

**BEFORE THE HEARING OFFICER
EMPOWERED BY THE
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION**

XXXXXXXXXXXXXX,)	
)	
Petitioner/Student)	
v.)	Expedited Due Process Complaint
)	Filed: July 31, 2012
Portageville School District,)	
)	
Respondent)	

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
DECISION AND ORDER**

The Hearing Officer, after conducting the expedited due process hearing in this matter on September 7, 2012, issues the following Findings of Fact, Conclusions of Law, Decision and Order:

I. FINDINGS OF FACT

The Hearing Officer makes the following Findings of Fact:

A. The Parties

1. At all times material to this due process proceeding, the Student resided with his Father within the boundaries of the Portageville School District (ADistrict@ or ARespondent@) and has attended school in the District. (Tr p. 22). The Student and his Father speak English as a primary language. (JEX 1, p. 2). At all times relevant to this proceeding the Student has been a Achild with a disability@ as that term is defined by the Individuals With Disabilities Education Act (AIDEA@) and the State Plan for Special Education (2010) (AState Plan@). (Tr p. 22).
2. The District is located in New Madrid County, Missouri and during school year 2011-12 had an enrollment of approximately 786 students. (Missouri School District Directory).
3. During this proceeding, the Student and Parent were represented by Celestine Dotson, Law Office of Celestine Dotson, LLC, 300 N. Tucker, Suite 301, St. Louis, Missouri 63101.
4. During this proceeding the District was represented by Ernest G. Trakas and Betsy Helfrich, Mickes Goldman O=Toole, LLC, 555 Maryville University Dr., Suite 240, St. Louis, Missouri 63141.

5. The Hearing Officer for the expedited hearing was Ransom A Ellis, III of the law firm of Ellis, Ellis, Hammons and Johnson, P.C., 901 St. Louis Street, Suite 600, Springfield, Missouri 65806-2505.

6. During all times relevant to this proceeding the following persons were employed by the District and have provided educational services to the Student:

XXXXXX	Superintendent (school year 2011-12)
XXXXXX	High School Principal (school year 2011-12)
	Superintendent (school year 2012-13)
XXXXXX	Assistant Principal, Portageville High School
XXXXXX	Special Education Process Coordinator
XXXXXX	Special Education Process Coordinator
XXXXXX	Special Education Process Coordinator
XXXXXX	Counselor
XXXXXX	Special Education Teacher
XXXXXX	Special Education Teacher
XXXXXX	Regular Education Teacher

B. Procedural Background

7. The expedited due process complaint was filed by the Student=s Father, through Petitioner=s attorney, with the Department of Elementary and Secondary Education (ADESE@) on July 31, 2012. (HEX 1). DESE assigned the Hearing Officer and notified the parties (HEX 2 through 5) on August 1, 2012, and the Hearing Officer corresponded with the parties on August 2, 2012. (HEX 6).

8. On or around August 2, 2012, Ernest G. Trakas of the law firm of Mickes Goldman O=Toole, LLC, entered an appearance on behalf of the District. Also present at the hearing was Betsy Helfrich of the law firm of Mickes Goldman O=Toole, LLC.

9. On August 6, 2012, the Hearing Officer issued Order Number 1 (Notice of Pre-Hearing Telephone Conference) which set the pre-hearing telephone conference in this case for August 8, 2012. (HEX 7). The pre-hearing telephone conference took place on August 8, 2012. During the telephone conference, the date for the hearing and the issues to be presented to the Hearing Officer were agreed upon. On August 9, 2012, the Hearing Officer issued Order Number 2 (Notice Of Hearing And Hearing Order) which scheduled the hearing in this matter for September 6, 2012, in Portageville, Missouri. (HEX 8).

10. On August 9, 2012, the District filed its Response to Petitioner=s Request for Due Process (HEX 9), District=s Notice of Insufficiency (HEX 8) and Motion to Dismiss Expedited Due Process Complaint. (HEX 9).

11. Prior to August 22, 2012, the parties jointly agreed to change the date of the due process hearing from September 6, 2012 to September 7, 2012. On August 22, 2012, the Hearing Officer issued Order Number 3 (Amended Notice Of Hearing And Hearing Order) which rescheduled the hearing in this matter for September 7, 2012, in Portageville, Missouri. (HEX 11).

12. The expedited due process hearing in this matter was held on September 7, 2012, in Portageville, Missouri. The hearing was open as determined by Petitioners. (Tr p. 6).

13. During the hearing the following exhibits were accepted into evidence:

A. Hearing Officer=s Exhibits (AHEX@) B HEX 1-11. (Tr pp. 6-7).

B. Joint Exhibits (AJEX@) B JEX 1-6. (Tr p. 7).

14. Prior to the hearing neither Petitioner nor the District exchanged separate exhibits, other than the above-described Joint exhibits. At the hearing, Petitioner sought to introduce two exhibits which were sent to District=s counsel and the Hearing Officer on Thursday, September 6, 2012. The District objected to the admission of these documents in that they were not exchanged in a timely manner, as required by the IDEA Regulations and the State Plan, Regulation V, *Procedural Safeguards/Discipline*, p. 73. The Hearing Officer refused to accept the documents proffered by Petitioner based on Petitioner=s failure to exchange the documents within two (2) business days prior to the expedited due process hearing, as required by the State Plan, and as required by the Hearing Officer=s Pre-Hearing Order. (HEX 11). (Tr pp. 7-13).

C. Time Line Information

15. As noted above, this matter is an expedited due process proceeding pursuant to the Individuals with Disabilities Education Act (AIDEA@), the Missouri State Plan for Special Education (2010) and the IDEA Regulations, 34 C.F.R. ' 300.532(c). The expedited due process complaint was filed by the Student=s Father, through their attorney, with the Department of Elementary and Secondary Education (ADESE@) on July 31, 2012. (HEX 1).

