

04-051

CASE CLOSURE SUMMARY REPORT



(This summary sheet must be used as a cover sheet for the hearing officer's decision at the end of the special education hearing and submitted to the Department of Education before filing.)

School Division Public Schools

Name of Parent _____

Name of Child _____

Counsel Representing LEA _____

Counsel Representing Parent/Child _____

None

Party Initiating Hearing _____

Hearing Officer's Determination of Issue(s):

(1) Decision of MDR committee upheld as being correct; (2) did not waive right to undertake disciplinary procedures

Date of Decision _____

Prevailing Party _____

Hearing Officer's Orders and Outcome of Hearing: **See above;**

This certifies that I have completed this matter in accordance with regulations. The written decision is attached.

Printed Name of Hearing Officer _____

Signature _____

cc: Parent(s); School Division; State Education Agency



VIRGINIA:

SPECIAL EDUCATION APPEAL

and :

Appellants :

v. : In Re:

PUBLIC SCHOOLS :

Respondent :

DECISION OF THE HEARING OFFICER

Procedural Status

On November 18, a Public School () IEP team determined that the behavior of () in bringing a "Swiss Army" knife to the for which had been subjected to disciplinary action was not a manifestation of disability. On November 23, and , parents of filed a Request for a Due Process Hearing. On November 26, , was designated as an independent hearing officer to conduct the due process hearing. On December 8, a prehearing conference was held involving counsel for , and Ms. . The date of December 15, was set as the hearing date. Hearings were held on December 15 and December 16, .

Statement of Facts

is a 14 year old ninth grade student at

at part of _____ Public Schools. On July 24, _____ was found to be eligible for special education and related services under the category of Other Health Impairment based upon the condition of Attention Deficit/Hyperactivity Disorder (ADHD). (Ex 36) As part of _____'s evaluation the evaluation team determined the _____ met the definition of ADHD namely

- “1. Is a persistent pattern of inattention and/or hyperactivity-impulsivity that is more frequent than is typically observed in individuals at comparable levels of development;
2. Is evident before the age of seven;
3. Is present in at least two environments (at home and at school); and
4. Results in clinically significant impairment in social and/or academic functioning.
5. Characteristics of AD/HD are not better accounted for by other conditions.

_____’s IEP was developed on August 22, _____ and was approved by his parents. (Ex. 37) It cited depression and ADHD as having an impact on _____’s academic performance. _____ prior to the 8th grade had performed at a high average to superior range. The IEP did not make reference to any disciplinary problems. Negative aspects of _____ performance were described as “.. Puts forth very little effort..”, “.. Wastes much of _____ time.”, “.. Work is untidy and careless” , “_____ weaknesses in math include organization, in-class focus and work completion”, “_____ can be very impulsive and defensive.”, “... does not accept criticism from adults very well.... Has tendencies to act immature with his peers.” At the same time _____ was described as

having” ..a strong, vivid and powerful mind.”, “... has great critical thinking and questioning skills.”, “..is bright and make valuable contributions to class when chooses to participate.” report cards indicate that is able to do grade level work. (Ex. 9, 11, 14,19, 29, 30, 40)

On November 12, a fellow student reported to ; the Assistant Principal at and to , Guidance Counselor, that he had witnessed with a knife the day previous, i.e. November 11, (Tr. p 42-43) Mr. testified

Q “So what happened after that”

A “So we decided to call in and ask if, indeed, had anything on possession shouldn’t have and denied having anything. And, when emptied pants pocket, produced a Swiss Army knife.”

Q “now, Could you describe the knife for us?”

A “Yes. It’s a regular Swiss Army knife. It has a number of gadgets, but it did have one pull-out blade that was less than three inches. It was about two and three quarter inches” (Tr. p 44)

* * *

Q Now, back to what happened. went in pockets and pulled the knife out.

A Right. Right. was asked why would have something – why would bring this to school and –

Q And let me make one thing clear. purportedly had it on the 11th; correct? (Tr. p 47)

* * *

A Yes

Q And also had it on the 12th at school?

