VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF ACCOUNTABILITY
OFFICE OF SPECIAL PROGRAMS

CASE CLOSURE SUMMARY REPORT

Public Schools School Division	Ms. Name of Parent(s)
Asst. Director of Special and Gifted Education Services	Name of Student
Daniel R. Hagemeister, Esquire Counsel Representing LEA	Chery A. Poe Advocate Representing Student
Alfred Bernard III, Esquire Hearing Officer	Parent Party Initiating Hearing

HEARING OFFICER'S DETERMINATION OF ISSUES:

Parent failed to meet her burden of proof that the School System was deemed to have knowledge that Student was in need of special education services. And Student's suspension by the School System in November 2003 was proper.. Decision and Order attached.

HEARING OFFICER'S ORDER AND OUTCOME OF HEARING:

I order that the due process request of Parent be dismissed.

April 15 2004
(DATE)

Hearing Officer

cc: Daniel R. Hagemeister, Esquire
Ms. Cheryl A. Poe
, Asst. Director of Special and Gifted Education Services
Patrick Adriano, Esquire, State Education Agency

VIRGINIA DEPARTMENT OF EDUCATION

DUE PROCESS HEARING REPORT

IN RE: **, ("Student")**

SCHOOL DIVISION ("LEA"): PUBLIC SCHOOLS
Represented by: Daniel R. Hagemeister, Esquire

PARTY INITIATING HEARING: Ms. , ("Parent")
Represented by: Ms. Cheryl A. Poe, Advocate

DECISION AND ORDER OF THE HEARING OFFICER

This matter came on request of the Parent, on behalf of the Student, for an impartial hearing under the Individuals with Disabilities Education Act ("IDEA") challenging the suspension of the Student from school by Public Schools ("School System") under IDEA on the basis that his behavioral or performance record demonstrated to the LEA that the Student was in need of special education services. By letter dated February 27, 2004 from Counsel for the Public Schools, I was appointed Hearing Officer in this matter.

I. PRE-HEARING MATTERS

On February 24, 2004, an earlier due process hearing was dismissed by another hearing officer without prejudice. Upon receipt of the LEA's February 27th letter, my office administrator arranged a pre-hearing teleconference among the parties, their representatives, and my office for March 8, 2004. During that teleconference a number of issues were dealt with, including the following:

1. The hearing was set for March 25, 2004, with March 26th held open by the parties if a second day was needed.

2. The exchange of lists of witnesses and documents to be used at the hearing

was set for March 18, 2004; and Parent's Advocate requested a subpoena for one witness.

3. Parent's Advocate raised concerns with my presiding over the hearing because of alleged difficulties she and Parent had had with my administrator; she declined the opportunity to raise these matters with the Supreme Court and seek my dismissal. I continued to preside over the hearing.

4. Parent's Advocate stated that Parent was relying on 34 CFR §300.527(b)[1] as it was her contention that the School System was on notice from the student's behavior and numerous conduct issues and his performance that he had a disability and should be receiving special education services.

5. Counsel for the School System asserted that the regulation created a special class and as such was unconstitutional; and Parent's Advocate replied that the disciplinary procedures of the School System discriminated against young African-American males, a group of which Student is a member. I ruled that I did not have the authority to decide such constitutional issues, that they were not relevant to the matters I could decide, and that I would not therefore allow any evidence on either of those issues; and I further observed that I would note their assertions in the record and my decision in the event either cared to raise the points at a later time.

My letter of March 9, 2004, confirmed these items to the parties and their representatives; it also confirmed that the date for my decision was April 12, 2004, and that mediation was available to resolve the issues between the parties.

Lists of witnesses and documents were exchanged by the parties on March 18, 2004; and

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[1] 8 VAC 20-80-68(C)(8) is Virginia's corresponding regulation and the basis of this decision.

Parent's Advocate submitted at least two additional lists thereafter with the same individuals but in a different order, except that her last list included persons not on the list submitted March 18, 2004. When counsel for the School System raised the matter, I advised the representatives that we would convene the hearing one-half hour earlier than scheduled to deal with the matter. Parent had also requested that a subpoena be issued for a second individual, and that was done

Immediately prior to the hearing beginning on March 25, 2004, matters concerning several witnesses were discussed by the parties' representatives and the haring officer. One of the witnesses on Parent's list was no longer employed by the LEA and not able to be produced to testify by it, and Parent's Advocate stated "[t]hat's fine." And another on Parent's list was on indefinite medical leave and not available. Initially, the use of her was held in abeyance depending on the relevance of her testimony; and it turned out that her testimony would have related to events after a date which the parties informally agreed (and which I accepted) would be the cut-off for their respective evidence. Parent's Advocate also struck on of the witnesses for whom a subpoena had been issued. The LEA's counsel objected to the Parent and Student being placed on the witness list after the March 18th date, and I overruled his objection on the ground they were parties and thus no surprise to the school system as witnesses.

At the beginning of the hearing, I stated my belief that the Parent had the burden to come forward with evidence in this matter, and the hearing began with that understanding. The March 25th hearing lasted a full day; and the entire hearing stretched over two additional full days – March 26 and March 31, 2004.

