#20-064/20-069

**COMMONWEALTH OF VIRGINIA**

**VIRGINIA DEPARTMENT OF EDUCATION**

**DIVISION OF SPECIAL EDUCATION & STUDENT SERVICES**

**OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES**

**Re: Child, by and through xxx parent(s), Parent v. County Public Schools Case No. 20-064**

**Child & Parent(s)/Guardian: Administrative Hearing Officer:**

child

parent(s)

**Child’s Attorney/Advocate(s):**

Advocate

**County Public Schools’ Attorney**

Attorney for LEA

**Superintendent of XXXXXXX County Public Schools:**

Dr. Superintendent

# AMENDED DECISION**[[1]](#footnote-1)**

# I. PROCEDURAL HISTORY[[2]](#footnote-2)

On March 3, 2020, the parent filed a due process complaint (DPC/complaint). (HO Exh. 1). This complaint contained expedited and non-expedited issues. On March 5, 2020, the parent filed another DPC which was non-expedited in nature. The LEA moved to consolidate the two complaints. (HO Exh. 8). The Hearing Officer held a prehearing conference (PHC) on March 12, 2020, to address matters pertaining to the March 3, 2020 DPC, as well as the LEA’s motion to consolidate the parent’s complaints. The parent agreed to consolidation during the PHC and by email. (HO Exhs. 12 and 15). The Hearing Officer determined that the first complaint identified expedited and non-expedited issues and scheduled the due process hearing (DPH) on the issues for March 25, 2020, through March 27, 2020. (HO Exh. 12).

On March 16, 2020, due to the local, state, and national emergency imposed by the coronavirus pandemic (COVID-19), the Governor of the Commonwealth of Virginia ordered the closure of all schools in the state from March 16, 2020, to March 27, 2020. The LEA complied with the governor’s order and closed its schools and requested a continuance of the DPH which had been scheduled to be held in person. The parent objected to the motion.

The Hearing Officer held a second PHC on March 17, 2020, to address the matters before her, to include the continuance motion.

The Hearing Officer considered the arguments of the parties during the PHC and determined the LEA had closed school for students from March 16, 2020, to March 27, 2020. Moreover, subsequent to the second PHC the Hearing Officer carefully considered submissions/arguments from LEA counsel and the parent’s advocate in support of their respective positions about the requested continuance. After doing so, the Hearing Officer confirmed her ruling during the PHC granting the continuance and rescheduling the expedited hearing to April 16, 20, 21, and 22, 2020.

In making her ruling, the Hearing Officer recognized applicable law which requires that an expedited hearing be held within 20 school days of the due process complaint being filed. 34 C.F.R. § 300.532(c)(2). The Hearing Officer noted in her ruling that the IDEA regulation defines a “school day” as “any day, including a partial day, that children are in attendance at school for instructional purposes.” 34 C.F.R. § 300.11(c). Further, the LEA had closed school for students from March 16, 2020, through March 27, 2020. Accordingly, no students were reporting to school for instructional purposes. The Hearing Officer noted that the parent filed her complaint consisting of some expedited issues on March 3, 2020. The school’s calendar and its two week closure implemented due to the COVID-19 virus demonstrated that the 20 school days that immediately followed the filing of this complaint were: March 4, 5, 6, 9, 10, 11, 12, 13, March 30, 31, April 1, 2, 3, 14, 15, 16, 17, 20, 21, and 22, 2020. Accordingly, based on that two-week school closure for students, the Hearing Officer determined that the expedited hearing at the time was required to be held no later than April 22, 2020. Accordingly, the Hearing Officer found good cause to reschedule the expedited hearing and that doing so is in the best interest of the child. By order issued on March 20, 2020, the Hearing Officer rescheduled the hearing for April 16, 20, 21, and 22, 2020. (HO Exh. 22).

On March 18 and 20,2020, the LEA filed insufficiency notices regarding the non-expedited issues contained in the parent’s March 3 and 5, 2020 DPCs. By order issued March 23, 2020, the Hearing Officer determined that the parent’s complaint insufficiency pled all non-expedited issues within her jurisdiction except one. The Hearing Officer granted the parent leave to amend the consolidated DPCs. (HO Exh. 24, 29).

The parent filed a third DPC on March 20, 2020, which in effect amended her non-expedited issues. (HO Exhs. 30 and 34). As such, the time line on the non-expedited issues began anew on March 20, 2020. Moreover, the Governor extended the closure of schools for the remainder of the school year. Hence, the Hearing Officer determined that no school days existed from March 16, 2020, until the close of school for students on June 12, 2020. (HO Exh. 2/6).

The Hearing Officer held a third PHC on April 2, 2020, and rescheduled a virtual hearing for all the issues. The new hearing dates established were April 28, 2020, May 1, 5, 7, and 8, 2020.[[3]](#footnote-3) The Hearing Officer held the hearing as scheduled. During the Hearing, the Hearing Officer admitted the exhibits as noted in the transcripts.

# II. ISSUES

**A.** **Expedited**

1. Did the LEA have knowledge or suspicion of the child having a disability before xxx discipline in 2019 that led to the child being placed at the XXXX Center? If so, did the LEA deny the child a FAPE by not holding a manifestation determination and/or placing child at XXXX center?

2. Did the LEA conduct a proper manifestation determination review regarding an incident involving the conduct of the child on or about January 21, 2020? If not, was there a denial of FAPE?

3. Did the LEA err when it determined that the incident occurring on or about January 21, 2020, was not a manifestation of the child’s suspected disability? If so, was there a denial of FAPE?

B **Non-Expedited**

4. Did the LEA on or about March 5, 2020, conduct an eligibility determination that failed to consider all suspected areas of disabilities of the child. Specifically, did the LEA fail to consider OHI as it pertains to any trauma, anxiety, and depression experienced by the child? If so, did the LEA deny the child a FAPE?

5. During the eligibility determination process in 2020, did the LEA fail to collect behavior and discipline data regarding the child? If so, did the LEA deny the child a FAPE?

6 Did the LEA make its eligibility determination without information pertaining to the child’s behavior and discipline record; particularly, without considering (i) videos of the child’s behaviors on or about January 2019 and January 2020 and (ii) Dr. XXXX’s file of the child before the student’s expulsion? If so, did the LEA deny the child a FAPE?

7. Did the LEA deny parental participation in the eligibility process on or about March 5, 2020? If so, did the LEA deny the child a FAPE?

After discussions to clarify the issues with the parties and a review of the due process complaints, the Hearing Officer identified them during the PHC held on April 2, 2020, and in her order issued on April 3, 2020. This order provided the parties with an opportunity to object to or request amendments to the issues as presented. The Hearing Officer received no objections.

# III. BURDEN OF PROOF

The United States Supreme Court held in *Shaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed.2d 387 (2005), that the party seeking relief bears the burden of proof. Therefore, in this case the parent bears the burden of proof as she is challenging the LEA’s actions.

# IV. STATEMENT OF FACTS

1. During the 2018-19 school year, Child was a 9th grader at High School. (Tr. 36). Principal 1 became senior administrator at this school in June 2018. (Tr. 865).

2. As early as September, 2018, Child started skipping classes and leaving the school’s campus when xxx was not authorized to do so. On one particular occasion in September, an adult located Child off campus in the community. Child was returned to school. Additionally, on another day, Parent, suspecting Child may be skipping school, checked with attendance staff at High School to determine if Child had made it to xxx scheduled class. When she received information to the contrary, Parent received permission to leave her job. Parent arrived at High School where it was determined that Child had been in another class or location on the school’s campus. Parent initiated an impromptu meeting with HS Counselor, Lieutenant (a police officer who had known Child’s deceased father), Child, and administrator. (S 45; Tr. 96-98, 877).

3. Parent communicated with teachers, administrators, and other school staff about the changes she was seeing in Child, to include Child sleeping for extensive hours, trauma, signs she attributed to depression, and truancy. (Tr. 84-85, 93-98, 955-56).

In fact, HS Counselor and Parent had significant communications about Child during the first semester of xxx 9th grade year. He had been informed about traumatic events Child had experienced: the death of Child’s biological father at age 7 and more recently the death of xxx mother’s fiancé who was also a father figure to the child. By reports from Parent, HS Counselor also understood Child was suffering from grief. Counselor also was aware of Child’s attendance issues and inappropriate statements xxx was making in class. (Tr. 953 -56 and 990-98; S 30).

4. Among other administrators she spoke to Principal 1 several times about concerns she had about Child during xxx first semester at High School. (S 45).

5. Per his testimony during the due process hearing, Principal 1 interacted with the child at High School. Particularly, he noted greeting, not just Child, but the students as they entered High School. Principal 1 stated that he also moved about the school where he would encounter Child. Principal 1 indicated there were instances during those encounters when the child would not be in class when xxx should have been. (Tr. 874-76). Principal 1 had concerns about not only Child’s behavior, but xxx academics as well. (S45; S2 at 3; and Tr. 914).

6. Even though Principal 1 was aware of Child’s attendance problems (including instances of the Child leaving High School when xxx was supposed to be in school) and that this issue presented safety concerns, the school developed no safety plan for Child. Principal provided no reason for this non-development. Moreover, the LEA conducted no functional behavior assessment (FBA) to determine why Child had attendance and/or behavior issues. (Tr. 910, 914).

7. On January 10, 2019, Child involved xxxself in an incident at High School. The administration determined Child’s conduct violated the Student Code of Conduct, specifically Code BA2 (Assault with no weapon). HS Assistant Principal describes the incident as set forth in the 10th entry on Child’s disciplinary log. This log is found below in Statement of Fact # 11. (P2 at 4).

Principal 1 then suspended Child until a hearing with the SSDRO. (S 1 at 4).

Director of SSRDO presided over the disciplinary hearing on February 4, 2019. Those attending the hearing included, but were not necessarily limited to, Principal 1, Parent, Child, HS Counselor, Associate Principal, and the attorneys for the parties. When the director asked Principal 1 for his comments about Child, the principal responded that he had concerns about Child being on top of class and doing what xxx was supposed to do. He stated child had both academic and behavior problems. He noted having several conversations with parent about those concerns. Moreover, Principal provided an example of Child’s truancy problem. He recalled an incident of Child having been brought back to school after being found in the community during the time xxx should have been attending school. He noted the meeting held with Child, Parent, Lt., guidance counselor, and administrator stressing to Child the importance of being in class where xxx was supposed to be. (S 45). Principal 1’s testimony at the due process hearing reiterated the same. (Tr. 874-76).

Also, during the disciplinary hearing, HS Associate Principal expressed her concerns about Child’s attendance problems: reporting to school and attending class. (S 45; Tr. 914).

Director of SSRDO recommended Child be expelled from HS. The School Board agreed with the recommendation and expelled the child. Child was later enrolled at Alternative School. (S 2 and S 3).

8. Child’s behavior and academic problems persisted while xxx attended High School.

For example, prior to the child being suspended for conduct occurring on January 10, 2019, on October 30, 2018, HS Special Education Teacher 3 sent an email to the parent informing Parent of Child’s misconduct in class, truancy, and absences from class. This email reads in pertinent part:

I am [HS Special Education Teacher 3], one of the teachers for[ Child’s] Algebra I, I am writing to get you up to date about [Child’s] performance lately. [Child] has really struggled to follow directions with [Co-teacher] and myself both in the classroom. However, most of the time, xxx does not even show up to class. Today actually, [Co-teacher] saw xxx actually outside of school skipping (said xxx was going to Hardee’s). She reported it upon entering the building to an administrator. In Algebra class, [Child] plays inappropriate cursing videos loud on xxx cell phone. xxx constantly uses foul language and makes inappropriate jokes, xxx has made several jokes about how xxx enjoys having sex with old people and xxx having sex with xxx grandmother, xxx goes into great detail making sounds and hand motions. Very disturbing. Today xxx tells me, “Ms. Special Education Teacher 1, when I went to the bathroom earlier I pee’s out green stuff,” followed by laughing… and this is in front of the whole class. With [Co-teacher], xxx is usually disrespectful, however with me, xxx instead makes these inappropriate jokes. At this point it might be attention seeking, but still, very inappropriate….I really want [Child] to succeed in this class, and xxx is actually really intelligent in math; I believe in xxx. I ask that you talk to xxx about this, and [Co-teacher] and I have already rearranged the class, moving xxx seat, and we are both open to any suggestions you may have to improve xxx performance level.

P 14 at 2.

9. In addition, on November 30, 2018, Parent emailed Child’s teachers and High School Guidance Counselor. The email reads in pertinent part as follows:

Good afternoon:

I am emailing you as the parent of [Child]. I have spoken to each of you individually at some point, I think I have created this group message to include each of [Child’s] Teachers and I copied xxx counselor any my work email.

**As a 9th grader [Child] has not gotten off to a very good start. Xxx performance communicates that xxx has definitely taken a detour. As xxx parent it is my duty to make every effort to reverse this downward spiral.**

I am a helicopter parent, I deal with discipline, then academics, I reward accordingly. My methods are very restrictive and recently has been faced with opposition from [Child]. **We have experienced quite a few challenges that were the result of unexpected tragedies that has left each of us trying to sort through the why’s in our way.**

**The last marking period is the worst that [Child] has ever performed in every class simultaneously. I feel as though xxx is screaming for help and attention in all the wrong ways.**

**I am arranging some opportunities to deal with this opposition outside of school, I need assistance during school. I would like to entertain the idea, that we come up with a plan for [Child] that can and will be consistently applied from class-to class and teacher -to-teacher.**

IDEAS: Preferential Seating, Teacher Student Proximity. I am open for suggestions, but I would like for us to share what is working in one place, could possibly work in another.

