



CASE CLOSURE SUMMARY REPORT

School Division: \

Parents: .

Child: [REDACTED]

Date of Decision: June 8, 2005

Counsel for LEA: Kathleen Mehfoud

No counsel for parents, child

Party initiating hearing: Parents

Party prevailing:

Hearing officer's determination of issues:

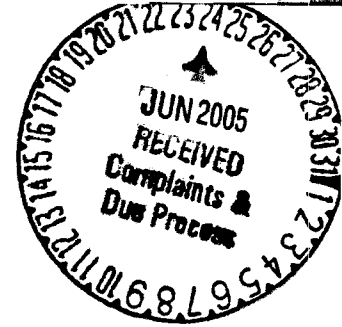
1. **Conduct of child was not a manifestation of his disability**
2. **Child was offered appropriate alternative interim placement.**

Officer's orders and outcome of hearing:

1. **School division had burden of proof on manifestation determination.**
2. **Manifestation determination was correct.**

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing.

James A. Eichner
Hearing officer



HEARING OFFICER'S DECISION

The father of _____, a student at _____ Elementary School in _____, filed a request dated May 12, 2005, asking for an expedited due process hearing challenging "school division recommendation for expulsion" and the "manifestation determination decision made by IEP team". This hearing officer was appointed by telephone call shortly thereafter, confirmed by letter of May 16 from _____ Public Schools.

After a pre-hearing conference call on May 18, a pre-hearing order letter of that date stated it was agreed that the issues were:

"(A) Did the manifestation determination of April 29, 2005, correctly state that the conduct which led to the proposed discipline was not a manifestation of _____ disability?

"(B) Is the alternative interim educational setting offered to him and others at the School Board headquarters appropriate?"

The "proposed discipline" was expulsion, according to letter of April 27, 2005, to _____'s parents from _____ Principal

(School Exhibit 28), which said _____ "was found to be restraining a female student against her will, on the school bus, while inappropriately touching her private areas and attempting to hug and kiss her".

That recommendation was carried out, and [redacted]'s expulsion formalized, at the School Board's meeting of May 11 (School Exhibit 34).

This followed a disability manifestation determination of April 28, following a hearing conducted the previous day (School Exhibit 30). It was noted that the student's disability classification was "other health impairment, specific learning disabled" and that the behavior in question "was not caused by the student's disability, and relevant disciplinary procedures applicable to student without disability may be applied".

The determination team consisted of [redacted] Principal [redacted] general education teacher [redacted]; school psychologist [redacted]; case manager [redacted]; special education teacher [redacted], and school counselor [redacted]. All except Ms.

[redacted] testified at the June 6 hearing. There was confusion as to whether [redacted], who represented himself and his son, had orally listed her as a witness he wanted to call, but Mr. [redacted] said June 6 he did not want^{to} pursue the matter and Ms. [redacted] was not summoned to testify.

All but Ms. [redacted] were members of the individualized educational program team which, on March 3, had approved proposed IEP (School Exhibit 27).

Before the hearing, [redacted] tendered its Exhibits 1-42. Mr. [redacted] did not object to any of them at the June 6 hearing, and all were

then ordered filed as designated. Mr. [redacted] then tendered papers related to a brief due process proceeding against the [redacted] Public Schools, where [redacted] was a student before he transferred to [redacted] in February, 2005. It was dismissed because [redacted] had ceased being a student in [redacted]. He also tendered a paper titled "Trash Talk," which Mr. [redacted] said had been given his son by special education teacher [redacted]. These were marked Parent Exhibits A and B, respectively, and, after objection, rejected as irrelevant.

Mr. [redacted] asked that the June 6 meeting be open. He had rejected mediation.

The suitability of the proposed IEP (School Exhibit 27), which neither parent signed, is not before me. Neither are the questions of whether the initial suspension or the later expulsion were excessive punishment, except in the context of whether the manifestation determination, necessary before a special education student like [redacted] could be disciplined like a non-disabled child, was incorrect.

That limited question, and the following question of whether the proposed interim alternative setting planned for [redacted], and for others alleged to have been involved in the April 22 incident, were appropriate, are all that a hearing officer has jurisdiction to resolve.

[redacted] on June 6 repeated its objection that the ruling in my May 18 pre-hearing order that it had the burden of proof on issues (A) and (B) above was incorrect. I responded (a) that the Supreme Court's

February, 2005, grant of certiorari to the Fourth Circuit ruling in *Weast v Schaffer*, 377 F. 3d 449 (4th Cir. 2004), that parents generally have the burden, made the issue again unclear, and (b) that, even if *Weast* is affirmed, in a parent's appeal from a manifestation determination, state and federal regulations require that the hearing officer "determine whether the local education agency has demonstrated that the student's behavior was not a manifestation of the student's disability...." 8 Virginia Administrative Code 20-80-68; 34 Code of Federal Regulations section 300.525.

In a second pre-hearing conference call on June 2, four days before the scheduled hearing, [redacted] father requested an independent educational evaluation paid for by [redacted], citing 34 C.F.R. section 300.502. It was ruled then, and when the matter was revisited at the June 6 hearing, that the evaluation mentioned in that provision, not in the manifestation determination appeal part of the regulations, could not be ordered, citing the "definitions" portion of 34 C.F.R. section 300.500: "Evaluation means procedures in accordance with 34 CFR Sections 300.530-300.536 Procedures for Evaluation and Determination of Eligibility...."

