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 binding.)

Public Schools
School Division

Name of Parents

Name of Child

May 7, 2004/Decision
Date of Decision or Dismissal

Kamala Hallgren Lannetti
Counsel Representing LEA

Mary Kathryn Hart
Counsel Representing Parent/Child

~~Parents~~
Party Initiating Hearing

School
Prevailing Party

Hearing Officer's Determination of Issue(s):

Was the child's assault upon a student in his class a result or manifestation of his underlying disabilities?

Was the child being educated in his least restrictive environment in light of his disabilities?

Hearing Officer's Orders and Outcome of Hearing:

Notwithstanding this child's emotional stability and his disabilities, he should have been able to control his behavior in this instance.
The child's behavior was not a manifestation of his disability.
Disciplinary action for this offense was permissible.
Change of placement to a more restrictive environment was warranted by the serious nature of the conduct.

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 is attached 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.

Sarah S. Freeman
Printed Name of Hearing Officer

Sarah S. Freeman
Signature

VIRGINIA DEPARTMENT OF EDUCATION

DUE PROCESS HEARING REPORT

SCHOOL DIVISION: PUBLIC SCHOOLS
LEA COUNSEL: KAMALA HALGREN LANNETTI

NAME OF PARENTS: MR. and MRS.
NAME OF CHILD: ("Student")
NAME OF COUNSEL: MARY KATHRYN HART

PARTY INITIATING HEARING: PARENTS

HEARING OFFICER: SARAH SMITH FREEMAN

INTRODUCTION

This matter came for hearing on March 2, 2004, in Virginia before a duly appointed Hearing Officer. Present in person in addition to the Hearing Officer and the Court Reporter were the mother and father, ("Parents"), and parent's counsel, counsel for the LEA and the School Division's Representative.

The due process hearing was requested in writing. The request was received by the LEA on February 2, 2004, and this Hearing Officer was assigned to hear the case on February 4, 2004. Parents allege that the LEA committed numerous errors in the conduct of this Student's Manifestation Determination. Parents' counsel asserts that this Student's disability and inability to control himself in certain situations, in effect, triggered the physical altercation that gave rise to disciplinary action. Parents' counsel requests that this Hearing Officer make a ruling holding that the Manifestation Determination was not proper in that many substantive and procedural violations occurred in violation of IDEA. Parents' counsel asserts that the Manifestation Committee erred

in the determination that this Student's behavior was not a manifestation of his disability. Therefore, counsel asserts, the disciplinary hearing should not have occurred. Further, Counsel asserts, the "stay-put" provisions of IDEA dictate that once the parents file a motion for due process, no other disciplinary action may proceed until the due process claim is resolved.

This hearing occurred during one day, both the LEA and the Parents having presented the testimony of witnesses and exhibits.

FINDINGS OF FACT

This Hearing Officer makes the following findings of fact:

1. The Student was born on , .

2. The Student was most recently found eligible for special education services through Virginia Public Schools ("LEA") on November 23, 2003 with the Identifying Handicapping Condition of emotional disturbance (primary) with no secondary disability noted under IDEA. This Student has been found eligible for accommodations pursuant to Section 504 of the Rehabilitation Act of 1974 during the 2002-2003 school year. (School Board Exhibit E/2-15)

3. On December 8, 2003, after a manifestation determination, a functional behavior assessment ("FBA") and behavior intervention plan ("BIP") were developed to address this Student's behavior. (School Board Exhibits E/22-23, E/24-28 & B/2-4)

4. Educational testing revealed that this Student

tests in the low-average range for ability, however, his capacity for learning is in the average to high-average range of ability. (School Board Exhibits F/1-41)

5. During this student's first ninth grade year at this school, disciplinary suspensions required that he be placed into an alternative setting. (Transcript pages 272-275)

6. This Student's disciplinary record is extensive. (School Board Exhibits A/1-104)

7. Mr. , this Student's math teacher, testified that this Student had experienced difficulties in his class, a low level algebra class. This Student had just transferred into this class only four days prior to this incident. (Transcript page 50)