A Yes. Now told me that the one on the 11th

Q was a different knife, it was a smaller knife.
A But said had a knife both days at school?
Q Yes, Well, didn't admit until actually
A found the knife on that day, but, yes, had a
knife both days.
Q Go ahead, continue.
A So said that wanted to show it off and
that's why he brought it to school. And we
talked about the seriousness of it. We talked
about – I had done class meeting at the
beginning of the school year.
Q admitted bringing it to school?
A Yes,
Q Both days?
A Yes. (Tr. p 47-48)
* * *
Q And admitted brought a knife to school
both days?
A Correct.
Q And did you discuss with whether knew
wasn't supposed to do that?
A Yes.
Q And what did say?
A said wanted to bring it to show it off, that
– I got the feeling that did know that it
was a – knew it was a serious violation.
Q Did you do any training – or had you done any
training with that would have established
for that wasn't supposed to bring that
knife to school, not even an Army knife
A The beginning of the school year, there are
Q Is the answer yes?
A Yes. (Tr. p 49-50)
* * *
Q Did you specifically mention during your
training that they were not to have a Swiss
Army knife at school?
A I did, indeed, yes.
Q And who was this training provided to?
A This was to all of the students. This was a class

meeting for all students.
Q Was this for _____'s class?
A Yes
Q Did _____ also have to sign at the beginning of the school year an acknowledgment that _____ had read the Code of Student Conduct and was aware of the rules?
A Yes, he did. (Tr. p 51-52)

Subsequently by letter dated November 20, _____ was suspended from school for "... the remainder of the first semester of the _____ school year for possession of a Category B knife, which is a violation of School Board Policy, Sec 8-32, Weapons." (_____ Ex 43)

Decision

The only factual evidence regarding _____'s possession of the knives in question is derived from the uncontradicted testimony of Assistant Principal _____

: That testimony, previously set forth, makes it clear that _____ (a) brought two knives to school on succeeding days, (b) brought the knives to show to his classmates, (c) had received training that bringing knives to school was against school policy, and (d) _____ admitted _____ knew it was a serious violation

The IEP team in conducting its Manifestation Determination was obligated pursuant to 8 VAC 20-80-68 C 5 b (1) consider evaluation and diagnostic studies, observations of the student, and the student's IEP and placement. The team is obligated to consider three questions. (_____ Ex 41)

1. In relationship to the behavior in question, were the student's IEP and

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

At the outset it should be noted the [redacted]'s IEP was accepted and agreed to by [redacted] parents. ([redacted] Ex 37). The IEP team who testified all agreed that [redacted]'s IEP and placement were proper. See [redacted] Tr p 56-57; [redacted] Tr. p 85-86, [redacted] Tr. p 99-100, [redacted] Tr. p. 24 However, the parents now assert that the "IEP does not speak to the student's processing". However, no testimony was presented to show how that alleged deficiency contributed to [redacted]'s action in bringing the knives to school.

The parent's further assert that no behavioral assessment had been completed. The IEP did contain accommodations and modifications of [redacted] program, i.e. preferential seating in class and having [redacted] daily agenda checked by [redacted] teachers. However, there was no evidence presented that prior to the creation of the IEP that there were behavioral aspects of [redacted]'s conduct related to the violation of disciplinary rules which would justify or require a special behavioral assessment designed to meet and deal with that problem.

Based upon the above data the IEP team's response was justified by the evidence.

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

As noted in _____'s eligibility determination, _____ disabilities were described as being (a) depression and (b) ADHD. The evidence is clear that _____ had high average to superior academic abilities and received grades commensurate to those abilities. _____ had received training as to the rules _____ was obligated to follow and acknowledged to Mr. _____ that _____ understood that _____ had violated the rules. There was no evidence of prior deliberate rule violations. The members of the IEP team confirmed that _____ was capable of understanding the nature of _____ actions and that _____ in fact did so. See Hepner Tr. p. 58, _____ Tr. p 86, _____ Tr. p. 100, _____ Tr. P 25-27

Nonetheless the parents assert that _____ lacked "forethought and planning" due to _____ lack of "impulse control and judgment" which "impacted decision making and understanding of consequences of _____ behavior". However, the conduct which brought about _____'s suspension was not impulsive but rather was deliberate and repetitive. Indeed bringing the knives to school was in _____ mind designed to enhance _____ position with _____ peers. While this may have been an incorrect conclusion on _____'s part not every incorrect conclusion is caused by ADHD. _____ was capable of understanding the impact of _____ actions and admitted to Mr. _____ that it was wrong.

