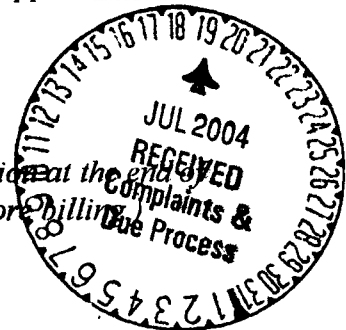


04-102

**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.)*

&	
_____	_____
School Division	Name of Parents
July 14, 2004	
_____	_____
Name of Child	Date of Decision
<u>Kathleen S. Mehfoud</u>	<u>Hunter C. Harrison, Jr.</u>
Counsel Representing LEA	Counsel Representing Parent/Child
_____	_____
Party Initiating Hearing	Prevailing Party

**Hearing Officer's Determination of Issue(s):** The parents raised four issues:  
 (1) Whether the LEA complied with the child find provisions of 8 VAC 20-80-50; (2) Whether the LEA should reimburse parents for education costs; (3) Whether the student is eligible for special education and related services under IDEA; and (4) Whether the LEA refused a due process hearing request.

**Hearing Officer's Orders and Outcome of Hearing:** The argument of complying with provisions of 8 VAC 20-80-50 is barred by the statute of limitations. The student is not a "handicapped child" eligible for special education and related services under the IDEA. The student's act was not a manifestation of ADHD. Since the student is not entitled to special education services, he is not entitled to FAPE. The LEA did not refuse a request for a due process hearing under IDEA. The fact there is no harm done from the delay also makes this matter moot.

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.

\_\_\_\_\_  
 Richard M. Alvey  
 Printed Name of Hearing Officer

*Richard M. Alvey*  
 Signature

VIRGINIA DEPARTMENT OF EDUCATION  
DUE PROCESS HEARING DECISION



SCHOOL DIVISION: PUBLIC SCHOOLS  
LEA COUNSEL: KATHLEEN S. MEHFOUD  
NAME OF PARENTS: MR. & MRS.  
NAME OF CHILD:  
PARENTS' COUNSEL: HUNTER C. HARRISON, JR.  
INITIATING PARTY: PARENTS  
HEARING OFFICER: RICHARD M ALVEY

INTRODUCTION

This matter came for hearing on June 22 and 23, 2004, in Virginia, before a duly appointed Hearing Officer. Present in person in addition to this Hearing Officer and the Court Reporter was the parents and their counsel, counsel for the LEA and the School Division's representative.

The due process hearing was requested in writing and received by the LEA on April 23, 2004 and this Hearing Officer was assigned to hear the case on May 12, 2004. The parents raised four issues: 1. Whether the LEA complied with the child find provisions of 8 VAC 20-80-50; 2. Whether the LEA should reimburse parents for education costs; 3. Whether the student is eligible for special education and related services under IDEA; and 4. Whether the LEA refused a due process hearing request.

In the course of two days, both parties presented the testimony of witnesses.

FINDING OF FACTS

This Hearing officer makes the following finding of facts:

1. The parties have compromised and settled the second issue, whether the LEA should reimburse the parents for education costs.
2. Due to concerns the student was not following directions, staying on task and getting his work done, his first grade teacher suggested to the parents that they should have the student evaluated for attention deficit disorder.
3. The student was diagnosed with attention deficit/hyper activity disorder (ADHD) in 1999 and the diagnosis was provided to his first grade teacher.
4. The diagnosis of ADHD was made known to the LEA in 1999.