We all have a common goal. Currently, xxx is definitely in the “I HATE SCHOOL MODE,” and “xxx PARENT IS DOING TOO MUCH.”

…

(P14 at 11 (emphasis added)).

10. Child failed all xxx courses the first quarter of the 2018-19 school. xxx also failed all xxx courses for the first semester of the 2018-19 school year, save a course xxx had previously failed in middle school and retook on-line at High School. (P3; Tr. 957-58).

11. Child’s Disciplinary Log from February 2, 2015, until the day of the January 10, 2019 incident list 25 code of conduct infractions. Nine more infractions are listed after the January 2019 incident. The log as of January 20, 2020 is set forth below:

**LEA Discipline Log of Student:**

Date: Description of Conduct/Behavior

1/21/20 [Principal 2] - Tl1 - [Child] had xxx phone while in the classroom. xxx had it connected to xxx computer and when the principal asked xxx to come with him, xxx got up and while walking to the classroom door, xxx put it in xxx back area underneath xxx pants. xxx was then asked to go walk through the metal detector. The metal detector went off, xxx opened xxx jacket, and the principal attempted to scan xxx [Child] said, “You are not going to touch me on my ass. That’s dead. You’re violating my rights.” The principal then said that you cannot have a cell phone in class and that you can be searched when in the building. [Child] then said, “Touch me again.” The principal then asked xxx if xxx was threatening xxx. [Child] then said, “You’re not going to touch me again, nigger. Fuck that shit.” xxx continued to curse and go on about xxx couldn’t be touched. [Child] walked out of the principal’s office, sat in the front lobby, and then returned to class without permission. The principal went to xxx class and asked xxx to return to the front. While walking out of the classroom, [Child] said to the principal, “I know you’re looking at me. Do you like what you see?” [Child] will be suspended to a hearing with the principal, [Principal 2]. Before [Child] may return to school, a hearing must be held. Please contact the Principal’s Secretary [Alternative School Secretary] @ xxx-xxx-xxxx to schedule the meeting. Because [Child] is going through Child Find process, a Manifestation Determination Review must be held. The Case Manager will contact you to schedule the meeting. I spoke with mother and advised her of the situation.

1/16/20 [Principal 2]- TC1 - [Child], during outdoor walking therapy, asked a passing car for a light and lit a small cigar. xxx then walked away from the group and smoked it. xxx teacher asked xxx not to; however, xxx continued to walk away and kept smoking.

1/06/20 [Principal 2]- D5C – [Child] took candy xxx teacher’s candy after xxx teacher asked xxx not to. xxx told xxx teacher to get away from xxx. Cursed repeatedly. xxx threw a pencil during class and said, “I don’t care about this bitch. I’m gonna take my GED.” xxx called xxx teacher a snitch ass bitch. xxx also threw a chair during class. On xxx way out the door, xxx said “Fuck you. You’re the opts.” Restorative meeting with mother and student was held.

11/21/19 [AS Counselor] – Discipline – [Child] was messing with the teacher’s tape dispenser and the sand was emptied out all over the floor. Th (sic) teacher asked xxx not to touch xxx belongings on xxx desk and xxx ignored and continued to play with the dispenser. Earlier in the day, xx x threw a quarter towards the front of the room where the teacher was sitting and it missed his head. [Child] thought it was funny and did not apologize. Parent contacted. OSS to a hearing with [Principal 2]

10/28/19 [AS Counselor] – Defiance – Student refused to turn xxx cell phone in. Staff caught xxx on xxx phone. Parent contacted and picked up the phone after school

10/25/19 [AS Counselor] – C2M – [Child] did not turn xxx phone in at morning arrival, instead xxx told staff xxx didn’t have it. xxx was observed in class by staff texting on xxx phone. The phone was confiscated and a student conference was held.

06/04/19 [Principal 2] – D3C – [Child]] and xxxxxxx male student had a disagreement during which disrupted the learning environment. A restorative meeting with the principal, sso, and the xxxx male student took place and both students were able to resolve the matter.

05/30/19 [Principal 2] - C2M – [Child] refused to forfeit xxx cell phone to xxx teacher and the principal three days in a row on 5/28, 5/29, and 5/30. The principal asked xxx for xxx cell phone and xxx said, “That’s dead.” I emailed mother.

05/16/19 [AS Counselor] – D5C - [Child] and another student were involved in a heated verbal exchange in class at the end of the school day. [Child] had to be physically removed from the classroom. Parent Contacted.

01/15/19 [HS Assistant Principal] - BA4 – [Child] was in [teacher’s] classroom with three other students and went on to assault a student who was sitting in the classroom. After [Child] and the three students assaulted the student, they proceeded to run out of the classroom. Video footage was obtained of the assault via social media.

10/24/18 [Staff] – Obscene Language – Constant cursing and (sic) test environment and refused to sit down and follow directions.

05/29/18 [Staff] -RE: FA2 – [Child and another student got into a physical altercation in PE after an exchange of words.

04/17/18 [Staff] – [Child] was on xxx phone, refused to put it away, was disrespectful in xxx responses for this situation.

02/21/18 [Staff] – F1T – [Child] kicked another student down the bleachers during gym yesterday. xxx stated that xxx was playing with the student. However, xxx recorded the incident on xxx phone and posted it on Instagram. [Child] has not accepted responsibility for xxx actions when spoken to on the morning of the 21st. After returning to class on the 21st, [Child] refused to follow directions of the teacher and continued to use xxx cell phone during class. The teacher asked [Child] to place the cell phone in the “cell phone bin.” xxx refused stating “I am getting suspended anyway.” This behavior is not tolerated at [Middle School].

02/07/18 [Staff] – classroom disruption – [Child] got into a verbal argument in class which led to a classroom disruption.

11/09/17 [Staff] – D2C – [Child] Not Listening to Authority – Disrupting class, Not listening to authority, walking out of class, defiance, and being disrespectful.

10/27/17 [Staff] – D3C – [Child] is walking around the class without permission, yelling at other students, talking out of tern, stopping the SOL instruction process, and harassing students that are smaller than xxxself.

09/15/17 [Staff] – Disrespect/Defiance – [Child] walked out the health class without permission and walked around the campus. When the assistant principal confronted [Child] about being out of class xxx became very disrespectful.

06/05/17 [Staff] – D5C – [Child] caused a major campus disruption on the sidewalk between classes. xxx refused to follow directions despite being directed by teachers. This caused a major campus disruption. This behavior is not tolerated at [Middle School].

05/24/17 [Staff] – D3C – [Child] threw a cup across the room today. xxx used profanity class and xxx was disrespectful to the teacher and Assistant Principal.

04/18/17 [Staff] – D3C Disruptive Demonstration - [Child] was warned to stop using inappropriate language while in gym. When xxx continued, xxx was asked to go to a time out location. [Child] became disrespectful and disruptive to the environment and had to be removed by an administrator after xxx ripped paper off of a bulletin board.

1/13/17 [Staff] – D3C – Disruptive Demonstrations – During morning arrival, [Child]was screaming as loud as xxx can while walking with a group of friends. The scream sounded like a xxxx in distress and several staff members were immediately concerned for the safety of students.

12/06/16 [Staff] - D3C – Disruptive Demonstrations – [Child] pushed a student into the bushed (sic) on campus. xxx then stated, “You’re not going to do anything that’s why I pushed you.” After the administrator asked about the situation [Child] then went back to class and made negative comments toward student. [Child] called the student fat and black. xxx also, called them hoes. This behavior will not be tolerated at Middle [School].

11/30/16 [Staff] – Disruption – When asked to ignore another student who xxx was going back and forwards with science in class, [Child] was sent out of the class for a conference with the other student and myself. A Parent contact was made.

11/28/16 [Staff] – D5C Class/Campus Disruption – [Child] has been continuously disruptive, disrespectful, and argumentative in classes. Timeouts, conferences with admin, detentions, parent phone calls, and other proactive approaches have not proven to be effective. Today, after being given several opportunities to correct xxx behavior and comply with reasonable requests, xxx chose to continue disruptive behaviors. This carried over into a fire drill exercise. When xxx consequence was given, xxx said that xxx refused to attend and that xxx would just take a suspension. xxx later apologized for xxx behavior.

10/17/16 [Staff] – A2T – [Child] was given permission to use the bathroom. Xxx was observed by the teacher coming from out area. [Staff] spoke with the student and made a phone contact wit (sic) the parent as a warning.

10/11/16 [Staff] – F1T – [Child] and another student made sarcastic comments to each other and the incident escalated to a near fight. xxx met with me and mediated with the other student.

04/22/16 [Staff] - FT1 – Fight/Altercation – [Child] was involved in an altercation with another student during PE. The other student was calling [Child] names. Instead of asking for help both students began to fight. This will not be tolerated at [Middle School].

12/11/15 [Staff] [Child] continues to be disruptive and disrespectful in class. In [Staff’s] class one referral states that [Child] was out of seat 5 times, pounding” on desk mumbling, and throwing broken pencils and paper across room. The next day [Staff] asked [Child] to stop talking 10 times. In [Staff 2’s] class [Child] was passing gas in class, and passing gas on the face of two students, out of xxx seat at all time, off task, talking, bothering other students, laughing, shouting at her every time that she gave xxx a warning, making fun of her, her accent and her English. These behaviors will not be tolerated.

11/24/15 [Staff] – D1C – [Child] continued to talk back to the teacher when redirected despite several opportunities to adjust xxx actions. Previous occurrences have resulted in time outs and student behavior logging. After school detention for Thursday, December 3rd is issued 3:30-4:30 p.m. [Child] will go to café D and will wait for administration to pick xxx up from there.

9/24/15 [Staff] - D3C Disruptive Demonstrataion (sic) – [Child] and another student were arguing on the bus. [Child] yelled “shut the fuck up” to the student and then stood up put xxx hands on the other students neck and pushed him.

05/11/15 [Staff] – Teacher Referral – D5C Class/Campus Disruption – [Child] has been extremely disruptive and disrespectful. xxx stated xxx is going to drop out and fail all xxx SOLs. [Child] was very argumentative when the teacher attempted to redirect xxx. xxx also sang the entire alphabet during instruction. The teacher reported the behavior to xxx mother via email. During recess, [Child] pushed another student and was disrespectful to staff. Once in the office, xxx arugued (sic) with another student and called him “burnt” was sent to the adjoining office. OUTCOME: student conference – 1 day OSS

03/30/15 [Staff] – F1T – Altercation/No Injury – [Child] was in a physical altercation with another student. The students shoved one another in the hallway after breakfast. A classmate intervened. OUTCOME: ISS 3/30/15

02/10/15 [Staff] – bus 1879 -D2C – Defiance/Refuses Requests – [Child] refused to move to the front of the bus when the assistant asked. OUTCOME: [Staff] had a conference with Child.

(P2 at 4-6).

12. Child’s Disciplinary Log reflects a pattern of behaviors. To include, disrespect, disruptive behaviors, defiance, altercations, and use of inappropriate language. *Id.*  (Tr. 208-09).

13. During the time Child was enrolled at High School, Child’s educational records do not document any interventions employed by the High School.

Per Child’s testimony, xxx received little support from adults at High School and it was xxx opinion that Principal 1 disliked xxx. (Tr. 37-40).

The evidence does reflect that Child met with HS Counselor a few times one on one while at High School and that HS Counselor attempted to enroll the child in a group addressing grief.

Although Child did not sign agreeing to attend grief counseling, HS Counselor believed xxx desired to attend. Per email from HS Counselor, even if Child signed indicating xxx consent to attend the grief counseling group, HS Counselor was not receptive to placing Child in the group due to Child’s attendance problems. (P14 at 10).

Hence, the Hearing Officer finds Child’s attendance issues precluded xxx from participating in the grief counseling.

In addition, regarding reported interventions or supports, per administrator, Child was afforded the opportunity to reset. In addition, informal conferences were held with child.

14. High School/LEA record does not reflect documented interventions.

14a. Child did not have anyone considered a trusted adult at High School. (Tr. 37, 1001). In fact, HS Counselor described child as not making any strong connections with any teacher in the school. (Tr. 960). Per HS Counselor’s testimony he noted that “Child seemed to be struggling a little more than other freshmen transferring to high school.”

15. Although Child’s attendance record reflects xxx had significant attendance problems at High School, the evidence shows Child accumulated even more absences from school or classes then reported. For instance, during the disciplinary hearing, Principal 1 commented that Child had 17 incidents of tardiness in xxx first period class and similar number of absences in other classes. (S 45).

17. Per testimony of Principal 1 and HS Counselor, they did not suspect Child was one with a disability. HS Counselor thought xxx was just having problems adjusting to high school. Per Principal 1’s testimony, he described Child’s attendance problem and failing grades as typical for 9th graders during the first semester, especially those at High School.

18. At the time the LEA expelled the Child xxx should have been suspected of being a child with a disability. This is so because xxx was displaying characteristics of anxiety as evidenced by xxx attendance issues. Additionally, Child had experience trauma and signs of depression. Child also displayed characteristics of ADHD and impulsivity. In addition, Child was failing xxx classes. (P2; Tr. 249).

19. HS Counselor qualified as an expert in public school counseling. (Tr. 952). Principal 1 qualified as an expert in educational leadership and policy. (Tr. 874).

20. Eligibility, Child Find, Manifestation Determination, and Special Education professional qualified as an expert in eligibility, child find, manifestation determination, and special education. (Tr. 194).

