

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 filing.)

School Division

Mr. & Mrs.  
Name of Parents

Name of Child

July 15, 2004  
Date of Decision or Dismissal

Kathrine Mehrad, Esq.  
Counsel Representing LEA

Parents - Pro Se  
Counsel Representing Parent/Child

Parents  
Party Initiating Hearing

Parents  
Prevailing Party

Hearing Officer's Determination of Issue(s):

See attached Memorandum Decision

Hearing Officer's Orders and Outcome of Hearing:

SEA directed to provide Chicks  
Child to Special Education Services

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.

Joseph B. Kennedy  
Printed Name of Hearing Officer

Joseph B. Kennedy  
Signature

VIRGINIA DEPARTMENT OF EDUCATION  
Public Schools

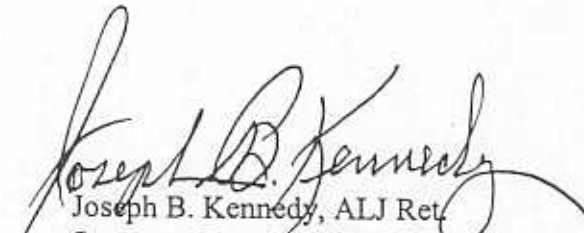


In the Matter of  
A Due Process Hearing

ERRATA TO MEMORANDUM DECISION OF July 15, 2004

Th first sentence on page 4 of the Memorandum Decision of July 15, 2004 is corrected to read: "With respect to the treatment of \_\_\_\_\_'s learning deficits, Dr. \_\_\_\_\_ found: That it may be in \_\_\_\_\_s' best interest to be categorized as a youth who has 'Other Health Impairments' based on his Attention Deficit Disorder without pronounced hyperactivity."

So Ordered this 16<sup>th</sup> day of July 2004.

  
Joseph B. Kennedy, ALJ Ret.  
Supreme Court Hearing Officer

VIRGINIA DEPARTMENT OF EDUCATION  
Public Schools



In the Matter of  
A Due Process Hearing

Memorandum Decision

ISSUE

Whether \_\_\_\_\_ is eligible for a Free Appropriate Special Public School Education.?

FINDINGS OF FACT

I

Dissatisfied with \_\_\_\_\_'s educational progress under his Speech/Language Accommodation, his parents requested a reevaluation in the Fall of 2000 that included an evaluation for ADHD by the family physician. Parents 17 (hereinafter P \_\_\_\_).

In response to a questionnaire Miss \_\_\_\_\_, his First Grade Teacher, noted that "\_\_\_\_\_ is not easily motivated. It is very difficult to keep him on task.; he jumps from task to task but rarely completes any assignment except with direct assistance from me. P. 17.

Parent/Teacher questionnaires registered "Very Much" for "Distractability/Attention Span Problems; Excitable/Impulsive Behavior; Difficulty in Learning; and "Easily Frustrated". Ibid. A Vanderbilt Teacher Behavior Evaluation Scale completed by his second grade teacher, reported \_\_\_\_\_ was "easily distracted, forgetful, fidgety, inattentive, and impulsive". Ibid.

A "Diagnostic for Attention Deficit/Hyperactivity Disorder (ADHD) adapted from DSM IV, and completed by Ms. \_\_\_\_\_, who was also \_\_\_\_\_'s Second Grade Teacher, listed 9 Symptoms of INATTENTION; 2 Symptoms of HYPERACTIVITY, and 1 Symptom of IMPULSIVITY for a total of 12 Symptoms of ADHD. Because \_\_\_\_\_ showed more than 6 Symptoms, he was referred for evaluation by Dr. \_\_\_\_\_, the family physician. On December 15, 2000, she advised the LEA that "\_\_\_\_\_ has features consistent with ADHD-Inattentive Type. This appears to affect his learning, organization skills, and retention of information." P. 17.

In December 2000, an Eligibility Committee found \_\_\_\_\_ "eligible for special education services as a student with a qualifying disability." P 31, p. 2; SB 16. It found \_\_\_\_\_ to be in need of special education services "because of a communication disorder, impaired articulation, and expressive language skills which adversely affect his educational performance." Ibid.

## II

Dissatisfied with the scope of the LEA's SLI determination, 40 minutes a week in a resource room, SB4, 's parents requested an Independent Education Evaluation in January 2001. P 34. They urged, inter alia, that Dr. 's ADHD evaluation made eligible for services as a child with an "Otherwise Health Impaired" learning disability. In March 2001, was referred for an IEE by Dr. , Psy D., Clinical Director of the Psychiatric and Neuropsychological Association, P.C.of , Virginia. to resolve the dispute over 's eligibility for an ADHD-Inattentive Type Learning Disorder and an Other Health Impaired Learning Disability and placement. P 36, 37.

