

IN THE WEST VIRGINIA DEPARTMENT OF EDUCATION
DUE PROCESS HEARING CASE NO.: D12-002

Parties Requesting Hearing
(Petitioners)

[REDACTED]
Parents of the Student

Student

[REDACTED]

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(Respondent)

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Hearing Location

[REDACTED]

Hearing Dates

September 19, 20 and 29, 2011

Type of Hearing

Closed to the public

Transcription Method

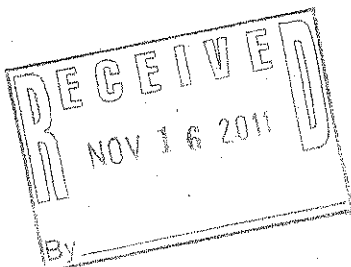
Certified Court Reporter

Student Present

The student did not appear

Witnesses for the Petitioners

[REDACTED]
[REDACTED]
[REDACTED]



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- P-E 1. Valley Health Care System WV Birth to Three Assessment/ Eligibility Report
- P-E 2. Klingberg Neurodevelopmental Center- November 4, 2003
- P-E 3. Valley Health Care System, Occupational Therapy Evaluation- November 26, 2003
- P-E 4. WV Birth to Three, Assessment Report- June 10, 2004
- P-E 5. Psychological Evaluation- June 21, 2004
- P-E 6. Communication Evaluation- June 23, 2004
- P-E 7. Marietta Memorial Hospital Pediatric Occupational Therapy Evaluation- August 26, 2004
- P-E 8. Screening Report- July 12, 2006 (date at top of report) July 12, 2008 (date by signature)
- P-E 9. United Rehab, Recommendation Letter- September 11, 2007
- P-E 10. County School, Speech/ Language Evaluation Report
- P-E 11. Psychological Evaluation Report, January 6, 2009
- P-E 12. Autism Assessment Report- January 3, 2009
- P-E 13. County Board of Education, Occupational Therapy Re-Evaluation Report
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- P-E 16. Letter from Parent's Private Psychologist
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- P-E 19. Center for Excellence in Disabilities, Assistive Technology Evaluation-
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- P-E 20. CELF- September 21, 2009
- P-E 21. County Schools, Diagnostic Evaluation- September 21, 2009
- P-E 22. County Schools Observation Report Form- September 17, 2009
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- P-E 24. County School, Student Observation- April 6, 2011
- P-E 25. Teacher Report Form, 4th Grade Classroom Teacher
- P-E 26. Quinn Curtis Center, Psychological Evaluation- November 3, 2010
- P-E 27. Quinn Curtis Center, Psychological Evaluation , November 3, 2010 (with notes:
"Report: Diagnosis Autism" "marked received ____December 21"
- P-E 28. Quinn Curtis Center, Psychological Report, April 4, 2011
- P-E 29. County School, Psychoeducational Evaluation - April 13, 2011
- P-E 30. County School, Speech and Language Therapy Services, Diagnostic Evaluation
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- P-E 31. Westest Scores- May 16, 2011
- P-E 32. Autism Training Center, Positive Behavior Support Plan, Implementation Date
- January 2011.

Petitioner's Eligibility Documents (P-ED)

- P-ED 1. Notice of Individual Evaluation / Reevaluation Request
- P-ED 2. Notice of Eligibility Committee Meeting- September 14, 2009
- P-ED 3. Notice of Eligibility Committee Meeting- November 16, 2009
- P-ED 4. Notice of Eligibility Committee Meeting- November 18, 2009
- P-ED 5. Eligibility Determination Checklist - December 1, 2009
- P-ED 6. Eligibility Committee Report- December 1, 2009

P-ED 7.	Teacher's Report of Student Progress- December 1, 2009
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P-ED 10.	SAT Report- January 18, 2011
P-ED 11.	Meeting Notes, Students 4 th Grade Classroom Teacher
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P-ED 16.	Notice of Eligibility Committee Meeting- April 8, 2011
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P-ED 18.	Eligibility Committee Report April 19, 2011
P-ED 19.	Eligibility Determination Checklist- April 18, 2011 (Date in blue ink)
P-ED 20	Eligibility Determination Checklist- April 18, 2011 (copy with notes indicating Positive Behavior Specialist responses on left margin)
P-ED 21.	Specific Learning Disabilities Team Report- April 19, 2011
P-ED 22.	Notice of Eligibility Committee Meeting- April 20, 2011
P-ED 23.	Eligibility Committee Report- May 5, 2011
P-ED 24.	Prior Written Notice- May 5, 2011
P-ED 25.	Specific Learning Disabilities Team Report- May 5, 2011
P-ED 26.	Eligibility Determination Checklist- May 5, 2011
P-ED 27.	SAT Report- May 16, 2011

Petitioner's Communication Sheets (P-CS)

P-CS 1. February 7, 2011 through May 25, 2011

Petitioner's Miscellaneous Documents (P-M)

P-M 1. Resume of Parent's Independent Doctor of Psychology

P-M 2. Resume of Positive Behavior Specialist

P-M 3. Diagnostic Criteria for Autistic Disorder, DSM-IV-TR

P-M 4. Eligibility Criteria for Autism, Policy 2419, 126 CSR § 16

P-M 5. Student Discipline Summary Report of August 18, 2006 through May 15, 2011

P-M 6. Student Transcripts 2009 and 2010

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Petitioners' Samples of Student's Classwork (P-CW)

P-CW 1. Fifth Grade

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Exhibit List for Respondent

R-1	Due Process Request
R-2	Letter from County Director of Special Education to parents Dated June 3, 2011
R-3	Parent Response received June 11, 2011
R-4	Letter from County Director of Special Education to Parents Dated June 19, 2011
R-5	Letter from County Director of Special Education to parent Dated August 7, 2009
R-6	Notice regarding Telephone Conversation
R-7	Notice of Individual Evaluation/ Re-Evaluation Request Dated September 9, 2009
R-8	Telephone Notes dated September 9, 2009
R-9	Eligibility Committee Meeting Notice Dated September 14,2009
R-10	Correspondence from Parents dated September 16, 2009
R-11	Letter from United Rehab dated September 21,2009
R-12	Notes Regarding September 22, 2009 Meeting
R-13	Parents Receipt of Records- September 2009
R-14	Multidisciplinary Team Assessment/ Tracking dated September 28, 2009
R-15	Eligibility Committee Meeting Notice dated November 6, 2009
R-16	Telephone Notes dated November 16, 2009
R-17	E-mail to Parents' Advocate
R-18	Eligibility Committee Meeting Notice dated November 18, 2009
R-19	Eligibility Committee Determination Checklist dated December 1, 2009
R-20	Classroom Teacher Reports

