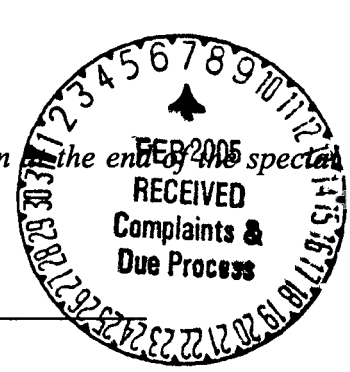
05-037

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

Mr. and Mrs.
Name of Parents

Name of Child

December 24, 2004
Date of Decision

Kathleen S. Mehfoud, Esquire
Counsel Representing LEA

Linda L. Woolridge, Ph.D.
Advocate Representing Parent/Child

Parent
Party Initiating Hearing

LEA
Prevailing Party

Hearing Officer's Determination of Issue(s):
On November 2, 2004, the parents filed a Request for Due Process Hearing. The Parents requested the hearing on behalf of the child to address their contention that the child's recent behavior which resulted in the LEA taking disciplinary action against the child, was a manifestation of the child's disability. The Parents contended that the decisions of the IEP Team conducting the manifestation determination meeting were wrong on this issue. The Parents also asserted that certain alleged procedural violations described in the Parents' brief and in the complaint made to the VDOE, were sufficiently serious so as to constitute a denial of a FAPE to the child. Further, the Parents asserted that the LEA is currently denying the child a FAPE by failing to adequately implement his current IEP, specifically by failing to implement the social or peer interaction component.

Hearing Officer's Orders and Outcome of Hearing:
As discussed in the decision and for the reasons provided in the decision, the hearing officer decided that the Parents had failed to meet their burden of proof concerning their claims and the relief which they sought. Additionally, the hearing officer decided that (1) the School District has met its burden of showing upon a preponderance of the evidence that the child's behavior was not a manifestation of the child's disability consistent with the requirements of 8 VAC 20-80-76(J)(19); (2) concerning the asserted procedural violations, in the context of this proceeding, the hearing officer found that the serious impact of any such procedural violations upon their child's education, including the disciplinary procedures mandated by IDEA and the Virginia Regulations, simply were not shown; and (3) the Proposed IEP was developed in accordance with IDEA's procedural mandates and is reasonably calculated to provide the child educational benefit and FAPE if and when it is implemented.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties to 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.

John V. Robinson
Printed Name of Hearing Officer

John V. Robinson
Signature

VIRGINIA:

SPECIAL EDUCATION DUE PROCESS HEARING

, et als.

Complainants

v.

PUBLIC SCHOOLS

Respondent.

DECISION OF THE HEARING OFFICER

I. Introduction

The Parents requested the hearing on behalf of the child to address their contention that the child's recent behavior which resulted in Public Schools (the "School District" or the "LEA") taking disciplinary action against the child, was a manifestation of the child's disability. Accordingly, the Parents contend that the decisions of the IEP Team conducting the manifestation determination meeting were wrong on this issue, as more specifically described in the Request for Due Process Hearing dated November 2. 2004, and the Parents' brief filed in this proceeding.

The Parents also assert that the alleged procedural violations described in the Parents' brief and in the complaint made to the Virginia Department of Education (the "VDOE" or the "SEA"), are sufficiently serious so as to constitute a denial of a free appropriate public education ("FAPE") to the child.

Further, the Parents assert that the LEA is currently denying the child a FAPE by failing to adequately implement current IEP, specifically by failing to implement the social or peer interaction component. The hearing officer was appointed to this administrative due process proceeding on November 10, 2004.

An administrative due process hearing was held on December 16, 2004. The hearing officer renders his decision based on the sworn testimony of the various witnesses, the numerous exhibits admitted into evidence and the argument of counsel.[1]

1 References to the School District's exhibits will be designated SE followed by the exhibit number. References to the Parents' exhibits will be designated PE followed by the exhibit number. References to exhibits from the hearing officer will be designated HO followed by the exhibit number. The transcript of the hearing was not yet available to the hearing officer at the time of his decision.

II. Findings of Fact

1. Mr. and Mrs. are the parents of the child.

2. The child was born on and disability is classified by the School District as "Emotionally Disabled" or more specifically, "Emotional Disturbance." SE 22.

