07-051

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 billing.)

School Division

Name of Parent(s)

Name of Child

May 14, 2007
Date of Decision or Dismissal

G. Rodney Young, Esq.
Counsel Representing LEA

Jonathan Martinis, Esq.; Mona Siddiqui, Esq.
Counsel Representing Parent/Child

Parent
Party Initiating Hearing

Parent
Prevailing Party

Hearing Officer's Determination of Issues(s):

1. Whether child is entitled to Manifestation Determination Review under §§ 300.534 and 300.530(e) of the IDEA 2004 Regulations.

2. Whether LEA is deemed not to have had prior knowledge of child's disability because child had been evaluated in accordance with IDEA 2004 Regulations, §§ 300.300 thorough 300.311, and determined not to be a child with a disability.

Hearing Officer's Orders and Outcome of Hearing:

LEA's 2005 Eligibility Evaluation of child was not in accordance with §§ 300.300 thorough 300.311 of the IDEA 2004 regulations. LEA is deemed to have had knowledge that child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

LEA ordered to conduct Manifestation Determination Review.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing. The written decision from this hearing was previously mailed in which 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

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION

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

Counsel for the Parent and

Jonathan Martinis, Esq.
Mona Siddiqui, Esq.
Virginia Office for Protection and Advocacy
1910 Byrd Avenue, Ste 5
Richmond VA 23230

Counsel for Public Schools

G. Rodney Young, II, Esq.
Timberlake, Smith, Thomas and Moses
PO Box 108
Staunton, Virginia 24402-0108

This matter came to be heard upon the request of the parent, [1], for an expedited Impartial Due Process hearing under the Individuals with Disabilities Education Act ("IDEA")[2], 20 U.S.C. §1400 et seq., and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia (the "Virginia Regulations" or "Va. Regs."). The child, , is a fifth grade student in Public Schools (" " or "LEA"). On December 5, 2006, the School Board voted to expel from

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[1] Ms. was formerly known as and she is identified as in many of the hearing exhibits.

[2] The Individuals with Disabilities Education Act was amended and reauthorized by the Individuals with Disabilities Education Improvement Act of 2004, Public Law 108–446, most parts of which took effect on July 1, 2005.

Schools following his violation of the code of student conduct at School on November 22, 2006. Two months after he was expelled, was determined eligible for special education services as having a Specific Learning Disability ("SLD"). Ms. requested this due process hearing to seek an order requiring that conduct a manifestation determination review ("MDR"), pursuant to U.S. Department of Education regulations, to determine whether conduct that precipitated his expulsion from school was a manifestation of his SLD disability. has denied the MDR request because was evaluated and found ineligible for special education services in May 2005. The only issue for this hearing is whether is entitled to an MDR.

The expedited due process hearing was held before the undersigned hearing officer on May 4, 2007 at the Industries Building near . The hearing, which was closed to the public, was transcribed by a court reporter. The parent appeared in person at the hearing and was represented by counsel. The parent elected not to have present. The school system was represented by its Director of Special Education, , Ph.D., and by counsel. Both parties made opening and closing statements and elected not to submit post hearing briefs.

FINDINGS OF FACT

I make the following findings of fact based upon the preponderance of the evidence adduced at the hearing. Except as stated in the findings, this evidence was undisputed.

was born on . Prior to his expulsion in December 2006, was a fifth grade student at School in . In the spring of 2005, , then a third grader at , was referred for an initial special education

evaluation under Va. Regs. 8 VAC 20-80-54 to determine whether he was a child with a disability eligible for special education services. had been referred for testing by his third grade teacher and his mother who expressed concerns about behavior at school and his perceived weakness in written expression and spelling. The Special Education Eligibility Committee met on May 23, 2005 and determined that although met the criteria for Attention Deficit Hyperactivity Disorder ("ADHD") and for Oppositional Defiant Disorder ("ODD"), he was not a child with a disability because he had good academic skills and because testing did not reveal a discrepancy between academic achievement scores and his cognitive abilities.