R-21	Speech Language Therapy Diagnostic Evaluation
R-22	Observation Report For Autism
R-23	Eligibility Committee Report dated December 1, 2009
R-24	Prior Written Notice dated December 1, 2009
R-25	Telephone Notes dated January 20, 2010
R-26	Eligibility Committee Meeting Notice dated January 20, 2010
R-27	Telephone Notes February 16, 2010 through April 22, 2010
R-28	Fax from Quinn Curtis Center dated May 26, 2010
R-29	Quinn Curtis Center Report dated and signed December 20, 2010
R-30	Notice of Student Assistance Team Meeting dated January 2, 2011
R- 31	Telephone Notes dated January 7, 2011
R-32	Notes to/ from home
R-34	Prior Written Notice to Conduct Multidisciplinary Evaluation dated February 2, 2011
R-35	Notice of Individual Evaluation/ Reevaluation Request dated February 2, 2011
R-36	Notice of Individual Evaluation/ Reevaluation Request dated February 11,2011
R-37	Correspondence to Parents dated March 9, 2011
R-38	Eligibility Committee Meeting Notice dated April 8, 2011
R-39	Eligibility Committee Meeting Report dated April 18-19, 2011
R-40	Specific Learning Disabilities Report dated April 19, 2011
R-41	Eligibility Committee Meeting Notice dated April 20, 2011
R-42	Letter from County Director of Special Education to Parents dated April 21, 2011
R-43	Documents Reviewed During May 5, 2011 Eligibility Meeting

R-43-A	Quinn Curtis Psychological Evaluation Executed December 20, 2010
R-43-B	Specific Learning Disabilities Team Report dated May 5, 2011
R-43-C	Westest dated May 17, 2011
R-43-D	Discipline Summary
R-43-E	Student Grade Summary
R-43-F	Teacher Report
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R-43-J	Quinn Curtis Report Executed April 11, 2011
R-44	Eligibility Determination Checklist
R-45	Eligibility Committee Report dated May 5, 2011
R-46	Prior Written Notice dated May 11, 2011
R-47	Student Assistance Team Report dated May 15, 2011
R-48	Westest dated May 16, 2011
R-49	Absence Summary
R-50	Letter from Parents' Attorney to County Schools dated June 27, 2011
R-51	Letter from County Director of Special Education to student's father dated July 8, 2011
R-52	Telephone notes July 2011
R-53	Communication Sheets
R-54	County and State Westest Data

I. Issue Presented

Whether student is eligible for special education and related services under the Individuals with Disabilities Education Act (IDEA), and, specifically, whether he qualifies as a student with autism.

II. Procedural History

The request for Due Process Hearing in this case was received by the West Virginia Department of Education (WVDE) on August 18, 2011, and assigned to this hearing officer the same day. The parties were notified of the hearing officer assignment and scheduled hearing dates in a certified letter dated August 19, 2011.

An initial telephone conference was scheduled and held on August 29, 2011. At that time, the issue for hearing was discussed and defined, and the hearing dates of September 19 and 20, 2011, were confirmed for hearing.

Subsequently, on August 26, 2011, the parties filed written notice that they jointly wished to waive the Resolution meeting, and instead, proceed to hearing.

Five subpoenas were requested by the parent's counsel and were prepared and sent to her on September 9, 2011. On September 12, 2011, a request from counsel for the school district for a single subpoena was received. It was prepared and mailed out to her that day.

On September 15, 2011 a second telephonic conference was held with counsel for the parties, to confirm the exchange of evidence and readiness for the hearing. I was informed the parties would be meeting with their mediator on September 18, 2011, the day before the hearing was scheduled to begin. No settlement was reached on that day.

The hearing commenced, as scheduled, on September 19, 2011. At the beginning of the hearing, the parties' counsel jointly presented me with a written motion for continuance, requesting that they be given until October 31, 2011 to submit post hearing briefs, and that November 14, 2011, be established as the due date for issuance of the final decision. After confirming with counsel that student was regularly attending school and that no harm would come to the student on account of the delay, the motion was granted. The hearing was held on September 19 and 20, 2011, as scheduled, but at the end of the second day of hearing the school district had been unable to complete the presentation of their case. Consequently, a third day of hearing was scheduled for September 29, 2011, and the hearing was completed that day. Post Hearing written submissions were made on behalf of the parties and received on November 2, 2011. Those writings have been considered in the final decision.

No post hearing changes were made to the decision deadline of November 14, 2011.

III. Findings of Fact

1.) Student is a male child, ten years and one month of age as of the time of hearing. EX. P- E 1

2.) In years past, he was identified as a child with a Pervasive Developmental Disorder and received services under West Virginia's Birth to age 3 years Child Find System, which is administered by West Virginia's Department of Health and Human Resources. Ex. P- E 2,3,4 and Policy 2419, CSR § 126-16-3 Chapter 2 Section 2 A.

3.) Student was tested in 2009, when he was in the second grade, in the areas of Intelligence, Achievement and Visual Motor Integration. On the Intelligence testing he obtained a Full Scale IQ score of 84. Scores on the sub parts of the test ranged from a low of 82 to a high of 91, all of which are in the average range. Ex. P- E 11 at pages 2-3.

In the achievement testing he scored at an overall 75th percentile level, meaning he did as well as, or better than, 75% of similarly aged students. His lowest ranking was 53rd percentile and his highest was 93rd percentile. All of these are higher than the median score of 50. All scores were consistent with a grade level equal to, or higher than, a beginning second grader. Ex. P E 11 at page 4-6.

On the Visual Motor Integration test, student showed some deficiencies with an age equivalency score of 5 years 7 months. At the time student was actually 7 years and 5 months of age Ex. P- E 11 at page 6.

On the discrepancy score calculation, student actually showed academic achievement greater than what would be expected from his IQ score. Ex. P- E 11 at page 8.

3.) Also in January 2009, student was given the Gillian Autism Rating Scale- 2nd Edition (GARS-2) with ratings based on information from his classroom teacher. On the four testing parameters, student received scores indicating autism was very likely on only one area: Stereotyped Behaviors (25th percentile.) On Communication he received a score of "possibly" (2nd percentile) on Social Interaction and Autism Index he received a report of "unlikely" (1st percentile) Ex. P-E 12 at page 2. A GARS - 2 screening test completed with information completed by student's mother at about the same time produced scores between the 91st and 98th percentile. Those four scores would indicate that autism was "very likely". Ex. P-E 14 at page 2. Thus, there appears to have been a discrepancy between the perceptions of his mother and the perceptions of his second grade school teacher regarding student's behavior in 2009.

4.) An Occupational Therapy Re-Evaluation from January 2009, found that student had age appropriate standardized scores for visual motor function and handwriting. Consequently, he did not require direct occupational therapy services at that time. Consultative services were recommended for 30 minutes per month to provide strategies to his teachers to address sensory processing issues relevant to classroom distractability. It was noted that "any sensory issues he may be having do not apparently affect his overall educational performance significantly". Ex. P-

E 13 at page 6.

5.) Also in 2009, a Psych assessment was obtained by the parents. This assessment was based on parental reports of students behavior and analyzed pursuant to the Developmental Profile- 3 Childhood Autism Rating Scale (CARS). The CARS score of 27 indicated student fell in the non- autistic range. Ex. P-E 17 page 4 of 6. Student also was interviewed for the assessment. The evaluator did not communicate with school personnel for this report because she had no release to do so.

