

## CASE CLOSURE SUMMARY REPORT

(This summary sheet must be used as a cover sheet for the hearing officer's decision at the end of the special education hearing and submitted to the Department of Education before billing.)



PUBLIC SCHOOLS

School Division

MS.

Name of Parent

Name of Child

MARCH 19, 2004

Date of Decision

BRADFORD A. KING, ESQ.

Counsel Representing LEA

NONE - PARENT REPRESENTS SELF/CHILD

Counsel Representing Parent/Child

MS.

Party Initiating Hearing

PUBLIC SCHOOLS

Prevailing Party

### Hearing Officer's Determination of Issue(s):

1. Counseling Services are not required in order for \_\_\_\_\_, Public Schools to provide \_\_\_\_\_, an appropriate education and \_\_\_\_\_, Public Schools is not required to pay for or provide counseling services to \_\_\_\_\_.
2. \_\_\_\_\_, Public Schools has, for all times relevant to this proceeding, provided \_\_\_\_\_, a free appropriate public education.
3. As to Issue Number 2. ("WHETHER PROCUREMENT OF COUNSELING SERVICES WAS DONE IN A TIMELY MATTER, (I.E. FAILURE TO FOLLOW TIMELINES AS ESTABLISHED BY THE STANDARDS GOVERNING SPECIAL EDUCATION?") Counseling Services not being found required in order for \_\_\_\_\_, Public Schools to provide \_\_\_\_\_, an appropriate education this issue therefore does not require determination and this issue is dismissed.
4. No procedural violations of the IDEA relative to IEP Meetings or eligibility committee meetings are found.

### Hearing Officer's Orders and Outcome of Hearing:

1. \_\_\_\_\_, Public Schools is not required to pay for lost wages or expenses incurred by Ms. \_\_\_\_\_ in this cause and her motion for attorney's fees is denied.
2. \_\_\_\_\_, Public Schools is the prevailing party on all issues.

This certifies that I have completed this hearing in accordance with 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.

Lorin A. Costanzo

Printed Name of Hearing Officer

Lorin A. Costanzo  
Signature

Copies of this Case Closure Summary Report mailed this date to:

1. Ms. \_\_\_\_\_,
2. Bradford A. King, Esq. Harrell & Chambliss LLP, PO Box 518, Richmond, VA 23218-0518.
3. Dr. \_\_\_\_\_, Director of Special Education, \_\_\_\_\_, Public Schools,

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



**DECISION AND FINAL HEARING REPORT**

School Division PUBLIC SCHOOLS

Name of Parent

" "

Name of Child

BRADFORD A. KING, ESQ.  
Representing LEA

PARENT,  
Representing Parents/Child

LORIN A. COSTANZO  
Due Process Hearing Officer

PARENT,  
Party Initiating Hearing

**A. PRELIMINARY MATTERS:**

**I. REQUEST FOR HEARING AND ISSUES FOR DETERMINATION:**

Ms. (who is also known as ) requested a due process hearing concerning her son, " " , . The request for hearing was received by Public Schools on February 4, 2004 and on February 6, 2004 the undersigned was appointed hearing officer in this cause. The following issues were presented for determination:

1. WHETHER PUBLIC SCHOOLS FAILED TO PROVIDE AN APPROPRIATE EDUCATION TO , IN THAT PUBLIC SCHOOL REFUSED TO PROVIDE COUNSELING SERVICES AND TRANSPORTATION TO COUNSELING SERVICES?

2. WHETHER PROCUREMENT OF COUNSELING SERVICES WAS DONE IN A TIMELY MATTER, (I.E. FAILURE TO FOLLOW TIMELINES AS ESTABLISHED BY THE STANDARDS GOVERNING SPECIAL EDUCATION)?

**II. MOTION OF PARENT AND DETERMINATION MADE ON MOTION:**

" " , and

moved the hearing officer to make an award of moneys to her on account of lost wages incurred as a result of her attendance at the due process hearing and her presenting the case on behalf of her child.

The issue of a parent presenting the case for his/her minor child in an educational due process proceeding has been addressed by the Fourth Circuit. The Fourth Circuit has determined that attorney fees reimbursement is not permitted where a parent represents his/her child. Doe vs. Board of Education of Baltimore County, 165 F.3d 260, (4th Cir. 1998). Additionally, similar results have been determined in other circuits. Woodside vs. School District of Philadelphia Board of Education, 248 F.2d 129 (3rd Cir. 2001).

Lost wages are not reimbursable costs under the Individuals with Disability Education Act. Houston Independent School District, 36 IDELR 168 (Jan.16, 2002).

The undersigned hearing officer, upon consideration of the statutes and applicable law, motions, evidence, and arguments of the parties, determined that there is not sufficient legal authority for an award to Ms. on account of lost wages nor other expenses incurred in this cause. It is further found that lost wages are not, as argued by Ms. , attorney's fees nor tantamount to attorney fees. For these reasons the motion of Ms. for an award on account of lost wages incurred as a result of her attendance at the due process hearing is hereby *denied*.

### III. TIMELINE:

February 04, 2004..... Request for due process hearing received by LEA  
February 06, 2004..... Hearing Officer appointed in this cause  
February 11, 2004 ..... Pre-Hearing and Due Process Hearing set by agreement.  
February 12, 2004 ..... Pre-Hearing Conference (via telephone) held.  
February 25, 2004..... First day of Due Process Hearing held.  
February 26, 2004..... Second and final day of Due Process Hearing held.  
March 12, 2004..... Transcript of Due Process Hearing due to parties and hearing officer.  
March 15,2004..... Notice from court reporter received that transcript is not available.

