

SEP 10 2007

Dispute Resolution &
Administrative Services

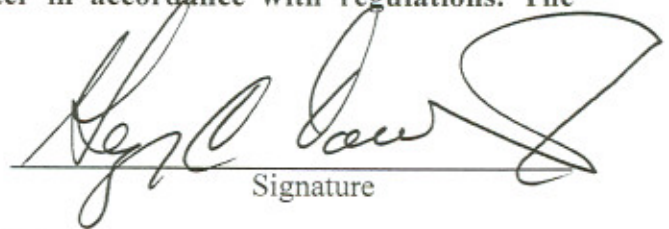
CASE CLOSURE SUMMARY REPORT

(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 Parents _____
 Name of Child _____
 Counsel Representing LEA John F. Cafferky, Esq.
 Counsel Representing Parent/Child Jonathan Martinis, Esq..
 Party Initiating Hearing _____
 Hearing Officer's Determination of Issue(s): See Attached List
 Date of Decision September 7, 2007
 Prevailing Party PS
 Hearing Officer's Orders and Outcome of Hearing: **Attached**

This certifies that I have completed this matter in accordance with regulations. The written order is attached.

George C. Towner, Jr.
 Printed Name of Hearing Officer


 Signature

cc: Parent(s); School Division; State Education Agency

Issues Decided

1. Who selects MDR team members?

ANS: Both school system and parents

2. Who are "relevant" members of MDR team?

ANS: Those selected by both school system and parents

3. What constituted "relevant" information to be considered by MDR team

ANS: The information available to the team members from the records and their personal contacts with each other and the student. It was adequate

4. Were _____ and his parents entitled to "votes" in the MDR team decision?

ANS: No, they were entitled to participate and make their views known. The ultimate responsibility for the decision rests upon the school system

5. Did any procedural violations seriously deprive _____ or his parents of the opportunity to participate fully in the MDR process or result in loss of educational opportunity or benefit for _____ ?

ANS. No

6. Was _____'s conduct caused by or did it have a direct and substantial relationship to his disability or was the conduct the direct result of the _____ HS's failure to implement _____'s IEP?

ANS: No

7. Is _____ currently receiving FAPE?

ANS: Yes under August 14, 2007 IEP

Received

SEP 10 2007

**Dispute Resolution &
Administrative Services**

VIRGINIA:

DUE PROCESS HEARING

Student, :
v. :
Public Schools :


ORDER OF DISMISSAL

This cause came on to be heard on August 22 and 23, 2007 and pursuant to the decision of the Hearing Officer dated September 7, 2007

It is accordingly **ORDERED** that this cause be and it hereby is, dismissed without prejudice.

AND THIS ORDER IS FINAL

ENTERED: September 7, 2007


George C. Towner, Jr.
Hearing Officer

SEP 10 2007

Dispute Resolution & Administrative Services

VIRGINIA:

DUE PROCESS HEARING

Student,
v.
Public Schools

:
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:

DECISION

Statement of the Case

On July 25, 2007 Mr. _____ and his wife _____ on behalf of their son _____ (_____) through their attorney, Jonathan Martinis, Esq. filed with the _____ Public Schools (_____ PS) a Request for an Expedited Due Process Hearing. [IC#1]The Request sought the reversal of a Manifestation Determination Review team decision dated January 5, 2007 that _____ 's conduct of December 16, 2006 which led to the disciplinary action of suspension and removal taken by _____ High School (_____ HS), a school operated by _____ PS, against _____ was not a manifestation of his disability. The Supreme Court of Virginia designated George C. Towner, Jr. Esq. as the Hearing Office in this matter. [IC#3]

The Hearing Officer held a prehearing telephone conference on August 7, 2007. At that conference the pertinent matters decided were:

1. That the parties had no objections to the designated hearing officer serving in this matter.
2. That the parties were advised that on their own they may settle the matter. The parties agreed that the hearing would be held on Wednesday August 22, 2007 at 9am at the _____ Center, _____, _____, VA _____. The parties were

advised that the Hearing Officers's decision would be rendered by Friday September 7, 2007.

3. It was determined by the parties that the hearing would not be open.

4. The parties agreed to voluntarily exchange exhibits without need of a subpoena. The parents agreed to notify the PS on or before August 8, 2007 of the names of school employees they desired to be present at the hearing and PS agreed to make said employees available either in person or by telephone without subpoena.

5. The parties agreed to provide the Hearing Officer on or before August 17, 2007 with lists of anticipated witnesses to be called (including the general thrust of their testimony) and a listing of the documents intended to be introduced as evidence. [IC #7] The Lists of Witnesses and Exhibits were provided by counsel in a timely manner.

The Hearing was held on August 22 and 23, 2007. Counsel for the parties agreed to submit Statements of Points and Authorities which Statements were timely filed on August 31, 2007. The Hearing Officer subsequently on September 3rd offered counsel the opportunity to submit additional legal citations by September 5th. Each counsel submitted additional citations.

Statement of Facts

became eligible for special education services when he was in the 8th grade at Middle school. He had exhibited anxiety, crying and school refusal issues and in lieu of disciplinary action was referred for evaluation. [PS # 13]The symptoms noted in his evaluation were anxiety, sweating, shaking and panic attacks. In the IDEA classification system he was categorized as a student with "emotional disabilities".

