

**In the West Virginia Department of Education
Due Process Hearing D14-014**

Person Requesting Hearing

[REDACTED]
Parent

Counsel for Student and Parent

[REDACTED]
[REDACTED]
[REDACTED]

Student

[REDACTED]

Local Educational Authority (LEA)

[REDACTED] County Board of Education

Counsel for LEA

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Method of Transcription

Court Reporter

Hearing Dates

March 14, 17, 18, 2014

Type of Hearing

Closed to the Public

Student Present at Hearing

Appeared briefly before the first day of hearing

Hearing Officer

Janet A. Sheehan, Esq.
41 – Fifteenth Street
Wheeling, WV 26003

Witnesses – In order of appearance

Day 1 – March 14, 2014

Transcript VOLUME I

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

_____ (also testified
further on Mar. 17 & 18 Transcript
VOLUMES II AND III)

Day 2 – March 17, 2014

Transcript VOLUME II

Feb. to June 2012

[REDACTED] (Testimony taken telephonically)

Day 3 – March 18, 2014

Transcript VOLUME III

[REDACTED]

PRELIMINARY STATEMENT

FOLLOWING THE DUE PROCESS HEARING IN THIS MATTER, COUNSEL FOR BOTH PARTIES WERE INVITED TO SUBMIT MEMORANDA INCLUDING PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF THEIR RESPECTIVE POSITIONS. ALL PROPOSED FINDINGS, CONCLUSIONS AND SUPPORTING ARGUMENTS SUBMITTED BY THE PARTIES HAVE BEEN CONSIDERED. TO THE EXTENT THAT THE PROPOSED FINDINGS, CONCLUSIONS, AND ARGUMENTS ADVANCED BY THE PARTIES ARE IN ACCORDANCE WITH THE FINDINGS, CONCLUSIONS AND VIEWS AS STATED HEREIN, THEY HAVE BEEN ACCEPTED, AND TO THE EXTENT THAT THEY ARE INCONSISTENT THEREWITH, THEY HAVE BEEN REJECTED, CERTAIN PROPOSED FINDINGS AND CONCLUSIONS HAVE BEEN OMITTED AS NOT RELEVANT OR NOT NECESSARY TO A PROPER DETERMINATION OF THE MATERIAL ISSUES AS PRESENTED. TO THE EXTENT THAT THE TESTIMONY OF VARIOUS WITNESSES IS NOT IN ACCORD WITH FINDINGS AS STATED HEREIN, IT IS NOT CREDITED.

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I. PROCEDURAL HISTORY

The complaint and request for due process in this case was submitted to the West Virginia Department of Education (WVDE) by cover letter dated January 29, 2014, received by the WVDE on February 4, 2014, and assigned to this Hearing Officer the same day. An answer was filed by the LEA on February 14, 2014.

Correspondence was sent from the Hearing Officer to the parties' legal counsel on February 5, 2014. That communication set preliminary dates for the hearing on March 14, 17 and 18, 2014, and also scheduled an initial telephone status conference on February 13, 2014.

A first telephone status conference was held between counsel for the two parties, and the Hearing Officer as scheduled on February 13, 2014. Timelines for the hearing, Resolution session, post-hearing briefs, and issuance of the decision were discussed and agreed upon. A scheduling Order was entered and sent to the parties provided as follows:

A Resolution session was scheduled for Wednesday, February 19, 2014;

Evidentiary materials were to be exchanged by the parties by close of business March 7, 2014;

A final prehearing conference was set for Thursday, March 13, 2014;

The Hearing dates of March 14, 17, and 18, 2014 were confirmed.

Post-Hearing briefs were to be provided to the Hearing Officer by both parties no later than close of business on April 8, 2014; and

The final decision in the case was to be issued on or before Monday, April 21, 2014. On February 21, 2014, notice was sent to the Hearing Officer that a Resolution session had been held on February 19, 2014, but that "no agreement [was] reached."

On February 25, 2014, the LEA, by its counsel, requested that its psychologist consultant, named as a witness, be permitted to testify telephonically at hearing. The next day, February 25, 2014, Counsel for the student and parent made a similar request for one of her independent evaluators, a neuropsychologist. She further requested a subpoena *duces tecum* for the notes prepared by the LEA's psychologist consultant.

On March 5, 2014, the Hearing Officer entered an Order granting the cross motions for telephonic testimony by these two expert witnesses and providing for the production of the notes taken by the LEA's psychologist consultant, requested by petitioner's counsel.

A subpoena *duces tecum* was provided to Petitioner's counsel for her to serve.

The final telephone status conference was held as scheduled on March 13, 2014, with counsel for both parties participating. Counsel for the petitioners indicated that the hearing should be closed to the public and that Student would not be in attendance.

The Hearing was subsequently held over three days – Friday, March 14, 2014 and Monday and Tuesday, March 17 and 18, 2014. The student's parents appeared and brought the student to meet the hearing officer immediately before the commencement of the first day of hearing. After greeting the hearing officer, he left for school with his father.

It was noted again at the close of hearing that Post hearing briefs were due on or before April 8, 2014.

Although given opportunity, the respondent's counsel chose to give neither opening nor closing statements, reserving his arguments for his post-hearing submission. The petitioner's counsel made an opening argument, but no closing at the time of the hearing.

Post-hearing submissions were made by both parties. As scheduled on April 8, 2014, the "LEA's Proposed Findings of Fact and Conclusions of Law," as well as the "Parent's Proposed

Findings of Fact and Closing Argument,” were timely delivered for my review. Both submissions were read and considered in the writing of this decision.

II. ISSUES PRESENTED

1. Whether the student's communication needs have been met. Deficiencies alleged are the lack of provision by the Local Educational Authority (the "LEA") of a communication device or system available to Student for use across environments, as well as the lack of intensive speech therapy.

2. Whether Student has been provided adequate teaching of adaptive skills, including personal care and community life skills.

3. Whether Student's current existing Individual Education Plan (IEP) is being implemented during the school day, whether Student's behavioral issues are properly being addressed, and whether Student's time in the classroom is devoted to instruction.

4. This issue was raised concerning the Least Restrictive Environment appropriate to the student, it being alleged that Student attends a self-contained classroom and has no contact with non-disabled peers.

5. It is alleged that Student is failing to learn social skills and community navigation skills necessary to adult life because he is in a self-contained classroom.

6. It is alleged that Student's transition plan is inadequate and not implemented.

7. This issue complains that despite Student's restrictive placement, he is not being offered skilled instruction and related therapies needed for his progress.

8. The final issue alleges that the LEA has violated Student's rights under § 504 of the Rehabilitation Act of 1973, by keeping Student in a classroom where he has been subject to repeated aggression by another student.

III. FINDINGS OF FACT

1. Student is a male, born in March 1995, 19 years old as of the time of hearing. Original complaint and Parent's Exhibit 1 at p. 2.
2. Student's mother was appointed full guardian for Student by court Order dated February 24, 2014. Parent's Exhibit 1.
3. Student is essentially nonverbal. He has a history of seizures but none in the last six years. He is eligible for special education as a student with autism. He also has intellectual impairments and mild cerebral palsy. An independent evaluation of the student indicated numerous symptoms consistent with Autistic Disorder; as well as cognitive weaknesses, low adaptive functioning and language impairments indicative of an intellectual disability. His overall Intelligence Quotient (IQ) on the TONI-3-Nonverbal Intelligence Test was equivalent to a 5-year 3-month age level. The Peabody Picture Vocabulary Test (PPVT-4) also elicited a score in the extremely low range, equivalent to 5 years, 5 months of age. Parent's Ex. 1. An evaluation by the LEA's Speech Language Specialist produced similar results. LEA Ex. 6A. His daily living skills are also impaired. He is not able to independently wash his face, brush his teeth, button or zip clothing, or consistently use the toilet independently. Parent's Ex. 1.
4. Student attends school for a shortened period of time, arriving each morning at 8:40 a.m. rather than when the other students arrive. LEA Ex. 8A and 8B. There are a total of four students in his classroom and three fully certified special education teachers, as well as a student peer mentor during each class period. LEA Ex. 8B and 8C.
5. In April 2012, the LEA requested permission to reevaluate Student for Academic Achievement, Adaptive Skills, Intellectual Ability, Motor Skills regarding fine and gross motor skills and Self-Care Skills, and his diagnosis of Autism. The LEA had already obtained an

observational report of Student's functioning levels in the classroom prepared by his teacher, and an eligibility committee had determined Student was still eligible for special education services as a student with autism. Student's mother signed as a participant in the Eligibility Committee Report and as an IEP team member regarding the request for permission to reevaluate. Student's mother indicated she did not want any testing done by marking a large N for "No" beside every proposed evaluation. LEA Ex. 7 and Parent's Ex 14.

6. Student's mother similarly refused permission for reevaluations recommended by the LEA in 2009. Parent's Ex. 13.

7. Student has been enrolled in the LEA's schools since September 1998. LEA E. 8E.

8. Student is effectively nonverbal. What communication he is able to initiate is primarily through individualistic signs and gestures, augmented by a few well recognized signs (nodding, shaking head for no and yes, waving for goodbye), as well as a few American sign language signs. Testimony of Class Room Teacher, Transcript Vol. 3 (hereafter TR 3) at p 557, line 22 – p 558, line 2. Testimony of Speech/Language therapist, TR 3, p 577, line 10 – p 578, line 3. Others communicate with him by speech, pictures, symbols, and visual schedules. LEA Ex. 4 at p 10 of 18 and LEA Ex. D1, D2 and D3.

