

VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES

Dispute Resolution &
Administrative Services

DECISION

Public Schools
School Division

Name of Parent

Division Superintendent

Name of Child

John F. Cafferky, Esquire
Counsel Representing LEA

Counsel Representing Parent/Child

James M. Mansfield, Esquire
Hearing Officer

Public Schools
Party Initiating Hearing

PROCEEDINGS

On behalf of his son, _____, (“Parents”) requested a Due Process Hearing pursuant to the provisions of the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. § 1400, *et seq.* (“IDEA”). The Parents challenged a Public School (“PS”) Administrative Review Committee’s decision upholding an IEP Team’s Manifestation Determination concerning _____’s alleged misconduct on March 11, 2008. (PS’s Exhibit No. 40). This Hearing Officer was appointed and a pre-hearing conference was held on June 25, 2008. The Due Process Hearing was initially scheduled for August 6, 2008, however, with the consent of the Parties, the Hearing was rescheduled to August 1, 2008.

PS timely submitted its Exhibit and Witness List, but the Hearing Officer received nothing from the Parents prior to the Hearing. On the morning of August 1, 2008, the Hearing Officer received a telephone call from Mr. _____ advising that Mrs. _____ was ill and requested that he and his wife be permitted to attend and participate in the Due Process Hearing

by conference call. PS counsel was contacted and informed of the request. Mr. [redacted] was advised that the Hearing would be held as scheduled and that his request would be the first item discussed.

The Hearing convened at approximately 9:30 a.m. with Mr. and Mrs. [redacted] present via telephone. Both Parties agreed to proceed with the Hearing without objection (Tr. p.p. 6-7).

PS then proffered and moved for the admission of PS's Exhibits No. 1 through 41. The same were received into evidence without objection (Tr. p.p. 8-12). Parents' Exhibit No. 1 was also received at that time without objection (*Id.*). PS then made an opening statement, followed by Mr. [redacted] (Tr. p.p. 13-26). As agreed, PS proceeded with its case-in chief first (Tr. p.p. 32-256) followed by the Parents (Tr. p.p. 257-280). PS then presented a brief rebuttal (Tr. p.p. 281-288). Both Parties presented closing arguments (Tr. p.p. 289-300).

During PS closing arguments the telephone connection with the Parents was lost. Consequently, PS's counsel was instructed to provide the Parents with a copy of the cases they cited in closing, and the Parents were advised that they could, but were not required to, present any comments or reply they may have to the cases by August 8, 2008 (Tr. p. 300). Thereupon the Hearing was adjourned.

PS submitted their case authority and the Parents submitted their response.

ISSUES PRESENTED

As agreed by the Parties, the issues for consideration are:

- 1.) Was [redacted]'s alleged misconduct on March 11, 2008 a manifestation of his disability?
- 2.) Was [redacted]'s Behavioral Intervention Plan appropriate in order for him to receive a free appropriate public education ("FAPE") as required under IDEA?
- 3.) To the extent the alleged misconduct was a manifestation of [redacted]'s

disability, and/or if his Behavioral Intervention Plan was not adequate, what relief, if any, is he entitled to receive?

FINDINGS OF FACT

is a thirteen (13) year old student who attended seventh grade in Public Schools at County Secondary School during the 2007-2008 academic year. Alexander came to PS from Florida where he received special education services (PS Exhibits Nos.1-6). Upon enrolling in PS, it was determined that continued to be eligible for special education services as a child with an emotional disability (PS Exhibit No. 8). Of note, one of PS's reasons for eligibility was that " has been observed to verbally and physically attack others without apparent reasons." (*Id.*).

After enrolling in PS, several IEPs for were developed with subsequent addenda – all of which were approved by the Parents (PS Exhibit Nos. 12-15 and 17). None of the IEPs indicated that had any special transportation requirements (*Id.*). Moreover, in October 2007 a Behavioral Intervention Plan was developed to assist in dealing with large group settings, classroom transitions, and appropriate behavior while on the school bus (PS Exhibit No. 16).

, 's Special Education Teacher, testified that on March 11, 2008 changes to 's IEP had been agreed upon with his Parents and that prior to the end of school that day she discussed the changes in services he was to receive with him for approximately thirty (30) minutes (Tr. p.p. 207-208). She testified that did not appear to be upset over the modification in his IEP (*Id.*). On the bus ride home that afternoon,

kicked another student in the head which resulted in that child's need for medical attention (PS Exhibit No. 39). The event was filmed and it clearly shows that from the

beginning [redacted] planned the attack; that he communicated his intentions to other students on the bus; and he delivered the blow at a predetermined point in time ([redacted] PS Exhibit No. 41).

