

**CASE CLOSURE SUMMARY REPORT**

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

Public Schools  
School Division

Name of Parent(s)

(for)  
Division Superintendent

Name of Child

Kathleen Mehfoud, Esq.; Patrick Andriano, Esq.  
Counsel Representing LEA

Jonathan Martinis, Esq., Mona Siddiqui, Esq.  
Counsel Representing Parent/Child

Parent  
Party Initiating Hearing

LEA  
Prevailing Party

Hearing Officer's Determination of Issue(s)

The Parent disagrees with the determination of a March 29, 2010 Manifestation Determination Review, following a March 26, 2010 disciplinary incident, that the conduct in question was not a manifestation of the Child's disability.


The Parent alleges that the Child's IEPs for the 2009-10 school year denied the Child a free and appropriate public education by failing to give due consideration to the Child's evaluations and by failing to provide appropriate behavioral interventions and supports and strategies to address the Child's behaviors related to his disability. The Parent alleges that the same IEP is in effect for the 2010-11 school year and continues to be deficient for the same reason.

Hearing Officer's Orders and Outcome of Hearing:

LEA demonstrated that behavior not a manifestation of disability.  
Parent did not meet burden of proof that IEP not reasonably calculated to provide educational benefit.

This certifies that I have advised the LEA of its responsibility to submit an implementation plan to the parties, the hearing officer, and the SEA within 45 calendar days.

Peter B. Vaden  
Printed Name of Hearing Officer

 9/24/10  
Signature

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF EDUCATION

65.001.2010

Office of Dispute Resolution and Administrative Services

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In Re: STUDENT<sup>1</sup> }  
 } Hearing Officer: Peter B. Vaden  
Expedited Due Process Hearing }  
(Frederick County School Board) }

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**FINDINGS OF FACT AND DECISION**

**BACKGROUND**

This matter came to be heard upon the request of an expedited due process hearing filed by Petitioner PARENT (the “Parent”), under the Individuals with Disabilities Education Act, as amended (the “IDEA”), 20 U.S.C. § 1400 et seq., and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia (“Virginia Regulations”). This Due Process Complaint arises out of a March 29, 2010 manifestation determination review (“MDR”) decision that the Student’s behavior during a March 26, 2010 disciplinary incident was not a manifestation of the Student’s disability. In addition, the Parent contends that the Student’s IEPs for the 2009-2010 and 2010-2011 school years denied the Child a free and appropriate public education, by failing to give due consideration to the Child’s evaluations and by failing to provide appropriate behavioral interventions, supports and strategies.

The Student, an AGE boy on the hearing date, was last found eligible for special education services on June 10, 2010 under the primarily disability Other Health Impairment (“OHI”).

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<sup>1</sup> Personal identification information is provided in Appendix A.

The Parent's Due Process Complaint was filed on July 26, 2010. The undersigned Hearing Officer was appointed on July 28, 2010. The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and 8 VAC 20-81-210.O.

