COVER PAGE FOR HEARING DECISION, NOT TO BE PUBLISHED

VIRGINIA:

# SPECIAL EDUCATION DUE PROCESS HEARING

XXXXXXXXXXXXXXX, et als. Complainants

v.

XXXXXXXXXXXXXXX SCHOOL BOARD Respondent.

**Student, Parent & Grandparent:** **Administrative Hearing Officer:**

XXXXXXXXXXX John V. Robinson, Esquire

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**Child’s Advocate**

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# DECISION OF THE HEARING OFFICER

 I. Introduction

 On January 6, 2020, Ms. XXXXXXXX (“Parent”) and Ms. XXXXXXXX (“Grandmother”), through their advocate initiated a first proceeding against XXXXXXXXXXX XXXXX Public Schools (“XXPS” or the “LEA”) regarding the Student pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq*. (as amended, “IDEA”). The Parent’s and Grandmother’s January 6, 2020 complaint was heard by Peter B. Vaden, Esq. on March 3 and 4, 2020 (“First Hearing”). The Parent and Grandmother are referred to together as the “Complainant”.

 The sole issue in this proceeding is whether the school division was required to conduct a manifestation determination review ("MDR") as a result of the Student's discipline. No other issues are pending before the Hearing Officer. For the reasons discussed below, the Complainant has failed to carry her burden of proof, and the Hearing Officer decides in favor of the School Board.

# II. Findings of Fact[[1]](#footnote-1)

1. The requirements of notice to the Complainant were satisfied[[2]](#footnote-2). The Student's date of birth is XXXXXX, XXXX. PE 4-1[[3]](#footnote-3).

 2. The issue for decision by the hearing officer in this proceeding is whether the School Board was required to conduct a MDR.

3.The Student is a XXXXXXXX student at XXXXXXXX XXXXXX School (“XXS”) in XXXXXXXXX, Virginia. See, e.g., SB 4.

4. Complainant’s Due Process Complaint, filed on January 6, 2020, named the LEA as respondent. Concerning the First Hearing, Mr. Vaden was appointed the hearing officer on January 9, 2020. The LEA filed its response to the due process complaint on January 16, 2020. On January 23, 2019, Mr. Vaden granted Complainant’s unopposed request to withdraw, without prejudice, a discipline issue[[4]](#footnote-4) asserted in the January 6, 2020 due process complaint. Essentially, the same issue as that withdrawn is addressed in this proceeding,

5. Student, resides in XXXXXXXXXXX, Virginia with Grandmother, apart from Mother. Student has lived with Grandmother since June 2019.

1. On February 19, 2020, the School Board members of Student’s

special education eligibility team determined that Student met criteria for the IDEA disability Other Health Impairment, as a result of chronic or acute health problems, namely, Attention Deficit - Hyperactivity Disorder (OHI-ADHD). The team did not complete a determination of whether Student was a child with a disability because Complainant withheld consent to the initial eligibility determination.[[5]](#footnote-5) An individualized education program (IEP) for Student was not developed. As of the date of the due process hearing, Complainant had not provided consent for Student to be found eligible for special education.

1. Prior to the 2019-2020 school year, Student attended day care and preschool programs in the XXXXXXXXXX area. Complainant enrolled Student at XXS at the beginning of the 2019-2020 school year.
2. In Spring 2019, in order to enroll Student in XXS, Complainant provided XXS a form, completed by Student’s physician on March 28, 2019, which indicated, amongst other things, that Student’s emotional and social development were within the normal range. On a Virginia State School Entrance Health Form signed by Parent on June 16, 2019, Parent did not check “yes” for any relevant health conditions for the Student – including “behavioral problems” or “developmental problems.”
3. Beginning the first week of school in the 2019-2020 school year, Grandmother started receiving telephone calls from school staff about Student’s behavior in school.
4. On October 3, 2019, Grandmother sent an email to School Counselor to request an Individualized Education Program (IEP) for Student.
5. Grandmother’s purpose was to secure a behavioral aide for Student.
6. When Grandmother emailed School Counselor on October 3, 2019 to request an IEP meeting, School Counselor telephoned Grandmother.
7. In the telephone conversation, Grandmother told School Counselor that she did not believe Student had a disability and that she did not want to move forward with the IEP.
8. School Counselor did not take further action on referring Student for a special education eligibility evaluation prior to a November 7, 2019 meeting with the family.
9. Grandmother told School Counselor on more than one occasion that she did not believe Student had a disability.
10. At some point in the fall, in a telephone request to the lead special education teacher at XXS, Grandmother sought a psychological evaluation of Student.
11. This teacher told Grandmother that the school would need to do a comprehensive evaluation of Student if they suspected that the child had a disability.
12. Grandmother told this teacher also that she did not believe that Student had a disability.
13. From the beginning of the 2019-2020 school year, School Counselor had frequent interactions with Student.
14. If Student didn't want to do xxx work or something to that nature, XX would just start doing stuff in the classroom, like hide under the table, sitting on top of the table, throwing stuff, and things of that nature.
15. If the classroom teacher or the aide could not get Student to calm down and go back to work they would call someone from the office to come down to the classroom.
16. If Student was unable to be de-escalated and was not showing safe behavior in the classroom, School Counselor would be called to help remove Student from the classroom and go to the counselor’s office.
17. XXS started a behavior chart for Student, and if Student earned positive stickers for the day, had completed the assignments and done the things XX needed to do, Student was able to come to School Counselor for the last five or ten minutes of the school day and choose preferred activities as a reward.
18. In response to concerns from Parent that Student’s inappropriate behaviors were happening at home as well as at school, School Counselor referred the family to outside agencies, including an intensive in-home behavior service, a therapeutic day treatment program provided by another agency inside the school building and play therapy.
19. XXS convened a meeting on November 7, 2019 with Parent and Grandmother to discuss the functional behavior checklist provided by Student’s teachers and a behavior plan for Student XXS was going to put in place.
20. Advocate participated in the meeting by telephone.
21. The tone of the meeting became contentious with yelling.
22. When Advocate raised special education issues at the meeting, the school representatives summoned XXXXXXXXX’s Director of Pupil Personnel, or essentially the director of special education (“Director”), to join the meeting. Tr. 399.
23. Prior to the meeting, Director had not had previous involvement with Student.
24. At this meeting, Grandmother informed the school representatives for the first time that Student had been diagnosed with the intermittent explosive disorder (IED) and oppositional defiant disorder (ODD).
25. Grandmother also stated that Student was scheduled to see a private psychologist and a psychiatrist in December 2019.
26. When Advocate asserted in the meeting that Student had a mental health disability, Director stated that the meeting could become a special education review team (SERT team) meeting to discuss conducting an eligibility evaluation of Student.
27. Discussion of the proposed behavior plan for Student did not go forward.
28. At the November 7, 2019 meeting, Parent signed a parental consent form for XXXXXXX to conduct a special education evaluation of Student, to include an