3. Did the student's disability impair the ability ability to control the behavior subject to the disciplinary action.

As noted previously _____ brought knives to school on two occasions. The avowed purpose of these actions was to show the knives to _____ classmates. This required deliberate action on _____ part on two separate occasions. As established by the ADHD definition, the _____ conduct precipitated by ADHD is impulsivity, hyperactivity or inattention. The bringing of the knives to school by _____ did not reflect that type of conduct.

The parents further asserted with respect to their _____, that they "... need to protect _____ in terms of judgment issues and behavior issues because these are manifestations of _____ disability from our way of thinking..." Regrettably, the evidence does not support the contention that all instances of poor judgment are the result of ADHD.

The relationship of ADHD to actions such as _____'s in bringing a weapon to school was considered by the Georgia State Education Agency in a matter involving the Oconee County School System. *Oconee County School System 27 IDELR 629 October 2, 1997*

In that case the factual situation was described by the hearing officer as follows:

The documentary evidence, and testimony at the hearing reflected that on the morning of September 8, 1997, as the student was leaving home, he realized that a shotgun which had been used by the student to hunt over the previous weekend was still behind the seat of his vehicle. Although the student considered removing the firearm from the vehicle

before he left home, he was afraid his parents would see him remove it from the vehicle and he would get in trouble for having the firearm in his vehicle. Secondly, when the student arrived at school, he again was concerned about having the firearm in his vehicle, and he asked a friend about the propriety of keeping the shotgun in his vehicle while it was parked on school property. According to R.C., the other student advised him that since the firearm was in the truck and behind the seat, it would probably not be discovered. Apparently satisfied that he would not get in trouble, the student entered the school building leaving the firearm in his vehicle. The student's friend apparently informed other students about the presence of the firearm in the student's vehicle, and the school administration was alerted. The student's vehicle was subsequently searched, and the student was detained and released by law enforcement authorities. The staffing committee concluded that due to the fact that the student had considered the consequences of his actions on at least two separate occasions, that there was no impulsivity in taking the gun to school and it was simply an act of poor judgment unrelated to the ADHD. Since the committee determined that it was not a manifestation of his disability, the student was suspended for the full 45 days allowed under state and federal regulations.

The parents contend that the incident was related to the student's disability. In support of the parent's position, Dr. Michael Shapiro, the student's private psychologist, agreed that the act of bringing the firearm on school property was not impulsive, but it was a string of bad decisions based on poor judgment which Dr. Shapiro states is consistent with the disorder of Attention-Deficit/Hyperactivity Disorder. The school psychologist testified that poor judgment is not part of the diagnostic criteria for ADHD as reflected in DSM IV.

The Hearing Officer in *Oconee case* in his Legal Analysis stated

The student's ability to learn is impaired by his Attention-Deficit/Hyperactivity Disorder. According to the