His IEP of 4/28/05 prescribed one hour per month of special education services to

be fulfilled by monitoring and consultation. [S #13] In the 9th grade advanced to HS where , a special education teacher, became his case manager and she prepared his IEP for the period 4/28/05 to 4/28/06. [S #14] That IEP made reference to inappropriate classroom behaviors often at the instigation of friends. During his sophomore year 's case manager was Mr. and his IEP dated March 24, 2006 covered the balance of his sophomore year and two thirds of his junior year. Ms. again became 's case manager in his junior year.[Tr p323] She and with the concurrence of 's parents agreed upon an informal method of providing special education services to avoid having called out of his regular education classes for one on one meeting.[Tr p334, Tr p71] 's IEP continued to contain references to his classroom behavior although some teachers noted improvement as increased in maturity.[Tr 332]

At the hearing four HS personnel testified. Ms was his History teacher. His junior year was the first time that he was taught by her. [Tr p 287] She felt he showed some leadership qualities having served as a "teacher" in one of the class projects.[Tr p 291] In response to questions concerning a Teacher Report Form [S #5] she had completed she stated

1 Q. I direct your attention to your
2 handwriting under the question, "Does this pupil
3 have any illness or disability, where you wrote, "I
4 believe that the student has been diagnosed with an
5 emotional disability, but I have never been fully
6 informed as the details."
7 A. Yes.
8 Q. Did you ask anyone about the details?
9 A. It depends what you mean by the details.
10 Q. What did you mean by the details?
11 A. Okay. I knew that had a
12 disability. I knew that he was receiving limited
13 services. I knew that he was received those limited
14 services from . I knew that his

15 disability was emotional in nature.
16 Beyond that, I didn't know the details
17 of when he had been treated for it, or what
18 treatment he had been receiving in the past. [Tr p 274]

Later in response to an email inquiry from Mrs. as to whether she thought "could be influenced by others into inappropriate disruptive conversation or movement around the classroom" (S #6) she replied

11 Q. Is that an e-mail that you sent to Mrs.
12 ?
13 A. Yes, it appears to be.
14 Q. Directing your attention to the sentence
15 near the end, "I also feel that I lack the necessary
16 knowledge about 's disabilities to make an
17 informed decision in this situation."
18 Was that a honest statement on your
19 part?

* * * *

3 A. Well, it certainly is honest. I
4 wouldn't put something incorrect in an e-mail.
5 Q. Okay. Now, you wrote this e-mail to
6 Mrs. in response to her request that you
7 give information about your experience as to whether
8 is unduly influenced by others; is that right?
9 A. That's correct. [Tr p 277-278]

Mr. was 's Algebra teacher his junior year. In response to an email from regarding 's academic and behavior progress he responded that 's behavior had "changed drastically" He testified

1 Then he was close friends to another
2 student, and that student was not as respectful as
3 was. And sometimes he would misbehave with,
4 kind of encourage to start laughing, to -- how
5 would I say it? To say that -- a green signal, do
6 you know what I mean? To tell him, kind of the, you
7 know, support it. It's okay if you do that. So he
8 started kind of backing him up by laughing.
9 And then that kind of concerned me. So
10 again, I talk to him. So I said, if someone
11 misbehaves, you would need to kind of try to control
12 yourself and just be respectful. [Tr p 259]

As noted previously Ms. was 's special education teacher.

She testified

13 Q. How did you have contact with his
14 teachers?

15 A. Well, I walk around a great deal, and I
16 walk around with my list and my schedules, and I
17 just make my rounds, so to speak. And I would find
18 out how he was doing. They also were informed that
19 I was his case manager, and if they had anything
20 that they wanted to bring up with me, these are the
21 classroom teachers –

22 Q. They were informed by who?

1 A. By me. This is in the beginning of the
2 school year, that I was his case manager, and that
3 if they wanted to talk to me about any of his
4 concerns or IEP goals and objectives to please give
5 me a call. And they were good with that. They were
6 good with that.

7 I mainly found things such as not being
8 exactly polite in some classes, talking out of turn,
9 getting embroiled in maybe some childish behavior in
10 the classroom.

11 But every single time that I talked to
12 about his behavior, he understood, he took
13 full responsibility for it, and it improved. He was
14 a very workable kid.

15 Q. Did you see any change in terms of the
16 feedback that you got about or your own
17 observations of from ninth grade to eleventh
18 grade?

19 A. Well, the tenth grade I was not his case
20 manager.

21 Q. I understand.

22 A. So you are asking me from –

1 Q. What did you see, was –

2 A. Oh, from ninth grade to eleventh?

3 Q. Yeah, from ninth grade to eleventh
4 grade, what did you see?

5 A. I personally felt that he was just
6 developing into a wonderful young man.

7 Q. Why do you say that?

8 A. Well, my office is right across from the
9 which is the little grill, the
10 bistro that's run by the students in culinary tech.
11 And the person who runs that is Mrs. . She
12 and I are always interacting together.