March 18, 2004 ..... Written Brief's/Arguments of both parties due no later than this date.  
March 20, 2004 ..... Final Decision due date.

#### IV. DUE PROCESS HEARING:

By agreement of the parties the Due Process Hearing was scheduled for and held on February 25, 2004 and February 26, 2004. Ms. \_\_\_\_\_ made a request for a "neutral" hearing site and with agreement of both the Parent and the counsel for the School the due process hearing was held at the Conference Room - \_\_\_\_\_, VA. At the request of the parent the due process hearing was closed to the public.

A. Witnesses: The following witnesses were presented at the due process hearing:

1. Witnesses for the Parents:

.... B.A., M.S., Parent of \_\_\_\_\_

2. Witnesses for \_\_\_\_\_ Public Schools:

..... Director of Special Education, \_\_\_\_\_

Public Schools

.... Teacher and Case Manager

.... Licensed Psychologist

B. Exhibits: The following exhibits were admitted by, *en masse*, agreement of the parties:

1. Parents exhibits numbered 1 through 12 with subparts (ie. separate documents) designated by consecutive letters of the alphabet within each exhibit number as indicated below:

1 (A - N)

5 (A - D)

9 (A - H)

2 (A - T)

6 (A - E)

10 (A - B)

3 (A - O)

7 (A - G)

11 (A - K)

4 (A - F)

8 (A - F)

12. . . . This Exhibit admitted at due process hearing by agreement of parties containing separate documents without alphabetical designations.

2. School exhibits numbered 1 through 67.

C. Designations of Transcript and Exhibits: The transcript of the due process hearing was not available from the court reporting service as of the date this Decision and Final Hearing Report. The

Parent's Exhibits are designated as "P. Ex. \_\_\_\_" (with Exhibit number and letter inserted at "\_\_\_\_") and the School's Exhibits are designated as "S. Ex. \_\_\_\_" (with the Exhibit number inserted at "\_\_\_\_").

D. Post-Hearing Timeline: At the conclusion of the Due Process Hearing Ms. \_\_\_\_\_ requested to provide written closing arguments. At the conclusion of the due process hearing Counsel for the school submitted written authorities/cases in response to parent's motion for an award of attorney's fees (with a copy of the written authorities/cases in response given to Ms. \_\_\_\_\_) and Counsel indicated he would additionally present closing arguments in writing.

The court reporter initially requested 3 weeks for preparation of the transcript but upon the request for earlier preparation indicated the transcript could be provided in approximately 15 days. To allow the parties to receive the transcript prior to submission of their written arguments, to enable compliance with the 45 day rule, and with the agreement of the parties the following post-hearing timeline was proposed and agreed to:

February 26, 2004	Two day Due Process Hearing concluded and written authorities tendered.
March 12, 2004	Anticipated date of transcript availability (estimating approximately 15 days for transcript preparation).
March 18, 2004	Written Arguments due to be received not later than 5:00 PM 3/18/04 by hearing officer from each party desiring to tender written closing arguments
March 20, 2004	Final decision due date.

E. Transcript Availability: The court reporting service did not deliver the due process hearing transcript on Friday, March 12, 2004, as discussed at the due process hearing. On Monday, March 15, 2004, the court reporter indicated that the transcript would not be available to the parties until, perhaps, March 19, 2004. March 19, 2004 was the goal date set for delivery and not a guaranteed delivery date. The court reporting service was again requested to deliver a transcript to the hearing officer and all parties as soon as possible.

Telephone conferences were held with Mr. King, counsel for the school, and Ms. \_\_\_\_\_, parent, to discuss the matter of the hearing transcript not being completed and delivered timely. Ms. \_\_\_\_\_ did not desire nor request to continue matters for transcript availability and stated her preference that that the hearing decision

be completed within the 45 day time limit. Ms. \_\_\_\_\_ stated she desired to proceed with written closing arguments without transcript availability and stated she desired that the hearing officer meet the 45 day time limit if this meant the decision would be drafted without the hearing transcript being available.

F. Written Closing Arguments: At the conclusion of the due process hearing request was made to tender Written Closing Arguments and the above timeline set for tendering the arguments. Ms. \_\_\_\_\_ tendered "Parents' Closing Remarks and Legal Points of Reference" which was timely received and was reviewed by the hearing officer. Mr. Bradford tendered "\_\_\_\_\_ Public Schools' Closing Argument and Brief" which was timely received and was reviewed by the hearing officer.

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

01. \_\_\_\_\_ (who is also known as \_\_\_\_\_) and \_\_\_\_\_ are the parents of \_\_\_\_\_ "\_\_\_\_\_" (hereinafter referred to as "\_\_\_\_\_"). \_\_\_\_\_ was born on August 21, 1987. (see P. Ex. 1F, P. Ex. 1G)

02. \_\_\_\_\_ Public Schools Eligibility Committee found \_\_\_\_\_ "\_\_\_\_\_" eligible for special education and related services on December 8, 1999. A \_\_\_\_\_ Public Schools Eligibility Committee meeting was subsequently held on November 25, 2002 and continued eligibility finding that \_\_\_\_\_ was "eligible for special education (OHI)".