8. Mr. did not review this Student's IEP in detailed fashion, however, he was generally aware of its contents and of the accommodations afforded to this Student. (Transcript pages 49-50)

9. Accommodations for this student included permitting him "cooling off" time periods during which this student was allowed to leave his individual classroom if the Student anticipated conflict. If the Student needed assistance at school, he had been instructed to seek out the two special education teachers. (Transcript page 50)

10. When this incident occurred, the Student had just returned to the classroom after being given "time out" to speak to one of his special education teachers. (Transcript page 50)

11. Algebra was a subject that "frustrated" this Student. Just before this math class, the Student had spoken to his guidance counselor about transferring to a less difficult math class. His counselor indicated to the Student that he was already enrolled in the least complex math class. The guidance counselor informed him that another transfer would not be possible. (Transcript page 149)

12. Mr. prepared a written report of the incident at the time that it occurred. During his testimony at the hearing, the math teacher admitted that his testimony differed somewhat from the detail contained in his prior statement. (School Board Exhibit A-6)

13. According to Mr. 's testimony, the Student was having trouble getting "settled in class" that day. This Student was permitted to leave class twice to seek out his special education teachers, first, . After the Student returned to class that morning, the Student continued to be "unsettled" and he was again permitted to leave the class. This time he went to , his other special education education teacher. (Transcript page 54)

14. After his return from the second trip, he "wandered" around for a while before he sat down. The Student then "turned around" and "stared" at the girl behind him making her "very uncomfortable." (Transcript page 54 and 55)

15. Mr. asked the Student to turn back around and when he would not comply the teacher gave the Student a "count of three." After the Student continued to disobey the teacher's

direction to turn around, the teacher began to write up a referral to the principal's office for the Student's misbehavior. (Transcript page 55)

16. The Student objected to the teacher's referral and responded to him "You can't refer me for that. I didn't do anything. I didn't do anything." (Transcript page 55)

17. The teacher continued to draft the referral and when he looked up, this Student and another student were both standing and "facing each other." According to the teacher, this Student was removing his sweatshirt. (Transcript page 55)

18. After being ordered by the teacher to "just sit down," this Student grabbed the other student "put him in a headlock" and "he punched him square in the face. It was kind of like a sickening thud." (Transcript page 55 and 56)

19. Before the teacher could remove this Student from the classroom, this Student was able to "hit him a couple more times as I [the teacher] was pulling him off." (Transcript page 56)

20. According to the incident report created by the student who was struck, the incident happened after he turned to a student who sat behind him and said, "Here we go again," when the Student refused to follow the teacher's direction to turn back around. The Student responded, "Shut up," to the student who was ultimately struck. According to this student's incident report, the student who was struck then said, "At this point, I stood up in his face." (School Board Exhibit A-9)

21. The math teacher supports the above account, however, he added that the Student who was disciplined for the incident was seated directly next to him before the incident began. As the incident progressed, this Student removed his sweatshirt and moved six feet to the rear of the room to attack the other student. As he was held in a headlock and punched repeatedly in the face, the student to the rear did not return the blows. Silently, he dangled his arms at his sides. (Transcript page 60)

22. According to the accounts of the teacher and the student who was struck, the attack was completely one-sided: There was no provocation, threat, or blow by the student who was struck. Although the written statement by the student who was struck is silent on this issue, the teacher's written statement identifies the location where the fight took place: toward the rear of the room. This Student went after the other to attack him. (Transcript page 60, and School Board Exhibits A/8 & A/9)

23. Although Mr. stated that he was not given particular strategies or interventions by the special education teachers regarding this student's classroom behavior or his serious emotional disturbance, Mr. had discussed this student's IEP and "cooling down" techniques with the special education teachers. (Transcript page 76)

24. Mr. , Special Education Teacher, testified that he has known this Student and he has managed his special education since November, 2002. (Transcript page 83, 84)

25. During this Student's first ninth grade year, he needed longer periods of time in the special education environment because of his school behaviors. This Student began with "one block" of special education time and he quickly moved to "six blocks." (Transcript pages 87, 88)