13 And on more than one occasion, I just
14 kept hearing these glowing reports about how he was
15 doing, that he was a natural in that field. And so
16 I was getting nothing but positive feedback. I was
17 also getting feedback that he was developing

18 leadership qualities. And I was delighted to
19 hear –
20 Q. Tell us about that?
21 A. It was from She told me
22 that she thought he had tremendous potential. That
1 she saw him taking the initiative in class more and
2 more. And was very impressed by his abilities.
[Tr p 330-333]

The incident which led to the MDR meeting occurred on December . It
was described by Officer of Police Department and the
school resource officer at High School
as follows:

4 Q. Tell us what information you received as
5 far as that was concerned?
6 A. Well, I received an information copy of
7 a report from the patrol officer that had initiated
8 a traffic stop, and also was the same officer who
9 handled the vandalism report that involved, based on
10 his belief, some of the same kids.
11 Q. What had basically happened at
12 High School as far as vandalism was
13 concerned?
14 A. He had been dispatched to take a report
15 of someone paintballing the school.
16 Q. Okay. Subsequent to that, you mentioned
17 a report of a traffic stop, what was that?
18 A. Well, around 3:30 in the morning, he had
19 had occasion to initiate a traffic stop on a vehicle
20 driven by a boy identified as
21 approximately a block away from the school. [Tr 208]

* * *

15 Q. As a result of receiving that
16 information, did there come a point when you became
17 involved in investigation of the vandalism incident?
[Tr 209]

* * *

22 A. I did. [Tr 210]

* * *

11 A. I did. I believe it was the evening of
12 the 20th, there was a basketball game at
13 High School that a student
14 was attending. Officer had stopped by the

15 school to meet with me and discuss the case. And I
16 noted that was there, and stated to him that
17 the boy that you are saying was driving the car is
18 here tonight.

19 Q. Did you have a chance on that occasion
20 to talk to about what had happened?

21 A. I did.

22 Q. What initially did he tell you, and then
1 what did he tell you after that? Tell us what that
2 conversation was?

3 A. Well, specifically I spoke with the
4 father first, told him why we wanted to talk -- his
5 father was at the game as well. Told his father why
6 we wanted to talk to him. It appeared that he was
7 somewhat already aware of the incident. And we
8 asked him if he would come up to my office at the
9 school, where we could conduct a sit-down interview.

10 The father was present. Initially, as I
11 said, we talked to about it, his involvement
12 in this incident, and he denied any involvement.

13 Q. Did there come any later point during
14 the interview process where had a, provided
15 different information in regards to whether he was
16 involved?

17 A. Yeah. Initially the officer who was
18 handling the case conducted the first stage of the
19 interview, and where denied any involvement.
[Tr 211-212]

* * *

16 Q. Okay. Did you -- I guess you were
17 answering the question about whether -- you
18 said he initially denied involvement. Did there --
19 was there any later point at which he was more
20 forthcoming?

21 A. Right. Based on what I just said, I
22 then offered that information up to both and
1 his father in my office, saying, knowing that the
2 school isn't looking to prosecute for the
3 destruction at this point, is there anything about
4 your story you want to change?

5 And he shook his head in
6 acknowledgment, and also said, yes, there is.

7 I said, what is it that you want to
8 change about your story?

9 And he said, that I did it.

10 Q. Did you have a -- I'll come back to
11 that. But did you have occasion in the course of
12 your interview process and investigation process to
13 interview the other students as well?

14 A. Yes, I did.

15 Q. How many students altogether were
16 involved?

17 A. Five.

18 Q. And did you have occasion to interview
19 students once or more than once?

20 A. More than once. [Tr 213-214]

* * *

12 Q. Right. And so from that, as a result of
13 that process, that interview process, or that
14 multiple interview process, were you able to
15 ascertain what had happened as far as the vandalism
16 incident was concerned?

17 A. Yes. Yes, I was.

18 Q. Where -- based upon that information,
19 can you describe for us what your investigation
20 revealed had happened?

21 A. Based on the interviews of the five
22 students, all of which were _____ students,
1 what I believed happened, based on putting all this
2 information together was, and what statements, and
3 the statements that were made to me, was that
4 approximately 10:00, 11:00 o'clock Saturday
5 evening --

6 Q. That would have been the _____ of
7 December? [Tr p215-216]

* * *

16 A. The boys met up at _____'s house. There
17 was four at that point. They decided to go to one
18 of the IHOP restaurants in the area to get some food
19 and to meet with some other friends and some girls
20 that they had called. They went to that IHOP --
[Tr p216]

* * *

5 Q. Okay

6 A. While there, one of the boys,
7 received a phone call from _____ asking what,
8 was asking what they were up to, what they were
9 doing. _____ basically said, we're just hanging out
10 at IHOP eating, talking to some girls and whatever.
11 Come on up.

12 _____ responded to the IHOP. Once
13 there --

14 Q. How did _____ get to the IHOP?

15 A. He drove his car.

16 Q. All right.

17 A. Once there, they sat around basically
18 asking each other what they wanted to do. They were

19 bored, didn't know what to do. Three of the four
20 boys, other boys there, stated that persisted
21 in the idea of, let's go paintball something. Let's
22 go paintball High School.

1 Q. Did , when he drove up to the IHOP,
2 did he have a paintball gun in his car at that time?

3 A. He did.

4 Q. Okay. So made that suggestion.
5 What happened then?

6 A. They threw that idea back and forth a
7 little bit. A couple of the boys there weren't
8 really up for that. But -

9 Q. When you say a couple of the boys
10 weren't really up for that, who wasn't really up for
11 it? Just first names?

12 A. and

13 Q. All right.

14 A. But they eventually all conceded to
15 doing this. They started to leave, initially
16 started to get into both cars. said, let's go
17 in my car. They all got into 's car.