16. The IDEA Regulations, 34 C.F.R. ' 300.532(c)(2) provide that an expedited due process hearing must be conducted within twenty (20) school days of the date the complaint requesting the hearing was filed. The term Aschool days@ is defined by the Regulations, 34 C.F.R. ' 300.11(c) as Any day when children are in attendance for instructional purposes.@ The regular session of the District began on August 17, 2012. In this case, the twentieth (20th) school day was calculated by the parties to be September 14, 2012. The Hearing in this matter took place and was completed on September 7, 2012.

17. The IDEA Regulations, 34 C.F.R. ' 300.532(c)(2) also provide that the Hearing Officer=s decision must be made within ten (10) school days after the hearing. In this case, the tenth (10th) school day following the end of the hearing is September 21, 2012. The decision in this case issued on September 21, 2012.

D. The Issues and Proposed Remedy

18. The following issues were presented to the Hearing Officer for decision:

Issue Number 1: Whether the District conducted a Manifestation Determination regarding the Student=s conduct in compliance with the Regulations of the Individuals with Disabilities Education Act (AIDEA@) 34 C.F.R. ' 300.530(e).

Issue Number 2: If so, whether the determination made by the Student=s Team during the Manifestation Determination Meeting was appropriate and did not violate the IDEA Regulations, 34 C.F.R. ' 300.530.

(Tr p. 5; HEX 11).

19. The Petitioners requested that the Hearing Officer grant a remedy which requires the District to return the Student to the placement set forth in his September, 2011, IEP. (Tr p. 140).

E. Background Facts

20. On October 6, 2009, the Student=s Team conducted a re-evaluation of the Student. (JEX 1, p. 4). Prior to the re-evaluation, the Student had been medically diagnosed as having Attention Deficit Hyperactivity Disorder (AADHD@) which was found to Aaffect the Student=s progress in the general education setting because he may become easily distracted and gets easily confused if there are multiple concepts presented in the same area of study at the same time.@ (JEX 1, p. 4). The Student=s evaluation team determined that his educational diagnosis was Other Health Impaired (AOHI@). (JEX 1, pp. 1-4; Tr pp. 22-23; Tr pp. 97-98).

21. During school year 2011-12, and at the time of the disciplinary action involved in this proceeding, the Student was a Ninth Grade Student and attended the District=s High School. (JEX 2; Tr p. 23).

22. On September 12, 2011, the Student=s IEP Team met and developed his annual IEP. (JEX 1, p. 2). The September 12, 2011, IEP was the Student=s most recent IEP prior to the disciplinary events that gave rise to this due process complaint. (Tr p. 19). The Student=s IEP Team developed two goals and objectives for him, as follows:

Annual Goal No. 1. [The Student] will demonstrate written language skills that include complete sentences, correct punctuation and capitalization and spelling with 80% accuracy as measured on five out [of] five random date days by the end of the IEP year.

Annual Goal No. 2. [The Student] will keep and maintain an assignment notebook or student planner on 5 out of 5 school days with 80% accuracy by the end of the IEP year.

(JEX 1, pp. 7-8). The Team also determined that the Student's educational placement should be Inside Regular Class at least 80% of time, (JEX 1, p. 12), the least restrictive educational placement on the continuum of educational placements. (Tr p. 131). The IEP indicates that the Student was in regular classes approximately 85% of the time, but that full participation in regular education [was] not appropriate because [the Student] requires a study skills class to help aid him in resources related to other general education curriculum [and] . . . also uses this time for organization of his homework and classroom work. (JEX 1, p. 11). The IEP states that the Student was receiving two hundred fifty-five (255) minutes of special education services per week, or fifty-one (51) minutes of special education services per school day. (JEX 1, p. 9).

23. On November 17, 2011, the Student brought a computer flash drive¹ to school. (Tr pp. 88-90). The Student used the flash drive while he was doing class work on a computer in his Computer Business Applications class. (Tr p. 132). After the class ended, the classroom teacher, discovered the flash drive in the computer and opened it to determine who owned it. (Tr p. 132). When the teacher opened the flash drive, she discovered multiple digital images which were considered by the District to be pornographic and/or child pornographic images. (JEX 5, p. 26; Tr pp. 107, 132).² There is no evidence that the Student displayed the images to any other person while at school. The Student admitted to his Father that he had downloaded the images onto the flash drive a long time before he brought the flash drive to school and had forgotten that the images were on the flash drive when he brought it to school. (Tr p. 90, Ins. 14-20).

¹ The flash drive involved in this case was also referred to in the record as a thumb drive and a jump drive all of which refer to a small portable computer data storage device which includes a flash memory and an integrated Universal Serial Bus (USB) interface. This decision will use the term flash drive for purposes of clarity.

² The District's Special Education Discipline Documentation Form (JEX 5, p. 26) describes the Student's conduct as follows:

[The Student] was found to have a flash drive at school which contained pornographic/child pornographic images.

The images were not placed into evidence and no finding is made herein concerning whether the images legally constitute pornography or child pornography. It is sufficient for this proceeding that the District determined that the possession of the images constituted a violation of the Student Code of Conduct, which subjected the Student to a long-term disciplinary suspension.

24. On November 17, 2011, the Principal of the District=s High School gave the Student a ten day out-of-school suspension and recommended to the District=s Superintendent that the Student receive an extended summary suspension and/or be expelled from school. (JEX 2, p. 21; Tr p. 108). This disciplinary matter was the basis for the expedited due process complaint filed in this case. (Tr pp. 24-25).

25. The District immediately reported the Student=s conduct to the New Madrid County Sheriff=s Office. (JEX 2, p. 21). The Student was in the custody of the New Madrid County Juvenile Authorities from November 17, 2011 through November 23, 2011. (Tr p. 92). The District did not have school on Wednesday through Friday, November 23, 2011 through November 25, 2011, due to the Thanksgiving Holiday. The Student served his ten day out-of-school suspension on November 17, 18, 21, 22, 28, 29, 30 and December 1, 2 and 5.

26. During school year 2011-12, prior to November 17, 2011, the Student had committed no violations of the District=s Student Code of Conduct and had no out-of-school suspensions and no in-school suspensions. (Tr pp. 25-26).