26. During this Student's first ninth grade year at this school, his IEP was changed to reflect his need for a more structured educational setting where this Student's needs could be addressed in a smaller sized class. The program was selected for him, however, this Student attended the program for only one week. His mother did not approve of the program because of disciplinary measures to be utilized. (Transcript pages 88, 89)

27. After leaving the program, this Student returned to this high school on October 1, 2003. With deference to his mother's wishes, this Student was given only one block of special education services with an escort to classes for two weeks to "acclimate" this Student to his new educational environment. Upon this Student's readmission, resource room hours were reduced because this Student's family reported that this Student had made great strides during the summer months. With the inclusion of all family members, the Student completed family preservation and therapy. (Transcript page 90)

28. Mr. testified that he had personally observed instances when this Student has "been able to control himself or pull himself back when he's having a problem" and he has

also known this Student to "gain control of his behavior." (Transcript page 93)

29. Mr. testified that he was impressed by this Student's statements at the latest IEP revision meeting upon this Student's re-entry into the high school for this academic year. This Student described intensive therapeutic counseling intervention, known as the "family preservation program." This Student related to his teacher his mastery of anger management strategies. The Student appeared to understand behavioral consequences and the benefit of making appropriate choices. (Transcript pages 102, 103, 104)

30. Even though Mr. was unavailable to this Student for a discussion that day because the teacher was instructing an earth science class, there were other individuals the Student could contact: Mrs. Guidance Counselor, any adult in the main office, and he did speak briefly to Mr. his Special Education Teacher. (Transcript page 100, 101)

31. Mr. described this student as "very polite" and as a "people pleaser" who likes his teachers. He seems to want his "family to be proud of him." (Transcript pages 107,108)

32. The Parents asserted that the "count to three" by Mr. may have set the events of January 8, 2004 into motion. Mr. disagreed with the Parents' suggestion that the countdown triggered this Student to react poorly. The countdown, he stated, was like a "reminder" to this Student to "stay on task." (Transcript page 116)

33. The special education teacher disagreed with the regular education math teacher's statement that the Student's accommodations had not been fully discussed with the new math teacher, Mr. . stated, "He may not remember ... but it was discussed." (Transcript page 119)

34. Mr. , Special Education Teacher, testified that this Student came to the special education department twice on the morning of January 8, 2004. The first time, Mr. directed him to the office after explaining to him that Mr. was not in. The second time this Student was directed back to the administration office. On both occasions, Mr. testified that this student was not "angry or agitated." "He had a smile on his face." (Transcript page 138)

35. Ms. , Guidance Counselor, also testified that this Student was not "upset or agitated" when he left her office that morning. He was "calm and respectful." Further, she added, " has reacted aggressively on some instances and he's walked away from other instances." (Transcript pages 151-153)

36. Ms. testified that this Student has the ability to control his behavior. He is capable of "diffusing" and of "returning to what he is supposed to be doing" if he desires to." (Transcript Pages 153, 156)

37. Parents asserted that this Student may have been frustrated on the morning in question because he may have believed that he was being told to go to two different places

[Mr. and the administration office] at the same time. Ms. testified that even if this had been the case that morning, this Student could have handled the situation "without any difficulty." (Transcript pages 161-163)

38. Ms. , Special Education Coordinator, testified that this Student had been placed into a lesser restrictive environment upon his return to this school because of the extensive involvement the Parents had undertaken with Comprehensive Mental Health Services and in-home services. Upon this student's re-entry into this high school, the LEA considered the Parent's initiative and the LEA's assessment that this Student could control himself better, and this Student was transitioned from a prior self-contained program to "one bell of resource." (Transcript page 169)

39. Testimony given by the school personnel contrasted significantly from the testimony of the Parents' expert witness, Dr. Jeremy A. Stowell, M.D., who qualified as an expert in this matter in the field of Child and Adolescent Psychiatry. Dr. Stowell attributed this Student's behavior on the morning of January 8, 2004 to his disability. Dr. Stowell has met with this Student privately 38 times since July 3, 2002. (Transcript Pages 198-200)

