05-026

CASE CLOSURE SUMMARY REPORT

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

School Division

Name of Parents

Name of Child

May 27, 2005 - Decision
Date of Decision or Dismissal

Daniel R. Hagemeister
Counsel Representing LEA

Lois N. Manes
Deborah W. Smith-George
Counsel Representing Parent/Child

Parent
Party Initiating Hearing

LEA
Prevailing Party

Hearing Officer's Determination of Issue(s):

Was the manifestation determination review decision warranted?
Did the LEA's lapse of services to this student entitle him to compensatory education and services?
Did the IEP with accompanying FBA & BIP provide FAPE to this student?
Did the LEA procedural errors result in an IDEA violation?

Hearing Officer's Orders and Outcome of Hearing:

The LEA was the prevailing party on all issues. The student's IEP and BIP were deemed sufficient. Procedural arrors did not result in adverse educational impact to the student. Student was not entitled to compensatory education & services because he has received FAPE. The MDR decision was justified - student's impulsivity and ED disability did not mean that he could not control his behavior . The disciplinary event was avoidable.

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

Sarah Smith Freeman
Printed Name of Hearing Officer

Sarah S. Freeman
Signature

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VIRGINIA DEPARTMENT OF EDUCATION

DUE PROCESS HEARING REPORT

SCHOOL DIVISION: ("LEA")
LEA COUNSEL: DANIEL R. HAGEMEISTER

NAME OF PARENT: ("Parent")
NAME OF CHILD: ("Student")
NAME OF COUNSEL: LOIS N. MANES and DEBORAH SMITH-GEORGE

PARTY INITIATING HEARING: PARENT

HEARING OFFICER: SARAH SMITH FREEMAN

INTRODUCTION

This matter came for hearing on December 15 & 16, February 24, March 7, 8 & 24, April 4 & 22, 2005, in the , Virginia, before a duly appointed hearing officer. Present in person, in addition to the Hearing Officer and Court Reporter, were the mother ("Parent"), and Parent's counsel, counsel for the LEA and the School Division's Representative.

The due process hearing was requested in writing. The request was received by the LEA on September 20, 2004 and this Hearing Officer was assigned to hear the case on September 22, 2004. Parent alleges that the LEA committed an error in the conduct of this Student's Manifestation Determination. Parent's counsel asserts that this Student's disability and inability to control himself in certain situations, in effect, triggered the incident: bringing a BB gun to school which which resulted in the LEA's disciplinary action. Parent's counsel urges the hearing Officer to make a ruling that the Manifestation Determination was not proper and in violation of IDEA.

Parent's counsel assert that the Manifestation Determination Review was flawed in that this Student's behavior was not found to have been caused by his disability, Emotional Disturbance. Parent requests that the Manifestation Determination and the resulting disciplinary action, long-term suspension, with conditions, be removed entirely from Student's educational record.

Counsel assert that the procedural errors committed by the LEA, notably, the failure of the LEA to provide home based placement for a period of about six (6) weeks, has adversely impacted this Student's education resulting in denial of FAPE: he has not passed his SOL's, is behind his peers academically and socially, and will require remedial education and services, together with relief deemed necessary by this Hearing Officer to fully compensate this Student for the academic progress he has not made.

On December 15, 2004 this Student was re-admitted to the LEA district into 9th grade. Therefore, the Hearing Officer **DISMISSES** this issue: Was Student's alternative placement proper and the least restrictive environment?

This hearing occcurred over a period of eight days, the Parent and the LEA having presented testimony and exhibits.

FINDINGS OF FACT

This Hearing Officer makes the following findings of fact:

1. The Student was born on 1989.
2. The Student was found eligible for special education

services through Virginia Public Schools ("LEA") on February 19, 2003 with the Identifying Handicapping Condition of emotional disturbance (ED) with no secondary disabilities noted under IDEA. This Student has not been found eligible for accommodations pursuant to Section 504 of the Rehabilitation Act of 1974.