During the hearing, witnesses were questioned and cross-examined on documents that had been submitted by each party. At the conclusion of the hearing, both parties formally submitted their documents for admission as evidence. During a colloquy at the end of the last witness's

testimony, the parties reached an informal agreement to not consider any matter that arose after December 15, 2003; and I sustained each party's objection to such of the other's documents that related to such matters. In addition, I sustained the objection of the LEA's counsel as to certain documents submitted by Parent that related to possible racial discrimination o school disciplinary proceedings as being not relevant to the matters over which I had jurisdiction in this hearing.

The documents submitted by Parent were labeled and collated by Parent as follows:

"1-A & B" from Elementary School, 3rd Grade, school year 1996-97; and including the Student's scores from a Stanford Achievement Test Series, Ninth Edition ("Stanford-Nine) and a notice of behavioral reprimand by a school bus driver.

"2-A thru D" from Elementary School, 4th Grade, school year 1997-98; and including suspension notices, report card (April 1, 1998) reflecting Student's retention in 4th Grade, and performance reports from Science and Mathematics classes.

"3-A thru I" from Elementary School, 4th Grade, school year 1998-99; and including suspension notices, certificate of participation in anger management course, performance reports from various classes and a report card indicating promotion to 5th Grade.

"7-A thru F" from Middle School, 7th Grade, school year 2002-03; and including suspension notices (two marked "reinstated", one "with conference"), written observations and comments from the Student's teachers (for use with the conference), minutes from the conference resulting in Student's long-term suspension;

and from Academy (In-School Alternative), 7th Grade, school year 2001-02; and including suspension notices.

"8-A thru K" from Middle School, 7th Grade, school year 2003-04; and including suspension notice with conference, incident reports, long-term suspension; and from Middle/High School, 7th Grade, school year 2003-04; and including guidance report, observations and comments from teachers, evaluations by teachers, incident reports, minutes from conference that resulted in suspension of the Student for remainder of the school year.

"9A thru C" copies of some Public Schools policies and procedures relating to special education, copies of several federal regulations relating to IDEA, and two articles, one relating to the empowerment of Young Black Males and the other to the "over-representation of black students in special education."

"10A" documents from after December 15, 2003.

"11A" documents from after December 15, 2003.

I did not admit the last three groups of documents into evidence as the first related to an area that is not within my jurisdiction to resolve; and I would note further at this point that no attempt was made by the Parent to present an expert witness to testify as to the material therein contained. And the last two groups were not admitted because of the parties' informal agreement reached towards the end of the hearing. With respect to the matter of exclusion of evidence as of a certain date, Parent's Advocate stated in an objection to a question by LEA's counsel that the issue was whether the LEA had knowledge as of December 15, 2003 that Student should have been referred , and that anything after that date was not relevant. Counsel for the LEA accepted her proposition and withdrew his question; Parent's Advocate affirmed the informal agreement at the end of the

hearing although the date was misstated by her as January 1, 2004. For purposes of the hearing and this decision, I have treated anything from December 15th forward as not being relevant.

No identification was tendered by Parent or her Advocate as to the missing groups that might be suggested by the numbering pattern of her documents, if indeed there are any missing groups.

These documents disclose the following incidents of Student's misconduct, arranged in their chronological order:

1. 04/28/97: a notice that he had failed to stay at an in-school detention given because of previous misconduct and that he was therefore suspended for a day.
2. 01/21/98: a suspension for calling a staff member a name and then kicking in a cafeteria door.
3. 09/06/98: a six-day suspension for fighting with another student.
4. 01/22/99: a one-day suspension for fighting with another student.
5. 03/15/99: an incident involving threats, abusive language and provocative behavior.
6. 05/24/99: conduct notice for fighting with another student that carries the note that Student "has shown considerable improvement in his behavior."
7. 03/20/02: in-school alternative to out-of-school suspension for excessive tardiness.
8. 05/08/02: three-day suspension for being disrespectful and leaving classroom without permission.
9. 05/28/02: five-day suspension for being disrespectful to staff.
10. 09/26/02: two-day suspension for throwing books in classroom, leaving the classroom without permission and being disrespectful to staff; he was reinstated.
11. 10/18/02: three-day suspension for refusal to remove hooded sweatshirt and being disrespectful; reinstated.

12. 10/31/02: out-of-school suspension with administrative conference when Student became angry upon being told he would have to have legal guardian accompany him for reinstatement (after apparently trying for reinstatement with a cousin he identified to school personnel as his father) and threatening staff and threatening to burn down school.

13. 11/07/02: Administrative conference for above suspension resulted in suspension for rest of semester and referral to School.

14. 09/10/03: suspension notice for conduct consisting of threatening staff when he became angry upon learning he would remain in the 7th grade; affidavit of probable cause for referral to juvenile court prepared for father's signature; Student was referred to School.

15. 11/14/03: suspension with conference when Student became angry with security guard who found match book in his pocket and took him to office; because of his behavior, guard called police and took out warrant; conference led to suspension that ultimately led to Parent's request for due process hearing.

The LEA's document exhibits were collated and numbered as follows:

"A1 thru A46" relating to Student's discipline history;

"B1 thru B3" relating to Student's academics, including Grade and Report Cards, Achievement test results, and Progress Reports, etc.;

"C1 thru C18" relating to Parent-School communications; and,

"D1 thru D17" covering miscellaneous matters, including enrollment history, attendance records for several years, etc.