The due process hearing was held before the undersigned hearing officer on September 8, 9 and 10, 2010 at the \_\_\_\_\_ Public Schools (" PS") Administration Building in \_\_\_\_\_, Virginia. The hearing, which was closed to the public, was recorded and transcribed by a court reporter. The Parent was present for the hearing and was represented by counsel. \_\_\_\_\_ School Board (" SB") was represented by Director of Special Instructional Services \_\_\_\_\_, and by counsel. Counsel for the Parent and for \_\_\_\_\_ SB made opening and closing statements. The Parent testified and called as witnesses MATH TEACHER ("Math Teacher"), \_\_\_\_\_, EDUCATIONAL DIAGNOSTICIAN ("Diagnostician"), SCHOOL SOCIAL WORKER ("Social Worker"), ASSISTANT DIRECTOR OF SPECIAL INSTRUCTIONAL SERVICES ("Instructional Services Assistant"), SPECIAL EDUCATION CASE MANAGER ("Case Manager"), ASSISTANT PRINCIPAL 1 ("Assistant Principal 1"), ASSISTANT PRINCIPAL 2 ("Assistant Principal 2"), SPANISH TEACHER ("Spanish Teacher"). Testifying for \_\_\_\_\_ SB were CHORAL AND MUSIC DIRECTOR ("Chorus Teacher"), SCIENCE AND LANGUAGE ARTS TEACHER ("Science Teacher") and the SCHOOL PSYCHOLOGIST ("School Psychologist"). Parent Exhibits P-1 through P-38 and P-13A, were admitted without objection, with the exception of P-14, P-16, P-28, P-32, P-33, P-34, P-35, and P-36. Exhibits P-14, P-16, P-28, P-32, P-34, and P-35 were admitted over the School Board's objection. Exhibits P-33 and P-36 were withdrawn. School Board Exhibits SB-1 through SB-22 and SB-32 through SB-45 were admitted without objection. Exhibits SB-23 through SB-31 were admitted over the Parent's objection.

## ISSUES

The issues asserted by the Parent to be determined are as follows:

1. Whether the Student's behavior in a March 26, 2010 disciplinary incident was a manifestation of his special education disability.
2. Whether PS's Individualized Education Program ("IEP") for the 2009-2010 school year and its proposed IEP for the 2010-2011 school year were deficient for failure to give due consideration to the Student's evaluations and failure to provide appropriate behavioral interventions and supports and strategies.

## BURDEN OF PROOF

In *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of proof in an administrative hearing challenging an Individualized Education Program ("IEP") is properly placed upon the party seeking relief. *Id.*, 546 U.S. at 62, 126 S.Ct. at 537. With regard to the Parent's challenge to the Student's 2001-2010 and 2010-11 IEPs, the burden of proof therefore is upon the Parent.

For MDR appeals, the Virginia Regulations charge the Hearing Officer with responsibility to "[d]etermine in a hearing regarding a manifestation determination whether the local educational agency has demonstrated that the child's behavior was not a manifestation of the child's disability . . ." 8 VAC 20-81-210.O.19.<sup>2</sup> SB argues that the U.S. Supreme Court's decision in *Schaffer, supra*, supercedes this Virginia regulation, to the extent the provision imposes on the LEA the burden of establishing that the child's behavior was not a manifestation of his disability. However, the *Schaeffer* decision does not address the burden of proof in MDR

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<sup>2</sup> This state regulation tracks the IDEA prior to the 2004 Amendments. *See* 20 U.S.C. § 1415 (k)(6)(B)(i) (1997), *amended by* 20 USC § 1415(k)(3) (2004). The Virginia Regulations were last amended effective January 25, 2010.

appeals, and a special education hearing officer may not rule as invalid a Virginia statutory or regulatory provision. Accordingly, I find that the Virginia Regulations place the burden of proof on SB to establish that the Student's March 26, 2010 behavior was not manifestation of his disability.

### **FINDINGS OF FACT**

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student was born on BIRTH DATE. He is a resident of \_\_\_\_\_, Virginia.
2. At all times concerned herein, Student has been eligible for special education and related services under the Disabling Condition Other Health Impairment, due to a diagnosis of Attention Deficit Hyperactivity Disorder ("ADHD").
3. For the 2009-2010 school year, Student was enrolled in the GRADE at CURRENT SCHOOL. Student's September 23, 2009 IEP provided that he would be educated in the regular classroom for all of his classes, co-taught by regular education and special education teachers. In addition he would attend study hall for 115 minutes weekly in a self-contained special education classroom.
4. The Student's 2009-2010 IEP was amended on November 12, 2009. An additional self-monitoring need was identified with the stated goal of the Student's staying on task. Progress toward this goal was to be measured using a "Tally Sheet" to be completed by the Student. The Student's Spanish class, where the Student had behavior problems, was dropped from his schedule and a special education resource class was added.
5. The tally sheet was a behavior intervention tool. It was intended that the Student would, without prompting, mark a slash on the tally sheet each time his mind wandered. The

Student refused to use the tally sheet. Although the tally sheet was not working, this self-monitoring goal was not removed from the Student's 2009-2010 IEP.

