

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION DUE PROCESS



HEARING DECISION

Public Schools
School Division

Parent

Division Superintendent

Child

Decision Date

Parent
Party Initiating Hearing

Hearing Officer

I. APPEARANCES:

Esquire
Virginia

Esquire
Deputy Attorney
Virginia

II ISSUE AND PURPOSE OF HEARING:

WHETHER PUBLIC SCHOOLS PROVIDE WITH A FREE AND APPROPRIATE PUBLIC EDUCATION?

The purpose of the hearing was to review and determine whether Public Schools denied a free and appropriate education by first, not creating and implementing adequate Individual Education Programs and Behavioral Intervention Plans

second, by suspending [REDACTED] for chronic disruption or misbehavior, from school for ten days or more and not timely identifying [REDACTED] actions as volitional or as manifestations of [REDACTED] disability and last by determining that [REDACTED] is not eligible for special education services under the status of [REDACTED]

III. PRE-HEARING REPORTS:

[REDACTED]
[REDACTED]
[REDACTED]

IV. PRE-HEARING CONFERENCE DATE:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

V. CONTINUANCE:

This hearing began on [REDACTED]. It was continued four times. [REDACTED], [REDACTED] and [REDACTED]th are subsequent hearing dates. The hearing concluded on [REDACTED].

It was agreed by all parties that the [REDACTED] hearing was to submit evidence on the issue of manifestation. The [REDACTED]th hearing was a continuance of manifestation. Evidence was also introduced regarding appropriate placement for [REDACTED] during suspension. [REDACTED] was initially for determination of eligibility; however, it became a hearing for procedural and substantive issues concerning [REDACTED]'s Individual Education Programs (IEPs). [REDACTED] the School Board responded to the [REDACTED] hearing. The School Board had not adequately

prepared for the previous hearing because of a miscommunication that the hearing was solely for the issue of eligibility. The hearing was continued to [REDACTED] to allow an Individual Educational Evaluation by [REDACTED] and consequently an eligibility determination by the [REDACTED] Public Schools. All parties agreed to extend the due process hearing beyond forty-five days.

VI. HEARING DATES AND LOCATIONS:

[REDACTED]
[REDACTED] Center School Administration Building
[REDACTED] Virginia [REDACTED]

VIII. WITNESSES IN THE ORDER OF THEIR TESTIMONY:

- [REDACTED]
1. [REDACTED] a, Director of Student Services, [REDACTED]
 2. [REDACTED] Supervisor of Programs for Learning Disabled Students
 3. [REDACTED]
 4. [REDACTED] of [REDACTED]
 5. [REDACTED] le, Special Education Teacher at [REDACTED] School

- [REDACTED]
1. M [REDACTED]
 2. M [REDACTED]

- [REDACTED]
1. N [REDACTED] School Psychologist
 2. [REDACTED] Social Worker
 3. [REDACTED] Speech Pathologist
 4. [REDACTED] Teacher
 5. [REDACTED] Teacher
 6. [REDACTED] Teacher

- [REDACTED]
1. [REDACTED], Representative for the Special Education Department ([REDACTED])
 2. [REDACTED] Regular Education English and Civics Teacher
 3. [REDACTED], Special Education Teacher
 4. [REDACTED] School Psychologist
 5. [REDACTED]
 6. [REDACTED]
 7. [REDACTED]

- [REDACTED]
1. [REDACTED] Ph.D. Neuropsychologist
 2. [REDACTED]
 3. [REDACTED] Social Worker
 4. [REDACTED] - Homebound Teacher
 5. [REDACTED]
 6. [REDACTED] Parent

IX. APPLICABLE LAWS AND REGULATIONS:

Individuals with Disabilities Education Act (IDEA)
84 Stat. 175, as amended, 20 U.S.C. 1400 et seq. (1997)

Part II Regulations, (March 12, 1999)
34 C.F.R., Parts 300 and 301

Section 22.1-213 et seq., Code of Virginia, 1950, as amended.

X. EXHIBITS:

1. SCHOOL BOARD PACKET CONTAINING :

- SB-1 Special Education Committee Report
- SB-2 Manifestation Hearing Notice
- SB-3 Special Education IEP/Causality Committee Report.
- SB-4 Letter to [REDACTED]s from [REDACTED]
- SB-5 Individual Education Plan (6 pgs.)
- SB-6 FBAT Referral (3 pgs.)
- SB-7 Special Education Assignment Letter
- SB-8 Functional Behavior Assessment Summary
- SB-9 Behavior Intervention Plan