[redacted]'s purported reason for the battery was simply that his victim "was gay" (*Id.*).

As a result of his actions, the Manifestation Determination Review (MDR) concluded Alexander's actions in kicking the student in the head were not a manifestation of his disability, nor were they the result of any failure on the part of [redacted] PS to implement his IEP ([redacted] PS Exhibit No. 39). On May 9, 2008, an Administrative Review Committee upheld the MDR ([redacted] PS Exhibit No. 41). It is from their decision that the Parents requested a Due Process Hearing.

At the hearing of this matter, the uncontroverted testimony was that [redacted]'s Behavioral Intervention Plan was appropriate (Tr. p.p. 103, 160, and 194), and his battery on a fellow student on March 11, 2008 was not a manifestation of any disability, but rather a premeditated, anti-social act of violence (Tr. p.p. 151). The Parents offered no evidence, expert or otherwise, to the contrary. The explanation offered for [redacted]'s behavior included an assertion that he was upset about the change in his IEP and that his behavior was being encouraged by other students on the bus. Neither explanation, however, is consistent with a manifestation of his disability.

The only documentary evidence introduced by the Parents was an Individual Therapy Treatment Plan which suggests that [redacted] may have been misdiagnosed with a Bipolar Disorder and that subsequently his medication had been changed (Parents' Exhibit No. 1). Again, however, the expert testimony was that a different diagnosis, such as Intermittent Explosive Disorder, would not explain [redacted]'s actions nor would it change the results of the manifestation determination (Tr. p. 183). As already stated, [redacted]'s teacher, [redacted], testified that she talked to him for approximately thirty (30) minutes regarding the changes to his IEP and that he did not appear to be at all upset about it (Tr. p.p. 211-213). Moreover, his

mother testified that [redacted] told her he had problems with the student he kicked, in that he was making facial and hand gestures towards him on the bus that day (Tr. P. 261). The unrefuted expert opinion was that [redacted]'s anti-behavior was not the result of frustration (Tr. p. 185), nor was the alleged encouragement of other students on the bus a causal factor in the incident (Tr. p. 194).

Lastly, both Mr. and Mrs. [redacted] testified that the relief they seek for their son is to simply have the Hearing Officer order an expungement of the incident from [redacted]'s educational records (Tr. p.p. 270 and 279).

CONCLUSIONS OF LAW

As required by IDEA, PS conducted a Manifestation Determination Review ("MDR") of [redacted]'s March 11, 2008 kicking incident. The conclusion reached was that his behavior was not directly or substantially related to his disability (PS Exhibit No. 40). Here, since the Parents are challenging the MDR decision, they have the burden of proof. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163, L. Ed. 2d 387 (2005). However, in *Fitzgerald, et al. v. Fairfax County School Board*, U.S. District Court, Eastern District of Virginia, Alexandria Division, CA No. 1:07cv1117 (May 23, 2008), as well as the Comments to the Federal Register (34 CFR Parts 300 and 301) there appears to be a question as to which party has the burden of proof in a due process hearing where, as here, a local education authority ("LEA") is removing a child with a disability from their current placement for disciplinary reasons. Nevertheless, in this case there has been no evidence, expert or otherwise, to support a finding that [redacted]'s kicking was a manifestation of his disability. On the contrary, PS's experts and educators consistently and competently testified that [redacted] was cognizant of the consequences of his behavior and that his attack was a deliberate, pre-meditated act of violence; not a manifestation of his disability. This finding is amply supported by a preponderance of evidence, with no expert opinion to the

contrary.

DECISION

After careful consideration of all the correspondence, exhibits, testimony, and for the reasons stated herein I conclude:

- 1.) 's misconduct was not a manifestation of his disability;
- 2.) His behavioral intervention plan was appropriate; and
- 3.) Even if they had prevailed, the specific relief which the Parents seek, *i.e.*,
expungement of the incident from 's school records, is not within the
Hearing Officer's authority or discretion.

For those reasons, I find that PS is the prevailing party in this matter. Finally, this decision is final and binding unless either party appeals in a Federal District Court within ninety (90) calendar days of the date of this decision or in a state court within one (1) year of the date of this decision.


Hearing Officer's Signature


Date

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Hearing Officer's Decision was delivered *via* facsimile and mail first class, postage prepaid, this 13th day of August 2008 to:

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And mailed first class, postage prepaid, this 13th day of August 2008 to:


James Michael Mansfield