In accordance with the parties' informal agreement to exclude documents from December 15, 2003, and forward, I did not admit the LEA's group "C" as it was all after that date; and also I did not admit the LEA's "D12 thru D17" for the same reason.

In addition to the documents, the parties took the *de bene esse* deposition of , a guidance teacher at Academy, when Student attended for a while, and called as a witness by Parent. This deposition was taken in my absence and was submitted as an exhibit by the parties' agreement.

II. A. REVIEW OF WITNESSES' TESTIMONY:

Because Parent's statement that the focus of her due process request was the aforementioned regulation and her insistence that the LEA should have know from Student's behavior and performance that he was eligible for special education services, I have indulged her Advocate's long presentation of witnesses and am providing a lengthier statement of their testimony that might otherwise be done.

The Student is now 17 years old and has not been identified by the LEA as having any disability or need for educational services under IDEA. The record, and testimony of Parent's witnesses, begins with the testimony of his teacher at Elementary School during the 1997-98 school year and a Stanford Nine he took in September 1998, on which his results were below – in some instances well below – his grade level. There was evidence of the Student's behavior there that included fights with his peers. As a result, he was referred to a anger management course conducted by , where he completed the class and received a certificate of participation.

This first witness was Student's 4th grade teacher when he repeated that grade at ; the year before he had been a student of Mr. – listed by Parent as a witness but

no longer employed by the LEA and thus not produced by them for the hearing. Among the issues that this teacher was examined on by Parent's Advocate was her ability to make referrals for evaluation of students for their special education needs, and she stated that she would do so when there was a lack of progress by a student in all areas. On cross-examination, she stated further that in her twenty-two (22) years of experience she had made four referrals for such evaluations and that each time there had been some disability found.

Also in her direct testimony, this teacher stated that she had "never done any screening for [Student] for special ed because that deals with ability, not behavior." When asked by Parent's Advocate about the kinds of behaviors would prompt her to initiate a child study for a student, she responded "That would be ED, emotional. That's not into my field, not even as an inclusive teacher. That's – you know, when I have problems with behavior, that's two different extremes. It has nothing to do with academics or their ability to learn, then we go into another realm where he would be screened for ED, emotionally disabled in some sense. And, no, I didn't do that with [Student]."

And she testified that she had had conversations with the Student's Parent; and while she remembered them in general, she recalled that she was concerned about the Student's progress and not about his ability to do the work. And on cross-examination, she reiterated that her overall impression of the Student's ability was that he could do the work. She also stated she believed she had made the right decision in not referring the Student for evaluation.

In response to questions from the hearing officer, this witness testified that she had formed an opinion of Student's ability to learn, which was that he could. And towards the end of her testimony, she stated that the Student was defiant; and she went on to state that, in response to her questioning him about why he was defiant, he was very defensive; and that "[i]t was always someone said something, done something, or even looked at him funny, or didn't do what he – if he

wanted something that was against the protocol of things, he didn't want to go along with it and then he would become disrespectful or destructive or out of his mouth in the wrong manner, especially to authority." And finally, she stated that no instruction had ever been given her by the LEA that would have deterred her from referring the Student for evaluation.

Parent's next witness was the assistant principal at during the Student's attendance there, and he had no specific role that he had with Student during his attendance but did recall that Student had some "issues."

The director of prevention services at Center, the resource that conducted the anger management course attended by Student, was Parent's next witness. He testified Student was referred in November 1998 and participated in a session held in 1999; he further testified that he did not work directly with Student. He also stated that the characteristics usually displayed for such a referral included "aggressive behavior." When Parent's Advocate began to direct questions to him about certain documents, LEA's counsel objected on the grounds that the documents to which he was referring and from which he was testifying were the witness's personal documents and had not been furnished with the other documents exchanged on March 18th; his objection was sustained. In response to a question from the hearing officer, the witness testified that he had no personal knowledge of Student's participation in the program. And in response to another question from the hearing officer, the witness stated Parent had access to the file and records he had brought to the hearing.

In 2002, because the Student had fallen so far behind, he was about to be enrolled in the same grade as one of his sisters, who is three years younger. His mother and father decided that the Student should go live with his father (from whom his mother was divorced) so he would be in another school district. This was accomplished by them with an appropriate custody order from the

Juvenile & Domestic Relations District Court.

Upon this change of residence, the Student first entered Middle School for the school year 2002-03 in the seventh grade; and the principal during that time – as well as during his second period of attendance in the school year 2003-04 – was Parent's next witness. She reviewed Student's record including the document from May 1998 relating to an after-school detention. She testified she would not consider that to reflect a behavioral problem. She was then asked by Parent about the January 1999 incident report for fighting and whether that was normal behavior; and she testified that it was. After she had been asked about subsequent incidents reported in conduct notices or suspension notices, the principal was asked if she saw a pattern; and she responded that she did see a pattern of poor behavior. She was also questioned extensively on the various forms relating to his conduct and the action taken by the LEA therefore. Then, she was asked by Parent if she thought Student's behavior interfered with his educational growth, and she responded "[Student] – yes, [Student] was defiant."