Educational Assessment, a Psychological Assessment, a Sociocultural Assessment, a

Hearing Screening, an Occupational Therapy Assessment, an Observation and a Functional Behavioral Assessment/Behavior Intervention Plan Development.

1. The respective assessments were completed on November 11, 2019

(Educational Assessment), November 26, 2019 (Psychological Assessment), December 20, 2019 (Sociocultural Assessment), November 20, 2019 (Hearing Screening), January 24, 2020 (Occupational Therapy Assessment) and December 4, 2019 (Observation).

1. The Functional Assessment Checklist for Teachers and Staff was completed on November 7, 2019.
2. After the November 7, 2019 meeting, XXS provided a one-on-one behavior aide for Student at school.
3. This position was filled by 2 persons. After being provided the aides, Student was doing better at school.
4. Student was suspended from school for one day on December 9, 2019.
5. After that, Grandmother decided not to send Student back to school.
6. Grandmother decided to keep Student at home out of safety concerns for Student and other children at school.
7. At the November 7, 2019 meeting, Advocate stated that Student needed a safety plan at school.
8. On December 13, 2019, the XXS principal reached out to Grandmother by email to ask her to meet regarding a draft safety plan developed by XXS for Student.
9. Neither Parent nor Grandmother responded to the safety plan email.
10. On December 20, 2019, the day before XXS’s winter break, the Parent made an oral request to XXS for homebound services for Student.
11. XXS provided a homebound services request form to the Parent on January 10, 2020, following winter break.
12. Grandmother did not provide the completed homebound services request form to XXS until after February 1, 2020.
13. Student is not confined to the home or to a healthcare facility.
14. XXS denied homebound services for Student.
15. All staff at XXS are aware that they can make a “child find” referral if they suspect that a child has a disability.
16. Director has personally trained special education teachers at XXS regarding special education policies and procedures.

# II. Additional Findings, Conclusions of Law and Decision[[6]](#footnote-6)

In this administrative due process proceeding initiated by the Complainant, the burden of proof is on the Parent. *Schaffer, ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

The Complainant alleges that XXPS denied the Student FAPE by failing to conduct a manifestation determination review (“MDR”) regarding the Student’s behavior. An MDR is a “process to review all relevant information and the relationship between the child’s disability and the behavior subject to the disciplinary action.” *See* 8 VAC 20-81-10.

An MDR is required if a school division “is contemplating a removal that constitutes a change in placement for a child with a disability who has violated a code of student conduct of the local educational agency that applies to all students.” *See* 8 VAC 20-81-160(D)(1); *see also* 34 C.F.R. § 300.530(c)—(g).

Accordingly, a “change in placement” for the purposes of student discipline means:

1. A removal of a student from the student’s current educational placement is for more than 10 consecutive school days; or

2. The student is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as:

 a. The length of each removal;

 b. The child’s behavior is substantially similar to the child’s behavior in previous incidents that resulted in the series of removals;

 c. The total amount of time the student is removed; or

 d. The proximity of the removals to one another.

*See* 8 VAC 20-81-10; 8 VAC 20-81-160(C).

 Specifically, the *Regulations Governing Special Education Programs for Children with Disabilities in Virginia* (the "Virginia Regulations") provide in relevant part as follows:

**8VAC20-81-160. Discipline procedures.**

A. General. (§ 22.1-277 of the Code of Virginia; 34 CFR 300.530(a);

 34 CFR 300.324(a)(2)(i))

 1. A child with a disability shall be entitled to the same due process

 rights that all children are entitled to under the Code of Virginia and the

 local educational agency's disciplinary policies and procedures...