**Alternative School**

21. Child’s enrollment at Alternative School started March 2019. (S4).

22. From March 2019, to January 21, 2020, Principal 2 recorded nine (9) instances of misconduct by Child and/or discipline on Child’s disciplinary log. *See*  Statement of Facts # 11.

Accordingly, after the School Board expelled Child and xxx was enrolled in Alternative School, xxx behavior issues increased. *Id.*

23. Child initially met with School Social Worker at Alternative School on or about October 31, 2019, for a group meeting with other xxxxx students attending Alternative School. (Tr. 1115; S13).

24. A review of the disciplinary log narratives for the time Child has attended Alternative School until January 20, 2020, shows 9 entries by Principal 2/AS Counselor. The reported infractions indicate Child engaged in repeated offenses involving defiance, disrespect, cell phone violations, and altercations. *See* Statement of Fact #11; P 2).

25. In addition, the log shows that before the January 21, 2020 incident, Child had been suspended at least 1 day during the 2019-20 school year. Specifically, annotations regarding the log’s November 21, 2019 entry indicate that Child received an out of school suspension (OSS). *Id.*

26. On November 25, 2019, Parent submitted to Principal 2 a referral request for a child suspected of having a disability. (S17).

27. Principal 2 scheduled a referral meeting which took place as set on December 4, 2019. (S Exh. 18). Those attending were Principal 1, Parent, Social Worker, General Ed Teacher, and School Psychologist. (S19).

28. A summary of the discussion during the meeting indicates that Parent reported to the team that Child has had difficulties since elementary school. Specifically, Parent commented that Child exhibits sensory issues, symptoms with ADHD, anxiety, and depression. She expressed her desire that Child receive support. Parent also informed the team that Child had been evaluated by Health Provider and had received a diagnosis of Depression. She also mentioned that Child was receiving group therapy through the County Mental Health and she was pursing private therapy for Child. Parent also informed the team that Child had lost xxx father at the age of seven and an “adoptive father” had passed away one year ago. Parent requested support for the child and expressed a desire for xxx to graduate.

Child’s general education teacher stated, among other things, Child is very smart. AS Guidance Counselor noted that Child currently had five credits.

The LEA proposed evaluating child to determine if xxx was eligible for special education and related services.

(S19).

29. When the team discussed evaluating Child, they did not discuss “sensory issues.” (Tr. at 1162/7-11). Accordingly, no occupational therapy evaluation was proposed to the parent. (S Exh. 20; Tr. at 229 and 1162). Because the summary of the discussion of the eligibility team specifically reports that parent mentioned Child having sensory issues and no occupational therapy assessment was offered, the Hearing officer finds, not all areas of suspected disability were assessed. (Tr. 228; S19).

30, The areas of evaluation the team selected were Educational, Psychological, Sociocultural, Hearing, Vision, and Observations. On December 4, 2019, Parent consented to these evaluations. (S20).

# Psychological Assessment

31. School Psychologist completed the psychological assessment on January 24, 2020. Even though School Psychologist’s report indicates that she completed it on January 24, 2020, School Psychologist did not place the evaluation in the child’s cumulative file at High School until 48 hours before the Scheduled eligibility meeting on February 11, 2020. (Tr. at 1035; S Exh. 27). School Psychologist provided parent with copy of the report on the day of the first eligibility meeting, February 11, 2020. (Tr. at 1035-1036).

School Psychologist provided no explanation for the delay in putting the report in the child’s file.

32. Page 2 of the psychological evaluation list 34 reported behavior infractions. Per the report, the school’s psychologist attained the information to prepare the listing from the child’s cumulative file and the school’s computer system that contains data on students within the district. The particulars of this listing are as follows:

Child’s 5th grade year in 2014/15 there were 3 infractions listed for 1) defiance/refusing request, 2) altercation with no injury, and 3) class/campus disruptions;

Child’s 6th grade year in 2015/16 there were 4 infractions listed for 1) disruptive demonstration, 2) disrespect, 3) disrespect, and 4) fight/altercation;

Child’s 7th grade year in 2016/17 there were 9 infractions listed for 1) minor physical altercation, 2) truancy, 3)class/campus disruption, 4) class/campus disruption, 5) disruptive demonstration, 6) disruptive demonstration, 7) disruptive demonstration, 8) disruptive demonstration, and 9) disruptive demonstration;

Child’s 8th grade year in 2017/18 there were 7 infractions for 1) disrespect/defiance, 2)disruptive demonstration, 3) not listening to authority, 4) not listening to authority, 5) class/campus disruption, 6) minor physical altercation, and 7) fighting with no/minor injury;

Child 9th grade year in 2018/19 at High School there were 2 infractions for 1) obscene language and 2) battery/assault with no weapon. In addition, during this school year while child was attending Alternative School there were 3 infractions for 1) classroom/campus disruption, 2) cellular telephones, and 3) disruptive demonstration;

Child 10th grade year in 2019/20 there have been thus far 6 infractions for 1) cellular telephones, 2) defiance, 3) discipline, 4) classroom/campus disruption, 5) tobacco use, and 6) threat/intimidation of staff.

(S 27 at 2).

33. Infractions listed in the psychological report show a pattern of behavior – defiance includes consideration of cellular phone violations), altercations (some physical), disruption, disrespect.

(S 27 at 2; P2; Tr. 208-09).

34. School Psychologist derived her listing of behavior infractions from the Child’s disciplinary log. School Psychologist omitted the narratives provided in the disciplinary log regarding each infraction. Per her testimony, this was out of concern that they may be subjective. (P 2 at 1-2; Tr. 1058).

The eligibility team did not discuss the narratives provided in the disciplinary log, but only the number of infractions as provided in School Psychologist’s report. School Psychologist believed the number of infractions not the narratives behind them were important. (Tr. 1058/4-14).

35. As additional tools of assessment for the school psychological evaluation, Parent and Child completed the Comprehensive Behavior Rating Scale at the psychologist’s request/direction.

The Child’s rating demonstrates that Child displays a lot of defiance and aggressive behavior. Accordingly, Child can be argumentative and defy requests from adults. Child’s rating scale also shows that xxx has poor control of xxx anger and may lose xxx temper at times. In addition, the rating shows Child struggles with hyperactivity. As such, xxx may have difficulty sitting still and will often seem impulsive. (S 27 at 8-9; Tr. 1044-1045).

The parent’s rating scale revealed that from Parent’s perspective, Child has high levels of emotional distress, worry, and hyperactivity (hyperactivity was reported by Child also). In addition, Parent’s rating scale revealed Child has high levels of physical symptoms along with worry and some social problems.

36. In conducting the psychological assessment, School Psychologist caused General Ed Teacher and Child to partake in the Children’s Depressive inventory. Results revealed an elevated score and that Child has emotional and functioning problems. School Psychologist concluded that Child has a profile consistent with a child experiencing depression. *Id.*

37. In her summary, School Psychologist concluded, regarding child’s social and emotional behavior that Child’s ratings show xxx has a profile consistent with difficulties experienced by children with Attention Deficit Hyperactive Disorder (ADHD), Anxiety, and Depression. Further, Child experiences difficulty with defiant/aggressive behaviors, hyperactivity/impulsivity, anxiety, and depression. (S27 at 12).

38. While School Psychologist evaluated Child, she observed the child display constant fidgetiness. Per her report, Child frequently required something in xxx hands while answering questions.” (Tr. at 1042-43, 1054; S27 at 3).

School Psychologist is not qualified to assess sensory issues. (Tr. 1054-1057/1-6).

39. School Psychologist also conducted intellectual testing, the Wechsler Adult Intelligence Scale-Fourth Edition (WAIS-IV).

Child’s overall score indicated that xxx overall cognitive ability is in the superior range. Per School Psychologist report, the superior range is from 121-130. Hence, Child’s overall score fell within two points from the very superior range (131 and above). (S27 at 4).

A break-down of xxx overall cognitive score show the following:

**Area**  **Score and Range**

**1 Verbal Comprehension Index (VCI) 136 (very superior)**

Per report this indicator relies heavily on knowledge that has been

acquired and gauges an individual’s verbal reasoning and

communication abilities, long term memory, and knowledge

of vocabulary and concept formation

**2 The Working Memory Index (WMI) 131 (very superior)**

Per report this indicator measures an individual’s ability to obtain

and retain information and utilize it effectively within a few

seconds

**3 Perceptual Reasoning Index (PRI) 121 (superior)**

Per report this indicator measures non-verbal concept formation,

higher level processing skills, visual perception and organization

and simultaneous processing

**4 Processing Speed Index (PSI) 100 (average)**

Per report this indicator is designed to measure the individual’s ability

to scan, sequence, or discriminate simple visual information and to quickly

and accurately perform simple visual motor tasks while maintaining

attention and concentration

(S27).

40. As referenced above, cognitive testing demonstrated that the child’s overall cognitive score is 129, in the superior range and two points from the very superior range. (S27 at 4-5).

A relative weakness of Child was xxx processing speed (in the average range) compared to xxx overall superior IQ (almost very superior IQ). (S27).

41. In addition, School Psychologist’s assessed the child’s academic achievement. Testing indicated a score of 125 and that Child’s educational ability fell within the superior range.  *Id*  at 6.

42. Even though Child’s cognitive scoring indicated xxx cognitive ability was in the high superior range and xxx educational achievement was in the superior range, on March 5, 2020, the eligibility team gave no consideration to determining if the child was twice exceptional. (Tr. at 197; S45).

43. Hearing Officer finds, Child presents with a complex profile considering xxx suspected disabilities and superior cognition. Hence, the eligibility team should have suspected Child as being twice-exceptional). (Tr 238-241).

# Social Evaluation

44. School Social Worker conducted a social evaluation by interviewing Parent over a two-day period. She completed the Social Evaluation on February 7, 2020. (Tr. at 1145). School Social Worker could have emailed the report to parent, but she did not. (Tr. at 1169/4). Parent received a copy of the eight (8) page report on the day of the February 11, 2020 meeting.

45. **Trauma**

During her interview with Parent, Parent reported Child had lost several individuals in close relationship to xxx. It was reported that the summer before Child’s 9th grade year, a friend of Child drowned in the pool. Also, Parent reported that her boyfriend, who served as a father figure for Child, died when Child was in the 8th grade. Further, Parent reported Child was jumped by several xxxx when xxx was conditioning on the xxxxxxxx team. (S30 at 2; Tr. at 1133).

Additionally, the report notes that Child lost xxx father suddenly at age 7 and thereafter xxx and xxx siblings lost their connection with their paternal relatives. (S Exh. 30 at 5).

46. **Sensory**

During her interview with Child, School Social Worker observed the child was restless throughout the interview. Her report states that the child was “fidgeting with different items” throughout the interview. In addition, per the report, Child described xxx mood as ranging from happy and energized to fidgety and often irritable. When the evaluator asked the child about coping skills, per her report the child stated that xxx “fidgets ten times harder.” (S30 at 3).

Moreover, in conducting the Social Evaluation, the social worker interviewed the parent. Parent also expressed concerns with Child being fidgety. Parent commented that Child cannot sit too long and would benefit from movement breaks. (S30 at 2). Parent also informed School Social Worker that Child is easily irritated by sounds around xxx. (Tr. at 1144-1145).

47. **Conduct/Behavior**

The report also mentioned that child had 20 conduct entries while in middle school. The report does not provide the reasons for those entries. The evaluation mentioned 11 entries of record since Child has been in high school. Specifically, 2 while at High School and 9 while at Alternative School. (S30 at 3).

Of note, Child accumulated those behavior infractions at Alternative School in less than one year. *See*  Disciplinary Log, Statement of Facts # 11.

Parent reported to Social Worker during the interview that because of Child’s size, xxx is often accused of initiating misconduct. Further, regarding child’s size the report also notes Child reported feeling angry when xxx believes xxx is being disrespected by other xxxxx due to xxx size. (S30 at 3).

48. **Health Concern**

Per the report, Parent informed the social worker that child had complained of headaches and blurred vision, that Child recently saw an eye doctor who determined Child needed glasses/contacts for reading. Child reported picking up xxx glasses the day before xxx February 7, 2020 interview with School Social Worker. (S30 at 3 and 4). Parent also expressed Child is self-medicating. Child confirmed xxx has smoked marijuana during xxx interview with Social Worker on February 7, 2020. (Tr. at 1186).

During Social Worker’s interview with Parent, Parent also expressed concerns she had about Child’s sleeping extended hours or experiencing insomnia. Moreover, there were reports of child sleeping during school hours. (S Exh. 30 at 4;Tr. at 1195). LEA collected no data regarding this concern. Social Worker noted that falling asleep in class interferes with Child’s ability to learn. (Tr. 1196/6).

49. In conducting the Social Evaluation, School Social Worker also caused parent to complete the Hawthorne Attention Deficit Disorders Evaluation Scales **(ADDES-4)** Home Version. Results of this assessment indicated a serious level of concern regarding child’s inattentiveness. Per School Social Worker report, behaviors concerning attentiveness that were noted to occur one to several times an hour were Child was easily distracted, by other things happening in the home, and disorganized with possessions. (S 30 at 6).

In addition, behaviors noted as occurring one to several times a day included the following: does not listen to what others are saying; does not direct attention or fails to maintain attention to important sounds in the immediate environment (e.g., conversations, instructions, etc.); needs oral questions and directions frequently repeated; has difficulty concentrating; does not remain on-task to do homework; does not listen to or follow verbal directions; forgets; changes from one activity to another without finishing the first, without putting things away, before it is time to move on to the next activity, etc.; has short attention span; fails to follow necessary steps in doing things; is easily angered, annoyed, or upset; appears restless; does not remain seated; and moves about unnecessarily. Further, scoring indicated a major behavior concern for a 16 year- old xxxx. *Id*.