03. Eligibility notice was given Ms. \_\_\_\_\_ for an eligibility committee meeting. The meeting was rescheduled and on 11/21/02 notice was additionally given her for a rescheduled meeting set for 11/25/02 concerning the 3 year re-evaluation. Ms. \_\_\_\_\_ participated and signed acknowledging notice, a receipt of a copy and explanation of rights and procedural safeguards. (S. Ex. 24 & 25)

04. At the November 25, 2002 eligibility committee meeting the committee found continued eligibility as "Other Health Impairment, learning disorder w/memory inattention (in remission)". Supporting these findings the committee noted, "Dysthymic disorder - behaviors in



classroom are good - some difficulty with organization" was indicated. (see P. Ex. 3C; S. Ex. 10 & 26)

05. On November 25, 2002 the "SPECIAL EDUCATION ELIGIBILITY COMMITTEE (SEEC) SUMMARY OF DELIBERATIONS" provided, under the Committee's recommendations forwarded to the IEP Committee, "continue current IEP and convene IEP team to implement/plan deliverance of counseling services" (S. Ex. 26)

06. On December 12, 2002 an IEP meeting was held for discussion/ planning of the counseling recommendation from outside evaluation. Ms. indicated at the meeting that had been receiving counseling with a private therapist for about 6 weeks and she reported an improved interest by in academics. School teachers did not see a difference in behavior. The meeting found that " .... the most appropriate step is evaluation of need for psychological services and/or accommodations as part of the IEP".

It was recommended that there be an evaluation by licensed professional counselor and that will arrange to contract with counselor for assessment of school related counseling needs. (P. Ex. 4B; S. Ex. 29) An IEP Amendment provided "pursue evaluation of school related counseling needs . . . .". signed giving consent for services based on the IEP amendment of 12/12/02. (P. Ex. 4C; S. Ex. 30)

07. On May 4, 2001 an IEP meeting was held. showed gains in his math skills and according to WRAT3 improved one grade level in Math (currently 8th), one grade level in reading recognition (currently 6th) and spelling skills have remained on the same grade level (4th). Weakness were noted in written expressing.

scored a "372" on his written SOL test and received mediation in this area. Accommodations were provided that included shortened assignments, extra time, note taker and tests with special ed. teacher (as needed if grades drop below "C"), not penalized on spelling, oral testing,

calculator, read & explain content areas orally. Parental consent was given for implementation of this IEP. (S Ex. 3)

08. On March 27, 2002 an IEP meeting was held. Ms. \_\_\_\_\_ signed indicating consent to implementation and that she had been informed of rights and procedural safeguards and received a copy of her rights.

The IEP team found that \_\_\_\_\_ continued to have difficulties in math due to organizational skills and sequencing deficits. However, he has made excellent progress in his math classes as evidenced in his class grades, SOL scores in Algebra I and his WRAT results. Weaknesses were noted in written expression due to spelling and syntax deficits. The IEP team indicated \_\_\_\_\_'s final grade of "B" in English I "suggested that \_\_\_\_\_ is making great progress in this area of academics". (P. Ex. 4C; S. Ex. 10)

09. On December 12, 2002 an IEP amendment meeting held which provided for a change in the current IEP to "pursue evaluation of school related counseling needs; change accommodations". Ms.

\_\_\_\_\_ attended and participated in the meeting and signed the IEP Amendment acknowledging consent and receipt of a copy and of parental rights. The IEP team determined the after discussion of how to provide counseling and student's level of need that the most appropriate step is evaluation of need for psychological services and/or accommodations as part of IEP. Meeting minutes noted that will arrange to contract with counselor for assessment of school related counseling needs.

(P. Ex. 5A; S. Ex. 29 & 30)

10. Dr. \_\_\_\_\_, Ph.D., L.P.C evaluated \_\_\_\_\_ in December of 1998 (Date of Report **December 14, 1998**). The evaluation noted that \_\_\_\_\_ is functioning in the Average Range of intellectual abilities with a Verbal IQ of 83, a Performance IQ of 107, and a Full Scale IQ of 93. \_\_\_\_\_ was functioning in the Average Range of intellectual abilities. Attention Deficit/Hyperactivity Disorder



Predominately Hyperactive-Impulsive (mild) and Adjustment Disorder, with mixed disturbance of emotions and conduct was noted. (S Ex. 1)

11. Dr. \_\_\_\_\_, Ph.D., L.P.C conducted a re-evaluation of \_\_\_\_\_ (date of Report: **September 30, 2002**). Her "Summary of Psycho-Educational Evaluation" noted that \_\_\_\_\_ is functioning in the Average Range of intellectual abilities with a Verbal IQ of 98, a Performance IQ of 106, and a Full Scale IQ of 101. \_\_\_\_\_ was functioning in the Average Range of intellectual abilities. This Psycho-Educational Evaluation (ie: report date of September 30, 2002) noted that the parents were concerned that \_\_\_\_\_ was not doing as well as expected in school and that he was having some behavioral problems in school and at home. \_\_\_\_\_ is noted to have improved academically (with grade incentives) but still has some organizational and time management difficulties. (P. Ex. 2C)

On the Brown ADD Scales for Adolescents \_\_\_\_\_ reached a total score of 40 placing him below the cutoff score for a probable AD/HD diagnosis. The Wechsler Intelligence Scale for Children, III indicated a Verbal IQ of 98, Performance IQ of 106, and a Full Scale IQ of 101. The Woodcock-Johanson Tests of Cognitive Ability, III indicated his performance in the extended Battery places \_\_\_\_\_ in the average ability range with short-term memory as a relative weakness. The evaluation indicated 1.) Learning Disorder NOS and that he meets the criteria for diagnosis of learning disability; 2.) Dysthymic Disorder (early Onset); and 3.) Attention Deficit/Hyperactivity Disorder, predominately inattentive (in remission). (S Ex. 19)

Dr. \_\_\_\_\_ recommendations included, "Initiate individual counseling to work on issues regarding low self-esteem, feelings of depression and hopelessness, as well as achieving a better relationship with peers."