 B. Short-term removals.

1. A short-term removal is for a period of time of up to 10 consecutive

school days or 10 cumulative school days in a school year. (34 CFR 300.530(b))

 a. School personnel may short-term remove a child with a disability from

 the child's current educational setting to an appropriate interim alternative

 educational setting, another setting, or suspension, to the extent those

 alternatives are applied to a child without disabilities.

 b. Additional short-term removals may apply to a child with a disability in

 a school year for separate incidents of misconduct as long as the removals do

 not constitute a pattern. If the short-term removals constitute a pattern, the

 requirements of subsection C of this section apply.

 (1) The local educational agency determines when isolated, short-term

 removals for unrelated instances of misconduct are considered a pattern.

 (2) These removals only constitute a change in placement if the local

 educational agency determines there is a pattern.

2. Services during short-term removals.

 a. The local educational agency is not required to provide services

 during the first 10 school days in a school year that a child with a disability

 is short-term removed if services are not provided to a child without a

 disability who has been similarly removed. (34 CFR 300.530(b)(2))

 b. For additional short-term removals, which do not constitute a

 pattern, the local educational agency shall provide services to the extent

 determined necessary to enable the student to continue to participate in the

 general education curriculum and to progress toward meeting the goals of

 the student's IEP. School personnel, in consultation with the student's

 special education teacher, make the service determinations. (34 CFR 300.

 530(b)(2))

 c. For additional short-term removals that do not constitute a pattern,

 the local educational agency shall ensure that children with disabilities are

 included in the Virginia Department of Education and division wide

 assessment programs in accordance with the provisions of subdivision 4

 of 8VAC20-81-20. (20 USC §1412(a)(16)(A))

 C. Long-term removals.

1. A long-term removal is for more than 10 consecutive school days; or

 (34 CFR 300.530; 34 CFR 300.536)

 2. The child has received a series of short-term removals that constitutes

 a pattern:

 a. Because the removals cumulate to more than 10 school days in a

 school year;

 b. Because the child's behavior is substantially similar to the child's

 behavior in previous incidents that results in a series of removals; and

 c. Because of such additional factors such as the length of each

 removal, the total amount of time the student is removed, and the

 proximity of the removals to one another.

 3. The local educational agency determines on a case-by-case basis

 whether a pattern of removals constitutes a change in placement. This

 determination is subject to review through due process and judicial

 proceedings. (34 CFR 300.530(a) and (b) and 34 CFR 300.536)

 4. On the date on which the decision is made to long-term remove

 the student because of a violation of a code of student conduct, the local

 educational agency shall notify the parent(s) of the decision and provide

 the parent(s) with the procedural safeguards. (34 CFR 300.530(h))

 5. Special circumstances. (34 CFR 300.530(g))

 a. …

6. Services during long-term removals.

 a. A child with a disability who is long-term removed receives services

 during the disciplinary removal so as to enable the student to: (34 CFR 300.

 530(d))

 (1) Continue to receive educational services so as to enable the student to

 continue to participate in the general educational curriculum, although in

 another setting;

 (2) Continue to receive those services and modifications including those

 described in the child's current IEP that will enable the child to progress

 toward meeting the IEP goals; and

 (3) Receive, as appropriate, a functional behavioral assessment, and

 behavioral intervention services and modifications, that are designed to

 address the behavior violation so that it does not recur.

 b. For long-term removals, the local educational agency shall ensure

 that children with disabilities are included in the Virginia Department of

 Education and division wide assessment programs in accordance with the

 provisions of subdivision 4 of 8VAC20-81-20. (20 USC § 1412(a)(16)(A))

 c. The IEP team determines the services needed for the child with a

 disability who has been long-term removed. (34 CFR 300.530(d)(5) and

 34 CFR 300.531)

Applicable law also provides potential protection in the discipline realm for children not yet found eligible for special education and related services provided that certain specific conditions are met.

Students who are not yet eligible for special education and related services are not entitled to the protections of the IDEA in the context of student discipline unless a school division “had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.” *See* 8 VAC 20-81-160(H)(1); 34 C.F.R. § 300.534.

A school division shall be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred:

a. The parent(s) of the child expressed concern in writing (or orally if the parent(s) does not know how to write or has a disability that prevents a written statement) 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 local educational agency or to other supervisory personnel of the local educational agency.

*See* 8 VAC 20-81-160(H)(2).[[7]](#footnote-7)

Conversely, a school division is not deemed to have knowledge that a child is a child with a disability if the parent of the child, “has not allowed a previous evaluation of the child or has refused services,” or the child has been “determined ineligible for special education and related services.” *See* 8 VAC 20-81-160(H)(3).

If a school division does not have knowledge that a child is a child with a disability prior to taking disciplinary measures, “the child may be subjected to the same disciplinary measures applied to a child without a disability who engages in comparable behaviors.” *See* 8 VAC 20-81-160(H)(4).

