

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



**Case Closing Summary Report**

Local hearing   X  

State level appeal       

*School Division*

*Parents/Guardians*

*Child*

January 21, 2005  
*Date of Decision*

Kamala Hallgren Lannetti, Esq.  
*Counsel for School Division*

Jean Veness, Esq.  
*Counsel*

The Parents  
*Party Initiating hearing*

Split  
*Party Prevailing*

**PURPOSE:**

This expedited due process hearing is an appeal of the manifestation hearing decision that assaulting of another student was not a manifestation of his disability.

**HEARING OFFICER'S DETERMINATION OF THE ISSUES:**

1. Whether the LEA gave the Parents notice of the recommendation of long term suspension on or before the date it was decided upon. Proper and sufficient notice was given.

Whether the LEA gave the Parents a copy of the Procedural Safeguards notice on or before that decision was made on 12/16/04. Due and proper notice of the Procedural Safeguards was not given on that date, but on 12/21/04. However, the Parents had been given that notice in October for the IEP meeting on 10/8/04. Therefore, the effect of the failure to give the notice on 12/16 was lessened.

Whether the LEA gave the Parents due and proper notice of the Manifestation Determination meeting. Yes.

2. Whether the LEA considered all relevant and material information concerning including that supplied by the Parents, and his current IEP and placement. The LEA gave careful consideration to the information covering the period 9/7 through 12/16/04 (the date of the subject incident), the first three months of 's time at IMS. However, only cursory or no consideration was given to information supplied by the Parents.

Whether the LEA considered all the matters set forth in 8 VAC 20-80-68C(5)(b). All those matters were considered by the LEA, except the matter of his Bipolar disorder and its effect on           . The LEA appeared to have ignored or discounted that problem and its relation to the incident of 12/16.

3. Whether            was given the rights under 8 VAC 20-80-68A, and notice of those rights.            was given the rights and sufficient notice thereof.

4. Whether the LEA implemented the BIP of 10/8/04. They did implement the BIP, but used the FBA developed in the            middle school which was still in effect.


5. Whether IEP team for the Manifestation Determination included the all other qualified persons, except the elementary school psychologist from 2002 and            's personal therapist who were not required members of the other qualified group.

6. Whether the school psychologist was a necessary member of the IEP team of the "other qualified persons" group. The school psychologist was not a necessary member of the team nor of the "other qualified persons" group.

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

The LEA did not demonstrate that            s behavior was not a manifestation of his disability consistent with the requirements of 8 VAC 20-80-68C(5). As to the other issues decided, the outcome was a split decision. Accordingly, the LEA was ordered to convene the IEP team to determine the question of            placement.

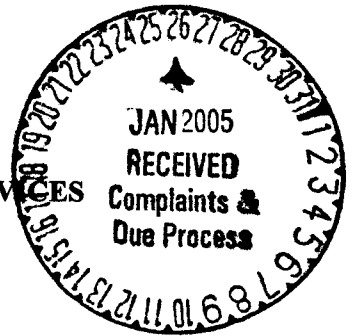
I hereby certify that I have completed this hearing in accordance with regulations and have advised the Parties in writing of their appeal rights. The written decision of this hearing was forwarded earlier. I advised the LEA, in the Initial Prehearing Report, of its responsibility to submit an implementation plan to the parties, the hearing officer, and the SEA within 45 calendar days following the decision.

  
F. Mather Archer      January 25, 2005  
Hearing Officer



VIRGINIA DEPARTMENT OF EDUCATION  
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES

POST-HEARING REPORT



*School Division*

*Parents*

*Superintendent*

*Child*

Kamala Hallgren Lannetti, Esq.  
*Counsel for School Division*

Jean Veness, Esq.  
*Counsel*

F. Mather Archer  
*Hearing Officer*

Parents  
*Party Initiating Hearing*

Hearing Requested 12/22/04

Hearing Officer Appointed 12/22/05

**PURPOSE:**

This expedited due process hearing is an appeal of the manifestation hearing decision that \_\_\_\_\_'s assaulting another student was not caused by his disability.

