18-068

**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 his parent, Parent v. LEA**

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

Child Ternon Galloway Lee, Esquire

Parent(s) 215 McLaws Circle, Suite 3A

Williamsburg, VA 23185

**Child’s Advocate(s):** (757) 253-1570

Advocates for Child (757) 253-2534

**LEA’s Attorney**

Attorneys for LEA

**Superintendent of LEA:**

Dr. Superintendent

# DECISION

**I.** PROCEDURAL HISTORY[[1]](#footnote-1)

On March 2, 2018, Parent filed an amended due process complaint (Complaint/Due Process Request) requesting a due process hearing. The Local Educational Agency (LEA) received this Complaint on the same date. The Hearing Officer determined that the amended complaint set forth expedited and non-expedited issues. Accordingly, the Hearing Officer scheduled two hearings for the two categories of issues. The expedited hearing date was set for March 26-27, 2018.[[2]](#footnote-2)

Prior to holding the expedited due process hearing, the Hearing Officer held several pre-hearing conferences (PHC) confirming the hearing dates, identifying the issues, and addressing other relevant matters. The Hearing Officer issued orders following the referenced PHCs related to the matters discussed and concerns noted.

The Hearing was held as scheduled on March 26 and 27, 2018. During the hearing, the Hearing Officer admitted Parent’s Exhibits 1 through 12, and 14 through 23, and 25. The Hearing Officer sustained the LEA’s objections to Parent’s Exhibits 13 and 24. The Hearing Officer admitted the LEA’s Exhibits 1 through 19, overruling the Parent’s objection to LEA Exhibits 4 and 5. The Hearing Officer also admitted her HO Exhibits 1 through 26 without objection from the parties. At the conclusion of the hearing, the parties requested permission to submit written closing arguments. The request was granted with the Hearing Officer imposing a five (5) page limit on each party’s written arguments.

The Hearing Officer now issues her decision in this matter.

**II.** EXPEDITED ISSUES

A. Did the LEA conduct a Manifestation Review (MDR) during the 2017/18 school year? If no MDR was conducted, did the LEA deny the child a free appropriate public education (FAPE)?[[3]](#footnote-3)

B. Did the LEA expel the child from school on or about January 22, 2018, for disciplinary reasons? Did the LEA convene an IEP team meeting on or about January 22, 2018, to determine a homebased placement for the child or did the LEA unilaterally place the child in a homebased setting? Was the child denied a FAPE?[[4]](#footnote-4)

C**.** Did the LEA’s Manager of Pupil Placement Services unilaterally place the child in a home-based setting for disciplinary reasons and without parental consent on or about January 22, 2018? If so, was the child denied a FAPE? Did the LEA change the child’s placement without providing appropriate supplemental aids and supports? If so, was the child denied a FAPE?[[5]](#footnote-5)

D. Did the LEA deny the child a FAPE by holding a hearing on February 27, 2018, conducted by a non-special education hearing officer and identified as a disciplinary/exclusionary hearing without the LEA convening an IEP team meeting or Manifestation Determination Review?[[6]](#footnote-6)

E. Did the LEA discipline the child for behaviors directly related to his identified and suspected disabilities during the 2016/17 school year when the child was enrolled in Elementary School; that is, from on or about April 20, 2017, to the end of the 2016/17 school year? If so was there a denial of FAPE?[[7]](#footnote-7)

**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.** FINDINGS OF FACTS

1. The child is a child with a disability. The LEA had determined him eligible for special education under the category of Other Health Impaired (OHI). (P Exh. 15/6; LEA Exh. 9/3).

2. During the 2015/16 school year, the child was enrolled in Private School until the school’s principal expelled the child for the repeated offense of “[s]tricking another person with a fist or closed hand and coming in physical contact with the sole purpose or intent to cause physical harm and or injury to another person.” The child had previously been enrolled in the LEA school district. (LEAs Exh. 5 and 8).

3. On or about April 20, 2017, the parent re-enrolled the child in an LEA school. Specifically, he attended Elementary School, his zoned public day elementary school.

4. On or about August 3, 2017, the parent registered the child to attend Charter School for the 2017/18 school year. (LEA Exhs. 7 and 8).

5. On the registration form for Charter School, a question appeared that reads “Has your child had any disciplinary infractions in his/her previous school”? The parent answered the question in the negative even though the child had been expelled from a private school on November 4, 2015, for punching his teacher on several occasions. (LEA Exhs. 5 and 7/3).

6. On August 3, 2017, the parent also signed a Statement of Affirmation. Her signature avowed that the child had not been expelled from attending a private or public school “for an offense in violation of school board policies relating to weapons, alcohol or drugs, of for the willful infliction of injury to another person.” (LEA Exh. 6).

7. The 2017/18 school year for Charter School started on or about the first of August, 2017. (Apr. 26 Tr. 162). Administration staff at the Charter School requested the child’s school records early and several times during the 2017/18 school year. However, the records were not promptly sent. Upon reviewing the child’s IEP online and receiving a faxed letter from Private School on or about November 11, 2017, Assistant Principal became aware that the child had previously been expelled from the private school. (Apr. 26 Tr. 247-49).

8. §22.1-277.2 of the Code of Virginia and the LEA’s Policy 8-3.15 grants, among other things, the LEA authority to exclude a student from attending the LEA’s schools when the student has previously been expelled from a private school.

