

SEP 22 2014

Dispute Resolution &
Administrative Services

**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(s), Parent v. LEA

Child & Parent(s)/Guardian:

Child, child
Mr. Parent, parent(s)

Administrative Hearing Officer:

Ternon Galloway Lee, Esquire
215 McLaws Circle, Suite 3A
Williamsburg, VA 23185

Child's Attorney Advocate:

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School Division Attorney
LEA Attorney, Esq.

Superintendent of LEA:
Dr. Superintendent

I. PROCEDURAL HISTORY¹

Parents filed a request for an expedited due process hearing on June 30, 2014, which was received by the Local Educational Agency (LEA) on the same date. (HO Exh. 9, p. 1).

Prior to holding the hearing, the Hearing Officer scheduled a pre-hearing conference (PHC) setting the hearing dates. (HO Exh. 9). Subsequent to the initial PHC, the Hearing Officer issued a scheduling order that, among other things, set the hearing for July 28 and 29, 2014. (HO Exh. 9). A subsequent PHC took place on July 24, 2014, to address any matters of concern regarding the parties' proposed exhibits and witness testimony. During the second PHC, by motion, the LEA requested that two of its witnesses be allowed to testify by telephone. In her response to the motion, the parent stated she had no objection. Thereafter, for good cause, the Hearing Officer granted leave for the telephonic testimony. Subsequently, as scheduled, the due process hearing occurred on July 28 and 29, 2014.

During the expedited hearing, the Hearing Officer admitted Parents' Exhibits P1 through P 11; LEA's Exhibits A through I; and Hearing Officer's Exhibits 1 through 18.²

¹ Throughout the decision, the Hearing Officer will use the following abbreviations: Transcript (Tr.); Parents' Exhibit (P Exh.); Local Educational Agency Exhibit (LEA Exh.); Hearing Officer Exhibit (HO Exh.)

² The hearing in this case was expedited under 34 C.F.R. § 300.532 (c). Thus, the decision in this case is due 10 school days after the hearing. The Hearing Officer has determined that the 10th school day is September 5, 2014. See Hearing Officer order issued September 24, 2014. (HO Exh. 18).

The Hearing Officer's decision is set forth below.

II. ISSUES

Did the LEA err when it found Child's behavior on May 15, 2014, was not a manifestation of his disability?

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 Parents bear the burden of proof because they are challenging the manifestation determination.

IV. FINDINGS OF FACTS

1. Child was a sixth grader at Middle School during the 2013-2014 school year. (Tr. p. 54; LEA Exh. C 197). The LEA had previously found Child eligible for special education and related services under the category of Other Health Impaired (OHI) due to Attention Deficit Hyperactivity Disorder (ADHD) and Asperger's traits. (LEA Exh. C 155; Tr. 115-116).
2. The Special Education Committee (SEC) re-evaluated Child for his triennial on or about October 6, 2013. During that reevaluation, it considered current observations and educational reports on Child, the 2010 Psychological Report by the LEA (2010 Psychological Report), the 2009 Social History Report prepared by Norfolk Public School Division, and any updated social history information. On October 7, 2013, it again found Child eligible for special education under the OHI category for the forenamed disabilities. Child's IEP from the beginning of the school year remained. (Tr. 70, 273; LEA Exh. C 153 - 159).
related services.
3. Child received a failing grade in English on his progress report for the second quarter of the 2013-14 school year. Hence, the LEA proposed an IEP meeting regarding amending the IEP. A meeting was held and attended by the parent; however, it resulted in no change to Child's IEP. Parent agreed with the results of this IEP meeting. (LEA Exh. C 138-139).
4. By February 2014, Child's behavior at school had deteriorated. By illustration, Child was skipping classes, shooting spitballs repeatedly in class, engaging in off-task behaviors such as reading graphic novels in class, becoming very loud and adamant in class when refusing to complete assignments, and disrupting other students. (Tr. 210-212; LEA Exh. C 128).
5. Because of the mounting behavior problems, on or about February 21, 2014, Case Manager conducted a Functional Behavior Assessment (FBA). She had 12 years of experience in completing such an assessment as well as developing Behavior Intervention Plans (BIP). Also, Case Manager was familiar with Child, as she was one of his teachers during the 2013-14 school year. (Tr. 282-284).