9. Efforts have been made to find an effective communication device for Student. His mother purchased a GO-TALK 90, a picture system of communication, but the Speech Language Specialist testified that Student perseverates on a single image, rendering it invalid as a communication tool. TR 3 at p 579, lines 3-10.

An iPad is also available to Student in the classroom. LEA Ex. 8B 9:00-9:15 timeslot. However, this has also proved to be unusable as a communication device for Student because he

just repeatedly hits the home button. He has also thrown the device when he gets frustrated. This behavior persists even though the device has been available to Student for at least the past two school years. LEA Ex. 22 note of 1/25/12. LEA 1C note of 12/3/13. TR 3 at p 581, lines 4—10.

The use of an iPad communication app called Proloquo was suggested by Student's mother as a possible means by which Student could be taught to communicate. The LEA's Speech Language Specialist testified concerning this program and indicated that Student would require grammar and syntax skills he does not possess in order to use it effectively. TR 3 at p 581, line 15-583, line 4.

Student received services from a physical therapist on an assistive technologies consultation between September 1, 2011, and January 3, 2014. This individual provided the LEA with an iPad, apps, and updates. He also consulted with Student's teachers after observing Student in his classroom. LEA Ex. 13.

Student has also been given access to a computer at school but when using it, he just hits all the keys. LEA Ex. 1C notes dated 12/2/13 and 1/13/14. Student's use of picture cards called PECS, was very inconsistent and if he got frustrated, he would just rip or throw them. TR 3 at p 584, lines 1-15.

While this may not represent all the augmented communication systems available on the market, it does demonstrate, at the least, that the LEA has made several good faith attempts to find a workable system for Student. Unfortunately, the efforts were unsuccessful.

10. The LEA's Speech Language Specialist indicated that direct speech language therapy services are not being given to Student because he has plateaued in this area, that is to say that his skills are no longer being improved by additional interventions. She testified that

regardless of interventions attempted, Student always just reverts to his natural idiosyncratic gestures. TR 3 at pp 577, line 24 – 578, line 3, and lines 7-12..

11. Student received services from an Occupational Therapist Consultant concerning sensory activities between October 20, 2010 and March 24, 2011, a total of 10 times. She also provided a number of exercises and activities for Student to use in a sensory room setting as part of his behavior management plan. LEA Ex. 13 and 14 and LEA Ex. 4, at p 9 of 18.

The use of a sensory room is included in Student's behavior plan as a quiet location for calming activities. LEA Ex. 4 at p 9 of 18.

Activities and exercises for use in the sensory room include bouncing and rocking on a ball, rolling and throwing large and small balls. LEA Ex. 14. He has a fidget box with toys he can use to calm himself. TR 3 3/18/14 at p 540 lines 4-8. He also has a brush for sensory stimulation. TR 3 at p 540, line 6.

The Autism Consultant utilized by the LEA noted and endorsed the use of sensory and activity breaks for Student and further noted that Student was using and making requests to use the sensory room. LEA Ex. 17 notes dated 3/26/12 and 4/24/12. Student's use of the sensory room is also reflected in communications between the school and Student's mother. LEA Ex. 22. On 2/15/12, Student's communication book indicates he was receiving sensory exercises and on 2/17/12, the teacher noted "I took him to exercise with the exercise ball twice." The note of 2/21/12 likewise reflected that Student was taken "to exercise room to complete sensory exercises." LEA Ex. 22. Sensory activities are to be provided to him for 150 minutes per week. LEA Ex. 4 at p 14 of 18.

12. Student's present levels of performance set out in his most recent IEP of 4/17/13, indicated that Student is capable of daily living skills such as washing dishes and laundry. "[He]

washes dishes with hand-over-hand assistance from the teacher. He needs to be verbally prompted and reminded continuously throughout the task. [Student] is successful in identifying signs commonly seen in the community. (ie Stop, hospital, school, crosswalk) He is able to match signs to their proper locations within the community. He is able to locate and utilize tools needed for daily living skills such as eating utensils, laundry soap, paper towels and hand soap. [Student] requires assistance in using the restroom. He must be verbally prompted to pull his pants down far enough before using the urinal and to stand close enough to use it without incident. In addition, [Student] must be reminded continuously to use the proper sign for his need to use the restroom rather than grabbing himself. [He] is able to navigate public places with adult supervision. He will show signs of being overwhelmed in public settings. He may frantically sign that he needs to use the restroom or that he wants his Nana. He may also grab adult's clothing, try to run, and climb over seats. These escape behaviors will continue until [Student] is removed from the area. Throughout the year, [he] participated in class field trips to Pizza Hut, McDonald's Ponderosa, and a movie theater. During these trips, it was best for one person to be assigned primarily to [Student]. LEA Ex. 4 p 10 of 18 ¶ describing "function."

13. Life Skills Goals included in Student's last IEP of 4/17/13 included Behavior Goals of: Respect personal space of others, Self-monitor sensory needs and manage break times; Access Skills of: Communicate wants and needs, and Express Wants and needs in a community setting, and Functional Skills; Communicate need to use restroom, and Correctly use eating utensils when eating. LEA Ex. 4 at pp 11 and 12 of 18.

14. Student's academic subjects are being presented with a functional purpose. Student's functional math goals are to identify correct time on a clock by whole and half hours, and identify the value of a given amount of money. LEA Ex. 4 at p 12. These were to be

achieved with 75% accuracy using verbal prompts and picture cards. Student's Reading/Language Arts goals were to identify character, setting, plot of story, and demonstrate the sequence of a story. LEA Ex. 4 at p 13 of 18. The teaching of these materials helps Student with listening skills and promotes understanding of cause and effect.

15. A review of Student's daily schedule, provided in LEA Exhibit 8B, reflects that much of his day is spent learning functional skills. He arrives at school at 8:45 and is dismissed at 2:30.

8:45–8:50 is school day prep: "Accessing school building; walking to class through hall with proper gait; appropriate social mannerisms/interactions with others; taking off outerwear and storing supplies; reviewing personal daily schedule. "

8:50–9:00 is Breakfast and Personal Hygiene "Exhibits appropriate table mannerisms, responsible for cleaning up after himself, utilizes restroom facilities, including urinal (when needed), sink, soap dispenser, paper towel dispenser, garbage can and light switches." LEA Ex. 8B.

9:00–9:15 "Individualized ELA Personal Information, number identification, colors, days of the week, months of the year, people, places, and things—Using teacher-made materials and personalized iPad, finger control and signing." LEA Ex. 8B. Although these might be considered conceptual learning, they are highly functional as well, since Student could hardly be expected to function in the community without an understanding of these basic foundational concepts. The emphasis on iPad use, finger control and signing is a clear effort to assist Student to communicate with others.

9:15–9:30 Classroom Morning Meeting

"Group Activities including but not limited to: personal sharing, calendar activity, weather

activity, choosing lunch options, counting and/or pointing by tens, counting and/or pointing by fives and signing.” LEA Ex. 8B. Again, these activities are all basic to understanding community life and the fact that these activities are done in a group promotes social interaction and communication with others.

9:30–9:45 Group ELA “Story time; Theme changes monthly.” LEA Ex. 8B. Again, this is a group experience with opportunities for socialization and communication with others.

9:45–10:15 Group News 2 U Curriculum:

Communication/Speech, Pragmatics, ELA, Reading, Social Studies, Math, Life and Adaptive Skills “Weekly factual articles with a specific alignment with WV Nx GCSO’s ...” LEA Ex. 8B. The fact that this area of emphasis expressly interweaves work on communication/speech, pragmatics, and life and adaptive skills strongly indicates its value towards the attainment of functional goals.

10:15–10:45 Lunch

“Personal Hygiene (prior to eating) and lunch, socialization with typical peers.” LEA Ex. 8B. There is little that could be more practically functional than learning to eat and keep yourself clean.

10:45–11:00 Socialization

“Structured leisure time with classmates and student aides (specific choices provided on a daily basis, choices are related to the monthly theme).” LEA Ex. 8B. One of Student’s IEP behavior goals is management of break times as part of his development of social skills. LEA Ex. 4 at p 11 of 18.

11:00–11:30 Related Arts

On Mondays and Fridays this time is given to Computer Lab. “Utilizing keyboard with prompts

accessing websites (related to monthly theme); reinforcement of skills (Writing, Language Arts, Reading, Science, Social Studies, etc.)”

On Tuesdays and Thursdays Student attends Arts and Crafts “Related to monthly theme; with typical peers during regularly scheduled Arts and Crafts class.”

On Wednesdays Student practices “Communication Skills ...: Small group with typical peer, working on pragmatics, conversational turn taking, signing, manners, personal space.” LEA Ex. 8B. The Arts and Crafts and Communication skills classes, in exposing Student to typical peers, gives Student opportunity for observation of social behavior and norms highly valuable in the community and presents an opportunity for interactions with typical peers. While the value of the Computer Lab is less evident to me, a familiarity with computers is becoming a basic skill much like handwriting was in the past. Devoting an hour a week to it, especially when used to reinforce the other academic instruction, does not seem unjustified.

