

VIRGINIA DEPARTMENT OF EDUCATION  
DIVISION OF ACCOUNTABILITY  
OFFICE OF SPECIAL PROGRAMS

DECISION

In re: [REDACTED]

STATEMENT OF THE CASE

On [REDACTED] 2002, [REDACTED] o [REDACTED]

requested a Due Process Hearing with [REDACTED] Public Schools [REDACTED] (Record #1) to reverse the decision rendered at a Manifestation Determination Review held on

[REDACTED] 2002, in connection with [REDACTED] On [REDACTED] 2002,

[REDACTED] was designated as the Hearing Officer. (Record #2). After conferring with counsel a Pre-Hearing Conference was held on [REDACTED] 2002. As a result of that Pre-Hearing Conference, the Hearing Officer declined to rule as a matter of law that the actions of the [REDACTED] Hearing Officer to transfer [REDACTED] to the [REDACTED] program at [REDACTED]

[REDACTED] School was not a change in educational placement as a matter of law, but rather whether that transfer was a change in educational placement was instead a matter for factual determination. The Hearing Officer advanced the previously agreed upon hearing date to the new date of [REDACTED] 2002. In addition, the Hearing Officer directed that "... [REDACTED] take immediate steps to convene an IEP meeting to develop a "functional behavioral assessment" and implement a behavioral implementation plan for [REDACTED] so that, regardless of where [REDACTED] continues to receive [REDACTED] schooling, the disciplinary problems which apparently exist can be avoided." Record No. 16

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The parties declined to mediate the matters before the hearing officer. As required by the Regulations the parties submitted in a timely fashion their exhibits and list of proposed witnesses. At the hearing on [REDACTED] 2002, the student, [REDACTED] was not present. Counsel for [REDACTED] presented the testimony of [REDACTED] together with the testimony of [REDACTED] Ph.D., a Licensed Clinical Psychologist. [REDACTED] PS presented the testimony of [REDACTED] [REDACTED]'s regular education and home room teacher; [REDACTED] Coordinator elementary [REDACTED] programs; [REDACTED] S; [REDACTED] PS Hearing Officer; and [REDACTED] School Psychologist at [REDACTED] school. The matter was continued at that time and reconvened on [REDACTED] 2002. [REDACTED] PS then presented the testimony of [REDACTED] an emotional disabilities teacher for [REDACTED] S; and [REDACTED] principal of [REDACTED]. Counsel for the parties then presented oral argument in support of their respective positions.

#### STATEMENT OF FACTS

[REDACTED] at the time of the Manifestation Determination Review on [REDACTED] 2002, was a 12 year old student at the [REDACTED] School in [REDACTED] County. [REDACTED] came to [REDACTED] County from [REDACTED] On [REDACTED] 2001, [REDACTED] was determined to be eligible for special education services with [REDACTED] disability designated as "emotional disabilities". [REDACTED] PS Ex. 14 )The eligibility determination stated in part

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that [REDACTED] had an "Inability to build or maintain satisfactory interpersonal relationships with peers and teachers." In addition [REDACTED] displayed "Inappropriate types of behavior or feelings under normal circumstances." Because of [REDACTED] above average academic abilities [REDACTED] had been assigned to the [REDACTED] Program ([REDACTED] at [REDACTED] since the [REDACTED] grade. ( PS Ex. 25) At age 4 [REDACTED] was diagnosed as having Oppositional Defiant Disorder. In addition, [REDACTED] was also diagnosed with ADD/ADHD and placed upon medication. ( PS Ex. 25 )

[REDACTED]'s initial IEP dated [REDACTED] 2001, provided that [REDACTED] would receive one (1) hour per week of special education services in a special education classroom to provide for [REDACTED]'s need for "...social skills support and assistance with work completion." ( PS Ex. 22 )

At the beginning of school in September 2001, [REDACTED] and other students in the [REDACTED] grade were advised of Student Responsibilities and Rights. ( PS Ex.8 ) On [REDACTED] 2001, [REDACTED] was involved in a teasing incident with fellow classmate, [REDACTED]. On [REDACTED] 2002, [REDACTED] complained to the Assistant Principal, [REDACTED] about [REDACTED]'s teasing behavior. ( PS Ex.2 ) [REDACTED] the guidance counselor at [REDACTED] [REDACTED] arranged a meeting with the two [REDACTED]. While the meeting was somewhat confrontational, [REDACTED] eventually and reluctantly wrote on a piece of paper that [REDACTED] would not tease [REDACTED] in the future. ( PS Ex. 8) During the period from [REDACTED] 2001,

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through [REDACTED] 2002. [REDACTED] was disciplined for misbehavior which included punching and harassing other students and being oppositional to a teacher. The consequences of these actions included being sent home with [REDACTED] having a "time out", attending counselor sessions, receiving in house detention and having [REDACTED] seat moved. ([REDACTED] PS Ex. 2)