The assessor's impressions were that student showed signs of Asberger's Disorder, that he had delays in his social-emotional functioning, motor, and adaptive behavior abilities. She recommended evaluations be done in the areas of Occupational therapy for fine motor/ manipulation issues, and sensory processing concerns. She also recommended testing to see if student had ADHD.

She noted student had a poor attitude regarding school and recommended behavioral supports in school, "if he is having difficulties in this setting...." She also opined that "Social Skills therapy would be beneficial Ex. P-E 17 at page 5 of 6. This psychologist was not available to testify at the hearing.

6.) Students Westest 2 from the third grade (2009-2010 school year) yielded performance levels of partial mastery in math and social studies, but novice, the lowest level, in reading/ language arts and in science. Ex.P-E 23.

7.) In a classroom observation performed by a special education liason, in April 2011, at the end of student's fourth grade year, the observer noted the incidence of several disruptive behaviors during the observed class period. However, she indicated that student was generally stopped in his disruption by a single verbal direction. She also noted he completed his assignment (an item of artwork) without physical assistance, that student was able to make eye contact and interact socially with the teacher and other students, and that he communicated clearly and precisely in the classroom. Ex. P-E 24

8.) On a teacher report by his 4th grade classroom teacher, it was noted that student had some behavioral incidents during the year but for the most part, student was able to improve his behaviors when he was reminded of the rules and when he experienced consequences for misbehavior. Student communicated well and interacted with other students. No repetitive or stereotyped behaviors were observed. As of April 2011 students grade averages were:

Spelling-	96% - A
Reading	83% - B
Lang. Arts	74% - C
Soc. Studies	91% - A
Math	88% - B
Science	28% - F due to two assignments which were not turned in.

The teacher noted student's tendencies to over react "when things don't go his way" Problem areas included 1) a limited ability to see others' point of view and 2) accepting responsibility for his actions.

Recommendations included a need for structure, discipline and consistency regarding his education, and a need to maintain communication in both directions between home and school Ex. P-E 25

9.) Student's parents rely heavily on the findings contained in a psych evaluation from the Quinn Curtis Center, dated November 3, 2010, which diagnoses student with Autistic Disorder. Ex. P-E 26 at page 9. However, a review of that report reveals that the great preponderance of the information on which the diagnosis is based, comes from verbal reports of student's parents. The Vineland Adaptive Behavior Scale (Vineland II), the Conners Parent Rating Scale- Revised Long version, and the Gillian Autism Rating Scale (GARS II), were all reliant on parent report. Information, not from parental report, included a Clinical interview with student, (duration not indicated) and two 20 minute sessions when student was observed playing checkers first with one parent, then with the other. Ex. P-E 26 at page 4.

No contact with student's school personnel was made, or included in, the evaluation. Ex. P-E 26 and Transcript 1 pg.100, line 18-101, line 20.

Recommendations from the Quinn Curtis Center included:

1. A medical evaluation because of his propensity to eat inedible objects.
2. An evaluation from a child psychiatrist concerning possible medication for regulation of emotions.
3. Behavioral intervention "treatment" including "teaching strategies, social skills training, and parent training."
4. Having parents obtain an Autism Diagnostic Observation Schedule, if they wanted a second opinion regarding student's diagnosis.

Recommendation 1, 2 and 4 are medical in nature, and are not relevant to the school district's provision of services. Recommendation 3 is ambiguous, but it is included as a component of his treatment. No specific educational recommendations are made in this report. Ex. P-E 26 and R- 29 at internal pg. 9 and 10.

10.) Student was tested on intelligence in April 2011 by the Quinn Curtis Center. Results of that testing with the Wechsler Intelligence Scale for Children- 4th ed. (WISC IV) yielded sub test scores ranging from the low average to the high average range, with a full scale IQ score of 99, which at the 47th percentile, is in the average range. Ex. P-E 28.

11.) Also in April 2011, student was evaluated broadly by the school district. Cognitive (IQ) testing using the Woodcock Johnson III test of Cognitive abilities (WJ-III COG) yielded a General Intellectual Ability score of 92, again within the average range. However, among the 16 subtests, where student was believed to have given his true best efforts, scores ranged from 74 (low) on processing speed to a high of 127 (superior) on general information. It was noted he communicated verbally and maintained eye contact with the evaluator during the testing. Ex. P-E 29 at page 3.

On Achievement testing, a broad reading score of 100, a broad math score of 93 and a brief broad writing score of 104, were obtained. All of which are in the average range. Again, sub- test scores ranged from the high average to the low average range. Ex. P-E 29 at page 4-5.

On the Autism Spectrum Rating Scale, both the parents and students teachers were asked to complete forms indicating the observance of behaviors and characteristics by student which are also demonstrated by identified autistic children. The parents scale yielded a total score of 79 in the very elevated range, showing many behaviors consistent with autism. The teachers rated student somewhat lower at 66. That is at the lower end of the elevated range. (59 is still in the average range.) Once again it appears that student's teachers observed less of the behaviors typical of Autism in the school setting than did student's parents in the home and community. Ex. P-E 29 at page 7-8

13.) Students speech and language skills are within normal limits. So Speech Language Therapy is not needed per speech/ language evaluation of April 18, 2011 Ex. P-E 30.

14.) At the end of his 4th grade year, student took the Westest and received a partial mastery ranking in mathematics, but only a novice score in Social Studies, Science and Reading/ Language Arts. Ex. P-E 31. The Elementary School Principal testified that these rankings represented average performance that school year. TR VOL. II at page 306-307, line 10 and Ex. R-54. Students 4th Grade teacher testified Westest scores were "very low across the board" that year. TR VOL. II at page 251, lines 19-20 and page 252, lines 8-10.

15.) Students ability to "easily converse with others" was noted by his positive behavioral support trainer, from Marshall University Autism Training Center, in her behavior support plan of January 2011. Ex. P-E 32.

16.) Student was found ineligible for special education services in December 2009. (Ex. P-ED 6) and again on May 5, 2011 (Ex. P-ED 24)

In 2009, it was found by the Eligibility Community that student's assessment and classroom assignment scores indicated grade level performance. Ex. P-ED 8.

In May 2011, the Eligibility Community found that the student did not meet eligibility criteria in any area of exceptionality. Ex. P-ED 24. At the latter meeting, the team had available to it a psychological evaluation, achievement data (benchmark assessments, progress monitoring.), teacher report(s), parent information, discipline data, attendance data, state and county test results, Autism rating scales, behavior rating scales, speech evaluation and observations. Ex. P-ED 24

17.) A student assistance team meeting, held on May 15, 2011, put together recommendations for supports and services which student should have available to him for the remainder of the 4th grade (2011-2012), and going into the fifth grade (2011-2012) academic years. The supports and services identified as needed were:

- "re direct to task

- quiet place to go/calm/work
 - by choice
 - by teacher direction
- social skills instruction
 - how to handle frustration
 - friendship
- Organization
 - homework assignments- he writes and teacher checks, and check book bag
- extra set of books at home
- extra verbal praise
- locker at end, by room
- have functional behaviors support trainer meet with 5th grade teacher and student goes (sic) to meet the school (with mom) Counselor will tour.
(Under planning at [middle school])
- Social skills instruction through counselor once a week or re teach after lunch or 1st period (maybe more frequent for several weeks)
- Use word processor for longer writing assignments". Ex. P- ED 10 at page 3

All of these supports and accommodations were offered without any finding of special education eligibility.

