report tendered.				
November 19, 2004	Pre-hearing Conference held. Mediation and settlement discussed.				
	Due dates for motions and clarification of issues set.				
November 24, 2004	Written clarification of Issues due.				
December 01, 2004	Letter from Parent's counsel received re clarification of i	ssues.			
December 02, 2004	Motions in writing due.				
December 06, 2004	Response to Motions, if any, due by this date.				

December 13, 2004 Copies of documents to be admitted at hearing and list of witnesses to be received by opposing parties and hearing officer by this date.

Two telephone pre-hearing conferences held re: inclement weather issues. Due Process Hearing start time moved from 9:00 A.M. to 1:00 P.M.

December 20, 2004 Due Process hearing held.

Final Decision Due Date.

# III. Motions and Dispositions on motions:

On December 1, 2004, in response to the hearing officer's request for clarification of issues in writing, Ms. Kobak faxed a letter to the hearing officer (with copy to opposing counsel). Ms. Kobak's letter indicated, "The only issue involving is that his father asked for an amended IEP to include his emotional disabilities and for an accommodation placement in a program that provided him with weight training which is available through the school."

On December 2, 2004, "School Board's Motion to Dismiss" was filed with the hearing officer (with copy to opposing counsel). Two main concerns were raised by Ms. Mehfoud in her motion to dismiss:

First, the School Board objected to what it characterized as an attempt to amend the issues presented for due process hearing (ie: adding the issue re emotional disabilities) and indicated that clarification of the issues was requested by the hearing officer and it was not proper to raise different or new allegations that were not stated in the initial request for due process hearing.

**Second**, the School Board moved that the Hearing Officer does not have jurisdiction to consider the claim involving the scheduling of a regular education PE class.

Ms. Kobak's letter of December 1, 2004 interjected new issues not raised in the written request for due process hearing. The issue of identifying as "emotionally disturbed" is raised for the first time on December 1, 2004, after the request for due process hearing was filed. Without addressing whether questions of identification were raised previously with school personnel the written request for due process hearing which initiated this proceeding did not raise an issue of identification.

Basic due process concerns mandate that the each party has timely notice of what the issues for determination are and that there be fair opportunity to address the issues raised and prepare for hearing and/or attempt resolution of issues.

On the motions filed in this cause, the hearing officer held that:

A. The only issue to be heard at due process hearing is, "WHETHER PUBLIC SCHOOLS

DENIED A FREE APPROPRIATE PUBLIC EDUCATION IN THAT IT DID NOT ALLOW AN

AMENDMENT OF HIS IEP TO PROVIDE FOR A NECESSARY ACCOMMODATION?". This issue was timely raised in the request for due process hearing and would be heard.

B. The hearing officer declined to dismiss this cause at the time the jurisdictional matter was raised. The parent has the right to proceed forward and present evidence on the issue above set forth. A hearing officer is charged with not making presumptions in a case, protecting the rights of all parties, and base findings and decisions solely upon the preponderance of the evidence presented at the hearing and applicable state and federal law and regulations. There is sufficient matter raised involving FAPE to allow this matter to proceed forward at this time. This cause shall proceed to due process hearing and after the presentation of evidence a final determination as to the motion and/or issues will be made.

## IV. Due Process Hearing start time amended:

The Due Process Hearing was initially set, by agreement, for December 20, 2004, at <u>9:00 A.M.</u> at the Conference Room,

Public Schools,

Virginia. At the pre-hearing telephone conferences held on 12/19/04 the parties agreed to reschedule the hearing to 1:00 P.M. on December 20, 2004 (at the same hearing site) due to concern over travel conditions and inclement weather conditions at the hearing site. The final decision due date was not extended in this cause.

#### V. Miscellaneous matters:

- 1. Closed Hearing: By request of parent the due process hearing will be closed to the public.
- 2. Exhibits: By agreement of the parties the exhibits are admitted en masse.
- 3. <u>Stipulations</u>:
  - 1.) The parties stipulated to the following matters:
    - a. The requirements of notice to the parent were satisfied;
    - b. The Child has a disability; and
    - c. The child needs special education and related services.
  - 2.) Whether the local educational agency is providing a free appropriate public education is at issue in this cause and is <u>not</u> stipulated to.

#### 4. Exhibits:

**Public Schools exhibits** numbered 1 through 19 were admitted, *en masse*, by agreement of the parties, into evidence.

Parent's exhibits numbered 1A, 1B, 1C, 1D, 1E, and 2A. were admitted, en masse, by agreement of the parties, into evidence.