6. After the Student exhibited behavior problems in the resource class, his IEP was amended again on January 25, 2010 to remove all resource room services. After the January 25, 2010 IEP Amendment, Student was to be taught only in the regular classroom. The September 23, 2010 IEP and later amendments all provided that in the regular classroom, Student would be co-taught by both a regular education teacher and a special education teacher.
7. Parent attended all IEP Team meetings during the 2009-2010 school year and always gave her permission to implement the IEP and amendments.
8. During the 2009-2010 school year, Student was referred to the Current School administration for numerous incidents of misbehavior. These incidents included, *inter alia*, fighting, showing disrespect to teachers, and disrupting his classes. From the beginning of the school year through March 25, 2010, there were over 25 incidents of misbehavior reported on Student's Discipline Summary Report.
9. At a January 25, 2010 IEP meeting, Parent requested a Functional Behavioral Assessment ("FBA") be conducted to assess the Student's behaviors. The FBA was not completed until the end of March 2010.
10. On March 5, 2010, Assistant Principal 1 wrote the Parent that Student was suspended from school beginning March 8, 2010 for refusal to follow school rules or policies. The Student was referred to the PS Coordinator for Student Support Services for further consideration.

11. A discipline conference was held on March 10, 2010 before the PS Coordinator for Student Support Services. Following the conference, the Coordinator reinstated The Student to school, on probation, for the remainder of the school year. The Coordinator requested the school administration to schedule a meeting of the Student's IEP team to review his progress and behavior.
12. On March 26, 2010, another behavior incident occurred which resulted in the Student's suspension for the remainder of the school year. When the Student and two classmates arrived late for their 4<sup>th</sup> period class, the Math Teacher told them that they could receive In-School Suspension for repeated tardiness. The Student responded with rude, disrespectful and vulgar comments. The Math Teacher attempted, unsuccessfully to "redirect" him, telling the Student repeatedly to leave the classroom and go out to the hallway. Eventually the Math Teacher directed the Student to report to the Assistant Principal's office. On leaving the classroom, the student slammed shut the classroom door. On his way to the principal's office, the Student made a rude comment to another teacher who spoke to him in the hall.
13. The Student was received by both assistant principals at the school office. During the meeting, when the administrators discussed his behavior, the Student was rude and disrespectful. He imitated the administrators, made faces and laughed at them. The assistant principals considered that the Student had violated his probation and decided to place him on long term suspension for the remainder of the school year.
14. On March 29, 2010, the Current School convened a Special Education Manifestation Determination Review to consider whether the Student's March 26, 2010 behavior was a manifestation of his disability. The meeting was attended by Assistant Principal 1,

Assistant Principal 2, Instructional Services Assistant, Case Manager, a general education teacher, the Parent and the Student.

15. Immediately prior to the MDR meeting, the same individuals convened as an IEP Team. The IEP Team concluded that the Student's current IEP, with the specified services and accommodations was appropriate, because the Student was making progress on the IEP. The IEP Team concluded that no changes needed to be made to the IEP. The Parent agreed with that decision.
16. During the March 29, 2010 meeting the team had the Student's entire school file available to review. In either the IEP session or the MDR session or both, the team reviewed the Student's disciplinary records, his attendance records, his special education eligibility reports, his 2009-2010 IEP and amendments, his report cards, his IEP progress reports, information from his teachers and input from the Student and the Parent.
17. The Parent took into the MDR meeting information she had downloaded from the internet. The Parent alleges that the MDR committee refused to consider this information. The SB attendees all testified that the Parent never offered these documents to the committee. I find, by the preponderance of the evidence, that the MDR committee did not refuse to consider the Parent's documents.
18. Before the MDR meeting, the Parent showed at least one MDR Team member a report from a Dr. , but she would not allow the report to be shared with the other MDR team members. The Dr. report was not offered into evidence at the due process hearing.



