**VIRGINIA DEPARTMENT OF EDUCATION**

#### EXPEDITED DUE PROCESS HEARING

**In re: Child Findings of Fact**

**Expedited Due Process Hearing and Decision**

**Advocate for Petitioner: Counsel for City Public Schools:**

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 This matter came to be heard upon the complaint for an expedited due process hearing

filed on March 1, 2018by the Petitioner (“Petitioner” or “the Child”), [[1]](#footnote-1) against the City School

Board, (“Respondent” or “the LEA”), under the Individuals with Disabilities Education Act,

(“the IDEA”), 20 U.S.C. 1400, *et seq*., and the regulations at C.F.R., Part B, Section 300, *et seq*.

 The expedited due process hearing was held before the undersigned hearing officer over

two days, March 26& 27, 2018 at the City Special Education Building, City, Virginia.

The hearing was closed to the public and transcribed by a court reporter. A special education

Advocate (“Advocate”) represented Petitioner and his parent at the hearing. School Board

Counsel (“Respondent Counsel”) and the City Special Education Director (“City Special

Education Director”) represented the LEA at the hearing.

 This decision is timely and within the expedited day time limitation period under the

IDEA.

 The record includes written orders, closing remarks, pre-hearing reports, Petitioner Exhibit

book, Respondent exhibit book, Petitioner’s written closing argument, and Respondent’s written

closing argument. [[2]](#footnote-2)

 Petitioner seeks to overturn the Manifestation Determination Review (“MDR”) held

for the Child on February 16, 2018 to avoid discipline Respondent imposed against the

Child requiring short and long-term school suspension; Petitioner asserts also that the February

14, 2018 incident was merely a prank when he sent nine text messages, with 20 threatening

emojis, accompanied by a death threat, to a female student, with whom he rode the school bus to

City Middle School, **Tr. 42: 1-22**; Petitioner asserts also that the texting incident

was a disability manifestation for which he should not be disciplined; and, after the disciplinary

incident, Petitioner asserts that he was diagnosed with an attention deficit medical condition,

(“ADD/ADHD”), which factor ought to be considered by this hearing officer; that

Petitioner regularly participates in practical joking with his family and school friends who

influenced him to text the female classmate, **Tr. 43: 22-23; Tr. 71: 21-23**; Petitioner alleges

also that his teachers know that he and his friends participate in horseplay which is his

problematic school conduct and that teacher intervention, preventing his impulsivity, could have

corrected this behavior and averted the texting incident; and, finally, Petitioner alluded to current

events [[3]](#footnote-3) alleging that the MDR team treated him more harshly because of the other school event

that happened that day. **Tr. 213: 1; Tr. 213: 2-5.**

In response, Respondent administrators assert that the Petitioner’s prior school conduct

did not provide prior notice that the Child would send a schoolmate menacing text messages

containing a death threat, **Tr. 309: 6-12**; also, Respondent school personnel assert that IEP

details and FAPE provision to the Child are not proper issues to be considered at this expedited

due process hearing; that the Respondent asserts affirmatively that the MDR was fairly

comprised and conducted; that a Parent was present at the MDR and concurred with MDR

findings; that Respondent asserts also that the MDR team reviewed all pertinent educational

materials, including the Child’s current IEP and other related information; that the MDR team

properly inquired about the Child’s educational services provided; that the Respondent inquired

regarding the relevant MDR inquiries only after the MDR team considered Petitioner’s complete

school record; and that the Respondent objected strenuously to the Petitioner’s allegation that the

Petitioner’s current IEP was not properly implemented or that the Respondent knew or should

have known that Petitioner’s school behavior required attention and adjustment prior to the

disciplinary incident; and, also, Respondent states that an ADD or ADHD diagnosis and current

events are irrelevant to this matter and had no relation to the discipline imposed by the MDR

team.