And Parent then asked the witness if she could have made a referral to child study for evaluation based on the Student's behavior pattern; and she answered that she would not think she would suspect a learning disability from that behavior pattern. Parent's Advocate then directed her questioning of principal to whether the behavioral pattern displayed by Student was sufficient to suspect an emotional disturbance; and the witness stated that she felt his difficulty was behavioral and a conduct problem. And she amplified her answer when Parent referenced that the school's educational structure was built around the concept of "clusters" whereby a student's teachers were, for the most part, 'clustered' together so that interaction between them about or with a particular student was enhanced. She testified that she recalled her ties to Student had to do with observing him in the halls of the school or in some of his classes and for disciplinary purposes in a parent

conference. She also stated she was familiar with the "child-find" provisions of IDEA. She also stated that Student's behavior did interfere with his educational growth because he was defiant. And she also stated that she had no independent recollection of Student's suspensions because that happened for a lot of students at the age Student was then.

When asked to review the teachers' Observations and Comments that were collected for the administrative conference in November 2002, principal noted that the behavior and even some of Student's grades were typical for new students during their initial nine-week period. On cross-examination, she confirmed the Student had been absent a great deal. And she also stated that Student's mother had not come to her to ask that a child study process be initiated for Student, but that such a process would have been implemented had she done so. And in response to a question from the hearing officer about whether there was some methodology at her school for following up on 'cluster' discussions about students, she said "Seventh grade is a – well, middle school is a tough three years, and I, you know, have conferences with parents who've never had children – whose children have never had difficulties in elementary school. They come to middle school and they get into this pre-adolescent and adolescent social life and, you know, that don't know what to do at that time."

Parent next called Middle School's assistant principal, who described her educational role as an "instruction specialist" who worked with teachers at improving either the content and/or delivery of their instruction as well as their classroom management. She had started at as an administrative aide, primarily focused on data analysis. She stated she might have recommended to a teacher that a referral of a student to "child study" be made for purposes of evaluating that student in terms of their need for special education services; but she did not recall making such a referral herself. She had no specific recollection of the discipline conference about Student in

November 2002, and she noted she had done more than fifty (50) such conferences in the past few weeks before giving testimony. At the request of Parent's Advocate, she reviewed the teachers' observations and comments that had been a part of the disciplinary conference and commented that she saw a student not doing the work, a student whose behavior got in the way of his educational progress. And while giving her answer, she stated "I see, again, homework assignments given, 14, homework assignments completed, 1. But, you know, I'm always somewhat confused when I see reports like this because I know that these reports go home to the parent. I know the parent is advised of the fact that a child's not doing homework, and I don't understand – you know, I don't understand that situation when a parent knows that a child's not participating."

Her testimony was interrupted by the end of the first day's hearing; and she resumed, because of prior commitments, her testimony on the third hearing day. And she testified then on direct examination that she believed a referral was proper for a student who was trying but not getting the process. And she stated that a student's behavior could be a part of his or her problem but that it was important to look at the efforts of the child.

At the beginning of the hearing's second day, Parent's Advocate posed a request for a continuance on the basis that Parent wished to contact the LEA's "parent advocate" as Parent was in need of "additional help to get through this process." And she requested that the LEA "support additional legal help for the parent." It was explained by the LEA's Assistant Director of Gifted and Special Education Programs that the person referred to by Parent's Advocate was not an advocate *per se* but provided information only. I did not find that there was any basis shown by Parent's Advocate that a request of a continuance would be in the best interests of the Student.

Parent's Advocate next raised a matter concerning the hearing officer's representation of the City Treasurer of in the collection of delinquent taxes. I noted that the Treasurer is a

constitutional officer separate from the City of and that such representation would not influence my decision in this matter. The following exchange then occurred:

HEARING OFFICER: That's fine. That's a matter of public record. Does not influence my ruling in this matter as perhaps Mr. Hagemeister can attest to. But, anyway, do you have any –

MS. POE: I'm ready for Rivers.

And the hearing went forward without further motion, request or comment from Parent's Advocate concerning this matter.

Parent's Advocate called the director of guidance at Middle School, whom she attempted to qualify as an expert in special education; her request was denied because he had no training in special education and had only commented he had had some experience with special education students during his twenty-one years experience in the school system; and in response to a direct question from Parent's Advocate, he stated he did not consider himself to be an expert in that field.

He testified that he had had two direct contacts with Student – the first when he enrolled with his father for the 2002-03 school year, and the second when he enrolled for the 2003-04 year. He recalled Student and that he believed Student's father had brought him to at the beginning of the school year 2002-03 for enrollment. He remembered meeting Student and their discussion of what grade he would be in at – the 7th grade, the same grade he had been in at Academy, his former Public school. He stated that he had given a handbook of rights and responsibilities to Student and his father that defines what are school laws and what are violations of those laws. At this point, Parent's Advocate stated she had no received no record of such handbook being given and asked that same be produced. In the colloquy that followed, I asked

the LEA's counsel if he were aware of any documents relating to Student's identification, evaluation and educational placement or in the provision of FAPE (spelled as f-a-t-e in the transcript) that Parent had not had an opportunity to inspect; and he responded there were none. Parent's Advocate then identified certain documents from those submitted by the LEA on March 18th pursuant to my order. And LEA's counsel then noted that, even if such documents had not been provided when Parent first asked to inspect Student's records, they had been made available in the document exchange for the first due process hearing (dismissed without prejudice) and available to her at least since that time. And Parent's Advocate made this comment:

> MS. POE: And, again, the example is that they do have documentation available that I didn't necessarily receive. Just to go on record. I'll move on, ...",
>
> and she turned her attention to the witness.