Social Worker did not give a reason why the school version of the scale was not conducted. (Tr. at 1199-1200).

**Observations**

50. In preparation for the meeting Alternative School Counselor (AS Counselor) collected data on the child. She observed xxx twice in the classroom setting on February 7, 2020, once in xxx morning class and once in xxx afternoon class. Regarding the observation of Child in xxx morning class, notes indicated that the child was focused on working on xxx assignments in the Edgenuity program. Regarding the afternoon observation, the observer’s notations indicate, among other things, that Child laid xxx head down on the desk while xxx was working. xxx had a positive interaction with the teacher when the child requested assistance on a quiz. Summary notes of the observation stated that Child had stated that xxx had been up for 24 hours. Further, to the observer, Child appeared “a little more restless.” Child was stretched between two chairs with xxx computer in xxx lap. Parent had reported that Child fidgets a lot but AS Counselor noted that she did not observe this behavior on February 7, 2020. (P7; Tr. at 495-500).

**February 11, 2020 Eligibility Meeting**

51. In December 2019, the eligibility team selected February 11, 2020 as the meeting date to discuss the child’s eligibility. Prior to the meeting being set for this date, Parent had communicated to the school’s team members that she was undergoing surgery on February 12, 2020, and was expected to need three to four weeks following the surgery to recuperate. (Tr. I at 120-121 and 172).

52. The Eligibility team held the meeting on February 11, 2020. Those in attendance at the beginning of this meeting were Principal 2, Parent, HS Special Education Teacher/Case Manager 1, AS Counselor, School Social Worker, General Ed Teacher, and School Psychologist. Parent had concerns about Case Manager I as she had not worked with the child. Her normal place of work was High School and not the alternative school. She arrived just before the February 11, 2020 meeting started and stated that she had been told to attend the meeting. It appeared to the parent that Case Manager 1 had a pierced tongue with a ring in it and she kept getting the ring stuck in her teeth. Parent believed that because of this, Parent was unable to understand what Case Manager 1 was saying during the meeting. Parent complained about Case Manager 1’s lack of experience working with Child, the manner in which she came to the meeting, and Parent’s inability to understand Case Manager 1 as she spoke during the meeting. (Tr. 102-103).

53. The purpose of the meeting was to review existing data and determine eligibility. (Tr. 1170-71; S 21).

54. Parent had participated in the February 11, 2020 meeting (February 11 meeting) from the beginning. Sometime after the meeting started, parent’s advocate joined the meeting by telephone.

55. It is not clear exactly when, but the evidence does show that sometime between January 2020, and the February 11, 2020 meeting, HS Special Education Teacher 2/Case Manager 2 agreed to obtain behavior data on Child in the Alternative School setting. Specifically, she agreed to observe the child at Alternative School and to have Child’s teachers complete documents on the child’s behavior. During the February 11 meeting parent and her advocate asked to review the behavior data promised. The LEA stated it had not been collected. Parent requested the behavior data again. (Testimony of AS Counselor).

56. Sometime during the February 11 meeting, the LEA provided parent copies of the psychological report and social work report. And when the parent’s advocate joined the meeting the social worker was reviewing her evaluation. Because Parent and her advocate had not received the reports in advance, they requested that the meeting be rescheduled to provide them time to review the documents. In addition, the parent and her advocate requested an FBA. Accordingly, the meeting ended. (Tr. 157, 163 -65).

After the February 11 meeting, HS Special Education Teacher 2 met with Child immediately following the meeting for about five minutes. This was the first time the teacher had met with the child. (Tr. 104, 513-515)

57. During the February 11 meeting, the team did not have before it any psychological data regarding any counseling sessions the child had participated in with School Psychologist. (Tr. II at 422/15-17 **)**

58. General Ed Teacher described the meeting as not going well. General Ed Teacher stated that after the parent’s advocate joined in, the meeting became argumentative and there was some anger and raised voices. Per his testimony the parent and advocate asked questions about the parent’s rights. (Tr. 605-607 Moreover, AS Counselor described Parent as expressing frustration with the principal. (Tr. 537). Parent and advocate requested more time to review the reports they had just received during the meeting. The meeting was adjourned with the understanding that the meeting would be reconvened at a later date.

59. Parent had surgery on February 12, 2020. As referenced earlier, she had previously informed the LEA that she would be recuperating from surgery for about three to four weeks. She was heavily medicated days after her surgery. (Tr. 172).

# Other Facts

**No data collected:**

60. Per the LEA, one intervention or support offered Child at Alternative School consisted of Child attending Groups with School Social Worker and School Psychologist. The groups started at the end of October, 2019 and were made up of several xxxx students attending Alternative School. The group activities were not guided by any curriculum. Further, Social Worker/psychologist collected no data on activities engaged in by the group.

That said, Child did create rap lyrics for one activity. In addition, there was a PowerPoint created by the group for another activity which the group presented to elementary students. (Tr. 1034 and 1116-1125).

61. Another support or intervention provided by Alternative School for the Child was “check-ins” or counseling with School Psychologist. No curriculum existed for the counseling sessions or check-ins. For this reason, the psychologist stated she did not keep notes of the sessions. School Psychologist described this intervention as a means to build rapport with the student. During sessions, the psychologist and Child discussed various topics. School Psychologist did not maintain any notes on her meetings with Child or matters that they discussed during the meetings. She did however, provide to Child’s eligibility team a list of dates she believes she met with Child. (S 13; Tr. 764-68, 1029, 1073-74).

Child had been screened by the psychologist at the beginning of the school year for anxiety and depression. The screening indicated Child measured in the “at risk” zone. (Tr. 1025/7-14). The intended reason for child meeting with the psychologist was to provide social and emotional support.

62. Also, regarding supports and interventions for the child, Principal 2 contended that the school used a point system where the Child earned points from xxx teachers based on xxx participation in class and compliance with school rules. Any data regarding points the child had received was not collected and was not shared with the eligibility team. (Tr. II at 397-398).

63. In addition to the sessions with the psychologist and group meetings, the LEA described another intervention or support for the child as scheduled meetings with Mentor and a young xxxx’s group. (Tr. 1034). Of note, Parent had already scheduled meetings with the same mentor in the community setting.

In addition, on November 25, 2019, Child agreed to a behavior contract. There was no data on the behavior contract. (Tr. 769).

64. Accordingly, Hearing Office finds that the LEA had set up several interventions and supports for the child; however, the supports had no curriculums and practically no data was collected or maintained regarding Child’s involvement with them and the effectiveness of them.

However, Child avoided some disciplinary infractions being formally entered on the log because xxx was allowed to meet with psychologist. Sometimes as a result of these meetings, xxx was able to self-regulate. (Testimony of School Psychologist). In addition, at times Child’s mother was called and Parent picked Child up from school.

65. Despite the interventions and supports mentioned, Child’s behavior infractions continued. *See*  Disciplinary Log (P 2) and Tr. 1031.

# March 5, 2020 Eligibility Meeting

66. Following the February 11 meeting, Principal 2 sent the parent a letter proposing dates to reconvene the eligibility meeting. Three dates and times were proposed as the date to reconvene. They were March 3, at 10:00 a.m.; March 4, at 11:00 a.m.; and March 5 at 1:00 p.m. All dates and times where during the period Parent had informed the LEA she would be recuperating from her surgery. (S 36).

The letter also asked Parent to provide alternative meeting dates and times if she were not available on the proposed dates and times. Finally, the letter informed Parent that if it did not receive a response the committee would proceed to hold the meeting on March 5, 2020 at 1:00 p.m.

March 5, 2020 was the deadline for determining eligibility unless the parties agreed in writing to an extension. Parent also received an email from LEA about the need to reconvene the meeting.

Parent did not respond to the letter.

67. On March 5, 2020, the school-based members gathered to commence the eligibility meeting. Parent and her advocate had not agreed to this meeting because Parent continued to recover from her surgery. In fact, on the day and time of the meeting, she was attending a medical appointment.

The school-based members of the team telephoned parent before commencing the meeting and left her a message stating they would be holding the eligibility meeting. Parent was asked to call back to participate. As referenced, Parent was attending a medical appointment and requested her advocate contact the team. Advocate attempted to call into the meeting; however, the facilitator did not recognize her number and did not answer the call. Meanwhile, the meeting started. Advocate then telephoned the school’s secretary who informed the team that the parent’s advocate/parent had attempted to call into the meeting. Eventually the advocate and the parent were connected to the meeting by telephone. Parent had stepped outside of her medical appointment to speak to the school-based team members for this purpose. Parent and advocate reiterated that the parent was at a medical appointment. Parent also stated she desired to appear in person. They requested to reschedule the meeting after Parent was well enough from her surgery. (Tr. 821-22; P 23 ; S45).

Parent also found it cumbersome to meet by teleconference, considering among other things, the logistics of sharing documents. Per Parent’s testimony, she felt the school was attempting to bully her into attending the meeting. (Tr. 120-21).

In addition, parent requested an extension so data could be obtained on Child’s behavior. This data had previously been requested and at one point, HS Special Education Teacher 2 had agreed to provide behavior data to the parent. However, no behavior data had been collected by the March 5 meeting. The LEA declined to extend the meeting date. The LEA stated that in order to meet the eligibility determination deadline, the meeting needed to take place by March 5, 2020. In addition, the LEA stated it did not need any additional data.

The LEA declined to reschedule the meeting to obtain the behavior data stating that it had not been a component selected for evaluation and that such an assessment was not needed for the eligibility determination. In addition, it was represented that HS Special Ed Teacher 2 had not had an opportunity to leave her class and observe the child at Alternative School.

The LEA indicated that the team could reconvene with the parent after the meeting on March 5, 2020, and review everything with Parent and answer any questions.

After being on the telephone for about 22 minutes, the parent and advocate disconnected themselves from the meeting.

(S 45).

68. The school-based members of the team, continued to meet.

A review of the evidence shows that during the February 11, 2020 eligibility meeting in which the parent attended in whole and her advocate in part, School Social Worker started reviewing her Social Report. At the March 5, 2020 eligibility meeting, she continued to review it with the school- based members of the eligibility team after the parent and her advocate who were connected to the meeting by telephone departed the meeting. Sections discussed during this meeting included, but were not limited to, traumas the child had experienced with the deaths of those in close relations to xxx and xxx being jumped in the eighth grade while conditioning for xxxxxxx. (S Exh. 45). Also, School Psychologist shared portions of her report that addressed whether the child was at high risk for depression. The Beck Youth Inventory result was shared with the team. This test evaluated the child in areas of depression, anxiety, anger, disruptive behavior, and self-concept. In addition, the psychologist went over the Children’s Depressive Inventory which was completed by the parent, the child, and teacher. Responses fell in the elevated range (indicated by Child’s responses) to the very elevated range (noted by Parent and Teacher). Behavior Ratings completed by Parent were also discussed. (S 45; Tr. 1040).

After considering those assessments, as well as others, the team then proceeded to go over the check list for OHI. During the discussion regarding this check list, the school-based team considered stressors in child’s life, depression, and anxiety. (S45).

The Eligibility Summary completed reflects their discussions on February 11, 2020 and March 5, 2020. (S45).

69. A twice-exceptional child is a child identified as a child with a disability and a child with giftedness. (Testimony of Eligibility, Special Education, and Child Find Expert) *See also,* VDOE guidance document: *Supporting the Identification and Achievement of the Twice-Exceptional Student: Frequently Asked* Question; *also* Testimony of Eligibility Expert Tr. at 198.

Evidence shows that Child has disabilities or suspected disabilities; for example, depression, trauma, anxiety, ADHD. Also, the evidence shows Child has superior intellectual abilities; that is, cognitive abilities in superior range and near very superior range and intellectual abilities in the superior range. (S 27).

The twice-exceptional Child has a complex profile. The eligibility team did not give thought to whether the child is twice-exceptional. (Testimony of Eligibility, Special Education, and Child Find Expert) *See also,* VDOE guidance document: *Supporting the Identification and Achievement of the Twice-Exceptional Student: Frequently Asked* Question; *also* Testimony of Eligibility Expert Tr. at 198; S40 and S45.

When a student is suspected of having a disability and being gifted, the eligibility team should consider whether Child is twice-exceptional. (Testimony of Eligibility, Special Education, and Child Find Expert); *See also,* VDOE guidance document: *Supporting the Identification and Achievement of the Twice-Exceptional Student: Frequently Asked* Question.

70. The eligibility team possessed information showing the child exhibited numerous characteristics of twice exceptional students, to include most if not all of the following:

(i). Shows high verbal ability, but may use language in inappropriate ways and at inappropriate times;

(ii) Shows attention deficit problems but may concentrate for long periods of time in areas of interest;

(iii) Has strong questioning attitudes; may concentrate for long periods of time; may appear disrespectful when questioning information, facts, etc., presented by teachers, adults, or other authority figures;

(iv ) May be unwilling to take risks with regard to academics and yet, willing to take risks in non-school areas without consideration of consequences;

(v) Appears immature relative to cognitive ability and chronological age since such students may use anger, crying and/or withdrawal to express feelings and deal with difficulties;

(vi ) Is often a leader among the more nontraditional students demonstrating strong “street wise” behavior; or conversely, the disability may interfere with the student’s ability to exercise leadership skills;

(vii ) Shows a wide range of interest but may be thwarted in pursuing them due to processing or learning problems;

(viii) May struggle with basic skills due to cognitive processing difficulties; and

(ix ) Often has excellent higher order thinking skills but struggles with rudimentary activities;

(S27; S40; S45; P2; Testimonies of social worker and psychologist; *see also, Supporting the Identification and Achievement of the Twice-Exceptional Student: Frequently Asked Questions* at 6-7).