 Behavioral difficulties and disciplinary infractions alone are not sufficient to confer knowledge upon a school division for the purpose of entitling a student not yet eligible under the IDEA for the IDEA’s disciplinary protections. *See Dickinson Indep. Sch. Dist.*, 29 LRP 5351 (SEA TX Aug. 20, 1998):

Many students without disabilities have difficulty conforming to school rules and suffer disciplinary consequences. Consequently, inappropriate behaviors and disciplinary referrals, in and of themselves, do not indicate a need for a referral to special education. Instead, a referral for special education due to behavior is indicated only when a student’s behavior significantly interferes with his ability to be educated in the regular educated program, it is suspected that he possesses one or more of the disabilities recognized under the IDEA, and where the student is exhibiting a need for special education services.

Hearing Officers also consider factors such as the student’s age, the student’s acclimation to the school environment, and familial stressors when deciding whether a school division had knowledge that a student may have a qualifying disability under the IDEA such as to entitle them to the IDEA’s disciplinary protections. *See Pointe Educational Services*, 115 LRP 17158 (SEA AZ Mar. 2, 2015) (holding that a school division was not deemed to have knowledge of a child’s potential disability for disciplinary purposes when the child was in kindergarten, was adjusting to the school environment, and experienced stress due to her parent’s divorce); *see also Warren Cnty. Schs.*, 119 LRP 38872 (SEA KY May 14, 2019) (“Many students without disabilities have trouble conforming to school rules and suffer disciplinary consequences. Disciplinary problems and defiance in the classroom alone do not give a school district a basis of knowledge that a child may have a disability.”).

 In addition, concerns expressed by teachers or parents regarding a student’s behavioral or disciplinary challenges must be connected to a suspicion of a disability in order to confer the requisite knowledge on the school division. *See Lower Kuskokim Sch. Dist*., 118 LRP 37839 (SEA AK Jul. 20, 2018). In *Lower Kuskokim*, school staff sent e-mails to school administrators regarding a student’s suicidal ideation. In that case, the hearing officer found that staff’s purpose in sending the e-mails was to “get help” for the student and “not to convey concerns regarding a potential disability.” *Id*. The hearing officer held that a “link” between “the parent’s requests for help and the staff’s disciplinary referrals” and “any suspected disability of the student,” is required for a school division to have knowledge that a child may be a child with a disability entitled to the IDEA’s disciplinary protections. *Id*; *see also* *Warren Cnty. Schs.*, 119 LRP 38872 (SEA KY May 14, 2019) (“The regulation requires that the parent specifically request a need for special education. Expressing vague concerns about [a student’s] behavior, without referencing at all any need for special education or related services, [is] insufficient to satisfy 34 C.F.R § 300.534(b)(1).

 The Complainant failed to prove by a preponderance of the evidence that XXPS was required to conduct an MDR of the Student. First, the Complainant failed to demonstrate that the Student qualified for the disciplinary protections of the IDEA. Second, the Complainant failed to demonstrate that XXPS contemplated a disciplinary removal of the Student that constituted a change in placement such that a MDR was required with respect to the Student’s discipline.

# The Student did not qualify for the disciplinary protections of the IDEA until November 7, 2019, at the earliest.

#### The Complainant did not demonstrate any of the three prongs of 8 VAC 20-81-160(H)(2) or 34 C.F.R. § 300.534(b) to prove that XXPS had knowledge that the Student may have a disability and be entitled to the IDEA’s disciplinary protections prior to November 7, 2019.

The Parent did not express concern to school personnel in writing that the student is in need of special education and related services. To the extent that the Complainant relies on an October 3, 2019 e-mail from the Grandmother to Ms. XXXXXXXXX, the Student’s school counselor, to argue that the Parent did express the requisite concern to school personnel in writing, such reliance is misplaced.

On October 3, 2019, the Grandmother sent an e-mail to Ms. XXXXXX stating that she wished for the Student to have an individualized education program (“IEP”). Tr.187-9. In response, Ms. XXXXX contacted the Grandmother via telephone to discuss her request. During this conversation, Ms. XXXXX asked the Grandmother if she suspected that the Student is a child with a disability. The Grandmother informed Ms. XXXXX that she did not believe that the Student has a disability. Tr. 189. Further, the Grandmother testified that she informed Ms. XXXXX on multiple occasions that she did not believe that the Student has a disability. First Hearing, Tr. Day 1, at 265-266. The Grandmother informed Ms. XXXXX that she did not wish to move forward with the process for obtaining an IEP for the Student. First Hearing, Tr. Day 2, at 540.

In his April 3, 2020 decision regarding the First Hearing, Hearing Officer Peter B. Vaden held that with respect to the Grandmother’s October 3, 2019 e-mail request, “Grandmother withdrew that request the same day and stated she did not believe Student had a disability.” *See A.V. v. Panama-Buena Vist. Union Sch. Dist*., 1:15-cv-00246-MCE-JLT, 118 LRP 1031 (E.D. Ca. Jan. 8, 2018) (holding that although a written request for special education evaluation creates a basis for knowledge, a school division is not deemed to have knowledge if the parent has not allowed an evaluation of the student).

Prior to November 7, 2019, the Parent did not request that XXPS evaluate the Student for eligibility for special education and related services under the IDEA. At some point in the fall of 2019, and prior to November 7, 2019, Grandmother contacted Ms. XXXXXXXXXX, the lead special education teacher at XXS, via telephone, and requested a psychological evaluation of the Student. First Hearing, Tr. Day 1, at 266.