#### BURDEN OF PROOF

Petitioner challenges the MDR findings. In *Schaffer v. Weast,* 546 U.S. 49, 126

S.Ct. 528, 163 L.Ed.2d 387 (2005), the court held that the burden of proof, in a special education

administrative hearing, is properly placed upon the party seeking relief, whether that is the

disabled child or the school district. *Id.,* at 537.

 Petitioner filed this due process hearing request. Accordingly, I find that the Petitioner

carries the burden of proof in this case.

####  FINDINGS OF FACT

1. The Child is a sixth grade student at City Middle School in City, Virginia. He is 13 years

of age. The Child first qualified for special education services on February 12, 2014 as a

child with a Specific Learning Disability (SLD) in reading, writing and math. (**SB 5**). The LEA

reevaluated the Child on February 7, 2017 (**SB 5**) and on January 26, 2018. (**SB 10**).

2. When the Child originally qualified to receive SLD services on February 12, 2014, his

teacher did not note any behavioral problems. (**SB 5**).

3. The Child rode the school bus on Valentine’s Day, February 14, 2018. While on the

school bus, the Child sent nine text messages, in four minutes, to a female student who

also rode the school bus. The Child texted the following text messages to the female student:

 *8:30 A.M. – “I see you”*

 *8:30 A.M. – “I know what school u go to”*

 *8:31 A.M. – “xxxxxxx Middle School”*

 *8:32 A.M. – “Homeroom xxx and teacher is [name of teacher]”*

 *8: 32 A.M. – “I will come to the school and kill u”*

 *8:33 A.M. – “[20 emojis showing guns, knives, and a bomb]”*

 *8:33 A.M. – “SEE U SOON”*

 *8:33 A.M. – “HAHAHAHAHAHAHA”*

 *8:34 A.M. – “P.S. happy death day”* ***SB 15***

 4. On the above day, the female student did not see the texts until about 11:30 A.M. **SB 13**, **SB**

**15**; **Tr. 190: 24-25; Tr. 191: 1-10**. The female student first saw the text messages after she turned on her

phone. **SB 13, SB 15**. When she reported the texts to her teacher, she did not know who had sent the

messages. Her teacher contacted Middle School Administrators, **SB 13** and **SB 15**.

5. The Child’s Middle School Administrators traced the texts back to the Child who received 10

days out-of-school suspension and was referred for school removal, a one year long-term

suspension. Ultimately, the Child received a long-term, one year school removal. **SB 13-14; Tr. 34:7-25**.

6. On February 16, 2018, the LEA convened an MDR to inquire regarding causation for the texting

incident. **SB 17**. School personnel properly comprised the MDR team. Parent attended the MDR

meeting. The MDR team reviewed the Child’s disciplinary records, evaluations, attendance records and

grades and other relevant information. **SB** **17**.

7. On February 16, 2018 the LEA decided that the punishment, long-term suspension from

school, was appropriate. **SB 16**.

8. Petitioner asserts that the MDR team approached its incident analysis with a “lackadaisical” [[4]](#footnote-4)

attitude and performed a “perfunctory” [[5]](#footnote-5) review of the Child’s educational record.

9. Petitioner asserts that the Child exhibits ADD/ADHD characteristics as follows:

 “[Petitioner] has difficulty focusing, is impulsive, acts before he

 thinks, is easily influenced by others, and often finds himself

 in a predicament where he couldn’t foresee consequences. It’s

 not something he chooses. They are behaviors that come out

 despite his efforts because he is not yet equipped with the skills

 needed to manage them fully.” [[6]](#footnote-6)

10. In contrast to the above characterization, Petitioner asserts that the Child’s behavior is “manageable” [[7]](#footnote-7)

but that:

 “[T]he “school district failed [the Petitioner] by slapping a generic

 label of SLD on him and instituting a few generic goals, but

 did nothing to address the glaring behaviors, including his social/

 emotional and functional performance needs...” [[8]](#footnote-8)

11. At the expedited due process hearing on March 26 & 27, LEA educators were credible in their

multiple statements that the MDR team considered the Child’s behavioral and educational needs, and that

the Child did not show glaring behaviors prior to this incident and that his school behavior was “very similar to his same aged peers.” **Tr. 207: 18-19**.