3. On May 27, 2004, the Student was issued a long-term suspension with special conditions for having "brandished a BB gun at another student." Witnesses reported that the Student told them that the gun was loaded and that he intended to shoot the other student. Witnesses also reported that the Student had wrapped a red bandanna around his arm 'like he was in the Bloods. [youth gang]' This Student had carried the gun to class after having pushed the gun into the beltline of his pants. The gun was found later by a security guard after it had been thrown under a mobile unit by this Student. (P-79)

4. The Student's written statements regarding the BB gun incident indicate, alternately, the Student received the gun from a friend who had heard that "a Crip [youth gang member]" was preparing to fight the Student after school. According to the Student, he intended merely to scare the gang member with a BB gun. In this account, the Student claimed that he was handed the gun "by the trees in the back ... to scare them ... so I [Student] said okay and I took the gun and put it in my pocket." Student admitted that he then pointed the BB gun at the feet of another student. This Student

admitted to throwing the gun under the special education mobile unit. (P-79, P-81)

5. In Student's second written account, he reported that he had spoken with a school acquaintance at a local grocery store and that the school acquaintance had indicated to him [Student] that a gang member wanted to fight the Student because he thought that Student was a member of the "Bloods" [youth gang]. The "Crips" [rival gang members] were to begin a fight, after school, "... when the security guards leave." Student related the above events. (P-79, P-80)

6. When the Student was caught looking for the gun by his special education teacher, he informed her that he was "... looking for a pencil." (P-84)

7. At the point when the above BB gun incident occurred, Student had pending a ten (10) day suspension for repeated violations, most recently, the theft of movie passes from the teacher's desk, the passes having inadvertently appeared in Student's pants pocket. The suspension notice was issued on May 19, 2004. (P-64 & P-66)

8. Functional Behavior Assessment ("FBA") and Behavior Intervention Plan ("BIP") were completed on February 20, 2004 in response to prior disciplinary infractions and IEP revision. The FBA and BIP appear to target all of the student's most difficult behaviors. Student's then teachers, by overwhelming participation, addressed student's behaviors. (P-44) Student entered into a behavior contract with the LEA. The LEA agreed to make progress sheets and point sheets. The LEA agreed

to institute a level behavior system for the student. (P-44)

9. Student's final grades for the 2003-2004 school year reflect an "A" in Reading though the rest of Student's grades were D's and F's. Grades throughout the year had generally been A's, B's, & C's. (P-99)

10. Student failed his 8th grade SOL's yet the LEA determined that Student's reading level indicates he should be able to pass. (P-45)

11. This Student was originally referred for special education evaluation because this Child was found to have possessed a switchbade knife on school property. The Student has an underlying diagnosis of ADHD for which he has taken various medications, notably, Adderal and Ritalin. The Parent and the Student report sporadic use of the medications to control ADHD, though this Student had difficulty "keeping his hands and feet to himself, was defiant, and was failing all core classes." (P-7) Teacher reports indicate that when this Student is on medication, "he appears to be focused." (P-10)

12. Educational testing revealed that this Student falls in the average to low-average range of cognitive ability. It should be noted that the original educational evaluation "did not indicate the presence of a learning disability." Given this Student's average academic ability, the evaluator reported, concern for the Student's performance should occur only when the Student performs in the low-average range, a score of 72 or below. (P-7, P-8)

13. This Student originally qualified for special education in his 7th grade year on February 19, 2003. At the time, he was described as being "at risk for sensation seeking behaviors and self-reliance." The original IEP described Student's weaknesses: According to teacher reports, Student was weak in social skills, leadership skills, study skills, and adaptive skills, his behavior being characterized as "loud, hostile, hyperactive, and physical." Teachers also described this Student as "capable of achieving and putting forth academically." Though Student does receive special education services, "his academic achievement scores suggested commensurate skills with his assessed abilities." (P-12)

It does appear that this Student's needs, academically, are not nearly as dramatic as his emotional needs. His mental stability, however, is tenuous and may sometimes affect his performance. Evaluators seem to agree that if this child could control his behavior, his potential would increase.

14. After this Student's return from an alternative school placement for behavioral concerns (Student had confided in his classmates that he had brought a switchblade knife to school) Student returned to regular middle school, the Parent having consented to a special education program for students with behavioral and emotional difficulties. (P-7)

15. Although Student has had a diagnosis of ADHD since the third grade, he has had generally good grades in school and he has never been retained. (P-7)

16. Student has experienced a great deal of separation

and family upheaval from infancy forward: His mother, a strong willed, sincere soul, has undergone positive personal changes and family turmoil. Parent is a single mother who works daily as a Certified Nurse's Assistant to care for and support her son. The Parent zealously advocated Student's cause during the course of this hearing. Her demeanor has been calm, respectful and she has never uttered so much as one unkind word to school personnel during the due process hearing. Parent provides a stable role model for student.

