

**VIRGINIA DEPARTMENT OF EDUCATION
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES**



Case Closing Summary Report

Local hearing X State level appeal

<i>School Division</i>	Public Schools	<i>Parents</i>	Ms.
<i>Child</i>		<i>Date of Decision</i>	November 8, 2004
<i>Counsel for School Division</i>	, Esq.	<i>Advocate</i>	Carlos Q. Adams
<i>Party Initiating hearing</i>	The Parents	<i>Party Prevailing</i>	Split

PURPOSE:

The purpose of this due process hearing is to determine an appeal of the manifestation hearing decision, and to determine the appropriateness of the child's current IEP and placement.

HEARING OFFICER'S DETERMINATION OF THE ISSUES:

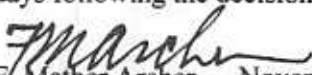
1. Were the manifestation determination findings and decision, and resulting suspension/alternative education setting placement, correct and appropriate?
The manifestation determination is correct. The resulting suspension and placement are not appropriate.
2. Is the current IEP appropriate? The current (8/27/04) IEP is not appropriate
3. Is the current placement in _____ appropriate? The current placement in _____ is not appropriate, except that the curriculum and the modifications and accommodations provided for _____ are appropriate and have benefited him.

HEARING OFFICER'S ORDERS AND THE OUTCOME OF THE HEARING:

The outcome is a split decision. The LEA is ordered to return _____ to _____ Middle School by December 1, 2004, not January.

I hereby certify that I have completed this hearing in accordance with regulations and have advised the Parties in writing of their appeal rights. The written decision of this hearing was forwarded earlier. I advised the LEA, in the Initial Prehearing Report, of its responsibility to

submit an implementation plan to the parties, the hearing officer, and the SEA within 45 calendar days following the decision.


F. Mather Archer November 10, 2004
Hearing Officer

VIRGINIA DEPARTMENT OF EDUCATION
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES



POST-HEARING REPORT

Public Schools	Ms
<i>School Division</i>	Mr.
	<i>Parents</i>
Dr.	
<i>Superintendent</i>	<i>Child</i>
Esq.	Carlos Q. Adams
<i>Counsel for School Division</i>	<i>Counsel/Advocate for Parent/Child</i>
F. Mather Archer	Parents
<i>Hearing Officer</i>	<i>Party Initiating Hearing</i>
Hearing Requested 9/24/04	Hearing Officer Appointed 9/29/04

PURPOSE:

The purpose of this due process hearing is to determine an appeal of the manifestation hearing decision, and to determine the appropriateness of the child's current IEP and placement.

ISSUES:

1. Were the manifestation determination findings and decision, and resulting in suspension/alternative educational setting placement, correct and appropriate?
2. Is the current IEP appropriate?
3. Is the current placement in _____ appropriate?

DECISION

Preliminary.

_____ and Mrs. _____ are represented by Mr. Carlos Q. Adams, advocate, and (at the hearing) also by his adoptive father Mr. _____.

The following exhibits were received in evidence:

School Division: A through H:

Parents: P 1 through 14.

Hearing Officer Exs H.O. 1, 2

Summary of the case.

This matter has come to a due process hearing primarily and essentially as an appeal of a manifestation determination that _____'s inappropriate behavior was not a manifestation of his disability, which resulted in his long-term suspension. The Schools' Office of Student Leadership (the disciplinary arm of the Schools) recommended suspension and placement in an alternative educational setting. The Parents disagreed with this determination and with the disciplinary action. After seeking a change in the manifestation determination and the action, a change was denied, and this proceeding ensued.

After receiving the evidence, and reviewing the testimony and documents, I have determined that the manifestation determination is correct; but that the suspension of _____ for more than 45 calendar days was in error, and that the placement of _____ in the _____ (_____) for more than 45 calendar days was in error and was not appropriate.

Findings of Fact.

Having heard and observed the demeanor of the witnesses, and considered the documentary evidence presented by the parties, I find the following facts.

1. _____ is 13 years old as of _____. He is a child with a learning disability in language arts. He was adopted by his great aunt, and by his great uncle by marriage. His adoptive parents are divorced and _____ lives with his adoptive mother. His birth mother, Ms _____, is the daughter of his adoptive mother's brother. _____ is in the 8th grade at _____ Middle School, but is currently suspended for a semester and enrolled at _____ in the _____ school division as a result of the findings of the manifestation determination. (Tr p. 88; Exs D1 – 23).
2. From about November of 2003, _____ began to behave badly at home. The family doctor, a Dr. _____, tried several medications aimed at attention deficit disorder and ADHD, but his behavior did not change for the better. In May, 2004, Mrs. _____, _____'s adoptive mother, took him off the medications prescribed by Dr. _____ because his behavior was not abating. Dr. _____ referred him to Dr. _____, who on 7/13/04, diagnosed ADHD by his history, and prescribed Abilify as treatment for his mood swings and poor behavior. _____'s poor behavior subsided and has remained changed for the better. (Tr pp. 27-29; Exs A23-25).
3. On 6/10/04 _____ was accused of sexually harassing two female students in his class during a classroom exercise in science, taught by Mr. _____. Mr. _____, assistant

Principal, investigated with Ms [redacted] and took a statement from each girl and from Mr. [redacted] (Exs A6 & A7; Tr pp. 124-130). [redacted] gave an oral and a written statement about the incidents.