**ISSUES:**

1. Whether the Schools
  - a. gave the Parents notice of the recommendation of long term suspension of \_\_\_\_\_ on or before the date the decision was made;
  - b. gave to the Parents a copy of the Procedural Safeguards on or before that date;
  - c. gave to the Parents proper and sufficient notice of the Manifestation Determination review by the IEP committee;
2. Whether the Schools, in the Manifestation Determination review,
  - a. considered all relevant and material information concerning \_\_\_\_\_, including \_\_\_\_\_ that supplied by the Parents, and his current IEP and placement;
  - b. considered all the matters set forth in 8 VAC 20-80-68 C. 5.b.
3. Whether \_\_\_\_\_ was given the due process rights to which he was entitled under 8 VAC 20-80-68 A, and appropriate notice of those rights.

4. Whether The Schools implemented the behavioral intervention plan of 10/8/04; and devised a functional behavioral assessment as provided in 8 VAC 20-80-68 C 2.d;
5. Whether the Schools included with the IEP team any of the other qualified persons set forth in 8 VAC 20-80-68 C 5.b.
6. Whether the school psychologist was a necessary member of either the IEP team or of the "other qualified persons" group.

**Preliminary matters.**

The following exhibits were admitted and received in evidence:

School Division – Exhibits A through J, contained in large looseleaf notebook;

Parents – P1, School OSS Suspension Notice dated 12/17/04

P2, Evaluation/Opinion of , LCSW dated 1/3/05.

**DECISION**

**Summary of the case.**

This matter is an appeal of a manifestation determination review in which it was determined that 's assault and battery of a classmate was not a manifestation of his disability. s disability category is Other Health Impaired with a sub-category of Attention Deficit Hyperactivity Disorder. As a result, was suspended by the Principal of the school for a period of 10 days (December 17<sup>th</sup> through January 10<sup>th</sup>) with the recommendation that he be expelled from School ( ). The Parents disagreed with the manifestation determination, the Principal's recommendation, and declined mediation. This expedited due process hearing ensued.

The matter had been referred to the schools' Office of Student Leadership (the disciplinary arm of the Schools) (hereinafter the OSL) upon rendition of the Principal's recommendation on 12/21/04 with a disciplinary hearing date of 1/10/05. has returned to the school as of 1/10/05 under the Stay Put provisions of the IDEA, and the disciplinary hearing has been deferred to a date to be set when this due process hearing is concluded.

was named as a witness for the Schools, and the Schools's attorney wanted to call the other boy (a witness to the assault and battery but who was not listed as a

witness). The parties conferred and since they both wanted to call the boys, they agreed to call them, but to limit their examination to questions asked by me, the hearing officer, without cross examination.

This due process hearing commenced on 1/3/05, was adjourned to the 5<sup>th</sup>, and again to the 7<sup>th</sup> of January. After receiving the evidence, and reviewing the testimony and documents, I have concluded that \_\_\_\_\_ action was a manifestation of \_\_\_\_\_ disability.

### **Findings of Fact.**

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

1. \_\_\_\_\_ is an 11-year-old male currently enrolled in the 6<sup>th</sup> grade at \_\_\_\_\_ School in \_\_\_\_\_. \_\_\_\_\_ was placed in the care of his guardians, \_\_\_\_\_ and \_\_\_\_\_, who are his great aunt and uncle, at age four. He was brought to their home in \_\_\_\_\_ and enrolled in kindergarten. There he was placed in \_\_\_\_\_ School where he was in a self-contained class, and has been in self-contained since then. In January, 2003, \_\_\_\_\_ and his aunt and uncle went to Indiana to live near his birth parents. After an assault on one of his teachers in his elementary school in Indiana, \_\_\_\_\_ was placed in a long-term treatment facility in Kentucky from December, 2003 to June, 2004. They returned to \_\_\_\_\_ in August, 2004. In September, 2004, \_\_\_\_\_ was enrolled in \_\_\_\_\_ School. He is diagnosed as OHI (ADHD) and Bi-polar (Tr 1/3/05 pp 86-89, Tr 1/5/05 pp 4-8, 13-15, 18-28; Exh E7)
2. Following his return to \_\_\_\_\_ and enrollment in \_\_\_\_\_ School in September of 2004, and up to December 16<sup>th</sup>, \_\_\_\_\_ was noted by the teachers to have improved in his behaviors. \_\_\_\_\_ had many disciplinary problems during that time that culminated in the 12/16/04 assault and battery. \_\_\_\_\_ disciplinary history reveals a number of incidents of oral and physical aggression some of which have resulted in fights, \_\_\_\_\_ hitting or being hit by a student, and use of insulting gestures and fighting words by \_\_\_\_\_ toward other students, and fighting words or insulting gestures by other students toward \_\_\_\_\_. Most of the aggressive actions by \_\_\_\_\_ are of the oral kind. (Tr 1/3/05 pp 176-182; 1/5/05 pp 164-166;
3. \_\_\_\_\_ has been under the care of his therapist since he was 4-years old and continuing until the family went to Indiana to live in early January until mid August 2004, a period