11:30–12:00 Math

“Money, time, simple addition, number recognition, number computation, patterns, matching, ordering by size/concepts, number order. Using manipulatives, visuals, teacher-made materials.”

LEA Ex. 8B. Again, the math concepts here are foundational to the most basic understanding of life in the community. While they may be conceptual in nature it would be hard to function in any vocational setting without understanding them.

12:00–12:30 Science

“Temperature, chemical reactions, science activities related to monthly theme, News 2 U Curriculum, WVNx GCSO’s; Each Friday is a science experiment and/or a cooking lesson.”

LEA Ex. 8B. Without more information, it is hard to tell how functional the curriculum is here, but certainly an understanding of temperature and chemical reactions would be useful to Student

in his transition plan to work in a laundry facility. The cooking lesson is also highly functional, and focused on helping students become more independent.

12:30–1:00 Physical Education, adapted to Student's needs.

This is Student's other class in a general education environment, (LEA Ex. 8B) giving him opportunities to interact with and observe typical peers. It also serves the same objective of enhancing physical welfare through exercise for Student as it does for any other student.

1:00–1:15 Hygiene and Snack

"Utilizes restroom, including urinal (when needed), sink, soap dispenser, paper towel dispenser, garbage can, and light switches. Exhibits appropriate table manners, responsible for cleaning up after himself, chooses snack and drink from cabinet refrigerator, eat appropriately." LEA Ex. 8B. Both the appropriate use of the restroom and the exercise of appropriate table manners are functional goals in Student's current IEP. LEA Ex. 4 at p 12 of 18. Further, Student's development of good toileting habits was identified by all three psychological experts at hearing as an exceedingly important factor in his ability to obtain vocational placement after he leaves the school environment. TR 1 at pp 25, line 23-26, and line 9, and pp 187, line 16-188, line 1, and TR 2 at p 483, lines 13-21.

1:15–1:30 PCI Reading

"Research based program individualized for [Student]. Includes listening skills, picture cards related to story content, read to him by teacher, comprehension skills (pointing to specific content), sign vocabulary." LEA Ex. 8B. Learning to listen, identify objects in pictures, learn receptive vocabulary and express himself by pointing at pictures, all have the potential to develop cognitive and communication skills which would greatly benefit him in a vocational setting.

1:30–1:55 Life Skills/Vocational Skills

(in classroom) “Matching colored objects with manipulatives (fine motor skills), folding towels, sorting silverware, measuring specific amounts of food, sorting objects and combining (nuts/bolts)...” LEA Ex. 8B.

These are activities which are components of many simple jobs and could be useful across both home and vocational settings. Further, as Student has fine motor difficulties due to his mild cerebral palsy, the activities that help develop fine motor skills would be of particular benefit to him.

1:55–2:00 Transition to Main Office and Preparation of Departure Materials

“Get book bag, communication book, coat, other clothing as needed.” LEA Ex. 8B. Learning basic organizational and transitional skills are necessary if Student is going to work in any vocational setting.

2:00–2:30 Vocational Skills in Main Office

“Shredding, copying on copier, interacting with student peers/office worker, washing tables, pushing in chairs/aligning tables with chairs, spraying and wiping windows, and other duties as they arise.” LEA Ex. 8B.

These are basic work activities which could be generalized to many settings and occupations at home and in the workplace.

After looking at the numerous activities included in Student’s daily schedule, it is evident that Life Skills and Functional Learning are the emphasis of the great majority of Student’s school day. LEA Ex. 8B

16. Frequency data was collected during the 2013-14 school year on a weekly basis regarding how well Student managed his break time, whether he used the restroom appropriately and whether he used his utensils when eating. LEA Ex. 16B

17. Data was also collected during the 2013-14 school year on how well Student performed activities identified during the arrival skills, breakfast and hygiene skills, morning reading and PCI and News 2 U portions of Student's day. A total of 104 discreet abilities/activities are tracked on these data sheets. LEA Ex. 10.

18. Student's mother received notices of proposed evaluations on 3/16/98, 1/25/00, 10/22/03, 5/28/04, 5/4/04 (for assistive technologies) and IEP meetings on 4/4/00, 1/8/01, 5/1/03, 3/19/04, 4/5/06, 4/3/07, 4/18/08, 4/1/09, 3/30/10, 4/12/10 (2 documents), and 4/1/11 and eligibility committee meetings on 1/3/01 and 11/24/03.

Eighteen of these notices indicate that a procedural safeguards brochure was provided to Student's mother. She signed each of these forms and returned them to the school district. LEA Ex. 24. It is my conclusion from this evidence that Student's mother was provided information from the school district advising her of Student's rights under the law and that any lack of knowledge on her part was due to her own oversight of this material.

19. Student's mother testified that she had "given up on this school district a long, long time ago." TR 2, 3/17/14 at p 309 line 23-24, and this happened when Student was only five or six years of age. TR 2, 3/17/14 p 334 at lines 10-18.

20. Student's behavior is frequently a significant obstacle to his learning and a challenge to his teachers and fellow students. LEA Ex. 4 at pp marked 3-4 of 18. A behavior support plan was included in his IEP of 4/17/13 prepared for the present school year. LEA Ex. 4 at pp marked 8-10 of 18. The same behavior support plan was previously included in Student's

IEP of 4/20/12 prepared for the 2012-2013 school year. LEA Ex 5 at pp marked 10-12 of 21. This behavior plan was created by the LEA's own behavior interventionist following an in-house assessment on 3/28/12. LEA Ex 5 at p 5 of 21. This behavioral interventionist also attended the IEP meeting of 4/20/12 which Student's mother also attended. LEA Ex 5 p 1 of 21.

21. One of Student's special education teachers kept a daily log of classroom events throughout the current 2013-14 school year.

Therein, are numerous references to occasions when Student exhibited behaviors that would interfere with his access to learning. There were notes on 11/8/13, 11/12/13, 11/19/13, and 11/20/13, that he could not be induced to get up off the floor. On 11/25/13 he wouldn't get off the bus and then didn't want on the bus in the afternoon.

There are references to agitated or "hyper" behavior on 11/14/13, 11/20/14, an undated note "Student hyped up," 11/25/13, and 1/10/14. Further, he was noted as uncooperative or reluctant at his work on 12/3/13, 12/5/13, 12/6/13, 12/16/13, 12/17/13, 1/9/14 and 2/6/14 "off task all day.") LEA Ex. 1C.

22. Student has, following lunch room incidents on 11/10/11 and 11/14/11, been assigned to eat lunch in his classroom in the company of a classroom teacher rather than in the cafeteria with his classmates. LEA Ex. 22 note of 11/14/11. It was noted by his teacher that the lunch room "is very loud."

This year the practice continues but he does have one student peer from the LEA's student mentor program who also socializes with him during this time. LEA Ex. 8B entry for 10:15-10:45.

23. Student is in a classroom with three certified special education teachers assigned to it. LEA Ex. 8B. There is also a non-disabled student peer assigned to the classroom between

8:50 am and 2:30 pm. LEA Ex. 8B. Including Student, there are four students in his classroom. LEA Ex. 8C. Student attends an adaptive physical education (P.E.) class and related arts class with non-disabled peers. LEA Ex. 4 pp 14–15 of 18. He has at least one and at times, up to three, special education teachers available to him throughout the school day. LEA Ex. 8B. Other than the P.E. and related arts classes, Student's program is provided in a self-contained special education classroom. LEA Ex. 4 p 14 of 18. Student's correct placement classification is Special Education: separate class (general education less than 40%). Testimony of LEA Special Education Director. TR 3, 3/18/14 at p. 650, lines 13–16. The indication on his IEP that he is General Education part time is a clerical error caused when the calculation was performed using a 8400-minute -per week schedule (what most students receive), rather than on a 6900-minute per week schedule, which is what Student attends. TR 3, p 650, lines 1–12.

24. Student's school has a student peer program. These are non-disabled high school students who receive class credit for their participation and assistance in the special education classroom, and completion of a related essay. LEA Ex. 15. One or more student peer(s) are in the classroom throughout the school day. LEA E. 8B.

25. During his school day, Student sees non-disabled peers in the hallway from 8:45–8:50, he has socialization at lunch with student peers from 10:15–10:45, he has leisure time with classmates and student peers from 10:45–11:00. His art class, 11:00–11:30 Tuesday and Thursday is with regular education students, as well as the same time slot on Wednesdays when he has communication skills times with a typical (non-disabled) peer and from 12:30–1:00 daily he has physical education in a general education setting. LEA Ex. 8B.

26. The LEA has made efforts to implement a transition plan for Student. Transition planning was included in Student's IEP on April 20, 2012. It was noted that Student would

further self-help and job training through rehab services. It was also stated that "after high school [Student] would like to work for a laundry service through rehab services and exploration using a job coach." LEA Ex. 5 at p 7 of 21. A transition IEP checklist, a parent survey and student survey, both completed by Student's mother, were included at the back of the IEP document, setting out information about Student's understanding abilities, personality, likes and dislikes, interests and plans for the future. LEA Ex. 5.