40. Dr. Stowell testified that it his professional opinion that this Student has "Intermittent Explosive Disorder" which is only one of the behavioral disorders evident in this Student's medical diagnosis. He also suffers from Conduct Disorder, Attention Deficit Disorder, and a psychotic disorder, "not

otherwise specified." Further, this Student exhibits "prodromal phase" (early signs) of shizophrenia, Dr. Stowell testified. (Transcript page 201)

41. Dr. Stowell extrapolated from the incident at hand that "if somebody just got in his way and caused him stress, he could easily exhibit paranoia and then come up with an actual delusion system, such as feeling that somebody was intentionally out to block him from doing what he wanted." (Transcript page 202)

42. It was the testimony of Dr. Stowell that this Student's level of aggression is simply "uncontrollable." This student, Dr. Stowell testified, requires "minimal provocation" because his thought processes are clouded by a "delusional system" that causes him to "justify" his behavior in certain situations such as "getting teased or taunted." In this Student's mind, Dr. Stowell, reasoned, "distortions" of logical thinking cause this Student to reflect on his behavior incorrectly and "led him to say, Okay, I'm justified." (Transcript page 204)

43. Dr. Stowell testified that the intensity of this Student's violent episodes dictate that this student is just "too dangerous" for any regular or special educational setting. Dr. Stowell recommended this Student's removal to an "alternative" placement with a "strong behavioral component" such as "the Treatment Program, ... or ." Dr. Stowell suggested for this student an "intensive daily residential environment where he could get the proper behavioral controls." (Transcript pages 210, 211, & 216)

44. This Hearing Officer noted that the medical diagnosis of multiple conduct disorders and a concurrent medical opinion that this Student is virtually incapable of following through with consequential behavior differs sharply from the credible testimony of school witnesses. Many school witnesses testified, from direct observation of this student at school, that this Student is capable of determining his own course of action. With all due respect to Dr. Stowell and his impressive medical expertise, he has observed this student primarily in a clinical setting, not in a school environment.

45. It may be evident to Dr. Stowell as he stated at the hearing, "Something awful is going to happen," however, this Hearing Officer limits Dr. Stowell's admonition to the home setting, where, admittedly, this student's behavior is downright scary: kicking the door in when the "television" is taken out of his room, a knife incident involving his sister and her friends, physical aggression toward his mother and most recently, his father. (Transcript pages 237-239)

46. Dr. Stowell admitted that his comments address primarily an "escalation of violence at home." He noted improvement at school. (Transcript pages 223-224)

47. Dr. Stowell's description of this Student's demeanor as akin to "blind rage" that is "just like a big wave taking over control of him" does not comport with the fact that this student's most recent disciplinary record reveals that, apparently, this Student's overall school behavior has indeed improved: There have been only four recorded

disciplinary events since his re-entry into this school system on October 1, 2003. (Transcript page 224, 236, 234)

48. This Student was placed into a special education setting, , where the focus is discipline. The Student did not benefit because he was removed after 6-7 days by his Parent primarily because of an unfortunate incident on the bus. The Parent admitted at the hearing that she had negative perceptions of this program prior to her son's entering it. Although the mother described herself as "an overprotective mom," in fact, it is quite possible that this Student's school performance may have changed more dramatically if he had been permitted to complete the program. It is has been suggested to the Parent that she consider viable options offered by the school to modify this student's intermittently poor judgment. (Transcript page 273)

ARGUMENTS RAISED

THE OTHER STUDENT'S VERSION OF THE EVENT WAS DIFFERENT/ THE MANIFESTATION DETERMINATION WAS NOT BASED UPON A COMPLETE EXAMINATION OF ALL THE EVIDENCE

Although it does appear that some minor inconsistencies are apparent in the different versions of the incident occurring on January 8, 2004, differing presentations of the detail do not significantly alter one fact: The math teacher observed that this Student was indeed the aggressor in this fight. The fact that the other student "stood up in his face" does not address one very important factor, namely, this Student moved 6 feet toward the other student and removed his own jacket. "Here we go again," is not a provocation.