12. On July 11, 2003 an IEP meeting was held. The IEP was initially scheduled May 20, 2003, then rescheduled for May 28, 2003, and then continued to July 11, 2003. Notice was provided Ms.

(P. Ex. &A). The IEP was signed by a parent, \_\_\_\_\_, giving permission for implementation with the notation "except - the related services - cannot at this time be included - due to payment and level of services concerns". He had been informed of his rights and procedural safeguards under IDEA and had received a copy of his Rights in Special Ed.

The IEP team found as per \_\_\_\_\_'s most recent re-evaluation he exhibited some deficits in his knowledge of mathematical procedures but his SOL math scores reflect a good understanding of algebra and geometry concepts. Reading comprehension is a strength. \_\_\_\_\_ will be doing remediation for Algebra II SOL tests and retake Algebra II SOL. Parent is seeking

Teachers observed that \_\_\_\_\_ functioned socially appropriately at school. \_\_\_\_\_'s social skills are adequate and relationships with teachers and peers normal. additional information on counseling. (P. Ex. 5A; S. Ex. 44)

13. Grades for \_\_\_\_\_ indicate that for the ninth, tenth, and eleventh grades at \_\_\_\_\_ Public Schools \_\_\_\_\_ has an received at least C's and did receive B's and A's. In the school semester from 11/19/03 to 1/16/04 \_\_\_\_\_ received the following grades: (P. Ex. 2J; S. Ex. 65)

C in English II;  
C in Spanish II;  
B in VA US Hist.; and  
A in Drafting

14. \_\_\_\_\_ is pursuing an Advanced Diploma having previously been seeking a "Standard Diploma". \_\_\_\_\_ is anticipated to graduate from high school in 2005 and is planning to go to college. \_\_\_\_\_ and his family have toured colleges and has spoken with college/university representatives. (P. Ex. 5A )

15. Since November 18, 2002 \_\_\_\_\_ received individual therapy and family therapy services with Charles E. Schank, LPC. (P. Ex. 8C)

16. Standard of Learning ("SOL") "END-OF COURSE-TEST" results indicate that [redacted] has achieved a "pass/proficient" in all but one such test (ie. Algebra II) that he has taken: (see S. Ex. 67)

's scaled scores are:

World History to 1000 AD ....	403 scaled score
Algebra I .....	438 scaled score
Earth Science .....	418 scaled score
Algebra II .....	362 scaled score
World History II .....	445 scaled score
Biology .....	450 scaled score
Geometry .....	454 scaled score

17. 's first semester Final Grade Report of 11/19/03 indicates he received the following grades:

"C" ... English II

"C" ... Spanish II

"B" ... VA US History

"A" ... Drafting I

(P. Ex. 2J; S. Ex. 65).

## V. DISCUSSION AND CONCLUSIONS OF LAW:

A. Burden of Proof . . . The parent initiated this due process hearing challenging the provision of an appropriate education by [redacted] Public Schools and challenging the decision of the IEP team not to require counseling as a related service. The parent, as the party requesting the hearing, bears the burden of proving their case. see *Bales v. Clark*, 523 F. Supp. 1366, 1371 (E.D. Va. 1981) addressing the burden of proof issue. The parent bears the burden of proving that the program established by the school system is inappropriate. *Tatro v. Texas*, 703 F.2d 823, 330 (5th Cir. 1983), *aff'd* 468 U.S. 883 (1984); *Board of Ed. of Baltimore County*, 162 F.3d 289, 292 (4th Cir. 1998).

B. Issue I . . . . WHETHER [redacted] PUBLIC SCHOOLS FAILED TO PROVIDE AN APPROPRIATE EDUCATION TO [redacted] " " II IN THAT [redacted] PUBLIC SCHOOL REFUSED TO PROVIDE COUNSELING SERVICES AND TRANSPORTATION TO COUNSELING SERVICES?

The Individuals with Disability education Act ("IDEA") requires that children with disabilities be offered a free appropriate public education ("FAPE"). A child is denied a FAPE if the school system has violated the IDEA's procedural requirements to such an extent that the violations detrimentally impact upon the child's right to a FAPE or if the IEP developed by the school is not reasonably calculated to enable the child to receive educational benefit. Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 206-207 (1982)

To determine if an IEP is appropriate and whether the school system has fulfilled its obligation to provide a Free Appropriate Public Education ("FAPE") there is a twofold inquiry that must be made, First, whether the School District has complied with the IDEA's procedural requirements in developing and implementing the IEP? and Second, whether the IEP is reasonably calculated to enable the child to receive educational benefit?

The "free appropriate public education" requirement is satisfied by "providing personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction." Board of Education of Hendrick Hudson Sch. Dist. v. Rowley, 458 U.S. 176, 192 (1982).

Rowley sets forth a standard that the school is to develop an IEP which should be reasonably calculated to confer educational benefit. The achievement of passing marks and the advancement from one grade to another grade are factors (but not the only factors) to be considered in determining educational benefit.