12. The Child’s school record does not factually indicate that surrounding circumstances ever triggered

IDEA child find regulations. As the Respondent indicated in closing argument, “[This] is not a

Child Find case.” [[9]](#footnote-9) The Petitioner’s later ADD/ADHD medical diagnosis has no nexus to the February

14, 2018 school bus texting incident. The Petitioner’s disability, SLD, did not cause and had no

direct and substantial relationship to the Child’s conduct that day; the Petitioner’s participation in the

February 14, 2018 school bus texting incident was not the direct result of the Respondent’s failure to

implement the IEP.

#### HEARING ISSUES FOR DETERMINATION

In order to determine if the February 16, 2018 MDR was properly conducted, the

following questions are presented to the MDR team which formed the basis for the expedited due

process hearing to determine if the February 14, 2018 incident was not a manifestation of the

Petitioner’s disability. The two questions presented to the MDR team are as follows:

1. Was the conduct in question caused by, or had a direct and substantial relationship to, the

 Child’s disability; or

2. Was the conduct in question the direct result of the LEA’s failure to implement the

 IEP. [[10]](#footnote-10)

#### BURDEN OF PROOF

 As above stated, Petitioner challenges the MDR conduct, findings, and decision meaning

that the Petitioner has the burden of proof in this case; Petitioner initiated this expedited due

process hearing requesting the hearing officer to reexamine the MDR. In *Schaffer v. Weast*, 546

U.S. 49, (2005), the Court held that the burden of proof, in an administrative hearing challenging

the IEP, is properly placed upon the party seeking relief, whether that is the disabled child or the

school district. *Id*., at 537.

#### LEGAL ARGUMENT

**I. Petitioner did not meet the burden of proof because he did not present any credible documentary or testamentary evidence indicating that the MDR was faulty.**

At the expedited due process hearing, Petitioner did not present any witnesses to

corroborate his stance that the MDR result was improperly conducted or that the MDR

outcome was inaccurate. Both parents testified that the Petitioner described to them that the

Child referred to the school bus incident as a joke or a prank. **Tr. 37: 22-23**. The Child’s mother

testified that the family and the Child “like to joke around. **Tr. 37: 12-13; Tr. 71: 21-25**. The

Child’s father added that another Child “put [the Child] up to [the school bus incident] but the

Child’s father also reported the Child’s apparent intent o scare the female student when he told

his father, “[the Child] sent the emojis to mess around with the female student.”  **Tr. 49: 25; Tr.**

**50: 1**.

Though both Petitioner’s parents testified they had difficulty getting the Child to focus at

home they were “shocked” with the texts’ actual content. **Tr. 23:23**; **Tr. 37: 12-13**; **Tr. 69: 8-10**;

Both Petitioner’s parents admitted that this incident represents poor choices on the Petitioner’s

part. **Tr. 37: 12-13; Tr. 48: 17-23.** Petitioner’s parents testified that their family has a tendency

to “joking.” **Tr. 71: 21-25; Tr. 72: 1-3**. But at the expedited due process hearing, the Child’s

father agreed that the Child made a poor choice in this instance as is reflected by the exchange

between the Advocate and the Parent: Q. Did you agree with the school that [the Child] made a

dumb decision? A. Absolutely. Q. It was a bad decision. A. Yes. It was a bad decision. **Tr.** **48:**

**17-19**; **Tr. 48: 20-21;** **Tr. 72: 1-3**. [[11]](#footnote-11)

But at the above expedited due process hearing, neither Parent stated that the MDR was

improper in any way. Petitioner also did not present any expert testimony to the effect the MDR

was flawed [[12]](#footnote-12) or improperly decided. Parents never stated either that the incident was prompted

by, or a manifestation of, the Child’s disability. School witnesses who were familiar with the

Petitioner or with his school record testified at the expedited due process hearing. [[13]](#footnote-13) Two school

witnesses provided the only expert testimony regarding the February 18, 2018 MDR

meeting. All of the LEA witnesses were credible. None of these hearing witnesses

asserted that the MDR was improperly conducted or substantively flawed.