The director of guidance was asked a number of questions about children's behaviors at generally, a number of questions about Student's behaviors specifically, and finally a question about his duties at which he described as being focused on academics. In response to questions from the hearing officer, he noted that there were three-and-a-half counselors for about 1,200 students, and that they spent most of their time with sixth-graders – meeting with seventh-graders three times each year and eighth-graders once. He said that Student was not at long enough for them to meet other than upon his enrollment; and he concluded his testimony by stating that he had seen students with behavior patterns similar to those of Student and they were handled no differently than Student had been.

Dean of Students was the next witness for Parent. She described her educational background as including a Bachelor's in Education with emphasis in Special Education and she noted she had taught special education classes for fourteen to fifteen years. She testified that as

Dean of Students, she had limited interaction with students and was involved in handling behavioral problems including investigations of incidents that might result in suspensions. She stated that although she was authorized to make referrals for "child study" she had never done so. She had no specific recollection of Student. After being directed by Parent's Advocate to review the teachers' Observations and Comments for the November 2002 administrative conference, she was asked if Student's behavior and performance warranted a referral for the child study process. She responded that sleeping in class did not warrant such a referral. And she said that it was the parent's option to come to the school and ask for such a referral if the parent felt there was more to the poor performance than just sleeping in class. And after reviewing the various behavior notices for Student from elementary school forward, she stated she saw no pattern of misbehavior; that the fighting, which might have been a repetitive problem, disappeared after his attendance at the anger management course; and that she saw nothing that was unusual for students at Middle School or that warranted a referral to some child study process.

Parent next called Student's social studies teacher at during the 2002-03 school year, who described her educational background as including a bachelor's degree in elementary education and a master's degree in the education of gifted students. She stated she "somewhat remembered" Student being in her social studies class and that she had no recollection of what infraction had caused her to fill out the Observations and Comments form with respect to Student. After reviewing the form she submitted, she stated she had no problems with Student's behavior and thought he got along with his peers. She saw no reason for an intervention by a referral to a "child study" for evaluation, although there might have been a need for some academic intervention. She did not recall any conference with Parent. She is sure that Student was discussed at 'cluster' sessions but did not remember the specifics of any such discussion. When asked on direct what characteristics

would inspire a referral to child study, she responded that an effort without any success would cause her to make such a referral for evaluation but not a child who did not do homework or did not participate in class. And she stated on cross-examination that she did not see Student smile all that often, that he usually had the same expression when he was in her class.

Parent's last witness on the hearing's second day was the principal of School, who testified that she knew Student because he became a student at when he received a long-term suspension form Middle School. She stated that students were usually referred to because of some behavioral problem and that Student's referral stemmed from a threat he had made to a staff member at .

This witness began the third day of the hearing and testified that she can make referrals to child study for evaluation of a student as can her staff. She stated that her contact with Student was too limited for her to have made a referral. She stated that she believed Student was not interested in school, that he wanted school to be over. She explained that Student did not do those things that children with an interest in school did such as apologize for his conduct or simply say they like school.

On cross-examination, the principal agreed that Student showed signs of social maladjustment. She also testified that Student only attended the school for three or four days before his long-term suspension. She stated she did not believe his behavior was the sort that needed specially designed instruction; and she testified that his suspension was based on conflict with a security guard at the school and not over instruction.

The assistant principal for returned to the stand, having previously testified at the end of the first day's hearing. And she testified that she believed there had to be some effort by a student to do the work in order for a teacher to have some basis for suggesting to a parent that a referral to

the child study process might be appropriate.

Parent then called one of Student's teachers from the 2002-03 school year who had filled out the Observations and Comments form used at the administrative conference on November 7, 2002; the Student had been a member of her communications class during that time. She testified that the form was consistent with her memory of Student and that sleeping in class and not being in class and not willing to do assignments did interfere with a student's educational progress. She testified that Student had been discussed at 'cluster' meetings, and his being argumentative and unwilling to follow directions had been talked about by his teachers. She stated she did not consider those behaviors unique to Student, that they happened with others in her class and at . She further testified that his overall grades showed a lack of progress, a student not doing his work. She further stated that Student chose not to do his work and that there was no behavior plan in place for him.

Another teacher from that same time period, Student's reading teacher, was Parent's next witness. She recalled Student's behavior as consisting of him putting his head on his desk, refusing to participate in class, and balling up paper that he threw up into the air, or sometimes at other pupils; she did not recall any confrontational behavior by Student. She stated she would ignore his behavior after an initial attempt to get him to stop and direct her attention to teaching the rest of her class. She did not recall any disrespectful behavior from Student. She observed it was Student's choice to be absent and to engage in certain behaviors. To a question from the hearing officer, she also stated that Student's failure to turn work in or to complete work was not in her opinion reflective of Student's intellectual ability but that it did reflect that he chose not to complete the work. And to another question from the hearing officer, she noted that there were scores that were not zero on the performance report and those scores reflected his intellectual ability. Finally, she could not recall whether either of Student's parents had called or responded to the notices she sent

home.

The security guard from School with whom Student had the November 2003 confrontation was Parent's next witness. He testified briefly to the details of the incident that occurred when he found a match book in Student's pocket and took him to the office.

Parent's next witness turned out to be the wrong person as she had the same last name as the witness Parent desired but had been designated by Parent to the LEA with her full name. In the ensuing discussion of just who was the right witness, Parent's Advocate stated: "It doesn't matter. I'll just call [Student's mother] at this point."