Students mother signed the SAT form, but indicated in the margin, "I still believe we need more not exactly sure what!"

18.) For the 2010- 2011 academic year (4th Grade), students 3rd semester report card was submitted in evidence (ending March 23rd 2011). At that time, student had a letter grade of C or better, or satisfactory, for the first semester average, and 3rd quarter grades in all subject areas. Notably, student's handwriting was considered to be satisfactory, in spite of parental concerns indicated during the hearing. Ex. P-M 7. In the 2009- 2010 academic year (3rd grade) student received a letter grade of a C or better, or a grade of "satisfactory" in all areas, with the exception that he received a second semester conduct grade of "F." Ex. P-M 6. In the 2008- 2009 year (2nd grade) all letter grades were C or better, or satisfactory.

19.) Student has at times stated that his behavior at school is outside his control or is the responsibility of other people. After hitting a student with a ball during recess he said "I watch wrestling, and it makes me violent and stupid." Ex. P-E 32 at page 4 #4C. After yelling in class, he told his classroom teacher, " You are going to have to get used to me yelling out because I'm autistic." Likewise, after pushing another student down, he told his teacher "... you are going to have to watch me better." Ex. P- ED 11 at page 3. That classroom teacher did indicate that student could be induced to behave appropriately when made aware of expectations and given consequences for inappropriate behavior. Ex. P-ED 11 at page 3

20.) Conversely, student told his bus monitor that he is able to control his behavior, but chooses not to. Ex. P-M 5. During his fourth grade year, student had several behavioral incidents on the bus that resulted in warnings, and three different suspensions from riding the bus (1 day, 3 days, and 5 days). Specifically, student put gum on another student's clothing, defied the bus driver's instructions, used foul and /or inappropriate language on numerous occasions, and most alarming of all bullied a pre- kindergarten student, "throwing him up against a window." Ex. P-M 5, P-E 29 Page 1-2 and Ex. R 43 D at page 1.

21.) During the fourth grade year, student apparently had some problems staying on task, and staying in his seat in the classroom. He was distracted from his work and was impulsive in his behavior at times. Ex. P-CS (communication sheets prepared by classroom teacher February 7, 2011- May 25, 2011). Student has problems maintaining attention and effort to tasks and controlling impulsive behaviors. Ex P-E 29, page 1, 9-10, 12. Prompting, praise and redirection may get him back on task for a time. Ex P-E 29, page 1, 10-11.

22.) Student's current (5th grade) math and science teacher testified that student is pleasant and smiling in her class, anxious to work, and that he readily volunteers to work at the blackboard. Transcript (TR) VOL III, page 8

He tries his best all the time. He is infrequently off task and can be redirected. He does well when he is ready to start and knows what's expected of him. This teacher has had no issues with his behavior this year (approximately 6 weeks into the year at hearing time.) He does not shout out and has not caused class disruptions. She sees him as involved and engaged in the classroom. TR VOL III, page 9. Student has not used inappropriate language TR VOL III, page 16. He interacts well with other students in the class and she has seen him interact and take a leadership role with other students on joint tasks. TR VOL III, page 10. She has seen him at lunch and recess and has always found him to be in the company of other students. TR VOL III, page 10-11. He has friends he chats with in class. This teacher has found this student to be very different from the anxious, unsocialized child described to her by student's parents. TR VOL III, page 13

23.) Student's handwriting is somewhat messy, but legible to his teacher. TR VOL III, page 28 This hearing officer also found his writing to be mostly legible with a few exceptions. Ex. P-CW 1

24.) A Speech Language evaluation completed in September 2009 recommended that student not be enrolled in speech language therapy "due to appropriate language and pragmatic scores." The only error noted in his speech pattern was an inconsistent f/th articulation error during conversation. Ex. R -21

25.) An Eligibility Committee Meeting held on December 1, 2009, found student to be ineligible for special education. That committee considered reports and information concerning his classroom performance, teacher reports, communication evaluation and school based observations Ex. R- 23. It concluded that student was not eligible for special education because "

student assessments [and] daily classroom scores indicate grade level performance.” It was further stated “the student did not meet eligibility criteria for any area of exceptionality,” Ex R-24.

26.) An SAT (School Assistance Team) meeting was held on January 18, 2011. Student’s mother was reporting that student didn’t want to come to school, and he was frequently saying he felt ill. He was having trouble getting homework done at home, and having disciplinary problems on his bus, and had been given a transportation suspension. She also indicated student was having problems with his handwriting at times. Several disciplinary interventions were suggested for classroom use, a reward chart at home for when homework assignments were completed, a set of extra textbooks for student to keep at home, communication sheets to go between home and school, and allowing student an MPS player on the bus ride. It was also recommended that Student’s Intelligence and Adaptive behavior levels be assessed. Ex. R 33 at page 3-4

27.) As of May 2011, student was noted as loving to read, silently, and orally to his class. His reading was on grade level (then grade 4) and he had an average of 86% (B). Ex. R 43 B

28.) The LEA’s school psychologist performed an extensive psychoeducational evaluation of the student. The report was dated April 13, 2011. Ex. R 43 I (See also FOF, 11 above)

This evaluation included discipline reports, of an Intelligence test, (Woodcock Johnson III test of Cognitive abilities) an achievement test, (Woodcock Johnson III achievement test) autism rating scales from the parents and from student’s teachers, communication sheets enumerating students problem behaviors, and a Functional Behavior assessment observation.

Notably, the bad behaviors severe enough to elicit reporting, all occurred while student was riding or waiting for his bus. (See FOF 20 above.) He was never suspended from class attendance.

Student’s General Intellectual ability falls in the average range with a standard score of 92. His achievement score was roughly commensurate with his measured intellect, with subtest scores scattered between the low average and high average ranges.

On the teacher completed forms concerning autistic like behaviors (ASRS), student’s observed behaviors were rated as average, in the area of social/ communication.

Overall, his teachers rated him in the slightly elevated range based on his in school performance. Ex. R 43 I. His parentally prepared forms (which reflect his behavior outside of school) placed him in the very elevated range. Ex. R 43 I

The single recommendation of the school psychologist was to have school personnel complete a reinforcer survey with student to identify things which will motivate him to good behavior and his best academic effort. Ex. R 43 I at page 12.

29.) Notable findings of the Quinn Curtis Center psych evaluation of November 3, 2010 include that:

- “He prefers solitary activities and does not actively participate in social play or games. He is unable to develop appropriate friendships and does not show an interest in developing friendships.

- He does not understand social conventions of social interactions and is unable to reciprocate in the interactions. Ex. R 43 (a) at page 9.

These findings correspond with Eligibility Criteria for Autism in the area of social interaction. Policy 2419, CSR § 126-16-3 Chapter 4, Section 3 A. 1 (a)(2), (3) and (4)

“[Student’s] language development was delayed. He is unable to sustain a conversation with others, and is unable to take turns in conversations

“He is not able to engage in pretend play and make believe situations” Ex. R- 43 (A) at page 9.