school psychologist, the most prevalent underlying symptom of ADHD is impulsivity, and he found no impulsive actions related to the conduct which led to the student's suspension. The school psychologist further testified that the student had exercised problem solving in weighing the consequences of his actions on two or three occasions on the morning of the incident; i.e. in his parent's driveway, on the way to school, and in the school parking lot when the student admittedly debated the ramifications of having the shotgun in his vehicle. It is on this basis that the manifestation determination review committee found that the actions were not related to his disability. On the other hand, the student's private psychologist, Dr. Shapiro, found that his actions were related to the ADHD inasmuch as the actions demonstrated a series of poor judgment decisions on the part of the student. It is noteworthy that Dr. Shapiro also concluded that the actions of the student on the morning in question were not impulsive, but were simply "bad decisions." Dr. Shapiro stated that he believed that the symptoms of poor judgment were discussed in the Diagnostic and Statistical Manual IV (DSM IV), and although poor judgment is not included in the diagnostic criteria for ADHD in DSM IV, that its inclusion in the text of the article on ADHD justified including poor judgment as a manifestation of the disorder. DSM IV provides that the essential feature of Attention-Deficit/Hyperactivity Disorder is a persistent pattern of inattention and/or hyperactivity-impulsivity that is more frequent and severe than is typically observed in individuals in a comparable level of development. According to the manual, impulsivity manifests itself as impatience, difficulty in delaying responses, blurting out answers, difficulty waiting one's turn, and frequently interrupting or intruding on others. The manual further states that impulsivity may lead to accidents and to engagement in potentially dangerous activities without consideration of possible consequences. Finally, DSM IV describes associated features which may include low frustration tolerance, temper outbursts, bossiness, stubbornness, excessive and frequent insistence that requests be met, mood lability, demoralization, dysphoria, rejection by peers, and poor self esteem. There is no reference in DSM IV

to poor judgment being part of the diagnostic criteria for ADHD either in the text describing the disorder or in the list of diagnostic criteria which concludes the chapter.

In his decision the Hearing Officer went on to state

I find and conclude that the preponderance of the evidence supports the school district's finding that the conduct of the student on September 8, 1997, is not a manifestation of the student's disorder. As stated in the previous section of this report, I do not find any corroboration for Dr. Shapiro's opinion that poor judgment is a diagnostic criteria for ADHD. Even if it were, the student admittedly considered the consequences of his actions on several different occasions as he debated whether or not he should have the gun at school. As stated within the ADHD Section in DSM IV, students with ADHD usually do not consider the consequences of their actions; thus, a consideration of the consequences is atypical of ADHD and is not consistent with the usual symptoms of the disorder. Thus, in having determined that the conduct was not a manifestation of his disorder, the district was within its rights under IDEA and state education rules to suspend the student for 45 days.

All of the witnesses praised _____'s capabilities and implicit in their testimony was observation that _____ was the type of student who could learn and would benefit from his mistakes. Fortunately because of the provisions of IDEA _____ is receiving educational services at home and should, given reasonable effort on _____ part, come through this difficulty no worse off educationally and hopefully benefitting from the realization that _____ conduct will be evaluated by others and thus _____ should be guided accordingly. Clearly, _____ had sufficient control of _____ to avoid bringing the knives to school.

Lastly the assertion was made at the prehearing conference that _____ had somehow waived its rights to enforce its disciplinary procedures in _____'s case. No evidence to substantiate this assertion was presented during the course of the hearing and it is accordingly rejected.

Conclusion

The decision by the IEP team following the Manifestation Determination that the behavior of _____ in bringing knives to school was not a manifestation of the student's disability was correct and the appeal is dismissed.

Dated:

Hearing Officer

APPEAL NOTICE

The parties are hereby notified pursuant to 8 VAC 20-80-76 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.

ATTORNEY AND COUNSELOR AT LAW

4, VIRGINIA

Ms. _____ & Mr. _____

Ms.
Director Special Education

VA

_____, Esq.

_____, VA

Re: _____

vs.

Public Schools

Dear Ladies and Mr. _____ :

It has been brought to my attention by the Virginia Department of Education that the language of the notice contained in my decision with regard to appeal rights is not accurate. That notice should read as follows:

APPEAL NOTICE

The parties are hereby notified pursuant to 8 VAC 20-80-76 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 *in a state circuit court within one year of this decision's issuance date, or in a federal court*. The appeal may be filed in either a state circuit court or a federal district court without regard to the amount in controversy.

I hereby amend my decision to contain the above language.

Ms. & Mr.
Ms. , Esq.

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Very truly yours,

Encl.

cc: Judith A. Douglas, VA Dept of Education

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