



VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES
P.O. BOX 2120
RICHMOND, VA 23218-2120

CASE CLOSURE SUMMARY REPORT

School Division

Name of Parent

Name of Child

APRIL 18, 2005

Date of Decision or Dismissal

A. DAVID HAWKINS, ESQ
Counsel Representing LEA

NONE
Counsel Representing Parents/Child

Party Initiating Hearing

Prevailing Party

HEARING OFFICER'S DETERMINATION OF ISSUES:

1. Public Schools did not violate its "Child Find" obligations.
2. was not improperly labeled and/or improperly placed.
3. was afforded an appropriate education under Section 504 and was not denied FAPE.
4. There were no procedural violations under the "IDEA".
5. Manifestation Determination under IDEA was not required. Under Section 504 there is not a causal relationship between disability and misconduct.
6. was not subject to discriminations/ violations of his rights under Section 504 of the Rehabilitation Act of 1973, as amended.

As of the date of _____'s actions which were the basis of the disciplinary actions taken by _____ Public School:

- a. _____ Public Schools did not know nor should have known _____ was a child with a disability.

- b. The parent of the child did not express concern in writing to personnel of Public Schools that is in need of special education and related services.
- c. The behavior or performance of did not demonstrate the need for special education and related services.
- d. An evaluation was not requested by the parent.
- e. No teacher or other personnel of the local educational agency expressed concern about the behavior or performance to the director of special education or other personnel in compliance with child find or special education referral system.

HEARING OFFICER'S ORDERS AND OUTCOME OF HEARING:

The LEA prevailed on all matters.

This certifies that I have completed this matter in accordance with the 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.

April 18, 2005



Lorin A. Costanzo, Hearing Officer

Copies mailed to:

1. LEA Counsel: A. David Hawkins, Esq.
2. Parent:
3. LEA: Cindee Pletke,

VIRGINIA DEPARTMENT OF EDUCATION

FINAL DECISION

PUBLIC SCHOOLS

School Division

Name of Parent

Name of Child

A. DAVID HAWKINS, ESQ.
Representing LEA

Representing Parents/Child

LORIN A. COSTANZO
Due Process Hearing Officer

Parties Initiating Hearing

PRELIMINARY MATTERS:

A. PURPOSE OF HEARING and ISSUES:

filed a "Request For Due Process Hearing" which the Public Schools received on March 21, 2005. Mr. requested the due process hearing be expedited.

ISSUES for determination at due process hearing:

1. Whether Public Schools violated its "Child Find" obligations in that was eligible for special education and related services but there was a failure to identify him as such?
2. Whether was improperly labeled and improperly placed?
3. Whether was denied a Free Appropriate Public Education ("FAPE") in the Least Restrictive Environment ("LRE")?
4. Whether there were procedural violations under the "IDEA"?
5. Whether 's actions were a manifestation of his disability and as such is he entitled to reinstatement?
6. Whether was subject to discrimination/violations of his rights under Section 504 of the Rehabilitation Act of 1973, as amended?

B. DUE PROCESS HEARING:

1. **Pre-Hearing Conferences** were held March 25, 2005 at 10:00 A.M. and April 12, 2005 at 11:00 A.M. via telephone. Additionally, the parties met at 8:30 A.M. on April 13, 2005, prior to the start of the due process hearing.

2. **Due Process Hearing** was held on April 13, 2005 starting at 9:00 A.M. (and concluded at 6:15 P.M. that same date) at the Conference Room, School Board Office . VA. By request of Mr. the hearing was "closed".

C. EXHIBITS:

1. **Parent's Exhibits**.... Parent's Exhibits were received by the hearing officer without page numbers or exhibit numbers. The hearing officer numbered the pages (pencil numbers at the bottom of each page) consecutively from 1 through 53 for purposes of identification herein. Parent's Exhibits are contained in one binder. Parent's Exhibits are referred to as P "___" with the page number inserted at the "___".

2. **School Exhibits**.... School Exhibits are page numbered 1 through 59 and contained in one binder. School's Exhibits are referred to as SB "___" with the page number inserted at the "___".

3. **Hearing Officer Exhibits**.... Certain documents were requested to be presented by the hearing officer and these were admitted into evidence by agreement of both parties. These exhibits were admitted and labeled as "hearing officer exhibits" numbered 1 through 4 and contained in one file folder. Hearing Officer's Exhibits are referred to as HO Ex. "___" with the exhibit number inserted at the "___".

By agreement of the parties the exhibits were admitted "en masse".

D. WITNESSES:

The following witnesses testified, under oath, at the due process hearing in this cause:

1. **Witnesses called by the Parent:**

Grandmother of
Youth Pastor
"Name withheld" A minor whose name is withheld in this decision
Child who was subject of proceeding
Father of

2. **Witnesses called by the School:**

Director Pupil Personnel Services
School Psychologist
Education Assessor
Teacher, History/Geography
Teacher, Geometry
Teacher, English

Teacher, Spanish
Assistant Superintendent
Assistant Superintendent

By agreement of the parties witnesses were taken out of sequence.

E. TRANSCRIPT:

1. At the conclusion of the due process hearing on 4/13/05 it was determined that the transcript of the due process hearing would not be available by the final decision due date (ie. 4/18/05). Upon the transcript being completed the original transcript is to be tendered to the hearing officer for inclusion in the record and a copy of the transcript is to be tendered to Parent and to the LEA counsel.

2. With the agreement of both the Parent and the LEA, a separate tape recording of the due process hearing was made by the hearing officer for review in drafting the final decision. This tape recording consisted of 5 cassette tapes which are to be filed with and included in the record of this proceeding.

FINDINGS OF FACT:

01. ("hereinafter referred to as ' '") is the child of Mrs. ' is stepmother. is a 16 year old male student who, in the beginning of the 2004-2005 school year, was attending School in the Public Schools. SB 15

02. admitted to being involved in the incident described below wherein two windows were broken and entry was made into a then closed school building during the Christmas school break of school year 2004-2005. SB 52; SB 14.

03. , together with two other minors who were also students in Public Schools, were involved in an incident that occurred in December 2004 during the Christmas school holiday and resulted in two windows being broken and entry made into a then closed school building. Damages totaled approximately \$316.00. Disciplinary actions were taken by the Public Schools.

