08-082

SEP 1 1 2008

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 billing.)

Public Schools
School Division

Name of Parent(s)

Name of Child

September 8, 2008
Date of Decision or Dismissal

Neal S. Johnson, Esq.
Counsel Representing LEA

Robin J. Mayer, Esq.
Counsel Representing Parent/Child

Parent
Party Initiating Hearing

School Division
Prevailing Party

Hearing Officer's Determination of Issues(s):

Whether school division effected a change of placement of the child after May 2008 disciplinary incident and, if so, whether school division failed to provide the services required by the IDEA for a child removed from his current IEP placement because of a violation of a code of student conduct

Hearing Officer's Orders and Outcome of Hearing:

Period of child's removal after disciplinary incident not long enough to constitute change of placement. Relief requested by parent denied.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing. I have also advised the LEA of its responsibility to submit an implementation plan to the parties, the hearing officer, and the SEA within 45 calendar days.

Peter B. Vaden
Printed Name of Hearing Officer


Signature

cc: Virginia Department of Education

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION

COPY

In Re:	}	**Findings of Fact**
Due Process Hearing	}	**and**
	}	**Decision**

Counsel for Child and Parent, _____:	Counsel for _____ Public Schools:
Robin J. Mayer, Esq. Blue Ridge Legal Services 203 N. Main Street Lexington VA 24450	Neal S. Johnson, Esq. Lichtenstein Fishwick & Johnson P.L.C. P. O. Box 601 Roanoke, Virginia 24004

This matter came to be heard upon the Request for a Due Process Hearing filed by ("the Parent"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. §1400 et seq., and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia ("Virginia Regulations"). This due process complaint arises out of Public Schools' (" PS") placement of [1] (the "Child") following a disciplinary incident at School (" S") on May 7, 2008. The Parent alleges that after the incident, the school effected a

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[1] and are 's foster parents and are in the process of completing formal adoption proceedings. It appears that the child's legal name remains , but that he is commonly called .

disciplinary change of placement, but failed to assure that the Child received continued educational services or provide a functional behavioral assessment pursuant to 34 C.F.R. § 300.530(d). The Parent seeks an order requiring that the Child receive a functional behavioral assessment and that PS provide appropriate "make up instruction." The requirements of notice to the parents have been satisfied.

The due process hearing was held before the undersigned hearing officer on August 25, 2008 at PS's Administration Building near , Virginia. The hearing, which was opened to the public, was recorded by a court reporter. The Parent appeared at the hearing and was represented by counsel. PS was represented by Director of Special Education and by counsel. Counsel for both sides made opening and closing statements.

ISSUES FOR DECISION

Whether PS effected a change of placement of the Child after the May 7, 2008 disciplinary incident and, if so, whether PS failed to provide the services required by the IDEA for a child removed from his current IEP placement because of a violation of a code of student conduct.

BURDEN OF PROOF

The substance of the Parent's claim in this case is that PS wrongfully removed the Child from his IEP placement and failed to provide educational services and a functional behavioral assessment as required by the IDEA. In *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of proof in an administrative hearing challenging an Individualized Education Program ("IEP") is properly placed upon the party seeking relief. *Id.*, 546 U.S. at 62, 126 S.Ct. at 537. Here the Parent is not

challenging an IEP, but seeks relief for the alleged disciplinary removal of the Child from his established IEP placement. In the Fourth Circuit Court of Appeals' decision affirmed by the U.S. Supreme Court in *Schaffer*, the Fourth Circuit endorsed "the normal rule of allocating the burden to the party seeking relief" in IDEA due process hearings. *See Weast v. Schaffer ex rel. Schaffer*, 377 F.3d 449, 453-456 (4th Cir. 2004), *aff'd*, 546 U.S. 49, 126 S.Ct. 528 (2005). Here the Parent is the party seeking relief. Accordingly, I find that in this case, the burden of proof is upon the Parent.

FINDINGS OF FACT

The Parent testified herself and called as witnesses the Child, S principal and S math teacher . PS called as witnesses S In-School Suspension teacher , S librarian , and , PS's Director of Special Education. A number of documents, were offered by the parties and received into evidence without objection. I make the following findings of fact based upon the preponderance of the evidence adduced at the hearing:

was born on September 8, . In the fall of 2007, the Child moved to the Parent's home to live with Mr. and Mrs. and their other children. The Parent and her husband are in the process of formally adopting the Child. It is not disputed that he is a child with a disability in need of special education services. In the Child's most recent special education reevaluation in March 2007, he was found eligible for special education services based upon the disability criteria for Emotional Disability ("ED"). Under an earlier PS 2007-08 IEP, the Child was placed at Health Care, a residential facility in Staunton, Virginia. Beginning in late October, 2007, for the rest of the 2007-08 school year, the

Child was placed in the eighth grade at School, a regular PS middle school. The Child's S IEP provided that he was to receive instruction in his core classes (English, Math, Science and World Geography) in the regular classroom. In addition, he would receive "Academic Intervention" for 50 minutes daily in the Resource Room.