5. Upon receipt of the diagnosis, the LEA initiated a child study but did not recommend a special education evaluation.
6. Due to concerns about the student's difficulty in staying on task and getting his work done, the student transferred to another elementary school and enrolled in the early intervention alternative program (EIAP) in his second grade year of school.
7. There is a record the student experienced difficulty with staying on task, following directions and getting his work done through first and fifth grades.
8. The EIAP is a regular education program with a low student teacher ratio designed to aid students who are not on task, don't follow directions and have difficulty getting work done.
9. The student was recommended for retention in the third grade by the LEA. He did not pass the third grade SOL.
10. The student transferred to a private school where he repeated the third grade and completed the fourth grade in regular education.
11. The student returned to the LEA for the fifth grade, enrolled in regular education.
12. Upon re-enrolling the student with the LEA, the parents filled out an emergency information card. This form requests information on medication the student is taking and "any current condition that may require attention during the school day". The parents did not disclose that the student was ADHD and taking medication for that condition.
13. While in the fifth grade regular education setting, the student and his teacher entered into a "behavior contract". The terms of the contract obligated the student to obey the teacher, not distract the class, complete assignments, turn in homework, and participate in class. The teacher agreed to allow the student additional time or assistance, if needed, to complete assignments.
14. The student has been expelled from school for possession of a knife in school.
15. Prior to his expulsion, the student was making progress in regular education, with a C-plus average. His parents repeatedly expressed satisfaction with the student's and teacher's performance.
16. After the initiation of this due process hearing, an eligibility meeting was conducted wherein the student was found ineligible for special education services.

#### ARGUMENTS RAISED

The parents argue that the student is eligible for special education services due to his disability. They called a qualified clinical psychologist who testified that he

reviewed the student's records. From this review and without actually meeting the student, this witness opined that the diagnosis of ADHD was proper and that the student's condition manifests itself mainly through impulsivity as opposed to inattentiveness. He cites as examples, the student's record of three disciplinary incidents, an argument in front of a bathroom, an argument during recess, and the knife incident. He also testified that a child with two standard deviations from the norm on the Conners scale, without significant change in his environment and change in medication, would not be able to inhibit his impulses.

The parents argue that the LEA did not comply with the child find provisions of 8 VAC 20-80-50. In closing argument, parents' counsel states the failure commenced in 1999 when the LEA first received notification of the ADHD diagnosis and continued throughout the years as disciplinary problems continued. A child study committee was formed in 1999 but an eligibility committee was never formed until the fifth grade.

The parents elicited testimony from a witness holding a Master's Degree in Special Education who has thirty years of educational experience. She implies the accommodations given the student since the formation of the child study committee and most recently during the fifth grade constitute a de facto IEP. Examples of such accommodations are giving the student reminders to complete work, giving the student more wait time to respond to questions, giving the student an additional day to complete work, and reducing the workload if the student felt overwhelmed.

The parents called a friend with a Master's Degree in education and experience in attending eligibility meetings to testify. She opined that the eligibility meeting in which the student was found to be ineligible for special education services was geared towards finding the student ineligible. She believes the student was found ineligible solely because he did not maintain grades of D or less. The parents argue that basing eligibility solely on grades does not comply with the child find provisions.

The parents argue the LEA refused the parents a due process hearing. The record reflects that the parents requested a due process hearing in writing on April 23, 2004 and received a written response denying any "further due process hearing." Of significance to the parents is the fact that their request was forwarded to the special education office prior to its being denied. This Hearing Officer was assigned to this case on May 12, 2004.

The LEA argues that considerations as to whether the student should have been found eligible for special education services from the first grade are barred by the statute of limitations. Nevertheless, the LEA also points out that the student made educational progress throughout the first, second and third grades in public school and was not placed in special education classes while in private school for the repeat of third grade and for the fourth grade.

Even now, the LEA maintains, the student is not eligible for special education services. An eligibility committee found the student was ADHD but ineligible for special

education services because his grades were adequate and he did not exhibit significant social dysfunction. The student's fifth grade teacher testified she did not believe the student needed special education services but, instead, needed to work on his behavior and respect for authority. She related that when she had a conference with the student and his mother wherein the behavior contract was developed, it became apparent his conduct in school was different from home. This conference ended with the student realizing his parents were going to hold him accountable for his conduct in school just as at home. Afterward, his conduct improved dramatically.