On [REDACTED] 2002, a new IEP meeting was held and the IEP was approved by [REDACTED]'s parents. The accommodations and modifications were the same as were developed in the prior IEP, namely "Positive Reinforcement" and "Clearly Defined Limits/Expectations". A behavior modification plan was not developed. ([REDACTED] S Ex. 23 )

On [REDACTED] 2002, [REDACTED] and [REDACTED] classmates in [REDACTED]'s class were involved in a computer project. During the course of the activity, [REDACTED] and [REDACTED] friend [REDACTED] decided to insert materials in the folder of [REDACTED] the two having figured out how to access [REDACTED]'s folder. [REDACTED] at the apparent instigation of [REDACTED] inserted the phrase "DEATH AWAITS YOU" in [REDACTED]'s folder. After about an hour the two [REDACTED] encouraged [REDACTED] to look in [REDACTED] folder at which time [REDACTED] saw the words which had been put into [REDACTED] folder. At this point [REDACTED] called over [REDACTED] and showed [REDACTED] the inserted words. As it was lunch time [REDACTED] led [REDACTED] class to lunch and took [REDACTED] and [REDACTED] to the school office. The [REDACTED] school administration then began an investigation securing statements from teachers and students. During this time [REDACTED] did

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not participate in classes. [REDACTED] PS Ex. 3-6,8 ) Later that day the principal, [REDACTED] notified [REDACTED]'s parents that [REDACTED] was being suspended for 10 school days effective Monday [REDACTED] which encompassed the period [REDACTED] through [REDACTED]. [REDACTED] ( PS Ex. 17 ) [REDACTED] further notified the parents that [REDACTED] was being recommended for expulsion from [REDACTED] PS. On [REDACTED] [REDACTED] parents were notified that by reason of the recommendation for expulsion which would result in [REDACTED] being removed from school for more than 10 days, that [REDACTED] S would be conducting a manifestation determination review (MDR) which was scheduled for [REDACTED]. [REDACTED] PS Ex. 18 ) [REDACTED]'s parents cancelled the [REDACTED] meeting and as a result a new notice was issued scheduling the meeting for [REDACTED]. [REDACTED] PS Ex. 18 & 19 ) On [REDACTED] the MDR was held. The MDR committee determined that [REDACTED]'s discipline was not casually related to [REDACTED] disability. [REDACTED] PS Ex. 24 ) On [REDACTED] 2002 [REDACTED] a [REDACTED] PS hearing officer, as the designee of the [REDACTED] PS Superintendent conducted a disciplinary hearing relative to the proposed expulsion recommendation. By letter dated [REDACTED] 2002, [REDACTED] upheld the 10 day suspension but decided to hold the recommendation for expulsion in abeyance. [REDACTED] further directed that [REDACTED] be removed from [REDACTED] and assigned to the [REDACTED] program at a neighboring school, [REDACTED] subject to what were described as strict probationary behavior requirements and [REDACTED] was directed not to return to [REDACTED] ( PS Ex. 9 ) [REDACTED] initially believed that

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[REDACTED]'s parents had agreed with [REDACTED] decision but was later advised that they did want [REDACTED] to return to [REDACTED] ([REDACTED] Tr. p. 125-127) [REDACTED] returned to [REDACTED] on [REDACTED] where [REDACTED] was separated from [REDACTED] former classmates and placed in a separate classroom with oversight by a teacher's aide. ([REDACTED] Tr p.395-396, 406-408) [REDACTED] was given [REDACTED] course work to undertake. On [REDACTED] [REDACTED]'s parents initiated a request for a Due Process Hearing. (Record #1) On [REDACTED] [REDACTED] was in a classroom by [REDACTED] with periodic observation but was again given [REDACTED] materials to work on. The week of [REDACTED] was spring break so students did not attend classes. At the prehearing conference on [REDACTED] 2002, the hearing officer ruled that [REDACTED] could return to [REDACTED] pending the outcome of the Due Process Hearing but was not to be placed in [REDACTED] previous class setting. The matter was set for a hearing on [REDACTED] 2002. (Record #16)

#### DECISION

At the outset and in response to 8 VAC 20-80-76 J 17 the Hearing officer makes the following findings:

1. The requirements of notice in this matter to the parents were satisfied by [REDACTED] PS.
2. [REDACTED] was properly designated as an Emotionally Disabled student. The evidence also showed that [REDACTED] was also determined to be subject to

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Attention Deficit Hyperactive Disorder (ADHD) and Obstructive Defiant Disorder (ODD)

3. [REDACTED] needed and continues to need special education and related services.

The final question for consideration under the above section is whether [REDACTED] PS is providing [REDACTED] with a "free appropriate public education."