17. Student's father, reports the Parent, is a violent, abusive man, who has not been involved in Student's life for many years. Intermittently, this family has required assistance from community service organizations. From the age of seven to twelve years, Student lived with a maternal aunt and her husband. (P-7)

18. Student regularly confers with a mental health provider for personal therapy for sexual abuse, drug abuse by family members, and for the father's aggressive behavior toward the Parent and Student. Parent does not have any knowledge of drug use by Student. Reportedly, other neighborhood children do use drugs. (P-7)

19. Student has many individual talents: He is a good artist and his Parent characterizes him as mechanically skilled and "activity centered." Both Student and the Parent hope that Student will graduate with his peers from high school. Student would like to play football, work on computers or join ROTC. Teachers report that this student can be very

"respectful" of adults. (P-12 & P-116)

20. This child's initial IEP provided for delivery of special education services in a self-contained ED classroom for five periods with two "bells" of regular classes. (P-12) Upon notice of proposed action to Parent, the Parent consented to the IEP. (P-12)

21. Although psychological testing completed on May 15, 2003 indicated that Student demonstrates attention deficit-hyperactivity disorder, anger, and mild depression, the evaluator described Student's academic development as "quite satisfactory." The Evaluator stressed the importance of medication for Student and he should engage in "individual and family psychotherapy." "Esteem building activities such as sports, school clubs, or community affiliations would likely provide wholesome, positive social experiences and models." (P-16) The evaluator noted of Student's behavior though, a "cautious, guarded, and self-centered" stance toward the world which is viewed by the Student to be "a potentially dangerous and troubling place." (P-16) "[Student] also demonstrates some oppositional defiant characteristics that tend to be manifested in social misconduct that create conflict with authority figures." (P-16)

22. On August 12, 2003, the Parent transferred the Student to the present LEA, a Virginia school district. (P-24)

23. The Parent consented to initial placement in an ED self-contained classroom which was identical to the prior placement, commencing in September, 2003. (P-25)

24. The initial IEP did not contain a FBA or BIP after

Student was re-admitted to the former LEA, a Virginia School District.

25. Progress notes indicate that the Parent communicated with the LEA about failing grades on October 13, 2003, November 21, 2003, January 23, 2004 and March 15, 2004. Parent discussed Student's behavior. (P-27) Progress notes reflect varying degrees of "mastery" or "progress" in all areas of study. (P-27)

26. Student had accumulated ten (10) days out-of-school ("OSS") and two reinstatements by February 10, 2004 and Student's in-school suspensions ("ISS") were numerous. (P-29--42, P-74) Student's suspensions appear to address incidents of obstinacy: refusals to comply, swearing, and aggression. He "likes to put his hands on the girls and tussle with the boys." (P-65A)

27. On February 20, 2004, the IEP Committee properly convened to review Student's IEP. The Committee found a causal relationship between his behavior and disability. Student was placed in a self-contained Science class and accommodations were made for core classes: smaller group size, visual aids, assistance with directions, math aids, spelling aids, and the use of a calculator. (P-43)

28. An FBA and BIP were initiated at this time: The LEA implemented a level behavior system, point sheets, and progress sheets to improve Student's behavior. Though the point sheets and progress sheets were not produced, the Student's special education teacher testified that she utilized all of

these items daily. Student's special education teacher conferred regularly with the Parent and with the Student regarding incidents of misconduct. (P-72, P-27, P-74, T.I-p.118-122)

29. By May 27, 2004, this student had missed 21 days of school and he was tardy 7 times. (P-72, P-96)

30. This Student's disciplinary record on May 27, 2004 reveals 14 disciplinary referrals for the year: Detentions (3) September 12, 2003 (disruption), November 7, 2003 (tardiness) & May 10, 2004 (insubordination); In-School Suspensions (4) - November 12, 2003 (insubordination & disruption), February 4, 2004 (swearing), April 7, 2004 (insubordination), April 9, 2004 (disruption) Out-of-School Suspensions (7) October 9, 2003 (multiple offense suspension) included with October 14, 2003 (fighting), 5 days, February 5, 2004 (fighting), reinstatement required, March 10, 2004, (throwing object, harassment) 3 days, reinstatement required, April 23, 3004 (disrespecting teacher) 2 days, May 14, 2004, (multiple offense suspension, pending manifestation determination, indeterminate length, May 19, 2004 (threatening staff), pending manifestation determination, indeterminate length, reinstatement required, May 27, 2004 (brandishing a BB gun), Juvenile Court Petition obtained, long-term suspension with special conditions. (weapon). (P-29 to P-69 & P-74)

31. LEA documentation recording their actions following disciplinary infractions reveals numerous conferences with the Parent and many BIP consults. (P-29-P-74)

32. A Manifestation Determination review occurred on May 24, 2004 for Student's threat to "slap [his teacher] upside the head." (P-71, P-68) The Committee found a causal relationship between Student's disability and his aggression toward the teacher. (P-71)

33. After the MDR on May 24, 2004, Student's special education teacher testified that the MDR Committee requested revision of the Student's BIP Goals and Objectives which were not being met by the Student. (T.I-p.129)