- SB-10 Student-School-Parent-Partnership Form
- SB-11 Discipline Notice
- SB-12 Discipline Notice
- SB-13 Discipline Notice
- SB-14 Discipline Notice
- SB-15 Discipline Notice
- SB-16 Individual Education Plan (8 pgs.)
- SB-17 Discipline Notice
- SB-18 Discipline Notice
- SB-19 Referral For Review
- SB-20 Discipline Notice
- SB-21 Staffing Minutes
- SB-22 Permission to Evaluate
- SB-23 Discipline Notice
- SB-24 Individual Education Plain (7 pgs.)
- SB-25 Notice of Eligibility/IEP Meeting
- SB-26 Notice of Eligibility/IEP Meeting
- SB-27 Non-Medical Placement for Homebound Transmittal
- SB-28 Special Education Committee Report (2 pgs.)
- SB-29 Teacher Narrative - [REDACTED] (2 pgs.)
- SB-30 Teacher Narrative-[REDACTED]
- SB-31 Notice of Ineligibility
- SB-32 Letter to [REDACTED] from [REDACTED]
- SB-33 Letter to [REDACTED] from [REDACTED] (3 pgs.)
- SB-34 Receipt for Homebound Instruction
- SB-35 Letter to [REDACTED] from [REDACTED] (2 pgs.)
- SB-36 Letter to [REDACTED] from [REDACTED] (2 pgs.)
- SB-37 Letter to [REDACTED] from [REDACTED]
- SB-38 Discipline Notice
- SB-39 Notice of IEP Meeting
- SB-40 Letter [REDACTED] C from [REDACTED]
- SB-41 Notice of IEP Meeting
- SB-42 Special Education IEP/Causality Committee Report
- SB-43 Special Education IEP Causality Committee Report
- SB-44 Letter to [REDACTED] from [REDACTED]
- SB-45 Notice of IEP Meeting
- SB-46 Letter to [REDACTED] from [REDACTED]
- SB-47 Letter to [REDACTED] from [REDACTED]
- SB-48 IEP Addendum
- SB-49 Letter to [REDACTED] et from [REDACTED] w/Report of [REDACTED] (7 pgs.)
- SB-50 Letter to [REDACTED] from [REDACTED]
- SB-51 Notice of IEP Meeting
- SB-52 Letter to [REDACTED] from [REDACTED]

- SB-53 Letter to [REDACTED] from [REDACTED]
- SB-54 Letter to [REDACTED] from [REDACTED]
- SB-55 Letter to [REDACTED] n from [REDACTED] (pgs.)
- SB-56 Letter to [REDACTED] k from [REDACTED]
- SB-57 Letter to [REDACTED] s from [REDACTED]
- SB-58 Letter to [REDACTED] n from [REDACTED] a
- SB-59 Letter to [REDACTED] s from [REDACTED] (pg.)
- SB-60 Letter to [REDACTED] from [REDACTED]
- SB-61 Notice of IEP Meeting
- SB-62 IEP Addendum (4 pgs.)
- SB-63 Letter to [REDACTED] from [REDACTED]
- SB-64 Letter to [REDACTED] from [REDACTED] (5 pgs)
- SB-65 Letter to [REDACTED] x & [REDACTED] n from [REDACTED] s (2 pgs.)
- SB-66 Letter to [REDACTED] n from [REDACTED] (3 pgs.)
- SB-67 Facsimile to [REDACTED] s from [REDACTED] ta (3 pgs.)
- SB-68 Letter to [REDACTED] s from [REDACTED]
- SB-69 Facsimile to [REDACTED] x & [REDACTED] from [REDACTED] s (2 pgs.)
- SB-73 Letter to [REDACTED] x & [REDACTED] n from [REDACTED] s (2 pgs.)
- SB-74 Letter to [REDACTED] & [REDACTED] from [REDACTED] (2 pgs.)
- SB-75 Memo to [REDACTED] from [REDACTED]
- SB-76 Letter to [REDACTED] x & [REDACTED] from [REDACTED]
- SB-75 Letter to [REDACTED] x & [REDACTED] n from [REDACTED]

II. PLAINTIFF'S PACKET CONTAINING:

- 5. [REDACTED] LEA Letter
- 6. [REDACTED] document
- 7. [REDACTED] School Document
- 8. [REDACTED] Columbia Academy Therapeutic Day School Document
- 9. [REDACTED] I.E.P
- 10. [REDACTED] Disciplinary Incidents
- 11. [REDACTED] Functional Behavior Assessment/ Behavior Intervention Plan
- 12. [REDACTED] Letter of Findings
- 13. [REDACTED] I.E.P
- 14. [REDACTED] IEP Addendum
- 15. [REDACTED] LEA Psychoeducational Evaluation
- 16. [REDACTED] d's report
- 17. [REDACTED] Report
- 18. [REDACTED]
- 19. [REDACTED] Physician's desk Reference (PDR)
- 20. [REDACTED] Request for Educational Assistance by [REDACTED], teacher
- 21. [REDACTED] Request for Educational Assistance by [REDACTED], teacher
- 22. [REDACTED] Child Study Pre-Referral