These findings match the criteria of W.Va. Policy 2419, CSR § 126-16-3, Chapter 4, Section 3 A 1 b(1), (2) and (4) regarding impairments in communication.

[Student] does not like change in his routine, and gets upset if his routine is disrupted. This finding satisfies the autism criteria of Policy 2419, CSR § 126- 16-3, Chapter 4, Section 3 A 1 C (2) regarding repetitive and stereotyped patterns of behavior.

In view of the above, it is apparent that the Quinn Curtis Report documents behaviors and/or patterns that satisfy the documentation requirement of the eligibility criteria for autism.

30.) The Quinn Curtis report is issued under the signature of a Doctor of Psychology and includes a diagnosis of “Autistic Disorder” Ex. R 43 I at page 9. Thus, it also satisfies the second criteria for eligibility in autism, ie., a diagnosis of autism W.Va. Policy 2419, CSR § 126-16-3 Chapter 4, Section 3.A.2.

31.) No evidence was submitted to indicate student has any emotional/behavioral disorder. Therefore, student also meets the final of the five eligibility criteria for autism, W.Va. Policy 2419, CSR § 126-16-3 Chapter 4, Section 3. A. (5)

32.) The evidence did not identify any areas where special education (ie., instruction where the content, methodology or delivery of instruction is adapted) is needed by this student. Student is achieving at least average and frequently better than average grades with the same instruction as the rest of his class. Therefore, student does not meet the eligibility criteria required under West Virginia law, W.Va. Policy 2419, CSR § 126-16-3 Chapter 4, Section 3 A.4. or under the IDEA- 34 CFR § 300.8(a)(1) (authorized by 20 U.S.C. §§ 1401(3) and 1401(30))

33.) During student’s 4th grade year, at the request of his parents, his classroom teacher began keeping communication sheets which were sent home daily. Part of the information she was to include on those sheets were incidents of off task, disruptive or other misbehaviors. Ex. P-CS February 7, 2011 through May 25, 2011. These sheets in the months of February and March 2011 were considered and reported on by the school’s psychologist in her Psych Educational Evaluation. According to her tallies, student had 33 instances of problem behaviors (in-complete class work, being off task or failing to try an assignment) while in his math class. Using the same criteria, there were 22 instances of similar behavior in language arts during the same time period

Ex. R-41-I at page 9-10. Comparatively, he had only seven of these identified behaviors in Social Studies in that same time frame. Ex. R-41-I at page 9. Thus his incidence of problem behaviors appears to vary markedly depending on the subject to which he is being asked to focus.

In spite of this apparently negative data, it was the testimony of his classroom teacher, that although he had some good days, some bad days and some mixed, overall, student's conduct was not dissimilar to that of his classmates. TR VOL. II at page 191, line 23 and page 192, line 14. In her opinion, none of the behaviors documented on student impeded student's learning or access to learning. TR VOL. II at page 193, lines 4-8. Further, the logs underreport the times that student was on task and behaving appropriately. TR VOL. II page 217, line 16-218, line 2-36.

As to student's low score on the writing portion of the 4th Grade Westest, student's classroom teacher testified she proctored that portion of student's testing. She observed student write several different paragraphs for the assignment, but each time, erased it, started over and redid it. Finally student submitted a single sentence as his essay. A writing sample that brief does not lend itself to a score, so he lost at least 30 points on account of this. TR VOL. II, page 196, line 5 and page 197, line 12.

34.) Students 4th grade teacher testified that at school she observed student having appropriate social interaction with his peers. She did not see any problems with his ability to communicate or observe social norms with other students. TR VOL. II, page 209, line 4 and page 211, line 3.

She also did not see any stereotyped or repetitive behaviors such as arm flapping, head banging or spinning TR VOL. II, page 211 lines 11-15.

35.) Student is capable of voluntarily altering his class performance and attention to academic tasks when he so chooses. TR II, page 213, line 8-214, line 8.

IV. Conclusions of Law

1.) West Virginia's standards for Special Education eligibility are provided in Policy 2419: Regulations for the Education of Students with Exceptionalities. West Virginia CSR § 126-16-3 Chapter 4, Section 3 State Eligibility Criteria (Hereinafter cited as Policy 2419, CSR § 12-16-___) That Section includes a 3 prong test for eligibility.

The first prong is that the student meets the eligibility requirements for a specific exceptionality. One of the possible areas of exceptionality is Autism.

The second prong is that the exceptionality/disability has an "adverse effect on educational performance."

The third prong is that the exceptional/disabled student needs special education. Special education is "specifically designed" meaning that "its content, methodology, or delivery is adapted, as appropriate to meet the unique needs of the student that result from the student's exceptionality." The goal of special education is to help the student "meet the educational standards that apply to all students."

The Federal Regulations for Special Education Eligibility require corresponding components. A student must be "evaluated" as having a disability (34 CFR § 300. 8(a)(1).)

Autism is one such area of disability (34 CFR § 300. 8(c)(1)(i).) The disability of autism must adversely affect the child's educational performance. (34 CFR § 300. 8(c)(1)(i)) By reason of that disability the child must need special education. (34 CFR § 308 (a)(1)))Authorized by 20 USC §§ 1401(3) and 1401(30))

2.) With regard to the specific category of autism, West Virginia requires that five factual findings be made.

First, that documentation establish that the student meets the same diagnostic criteria for autism, as described by the Diagnostic and Statistical Manual, Four (DSM IV) which is the recognized authority used by medical and mental health care professionals... Federal Law presents the same requirement but uses the term "evaluated... as having autism" instead of the word "documentation" (34 CFR § 300. 8(a)(1).)

Second, that the student have been diagnosed as having autism by a recognized mental health professional, ie. A psychiatrist, physician, licensed psychologist or school psychologist.

Third, that the student's condition adversely affects his educational performance.

Fourth, that the student needs special education and;

Last, that the adverse effects seen in student's educational performance are not caused by an emotional or behavioral disorder.

In the instant case, student has been diagnosed by a doctor of psychology as being autistic. That doctor, from the Quinn Curtis Center, submitted a report documenting findings which satisfy the autism criteria of the DSM IV and Policy 2419 and assigning the student a diagnosis of "Autistic Disorder" (Ex. P-E 26 at page 9). There is no evidence that student has an emotional or behavioral disorder. Therefore, student satisfies requirements one, two, and five of the eligibility criteria for autism. However, it is my finding that student is achieving academic success commensurate with his intellectual abilities and that success is giving him a substantial

educational benefit. Therefore, student does not meet criteria three and four concerning an adverse effect on educational performance, or a need for special education. Consequently, student does not meet the criteria for autism under W.Va. Policy 2419, or under federal law as described at 34 CFR §§300. 8(c)(1)(a) and 300. 8(a)(1) (authorized by 20 USC §§ 1401 (3) and 1401 (30)).

3.) A student who needs a related service, but not special education is not eligible for special education under either state or federal law. 34 CFR § 300. 8(a)(2)(i) (authorized by 20 USC §§ 1401 (3) and (30), and WV Policy 2419, Chapter 4 Section 3 (3 prong test of eligibility, final paragraph.)