04. During the Christmas school holidays in the latter part of December, 2004, and two other students, one of whom was a 12 year old student at School, took 3 shot-puts from the equipment room under the bleachers at School. They hid the shot-puts in the grass, and later came back and each got a shot-put. They went to School with the shot-puts which they rolled under a fence and climbed over the fence. At the parking lot there was talk of breaking a window(s).

On a count of three [redacted] threw his shot-put and broke the window with the shot-put. All three boys ran but then returned after one student raised the issue of fingerprints on the shot-puts. The shot-put was subsequently recovered and placed in water to help remove the fingerprints.

Another shot-put was thrown (not by [redacted]) and cracked another window. One student reached in through a broken window and pulled back a latch/cover on a door, and the door was opened. [redacted] and one student entered the middle school for about 5 minutes and then came out of the school (the 12 year old acted as lookout). A second entry was made by all three students. There was a question asked by one of the other students of where the laptops were. Noises were heard and the students left the school building.

05. A police investigation was conducted concerning the damage to the school property which led to charges being placed.

06. On January 7, 2005 Mr. [redacted] was informed by letter that [redacted] was suspended from [redacted] School for ten days, from January 10 through January 25, 2005. Additionally, it was recommended to the Superintendent of [redacted] Schools that [redacted] be enrolled at the [redacted] Educational Center. This letter provided notice of the right to review circumstances and for a review hearing. At this time, Mr. [redacted] requested a review of circumstances to be held by the Superintendent. see P 3, P 13; SB 52 ; HO3.

07. On January 12, 2005 the [redacted] Public Schools held a discipline conference which was attended by Mr. [redacted]. Assistant Superintendent, designee for appeals for disciplinary matters, held a review of the suspension and recommendation for transfer. On review of matters and after discussion of the incident, the Assistant Superintendent's decision was: a). to assign [redacted] to [redacted] Educational Center for a minimum stay of to the end of the 2004-2005 school year and b.) that [redacted] was not to be present on any other [redacted] School property while enrolled at the [redacted] Educational Center.

Mr. [redacted] was notified this date that he could appeal to the School Board which met on January 13, 2005 and did so appeal. SB 51, testimony of Mr. [redacted]

08. On January 13, 2005, Mr. [redacted] appealed the Assistant Superintendent's decision to the [redacted] School Board. After a hearing on the appeal, the [redacted] School Board upheld the Assistant Superintendent's decision, including [redacted]'s assignment to the [redacted] Education Center. see HO 2

09. [redacted]'s father did not and does not consent to [redacted]'s placement at the [redacted] Educational Center. SB 14. With the agreement of Mr. [redacted] began homebound instruction on or about 2/15/05 and is currently receiving homebound instruction. (P 4; SB 14 and 34)

10. Mr. [redacted] has raised issues that [redacted] has ADD and insomnia and [redacted] went off medications in early 2004. [redacted] also wears glasses but will not wear glasses at school.

11. In the first semester of this school year (ie. 2004-2005) [redacted] received passing grades in Biology, Horticulture I, and Health and PE 10/Drivers's Education. He received failing grades in Spanish II, English 10, World History/Geography, and Geometry. SB 46-47

12. On October 28, 2004 Mr. [redacted] e-mailed certain teachers and a school guidance counselor informing them, "Please keep this information confidential. [redacted] is ADD, and is not on medication at this time. Also, he wears glasses that he won't wear to school. I feel this may be affecting his grades, and I ask for help from guidance to get him on task. Please talk to his teachers to see if these are in fact an issue. If they are, I need documentation from his teachers to make a doctors visit to get him help if he needs it." P 22

13. On December 7, 2004 Mr. [redacted] e-mailed certain teachers and counselors and stated, "Please can someone help me get [redacted] back on tract before he has to repeat the 10th grade? Please see report card attached. I will certainly appreciate any assistance offered?" P 24

14. On or about December 9, 2004 Mr. [redacted] gave Vanderbilt Assessment Evaluations to [redacted]'s teachers and guidance personnel of his school. They were informed that this was for [redacted]'s doctor who wanted the information for medication review issues related to ADD. These Evaluations were picked up by Mr. [redacted] in the first week of January, 2005. see HO 3

15 On January 20, 2005. [redacted] had an office visit with Dr. [redacted], MD, [redacted] Pediatric Associates, Inc. Dr. [redacted] indicated in a letter of this date addressed to Mr. [redacted] that, "From knowing [redacted]'s history from many years, from reviewing his school grades, Conner Scales and comments from the teachers, I believe that [redacted] has attention deficit disorder. I think that this contributes greatly to his deteriorating school performance and poor grades." Dr. [redacted] further indicated, "In addition I strongly recommend that the school carry out an IEP evaluation on him, as it is very probable that he has a learning disability as well." P 19; SB 11

On February 1, 2005, Mr. [redacted] submitted a copy of the above letter to the School. P 2

16. On January 18, 2005 a "Referral to Pupil Personnel Services" was made ' [redacted] ASE for "suspected disability due to impact of ADHD". see SB 5 Prior Notice (see SB 6) was provided the Mr. [redacted].

17. On January 20, 2005 Parental Consent for Individual Evaluation was given by Mr. _____ for _____

Public Schools to proceed with the proposed evaluation of Justin to determine whether or not he is eligible for special education and related services. Mr. _____ signed indicating he received a copy of the procedural safeguards and understood these rights. SB 7

18. On March 7, 2005 The _____ Schools Eligibility Committee met concerning _____ was found to not be eligible for special education and related services under the IDEA. However, _____ was found to be eligible for 504/a qualified individual with a handicap under Section 504 of the Rehabilitation Act. Mr. _____ attended, participated and noted that he was opposed to the determination of the committee. SB 12-13, 58

19. _____, Ed.S., NCSP conducted a psychological evaluation of _____ on March 2, 2005. _____ was referred to evaluation by his parents because of their concerns regarding Attention Deficit Hyperactivity disorder. SB 17-20)

20. On March 10, 2005 a Section 504 Education Plan was developed. Mr. and Mrs. _____ attended and signed the plan. This plan provided for regular class placement with accommodations/services of the following: use of an agenda (_____ responsible for presenting teachers with agenda at beginning of each class for teacher signature), extra set of books, preferential seating, use of prompts, extended time on lengthy assignments as deemed appropriate by teachers, reduced length of assignments as deemed appropriate by teachers, extended time on tests as deemed appropriate by teachers. (SB 58)

21. On March 21, 2005 a Section 504 Discipline Meeting was held concerning _____ and the destruction of school property. The committee found there not to be a direct causal relationship between _____'s disability and misconduct. Mr. _____ participated and was members of the committee. _____'s parent indicated in writing he did not agree with the decision of the committee. SB 59

22. _____, Assistant Superintendent, was the designee for appeals for disciplinary matters. As such he conducted the appeal procedure held January 12, 2005.