In pertinent part, a student so situated may be excluded from attendance after the following:

(i) written notice to the student and his/her parent or guardian that the student may be subject to exclusion, including the reasons therefore, and notice of the opportunity for the student and his/her parent or guardian to participate in a hearing to be conducted by the division superintendent or his/her designee regarding such exclusion; and

(ii) a hearing of the case has been conducted by the division superintendent or his/her designee and the decision has been made to exclude the student from attendance.

(§22.1-277.2 of the Code of Virginia and the LEA’s Policy 8-3.15; LEA Exhs. 3 and 4).

9. The superintendent’s designee for exclusionary cases is the LEA hearing officer (LEA Officer). (April 27 Tr./94).

10. After closely examining the code and policy referenced above, the Hearing Officer finds that the LEA is authorized, but not mandated, to undertake the procedures outlined under the policy and law as noted in “Finding of Fact” 8. (§22.1-277.2 of the Code of Virginia and the LEA’s Policy 8-3.15; LEA Exhs. 3 and 4).

11. Hence, the revelation to the LEA that a student has previously been expelled from another school division or private school does not automatically trigger exclusionary proceedings. (Hearing Officer’s determination after review of the Code and Policy).

12. Despite the LEA learning on or about November 11, 2017, of the child’s prior expulsion and the reason for it, the LEA elected from November 11, 2017, to January 22, 2018, to not commence proceedings under its exclusionary authority. By then 10 weeks had elapsed. (LEA Exh. 10; Judicial Notice of lapse of time from November 11, 2017, to January 22, 2018).

13. By January 22, 2018, the child had accumulated in excess of 25 incidents of unexcused tardiness at Charter School. (LEA Exhs. 10 and 13). The parent had also just rejected the Behavior Improvement Plan (BIP) created by the assistant principal. (Apr. 16 Tr. 119; P Exh. 20). Then, the LEA elected to exercise the authority bestowed under §22.1-277.2 of the Code of Virginia and LEA Policy 8-3.15. (P Exh. 20; Apr. 27 Tr. 109-10).

# Excessive Tardiness and Behavior Improvement Plan

14. Excessive tardiness is a violation of the LEA’s code of student conduct. (Apr. 26 Tr. 142-43; P Exh. 12/2-3).

15. Also, the Charter School’s parental handbook specifies that unexcused, excessive incidents of tardiness that exceed 25 may be reason to return the child to his zoned school. (LEA Exh. 1/2-3).

16. Pursuant to Charter School’s handbook, placing a child on a Behavior Improvement Plan (BIP) is a consequence of misbehavior and considered a form of discipline. (LEA Exh. 1/9; Apr. 26 Tr. 118)

17. On January 16, 2018, the Charter School administrators attempted to place the child on a BIP. However, the parent objected and declined to consent to the plan. (P Exh. 20; Apr. 26 Tr. 155-56 and Apr. 26 Tr. 60).

# January 22, 2018 Letter

18. Four (4) school days after the parent rejected the BIP, the LEA presented the parent with a letter of the same date, January 22, 2018. (Apr. 26 Tr. 144; P Exhs. 20 and 21).

The January 22, 2018 letter (January 22 Letter) was endorsed by the principal and the Charter School’s chair of the Board of Directors. In pertinent part the letter stated that the child would not be permitted to return to the Charter School after January 22, 2018, because …”truthful information was not provided upon registration at [Charter School], **as well as the family violating the school’s attendance policy**, which is also a requirement of [Charter School] enrollment, [Child] will not be permitted to return to [Charter School] after January 22, 2018.” (P Exh. 21/1, Emphasis added).

This letter goes on to say that the child would have to appear before an LEA Hearing Office to determine if he will be permitted to attend any LEA school. The letter cited as its authority §22.1-277.2 of the Code of Virginia and LEA’s policy 8-3.15. (P Exh. 21/1).

# January 23, 2018 Letter

19. The day after the parent was notified that the child could not return to Charter School, the Manager of Pupil Placement Services composed a letter dated January 23, 2018 (January 23 Letter). The January 23 Letter indicated that the child was to appear on a date to be determined before a Hearing/Disciplinary Office of the LEA. (P Exh. 20/1).

20. Further, the first paragraph of the January 23 Letter also indicated that the child homebased placement may be authorized under three conditions. Two of the three conditions referred to discipline. Specifically, condition one mentioned that homebased placement may be designated due to expulsion or disciplinary action of a student receiving special education services (outlined within an Individualized Education Plan or 504 accommodations). The second condition noted that such placement may be made due to administrative requests from the disciplinary/hearing officer. (P Exh. 21/4).

21. The January 23 Letter provided that a third reason for homebased placement can be a decision made by the IEP team. The evidence does not establish that the child’s IEP team determined that the child should receive homebased services. Rather, the evidence shows that LEA Officer instructed the Manager of Pupil Services to provide homebased services for the child. This instruction was given because the LEA officer was aware that the child had an IEP. (Apr. 27 Tr. 123-24).

# Homebound Student Enrollment Information Form

22. Next, the Manager of Pupil Placement Services prepared an assignment form for the child’s administrators and teachers. It was titled “Homebound or Home-based Student Enrollment Information.” On the assignment sheet, the Manager of Pupil Placement Services denoted that effective January 22, 2018, due to discipline, the child’s educational assignment was home-based. This form also indicated that the service dates were pending the decision of an LEA hearing officer. (P Exh. 21/3).