In coming to a conclusion on that latter question two issues are presented. First, was the decision of the MDR committee correct and second, was the removal from [REDACTED] and the reassignment of [REDACTED] to [REDACTED] a change of educational placement which would have required a new IEP.

#### Was The Decision of the MDR Committee Correct

Disciplinary procedures available to the Local Education Administration (LEA) are set forth in 8 VAC 20-80-68.

While a "Manifestation Determination Review" is not required if the disciplinary action contemplated by the LEA is not to exceed 10 days, since expulsion was being recommended [REDACTED] PS elected to conduct a MDR. See 8 VAC 20-80-68 B5.

In conducting the MDR [REDACTED] IEP team and other qualified personnel are directed to determine that:

(a) in relationship to the behavior subject to the disciplinary action, the student's IEP and placement were

appropriate, and the special education services, supplementary aids and services, behavior intervention strategies were provided consistent with the student's IEP and placement;

(b) The student's disability did not impair the student's ability to understand the impact and consequences of the behavior subject to the disciplinary action; and

(c) The student's disability did not impair the student's ability to control the behavior subject to the disciplinary action. See 8 VAC 20-80-68 B5(2)

The MDR committee answered Yes to the first question and No to the second two. [REDACTED]'s parents through their counsel assert that these responses were incorrect.

A. Were [REDACTED]'s IEP and [REDACTED] placement appropriate and were the special education services and behavior intervention strategies provided to [REDACTED] consistent with IEP and placement?

It should be noted at the outset that [REDACTED]'s IEP team had just completed a new IEP for [REDACTED] on [REDACTED], 2002, three days before the incident which led to [REDACTED]'s suspension. (PS Ex. 23 ) That IEP of necessity met with the approval, not only of personnel at [REDACTED] but with [REDACTED]'s parents. At the hearing the parents took the position that because the IEP did not have a Behavior Modification Plan it was deficient. While the IEP form utilized by [REDACTED] PS to set forth the Curriculum/Classroom Accommodations and Modifications provided a line to check if a Behavior Modification Plan was to be put in place in neither the [REDACTED] 2001, and the [REDACTED] 2002,



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IEP's were those lines checked. (PS Ex. 22 and 23 )

The parents also asserted that they had not been made aware of the extent of [REDACTED]'s disciplinary problems or of their ability to ask for a Behavior Modification Plan so that their approval of the [REDACTED] 2002, IEP was tainted by their lack of knowledge.

The LEA'S response to this argument was that it, as a practical matter, did have in effect a Behavior Modification Plan, based upon the actions of the School personnel, but that it just had not been put into a written format. In addition, the LEA argued that it too had been deceived by [REDACTED]'s behavior and they thought that [REDACTED] had been progressing in [REDACTED] social/emotional actions when in fact [REDACTED] relationship with the student, [REDACTED] had deteriorated significantly. (Tr. p. 390)

The LEA immediately following the incident secured from [REDACTED]'s teachers and fellow students statements which detailed what had been going on between [REDACTED] and [REDACTED] classmates, in particular [REDACTED] during the course of the 2001-2002 school year. The record shows that their relationship was indeed rocky. It appears that [REDACTED] was a new student at [REDACTED]. The notes regarding the first reported conflict between the two [REDACTED] is illuminating. [REDACTED] construed [REDACTED]'s actions as intruding upon [REDACTED] friends. The Guidance Counselor, [REDACTED] in [REDACTED] notes made the following comments.

"I asked [REDACTED] if [REDACTED] understood what [REDACTED] repeated teasing was doing to [REDACTED]s state of mind and [REDACTED] shrugged [REDACTED] shoulders. I asked [REDACTED] why [REDACTED] teased [REDACTED] and [REDACTED] said because [REDACTED] read [REDACTED] book instead of working on group projects. [REDACTED] replied [REDACTED] stopped contributing because every time [REDACTED] tried to talk to someone in the group, [REDACTED] would ridicule [REDACTED] or give [REDACTED] "dirty looks". I asked [REDACTED] if [REDACTED] was threatened by [REDACTED] talking to their fellow classmates and [REDACTED] replied only to certain ones. I asked [REDACTED] why only certain ones, and [REDACTED] said because they were [REDACTED] friends and [REDACTED] didn't want [REDACTED] to say things about [REDACTED] that were not true. [REDACTED] tried to convince [REDACTED] that [REDACTED] would never say anything about [REDACTED] to others that was not true because [REDACTED] knew how hurtful that could be. [REDACTED] was unconvinced and so [REDACTED] said because [REDACTED] was new [REDACTED] was just trying to reach out to make some friends, but would avoid several students that [REDACTED] claimed off limits. [REDACTED] made this concession, voluntarily in an effort to stop the teasing. [REDACTED] stated that [REDACTED]s efforts to avoid [REDACTED] friends would be acceptable to [REDACTED] but did not readily agree to stop teasing [REDACTED]. I asked [REDACTED] if [REDACTED] could at least avoid [REDACTED] and [REDACTED] shrugged [REDACTED] shoulders. (PS Ex. 8 )