Parents' argument that there are two different versions of the same incident, one from this Student and one from the other student, is not plausible. The manifestation committee properly reviewed the evidence. There were three different statements to be reviewed and certain factual detail may have been missing from each version. This aspect of the evidentiary record does not necessarily negate all three versions of the incident. It is more credible, as Mr. explained, that when he created the referral he may have omitted some minor detail about the events preceding the incident, namely, the two "time outs" before this Student returned to the classroom. Regarding the other student's account: it is reasonable to assume that he stood in the face of this Student only after this Student moved 6 feet toward his desk at the rear of the room. In any event, this Student removed his jacket and this was the first event to signal a fight, not the remark, "Here we go again." There was no teasing or taunting by the other student. Clearly, when this Student and the other student are standing in each other's faces, this Student was the aggressor, not the other boy.

THIS STUDENT WAS PREVENTED FROM UTILIZING HIS IEP ACCOMMODATION THAT HE BE PERMITTED TO LEAVE THE CLASSROOM TO SEEK ASSISTANCE FROM THE SPECIAL EDUCATION DEPARTMENT OR SCHOOL ADMINISTRATORS

Although this Student may not have reached the individual he had originally attempted to consult that morning, he did speak with numerous adults, the guidance counselor, a special education teacher, and most importantly, each time he asked to leave the classroom to help him to "get settled," his request

was granted. There is no reason to believe that the Student's mental state was one of agitation upon his return to class. Prior to this incident, the only source of concern to this Student seemed to be the referral the teacher was writing: "You can't write me up for that." It is apparent from this statement that this student DID appreciate the consequence of his actions, however, he chose to disregard consequences when he chose to attack the other child.

DISCUSSION AND CONCLUSION OF LAW

Based upon all of the evidence presented, the applicable statutes, regulations and case law, and the arguments presented by the parties, the Hearing Officer makes the following conclusions of law:

1. , ("the Student") is handicapped, having specific learning disabilities and comes within the purview of IDEA.

2. requires specific education and related services in order to derive benefit from his education.

3. At all times, relevant hereto, 's parents have resided in Virginia, thus the local educational agency ("LEA") is responsible for educating and providing him with a Free and Appropriate Public Education ("FAPE").

FAPE

To determine whether the manifestation determination review conducted by the LEA after the January 8, 2004 incident was flawed, this Hearing Officer must first determine

whether the appropriate questions have been correctly addressed by the LEA. State regulations at 8 VAC 20-80-68(5) provide that a Manifestation Determination is required if the local educational agency is contemplating a removal that constitutes a change in placement, including removal to an interim educational setting, for a student with a disability who has violated any rule or code of conduct of the local educational agency that applies to all students. The local educational agency shall notify the parent or parents with the procedural safeguards notice not later than the date upon which the action is to be made.

In reaching its decision, the IEP team and qualified school personnel must first consider all relevant information and the IEP team shall review the relationship between the student's disability and the behavior subject to the disciplinary action. The following analysis must then be made by the IEP team: 8 VAC 20-80-68(5)(1)(a-c)

(a) In relationship to the behavior subject to the disciplinary action, the student's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the student's IEP and placement?

(b) The student's disability did not impair his ability to understand the impact and consequences of the disciplinary action; and

(c) The student's disability did not impair the student's ability to control the behavior subject to the disciplinary action.

The LEA has made a manifestation determination in the above case that the Student's behavior was not caused by disability. It is the position of this Hearing Officer that the Parents

bear the burden of proving that their son's disability caused this incident, that their son did not have adequate IDEA support and services in place to prevent this incident, that he was not in control the day of the incident, or that his judgment was impaired by his disability to the end that he could not appreciate the impact or consequence of his behavior. In this Hearing Officer's opinion, the Parents have not met this burden.

The burden of proof rests with the Parents in this case because the Parents have requested the hearing. Extensive case law and administrative decisions support placing the burden of proof on the party who attacks the administrative action.

