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## Pennsylvania Special Education Hearing Officer

### DECISION

Child's Name: RP

Date of Birth: xx/xx/xx

Dates of Hearing:  
November 21, 2006, November 28, 2006  
CLOSED HEARING  
ODR #7115/ 06-07 LS

Parties to the Hearing:

Mr. and Mrs.

School District of Philadelphia  
440 North Broad Street, Suite 313  
Philadelphia PA 19130

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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November 28, 2006

December 8, 2006

William F. Culleton, Jr., Esquire

## INTRODUCTION

Student is a xx year old eligible student of the School District of Philadelphia (District). (FF 1.) He is identified with the exceptionality Emotional Disturbance and the District has placed him in Full Time Emotional Support at the “[redacted]” School (School), a private alternative special education school. (FF 2.) He has been diagnosed with Intermittent Explosive Disorder, Oppositional Defiant Disorder, Attention Deficit/Hyperactivity Disorder and Selective Mutism. (FF 3.) The District recently found him in violation of its Code of Conduct for breaking and entering the School building, destroying property and stealing computer equipment. (FF 4.) The issue in this matter is whether or not his behavior was a manifestation of his disability.

It is undisputed that, for several weekends, the Student broke into the School building and used the school’s computers, damaging windows, doors and door jambs, rooting through desks and downloading pornography onto the School’s server. (FF 5.) On Saturday, October 7, 2006, the Student broke a window to the basement and used the School’s computers. (FF 6.) When this was discovered, the School’s maintenance man boarded the window. (FF 7.) The student returned on Sunday, and finding the basement window boarded, he climbed a fire escape to the roof in rainy weather and broke into the building through an attic window, tried to open locked cabinets, opened locked doors, kicked in windows and stole various articles of computer and other equipment. (FF 8, 9.) He decided to steal the School’s computer server, because it appeared to be the most valuable item due to its size. (FF 10.) He hid the stolen goods in his bedroom, and during the following week was caught when one of his fellow students reported that the Student had tried to sell computer equipment to the informant. (FF 11.)

The Student’s Parents contend that his behavior was a manifestation of his disability, which is characterized by inability to control his impulses, in addition to deficits in executive function. Additionally they argue that the conduct is the product of the District’s failure to implement an appropriate IEP. The District contends that the Student’s symptoms of disability do not explain the behavior, because it was not “impulsive” in the sense of being immediate in time to the stimulus; rather, the District argues that the behavior was repeated, extended over a long period of time, and carefully thought out – thus manifestly not substantially caused by impulse or diminished executive function. The District further contends that it properly implemented the IEP.

## PROCEDURAL HISTORY

The Student was identified in March 1998, when he was in second grade, with Serious Emotional Disturbance. (S-15, 16.) In ninth grade he was suspended for a disciplinary infraction. (S-15 p. 3 to 4.) In October 2005 the District reevaluated the Student and recommended special education in an alternative special education setting for emotional disturbance; he was removed eventually to School. (S-15 p. 3 to 4.) On October 11, 2006, he was suspended for three days for breaking into the school, vandalizing it and stealing computer equipment. (FF 4, 12.) A manifestation determination meeting was held on October 18, in which the District’s participants concluded that the behavior was not a manifestation of the Student’s disability, but the Parents did not agree. (FF 13.) Approximately one week after the manifestation

determination meeting, the Parents sent a note to the District requesting a due process hearing. (FF 15.) On November 6, 2006, the District filed a request for due process. (NT 164-9 to 165-6; S-9.)<sup>1</sup> The hearing on this request commenced on November 21, 2006 and concluded November 28, 2006, at which time the record was closed. The hearing officer received the transcript for the November 28 session on December 1, 2006.

## ISSUES

1. Was the Student's behavior in breaking into the School on multiple occasions over a span of several weeks, and stealing computer equipment, caused by or directly and substantially related to his disabilities, so as to constitute a manifestation of his disabilities?
2. Was the Student's behavior in breaking into the School on multiple occasions over a span of several weeks, and stealing computer equipment, the direct result of the District's failure to implement the IEP, so as to constitute a manifestation of his disabilities?