# Exclusionary Hearing

23. The evidence established that an LEA hearing officer (LEA Officer) was assigned to handle the child’s case on or about January 22, 2018. LEA Officer handled primarily disciplinary cases. (April 27 Tr. 93).

24. On January 22, 2018, LEA Officer or her assistant scheduled a hearing for January 24, 2018. At some point after the January 22 and 23 letters were prepared, the LEA refers to this hearing as an “exclusionary hearing.” The parent was notified by telephone, but she declined to appear for the hearing. LEA Officer rescheduled the hearing for January 29, 2018. Although the parent was notified, she declined again to appear for the hearing. On January 31, 2018, the LEA Officer’s assistant attempted by telephone to schedule the “exclusionary hearing” again. When the assistant identified herself, the parent ended the telephone call. Next, and again by telephone, LEA Officer’s assistant attempted to schedule the hearing for February 15, 2018, but the assistant received no response from the parent. Eventually, by mail the LEA Officer rescheduled the hearing for February 27, 2018. The parent appeared for the February 27, 2018 hearing. (April 27 Tr. 99-100 and 126; LEA Exh. 11).

25. Upon holding the exclusionary hearing, LEA Officer sent a letter to the parent on February 28, 2018,[[8]](#footnote-8) which informed the parent that she had determined that the child could attend school in the district. The letter also informed the parent that the child would be eligible to enroll and attend classes at his zoned school, Elementary School. The decision letter designated the child’s effective date to return to school as March 5, 2018. (LEA Exh. 11). Had the hearing been held on January 24, 2018, when the LEA’s officer originally scheduled it, the child could have returned to school by the end of January, 2018. (Apr. 27 Tr. 100-01).

26. The LEA Officer determined the child could attend the district’s school because of his young age and the remoteness of the private school expulsion. (April 27 Tr. 103-04).

27.Based on the reasons the LEA articulated for the outcome of the exclusionary hearing and the basis for the scheduling difficulties noted, the Hearing Officer finds that the delay in scheduling is not attributed to the LEA. Had the parent attended the initial hearing as scheduled on January 24, 2018, the child would have been removed from school for only 5 school days before being permitted to return to a public day school. The Hearing Officer bases this finding on the fact that by the January 22 Letter, the child was removed from school starting January 23, 2018. Upon the second day of the removal, the LEA had set a hearing. The LEA had notified the parent, but the parent did not attend the hearing. Then the LEA made several additional attempts to hold the hearing, but the parent again declined to attend or cooperate. Eventually the parent attended the hearing scheduled on February 27, 2018. The outcome resulted in the LEA granting permission for the child to return to a public day school on the 4th day after the hearing. Thus, the Hearing Officer does not attribute the child’s removal from January 25, 2018, through February 27, 2018, to the LEA, but the parent. Hence, the Hearing Officer finds the LEA removed the child for a total of 5 school days for discipline. Those days were January 23, 24, February 28, March 1 and 2, 2018.

28. The 5 day removal is consistent with disciplinary consequences outlined in the LEA’s Student Code of Responsibility. (P Exh. 12/2-3).

29. Although the LEA removal was disciplinary in nature, singly, it was not long term. Therefore, a MDR under 34C.F.R. §300.530(e) was not required.

# Child’s Disciplinary History During the 2017/18 School Year

30. The disciplinary history of the Child during the 2017/18 school year includes the following:

**(i) October 3, 2017 Conduct**

Description of Conduct by LEA: After recess, Child was in line to go back inside when [other student] said “We won” the game. Child pulled his shirt, threw him on the ground, punched him in the face, and threw him against the wall. Child admitted the assistant principal the boy did not hit him. He also did this because he was mad he lost.

Action Taken: Two (2) days of out of school suspension (OSS)

**(ii) November 1, 2017 Conduct**

Description of Conduct by LEA: Child walked around the classroom during instruction talking loudly and ignoring silent and verbal redirection. The entire class was distracted. He pulled peoples papers off of the tables and stepped directly on them. He began to throw pencils in the air while walking around the room. On the carpet he punched a girl’s foot, poured his water, and hit a boy with a water bottle while packing up.

Action Taken: Child spent time in the office with the assistant principal. Child admitted to his actions. After talking with the assistant principal, he returned to class 15 minutes before dismissal. Child hit a student with a water bottle while packing up.

**(iii) December 13, 2017 Conduct**

Description of Conduct by LEA: Whenever the teacher responded to Child, he would respond with loud sign, eye roll, and yell OH MY GOD. It didn’t matter if she was asking him a question of giving an instruction. At the end of the day when the students were packing up, Child kept using the work “dick.” He reported to the teacher and assistant principal he was trying to get people to say it because he wanted to get people in trouble. The teacher and assistant principal informed him this was unacceptable. Child told the teacher he did not care and that it’s funny so he was going to keep saying it. Child reported to the assistant principal he knew his actions were wrong but thought it was funny.

Action Taken: One (1) day of in school suspension (ISS).

**(iv) January 11, 2018 Conduct**

Description of Conduct by LEA: On the playground Child was playing football. I watched him go behind the playground tree. When I looked at him, he was facing backwards and was urinating. I ran over to stop him. His response was that he had to go to the bathroom and did not want to wait. I asked him to show me our routine for using the bathroom. He told me he went behind the tree because it was a private place. We discussed that this is not a private place and that we never expose ourselves in public. He acknowledged, said sorry and that “it was stupid” then said “he did not want to wait.”