Mr. [redacted] on June 6 also questioned whether [redacted]'s parents had adequate notice of the manifestation determination hearing, which neither parent attended. Ms. [redacted] described several telephone messages giving

notice. When Mr. [redacted] testified he did not dispute this. No other objection was made to notice or other procedural deficiencies.

First, the conduct which led to expulsion. There was no contest as to this, although the father questioned whether the boy's interview with [redacted] in the presence of a city detective, was "independent".

[redacted] testified that [redacted] (a 10-year-old fourth grader) confessed to him that while on a school bus April 22, 2005, he had put one or more of his fingers on the back of the victim's jeans; that he was "humping" her—which [redacted] took to mean rubbing his pelvis against hers—for about three minutes, and that she several times asked him to stop.

The victim, a fifth grade girl, had been traumatized by the incident, and was still unwilling to ride a bus, he said.

During the interview, the principal said, [redacted] told him he knew what he did on the bus was wrong, and he knew he would be punished for it.

Four other boys, including [redacted]'s brother, also were involved in the incident on the bus, [redacted] said.

The principal testified to [redacted]'s three earlier behavior problems at [redacted]. In each case, he said, the boy appeared to have the ability to control his behavior.

Ms. [redacted], school psychologist, said she had not done an evaluation of [redacted]. From reviewing his records and attending the IEP and manifestation hearings, she said, she had determined his main disability

was in reading and writing. He was characterized by lack of organization, distraction, and inattention. His disability, she said, had nothing to do with his behavior on the bus April 22. That behavior, in her opinion, was not impulsive.

Ms. , special education teacher, said was making progress between the March IEP meeting and the April bus incident. She felt the proposed IEP was appropriate, and that had the ability to control his behavior. She disagreed with the father's contention that lack of ADHD medication, when the supply provided by the parents to the school ran out, had anything to do with the behavior in question.

Dr. , special education director, said the offered alternative interim program would provide more than the five hours per week special education provided for in the state guidelines, and that the school system would pay for transportation for it.

General education teacher , called as a witness for did not think the lack of medication caused any behavior that would indicate something was wrong with him.

Special education teacher said prior behavior included making inappropriate remarks to girls. His father, she said, refused to participate in the manifestation determination meeting.

Mr. , testifying on his own behalf, said he thought absence of medication for a period affected his son's behavior. He thought it

significant that only two of the five children involved in the bus incident had been expelled.

The progress noted above before the bus incident, and description of the interim alternative program engaged in by other boys involved in the bus incident, make it clear that what was provided, or offered, meets the requirements of the oft-cited Supreme Court decision in *Board of Education v Rowley*, 458 U.S. 176, 205 (1982), saying a free appropriate public education is provided when the plan offered the student is "reasonably calculated to enable the child to receive educational benefits".

Additionally, the sufficiency of the interim alternative placement appears moot because of the refusal of the parents to allow to attend that program, which has been attended by three of the other students alleged to have been involved in the bus incident.

FINDINGS OF FACT

1. , was a 10-year-old student in the fourth grade at Elementary School in when the incident in question occurred.

2. At that time, he forced himself on a fifth-grade girl originally sitting on the opposite side of the aisle in a school bus on April 22, 2005, with some participation by his brother and three other boys.

3. conduct included putting fingers down the back of the girl's jeans and climbing on top of her and "humping" her, his pelvis rubbing against hers, for a period said he estimated at three minutes.

4. This conduct was unwelcome to the girl, who asked him several times to stop.

5. At all relevant times, was a special education student diagnosed with specific learning disability and other health impairment.

6. All proper notices to parents, and other procedural steps, were followed in connection with 's suspension, manifestation determination hearing, expulsion, and offer of an adequate alternative interim educational setting.

CONCLUSIONS OF LAW

1. has proven that the conduct for which was expelled was not a manifestation of his disability.

2. 's parents have not proven that such conduct was a manifestation of 's disability.

3. has proven that it has offered an interim alternative educational setting that would provide a free appropriate public education.

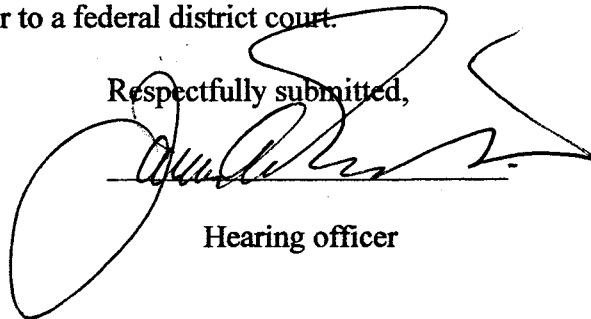
4. ^{parents} 's have not proven that that program would not provide him with a FAPE.

5. was lawfully suspended and expelled.

This decision is final, unless appealed to a state circuit court

within one year of this date or to a federal district court.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'James A. Eichner', written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke at the end.

Hearing officer

James A. Eichner

June 8, 2005