On March 5, 2008, the Child received a three day disciplinary out-of-school suspension for alleged disrespectful behavior that involved verbally threatening a teacher. During a break period at an after-school remediation class, the Child did not want to leave the adult tutors. When a special education teacher attempted to move the Child to the area where other students were taking their break, the Child made a comment to the teacher about "yanking that yellow hair out of your head." The Child was suspended from school for three days and allowed to return on March 10, 2008.

The disciplinary incidents that preceded the Parent's request for the present due process hearing occurred on May 7, 2008. On the bus to school that day, the Child allegedly jabbed another student in the arm with an ink pen. This was reported to the school principal who placed the Child in In-School Suspension ("ISS") for one-half day. In the ISS classroom, the Child's disruptive behavior escalated and the principal was summoned. After the Child threw a desk toward the ISS teacher, the principal subdued and restrained the Child. police were summoned. The police arrested the Child and removed him from school property.

On the evening of May 7, 2008, the S principal telephoned the Parent to tell her to keep the Child at home through Monday, May 12, 2008 while the school administrators deliberated on an appropriate formal suspension period. The Parent kept the Child at home on May 8th and May 9th, but sent the Child back to school on May 12th without having received

further information regarding the Child's suspension. When the Child arrived at school on May 12th, he was sent to the ISS classroom for the day. After school, the Principal sent home a letter to the parents, dated May 12, 2008, stating that the Child was suspended from S for seven days, to "cover" the dates of May 8, May 9, May 13, May 14, May 15, May 16 and May 19. In the same letter, the principal wrote that after the Child returned to S on May 20, 2008, he would receive his assignments in the ISS classroom. The letter further advised the parents that upon his return, the Child would take the Virginia Standards of Learning ("SOL") assessments from May 20th through May 23rd, and after completing the SOL's he would continue to work on improving his academic skills. The principal testified that he had planned for the Child to be placed in the ISS classroom for the rest of the school year through June 5, 2008.

Prior to the Child's return to school on May 20, 2008, PS superintendent, , had assured that the Child would be allowed to return to his regular classroom at the end of his suspension. The S principal was not informed of this decision and he sent the Child back to the ISS classroom when he returned to school on May 20th. That day, the Child took his first SOL assessment in the ISS classroom. The next day, the Parent sent in a note to the principal advising that she would be filing a due process complaint that day and invoke the IDEA's stay-put provision to require that the Child be placed back in his regular classroom. After reading the Parent's note, the principal allowed the Child to return to his regular placement.

From May 19 through May 30, 2008, S was focused on 8th Grade SOL preparation and assessments. From May 20th to May 23rd, the Child took his SOL assessments separately from his nondisabled peers who were receiving SOL review instruction. (The Child's IEP

provided that he was to receive "small group testing" as an accommodation.) The record is unclear as to where the SOL's were administered to the Child, except that after May 20, 2008, the Child was no longer in ISS. After the Child completed his SOL's on May 23, 2008, he was placed back in his regular classroom. The following week, S was running what it called an "Alpha Schedule" to accommodate eighth grade SOL testing on the school's limited number of computers. Instead of students' changing classrooms each period, the eighth graders, grouped alphabetically, were assigned to a set homeroom for the day and the teachers would rotate from classroom to classroom. This enabled the school to schedule times to pull out students to take the SOL assessments at the computer stations. After the eighth grade SOL testing was completed, the Child and his nondisabled peers returned to their regular schedules.

During the 2008 summer session, PS provided eight weeks of Extended School Year ("ESY") services to the Child, consisting of 4 hours per week of math and English instruction. In its IEP for the Child's 2008-09 school year, PS agreed to provide a functional behavioral assessment as an IEP accommodation within the first 9 week grading period.

DECISION

Was there a Change of placement?

The Parent contends that PS effected a change of placement of the Child after the May 7, 2008 disciplinary incident without following the requirements of the IDEA and the Virginia Regulations for a change of placement. If a change of placement had occurred, PS would have been required to provide specified services, including, *inter alia*, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur. *See* 34 C.F.R.

300.530(d).