18 They drove to -- I guess en route to the
19 school, one of the other boys named said,
20 let's go by my truck; I have two other paintball
21 guns in my truck.

22 Q. So did they make some kind of a detour
1 from whatever the direct route between the IHOP and
2 the high school was, to pick up some more paintball
3 guns?

4 A. Yes. [Tr 217-219]

* * *

18 Q. Okay. So they get the two more
19 paintball guns, and then what happens?

20 A. From there, they go to the school. They
21 drive through the back -- I'm sorry -- the back lot
22 of the school, basically just checking to see if
1 anyone is there. And then once they feel a little
2 more safe about what they are intending, they load
3 up the guns and they start shooting them.

4 Q. Who is driving the car at this point?

5 A.

6 Q. All right. And then what happens?

7 A. Just so, to give, I guess, a more
8 realistic understanding of where they were, is
9 driving. is in the front seat next to him.

10 , and are in the back seat.

11 Q. All right.

12 A. And in that order, so and
13 are on the outsides of the back seat. is in

14 the middle. And they are shooting out the window of
15 the car while driving, at the windows in the
16 building, of the High School, rather,
17 and also at parked vehicles. There are school
18 buses, county vehicles, and the like. [Tr p 219-220]

* * *

19 Q. All right. So then what happened?

20 A. They made a couple of loops through the
21 parking lot shooting, went from the south side of
22 the building around to the west side by the football
1 fields, shooting up those sides of the building.

2 At some point they thought that the
3 problem with the gun was that it was out of CO2, or
4 they needed more CO2.

5 Q. So what did they do then?

6 A. The statements that I have say that they
7 left the property to go get more CO2 from 's
8 truck, as well as more paintballs.

9 Q. still driving at this point?

10 A. Yes. [Tr p 211-222]

* * *

13 Q. You say they left the grounds of
14 High to go get some more CO2?

15 A. Yes, sir.

16 Q. Did they secure some more CO2?

17 A. That's what I'm led to believe from
18 their statements, yes.

19 Q. Did they come back to High
20 School?

21 A. They did. [Tr 223]

* * *

9 Q. Okay. And after they did that,
10 did that, what happened then?

11 A. Then , and were the
12 only three in the vehicle. They went back to the
13 school a third time.

14 And this time they went by the route of
15 in front of the school, went in through
16 the, what we call the kiss-and-ride lane or the
17 drop-off lane of the school, and shot up the school
18 again, specifically the marquee that's out front,
19 marquee, and a few shots at the front
20 side of the building.

21 Q. And then did there come a point when
22 they left the grounds of the High
1 School for the final time?

2 A. Yes. And that would have been right
3 prior to the traffic stop. They exited the school
4 property heading east on to
5 which is where they made a right turn and blew
6 through the stop sign, and then the traffic stop was
7 initiated by the officer.

8 Q. At the time of the traffic stop, was
9 the -- were any of the paintball guns discovered to
10 be in the car --

11 A. Yes, they were.

12 Q. -- by the officer? Was questioned
13 about that?

14 A. He was. [Tr p 225-226]

* * *

19 Q. What was the response?

20 A. I believe the response, based on the
21 officer's report, was that they had been in the car.
22 had told them, and the other boys had said
1 that they had been in the car from an earlier date
2 when they had been out in the woods somewhere having
3 paintball wars.

4 But that they -- and then the officer
5 specifically asked them, I'm not going to get a call
6 later on about any paintball vandalism, am I? And
7 they said, no, we weren't involved in anything.
[Tr p 226]

* * *

20 Q. Was the information that you -- did you
21 get any information in the course of your
22 investigation that indicated to you that when it
1 came to the planning and exclusion of this
2 situation, that was following the lead of
3 somebody else, or not?

4 A. No. As you see in the book, as well as
5 in my notes, and what I heard verbally from three of
6 the other four boys, that this was 's idea,
7 and at some point (last name deleted)
8 was also mentioned. It was their idea and it was
9 basically out of spite for being ejected from a game
10 a week earlier for disorderly conduct.

11 So they were coming back to initiate
12 some type of prank on the school. And that's a
13 direct statement from one of the students, and two
14 of the other students involved also supported that
15 this was 's idea.

16 Q. Based upon your experience as a police
17 officer, and interviewing individuals over the
18 course of 19 years, did you believe those statements

19 to that effect?
20 A. I did. They were all interviewed
21 independently. And they all, for the most part all
22 their statements were consistent. And as I said,
1 three of the four other kids, basically if you want
2 to say pointed a finger, were pointing a finger at
3 and
4 Q. Final question. In the interviews that
5 you had with , did he at any point indicate
6 that he had become involved in this at the behest of
7 others, or because he didn't want to lose face in
8 front of kids that were more popular, or anything
9 like that?
10 A. No.
11 Q. Was that his rationale?
12 A. That never came up at any point during
13 my interviews. [Tr p 237-239]

Mr. the PS hearing officer testified as to similar and consistent facts.
(Tr p 580-588)

