

APR 26 2017

**Dispute Resolution &
Administrative Services**

CASE CLOSURE SUMMARY REPORT

School Division: County Public Schools

Name of Child:

Name of Parent:

Party Initiating Hearing:

Counsel Representing LEA: John Cafferky, Esquire, Robert M. Falconi, Esquire

Address for Counsel: Blankinship & Keith, 4020 University Drive #300, Fairfax, VA 22030

Counsel Representing Parent/Child: Harold Belkowitz, Esquire

Address for Counsel: 10427 North Street, Ste. 200, Fairfax, VA 22030

Hearing Officer's Orders and Outcome of Hearing:

The relief requested by the Parent herein is denied and the LEA is the prevailing party in this due process hearing.

This matter is DISMISSED.

This decision shall be final and binding unless either party appeals in federal district court within 90 calendar days of the date of this decision, or in a state circuit court within 180 calendar days of the date of this decision.


Richard M. Alvey, Hearing Officer

4/20/2017
Date

**DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES OFFICE OF
DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES**

School Division: County Public Schools

Name of child: _____

Name of parent: _____

Party initiating hearing: _____

Counsel representing LEA: John F. Cafferky, Susan Whyte, Blankingship & Keith, PC

Address for counsel: 4020 University Drive, Suite 300, Fairfax, VA 22030

Counsel representing Parent: Harold Belkowitz, Cheri Belkowitz

Address for counsel: 10427 North Street, Suite 200, Fairfax, VA 22030

Hearing Officer: Richard M. Alvey

Type of Decision: Manifestation Determination

Date of Issuance: April 20, 2017

Findings of Fact and Decision

Background

This matter came to be heard upon the request of an expedited due process hearing filed on January 13, 2017 by Petitioner Parent (the "Parent"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C., Section 1400 et seq., and the Regulations governing Special Education programs for children with disabilities in Virginia ("Virginia Regulations"). This Due Process Complaint arises out of a May 25, 2016 manifestation determination review ("MDR") decision that the Student's behavior during a May 12, 2016 incident was not a manifestation of the Student's disability. In addition, the Parent contends that the Student's behavior was the result of the LEA's failure to properly implement his IEP.

The Student, a fourteen year old boy on the hearing date, was found eligible for special education services under the primary disability Other Health Impairment ("OHI").

The Parent's Due Process Complaint was filed on January 13, 2017. An Amended complaint was filed on March 12, 2017. The undersigned Hearing Officer was appointed on January 23, 2017

The Due Process Hearing was held before the undersigned Hearing Officer on March 29, 30 and April 3, 2017 at the law offices of Parent's counsel. The hearing, which was closed to the

public, was recorded and transcribed by a court reporter. The Parent was present for the hearing and was represented by counsel.

The LEA was represented by the Coordinator for Due Process and Eligibility and by counsel. Counsel for the Parent and for the LEA made opening and closing statements. With the exception of School Exhibits 62, 63, and 64, all exhibits submitted by both parties were deemed admitted without objection. However, some admitted exhibits pertaining to the resumes of witnesses never called have been ignored by this Hearing Officer. Towards the end of the hearing Parent submitted two additional exhibits, numbers 90 and 91 which were admitted after argument of counsel. The Parent testified and called as a witness, the Student's physician, who testified by telephone. Without objection, he was accepted as an expert witness. The Student testified. Due to the structure of the hearing and sharing of the many witnesses by both parties, the following witnesses were called: a special education teacher, a teacher, the administrator at an alternative learning center, an assistant principal, and a school psychologist who was accepted as an expert witness without objection.

Issues

The issues asserted by the Parent to be determined are as follows:

1. Whether the MDR decision was a predetermined outcome, and therefore a denial of FAPE.
2. Whether the Student's behavior in a May 12, 2016 disciplinary incident was a manifestation of his special education disability.
3. Whether the Student's behavior was the result of the LEA's failure to properly implement his IEP.

Burden of Proof

Parent's counsel cited a previous decision of a Virginia Hearing Officer who weighed the decision in the case of Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed. 2d 387 (2005) which placed the burden of proof upon the party seeking relief against a Virginia Regulation, 8 VAC 20-81-210.O.19 which places the burden of proof in an MDR appeal upon the LEA to demonstrate the child's behavior was not a manifestation of the child's disability. This Hearing Officer finds the previous decision persuasive in that the Schaffer decision does not address the burden of proof in MDR appeals, and a special education hearing officer may not rule as invalid a Virginia statutory or regulatory provision. I find the burden of proof is on the LEA to establish that the Student's May 12, 2016 behavior was not a manifestation of his disability.

Findings of Facts

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Finding of Facts are as follows:

1. Student was born on _____, _____. He is a resident of _____ County, Virginia.
2. At all times concerned herein, Student has been eligible for special education and related services under the Disability Condition Other Health Impairment, due to a diagnosis of Attention Deficit Hyperactivity Disorder ("ADHD")
3. On May 12, 2016, the Student returned to school following a four day suspension for assaulting another student.
4. During the morning hours, the Student suddenly and unexpectedly encountered his accuser in the hallway.
5. The Student called his accuser a "snitch" and told him he was "dead".
6. A teacher heard the threat, told the Student his conduct was "inappropriate" and directed him to move on.
7. Later in the afternoon, the Student approached his accuser who was sitting with friends at a table in the cafeteria and repeated threats.