3. The child's clinical diagnoses include Attention Deficit/Hyper Activity Disorder ("ADHD"), Oppositional Defiant Disorder ("ODD") and Adjustment Disorder of Childhood. Currently Dr. provides medical management for the child and has prescribed Adderall and Lexapro for the diagnosed ADHD, ODD and Adjustment Disorder of Childhood.

4. The child was first found eligible by Public Schools for special education and related services on April 15, 1999, under the classification of Emotional Disturbance. SE 4. The child received self-contained special education services through the ED program in Public Schools. SE 5 and 6.

5. The family moved to in March 2002 and the child enrolled at Elementary School on March 25, 2002. On that same date, the Elementary School IEP Team accepted the Public Schools IEP with the modification that the child would receive collaborative classes in reading/writing, science and social studies "[d]ue to [the child] being near grade level." SE 9.

6. Since the child's entry into the LEA, the child's behavior and educational performance have significantly improved. The child has made significant educational progress in the collaborative educational placement provided by the LEA up to the time of the disciplinary incident.

7. The support given by the special education teacher and the self-monitoring checklist that focuses upon the child's adverse behaviors – stayed in seat, focused during class, put forth best effort, uses respectful tone, did not yell out, homework is written down, and binder is organized – have benefited in the collaborative classroom setting. grades and reports toward his annual goals indicate this progress. SE 23 and 29.

8. The child is now 12 and currently attends the School District's Middle School where is in the sixth grade. currently receives special education under the category of Emotional Disturbance.

9. The child is currently able to participate in regular education classes and perform grade level work without curriculum accommodations.

10. The child's IQ is in the low average to average range of intellectual ability. SE 10, page 2.

11. The child has been earning passing grades in general education classes and has experienced academic success and made educational progress commensurate with ability.

12. On October 22, 2004, the child took a water bottle or sports bottle with beer in it to school bus which currently transports middle school and junior high school students. SE 27. The LEA's middle school serves students in grades 5 and 6. The LEA's junior high school serves students in grades 7 and 8.

13. The child planned to take the beer to school and had announced earlier to other students that would bring beer to school. The child drank some beer and offered the beer to other students on the bus and the beer was passed to other students on the bus. SE 26 and 27.

14. The child carried beer into school in the water bottle and hid it in backpack which left in homeroom at the school. The misconduct was planned, calculated and furtive, not sudden and impulsive.

15. A student reported the child to the administration for having possession of alcohol and, when confronted by the administration, at first denied bringing the alcohol to school and accused another student at the junior high school. Later, the child admitted that it was beer that had obtained at home and brought to school.

16. The child has an IEP and a behavior intervention plan that was developed for The behavior intervention plan does not address alcohol.

17. Alcohol has not been a problem for the child and is not part of disability.

18. The behavior intervention plan in effect at the time of the child's misconduct was designed to be implemented in more structured educational settings such as the classroom and was not designed to be implemented on the school bus at the time it was developed. At the time the plan was developed and at the time of the child's misconduct, this was appropriate and reasonable given the marked success the child had shown in improving the adverse behaviors which impeded education. SE 24; SE 22, page 12.

19. The child's teachers who were responsible for implementing behavior intervention plan were advised of the intervention plan prior to the start of school and made a good faith, coordinated and collaborative effort to implement it.

20. The child was aware of the prohibition on possession and distribution of alcohol at school. The child was provided training regarding the Code of Student Conduct on September 7, 2004. SE 21. That training included a discussion in class of the School District's policy regarding the possession and distribution of alcohol at school. That policy is a zero tolerance policy. SE 21.

21. Additionally, the child participated in the LEA's DARE program. SE 39. The DARE program explains in great detail the LEA's concerns regarding use and possession of alcohol and the LEA's policy regarding alcohol. SE 39.

22. The child has the ability to understand cause and effect and knew that was not to possess or distribute alcohol at school.

23. A manifestation determination review committee met on November 1, 2004, and after considering relevant information, including the parents' input and the functional behavioral assessment and behavior intervention plan, determined that the misconduct was not a manifestation of the child's disability. SE 28.

24. Numerous persons, including the parent and Dr. attended the manifestation determination meeting on November 1, 2004. SE 28.