23. [REDACTED] Report of [REDACTED] Screening
24. [REDACTED] [REDACTED]'s report
25. [REDACTED] LEA Sociocultural report by [REDACTED]
26. [REDACTED] SPED Committee Report
27. [REDACTED] LEA Letter
28. [REDACTED] Parent Letter
29. [REDACTED] A Letter
30. [REDACTED] LEA Letter
31. [REDACTED] IEP/Causality
32. [REDACTED] [REDACTED], M.D., Psychiatry
33. [REDACTED] Code of Conduct [REDACTED] Public Schools, pages 23-32
34. Effective [REDACTED] DSM-IV, pages 78-85
35. [REDACTED] Amendment of records at parent's request

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COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION

In Re: [REDACTED] :
SPECIAL EDUCATION : FINDING OF FACT
DUE PROCESS HEARING : AND
: DECISION

The hearing began on [REDACTED] and concluded on [REDACTED]. It was held in the [REDACTED] Center and the [REDACTED] Public School Administration Building, [REDACTED] Virginia. (Hereinafter referred to as "the School"). All witnesses examined are as listed on the attached witness list in the order of their appearances with their testimonies embodied in the transcript. (Hereinafter referred to as "T"). On [REDACTED], [REDACTED], the parent, mailed a letter to [REDACTED] Director of Student Services, [REDACTED] requesting a special education due process hearing.

The parties were present at the hearings. The parent waived appearance at the [REDACTED] hearing. (T.3 3) My findings of fact are based upon the testimony of the witnesses, exhibits, federal and state law and the regulations.

FINDING OF FACT

[REDACTED] (hereinafter referred to as the "student") is a [REDACTED] year old [REDACTED] grader at [REDACTED] School. On [REDACTED], after evaluation, [REDACTED] was determined by the [REDACTED] Public Schools to be eligible for special education under the status of [REDACTED]. The Individual Educational Program (IEP) meeting was scheduled immediately. However, at the parent's request it was postponed until [REDACTED]. (T. 236-237) A team met and developed an IEP for the student.

On [REDACTED], a Behavior Intervention Plan was created for the student. (Ex. SB 9)

During the [REDACTED] school year, the student was suspended on [REDACTED] - one day, on [REDACTED] - two days, on [REDACTED] - two days, [REDACTED] - one day, [REDACTED] - four days, [REDACTED] - two days, [REDACTED] - three days, [REDACTED] - four days, [REDACTED] - ten days and [REDACTED] - eleven days. (Ex. SB 11-15, 17, 18, 23, 38) [REDACTED] was subsequently suspended for the remainder of the school year. The student is currently receiving up to two hundred fifty hours of homebound services. (T4. 80-82)

The IEP team met throughout the [REDACTED] school year to review and revise the student's IEP. The team met on [REDACTED]th, [REDACTED]th, [REDACTED]th, [REDACTED] and [REDACTED] (Ex. SB 5, 16, 24, 48, 62) The Programs did not change with exception of the amount of time allotted to a resource class for emotionally disturbed students and the addition of homebound services. The [REDACTED]th IEP doubled the amount of time in the resource class. (Ex. SB-5, SB-24) The [REDACTED] and [REDACTED] addendums added and revised the homebound services. The student was placed in collaborative classes for math and science. (T1. 102, 239)

A staffing was held on [REDACTED], [REDACTED]. (Ex. SB 21) The student's progress, under the BIP, was discussed. The BIP of [REDACTED] was never revised.

On [REDACTED] the parent gave the School Board permission to evaluate [REDACTED] for the second time, to determine whether [REDACTED] was eligible for special education and related services. (Ex. SB 22) Notice of the meeting was provided, to the parent, on [REDACTED] (Ex. SB 26) On [REDACTED], a special education committee met and found that [REDACTED] was not eligible for special education. (Ex. SB 28) IEP/Causality hearings were held on

[REDACTED] to determine whether the [REDACTED] and the [REDACTED] incidents, for which the student was suspended, were caused by [REDACTED] disability. (Ex. SB 42, 43) The parent was provided notice of the IEP/Causality committee meeting on [REDACTED] 10-2000. (Ex. SB 41) [REDACTED] attended the first meeting, but refused to remain for the second. (Ex. SB 42, 43) On [REDACTED] after receiving the results of the Independent Educational Evaluation from [REDACTED] a special education committee met and again found the student not eligible for special education and related services.