5.	Designations	of	Transcr	int and	l Exhibits:
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- 1. The transcript of the due process hearing, consisting of one volume, is referred to as "Tr." (with the page number inserted at "\_\_").
- 2. The Parent's Exhibits are designated as "P\_\_\_, pg. \_\_\_" (with the Exhibit's number inserted following "P" and the page number in Parents binder of exhibits following "pg."
- 3. The School's Exhibits are designated as "SB \_\_" (with the Exhibit's number inserted at "\_\_").
- 6. Witnesses: The following witnesses were presented by Parent.
  - 1.
  - 2.
  - 3.
  - 4.
  - 5.
  - 6.

No witnesses were presented by

Public Schools.

## **B. FINDINGS OF FACT:**

- o1. (hereinafter referred to as ") was born on is a 16 year old male who is in the 10th grade at High School. is passing all his courses and is a candidate for a Modified Standard Diploma with a projected Graduation/Exit Date of 6/1/07. (SB 8)
- 02. An Eligibility Committee met on 6/2/04 for purposes of reevaluation and determined that is eligible for special education services as "Learning Disabled"/"Other Health Impaired". Mr. father, has sole custody and signed indicated permission for to be identified as LD/OHI was given on 6/2/04. (SB 11)
- 03. On June 2, 2004 an IEP Addendum was adopted and consented to by \_\_\_\_\_ for to have bussing, PE, and extracurricular activities in regular educational setting. (SB 12)
- 04. The "Advanced Physical Education" class at High School is a regular education class

- (SB 18, & 19) which has requirements for entry and staying in the class. Advanced Physical Education is open for students who meet requirements and play on a school sports team. This class involves weight training and weight lifting.
- 05. During the early part of school year 2004/2005 played on the High School's football team and was in High School's "Advanced Physical Education "class."
- 06. In September 2004 quit the school football team and was not allowed to continue in the "Advanced Physical Education" class. (P 1E pg. 7; SB 15, SB 18) He was transferred from third period "Advanced Physical Education" to a third period regular Physical Education class. (Tr. 34)
- 07. father requested County Public Schools allow to attend the "Advanced Physical Education" class but this was denied. (SB 1)
- 08. By letter dated October 27, 2004 counsel for requested a meeting for an amendment to 's IEP. (P 1A pg. 1; SB 17)
- 09. A meeting to consider amending IEP was held on November 9, 2004 with 's father present and with Notice of Individualized Education Program ("IEP") Meeting sent. (P 1C pg. 3 & 4).
- 10. At 's November 9, 2004 IEP amendment meeting the amendment to place in a regular "Advanced Physical Education" classroom instead of his then current placement (in a regular education PE class) was denied. (P. 1E pg. 7 & 8; SB 18)
- 11. By letter dated November 10, 2004 a due process hearing was requested indicating, "By this letter, I am requesting a Due Process Hearing on the issue of not allowing an amended IEP which would allow an accommodation for " (P 1D pg. 5.)

## C. Discussion and Conclusions of Law:

#### I. Introduction:

In June of 2004 the Eligibility Committee met for purposes of reevaluation and determined that was eligible for special education services as "Learning Disabled"/"Other Health Impaired". His father signed indicating permission for to be identified as LD/OHI on 6/2/04. (SB 11)

current IEP is the IEP of 2/26/04 as amended 6/2/04. (see SB 8 & SB 12) On June 2, 2004 an IEP Addendum was adopted and consented to by father which provided, among other matters, for PE, and extracurricular activities in regular educational setting. (SB 12)

At the start of the conschool year—was in an "Advanced Physical Education" class but was removed by the school and placed in a regular PE class. By letter of October 27, 2004 his father requested a meeting to amend—'s IEP. The meeting was held November 9, 2004. (P 1A pg. 1 and P 1C pg. 3 & 4). His father requested—'s placement in "Advanced Physical Education" and asked that "Advanced P.E. be required as a necessary accommodation in—'s IEP. His father raised "self esteem" issues is support of this.

Reinstatement into Advanced Physical Education was denied by the IEP team and subsequently a due process hearing was requested on the issue of "WHETHER PUBLIC SCHOOLS DENIED A FREE APPROPRIATE PUBLIC EDUCATION IN THAT IT DID NOT ALLOW AN AMENDMENT OF HIS IEP TO PROVIDE FOR A NECESSARY ACCOMMODATION.