25. The child's psychological evaluation was reviewed at the manifestation determination meeting by Ms. who shared the information with the team.

26. In relationship to the behavior subject to disciplinary action, the child's June 7, 2004, IEP and the child's placement were appropriate. SE 22.

27. The child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action.

28. The child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

29. Accordingly, the IEP team conducted the analysis mandated by 8 VAC 20-80-76(J)(19) and determined that the behavior of the student was not caused by the student's disability, and that relevant disciplinary procedures applicable to students without disabilities could be applied. SE 28.

30. The parent disagreed with the determination of the IEP team at the manifestation determination meeting and instituted this administrative due process proceeding to challenge the determination and the action taken by the IEP team. SE 28.

31. An IEP addendum was developed on November 4, 2004, and it provides for the child to receive home-based instruction for 10 hours per week while on discipline. SE 30. On December 7, 2004, consistent with the LEA's practice regarding students with disabilities who are under extended discipline, the child has been offered a private day placement with special transportation during the period of time that he is subject to discipline (the "Proposed IEP"). SE 43.

32. The child was suspended for 365 days by the School Board on November 3, 2004. SE 31. No appeal or challenge of this underlying basis for the child's discipline or the suspension has been made under Va. Code Ann. § 22.1-87.

33. Any procedural violations by the LEA were not related to the student's misconduct, were merely technical or *de minimis* and did not actually interfere with the provision of a FAPE to the disabled child.

34. Any procedural violations did not cause the disabled child to suffer a loss of educational opportunity.

35. The LEA has made a good faith, collaborative, coordinated, reasonable effort to make the educational programs offered to the child during the current school year successful for the child and to implement the behavioral interventions to assist the child with his learning. The LEA has offered the child an appropriate education during the current school year and the IEPs provided and offered for the current school year were appropriate. The child has made educational progress, received educational benefit and did not suffer any loss of educational opportunity due to any action or inaction on the part of the LEA.

36. The requirements of notice to the parents were satisfied.

37. The LEA is providing the child with a FAPE.

38. The testimony of the LEA's educational professionals was both credible and consistent on the major issues before the hearing officer and is entitled to deference from the hearing officer. The demeanor of such professionals at the hearing was candid and forthright.

39. The testimony of the parents' experts as a group was not as compelling or convincing because they did not review the child's school file, did not observe the child in the school setting, did not speak to the LEA's representatives who worked with the child on a day-to-day basis, had very limited interaction with the child, etc.

40. The private placement offered by the Proposed IEP is appropriate and is reasonably calculated to provide the child with educational benefit and with a FAPE if and when it is implemented. SE 43.

41. Any procedural violations were not related to the misconduct, were technical and did not actually interfere with the provision of a FAPE to the child.

III. Conclusions of Law and Decision

The parties do not dispute that the child had a disability, that the child needed special education and related services and that the child was entitled to a free appropriate public education pursuant to the Individuals with Disabilities Education Act ("IDEA" or the "Act") 20 U.S.C. §§ 1400 et seq., and Va. Code Ann. § 22.1-213-221 (1950), and the regulations promulgated thereunder. Because this is an administrative due process proceeding concerning disciplinary action taken by the School District against a disabled child, the burden of proof falls squarely on the School District. 8 VAC 20-80-76(J)(19) provides in relevant part:

> [The hearing officer shall] [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 consistent with the following requirements:
>
> a. The IEP team first considered, in terms of the behavior subject to disciplinary action, all relevant information, including:
>
> Evaluation and diagnostic results, including such results or other relevant information supplied by the parents or parents of the child;
> (2) Observations of the child; and
> (3) The child's IEP and placement; and
>
> b. The IEP team then determined that:
>
> In relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;
> The child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and
> (3) The child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.
>
> c. If the IEP Team determined that any of these standards were not met, the behavior must be considered a manifestation of the child's disability.

See, also, 8 VAC 20-80-68(C)(6).

The hearing officer is also required to include in his written findings a determination of whether the School District is providing the disabled child with a FAPE. 8 VAC 20-80-76(17)(d).