Action Taken: 1 day of OSS.[[9]](#footnote-9)

**(v) Removal resulting from January 22 Letter**

On January 22, 2018, the LEA removed the child from school, effective January 23, 2018, due in part to excessive incidents of tardiness. The length of the removal was 5 school days as noted in the above “Findings of Fact” # 27.

Actual days spent in OSS from October 3, 2017 to January 11, 2018 were three (3). (Apr. 26 Tr. 250-51). (A Exh. 12). Considering also the removal that commenced because of the action noted in the January 22 Letter, the total cumulative days of removal for discipline during the 2017/18 school totaled eight (8).

**Disciplinary History of Child for the 2016/17 School Year**

31. The evidence does not establish that Child was disciplined for misconduct during the two months he attended school in the 2016/17 school year.

**Homebased Placement**

32. Administrators at the Charter School removed the child from this school. Thereafter, the LEA Officer who is not a member of the child’s IEP team, instructed the child be placed on homebased services. Her instruction was carried out by the Manager of Pupil Placement Services. (Apr. 26 Tr. 225; Apr. 27 Tr. 123-24).

**Other**

32. Charter School and Elementary School are Public Day Schools. (Apr. 26 Tr. 198; LEA Exh. 14).

33. The evidence fails to establish that the LEA disciplined the child during the 2016/17 school year from on or about April 20, 2017, to the end of the 2016/17 school year.

34. The Parent’s Expert holds a doctorate in Special Education Leadership with an emphasis in policy and program. She has testified on multiple occasions as an expert in the area of special education policy and compliance. Moreover, she has been a consultant for various school districts. The Hearing Officer qualified the witness as an expert for the parent in the area of special education policy and compliance. (Apr. 27 Tr. 7-9).

35. Parent’s expert opined that the child’s series of removals for disciplinary reasons during the 2017/18 school year constituted a pattern of removals. (Apr. 27 Tr. 37-38).

**V. Legal Analysis**

The Individuals with Disabilities Education Improvement Act (IDEA/Act), 20 U.S.C. § 1400 et seq., requires states, 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), § 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 within their respective jurisdictions. 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) (ruling that the FAPE test is more than “de *minimus progress”* and a child’s educational program must be appropriately ambitious in light of the child’s circumstances). The mandates of the Act also require the LEA to fulfil certain obligations when a child with a disability is disciplined and receives a long-term removal or a pattern of removals that establish a long term removal/change in placement. 20 U.S.C. § 1415(k; 34 C.F.R. §§300.530 and 300.536; 8 VAC 20-81-160.

In this case, the parent avers that the LEA disciplined the child and in doing so changed his placement. Further, Parent contends that the LEA failed to follow the IDEA mandates in changing Child’s placement due to discipline. Because the parent seeks relief in this matter, she bears the burden of proof. *Schaffer v. Jerry Weast*, 105 LRP 55797 (November 14, 2005).

The Hearing Officer now examines the evidence to determine if the Parent has met her burden.

**A.** Issue:

**Did the LEA conduct a Manifestation Review (MDR) during the 2017/18 school year? If no MDR was conducted, did the LEA deny the child a free appropriate public education (FAPE).**

First, the Hearing Officer considers the issue stated above.

As mentioned previously, it is obligatory that the LEA conduct a MDR when the LEA implements a disciplinary removal that changes the placement of a child with a disability. 34 C.F.R. §300.530(e). The IDEA defines such a change in placement as (i) a removal of more than 10 consecutive school days or (ii) a series of short term removals that constitute a pattern. A pattern of removals can be determined from the following circumstances:

(i) the removals cumulate to more than 10 school days in a school year;

(ii) the child’s behavior is substantially similar to the child’s behavior in previous incidents that results in a series of removals; and

(iii) other factors such as the length of each removal, the total amount of time the child is removed, and the closeness of the removals to one another.

The LEA determines whether a pattern of removals has been established. This determination can be reviewed through due process and judicial proceedings. 34 C.F.R. §300.536; 8 VAC 20-81-160 (C)(1),(2), and (3).

# 1. Allegation that Child was expelled on January 22, 2018

The parent posits that the LEA subjected the child to a long term removal during the 2017/18 school year because the LEA (i) expelled the child from Charter School on January 22, 1018, and (ii) imposed a pattern of removals.

The Hearing Officer now considers the expulsion allegation. Among other evidence, the parent offers for examination several written communications generated by the LEA to corroborate this assertion.

# a. January 22, 2018 Letter

One such communication proffered by the parent is the January 22 Letter. In pertinent part the letter stated that the child would not be permitted to return to Charter School after January 22, 2018, because …”truthful information was not provided upon registration at [Charter School], **as well as the family violating the school’s attendance policy….”** (Emphasis added).

The evidence shows that the letter’s reference to information not being supplied by the parent concerns the parent not reporting certain information on Charter School’s registration form. Specifically, the evidence shows that on August 4, 2017, when the parent completed a registration form for the child to attend the district’s charter school, the parent signed the form indicating the child had no disciplinary infractions in his previous school. What is more, on August 3, 2017, the parent signed a statement attesting to the following:

I, [Parent], affirm that [Child] has not been expelled from school attendance at a private school or public school in Virginia or another state for an offense in violation of school board policies relating to weapons, alcohol or drugs, or for the willful infliction of injury to another person.