The parent and disagree on whether the May 2005 Eligibility Committee considered eligibility for special education services specifically on the basis of an SLD in written expression. identified only "IDEA for ADD [Attention Deficit Disorder]" as an option or action it proposed on the Prior Written Notice given to Ms after the Eligibility Committee meeting. Although the Meeting Minutes and the Prior Written Notice omit any discussion of deliberations or findings pertaining to SLD, school psychologist, , who was a member of Eligibility Committee, testified that the team definitely considered and rejected SLD as a possible disability because there was not a discrepancy at that time between ability in his writing and his cognitive ability. I find Ms. testimony persuasive that the Eligibility Committee did in fact consider SLD as a possible disorder. However, the committee failed to document its SLD determination as

then required by the Virginia Regulations.[3]

Ms. confirmed that provided to her the May 2005 Eligibility Committee Meeting Minutes and Prior Written Notice, but she denied receiving the May 23, 2005 transmittal letter from Director of Special Education informing her that was found not eligible for special education services. *See* Sch. Exh. 4. Ms. testified that she thought that had been found eligible for special education services. This misapprehension of the committee's decision was not reasonable. The Meeting Minutes state expressly that was not eligible for special education services and Ms. signed the Meeting Minutes under Section VI which affirms, "I understand that my child's IEP committee met on 05/23/2005 and determined, based on a review of data obtained, that my child is no longer eligible for special education services in Public Schools." [*Sic*] LEA Exhibit 4. I find that the Eligibility Committee's decision finding not eligible was furnished to Ms and that she was advised, in writing, of her right to appeal the eligibility decision through the due process hearing system. Ms. did not appeal the decision.

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[3] For a child suspected of having a specific learning disability, the documentation of the group's determination of eligibility must also include a statement of:

a. Whether the child has a specific learning disability;
b. The basis for making the determination;
c. The relevant behavior noted during the observation of the child;
d. The relationship of the behavior to the child's academic functioning;
e. The educationally relevant medical findings, if any;
f. Whether there is a severe discrepancy between the child's achievement and ability that is not correctable without special education and related services; and
g. The determination of the group concerning the effects of any environmental, cultural, or economic disadvantage.

8 VAC 20-80-56.C.7

In January 2006, Ms. was called in for a meeting with School principal after misbehaved in class. Ms. asked for a behavior assessment of and was told was not eligible for the assessment. In April 2006, was suspended from school for kicking a teacher. Ms. again asked for a behavior assessment. When her oral request was denied, she was advised by Assistant Principal to put her request in writing. On April 26, 2006, Ms. wrote to request a Functional Behavioral Assessment "so that we can get a Behavioral Intervention Plan in place for [ ]." Parent Exh. 5. In response, the school convened a Child Study Committee, which met on June 7, 2006 and recommended various strategies to address behavioral needs. The Child Study Committee did not refer for evaluation for special education.

In September 2006, at the beginning of fifth grade year, Ms. renewed her request for a behavioral assessment because she felt that was struggling in school. Ms. testified that school principal refused her request and told her to stop asking for testing or evaluations of . Ms. persisted. At a parent-teacher conference in October 2006, Ms. made a request to teacher that he be evaluated for a possible learning disability in written language.[4] Child Study Committee was convened again on November 1, 2006 and declined to refer for evaluation for special education eligibility. The same month, was initially suspended, and ultimately expelled, from Schools for allegedly kicking and hitting his school principal on November 22, 2006 when she attempted to detain him for in-school suspension after a misconduct incident the day before.

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[4] admitted at the hearing that Ms made a specific request at this time for an SLD evaluation of .

After was suspended and expelled from Schools, Ms. again referred him for evaluation for special education services for a suspected SLD disorder in written language. was evaluated and tested and, in February 2007, was found by the Eligibility Committee to be eligible for special education services on the basis of a specific learning disability in the area of writing. At the present time, remains expelled from school and is providing special education services to outside of the regular school setting.

After was found eligible for special education services in February 2007, Ms. requested to conduct a manifestation determination review to determine if conduct on November 22, 2006, which led to his expulsion from school, was a manifestation of SLD disability. Director of Special Education, Dr. , initially agreed to conduct the MDR. Later, after consulting with the Virginia Department of Education, Dr. concluded that was not entitled to an MDR and denied the MDR request. Ms. disagrees with this decision and requested the present expedited due process hearing for a determination of whether the IDEA regulations mandate that conduct the requested MDR.