23. _____ as compliance officer, investigated Mr. _____ charge of discrimination. He has observed the School Board overturn decisions of Mr. _____ in the past when they conducted appeal hearings. After investigation the charges of discrimination were determined by him to be not found.

24. Mr. _____ is able to read and write.

25. Public Schools has adopted 504 Hearing Procedures allowing for utilization of the due process procedures under the IDEA. see HO 1

26. Pubic Schools has adopted standards of Student Conduct established by the School Board. see HO 4

27. At the time of 's actions which gave rise to disciplinary actions by Public Schools and at the time of his suspension in January 2005 no determination of eligibility had been made finding to be a "child with a disability" (and in need of special education and related services) under IDEA . Additionally had not been found eligible under Section 504.

DISCUSSION:

The Disciplinary Incident:

() is a 16 year old child and a 10th grade student. Prior to January of 2005 he was attending School in the Public Schools. see SB15

During the Christmas holidays (ie. December of 2004) and two other Public Schools students were involved in an incident in which shot-puts were taken from School Property, used to break two windows at the School, and the School was entered. SB 52; SB 14

Earlier, on the day of the windows being broken, three students had taken three shot-puts belonging to Public Schools from School and transported them to School. On a count of three threw his shot-put and broke a window at School. A second window was broken by another student.

Testimony by one of the students who was a participant in the disciplinary incident indicated that threw his shot-put, left the area, and then returned after there was some talk of fingerprints. This witness indicated the shot-put was retrieved and rolled in the water to remove fingerprints.

, together with one other student, entered into School after the other student had reached through a broken window and pulled back a device over the door and opened the door. Then and one other student entered School (while one student acted as lookout) and wandered within the school. The two students exited the school and then all three students entered the school. Testimony was

further elicited that one of the other students made statements about looking for computers. It is noted that while in the school no property was taken nor other property vandalized.

Law enforcement officials investigated this matter and reported estimated damages of approximately \$316.00.

The Disciplinary Actions Taken:

On January 7, 2005, [redacted] was suspended for ten days and it was recommended to the Superintendent that he be enrolled at the [redacted] Educational Center. Mr. [redacted] was notified of this in writing and provided written notice of his rights to review circumstances and for a review hearing. Mr. [redacted] requested a review by the Superintendent or his designee. see P 2, P 13; SB 52

On January 12, 2005 the [redacted] Public Schools held a disciplinary review which was attended by Mr. [redacted] Assistant Superintendent, held the review of the suspension and made a recommendation for [redacted] to be transferred to the [redacted] Educational Center. Mr. [redacted] decision provided for a) " [redacted] to be assigned to the [redacted] Educational Center for a minimum stay of to the end of the 2004-2005 school year" and b) that [redacted] was not to be present on any other [redacted] School property while so enrolled at the [redacted] Educational Center.

Mr. [redacted] was notified that he could appeal this decision to the School Board which was to meet the next day. Mr. [redacted] did in fact appeal. SB 51

On January 13, 2005 the [redacted] School Board conducted an appeal hearing as requested by Mr. [redacted]. Mr. [redacted] participated in the appeal. At the conclusion of the hearing the [redacted] School Board upheld [redacted]'s assignment to the [redacted] Education Center. see HO 2

Mr. [redacted] was informed that he could enroll [redacted] at the [redacted] Educational Center at approximately 3 days into the suspension (thus terminating the 10 day suspension at that point). Mr. [redacted] declined to enroll [redacted] at that time and continues to decline to enroll [redacted] at the [redacted] Educational Center. SB 14

The Parent's position:

It is the position of Mr. [redacted] and he contends that:

1. Mr. [redacted] presents that [redacted] is eligible for special education and related services and should have been so defined.
2. [redacted]'s behavior demonstrates a need for special education and related services.
3. Mr. [redacted] contends that as a result of e-mails he sent to School personnel prior to [redacted]'s actions in December, 2004 that gave rise to disciplinary matters:

- a.) Public Schools knew or should have known that [redacted] was a child with a disability and therefore [redacted] was entitled to IDEA protections and procedures including a manifestation determination. [redacted] actions, which gave rise to disciplinary actions, were a manifestation of his disability and as such [redacted] should not be subject to disciplinary actions including suspension, transfer to the [redacted] Educational Center, and restrictions as to going on to school property other than the [redacted] Educational Center.
- b.) Public Schools was notified by him in writing that [redacted] was in need of special education and related services; and
- c.) this was a request for an evaluation per 34 C.F.R. 300.530-300.536.
- (see P 2)

Parent's Witnesses:

Five witnesses were called on behalf of Parent, Ms. [redacted] ([redacted] s maternal Grandmother), (Youth Pastor), a minor whose name is withheld in this decision, [redacted] and [redacted] father). No expert witnesses were presented on behalf of Parent.

Mr. [redacted] had not observed [redacted] in the school setting but noted that [redacted] has helped him on a regular basis.

Disability:

Having a disability does not automatically qualify a child for services under the IDEA. A child can have a disability but not be eligible for special education and related services. "Child with a disability" is defined to mean a child who is evaluated and found to have a listed disability category "who by reason thereof, needs special education and related services". see VAC 20-80-10

If a child has a disability but does not need special education and related services then the child will not qualify under the IDEA . However, the child may still qualify under Section 504 of the Rehabilitation Act for its protections.

Child Find:

The term "child with a disability" includes a child with "other health impairments" who by reason thereof needs special education and related services. (see 8 VAC 20-80-10) An attention deficit disorder or an attention deficit hyperactivity disorder is included under the other health impaired category. 34 C.F.R. Section 300.7 © (9); 8 VAC 20-80-10.