4.) The U.S. Supreme Court, in its decision in *Schaffer v. Weast*, 546 U.S. 49. 126 S. Ct. 528, ___ L.Ed.2d ___ (2005) indicated that the burden of persuasion, in administrative hearings assessing the appropriateness of an IEP, falls upon the plaintiff in States such as Maryland which have no specific rule allocating the burden. *Id.* 546 U.S. at 61-62. The Schaffer Court specifically declined to address the issue of whether states may, if they wish, put the burden on the school district. *Id.* 546 US at 61-62. Thus this question remains unresolved by the high court.

In West Virginia, state policy indicates “The Burden of Proof as to the appropriateness of any proposed action, as to why more normalized placement could/could not adequately and appropriately service the individual’s education needs, and as to the adequacy and appropriateness of any test or evaluation procedure, will be upon the school personnel recommending the matter in contention.” W.Va. Policy 2419, Chapter 11 §3 A, at the third paragraph. Although, as the *Schaffer* court notes, the Placement of the Burden of persuasion will only be determinative in those cases where there is “evidentiary equipoise.” *Id.* 546 U.S. at page 58.

In this case the school district has shown persuasively that the student is achieving academic benefits (ie. good to average grades, and grade to grade advancement at least commensurate to his measured intellectual abilities).

5.) Trivial academic advancement does not constitute a free and appropriate public education (hereinafter FAPE). Hall Ex rel Hall v. Vance County Board of Education, 774 F 2d 629, 636 (4th Cir. 1985) However, the IDEA “does not require a school district to provide a disabled child the best possible education.” Rather, an appropriate education “provide[s] instruction that suits the child’s needs as well as related services to ensure the child receives some educational benefit from instruction. 20 § 1401 (8)” A.B. ex rel D.B. v. Lawson, 354 F3d 315, 319 (4th Cir. 2004 emphasis added) and J.L. v. Mercer Island, 575 F3d 1025 1037- 1038, (9th Cir. 2009) “[T]he achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit” Board of Education of Hendrick Hudson Central School District v. Rowley 458 U.S. 176, 207 73 Led 2d 690 ___ 102 S Ct 3034, ___ (1982). The amount of advancement appropriate to a particular child will depend on the abilities of that individual student. See: In Re Conklin 946 F 2d 306, 315-316 (4th Cir. 1991)

V. DISCUSSION

A. THE STANDARD FOR ELIGIBILITY IN AUTISM

The issue presented in this case is whether the student should be identified as eligible for special education as a child with autism. At the most recent eligibility committee meeting, which was held over two days (April 19 and May 5, 2011) it was found by the committee, that student was not eligible for special education. See Exhibits R 44, 45 and 46. This finding was not unanimous, however. Student's parent attended the meeting and vigorously advocated for a finding of eligibility. Her disagreement with the committee's final decision is noted on the eligibility committee report. Ex. R-45

West Virginia Policy 2419 sets out 5 criteria which must be met for a student to be found eligible for special education as a child with autism. WV CSR § 126-16-13 Chapter 4, Section 3, Definitions and Eligibility Criteria. A and Ex. R 44

The eligibility Committee reached a consensus on only two criteria, those being:

No.2: That "[t]he student had been diagnosed on having autism by a "licensed psychologist " and No.5, that the students educational performance IS NOT affected primarily because the student has an emotional/ behavioral disorder as defined in this chapter"

The Committee members failed to agree regarding the other 3 which require documentation of specific types of behavior consistent with autism (criterion 1); that the student autistic condition adversely affects his educational performance (criterion 3) ; and that the student needs special education (criterion 4). I shall address these criteria in sequence.

B. Criterion One: Documentation of Autistic Like Behaviors

The checklist for autism eligibility contained in West Virginia Policy 2419, is substantially the same as the diagnostic criteria for autism provided in the Diagnostic and Statistic Manual 4 (DSM IV) That publication is the currently accepted authoritative resource describing and defining psychological conditions recognized by the medical and mental health professions.

The Eligibility Committee which met on May 5, 2011 recognized that the report from the Quinn Curtis Center represented a valid diagnosis of autism. Ex. R 44 and R 43 A at page 9. However, they were unable to agree whether that report also satisfied the specific and separate diagnostic criteria provided for in Policy 2419. A review of the Quinn Curtis Report which bears the supervisory signature of a licensed doctor of psychology, constitute findings that fulfill all the requirements of West Virginia autism eligibility criteria. In the section marked "Summary" the report states "[Student] shows considerable problems in the areas of social interaction, communication, and stereotyped patterns of behavior." Ex. R 43 A at page 9. West Virginia's Eligibility Criteria for Autism refers to "Qualitative impairments in social interaction...", "Qualitative impairments in communication...", and " Restricted, repetitive and stereotyped patterns of behavior, interests and activities."

Regarding Social Interaction, the Quinn Curtis Report states; " He prefers solitary activities and does not actively participate in social play or games. He is unable to develop appropriate friendships and does not show an interest in developing friendships. According to

[student's mother], he does not understand the social conventions of social interactions and is unable to reciprocate in interactions." These findings would seem to satisfy the requirements of impairment to social interaction required under Eligibility Criteria (1)(a) W.Va. CSR § 126-16, Chapter 4, Section 3 Eligibility Criteria 1(a)(2-4). In this finding it demonstrates "(2) Failure to develop peer relationships appropriate to developmental level; (3) A lack of spontaneous seeking to share enjoyment interests, or achievements with other people (e.g. by a lack of showing, bringing or pointing out objects of interest); and (4) Lack of social or emotional reciprocity."

On the issue of student's communication abilities, the Quinn Curtis Report states: "As a child, (student's) language development was delayed. He is unable to sustain a conversation with others and is unable to take turns in conversations. [Student] is not able to engage in pretend play and make believe situations" West Virginia's Autism Criteria regarding impairment to communication would appear to be satisfied by these findings. They correlate with the described criteria of W.Va. CSR § 126-16-3 b(1), (2) and (4). They are "(1) Delay,... in the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime); (2) In individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others;".... and "(4) Lack of varied, spontaneous make- believe play or social imitative play appropriate to developmental level."

The Quinn Curtis report also notes that "[Student] does not like changes in his routine and gets upset if his routine is disrupted." This seems to match the criteria of W.Va. CSR § 126-16-3 (C)(2) regarding restricted and repetitive patterns of behavior, ie. an " Apparently inflexible adherence to specific, non-functional routines or rituals." West Virginia's law requires a finding of at least six items from: (a) Social Interaction, (b) Communication Impairments and (c) Repetitive Behavior Patterns, with at least two from (a), one from (b) and one from (c).

It is my conclusion that the Quinn Curtis Report documents the manifestation of behaviors or characteristics which satisfy 7 items, three under (a), three under (b) and one under (c). Thus the eligibility characteristics unique to autism are satisfied.

For their part, the school district has not contested that student was accurately diagnosed with autism, nor have they quibbled over the findings of the Quinn Curtis Report. Rather, the school district's position has been that student has not manifested the behaviors characteristic of autism to the same degree or with the same pervasiveness in the school setting that has been seen at home.