34. Parent was notified of the IEP revision meeting scheduled for May 28, 2004 which she requested to attend. Parent attended the meeting on that date. (P-89)

35. Another MDR took place on May 27, 2004 to review the weapons charge against Student. His IEP and placement were deemed appropriate. No causal relationship was found between the BB gun incident and this Student's disability though the Committee noted that Student had brought a knife to school in his prior school setting. (P-90) The Committee listed the methods used to correct this Student's behavior: BIP, OSS, ISA, & Conferences [with the Student and Parent]. Parent was present at the MDR. (P-90)

36. Although the MDR notes do not reflect the rationale for the MDR decision, Student's special education teacher participated in the meeting on May 27, 2004. Student's teacher testified that the consensus was that Student "was aware of his own actions" and that "he [student] shouldn't have had the BB gun." (T.I - p.127)

37. An IEP meeting occurred on May 27, 2004 after the MDR. Parent's signature on the face of the form indicates her presence at the meeting. (P-94) A notice to Parent of the IEP meeting following the MDR was sent by the LEA to Parent. (LEA Exhibits) Also, on May 27, 2004, Parent executed consent to Student's alternative school placement. (LEA Exhibits)

38. Parent consented to the BIP, at its inception, on February 20, 2004. Written revisions to the BIP occurred on April 29, 2004, May 13, 2004, & May 24, 2004. The Parent "signed off" on all the revisions. (LEA Exhibits)

39. After the May 27, 2004 MDR, Student's special education teacher testified that another BIP revision occurred though the date may not be recited on the BIP and the additional paperwork appears to be missing from the file. (T.I-p.130)

40. Student's therapist, a licensed professional counselor who qualified as an expert and assisted in the Student's initial IEP, sent a letter to the LEA dated November 4, 2004. Student's therapist opined that Student's ADHD and depression contributed to the BB gun incident, the therapist confirmed that Student was not, at the time, "taking medication on a regular basis." Therapy sessions were described as "sporadic." Therapy visits now occur monthly and Student responds to Adderal, strictly managed by Parent, which provides Student with good concentration and reduced impulsivity. (P-6A)

41. Parent consented to home based placement on May 27, 2004 until an alternative placement could be determined. (P-93)

42. Communications between school personnel reveal that Student's home based instruction did not begin during the week of May 27, 2004 continuing through June 17, 2004 with extension through to July, 2004, as needed. (P-112A - P-112 II)

43. Communications between school personnel regarding the beginning date of Student's home based instruction reflects that home based instruction was not implemented by the School until June 18, 2004. (P-100)

44. Home Based plan provided service of four core subjects to be taught by one instructor for two hours daily or 30 hours by July 30, 2004. (P-100)

45. Home Based plan dated September 14, 2004 provided service from September 7, 2004 to an uncertain date to be determined by the School Board's decision about Student's readmission to the LEA. (LEA Exhibits)

46. Student's failing grades were to be changed upward after he completed home based instruction. (P-112-I)

47. School personnel indicate that minutes of the MDR were defective by the following statement: 'The disability does not have an impact upon his behavior (generally)?' "OBVIOUSLY HIS BEHAVIOR DOES HAVE AN IMPACT OR HE WOULD NOT BE CLASSIFIED ED!!!' "I feel certain that we are in violation of IDEA." LEA personnel indicates that the MDR

minutes should have more accurately stated that the disability does impact behavior but that there was a "BIP in place." (P-112-J)

48. Communication dated June 30, 2004 indicates that school personnel made an error in their assumption that the suggested alternative school setting for Student was appropriate because the placement did not have an ED self-contained class. (P-112-J, T)

49. Parent reported that the Student did not begin home based instruction until the second week in July, 2004. (P-119) Student's special education teacher testified, however, that she began home based instruction on June 18, 2004 through July 29, 2004 for two hours daily. (T.I-p.133) Also, this teacher brought over Student's work to his home immediately after the long-term suspension from May 27, 2004 until instruction officially began. (T.I-p.142)

50. The special education teacher who delivered Student's home based instruction in the summer, 2004, was ED certified (T.I-p.115), delivered courses at the ninth grade level and followed the IEP. (T.I-p.144) Student's teacher for the summer home based instruction continued, as a volunteer, to bring Student's school work to him through August, 2004. (T.I-p.146-147)

51. Student's special education teacher, who delivered summer instruction, attempted to begin home based instruction on September 21, 2004. The LEA told the teacher that she would not have to begin because Student's alternative placement

was to begin. The teacher left a note for Parent on September 27, 2004 about renewing home based instruction. In response, Parent referred the home based teacher to one of Student's therapists to explain Student's position: (V.I-p.140) Parent was angry that Student was not in school. (T.I-pgs. 138-142)