27. On December 1, 2011, the Student=s Father was given oral notice that a Manifestation Determination Meeting would be held concerning the Student=s conduct on December 16, 2011. (JEX 3, pp. 22-23). The Student=s Father was subsequently provided a written notice confirming the date and location of the meeting. (JEX 3, pp. 22-23; Tr pp. 76-77). The date of December 16, 2011, was requested by the Student=s Father and was agreed to by the District after the Student=s Father requested the later date so as to accommodate the schedules of additional people he wished to invite to the meeting. (Tr p. 77; JEX 3, p. 23).

28. On December 5, 2011, the District=s Superintendent notified the Student=s Father by letter, that she had decided to extend the suspension of the Student Afor one-hundred eighty (180) school days beginning December 5, 2011.@ (JEX 4, pp. 24-25; Tr p. 78). The Superintendent further stated that the Student=s conduct violated Board of Education Policy 2600 B Discipline; Policy 2610 B Discipline B Behavioral Expectations; and, Regulation 2610 B Discipline B Behavioral Expectations. (JEX 4, p. 24; Tr pp. 93-94).

29. The Manifestation Determination Meeting was held on December 16, 2011. (JEX 5, p. 24). At the time of the Manifestation Determination Meeting, the Student had been on his out-of-school suspension for nineteen (19) school days.³

³ At the time of the Manifestation Determination Meeting, the Student had been suspended out-of-school for his conduct on November 17, 2011, for nineteen (19) school days B November 17, 18, 21, 22, 28, 29, 30 and December 1, 2, 5-9 and 12-16.

30. On December 16, 2011, the Manifestation Determination Meeting was held. The following persons were present at the meeting and comprised the Student=s Team: the Student=s Father and Grandmother; Charles Mueller (the Student=s private Counselor from Boothill Counseling Service); Michael Allred (the High School Principal and LEA Representative); Mary Sample (a Process Coordinator and Person Interpreting Evaluation Results); Judy Scherer (a School Counselor and Person Interpreting Evaluation Results); Barbara Lindsey (the Student=s 8th Grade Special Education Teacher)⁴; Christina Brands (one of the Student=s High School General Education Teachers); and Patty Johnson (one of the Student=s High School General Education Teachers). (JEX 5, p. 31; Tr pp. 73-75; Tr pp. 100-102).

31. During the Manifestation Determination Meeting, the following events occurred:

A. The Student=s Team reviewed all relevant information in the Student=s file, the Student=s IEP and teacher observations. (Tr pp. 75-76; Tr p. 103). Included in the information reviewed by the Student=s Team was the Student=s September, 2011, IEP (Tr p. 117; JEX 1), his 2009 educational re-evaluation (Tr pp. 117-118) and the medical records from the Student=s psychiatrist which dealt with his medical diagnosis of ADHD, which were contained in his education file. (Tr pp. 118-119). In particular, the District=s Process Coordinator stated that the Student=s Team Alooked at what was listed as [the Student=s] disability on the IEP and the behaviors that he had exhibited that qualified him for the services.@ (Tr p. 120, lns. 1-6). The Student=s most recent IEP describes the Student=s disability as follows:

A[The Student=s] ADHD affects his progress in the general education setting because he may become easily distracted and gets easily confused if there are multiple concepts presented in the same area of study at the same time in a days class setting. When mathematics are concerned [the Student] has difficulties identifying and using appropriate problem solving strategies. He experiences difficulties choosing the correct operation when working with multi-step algebraic equations. He may experience and demonstrate difficulty following the sequence of steps in a multi-step computation and may need to seek the teacher=s assistance. Overall, [the Student] may experience learning things in the general education setting at a slower pace then his peers.@

(JEX 1, p. 4). The Student=s Team also reviewed the Student=s IEP. No evidence was presented during the hearing that the Student=s Father claimed at the Manifestation Determination Meeting that the District had failed to implement the Student=s IEP. Likewise, no evidence was presented at the hearing and Petitioner did not argue in his Proposed Findings of

⁴ The Student=s 8th Grade special education teacher was substituting for the Student=s 9th grade special education teacher, who was not available to participate in the meeting due to a serious medical problem. (Tr p. 121).

Fact that the Student=s conduct was the direct result of the District=s failure to implement his IEP.

B. The Student=s Team reviewed the conduct that the Student had engaged in on November 17, 2011, (JEX 5, p. 28), including the following information:

(1) The Student=s Team reviewed the Student=s conduct as described by his Computer Business Applications classroom teacher who discovered the flash drive in the computer at the end of her class, opened it to find out who left the flash drive, discovered the images and reported them to the District=s Administration. (Tr pp. 131-132).

(2) The Student=s Team reviewed the disciplinary notices that had been provided to the Student.

(3) The Student=s Father told the Student=s Team that the Student had downloaded the digital images Aa long time ago and that he did not know [that the digital images were] on [the flash drive] and he took it to school . . . without knowing what was on there.@ (Tr p. 90, lns. 14-17).

C. The Student=s Team reviewed relevant information about the Student=s medical issues provided by the Student=s Parent, (Tr pp. 75-76; Tr pp. 103-105), and the Student=s private Counselor from Boothill Counseling Service, including the following information:

(1) The Student=s Father provided the Student=s Team with a handwritten note from the Student which told his side of the story and a handwritten Aform@ that had a list of items he wanted to discuss with the Student=s Team. (Tr p. 104).

(2) The Student=s Father testified that he provided the Student=s Team with what he termed an Aaxis report@ from the Student=s psychiatrist which set forth the Student psychological diagnoses. (Tr pp. 60-61). The District=s Process Coordinator, testified she did not recall receiving any written materials at the Manifestation Determination Meeting from the Student=s psychiatrist, which were provided either by the Student=s Father or his Counselor. (Tr p. 118).

(3) The Student=s Father reported to the Student=s Team that the Student had a new psychiatrist who had seen the Student only a very few times. The Student=s Father further reported that the Student=s psychiatrist had decided to change the Student=s medications and took him off of certain medications which he had been taking to help him sleep at night, (Tr pp. 64-66), and that change had caused the Student to suffer from sleep deprivation. (Tr p. 67).⁵ The Student=s Father also told the Team that he had asked the Student=s psychiatrist to provide a letter to the Team, but she was unwilling to provide one because she did not know the Student well enough. (Tr p. 64).