In response, Ms. XXXXXXX informed the grandmother that XXPS would need to do a comprehensive evaluation of the Student if they suspected that the Student was a child with a disability. First Hearing, Tr. Day 1, at 267. Again, the Grandmother informed Ms. XXXXXXX that she did not believe that the Student was a child with a disability. Tr. Day 1 at 267.

The Parent herself never requested a special education evaluation of the Student. The Grandmother requested a stand-alone psychological evaluation of the Student, not an evaluation for special education eligibility. Additionally, the Grandmother stated on multiple occasions that she did not believe that the Student had a disability. To her credit, the hearing officer finds that the Grandmother was a very credible witness, freely admitting facts which obviously ran counter to her case. Her testimony was always consistent and sincere and her demeanor was open, frank and forthright.

The Complainant also failed to prove that the Student’s teacher or other school personnel expressed concern about a “pattern of behavior demonstrated by the child directly to the director of special education of the local educational agency or to other supervisory personnel of the local educational agency,” prior to November 7, 2019.

There is no probative evidence in the record that XXS staff expressed concern about a pattern of the Student’s behavior directly to the director of special education or to other supervisory personnel of the school division. In fact, there is evidence to the contrary: the Director of Pupil Personnel,[[8]](#footnote-8) Ms. XXXXXXXX, testified that she was not aware of the Student or any of the Student’s behavioral challenges until November 7, 2019.

Prior to November 7, 2019, none of the precipitating events required by 8 VAC 20-81-160(H)(2) to confer knowledge on XXPS that the Student is a child with a disability occurred.

# XXPS did not otherwise suspect that the Student is a child with a disability prior to November 7, 2019.

The Student was not entitled to the IDEA’s disciplinary protections prior to November 7, 2019, because prior to November 7, 2019, XXPS did not suspect that the Student is a child with a disability. An April 3, 2020 final decision from Hearing Officer Vaden holds that XXPS did not violate its child find obligations with respect to the Student. Attachment 1 to SOB.

Specifically, Hearing Officer Vaden held that the Complainant did not meet her burden of proof to demonstrate that, “prior to November 7, 2019, XXXXXXXXX school officials overlooked clear signs that the Student had a disability, were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate the Student earlier in the school year.” *See Id.* at p. 15. Hearing Officer Vaden noted that Ms. XXXXXX testified, “credibly,” that even though the Student demonstrated challenging behaviors in school, she did not suspect a disability before the November 7, 2019 meeting and that prior to November 7, 2019, XXS addressed the Student’s behaviors appropriately, according to the school’s normal procedures, using the school’s available supports. *Id*. In the present proceeding, the findings of Hearing Officer Vaden were not countermanded.

Testimony elicited at both due process hearings regarding this Student demonstrates that XXPS was reasonable in not suspecting that the Student is a child with a disability prior to November 7, 2019.

On March 28, 2019, in order to enroll the Student at XXS, the Parent provided XXS with a Comprehensive Physical Examination Report completed by the Student’s physician. This document expressly states that the Student’s emotional and social development were within the “normal range.” *See* SB 1.

The Parent also signed and provided to XXPS a School Entrance Health Form on June 16, 2019. *See* SB 2. The School Entrance Health Form lists dozens of conditions that a parent may indicate are present for a child. Notably, the Parent did not check “yes” for any condition on the form, including “behavioral problems” or “developmental problems.” *Id*.

The Complainant’s expert witness, Ms. XXXXXXX, testified that the School Entrance Health Form and the Comprehensive Physical Examination Report are relevant to XXPS’ decision as to whether an MDR would have been required. Tr. 256-258

Additionally, the Parent and Grandparent did not provide XXPS with any medical or psychological diagnoses of the Student or any private evaluation reports of the Student prior to November 7, 2019. Prior to November 7, 2019, XXPS staff were unaware of any medical or psychological diagnosis of the Student. Tr. 310-311.

Only at the November 7, 2019 meeting did the Grandmother assert that the Student might have a disability request that the Student be evaluated for IDEA eligibility. As a result, prior to November 7, 2019, XXPS did not have knowledge that the Student is a student with a disability under the IDEA. Indeed, Ms. XXXXXXXX, an expert in special education and special education administration, opined that school staff did not suspect that the Student is a child with a disability until November 7, 2019. Tr. 402. Accordingly, the Student was not entitled to the IDEA’s protections regarding student discipline prior to November 7, 2019.

Hearing Officer Vaden correctly decided that XXPS did not violate its child find obligations regarding the Student because XXPS did not suspect that the Student is a child with a disability prior to November 7, 2019. Moreover, the Complainant failed to demonstrate that XXPS had knowledge that the Student is a child with a disability based on the regulatory factors delineated in 8 VAC 20-81-160(H) prior to November 7, 2019. As a result, the Student was not entitled to the disciplinary protections of the IDEA prior to November 7, 2019.

# XXPS did not contemplate a disciplinary removal of the Student that

#  constituted a change in placement.

The Student was also not entitled to an MDR because XXPS did not contemplate a disciplinary removal of the Student that constituted a change in placement. It is undisputed that XXPS did not assign the Student to a removal of ten consecutive school days. *See* SB 33 and PE 18. To the extent that the Complainant asserts that the Student was subjected to a series of short-term removals that constituted a pattern, such an argument is without merit.