Inevitably, any analysis of the standard of FAPE must begin with Rowley. Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982). The Rowley Court held that by passing the Act, Congress sought primarily to provide disabled children meaningful access to public education. The Rowley analysis provides that the disabled child is deprived of a free appropriate public education under either of two sets of circumstances: first, if the LEA has violated IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon the disabled child's right to a free appropriate public education or, second, if the IEP that was developed by the LEA is not reasonably calculated to enable the disabled child to receive educational benefit. Rowley, *supra*, 206-7 (1982); Tice v. Botetourt County School Board, 908 F.2d 1200 (4th Cir. 1990); Hudson v. Wilson, 828 F.2d 1059 (4th Cir. 1987); Gerstmyer v. Howard County Public Schools, 20 IDELR 1327 (1994).

A small violation of IDEA's procedural requirements does not, without evidence of an actual loss of educational opportunity, constitute a failure to provide the disabled child with a free appropriate public education. Rowley, *supra*; Gadsby v. Grasmick, 109 F.3d 940 (4th Cir. 1997); MM v. School District of Greenville County, 303 F.2d 523 (4th Cir. 2002); Dibuo v. Board of Educ., 309 F.3d 184 (4th Cir. 2002); Hall v. Vance County Board of Education, 774 F.2d 629 (4th Cir. 1985); Tice, *supra*; Doe v. Alabama Department of Education, 915 F.2d 615 (11th Cir. 1990); W.G. v. Board of Trustees of Target Range School District, 960 F.2d 1479 (9th Cir. 1992); Evans v. School District No. 17 of Douglas County, 841 F.2d 824 (8th Cir. 1988). Technical violations of IDEA procedures that do not deny the student FAPE are considered de minimis. See, e.g., Fairfax County Sch. Bd. v. Doe, Civil Action No. 96-1803-A (April 24, 1997); see also Roland v. Concord School Committee, 910 F.2d 983, 994 (1st Cir. 1990), cert. denied 499 U.S. 912 (1991); Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 982 (4th Cir. 1990); Spielberg v. Henrico County Sch. Bd., 853 F.2d 256, 259 (4th Cir. 1988); Hall v. Vance County Bd. of Educ., 774 F.2d 629, 633-635 (4th Cir. 1985); and Board of Educ. v. Brett Y, 155 F.3d 557 (4th Cir. 1998).

In Dibuo, *supra*, the Court reaffirms the law in our circuit that not every procedural violation of the IDEA warrants granting the relief requested. Before any relief can be afforded, the Court (or hearing officer) must proceed beyond the finding of any procedural violation of the IDEA to further analyze whether the procedural violation actually interfered with the provision of a FAPE to a child:

> Most recently, in MM, we relied upon our decision in Gadsby v. Grasmick, 109 F.3d 940 (4th Cir. 1997) to reiterate that [HN6] "when . . . a procedural [violation of the IDEA] exists, we are obliged to assess whether it resulted in the loss of an educational opportunity for the disabled child, or whether, on the other hand, it was a mere technical contravention of the IDEA." MM, 303 F.3d 523, 533, 2002 WL 31001195 at *7.

Dibuo, *supra*, at 190.

The parents concede that the child's placement and operative IEP at the time of the disciplinary incident were appropriate but the parents asset several procedural violations. However, the parents offered little if any compelling evidence concerning how these alleged procedural violations relate to the child's misconduct and denied their child FAPE or led to any loss of educational opportunity in the context of the child's disciplinary infraction.

For example, the LEA concedes that at the time of the incident, the bus driver was unaware of the child's disability, IEP and behavior intervention plan, but the impact of this alleged failure by the LEA and how it could or should have prevented the child's disciplinary infraction or changed the manifestation determination was not fully developed by the parents at the hearing.

Similarly, the parents correctly assert that the name/position of Ms. , the Assistant Superintendent of the LEA, was not included either during the telephone conversation or on the written notice of the manifestation determination review but how this failure materially prejudiced the parents' or child's rights was not meaningfully developed.

The parents also contend that certain relevant information, such as the social evaluation, was not considered during the manifestation determination review. Of course, the parents could have brought this up at the meeting as a relevant consideration but, in any event, at the hearing the parents, again, did not show exactly how this negatively affected the child in any way. See, Farrin v. Maine School Adm. Dist. No. 59, 35 IDELR 189, 165 F.Supp. 2d 37 (D. Maine 2001); and Roland M. and Miriam M. v. The Concord School Committee, et. als., 910 F.2d 983 (1st Cir, 1990).