In contrast, the Petitioner did not call any experts to testify about the MDR result.

Parent suggested at the expedited hearing that Petitioner’s disability causes him to be

impulsive and easily influenced by others. Yet this conclusion does not appear in the

record as a teacher’s recollection, his eligibility paperwork or in his triennial

documentation. **SB 5; SB 7.** The most recent IEP notes that the Child’s SLD is in reading

and math. It is clear that these educational deficits bear no relationship to the “kill

threats” made to another student. In fact, school witnesses who testified stated that the

Child posed behavior no worse than his peers though the Child has demonstrated impulsivity on occasion. **Tr. 110: 4-9**.

In special education matters, if all LEA experts agree upon the MDR outcome, a

hearing officer is generally precluded from reaching a result contrary to the experts’

collective MDR opinion. *See Arlington Cty. Sch. Bd. v. Smith*, 230 F. Supp.2d 704, 715

(E.D. Va. 2002). (A hearing officer decision was not given any weight because no expert opinion

was presented to contradict the school witnesses’ expert opinion.) *See Tice v. Botetourt Co. Sch.*

*Bd.,* 908 F.2d 1200 quoting *Board of Education v. Rowley,* 458 U.S. 176, (1982) (“[O]nce a

procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to

second-guess the judgment of education professionals.”)

Also, Respondent directed the hearing officer to the case of a student who claimed he was influenced by his friends to place a threatening note on another student’s computer stating “Death awaits you.” *See Respondent’s Closing Remarks*, at Pg. 12. In the Fourth Circuit, the court addressed impulsivity and peer pressure issues in the case of *AW v. Fairfax Cty. City Sch. Bd*., 372 F.3d 674 (4th Cir. 2004). The court did not find a causal connection between the child’s impulsivity caused by ADHD and the incident. The court’s rationale was that making the death threat by computer required “forethought and investigation.” *Id*., *See also Fitzgerald v. Fairfax Cty. Sch. Bd.,* 556 F.Supp.2d 543, 562 (E.D. Va. 2008). (An MDR decision was upheld because the record shows that the student initiated the incident, planned and executed it and the record did not show that the student was drawn into the incident by his peers.) *See Springer v Fairfax County School Bd.,* 960 F. Supp. 89 (E.D. Va. 1997). (School Systems Eligibility Committee properly found that student who exhibited anti-social behavior was socially maladjusted, not seriously emotionally disturbed, and his parents were denied reimbursement for private placement.)

The Fourth Circuit logic in the foregoing case is applicable to these facts because this case also reflects the Petitioner’s intent to make a death threat, not to joke or participate in a prank. In the instant case, this Petitioner also exhibited planning through forethought and investigation. Petitioner obtained the female student’s telephone number from his cousin, located 20 deftly selected emojis (knives, guns and a bomb) to emphasize his message and methodically sent 9 separate texts expressing his desire to “kill” her over a four minute timespan. This is not an impulsive scenario, but a plan. It is notable that Petitioner carefully selected the lettering, upper case versus lower case and different emojis, to strengthen the intensity of some, but not all, text messages. Thus, this hearing officer agrees with the City Behavioral Consultant who testified at the expedited due process hearing. She disagreed with the premise that this behavior was the result of impulsivity. She was familiar only with the Petitioner’s usual horseplay with friends. *See* **Tr. 261: 23-25; Tr. 262: 1-7.** Thus, the record does not reflect the Petitioner’s theory that the texts represented merely a prank, a joke, a lark or an impulsive incident initiated by peers.