71. The evidence shows that Eligibility Expert has extensive training in special education. She holds certification in special education and a master’s of science degree in special education. She taught special education in the public-school setting for 14 years. In addition, Eligibility Expert has served on at least 100 eligibility meetings. Further, she has served as lead eligibility representative and principal designee in eligibility meetings. She has also helped develop over 100 IEPs for children with disabilities and served on 30 to 50 MDR committees. In her training and experience she has referred students to be evaluated for giftedness. (P20; Tr. at 188-189, 214).

71a. Principal designee on the March 5, 2020 eligibility team was not a special education expert. Neither was the general education teacher, the social worker, or the school psychologist. Further, of note, psychologist was working in her first job as a school psychologist and had only been the school psychologist for about five months at the time of the March 5, 2020 eligibility meeting. (Tr. at 1013, 1032). She had attended very few IEP meetings. In addition, Special Education Coordinator lacked the extensive training of Eligibility Expert. For example, her resume noted that at the time of the eligibility meeting she had received her degree with a concentration in special education less than three years earlier. In addition, she had only been a special education coordinator at the time of the meeting for about 6 to 8 weeks. (S 50).

72. The school members of the eligibility team determined during the March 5, 2020 meeting that the child was eligible for special education and related services under the categories of OHI and emotional disturbance. Parent disagreed with the decision that the child was ED. In addition, she believes the committee failed to consider all areas of disability; that is, xxx behavior, sensory issues, etc. She also felt the observations by the counselor were rushed. (Tr. I at 123-124).

73. In at least one case involving another student attending the school division, the LEA extended the 65-day deadline to determine if the child remained eligible for special education. In fact, the evidence shows that the LEA granted or extended the time periods on two occasions. The first extension came about because the parent refused to agree to the school’s finding that the student no longer needed special education. The second extension was due to schools being closed because of COVID-19) and the consequential inability to conduct further evaluations on the student. (Testimony of Parent 2; Tr. II at 310-311; P Exh. 10-3).

**The January 21, 2020 Incident and January 28, 2020 MDR Meeting**

74. The Hearing Officer now turns to the January 21, 2020 incident.

Prior to the eligibility team holding its February 11, 2020 meeting, Child was involved in an incident on January 21, 2020, for which Principal 2 accused xxx of threating and intimidating staff. (P 2 at 4).

The Hearing Officer viewed an inaudible video of the incident provided as an exhibit by the LEA. The video comprised three scenes.

The first scene shows in the pertinent section that about 9:14 a.m. on January 21, 2020, Child was seated in classroom 09 with xxx lap top on the desk and opened. Child also appeared to possess a smaller electronic device in xxx hand. The screen on this smaller device illuminated briefly at one point. Moments later, Principal 2 walks into the room. He eventually makes his way across the room to Child’s desk. Principal motions for Child to follow him. Child gets up from xxx seat and follows Principal 2. In the next scene, Child walks through the security scanner at the principal’s instruction. Present during this scene are Child, SRO and Principal 2. The scanner flashes red as Child steps through and walks back out of the scanner. SRO, Child, and Principal at this point are very close to one another. However, it appears Child and Principal 2 are in closer proximity than Child and SRO. Child is much taller in stature than Principal 2 and from the viewer’s angle, Child’s body is in front of the principal’s and blocking almost all of the principal’s body from view. Accordingly, the Hearing Officer is not able to determine if Principal 2 made physical contact with Child or vice versa. Principal then makes a motion directing Child to go one way, Child proceeds in another direction. Principal follows the child. Eventually, Child walks in the direction the principal directs xxx to go with the principal walking behind xxx. In the third scene, the two are seen walking up a hall way and into an area with a filing cabinet.

The Hearing Office is unable to determine from the video scenes if Child’s actions constituted a threat to the principal or intimidation of staff. (S 46).

Principal 2 wrote his version of what happened in the disciplinary log. That description appears in Statement of Fact # 11.

(S 46)

75. Child and Parent have accused Principal 2 of inappropriately touching xxx during the January 21, 2020 incident. (Tr. 181)

76. Because Child was deemed a child suspected of having a disability at the time of the January 21, 2020 incident, the LEA scheduled a Manifestation Determination Review (MDR) meeting on January 28, 2020.

77. Principal 2 was not comfortable with holding an MDR meeting; therefore, he sought direction from Special Education Coordinator for the district. (Tr. 741). Special Education Coordinator had taken on this role in January 2020. (S50).

78. The meeting commenced about 12:25 p.m. on the scheduled date. Hearing Officer has determined this was the start time because the evidence shows that Parent and her advocate signed the school’s sign in log by12:21 p.m. and Principal 2 testified that the parent and advocate waited about 5 minutes before being called into his office for the meeting. (Tr. 437; P9 at 1).

79. At the start of the meeting not all members required to attend were present. Specifically, AS General Education Teacher was absent from the meeting. Per his testimony, General Education Teacher had to assure he had coverage for his class. In fact, the evidence shows that because of this concern, even after arriving for the meeting, General Education Teacher left the meeting and returned sometime later. While absent from the meeting, the General Education Teacher missed the school resource officer’s account of what occurred during the incident on January 21, 2020. Of significance, SRO’s was an eye witness and his account of what occurred differed from the account Principal 2 gave during the meeting. (Testimony of AS Counselor). In addition, General Education Teacher had not reviewed the Child’s file prior to the meeting.

80. This fact brings up another issue during the meeting concerning the Child’s file. The evidence shows that the district maintained two files on the child. High School housed the Child’s cumulative file. Alternative School housed another file. The evidence shows the two files were not duplicative and the Child’s cumulative was housed at High School. The evidence clearly shows that at the commencement of the meeting, neither file was present for the team to review. It is not clear exactly when someone from the Alternative School arrived with the file from Alternative School, but the evidence does demonstrate that before the parent and her advocate left the meeting the Alternative School file was present at the meeting.

Parent and advocate were in attendance for the meeting for practically an hour, and the Child’s cumulative file had not been brought into the meeting. They eventually left the meeting with the understanding that it had adjourned. They signed out of the building at 1:21 p.m. having been on site for the meeting for an hour. (P9). Regarding the arrival of the cumulative file, the evidence shows LEA staff did not manage to get the file to the meeting until the special education coordinator arrived for the meeting in person. She arrived at 1:48 p.m. This was well over an hour after the meeting started. And about 30 minutes after the parent and her advocate left. Prior to her arrival with the file, she had participated by phone. The Hearing Officer has deduced it was a mobile phone as she indicated that when she arrived at Alternative School, she got off the phone. The evidence shows that her mobile phone transmission was less than desirable. For instance, she described her attendance in the meeting when she was on the phone as being “in and out.” (Testimony of Special Education Coordinator). Accordingly, the Hearing Officer finds that like the general education teacher, the special education coordinator did not participate in the entire MDR meeting.

81. Additionally, regarding the child’s cumulative file, a relevant evaluation was missing from the file. This was the case because School Psychologist had completed her evaluation on January 24, 2020, four days before the Manifestation Determination Meeting. However, she did not place the evaluation in the child’s file until two weeks later, February 7, 2020. No explanation was given regarding the psychologist not immediately putting the evaluation in the cumulative file. Hence, even if the file had been available at the start of the meeting, this evaluation was not there for review by the MDR team. Additionally, the psychological evaluation contained information about the child’s disciplinary history. Equally as important it provided results of Child’s Intellectual testing. This testing revealed Child’s cognitive and academic abilities were in the superior range. Moreover, the school psychologist was not invited to the meeting. The only explanation provided by Principal 2 was he understood she was not needed. Neither was someone knowledgeable about gifted students or twice exceptional students present for the meeting. Such individuals would be able to address the characteristics of the twice exceptional student. For example, the twice exceptional student appearing defiant because of high cognition, inquisitive nature, and disability of the student. (Testimony of Special Education, Child Find, Eligibility, and MDR expert).

82. Per testimony of Special Education, Child Find, Eligibility, and MDR expert, the MDR team needed the psychologist and a gifted specialist at the meeting to discuss (i) intellectual testing results of student (ii) the possible giftedness of Child in relation to xxx disability and (iv) how xxx giftedness may affect xxx behavior, and (v) the unique needs of the twice exceptional child. *Id.*  (Tr. 213-14)

83. Furthermore, missing from the meeting was the video of the incident leading to the child being accused of violating the student code of conduct. The evidence shows that the principal had reviewed the video prior to the meeting. But the MDR team was not given an opportunity to see it, including the parent and her advocate. Principal’s reason for not showing the video was that other students were in it and therefore it was confidential. Principal gave his interpretation of what was on the video during the meeting.

Principal had indicated that he would attempt to provide a copy to the parent. Parent did not receive a copy of the video until after the due process complaint was filed and the advocate requested the LEA produce the video.

84. In addition to the above, the evidence shows that during the MDR, all areas of the child’s suspected disabilities were not considered by the child. In her referral, Parent stated that, among other disabilities, child displayed sensory issues. MDR team failed to consider this suspected disability.

85. What is more, Parent and Advocate left the meeting after an hour in light of the missing file and parent not having access to certain documents during the meeting. Parent elected to request a due process hearing. At the time they left, they were followed by Alternative School Counselor. They thought the meeting had ended. However, after they left, the meeting resumed and the school-based members of the team decided that the child’s conduct was not a manifestation of xxx disabilities, particularly emotional disability and OHI.

Further, although the meeting took place on January 28, 2020. LEA circulated the MDR summary sheet for signing 2 days later. (S28).

# V. LEGAL ANALYSIS

The Individuals with Disabilities Education Improvement Act (IDEA/Act), 20 U.S.C. § 1400 *et, seq,* requires a state, as a condition of acceptance of federal financial assistance, to ensure a “free appropriate public education” (FAPE) to all children with disabilities. 20 U.S.C. § 1400 (d) and § 1412(a)(1). The Commonwealth of Virginia has elected to participate in this program and has required its public schools, including the LEA here, to provide FAPE to all children with disabilities residing in its jurisdiction. Va. Code Ann. § 22.1-214-215.

The Act imposes extensive substantive and procedural requirements on states to ensure that children receive a FAPE. 20 U.S.C. § 1415. *See also Board of Education v. Rowley*, 458 U.S. 176 (1982) and *Endrew v. Douglas County – School District RE-1,* 580 U.S. \_\_\_\_\_\_\_\_ (2017) 137 S. Ct. 988. This includes, certain obligations of the LEA when a child is suspected of having a disability and the LEA seeks to discipline the child. 34 CFR § 300. 534

The Parent contends, among other things, that the LEA had knowledge that her child had a disability when the district expelled the child. The Hearing Officer now undertakes her examination to determine if the LEA erred.

# A. EXPEDITED ISSUES

1. Did the LEA have knowledge or suspicion of the child having a disability before xxx discipline in 2019 that led to the child being placed at the xxxx Center? If so, did the LEA deny the child a FAPE by not holding a manifestation determination and/or placing child at xxxx center?

The IDEA affords protections to certain children not yet determined eligible for special education and related services. 34 C.F.R. § 300. 434; 8 VAC 20-81-160.(H). Particularly, under the applicable regulation, the LEA is deemed to have knowledge that a child is one with a disability before the behavior that precipitated the disciplinary action if;

(a ) the parent(s) of the child expressed concern in writing … to school personnel that the child is in need of special education and related services.;

(b ) the parent(s) of the child requested an evaluation of the child to be determined eligible for special education and related services; or

(c ) a teacher of the child or school personnel expressed concern about a pattern of behavior demonstrated by the child directly to the director of special education of the LEA or to other supervisory personnel of the LEA.

34 C.F.R. § 300. 534; 8 VAC 20-81-160(H).

The Hearing Officer finds the LEA was deemed to have knowledge that the child had a disability at the time of the January 10, 2019 conduct – described by the LEA as an assault on another student - for reasons set forth here.

Prior to this conduct, the evidence demonstrates that on October 30, 2018, HS Special Education Teacher 3 sent an email to the parent informing Parent of Child’s misconduct in class, truancy, and absences from class. This email reads in pertinent part as follows:

I am [HS Special Education Teacher 3], one of the teachers for[ Child’s] Algebra I, I am writing to get you up to date about [Child’s] performance lately. [Child] has really struggled to follow directions with [Co-teacher] and myself both in the classroom. However, most of the time, xxx does not even show up to class. Today actually, [Co-teacher] saw xxx actually outside of school skipping (said xxx was going to Hardee’s). She reported it upon entering the building to an administrator. In Algebra class, [Child] plays inappropriate cursing videos loud on xxx cell phone. xxx constantly uses foul language and makes inappropriate jokes, xxx has made several jokes about how xxx enjoys having sex with old people and xxx having sex with xxx grandmother, xxx goes into great detail making sounds and hand motions. Very disturbing. Today xxx tells me, “Ms. Special Education Teacher 1, when I went to the bathroom earlier I pee’s out green stuff,” followed by laughing… and this is in front of the whole class. With [Co-teacher], xxx is usually disrespectful, however with me, xxx instead makes these inappropriate jokes. At this point it might be attention seeking, but still, very inappropriate….I really want [Child] to succeed in this class, and xxx is actually really intelligent in math; I believe in xxx. I ask that you talk to xxx about this, and [Co-teacher] and I have already rearranged the class, moving xxx seat, and we are both open to any suggestions you may have to improve xxx performance level.