Subsequently, [REDACTED] was again disciplined for harassing [REDACTED] on

[REDACTED] 2001. That was followed by disciplinary actions following harassment of other students. During the course of the investigation it was learned that [REDACTED] had been observed by fellow students tripping and trying to kick [REDACTED] calling [REDACTED] names, and bragging that [REDACTED] was annoyed by [REDACTED] actions. Significantly on [REDACTED] [REDACTED] was alleged to have stated that if they could "... freak out [REDACTED] maybe [REDACTED] will never come to school again." [REDACTED] principal [REDACTED] testified that [REDACTED] told [REDACTED] that [REDACTED] was trying to be a tough guy in so far as [REDACTED]s actions toward [REDACTED] were concerned so that [REDACTED] avoided complaining to the school administration or teachers about [REDACTED]s conduct.

When the evidence is considered in its totality, and not in hind sight, the weight of the evidence supports the LEA's position. While it is true that [REDACTED] had relationship problems with other students, this was nothing new. The problems had been dealt with over the years according to the staff at [REDACTED] by counseling [REDACTED] so as to be positive when [REDACTED] did something good and to be strict and consistent in connection with [REDACTED] infractions. These problems appear to have had a varied pattern. [REDACTED]'s negative emphasis on [REDACTED] appears to have been missed by all concerned. Only when the severity of [REDACTED]'s conduct in relationship to the computer message became known did the other elements of the relationship and it's extent and duration become known. Given the level of information then available I believe that the IEP in existence on [REDACTED] 2002, was appropriate.

B. Did the student's disability impair the student's ability to understand the impact and consequences of the behavior subject to the disciplinary action?

The school psychologist, [REDACTED], in testimony gave opinion on this question. stated:

Q. The second question here, as to whether the student's disability impaired his or her ability to understand the impact and consequences of the behavior subject to disciplinary action, the committee's decision there was no. I take it you were in agreement with that also?

A. Yes.

Q. Can you explain why?

A. There actually wasn't very much discussion of this. I think all parties involved in that meeting clearly agreed that [REDACTED] understood the behavior and that, the possible consequences of the behaviors.

Q. Let me ask you about that. Why did -- was that clear to you, as a member of the committee?

A. It was clear to me based upon my understanding of [REDACTED] my knowledge of [REDACTED]

Q. Why was it clear?

A. [REDACTED] is a very bright young [REDACTED] can be very manipulative at times. And [REDACTED] is a student, a child that seems to strive for control in [REDACTED] life, and in various ways. But in many ways, seems to plan out how [REDACTED] behaves, to either elicit responses from certain individuals, or to achieve certain ends.

Q. So in terms of [REDACTED] emotional disability, you didn't feel that that impacted [REDACTED] ability to understand that sending the message was something that was against the rules?

A. No, not at all. ([REDACTED] Tr. p. 294-295)

In addition, the number of counseling sessions and the prior disciplinary actions in which [REDACTED] was involved lead me to accept [REDACTED]'s conclusion on this question.

(c) Did the student's disability impair the student's ability to control the behavior subject to the disciplinary action.

[REDACTED]'s parents relied upon the testimony of their expert Dr. [REDACTED] relative to this issue.

Dr. [REDACTED] testified

Q. Is this type of behavior consistent with the problems that we see in [REDACTED]?

A. Well, yeah, because unlike a conduct disordered kid, [REDACTED] actually believes -- while [REDACTED] is doing what we call harassment, [REDACTED] actually thinks [REDACTED] is interacting in an appropriate way, because [REDACTED] can't tell when [REDACTED] crosses the line.

[REDACTED] thinks [REDACTED] is just being energetic and exuberant, and trying to initiate contact with other people. [REDACTED] thinks [REDACTED] is just playing the game the right way. And when [REDACTED] challenges the school and is Oppositional [REDACTED] thinks [REDACTED] is using [REDACTED] intelligence to assert [REDACTED] creative way of doing things.

[REDACTED] actually doesn't get the concept that [REDACTED] is breaking rules and annoying people, and that [REDACTED] is invading [REDACTED] peers' spaces. [REDACTED] actually thinks [REDACTED] is carrying out [REDACTED] social skills in an appropriate way. [REDACTED] doesn't have the mechanism to tell that [REDACTED] is crossing the line.

Q. Is a behavioral intervention plan of some sort helpful with children with this problem?

A. It's the only treatment that we know of.

Q. What should be in that plan, sir?

A. Well, any behavior modification plan for a kid with Oppositional Defiant Disorder needs to include immediate negative consequences, administered in the environment in

which it happened, by the person who observed the behavior.