Being cognizant of PS requirements where a weapon is brought on the school campus the Principal determined to suspend for 10 days with a recommendation that he be expelled as required by Virginia Code Section 22.1-277. By letter dated December the principal notified Mr. and Mrs. of her decision and advised them that the IEP was required to convene and that there would be a Manifestation Determination Review. [PS #4]

As the chair of the Special Education Department chair Ms was designated to serve as chair of the MDR team. [Tr p 529] In accordance with PS policies she was required to include the following categories of school personnel on the MDR team in addition to herself, namely a School Administrator or designee, special education teacher of the student, general education teacher of the student, and psychologist. [PS #86] She selected the following individuals to serve on the MDR team: Mr. , the assistant principal who handled the school investigation; , a school Psychologist; , 's Special Education

case manager; and , 's regular education History teacher. (S #2]

She telephoned Mr. and Mrs. initially suggesting Jan as the date for the meeting but that date was later changed to Jan . She then completed and sent a "Parent Notification of Manifestation Determination Review Meeting" form to Mr. and Mrs. . [S #1]The Notification was accompanied by the VA DOE procedural safeguards. [PS #61]

No request was made by the to have people attend the meeting nor did Ms. solicit them to bring additional people. She did not talk to the further, believing that the materials she sent provided an adequate explanation of the MDR process.

[Tr p 561]

The testimony indicates that there were informal meetings between the school MDR members prior to the Hearing. [Tr p 375-376] [p 538][Tr p 310] [Tr p 470, 477] The evidence indicated that the prehearing research done by each member varied but no member of the MDR team appears to have read all of 's files prior to the meeting.

On the hearing date and Mr. and Mrs. appeared and participated in the meeting. The various witnesses estimated the length of the meeting as varying between 10 and 45 minutes. [Tr p 65; Tr p 483; Tr p 416;] The school participants did not recall or his family presenting at that time evidence that he was induced by his classmates to participate in the paintball episode. [Tr p 485-486; Tr p 564; Tr p 428;]

Questions Presented

The parents' in their challenge to the actions of the MDR team raise both

procedural and substantive issues. It should be noted that pursuant the 2005 decision of the United States Supreme Court in the case of *Schaffer v. Weast* 126 S. Ct. 528 (2005) and his parents have the burden of proof on all issues before the Hearing Officer.

A. Procedural issues

The parents assertion that the MDR team acted improperly requires an analysis of the pertinent Regulation contained in 34 CFR Sec 300.530. Subsection (e) deals with the actions of the MDR team and provides as follows:

(e) Manifestation determination.

(1) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must 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 LEA's failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.

(3) If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (e)(1)(ii) of this section was met, the LEA must take immediate steps to remedy those deficiencies.

(f) Determination that behavior was a manifestation. *If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must--*

(1) Either--

(i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or

(ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

(g) **Special circumstances.** School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child--

(1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA;

(2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or

(3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA.

(h) **Notification.** On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parents of that decision, and provide the parents the procedural safeguards notice described in Sec. 300.504.

(i) **Definitions.** For purposes of this section, the following definitions apply:

(1) Controlled substance means a drug or other substance identified under schedules I, II, III, IV, or V in section [[Page 46799]] 202 (c) of the Controlled Substances Act (21 U.S.C. 812©).

(2) Illegal drug means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

(3) Serious bodily injury has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.

(4) Weapon has the meaning given the term "dangerous weapon" under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code.

1. Who selects MDR team members?

Counsel for the parents asserts at the outset that the parents were deprived of their

right to

“..... “determine” the “relevant members” of _____’s IEP team presiding over his MDR ” underlining added

Counsel goes on to further to argue that

“13. Applying the plain meaning of the word “determine” to 20 U.S.C. § 1415 and 34 C.F.R. § 300.530, the phrase “relevant members of the IEP team (as determined by the parent and LEA)” means that both the parents and the LEA have an equal right to “settle or decide by choice of alternatives” the “relevant members” of the IEP team presiding over the MDR.”

It is clear that parents’ counsel interprets “determine” to mean that the parents must consent to the composition of the MDR team.

The Hearing Officer believes that this is an incorrect interpretation of Section 530 for a number of reasons. At no place in Section 530 are the words “agreement” or “consent” used. “Determine” can also be interpreted as meaning “having the ability to select”. Such an interpretation is consistent with IDEA’s effort to encourage parental involvement and participation in the decision making process with regard to their child’s education. Clearly both the parents and _____ PS have the right, and one might say the duty, to nominate individuals who could contribute to the decision making process.

The “Parent Notification of Manifestation Determination Review Meeting” form sent to the parents on January _____ advised the parents that

“Additional individuals may attend at the request of the parent or _____ PS”

This Notification was accompanied by the Virginia Procedural Safeguards Notice which also included information for the parents about the Manifestation Determination Review process. The Hearing Officer does not accept that _____ PS denied the parents their right to have individuals of their choice attend the MDR meeting.