6. In performing the FBA, the case manager conducted observations of Child, reviewed his disciplinary record, looked at the behavior incidents, the antecedents to them, and the consequences of the behavior. Case Manager also conferred with Child to determine his rationale for engaging in the behaviors. She also discussed the incidents with Parents to assist Case Manager in determining what could be employed as positive reinforcements. Therefore, at an IEP meeting held on February 21, 2014, the FBA was completed. (Tr. 283-287; LEA Exh. C 126-128).

The targeted behaviors noted on the FBA included the following:

- (i) Child's refusal to complete assignments he does not desire to do
- (ii) Child engaging in off tasks behaviors such a reading graphic novels in class instead of completing assigned work;
- (iii) Child playing with spitballs and staring into space; and
- (iv) Child becoming very loud and adamant in his refusal to complete assigned work and disrupting other students.

LEA Exh. C 128).

7. During the February 21, 2014 IEP meeting, a BIP was also developed and implemented as an integral part of Child's IEP. (Tr. 282; LEA Exh. (C 126-131).

8. The BIP implemented on February 21, 2014, detailed the following plan:

Description of problem/target behavior:

[Child] will comply with teacher request after no more than two prompts.

Evaluation System:

Referrals to the office that result in ISS or OSS

Case manager will evaluate behavior sheet filled out by teachers daily

Prevention Activities:

[Child] will comply with teacher requests without argument.

[Child] will be taught the expectations during class.

[Child] will be provided with choices on how to react when asked to do something he does not want to do.

[Child] will discuss behavior chart with teachers.

Intervention Strategies:

[Child] will be praised and reinforced for compliance.

[Child] will be reminded of appropriate choices of behaviors when upset about the need to comply

[Child] will be provided with firm and clear reminders of expectations.

Teaching Activities:

Teach and review code of conduct, expectations and routines.

Person responsible

[Case Manager]

(LEA Exh. C 126).

9. Parent attended the February 21, 2014 IEP meeting and consented to the FBA and the BIP. (LEA Exh. C 126-128).

10. Between February 22, 2014, and April 30, 2014, Child's behavior escalated despite the BIP. During that time period, Child received 10 referrals for misbehavior. (P Exh. 8, pp. 1-6). Also, at Parent's request the IEP team met on April 28, 2014, to address Child's recent behavior involving skipping classes. During that meeting the IEP team recommended observations be conducted in the classes Child was skipping to determine if there were factors in the classroom contributing to Child's misconduct. The observations were conducted and the IEP team met again on May 13, 2014, to review them and amend Child's BIP. (LEA Exh. C 55, 69 – 73; Tr. 65, 105, 130-131, 289-290, and 301). Child's amended BIP was implemented on May 13, 2014. (LEA Exh. C 69).

Even though Child engaged in additional misconduct from the inception of the initial BIP and April 30, 2014, the BIP was not modified until May 13, 2014, because time was needed for the LEA to collect data on how the BIP was working and what modifications, if any, were needed. Also, BIPs are not normally modified at every instance of misconduct. (Tr. 485 – 491).

11. The May 13, 2014 amended BIP detailed the following plan:

Description of problem/target behavior:

[C]hild will comply with teacher request after no more than two prompts. Teacher request include completing assigned work, staying in assigned areas, and following teacher instructions;

Evaluation System:

Class attendance will be completed.

Behavior sheet will be completed bi- weekly by case manager.

Prevention Activities:

[Child] will be given warnings when there is a change in his routine or schedule.

[Child] will be given "forced choices"; first complete your assignment and then you can choose an activity or reinforcer.

[Child] will be reminded of appropriate expectations and school rules.

[Child] and his case manager will review his grades and missing assignment on a weekly basis.

Intervention Strategies:

[Child] will be praised and given positive feedback for compliance.
 [Child] will earn privileges and reinforcers for appropriate behaviors.
 [Child] will be given cool down/timeout in a designated supervised area.