## II. Physical Education and Advanced Physical Education Class:

The Regulations Governing Special Education Programs for Children with Disabilities in Virginia provide: (see 8 VAC 20-80-60 H 1 and 2)

- H. Physical education.
- 1. General. Physical education services, specially designed if necessary, must be made available to every child with a disability receiving a free appropriate public education.
- 2. Regular physical education. Each child with a disability must be afforded the opportunity to participate in the regular physical education program available to children without disabilities, unless;
  - a. The child is enrolled full time in a separate facility; or
  - b. The child needs specially designed physical education, as prescribed in the child's IEP that cannot be provided in the regular physical education program.

"Advanced Physical Education" at High School is a weight training class for strength, endurance, size, and flexibility and is established for High School athletes. Requirements for the class include a VHSL physical, coach's recommendations, and playing a sport. Three periods of "Advanced Physical Education" are offered at High School with approximately eighty-six students enrolled however there is more demand for the class than there are placements available.

Students in the "Advanced PE" were told that in order for them to remain in the class they must participate daily, follow the workout schedule, and continue to participate in a sport. Additionally, they were told that if they failed to meet all these obligations they would be removed from the class and placed in a regular PE class or study hall. Several students who failed to meet all obligations and requirements of the class have been removed. (SB 19)

qualified for the class and was in the Advanced Physical Education class until he quit the football team in September of 2004. Upon quitting football he was removed from "Advanced Physical Education" and transferred from his third period "Advanced Physical Education" to a third period regular Physical Education class. (Tr. 34) Both "Advanced PE" and regular PE are regular education classes.

affirms he quit the High School football team because he wasn't getting playing time. (Tr. 68) testified he asked before he quit if there was anyway that he would be able to stay in the "Advanced PE" and understood if he played another sport he could stay in "Advanced PE". further testified that he told staff, "I'd probably end up taking track" but he was told he couldn't stay in the "Advanced Physical Education" class because he quit football. (Tr. 12)

There is a variance between and Staff as to if was told he could quit one team and not get removed from Advanced Physical Education by playing on another school team/sport activity.

testified the Coach told him if he dropped football he would be thrown out of the class (Tr. 15) but also indicate that Principal told the students on the second day of school, "if you quit football you'll be thrown out, but if you're in another sport, you'll still be in the class if you participate in another sport". (Tr.16)

, Principal at High School talked with Coach 's "Advanced PE" class and explained that if a student quit a sport they would be removed form the class. (Tr. 43)

Coach teaches the "Advanced Physical Education" class that was in and told the students that if they quit a sport then they cannot participate in the class. Coach emphasized that he told the students if they take a sport and quit it they're going to be out of the class. (Tr. 24, 25) He further testified that there is no exception and no students are told they can drop one sport and remain in the class if they are in another sport (Tr. 26-28)

## III. FAPE and necessary accommodation:

The parties stipulated that (a.) The requirements of notice to the parent were satisfied, (b.) has a disability, and (c.) needs special education and related services. Whether the Local Educational Agency ("LEA") is providing a free appropriate public education ("FAPE") is not stipulated in this cause.

The requirement of providing a FAPE under the IDEA is satisfied by providing the child with "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Board of Education v. Rowley, 458 U.S. 176, 203 (1982)*.

In determining whether 's IEP is appropriate and whether the school system is providing with FAPE, a twofold inquiry is used (1) whether there is compliance with IDEA's procedural requirements in

developing and implementing the IEP and (2) whether the IEP is "reasonably calculated to enable the child to receive educational benefits. see Board of Education v. Rowley, 458 U.S. 176, 206 (1982)

The parent has not contend that the LEA violated procedural requirements. The parent contends that was not provided a necessary accommodation at the IEP meeting called at his request on November 9, 2004.

's father had signed indicating his permission to implement the current IEP of 2/26/04 as amended 6/2/04. (see SB 8 & SB 12). In October of 2004 ' .'s father requested an accommodation be provided and requested an IEP team meeting to review the IEP. He was invited to attend and did attend the meeting held at his request with his counsel. There, he requested a modification of 's IEP to allow to return to the Advanced Physical Education class and presented this as an accommodation that is necessary to provision of an Appropriate Education. 's parent and his counsel were afforded an opportunity to participate at the meeting and did actively participate. Their participation was meaningful and was given consideration. However, the modification was denied.