The evidence demonstrates that on or about November 11, 2017, Charter School’s administrators became aware that in 2015, the child had been expelled from a private school. Yet, the LEA declined to employ its authority and implement exclusionary proceedings under §22.1-277.2 of the Code of Virginia and School Board Policy 8-3.15. It took 10 weeks for the LEA to decide to assert its authority. Of particular note, by this time, January 22, 2018, the child had accumulated over 25 incidents of unexcused tardiness. This excessive lateness violated the LEA’s and Charter School’s student code of conduct. Coincidentally, the parent had refused to consent to Charter School’s BIP. The LEA admits the BIP is routinely employed at Charter School in an attempt to address a child’s misbehavior. Returning to the January 22 Letter, the evidence shows that it was not until the behavior infraction and the parent rebuffed the BIP that Charter School’s principal presented the parent with the January 22 Letter.

Accordingly, although the January 22 Letter sets forth two reasons for the removal, the Hearing Officer finds that the primary reason for the child being removed from Charter School was a violation of the student code of conduct. The Hearing Officer has based this finding on the unexplained and protracted time the LEA took to utilize its exclusionary procedures. Further and conspicuously, the removal occurred immediately following the child’s “excessive tardiness” violation coupled with the parent’s refusal to accept the school’s BIP.

# b. January 23, 2018 Letter

Moreover, the evidence demonstrates that the day after the parent was notified that the child could not return to Charter School, the Manager of Pupil Placement Services composed the January 23 Letter which was addressed to the parent. This correspondence indicated that the child would receive homebased instruction and was to appear on a date to be determined before a Hearing/Disciplinary Office of the LEA.

Also, the first paragraph of the January 23 Letter mentioned that the child homebased placement may be authorized under three conditions. Two of the three conditions referred to discipline. Specifically, condition one states that homebased placement may be designated due to expulsion or disciplinary action of a student receiving special education services (outlined within an Individualized Education Plan or 504 accommodations). The second condition states that such placement may be made due to administrative requests from the disciplinary/hearing officer. The evidence demonstrated that both conditions 1 and 2 applied in this case. While the letter gives a third condition (IEP team decision), the evidence fails to show that the IEP team made the decision to place the child at home for services. Hence, this Hearing Officer finds the homebased placement referenced in the January 23 Letter was based on conditions 1 and 2. Both indicate discipline and thereby corroborate the parent’s positon that on January 22, 2018, the LEA removed the child from his educational setting for disciplinary reasons

# c. Homebound Student Enrollment Information Form

Furthermore, the evidence shows that the Manager of Pupil Placement Services completed an assignment form for the child’s administrators and teachers. He named this form “Homebound or Home-based Student Enrollment Information.” On this sheet, the Manager of Pupil Placement Services denoted that effective January 22, 2018, due to discipline, the child’s educational assignment was home-based. This sheet also indicated that the service dates were pending the decision of an LEA hearing officer (LEA Officer). Of note, the evidence has established that the LEA Officer assigned to the case handled primarily disciplinary matters.

In sum, all three of the communications referenced above lend persuasive support to the parent’s argument. Having made this finding, the Hearing Officer is cognizant of the LEA’s assertion that the LEA’s removal effective January 23, 2018 was not for disciplinary reasons. The Hearing Officer has noted evidence offered by the LEA to support this claim. This includes, among other evidence, witness testimony that LEA staff erroneously used the diction “discipline” in the referenced communications. The Hearing Officer has not been convinced by this evidence.

# 2. Length of the January 23, 2018 Removal

Having found that the communications corroborate the parent’s contention that the child was disciplined on January 22, 2018 for tardiness, the Hearing Officer now directs her attention to the length of the removal initiated by the January 22 Letter.

After perusing the evidence, the Hearing Officer finds that the removal was not long term for reasons mentioned here. LEA Officer testified that the parent was notified of a hearing to take place on January 24, 2018, to determine if the child could attend the district’s public schools since he had been expelled previously from a private school. The LEA evolved to refer to this hearing as an “exclusionary hearing.” LEA Officer also testified that when the parent did not appear for this hearing on January 24, 2018, she rescheduled it for January 29, 2018. LEA Officer stated that the parent also failed to show for this hearing. LEA Officer’s testimony reveals that several other attempts were made to schedule the hearing in late January and February. LEA Officer testified that after those attempts failed, a letter was sent to the parent rescheduling the exclusionary hearing for February 27, 2018. Neither party disputes that the parent attended this hearing. Subsequent to it occurring, by letter dated February 28, 2018, LEA Officer informed the parent that her child could attend the district’s school. The letter further informed the parent that the child could start attending his zoned public day school on March 5, 2018. Concerning the designated “return to school date,” the Hearing Officer notes that March 5, 2018, is four (4) school days after the date of the “exclusionary hearing.”

The parent offered little or no evidence contrary to the testimony of the LEA Officer regarding the scheduled hearing or attempts to set the hearing. Accordingly, the Hearing Officer finds that the LEA provided several opportunities for a hearing to determine if the child would be removed long term from the public day school. Moreover, the Hearing Officer finds the first opportunity for the hearing was January 24, 2018, but the parent failed to attend.

From these findings, the Hearing Officer has reasoned that had the parent attended the first scheduled hearing on January 24, 2018, the child could have reported to his zoned school by January 30, 2018; that is, the fourth school day following the hearing.[[10]](#footnote-10) The removal was protracted because of scheduling difficulties caused by the parent’s uncooperativeness. Once the hearing took place on February 27, 2018, the child was granted permission to return to school on the fourth school day after the hearing. Accordingly, the Hearing Officer attributes five (5) school days of the child’s removal to the LEA during the period January 22, 2018, to March 5, 2018. Specifically, removal days attributed to the LEA are January 23, and 24, 2018; February 28, 2018; and March 1 and 2, 2018.