There are at least two possibilities for this discrepancy. The first possibility is that student objectively manifests more autistic like behaviors when at home. Student's 4th grade teacher did report that student did much better in a structured, disciplined environment where consequences and rewards for conduct are defined in advance. (Ex. R- 43 F) it would not be hard to imagine that a child's home might be less structured and disciplined (ie. relaxed) than a school room. The other possibility is that student's mother may be somewhat more sensitive to these types of behaviors, and may rate manifestations somewhat higher on the ratings scales than do ratings submitted by the school teachers and personnel. Either way, it is quite clear that student's behavior in his home and community is viewed as a more serious problem by his parents, than his school based behavior is to his instructors.

A good deal of testimony was elicited at hearing concerning the manner in which the school's personnel evaluated student's behavior during the Eligibility Committee meeting, with respect to the West Virginia eligibility criteria for autism. The parents believe the school personnel tried to substitute their judgment for that of the psychology professional at the Quinn Curtis Center. The school's personnel insisted that only if the autistic behaviors happened in the school environment would they matter, when the question to be answered is whether a child should be getting special education.

I have located no caselaw, nor any explanation within the statutory law or regulations which identifies which approach is right. The West Virginia criteria for autism demands "documentation" of the characteristic autistic behaviors. Similarly, the federal regulations require a child to be evaluated as having autism. 34 CFR § 300. 8(a)(1). The Quinn Curtis Center Report documented such behaviors as a consequence of their evaluation of the student. Therefore, I find this report satisfies the documentation and evaluation requirements of state and federal law.

I also agree that as the school personnel assert, if he doesn't manifest the symptoms in the school environment, it cannot adversely affect educational performance and it doesn't support a need for special education. In this case, the finding that student satisfies the requirements of criterion one is not determinative of the demand for relief. Therefore, I make no finding as to which approach represents the correct process.

C. Criterion 3: The Autistic Condition Adversely Affects Educational Performance

Since there is no way to determine what student's educational performance would be if he were not autistic, the only way to determine if his performance is suffering some adverse impact due to his autistic condition, is to look at what his educational performance actually is, and compare it to norms for all students. In his 4th grade year, his second semester grades and his third quarter grades were a mixture of A's, B's, and C's and some non-letter grades of Satisfactory. While he did get D letter grades in the first or second quarters for math (2nd quarter), C.A.T.S (Science)(2nd quarter) and conduct (1st quarter), he achieved higher grades in the other quarter to bring up his average for the semester. In the 3rd quarter he received 2 "A" grades, 2 "B" grades, and 4 "C" grades. (Ex. P-M-7) His academic performance was described by his 4th grade teacher as "average," doing better in some things than others.

Evidence submitted at hearing indicated that student has had his intelligence evaluated on three occasions. In 2009 he was tested by the County School psychologist using the Wechsler Intelligence Scale for Children IV. He received a full scale IQ of 84, in the average range with subtest results falling between the low-average and average ranges. (Ex. P-E 11)

In April 2011 he was tested by the Quinn Curtis Center again using the Wechsler Intelligence Scale for Children, IV. He achieved an overall IQ score of 99, which is in the average range, with subtest scores ranging from low-average to high-average. (Ex. R-43-J at page 4)

Also in April 2011, he was given the Woodcock Johnson III Test of Cognitive Abilities by the school district psychologist and received an overall IQ score of 92, which also is in the average range. (Ex. R-43 I at page 3) Again, subtest averages varied from the low range (Processing Speed) to high-average (Verbal Ability and Comprehension) Notably, the evaluator indicated the verbal ability area, which is an area “influenced by formal and cultural exposure, appears to be fairly well developed and falls solidly in the high- average range.”

The picture presented is of an overall average student with abilities of somewhat varied levels, achieving grades of average (C) or better (the A’s and B’s). Grades of “ Satisfactory” are harder to characterize but would appear to indicate areas where there are no problems. It is hard to identify from this information where the adverse impact is making itself felt. His academic progress appears to be relatively good, and commensurate with his measured abilities.

Controlling caselaw is clear that a school district is not bound to provide a disabled child with the best possible education. The standard which the school district must meet is to provide an appropriate education, ie. A program “calculated to confer some educational benefit.” See: A.B ex rel D.B. v. Lawson, 354 F3d 315, 319 (4th Cir. 2004) . While trivial academic advancement will not constitute a Free Appropriate Public Education, the achievement of passing marks and advancement from grade to grade are important factors in determining whether educational benefit is being conferred. See, Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 207; ___; 102 S. Ct. 3034, ___ 73 LEd2d 690, (1982); and Hall ex rel Hall v. Vance County Board of Education, 774 F2d 629, 636 (4th Cir 1985)

Exactly how much benefit a child must receive from his education before his program will be deemed appropriate is not defined with exactitude in the available caselaw, but it has been indicated that the amount of advancement appropriate to a particular child will depend on the abilities of that individual child. See: In Re: Conklin, 946 F2d 306, 315-316 (4th Cir., 1991).

This student’s actual achievement levels are strong evidence that he is receiving an appropriate education, in line with his measured intelligence and abilities.

The Parents point to students “novice” ranking on the Westests he took in the 3rd and 4th grades. He received novice ratings, (which are the lowest given) in Science and Reading/Language Arts in the third grade. (Ex. P-E-23) On the 4th grade Westest he received three novice rankings in Science, Language Arts and Social Studies. It was the testimony of the elementary school principal, that these scores actually represented average scores on these tests in their respective years. (TR VOL. II at page 306-307, line 10 and Ex. R- 54) His 4th grade teacher also testified Westest scores were “ very low across the board” that year (TR VOL. II, page 251, lines 19-20 and page 252, lines 8-10.)

Further, the Westest represents a snapshot of a child’s performance in a given week, whereas his letter grades represent performance over a sustained period of time. Consequently, I believe his grades represent a truer and more comprehensive indicator of his academic performances and achievements over the course of the year. In addition, a standardized achievement test administered by the school district’s psychologist (ie. The Woodcock Johnson

Test of Achievement) which tested his abilities in reading, math and writing skills showed that all three subject results were solidly in the average range. (Ex. R- 43 I at page 4) I believe this test administered under controlled conditions is a good indicator of students overall educational achievement.

Student's behavior was another area of deep concern for his parents. However, his 4th grade classroom teacher and his 5th grade science/math teacher indicated his behavior was not significantly different than his classmates and did not present severe problems in the classroom. (TR VOL. II at page 191 line 23- page 192, line 14 and TR VOL. III at page 9) He has not been suspended from school for any behaviors in the classroom, nor has he been excluded from classroom instruction for disciplinary reasons. Student's main behavior problem in the classroom appears to be distractibility. However, as discussed above, his propensity to become distracted has not prevented him from achieving good to average grades.