**II. The MDR team correctly held that the incident in question was not the direct result of the LEA’s failure to implement the IEP.**

The MDR team considered causation for this incident by the Respondent’s failure to

implement the IEP. The City Assistant Principal, who oversees special education at City Middle

School testified at the expedited due process hearing. He verified that the MDR team reviewed

the triennial IEP with all MDR members. **Tr. 132: 24-25**. He also testified that the MDR team

reviewed the past and current IEP, school staff reports, health records, and the Child’s [special

education] eligibility paperwork, information provided by the parents, academic results,

attendance records, and disciplinary records. **Tr. 133: 24-25; Tr. 133:1; Tr. 133: 17; Tr. 135:**

 **22; Tr. 135: 25; Tr. 136: 3; Tr. 150: 19-22; Tr. 151: 19-22; Tr. 151: 1**.

The City Special Education Teacher also reported to the MDR team regarding the

Respondent’s IEP implementation. The City Special Education Teacher, who taught the Child

reading, writing and math, described the Child as “jovial” and reported that the Child has “many,

many friends.” **Tr. 79: 1-4**. She did not believe the Child required any more redirection than

his classmates. **Tr. 76: 21-22; Tr. 78: 11-12**. She testified that the Child was nor disruptive in

class. **Tr. 80: 4-5**.

 Also, a City Behavior Consultant, who is a Virginia State Licensed Special Education

Teacher, qualified as an expert witness [[14]](#footnote-14) in this case. She testified that she comprised part of the

MDR team. She described the Child’s tendency to joke with his friends and participate in what

she referred to as “horseplay.” **Tr. 213: 1**. Regarding this school conduct, the City Behavior

Consultant stated that the MDR team noted that at times the Child may get “caught up with his

friends, struggles in unstructured areas, and does not take responsibility for his actions.” **Tr. 213:**

**2-5**. She describes the Child as a “follower, not a leader.” **Tr. 213: 19-20; Tr. 213: 22**. She

affirmed the parents’ assessment that the Child is an “attention hound” who “seeks approval.”

**Tr. 215: 24**. But the City Behavior Consultant also described the Child as “one of the more well-

behaved students” in class. **Tr. 214: 8**.

Though the City Behavior Consultant did not conduct an observation of the

Child’s behavior, she again confirmed that the Child is similar to his same age peers in that he

exhibits “lack of focus, impulsiveness, and is easily influenced by others.” **Tr. 211: 16; Tr.**

**212: 15-16; Tr. 212: 25**. This witness concluded, after reviewing current behavior and

observations from her case manager and his teachers, that the Child was “very similar to his

same aged peers.” **Tr. 205: 17-20; Tr. 207: 18-19; Tr. 211: 16; Tr. 212: 15-16; Tr. 212: 25**.

 The City Special Education Director did not participate in the above MDR meeting along

with the above City Behavior Consultant but he qualified as an expert witness in this case.[[15]](#footnote-15) He

did not instruct this MDR team but testified that he regularly instructs MDR teams to retrieve

relevant information from a given student’s file, to get input from [educational] staff and to get

input from parents. **Tr. 291: 6-9**. Regarding this incident, the City Special Education Director

testified as follows:

 “[A] child with a specific learning disability – that there’s no

 characteristics that I am aware of for a specific learning

 disability that would, when we look at the criteria [for an MDR],

 would cause or be a direct and substantial relationship to homicidal

 statements, to threatening to kill a girl, threatening to kill another

 student. **Tr. 309: 6-12**.

Again, none of the Petitioner’s witnesses testified that the Respondent

failed to implement the IEP at the time of the MDR meeting, **Tr. 250: 12-19**.

 Petitioner has not met the burden of proof on this issue.