(4) The Student=s Counselor from Bootheel Counseling Services testified that he discussed the Student=s medical diagnosis of ADHD with the Team and that the Student=s medications had been changed by his Psychiatrist during the Summer and that the Student had completed taking his old medications about two weeks prior to the disciplinary event on November 17, 2011. (Tr pp. 34-35). The Student=s Counselor testified that during the Manifestation Determination Meeting, he provided the Student=s Team with his opinion concerning the Student=s conduct, which was that when the Student brought the flash drive to school, it was related to the Student=s ADHD because it was an Aimpulsive act.@ (Tr p. 35).

(5) The Student=s Father testified that he believed the Student=s Team did not want to listen to him. (Tr pp. 64-65). The Student=s private Counselor testified that both he and the Student=s Father were given an opportunity to express their thoughts and opinions. (Tr pp. 51-52). The District=s Process Coordinator testified that she believed everyone at the meeting had a fair opportunity to express their viewpoints, including the Student=s Father and Counselor and noone was cut off during the discussions. (Tr pp. 104-105; Tr pp. 111-112).

D. The Student=s Team reviewed teacher observations concerning the Student, (JEX 5, p. 28), including the following information:

(1) The Student=s Team reviewed the observations and statements of the Student=s teachers concerning the specific incident and the Student=s behavior in general during the time leading up to the November 17, 2011 incident. (Tr p. 76).

⁵ The Student=s Father first testified that he could not remember when the Student had discontinued taking the medication. He explained that the Student=s new psychiatrist did not want him to take the medication, but he continued to give it to his son for some time until his new psychiatrist insisted that the medication be discontinued. With some prodding during examination by the Hearing Officer, the Student=s Father stated that he thought the Student had stopped taking the medication approximately two weeks prior to the November 17, 2011, incident. (Tr pp. 84-87).

(2) The Student=s Team discussed the comments of the Student=s Father, that the Student was suffering from sleep deprivation due to a change in his medications. None of the teachers or other District personnel who were on the Student=s Team stated that the Student appeared to be sleep deprived or that he was having a hard time staying awake at school around the time of the November 17, 2011, disciplinary incident. (Tr pp. 110-111).

(3) The Student=s Father testified that the Student=s 8th Grade special education teacher stated that she felt the Student Awas a completely changed kid from what she knew of the issues he had before.@ (Tr p. 64, Ins. 23-24). The Student=s Father also pointed out to the Student=s Team that since the beginning of his ninth grade year, the Student had improved grades, perfect attendance, had not gotten an in-school or out-of-school suspension and was participating on the District=s football team. (Tr p. 58; Tr pp. 64-65).

E. The Student=s Team determined that the Student=s conduct on November 17, 2011 was not a manifestation of the Student=s disability. (JEX 5, p. 28).

F. The Student=s Team determined that the Student continued to need to receive educational services so he could continue to meet the goals in his IEP. The Student=s Team determined that the appropriate educational placement for the Student was Home Bound and the services that would be provided in that placement were sixty (60) minutes of special education services per day. (JEX 5, P. 28; JEX 6, p. 32; Tr pp. 130-131).⁶

32. During the Manifestation Determination Meeting on December 16, 2011, the Student=s Team reviewed all relevant information in the Student=s file, including the Student=s IEP, any teacher observations, and any relevant information provided by the parents 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 District=s failure to implement the IEP. During the Manifestation Determination Meeting, the Student=s Father did not allege that the Student=s conduct Awas the direct result of the [District=s] failure to implement the Student=s IEP.@

33. The Student=s conduct on November 17, 2011, can not reasonably be said to involve the type of distraction or confusion which typified the nature and extent of the Student=s disabilities as described in his most recent IEP. The determination of the Student=s Team that the Student=s

⁶ The special education service minutes provided to the Student while he was in the Home Bound placement as a result of his out-of-school suspension were sixty (60) minutes per day, which was an increase in service minutes from the fifty-one (51) minutes per day that he received at school through his September, 2011 IEP. (JEX 6, p. 32).

conduct on November 17, 2011, was not caused by and/or did not have a direct and substantial relationship to the Student=s disability, was appropriate.

34. The Student=s conduct on November 17, 2011, could not reasonably be said to Adirectly result from the LEA=s failure to implement the Student=s IEP.@ In fact, during the Manifestation Determination Meeting, during the hearing in this matter and in Petitioner=s Proposed Findings of Fact, the Petitioner did not allege that the Student=s conduct on November 17, 2011, Awas the direct result of the [District=s] failure to implement the Student=s IEP.@ The determination of the Student=s Team that the Student=s conduct on November 17, 2011, was not the direct result of the District=s failure to implement the Student=s IEP, was appropriate.

35. On December 16, 2011, the District provided the Student=s Father a Notice of Action which documented the District=s proposed change of placement (Home Bound) and change of services for the Student. (JEX 6, pp. 32-33; Tr pp. 113-114).

II. CONCLUSIONS OF LAW

The Hearing Officer makes the following Conclusions of Law:

36. Respondent District is a Missouri Public School District which is organized pursuant to Missouri statutes.

37. The Student is now and has been a resident of the District during all times relevant to this due process proceeding, as defined by Section 167.020 RSMo. The Student is now and has been during all times relevant to this proceeding, a Achild with a disability@ as that term is defined by the IDEA Regulations, 34 C.F.R. ' 300.8, the State Plan, Regulation I B *General Provisions*, p. 2 and Section 162.675 (1) RSMo.

38. Article IX ' 2(a) of the Missouri Constitution states in pertinent part that A[t]he supervision of instruction in the public schools shall be vested in a state board of education. . . .@ The State Board of Education for the State of Missouri is the AState Educational Agency@ (ASEA@) for the State of Missouri, as that term is defined in the IDEA, 20 U.S.C. ' 1401(28).

39. The IDEA, its regulations and the State Plan which constitutes regulations of the State of Missouri, further define the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as the District, in providing special education and related services to students with disabilities.