The one area where student has presented behavior problems is on his bus. He has been suspended three times, for putting gum on another student, for using foul language, and for defying the instructions of the bus driver. These suspensions were sequentially for 1 day, 3 days, and 5 days. He also bullied a pre-kindergarten student by shoving him against the window. His mother was called on that occasion. While these misbehaviors are not trivial, I fail to see how they impact his educational achievement, nor was it demonstrated that these behaviors are related in any way to his autism. Additionally, I do not see how they indicate a need for special education. Special Education is "specially designed instruction" where the "content, methodology or delivery of instruction is adapted" for a student's unique needs. Nothing at the hearing indicated that student's behaviors arose from such a lack of specialized teaching, nor that such special instruction might, in any way, address his behavior. If anything, it indicates a need for a behavior plan, not special education.

In summation, since he appears to be a student of average abilities achieving average grades, matriculating normally from grade to grade, and his teachers report adequate classroom performance, I do not see how his autism adversely affects his educational performance. Therefore, Criterion 3 of the Autism criteria (as well as prong 2 of the 3 prong eligibility test) is not met by this student. Also, his academic achievement, as measured by report card grades, the Woodcock Johnson Achievement Test, and his matriculation from grade to grade, are strong evidence that student is receiving substantial educational benefit from his schooling.

D. Criterion 4: The Student Needs Special Education

Federal Regulation makes clear that to be eligible for special education there must be a need for special education and that need must be causally linked to the disabling condition. A child with a disability is defined to include a child with autism "who by reason thereof, needs special education and related services." 34 CFR § 300. 8(a)(1) (emphasis added).

In the case at hand, the student has been found to have autism and has been given that

diagnosis by a doctor of psychology. (Ex. R 43- A) However, as discussed in the section above, student's academic achievement has been on grade level. He is receiving passing or better grades in his studies and he is advancing normally from grade to grade. That is not to say that all is perfect. Student has demonstrated a tendency to becoming distracted, fidgety, sometimes speaking out of turn, and occasionally getting out of his seat at inappropriate times, and he sometimes over reacts to emotional situations. (P-CS 29 at page 11-12.) Also, there have been disciplinary infractions on the bus, (Ex. R-43-D) and on at least one occasion he twice threw a ball at another student's head during recess (Ex. P-E-25.) In the home environment, his behavior has apparently been even worse, resulting in significant destruction of property and frequent outbursts of temper (Ex. P-E-32.)

That being acknowledged, it must be stated that special education is "specifically designed instruction" i.e. "The content, methodology, or delivery of instruction is adapted, as appropriate to address the unique needs of the student that result from the students exceptionality, and to ensure access of the student to the general curriculum so that the student can meet the educational standards that apply to all students (Policy 2419, Chapter 4, Section 3, Three Prong Test of Eligibility at (3).) (Emphasis added). It would appear that if undisciplined behaviors are the problem, what is needed is a functional behavioral analysis, and the subsequent development of an effective behavior plan. This approach has apparently been undertaken by the parents and an initial behavior plan was drafted for implementation in January 2011. (Ex. P-E 32.) The school district was contacted by the positive behavior specialist, who is from Marshall University, but they declined to use her services (TR I, page 184, lines 6-21). The school district has also independently examined the prospects of a behavior plan (Ex. R-43-I, at page 12.) If a behavioral plan were found to be necessary for student, such a plan would be a supportive service, not special education. Such supportive services are defined as related services, (see 34 CFR § 308. 34 (a).), and a student who needs only related services, not special education, is not a child with a disability for purposes of the IDEA per 34 CFR § 300. 8(a)(2)(i). Neither does it qualify under state law; Policy 2419 succinctly states; "A student who only needs a related service and not special education is not eligible." (CSR § 126-16-3, Chapter 4, Section 3, Three Prong Test of Eligibility.)

Following the Eligibility Committee meeting on May 5, 2011, a student assistance team (SAT) meeting was held to determine what might be done to address the student's known weaknesses since he had not been found eligible for special education by the eligibility committee. The SAT report includes a list of supports identified as needed by student:

- "Redirect to Task
- Quiet place to go/ calm/ work
 - by choice
 - by teacher direction
- Social Skills Instruction
 - how to handle frustration
 - friendship

- Organization
 - Homework assignment, he writes and teacher checks
 - Check book bag
- Extra Set of books at home
- Extra Verbal Praise
- Locker at end, by room
- Have(4th grade teacher) meet 5th grade teacher and [student] goes to meet the school (with mom)- counselor will tour
- Underplanning at M.S. (middle school)
 - Social Skills instruction through counselor once a week or re-teach after lunch or 1st period (maybe more frequent] for several weeks)
- Use Word Processor for longer writing assignments”

(Ex. R-47 at page 3.)

Nothing in this list constitutes special education. Only the social skills instruction even remotely sounds like an adapted instruction, but it is to be delivered by a school counselor, and psychological services are expressly included in the list of related services stated in 34 CFR § 300.34(a).

An examination of the petitioners’ request for relief, included in the original complaint reveals that the relief sought was that he “be provided with an IEP and that the specific accommodations be provided to him:

- A. that the special educators at [the county schools] consult with the Quinn Curtis Center with regard to specific modifications that [student] requires;
- B. occupational therapy to address the difficulties he experiences with writing;
- C. the development and implementation of a plan to address the emotional outbursts that impede [student’s] learning;
- D. instruction in social skills to facilitate his interactions with peers; and
- E. other accommodations that would facilitate the delivery of a free appropriate education for [student].”

Original Complaint of the Petitioner at page five filed with the WVDE on August 18, 2011.

A review of this plea reveals that, with the exception of the request for an IEP document, it is substantively asking, in each case, for a related service. None of these requested services require any change to “the content, methodology, or delivery of instruction” Policy 2419, CSR § 126-16-3, Chapter 4, Section 3, Three Prong Test of Eligibility, 3. Further, any of these requested services could be provided outside the context of a special education program.

An examination of the evidence has disclosed no area where student requires specially

designed instruction. It does reveal related service needs, but those needs, standing alone, are expressly exempted from being determiners of eligibility. This student already has access to the general curriculum and is currently meeting at least the minimum standards that apply to all students, which is the goal which special education aspires to ultimately reach. Policy 2419, Chapter 4, Section 3, Three Prong Test, at no. 3. The student, therefore, does not have a need for Special Education.

VI. Conclusion

For the stated reasons, it is my finding that student does not meet the eligibility criteria to be identified as an eligible child with autism. Specifically, his condition has not been shown to adversely affect educational performance, nor does the student require special education.

VII. Directives for Implementation

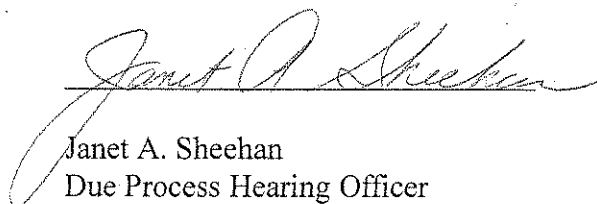
NONE

VIII. Appeal Rights

Any party aggrieved by the findings and decisions made in the hearing has the right to bring a civil action with respect to the due process complaint notice in any state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy within 90 days of the issuance of the hearing officers written decision.

Policy 2419, CSR § 126- 16-3, Chapter 11, Section 3 N

SO ORDERED


Janet A. Sheehan
Due Process Hearing Officer

Entered this 14th day of November, 2011