Although the Hearing Officer has determined this 5 day removal was for discipline under the cover of exclusionary proceedings, no long term removal happened. Therefore, a MDR was not required under 34C.F.R. §300.530(e).

In addition, as mentioned above, LEA Officer informed the parent that the child could attend the district school. However, the child was instructed to return to his zoned public day school and not Charter School. The parent argues, in effect, that the change in schools was tantamount to a change in placement. The Hearing Officer finds no equivalency. This is so because the evidence establishes that the Charter School and Elementary School were public day schools. Further, there was no indication that as a result of the physical location changing, the child would experience a substantial or material change in the educational program or services provided to the child. Thus, the Hearing Officer finds that the physical location change alone does not constitute a change in placement. *See* 71 Fed. Reg. 46,588 (2006).

# 2. Allegation that there was there a pattern of removals

Next the Hearing Officer turns to the parent’s claim that the LEA subjected the child to a pattern of removals, and therefore, the LEA should have held a MDR.

The evidence demonstrates that the child’s disciplinary history for 2017/18 school year through January 22, 2018, comprises the following:

# (i) October 3, 2017 Conduct

Description of Conduct by LEA: After recess, Child was in line to go back inside when [other student] said “We won” the game. Child pulled his shirt, threw him on the ground, punched him in the face, and threw him against the wall. Child admitted the assistant principal the boy did not hit him. He also did this because he was mad he lost.

Action Taken: Two (2) days of out of school suspension (OSS)

# (ii) November 1, 2017 Conduct

Description of Conduct by LEA: Child walked around the classroom during instruction talking loudly and ignoring silent and verbal redirection. The entire class was distracted. He pulled peoples papers off of the tables and stepped directly on them. He began to throw pencils in the air while walking around the room. On the carpet he punched a girl’s foot, poured his water, and hit a boy with a water bottle while packing up.

Action Taken: Child spent time in the office with the assistant principal. Child admitted to his actions. After talking with the assistant principal, he return to class 15 minutes before dismissal. Child hit a student with a water bottle while packing up.

**(iii)** December 13, 2017 Conduct

Description of Conduct by LEA: Whenever the teacher responded to Child, he would respond with loud sign, eye roll, and yell OH MY GOD. It didn’t matter if she was asking him a question of giving an instruction. At the end of the day when the students were packing up, Child kept using the work “dick.” He reported to the teacher and assistant principal he was trying to get people to say it because he wanted to get people in trouble. The teacher and assistant principal informed him this was unacceptable. Child told the teacher he did not care and that it’s funny so he was going to keep saying it. Child reported to the assistant principal he knew his actions were wrong but thought it was funny.

Action Taken: One (1) day of in school suspension (ISS).

**(iv)** January 11, 2018 Conduct

Description of Conduct by LEA: On the playground Child was playing football. I watched him go behind the playground tree. When I looked at him, he was facing backwards and was urinating. I ran over to stop him. His response was that he had to go to the bathroom and did not want to wait. I asked him to show me our routine for using the bathroom. He told me he went behind the tree because it was a private place. We discussed that this is not a private place and that we never expose ourselves in public. He acknowledged, said sorry and that “it was stupid” then said “he did not want to wait.”

Action Taken: 1 day of OSS.

Of note, the parent contends that for the November 1, 2017, incident, the child received 2 days of OSS. Other than the assertion made in the amended due process complaint, no evidence was submitted to support the claim. Accordingly, for the period October 3, 2017, to January 11, 2018, the Hearing Officer finds the removals are as set forth above in the child’s conduct history and the child received 3 days of OSS.

Moreover, the Hearing Officer has determined for reasons already discussed here that the LEA executed a disciplinary removed for 5 school days between January 22, 2018, and March 5, 2018, due to excessive tardiness. Hence, during the 2017/18 school year, the evidence shows the child was removed for eight (8) school days.

Moving on with her analysis, the Hearing Officer considers the behaviors causing the removals. The October 3, 2017 conduct involved physical aggression; the January 11, 2018 behavior was for urinating in a public area; and the 5 day removal commencing on January 23, 2018, concerned excessive tardiness. Thus, the Hearing Officer does not find the behaviors for which the child was removed were substantially similar.

In addition, the removals occurred over at least a 16 week period of time. One removal occurred in October, 2017, one in December 2017, and two removals in January. The latter OSS occurring in January 2018, was extended to March, 2018, due to the parent’s failure to attend the exclusionary hearing.

Considering the cumulative number of removal days, the varying behaviors for which the LEA disciplined the child, and the proximity of the removals, the Hearing Officer finds the series of removals do not constitute a pattern. Having made this determination, the Hearing Officer has considered the parent’s expert testimony wherein this witness opined that the series of removals established a pattern. The Hearing Officer was not swayed.

Consequently, there was no removal for more than 10 consecutive days by the LEA or a series of removals that established a pattern. Accordingly, the LEA was not required to conduct an MDR. The Hearing Officer finds no denial of FAPE because none was conducted.