40. The burden of proof in an administrative due process hearing pursuant to the IDEA is placed on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528 (2005). Here the Student=s Father filed the expedited due process complaint and he therefore bears the burden of proof on the issues presented in this proceeding.

41. The Student=s Father filed this expedited due process complaint on July 31, 2012, (AComplaint@). The Complaint is brought pursuant to the discipline procedures of the IDEA, including its Regulations, 34 C.F.R. ' ' 300.530-300.537, the State Plan, Regulation V B *Procedural Safeguards/Discipline*, pages 80-85 and Section 162.961.4 RSMo.

42. The IDEA Regulations, 34 C.F.R. ' 300.532(c)(2) provide that an expedited due process hearing must be conducted within twenty (20) school days of the date the complaint requesting the hearing was filed. The term Aschool days@ is defined by the IDEA Regulations, 34 C.F.R. ' 300.11(c) as Any day when children are in attendance for instructional purposes.@ The regular session of the District began on August 17, 2012. The due process hearing was held on September 7, 2012, which was fifteen (15) school days following the filing of the expedited due process complaint. The IDEA Regulations, 34 C.F.R. ' 300.532(c)(2) also provide that the Hearing Officer=s decision must be made within ten (10) school days after the hearing. The decision in this case issued on September 21, 2012, which was ten (10) school days following the expedited due process hearing on September 7, 2012. The time lines for conducting an expedited due process hearing and issuing the decision were met.

43. The IDEA, its regulations, the State Plan and the Missouri statutes substantially limit the scope and extent of the authority of a Hearing Officer in an expedited due process proceeding. Specifically, the IDEA Regulations limit the scope of the rights which are subject to expedited due process. The IDEA Regulations, 34 C.F.R. ' 300.532 provide that A[t]he parent of a child with a disability who disagrees with any decision regarding placement under ' ' 300.530 and 300.531, or the manifestation determination under ' 300.530(e) . . . may appeal the decision by requesting a hearing pursuant to ' ' 300.507 and 300.508(a) and (b).@

44. The issues raised in the Complaint are limited to the statutory jurisdiction of this Hearing Officer and encompass school years 2011-12 and 2012-13 through July 31, 2012, the date of the filing of the Complaint. (ARelevant Period@).

45. During the Relevant Period, the Student was enrolled in the District. Beginning on November 28, 2011, through the end of the Relevant Period, the Student was on an extended summary suspension, had an educational placement of Home Bound and received sixty (60) minutes of special education services per day. The Student=s out-of-school disciplinary suspension is scheduled to continue until December, 2012.

46. The IDEA Regulations, 34 C.F.R. ' 300.530(e), and the State Plan, *Regulation V, Procedural Safeguards/Discipline*, pp. 81-82, set forth the requirements for a Manifestation Determination, as follows:

A(e) *Manifestation Determination.*

- (1) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child=s IEP Team (as

determined by the parent and the LEA) must review all relevant information in the student=s file, including the child=s IEP, any teacher observations, and any relevant information provided by the parents to determine B

- (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child=s disability; or,
- (ii) If the conduct in question was the direct result of the LEA=s failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the child=s disability if the LEA, the parent, and relevant members of the child=s IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.@

47. During a Manifestation Determination Meeting, the student=s team must analyze the child=s behavior Aas demonstrated across settings and across time when determining whether the conduct in question is a direct result of the disability.@ Federal Register, Vol. 71, No. 156, p. 46720 (August 14, 2006).

48. The Student=s Team for purposes of a Manifestation Determination Meeting is the Student=s IEP Team which includes: (1) the parents of the child; (2) not less than one regular education teacher of the child; (3) not less than one special education teacher of the child; (4) a representative of the District; (5) an individual who can interpret the instructional implications of evaluation results; (6) at the discretion of the parent or the District, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and, (7) the child, whenever appropriate. IDEA Regulations, 34 C.F.R. ' 300.321(a); State Plan, Regulation IV B *FAPE/IEP/LRE*, pp. 45-46.

49. At the December 16, 2011, Manifestation Determination Meeting, the individual who served as the Aspecial education teacher of the child@ was the special education teacher of the Student during school year 2010-11, his 8th Grade year, rather than his 9th Grade special education teacher. This substitution occurred because the Student=s 9th Grade special education teacher was unable to attend the meeting due to a serious medical condition. The IDEA Regulations, 34 C.F.R. ' 300.321(a) defines the appropriate composition of a student=s IEP Team. The Comments to that regulation contained in the Federal Register provide further insight into the specific individuals who must be present for an IEP Team meeting, as follows:

ADiscussion. Section 612(d)(1)(B)(iii) of the Act requires that not less than one special education teacher of the child (or where appropriate, not less than one special education provider of the child) be included on the IEP Team. Decisions as to which particular teacher(s) or special education providers(s) are members of the IEP Team . . . are best left to State and local officials to determine, based on the needs of the child.@

(Federal Register, Vol. 71, No. 156, p. 46670 (August 14, 2006)). The Comments further provide insight into when and for what purpose a special education provider can be used:

Comment: A few commenters stated that a special education provider should be allowed to substitute for a special education teacher only when the child does not have a special education teacher because the role of a special education teacher is different from the role of a special education provider.

Discussion: The recommended change is not appropriate. Section 300.321(a)(2) incorporates the language in section 614(d)(1)(B)(iii) of the Act and requires the IEP Team to include not less than one special education teacher, or where appropriate, not less than one special education provider. The special education provider may substitute when there is no special education teacher. However the Act leaves open the possibility that there may be other appropriate circumstances when a special education provider could substitute for a special education teacher. These are decisions best left to State and local officials.

(Federal Register, Vol. 71, No. 156, p. 46670 (August 14, 2006)). The decision of the District to substitute the Student's 8th Grade special education teacher for his 9th Grade special education teacher was appropriate given the circumstances which included the current teacher's medical situation and the compressed time line involved with conducting a manifestation determination meeting. In addition, the Student's 8th Grade special education teacher and the Middle School Counselor who worked with the Student that school year had at least a school year's worth of relevant experience with the Student and his disabilities which allowed them to analyze the Student's behavior as demonstrated across settings and across time as required by the Act. The Act and the Regulations leave the decisions regarding the composition of the IEP Team to the District.