of about five years. Throughout that period, she has ministered to him on a bi-monthly or a monthly basis to date. During that period, [redacted] has been diagnosed ADHD and to have Bipolar disorder. [redacted]'s behaviors shown in the Administrative Statement following the incident with the girl are related to the disability of ADHD and Bipolar. In the context of the 12/16 incident with the girl, Bipolar is classified as a mood disorder problem, and the moods can cycle very quickly. But in that incident, [redacted] was said to be in a consistently good mood, which would make [redacted]'s act one of impulsivity related to his ADHD disability. [redacted] has difficulty, too, learning from consequences that follow upon his negative actions (Tr 1/5/05 pp 5-10, 12-29, 36-38; Exhs B11-12; Tr 1/5/05 pp 44-47, 59-61, 66-73.)

4. On December 16, 2004, in the second class session of the day (2<sup>nd</sup> bell), [redacted] was seated in his seat. The girl (the victim) made an obscene or insulting gesture at [redacted] (he described it as, she "flipped me off"). At some point after that [redacted] asked the teacher, Mr. Teets, if he could go to the restroom. Given permission, [redacted] left the room and went to the restroom. Upon returning to his classroom and while Mr. Teets's back was turned the girl repeated the gesture and [redacted] walked to the girl and stuck her in the neck with the pin. He then returned to his seat. (Tr 1/7/05 pp 144-154).
5. [redacted]'s assault had come after an unfriendly relationship between them existing since the first of the school year. [redacted] described the relationship as one of the girl constantly picking at him and bossing him – "do this, do that, you can't sit there," and the like. The picking by the girl, as it continued, increasingly angered him, and culminated in the effect on [redacted] of her gestures which resulted in his sticking her with the needle. (Tr 1/7/05, pp 145-154)
6. The Manifestation Determination (MD) meeting was held on 12/21/04. The Parents were given telephone notice on 12/16/04 of the MD meeting. The Parents received written notice of the MD meeting at the beginning of the meeting, together with written notice of the Procedural Safeguards. The Parents had earlier received an exact copy of the Safeguards notice at the 10/8/04 IEP meeting. The Parents made no objections to any MD team members on 12/21, and they did not request that any other qualified persons be brought into the meeting to participate. (Tr 1/5/05, pp 96, 98, 100; Tr 1/7/05, pp 182-185; Exhs B1, 42,
7. The MD team members did consider the 2002 psychological report by Ms Cheryl Martin. But witnesses' testimonies also evidenced that the team members were so focused on the details of the 12/16 incident of the pin-sticking that they only browsed the records of

anything that occurred before [redacted]'s matriculation in [redacted], including the records from his school in Indiana. The MD team, noticing only the 2002 evaluation by Martin and the then current IEP, FBA, and BIP of 2004, they attended closely to the occurrences since 9/7/04, saying continually that they had never seen in [redacted] the behavior he displayed in the sticking incident. The team's investigation missed the very nature of [redacted]'s ADHD and the various forms in which his disability affected him and manifested itself in his elementary school years and into his middle school years to date; and also took no account of his Bi-polar disorder. (Tr 1/7/05, pp 188-190, 205-216); Exhs E7, F8-11)