The second prong of the *Rowley* test is whether the IEP was "reasonably calculated" to enable the child to receive educational benefits. *See Rowley*, 458 U.S. at 206-207. Under IDEA, to provide FAPE, the school division must provide every disabled child with meaningful access to the educational process. A FAPE must be reasonably calculated to confer some educational benefit on the child. Such an educational benefit must be provided to a disabled child in the least restrictive and appropriate environment, with the child participating, to the extent possible, in the same activities as non-disabled children. *(see MM ex rel. DM v. School Dist of Greenville County, 303 F. 3d 523,526 (4th Cir. 2002).* 

IDEA does not require that the school district provide a child with the best possible education nor does IDEA require furnishing every service necessary to maximize each disabled child's potential. Instead, school districts are required to provide a "basic floor of opportunity to every child with a disability. However, a school district cannot discharge it duty under IDEA by providing a program that provides only *de minis* or trivial academic advancement. See Carter v. Florence Co. School District, 950 F.2d 156, 160 (4th Cir. 1991)

Weekly monitor sheets were used with August 30 through Nov. 15, of 2004. 's behavior is noted as good to excellent, he had trouble with reading but also it was noted that he tries very hard. He is Passing both PE 10, Dr. Ed, and Tech II. (see SB 14). Grades from 8/19/04 to 10/15/04 indicated received passing grades ranging from a "D" in Drivers Ed, "C" in Math Found.I & Biology, "B" in Tech Transfer & Prs Lvng/Finance, to an "A" in PE/Health. (SB16)

's IEP (of 2/26/04) noted that "has no behavior problems that impede his nor the learning of other within the classroom". The Crisis Intervention/Consultation dated 9/20/04 provided by Parent (see P 2A,

29) reports that "Father denies history of behavior problem at school".

is described as passing all classes. .'s current reading level is on approximately the fourth to fifth grade level and his current performance is on the low average in broad reading, broad math, and broad knowledge and his performance is low in broad written language. 's grades have been substantial enough that he was promoted to the tenth grade. (Tr. 56) is a candidate for a Modified Standard Diploma with a projected Graduation/Exit Date of 6/1/07. (SB 8)

Self-esteem issues were presented by 's parent as a factor that necessitated the "Advanced Physical Education" placement accommodation requested. (Tr. 46) However, Principal did not observe self-esteem as a problem with and indicated that he has not observed anything to make him believe differently. is described as being well liked among his peers and as having a girl friend. (Tr. 52, 53)

Mr. I , IEP Coordinator, was on the team that reviewed the requested amendment and indicated was denied admission back into the "Advanced Physical Education" class as he did not meet the requirements to be in the class. had quit the school's football team and he could not remain in the Advanced Physical Education class.

Mr. indicated 's IEP addresses 's needs and is adequate. (Tr. 84) He also does not feel self-esteem is an issue (Tr. 85). Mr. felt that was very competent with his interactions with students within the cafeteria and other places within the school. He felt like he gets along well for himself and he has strong beliefs in himself. Additionally he indicated, "I would think the last thing with is self-esteem problems." (Tr. 85).

Mr. has talked with teachers, reviewed grades, and noted was passing his courses. Until the "Advanced PE" issue arose it has not been mentioned to him in any IEP meeting or other meeting that was depressed nor that self-esteem was at issue.

When he was asked Mr. further noted his concerns that the IEP team couldn't be transferring a student from one regular education class to another regular education class and that he felt the IEP was adequate as it was already written. (Tr. 88)

Parents Exhibit P 2A at page 20 indicates that reported he still is having difficulty in reading and writing primarily, but he believes he is making some progress. was reported as wanting to go to college and as describing his social life as "good". P 2A at page 22

Testimony of Mr. . (Tr. 94), Director of Special Education, opined 's IEP is appropriate, he was transferred from the Advanced PE class to a regular PE class and that the special

education services were appropriate. (Tr. 100) Additionally he indicated that according to grades well and that self-esteem issues do not necessarily mean a change in IEP.

Parent's exhibits raised matters of concern relating to alcohol and marijuana that were being addressed in counseling with . 's father was not able to address these matters in his testimony (71-73) and indicated he had not read the medical records submitted as Parent's Exhibit 2A (pages 1 - 30) (Tr. 71).