50. The Student's Team which participated in the December 16, 2011, Manifestation Determination Meeting, was properly constituted and met the requirements of the IDEA Regulations, 34 C.F.R. ' 300.321(a) and the State Plan, Regulation IV B *FAPE/IEP/LRE*, pp. 45-46.

51. During the Manifestation Determination Meeting on December 16, 2011, the Student's Team reviewed all relevant information in the [Student's] file, including the [Student's] IEP, any teacher observations, and any relevant information provided by the parents 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 [District's] failure to implement the IEP, in compliance with the IDEA Regulations, 34 C.F.R. ' 300.530(e)(i) and (ii) and the State Plan, Regulation V B *Procedural Safeguards/Discipline*, pp. 81-82.

52. During the Manifestation Determination Meeting on December 16, 2011, the Student=s Team determined that the Student=s conduct on November 17, 2011, was not a manifestation of his disability. This determination was in compliance with the IDEA Regulations, 34 C.F.R. ' 300.530(e)(i) and (ii) and the State Plan, Regulation V B *Procedural Safeguards/Discipline*, pp. 81-82, for the following reasons:

a. The Student=s educational disability was Other Health Impaired (AOHI@) and his medical disability was Attention Deficit Hyperactivity Disorder (AADHD@). The Student=s September, 2011, IEP indicates that the nature and extent of these disabilities involved his tendency to Abecome easily distracted and easily confused if there are multiple concepts presented in the same area of study at the same time in a day=s class setting.@ The IEP sets forth only two goals and objectives, one involving written language and the other involving establishing and maintaining an Aassignment notebook.@ The Student=s Team considered these factors during the Manifestation Determination Meeting. The determination of the Student=s Team that the Student=s conduct on November 17, 2011, was not caused by and/or did not have a direct and substantial relationship to the Student=s disability, was appropriate.

b. The Student=s Team reviewed the Student=s IEP. During the Manifestation Determination Meeting, during the hearing in this matter and in Petitioner=s Proposed Findings of Fact, the Student=s Father did not allege that the Student=s conduct on November 17, 2011, Awas the direct result of the [District=s] failure to implement the Student=s IEP.@ The determination of the Student=s Team that the Student=s conduct on November 17, 2011, was not the direct result of the District=s failure to implement the Student=s IEP, was appropriate.

c. During the period between the beginning of school in August, 2011 and the date of the incident, November 17, 2011, the Student maintained perfect attendance, had no in-school or out-of-school suspensions, had improved his grades and was participating on the District=s High School Football team.

d. The Student=s Father and his private Counselor argued to the Student=s Team that the Student=s conduct was a result of his impulsiveness, yet the Student=s Father also informed the Student=s Team that the Student had downloaded the digital images Aa long time ago and that he did not know [that the digital images were] on [the flash drive] and he took it to school . . . without knowing what was on there,@ (Tr p. 90, lns. 14-17), which is certainly not an impulsive act.

e. The Student=s Father argued to the Student=s Team that the Student=s conduct was a result of sleep deprivation which was caused by the Student being removed from one of his medications by his new Psychiatrist. The Student=s Team discussed this potential factor, but none of the school personnel on the Student=s Team, including two of the Student=s regular education teachers, could verify that the Student had been

observed to be sleepy or that he appeared to be sleep deprived. In fact, during that same period of time, the Student was maintaining perfect attendance, had improved his grades, had no in-school or out-of-school suspensions and was participating on the District=s High School Football team.

53. The determination that the Student=s conduct was not a manifestation of his disability means that the relevant disciplinary procedures applicable to children without disabilities [could] be applied to the [Student] in the same manner and for the same duration in which the procedures [could] be applied to children without disabilities, except services must be provided to ensure the [Student] receives a free appropriate public education, although it may be provided in an alternative educational setting.@ IDEA Regulations, 34 C.F.R. ' 300.530(c) and the State Plan, Regulation V B *Procedural Safeguards/Discipline*, p. 80.

54. As stated above, the IDEA Regulations, 34 C.F.R. ' 300.530(e), require that the Manifestation Determination be held A[w]ithin 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct.@ The IDEA Regulations, 34 C.F.R. ' 300.536(a), provide a definition of whether a disciplinary removal constitutes a Achange of placement@ under the IDEA, as follows:

A1(a) For purposes of removals of a child with a disability from the child=s current educational placement under ' ' 300.530 through 300.535, a change of placement occurs if B

(1) The removal is for more than 10 consecutive school days; . . .@

The State Plan provides a similar definition in Regulation V, *Procedural Safeguards/Discipline*, page 80.

55. On December 16, 2011, the date of the Manifestation Determination Meeting, the Student had been on his out-of-school suspension for nineteen (19) consecutive school days B November 17, 2011 through December 16, 2011. A change of the Student=s placement occurred on Tuesday, December 6, 2011, when the Student had been out on suspension for a full ten (10) consecutive school days B November 17, 2011 through December 5, 2011. See: the IDEA Regulations, 34 C.F.R. ' 300.530(e)(1) and 34 C.F.R. ' 300.536(a), and the State Plan, Regulation V B *Procedural Safeguards/Discipline*, pp. 80-81. However, the failure of the District to conduct the Manifestation Determination Meeting prior to December 6, 2011, does not constitute a procedural or substantive violation of the IDEA or the State Plan for the following reasons:

a. The Student=s right to receive a free appropriate public education (FAPE@) was not impeded and the Student did not have a deprivation of educational benefit because:

(1) The change of placement lasted only nine (9) school days;

(2) The determination by the Student=s Team that the Student=s conduct was not a manifestation of his disability was in compliance with the IDEA and State Plan as detailed above. That finding means that Athe relevant disciplinary procedures applicable to children without disabilities [could] be applied to the [Student] in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except services must be provided to ensure the [Student] receives a free appropriate public education, although it may be provided in an alternative educational setting.@ State Plan, Regulation V B *Procedural Safeguards/Discipline*, p. 80; and,

(3) Even if the change in placement caused the Student to suffer a limited loss of FAPE or a limited deprivation of educational benefit, the special education services provided to the Student in the Home Bound setting following the Manifestation Determination Meeting on December 16, 2011, provided more special education minutes than his September, 2011, IEP did, such that the four hundred fifty nine (459) minutes of service the Student possibly missed⁷ during the nine day period were made up within the first fifty-one (51) school days during his long-term suspension.

b. The change of placement did not significantly impede the opportunity of the Student=s Father to participate in the decision-making process regarding the provision of FAPE for the Student, because, the Student=s Father attended and was an active participant at the Manifestation Determination Meeting, which considered the conduct of the Student, the educational services that would be provided to him and his educational placement during the duration of the out-of-school suspension.