52. The special education teacher who delivered Student's home based instruction from September through October, 2004 was not a Virginia licensed, state certified special education teacher until December, 2004. (T.IV-p.13)

53. Student's second teacher testified that her instruction began on September 29, 2004 for four hours daily at a local library. She described having no behavior problems with Student. Student's second home based teacher was confident that Student could pass the 9th grade SOL's though this teacher was "not really proficient in algebra" and peer tutoring (help from another student) was utilized. (T.II-p.6-13)

54. Currently, Student has been exempted from taking 9th grade SOL's. (LEA Exhibits)

55. The LEA representative candidly responded, to explain the lapse in services, that Student apparently "fell through the cracks." (T.VI, p.60)

56. The lapse in services appeared to have occurred also because the suggested LEA placement did not have an ED class. Further, Parent repudiated her consent to the suggested placement because "alternative school would not be good for him." (LEA Exhibits) From LEA communications

at the time, it also appears that the Parent did not want the home based instruction to occur at home. When the library was suggested as an alternate location, Parent summarily responded, "[The library] would not work." (P-112-B, Due Process Request)

57. In order to "make up" the time, the LEA has expended about 224 hours toward Student's home based instruction though the original home based instruction plan required only 140 hours. (T.VI, p. 81)

58. The independent educational evaluation dated December 2, 2004 refers to this Student as "hypervigilent" or "always on guard waiting for the next bad thing to happen." (P-116 & T.III-p.104)

59. The independent educational evaluator observed Student who was, at the time, participating in his home based instruction at the library, reveals that Student seemed "really focused ... involved ... interacting in an appropriate way." (T. III-p.99)

60. In the opinion of the independent educational evaluator, this Student's current BIP is a "very positive plan" that "meets Student's educational needs." (T.III-p.132) Regarding the BIP in place when Student was removed from school, the independent evaluator did not find a "target behavior not to bring weapons to school" addressed in the FBA or the BIP, however, he stated, "...the [BIP] could be easily modified." (T.III-p.133)

61. The independent evaluator's academic testing reveals scores, in all areas, above 9th grade level except

for two subtests, Passage Comprehension, at the 5.2 level (fifth grade, second month) and Calculation, at the 8.9 level, (eighth grade, ninth month). General academic fluency was measured at 12.2 level, Reading Fluency was measured at the 13.0 level (college level) and Math Fluency at the 10.4 level. The Passage Comprehension low subtest score is inconsistent with his Broad Reading score and is therefore not significant as an educational discrepancy. Broad academic skills were measured to be at the 9.6 level. (P-116, (T.III-p.150-160)

62. The independent educational evaluator related that Student was "jumped by a gang last year" and it "scared him." He confided to the evaluator that he felt "dumb" for being out of school yet he acknowledged "getting put out of school because I did something which was stupid" and it was "the worst thing to happen to him." (P-116) Student is extremely "remorseful" about the BB gun incident. (T.III-p.138)

63. Student has now completed an eight week course in anger management through an alternative school program. (T.I-p.8)

64. LEA personnel currently report that although there have been no disciplinary referrals for Student this year, He does not appear to be "engaged" and he will "put his head down" when he is not being assisted by an adult. (T.VII-pgs. 9-11) LEA personnel indicated that it would not be prudent to assign a one-on-one assistant to him." (T.VIII-pgs.9-16)

ARGUMENTS RAISED

THE MANIFESTATION DETERMINATION OF MAY 27, 2004 WAS FLAWED BECAUSE THE BIP WAS NOT CHANGED AFTER THE MANIFESTATION DETERMINATION OF MAY 24, 2004 REVEALED THAT STUDENT WAS NOT MEETING BEHAVIORAL GOALS AND OBJECTIVES

Hindsight is not helpful in this case. The LEA and the Parent dispute events from differing points of view. It is important now to consider the evidence prospectively, not retrospectively, from the information then available to the team at the time of the MDR.

Although the BIP did not contain a specific target behavior regarding not bringing weapons to school, the record reflects that the BIP Goals and Objectives were reviewed on May 24, 2004, deemed insufficient, and revised. There wasn't much time to gather new data because of the second MDR meeting resulting in long-term suspension. Also, the May 24, 2004 MDR addressed obstinate, aggressive behavior which was a product of Student's impulsivity, the behavior well known to the team. The May 27, 2004 MDR addressed behavior over which the MDR team opined that Student should have been able to control, though the behavior was not well known to the team. Even though Student had already brought a weapon to school once, the current teachers did not normally encounter this behavior. BIP's address triggers and problem behaviors regularly displayed by a student.