8. The Indiana IEP of 10/17/03, for the school year 10/18/03 to 10/18/04, on page 4 of 16 under the notes of discussion at the (IEP) conference contains the statement that the "Dr. in VA considered (. [redacted]) (to be) bi-polar". The IEP team and the MD team discounted, if not ignored, this heads-up of a disorder in addition to [redacted]'s ADHD contained in the IEP that was the basis of the 10/8/04 IEP developed in IMS. (Exh E1-18; Tr 1/7/05 pp 192-194, 195-6, 213-220)

9. The school psychologist, Cheryl Martin, whose evaluation of 2002 was part of the basis for the IEP of 10/8/04, was not a member of the MD team tasked with judging whether [redacted]'s action on 12/16 was or was not a manifestation of his disability. [redacted]'s therapist of six years (less the nearly a year when he was in Indiana), [redacted], was not a member of the MD team. (Tr 1/3/05 pp 110-112; Tr 1/5/05 pp 3-6; Exh B2)

10. The Parents informed the MD team in their meeting that after [redacted] returned home on 12/16 that the victim of the needle sticking had been bothering him and had been teasing him. The team leader said the teasing by the girl was new information and that none of the teachers and his interviewees had mentioned it. If that information had been brought to the attention of the MD team, it was provocation and it would have changed the decision. (Tr 1/7/05 pp 220-223)

11. Mr. Teets, who participated in the MD meeting, did not see any provocation by the victim of [redacted] and knew nothing of the teasing by the girl over the months since school opened in September, 2004. (Tr 1/3/05 pp 182-186)

12. On 12/16/04, following the incident with the girl, [redacted] was informed of his pending expulsion, just before [redacted] arrived to pick up [redacted]. [redacted] was also so informed and given the notice of expulsion. (Exhs B11, B12, P1)

**Conclusions of Law.**

The decisions of [redacted] to expel [redacted] beginning on 12/17/04, and to hold the required manifestation determination meeting were made on 12/16/04, the day on which the offense charged to [redacted] occurred. Due notice of the expulsion decision and of the meeting was delivered in person and by telephone on that day to the Parents. However, due notice of the Procedural Safeguards, required also to be given on 12/16/04, was not given until the day of the MD meeting on 12/21/04. Therefore, the requirements of notice to the Parents have not been satisfied. (8 VAC 20-80-68C (5) (a)

[redacted] is a child with a disability.

[redacted] needs special education and related services.

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

**Issue 1: Whether the LEA**

- a. gave the Parents notice of the recommendation of long term suspension of [redacted] on or before the date the decision was made; Yes, as above noted.
- b. gave to the Parents a copy of the Procedural Safeguards on or before that date; No, as noted above.
- c. gave to the Parents proper and sufficient notice of the Manifestation Determination meeting by the IEP committee; Yes, as noted above.

**Issue 2: Whether the Schools, in the Manifestation review,**

- a. considered all relevant and material information concerning [redacted], including that supplied by the Parents, and his current IEP and placement.

The MD team did not consider all relevant and material information, except that which was at hand between 9/7/04 and 12/16/04 the date of the incident, and giving close attention to all those records and occurrences. For the rest – occurrences prior to 9/7/04, records from [redacted] Elementary, where [redacted] was placed earlier, and the records pertaining to his school experiences in Indiana – the MD team only browsed but gave little or no attention to. The notation on page 4 of the 10/17/03 Indiana IEP (Exh E7) of the doctor in Virginia having diagnosed [redacted] with the additional category of Bipolar disorder was either completely missed or ignored. And this was the IEP from which IMS



was to serve [redacted] and based on which his 10/8/04 IEP was developed by the LEA. Yet neither the MD team nor the IEP team ever mentioned that detail of Bipolar disorder.

**b. considered all the matters set forth in 8 VAC 20-80-68C(5)(b).**

Under Subsection 5.b.2, except for the omission of the Bi-polar disorder, in relationship to the behavior subject to disciplinary action, [redacted]'s IEP and placement were appropriate; and the special services, supplementary aids and services, and behavior intervention strategies were provided consistent with his IEP and placement.