## FINDINGS OF FACT

1. The Student is a xx year old eligible resident of the School District of Philadelphia. (NT 165-2 to 4; HO-1.)
2. The Student is classified with Emotional Disturbance and the District has placed him in Full Time Emotional Support at the "[redacted]" School, a private alternative special education school. (NT 61-23 to 62-9; S-11 p. 21, S-15, S-16 p. 12.)
3. The Student has been diagnosed clinically with Intermittent Explosive Disorder, Oppositional Defiant Disorder, Attention Deficit/Hyperactivity Disorder and Selective Mutism. (S-15 p. 2 to 3.)

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<sup>1</sup> The hearing officer at the hearing treated this matter as a request for due process by the District, since the Due Process Complaint Notice filed with ODR indicated that the District was the requesting party. (NT 20-13 to 22-1; HO-1.) However, the full record makes clear that the District had filed only to effectuate the Parents' written request for due process and that the Parents in effect were appealing the manifestation determination pursuant to the first clause of 20 U.S.C. §1415(k)(H)(3)(A). (NT 21-8 to 19, 164-9 to 166-3; S-9, 10.) Indeed, the District appeared to consider this to be the posture of the case, since it contested the hearing officer's allocation of the burden of persuasion to itself. (NT 20-13 to 21-9.) Likewise, the Parents requested an order maintaining the Student's placement at the School. (NT 29-15 to 17.) Therefore, the matter will be treated as a request by the Parents to appeal the manifestation determination. While this might raise theoretical questions regarding the allocation of the burden of persuasion in this matter on the District, *Schaffer v. Weast*, 546 U.S. 49, 163 L.Ed.2d 387, 126 S.Ct. 528 (2005), there is no practical effect. The evidence was far from being in "equipose", *Weast*, 163 L.Ed.2d at 395, 397, 126 S.Ct. at 533-34, 535. On the contrary, the evidence presented by the District was far greater than preponderant that the Student's behavior was not a manifestation of his disability.

4. The District recently found him in violation of its Code of Conduct for breaking and entering the School building, destroying property and stealing computer equipment. Offenses included Level I for disruption of school and abuse of computer, as well as Level II for destruction and theft of property and robbery. (S-1, 5.)
5. On several weekends prior to October 7, 2006, the Student broke into the School building and used the school's computers, damaging windows, doors and door jambs, rooting through desks and downloading pornography onto the School's server. (NT 33-12 to 25, 35-2 to 36-3; S-1, S-2, S-3.)
6. On Saturday, October 7, 2006, the Student broke a window to the basement, entered, and used the school's computers. (NT 34-1 to 3.)
7. When the broken window was discovered, the School's maintenance man boarded the window. (NT 34-3 to 10.)
8. The Student returned on Sunday, and finding the basement window boarded, he climbed a fire escape to the roof in rainy weather and broke into the building through an attic window. (NT 34-1 to 12, 39-7 to 16.)
9. While in the building on Sunday, the Student tried to open locked cabinets, opened locked doors, kicked in windows and stole various articles of computer and other equipment. (NT 34-12 to 18; S-1, S-2, S-3.)
10. The Student was motivated in this behavior by the desire to impress his peers. He was overheard telling his peers about his actions and the suspension and resulting criminal charges. He also selected the School's computer server to steal, because it appeared to be the most valuable item due to its size. (NT 34-19 to 24, 56-3 to 18; S-16 p. 5.)
11. The Student hid the stolen goods in his bedroom, and during the following week was caught when a peer reported that he offered to sell computer equipment to the informant. (NT 38-9 to 17, 40-23 to 41-19; S-1, S-3.)
12. The Student was suspended for three days with the District recommending a disciplinary transfer to a remedial disciplinary setting. (NT 33-1 to 10; S-1, S-3.)
13. A manifestation determination meeting was held on October 18, in which the District's participants concluded that the behavior was not a manifestation of the Student's disability, but the Parents did not agree. (NT 47-19 to 25; S-4.)