 Petitioner’s relief request is DENIED

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#### RIGHT OF APPEAL NOTICE

This decision shall be final and binding unless either party appeals in federal

district court within 90 calendar days of the date of this decision, or in a state circuit court

within 180 calendar days of the date of this decision.

**Decision Date: April 17, 2018**

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 Sarah Smith Freeman, Hearing Officer

## CERTIFICATE OF MAILING

I have emailed the above Expedited Due Process Decision to counsel on this date and

will follow-up by mailing a hard copy of the decision to all counsel and parties.

 Sarah Smith Freeman, Hearing Officer

Sarah Smith Freeman, Esquire, VSB# 21354

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1. The Child’s father filed the due process request. [↑](#footnote-ref-1)
2. Petitioner’s Exhibits are marked “**P1-6, 15, 17-23.**” The LEA’s Exhibits are marked “**SB 1-13**.” [↑](#footnote-ref-2)
3. The Parkland, Florida mass school shooting also occurred on February 14, 2018. [↑](#footnote-ref-3)
4. *See also* *Petitioner’s Closing Argument*, at Pg. 1. [↑](#footnote-ref-4)
5. *Id.* [↑](#footnote-ref-5)
6. *Id.* [↑](#footnote-ref-6)
7. *Id.* [↑](#footnote-ref-7)
8. *Id.* [↑](#footnote-ref-8)
9. *See Respondent’s Closing Argument*, at Pg. 19; also, in the matter of *School Board of the City of Norfolk v. Brown,* 769 F.Supp.2d 928 (E.D. Va. 2010) Child Find and FAPE issues were before me. But the Court clarified that a FAPE deficiency in an IEP does not mean that the LEA has not properly implemented an IEP. Thus, it is incumbent that the MDR team determine also the second question, after fully considering the first question.  [↑](#footnote-ref-9)
10. *See* 20 USC Sec. 1415(k)(1)(E)(i); 34 CFR 300.530(e); 8 VAC 20-81-160(D)(4). [↑](#footnote-ref-10)
11. Both Parents asserted also the Child now has a medical diagnosis of ADD/ADHD. Parents admit that they did not obtain the medical diagnosis until after the MDR occurred. Parents also asserted that the Parkland, Florida mass shooting intensified school administrators’ sensitivity to this incident, the inference being that school personnel and the MDR team overreacted to the Child’s texts containing a death threat. This hearing officer acknowledges proximity to the Parkland, Florida mass shooting. But the expedited due process hearing did not show that the MDR team acted more harshly in the instant case because of the Parkland, Florida mass school shooting. [↑](#footnote-ref-11)
12. The City Special Education Director stated that the MDR team was properly comprised and that relevant members of the Child’s IEP team were present at the MDR. Also, the MDR team examined relevant information from the student’s file, input or comments from staff, and input from parents. **Tr. 291: 6-9.** Also, the City Special Education Director stated at the hearing “an appropriate team comprised this manifestation determination review. It involved people who did work with [the Child] on a daily basis, who were responsible for implementing the IEP, who absolutely had the basis to make that determination to say, yes, we are doing what’s in this IEP, it’s my understanding that the appropriate team did conclude that the IEP was implemented correctly and that it had input from all people including the parent; that, you know, during the meeting, nobody felt differently; and so, I have to believe that those experts that were working with [the Child], that they got it right.” **Tr. 303: 11-23.** [↑](#footnote-ref-12)
13. School witnesses who testified were as follows: The City Special Education Teacher, the City Assistant Principal, the City Behavior Consultant, and the City Special Education Director. [↑](#footnote-ref-13)
14. The City Behavior Consultant qualified as an expert witness in educational programming for students with disabilities. She has 37 years of experience in this field and attended from 75-100 MDR meetings per year for the past ten years.. [↑](#footnote-ref-14)
15. The City Special Education Director qualified as an expert in the field of programming and assessment of students with disabilities. [↑](#footnote-ref-15)