The *Regulations Governing Special Education Programs for Children with Disabilities in Virginia* provide that "A FAPE shall be available to all children with disabilities who need special education and related services . . . This includes children with disabilities who are in need of special

education and related services even though they are advancing from grade to grade . . .” (8 VAC 20-80-60 (A) (1))

Ms.            has raised the question of whether the School is required to provide/pay for counseling services to            . Counseling services may be provided as a related service to a child with a disability. The term ‘Related Services’ is defined as “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. . .counseling services” (*emphasis added*) (8 VAC 20-80-10)

It is not contested that            is earning passing grades and is advancing each school year.            anticipates going on to college, is pursuing an Advanced Diploma, and is on track to graduate high school in 2005.

Standard of Learning (“SOL”) “END-OF COURSE-TEST” results indicate that            has achieved a “pass/proficient” in all but one such test (ie. Algebra II) that he has taken. His scaled scores are: (see S. Ex. 67)

World History to 1000 AD ....	403 scaled score
Algebra I ....	438 scaled score
Earth Science ....	418 scaled score
Algebra II ....	362 scaled score
World History II..	445 scaled score
Biology ....	450 scaled score
Geometry ....	454 scaled score

          ’s Secondary School Transcript shows no grade below a “C” has been received in the 2000-2001, the 2001-2002, or 2002-2003 school years.

The 2003-2004 school year reports indicate that            was receiving passing grades. The Three Week Monitoring Form for Special Education indicate:

<u>Date:</u>	<u>Teacher:</u>	<u>Grade:</u>
9/15/03		A
9/15/03		B
9/15/03		88
9/15/03		82 (S Ex. 54)

<u>Date:</u>	<u>Teacher:</u>	<u>Grade:</u>
10/25/03		B
10/25/03		86
10/25/03		85 (S Ex. 55)

's Semester I Final Grade Report of 11/19/03 indicates he received the following grades:

"C" ... English II  
"C" ... Spanish II  
"B" ... VA US History  
"A" ... Drafting I

(P. Ex. 2J; S. Ex. 65).

's IEP teams have indicated:

1. May 4, 2001 ... " has excellent classroom behavior according to his teachers. He works diligently in class and is motivated to learn. He asks questions when he does not understand a concept." (S Ex. 3 pg. 4 of 16)
2. March 27, 2002 . continues to have difficulties in math due to organizational skills and sequencing deficits. However, he has made excellent progress in his math classes as evidenced in his class grades, SOL scores in Algebra I, and his WRAT results.
3. May 28, 2003 ... Teachers observations of are that he functions socially appropriate at school. His socials skills again are adequate and relationships with teachers and peers appear to be normal. (S Ex. 44 pg. 3 and 4 of 15).
4. May 28, 2003 ... participates in extra curricular activities and has visited several colleges in anticipation of continuing his education. (S 44 at page 4 of 15).
5. May 28, 2003, March 27, 2002, May 4, 2001 . . The IEP team indicated "student's behavior does not impede his or her learning or that of others" (S Ex. 3 pg. 2 of 16; SB 10 pg. 2 of 20; SB 44 pg. 2 of 15)

has approximately 30 years experience and educator and testified was assigned to her for case management in 2002. Last year she had regular contact with and this year she monitors his progress but does not teach him. She described as an "average maturing young man" who had adequate social skills and was not a behavioral problem. She further observed an increase in social skill skills and did not observe and social, emotional or behavioral issues.

., school psychologist, review 's file and testified 's file did not provide information that would indicate the need for counseling related to school work.



Dr. \_\_\_\_\_, in her report of 9/30/2002 entitled, "Summary of Psycho-Educational Evaluation" noted that "The mother is proud to inform that \_\_\_\_\_ is doing much better in many areas. He has improved academically (with grade incentives), made some new friends... It was however noted that \_\_\_\_\_ still had some organizational and time management difficulties." Behavioral Observations noted that \_\_\_\_\_ was very collaborative and able to stay attentive for about an hour at a time. He understood instructions rapidly and tried to follow them correctly. In contrast to previous testing, he was much less impulsive in his answers and no excessive physical movements were observed. (S. Ex. 19)

On November 25, 2002 eligibility team met and determined that \_\_\_\_\_ continued to be eligible for special education and related services under the classification of "Other Health Impaired". In their "SUMMARY STATEMENT OF RECOMMENDATIONS FORWARDED TO THE IEP COMMITTEE . . ." the eligibility committee recommended "continue current IEP and convene IEP to implement/plan delivery of counseling services". (S. Ex. 26 at pg. 3).

The eligibility committee is authorized to make "recommendations" to the IEP team but does not exercise control over the IEP nor the IEP team. {see *Regulations* provide at 8 VAC 20-80-56(C)(6)} It is the IEP team who is charged with determining the appropriateness of services and formulating an IEP including all necessary related services to provide a free appropriate public education ("FAPE") for a child with a disability (see *Regulations* at 8 VAC 20-80-62).

On December 12, 2002 the IEP team met for the stated purpose to "discuss/plan counseling recommendations . . .". Ms. \_\_\_\_\_ was an active member of the team and signed the IEP acknowledging her consent, receipt of a written copy of the amendment and a copy of her parental rights. (S Ex. 29 and 30) The IEP team referenced in their minutes and gave consideration to the Psycho-Educational Evaluation conducted by \_\_\_\_\_ Ph.D., L.P.C. The IEP team

discussed counseling and Ms.                      indicated at the meeting that                      had been receiving counseling with a private therapist (Mr. Charles Schank LPC) for about 6 weeks. She reported an improved interest by                      in academics however the school teachers did not see a difference in behavior.