On May 7, 2001, Dr. issued his 24 page single spaced report, and 4 page addendum. P 37. On June 4, 2001, an Individual Education Program, IEP, Committee voted to reject the IEE's findings and recommendations and to continue "40 minutes a week of Speech Language Services." SB 17. On June 22, 2001, an Eligibility Committee concurred and renewed 's eligibility for a Speech Language Impairment of 40 minutes a week. SB 18. It rejected Dr. 's findings of eligibility for an Other Health Impairment category or a Specific Learning Disability on the ground was "benefitting from the Regular Education Program and [his] progress does not necessitate Special Services beyond an accommodation for a Speech Language Impairment." SB 18, 19.

## III

Dr. 's report was admitted without objection by counsel for the LEA. Special Education Regulations provide that the results of an IEE may presented be as evidence and, as such, must be considered by the hearing officer at a Due Process Hearing. 8VAC 20-80-70 B3(b); 80 VAC 20-80-76.

The Background Information provided Dr. shows that 's family has an extensive history of ADD and ADHD and dyslexia. Indeed, his Mother's own speech/language deficits account for much of the incoherence in her examination of the LEA's witnesses and their responses. has two brothers both of whom have been diagnosed with ADHD and dyslexia. They have both been found eligible for special education services under a 504 Accommodation Plan and an IDEA learning disability program. P 37, p. 1.

As noted earlier, 's family physician had diagnosed him with an Attention Deficit Disorder and placed him on medication [Adderall therapy] in September 2000. P 17, 37. At the time of his IEE had been on this therapy for almost a year. All of the psychologists and teachers who worked with , including Dr. and Dr. the LEA's school psychologist, admitted that medications, when taken in the morning muted his distractability, impulsivity and other symptoms of ADD. SB 31, 32, 55; P 56, 67. Dr. testified that because his testing and observations were performed early in the day shortly after had taken his medications at home it was to be expected that both his ratings and teacher ratings of levels of performance "would show no elevations in any category, including ADHD characteristics." Tr. 83. Dr. testified this also accounted for why Dr.

ratings were so close to his Tr. 83-84. Dr. [redacted] reiterated that the fact that [redacted] was always "medicated when he was at school but not at home could make a lot of difference in terms of the ratings, and account for why "in the classroom setting, [redacted]'s behavior was consistent with the majority of students." Tr. 84.

Dr. [redacted]'s report confirms that [redacted] was always tested on his "Adderall therapy". P 37, pp. 2, 4. Dr. [redacted] found this "was appropriate, although the most common way to evaluate a child with suspected neuropsychological difficulties is to test him off all medications." P 37, p 4. Dr. [redacted] stated that the medication "lasts approximately 5-6 hours, and then became slightly more inattentive and distractible, but not at a significant level." Even on the medication, "[redacted] had noticeable problems with attention span, concentration, distractability, and inconsistencies in more complex auditory sequential, and, primarily visual, perceptual processing. He worked very slow and laboriously at any type of visual perceptual processing speed task involving paper and pencil output. He was slow in visual scanning, tracking, and sequencing in addition to having definite problems with more complex comprehension and expressive language." P 37, p. 4.

Dr. [redacted]'s testimony shows that he too found [redacted] had a "slow processing speed." SB 32. Dr. [redacted] found that "[redacted] is a very bright and capable youth who shows some neuropsychological deficits as opposed to any neurocognitive or learning disabilities. P. 37, p. 4. Nevertheless, after fully testing [redacted] and considering his strengths and weaknesses, Dr. [redacted] recommended, "having the school reconsider [redacted]'s overall special education needs and expand his speech and language IEP to include other health impairments [and] thus allow him to be provided with supportive and tutorial services to address his ADHD disorder and subtle but noticeable learning disabilities." P37, p. 22.

With specific reference to [redacted]'s Attention Span, Concentration and Level of Hyperactivity, Dr. [redacted] found that "Throughout the diagnostic neuropsychological testing [redacted] was rated with the Attention Deficit Hyperactivity Disorder Test and obtained a score of above average (ADHD 112, which indicates above average probability of ADHD occurring This is consistent with his previous rating scales ; but nonetheless are still consistent with indications of a co-existing processing disorder." P 37, p. 14.