In the most recent IEP of 4/17/13, Transition planning was again included among the areas to be addressed. LEA E. 4, pp 5-6 of 18. A new parent survey was included and representatives from the State Department of Rehabilitative Services and the County Sheltered Workshop were invited and in attendance. LEA Ex. 4 behind p 18 and at p 1 of 18.

Student's mother signed a permission slip for these two agencies to attend the IEP meeting, which notes that the Sheltered Workshop is also the laundry facility. LEA Ex. 4 at p 21. In reporting Student's future career interests in 2012, Student's mother thought Student might like to own a Laundromat, work for a laundry service or repair washers and dryers. LEA Ex. 5 at p 30 ("What's My Bag") And in a survey for transition planning "Plans for the future," to the question "What kind of work would you like to be doing, if any, during the next year?" the answer "laundry" was given. LEA E. 5 at p 34.

Parent, by counsel, now complains that the transition plan has been limited in its offerings, and is requesting job sampling rather than just the county laundry. TR Vol. 1, 3/14/14 at p 12, lines 2-7. Student's day includes vocational skills from 2:00-2:30 in the school's main office. The description of these activities states: "shredding, copying on copier, interacting with student peer, office worker, washing tables, pushing in chairs/aligning tables with chairs,

spraying and wiping windows, any other duties as they arise.” All of these activities are basic job skills that could be used in an office, food service, or light industrial setting.

27. Student was accosted and punched by another student, D.M., on the bus in August 2013. Parent’s Ex. 17. In that event, Student suffered a black eye, scratches to his face and cuts in his lip and mouth. Parent’s Ex. 3 at p 1. The mother of D.M. also testified that she had called the petitioner “many, many times” and said “I’m sorry. I heard [D.M.] had a behavior, you know, and [Student] ended up with, you know—got hit in the process, you know, I’m sorry.” TR 1, p 127, lines 18–22. From this testimony it is impossible to tell how many times these events are supposed to have occurred, with what frequency, and what, if any, damages were inflicted on Student as a consequence.

28. Student suffered some mood changes following the assault on the bus. He started to avoid going to school and was more irritable than usual. He had tantrums when told to get on the bus. There was also an increase in self harming behaviors like hitting his head when he had to ride the bus. Problems also included increased bed wetting and a reluctance to eat. Parent’s neuropsychologist found a reasonable degree of medical certainty that these emotional problems arose due to the assault on the bus. Parent’s Ex. 3.

29. At the time of the assault on the bus, the aggressor, D.M., was accompanied by a bus aide who sat in the seat across from him. As soon as he stood up, the aide intervened. She was physically in between D.M. and Student at the time of the assault. She draped herself over Student trying to protect him. She was bitten on her back by the aggressive student during the altercation. Parent’s Ex. 3, p 1.

30. The aggressive Student, D.M., was not in Student’s class this year. LEA Ex. 8C.

31. Parent's neuropsychologist makes a number of recommendations in her report. The first of these is that he be "transferred to a more intensive educational setting like an approved private school and/or partial hospitalization to help stabilize his behaviors and optimize his learning potential. Second, that Student receive a psychiatric evaluation, and third that he obtain a "life coach" to increase his level of functional independence." The second recommendation is medical in nature. Only the first is educational and it is completely conclusory. She does not identify what is needed by Student (i.e., programs/services) that can only be provided at a private school or hospital. Parent's Ex. 3 at p 13-14.

32. Many of the interventions suggested by the neuropsychologist (Parent's Ex. 3 at p 14-16) have/are being used by the LEA for Student. The peer mentoring program at Student's school gives him opportunities for adult-facilitated interactions with peers (Educational intervention 2). Student was receiving speech/language therapy until it was found that he had reached a plateau where additional interventions no longer gave him benefit (educational intervention 3) TR 3, testimony of Speech/Language Pathologist at p 578, lines 6-12, p 601 at lines 13-16, LEA Ex. 12A.

Student has been provided with various communication systems, without major success. (See Finding of Fact 9) (Educational intervention 4).

Student presently has sensory exercises, a sensory room and fine motor skills exercises provided to him by the LEA and has received O.T. consultation services (suggestion 5). LEA Ex. 13, 14, Demonstrative Exhibit D3 (photos of sensory room.).

The family has been linked to the West Virginia Division of Rehabilitation Services, who sent a representative to Student's most recent IEP meeting (suggestion 6) LEA Ex. 4 at p 2 (marked 1 of 18).

Student is provided with familiarity and structure at school. He has a schedule which is essentially the same every day and he is taught in small groups or individually. (suggestion 7, but marked 1). LEA Ex. 8B. Student's IEP includes presentation accommodations, response accommodations and timing accommodations (suggestion 8, but marked 1) LEA Ex. 4 at pp marked 16-17 of 18. Visual aids are used extensively with student (suggestion 8, marked 2) LEA Ex. D1, 2, 3. Additionally, reinforcers for Student have already been identified and included in his present IEP. LEA Ex. 4 at p marked 10 of 18 and TR 3 at p 590, lines 3-8. Student currently engages in small socialization groups in his classroom. LEA Ex. 8B entries for 10:45-11:00 daily, and 11:00-11:30 Tuesday, Wednesday and Thursday.

The other educational suggestions of the neuropsychologist all involve the use of specific methodologies for teaching.

33. Similarly, the recommendations of a psychologist from whom the Parent obtained an Independent evaluation, largely mirror steps already taken and/or presently being used with Student. Adaptive skills are included in his daily schedule. LEA Ex. 8B at 8:45-8:50, and 8:50-9:00, 10:15-10:45, 1:00-1:15. Specifically, adaptive skills of personal hygiene, toileting, and managing his clothing are being tracked and data collected regarding his compliance/progress. LEA Ex. 10.

Reading is presented to student in a functional approach and data collected regarding his recognition of sight words. LEA Ex. 10, 16A, D1, 2, 3.

Errorless learning techniques are being used with Student. TR 2 at p 464, lines 4-23. Reinforcers are used to motivate him. LEA Ex. 4 at p 10 of 18, TR 3, p 590, lines 3-8. As discussed earlier, multiple efforts have been made to find a means of communication for Student. Finding of Fact 9, above.

34. In spite of the behavior plan in place, Student exhibited behaviors worthy of note on 9/10/13, "cantankerous today,"; 9/11/13 "trouble working in gym and art today,"; 9/20/13, "banged head on desk...,"; 9/24/13, "hard time in art,"; 11/21/13, "but uncooperative this afternoon,"; 11/22/13, "very worked up this afternoon. He banged his head,"; 12/5/13, "He got mad and threw a cup,"; 12/9/13, "He was not thrilled to do his work today,"; 12/13/13, "He was "wound up" in the afternoon,"; 2/21/14, "He was not wanting to work today,"; Undated note above 1/15/14, Student "was very agitated all day today. He would obsess a great deal and has difficulty doing his work,"; 1/15/14, Student was agitated on arrival in AM, settled down, and then had difficulty doing work after lunch,; and on 2/6/14, he wanted to be left alone and cried. LEA Ex 11 Daily communication log book for the 2013-14 year, before the behavior plan was put in place. However, a review of documented behavior prior to the institution of the behavior plan of 3/28/12, reveals that Student's behavior was considerably more extreme, disruptive, aggressive and potentially injurious to himself and others during the 2011-2012 school year. Teacher notes reflect the following: On 9/26/11 he was pushing a table and banging his own head; on 10/17/11 he was "very agitated" and hitting himself; on 10/26/11 he threw his orange juice carton and pounded his cup; on 10/28/11 he banged his own head and disrobed, including his underclothes, three times in class; on 11/1/11 he pulled his teacher's hair, bit his own tongue and hit himself in the head; on 11/8/11 he hit his own head and pulled another boy's hoodie strings tight and wouldn't let go; on 11/10/11, he was very agitated and restless at lunch and he tossed his entire lunch tray onto another student after pushing his chair back and pushing on the table. On 11/14/11, he pulled a staff member's hair hard and repeatedly, and shoved the lunch table into other students. Following this event, Student was assigned to eat in the classroom with a teacher. Further references to misbehaviors are reflected on the record on 11/16/11, 11/17/11,

11/18/11, 11/22/11, 11/29/11, 1/15/12, 1/9/12, 1/10/12, 1/11/12, 1/9/12, 1/20/12, 1/23/12, 2/1/12, 2/10/12, 2/15/12, 2/16/12, 2/17/12, 2/21/12, 2/22/12, 2/23/12, 2/24/12, 2/27/12, 2/28/12, 3/8/12, 3/9/12, . 4/16/12, 4/17/12 and 4/20/12. These behaviors ranged from the merely distracting, such as vocalizations, to the truly startling. For instance, on 2/15/12 he tried to knock his teacher down, completely flipped over a table in the classroom and threw a binder and folder trays all over the floor. LEA Ex. 22 daily communication book entries for 2011-12 school year.

Overall, I have to conclude that the behavior plan's implementation has coincided with a general improvement in his behaviors reducing both the severity and the frequency of misbehaviors, and apparently eliminating the most aggressive behaviors.

IV. CONCLUSIONS OF LAW

1. A due process complaint must be initiated within two years of the date the parent/adult student or district knew or should have known of the disputed decision or alleged action that forms the basis for the complaint. The two-year timeline will not apply if the parent/adult student was prevented from filing a complaint due to specific misrepresentations by the district that it had resolved the problem forming the basis of the due process complaint or the district's withholding information it was required to provide to the parent/adult student. WV Policy 2419, Chapter 11, Section 3A, at second paragraph.