19. At the March 29, 2010 IEP/MDR meeting, the team members, including the Parent, agreed that the Student's IEP was appropriate and that there was no failure to implement the IEP.
20. In the MDR session of the meeting, the team concluded that the Student's disability did not have a direct and substantial relationship to the Student's March 26, 2010 misconduct. The Parent signed the MDR Review Summary, but added the written notation that the FBA, which she had requested in January 2010, had not been done. Although it is now disputed by the Parent, I find that the preponderance of the evidence establishes that at the MDR meeting, the Parent stated that she agreed that the March 26, 2010 incident was not a manifestation of the Student's disability.
21. After the March 29, 2010 MDR Meeting, Case Manager completed the FBA, which had been requested by the Parent in January 2010. The Student's IEP Team considered the FBA at a meeting on March 30, 2010 and put in place a Behavior Intervention Plan ("BIP"). The Parent and the Student participated in the BIP development process.
22. The Student served his suspension for the remainder of the 2010-2011 school year. He was promoted to CURRENT GRADE. After his suspension, Student was reinstated and is still enrolled at Current School.
23. On June 11, 2010, PS determined that Student remained eligible for special education services under the category OHI based upon characteristics demonstrated by the Student associated with his ADHD diagnosis.
24. In August 2010, PS proposed an IEP for Student's 2010-2011 school year. The Parent has not consented to its implementation.

## CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

1. Whether Student's March 26, 2010 was a manifestation of his disability.

The IDEA requires that for children with disabilities who have been suspended for 10 or more days total in a school year, the local education agency (LEA) must hold a manifestation determination hearing, within 10 school days, to determine whether the conduct was a manifestation of the Child's disability.

[T]he local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine - (I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

20 U.S.C. § 1415(k)(E). *See, also*, 8 VAC 20-81-160D.

Following the March 26, 2010 misconduct of the Student, PS timely convened an MDR on March 29, 2010. The Parent, the PS representative and relevant members of the Student's IEP Team attended the meeting. The team convened first as an IEP Team and then continued the meeting for the manifestation determination hearing. All of the participants were present for both parts of the meeting. The testimony at the hearing established that the MDR team reviewed the Student's disciplinary records, his attendance records, his special education eligibility reports, his 2009-2010 IEP and amendments, his report cards, his IEP progress reports, information from his teachers and input from the Student and the Parent. Although the Parent raised questions at the hearing over whether the MDR team reviewed all relevant information, I find that this requirement was met.

The first issue to be addressed is whether, as the Parent alleges, the Student's behavior on March 26, 2010 was a manifestation of his OHI disability. The facts of the incident are not in dispute. The Student and two classmates were late returning to class after lunch. The Math Teacher told them that they could receive in-school suspension for repeated tardiness. The Student became disrespectful and told the teacher, "This is retarded." When the Student would not calm down, the Math Teacher had to tell him repeatedly to go out into the hallway. When the Student continued to talk back, the Teacher ordered him to report to the school office. The student complied, slamming the classroom door on his way out. In the hallway, the Student spoke disrespectfully to another teacher. At the office, both Assistant Principals met with the Student. He continued to act in a rude and disrespectful manner, mocking the administrators and making faces. The incident continued for over twenty minutes and for the entire period, the Student continued to act and to speak disrespectfully to the school administrators.

SB maintains that the Student's behavior on March 26, 2010 did not have a direct and substantial relationship to his OHI-ADHD disability. SB's experts, all school employees, testified that the Student's behavior was not aspects of ADHD. Educational Diagnostician explained that the Student's ADHD includes distractibility and may include difficulty with stimulus, but ADHD does not manifest in the behaviors, including disrespect and defiance, shown by Student on March 26, 2010. School Psychologist opined, similarly, that the behaviors Student engaged in were not related to ADHD. In her opinion, the Student was choosing to engage in disrespect and mimicking and those behaviors have nothing to do with inattention or hyperactivity. Director of Special Instructional Services testified that Student's behaviors were not a manifestation of his disability because the Student's ADHD showed in

distractibility and hyperactivity movement. The ADHD condition would not cause him to be disrespectful and to mock and imitate the administrators.