8 VAC 20-80-50 addresses issues of child find and requires each local school division to maintain an active and continuing child find program designated to identify, locate and evaluate those children residing in the jurisdiction who are birth to age 21, inclusive, who are in need of special education and related services....

8 VAC 20-80-52 directs that all children, aged two to 21, inclusive, suspected of having a disability shall be referred to the special education administrator or designee, who shall initiate the process of determining eligibility for special education and related services. Referrals may be made by any source, including child study committee, school staff, a parent, or other individual.

Ms. _____, Director of Pupil Services, testified as to child find and procedure. _____ Public Schools publishes annually in every student handbook a statement of services being provided under IDEA and Section 504; notices are additionally sent to the media, real estate agencies, public services agencies, pediatric offices, and other departments/agencies. Annually the child study chairman in each school talks with school faculty about referrals if they have any concerns; screenings are done when they enter school and in certain grade levels as required by law.

Ms. _____, Director Pupil Personnel Services for _____ Public Schools, supervises special education, school nurses, guidance and psychologists as part of her duties. She has a bachelor's degree in communication disorders, is licensed as a speech pathologist, taught from 1980-1994, she has work experience in the central office in special education and a masters in educational leadership. Ms. _____ has taught pre-K through grade 12, has taught regular education and children with every disability identified in the regulations including ADD, and has experience as an assistant principal at two schools. As an assistant principal she supervised special education teachers for 6 years. She is familiar with symptoms and problems associated with ADD. She has work experience including chairing eligibility meetings and insuring procedural compliance in the referral and IEP process.

Ms. _____ testified there was no failure to identify _____ as a child with a disability and in need of special education and related services. His teachers at no point suspected _____ had a disability which required special services and he had a history of being successful in school. _____ was not only successful by curriculum standards but also by standardized test achievements and SOL's.

In the 9th grade _____ was not receiving special education or accommodations. In the 9th grade he got 2 D's and the rest of his grades were average or above average and he received verified credit for a standard or advanced diploma.

_____ had the following grades during the 9th Grade:

Algebra 1	"C"
Spanish	"B"
Science	"C"
English	"D"
Keyboard	"D"
Health and PE	"A"

Ms. _____ noted that there was not a severe discrepancy between _____'s achievement level and ability level.

_____ Public Schools looks at standardized test measurements. If the child is functioning 1½ standard deviations below his expected achievement level then this would be considered a severe discrepancy. Classroom achievement is also part of the evaluation.

_____s grades in middle school showed a few "C's" but majority were above average, "B's" and "A's" even achieved honor roll a couple of six week reporting periods. He mastered all 4 content areas of the grade 8 SOL's.

Ms. [redacted] also testified that just because a student has ADD it does not necessarily mean they are qualified for special education or that the school must do an eligibility. Many students do very well and have learned coping skills.

In October or December a majority of [redacted]'s teachers had met with Mr. [redacted] as he requested. It was noted that when [redacted] would complete his work then his grades would go up. The concern was that [redacted] just chose not to complete his work. Processing was not considered to be an issue with [redacted]. [redacted] would be given two and sometimes three chances to complete his work and he would not take advantage of these opportunities to complete his work and improve his grades. Teachers had reported that he made statements that he would not try.

On 1/18/05 referral was made indicating suspected disability due to the impact of ADHD (SB 5). Parental consent was given on 1/20/05 for the proposed evaluation.

"Child Study By-Passed" was authorized which indicated that the requirements that certain strategies be tried or considered before the decision to recommend a full evaluation was essentially waived.

In the Referral for Evaluation the following were indicated as considerations:

- a. [redacted] had not failed a grade and was historically not noted to be frequently absent. However recent unexecuted absences were noted.
- b. [redacted] had been an above average student in the past. He passed all SOL tests given in middle school.
- c. [redacted] high school academics are in the average to low average range.
- d. Stanford tests during the 6th grade indicated reading and language skills as a strength and math skills below average to average. The Otis Lannon indicated low average ability.
- e. A total of 4 days of in-school suspension were noted in middle school.
- f. Dr. [redacted] indicated in a letter of January 20, 2005, "I believe that [redacted] has attention deficit disorder, I believe that this contributes greatly to his deteriorating school performance and poor grades.... I strongly recommend that the school carry out an IEP evaluation on him, as it is very probable that he has a learning disability as well." SB 8-11

The local educational agency is to establish procedures to ensure that the decision regarding eligibility for special education and related services is made within 65 business days after the referral for evaluation is received for an initial evaluation. The Eligibility Committee actually met on March 7, 2005 or within about 48 calendar days of referral.

For the reasons stated herein it is the decision of the hearing officer in this cause that Campbell County Public Schools did not violate its "Child Find" obligations.

2. Placement and label:

No evidence was presented that [redacted] carries a label. It is specifically noted that [redacted] is currently on homebound with the consent of both the school and Mr. [redacted].

has been and is in regular education. As a student at [redacted] School [redacted] was in regular education classes and if he were to accept placement at the [redacted] Educational Center he would be in a regular education classes, both are mainstream placements. There is no significant change of placement.

In the continuum of least to most restrictive environment there is no difference.

As to a placement if [redacted] were a special education student or a regular student it is noted that both special education and regular education students could go either to [redacted] School or the [redacted] Educational Center. The determination for a special education student would be made at an IEP meeting by the IEP team.

[redacted] Educational Center placement and additional considerations and discussions as to placement decisions as per the Student Standards of Conduct are set forth herein below.

For the reasons stated herein it is the decision of the hearing officer in this cause that Justin was not improperly labeled and/or improperly placed.