Parent was her last witness. She testified that Student lived with her from the time he enrolled in kindergarten until the time he was finished the 5th grade at and that she had interacted with all his teachers during that time. She explained that she would see the teachers while she was dropping Student or his sisters off at school or when she was picking them up. She stated she asked them how he was doing. And she said she had sat in on some of his classes.

She also said she noticed he had behavior problems when he went to Academy and that he had problems with some of his classes. She said his suspensions at resulted from his interaction with his peers. She stated he told her he would speak with teachers about others joking around but they would not do anything about it.

Parent also testified that when Student was about to be put into same class as a sister who was younger, she spoke with his father about Student going to live with him so he would be in a school district, that of Middle School, other than . When shown Student's report cards from the 1997-98 school year, she stated he had received no support from the school; and she said she had talked with his teachers but they had given her no insight as to why he was not doing well. She further said she talked with family and friends about what she could do, and that she enrolled

him in an after-school tutoring program at a local church. And she said that while in that program, he had had some behavior problems.

She testified that she had not known of a parent resource center at the time she sought advice from her family. With respect to the anger management program Student attended, she said was told she had to go to some meeting in the evening where she talked with other women about what was happening in their respective families. She said the meetings gave her no techniques to intervene with her son's behavior. Parent said her son believed that he was not understood at school.

Student's mother further testified on direct examination that she had not known about the incidents at that led to Student's suspension, that his father had not told her about them. She stated that Student's relationship with his father at this time was not "great, but it was okay." She also denied having seen the letter from concerning her son's November 2003 suspension, and she acknowledged her participation in the conference that followed upon that suspension. She also testified that she "never knew about a child screening or a child find or any of that." She said that she had been in the PTA.

In response to a question from the Advocate about whether she ever talked with Student about the incidents for which she had received notices, she said she had sat with him and asked Student what happened; and she explained "[b]ecause there's always two sides to a story. And sometimes the adult is not always right, and sometimes the child not always right, but I view both sides and make my determination, you know, who is pretty much on task telling the truth about the subject." She also said that, when Student got in trouble, he would not be allowed to do things with the family on the week-end and would lose privileges like television; she described him as sitting in his room, looking at the walls. And she stated Student's behavior at school is different from that of his sisters "because he feels like he's not understood." And she amplified that by saying: "When

a problem arises in school and he asks a question or whatever, if he asks that question a thousand times, he doesn't get clarification that he understands what's going on, and he gets kind of blown off like, then he just pretty much shuts down." With reference to Student's November 2002 suspension, Parent stated that he had told her the school would not let him call her and that he blamed the School System for his being put in the Detention Center as a result of that incident (which occurred when he attempted reinstatement by bringing his cousin to the school, identified as his father).

Also while on cross-examination, and in response to a question about whether Student had ever expressed remorse for saying the things the security guard stated had been said by Student, Parent testified:

> Did he say he was sorry he said that to him? He said – some of the things that he said, he did not even say. So I guess he was sorry for putting me through whatever – what I had to go through.

Parent denied knowing that Student had been taken from by the police – or that the police had been called – after the altercation with the security guard in November 2003; and when asked if she thought they would have been wrong to have called the police, she stated: "Yes. I think they would be."

And when Parent was asked by LEA's counsel if the testimony about Student putting his head down on his desk were true, she finally said: "No. I wouldn't – I wouldn't say it was – it was true because I wasn't there to see it. And he said he didn't do it. So when they said he did, he said he didn't, so – ".

In response to a question from the Hearing Officer about what might have occurred in Student's life between the April 1997 and September 1998 Stanford Nines that might account for

his disparate scores, she replied that she and his father had begun having problems, and his father had moved out from the home during that time. I asked about her son's living arrangements with his father while enrolled at , and she answered that his father worked at night but her son stayed at his residence where his father's brothers also lived. She acknowledged the excessive absences from school.

At this point, Parent rested her formal presentation of witnesses.

One of Parent's witness, the guidance counselor at when Student was enrolled there, was unable to be present at any day of the hearing because of a family matter that took her out of town. The parties agreed to take her deposition on the day prior to the hearing beginning, and they agreed to do so in my absence. Her deposition reveals that she believed Student formed and maintained relationships with his peers and with several teachers at . When she was asked by Parent's Advocate if Student had behavioral problems, she agreed that she had some issues and explained that there were "behaviors that he choose (*sic*) that were not in his best interest." The guidance counselor stated that her recollection of Student was that he was a "C/D" student. And in response to a direct question from Parent's Advocate she stated she did not suspect Student as having a disability of any sort; and she explained his lack of performance as stemming from a lack of motivation. During her cross-examination, she stated that it had been a correct decision by her to not make a referral of Student to the child study process.

The LEA called just one witness, the assistant director of its Special and Gifted Education programs. She described her extensive experience and education in special education as well as her authorship of various articles thereon, and LEA's counsel moved her qualification as an expert. Parent's Advocate objected on the grounds that her training had all occurred prior the 1997 amendments to IDEA. The witness then described her additional training and experience with IDEA

and the 1997 amendments. She was qualified as an expert in special education with no further objection from Parent.