[REDACTED] a special education teacher, is providing homebound services to [REDACTED] (T5. 185-187) The student is expected to pass to the [REDACTED] grade. (T4. 132)

DECISION AND RATIONALE:

The Individual Education Programs created for the student were adequate. Though, the School Board did not follow 8 VAC 20-80-62 to the letter when it created the teams. On two IEPs [REDACTED] and [REDACTED] - no regular education teacher, that taught [REDACTED] was present.

The student's Behavior Intervention Plan did not provide services appropriate to the student or commensurate with the IEPs. After successive suspensions accumulating an excess of ten days after the [REDACTED] suspension, the BIP remained the same. It was clear from the student's types of outbursts that a pattern existed. (T3. 261-266, 225-232) (T1. 251-254) Yet, in disregard of 8 VAC 20-80-68, the IEP team failed to convene to review and modify the BIP and its implementation as necessary to address the behavior. Furthermore, each IEP included a section II(c), on the first page, which was checked yes by each team. The teams agreed that

strategies including positive behavior interventions and supports were important to the student's success. Still, the behavior intervention plan remained the same with little indication of implementation. Consequently, the suspensions that occurred after the [REDACTED] special education eligibility committee meeting were all manifestations of the student's disability. 8 VAC 20-80-68(C) (5)(b) (2)(a) The first manifestation hearing should have been held within ten days of [REDACTED]

In order for the student to qualify for special education services [REDACTED] must be determined eligible under Section 22.1-1, Code of Virginia, 1950, as amended, to receive such services or programs. I find that the student, in this case, is eligible under the category of [REDACTED] [REDACTED] [REDACTED] by definition of the regulations governing special education, means a condition exhibiting one or more characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance.

The student has, since approximately [REDACTED], exhibited inappropriate types of behavior or feelings under normal circumstances. (T3. 214) [REDACTED] inability to control [REDACTED] behavior or feelings, result in incomplete work and unsatisfactory performance or grades. (T3. 245)

[REDACTED] taught [REDACTED] in [REDACTED] [REDACTED] referred the student to the principal because of aggressive, disruptive behavior that escalated throughout the day and because of unacceptable study and social skills. (T3. 214-218) In [REDACTED] the Assistant Principal at [REDACTED] [REDACTED] intervened on occasion to provide [REDACTED] a cooling off period at the office. (T3. 229) [REDACTED] found [REDACTED] to be oppositional, disruptive and non-compliant. Triggers for [REDACTED] behavior included redirection and misperception concerning fairness and application of consequences and academic weaknesses. (T3. 228-229) [REDACTED] the student's United States history

teacher in [REDACTED], described [REDACTED] as moody and extremely stubborn with problems managing [REDACTED] anger. (T3. 261-264) [REDACTED] compared [REDACTED] attitude and moods swings to one of [REDACTED] previous students that was executed, a few years ago, for capital murder. (T3. 266) [REDACTED] the student's collaborative special education teacher during the school year [REDACTED] found [REDACTED] to be oppositional, defiant, angry, unhappy and lacking the ability to make good decisions. (T1. 238-254) The school psychologist, [REDACTED] suggested that the student seek private counseling to address [REDACTED] symptoms of depression and [REDACTED] feelings of loss concerning [REDACTED]. (Ex. PL 11) In addition, the student was suspended systematically, beginning in [REDACTED], for walking in front of a moving school bus, disruptive behavior, failure to follow instruction, talking back, biting, yelling at the teacher, disrespectful behavior, chronic disruption and misbehavior and threatening any school staff. (Ex. SB 11-15, 17, 18, 23, 38)

The School Board concedes that the student has [REDACTED] [REDACTED] (T3. 43) However, it does not concede that [REDACTED] disorder is enough to qualify [REDACTED] for special education and related services. In order to qualify under [REDACTED] must have the disorder and it must adversely affect [REDACTED] educational performance. A child with [REDACTED] would tend to be defiant, inattentive, have problems applying themselves and display excessive physical behavior. (T1. 63-64) These characteristics would be constant and uncontrollable. (T1. 64-65) Yet, the student seems to control [REDACTED] behavior to the extent that [REDACTED] appears manipulative. (T1. 289-297) (T5. 90)

The student does not qualify for special education under [REDACTED] [REDACTED] is an intelligent child. (T2. 73) There is no indication that [REDACTED] has a severe discrepancy between

achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension mathematical calculations or mathematical reasoning. [REDACTED] test scores reveal problems with [REDACTED] visual motor skills and perceptual organization. (T3. 86-89) However, [REDACTED] has high verbal comprehension scores and ranges average or above in all other subjects. (T3. 90-123) The student is a stronger verbal than nonverbal learner which is almost a positive in a classroom setting. (T3. 84)

[REDACTED]
[REDACTED] Hearing Officer