Conclusions of Law

Based upon the above Findings of Fact and the arguments of counsel, the Conclusions of Law are as follows:

Whether the MDR Decision was a predetermined outcome, and therefore a denial of FAPE.

Parent presented evidence that establishes the MDR determination and a disciplinary hearing conducted by the Office of the Superintendent were conducted just hours apart and at different locations. These facts alone are not enough to establish that the MDR decision was a predetermined outcome. However, even assuming the decision was predetermined, the true issue to be decided is whether the Student's conduct was a manifestation of his disability.

Whether the Student's behavior in a May 12, 2016 Disciplinary incident was a manifestation of his Special education disability

The IDEA requires that for children with disabilities who have been suspended for 10 or more days total in a school year, the local education agency (LEA) must hold a manifestation determination hearing, within 10 school days, to determine whether the conduct was a manifestation of the child's disability.

The LEA, the parent, and relevant members of the IEP team (as determined by the parent and the LEA) shall review all relevant information in the student's file, including the Student's IEP, any teacher observations, and any relevant information provided by the parent to determine if the conduct in question was caused by, or had a direct and substantial relationship to the student's disability; or if the conduct in question was the direct result of the LEA failure to implement the IEP. 20 U.S.C. Section 1415(k)(E) and 8VAC20-81-160D.

Following the May 12, 2016 misconduct of the student, the LEA timely convened an MDR on May 25, 2016. The Parent, a psychologist, a general education teacher, a principal designee, a special education teacher, an administrator, a procedural support liaison and a counselor attended the meeting. The testimony established the MDR Team reviewed the Student's disciplinary records, his attendance records, his special education eligibility reports, his 2016 IEP and amendments, his report cards, his IEP progress reports, information from his teachers and input from the Parent. Although the Parent raised questions at the hearing over whether the MDR team reviewed all relevant information, I find this requirement was met.

The main issue to be addressed is whether, as the Parent alleges, the Student's behavior on May 12, 2016 was a manifestation of his OHI disability. On that date, the Student returned to school from a four day suspension for assaulting another student. The Student had surmised that the other student had accused him of the assault. When the Student suddenly and unexpectedly encountered his accuser, he called him a "snitch" and told him he was "dead". A teacher heard the confrontation, told the Student his conduct was "inappropriate" and told him to move on.

Hours later, the Student was in the cafeteria when he approached a table occupied by "the snitch" and several other students. Several different versions of what occurred in the cafeteria are included in the record. The common denominator is that the Student threatened "the snitch" again and may have repeated the threats even later in the school day.

The evidence establishes the Parent's contention that the Student's misconduct on May 12, 2016 is similar to numerous other acts of his misconduct throughout his school career. The Parent questions why, when all these previous acts of misconduct never triggered an MDR, this series of incidents do. Of course, the answer is, as stated earlier, whenever suspension exceeding ten days during a school year is considered, an MDR must be conducted. The need to conduct an MDR was never before triggered. It's important to point out that many of these prior acts of misconduct were certainly manifestations of the Student's disability and many such acts were probably not.

The Parent presented testimony from an expert witness, the Student's doctor. The doctor's testimony was very enlightening. The doctor testified that impulsivity is a manifestation of the Student's disability. He opined that the Student probably acted impulsively when upon his return from four days of suspension, he suddenly came face to face with his accuser. The doctor was unaware that additional threats were made hours later in the school cafeteria. When presented with that additional fact, he opined that without additional provocation, the repeated threats would not be considered compulsive. (March 29, 2017 transcript, page 282).

Members of the MDR team generally agreed with the doctor's opinion in that impulsivity follows a triggering event, a stimuli. (March 30, 2017 Transcript, page 538). In explaining her conclusion that the Student's misconduct was not an impulsive act, the school

psychologist explained there was an element of calculation and time for the Student to reflect. Though the teacher in the earlier hallway incident had told the Student his conduct was inappropriate, the Student sought out the "snitch" in the cafeteria. The school psychologist found there appeared to be strategy on his part. She noted there were no adults around when the second set of threats were delivered. (April 1, 2016 transcript, page 798).

Significantly, both the doctor and the members of the MDR team explained that when trying to determine if an act was due to impulsivity, find the stimuli. In the hallway incident, the doctor found the stimuli in that the Student suddenly and unexpectedly came upon his accuser. Many of the members of the MDR team conceded that this could be sufficient stimuli and therefore, the hallway threat may have been impulsive.

No evidence was presented to show stimuli in the second and possibly third threat incidents. Counsel for Parent argued that stimuli could be found in the conversation that occurred at the lunch table between "the snitch's" friends and the Student. I don't find this argument persuasive. The evidence is unclear as to the conversation. However, it is clear the Student approached the table after having been told making threats was inappropriate. I find that the Student's May 12, 2016 misconduct was not a manifestation of his OHI disability.

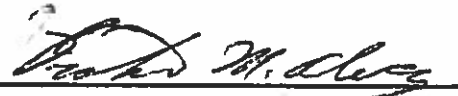
**Whether the Student's behavior was a result of the
LEA's failure to properly implement his IEP**

Having found the Student's behavior was not a manifestation of his disability, I also find the Student's behavior was not a result of the LEA's failure to properly implement his IEP.

Order

For the reasons set forth above, it is hereby ordered as follows:

1. The relief requested by the Parent herein is denied; and
2. The LEA is the prevailing party in this due process hearing.
3. This decision shall be final and binding unless either party appeals in federal district court within 90 calendar days of the date of this decision, or in a state circuit court within 180 days of the date of this decision.


Richard M. Alvey