DECISION

The only issue to be decided in this case is whether under the IDEA 2004 regulations issued by the U.S. Department of Education's Office of Special Education and Rehabilitative Services ("OSEP"), has a right to an MDR to determine if his November 22, 2006 school misconduct was a manifestation of his SLD disability. The parties agree that this determination

hinges on the proper interpretation of § 300.534 of the IDEA 2004 Regulations[5]. That section provides:

> **§ 300.534 Protections for children not determined eligible for special education and related services.**
>
> (a) *General.* A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in this part if the public agency had knowledge (as determined in accordance with paragraph (b) of this section) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.
>
> (b) *Basis of knowledge.* A public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred—
> (1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
> (2) The parent of the child requested an evaluation of the child pursuant to §§ 300.300 through 300.311; or
> (3) The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency.
>
> (c) *Exception.* A public agency would not be deemed to have knowledge under paragraph (b) of this section if—
> (1) The parent of the child—
> (i) Has not allowed an evaluation of the child pursuant to §§ 300.300 through 300.311; or
> (ii) Has refused services under this part; or
> (2) The child has been evaluated in accordance with §§ 300.300 through 300.311 and determined to not be a child with a disability under this part.
>
> (d) *Conditions that apply if no basis of knowledge.* (1) If a public agency does

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[5] The Office of Special Education and Rehabilitative Services, U.S. Department of Education issued final regulations to implement changes made to the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004, in August 2006. These regulations took effect on October 13, 2006 and will be codified in Part 34 of the Code of Federal Regulations.

not have knowledge that a child is a child with a disability (in accordance with paragraphs (b) and (c) of this section) prior to taking disciplinary measures against the child, the child may be subjected to the disciplinary measures applied to children without disabilities who engage in comparable behaviors consistent with paragraph (d)(2) of this section.

(2)(i) If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under§ 300.530, the evaluation must be conducted in an expedited manner.

(ii) Until the evaluation is completed, the child remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services.

(iii) If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency must provide special education and related services in accordance with this part, including the requirements of §§ 300.530 through 300.536 and section 612(a)(1)(A) of the Act.

71 Fed. Reg. 46799-46800 (to be codified at 34 C.F.R. § 300.534).

is a child with a disability as defined by § 300.8 of the IDEA 2004 Regulations. *See* 71 Fed. Reg. 46756 (to be codified at 34 C.F.R. § 300.8). The parties agree that if is deemed to have had knowledge of SLD disability before his November 22 2006 misconduct then he is entitled to an MDR. *See* § 300.534(a). stipulated at the hearing that, but for the exception provision in § 300.534(c), it would be deemed to have had prior knowledge of SLD disability because it is undisputed that Ms. requested an SLD evaluation before November 22, 2006. However contends that under the exception provision in § 300.534(c)(2), it is not deemed to have prior knowledge because was evaluated in May 2005 and determined to not be a child with a disability. I find that misinterprets § 300.534(c)(2) and that the exception does not apply under the facts in this case.

As the party asserting the exception, the burden of persuasion is on to

establish that it comes within the exception's terms. *Cf., e.g., Schaffer ex rel. Schaffer v. Weast,* 126 S.Ct. 528, 534 (2005) (Burden of persuasion as to certain elements of a plaintiff's claim may be shifted to defendants, when such elements can fairly be characterized as affirmative defenses or exemptions.); *Ryan v. Carter,* 93 U.S. 78, 83 (1876) (Those who set up exception must establish it, as being within the words as well as the reason thereof.)[6] Subsection (c)(2) provides that the school system would not be deemed to have knowledge that a student is a child with a disability if the child has been evaluated in accordance with §§ 300.300 through 300.311 and determined to not be a child with a disability under Part 300 of the regulations (Assistance to States for the Education of Children with Disabilities). Significantly, when OSEP amended the IDEA regulations in 2006, it changed the language of the exception provision now found in § 300.534(c)(2) to require expressly that the prior eligibility evaluation have complied with the regulations for determining whether the child had an SLD disability. Under the pre-IDEA 2004 exception language, an LEA would not be deemed to have prior knowledge of a disability if it had conducted an evaluation under the non-SLD specific requirements of 34 C.F.R. §§ 300..530 through 300.536. *See* 34 C.F.R. 300.527(c)(1)(i) (July 1, 2006).

The evidence is uncontested that was evaluated in May 2005 and found ineligible for special education services. Moreover, I have found that was then considered for SLD eligibility. However, I find that the May 2005 evaluation was not in accordance with §§ 300.307 and 300.311 of the IDEA 2004 regulations.