4. [redacted] was hit in his head and on his shoulder by one of the girls, [redacted], who also bit him on his right shoulder. [redacted] "poked" her in her "butt" to stop her biting him. At one point, [redacted] and [redacted] were, as [redacted] said, playing around and [redacted] poked her in her upper back with the eraser end of a pencil. [redacted] was given 3 days' out-of-school suspension for sexual harassment. (Exs P3, B3, A8, H.O. 1; Tr. pp 75-82).
5. The Manifestation Determination meeting on 6/14/04, called by Principal [redacted] (who recommended expulsion), determined that [redacted]'s sexual harassment of the two girls was not a manifestation of [redacted]'s disability of LD in the language arts. The committee referred the matter to the Student Leadership office for a hearing. Both [redacted] and his mother were present and told the members about [redacted]'s improvement in his behavior since being off the medication prescribed by Dr. [redacted], and that he was to be examined by Dr. [redacted]. But the Manifestation committee gave no credence to their statements, telling both of them that they were lying. (Ex C46-47 also A9-10; Tr pp. 29, 47-51, 80-81, 120-121, 171-172).
6. The Student Leadership hearing examiner, on 6/24/04, changed the recommendation of expulsion to suspension for one year, and then placed the suspension in abeyance. The hearing examiner further recommended that [redacted] be placed in the alternative educational setting at the [redacted] for one semester. [redacted] was put on probation for the year 2004-05. The matter was then referred to the IEP team to consider the examiner's recommendation along with any other recommendations that the Parents and the IEP committee members propose. (Ex B1)
7. The decision by the hearing examiner in the Student Leadership hearing, was based solely on the statements of the two girls and Mr. [redacted], and formed the basis of the recommendation of the hearing examiner that [redacted] should be given a long term suspension. [redacted] and his mother again testified to the details of [redacted]'s problems with the medication, that he had been off the medications since late May and was doing better, and that he had an appointment for evaluation by Dr. [redacted].
8. The IEP team met on 8/27/04 to review and/or revise the 5/17/04 IEP which was the then current IEP, but again declined to allow Mrs. [redacted]'s and [redacted]'s statements about the new medication, which he had been taking since 7/13/04 and it's

- effectiveness in improving [redacted]'s behavior, and wouldn't consider Dr. [redacted]'s report or [redacted]'s letter. (Exs C8-16; Tr pp. 54-59)
9. The 8/27/04 IEP "acknowledged" that [redacted] had already been placed at the [redacted] and considered no other placement option. The reasons given for this decision by the IEP team were that [redacted] was placed in the alternative setting by the hearing examiner in the Student Leadership office of [redacted] Middle School, that the IEP team has no jurisdiction over his placement, and that the IEP team has no discretion in the matter. The team did specify accommodations and modifications, in addition to the modification contained in the 5/17/04 IEP. The Parents refused to give permission for implementation of the 8/27/04 IEP and the placement at the [redacted]. (Exs A15-18, these pages being duplicated in the full IEP at Exs C8-16;
10. The [redacted] is called an alternative school of the [redacted] School Board. It apparently houses many of the students being disciplined, including those students in Special Education. There is much fighting among the students, gang-related conflicts and influence, picking on [redacted] and others, bullying, provocation of students, and calls to law enforcement in connection with these problems at the [redacted]. [redacted]'s anger management counselor asked the IEP team to not place [redacted] in the [redacted] for fear of adverse effects on him. (Tr pp. 40-41,58-59, 65-67, 181-183, 186-195; Exs A21-21, A23-25.
11. There is an abundance of police action at the [redacted] indicating the conditions to which [redacted] can be exposed. In addition to Exs A21-22, there is the [redacted] Police Report on Crimes by Neighborhood contained in the Parents' brief as "Item P-3a, which is H.O. Ex 2 (4 pages) included in this Finding by judicial notice.

Conclusions of Law.

I have taken judicial notice of the public police record referred to as H.O. Exhibit 2 in #15 of the Findings of fact.

The requirements of notice to the Parents have been satisfied.