The IEP team concluded and agreed the “. . . most appropriate step is evaluation of need for psychological services and/or accommodations as part of the IEP” and it was recommended there be an “Evaluation by licensed professional counselor as to needs related to self esteem, peer relations, feelings of depression in the school setting *(emphasis added)*                      will arrange to contact with counselor for assessment of school related counseling needs.” (S Ex. 29)

The 12/12/02 IEP Amendment provided a change in the current IEP of “pursue evaluation of school related counseling needs; change accommodations.” The listed reason for this was the recommendation from an outside psychological evaluation, as part of triennial re-evaluation, for counseling concerning self-esteem, feelings of hopelessness, and peer relationships. (S. Ex. 30)

                    had been seeing Mr. Charles Schank, LCP for counseling (P. Ex. 8C) and on 12/12/02                      gave a written consent for exchange of information between                      Public Schools and Charles Schank, LPC. (S. Ex. 31) . Dr.                      contacted Mr. Schank and discussed in general terms evaluation/counseling services. Dr.                      sent the authorization for exchange of information form signed by                      ’s mother and subsequently called Mr. Schank requesting information on costs. Mr. Schank responded with a letter setting out his hourly rate and the maximum charge for a single referral (S. Ex. 33). Subsequently                      Public Schools authorized a Purchase Order specifying “1 assessment @ \$75.00 per hour not to exceed \$300.00” dated 1/2/03 which was sent to Mr. Schank. No place on the Purchase Order mentioned                      ’s name. (S. Ex. 34) Dr.                      requested a bill to make payment for the evaluation and for time spend related to the evaluation. Mr. Schank

indicated he will not bill for same and the school has indicated it is not able to make a payment without an invoice. Public Schools did not receive a bill and has not made payment. (P. Ex. 8B)

By March 19, 2003 no report from Mr. Schank was received and he was contacted by the school and the need for the report was clarified. (see note at S. Ex 28 and P. Ex. 8B). On March 25, 2003 the IEP team met and amended [redacted]'s IEP "changing the IEP date to later in school term" to postpone IEP until information from Mr. Schank was available. (S Ex. 35)

On April 1, 2003 written notice of an IEP meeting (to be held 5/20/03) was sent to Ms. [redacted] and due to a conflict of Ms. [redacted] the meeting was rescheduled to 5/28/03. (S. Ex. 37 and S. Ex. 38)

In response to Dr. [redacted]'s request for information, by letter dated April 24, 2003, Charles E. Schank, LPC addressed "certain things going on with [redacted] as they relate to Special Education Services and which are some of the reasons he is in treatment with me". At [redacted]'s parents' request Mr. Schank had been meeting with [redacted] weekly since 11/18/02 and had additionally met with other members of the family providing both individual and family therapy.

Mr. Schank did not see any symptoms that seriously concerned him (as to ADHD) and he discussed this with school personnel and they don't report this as a serious problem. Some problems were noted with organization but these "Might be more due to interference from Dysthymia than the remnants of ADHD problems...". In his conclusions Mr. Schank stated,

"As far as any recommendations that I might make I do not see at the present time any additional help that is required for [redacted] other than that you have already deemed essential. I say this with reference to the diagnosis of ADHD that the examiner saw in remission and I don't see any predominate manifestations of. We will continue to do counseling to work at helping wim with his self-esteem, and any other difficulties that are showing up in a depressed mood. I don't see where the school needs to do anything at this point other than to let me know if they begin to see [redacted] deteriorating in any way." (emphasis added) (P. Ex. 8D; S. Ex. 38)

At the May 28th, 2003 the IEP team meeting (S Ex. 42) Dr. \_\_\_\_\_ presented the evaluation received from Charles Schank, LPC and it was read to the IEP team. Ms. \_\_\_\_\_ expressed concern that the report took five months and indicated she felt the school system was responsible for paying for \_\_\_\_\_'s counseling. Ms. \_\_\_\_\_ disagreed with the team's determination of the need for counseling and on the issue of \_\_\_\_\_ Public Schools' payment for counseling. \_\_\_\_\_ Public Schools proposed to pay for the evaluation of the need for counseling services by Charles Schank but not the counseling itself. The indicated "action proposed or refused by the school system" was "Pay for evaluation by Chuck Schank and Refused need for counseling paid by school division."

Ms. \_\_\_\_\_ asked if Dr. Verthelyi's assessment was considered in \_\_\_\_\_'s evaluation and asked the IEP team to go with Dr. Verthelyi's assessment which recommended counseling.

The School division deferred to Mr. Schank's evaluation, an evaluation by a counselor who had seen \_\_\_\_\_ on a regular basis who has contact with school staff. Testimony indicated Dr. Verthelyi had not observed \_\_\_\_\_ in his educational setting nor had Dr. Verthelyi talked to school staff concerning their observations of \_\_\_\_\_.

Dr. Verthelyi's recommendation was to initiate individual counseling to work on issues regarding low self-esteem, feelings of depression and hopelessness, as well as achieving a better relationship with peers. There was question by the School as to the need for counseling as to the educational setting and if counseling was required for \_\_\_\_\_ to receive educational benefit and/or benefit from special education.