A significant change included in IDEA 2004 was the elimination of the requirement for

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[6] The ultimate burden of persuasion in this hearing rests with the parent as the party seeking relief. *See Schaffer ex rel. Schaffer v. Weast,* 126 S.Ct. 528, 537 (2005)

an LEA to take into consideration whether a student shows a "severe discrepancy" between intellectual ability and academic achievement in order to be identified as having an SLD. *See* 20 U.S.C. § 1414(b)(6). The SLD evaluation now must include a variety of assessment tools and strategies. This change superceded the pre-IDEA 2004 Virginia Regulations, which for SLD identification requires a finding that the child has a severe discrepancy between achievement and intellectual ability. *See* 8 VAC 20-80-56.G. In § 300.307, OSEP barred the mandatory use of the severe discrepancy criterion:

> **§ 300.307 Specific learning disabilities.**
>
> (a) *General.* A State must adopt, consistent with § 300.309, criteria for determining whether a child has a specific learning disability as defined in § 300.8(c)(10). In addition, the criteria adopted by the State—
>
> **(1) Must not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability, as defined in § 300.8(c)(10);**
>
> (2) Must permit the use of a process based on the child's response to scientific, research-based intervention; and
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> (3) May permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability, as defined in § 300.8(c)(10).
>
> (b) Consistency with State criteria. A public agency must use the State criteria adopted pursuant to paragraph (a) of this section in determining whether a child has a specific learning disability.

71 Fed. Reg. 46786 (to be codified at 34 C.F.R. § 300.307) (Emphasis supplied).

school psychologist, testified at the hearing that the May 2005 Eligibility Committee determined that did not then have a specific learning disability because there was not a discrepancy between his ability in his writing and his cognitive ability.

If SLD evaluation had been made in accordance with § 300.307, his assessment would have included the variety of tools and strategies now required by IDEA 2004 and would not have relied solely on the severe discrepancy criterion.

In addition to not being in accordance with § 300.307, May 2005 evaluation was not documented in accordance with § 300.311 of the OSEP regulations. This section provides:

> **§ 300.311 Specific documentation for the eligibility determination.**
>
> (a) For a child suspected of having a specific learning disability, the documentation of the determination of eligibility, as required in § 300.306(a)(2), must contain a statement of—
>
> (1) Whether the child has a specific learning disability;
>
> (2) The basis for making the determination, including an assurance that the determination has been made in accordance with § 300.306(c)(1);
>
> (3) The relevant behavior, if any noted during the observation of the child and the relationship of that behavior to the child's academic functioning;
>
> (4) The educationally relevant medical findings, if any;
>
> (5) Whether—
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> (i) The child does not achieve adequately for the child's age or to meet State-approved grade-level standards consistent with § 300.309(a)(1); and
>
> (ii)(A) The child does not make sufficient progress to meet age or State approved grade-level standards consistent with § 300.309(a)(2)(i); or
> (B) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade level standards or intellectual development consistent with § 300.309(a)(2)(ii);
>
> (6) The determination of the group concerning the effects of a visual, hearing, or motor disability; mental retardation; emotional disturbance; cultural factors; environmental or economic disadvantage; or limited English proficiency on the child's achievement level; and
>
> * * *

> (b) Each group member must certify in writing whether the report reflects the member's conclusion. If it does not reflect the member's conclusion, the group member must submit a separate statement presenting the member's conclusions.

71 Fed. Reg. 46787 (to be codified at 34 C.F.R. § 300.311). May 2005 evaluation was not in accordance with Section 300.311 because the documentation contains no statement whatsoever of whether had an SLD or the basis for making the determination. *See* Sch. Exh. 4. (The absence of an SLD statement also violated the procedures for determining eligibility in the Virginia Regulations which require specified documentation for a child suspected of having an SLD. *See* 8 VAC 20-80-56.C.7.)

In sum, Ms. is entitled to an MDR hearing for if is deemed to have had knowledge that was a child with a disability before his November 22, 2006 misbehavior occurred. Under the facts in this case, must be deemed to have had prior knowledge of SLD disability unless, prior to the November 22, 2006 misconduct, had been determined not to be a child with a disability after being evaluated in accordance with §§ 300.300 through 300.311of the IDEA 2004 regulations. I find that was not evaluated in accordance with § 300.307 and § 300.311 of the regulations. Therefore, must be deemed to have had knowledge that was a child with a disability before his behavior that precipitated his suspension and expulsion from Schools. Accordingly, Ms. is entitled to assert on behalf the protection a manifestation determination review.

ORDER

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

1. Public Schools shall, within 10 school days of receipt of this Order, conduct a Manifestation Determination Review to determine whether November 22, 2006 conduct was a manifestation of his SLD disability in accordance with § 300.530(e)-(f) 71 Fed. Reg. 46798 (to be codified at 34 C.F.R. § 300.530[e], [f]) and take appropriate follow-up action.

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.

Right of Appeal Notice

This decision is final and binding unless either 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
600 Peter Jefferson Pkwy, Ste 220
Charlottesville, Virginia 22911-8835
Telephone: 434-923-4044
Telecopier: 434-923-4045