[redacted] is a child with a disability.

[redacted] needs special education and related services.

[redacted] Public School Division is providing a free appropriate public education to [redacted].

Issue 1: (a) Were the manifestation determination findings and decision correct, and

(b) Were the resulting suspension and placement correct and appropriate?

The evidence fully supports the decision of the manifestation determination committee that [redacted]'s behavior is *not* a manifestation of his disability. He is learning disabled, specifically in the language arts, but that had no effect on his ability to make right choices, to control his impulses, and avoid the tussles with the two girls. It was his ADHD (or ADD) medication, interacting with his natural 13-year-old rebel tendencies and the discord in his home (not to mention the circumstances of his birth) that are the culprits to look to in discovering why got into the trouble that brought him to the serious disciplinary circumstances. Nevertheless, it remains that his disability alone is not related to the behavior [redacted] exhibited with the girls. Thus, the findings and decision of the committee were correct.

On the charge of sexual harassment of the two girls, [redacted] received a 3-day out-of-school suspension. On 6/14/04, before the 3-day suspension was ended, the manifestation determination team, finding that [redacted]'s disability was not related to his behavior toward the girls, took the action of sending the case to the Schools' Student Leadership office for a hearing.

The Office of Student Leadership decided to suspend [redacted] for 1 calendar year and to hold the suspension in abeyance in view of its hearing examiner's recommending that [redacted] be placed in an alternative educational setting at the [redacted] for one semester of the 2004-05 year. The matter was then sent to the IEP committee for review and/or revision of the 5/17/04 IEP in the light of the recommendations.

The matter of placement of a disabled child, even in disciplinary circumstances, is the province of the IEP team (8 VAC 20-80-64 C.) A long-term suspension such as that provided for [redacted] is a change in placement under 8 VAC 20-80-68 C. Hence the placement must be determined by the IEP team, not by the SLO.

When the IEP team met, they gave cursory attention to the matter of placement maintaining that the team had no discretion or authority in regard to placement since the SLO had usurped the jurisdiction of the IEP team. The SLO hearing examiner, on the other hand, *recommended* that [redacted] be placed in the [redacted]. Nevertheless, the IEP team, charged with responsibility for placement and considering other options than the one handed to them by the SLO, refused to consider other options than placement of [redacted] at [redacted]. The team also failed to consider the effects on [redacted] and his education of a placement at the [redacted], with its problems of gang violence, bullying, fighting, etc. that results in an amazing number of crimes at the [redacted] list on the police records. In rubber-stamping the recommendations of the SLO, the IEP team gave

no real consideration to the plea of _____ in her letter of 8/23/04 that _____ not be placed at the _____ or to the objections of Ms _____.

The provisions of 8 VAC 20-80-68 C. 2. do not relieve the IEP team of the responsibility and jurisdiction for choosing another placement than that given to them by the SLO.

Accordingly, this issue is decided (a) in favor of the Schools; and (b) in favor of the Parents.

Issue: Is the current IEP appropriate?

The current - 8/27/04 – IEP is not appropriate in that it fails to take into account other placement options in view of the abysmal conditions existing at the _____. The evidence clearly shows that, given the low grade of the offense charged to _____, the punishment does not fit the “crime”. Furthermore, the failure of the IEP team to give any consideration to the testimony of Mrs. _____ and the contents of _____’s letter, the placement in the _____ was in effect a punishment far beyond that contemplated in the IDEA. The conditions there, shown by the evidence, are at best not conducive to his education and his well being in life.

Instead of carrying out their statutory obligations, the IEP team abdicated and simply did what the SLO told them to do, despite the fact that the team did have jurisdiction and discretion to change the placement

Accordingly, this issue is decided in favor of the Parents and


Issue: Is the current placement in the _____ appropriate?

As pointed out in the forgoing, the current placement in the _____ is not appropriate because of the conditions in which _____ is forced to exist in that school. It is by virtue of his determination to learn, the effective medication he receives, and his determination to stay out of trouble, along with Mr. _____’s help that he is doing as well as he is doing. Only time will tell what the effects of conditions in that school will have on _____.

Accordingly, this issue is decided in favor of the Schools to the extent of the curriculum and modifications and accommodations _____ receives; and in favor of _____ and Ms _____ because it is atrocious to put an impressionable 13-year-old in with school mates such as those who populate the _____.

ORDER

It is ordered that _____ be returned to _____ Middle School by December 1, 2004.


F. Mather Archer November 8, 2004
Hearing Officer

Cc: Parties and counsel/advocate
 Virginia Department of Education

NOTICE: This decision is final and binding unless it is appealed by either party to a State circuit court within one (1) year following the issuance of this decision on November 8, 2004, or to a Federal district court, without regard to any amount in controversy.