XXPS did not subject the Student to a pattern of removals that constituted a change in placement after November 7, 2019. As found above, the Student was not entitled to the disciplinary protections of the IDEA until November 7, 2019.

The Hearing Officer agrees with counsel for the School Board that the hearing officer should not attach nearly the same weight to PE 18 as he does to SB 33, for the reasons and in accordance with the authorities, provided in SOB at 11. In short, documents created in anticipation and for the purposes of litigation, rather than in the ordinary course of business, should be regarded circumspectly by the fact finder.

However, for the sake of argument, the Complainant argues that on and after November 7, 2019, the Student was assigned the following disciplinary consequences: out-of-school suspension (“OSS”) on November 7; OSS on November 8; in-school suspension (“ISS”) on November 25; and OSS on December 10, 2019. *See* P 18-1 through 18-7. With two minor discrepancies, this correctly reflects the Student’s disciplinary consequences assigned in SB 33 following November 7, 2019. For instance, in SB 33 the Student was assigned ISS on November 25, 2019 but actually served it on November 26, 2019; the Student was actually assigned to ISS on December 10, 2019 and to OSS on December 11, 2019. *See* SB 33; *see also* Parent’s Exhibit 9-22.

Days of ISS do not constitute days of removal for the purposes of calculating a change in placement if: (1) the student is afforded the opportunity to continue to appropriately progress in the general curriculum; (2) the school division continues to provide the services specified in the student’s IEP; and (3) the student continues to participate with nondisabled students to the same extent as he or she does in his or her current placement. *See* 71 Fed. Reg. 46,715 (2006); *see also Dear Colleague Letter*, 68 IDELR 76 (OSEP 2016).

Principal XXXXX testified that during each of the Student’s assignments to ISS, she had access to the general curriculum and to her nondisabled peers. Tr. at 298-9; 312-3.

The Student does not currently have an IEP because XX initial eligibility determination was made on February 19, 2020; as a result, while there were no IEP services to provide, XXPS did continue to provide the Student with the general education behavioral supports that XXPS had been providing to the Student in the classroom setting, including XX one-to-one aide (from the time assigned). *Id*.

In light of the fact that the Student’s assignments to ISS did not constitute removals, following November 7, 2019, the date on which XXPS became knowledgeable that the Student may be a student with a disability under the IDEA, the Student was subjected to three (3) short-term removals (totaling three school days). Short-term removals do not constitute a change in placement such as to necessitate a MDR unless there are over ten (10) days of removals within a school year that constitute a pattern of removal. *See* 8 VAC 20-81-10; 8 VAC 20-81-160(C).

Here, the Student was not assigned a long-term removal nor was XX assigned a series of short-term removals that exceeded ten school days and constituted a pattern. Because no change in educational placement occurred, XXPS was, therefore, not required to conduct an MDR in this matter.

Even if XXPS had knowledge that the Student may be a child with a disability under the IDEA prior to November 7, 2019, and it did not, XXPS was still not required to conduct an MDR of the Student. Without considering early dismissals from school and out-of-class behavioral interventions, discussed *infra*, it is the Complainant’s position that prior to November 7, 2019, the Student was assigned the following disciplinary consequences: ISS on September 11, 2019; ISS on September 16, 2019; ISS on October 8, 2019; ISS on October 18, 2019; and OSS on November 6, 2019. *See* P Exhibit 18-1 through 18-7.

According to XXPS’ official report, prior to November 7, 2019, the Student was assigned the following disciplinary consequences: ISS on October 10, 2019 and OSS on November 6, 2019. *See* SB Exhibit 33.

Even using the Complainant’s chart and counting the Student’s assignments to ISS as days of removal, the Student was subjected to exactly ten (10) days of short-term removals during the 2019-2020 school year.

The IDEA only requires a MDR if a student is subjected to over ten (10) days of short-term removals and only then if those removals constitute a pattern. *See* 8 VAC 20-81-10; 8 VAC 20-81-160(C). The Complainant presented no evidence, either via testimony or documents, that any removals experienced by the Student constituted a pattern based on the reason for, proximity of, and length of any removals. Counted correctly, noting that the Student’s assignments to ISS did not constitute removals, the Student was subjected to four (4) days of short-term removals. As a result, the Student was not subjected to the requisite eleven (11) or more days of short-term removals constituting a pattern to necessitate a MDR.

The Complainant attempts to argue that the Student’s “early dismissals” constituted disciplinary removals. There is no factual support for this position. First, the Student was not subjected to any “early dismissals” after November 7, 2019, which was the first day on which XXPS had knowledge that the Student may be a student with a disability. *See* SB 33; P 18-1 through 18-7. Second, the Complainant presented no evidence other than Exhibit P 18-1 through 18-7 that stands for the proposition that XXPS either sent the Student home from school or demanded that the Grandmother or Parent pick the Student up from school.

To the contrary, Principal XXXXX testified that she has never required a parent to pick up a student from school due to disciplinary reasons. Tr. 360. Principal XXXXX testified that she never requested that the Grandmother pick the Student up from school. Tr. 361.

Principal XXXXX also testified that when Ms. XXXXXX or other school administrators called the Grandmother, staff did so with the purpose of providing the Grandmother with updates about how the Student’s day was progressing (as the Grandmother had authorized), not to order that the Grandmother pick up the Student from school. Tr. 173 and 318. In addition, the Grandmother testified that certain of the Student’s early dismissals from school were her choice:

Q: Okay. And what was your response when you received phone calls, and who called you?