Teaching Activities:

[Child] will participate in role-playing demonstrating appropriate ways to respond to authorities.
 [Child] will engage in social stories.
 [Child] will engage in discussions about incidents and alternative ways to engage with adults and peers.

Person responsible
 case manager

(LEA Exh. C 69).

12. Parent consented to the amended BIP. (LEA Exh. C 69; Tr. 290).

13. No other changes were made to the IEP on May 13, 2014. However between the beginning of the school year and before May 13, 2014, Child's accommodations and related services had been modified through the course of several IEP meetings. Accordingly, the May 13, 2014 IEP set forth Child's current accommodations and services that had been previously established, but remained effective. They are detailed below:

Accommodations

Type	Accommodation	Location	Setting	Amount of Time/ Frequency
General	directions read aloud, simplified, clarified, and repeated	Public Day School	General Education Classroom	when directions are given
Testing	read aloud	Public Day School	General Education Classroom	when test are given
Testing	small group testing to minimize distractions	Public Day School	General Education Classroom	when test are administered
Testing	read aloud via audio online format	Public Day School	General Education Classroom	for tests having an on line format
Testing	breaks during testing	Public Day School	General Education	when student appears to be off tasks during

			Classroom	testing
General	extended time for written assignments, more than 1 paragraph not to exceed 1 class period (block = 100 min.)	Public Day School	General Education Classroom	when written assignments longer than 1 paragraph are given
General	read aloud	Public Day School	General Education Classroom	during instruction

Services

<u>Specially Designed Instruction</u>	<u>Location</u>	<u>Instructional Setting</u>	<u>Amount of Time</u>	<u>Start and Finish</u>
Reading/ Written Expression	Public Day School	General Ed Classroom	75 minutes 5 x every 2 weeks	2/24/14 to 6/13/14 and 9/2/14 to 2/20/15
Special Educational Services	Public Day School	Special Ed Classroom	50 minutes 5 x per week	2/24/14 to 6/13/14 and 9/2/14 to 2/20/15
Reading	Public Day School	Special Ed Classroom	50 minutes 5 x per week	2/24/14 to 6/13/14 and 9/2/14 to 2/20/15

(LEA Exh. C 62).

14. The May 13, 2014 IEP also contained several goals. Pertinent to the case before this Hearing Officer is the social and emotional behavior skills goal. It reads as follows:

Category: Social/emotional/behavior Skills

By 2/20/15, when given a request by a teacher, [Child] will comply with the request with no more than 2 prompts, as measured by teacher collected data with no more than 3 incidents of noncompliance in each nine week period.

(LEA Exh. C 61).

Teachers collected data regarding the social/emotional behavior goal referenced above. (P Exh. 7; Tr. 382-383).

MAY 15, 2014 BEHAVIOR

15. While attending his inclusion English class on May 15, 2014, Child was not performing the assigned classwork. Instead he was reading a graphic novel. When one of his teachers asked him to put the book away, he refused. In addition, when Child was given a paper to work on, he flung it off his desk onto the floor. When Child was asked to pick up the paper, he refused. (Tr. 192). The teachers tried to work with Child for about 45 minutes. At that point the situation was deemed a serious problem. As such the case manager/special education teacher went to the office and requested the help of Assistant Principal. (LEA Exh. B 18; Tr. 291-292). When Assistant Principal arrived in the class room, he asked Child to come into the hallway, to which Child complied.

16. Assistant Principal then asked Child to give Assistant Principal the books because they were causing Child trouble. Assistant Principal further stated that he would return them to Child at the end of the day. Child did not comply with this request insisting that the books needed to be returned to the library. Assistant Principal then proposed returning the books to the library for Child. The Child refused, stating that he needed to see that the books were returned. Assistant Principal then agreed to walk with Child to the library so Child could return the books. The Child was allowed to return the books to the library with Assistant Principal and watch the librarian scan in the books. The librarian then showed Child the screen which indicated the books had been returned. (Tr., p. 57-58).