**B.** Issue

**Issue: Did the LEA expel the child from school on or about January 22, 2018, for disciplinary reasons? Did the LEA convene an IEP team meeting on or about January 22, 2018, to determine a homebased placement for the child or did the LEA unilaterally place the child in a homebased setting? Was the child denied a FAPE?**

The Hearing Officer now focuses on the issue immediately above.

The LEA may implement a short term removal of a child with a disability to an appropriate interim alternative educational setting (IAES), a suspension, or another setting to the extent these alternative settings would be applied to a child without a disability. 34 C.F.R. §300.530(b); 8 VAC 20-81-160B. For short term removals that do not cause the cumulative days of removal to exceed 10 days, no services are required unless provided to a child without a disability similarly situated. *See* 34 C.F.R. §300.530(b)(2); 8 VAC 20-81-160B2.

A child with a disability who is long-termed removed receives services during the disciplinary removal so as to enable the child to

(1) continue to receive educational services so as to enable the child to continue to participate in the general educational curriculum, although in another setting;

(2) progress toward meeting the goals set out in the child’s IEP; and

(3) receive as appropriate a functional behavior assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

In addition, the child’s IEP team determines the IEAS for services if there is a change in placement due to the disciplinary removal. 34 C.F.R. §300.530(d) (5); 34 C.F.R. §300.531; 8 VAC 20-81-160 C6.

Under the facts in this case as previously discussed, the child received a short term removal which was effectuated by the January 22 Letter. The January 22 removal did not change the child’s placement. Accordingly, under applicable law as it relates to disciplinary removals, the IEP team was not obligated to meet and determine the child’s short-term IAES. . Further, the child had not acquired more than 10 cumulative days of removal during the school year. Thus, short term removal services were not even required. 34 C.F.R. § 300.530(b)(2); 8 VAC 20-81-160B2.

The Hearing Officer notes that the evidence establishes that the LEA Officer - who is not a member of the child’s IEP team - directed the Manager of Pupil Placement Services to provide homebased services for the child during his removal. The Hearing Officer finds that this illustrates the LEA offering services beyond its requirement. This is the case because the evidence does not show that the LEA provides homebased services for children without disabilities who are similarly disciplined.

Hence, the Hearing Officer finds no denial of FAPE.

**C.** Issue

**Issue: Whether the LEA’s Director of Pupil Services unilaterally placed the child in a home-based setting for disciplinary reasons without parental consent on or about January 22, 2018? If so, was the child denied a FAPE? Whether the LEA changed the child’s placement without providing appropriate supplementary**

Regarding placement, the parent has also requested this Hearing Officer decide the related issues noted here.

The Hearing Officer previously found that the LEA Officer instructed the Manager of Pupil Services to provide home based services for the child. Thereafter the Manager of Pupil Services placed the child in home-based setting. The evidence does not indicate that the parent consented to IAES. Notwithstanding, the Hearing Officer does not find a denial of FAPE for reasons previously stated. That is, the disciplinary removal was short-term. Accordingly, no change in placement occurred.

Further and as previously mentioned, the cumulative school days of disciplinary removal for the 2017/18 school year did not exceed 10 days. Under applicable law, the LEA had authority to remove the child to an IAES without providing services if a child with a disability would not have received services. 34C.F.R. §§300.530(b) and 300.530(d)(3); 8 VAC 20-81-160(B)(2)(a). The evidence does not establish that a child without a disability similarly situated to the child would have been provided any services. In fact, the evidence shows that by providing the child with homebased services during his short term removal, he received more services than a child without a disability and similarly situated would have obtained.

The parent also alleges that the child was denied a FAPE because the LEA changed the child’s placement without providing appropriate supplemental aids and supports.

Here the parent’s contention is based on the premise that the LEA removed the child long term and therefore changed his educational setting. The evidence demonstrates no change in placement. Accordingly, the parent’s argument fails.

**D.** Issue

**Whether the LEA denied the child a FAPE by holding a hearing on February 27, 2018, conducted by a non-special education hearing officer and identified as a disciplinary/exclusionary hearing without the LEA convening an IEP team meeting or Manifestation Determination Review?**

Within ten school days of the LEA deciding to change the placement of a child with a disability because he has violated a code of student conduct, the LEA, the parent, and relevant members of the IEP team must review all relevant information in the student’s file, … to determine (i) if the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or if the conduct in question was the direct result of the LEA’s failure to implement the IEP. 34 C.F.R. §300.530(e).

For reasons already discussed here, the facts in this case show the LEA made no decision to change the child’s placement. Accordingly, the LEA was not required to hold an MDR meeting or IEP meeting.

**E.** Issue

**Whether the LEA disciplined the child for behaviors directly related to his identified and suspected disabilities during the 2016/17 school year when the child was enrolled in Elementary School; that is, from on or about April 20, 2017 to the end of the 2016/17 school year? If so was there a denial of FAPE?**

The parent failed to establish any discipline occurred during the relevant time period during the 2016/17 school year. Accordingly, she did not meet her burden.

**VI.** Decision and Order

The Hearing Officer has considered all the evidence and arguments whether specifically mentioned or not. For the reasons stated above, the Hearing Officer finds the following with respect to each issue.

A. Issue: Did the LEA conduct a Manifestation Review (MDR) during the 2017/18 school year? If no MDR was conducted, did the LEA deny the child a free appropriate public education (FAPE)? (Issue 3 of the amended complaint)

The Hearing Officer determined that the LEA conducted no MDR. However, none was required under the facts of this case and applicable law for the reasons stated here. The parent failed to meet her burden. Accordingly, there was no denial of FAPE.