A: Ms. XXXXXX called when she would have the Student in her office. The day that I received numerous phone calls – I believe I received probably about three before…o’clock…I had to…to pick the Student up because I felt like, if I did not, then they would continue to call, disrupting my day. And I just could not work like that.

Tr. at 109

Even if XXPS had knowledge that the Student may be a child with a disability before November 7, 2019, and it did not, and even if the “early dismissals” listed on the Student Attendance Report constitute disciplinary removals, counting the early dismissals in the Student’s short-term removals still did not require XXPS to conduct an MDR. The Virginia Department of Education (“VDOE”) recommends that removals lasting less than half of a school day be counted as half of a day of removal.[[9]](#footnote-9) The Student Attendance Report indicates that with the exception of one early dismissal, each of the Student’s early dismissals occurred at or after 2:25 p.m. The school day ends at 3:15 p.m. As a result, with respect to eight (8) early dismissals where the Grandmother elected to pick up the Student early, the Student missed a minimal amount of classroom instruction.

Even counting those early dismissals where arguably the Complainant on PE 18 states (or it can be reasonably inferred) that the school administration required the Grandmother to pick up the Student, only 4 days are captured: September 30, October 1, October 2, and October 23, 2019.

In short, the number of the Student’s short-term removals does not cross the ten-day removal threshold required by the IDEA in order to even consider the need for a MDR.

Ms. XXXXXX, the Student’s school counselor, provided the Student with behavioral interventions and supports in her office or elsewhere in the school building when the Student experienced difficulty de-escalating during the school day. First Hearing, Tr. Day 2, at 468-72.

The Grandmother testified that she suggested that the Student be able to take breaks when XX became frustrated and that she was aware that Ms. XXXXXX implemented this suggestion. Tr. at 109 and 172-3.

Ms. XXXXXX testified extensively at the First Hearing regarding the disciplinary supports that she provided to the Student. Specifically, Ms. XXXXXX (as well as the Grandmother) testified regarding a chart system in which the Student could earn stickers for demonstrating positive behavior; if the Student earned a sufficient amount of stickers, XX would be permitted to spend time with Ms. XXXXXX, with whom XX had developed a rapport, and engage in preferred play activities as a reward. First Hearing, Tr. Day 1 at 262-263. Ms. XXXXXX testified that only if the Student could not de-escalate with XX support in the classroom, the Student could come to Ms. XXXXXX’s office for a short break of less than thirty minutes. First Hearing, Tr. Day 2 at 468-72.

Ms. XXXXXXX, an expert in special education and special education administration, opined that the behavioral interventions provided to the Student by Ms. XXXXXX did not constitute removals causing a change in placement. Tr. 466-7. In sum, the time that the Student spent with Ms. XXXXXX constituted an appropriate behavioral support strategy, not a disciplinary removal from the classroom.

Ms. XXXXXXX, an expert in special education and special education administration, credibly testified that in her expert opinion, XXPS was not required to conduct a MDR either before or after November 7, 2019 because XXPS did not contemplate a disciplinary removal that constituted a change in placement and that the Student had not been subjected to over ten days of removal. Tr. 409 and 412. The evidence supports Ms. XXXXXXX’ expert opinion. The Complainant failed to meet her burden of proof to demonstrate that XXPS failed to conduct a MDR of the Student as no MDR was required. As a result, the Hearing Officer finds in XXPS’ favor on the sole issue in this case.

Because the hearing officer’s findings and decisions above are dispositive of the case, the hearing officer only summarily addresses the School Board’s assertions of the mootness and types of available relief, which are legally relevant to the manifestation issue.

# NOT MOOT

## The Student was permitted to return to school on December 12, 2020 at the conclusion of a short-term removal comprised of one day of ISS and one day of OSS. On December 9, 2019, XXPS assigned the Student to one day of OSS for December 10, 2019. *See* SB 33. On December 10, 2019, the Grandmother disregarded the suspension and sent the Student to school anyway. As a result, the Student was assigned one day of ISS on December 10, 2019. *Id*. As a result, XXPS informed the Grandmother that the Student would need to serve XX one day of OSS on December 11, 2019 and could return to school on December 12, 2019. First Hearing, Parent’s Exhibit 11-13, clean copy attached as Attachment 2 to SOB. The Student could have returned to school some time ago. Tr. at 314.

## As a result, the School Board argues the sole issue in this case is moot. “In general a case becomes moot ‘when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.’” *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (quoting Powell v. McCormack, 395 U.S. 486, 496 (1960)); see also Richmond Med. Ctr. For Women v. Gilmore, 55 F.Supp.2d 441, 472 (E.D. Va. 1999); Sch. Bd. of the City of Norfolk v. Brown, 769 F.Supp.2d (E.D. Va. 2010) (“In this case, the IEE and ADHD testing which the School Board contests have already been completed. Thus, there is no present controversy which exists for the Court to adjudicate.”).

 However, applicable law specifically allows a parent to challenge the adverse determination of the MDR team concerning any manifestation. See, e.g. 8 VAC 20-81-160(E).