Q. Is inconsistent or intermittent discipline, is that helpful with one of these young [REDACTED]?

A. No. It basically communicates to them that there are plenty of loopholes, that if they just wait or manipulate the situation, they will be able to get out of it.

Q. Dr. [REDACTED] do you know what a Manifestation Determination Review is?

A. I'm familiar with it, from looking back on my notes. I have testified at them before, so I know something about what it is.

Q. All right, sir. Three questions are asked in those reviews, and if you will bear with me a minute, I'll find it. We are concerned with only one of those questions here. And the question here is, "Did the student's disability impair [REDACTED] ability to control the behavior subject to disciplinary action?"

Now, keeping that question in mind, sir, do you have an opinion as to whether [REDACTED]'s disabling conditions impaired [REDACTED] ability to control [REDACTED] behavior when [REDACTED] directed another student to make threats to a third student?

A. In all these kind of cases, I think [REDACTED]'s disability is [REDACTED] inability to direct and control [REDACTED] behavior in these matters. I think they are one and the same thing. That is [REDACTED] disability.

Q. Explain to us, if you would, sir, if you can, or maybe I'm asking the wrong question. But how does [REDACTED] handicapping condition, how does [REDACTED] ODD or ADHD impair [REDACTED] ability to control [REDACTED] behavior?

A. Well, in the case of the ODD, whether [REDACTED] is dealing with

peers or superiors, [REDACTED] basically thinks [REDACTED] is using [REDACTED] intellectual creativity to do things the right way. [REDACTED] can't tell when [REDACTED] is hurting people's feelings, stepping on their toes, invading their space.

Because I happen to know that [REDACTED] not a conduct-disordered kid. [REDACTED] doesn't do this maliciously, or for some identifiable secondary gain.

[REDACTED] just can't tell when [REDACTED] is crossing the line. [REDACTED] doesn't have that mechanism. ([REDACTED] Tr. P. 29-32)

On behalf of [REDACTED] PS, [REDACTED] testified on this same question.

Q. Now, in regards to the third criteria, whether the disability impaired his or her ability to control the behavior subject to the action, what was -- the committee's decision was no. Can you explain why?

A. It was our belief, and my belief, based on the pattern of behavior that [REDACTED] has exhibited, and where and when [REDACTED] chooses to engage in the types of behavior -- the teasing, the threatening, the harassing of other students -- [REDACTED] does so at times when [REDACTED] is more likely to not be noticed by adults, when there may be less adult supervision, in transition time, in the hallway, at lunch, at recess. It seems very planned and very purposeful, and that indicates an ability to control that behavior. [REDACTED] wasn't impulsive in the classroom, and doing things in front of the teacher, that would get [REDACTED] caught.

Q. This specific action, [REDACTED] -- which I'll just paraphrase as, [REDACTED] getting another kid to send this message, is that something that you regarded as an impulsive or uncontrollable action on [REDACTED] part? I mean, that specific action?

A. No.

Q. Why not?

A. I mean, it required quite a bit of thought, to be able to carry it out.

Q. What do you mean by that? Explain that?

A. Well, [REDACTED] -- apparently, the story that I understand [REDACTED] was not the student that actually typed. [REDACTED] sort of directed the student. And from statements of other students, made comments about the purpose of what [REDACTED] was doing, in order to scare or frighten this other student. They had to figure out a way, because each student has folders, that they are able to place their work in the way the computer system works. And

--

Q. These are folders on a computer server?

A. Yes, on a computer server. And the students aren't supposed to have access to other students' servers (sic). And the files are only labeled by number, not by students' names. So there is no real identifying information on the folders. They figured out how the students were organized in the folders, that it was an alphabetical listing. So they just went through the class, figured out the names of the students in the class, figured out what number this students had to be, and then figured out how to place the message in [REDACTED] folder so that [REDACTED] could later retrieve it. So it was somewhat of a complex plan to carry out, much too complex to be impulsive on any level.

Q. Did you, [REDACTED] see -- by the way, let me ask you: In your clinical interview that you had with [REDACTED] his past Wednesday, did [REDACTED] acknowledge wrongdoing for [REDACTED] part in this action?

A. No, [REDACTED] did not.



Q. When [REDACTED] was confronted with [REDACTED] involvement, initially when this occurred, what's your understanding of what [REDACTED] immediate reaction was?

A. That [REDACTED] had nothing to do with it. [REDACTED] was not involved.

Q. Is that description of the incident and [REDACTED] involvement in it, is that something that you saw as a, just sort of being an energetic and exuberant action of somebody who didn't really think [REDACTED] was breaking the rules, but was just playing around?