Other questions raised by counsel suggested that the “Guidance Document on

Manifest Determination New Requirements” VADOE November 2006 (S Ex S-4)

imposes affirmative requirements on local school systems in Manifestation Determination cases that were not met by the HS MDR team in the instant case. See Tr p 567-570. Thus was asked

15 BY MR. MARTINIS:

16 Q. At any time did contact you and
17 tell you how these things would work?

18 A. No.

19 Q. Did they tell you what role that you
20 would have in determining who was on the team?

21 A. No, they did not. (Tr p 57)

* * * *

7 Q. At the MDR hearing, were you given an
8 opportunity to object to who they had chosen for the
9 team? (Tr p 58)

The hallmark principle of IDEA is to insure that there is parental participation in a reasonable and convenient manner in the educational decisions of their children who have disabilities. However, the Hearing Officer has been cited to no cases where the local school system has to lead the parents by the hand after they have provided the parents with reasonable notice of their obligations in the IEP and MDR process. The cases cited by counsel

See, In Re: Philadelphia City School District, 47 IDELR 56, 107 LRP 1612 (Pa., 10 January 2007); In Re: Maple Heights City School District, 107 LRP 28576 (Ohio, 18 March 2007) (Maple Heights I); In Re: Maple Heights City School District, 107 LRP 38499 (Ohio, 8 May 2007) (Maple Heights II).¹

involve factual situations where the fundamental requirements of notice to the parents were not met which deprived the parents of meaningful participation in the MDR process. The parents in the instant case received thorough and detailed written explanations of the MDR process. The Hearing Officer believes that the school system met its obligations as

to the composition of the MDR team under IDEA.

2. Who are “relevant” members of MDR team?

Counsel for the parents next asserts that the parents were deprived of the

*“.....right to have only “relevant” members of [redacted]’s IEP team
preside over his MDR*

Counsel challenges the status of the individuals selected by [redacted] PS to serve on the MDR team as being “relevant” on a variety of grounds including that (a) four members had not served on a prior IEP team for [redacted], (b) that two of the members did not serve on any subsequent IEP team, (c) comments by one teacher concerning her inability to comment on [redacted]’s “... susceptibility to disruptive or inappropriate influence by his peers...”, (d) alleged lack of contact of some MDR members with [redacted], and (e) failure of some members to speak with [redacted] or his parents prior to the MDR meeting.

Counsel’s line of argument is apparently based upon the proposition that the parents not the school system make the determination of what constitutes “relevant” qualifications for a MDR team member selected by the school system. It is the Hearing Officer’s view once again that neither the parents nor the school system control the composition of the MDR team. Each may have their own perspective of what person is relevant and are free to invite those who they consider “relevant” to participate on the MDR team. To this Hearing Officer “relevant” appears to provide the school system with an excuse for leaving a person within a unique background off of the MDR team rather than providing the classification of a narrow category of individuals who can be included on the MDR team. Mr. [redacted] cited other teacher and staff members who he believed would be “relevant.” While he acknowledged that he had the right to bring people of his choice to the MDR meeting he nonetheless failed to invite those school personnel he felt were “relevant.” This was no fault of the school system.

The evidence showed that PS had established a policy which required individuals at the school in question serving in the following capacities to serve on the MDR. School Administrator or designee, special education teacher of the student, general education teacher of the student, and psychologist. [PS # 86] As explained by school psychologist the rationale for this selection was to form a committee that consisted of

16 “ of individuals
17 with various backgrounds to look over the student's
18 history, their educational history, their
19 developmental history, to make those determinations
20 about continued eligibility, [Tr p 465]

The categories of individuals selected appears reasonably suited to provide an intelligent and fair analysis of the data before the MDR team and is not inherently flawed as suggested by counsel for and his parents.

3. What constituted “relevant” information to be considered by MDR team

Counsel for the parents also asserts that the MDR team did not 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....”

as required by the regulation.

Once again it appears that counsel for the parents’ view of the MDR meeting is out of keeping with the purpose of IDEA. While it appears that the school system did not provide each MDR team member with a complete copy of ’s student file the evidence before the Hearing Officer supports the conclusion that a reasonable review of relevant information was made by all the school system members of the MDR team. Each school member of the team had access to information commensurate with that member’s background. The MDR meeting is not designed to be a jury trial where the triers of fact

are isolated from any knowledge of the facts of the case they are deciding other than what is properly presented to them. The MDR meeting has just the reverse concept. The more the participants know about the student whether through the student file or personal contact the better the process should be. From the school system's perspective the individuals designated to be on the MDR team come from a variety of backgrounds to provide a thorough but varied picture of the student to better enable the group to judge the conduct of the student for which disciplinary action is sought as it relates to the student's disability.

Counsel for the parents asserts that the MDR hearing was tainted because the school system members had discussed [redacted] prior to the hearing and these private individual discussions showed the bias of the school system's members and rendered the decision made at the MDR hearing invalid. As support for this conclusion counsel relies on the fact that [redacted], [redacted]'s special education case manager had prepared an IEP based upon the assumption that the MDR team would find that [redacted]'s actions leading to his discipline were not causally related to his disability.[Tr p 395] The explanation of Ms. [redacted] that the IEP was prepared as a time saving exercise to improve the efficiency of the MDR process appears to be a reasonable explanation of this action.

4. Were [redacted] and his parents entitled to "votes" in the MDR team decision?

Counsel for [redacted] through his questioning of Mr. [redacted] and other witnesses stressed that the composition of the MDR team denied [redacted] and his parents of their votes on the MDR team. A review of IDEA fails to establish that non-school personnel have a vote in either the IEP or MDR process. As noted above the hallmark principle of IDEA is to insure that there is parental participation in all processes. But significantly it

leaves the burden on the school system to insure that the student receives FAPE. The parent is provided with the opportunity to challenge the school system's decision on the merits once that decision is made through a due process hearing but the parent does not have the authority under IDEA to make the initial decision.