Student's special education teacher testified she was certain that an additional review of the BIP took place after

the MDR and IEP meeting on May 27, 2004 even though the written revision is not now attached to the original BIP document.

Further, it seems to this Hearing Officer that if Student was long-term suspended with special conditions and presumably, on his way to alternative school placement, the necessity for revision, at that point, would not have been great.

THE MDR DECISION WAS FLAWED IN THAT THE MDR TEAM DID NOT FULLY CONSIDER THE STUDENT'S ADHD IMPULSIVITY, HYPERVIGILENCE, OPPOSITIONAL DEFIANCE, AGGRESSION, DEPRESSION OR ANY OTHER DIAGNOSED CAUSATION IN THE MDR FINDING ON MAY 27,2004

LEA personnel's inter-office remarks regarding the ultimate issue for due process are not dispositive: Did the MDR team fail to fully consider the effects of Student's ED on his actions?

Although the LEA MDR form, clearly, does not provide much insight into the team's rationale for the MDR decision, it is apparent that the team did not find causation for the BB gun incident in Student's disability. Testimony revealed that the MDR team believed that Student should have known better and could have controlled his actions.

It is apparent that the E-Mail author disputed the manner in which the MDR form had been completed and not the outcome of the MDR decision.

Regarding Student's ability to control himself, this Hearing Officer defers to the judgment of the MDR team.

This examiner noted, of the BB gun incident, bullying or fear did not appear to be the motivating factors. Student was the one who donned the red "Bloods" bandanna, brandished a

gun, then intimidated another student with it. It was this Student who appeared to be the aggressor. He was the one who intended to incite fear by pointing the gun. This is bullying behavior.

STUDENT IS ENTITLED TO COMPENSATORY EDUCATION AND SERVICES BECAUSE OF THE FLAWED MDR, TIME OUT-OF-SCHOOL WHEN HOMEBOUND INSTRUCTION HAD NOT OFFICIALLY BEGUN OR THE TEACHER WAS NOT CERTIFIED IN SPECIAL EDUCATION AS REQUIRED BY LAW

The LEA has admitted to having permitted this student's educational services to temporarily lapse. The LEA has fully documented all impediments that hindered the progression of delivery of home based services. It is evident that "fault" was mutual in that Parent vacillated in her acceptance of a home based instruction plan. This factor is as likely the cause of the lapse as the LEA's theory that this Student "fell through the cracks."

In order to make-up services, the LEA has already provided overwhelming compensatory educational services (224 hours v. 140 hours) to this Student. The IEP/BIP can be revised upward or downward for educational services, as determined by school personnel to be necessary.

Regression is not an issue nor is ESY. Apparently, School personnel have referred to the service of a one-on-one assistant to be "crippling." Remedial educational services do not appear to be needed by this Student.

THE BIP FAILED TO PROPERLY MODIFY STUDENT'S BEHAVIOR BECAUSE THE BIP DID NOT ADDRESS BULLYING OR THREATENING BEHAVIOR BY OTHER STUDENTS

The BIP did not address bullying or threatening behavior because it appeared to this examiner that Student was the aggressor in disciplinary events.

RECENT INDEPENDENT EDUCATIONAL EVALUATION REPORTS A SIGNIFICANT DISCREPANCY BETWEEN VERBAL AND NON VERBAL REASONING SKILLS WHICH NEEDS TO BE ADDRESSED IN THE IEP AS A LEARNING DISABILITY

A discrepancy is not significant for special education purposes unless adverse educational impact is reflected in Student's academic skills and ability. By contrast, Student's achievement is superior by academic testing standards except in one minor subtest, Passage Comprehension, at 5.2. His Broad Reading score on the Woodcock-Johnson, 13.0, is "off the chart." The low subtest score truly appears to be an anomaly and not indicative of special education needs. Learning disability has never been indicated.

STUDENT'S CURRENT PLACEMENT IS INAPPROPRIATE, THE SELF-CONTAINED ED CLASSROOM IS NOT APPROPRIATE FOR AN ADHD STUDENT

There was not a scintilla of evidence presented at this hearing to indicate that Student requires an LD placement or any placement other than the self-contained ED classroom where he has been able to achieve academically in spite of his occasional "nasty" behavior. Need to explore other educational options or skills is not indicated.

Student's academic skills and potential indicate that he should be able to eventually pass 8th and 9th grade SOL's. Student must take his medication daily. Student should continue to regularly attend independent therapy for family issues.