Mr. Schank's evaluation was sought as he was \_\_\_\_\_'s current counselor. Mr. Schank's evaluation specifically did not indicate the need for counseling. He did not see that any additional help is required for \_\_\_\_\_ other than what was already deemed essential and furthermore, he indicated the school did not need to do anything other than let him know if \_\_\_\_\_ deteriorates.

The School Division had reviewed testing by Renata Frank de Verthelyi at the meeting for eligibility on 11-25-02 . At the December 12, 2002 IEP meeting the IEP team recommended evaluation of counseling services by the counselor currently seeing [redacted] and requested by the family (ie. Mr. Charles Schank, LPC).

Ms. [redacted] noted "Disagree" when she signed on 5/28/03 (the date handwritten thereon was 5/28/08, *emphasis added*) the Special Education Meeting Minutes/Prior Notice concerning the 5/28/03 meeting (Annual Review of IEP). Procedural safeguard requirements were noted as attached to the form signed. Ms. [redacted] was concerned over Mr. Schank's report taken so long to be tendered. She also felt the School was responsible for paying for [redacted]'s counseling. The School disputed that it was responsible for paying for counseling. (S. Ex. 42)

Notice was sent to Ms. [redacted] (dated 7/2/03) concerning an IEP meeting scheduled for July 11, 2003. [redacted] ([redacted]'s father) attended the meeting and the team reviewed academic portions of the 2003-2004 IEP. Mr. [redacted] suggested dealing with the academic sessions of the IEP and leaving the components of related services on hold. Mr. [redacted] signed the IEP indicating consent to implementation but noted the consent was with reservation/exception and he wrote on the IEP (S Ex. 44 at pg.15 of 15) "except the related services cannot at this time be included due to payment and level of services concerns".

On November 18, 2003 Ms. [redacted] requested an IEP meeting concerning counseling services for [redacted] and payment of those services. (S. Ex. 56) Notice was given on November 26, 2003. The IEP meeting was originally scheduled 12/4/03 and was changed to December 11, 2003 due to snow on 12/4/03. (S. Ex. 57)

The IEP team met on December 11, 2003 and the school again discussed with parent counseling for [redacted]. As previously determined the team refused find a need for counseling and to pay for [redacted]'s

counseling. The team refused payment for parent's transportation costs to and from the counselor's office as the parents' requested. (S. Ex. 58) Public Schools agreed to pay for evaluation of counseling needs by Charles Schank however, Mr. Schank had not provided a bill for the evaluation. The IEP team discussed parental request concerning counseling services. Consideration by the IEP team was given to Mr. Schank report to Public Schools that he "did not see at the present time any additional help that is required for other than that that you have already deemed essential" and "I don't see where the school needs to do anything at this point other than let me know if they begin to see deteriorating in any way". Additional consideration was given for evaluations used for re-evaluation meeting on 11-25-02 and teacher observations. (S Ex. 58)

A free appropriate public education ("FAPE") is one designed to confer educational benefit and which is developed in accordance with the IDEA's procedures. The state is required to provide children with "meaningful access" to public education. IDEA does not require the furnishing of every special service necessary to maximize each child's potential. (see Hartmann vs. Loudoun County Board of Education, 118 F.3d 996, 1001 (4th Cir. 1997) The requirement is to confer some educational benefit upon the child.

The evidence as above discussed and as presented at the hearing indicates that [redacted] has received educational benefit, is receiving educational benefit. [redacted] has received and is receiving a FAPE without counseling being required as a related service.

C. Procedural Safeguards . . . IDEA establishes a series of procedural safeguards designed to ensure that the parents or guardian of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to those decisions.

While a procedural violation of IDEA may constitute a *per se* denial of FAPE, the procedural violation must be so significant as to deny the education itself or prevent meaningful parental



involvement. Fairfax Co. Public Schools., 29 IDLER 1096 (1998), Hall v. Vance County Board of Education, 774 F. 2d 629 (4th Cir. 1985). There must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parent's opportunity to participate in the formulation process, or caused a deprivation of educational benefits. Kathleen H. v. Massachusetts Dpt. of Ed., 154 F .3d 14 (1st Cir. 1998)

In MM v. Board of Education, 303 F.3d 523 (4th Cir. 2002) the court examined appropriateness of services provided to a child through her IEP. In reversing a portion of the lower court's decision the Court held that when there is a procedural defect in the IEP the reviewing body is obligated to assess whether the procedural defect resulted in the loss of an educational opportunity for the disabled child or whether it was a mere technical contravention of the IDEA.

For a denial of FAPE to be found on procedural violations the procedural violations must be serious and cause the student to lose educational opportunity. (Burke County Board of Education vs. Denton, 859 F.2d 973, 982 (4th Cir. 1990). Mere technical violations of procedures, which do not deny meaningful parental participation, do not render a proposed program inappropriate. (Doyle vs. Arlington Co. School Board, 806 F. Supp. 1253, 1260 (E.D. Va. 1992)

Ms.            or her husband actively participated in each meeting held concerning            . No meetings were held without the presence of a parent and a number of times the meetings were rescheduled to accommodate the parent's schedule. The evidence at hearing further indicate active participation in the IEP process by the parent.