2. 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. WV Policy 2419, Chapter 11, Section 3A, at third paragraph.

3. A school district cannot discharge its duties under the IDEA by providing a program that produces only minimal or trivial academic advancement. Carter v. Florence County School District Four, 950 F.2d 156, 160 (4th Cir. 1991) aff'd 510 U.S. 7; 114 S. Ct. 361; 126 L.Ed. 284 (1993) citing Hall ex rel. Hall v. Vance County Board of Education, 774 F.2d 629, 636 (4th Cir. 1985). But neither is it required to provide every service or accommodation which might bring a child with disabilities an educational benefit. In re Board of Education of Hendrick Hudson Central School v. Rowley, 458 U.S. 176, 199; 102 S. Ct. 3034, 3047; 73 L.Ed. 2d 690, ____ (1982).

4. The basic right to a Free Appropriate public education guarantees a child "access to special instruction and related services which are individually designed to provide educational

benefit to the handicapped child.” Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 201, 73 L.Ed 2d 690, 708, 102 S. Ct. 3034, ____ (1982). An IEP is therefore adequate if it is “reasonably calculated to enable the child to receive educational benefits...Id. 458 U.S. at 207, 73 L.Ed 2d at 712.

5. “[C]ourts must be careful to avoid imposing their view of preferable educational methods upon the States.” Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 207, 73 L.Ed 2d 690, 712, 102 S. Ct. 3034, 3051 (1982). It is left to the state and local educational agencies in cooperation with the parents to choose the educational method best suited to the child’s need. Id. 458 U.S. at 207, 73 L.Ed 2d at 712-713, 102 S. Ct. at 3051.

6. Special Education Services provided to handicapped children are not guaranteed to produce any particular outcome. Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 208, 73 L.Ed 2d 690, 713, 102 S. Ct. 3034, 3052 (1982). The amount of appropriate advancement will vary depending on the abilities of the individual student. See, In re Conklin, 946 F.2d 306, 315-316 (4th Cir. 1991).

7. “To state a claim under § 504, a plaintiff must plead discrimination ‘solely by reason of his or her handicap’ Walker v. District of Columbia, 157 F. Supp 2d 11, 35 (DDC 2001)...Not every violation of IDEA also constitutes a violation of § 504, Torrence v. District of Columbia, 669 F. sup. 2d 68, 71 (DDC 2009). Rather ‘Something more than a mere failure to provide the [FAPE] required by [IDEA] must be shown’ to demonstrate discrimination solely on the basis of the student’s disability. Lunceford v. DC Board of Education, 745 F.2d 177, 1580 (DC Cir. 1984) (quoting Monahan v. Nebraska, 687 F.2d 1164, 1170 (8th Cir. 1982) (interpreting EHA of 1975, a precursor to IDEA). A plaintiff may satisfy this requirement by

alleging that any failure to provide a FAPE resulted from either bad faith or gross misjudgment. Torrence, 669 F.Supp. 2d at 71 (citing Monahan, 687 F.2d at 1171)" Williams v. District of Columbia, 771 F.Supp. 2d 29, 31 (DDC 2011).

8. With regard to transition services: "Beginning with the first IEP to be in effect when a student is sixteen years old...the IEP must include:

- 1) Appropriate, measurable post-secondary goals related to independent living skills, if needed;
- 2) Appropriate measurable post secondary goals based upon age appropriate transition assessment related to training, education and employment; and
- 3) Transition Services (including courses of study) needed to assist the student in reaching post secondary goals identified in the IEP."

The goals and transition services must be updated on the IEP annually."

West Virginia Regulations for the Education of Students with Exceptionalities, Policy 2419, (Hereinafter, WV Policy 2419) Chapter 5, section 2F (effective 7/1/12).

9. "Special Education rights will transfer from the parent to the student when the student turns eighteen years old unless the parent has obtained legal guardianship" WV Policy 2419, Chapter 5 Section 2F (effective 7/1/12). In this case, the parent obtained legal guardianship of Student as of 2/24/14, (Parent's Ex. 1) and therefore she had full legal capacity to prosecute this matter at the time of the hearing.

10. "The party requesting a due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint unless the other party agrees otherwise" WV Policy 2419, Chapter 11, Section I. Due Process Hearing Rights.

In the instant matter, no agreement by the LEA or its counsel was voiced to permit the consideration of additional issues not identified in the original complaint. Consequently, this decision will be restricted to those issues clearly identified in that original complaint. The Complaint did not raise any procedural issues, so those raised in the post hearing submission of the Parent will not be considered.

11. A placement in a Special Education: Special School, whether public or private, is definitionally a more restrictive educational environment than students in a Special Education: Separate Classroom. See WV Policy 2419, Chapter 5, Section 2J. Least Restrictive Environment Considerations and Placement Decisions, p 53.

12. "Students must be educated in the Least Restrictive Environment. This means that [a]n eligible student must be educated with general education students in the general education classroom to the maximum extent appropriate. Removal from the general education environment occurs only when the nature or severity of the exceptionality is such that education in general classes and other settings with general education students cannot be achieved satisfactorily even with the use of supplementary aids and services." WV Policy 2419, Chapter 5, Section 2, LRE. Considerations and Placement Decisions, p 51 (see also 34 CFR § 300.114(a) authorized by 20 U.S.C § 1412(a)(5)).

The evidence submitted by the parent seemed to argue in favor of a special education: Separate School placement, both psychological experts testifying for Parent indicating a more intensive program in a private school or partial hospitalization was desirable for Student. Therefore, the Special Education: Separate Classroom environment, in which he is now placed, is the less restrictive of the placements promoted by the two parties, and must be continued unless his educational program cannot be provided appropriately there.

13. Public school students with exceptionalities are entitled to educational services through the end of the school year in which they reach their twenty-first birthday. See WV Policy 2419, Chapter 5, Section J, subsection "Placement Decisions: Placement Decisions for Students Six through Twenty-One" at p 52. Student was eighteen when he began this school year, so he is entitled to continue to attend school for up to three (3) more school years.

14. A FAPE is defined by the State of West Virginia as expressly the same as that provided for under IDEA 2004 (20 U.S.C. § 1400 et. seq.) WV Policy 2419, Chapter 1, Section 1, at p 4.

15. The severity of a child's handicaps are an appropriate consideration when making the determination of whether the child has made adequate progress.

As stated by the 4th Circuit Court of Appeals, "Some children due to the extent of their handicaps will never be able to perform at grade level, and will require several years to achieve what would be to a non-handicapped child, a year's worth of progress" In re: Conklin, 946 F.2d 306, at 316 (4th Cir. 1991).

16. Policy 2419, Chapter 3, Section 3 C.3. states "Neither written notice nor consent is required for ... 3) Screening, including monitoring of progress by a teacher or specialist, to determine the appropriate instructional strategies for curriculum implementation." In the present case, the student's record reveals that Student was screened and/or his progress monitored by a speech/language pathologist, an Occupational Therapist, a Physical Therapist, a behavior interventionist, and a psychologist experienced with autistic students. No prior written consent was obtained or necessary for these screenings.

17. Within three years of the date of the last EC, or more frequently if the parent or teacher requests or conditions warrant (e.g., if the district determines that the educational or

related services needs, including improved academic achievement and functional performance, warrant a reevaluation), the district shall conduct, as appropriate, an individual multidisciplinary reevaluation to determine a student's educational needs and continued eligibility for special education and related services and whether any additions or modifications to the student's special education and related services are needed to enable the student to meet their measurable annual IEP goals and to participate, to the extent appropriate, in the general education curriculum. As part of the reevaluation, the IEP Team and other qualified professions, as appropriate, must review existing evaluation data on the student.

WV Policy 2419, Chapter 3, Section 2B. Clearly, West Virginia's special education provisions empower parents to request reevaluations regarding related service needs.

18. "A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with [34 CFR] § 300.304 through 300.311 —

(1) If the public agency determines that the educational or related services needs, including improved academic performance and functional performance, of the child warrant a reevaluation; or

(2) If the child's parent or teacher requests a reevaluation."

34 CFR § 300.303(a) (authorized by 20 USC § 1414(a)(2))

From this rule, promulgated for the implementation of IDEA, it is clear that parents have the power under Federal Regulation to request reevaluations for their student/child concerning related service needs such as whether a student could/would benefit from an augmentative communication device or system.

V. DISCUSSION

Introduction

The student herein is now nineteen years of age with a primary eligibility of Autism. He is also cognitively impaired with an IQ equivalent to a child aged 5 years and 5 months. He is essentially nonverbal and communicates with just a few words, and a small number of gestures or signs. He is frequently distracted or restless in the classroom. Sometimes he cannot be induced to sit or move to the location his teachers request. He is sensitive to noise and has a difficult time where there are many people present. He receives his education primarily in a Special Education self-contained classroom. He eats lunch in his classroom with one teacher because he cannot behave himself consistently in the clatter of the cafeteria. He has a behavior plan in his IEP which includes daily use of a special room for sensory exercises, which frequently seem to calm him. He is prone to toileting accidents in spite of regular bathroom breaks written into his daily class schedule. He requires hand-over-hand assistance for daily tasks such as face washing, tooth brushing, and dish washing. He has mild cerebral palsy and has difficulty with fine motor control. He cannot zip up a coat without an oversized pull, and he cannot tie his shoes. He can put on his own pants if they have an elastic waist.