FAPE and Procedure:

Eligibility under IDEA and Section 504: An eligibility team meeting was held on March 7, 2005. 8 VAC 20-80-56 (B) provides for the eligibility team to include a LEA personnel representing the disciplines providing assessments, the special education administrator or designee and the parent(s). At least one LEA representative must have either assessed or observed the child. 8 VAC 20-80-56 (C) further provides that the LEA shall draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, physical condition, social or cultural background, adaptive behavior. The evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the child's disability category. see section 34 C.F.R. Section 300.532(h)

Referral to Pupil Personnel Services was made on January 18, 2005 concerning [redacted] and "suspected disability due to impact of ADHD". see SB 5

Prior Notice was provided Mr. [redacted] and "Child Study Bypassed". Mr. [redacted] gave consent for the proposed evaluation, received procedural safeguards, and signed indicating he understood these rights. SB 6 & 7

On March 7, 2005 the Eligibility Committee met. The Team was composed of [redacted]

[redacted], Mr. [redacted], Mrs. [redacted], and Ms [redacted]. see SB 13

The Eligibility Committee's Summary of Deliberations indicated that [redacted] currently evidences average ability with a strength in working memory and deficit in processing speed and attention/concentration. Academic achievement on standardized tests is within average overall. Class function reflects a significant drop for this school period. Effort is felt to be a factor as well as a history of insomnia. [redacted] is noted to have skills necessary to succeed but fails to apply them consistently.

, Director Pupil Personnel Services was a member of the eligibility team. She was familiar with ADD and matters concerning impulse control. She noted that the committee took consideration of the fact that was not failing in the 9th grade and was in fact on the honor roll for a couple of 6 week periods in middle school. She further indicated that having ADD does not necessarily mean that special education is required. She noted that there was an issue of. generally making a choice to not do the work.

It was not determined that had any processing problems. Looking at class room achievement, classroom functioning, and grade levels it was not found that a serious discrepancy existed nor did 's behavior or performance demonstrate a need for special education and related services. No processing problems were found and that looking at classroom achievement, classroom function, and grade levels there was not to be found a serious discrepancy.

. School Psychologist, has approximately 20 years experience as a school psychologist and indicated that she had personal contact with and conducted testing with . She found school and measured achievement to be commensurate with his ability. She concluded that . was making educational progress.

The WISC-IV revealed the presence of a significant and unique amount of scatter existed. evidenced high average to superior skills on the Working Memory Index, average skills on Verbal Comprehension and Perceptual Reasoning Indexes, and deficient to low average skills on Processing Speed Index. For educational purposes it was suggested that average General Ability Index be used as an estimate of his ability. SB 18

; Educational Assessor, conducted educational assessment to assess current academic performance. She determined potential and achievement to be within the average range.

Student Educational Assessment of March 4, 2005 by and Regular Ed. Teachers indicated presented with a very quiet demeanor and maintained attention to tasks and responded . 's level of achievement overall is in the average range. Broad Math skills indicating low average performance in math calculations. Broad Reading Skills indicate a relative strength in passage comprehension. Broad Written Language Skills indicate relative strengths in spelling and writing samples. Math proficiency noted "Success is evident when participates in class." It was additionally noted that Homework completion has been inconsistent. see SB 33

On March 7, 2005 was found *not eligible* for special education and related services under the IDEA. , however, was found to be eligible as a qualified individual with a handicap under Section 504 of the Rehabilitation Act. Recommendations concerning LRE/Level of Service: Regular Class.

To qualify for Section 504 protections. was found to have a mental or physical impairment (or has a record of an impairment or is regarded as having an impairment) which substantially limits one or more major life activities.

On March 10, 2005 a Section 504 Educational Plan was developed and signed by Mr. The plan provided for regular education and specific accommodations/services. SB 58

It is noted that on 3/21/05 a "Section 504 Discipline Meeting" was held concerning the incident herein discussed involving over the Christmas school holidays which led to disciplinary actions in January, 2005. The 504 Disciplinary Committee found there is not a direct causal relationship between 's disability and misconduct. Mr.

participated in the meeting and noted his disagreement to the finding. Further discussion of the procedures involved with discipline are discussed below.

Section 504 procedural safeguards differ significantly from those provided under the IDEA. Section 504 is a civil rights statute that protect individuals with disabilities from discrimination. Under Section 504 provision of an appropriate education means the provision of regular or special education and related aids and services that are designed to meet the individual needs of handicapped persons as adequately as the needs of nonhandicapped persons are met. see 34 C.F.R. Part 104 Sec. 104.33

The educational opportunities provided must meet the needs of a student with disabilities as adequately as the needs of students without disabilities. 's performance in school and the testimony of , his teachers, his family members who testified, and the testimony of school professionals were reviewed. The Exhibits, including the Educational Plan developed for were reviewed and considered. The finding of the disciplinary committee that there was not a direct causal relationship between the disability and misconduct was taken into consideration together with the basis of the determination.

For the reasons stated herein, it is the decision of the hearing officer that was afforded a free appropriate public appropriate education under Section 504.

Parent's claim to IDEA Protections: had not been identified as being eligible for special education and related services at the time of 's actions which gave rise to the disciplinary actions of Public Schools. Nevertheless, Mr. raised the issue that is entitled to the IDEA protections and procedures.

could be entitled to IDEA protections if the school knew or should have known that he was a child with a disability. see 20 U.S.C. 1415(k)(8). For this protection to arise the Public School's knowledge of disability must have arisen or should have arisen prior to the disciplinary matters arising December, 2004 involving trespass and vandalism of school property.

34 C.F.R. Section 500.527(b) provides that a local educational agency ("LEA") must be deemed to have knowledge that a child is a child with a disability if (1) The parent of the child has expressed concern in writing (or orally if the parent does not know how to write or has a disability that prevents a written statement) to personnel of the appropriate educational agency that the child is in need of special education and related services; (2) The behavior or performance of the child demonstrates need for these services in accordance with Section 300.7; (3) The parent of the child has requested an evaluation of the child pursuant to Sections 300.530-300.536; or (4) The teacher of the child, or other personnel of the local educational agency, has expressed concern about the behavior of the child or performance of the child to the director of special education of the agency or to other personnel in accordance with the agency's established child find or special education referral system. Should evaluation be requested when the student may be subjected to discipline, the evaluation must be conducted in an expedited manner. see 20 U.S.C. 300.527 (d)(2)(i)-(ii).

If it is determined that a child is a "child with a disability" as specifically defined in the IDEA/ the "Regulations Governing Special Education Programs for Children With Disabilities in Virginia" then special education and related services must be provided together with the procedural requirements provided under the IDEA. This definition requires establishing that the child with a disability also is one, "who by reason thereof, needs special education and related services". Having a disability alone is not sufficient under the Regulations/IDEA to be qualify as a "child with a disability".