This question has been considered in the case of *John E. Buser, Jr., by his next friends John E. and Virginia Buser, Plaintiff v. Corpus Christi Independent School District, Defendant* U.S. District Court, Southern District of Texas C-87-114 January 17, 1994 20 IDELR 981 where the Court held that parents were not entitled to votes. The court stated

"2. Whether plaintiff's parents were entitled to an "equal vote" in formulating plaintiff's IEPs at the Admissions, Review and Dismissal ("ARD") meetings?"

Plaintiff also challenges the failure of the school district to inform plaintiff's parents that they had an "equal vote" in formulating plaintiff's IEPs. Both Mr. and Mrs. Buser testified that they did not challenge plaintiff's earlier IEPs because of their belief that their votes would always be outnumbered by the votes of the school personnel. Plaintiff alleges that under the IDEA, parents, as a unit, are entitled to a vote equal to the collective vote of the school personnel. As authority for his "equal vote" argument, plaintiff relies on Appendix C, Question No. 26, 34 C.F.R. Part 300 (1991) which provides that "parents are expected to be equal participants along with school personnel, in developing, reviewing and revising the child's IEP." Plaintiff offers no additional authority to support his conclusion that "equal participants" is equivalent to an "equal vote."

The Supreme Court has referred to the IDEA's statutory scheme of procedural safeguards as "guaranteeing parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate." Honig v. Doe, 484 U.S. 305, 311, 108 S. Ct. 592, 598 (1988). Rowley refers to the "large measure of participation" for parents and guardians at every stage of the administrative process. Board of Education v. Rowley, 458 U.S. 176, 205, 102 S. Ct. 3034, 3050 (1982). The Court concludes that equal opportunity to participate and offer input is not equivalent to block voting. To adopt plaintiff's argument would allow parents to prevent the implementation of an IEP anytime there was a disagreement. This is not the intent of the IDEA. Plaintiff's remedy

is the administrative hearing and appeal to this Court. Plaintiff's claim is a misstatement of the law, and therefore, CCISD did not violate the IDEA in not informing plaintiff's parents that they had an "equal vote" at ARD meetings. [underlining added]

5. Did any procedural violations seriously deprive [redacted] or his parents of the opportunity to participate fully in the MDR process or result in loss of educational opportunity or benefit for [redacted] ?

While the Hearing Officer has found no procedural violations by [redacted] PS even if the evidence referred to in the prior pages is construed as constituting a technical violation the recently enacted provision make it clear that the entire MDR process has to be totally flawed before the procedural violations would constitute a denial of FAPE. See 20 U.S.C. Sec 1415(f)(3)(E)(ii). Thus in the Maple City cases cited by counsel for [redacted] and his parents the school system was faulted for scheduling the MDR meeting two hours after the parent received oral notice of the conduct by the student for which discipline was sought.

6. Was [redacted]'s conduct caused by or did it have a direct and substantial relationship to his disability or was the conduct the direct result of the [redacted] HS's failure to implement [redacted]'s IEP?

These are the critical substantive issues presented in this hearing.

At the outset it should be noted that counsel for [redacted] and his parents conceded at the hearing that prior to the incident of December [redacted]'s IEP was being properly implemented by [redacted] HS.

This leaves the question of whether [redacted]'s conduct was or was not caused by or did it have a direct and substantial relationship to his disability. The school members of the MDR team concluded that it was not caused by his disability. The Hearing Officer concurs in this view for a variety of reasons which render this conclusion clear and

convincing.

The primary argument that counsel for [redacted] and his parents has asserted for the proposition that [redacted]'s disability did cause and did have a direct and substantial relationship to his disability is that his disability made him likely to be "drawn into inappropriate behavior". That conclusion cannot be justified based upon the evidence before the Hearing Officer.

While there was evidence presented that [redacted] would have occasional inappropriate behavior in his classes, the primary basis for his disability classification of emotional disability was evidence of anxiety particularly anxiety at being in the school environment. The inappropriate behavior described in the evidence hardly reached a level of being more than a juvenile outburst.

To translate those juvenile outbursts into the events which occurred on December [redacted] cannot be justified. This is true for a variety of reasons.

1. First and foremost the preponderance of the evidence is clear that [redacted] was the instigator and leader of the paintball episode. He took the paintball gun from his home and placed it in his car. He drove the car that was used during the episode. He facilitated the actions of his schoolmates as they used the paintball guns.

2. Second, the paintball episode was not a sudden spur of the moment response to a sudden stimulus typical of individuals with ADHD but a deliberate and prolonged event. The episode had a background in [redacted]'s actions at a prior basketball game where he was told not to return although he denied this. The entire paintball episode lasted 4 hours. It involved having [redacted] drive home two of his schoolmates who did not want to continue their participation in the vandalism. It involved having [redacted] lie to the police officer who stopped him as to his activities.

3. Third, _____'s schoolmates identified him as having a leadership role. This is hardly consistent with his being "drawn into inappropriate behavior".