The Parent, who did not call any expert witnesses, argues that the Student's behavior on March 26, 2010 had a direct and substantial relationship to his OHI disability, which she contends was broader than just ADHD. The Parent's argument focuses on the Student's November 27, 2007 Psychological Evaluation, which concluded that the Student continued to demonstrate significant symptoms of ADHD in the classroom, as well as verbal aggression and conduct problems. The 2007 Psychological Evaluation language, including the reference to "verbal aggression and conduct problems" is carried over in the Student's IEPs in the Present Levels of Performance ("PLOP") and the Placement Decision sections.

The Parent argues that the references to the Student's verbal aggression and conduct problems in the Psychological Evaluation and the IEPs mean that the Student's OHI special education disability includes verbal aggression and conduct problems, in addition to ADHD. I disagree. The School Psychologist testified that the Student's disability is identified as Other Health Impairment due to his diagnosis of ADHD. Her testimony is borne out by the November 27, 2007 Eligibility Committee Minutes which reported that the Student meets the criteria for OHI Services – after noting in the preceding sentence that he "continues to be highly distractible and needs to be redirected often." Moreover the 2007 Psychological Evaluation states that although the Student had exhibited significant "acting out" behaviors in the classroom, Student did not appear to be exhibiting significant internalizing or emotional problems. In that report, the School Psychologist concluded that the Student's "acting out" behaviors appeared to be related to his ADHD or were behaviors aimed at gaining attention. In a Fourth Circuit decision cited by the Parent, *AW ex rel. Wilson v. Fairfax County School Bd.* 372 F.3d 674, 685 (4<sup>th</sup> Cir.

2004), the Court distinguished between a child's confrontational behavior and his ADHD. The Court concluded that the child's ADHD, but not the confrontational behavior, figured prominently in his qualifying disability. In this case, I similarly find that although the Student undoubtedly exhibits verbal aggression and conduct problems, his ADHD, not these "acting out" behaviors, figures prominently in his OHI qualifying disability.

The school board's experts, all professional educators, opined that the Student's behavior on March 26, 2010 was not a manifestation of his OHI disability. While the Parent disagreed with the school experts' opinions, she offered no contrary expert opinion to support her own contention that the Student's behavior was a manifestation of his disability. Under well established precedent in this federal judicial circuit, the opinion of school board witnesses, as professional educators, is due appropriate deference. *See, e.g., County School Bd. of Henrico County, Virginia v. Z.P. ex rel. R.P.*, 399 F.3d 298, 313 (4<sup>th</sup> Cir. 2005). Accordingly, I find that

SB has met its burden of demonstrating that the Student's March 26, 2010 misconduct was not a manifestation of his OHI disability.<sup>3</sup>

2. Whether the Student's IEPs failed to provide appropriate behavioral interventions and supports and strategies to address the Child's behaviors related to his disability.

The Parent contends that the PS's 2009-2010 and 2010-2011 IEPs were deficient in not providing appropriate behavioral supports and services. The well established standard for determining the adequacy of an IEP is "whether the IEP was reasonably calculated to enable the child to receive educational benefits, or stated another way, was the IEP sufficient to confer 'some educational benefit' upon the handicapped child." *MM ex rel. DM v. School Dist. of*

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<sup>3</sup> There was no evidenced adduced at the hearing that the Student's March 26, 2009 conduct was the direct result of the local educational agency's failure to implement the IEP.