B. Issue: Did the LEA expel the child from school on or about January 22, 2018, for disciplinary reasons? Did the LEA convene an IEP team meeting on or about January 22, 2018, to determine a homebased placement for the child or did the LEA unilaterally place the child in a homebased setting? Was the child denied a FAPE? (Issues 5 and 6 of the amended complaint)

The Hearing Officer determined that the LEA did not expel the child from school on or about January 22, 2018. No IEP team was convened to determine the child’s placement as any removal was short termed and therefore did not require the IEP team to determine the child’s IAES. Further, the Hearing Officer found that while the LEA provided for services during the short term removal attributed to the LEA, under applicable law and the facts, the LEA was not required to do so. The parent failed to meet her burden. The LEA did not deny the child a FAPE.

C**.** Issue: Did the LEA’s Manager of Pupil Placement Services unilaterally place the child in a home-based setting for disciplinary reasons and without parental consent on or about January 22, 2018? If so, was the child denied a FAPE? Did the LEA change the child’s placement without providing appropriate supplemental aids and supports? If so, was the child denied a FAPE? (Issues 11 and 12 of the amended complaint)

The Hearing Officer determined that the LEA had removed the child short term for disciplinary reasons. In addition, the facts of the case did not require the LEA to provide services. However, the LEA Officer directed the Manager of Pupil Placement Services to provide services to the child. The parent’s consent was not required. The parent failed to meet her burden. The LEA did not deny the child FAPE.

D. Issue: Did the LEA deny the child a FAPE by holding a hearing on February 27, 2018, conducted by a non-special education hearing officer and identified as a disciplinary/exclusionary hearing without the LEA convening an IEP team meeting or Manifestation Determination Review? (Issue 17 of the amended complaint)

The Hearing Officer determined that under the case’s facts the LEA made no decision to change the child’s placement. Accordingly, the LEA was not required to hold a MDR meeting or IEP meeting. The parent failed to meet her burden and show that the LEA denied the child a FAPE

E. Issue: Did the LEA discipline the child for behaviors directly related to his identified and suspected disabilities during the 2016/17 school year when the child was enrolled in Elementary School; that is, from on or about April 20, 2017, to the end of the 2016/17 school year? If so was there a denial of FAPE? (Issue 2 of the complaint)

The Hearing Officer determined that the parent failed to establish any discipline occurred during the relevant time period during the 2016/17 school year. Accordingly, she did not meet her burden. There was no denial of FAPE.

Moreover, the Hearing Officer finds with regard to all the issues before her all requirements of notice to the parents have been satisfied and that the school reports Child is one with a disability as defined by applicable law 34 C.F.R. Section 300.8 and that Child is in need of special education and related services. The Hearing Officer also with respect to the issues before her finds that the LEA has provided Child with a FAPE.

**VII. PREVAILING PARTY**

I have the authority to determine the prevailing party on the issues and find the prevailing party is the LEA on all the issues.

**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 17th day of April, 2018.

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Ternon Galloway Lee, Hearing Officer

Cc: Parent

Advocate for Parent

Counsel for LEA

Dir. of Special Education for LEA

VDOE Coordinator

1. Throughout the decision, the Hearing Officer will use the following abbreviations:

   April 26, 2018 Transcript - Apr. 26 Tr.

   April 27, 2018 Transcript - Apr. 27 Tr.

   Parents’ Exhibit P Exh.

   Local Educational Agency Exhibit - LEA Exh.

   Hearing Officer Exhibit - HO Exh.

   [↑](#footnote-ref-1)
2. Moreover, the non-expedited hearing was scheduled for April 17, 18, 23, and 24, 2018. The parties agreed to the scheduling. After this scheduling, the parent moved to withdraw her request for a due process hearing on the non-expedited matters. By Order entered April 16, 2018, the Hearing Officer dismissed the non-expedited due process matter. [↑](#footnote-ref-2)
3. Identified as Issue 3 on the amended due process complaint (DPC). [↑](#footnote-ref-3)
4. Identified as Issues 5 and 6 on the amended DPC. [↑](#footnote-ref-4)
5. Identified as Issues 11 and 12 on the amended DPC. [↑](#footnote-ref-5)
6. Identified as Issue 17 on the amended DPC. [↑](#footnote-ref-6)
7. Identified as Issue 3 on the amended DPC. [↑](#footnote-ref-7)
8. The letter was revised on February 28, 2018, due to a clerical error and resent to the parent. (April 27 Tr./101). [↑](#footnote-ref-8)
9. In the parent’s amended due process complaint, she posits that child received 2 days of OSS for the October 3, 2017 behavior; 2 days of OSS for the November 1 conduct; 1 day of ISS for the December 13, 2017 conduct; and 1 day of OSS for the January 11, 2018 conduct. [↑](#footnote-ref-9)
10. This is the same amount of time that passed from the February 27, 2018 hearing to the March 5, 2018 date given for the child to return to school. Had the hearing been held on the first date it was set, January 24, 2018, and the lapse time between the hearing date and return date been identical, the child would have been removed from school for five school days. Based on the reasons the LEA Officer presented for ruling that the child could attend the district school, the Hearing Officer finds no reason to believe the ruling would have been different had the hearing been held on January 24, 2018. Further, had the January 24, 2018 hearing occurred, the Hearing Officer finds no evidence to suggest the return date would have been longer than the 4th school day after the hearing. [↑](#footnote-ref-10)