She noted that she had reviewed the documents in order to form an opinion of Student and had noticed he had done well in his classes with men teachers; she further stated she had called one of them who had taught Student in the 5th grade at and he had reported that Student had presented him with no problems. This witness testified that Student had the ability to learn, explaining as follows:

> Well, he's demonstrated he has the ability to learn. I mean, he's still scoring within the normal range, even on the achievement test scores from the elementary school. He may not be scoring as well as he should be, but it isn't because of his ability. I mean, he's demonstrating he has some ability. I don't know what that is.

And later, she addressed the matter of "socially maladjusted" behavior, explaining:

> Some of the behaviors [Student] displayed, that of defiance, oppositionalness, disrespect, those kind of behaviors fall under that – and it's an educational term. You'll find it in a psychiatric manual. It's an educational term, but they fall under that category of socially maladjustment (*sic*).
>
> And those children who display those kinds of characteristic (*sic*) show a consistent pattern of behavior that's characterized by violating the rights of others through aggressiveness, bullying, intimidation, and that kind of thing, as well as following rules that are age appropriate behavioral norms or rules. And those are the kinds of behaviors where children are constantly pushing the limit.

On her cross-examination, which was often detailed and sometimes vigorous, she testified that, in her opinion, Student did not show any reason for a referral to any child study team for evaluation

of whether he should receive special education services. She stated that he was making some choices about his behavior and performance; and that a school system could not force children who are making such choices about not being in school to learn.

At this point in the proceeding, Parent's Advocate sought to examine the witness on documents grouped under "9-C", which was objected to by counsel for the LEA; I sustained the objection on the grounds I had announced several times before – that questions of racial discrimination were not within my jurisdiction – and Parent's Advocate stopped her cross-examination of this witness.

The LEA rested its case at this point. I gave Parent's Advocate an opportunity to make closing remarks but she declined with the statement that I would not let her say what she wanted to say – an apparent reference to my sustaining of the LEA's objection noted in the immediately preceding paragraph of this decision. LEA's counsel made his closing remarks and the hearing was adjourned.

II. B. FINDINGS OF FACT

Based on the documents submitted by both parties, and upon the testimony of the witnesses as to their direct knowledge and consideration of Student's behavior and performance, and further based on my observance of them and their demeanor while they testified, I make the following findings of fact:

A. From time to time, Student exhibited an ability to perform the work requested of him at a level acceptable for his grade, as shown in the various performance reports and report cars introduced into evidence as well as by the testimony of several of his teachers.

B. Student did not like school in general and was frequently absent, as shown in the records of Student introduced into evidence by Parent and by the LEA.

C. Student clashed with authority at schools he attended, whether that authority was presented to him by a teacher or other staff person, such as security guards, or by the school's rules, as reflected in the various suspension notices that were made a part of the hearing record by Parent and by the LEA.

D. Student was not involved in the schools he attended, as shown not just be the absences noted earlier but also by him not doing the work and by him not participating in his classes, again as reflected in the numerous teachers' observations and comments forms made a part of the record by Parent and by the testimony of some of those teachers.

E. Student reacted with rage and threats of violence in some situations when his expectations or desires were not met by school personnel, as shown by the reports of the incidents that led to his suspensions from various schools.

F. Student blamed others for his behavior and misconduct at school, as was reflected in Parent's testimony.

G. Neither parent of Student was involved with school personnel about Student's behavior or lack of performance, especially after he entered Middle School, as was stated by both Student's teachers who sent notices home and by school administration personnel.

H. Neither parent of Student requested the LEA to evaluate Student to determine if he were eligible for, and in need of, special education services.

I. Neither parent of Student expressed concern to the LEA or any of its personnel that the student was in need of special education and related services.

J. None of Student's teachers or other school personnel expressed concern about his behavior or performance or found either his behavior or performance to require recommendation to the LEA's child find or special education referral system.

K. The LEA did not initiate any process to evaluate Student for his eligibility for special education services.

III. ISSUE PRESENTED

A. Is the LEA deemed to know that Student was a child requiring special education services so that Virginia Regulation 8 VAC 20-80-68(C)(8)(b) controlled his situation at the time of his suspension from in November 2003?

IV. DECISION

A. Applicability of 8 VAC 20-80-68(C)(8)(b)

The Virginia regulation with which we are concerned is as follows:

> **8. Protection for students not yet eligible for special education and related services.**
>
> a. A student who has not been determined to be eligible for special education and related services and who has engaged in behavior that violates any rule or code of conduct of the local educational agency, including behavior described in subdivisions 2 and 4 of this subsection, may assert any of the protections provided in this chapter if the local educational agency had knowledge that the student was a student with a disability before the behavior that precipitated the disciplinary action occurred.
>
> b. A local educational agency shall be deemed to have knowledge that a student is a student with a disability if

(1) The parent or parents of the student have expressed concern in writing (or orally if the parent or parents do not know how to write or have a disability that prevents a written statement) to school personnel that the student is in need of special education and related services;

(2) The behavior or performance of the student demonstrates the need for these services;

(3) The parent or parents of the student have requested an evaluation of the student to be determined eligible for special education and related services; or

(4) A teacher of the student or school personnel have expressed concern about the behavior or performance of the student to the director of special education of the local educational agency or to other personnel in accordance with the local educational agency's child find or special education referral system.

c. A local educational agency would not be deemed to have knowledge that a student is a student with a disability if the local educational agency:

(1) Conducted an evaluation and determined that the student was not a student with a disability; or

(2) Determined that an evaluation was not necessary and provided notice to the student's parent or parents of its determination in accordance with the notice requirements found in *8 VA C 20-80- 70.*

d. If the local educational agency does not have knowledge that a student is a student with a disability prior to taking disciplinary measures against the student, the student may be subjected to the same disciplinary measures applied to a student without a disability who engages in comparable behaviors.