The IEP team considered the need for            to receive counseling services in light of the recommendation in Dr. Verthelyi's psycho-educational evaluation (S. Ex. 19) and the Eligibility Committee's recommendation to the IEP team. The team discussed and determined it would pursue additional information. In fact received additional information from Mr. Schank, LPC who had been

providing individual counseling services to            and family counseling services with            's family. The team considered the need for counseling services, the report of Mr. Schank, and determined there was no need for counseling. Among other considerations, Mr. Schank report that no additional help was required (other than what the School has already deemed essential) and he did not see where the school needs to do anything at this pint (other than notifying him if deterioration is seen). (P. Ex. 8D; S. Ex. 38)

While the Eligibility committee may provide other recommendations in addition to their determination of eligibility it is the IEP team who is responsible for developing the IEP. (see 8 VAC 20-80-56(C)(6) An IEP is to be developed by an IEP Team consisting of:

- a. The child's parent(s),
- b. A regular education teacher,
- c. A special education teacher,
- d. A representative of the local educational agency who is:
  - (1.) qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of children with disabilities;
  - (2.) knowledgeable about the general curriculum; and
  - (3.) knowledgeable about the availability of resources of the local educational agency.A LEA may designated another member of the IEP team to serve simultaneously as the agency representative if that individual meets the above criteria.
- e. An individual who can interpret the instructional implications of evaluation results. This individual may be a member of the team serving in another capacity, other than the parent or the child.
- f. An individual who can interpret evaluation results, and whenever appropriate, the disabled child .

8 VAC 20-80-62(C)(1)

Reviewing the IEP meetings the meetings had personnel who met the IEP team composition requirement. (see 34 C.F.R. Section 300.344 and VAC 20-80-62 ©)

's triennial re-evaluation was completed prior to the due date and the statutory timeline for completion was met. Eligibility was determined on 12/8/99 and re-evaluation determined to be needed to occur before 12/7/02 (see S. Ex. 10) After a 11/13/03 notice of Special Education Eligibility committee meeting there was a rescheduling of the meeting at parent request. On 11/20/02 it was noted that, "Parent stopped meeting. Asked for principal instead of designee (assistant principal)". At the request of the parent the meeting was continue and the principal was able to attend.

On 11/25/02 the Eligibility Committee Summary of Deliberations (Triennial) reflected that the committee determined continued to be eligible with the categorical identification of "Other Health Impairment". Ms. participated as a member of the committee and she and the other members of the committee signed as supporting the members conclusions that was eligible for special education (OHI) on 11/25/02. (S Ex. 26)

The evidence indicates that there were no procedural violations that resulted in loss of an educational opportunity for . The parent(s) were notified and in fact did attend all meetings and actively and meaningfully participated in the meetings. Furthermore, the committee/teams at the respective meetings were correctly composed.

**D. Issue 2. .... "WHETHER PROCUREMENT OF COUNSELING SERVICES WAS DONE IN A TIMELY MATTER, (I.E. FAILURE TO FOLLOW TIMELINES AS ESTABLISHED BY THE STANDARDS GOVERNING SPECIAL EDUCATION)?"**

Counseling services were, as above discussed, not found to have been required for the provision of a free appropriate public education to . The issue of timely procurement of counseling service is moot and, therefore, not an issue for determination. This issue is dismissed.

**SUMMARY and CONCLUSIONS:**

In Summary, upon review of the evidence including testimony of witnesses, exhibits admitted, applicable law, statutes, regulations, arguments presented, and for the reasons above set forth the following conclusions of law are made:

**A. Determinations required by Regulations:**

- 1.) The requirements of notice to the parents were satisfied;
- 2.) " " , has a disability;
- 3.) " " , needs special education and related services; and
- 4.) The LEA is providing a free appropriate public education.

B. Conclusions of Law:

1. Counseling Services are not required in order for \_\_\_\_\_ Public Schools to provide \_\_\_\_\_, an appropriate education and \_\_\_\_\_ Public Schools is not required to pay for or provide counseling services to \_\_\_\_\_.
2. \_\_\_\_\_ Public Schools has, for all times relevant to this proceeding, provided \_\_\_\_\_, a free appropriate public education.
3. \_\_\_\_\_ Public Schools is not required to pay for lost wages or expenses incurred by Ms. \_\_\_\_\_ in this cause.
4. No procedural violations of the IDEA relative to IEP Meetings or eligibility committee meetings are found.
5. As to Issue Number 2. ("WHETHER PROCUREMENT OF COUNSELING SERVICES WAS DONE IN A TIMELY MATTER, (I.E. FAILURE TO FOLLOW TIMELINES AS ESTABLISHED BY THE STANDARDS GOVERNING SPECIAL EDUCATION?") Counseling Services not being found required in order for \_\_\_\_\_ Public Schools to provide \_\_\_\_\_, an appropriate education this issue therefore does not require determination and the issue is dismissed.

**APPEAL RIGHTS AND IMPLEMENTATION:**

***The Regulations Governing Special Education Programs for Children with Disabilities in Virginia provides:***

1. **Appeal Rights:** "A decision by the hearing officer in any hearing, including an expedited 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. **Implementation:** "In every case within 45 days of the final decision of the hearing officer, an implementation plan must be filed by the local educational agency, with copies to the parties, the Virginia Department of Education, and the hearing officer..."

**The 45 DAY FINAL DECISION DUE DATE: March 20, 2004**

March 19, 2004

  
Lorin A. Costanzo, Hearing Officer

Copies of this Final Hearing Report and Order mailed this date to:

1. Ms. \_\_\_\_\_,
2. Bradford A. King, Esq. Harrell & Chambliss LLP, PO Box 518, Richmond, VA 23218-0518.
3. Dr. \_\_\_\_\_, Director of Special Education, \_\_\_\_\_ Public Schools,