Dr. [redacted]'s relevant Diagnostic Impressions were that [redacted] has a "Disorder of Articulation" and an "Attention Deficit Hyperactivity Disorder Co-Existing with Visual Perceptive processing and Learning Disabilities." P 37, p. 20

In his Summary and Recommendations, Dr. [redacted] stated:

"It is important to differentiate [redacted]'s learning weaknesses [such as his mild dyslexic disorder] from his attention deficit disorder. Actually [redacted] was tested on his medicine and still displayed the same pattern of visual perceptual processing deficits. When the medicine began to wear off, there was slightly more distractability but, it was very clear that [redacted] displays a co-existing pattern of learning difficulties combined with an attentional disorder which is very commonly seen in children who have very mild dyslexic traits, such as visual perceptual

processing disorder. P 37, p. 21.

With respect to treatment of [redacted]'s learning deficits, Dr. [redacted] found [redacted] "That it may be in [redacted]'s best interest to be categorized as a youth who has "Other Health Impairments" based on his Attention Deficit Disorder without pronounced hyperactivity. P 37, p. 21. For this reason, Dr. [redacted] recommended that [redacted]'s "overall special education needs can best be met by expanding his speech and learning IEP to include Other Health Impairments [as this] would allow him to be provided with supportive and tutorial services to address his ADHD disorder and subtle but noticeable learning disabilities." P 37, p. 22.

On October 15, 2002, the Eligibility Committee reconsidered [redacted]'s SLI accommodation and found he was no longer a student with a disability under IDEA or Section 504. SB 34. Because [redacted] parents would not consent to his release from special education services, he continued his 40 minutes a week under a "stay/put" IEP. SB 41, P 75. On February 25, 2004, another Eligibility Committee decided [redacted] was no longer eligible for special education services. SB 43, P 87. On March 23, 2004 the Eligibility Committee again proposed terminating all of [redacted] special education services and again the parents disagreed. P. 89, SB 44. Finally a Notice of Termination of special education services was served on the parents by letter of April 15, 2004. SB 45; P 91. On April 22, 2004, [redacted]'s parents requested a Due Process Hearing.

#### IV

### CONCLUSIONS OF LAW

I find [redacted] is a student with a learning disability within the meaning of IDEA and Section 504.

I also find [redacted] has two severe and specific learning disabilities namely (1) a Phonological Disorder (Disorder of Articulation) and (2) an Attention Deficit Disorder both of which qualify him for learning disability services under IDEA and Section 504. P 37, p. 20. I further find that because such disabilities substantially limit his learning, as Dr. [redacted] demonstrated, the fact that he is able to earn average grades and be promoted does not disqualify him under IDEA or Section 504.

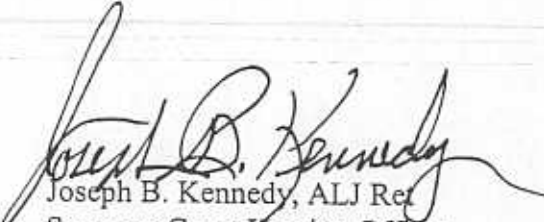
34 CFR 104.33 (a), and (b)(1)(I), of the of the 504 Regulations and the Appendix A, Subpart D thereto show the LEA is in error when it asserts that "in order to qualify as disabled under Section 504 [redacted] would have to have a disability that substantially limits learning." LEA Br. p. 9. Dr. [redacted] report does show that [redacted] does have such a disability and none of the LEA's witnesses convincingly testified or showed that their testimony or testing was not skewed by the fact that it was based upon observations made when [redacted] was under a therapy that muted or disguised his disability. . What is important about Section 104.33(a) is that it makes the LEA "responsible for providing a free appropriate public education to each qualified handicapped person within its jurisdiction. . . regardless of the nature or severity of his or her disability." Section 104.33(a) and its Appendix D, Published July 1, 2003, p. 377. [redacted] is a "qualified handicapped person" because, as Dr. [redacted] convincingly showed he has both a

severe Articulation Disorder and an Attention Deficit Disorder that noticeably interferes with his intellectual achievement.

#### ORDER

The premises considered, it is ORDERED that \_\_\_\_\_, a child with multiple learning disabilities, be afforded a FREE APPROPRIATE PUBLIC SCHOOL EDUCATION.

So Ordered this 15<sup>th</sup> Day of July 2004.

  
Joseph B. Kennedy, ALJ Ret.  
Supreme Court Hearing Officer

#### Implementation Plan

The LEA is reminded of its obligations under 8 VAC 20-80-76(I)(16) to develop and submit an implementation plan to the parties, the hearing officer, and the SEA within 45 days of the rendering of this decision.

#### Right of Appeal

This hearing officer's decision shall become final and binding unless the decision is appealed by a party within two years of the issuance of this decision. Virginia Code 8.01-248. The appeal may be filed in either a state circuit court or a federal district court without regard to the amount in controversy. RR v. Fairfax County School Board, 338 F.5th ed. 325 (4<sup>th</sup> Cir. 2003).