In Spielberg v. Henrico County Public Schools, 853 F. 2d 256, 258, n.2 (4th Cir. 1988), cert. denied, 489 U.S. 1016 (1989), the court ruled that the burden of proof is more appropriately placed on the party who brings the action. In Bales v. Clark, 523 F. Supp. 1366, the burden of proof issue was addressed and the decision was that the parents have the burden of proving their case.

Numerous Virginia administrative hearing decisions have placed the burden of proof on the party attacking the School Board's decision at the due process hearing level. In Fairfax County Pub.Sch., 21 IDELR 1214 (SEA 1995) the hearing officer correctly placed the burden of proof on the parents. Clearly, the parents have not proven by a preponderance of the evidence that the no manifestation determination on January 15, 2004 was not supported by the evidentiary record.

4. I find that parental notice requirements were satisfied by the LEA.

Accordingly, I find that:

5. The Manifestation Determination shall be upheld upon the following grounds:

The parents were provided with due notice of the Manifestation Determination that took place on January 15, 2004 and all procedural safeguards were afforded to them.

The IEP team was timely convened and the IEP team was comprised of the appropriate number of qualified individuals. Evidence presented to the Manifestation Determination Committee was fair and reasonably accurate.

In making the Manifestation Determination, the IEP team properly considered all components required by the Virginia regulations in making an analysis of the facts.

The incident occurring on January 8, 2004 was not caused by the behavior of this student's disability. The incident was not a result or manifestation of this student's disability.

The "stay-put" provision of the Virginia regulations regarding placement during a Manifestation Determination and the filing of a motion for due process has not been violated. Parents were entitled to file for due process, this Hearing Officer finds only that placement may not be changed during due process without consensus by the parties. 8 VAC 20 80-68 (7)(a) In the instant case, the parties have consented to homebased placement pending the outcome of this hearing.

The student's IEP and placement were appropriate, the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the student's IEP and placement.

The student's disability did not impair this student's ability to understand the impact and consequences of the behavior subject to this disciplinary action.

The student's disability did not impair the student's ability to control his behavior which is subject to disciplinary action.

This student was permitted to leave the classroom twice during one math class. The altercation that followed the student's return to math class on January 8, 2004 occurred

without any provocation and under the supervision of the the math teacher. The student's behavior was not impulsive. There were no threats, taunts, or teasing directed toward this student. He was not defending himself. This Student anticipated the fight by the removal of his jacket as he approached the other child at the rear of the room.

Unfortunately, this Student has caused this incident even though his overall school record reflects improvement. It is not fair to examine decisions made by the LEA, in retrospect, in light of this incident. This student was the aggressor and he must be held accountable for his bad decision to engage in a classroom fight. The Parents urged the LEA to readmit their son into this LEA, they cannot now assert, in essence, that it was a mistake to take him back.

6. The LEA provided a FAPE.

IDENTIFICATION OF PREVAILING PARTY

Pursuant to 8 VAC 20-80-76(K)(11) this Hearing Officer has the authority to determine the prevailing party on each issue that is decided. Having found that the LEA provided with a FAPE and that the manifestation determination was in compliance with Virginia regulation provided in 8 VAC 20-76 (J)(19(a-c), the Hearing Officer identifies the LEA as the prevailing party on all issues.

APPEAL INFORMATION

8 VAC 20-80-76(O) Right of Appeal

1. A decision by the Hearing Officer in any hearing ... shall be final and binding unless the decision is appealed by a party in a state circuit court within one year of the issuance of the decision or in a federal district court.

2. The appeal may be filed either in a state circuit court or in a federal district court without regard to the amount in controversy.

3. If the hearing officer's decision is appealed in court, implementation of the hearing officer's order is held in abeyance except in those cases where the hearing officer has agreed with the child's parent or parents that a change of placement is appropriate in accordance with subsection E of this section. In those cases, the hearing officer's order must be implemented while the case is being appealed.

IMPLEMENTATION PLAN

The LEA is responsible to submit an implementation plan to the parties, the hearing officer, and the Virginia Department of Education within 45 calendar days.

Dated: May 7, 2004

Sarah A. Thomas
Hearing Officer