Mr. [redacted] raises the matter of [redacted] ADD which Mr. [redacted] first indicated to certain school personnel in an October 2004 e-mail and which he also requested that the matter of ADD be kept confidential. Also, Mr. [redacted] stated therein that [redacted] had glasses but refused to wear glasses at school.

Prior to the 2004-2005 school year [redacted] was receiving passing grades. In the 9th Grade [redacted] made one "A", one "B", three "C's", and two "D's". However, in the 10th grade there appears to have been a drop in grades for the first semester with an improvement noted for the 4th six week period.

[redacted]'s grades for the 10th grade are as follows, to-wit: [redacted] see SB 39 and SB 49

10TH GRADE	1st 6 wks	2nd 6 wks	3rd 6 wks	1st semester	4th 6 wks
Biology	D	C	F	D	C
Spanish II	F	F	F	F	I
Horticulture I	A	A	C	A	A
Hlth/PE/Dr Ed 10	C	A	B	B	INC
Driver's Ed	B	B	B	C	
English 10	F	D	F	F	B
WH/WG Part II	C	F	F	F	I
Geometry	F	F	F	F	C

E-mails occurring prior to the date of the incident which resulted in disciplinary actions being taken were presented at due process hearing in this cause. These e-mails include the following:

1. On October 28th, of 2004 Mr. [redacted] sent the following e-mail to certain of [redacted]'s teachers and school guidance personnel:

"Please keep this information confidential. [redacted] is ADD, and is not on medication at this time. Also, he wears glasses that he won't wear to school. I feel this may be affecting his grades, and I ask for help from guidance to get him on task. Please talk to his teachers including Mr. [redacted] (whom does not list an e-mail address) to see if these are in fact an issue. If they are, I need documentation from his teachers to make a doctors visit to get him help if he needs it...."

2. Responses to Mr. [redacted] e-mail were sent via e-mail to Mr. [redacted] on October 28, 2004 and include the following:

- a. ([redacted] 's English Teacher) e-mailed Mr. [redacted] indicating [redacted] is continuing to make improvements in English and noted that [redacted] was not seen to be wearing his glasses at all but does sit in front of the classroom.
 - b. [redacted] 's Biology Teacher) e-mailed Mr. [redacted] indicating that [redacted] has been more consistent so far this 6 weeks. Out of 7 homework assignments so far, he has missed only 1. He did redo his project and got a much better grade: 80 On the last quiz that we took he got a 92.....
 - c. ([redacted] 's Spanish Teacher) e-mailed Mr. [redacted] and said, "Thank you for your continued interest and support. Since we last met during parent/teacher con. [redacted] has been trying to pay more attention and participate during class but HAW is still a problem for him. He has missed 4 out of 7 assignments. I catch him trying to finish it last minute in class but most of the time he just tries to fill the blank in to get some type of credit."
3. On December 7, 2004 Mr. [redacted] e-mailed [redacted] 's report card to school guidance and [redacted] 's teachers indicating: "Please can someone help me get [redacted] back on track before he has to repeat the 10th grade? Please see the report card attachment. I will certainly appreciate any assistance offered?"

After the date of the incident which resulted in discipline there were additional notifications made by Mr. [redacted] as to [redacted] and ADD. On January 12, 2005 (at the discipline review) Mr. [redacted] informed Mr. [redacted] that [redacted] had ADD and was not on his medications. On January 13, 2005 at his appeal hearing Mr. [redacted] also notified the School Board of this. On February 1, 2005 he submitted a doctor's letter/report concerning ADD. (see P 2)

Of significance in this cause is whether the e-mails from [redacted] 's father were a written notice to the appropriate educational agency that [redacted] was in need of special education and related services. Additionally, of concern is if [redacted] behavior or performance demonstrated a need for these services.

The current school year saw a change in [redacted] 's actions in school and in [redacted] 's grades. [redacted] 's teacher were concerned that [redacted] quit doing homework and quit trying in school during the first semester of the 2004-2005 school year. It is also evident that Mr. [redacted] was concerned about this and he had a number of communications concerning this with [redacted] 's teachers.

Mr. [redacted] taught [redacted] World History II in the 10th grade. Mr. [redacted] has approximately 20 years teaching experience. He noted that he did not observe processing issues with [redacted].

In the 1st 6 week period [redacted] got a "C", had turned in all but one homework assignment, and was getting 70-80 on tests. However, during the 2nd six week period it seemed [redacted] stopped doing homework in the middle of the 6 week period.

Credit for attempting to do the work was given by Mr. [redacted] and the work at home was 25% of [redacted] grade.

[redacted] lost 19% for not turning in homework; homework that was not timed nor had to be perfect but effort counted and

the home work had to be turned in. Mr. saw as a student who could do work but would not. Mr. indicated could pass if he would turn in the homework.

Mr. taught Geometry in the 10th grade and also indicated homework accounted for 25% of s grade. could get the 25% for effort if he tried. After the 1st 6 weeks was not doing his work at home and not doing much in class. was described as tuning out his teacher. Mr. did not see anything indicating could not do the work and he offered to tutor before or after school. Mr. he did not see as giving up but saw him as not making an attempt.

Consideration given to Mr. s testimony that is receiving homebound currently and s last test grade was an "83" and in the last 6 week period received a grade of "C". takes the same tests as Mr. s other students.

taught 10th grade English. did not do well at all in the first 6 week period. had a 39 average in the 1st 6 weeks but then got a 70 average in the 2nd six week period. She felt chose not to do work. Ms. indicated that when wanted to do better he did do better and she observed that at one point "Told me he wanted to do better and he did".

taught 10th grade Spanish and testified that told her, "I am going to drop out". also told her that he would not do homework. Homework was graded on effort in her class also. She noted did better and seemed interested and his effort increased a day or two after the parent teacher conference but then dropped. At one parent teacher conference was asked by his father in front of her if he would try and told his father that he wouldn't. She also testified that in group work in which the students worked on assignments together, refused to write down answers the group would determine.

There was an ongoing dialogue between Mr. and s teachers concerning s education. was a regular education student. Mr. and the school kept open lines of communications to discuss ongoing issues with

The evidence does indicate a strong concern of a father for his child. Both Mr. and teachers were concerned with the education of and were specifically concerned with the problems that arose in the first semester of the 2004-2005 school year. During the school year issues arose concerning grades dropping, refusal to do homework, his refusal to turn in work, and his attitude in class. With this background issues of vandalism and trespassing on school property arose.