's father, was concerned that he started having serious disciplinary issues with at home, that was angry a lot and that needed some help. started counseling. (Tr. 61). does fine in regular physical education (Tr. 63). However, Mr. His father feels noted that he had a whole lot less trouble out of at home when he was involved with the "Advanced PE" class. (Tr. 64) is not involved is sports at all in school. (Tr. 66) Mr. Currently expressed concern that could benefit from the Advanced Physical Education and sport participation.

's father indicated he understood that it didn't matter if a student played a sport as long as a coach recommends them. Mr. testified, ".... but they wouldn't allow because they was mad at because he had quit football, and if they would have played the boy, he wouldn't have quit football. They was letting him stand there on the sidelines, watching all the other kids play, whenever they had kids out there who couldn't hold him a light." (Tr. 67) Mr. further expressed concerns that quit because he wasn't playing.

Counseling needs for . were raised by Mr. but when asked if had issues concerning the use of alcohol and marijuana Mr. replied, "That's something that I cannot say for sure. I've had him in counseling." (Tr. 69) Parent's Exhibit 2A indicates, "Father reports recent incident in which . came in intoxicated...." (P 2A pg. 29)

Parent's Exhibit 2A, brings up matters of Alcohol use and Cannabis use. Child & Adolescent Center noted appointments on 9/20, 9/28, 10/5, 10/12, 10/19, 11/22, 11/18, 11/4. (see P 2A, pg. 30) was seeing , LPC, for therapy and discussing issues including disruptive behavior, controlling temper, alcohol, and cannabis use (P 2A at page 25, 26, 27).

A number of questions were addressed to s father concerning s counseling, his understanding if might use alcohol and/or marijuana. The responses and demeanor of the witness were taken under consideration in determining weight to be afforded the evidence.

At issue is the proposed amendment to the IEP 's father makes calling for placement in the "Advanced Physical Education" class to be mandated by the IEP and to be an accommodation. Both his current PE class and the "Advanced PE" class that was in are regular education PE classes. And a regular education PE is currently called for in current IEP (2/26/04 as amended 6/2/04).

There is concern expressed by Mr. that may have self-esteem issues and that "Advanced Physical Education" would help with this. There is also concern expressed by other witnesses that they have not seen self-esteem issues with

Testimony was received concerning problems that have arisen with at home and how matters have progressed since both dropped out of sports activities at school and was removed from the "Advanced PE" class. Conflicts arose in counseling needs, reasons, and purposes and even when they arose.

The evidence presented indicates that is having difficulty with reading but is making passing grades and himself reported that he still is having difficulty in reading and writing but he believes he is making some progress. (P 2A pg. 20) The testimony and exhibits presented at hearing further indicate that educational progress is being noted and that 's IEP was developed by the IEP team of which Mr. participated and provided his consent. The IEP team had previously modified the IEP on June 2, 2004 and met November 9, 2004 to consider the proposed amendment but after discussion and consideration rejected amending the IEP as and his father requested.

Upon consideration of the above, upon consideration of applicable law, regulations, cases, and the testimony and evidence presented in this cause I find that is receiving FAPE under his IEP. The proposed transfer from a regular education PE class to another regular education (ie: Advanced PE) class is not a necessary accommodation required for the provision of an appropriate education.

## It is therefore the decision of the hearing officer that:

- 1. Public Schools did not deny a free appropriate public education in not allowing an amendment to his IEP placing him in "Advanced Physical Education".
- 2. That the proposed amendment to 's IEP to place in "Advanced Physical Education" is not a necessary accommodation to provide FAPE.
- 3. That Public Schools is providing a free appropriate public education to

## **APPEAL RIGHTS AND IMPLEMENTATION PLAN:**

- 1. Appeal rights: A decision by the hearing officer in any hearing shall be final and binding unless the decision is appealed by a party in a state circuit court within one year of the issuance of the decision or in a federal district court.
- 2. <u>Implementation Plan</u>: The local educational agency shall develop and submit an implementation plan within 45 calendar days of the rendering of a decision or the withdrawal of a hearing request with the following exception: the appeal or consideration of an appeal of the decision by the local school division

and the decision is not an agreement by the hearing officer with the parent or parents of the child that a change in placement is appropriate.

# The 45 DAY DECISION DUE DATE: December 30, 2004.

December 30, 2004

Lorin A. Costanzo, Hearing Officer

Copies of this "Final Hearing Report and Decision" mailed this date to:

1. Parent's Counsel:

Sue Ella E. Kobak, Esq.

PO Box 428

Pennington Gap, VA 24277

2. LEA's Counsel:

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3. Parent:

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