At this time, and for the last two academic years, Student has had a transition plan in place with a goal of working at the country laundry facility run by his county's sheltered workshop, doing laundry being an activity he greatly enjoys.

Student's parents are concerned that Student does not appear ready or able to transition to life post school. His failure to reliably learn to use the toilet is a great concern and a greatly limiting factor for job prospects. They also fear that he does not understand the safety skills and signs he needs to navigate safely in the community.

Several field trips into the community were cut short because Student could not conduct himself in socially appropriate ways. These behaviors, as well as others manifested in the classroom, have caused the parents to fear that he will not be able to learn the basics he needs to know before he can enter the greater community.

The LEA, for its part, has provided Student with a self-contained classroom, a curriculum with a balance of functional subjects and academics (also functionally based). Consultative services of Occupational and Physical Therapists, an autism expert, and a speech language pathologist have been obtained for Student. A behavioral interventionist developed a behavior plan for him included in his 2012-13, and his 2013-14 IEP's. He has a high teacher to student ratio in his class with three fully-certified special education teachers for four students. Additionally, at least one non-disabled student peer is in the room at all times throughout the instructional periods thanks to a peer mentor program at Student's high school.

The LEA would have me look at all they have undertaken for Student and declare it appropriate for Student. The parents compare their son's meager functional gains to what they hope for him and declare that more is needed from the school. It falls to me to determine whether Student has been provided with a FAPE as mandated by IDEA 2004 20 USC § 1400 et. Seq., and West Virginia's Policy 2419, WV CSR § 126-19-3.1 (effective 7/1/12).

Issue 1 - Whether Student's communication needs have been met. Deficiencies alleged are a lack of provision of a communication device or a system available across environments and a lack of intensive speech therapy.

It is undeniable that Student's life and functioning would be greatly improved if he were able to use a communication device or system in his school, home and community. Student's mother purchased a picture system device called the GO-TALK 90 which has proved unusable as

a communication device for Student because he perseverates on individual pictures. TR 3, p 579, lines 5-9. An iPad available to Student for the last two years (LEA Ex. 22) has not proved useful because Student just hits the home button repeatedly and throws it or pounds on it when frustrated. TR 3, p 579, lines 11-16 and p 581, lines 4-20. A communication application for the iPad, called Proloquo, was considered by the school's speech/language pathologist who testified that the program requires the user to possess grammar and syntax skills which Student does not have. TR 3, p 581, line 15-p 583, line 4.

Additionally, a Picture Exchange Communication System (PECS) was introduced for attempted use by Student, but the results were very inconsistent and when he became frustrated, he ripped up the cards. TR 3, p 583, line 12-p 584 line 15. The speech language pathologist further testified that Student had reached a plateau in his communication skills. TR 3, p 574 lines 10-13. His skills have not improved appreciably in spite of varying prompts and trying different methods of communication. TR 3, p 578, lines 8-12. Regardless of the communication system attempted, student always resorts back to using his preferred method of communication, his few enhanced natural gestures, some pointing, and a very small number of vocalizations that are approximations of words, to communicate his wants and needs. TR 3, p 587, line 16-p 588, line 6.

There is however, one direction which the LEA could yet attempt which it has not done. Both of the Independent Evaluators called to testify for the Parent, independently recommended in their reports that Student should have full assistive technology augmentative communication evaluation. Parents Ex. 3 at - 14 and 5 at p 7. Given the severity of Student's communication limits, and the overriding importance of communication for him to function in all environments, I do not believe that Student's education can be termed "appropriate" until this one last identified

option is attempted for Student. It may be that the right system has simply not been identified. Therefore, Student should be given this assessment before a conclusion is drawn that further services are not useful to him.

The conclusions reached by the speech language pathologist were based on her own informal assessments of the Student LEA Ex. 1A, 1B. Normally a formal reevaluation of a student's related service needs would be conducted every three years, and may be done more frequently if a parent requests it. See 34 CFR § 300.303(a), and WV Policy 2419, Chapter 3, Section 2B (first paragraph). Here, the parent has requested, by means of this hearing, that more intensive speech therapy be provided, and her independent evaluator, whose recommendation she is requesting the LEA follow, has endorsed the desirability of further formal evaluation in this area. Accepting this as a request by the other for this evaluation, it is not necessary to find any violation of FAPE in order to grant her request for this testing.

Consequently, I find that the school has discharged its obligation to provide a FAPE to this student by providing him the services of a speech language specialist, and by attempting to help him communicate by means of the several systems described above. However, by bringing this issue at hearing and submitting the independent evaluation recommending a full assistive technology/augmentative communication evaluation (Parent's Ex. 5, p. 13), I believe Student's mother has effectively requested that such an evaluation be conducted, and she should have it pursuant to 34 CFR § 300.303(a) AND WV Policy 2419 provisions concerning parental rights to reevaluations on request.

Issue 2 - Whether Student has been provided adequate teaching of adaptive skills including personal care skills and community life skills.

Student's IEP for the 2013-14 year, dated 4/17/13 (LEA Ex. 4) includes a statement of his then current functioning levels, which clearly shows deficits in his adaptive skills. He requires hand-over-hand assistance to wash dishes and needs to be verbally prompted continuously while performing the task. He still requires adult assistance to use the restroom. He even requires continuous reminders to use the appropriate sign to signal his need to use the restroom. He requires adult supervision to navigate public places, and shows signs of being overwhelmed in those public places. LEA Ex. 4 at p 10. His mother testified similarly that he requires direct hands on assistance to wash his own face or brush his teeth. TR 2, p 252 lines 4-19.

A review of Student's IEP Goals and Objectives demonstrates that they are largely focused on acquisition of life skills. He is being taught to respect the personal space of others, self-monitor sensory needs and manage his break times, communicate his wants and needs in school, and in a community setting, communicate the need for a restroom and correctly use eating utensils. LEA Ex. 4 at pp 11-12 of 18. His math goals to identify time on a clock face and identify the values of money are also functional adaptive skills. LEA Ex. 4 at p 12. The Reading/Language Arts goals requiring him to identify character, setting, and plot of a story (LEA Ex. 4, p 13 of 18) may seem academic, but engaging in these activities helps to develop listening skills and develop a concept of cause and effect. According to his teacher, Student has learned to recognize common signs in the community setting, such as "stop, hospital, school" and "crosswalk." LEA Ex. 4 at p 10.

A review of his daily schedule reveals that Student's day is focused on activities of daily living like eating, toileting, navigating the school hallways, and cleaning up after himself. All academics presented have a functional approach and relate to foundational concepts. Socialization with classmates and peer mentors is stressed. Communication is also a focus throughout the subject areas. Basic vocational and organizational skills are practiced. (See Findings of Fact 14, 15 and 17.) While opinions might differ as to whether certain life skills are more or less important than others, the record reflects that adaptive skills, personal care skills and community life skills essentially sum up his entire educational program. LEA Ex. 8B. There is certainly more than enough to satisfy the standard set by Board of Education of Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176, 73 L.Ed. 2d 690, (1982) of "reasonably calculated to confer educational benefit." Id. 458 US 176, 201. The fact that the visible learning by Student is limited and slow does not make his educational program inappropriate. Specific outcomes have never been a guarantee of a FAPE. See, Rowley at 458 US 176, 208. The advancement deemed appropriate will depend on the abilities of the individual child. In re: Conklin, 946 F.2d 306, 315-316 (4th Cir. 1991)

Although we would wish otherwise, this student is burdened with numerous handicaps. His autism is compounded by substantial intellectual impairment and his cerebral palsy impedes his fine and gross motor abilities. Given the severity and numerosity of his disabilities, it is more than possible that his modest educational gains represent his true ability. Given the established facts, I do not find any deprivation of FAPE with respect to this issue.

Issue 3- Is Student's existing IEP (of 4/17/13, LEA Ex. 4) being implemented during the school day, whether Student's behavioral issues are being properly addressed and whether Student's time in the classroom is devoted to instruction?

In the Parent's Proposed Findings of Fact and Closing Argument filed April 8, 2014, Parent's counsel explains this issue: "Parents contend that the failure to provide appropriate behavioral supports with intensity and fidelity is a failure to implement a material portion of the IEP and is a denial of FAPE.

It is uncontested that Student has significant behavioral issues. In the spring of 2012, a behavior plan was drafted by the LEA's behavior interventionist (LEA Ex. 5 at p. 1, 5, 10-12). The school personnel had noticed a deterioration in the year preceding the 3/28/12 behavior plan, i.e., the 2011-2012 school year. The behavior plan was included in the IEP of 4/20/12, which was drafted to guide instruction for the upcoming 2012-13 school year. A review of LEA Ex. 22, the daily communication book for the 2011-12 year, reveals at least 36 entries where Student exhibited disruptive, aggressive, or potentially injurious behavior. See Finding of Fact 35 above. There are numerous notes of him hitting or banging his own head, throwing objects, biting his own tongue, grabbing his classmates, pulling the hair of his instructors, and pushing tables into other people. An incident where he turned his entire lunch tray onto another student was the genesis of a practice of having Student eat his lunch in his classroom with a teacher rather than with his classmates in the cafeteria. LEA Ex. 22, entry dated 11/14/11.