14. On the same day, the District provided to the Parents a NOREP to place the Student in emotional support within a remedial disciplinary setting. (NT 1 to 9; S-6.)
15. Approximately one week after the manifestation determination meeting and issuance of the NOREP, the Parents sent a note to the District requesting a due process hearing. (NT 165-7 to 166-3; S-10.)
16. The Student has a long history of disciplinary violations and disruptive behavior, including aggressive behavior toward teachers and other students, as well as several instances of violent behavior. His violent behavior included throwing a chair and other objects, kicking and pushing peers and punching a teacher in the back. In addition, the Student has threatened staff and peers at school by indicating an intention to bring a gun into school and shoot everyone and to stab someone with scissors. These behaviors were impulsive and demonstrated a weakness in executive function. (NT 169-23 to 170-1, 246-11 to 25; S-11 p. 15, 16, 26, S-11 p. 2 to 3.)
17. Student had demonstrated exemplary behavior during classes at the School from January 2006 to the end of the school year, as well as during the first weeks of the 2006-2007 school year, thus showing no signs of regression of his symptoms. The Student had not demonstrated any lack of impulse control or lack of executive functioning during classes in this period. (NT 40-13 to 18, 59-5 to 15, 187-4 to 24, 289-4 to 13, 290-15 to 291-15.)
18. From January 2006 until the end of the school year, the Student had good attendance and obtained good grades in the School. (NT 58-18 to 59-22; S-8.)
19. The Student's behavior in breaking into the School on multiple occasions over a span of several weeks, and stealing computer equipment, does not meet the definition of "impulsive" as commonly understood in the psychiatric and psychological professions. (NT 183-11 to 187-20, 306-7 to 310-10.)
20. The Student's behavior in breaking into the School on multiple occasions over a span of several weeks, and stealing computer equipment, was dissimilar to the behaviors which gave rise to his clinical diagnoses and his identification as Emotionally Disturbed. (NT 185-15 to 187-20, 307-10 to 23, 190-8 to 18.)
21. The Student's behavior in breaking into the School on multiple occasions over a span of several weeks, and stealing computer equipment, was intentional and methodical. (NT 50-17 to 25.)

22. Since he was suspended, the Student has displayed defiant behavior, discussing his breaking into the School and the thefts, attempting to obtain access to school computers during school time, and provoking other students. (NT 55-19 to 56-18.)
23. The District adequately implemented the Student's IEP. (NT 61-15 to 68-6, 70-2 to 71-9, 75-9 to 82-10, 85-7 to 89-11; S-7, S-11, S-13, S-17.)

## DISCUSSION AND CONCLUSIONS OF LAW

Under limited circumstances, the IDEIA absolves an identified student of certain disciplinary consequences for violating school codes of conduct. A district may not change such a student's placement for disciplinary reasons, if the behavior violating school conduct codes is found to be a "manifestation" of the student's disability. 20 U.S.C. §1415(k)(E)(i), (ii). A special team including the parents may find conduct to be a "manifestation" of the student's disability:

- (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 local educational agency's failure to implement the IEP.

See also, 34 C.F.R. §300.530(e).

The Student has a long history of behavioral difficulties and remedial placements. Prior to being identified, the student was transferred to a Learning Support class in the middle of his first grade year, January 1998. (S-15, 16.) The Student was identified in March 1998, when he was in second grade, as SED, and continued in the Learning Support class. Ibid. In September 1998, when he was in second grade, the Student was transferred to an emotional support program; at the end of that school year, he went to a Learning Support program. Ibid. By the middle of third grade, he was transferred to a regular education classroom with resource room services. Ibid. In fourth grade he was transferred as a result of disciplinary infractions, with part time Learning Support and a TSS one to one aide. Ibid. In eighth grade he was returned to a regular education with resource room services. Ibid. In ninth grade he was suspended for a disciplinary infraction, (S-15 p. 3 to 4), and eventually transferred to the School. (S-15 p. 3 to 4.)

With regard to the most recent behavior, the District demonstrated clearly by more than a preponderance of the evidence that the behavior met neither of the legal tests for finding a "manifestation." Based upon the record, the District showed that the behavior could not have been caused by the Student's impaired impulse control or executive functioning, for two reasons. First, the behavior in question was intrinsically non-impulsive and demonstrated the utilization of executive functioning. (FF 17, 19, 20; NT 183-11 to 184-25.) Second, the behavior occurred at a time when the Student was not exhibiting any symptoms of his disabilities, thus making it unlikely that his typical

symptoms had caused the behavior. The Student had demonstrated exemplary behavior in the weeks prior to the behavior in question, thus showing no signs of regression of his symptoms. (FF 17, 18.)