This email as well as other evidence of record indicates that Child engaged in a pattern of truancy or skipping classes. Further, as clearly evident in this email, school personnel made the administration aware of this behavior. Additionally, by other means the administration was informed about this behavior. To this point, by his testimony, Principal 1 stated that he routinely walks the halls greeting the students; he had concerns about Child doing what xxx was supposed to do; and he and the parent engaged in several conversations about Child. Parent testified credibly that she always informed administrators about changes she saw in the child’s behavior. One such change involved Child skipping classes. For instance, in September 2018, Parent learned that Child had been truant or had not reported to class. She then took time off her job arriving at school to address the problem. It was there that she was informed of Child’s truancy a few days before where xxx was located in the community and then returned to school. At the initiation of parent, an informal meeting was held with Parent, Child, Lt., an administrator, and High School Guidance Counselor. The adults stressed to Child the importance of attending school and doing what xxx was supposed to do.

Furthermore, the recording of the disciplinary hearing held on February 4, 2019, demonstrates the administration was well aware of Child’s truancy problem before the conduct in question took place. For example, child’s associate principal stated during the hearing that her issue with Child centered around xxx absences and not attending class. Among other statements, Principal 1 mentioned Child being absent from xxx first period class 17 times and other numerous absences from additional classes.

Accordingly, before the child’s conduct took place on January 10, 2019, the administration knew Child displayed a pattern of truancy and skipping classes.

The Hearing Officer recognizes that a student’s chronic attendance problems solely may not rise to a suspicion of disability. *See e. g.,* 37 IDELR 232 (July 18, 2002). However, the evidence shows more in this case. For one, Child was failing all xxx classes save one course xxx was repeating. In addition, prior to the January 10, 2019 incident, Child’s behavior issues were not limited to attendance concerns. As shown by the October 30, 2018 email and xxx disciplinary log, Child’s behavior included defiance, disrespect, disruptiveness, cursing and using inappropriate language, not following directions. Such behaviors are hallmarks of one or more of the 13 IDEA disability categories or disabilities underlying those categories. *See* 34 C.F.R. § 300.8. Parent had also reported to school staff that Child had experienced loss by the death of father figures. The evidence clearly indicates that school staff reasoned that Child was experiencing grief. In fact, HS Counselor inquired if Child desired to participate in a group therapy for grieving. However, based on correspondence HS Counselor sent to parent, Child would not be able to attend due to xxx absenteeism problem.

Additionally, Parent on November 30, 2018 sent an email to Child’s teachers and High School Guidance counselor. She indicated that Child was crying out for help in all the wrong ways. Parent requested assistance. Parent’s request for help may not have been as artfully crafted as one would be from a legal professional or school personnel. However, the gist of her email was that she petitioned the school for assistance to meet the special needs of Child.

The Hearing Officer has carefully deliberated on school personnel’s contention that they did not suspect a disability. She has considered whether the LEA was reasonable in believing the child was simply socially maladjusted and therefore not eligible for special education and related services. *See*  *Springer v. The Fairfax County School Board,* 27 IDELR 367 (4th Cir. 1998). A close review of the facts in the instant case demonstrates more than a socially maladjustment disorder. For one, Child had numerous behavior issues. xxx was described as being defiant, disruptive, disrespectful. xxx disciplinary log, showed a pattern of this behavior. In addition, evidence illustrates xxx had lost loved ones and was grieving. Parent also reported other changes in xxx behavior such as xxx sleeping for long periods of time.

Moreover, the evidence shows that while at High School, the child did not have a trusted adult xxx could speak with about concerns. Although Principal 1 testified to the contrary, his testimony in this regard was disputed by Child’s High School counselor. In fact, the school counselor testified that he was in the process of building a rapport with child when Child was expelled, but it had not reached the level of Child considering him a trusted adult. This was the case even though Child knew the counselor from having been involved with the family when xxx sibling attended high school.

In addition, the hearing Officer is cognizant of Principal 1’s statement that he did not suspect a disability because the child’s truancy and skipping classes was typical behavior of a 9th grader as well as xxx failing grades. The Hearing Officer takes judicial notice of the contrary. Further, she finds that such generalized statement lacks credibility. Also, the Hearing Officer notes that Principal 1 had only been the principal of High School since June 2018. Considering students return date from summer vacation was early September 2018, Principal 1 would have had only been on the job for less than a semester. Hence, the Hearing Office finds he had very limited time to access typical 9th grade behavior at High School.

Further, the Hearing Officer notes the Principal 1’s testimony explaining why he did not review the child’s disciplinary record before (i) suspending xxx and (ii) referring xxx to SSDRO. In effect, Principal 1’s reason for the reported non-review was to prevent prejudgment. The principal’s desire to not prejudge may have been reasonably accomplished by other means such as keeping an open mind and considering only the incident before him when determining whether an offense of the student violates the Student Code of Conduct.

The LEA has an affirmative duty to refer a child suspected of having a disability to be evaluated to determine if the child is eligible for special education and related services.  *See* 34 C.F.R. § 300.111*.* The Hearing Officer finds that unfamiliarity of a child’s disciplinary record impedes the LEA’s ability to fulfill its child find obligations. As a child’s misconduct may be a mark of xxx disability. *See*  *Springer v. The Fairfax County School Board,* 27 IDELR 367 (4th Cir. 1998) (indicating a child’s misbehavior may be consistent with a disability) *see e.g.,*  34. C.F.R. § 300.8(c)(4)(i) (emotional disturbance characteristics include inappropriate types of behavior or feelings under normal circumstances). Accordingly, a district’s ignorance of a Child’s possible disability and need of Special Education will not relieve the district of its obligation under child find if it should have suspected the child had a disability. *Dept. of Education v. Cari Rae S.,* 158 F. Supp. 2d 1190 (D. Haw. 2001).

In the instant case, the Hearing Officer finds for several reasons, the LEA should have suspected the Child of having a disability before the January 10, 2019 incident. Those reasons include the child’s chronic absenteeism (truancy and skipping classes), the child’s failing grades, the child’s patterns of behavior (to include truancy, defiance, disrespect, and disruption), the child’s trauma and grieving, the parent’s written cry for help, and the administration’s knowledge of child’s patterns of behavior. This was knowledge first hand and by reports from other staff. Because of this suspicion, the eligibility process had been triggered. Hence, the LEA was deemed to have knowledge that the student was a child with a disability prior to the January 10, 2019 incident. Accordingly, it was obligatory that the LEA hold a manifestation determination meeting before changing the child’s placement. The LEA failed to do so.

The Hearing Officer finds that this violation was more than procedural. The LEA changed Child’s placement from a comprehensive high school to an alternative school. xxx was placed in a more restrictive environment. LEA banned Child from attending sporting and social events at xxx home school which may have affected xxx social and emotional growth. Further, Child was not assessed in suspected areas of disability. As such, assuming xxx would have been found eligible for special education and related services, there was no determination of xxx social, emotional, functional and educational needs. Moreover, Parent did not participate in the placement decision. Accordingly, failure to suspect the child of having a disability was a harmful error.

2. Did the LEA conduct a proper manifestation determination review regarding an incident involving the conduct of the child on or about January 21, 2020? If not, was there a denial of FAPE?

The IDEA imposes extensive substantive and procedural requirements on states to ensure that children receive a FAPE. 20 U.S.C. § 1415. *See also Board of Education v. Rowley,* 458 U.S. 176 (1982). This includes, certain obligations of the LEA when a child with a disability is or a child who is suspected of a disability is recommended for a long-term suspension. 20 U.S.C. § 1415(k). In this case, the LEA recommended Child for a long-term suspension and was therefore required to hold a manifestation determination review (MDR) meeting to decide if the conduct in question was a manifestation of Child’s disability or suspected disability. Parent contends that the LEA failed to meet its obligations during the MDR meeting. Thus, here the Hearing Officer examines the evidence to determine if the MDR determination was flawed.

In determining whether Child’s conduct was a manifestation of the disability, IDEA directs the team to determine whether the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or whether the conduct was the direct result of the failure of the LEA to implement Child’s IEP. 20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e).

The MDR Committee is also required to review all relevant information in Child’s file, including the child’s IEP, any teacher observations, and relevant information provided by the parents. 20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e). Further, the IDEA requires the MDR team to consist of relevant members of the IEP team as determined by the parent and LEA. 34 C.F.R. § 300.530(e).

A review of the evidence shows wide-ranging problems with the meeting.

The evidence shows that the meeting commenced at about 12:25 p.m. on January 28, 2020, as noted by the sign in time of the parent and her advocate. At the start of the meeting not all members required to attend were present. Specifically, AS General Ed Teacher was absent from the meeting. Per his testimony, AS General Ed Teacher was awaiting coverage for his class. The evidence also shows that this teacher left the meeting several times to check on his class. While absent from the meeting, the teacher missed the school resource officer’s account of what occurred during the incident which resulted in the child being accused of violating the student code of conduct. Further, AS General Ed Teacher had not reviewed the child’s file prior to attending the meeting. The evidence is insufficient to establish this teacher ever reviewed the file.

This brings up another issue during the meeting. The evidence also shows that the district maintained two files on the child. High School housed xxx cumulative file. Alternative School housed another. The two files were not duplicative. The evidence clearly shows that at the commencement of the meeting, neither file was present for the team to review. It is not clear exactly when someone from the school arrived with the file from Alternative School, but the evidence does demonstrate that sometime before the parent and her advocate left the meeting the Alternative School file was in the meeting. Parent and her advocate left the meeting at 1:21 p.m.

Parent and advocate were in attendance for the meeting for practically an hour, and the Child’s cumulative file had not been brought into the meeting. They eventually left the meeting with the understanding that it had adjourned. The Hearing Officer finds that under the circumstances it was reasonable for the parent and her advocate to leave the meeting. They had been timely and in attendance for an hour. Yet the LEA was not prepared to go forward with a legitimate MDR meeting due to reasons already mentioned and other reasons discussed below.

Regarding the arrival of the cumulative file, the evidence shows LEA staff did not manage to get the file to the meeting until the special education coordinator arrived for the meeting in person. She arrived at 1:48 p.m. This was well over an hour after the meeting started. And about 30 minutes after the parent and her advocate left. Prior to her arrival with the file, she had participated by phone. The Hearing Officer has deduced it was a mobile phone as she indicated that when she arrived at Alternative School, she got off the phone. The evidence shows that her mobile phone transmission was less than desirable. For instance, she described her attendance in the meeting when she was on the phone as being “in and out.” Accordingly, the Hearing Officer finds that like the general education teacher, the special education coordinator did not participate in the entire MDR meeting.

Additionally, regarding the child’s cumulative file, a relevant evaluation was missing from the file. This was the case because School Psychologist had completed her evaluation on January 24, 2020, four days before the Manifestation Determination Meeting. However, she did not place the evaluation in the child’s file until two weeks later, February 7, 2020. No explanation was given for the psychologist not immediately putting the evaluation in the cumulative file. Hence, even if the file had been available at the start of the meeting, this evaluation was not there for review by the MDR team. Additionally, the psychological evaluation contained information about the child’s disciplinary history. Equally as important it provided results of Child’s Intellectual testing. This testing revealed Child’s cognitive and academic abilities were in the superior range. The school psychologist had not been invited to the meeting to share this relevant information. The only explanation provided by Principal 1 was he understood she was not needed. Neither was someone knowledgeable about gifted students or twice exceptional students present for the meeting. Such individuals would be able to address the characteristics of the twice exception student. For example, the twice exceptional student appearing defiant because of high cognition, inquisitive nature, and disability of the student.

To this point, the Hearing Officer gives great weight to the testimony of Eligibility, Special Education, Child Find and MDR Expert. The evidence shows she has extensive experience in participating in MDR meetings and eligibility meeting. Further, she has referred students to be evaluated for giftedness. She testified that the team warranted the psychologist and a gifted specialist at the meeting to discuss (i) intellectual testing results of student and (ii) the possible giftedness of Child, and (iii) how xxx giftedness may affect xxx behavior, and (iv) the unique needs of the gifted student. (Tr. 213-14).

In contrast, the Hearing Officer does not give deference to the school’s witnesses or experts. For example, Special Education Coordinator testified that Principal 2 was “not comfortable conducting an MDR meeting” and he called on her for guidance and direction. Yet, under her direction proper individuals were not at the meeting. The cumulative file was not there. Further, Special Education Coordinator and for that matter the other school witnesses lacked the extensive training of the parent’s expert whom I have found credible. That is, extensive training and experience in MDR meetings, special education, child find, and eligibility.

That said, the Hearing Officer recognizes precedent in this federal judicial circuit, requiring that due deference be given to the opinion of the professional educators. *See, e.g., County School Bd. Of Henrico County, Virginia v. Z.P. ex rel. R.P., I* 399 f.3d 298, 313 (4th Cir. 2005). That deference is not absolute. The Hearing officer finds, the evidence of record provides sufficient reason for her to give little weight to the educators’ assessment for the reasons noted here regarding the wide-ranging problems with the MDR meeting. Without a doubt, the district violated 34 CFR §300.530 (e) and the violation was substantive in nature.

Furthermore, missing from the meeting was the video of the incident that lead to the child being accused of violating the student code of conduct. The evidence shows that the principal had reviewed the video prior to the meeting. But the MDR team was not given an opportunity to see it, including the parent and her advocate. Principal’s reason for not showing the video was that other students were in it and therefore it was confidential. Principal gave his interpretation of what was on the video during the meeting even though he was a party in the video accused of wrongdoing.