The same behavior plan was again included in the IEP of 4/17/13 for the 2013-14 year. A comparison of these behaviors seen in 2011-12 with those being observed in the year now concluding (2013-14) show that there has been significant improvement in his behavior over the ensuing two school years. Also see Finding of Fact 34, previous. In all, the communication log

book for the 2013-14 year contained twelve notes to Student's mother indicating problems with uncooperative behavior and agitation, and a single indication on 9/20/13 of him banging his own head on his desk. LEA Ex. 11, daily communication log book for 2013-14 year. Significantly, there are no reported incidents of violence toward others. The most violent act referenced is "He got mad and threw a cup," entry of 12/5/13. It appears that the self-injurious behavior and aggressive behaviors have been greatly reduced. This is an important achievement and the school is to be commended for these results.

The problem of concern to parents, however, is the category of distracted, agitated and non-compliant behavior. At LEA Exhibit IC are the daily logs kept by one of student's special education teachers. She noted therein that Student was frequently "hyper" or uncooperative at his work. At times, he could not be induced to get up off the floor.

On January 16, 2014, an independent evaluator hired by the parent observed Student in his special education classroom. Parent's Ex. 5. This evaluator was a doctor of psychology with extensive experience with autism. Parent's Ex. 4. In his report, he noted inconsistent behavior by Student during the observation period, generally focused and compliant from 9:10-10:00 a.m. but with increased irritability and non-compliance as time went on. Parent's Ex. 5 at p 3. He particularly noted three instances when Student got into a small room at the back of the classroom in order to get hold of a dustpan. Parent's 5 at pp 2-3. That expert noted in his testimony, his concern that off task behaviors like Student's repeated pursuit of the dustpan, were treated inconsistently. In one instance, when Student got the dustpan, he was told "that was bad" but was allowed to keep it. Later, when Student requested the dustpan, he was told "no," but later he again retrieved it without consequence. TR 1, p 41, line 14-p 42, line 9. The psychologist also noted several instances during the observation when Student was unfocused

and somewhat non-complaint. Parent's Ex. 5 at pp 2-3. By contrast, the classroom teacher's note that day stated "[Student] was completely 'on task' this morning. He was compliant and focused" LEA Ex. 1C, note dated 1/16/14.

The doctor's observation notes show that periods of attention and focus were interspersed with periods of distraction. Parent's Ex. 5, p 1-3. In his conclusions, he understandably focused on the weaknesses of the program since his focus was on finding ways to bring improvement and make recommendations. Parent's Ex. 5, pp 4-7. Student's teacher was apparently focused on his participation in the program. LEA 1C, note dated 1/16/14. A second independent evaluator, a neuropsychologist, also observed Student in his special education classroom this year. On the day that she observed him between 10:20 and 11:40 a.m. Her observations reflect numerous times when Student was distracted, attempting to get a communication device and trying to get into the kitchen off the classroom. When Student was given the device, he slammed it down. "His teachers reported he perseverantly wants it, but it sets him off. He has never used it to communicate even when it works." Parent's Ex. 3, pp3-5. This expert noted the use by Student's classroom teachers of calming and sensory techniques for him. He was given a ball to bounce on as an alternative to jumping on tables and self-stimulating behaviors. Parent's Ex. 5 at p 4, 10:55 note. Brushing and back rubbing were attempted, as well as relocating him to a darkened room with more brushing and breathing exercises. Parent's Ex. 5, p 5, notes 11:05, 11:15. Student was crying and requested to go to the boy's locker room where a washing machine is kept. After going there, he calmed down and was able to watch a video with his classmates. Parent's Ex. 5, p 5-6 notes 11:25 and 11:40.

It appears from these observations that the behaviors now distracting him have more to do with the perseverance and the sensory issues attendant to Student's autism than to any

behavior that would be considered defiant or deliberately non-complaint. His IEP notes that purposes of his behaviors are generally to satisfy sensory needs or to escape from situations or tasks he doesn't like. LEA Ex. 4, at p 9. Ironically, the use of the sensory room and sensory exercises created for his benefit to calm him, also take time away from substantive learning. Without the calming effects of the sensory exercises, however, it is likely that his lack of focus and agitation would simply spiral out of control, as was happening in the 2011-12 year, before the behavior plan was put into place.

The question of how much benefit is appropriate for any student is a difficult, fact-based one. The IEP of 4/17/13 (LEA Ex. 4) contains a behavior plan which, as discussed above, has eliminated much of the worst behaviors (re the self-injurious and the aggressive) in the classroom environment. The sensory exercises and techniques appear to work at times but not at others. See LEA Ex. 11, notes of 9/25/13 and 10/4/13. The behavior exercises developed for the sensory room, include techniques for calming mood and refocusing attention. LEA Ex. 14 (Pages marked "when I am in the Red Zone" and 4 pages thereafter). These provisions of the IEP appear to have been created specifically to address the concerns about Student's behavior, which are the source of Parent's complaint. The standard to be reached again is "reasonably calculated to enable the child to receive educational benefits." Rowley, Id., 485 US at 207, 73 L.Ed. 2d at 712. This behavior plan was designed specifically for the student with a goal of providing Student with educational benefit, by improving his behaviors, and consequently, his access to teaching and learning. While the behavior plan has not completely eradicated all problem behaviors, it has eliminated some of the most alarming and potentially destructive and has been moderately successful in ameliorating behaviors due to sensory issues. Therefore, I find that with regard to behavioral issues, Student's IEP of 4/17/13, (LEA Ex. 4) and also

4/20/12 (LEA Ex. 5) were "reasonably calculated to confer educational benefit," that the IEP's behavior plan has been implemented, and that the results of the behavior plan have been to confer actual benefits on the student. Consequently, I find that Student has not been denied a FAPE.

This should not be taken as an endorsement of all that has been done in this area, however. I looked very closely at the inconsistencies in enforcement and use of reinforcers noted by the independent evaluator (Parent's Ex 3 at p 5) and there is clearly room for improvement in this area. I am ultimately persuaded by the decreasing frequency and intensity of negative behavioral events this school year.

Issue 4 – Is Student's current placement the least restrictive environment for him? Parent alleges he is in a self-contained classroom and has no contact with non-disabled peers.

It is a pivotal provision of IDEA 2004 that students are to be provided their educational services in the Least Restrictive Environment appropriate to them. This requires schools to educate disabled students with children who are not disabled, "to the maximum extent appropriate," and to remove disabled students from the regular classroom "only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily" 34 CFR § 300.114(A)(2) authorized by 20 USC § 1412(a)(5). See also WV Policy 2419, Chapter 5, Section 2, p 51 (accord).

This student's placement is in a fulltime Special Education: Separate Classroom. TR 3, p 650, lines 13-16. Due to a clerical error, his current IEP indicates he is in a General Education: Part time placement. LEA Ex. 4, p. 15. Student's need for a full time special education placement is well substantiated in the record. At page 15 of his IEP, it is noted "As a result of [Student's] cognitive capabilities, he is unable to participate in the general education setting.

[Student] benefits more fully with small group instruction. With more individual support [Student] is able to participate in the related arts classes with non-disabled peers.” LEA Ex. 4 at p. 15. In the Services section, the IEP indicates that all his classes, with the exception of related arts and physical education, are to be given in a special education environment and the P.E. general education class must be specially adapted for him. LEA Ex. 4, p. 14.

Student is in a class with only three other students and three special education teachers. LEA Ex. 8B and 8C. Even with this level of intensive, small group instruction, Student struggles and has had only very modest achievement. Both of the independent evaluations obtained by the parent note the need for intensive services. Parent’s Ex. 3 and 5. Indeed, there was not a scrap of evidence submitted that suggested Student should be in a less restrictive placement (i.e., more time in general education classes). It is evident that a full-time special education placement is needed for him and that no less restrictive placement would be appropriate. The LEA has attempted to increase Student’s contact with non-disabled peers by having him participate with non-disabled peers in general education related arts classes and physical education classes, daily. Additionally, regular educational students in the LEA’s peer mentoring program are in Student’s classroom throughout the instructional day. I find the Student’s placement to satisfy LRE for him, and find inaccurate the parent’s assertion that he has no contact with non-disabled peers. It should also be noted that the intensive special school, or hospitalization which was recommended for Student by the independent evaluator would be a more restrictive environment for him than where he is currently placed Parent’s Ex. 3, p 13. See WV Policy 2419, Chapter 5, Section 2J, pp. 52-54. (Continuum of Placement Options).

Issue 5 – Is Student failing to learn social skills and community navigation skills necessary to adult life because he is in a self-contained classroom?

As discussed previously under Issue 4, student's current IEP requires placement in a special education classroom. LEA Ex. 4, p 14. Parent's two independent evaluators both documented the amount of teacher attention and interaction which is required for him. Parents; Ex. 3 and 5. The doctor of psychology recommended "an educational placement that provides a great deal of structure, one-to-one and small group instruction, and facilities for teaching adaptive skills." Parent's Ex. 3, p 4. This is precisely what his current special education classroom provides for him. Additionally, the independent neuropsychologist recommended a more restrictive and intensive placement be utilized, such as "an appropriate private school or partial hospitalization." LEA Ex. 3, p. 13. Thus, the special education setting where Student is currently placed is the less restrictive one advanced by either party. No credible evidence indicated or suggested Student requires more time in the general education environment.