A. No.

Q. Why not?

A. I think that most times, [REDACTED] s pattern when [REDACTED] is accused of any wrongdoing, is to try to distance [REDACTED] from it as much as possible, which again indicates to me that [REDACTED] is aware that what was done, or what [REDACTED] is being accused of is wrong, and should not be done. And much of [REDACTED] response is very characteristic of children with Oppositional Defiant Disorder. A part of the diagnosis is that they fail to recognize or accept responsibility for their actions, or try to place the blame on other people. And [REDACTED] will either say [REDACTED] had nothing to do with it, and try to deny as much as possible, or say it was somebody else's fault, or someone else had forced [REDACTED] in some way to act the way [REDACTED] acted. ([REDACTED] Tr. p. 295-299)

[REDACTED] and [REDACTED] s testimony is clearly in conflict. In evaluating their competing positions we must return to the question being answered. "Did the student's disability impair the student's ability to control the behavior subject to the disciplinary

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action?" What was [REDACTED]'s "disability" for special education purposes. At the eligibility meeting, [REDACTED] was determined to have "emotional disabilities". That specific term is not defined in either the Federal or Virginia regulations but the term "emotional disturbance" is. That phrase is defined as follows:

"Emotional disturbance" means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely effects a child's education performance:

1. An inability to learn that cannot be explained by intellectual, sensory or health factors;
2. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
3. Inappropriate types of behavior or feelings under normal circumstances;
4. A general pervasive mood of unhappiness or depression; or
5. A tendency for development physical symptoms or fears associated with personal or school problems.

The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance. (Underlining added)

**8 VAC 20-80-10**

The evidence presented by parents' counsel demonstrated that [REDACTED] had the conditions known as ADHD (Attention Deficit Hyperactive Disorder) and ODD (Oppositional Defiant Disorder) and [REDACTED]'s conduct, it was asserted, is attributable to those conditions. However, there is nothing in the evidence to establish that these conditions constitute an "emotional disturbance". Since the third question required to be answered by the MDR committee was that [REDACTED]'s "disability" prevented [REDACTED] from controlling [REDACTED] actions, it follows

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that it is only those conditions that fit within the "emotional disturbance" definition that can be examined to answer the question. While "social maladjustment" is not defined it must be concluded that symptoms caused by ADHD or ODD must be viewed as being within the "social maladjustment" classification.

[REDACTED] S has developed a chart to assist its personnel in distinguishing between the "emotional disability", i.e. "ED" classification and the "social maladjustment" classification. See ( PS Ex 45). As can be seen in the various categories considered, among the other elements the child having a "social maladjustment" is seen as being more purposeful in his actions.

[REDACTED] contended, as noted above, that:

[REDACTED] thinks [REDACTED] just being energetic and exuberant, and trying to initiate contact with other people. [REDACTED] thinks [REDACTED] is just playing the game the right way. And when [REDACTED] challenges the school and is Oppositional, [REDACTED] thinks [REDACTED] is using [REDACTED] intelligence to assert [REDACTED] creative way of doing things. ([REDACTED] Tr. p.29)

The evidence however fails to demonstrate any circumstance or situation to illustrate [REDACTED] position. Instead we are just left with [REDACTED] conclusion based upon [REDACTED] conversations with [REDACTED] with no facts to support that conclusion.

For the foregoing reasons it is my decision that the MDR committee's conclusion on the third question it was required to answer was correct.

II. - Is the Proposed Transfer of [REDACTED] to [REDACTED]

A Change in Educational Placement Requiring an IEP?

As was stated in the recent case Hale v Popular Bluff R-1 School District

*USCA 8<sup>th</sup> 22 IDELR 268 (February 11, 2002)*

The statute does not define the term "then-current educational placement," and the District argues there was no change when it offered Jeffrey identical educational services at a different location in January 2000. Considering this a fact-specific issue, the district court reviewed the impact of the change on Jeffrey and concluded that "[moving the location of his services, in this case, changed the educational placement." We agree. Though the parties cite prior cases which seem to disagree on whether a mere change in location was a change in educational placement, the conflict is more apparent than real. A transfer to a different school building for fiscal or other reasons unrelated to the disabled child has generally not been deemed a change in placement, whereas an expulsion from school or some other change in location made on account of the disabled child or his behavior has usually been deemed a change in educational placement that violates the stay-put provision if made unilaterally. *See Bd. of Educ. of Cmty. High Sch. Dist. No. 218 v. III. State Bd. of Educ.*, 103 F.3d 545,548-49 (7th Cir. 1996), and cases cited.

In the *Bd. of Educ. of Cmty. High Sch. Dist. No. 218 v. III. State Bd. of Educ.*, 103 F.3d 545,548-49 (7th Cir. 1996) the 7<sup>th</sup> Circuit commented further on this issue.

In the instant case, we are presented with variations on both of these scenarios. J.B. has been expelled, but the parents do not challenge the expulsion. The school board, rather than allowed to redirect J.B.'s placement, as it commonly does when the old school has become an impossibility, has forfeited the right to do so. What is challenged is the power of the court and the parents, rather than the power of the

school district, to effect J.B.'s placement.