[redacted] disability did not impair his ability to understand the impact and consequences of his act. However, his ADHD, in conjunction with his Bi-polar disorder, did impair his ability to control the behavior of sticking the victim in the neck with a pin. That act was an impulsive one which grew out of a 3-month more or less constant teasing and picking at [redacted]; by the victim. Finally, on 12/16 the final straw came onto [redacted]; when she twice gave him an obscene and insulting gesture, thereby provoking him. That angered [redacted] enough to bring about retaliation. Yes, he understood the impact and the consequences of retaliating; but it is a characteristic of ADHD, especially when coupled with the Bipolar disorder, that the ability to control his impulse to retaliate was not there for [redacted]. He had been controlling his impulses fairly well to that point, although they had gotten him in trouble at [redacted] on a significant number of other occasions.

**Issue 3: Whether [redacted] was given the due process rights to which he is entitled under 8 VAC 20-80-68A, and appropriate notice of those rights.**

[redacted] was given the due process rights, and notice thereof was given to him on 12/16/04 either directly or via his guardian to whom written notice was given at the MD meeting on 12/21.

**Issue 4: Whether the LEA implemented the Behavior Intervention Plan of 10/8/04; and developed a Functional Behavior Assessment as required.**

The BIP was implemented. An FBA was developed but only in summary form. For the most part the LEA relied on the FBA prepared in and received from [redacted]'s middle school in Indiana, which in 10/8/04 was still in effect. A new FBA had not yet been fully developed.

**Issue 5: Whether the LEA included in the IEP team any of the other qualified persons set forth in 8 VAC 20-80-68C(5)(b).**

The IEP team included, other than the Parents, the teachers who were qualified, as required, and familiar with \_\_\_\_\_; but the team did not include his school psychologist from his elementary school, nor his therapist of five years both of whom meet the requirements set forth in the Regulation. However, inclusion of the psychologist and the therapist is not mandatory, but permissible.

**Issue 6: Whether the school psychologist was a necessary member of the IEP team or of the “other qualified persons” group.**

The psychologist was not a necessary member of the IEP team, even as a member of the other qualified person group, but a permissive member. It would have been good to have both of those professionals on the team, but the LEA didn't call them and the Parents didn't request their presence. (8 VAC 20-80-60C(1); 8 VAC 20-80-68C(5).

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Finally, the several procedural violations, considered severally, are relatively small, except for that covered under Issue 1b above – notice of procedural safeguards. The effect of the omission of that notice is somewhat lessened by the fact that the Parents had been given the notice of procedural safeguards on October 8<sup>th</sup> for the development of the IEP of that date.

However, the notice violation together with those covered under Issue 2 constitute a serious failure of the LEA's duty under the law. The MD team's neglect of the Bi-polar aspect of disability when they had notice of that potential problem, the team's apparent failure to understand the effect of his ADHD on his impulsiveness, his ability to control his impulses, and the other symptoms that remain under the surface no matter the amount of improvement teachers see in his behaviors, brought about this painful time for themselves, their school and the

He was provoked, after a long period of abuse by the girl, by the gesture she twice gave him – a gesture that has caused grown men to do violence to the perpetrator. It is not a surprise to this hearing officer that \_\_\_\_\_ retaliated as he did. And this is true regardless of the fact that \_\_\_\_\_ had improved considerably. That tendency, as \_\_\_\_\_ improved, was always there under his surface just waiting to be loosed, even though he knew what he was doing. The MD team simply failed to see and understand this.

For all these reasons I conclude that \_\_\_\_\_'s violence toward the girl on 12/16/04 was a manifestation of his disability.

**ORDER**

Accordingly, it is ordered that [redacted] remain in his current educational placement in [redacted] School, and that the [redacted] immediately convene the IEP team to carry out the provisions of 8 VAC 20-80-68C(5)(c) as may be deemed appropriate.



F. Mather Archer      January 21, 2005

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.