The record as established after three (3) days of this hearing does not establish if Student is a "child with a disability" as defined by Virginia's regulation.[2] By the language of the regulation,

[2] As found in 8 VAC 20-80-10 "Definitions".

such a child is a child who has one of the following conditions:

autism,
deaf-blindness,
a developmental delay,
a hearing impairment including deafness,
mental retardation,
multiple disabilities,
an orthopedic impairment,
other health impairment,
an emotional disturbance,
a severe disability,
a specific learning disability,
a speech or language impairment,
a traumatic brain injury, or
a visual impairment including blindness,
and who by reason thereof, needs special education and related services.

In turn, "special education" is defined by this regulation as instruction which has adapted, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction in order to (1) to address the unique needs of the child that result from the child's disability; and (2) to ensure access of the child to the general curriculum, so that the child can meet the educational standards that apply to all children within the jurisdiction of the local educational agency.

There is no evidence presented during this hearing by Parent that established Student as having unique needs – indeed, the testimony of his teachers and school personnel that came into contact with him was that his behavior was not unusual among students at his schools. The Parent's Advocate on occasion asked questions of witnesses that referenced "emotional disturbance", which is a condition contained in the definition of a child with a disability. And that term is defined by the regulation as a condition exhibiting one or more of the following characteristics over a long

period of time and to a marked degree that adversely affects a child's educational performance:

1. An inability to learn that cannot be explained by intellectual, sensory, or health factors;

2. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

3. Inappropriate types of behavior or feelings under normal circumstances;

4. A general pervasive mood of unhappiness or depression; or

5. A tendency to develop physical symptoms or fears associated with personal or school problems.

The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.

No witness who testified during the hearing said that Student had an inability to learn. No witness identified Student as having an inability to maintain satisfactory interpersonal relationships with his peers or teachers. Although there was evidence of fighting with his classmates, that behavior disappeared after the course in anger management he took at Center. Several of his teachers, in their comments form and in their testimony, stated they had no confrontations with him, that he was cooperative with them – indeed, one wrote that he helped out in class.

Certainly his angry outbursts and threats directed toward teachers or school staff might be described as inappropriate behavior; but were those occurrences in situations of normal circumstances? Again, there is no evidence from a witness[3] or from a document that explains or defines the phrase "inappropriate behaviors under normal circumstances." Teachers and administrators stated under oath that some of Student's angry behavior was typical of students at his school. Parent has not provided any evidence that his behavior was of the sort contemplated as

[3] The guidance counselor from did describe such behavior as occurring when a student regularly and consistently descends the wrong (as defined by school regulations) side of the stairs even after being told repeatedly not to.

manifesting "inappropriate behavior", and I would be left to using my own judgment to make that determination[4]; and I will not do that.

Although a teacher of Student did say he wore the same expression on his face in his class, and although Parent's Advocate asked some witnesses if Student were depressed or unhappy, no one testified he was. And there is no evidence in the record that he was pervasively unhappy or depressed.

And there is absolutely no evidence in the record that Student had any tendency to develop physical symptoms or fears associated with his personal or schools problems.

In the above cited definition of emotional disturbance, children who are socially maladjusted are exempted unless they are emotionally disturbed. And one witness – the LEA's assistant director of special and gifted educational services – testified specifically to this term and what behaviors it encompasses; and a number of teachers of Student and other school personnel who came into contact with him described his behaviors in terms that were very similar to her testimony. The record does support that Student would be termed socially maladjusted and thus not on the basis of that behavior alone in need of special education services.

So, nothing appears in the record to provide a basis for finding that the LEA is deemed to have knowledge that Student was in need of special education and related services. And there is no remedy to recommend as Student is subject to the same disciplinary measures as any other student in the Public School System.

While Student appears to have difficulty in situations where his expectations conflict with the expectations of those in authority, I find nothing in the record on which to rest a finding that the

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[4] The LEA's assistant director of special and gifted educational services did describe such behaviors as being the of the sort when a person refuses to cross a floor because of a pattern of lines or curling up in a corner and crying when he or she does not get his or her way.

LEA is deemed to have knowledge that he is in need of special education services. I find suggestions of what might be a source of his difficulty; but those suggestions, if relied on by me, would end in my speculation and guessing. And I find that his suspension from in November 2003 was a discipline properly administered to Student.

V. ORDER

The request of Parent for due process filed on February 24, 2004, is dismissed.

VI. APPEAL RIGHTS

Under Virginia Regulation 8 VAC 208076(O)(1) "[a] decision by the hearing officer in any hearing, including an expedited 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. The appeal may be filed in either a state circuit court or a federal district court without regard to the amount in controversy. The district courts of the United States have jurisdiction over actions brought under § 1415 of the Individuals with Disabilities Education Act (20 USC §1400 *et seq.*) without regard to the amount in controversy."

Date: April 12, 2004

Alfred Bernard III, Hearing Officer