Mr. holds a strong belief that ADD/ADHD is what is being seen in the classroom and in the activities that gave rise to disciplinary action. He further presents that actions for which discipline occurred is a manifestation of disability and as such the disciplinary actions should be stricken from Justin's records and that should be reinstated at School.

Ms. testified that in reviewing the E-mails of 10/28/05 personnel were not informed in writing that was in need of special education and related services and neither's behavior nor performance demonstrated a need for these services.

A number of witnesses who were in contact with on a daily basis and saw him in their classrooms testified as to their belief. 's teachers were concerned with 's attitude and his refusal to do homework, refusal to turn in homework, and his refusal to pay attention all of which seemed to arise in the first semester of the 10th grade. These issues were the subject of discussion and concern to parent and teachers alike.

Mr. points out that his e-mails in October and early December were prior to 's behavior which gave rise to discipline and in them he indicates has ADD. Mr. did indicate ADD and also requested that this information be kept confidential and indicated was not wearing his glasses.

While there were a number of concerns and contacts, both in parent teacher conferences and outside these conferences, no specific request for an evaluation was received by Public Schools prior to the December 2004 incidents which led to disciplinary action. No teacher or other personnel of the local educational agency expressed concern about 's behavior or performance to the director of special education or other personnel in compliance with child find or special education referral system.

Having ADD in and of itself does not necessitate special education and related services nor give rise to the need for special education and related services. Consideration was given to the educational concerns and problems that had arisen in the first semester of the 2004-2005 school year, parental and school involvement, and to the e-mails themselves. The wording of the e-mails and surrounding facts were considered. The evidence does not indicate that the e-mails of Mr.

were a written notification to the personnel of the appropriate educational agency that the child (ie.) is in need of special education and related services.

Conclusions and Findings as to Parent's claim of IDEA protections and other matters:

could be entitled to IDEA protections if the school knew or should have known that he was a child with a disability and this knowledge arose prior to 's acts in December of 2004 which were the basis of the disciplinary actions taken by / Public Schools. However, based upon the evidence in this cause I can not find him so entitled.

For the reasons stated herein, it is the decision of the hearing officer that:

1. As of the date of actions which were the basis of the disciplinary actions taken by Public School:

- a. Public Schools did not know nor should have known was a child with a disability.
- b. The parent of the child did not express concern in writing to personnel of Public Schools that is in need of special education and related services.
- c. The behavior or performance of did not demonstrate the need for special education and related services.

- d. An evaluation was not requested by the parent.
- e. No teacher or other personnel of the local educational agency expressed concern about the behavior or performance to the director of special education or other personnel in compliance with child find or special education referral system.

2. Furthermore, and for the reasons stated herein it is the decision of the hearing officer that:

- a. is not eligible under the IDEA for special education and related services and its applicable procedures and requirements.
- b. was not denied a FAPE.
- c. There were no procedural violations under the "IDEA".

could be entitled to IDEA protections/requirements if the LEA knew or should have known that he was a child with a disability. see 20 U.S.C. 1415(k)(8). For this protection to arise the Public School's knowledge of 's disability must have arisen or should have arisen prior to the disciplinary matters arising December, 2004 involving trespass and vandalism of school property.

Having found the above, issues concerning manifestation determination are not addressed. If it were determined that were a child with a disability in need of special education and related services then IDEA's procedural requirements and rights would be provided under the IDEA. As this is not the case, then matters concerning manifestation determination are not appropriate for determination herein.

For the reasons stated herein, it is the decision of the hearing officer that a Manifestation Determination/Manifestation Determination Review under the IDEA was not required.

Discrimination and 504 matters:

Section 504 is a civil rights statute that protects individuals with disabilities from discrimination. Section 504 provides that the provision of an appropriate education is the provision of regular or special education and related aids and services that are designed to meet the individual needs of handicapped persons as adequately as the needs of nonhandicapped persons are met. 34 C.F.R. Part 104 Sec. 104.33

Under Section 504 procedural safeguards differ than provided under the IDEA. Section 504 does not include requirements of written notice nor is notice required before a significant change in placement.

Mr. alleged that the actions of his son and ADD were directly related and that ADD was not given proper consideration. He further presented that ADD was primary factor in the incident involving vandalism and trespass that led to disciplinary actions. P3

Mr. raised concerns that grades alone don't make a good student. He expressed concerns of discrimination against due to "using his poor grades that were due to his ADD condition" during the disciplinary action. He also held that the breaking of the windows and trespassing on school property were directly related to ADD and as such his son should not be disciplined or alternatively, that the discipline provided to Justin was too severe. Mr. indicates that he found no just cause for the overly severe disciplinary action taken. P 14

Section 504 is designed to eliminate discrimination on the basis of disability in any program or activity receiving federal financial assistance. (see 29 USC Section 701 et seq.)

The Student Conduct and Standards of Conduct adopted by the _____ Public Schools provides that students are subject to corrective actions for any misconduct that occurs in school or on school property. It specifically provides therein that: "Students shall not willfully or maliciously damage or deface any school building or other property owned or under the control of the School Board." It is additionally provided therein that, "The student shall not trespass on school property or use school facilities without proper authority or permission, or during a period of suspension or expulsion."

Corrective actions available to the school administration for violations include, but are not limited to:

Suspension from school-sponsored activities or events

In school suspensions or out of school suspensions

Referral to an alternative education program

Notify legal authority where appropriate

see HO Ex. 4

_____ actions involved, at the minimum, a trespass on school property and vandalism. _____ did not contest at the due process hearing that he took a shot-put, broke a window, and entered _____ School during the 2004-2005 Christmas School Holiday.

The _____ Public Schools acted within its authority in the actions it took. The discipline afforded _____ was not discriminatory in nature and was consistent with the authority adopted in the Student Code and Standards of Conduct.

_____ was suspended for ten days initially but was offered the ability to enroll in the _____ Educational Center after the 3rd day of suspension which would have terminated the suspension. Mr. _____ chose to decline consent to enrollment at the _____ Educational Center and continues to so consent.