In addition to the above, the evidence shows that during the MDR, all areas of the child’s suspected disabilities were not considered by the child. In her referral, Parent stated that, among other disabilities, child displayed sensory issues. MDR team failed to consider this disability.

What is more, Parent and Advocate left the meeting after an hour in light of the missing file and parent not having access to certain documents. Parent then filed a due process complaint now before this Hearing Officer. At the time Parent and her advocate left the meeting, they were followed by Alternative School Counselor. They thought the meeting had ended. However, after they left, the meeting resumed and the school-based members of the team decided that the child’s conduct was not a manifestation of xxx disabilities, particularly emotional disability and OHI. Further, although the meeting took place on January 28, 2020, LEA only finalized the written account of what happened and what was supposedly decided during the meeting days later. This was evident by special education coordinator collecting signatures for the written account two days after the meeting took place.

Considering the myriad problems with the meeting, the Hearing Officer finds the legitimacy of the MDR meetings highly questionable.

For reasons stated above, the Hearing Officer finds the manifestation determination review was conducted in violation of 34 C.F.R. § 300.530 (e) and substantially flawed. Therefore, the determination that Child’s conduct was not a manifestation of xxx disability is not upheld.

3. Did the LEA err when it determined that the incident occurring on or about January 21, 2020, was not a manifestation of the child’s suspected disability? If so, was there a denial of FAPE?

Because HO find the meeting improper, the Hearing Officer does not reach the question of manifestation.

# B. NON-EXPEDITED ISSUES

4. Did the LEA on or about March 5, 2020, conduct an eligibility determination that failed to consider all suspected areas of disabilities of the child. Specifically, did the LEA fail to consider OHI as it pertains to any trauma, anxiety, and depression experienced by the child? If so, did the LEA deny the child a FAPE?

Once assessments are completed regarding suspected areas of disabilities or related ones, the eligibility team meets and considers the data collected and in effect the suspected areas of disabilities. *See*  34 C.F.R. § 300.306(c).

Parent argues that the LEA has failed to consider all areas of suspected disabilities. Particularly, she contends that the LEA did not consider trauma, anxiety, and depression as they relate to OHI. A review of the evidence shows that during the February 11, 2020 eligibility meeting in which the parent attended in whole and her advocate in part, School Social Worker started reviewing her Social Report. At the March 5, 2020 eligibility meeting, she continued to review it with the school- based members of the eligibility team after the parent and her advocate who were connected to the meeting by telephone departed the meeting for reasons discussed in detail below. Sections discussed during this meeting include, but were not limited to, traumas the child had experienced with the deaths of those in close relations to xxx and xxx being jumped in the eighth grade while conditioning for xxxxxxx. Also, School Psychologist shared portions of her report that addressed whether the child was at high risk for depression. The Beck Youth Inventory result was shared with the team. This test evaluated the child in areas of depression, anxiety, anger, disruptive behavior, and self-concept. In addition, the psychologist went over the Children’s Depressive Inventory which was completed by the parent, the child, and teacher. Responses fell in the elevated range (indicated by Child’s responses) to the very elevated range (noted by Parent and Teacher).

After considering those assessments, as well as others, the team then proceeded to go over the check list for OHI. During the discussion regarding this check list, the school-based team considered stressors in child’s life, depression, and anxiety. Accordingly, the Hearing Officer does not find the parent has met her burden and shown that the eligibility team failed to consider OHI as it relates to Other Health Impaired.

That said, the Hearing Officer finds the team did fail to give any thought to whether the child was twice-exceptional even though the evidence shows the child having (i) disabilities as well as (ii) overall superior cognitive and academic abilities.

A twice-exceptional child is a child identified as a child with a disability and a child with giftedness. *See* VDOE guidance document: *Supporting the Identification and Achievement of the Twice-Exceptional Student: Frequently Asked* Question.

The Virginia Department of Education (VDOE) expects eligibility teams for the gifted and the disabled to be familiar with the identification practices and criteria surrounding each area of disability and giftedness. Because of the complex profile the twice-exceptional student displays, per VDOE guidance, special education eligibility teams should consider both giftedness and disabilities evaluation when a student is suspected of being twice-exceptional. According to guidance from VDOE, when a student is suspected of having a disability and being gifted, the eligibility team should consider whether Child is twice-exceptional.  *Id.*

In the case before this Hearing Officer, in determining Child’s eligibility for special education and related services, School Psychologist assessed the child. Among other assessment procedures, the psychologist administered the WAIS-IV and KTEA-3 to evaluate the child’s cognitive and academic abilities. Both tests showed that Child’s overall cognitive abilities were in the superior range. In fact, per the psychological assessment xxx 129 overall cognitive score was only two points away from being in the very superior range. Likewise, Child’s 126 overall academic abilities’ score fell in the superior range. The psychologist shared this information with the team during the March 5, 2020 eligibility meeting. Further, Parent had reported, among other things, that Child did not feel challenged; Child took IB courses in middle school and was able to passed a SOL even though Child failed the class which the evidence indicates was due to xxx not completing assignments.

Moreover, the evidence shows that the team, possessed data showing that the child exhibits numerous characteristics of twice exceptional students, to include all if not most of the following:

(i). Shows high verbal ability, but may use language in inappropriate ways and at inappropriate times;

(ii) Shows attention deficit problems but may concentrate for long periods of time in areas of interest;

(iii) Has strong questioning attitudes; may concentrate for long periods of time; may appear disrespectful when questioning information, facts, etc., presented by teachers, adults, or other authority figures;

(iv) May be unwilling to take risks with regard to academics and yet, willing to take risks in non-school areas without consideration of consequences;

(v) Appears immature relative to cognitive ability and chronological age since such students may use anger, crying and/or withdrawal to express feelings and deal with difficulties;

(vi) Is often a leader among the more nontraditional students demonstrating strong “street wise” behavior; or conversely, the disability may interfere with the student’s ability to exercise leadership skills;

(vii) Shows a wide range of interest but may be thwarted in pursuing them due to processing or learning problems;

(viii) May struggle with basic skills due to cognitive processing difficulties; and

(ix) Often has excellent higher order thinking skills but struggles with rudimentary activities;

*Id.*

Further Eligibility Expert who testified on behalf of Child testified that the eligibility team had a duty to suspect and consider whether the child was twice exceptional in light of xxx superior intellectual scoring. A review of the evidence demonstrates that the eligibility team did consider xxx intelligence but not in questioning whether xxx was not only a child with a disability, but also a gifted student. xxx high cognition warranted such a suspicion. (S Exh. 45 and 40).

The evidence shows that Eligibility Expert has extensive training in special education. She holds certification in special education and a master’s of science degree in special education. She taught special education in the public-school setting for 14 years. In addition, Eligibility Expert has served on at least 100 eligibility meetings. Further, she has served as lead eligibility representative and principal designee in eligibility meetings. She has also helped develop over 100 IEPs for children with disabilities and served on 30 to 50 MDR committees. In her training and experience she has referred students to be evaluated for giftedness. (Tr. at 188-189, 214).

In contrast, principal designee on the team was not a special education expert. Neither was the general education teacher, the social worker, or the school psychologist. Further, of note, psychologist was working in her first job as a school psychologist and had only been the school psychologist for about five months at the time of the March 5, 2020 eligibility meeting. She had attended very few IEP meetings. In addition, Special Education Coordinator lacked the extensive training of Eligibility Expert. For example, her resume noted that at the time of the eligibility meeting she had received her degree with a concentration in special education less than three years earlier.

The Hearing Office finds Eligibility Expert’s testimony credible and consistent with VDOE guidance to LEAs. The Hearing Officer assigns great weight to her testimony. Hence, the Hearing Officer finds the eligibility team should have suspected Child as one with a disability and as a gifted student. Furthermore, in its deliberations the team should have considered whether the unique needs of this suspected twice-exceptional child warranted a referral for xxx to be evaluated for giftedness. This degree of deliberation was necessary because of xxx high cognition and to assist in meeting the needs the child may require such as a more rigorous or advanced curriculum due to xxx superior intellect.

That said, the Hearing Officer recognizes precedent in this federal judicial circuit, requiring that due deference be given to the opinion of the professional educators. *See, e.g., County School Bd. Of Henrico County, Virginia v. Z.P. ex rel. R.P., I* 399 f.3d 298, 313 (4th Cir. 2005). The Hearing officer finds, the evidence of record provides sufficient reason for her to give little weight to the educators’ opinion regarding this matter.

5.During the eligibility determination process in 2020, did the LEA fail to collect behavior and discipline data regarding the child? If so, did the LEA deny the child a FAPE?

Next Parent argues in effect that the eligibility team erred in not conducting an FBA.

IDEA regulation addressing the eligibility process and evaluations “requires the public agency to ensure that the child is assessed in all areas related to the suspected disability. 34 C.F.R. § 300.304(c)(4). This could include, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. This is not an exhaustive list of areas that must be assessed. *Id.* Further, decisions regarding the areas to be addressed are to be determined by the suspected needs of the child. If the child’s behavior or physical status is of concern, evaluations addressing these areas must be conducted. 71 Fed. Reg. 46,643 (2006).

Now, the Hearing Officer considers the evidence. From 5th grade until 2019-20 school the Child’s school related behavior infractions have increased over time. xxx school disciplinary log with entries through January 21, 2020, appears in Statement of Facts #11

In addition to the numerous behavior issues noted in the above log, the evidence shows that Child has had even more conduct issues than reported by the LEA.

By way of example, evidence obtained from High School staff illustrate this point. Child was only enrolled at High School from September 2018, to January 2019. Yet, Principal 1’s testimony indicated that the principal had his share of encounters with Child over behavior matters. Principal 1 noted that some of these issues may have been handled by informal conferences with Parent, Child, and other staff. He also offered that Child had been afforded the opportunity to “reset” while attending High School or a cooling off period. Furthermore, during the February 4, 2019 disciplinary hearing, Principal 1 indicated that Child had as many as 17 absences/instances of tardiness from xxx first period class during xxx first semester. He denoted numerous other late arrivals to class or absences from other class periods. Child’s associate principal at High School also stated during the disciplinary hearing that Child had attendance problems. While the school’s documentation reflects Child had an attendance problem, the extent of it was not shown in the LEA’s official records. The Hearing Officer finds based on the documentation provided and other evidence of record, the child’s lack of attendance while enrolled at High School was substantial. Not surprising, Child failed all xxx classes during the first semester of xxx 9th grade year.

Moreover, since attending the alternative school from March 2019, until January 2020, Child accumulated 9 additional disciplinary referrals. Similar to High School, the evidence shows that other behavior issues at the school went unreported on the LEA’s official disciplinary log. Such is the case because either Parent was called to pick the child up from school or xxx was allowed to visit with school psychologist until xxx was able to cool down and avoid being disciplined.

Concerning collecting data regarding Child’s behavior, Alternative School Counselor testified candidly and the Hearing Officer finds her testimony credible. Per her testimony, she had concerns about Child academically. And she believed Child’s behavior data was a vital component to be evaluated by the eligibility team because Child’s conduct was causing xxx to be disciplined and put out of school.

Clearly child’s behaviors have and continue to warrant significant concern. Although presented as a witness for the LEA during the due process hearing, School Psychologist admitted that behaviors such as failing to turn in assignments on time, difficulty with accepting responsibility, failing to follow rules and difficulty using self-control, and lack of organization interfere with learning. The evidence shows that Child experiences all these behaviors in the learning environment.

The LEA/eligibility team is tasked with determining eligibility and obtaining data from varied sources to include relevant functional information to assist in the formulation of an appropriate IEP if the child is deemed eligible. 34 C.F.R. § 300. 304(b). Yet, the eligibility team failed to conduct a functional behavior assessment or collect behavior and discipline data on the child where it is enormously conspicuous that the Child’s behaviors interfere with xxx ability to access the educational environment. And the LEA lacks such data.

Of particular note, the fact is undisputed that during a meeting held before the March 5, 2020 eligibility meeting, a specific special education teacher/case manager from High School agreed to observe the child’s behavior in class at Alternative School. She also agreed to cause Child’s teachers to collect behavior data on Child at Alternative School. The LEA then disregarded its agreement. Parent learned of this breach at the March 5, 2020 eligibility meeting when the school-based members of the eligibility team sought to move forward in determining eligibility without the promised behavior data. The default fostered lack of trust between the parent/advocate and the LEA. The LEA provided several reasons for not obtaining the data. One reason given was the data was not needed during the eligibility process. Another reason provided was the special education teacher from High School had been unable to leave her classes at High School to observe Child at the alternative school.

Considering the above, the Hearing Officer finds that the child’s behavior is or should be of significant concern for the eligibility team. As referenced above in mentioning the testimony of AS Counselor, Child’s behaviors are causing xxx to be suspended from the learning environment. In addition, Eligibility Expert who has extensive experience participating in eligibility meetings opined that an FBA should have been conducted because of the Child’s pattern of behaviors evidenced by the LEA’s own documentation, the psychological report on page 2.

What is more, the LEA suspected Child’s disabilities placed xxx in the emotional disability (ED) category. Characteristics of ED include but are not limited to inappropriate types of behaviors or feelings under normal circumstances. The eligibility team also suspected child’s disability fell under the OHI category due to ADHD. The LEA documented that Parent reported concerns regarding child having ADHD. Child’s behaviors reflected a pattern and conduct related to the two suspected disabilities. Accordingly, the Hearing Officer finds the LEA should have obtained data on the child’s behavior/discipline and conducted an FBA as required by IDEA. *See* 34 C.F.R. § 300.304(c)(4) and 71 Fed. Reg. 46,643 (2006).