DISCUSSION AND CONCLUSION OF LAW

Based upon all of the evidence presented, the applicable statutes, regulations, and case law, and the arguments presented by the parties, the Hearing Officer makes the following conclusions of law:

1. , (the "Student") is handicapped, having Emotional Disturbance, and comes within the purview of IDEA.

2. The Student requires specific conditions and related services in order to derive benefit from his education.

3. At all times relevant hereto, Student's Parent has resided in Virginia, thus the local educational agency ("LEA") is responsible for educating the Student and providing him with a Free and Appropriate Public Education ("FAPE").

FAPE

To determine whether the manifestation determination review after the BB gun incident conducted on May 27, 2004 was flawed, the Hearing Officer must examine the statutory requirements of an MDR. State regulations at 8 VAC 20-80--68(5) provide that a manifestation determination is required if the local educational agency is contemplating a removal that constitutes a change in placement, including removal to an interim educational setting, for a student with a disability who has violated any rule or code of conduct of the local educational agency that applies to all students. The local educational agency shall notify the parent or parents

with the procedural safeguards notice not later than the date upon which the action is to be made.

In reaching its decision, the IEP team and qualified school personnel must first consider all relevant information and the IEP team shall review the relationship between the student's disability and the behavior subject to the disciplinary action. The following analysis must then be made by the IEP team: 8 VAC 20-80-68(5)(1)(a-c)

The MDR team must consider the following information, namely:

(1) Evaluations and diagnostic results, including the results of other relevant information supplied by parent.

(2) Observations of the student.

(3) The student's IEP and placement.

The MDR team must then determine:

(a) In relationship to the behavior subject to the disciplinary action, were student's IEP and placement appropriate and were the special education services, supplementary aids and services, and behavior intervention strategies provided this student consistent with the student's IEP and placement?

(b) Did the student's disability impair his ability to understand the impact and consequences of the conduct subject to the disciplinary action?

(c) Did the student's disability impair the student's ability to control the behavior subject to the disciplinary action?

The LEA has made a manifestation determination in the above case that the Student's behavior was not caused by disability. It is the position of this Hearing Officer that the Parent bears the burden of proving that Student could not avoid this incident, that the Student did not have adequate IDEA support and services in place to prevent this incident that he was not in control of his actions on May 27, 2004 or

DISCUSSION AND CONCLUSION OF LAW

Based upon all of the evidence presented, the applicable statutes, regulations, and case law, and the arguments presented by the parties, the Hearing Officer makes the following conclusions of law:

1. , (the "Student") is handicapped, having Emotional Disturbance, and comes within the purview of IDEA.

2. The Student requires specific conditions and related services in order to derive benefit from his education.

3. At all times relevant hereto, Student's Parent has resided in Virginia, thus the local educational agency ("LEA") is responsible for educating the Student and providing him with a Free and Appropriate Public Education ("FAPE").

FAPE

To determine whether the manifestation determination review after the BB gun incident conducted on May 27, 2004 was flawed, the Hearing Officer must examine the statutory requirements of an MDR. State regulations at 8 VAC 20-80--68(5) provide that a manifestation determination is required if the local educational agency is contemplating a removal that constitutes a change in placement, including removal to an interim educational setting, for a student with a disability who has violated any rule or code of conduct of the local educational agency that applies to all students. The local educational agency shall notify the parent or parents

that his judgment was impaired by his disability to the extent that he could not appreciate the impact or consequence of his behavior. The Parent has not met this burden.

The burden of proof rests with the Parent in this case: Parent requested the due process hearing. Virginia case law, federal decisions and administrative decisions support placing the burden of proof on the party who challenges the administrative action.

In the 4th Circuit, the Court has held that a parent who initiates a due process hearing bears the burden of proof in challenging the IEP. Weast v. Schaffer, 277 F.3d 449 (United States Court of Appeals, 4th Circuit (2004).

The Parent has not proven by a preponderance of the evidence that the no manifestation determination on May 27, 2004 was not supported by the evidentiary record.

4. I find that parental notice requirements were satisfied by the LEA.

Accordingly, I find that:

5. The Manifestation Determination shall be upheld upon the following grounds:

The Parent was provided with due notice of the Manifestation Determination occurring on May 27, 2004 and all procedural safeguards were afforded to Parent.

The IEP team was timely convened and the IEP team was comprised of the appropriate number of qualified individuals. Evidence presented to the Manifestation Determination Committee was fair and reasonably accurate.

In making the Manifestation Determination, the IEP team properly considered all components required by the Virginia regulations in making an analysis of the facts.

The incident occurring on May 27, 2004 was not caused by the behavior of this student's disability. The incident was not a result or manifestation of this student's disability.