Further, there is no evidence that Student learns well from mere observation of non-disabled persons. His mother testified that at age 19 he still requires hands-on assistance from her to wash his face or brush his teeth. Presumably, if he were able to learn from observation he would have mastered these basic daily tasks by now. Similarly, Student has not learned to speak, a task that a majority of persons learn from simply observing and hearing. Student is not most people. His challenges are unique to him and substantial. It is my conclusion that Student needs to learn his social skills and community navigation skills in the structured, small group setting of his special education classroom, under the instruction of teachers experienced with children like him. If he loses out on some interactions with peers as a consequence, it is an outcome countenanced by the law. See 34 CFR § 300.114(a)(2). It is also a consequence the LEA has

attempted to ameliorate by including him in general education classes for related arts and P.E., and through interactions with peer mentors.

Far from preventing him from learning necessary skills, I believe his special education placement is his best chance to gain these skills.

Issue 6 – Is Student’s transition plan adequate and implemented?

Parent’s counsel does not address this issue in her post-hearing submission so the precise deficiency alleged was not made clear. However, transition was addressed in both of the last two IEP’s. LEA Ex. 4 and 5. The most recent IEP of 4/17/13 was finalized in the presence of representatives of the WV Department of Rehabilitative Services and the Local County Sheltered Workshop. LEA Ex. 4, p. 2. These are agencies who will take over services for Student after he graduates. LEA Ex. 4 at p. 3 of 18. The IEP contains a transition planning section. LEA Ex. 4 at p. 5 and 6 of 18. It is there noted that a parent survey/interview and a student survey/interview were obtained as the means of determining Student’s preferences and interests. Presumably, both were filled out by Student’s parent in this instance. Behind the IEP document of 4/20/12, the actual surveys are attached. LEA Ex. 5, pp 24-37. When asked what jobs interest Student, the parent responded “own Laundromat, work for laundry service” and “repair washers and dryers.” LEA Ex. 5, p. 31. When asked “What kind of work would you like to be doing, if any, during the next school year?”, the answer given was “laundry.” LEA Ex. 5, p. 35. Consistent with these responses, the transition planning form indicates Student’s concentration for 10th grade will be “laundry care.” His employment goal after high school is indicated as “[Student] would like to work for a laundry service through rehab services and exploration using a job coach.” Given Student’s narrow expressed interest in this type of work, the transition plan seems to be in line with both Student’s interests and his Parent’s expressed wishes. Services are to be

provided by rehab services after graduation, not the LEA. The representative of that agency was in attendance at the IEP meeting of 4/17/13. The transition planning sheet further indicates that Instruction, Community experiences and Daily living are to be addressed in the annual goals. These goals are set out at LEA Ex. 4, pp 11-13.

It should also be noted that it is the expectation of the LEA that Student should continue attending school there until he ages out of eligibility. For this student, that means he can attend the LEA's programs for three more academic years. TR 3, p. 679, line 8 to p. 680, line 12. It was indicated that the referring agencies would not be ready for him before that time because community opportunities are not available before age 21. TR 3, p. 680, lines 4-5. Since the plan is geared toward the area of Student's expressed interest, and the referral agencies are now involved, planning would appear to be adequate for this point in time. The plan will not be fully implemented until Student graduates, which is not imminent. In the absence of specific complaint from the parent as to what the perceived inadequacies might be, the current plan seems to accord with the general requirements of state law. See WV Policy 2419, Chapter 5, Section 2F (Transition Services). I find no violation of FAPE due to inadequate or unimplemented transition planning.

Issue 7 – This issue alleges that Student's placement is restrictive but does not offer skilled instruction and related therapy needed for his progress.

The components of this allegation have previously been discussed under Issue 1 concerning Communication, Issue 2 concerning teaching of adaptive skills, Issue 3 concerning behavior and Issue 4 concerning the least restrictive environment. I refer the reader to those sections for determination of this issue. My ultimate conclusion from these considerations is that

Student is placed in the LRE for him and that he is being provided skilled instruction and related therapies needed for his benefit.

Issue 8 – Did the LEA violate the student’s rights under Section 504 of the Rehabilitation Act of 1973 by keeping Student in a classroom where he has been subjected to repeated aggressive behaviors by another student?

The standard for stating a claim under § 504 requires a plaintiff to plead that they have been subjected to discrimination “solely by reason of his or her handicap” Walker v. District of Columbia, 157 F. Supp 2d 11, 35 (DDC 2001). The standard is more stringent than the standard for Due Process and “Not every violation of IDEA also constitutes a violation of § 504.” Torrence v. District of Columbia, 699 F. Supp. 2d 68, 71 (DDC 2009). “Something more than a mere failure to provide the [FAPE] required by [IDEA] must be shown to demonstrate discrimination solely on the basis of the student’s disability.” Williams v. District of Columbia, 771 F.Supp. 2d 29, 31 (DDC 2011) citing Lunceford v. DC Bd of Ed, 745 F.2d. 1577, 1580 (DC Cir. 1984) and Monahan v. Nebraska, 687 F.2d. 1164, 1170 (8th Cir. 1982) (interpreting EHA of 1975, a precursor of IDEA.) “A plaintiff may satisfy the requirement by alleging that any failure to provide a FAPE resulted from either bad faith or gross misjudgment.” Monahan, Id. The standard for liability under § 504 is not met here.

The evidence in the record demonstrates that Student was involved in a single altercation on the bus, where another student became agitated and violent. Student had injuries to his face, mouth, and a black eye. Parent’s Ex. 3 at p. 1. Parent’s neuropsychologist opined that he suffered some lingering emotional and psychological effects from the attack and injuries. Parent’s Ex. 3, p. 2. The event was recorded by a video camera on the bus, a recording of which was offered and watched at the hearing. Parent’s Ex. 17. The recording was very unclear and it

was not possible to tell how many people were even in the picture due to the darkness and graininess of the images. The neuropsychologist's report was consistent with testimony of the aggressive student's mother that a bus aide was attending to the aggressive student at the time of the attack. That aide physically placed herself between the attacker and the student in this case. She suffered a bite to her back in her efforts to protect Student. (Parent's Ex. 3 at p. 1, TR 1, p. 127, lines 7-9.

Regarding the alleged repetitious aggressive behaviors in the classroom, the attacking student D, is not in Student's class this year. LEA Ex. 8C. The aggressive student's mother testified that she had "many, many times," called Student's mother to tell her she was sorry because her son "had a behavior" and Student "got hit in the process." TR 1, p. 127, lines 11-22.

There was no evidence of specific injury, and no documentation was offered to quantify the "many," times these events occurred. Neither was there any evidence offered concerning the circumstances of any of these events. Further, this witness' source of information was telephone calls from the school personnel or communication logs, so by her own admission, she was not even witness to any of the actual events. TR 1, p. 128, lines 13-21. The events were also reported to have occurred "over the years" so the timing is also undefined. TR 1, p. 128, line 12. Under the circumstances, I do not find this testimony credible or probative, and no documentation was offered to add to its value.

The other witness, asserted by the parents to support these claims, testified that while he was a life coach for another boy in Student's class, that boy he was watching would get out of his chair and run around the room. He expressly denied seeing that other child ever attack Student. TR 2, p. 388, line 14 – p. 389, line 4. Presuming this boy was the same one who assaulted Student on the bus, which was not indicated in the testimonial record, this witness testimony

adds nothing to the claim that Student was subjected to repeated aggression by another Student. Consequently, no factual basis has been proven to support the claim that Student has been the victim of discrimination by the LEA in any way.

VI. DIRECTIVES OF IMPLEMENTATION

1. Under the provisions of WV Policy 2419, Chapter 3, Section 2B, AND 34 CFR § 300.303(a), giving parents the right to request reevaluations, the LEA shall make arrangements for Student to have a full assistive technology/augmentative communication evaluation. To avoid bias, the evaluator should be an individual not in the employ of the LEA and not an individual who previously evaluated him. (Persons currently contractually associated with the LEA are not excluded, however.) The evaluation should include an assessment of whether signing should be his primary communication mode or whether another communication system/device should be utilized. Efforts to conduct this evaluation should begin immediately and be completed by the beginning of the 2014-15 school year.

The IEP team shall reconvene when the full evaluation report is received by the LEA, and the results considered and incorporated, as appropriate, into the then current IEP document.

2. I find no violation of FAPE in the record of this matter with respect to any of the issues identified in the complaint.

3. I find no violation of § 504 of the Rehabilitation Act of 1973.

VII. 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 hearing 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 written decision.

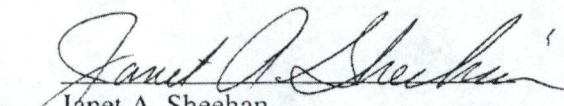
Entered this ____ day of April, 2014

Janet A. Sheehan
Due Process Hearing Officer

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Entered this 21st day of April, 2014


Janet A. Sheehan
Due Process Hearing Officer