The District presented the testimony of its Special Education Case Manager, who conducted the manifestation determination. (NT 160-2 to 25, 163-1 to 2.) This witness is well qualified; he has a doctorate with emphasis in school psychology from Temple University, is a licensed clinical psychologist and is certified in both school psychology and supervision of school psychological services. (NT 161-6 to 162-5.) A serious weakness in his testimony was that he had not tested, observed or spoken to the Student. However, the witness had reviewed all of the medical and educational evaluations in the Student's record, (NT 182-13 to 22), and he testified credibly that the Student had not demonstrated any lack of impulse control or lack of executive functioning in classes from January 1, 2005 to October 11, concluding that this evidence militated against a finding that the behavior was a manifestation of those symptoms. (FF 17, 19, 20.)

The hearing officer so finds. In making this finding, the hearing officer relies upon the District Special Education Case Manager's evaluation of the Student's behavior, as well as the weight lent to this opinion testimony by the facts of the case itself. The Student's behavior extended over a period of several weeks, (FF 5); even the break-in and theft occurred over two days, (FF 6 to 9), and this episode extended into the next week when the Student discussed the incident with friends, who reported that he attempted to sell the stolen items, (NT 11), which he had selected because of their apparent monetary value, (NT 10). These actions obviously were planned in advance.

The Student's motivation is likely based upon a desire to impress his peers. The Student anticipated considerable benefit in terms of the approval or fear of the Student's peers upon hearing of his exploits. (FF 10.) The Student had once stated that he likes it when other students are afraid of him. (S-16 p. 5.) The Student's Mother testified that a dare was involved, although her testimony, based on what the Student had told her, conflicted with reports that the Student was attempting to sell the computer equipment. (NT 215-9 to 12; S-1 p. 3-4.) Thus the evidence is in conflict as to the intention to sell the equipment, and the possible anticipation of monetary benefit.

The hearing officer particularly relies upon the fact that the Student's prior manifestations of his disability exhibited a pattern that was far different from the behavior in question. (FF 20.) His behavior was characterized by getting into altercations with other students, initiating arguments and fights, or making threatening statements. (FF 16.) Much of his behavior was violent or threatening, (FF 16), and none of it evidenced the kind of planning and forethought that characterized the behavior in question, (FF 21). The typical manifestation of this Student's disability was far more obviously the product of poor impulse control. (FF 16, 19.)

Subsequent to his suspension and arrest for the thefts, the Student has begun to show more dysfunctional behavior; however the new behavior was not following any new pattern showing more planning and forethought. On the contrary, this behavior is again similar to the previous pattern of disruption and instigating others. (FF 22.)

Thus, the break in and theft behavior is aberrant. The hearing officer finds this fact to militate against finding it to have been caused by, or to have been directly and substantially related to, the disabilities that in all respects have manifested themselves in much more impulsive and disorganized behavior.

The Parents attempted to show that the Student's behavior was a product of his emotional disability. They presented a psychologist who had provided an Independent Educational Evaluation of the Student. This witness also is well qualified, with a Ph.D., in Education and Child Development, from [redacted] College; she is both licensed in clinical psychology and certified as a school psychologist. (NT 242-3 to 7.) This witness, unlike the District's expert, had formally evaluated the student, testing him both cognitively and projectively over a period of about six hours. (NT 243-23 to 244-19.) There were two limitations on the data from this evaluation. First, the expert had not seen the Student for almost a full year before the incident (the last interview had been on October 31, 2005, and the last break in was on October 8, 2006.) (NT 255-7 to 9; S-15.) (Still she had had much more contact with the Student than the District's expert.) Second, the Student had not spoken at all during the evaluation, presenting as selectively mute; he communicated by shaking his head yes or no, and by writing. (NT 244-4 to 19.) The Parents' expert cautioned that this unusual testing condition may have distorted her results. (NT 292-15 to 294-20, 296-4 to 15, 308-10 to 16.)