The student's principal testified there are several children in her school who are ADHD but not in special education. She stated that the student was not a "significant behavioral problem" prior to the incident resulting in his expulsion. She also testified that it is a regular educational technique to use behavioral contracts with students and that each of the adjustments or accommodations provided to the student has been done with regular education students.

A school psychologist testified for the LEA. She testified the student's intellect fell in the low average range. She agreed with the diagnosis of ADHD. She testified that if the student had been put in special education, nothing more would be done for him that wasn't being done in regular education. She stated the student was ineligible for special education because his grades were adequate and that he did not exhibit significant social dysfunction, that is, whatever difficulties he had could be handled by his regular education teacher.

An educational diagnostician testified for the LEA. She testified the student did not appear to have any adverse education affect from any disability he may have. The student maintained good grades.

The LEA argues that confusion arose with the request for a due process hearing delivered by the parents. It was delivered on the heels of an expulsion decision by the school board. The request referred to an "expedient due process hearing on the expulsion." The student was not in special education at the time the request for a due process hearing was delivered. The LEA asserts they innocently misinterpreted the parents' request as a further proceeding for a regular education due process hearing.

The LEA also argues that there is no harm done to the student from the delay in providing this special education due process hearing.

#### DISCUSSION AND CONCLUSION OF LAW

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

1. To the extent the parents argue the LEA did not comply with the child find provisions of 8 VAC 20-80-50 for the student's first and second grades, that argument is

barred by the statute of limitations. See: *R.R. by and through his father, Mr. R. v. Fairfax County School Board*, 338 F.3<sup>rd</sup> 325 (2003)

2. The student is not a "handicapped child" eligible for special education and related services under the Individuals with Disabilities Education Act (IDEA). Though the student has been diagnosed with ADHD, the only evidence of a disability affecting education is the testimony of the parent's clinical psychologist who testified that, generally, disciplinary problems are a clear indication. However, this witness has never met the student. His opinion is based on a five year old diagnosis. If disciplinary problems were a clear indication of a qualifying disability, one would expect to find disciplinary problems in the home setting. The student's mother testified there were no disciplinary problems at home. (Trans. P.41/L.13) The student's teacher confirmed the parents were not experiencing disciplinary problems at home. (Trans.P.206/L.17)

Evidence is unchallenged that the student is making educational progress, earning above average grades in the regular education setting. In order for the parents to prevail there must be evidence the other health impairment, in this case, the ADHD, adversely affects the child's educational performance. That evidence simply does not exist. See: *Shaunte D.Lee, by her mother, Cynthia Lee v. Prince William County School Board*, no cite available.

Parents' counsel argues that expulsion is the product of the student's ADHD and expulsion adversely affects the student's educational performance. The act culminating in expulsion appears to be purposeful and not impulsive. The evidence does not support the conclusion the student's act was a manifestation of ADHD. The evidence supports a conclusion that the student's conduct was simply bad behavior.

Since the student is not entitled to special education services, he is not entitled to FAPE.

3. The LEA did not refuse a request for a due process hearing under IDEA. Confusion was generated by ambiguous language in the written request for a due process hearing, referring to an "expedient" hearing on the "expulsion." The student had not been identified as a special education child at the time. The request came on the heels of the expulsion decision. These facts justify the delay in providing a due process hearing. The fact there is no harm done from the delay also makes this matter moot. See: *MM, by and through her parents, DM and EM v. School District of Greenville County*, 303 F.3<sup>rd</sup> 523 (2002)

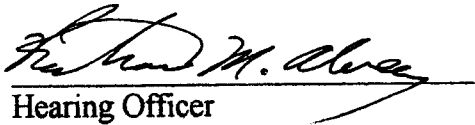
4. Parental notice requirements were satisfied by the LEA.

#### IDENTIFICATION OF PREVAILING PARTIES

This Hearing Officer identifies the LEA as the prevailing party on all issues.

APPEAL INFORMATION

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

  
Hearing Officer

14 July 2004  
Date