The disciplinary actions taken were not the most severe nor the least severe. Notice and rights were tendered to Mr. _____ on in the letter of January 5, 2005. Review rights were disclosed and Mr. _____ did in fact seek a review of the determinations and considerations. After the review Mr. _____ was told of appeal rights and did appeal to the Board of Education.

It was indicated that the _____ Educational Center maintained smaller classes with more structure and that it was felt that _____ could benefit from this. _____ would remain in a regular education setting at the _____ Educational Center.

On March 10, 2005 a Section 504 Education Plan was developed for _____ Mr. _____ attended, participated, and signed the plan generated. This plan provided for regular class placements with accommodation/services of:

- a. use of an agenda (Justin responsible for presenting teachers with agenda at the beginning of each class for teacher signature)
- b. extra set of books
- c. preferential seating
- d. use of prompts

- e. extended time on lengthy assignments as deemed appropriate by teachers
- f. reduced length of assignments as deemed appropriate by teachers
- g. extended time on tests as deemed appropriate by teachers.

A Section 504 Discipline Meeting was held on March 21, 2005 to determine if there was or was not a direct causal relationship between [redacted] disability and the misconduct alleged during the Christmas break.

It is noted that at the time of the actions for which [redacted] was subject to disciplinary action by Public Schools [redacted] had not been determined to be eligible under Section 504 or under the IDEA. It was not until March 7, 2005 that [redacted] was found qualified under Section 504 and until March 10, 2005 that a Section 504 Educational Plan with Accommodations/Services was proposed. However, on March 21, 2005 the school chose to proceed forward with this determination. It is significant also that the acts that led to the disciplinary actions occurred during a school holiday and were not related to classroom, school, extracurricular, nor academic activities. Discipline was initially set at a 10 day suspension but [redacted] was offered the ability to enroll at the [redacted] Education Center on the 3rd day of the suspension and to begin attendance there. [redacted] at both [redacted] Educational Center and [redacted] School would be in regular education classes.

It was the opinion of the committee that there was not a direct causal relationship between [redacted] disability and misconduct. The manifestation determination under the IDEA is conducted in a substantially similar but not the same manner if the child is eligible only under Section 504. Under 504 if there is a determination made that the misconduct is *caused* by the disability the student may not be disciplined. If the conduct is not caused by the disability then the child may receive discipline as any non-disabled student could.

[redacted]'s father raised concerns that Justin was not on medications when the actions which gave rise to the disciplinary actions of [redacted] Public Schools arose. He argues that, "during the manifestation determination they wouldn't listen to me". He was concerned that "their minds were made up when they went in there" and "that they didn't listen". Mr. [redacted] argued further that [redacted] disability may cause him to lack capacity to either to appreciate the wrongfulness of the conduct or to conform his conduct.

This committee's decision was based on factors including the fact that [redacted] carried a shot-put from the high school to the middle school which did not indicate an impulsive act. He then used it and threw it through a window. Mr. [redacted] attended and participated in the committee meeting and did note his objection to the committee's decision. see SB 59

The recent eligibility deliberations/evaluation components were reviewed by the committee before the determination was made. Testimony indicated there was a concern within the committee over the fact that there was a timeline of events that occurred:

- Getting the shot-put at the [redacted] High School.
- Then taking the shot-put to the [redacted] Middle School.
- Counting and throwing the shot-put on a count of three.
- Leaving the scene and then returning to the scene.
- Talk of fingerprints, recovery of shot-puts, and putting them into water to remove fingerprints.

Entry into the Middle School and then waking around once in the school.

The evidence and testimony indicated that consideration was given to the question of whether disability impairs his ability to understand the impact and consequences of his behavior and it was found it did not. Upon review of the evidence including the testimony of witnesses and upon consideration of the arguments of Mr. the hearing officer upholds the finding of the committee and finds that there is not a causal relationship between disability and misconduct which was the basis of the disciplinary actions.

For the above reasons, it is the finding of the hearing officer that:

- a. was not subject to discriminations or violations of his rights under Section 504 of the Rehabilitation Act of 1973, as amended. and*
- b. There is not a direct causal relationship between disability and misconduct.*

CONCLUSIONS OF LAW:

Upon consideration of the exhibits, testimony of witnesses, demeanor of the witnesses, evidence, applicable law, regulations, and cases

A. For the reasons stated above, it is the decision of the hearing officer that:

1. Public Schools did not violate its "Child Find" obligations.
2. was not improperly labeled and/or improperly placed.
3. was afforded an free, appropriate, public, education under Section 504. was not denied FAPE.
4. There were no procedural violations under the "IDEA".
5. Manifestation Determination under IDEA was not required. Under Section 504 there is not a causal relationship between 's disability and misconduct.
6. was not subject to discriminations/ violations of his rights under Section 504 of the Rehabilitation Act of 1973, as amended.

B. Furthermore, for the reasons stated herein above, it is the decision and finding of the hearing officer that, as of the date of actions which were the basis of the disciplinary actions taken by Public School:

- a. Public Schools did not know nor should have known was a child with a disability.
- b. The parent of the child did not express concern in writing to personnel of Public Schools that is in need of special education and related services.
- c. The behavior or performance of did not demonstrate the need for special education and related services.

- d. An evaluation was not requested by the parent.
- e. No teacher or other personnel of the local educational agency expressed concern about the behavior or performance to the director of special education or other personnel in compliance with child find or special education referral system.

APPEAL RIGHTS AND IMPLEMENTATION:

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

2. Implementation Plan: The local educational agency shall develop and submit an implementation plan within 45 calendar days of the rendering of a decision or the withdrawal of a hearing request with the following exception: the appeal or consideration of an appeal of the decision by the local school division and the decision is not an agreement by the hearing officer with the parent or parents of the child that a change in placement is appropriate.

FINAL DECISION DUE DATE: April 18, 2005.

April 18, 2005


Lorin A. Costanzo, Hearing Officer

Copies of this Final Decision mailed to:

1. Parent:
2. LEA Counsel: A. David Hawkins, Esq.
P.O. Box 38
Rustburg, VA 24588
3. LEA: Director of Pupil Personnel
4. SEA: Judith A. Douglas, Director, Dispute Resolution and Administrative Services
Virginia Department of Education
P.O. Box 2120
Richmond, VA 23218-2120