The Parents' expert opined that the Student's disabilities result in global deficits in functioning, including poor social skills, lack of judgment, lack of impulse control, an inability to step back and review his own behavior, and an unawareness of the consequences of his behavior. (NT 303-9 to 20, 309-8 to 14.) On this basis, she concluded that the behavior in question was caused by and was substantially related to the Student's diagnosed disabilities. (NT 308-16 to 310-10.) At the same time, the expert recognized and agreed that there need to be consequences for the Student's behavior. Ibid. Her disagreement was with the consequences chosen by the District: placement in a remedial disciplinary school. Ibid.

The Parents' expert admitted that she did not know the selected school, although she pointed out that she had observed and found wanting another of the District's remedial disciplinary schools, nor did she know anything about how the Student had been functioning at his present School placement. (NT 289-4 to 13, 290-15 to 291-15.) The expert also did not seem to know that the District's proposed placement would include full time emotional support. Ibid. Thus, the expert seemed to be unaware of some crucial facts that should have been taken into account in formulating her opinions. Moreover, none of her opinions were based upon clinical observations made during her evaluation of the Student; thus her factual basis was not rendered superior to that of the District's expert due to her advantage in having evaluated the Student almost one year before the behavior in question.

The law expressly requires a nuanced judgment as to the degree to which the disabilities influenced the behavior in question; not every relationship between the disability and the behavior is sufficient to find a "manifestation." It is easy to speculate that the disabilities had some effect in the break in and theft, but, even if they did, this would be insufficient. The legal issue is whether their effect was causal or "direct and substantial." 20 U.S.C. §1415(k)(E)(i)(I). This explicitly requires more weighty evidence than the existence of a "nexus" between the behavior and the disabilities; yet the Parents' expert seemed to imply that this was all she found. (NT 308-16 to 25.)

This legally required nuanced judgment is made difficult by the fact that no one was with the Student when he broke into the School and stole the equipment, nor when he decided to do so, nor when he devised a method for doing so, nor afterwards when he



hid the equipment, nor even later when he reportedly tried to sell the equipment to a peer. Thus, in determining whether or not the behavior was a manifestation of the disabilities, all concerned are forced to rely upon circumstantial evidence to make the nuanced judgment that the law requires.

The hearing officer accords substantially less weight to the conclusion of the Parents' expert than to that of the District's Case Manager (who also is a well qualified and experienced school psychologist). This is because the record strongly contradicts the Parent's expert's view that the behavior was either caused by or directly and substantially related to the Student's disabilities, as discussed above. While the record militates against her view, the expert was unable to point to any other facts, circumstantial or otherwise, to support her conclusion. Thus, her view is not as well grounded in the facts of the case as the conclusion reached by the District's expert and the District's representatives on the manifestation team.

Indeed, the witness admitted key aspects of the District's case, when specifically asked. She admitted readily that "impulsiveness" is commonly understood to be behavior that is close in time to the stimulus, and that the Student's breaking into the School and stealing did not fit that understanding of the term. (NT 285-6 to 13, 305-23 to 307-9.) She admitted that she could not distinguish whether or not the behavior had been due to "inability or unwillingness" to control the impulse to break in and steal. (NT 285-14 to 21.) The expert further confirmed that the behavior in question was not similar to the more technically "impulsive" behavior that had been the prominent feature of his symptomatic behavior in the history. (NT 307-9 to 20.)

The expert's testimony regarding executive function did not rebut the District's evidence. She admitted that the behavior was the product of planning, (NT 281-22 to 282-22), stating candidly: "I guess that part of his executive function was pretty good." (NT 286-10 to 16.) She also stated that the Student had "demonstrated a lot of skills that I suspected that he didn't have and maybe he does have, really hard to tell from my testing ... ." (NT 308-9 to 16). However, she construed executive function as a broader ability that includes metacognition and behavioral control in a more overarching sense. (NT 303-9 to 304-6.) However, her criterion for holding the break – ins and thefts to be caused by the Student's lack of executive function was that "most kids of his age wouldn't choose to do the kinds of things that he has done ... ." (NT 303-23 to 304-6.) Based on this criterion, it is difficult to discern how any serious discipline violations could be deemed not to be manifestations of a lack of executive function and therefore of disability. This hearing officer believes that the meaning of "manifestation" is more restrictive than the Parents' expert's application of the term in this case.