Hesitant to definitively establish the meaning of "educational placement" for our circuit, we adopt our sister circuits' fact-driven approach. We accept as the outer parameters of "educational placement" that it means something more than the actual school attended by the child and something less than the child's ultimate educational goals. Because we are not concerned about Intervention's expulsion or that J.B. and his IEP are mis-matched, we opt for a looser interpretation of "educational placement" and recognize within the term enough room to encompass J.B.'s experience.

Following the *Hale case* admonition to examine the factual circumstances and utilizing the parameters suggested by the 7<sup>th</sup> Circuit an evaluation of the varying arguments presented by the parties for and against the transfer is required.

1. Comparison of educational programs. The IEP's that were in existence over the past two years provided [REDACTED] with a minimal amount of special education modifications. [REDACTED] was scheduled to receive one hour per week of Primary Special Education Service in a special education setting. The evidence was clear that this same service could and would be provided at [REDACTED]. As for the balance of [REDACTED] regular education program the evidence likewise demonstrated that from an educational perspective that [REDACTED] would receive an equivalent [REDACTED] program at [REDACTED] as [REDACTED] was receiving at [REDACTED].

2. Least Restrictive Environment. The parents asserted that since [REDACTED]

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was farther from [REDACTED]'s home than [REDACTED] it was not education provided in the "least restrictive environment." However, since participation in a [REDACTED] program is considered by all parties to be an essential element in [REDACTED]'s educational program and since [REDACTED] itself was not the closest elementary school to [REDACTED]'s home, the fact that [REDACTED] is slightly farther away does not violate the least restrictive environment in any significant manner. [REDACTED]S will continue to provide the necessary transportation.

3. Environment at [REDACTED] - Counsel for the parents on the one hand asserts that [REDACTED] has been "demonized" by the [REDACTED] staff and yet asserts that [REDACTED] still has friends at [REDACTED] and that it would be in [REDACTED]'s best interest to return to that school. While it is true that the Supreme Court in *Honig v. Doe* 484 U.S. 305 (1989) held that it would not infer a "dangerousness" exception to the "stay put" provisions of EHA, it does not follow that the effect of [REDACTED]'s actions on [REDACTED] fellow students should be ignored in evaluating the overall educational placement question. The school's immediate investigative response could not help but stir up anxiety among [REDACTED]'s classmates and their parents. Is it in the best interest of the school that this anxiety be increased or should it be avoided. Unfortunately, it was [REDACTED]'s own actions that brought this attention to [REDACTED] Where there is an alternate site which will provide equivalent service the evidence fails to disclose any educational benefit to [REDACTED]'s

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classmates to force [REDACTED] back into their midst. While it is hard to think of a [REDACTED] year old as creating anxiety it should be noted that [REDACTED] is a [REDACTED] year old who, according to [REDACTED] educational assessment ([REDACTED] PS Ex 26) has mental abilities which are equivalent to those of a high school student. Children, parents and school administrators are on notice of other children in other locations throughout the United States who have acted out their aggression.

4. [REDACTED] Best Interest - Under IDEA the provision of a free appropriate public education (FAPE) is geared to the individual child. The federal regulations state that:

“The services and placement needed by each child with a disability to receive FAPE must be based on the child’s unique needs and not on the child’s disability.” 34 CFR Sec 300.300 (a) (3) (ii)

Thus in determining whether [REDACTED]’s reassignment to [REDACTED] should be considered a change in [REDACTED] educational placement the overall question of whether the reassignment to [REDACTED] is in [REDACTED]’s best interest is of primary importance. Looked at from a variety of perspectives it appears that the reassignment is in [REDACTED]’s best interest.

a. Many of the witnesses offered by [REDACTED] PS asserted that the change would enable [REDACTED] to have a “fresh start”. How does the reassignment become a “fresh start”? All parties concede that [REDACTED] made a serious mistake in participating in sending the

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death threat to [REDACTED]. It was an action that raised a concern among all associated with [REDACTED] for the safety of a fellow student with whom [REDACTED] had a poor relationship.

Hopefully, at [REDACTED], [REDACTED]'s new classmates will treat [REDACTED] simply as a new [REDACTED] in class and not as someone they have to avoid or be afraid of.

b. [REDACTED] in [REDACTED] testimony stated that the reasons why [REDACTED] felt it would be good for [REDACTED] to return to [REDACTED]

Q. [REDACTED] Public Schools has proposed moving [REDACTED] to another school for the remainder of [REDACTED] grade. Now, in your opinion as [REDACTED], is that a good idea?