4. Fourth, _____ admitted his roles in his response to the police officer, the assistant principal and to Mr. _____ in the PS disciplinary hearing. While he was present at the beginning of this due process hearing he left after a few hours and did not return. While his father and his counsel attempted to pursue the "I was induced by my school mates to carry out the vandalism" argument, _____ did not present that argument himself. It must be said that he would have been the most convincing witness on the subject but he was not heard from. It can only be assumed that it was because he could not truthfully take that position.

5. The Hearing Officer found that the opinion of Ms. _____ was based upon a more reliable factual background than those of Dr. _____ and _____'s other medical personnel who clearly did not have an accurate factual understanding of his actions.

Ms. _____'s rationale for her decision as a member of the MDR team were persuasive.

16 *Q. Now, what in the evidence that was*
17 *before you at the MDR meeting led you to come to the*
18 *conclusion that you did?*

19 *A. Well, at the time of the meeting, the*
20 *teachers presented _____ as being a capable student,*
21 *a student that was having some inappropriate*
22 *behavior in the classroom, but of a class clown*
1 *nature, nothing of significance that would have*
2 *resulted in this. He was not described as an*
3 *aggressive or hostile student. [Tr p517-518].*

* * *

8 *A. He was described as inattentive in the*
9 *classroom setting. But a very likable young man.*
10 *Overall the common theme that ran through the*
11 *discussion was that this was a very capable student,*
12 *a very likable student, a very sociable student.*
13 *At no time did anyone describe him being*
14 *susceptible to peers in that way.*

15 It did come up in terms of being drawn
16 into those talkative kind of behaviors and things
17 like that, being easily distracted in the classroom,
18 in that sense. It did come up in that sense.

19 And when we went over the account of
20 what took place, and the depth of his involvement in
21 it, to me it spoke against it being related to his
22 disability.

1 Q. Why?

2 A. He was in a position where he was
3 driving the car. My understanding is that they did
4 a couple of drive-bys. So he was in a position to,
5 you know, kind of work his way out of that.

6 Also, the other, a couple of the other
7 students that were involved in the case identified
8 him as an individual that kind of encouraged or
9 initiated or came up with the idea of doing this.

10 So looking at all of those factors, the
11 accounts of what took place, his disciplinary
12 record, and what was presented by the teachers at
13 the time, along with his disability, did not seem
14 related to the disability.

15 Q. Let me phrase my question kind of in the
16 reverse. What kind of conduct would you have felt
17 would have been necessary from to conclude
18 that it was causally related? What would you have
19 looked for?

20 A. I think that his being involved in
21 itself would not have necessarily meant that it
22 wasn't causal.

1 I think that evidence to suggest that he
2 was not as active a participant, you know, was not
3 in a position where he had some level of control
4 over what was taking place, or evidence that he was
5 not a part of thinking it up, coming up with the
6 idea. Something to suggest that he got swept into
7 the activity.

8 Q. Would the repetition of the trips to the
9 school -- what does that indicate to you in terms
10 of --?

11 A. Well, it does have a significance. It
12 plays significantly into this, because it was more
13 than one time. So it's hard for me to see that as
14 an impulsive spur-of-the-moment kind of thing,
15 because there was time to kind of plan it, and go
16 get more supplies, and come back and do it again,
17 and taking someone home or something to that effect,
18 and come back and do it again.

19 So I felt like there were opportunities
20 for to kind of work his way out of that
21 situation.

22 Q. In the information that you had at the
 1 MDR hearing, there was no evidence that he had ever
 2 been involved in anything like this before?
 3 A. No.
 4 Q. And would you have expected that, if
 5 this was going to be cause, that you would have seen
 6 evidence of similar behavior on a prior occasion?
 7 A. Yes. Yes.
 8 Q. Now, you have testified that the parents
 9 said that it was causally related. That they voiced
 10 that opinion?
 11 A. Right. They voiced that opinion.
 12 Q. Did they give the committee, the group
 13 there, any reasons why they felt that?
 14 A. Not specifically. I remember being
 15 asked how did I know that it was not causal. And I
 16 remember them expressing concern about, myself in
 17 particular, not having worked directly with him.
 18 That's -
 19 Q. When the meeting ended, did you have
 20 some understanding as to why the felt it
 21 wasn't causally -- or was causally related.
 22 A. I did not. I did not [Tr p 518-521]

7. Is currently receiving FAPE?

The record is clear that is a student with a disability and as such is entitled to special education services. This was confirmed by the Reevaluation Report dated January [PS #43] and by the IEP's dated January , March , March . April . [PS #27-30] The record likewise shows that received the required special education services during the period since he left HS. A review of the IEP dated August covering 's attendance at High School indicates that it too provides with FAPE based upon the removal of the conditions on his attendance as outlined in the testimony of Mr. . [PS # 31, Tr p 612-614]

Conclusion

It is the conclusion of the Hearing Officer that the actions of the MDR team in it's decision of January with respect to were in compliance with the

requirements of IDEA. It is further the conclusion of the Hearing Officer that the IEP dated August providing for 's attendance at High School provides him with FAPE.

Dated September 7, 2007



George C. Towner, Jr.
Hearing Officer

APPEAL NOTICE

The parties are hereby notified pursuant to 8 VAC 20-80-76 O that a decision by the hearing officer in any hearing, including an expedited hearing, shall be 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 one year of the date of this decision.