Accordingly, the hearing officer finds that these alleged procedural violations were technical and harmless and do not warrant the annulment of the child's expulsion. After all, the LEA needs to maintain a safe and secure environment for all students and there is no rational basis to believe that any procedural inadequacies compromised the child's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits. See, Burke Co. Bd. of Educ. v. Denton, 895 F.2d 973 at 979, 982 (4th Cir. 1990).

Accordingly, concerning the asserted procedural violations, in the context of this proceeding, the hearing officer finds that the serious impact of any such procedural violations upon their child's education, including the disciplinary procedures mandated by IDEA and the Virginia Regulations, simply were not shown.

Concerning the private placement offered by the Proposed IEP, the law does not require that the child receive the optimal education available, nor even that the education provided allow the child to realize his full potential commensurate with the opportunity provided to other children. Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, at 198, 102 S.Ct. 3034 (1982); Bales v. Clark, 523 F.Supp. 1366 (E.D.Va. 1981).

In Rowley, *supra*, the Court cautioned judges against imposing their view of preferable education methods upon school districts. Noting that courts lack the wisdom and experience necessary to resolve persistent and difficult questions of educational policy, the Court limited the permissible inquiry to determining whether the specified requirements of the Act were being met. Id. at 206, 102 S.Ct. at 3051.

Subsequent court decisions have also been careful to recognize the importance of leaving the business of running schools to the considered judgment of local educators.

In Hartmann v. Loudoun County, the court stated:

> Although section 1415(e)(2) provides district courts with authority to grant 'appropriate' relief based on a preponderance of the evidence, 20 U.S.C. 1415(e)(2), that section 'is by no means an invitation to courts to substitute their own notions of sound educational policy for those of the school authorities which they review.' (citations omitted)... [t]hese principles reflect the IDEA's recognition that federal courts cannot run local schools. Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment.

118 F.3d 996, 1000-1001 (4th Cir. 1997).

See also Springer v. Fairfax County, 134 F.3d 659, 663 (4th Cir. 1998) (holding that "[a]bsent some statutory infraction, the task of education belongs to the educators who have been charged by society with that critical task"); Barnett v. Fairfax County School Board, 927 F.2d 146, 151-52 (4th Cir.), cert. denied, 502 U.S. 859 (1991) (recognizing Congressional intent to leave education decisions to local school officials and recognizing the importance of giving school officials flexibility in designing educational programs for students); and Tice v. Botetourt County, supra, at 1207 (once a "procedurally proper IEP has been formulated, a reviewing court should be reluctant... to second-guess the judgment of education professionals" – rather, the court should "defer to educators' decisions as long as an IEP provided the basic floor of opportunity that access to special education and related services provides").

In a recent decision, the Court cautioned hearing officers not to succumb to the temptation to substitute their judgment for that of local school authorities in IEP matters. Arlington County Sch. Bd. v. Smith, 230 F.Supp. 2d 704, 715 (E.D. Va. 2002).

The Proposed IEP was developed in accordance with IDEA's procedural mandates and is reasonably calculated to provide the child educational benefit and FAPE if and when it is implemented.

The School District has met its burden of showing upon a preponderance of the evidence that the child's behavior was not a manifestation of the child's disability consistent with the requirements of 8 VAC 20-80-76(J)(19).

The LEA is reminded of its obligations concerning 8 VAC 20-80-76(I)(16) to develop and submit an implementation plan to the parties, the hearing officer, and the SEA within 45 days of the rendering of this decision.

Right of Appeal. A decision by the hearing officer in any hearing, including an expedited hearing, shall be final and binding unless the decision is appealed by a party in a state court within one year of the issuance of the decision or in a federal district court. The appeal may be filed in either a state circuit court or a federal district court without regard to the amount in controversy. The district courts of the United States have jurisdiction over actions brought under § 1415 of the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq.) without regard to the amount in controversy. 8 VAC 20-80-76(O)(1).

ENTER: 12 / 24 / 04

John V. Robinson

John V. Robinson, Hearing Officer

cc: Persons on the Attached Distribution List (by U.S. Mail, facsimile and/or e-mail, where possible)