(See: IDEA Regulation, 34 C.F.R. ' 300.513(a)(2) and the State Plan, Regulation V, *Procedural Safeguards/Discipline*, page 69).

56. Petitioner has failed to meet the burden of proof in this case for the reasons set forth above.

III. DECISION

The Hearing Officer issues the following decision concerning the issues presented in this case:

⁷ The Student was receiving fifty-one (51) minutes of special education services each school day pursuant to his September, 2011, IEP. During the nine (9) school days beginning on December 6 and ending on December 16, 2011, the Student could have missed four hundred fifty nine (459) minutes of special education services.

57. **Issue Number 1:** Whether the District conducted a Manifestation Determination regarding the Student=s conduct in compliance with the Regulations of the Individuals with Disabilities Education Act (AIDEA@) 34 C.F.R. ' 300.530(e).

Decision:

The IDEA Regulations, 34 C.F.R. ' 300.530(e), and the State Plan, *Regulation V, Procedural Safeguards/Discipline*, pp. 81-82, require that a Manifestation Determination Meeting be held within ten (10) school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct. The Regulations further require that the Student=s Team must review all relevant information in the student=s file, including the student=s IEP, any teacher observations, and any relevant information provided by the parents in order to determine whether the student=s conduct: (1) was caused by, or had a direct and substantial relationship to, the student=s disability, or, (2) was the direct result of the District=s failure to implement the student=s IEP.

In this case, the Student brought a flash drive to school on November 17, 2011, for use in school. While in his Computer Applications Class, he forgot to take it out of the computer at the end of the class period. The teacher discovered the flash drive in the computer after the Student and others had left the room. She opened the flash drive to try to determine who owned it and discovered that it contained digital images that were described by the District as Apornography@ or Achild pornography.@ The teacher reported the incident to the office. It was determined that the flash drive belonged to the Student. The High School Principal gave the Student a ten (10) day out-of-school suspension and reported the conduct to the New Madrid County Sheriff=s Office. The Student was arrested and remained in the custody of the New Madrid County Juvenile authorities through November 23, 2011, the day before Thanksgiving. The District celebrated the Thanksgiving Holiday on November 23-25, 2011. The Student=s ten (10) school day out-of-school suspension began on Thursday, November 17, 2011 and continued on November 18, 21, 22, 28, 29, 30, December 1, 2 and 5.

On December 1, 2011, District personnel contacted the Student=s Father to set up a Manifestation Determination Meeting. The Student=s Father said he wanted to invite several people to the meeting and got their schedules. The District and the Student=s Father agreed to have the Manifestation Determination Meeting on December 16, 2011. On December 5, 2011, the District=s Superintendent informed the Student=s Father that the Superintendent was extending the Student=s summary suspension for a total of one hundred eighty (180) school days.

The Student=s Team for purposes of the December 16, 2011, Manifestation Determination Meeting consisted of: (1) his Father and Grandmother; (2) two of his regular education teachers; (3) his 8th grade special education teacher, who was substituting for his 9th grade special education teacher due to a medical issue that caused her to be unable to be present for the meeting; (4) the High School Principal, who acted as the representative of the District; (5) a District Process Coordinator and the Middle School Counselor who were there to interpret the

instructional implications of any evaluation results; and, (6) the Student=s private counselor. The composition of the Student=s Team for the Manifestation Determination Meeting met the requirements of the IDEA and its Regulations, 34 C.F.R. ' 300.321(a) and the State Plan, Regulation IV B *FAPE/IEP/LRE*, pp. 45-46.

During the Manifestation Determination Meeting, the Student=s Team reviewed Aall relevant information in the [Student=s] file, including the [Student=s] IEP, any teacher observations, and any relevant information provided by the parents@ to determine Aif 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 [District=s] failure to implement the IEP,@ in compliance with the IDEA Regulations, 34 C.F.R. ' 300.530(e)(i) and (ii) and the State Plan, Regulation V B *Procedural Safeguards/Discipline*, pp. 81-82.

During the Manifestation Determination Meeting, the Student=s Team determined that the Student=s conduct on November 17, 2011, was not a manifestation of his disability. This determination was in compliance with the IDEA Regulations, 34 C.F.R. ' 300.530(e)(i) and (ii) and the State Plan, Regulation V B *Procedural Safeguards/Discipline*, pp. 81-82, for the following reasons:

- a. The Student=s educational disability was Other Health Impaired (AOHI@) and his medical disability was Attention Deficit Hyperactivity Disorder (AADHD@). The Student=s September, 2011, IEP indicates that the nature and extent of these disabilities involved his tendency to Abecome easily distracted and easily confused if there are multiple concepts presented in the same area of study at the same time in a day=s class setting.@ The IEP sets forth only two goals and objectives, one involving written language and the other involving establishing and maintaining an Aassignment notebook.@ The Student=s Team considered these factors during the Manifestation Determination Meeting. The determination of the Student=s Team that the Student=s conduct on November 17, 2011, was not caused by and/or did not have a direct and substantial relationship to the Student=s disability, was appropriate.
- b. The Student=s Team reviewed the Student=s IEP. During the Manifestation Determination Meeting, and during the hearing in this matter, the Student=s Father did not allege that the Student=s conduct on November 17, 2011, Awas the direct result of the [District=s] failure to implement the Student=s IEP.@ The determination of the Student=s Team that the Student=s conduct on November 17, 2011, was not the direct result of the District=s failure to implement the Student=s IEP, was appropriate.
- c. During the period between the beginning of school in August, 2011, and the date of the incident, November 17, 2011, the Student maintained perfect attendance, had no in-school or out-of-school suspensions, had improved his grades and was participating on the District=s High School Football team.