*Greenville County*, 303 F.3d 523, 531 (4<sup>th</sup> Cir.2002). *Accord*, *M.S. ex rel. Simchick v. Fairfax County School Bd.* 553 F.3d 315, 319 (4<sup>th</sup> Cir. 2009). As the Fourth Circuit Court of Appeals has observed repeatedly, the IDEA establishes a basic floor of opportunity for every student with disabilities, but the Act does not require “the furnishing of every special service necessary to maximize each handicapped child's potential.” *Hartmann by Hartmann v. Loudoun County Bd. of Educ.* 118 F.3d 996, 1001 (4<sup>th</sup> Cir. 1997) (Citations omitted.)

The 2009-2010 IEP at issue in this case was issued on September 18, 2009. The Parent attended the IEP meeting and gave her permission to implement the IEP and the placement decision. The IEP was amended on November 12, 2009 and again on January 25, 2010. The Parent also participated in these meetings and consented to the amendments. The proposed 2010-2011 IEP was presented to the Parent in August 2010.<sup>4</sup>

With regard to the 2009-2010 IEP, the SB experts testified that the Student’s IEP and IEP amendments were appropriate. The School Psychologist explained that the under this IEP, Student was being provided with numerous services, accommodations and modifications that fit his needs. He was being co-taught classes with two teachers. He was being provided with read aloud on tests if requested. He was permitted to take tests in small group settings. According to the witness, these accommodations could help a student with ADHD because they reduce extraneous distractions. In addition, she noted that changes were made to the Student’s services during the school year, including class changes, self-monitoring and an incentive-reward program to respond to the Student’s behavioral issues. The Educational Diagnostician testified that the 2009-2010 IEP was appropriate for this Student because it contained goals for academic

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<sup>4</sup> The Parent did not offer evidence regarding the appropriateness of the proposed 2010-2011 IEP and I deem that part of her claim to be waived.

areas that had been demonstrated as weak and impacted by some of the attention deficit behaviors and symptoms.

In this case, it is also appropriate to consider evidence of the Student's actual progress to determine whether the 2009-2010 IEP was reasonably calculated to confer some educational benefit. *See Hartmann, supra*, 118 F.3d at 1001. Educational Diagnostician testified that, based upon the Triennial Educational Evaluation she conducted in June 2010, the Student had made progress in terms of his academic skills in most areas. His scores increased in basic reading skills. His performance in listening comprehension improved dramatically, and, compared to 2007 testing, he was less distractible. The Student's Pupil Report Card indicates that he passed *all* of his subjects for 2009-2010 school year and was promoted to the next grade. He showed improvement from the first to second semester in all subjects except Science.

For this part of her claim, the Parent had the burden of proof to establish that the 2009-2010 IEP was not reasonably calculated to enable the Student to receive educational benefit. The Parent offered no expert evidence that the 2009-2010 IEP failed to provide some educational benefit to the Student or that additional behavioral supports or services were required for the Student to receive educational benefit from his IEP. Based upon the opinions of the School Board experts that the 2009-2010 IEP was appropriate and the evidence that the Student made educational progress under the IEP, I find that the Parent has not met her burden of proof.

In summary, I find, based upon the preponderance of the evidence adduced at the hearing, that the Student's March 26, 2010 behavior was not a manifestation of his qualifying

disability and further that the Parent did not establish that the Student was denied a Free Appropriate Public Education under the 2009-2010 IEP.

ORDER

For the reasons set forth above, it is hereby ordered as follows:

1. The relief requested by the Parent herein is denied; and
2. SB shall develop an implementation plan within 45 calendar days of the date of this decision which must state how and when this decision will be put into operation. The implementation plan shall include the name and position of a case manager charged with implementing the decision. Copies of the plan shall be forwarded to the parties to the hearing, the hearing officer and the Virginia Department of Education.

The LEA is the prevailing party in this due process hearing.

Right of Appeal Notice

This decision is final and binding unless either party appeals in a federal district court within 90 calendar days of the date of this decision, or in a state circuit court within 180 calendar days of the date of this decision.



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Date of Decision: September 24, 2010