Rather than rely exclusively on the theory of deficient executive function, the expert then seemed to fall back on other diagnostic theories not encompassed by the Student's prevailing clinical diagnoses or educational classification. These included "something that is cognitive that is missing", a lack of "internalization of appropriate socialized controls", and "a real inability to be attached ... emotionally ... ." (NT 308-1 to 309-20.) At this point the witness' testimony appeared to be more an effort to generate clinical hypotheses than a definitive evaluation of the behavior in question. For this reason also the hearing officer accords it diminished weight regarding the more precise "manifestation" issue in this matter.

The Parents argued that the Student's disability was manifested by his apparent belief that he would not suffer consequences for his behavior. (NT 211-24 to 212-10, 220-12 to 14.) The experts differed on whether or not this belief was the product of his disabilities. The District's expert opined that it was caused by the Student's history of bad behavior where he had not suffered serious consequences and simply learned to believe that consequences do not apply to him; the Parents' expert characterized it as an unawareness of the seriousness and consequences of his behavior to others, as well as a cognitive inability to make the connection between his behaviors and the consequences. (NT 245-12 to 246-10.) However, the Parents' expert seemed to contradict this opinion by repeatedly emphasizing that the Student should have consequences and suggesting that the Student would disabuse himself of his present beliefs only by experiencing the "natural" consequences of his behavior. (NT 264-21 to 265-21, 287-12 to 14, 300-11 to 14, 308-23 to 309-1.)

In addition to the above arguments, the Parents also argued that manifestation was demonstrated under the second test, 20 U.S.C. §1415(k)(E)(i)(II), which provides that behavior is a manifestation of disability if it is "the direct result of the local educational agency's failure to implement the IEP."<sup>2</sup> The Parents argued that the Student's IEP was flawed in numerous ways, and that there were insufficient and unclear mechanisms for monitoring the attainment of the Student's goals. The District presented credible evidence that the IEP was in fact implemented. (FF 23.) Moreover, the Parents presented no evidence that the Student's behavior was the "direct result" of any failure to implement the IEP. On the other hand, as discussed above, the record strongly supports the inference that the Student's behavior was aberrant, not caused by his disability, and consequently not caused by any failure of service meant to address that disability. Thus, the evidence is more than preponderant that there is no manifestation based upon 20 U.S.C. §1415(k)(E)(i)(II).

Although the Parents raised section 504 of the Rehabilitation Act of 1973 in arguments, they introduced no evidence to show that the issue in this matter related to a deprivation of services, or an inability to benefit from services, due to discrimination on account of handicap. On the contrary, this matter clearly falls within the ambit of IDEIA. Therefore, this hearing officer finds no basis to find an independent violation of section 504.

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<sup>2</sup> The Parents argued also that the new regulations under the IDEIA and the IDEIA itself are superceded by the existing Pennsylvania regulations on the subject of discipline, Chapter 12, 22 Pa. Code §12.6. This section incorporates by reference the federal regulations in existence at the time that §12.6 was promulgated, subsequent to the passage of the IDEIA. Thus, Parents argue that state policy is to apply the "old" federal regulations to manifestation determinations, whose definition of manifestation is expansive and includes failure to offer an appropriate IEP and conditions impairing the student's ability to understand the consequences of his or her actions. 34 C.F.R. §300.523 (March 12, 1999). (NT 274-10 to 275-6.) The hearing officer declines to interpret the state regulations, federal law and the new IDEIA regulations in a way contrary to the plain language of the IDEIA without some binding authority in support of such reasoning.

## ORDER

It is hereby ORDERED that:

1. The Student's behavior in breaking into the School on multiple occasions over a span of several weeks, and stealing computer equipment, was not caused by or directly and substantially related to his disabilities, and therefore the District properly determined that it was not a manifestation of his disabilities.
2. The Student's behavior in breaking into the School on multiple occasions over a span of several weeks, and stealing computer equipment, was not the direct result of the District's failure to implement the Student's IEP, and therefore the District properly determined that the behavior was not a manifestation of his disabilities.

December 8, 2006

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WILLIAM F. CULLETON, JR., ESQ.  
HEARING OFFICER