Virginia regulation at 8 VAC 20-68(5)(f)(2) sets out procedure for the LEA when the MDR team decides that Student's behavior was not a manifestation of the student's disability and the student will be subjected to the discipline applicable to a student without a disability:

"(f)(2) The IEP team determines the extent to which services are necessary to enable the student to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the student's IEP."

The U.S. Supreme Court in Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley, et al. (102 S. Ct. 3034, IDELR 553:656 (1982) provides the ultimate analysis in FAPE determinations:

(1) Did the LEA meet the procedural requirements of IDEA?

(2) Is the IEP reasonably calculated to enable the student to receive educational benefits?

Parent's assertion that IDEA procedural violations have occurred in this case does not alter the correct finding to be made in this case regarding the sufficiency of this Student's IEP.

In order to be entitled to compensatory educational services, there must be a "substantial" procedural violation of IDEA that denies the student of a FAPE. Dibuo v.Board of Education, 309 3d 184 (4th Circuit (2002) Procedural violations deemed to be "mere technical contraventions of IDEA" do not necessarily interfere with the provision of FAPE. MM, 303 F.3d at 533.

Here, Parent has asserted that the LEA committed many procedural violations. Most of the violations claimed by the parent, upon examination of the facts, were inaccurate regarding notices sent to the Parent, parent's presence at IEP meetings and notices of proposed actions.

Parent has also claimed deficiencies in the home based instruction provided to Student: home based instruction was insufficient, the instruction didn't begin on the correct date, the instructional hours were insufficient, the second special education teacher was not state endorsed until after the final date of instruction. Finally, Parent asserts inter-office E-Mails confirm the existence and acknowledgment by the LEA of substantial procedural errors in this case.

Procedural errors presented in this case were, at most, insignificant in consideration of the magnitude of the LEA's effort to make up for any time lost initially because the home based instruction did not begin on the operative dates. There has never been a showing of adverse educational impact on this Student caused by the LEA's minor procedural "blips." Failure for this student to pass the 8th grade SOL's is not necessarily indicative of academic failure or regression. Contrarily, independent evaluation of this student shows that he is ahead of his peers academically.

Regarding the sufficiency of this Student's IEP behavior intervention plan, in the United States Court of Appeals, 7th Circuit, the Court has held that IDEA does not contain specific substantive requirements for IEP behavior intervention plans. The Court held that a behavior intervention plan cannot be deemed insufficient. Alex R. v. Forrestville Valley Community Unit School District #221, 375 F.3d 603 (2004).

The Student's IEP and placement were appropriate, the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the student's IEP and placement. After the manifestation determination was made, revisions were made to the IEP, as needed.

This Student's disability did not impair his ability to understand the impact and consequences of the behavior subject to this disciplinary action.

The Student showed "forethought and investigation." These attributes have been deemed to show that the behavior was not "impulsive." A.W. v. Fairfax County Schools, 372 F. 3d 674 (United States Court of Appeals, 4th Circuit, 2004)

Facts reflected that Student obtained a BB gun, loaded it, attached a red "Bloods" bandanna to his arm, secreted the gun, brought it to school, aimed the gun at a fellow student, then hid it under the mobile unit. To avoid discipline, he provided two different accounts to school personnel.

This behavior was planned, intentional. The no manifestation finding was warranted.

6. The LEA has provided this student, ,

with a FAPE.

IDENTIFICATION OF PREVAILING PARTY

Pursuant to 8 VAC 20-80-76(K)(11) this Hearing Officer has the authority to determine the prevailing party on each issue that is decided. Having found that the LEA provided Travis John Gordon with a FAPE and that the manifestation determination was in compliance with Virginia regulation provided in 8 VAC 20-76 (J)(19(a-c), the Hearing Officer identifies the LEA as prevailing party on all issues.

APPEAL INFORMATION

8 VAC 20-80-76(O) Right of Appeal

1. A decision by the Hearing Officer in any hearing ... shall be final and binding unless the decision is appealed by a party in a state circuit court within one year of the issuance of the decision or in a federal district court.

2. The appeal may be filed either in a state circuit court or in a federal district court without regard to the amount in controversy.

3. If the hearing officer's decision is appealed in court, implementation of the hearing officer's order is held in abeyance except in those cases where the hearing officer has agreed with the child's parent or parents that a change of placement is appropriate in accordance with subsection E of this section. In those cases, the hearing officer's order must be implemented while the case is being appealed.

IMPLEMENTATION PLAN

The LEA is responsible to submit an implementation plan to the parties, the hearing officer, and the Virginia Department of Education within 45 calendar days.

Dated: May 27, 2005

Hearing Officer