A. No. I don't think so.

Q. Why not?

A. I think [REDACTED] would learn best from this instance, this situation, by going back to the people that were involved, and making amends to those people, and understanding, or being helped to understand the consequences of what [REDACTED] did, and how it impacted other people, and how [REDACTED] could do better in the future to have better relationships. ([REDACTED] Tr p .60)

While such a statement appears well intentioned, no evidence was presented in the record before the hearing officer as to how this would be accomplished. Indeed one of the chief complaints about [REDACTED]'s conduct on this occasion and in the past was [REDACTED] inability to acknowledge that [REDACTED] was at fault. How could [REDACTED] make amends to those who apparently didn't believe [REDACTED]?



Another element here is how [REDACTED] would perceive [REDACTED] being allowed to remain at [REDACTED]? Certainly the school administration found [REDACTED] manipulative. There was no evidence to show that on prior occasions [REDACTED] benefitted from such an approach. [REDACTED] has even been reported as emailing classmates that [REDACTED] would return to [REDACTED] [REDACTED]

It should be noted that even [REDACTED] did not come out and say unequivocally that it would be in [REDACTED]'s best interest to return to [REDACTED]

Q. .... You are aware, I believe, that [REDACTED] attended [REDACTED] School?

A. Yes.

Q. In their [REDACTED] program?

A. Yes.

Q. Are you aware that [REDACTED] has proposed moving [REDACTED] to another school, another [REDACTED] school, [REDACTED] for the remainder of this school year?

A. I have heard that, yes.

Q. In your opinion, sir, is that a good idea?

A. I have never been to [REDACTED] School. Whatever school [REDACTED] is going to, [REDACTED] is going to need a very structured, all-day-long behavior modification plan. I'm not familiar with what [REDACTED] consists of, or what it includes.

Q. But is the idea of moving [REDACTED] at this time a good idea?

A. The only thing that would be a good idea is that [REDACTED] be in a situation where [REDACTED] has a structured, consistent, all-day-long behavior modification plan. That's the best treatment for [REDACTED] based on [REDACTED] impairment.

[REDACTED] also testified as to how [REDACTED]'s behavior should be managed.

Q. Is a behavioral intervention plan of some sort helpful with children with this problem?

A. It's the only treatment that we know of.

Q. What should be in that plan, sir?

A. Well, any behavior modification plan for a kid with Oppositional Defiant Disorder needs to include immediate negative consequences, administered in the environment in which it happened, by the person who observed the behavior. [REDACTED] Tr. p.30)

While the "immediate negative consequences" to [REDACTED] are not currently in place, it is the Hearing Officer's view that the most serious consequence of allowing [REDACTED] to return to [REDACTED] would be that it would create in [REDACTED] mind just the opposite reaction as that sought by [REDACTED]

For the above reasons, it is the decision of the Hearing Officer that the reassignment to [REDACTED] is appropriate and in [REDACTED]'s best interest and does not constitute a "change in educational placement" within the meaning of IDEA.

#### Implementation Plan

A new IEP meeting was held on [REDACTED] 2002, which included a

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Behavioral Intervention Plan. Neither were approved by [REDACTED]'s parents. Prior to [REDACTED]'s movement to [REDACTED] a new IEP meeting should be convened at [REDACTED] that would include [REDACTED] new IEP team as well as members of the IEP team at [REDACTED] specifically [REDACTED] and [REDACTED].

The BIP at [REDACTED] should include implementation requirements designed on the one hand to make sure that all adults who have oversight function are aware of [REDACTED]'s prior behavioral problems while at the same time making sure that no gossip from [REDACTED] reaches [REDACTED]'s new classmates. The "fresh start" should indeed be a fresh start.

While school staff and the experts on both sides have emphasized the need for strict requirements and responses for [REDACTED]'s behavior, the Hearing Officer has noted the lack of comment on both sides during the course of this hearing concerning the quality of the materials being presented to [REDACTED]. [REDACTED] complained to [REDACTED] that it was hard to get [REDACTED] out of bed. [REDACTED] is asserted to have said that was the parent's problem not the school system's problem. While on its face that is correct, at the same time it is the responsibility of [REDACTED] PS to attempt to provide an environment for [REDACTED] that attending school would be something that [REDACTED] would want to do and not to avoid. With [REDACTED] above average intellectual abilities it would seem that much more could be gained by letting [REDACTED] know that because of [REDACTED] unique abilities [REDACTED] is being given

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greater opportunities for creative learning rather than simply concentrating on [REDACTED]  
disciplinary problems alone. The convening of the [REDACTED] meeting is appropriate.

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[REDACTED]

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### APPEAL NOTICE

The parties are hereby notified pursuant to 8 VAC 20-80-76 O that a decision by the hearing officer in any hearing, including an expedited hearing, shall be final and binding unless the decision is appealed by a party within one year of the issuance of the decision. 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 Section 1415 of the Individuals with Disabilities Education Act (20 USC Sec 1400 et seq) without regard to the amount in controversy.