For purposes of the IDEA, a "change of placement" occurs if--

(1) The removal is for more than 10 consecutive school days; or

(2) The child has been subjected to a series of removals that constitute a pattern–

(i) Because the series of removals total more than 10 school days in a school year;

(ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and

(iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

34 C.F.R. § 300.536(a).

To establish that there was a change of placement in this case, the Parent must show either that the Child was removed for more than 10 consecutive school days after the May 7, 2008 disciplinary incident or that the three-day suspension in March 2008 with the ten-day suspension in May 2008 were a "series of removals that constitute a pattern" as defined in 34 C.F.R. 300.536(a)(2). I find that the evidence does not establish that either of these events occurred.

With regard to the May 2008 disciplinary removal, I find that the Child was removed at most for ten school days. On May 7, 2008, the day of the incident, the Child was first placed in ISS and later removed from school.[2] For the next eight school days, May 8-19, 2008, the child

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[2] The U.S. Department of Education has stated that any part of an instructional day for which an eligible student is suspended is counted. *See* 64 Fed. Reg. 34 CFR 12,619 (March 12, 1999) at Attachment 1. (Portions of a school day that a child had been suspended would be included in determining whether the child had been removed for more than 10 cumulative school days or subjected to a change of placement under former Sec. 300.519.)

was placed on out-of-school suspension. (I count May 12, 2008 as a removal day even though the Parent sent the Child to school, because the S principal had instructed the Parent to keep the Child at home.)

When the Child returned to school on May 20, 2008, he was placed in ISS where he took the first of his four SOL evaluations. The Child's IEP provides for small group testing as an accommodation both in his regular curriculum and for the SOL's. For that reason, I find that the school's decision to administer the SOL's to the Child at a separate time and place from his peers, that is, in the ISS classroom, did not constitute a denial of the opportunity to participate in the general curriculum and receive IEP services.[3] However, evidently after the Child completed his SOL assessment in the morning on May 20th, he was not permitted to rejoin his nondisabled peers in the regular classroom. Therefore I count May 20, 2008 as an additional, tenth, consecutive removal day for purposes of 34 C.F.R. § 300.536.

From May 21 through May 23, 2008, the Child completed his SOL assessments. It is unclear from the hearing record where the Child was placed for those three days, except that he was not placed in the ISS classroom.[4] The next week, the Child was placed in the "Alpha Schedule" classroom with nondisabled peers who were pulled out at times for their SOL

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[3] Under U.S. Department of Education guidelines, in-school suspension is not considered a "removal" day "as long as the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child's IEP and continue to participate with nondisabled children to the extent they would have in their current placement." 71 Fed. Reg. 46715 (August 14, 2006).

[4] The Parent offered evidence that the Child's one-on-one aide, , at times after May 20, 2008, took the Child to the school library or the art room where the Child watched videos or played computer games. If so, this practice, even if not in compliance with the placement provision in the Child's IEP, would not constitute a disciplinary removal.

assessments. For the rest of the school year, after administration of the SOL's was completed, it appears that the Child continued in his IEP placement. In sum, I find that following the May 7, 2008 incident, the Child's disciplinary removal lasted from May 7 through May 20, 2008, totaling 10 (but not more than 10) consecutive school days. Therefore, there was no change of placement for purposes of 34 C.F.R. § 300.536(a)(1).

The Parent also contends that the three-day suspension in March 2008 with the ten-day suspension in May were a pattern of removals that, taken together, constitute a change of placement under 34 C.F.R. § 300.536(a)(2). To constitute a pattern, the Child's misconduct in May 2008 must have been be substantially similar to his behavior in the March incident. I find that the child's behavior in May (jabbing a student on the bus and throwing desks in the ISS classroom) was not substantially similar to his behavior in March (verbally threatening a staff member at an after school class). Therefore, I find that the evidence does not establish a pattern of removals that constitutes a change of placement.

Because I find that the Child was not subjected to a change of placement for violations of the code of student conduct, as defined by 34 C.F.R. 300.536(a), PS was not required to conduct a manifestation determination review or to provide 34 C.F.R. 300.530(d) change of placement services.

ORDER

For the reasons set forth above, it is hereby ordered as follows:

1. The relief requested by the parent , herein is denied in its entirety.

2. Public Schools shall develop an implementation plan within

45 calendar days of the date of this decision which must state how and when this decision will be put into operation. The implementation plan shall include the name and position of a case manager charged with implementing the decision. Copies of the plan shall be forwarded to the parties to the hearing, the hearing officer and the Virginia Department of Education.

3. Public Schools is the prevailing party in this due process hearing.

Right of Appeal Notice

This decision is final and binding unless a party appeals in a federal district court within 90 calendar days of this decision, or in a state circuit court within one year of the date of this decision.

Peter B. Vaden, Hearing Officer
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Date of Decision: September 8, 2008