 Because the award of the types of relief available to a hearing officer may be limited, does not necessarily mean that the issue is moot.

 For example, if a hearing officer were to find a manifestation where an MDR Team did not, important legal consequences flow from such a decision. Even though a hearing officer might not be able to change the LEA records lacking subject matter jurisdiction to do so, presumably the LEA would reflect such a decision in the Student’s cumulative record, absolving the student of a certain moral culpability or responsibility for the challenged actions of the student which led to the discipline and affecting the cumulative number of school days the student was considered disciplined in any given school year, etc.

 If the School Board chose not to reflect the fact that a hearing officer had found the LEA’s disciplinary action unwarranted, a student could bring an action under other means, such as FERPA, to assert his position concerning the accuracy of the LEA’s educational records. Accordingly, mootness does not attach.

## The LEA is correct that the primary purpose of a MDR is to determine whether a student’s disability caused, or was substantially related to, a behavior that led to a disciplinary removal that in turn led to a change in placement. *See* 8 VAC 20-81-160(D)(4). If the MDR team answers in the affirmative, then the student returns to his or her last agreed-upon placement. 8 VAC 20-81-160(D)(6)(A) (“The IEP team shall return the child to the placement from which the child was removed unless the parent and the local education agency agree to a change in placement….”).

## The LEA is also correct that this hearing officer has previously held that when a school division failed to hold a MDR when one was required, the remedy in that case was to return the student to the placement from which he or she was removed. *See J.V. v. Stafford Cty. Sch. Bd.*, 71 IDELR 99 (Va. May 31, 2017) (“By not conducting the MDR requested by the Parent…the School Board violated subsection C and D of 8 VAC 20-81-160. Accordingly, the hearing officer decides pursuant to 8 VAC 20-81-160(F)(2) that the Student should be returned to the placement from which she was removed…”).

 Under the facts and circumstances of *J.V*. case, to the best of the hearing officer’s recollection, the Parent did not ask for compensatory education services but argued that the hearing officer should change the placement of the student precisely while the Circuit Court already had a prior case pending before it seeking the same relief.

Accordingly, the *J.V.* case should be considered in light of its particular facts and the hearing officer’s subsequent research has found situations where compensatory education and possibly other relief could be considered in the manifestation context. For this additional reason, without obviously needing to take up this issue further in this proceeding, the hearing officer declines to accept the LEA’s present assertion of mootness.

The LEA is reminded of its obligations concerning 8 VAC 20-81-210(N)(16) to develop and submit an implementation plan to the parents and the SEA within 45 days of the rendering of this decision.

 Right of Appeal. 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.

ENTER: 6 / 10 / 2020

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John V. Robinson, Hearing Officer

cc: Persons on the Attached Distribution List (by e-mail)

6-10-20 HO Decision – K. Robinson v. XXPS

1. To the extent the other section entitled, “Additional Findings, Conclusions of Law and Decision” includes findings of fact, these findings are incorporated into this section. [↑](#footnote-ref-1)
2. The Complainant and the Student are referred to generically herein to preserve privacy. [↑](#footnote-ref-2)
3. Exhibits submitted by the LEA and admitted into evidence in this proceeding are cited as "SB <Exhibit Number> <page reference, if any>". Exhibits submitted by or on behalf of the Student and admitted into evidence in this proceeding are cited as "PE or P<Exhibit Number> <page reference, if any>". References to the verbatim transcript of the hearing held on March 26, 27 and 31 are cited in the following format "Tr.<page number>." References to the Vaden hearing are cited as “First Hearing, Tr. Day <1 or 2>.<page number>.” References to the Complainant's post-hearing Opening Brief are cited in the following format: "POB<page number>". References to the LEA's post-hearing Opening Brief are cited in the following format "SOB<page number>". [↑](#footnote-ref-3)
4. The discipline claim withdrawn by the Petitioner was,

Whether XXXXXXXXXXX Public Schools (XXXXXXX) has denied Student a free appropriate public education (FAPE) by refusing to conduct an MDR determination when Student has been subjected to a series of disciplinary removals for over 10 school days in the current school year, where the child’s behaviors were substantially similar in the incidents resulting in the removals. [↑](#footnote-ref-4)
5. See 8 VAC 20-81-170(E)(1)(b):

Informed parental consent is required before . . . An initial eligibility determination or any change in categorical identification . . . . [↑](#footnote-ref-5)
6. To the extent the above section entitled, “Findings of Fact” includes conclusions of law, these conclusions are incorporated into this section. [↑](#footnote-ref-6)
7. Apart from the 2 delineated exceptions, the expression of parental concern for the purpose of conferring knowledge on a school division must be written. The United States Department of Education advised that to allow parental notification of the need for special education to be oral would, “impermissibly broaden the requirements of the Act.” 71 Fed. Reg. 46,727 (2006). [↑](#footnote-ref-7)
8. In XXXXXXXXXXX Public Schools, the Director of Pupil Personnel oversees the administration of special education and related services for the school division and functions as the director of special education. Tr. 399-400 and First Hearing, Tr. Day 2, at. 549. [↑](#footnote-ref-8)
9. Discipline of Children with Disabilities: Technical Assistance Resource Document, Division of Special Education and Student Services (VDOE 2010). [↑](#footnote-ref-9)