Moving on, the Hearing Officer also finds that in addition to LEA failing to obtain data regarding child’s behavior, the eligibility team erred by not obtaining an appropriate evaluation of child’s sensory issues.

A review of the evidence shows that Parent clearly reported to the referral team that child experiences sensory issues. Further, when School Psychologist and School Social Worker conducted their evaluations, both observed the child displaying symptoms characteristic of one with sensory issues. They minimized xxx symptoms. However, the evidence demonstrates that neither were qualified to assess Child for sensory issues. Accordingly, the Hearing Officer affords little weight to testimony from these witnesses that Child did not require an appropriated evaluation to assess any sensory issues.

Moreover, the evidence shows that the only reason the LEA did not assess Child in this area is when the referral team met and discussed the areas of evaluation, sensory issues were not mentioned. Hence, the Hearing Officer finds, the referral committee overlooked this suspected area of disability. This failure or oversight, when it came to the LEA proposing evaluations to determine the child’s eligibility, does not relieve the eligibility team from evaluating the Child in all areas of suspected disabilities. That is, the onus is on the LEA, not the parent to propose the appropriate evaluations based on the suspected areas of disabilities. *See* 34 C.F.R. § 300.304(a) (indicating that the LEA, not the parent proposes the evaluation). Sensory issues are clearly identified on the LEA’s own documentation as a suspected area. In addition, the Hearing Officer notes that sensory problems can be characteristics of hyperactivity as shown by the LEA’s own documentation – the ADHD Worksheet.

As mentioned above, IDEA regulation requires the LEA to access the child not only in the suspected area of disability but also in all areas related to the suspected disability. Sensory concerns are an area related to the OHI suspected disability. Accordingly, the Hearing Officer finds the LEA should have conducted an appropriate evaluation to assess the child in the area of sensory issues.

In addition, regarding an assessment of Child’s sensory issues and the FBA previously discussed, both evaluations are needed also so that the eligibility team can determine the educational needs of the child. *See*  34 .C.F.R. § 300.301(c)(2).

6 Did the LEA make its eligibility determination without information pertaining to the child’s behavior and discipline record; particularly, without considering (i) videos of the child’s behaviors on or about January 2019 and January 2020 and (ii) Dr. xxxx’s file of the child before the student’s expulsion? If so, did the LEA deny the child a FAPE?

Hearing Officer listened to the entire recording of the March 5, 2020 eligibility meeting. There is no indication in the recording that the team viewed the videos of the incidents regarding Child’s behaviors on January 10, 2019, and January 21, 2020, either individually or collectively. There was no mention of the videos. Similarly, during the meeting there were no discussions specifically addressing the Director of SSDRO and what was contained in his file about the child prior to xxx expulsion.

Accordingly, the Hearing Officer finds a view of videos of the incidents would have been instrumental in assessing child’s behavior considering (i) the team had not obtained an FBA and (ii) the LEA lacked data on (1) any interventions it claimed to have implemented to address Child’s behaviors that interfered with xxx learning and (2) the effectiveness of them on helping Child access xxx education.

7. Did the LEA deny parental participation in the eligibility process on or about March 5, 2020? If so, did the LEA deny the child a FAPE?

The IDEA guarantees parents the right to participate in and receive notice of meetings with regard to: (i) the identification, evaluation, and educational placement of the child; and (ii) the provision of FAPE to the child. 34 C.F.R. § 300.501(b).

A desired goal of IDEA is parental participation. One way the LEA fosters this goal is by its implementation of 34 CFR § 300.322. Specifically, the regulation requires the LEA to take steps to ensure that the parent(s) of a child with a disability be afforded the opportunity to participate in meetings with the school members at a mutually agreed on time and place. 34 C.F.R. 300.322(a)(2).

Moreover, the IDEA contains procedural safeguards that provide parents "an opportunity for meaningful input into all decisions affecting their child's education." *Honig v. Doe*, [484 U.S. 305](https://www.specialedconnection.com/LrpSecStoryTool/servlet/GetCase?cite=484+U.S.+305.++), 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988).

In examining the evidence, the Hearing Officer finds it is undisputed that the parent historically worked in collaboration with the LEA. She assisted, cooperated, and supported the LEA in matters involving Child. For instance, she informed the school of changes she observed in her child. Until the March 5, 2020 meeting, she had never missed a meeting with school staff regarding her child. In fact, when Parent was called by Alternative School to pick up her child because xxx had been involved in what the school believed was a behavior event, Parent complied and picked up her xxxxx. In addition, if staff called her and informed her of a problem at school with her child, she would volunteer to pick up the child.

The Hearing Officer now turns to circumstances leading to the March 5, 2020 eligibility meeting which the parent did not participate in. On November 25, 2019, Parent referred Child to be evaluated to determine if xxx was a child with a disability. The LEA held the initial referral meeting on December 4, 2019. As usual, Parent attended this meeting. As previously mentioned, one area of disability raised by the parent was overlooked by the referral team when it proposed evaluations. Either during that referral meeting or shortly thereafter, Parent informed the LEA that she was having surgery on February 12, 2020, and her recuperation time would be three to four weeks. The LEA scheduled the eligibility meeting for February 11, 2020, only one day before the parent’s surgery. This scheduling left no room to reconvene the eligibility meeting before the parent’s surgery and long recovery period if there was a need. A notice of this eligibility meeting was sent to Parent on December 2019, identifying the purpose of the meeting was to (i) review existing data and (ii) to determine eligibility.

As discussed before herein, on January 28, 2020, an MDR meeting was conducted. During this meeting or around this time, Special Education Teacher from High School represented to the parent that she would collect behavior data on Child. Specifically, this teacher stated that she would have Child’s teacher complete documents pertaining to Child’s behavior and she would observe Child’s behavior in the class room.

Meanwhile, School Psychologist completed her psychological assessment of child by January 24, 2020. The evaluation was placed in Child’s cumulative file at High School on February 7, 2020. Social Work report was completed on February 7, 2020, and placed in Child’s cumulative file on the same date. However, Parent was not provided a copy of the evaluations until the day of the meeting on February 11, 2020. There is no explanation why parent was not emailed the reports at the same time they were placed in the file. The February 11 meeting proceeded with the Social Worker beginning to review her report. Before she finished, Parent’s advocate joined the meeting. Parent and her advocate desired an opportunity to review the reports and asked that the meeting not proceed until they had an opportunity to do so. In addition, parent requested the behavior data promised. None was provided at that time. The meeting was adjourned.

On February 17, 2020, Principal 2 sent Parent notice of a rescheduled meeting date. The rescheduled date was March 5, 2020. A letter accompanying the notice offered Parent alternative dates of March 3 and 4, 2020. The scheduled date and options fell within the Parent’s period of time she was recovering from her surgery. The letter also informed parent that she could submit or propose alternative dates for the eligibility meeting. But the LEA made it clear the meeting date needed to be before or by March 5, 2020.

Parent had not responded to the letter by March 5, 2020, hence the LEA members of the committee proceeded to hold the eligibility meeting. Before starting the meeting, the LEA telephoned the parent and left her a message stating that they would be holding the meeting in 10 minutes and invited the parent to call back to participate. Parent’s advocate returned the call but no one answered the call. The meeting commenced. Advocate called the school to get a message to the committee to call the parent’s advocate. At some point the parent and advocate were connected by phone to the meeting. At the time, Parent was attending a medical appointment and had stepped outside. Parent and advocate objected to the meeting taking place. Parent requested it be postponed until she could appear in person. In addition, parent and advocate requested the behavior data the school had agreed to do. At this point, LEA stated it was not required to do it. In addition, the LEA noted that the special education teacher had been unable to leave her class to observe the child.

By not attending the meeting, parent was unable to ask questions about the reports. In addition, she had been led to believe by the LEA that behavior data would be collected and it was not. LEA also set the original meeting date the day before the parent’s surgery, knowing that parent had surgery the next day and would be recuperating for 4 weeks. The proposed dates and March 5 fell within that recuperation time. Considering the facts, the Hearing Officer finds that the LEA denied the parent meaningful participation. Granted parent did not respond to Principal 2’s letter following the February 11 meeting. The Hearing Officer finds that even if the parent had responded, it is not likely that she would have had alternative meeting dates to offer that predated March 5, 2020, considering her recent surgery and time needed to heal.

Considering the totality of circumstances, the Hearing Officer finds the LEA denied the parent meaningful participation.

# VI. DECISION AND ORDER

The Hearing Officer finds the following and issues the orders below;

**A.** **Expedited**

1. Did the LEA have knowledge or suspicion of the child having a disability before xxx discipline in 2019 that led to the child being placed at the xxxx Center? If so, did the LEA deny the child a FAPE by not holding a manifestation determination and/or placing child at xxxx center?

The LEA for the reasons discussed above had knowledge that child was suspected of a disability and was deemed to have knowledge of the disability. Accordingly, a manifestation disability meeting should have occurred. It did not and the Child was denied FAPE.

# ORDER:

ACCORDINGLY, THE LEA IS ORDERED TO immediately return Child to HIGH SCHOOL where Child was enrolled as a 9th grader before xxx was suspended and then expelled. Further, THE LEA IS ORDERED TO IMMEDIATLEY EXPUNGE THE DISCPLINARY entry on xxx disciplinary log pertaining to the January 10, 2019 incident.

2. Did the LEA conduct a proper manifestation determination review regarding an incident involving the conduct of the child on or about January 21, 2020? If not, was there a denial of FAPE?

The LEA conducted an improper MDR meeting and denied the child a FAPE.

# ORDER:

ACCORDINGLY, THE LEA IS ORDERED TO immediately expunge the disciplinary entry on xxx disciplinary log pertaining to the January 21, 2020 incident.

3. Did the LEA err when it determined that the incident occurring on or about January 21, 2020, was not a manifestation of the child’s suspected disability? If so, was there a denial of FAPE?

Because Hearing Officer found the MDR meeting improper, the Hearing Officer did not reach the question of manifestation.

B. **Non-Expedited**

4. Did the LEA on or about March 5, 2020, conduct an eligibility determination that failed to consider all suspected areas of disabilities of the child. Specifically, did the LEA fail to consider OHI as it pertains to any trauma, anxiety, and depression experienced by the child? If so, did the LEA deny the child a FAPE?

The Hearing Officer determined that the Parent failed to meet her burden. However, the Hearing Officer determined that the eligibility committee failed to consider whether child is twice-exceptional and whether the unique needs of this suspected twice-exceptional child warranted a referral for xxx to be evaluated for giftedness. The Hearing Officer determined that this degree of deliberation was necessary because of xxx high cognition and to assist in meeting the needs the child may require such as a more rigorous or advanced curriculum due to xxx superior intellect.

5. During the eligibility determination process in 2020, did the LEA fail to collect behavior and discipline data regarding the child? If so, did the LEA deny the child a FAPE?

The Hearing Officer determined the parent met her burden for the reasons noted in the decision and there was a denial of FAPE.

6 Did the LEA make its eligibility determination without information pertaining to the child’s behavior and discipline record; particularly, without considering (i) videos of the child’s behaviors on or about January 2019 and January 2020 and (ii) Dr. xxxx’s file of the child before the student’s expulsion? If so, did the LEA deny the child a FAPE?

The Hearing Officer determined reviewing the videos would have been helpful in light of the fact that no behavior data had been collected.

7. Did the LEA deny parental participation in the eligibility process on or about March 5, 2020? If so, did the LEA deny the child a FAPE?

The Hearing Officer determined that under the circumstances the parent was denied meaningful participation. The error was substantive and a denial of FAPE

# ORDER regarding issues 5 through 7:

The LEA is ordered to do the following:

1. Vacate the eligibility determination made on March 5, 2020;
2. Evaluate the child by an appropriate professional for sensory issues and for assistive technology, in light of child’s slow processing speed compared with xxx high cognition;
3. Conduct a vision screening in light of recent reports of child having blurred vision and reportedly getting new glasses;
4. Provide for an independent Functional Behavior Assessment as the LEA had the opportunity to collect behavior data, agreed to do so, but failed to do so;
5. Convene to review the assessments once completed, determine if any other data is need; and determine eligibility;
6. and consider during the eligibility deliberation whether the child is twice exceptional and should be referred to be evaluated as a gifted student.

Further, the Hearing Officer finds with regard to the issue before her that all requirements of notice to the parents have been satisfied and that the school reports Child is one with a suspected disability as defined by applicable law 34 C.F.R. Section 300.8. The Hearing Officer also determined that with respect to the issues 1, 2, 5, and 7 that the LEA has failed to provide Child with a FAPE.

# VII. PREVAILING PARTY

I have the authority to determine the prevailing party on the issues and find the prevailing party regarding issues 1, 2, 5, and 7 is the parent.

# VIII. APPEAL INFORMATION

This decision is final and binding, unless either party appeals in a 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.

ENTERED THIS 23rd day of June 2020.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Ternon Galloway Lee, Hearing Officer

Cc: Parent

Parents and Advocate for Parent

Counsel for LEA

Dir. of Special Education for LEA

VDOE Coordinator

1. This decision has been amended to make technical/clerical corrections to the initial decision issued on June 3, 2020.

   [↑](#footnote-ref-1)
2. Throughout the decision, the Hearing Officer will use the following abbreviations:

   Transcript - Tr.

   Parents’ Exhibit P

   Local Educational Agency Exhibit - S

   Hearing Officer Exhibit - HO Exh.

   [↑](#footnote-ref-2)
3. The parties were available to participate in the hearing on these days. [↑](#footnote-ref-3)