d. The Student=s Father and his private Counselor argued to the Student=s Team that the Student=s conduct was a result of his impulsiveness, yet the Student=s Father also informed the Student=s Team that the Student had downloaded the digital images Aa long time ago and that he did not know [that the digital images were] on [the flash drive] and he took it to school . . . without knowing what was on there,@ (Tr p. 90, Ins. 14-17), which is certainly not an impulsive act.

e. The Student=s Father argued to the Student=s Team that the Student=s conduct was a result of sleep deprivation which was caused by the Student being removed from one of his medications by his new Psychiatrist. The Student=s Team discussed this potential factor, but none of the school personnel on the Student=s Team, including two of his regular education classroom teachers, could verify that the Student had been observed to be sleepy or that he appeared to be sleep deprived. In fact, during that same time, the Student was maintaining perfect attendance, had improved his grades, had no in-school or out-of-school suspensions and was participating on the District=s High School Football team.

The determination that the Student=s conduct was not a manifestation of his disability means that Athe relevant disciplinary procedures applicable to children without disabilities may be applied to the [Student] in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except services must be provided to ensure the [Student] receives a free appropriate public education, although it may be provided in an alternative educational setting.@ State Plan, Regulation V B *Procedural Safeguards/Discipline*, p. 80 and the IDEA Regulations, 34 C.F.R. ' 300.530(c).

As stated above, the IDEA Regulations, 34 C.F.R. ' 300.530(e), require that the Manifestation Determination be held A[w]ithin 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct.@ The IDEA Regulations, 34 C.F.R. ' 300.536(a), define the term Achange of placement,@ as follows:

A1(a) For purposes of removals of a child with a disability from the child=s current educational placement under ' ' 300.530 through 300.535, a change of placement occurs if B

(1) The removal is for more than 10 consecutive school days; . . .@

At the time of the Manifestation Determination Meeting on December 16, 2011, the Student had been suspended out-of-school for nineteen (19) school days B November 17, 18, 21, 22, 28, 29, 30 and December 1, 2, 5-9 and 12-16. Thus, the Student had a change of placement effective on December 6, 2011. See: the IDEA Regulations, 34 C.F.R. ' 300.530(e)(1) and 34 C.F.R. ' 300.536(a), and the State Plan, Regulation V B *Procedural Safeguards/Discipline*, pp. 80-81. However, the failure of the District to conduct the Manifestation Determination Meeting prior to

December 6, 2011, did not constitute a procedural or substantive violation of the IDEA or the State Plan for the following reasons:

- a. The Student=s right to receive a free appropriate public education (FAPE) was not impeded and the Student did not have a deprivation of educational benefit because:
 - (1) The change of placement lasted only nine (9) school days;
 - (2) The determination by the Student=s Team that the Student=s conduct was not a manifestation of this disability was in compliance with the IDEA and State Plan as detailed above. That finding means that the relevant disciplinary procedures applicable to children without disabilities [could] be applied to the [Student] in the same manner and for the same duration in which the procedures [could] be applied to children without disabilities, except services must be provided to ensure the [Student] receives a free appropriate public education, although it may be provided in an alternative educational setting. State Plan, *Regulation V B Procedural Safeguards/Discipline*, p. 80; and,
 - (3) Even if the change in placement caused the Student to suffer a limited loss of FAPE or a limited deprivation of educational benefit, the special education services provided to the Student in the Home Bound setting following the Manifestation Determination Meeting on December 16, 2011, provided more special education minutes than his September, 2011 IEP did, such that the four hundred fifty-nine (459) minutes of service the Student missed during the nine day period were made up within the first fifty-one (51) school days during his long-term suspension.
- b. The change of placement did not significantly impede the opportunity of the Student=s Father to participate in the decision-making process regarding the provision of FAPE for the Student, because, the Student=s Father attended and was an active participant at the Manifestation Determination Meeting, which considered the conduct of the Student, the educational services that would be provided to him and his educational placement during the duration of the out-of-school suspension.

The District conducted a Manifestation Determination on December 16, 2011, regarding the Student=s conduct in compliance with the IDEA Regulations, 34 C.F.R. ' 300.530(e) as explained above.

58. **Issue Number 2:** If so, whether the determination made by the Student=s Team during the Manifestation Determination Meeting was appropriate and did not violate the IDEA Regulations, 34 C.F.R. ' 300.530.

Decision:

The determination of the Student=s Team at the Manifestation Determination Meeting was appropriate and met the requirements of the IDEA Regulations, 34 C.F.R. ' 300.530(e) as explained above.

IV. ORDER

59. The Hearing Officer hereby orders that the due process complaint in this matter, which was filed with the Department of Elementary and Secondary Education on July 31, 2012, is dismissed.

V. APPEAL PROCEDURE

PLEASE TAKE NOTICE that these Findings of Fact, Conclusions of Law, Decision and Order constitute the final decision of the Department of Elementary and Secondary Education in this matter and you have a right to request review of this decision pursuant to Section 162.962 RSMo. Specifically, you may request review by filing a petition in a state or federal court of competent jurisdiction within forty-five days after the receipt of this final decision. Your right to appeal this final decision is also set forth in the Regulations to the IDEA, 34 C.F.R. ' 300.512, and in the Procedural Safeguards which were provided to you at the beginning of this matter.

Ransom A Ellis, III
Hearing Officer

Dated: September 21, 2012

CERTIFICATE OF SERVICE

This Order has been served by Certified United States Mail, Return Receipt Requested, with courtesy copies sent electronic mail on the following persons on this 21st day of September, 2012:

Ms. Celestine Dotson *Electronic Mail and Regular Mail*
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Ransom A Ellis, III