17. For the purpose of discussing the incident with Child and then allowing him to return to class with the appropriate mindset, Assistant Principal then instructed Child to accompany him to the office. Child informed Assistant Principal that he was not going to the office and began to yell stating that Assistant Principal could not make him return to class. Further, Child stated that he was going to go where he wanted to go. Assistant Principal remained calm while informing Child again that he needed to accompany Assistant Principal so that he could return to class. Child continued to yell while Assistant Principal told him he needed to calm down. Child then began to run down the hallway in the direction of the main entrance to the school. Assistant Principal was able to get in front of Child, who continued to yell, blurting that he was not going to go to the office. Even though Assistant Principal reiterated that his goal was to return Child to class, Child continued to yell. (Tr. 59-60).

18. Then Child dropped to the floor. Several times, Assistant Principal requested Child stand up so they could go to the office. Child refused to do so and continued to yell that he did not have to listen to Assistant Principal and was not going to go with him. Child was then informed several times by Assistant Principal that if he did not stand up, he would be picked up and taken to the office. Child's back was facing Assistant Principal's chest. Assistant Principal then wrapped his arms around Child's elbows so that Child could not swing at Assistant Principal. Assistant Principal attempted to hold Child and walk him to the office which was about 15 feet away. During this time Child kicked Assistant Principal repeatedly. It was at this time that students were about to be released from the classes they were currently attending. Hence, in minutes, the hall would be full of moving students. Realizing the urgent situation, other staff that heard the commotion were able to assist in getting Child in the main office. He was then taken into Principal's conference room. Child's mother arrived about 20 minutes later and was escorted to the conference room. Child continued to yell, scream, and display utter disrespect to

everyone present until Principal stated that she was going to contact the police, school's resource officer (SRO). At that point, Child became silent. (Tr. 59-60, 256).

19. The incident with Assistant Principal, from the time he had Child leave his English class until Child calmed down, lasted about 25 minutes. Assistant Principal remained calm throughout the entire episode. (Tr. 59-60, 256).

20. Because of Child's behavior, Principal recommended him for a long-term suspension. Infractions cited for the proposed discipline were defiance, insubordination, disrespect and assault on a school board employee. Parent and Child received notice of the recommendation for long term suspension. (Tr. 60-65, 72, 245-246-247, 256, 337-338, 408-414; LEA Exh. B 15 and 65).

21. The evidence shows that at the time of the incident, Child's IEP, including his BIP, was being followed. For example, Child was read aloud to and received extended time on assignments. (Tr. 178-179, 196-198, 216-217, 227, 306).

22. As another illustration, consistent with Child's BIP, while in his English class on May 15, 2014, child was given choices. Moreover, interventions were used. Child was informed that there was a change in routine. He was given a choice to complete the assignment. He was reminded of school rules and expectations. He was told he could earn the privilege of reading the book later upon completing the assigned class activity. (Tr. 197-198).

23. In addition, during the incident with Assistant Principal, Child was given warnings and choices. Assistant Principal attempted to implement the BIP's cool down period during the incident. Also, Child was reminded of expectations. Further, Assistant Principal attempted to engage Child. (Tr. 100-101, and 493-494).

MANIFESTATION DETERMINATION MEETING

24. Next, on May 19, 2014, a manifestation determination meeting was held to determine if Child's conduct on May 15, 2014, was a manifestation of his disability. The meeting was professional and cordial. Specifically, those in attendance were the parents, Special Education (Ed) Teacher, Assistant Principal, General Ed Teacher, Case Manager, Psychologist, SEC Chairperson, Special Education Coordinator, and School Social Worker (Social Worker). (LEA Exh. C 51-52; Tr. 68-69, 74-75, 248).

25. During the MDR meeting, Assistant Principal served as the facilitator. He discussed the behavior as he was directly involved in the incident. (Tr. 71, 173, 294-295).

26. Also, at the MDR meeting, Social Worker, who is assigned to Middle School that the child attended during the 2013-14 school year, discussed Child's social history. She reviewed the social history report completed by another school division in 2009. At this meeting, she reported the behavior issues mentioned in the report. For example, Social Worker mentioned Child being fixed on doing things the way he wants them done and having difficulty with

boundaries. While discussing this report, Social Worker reviewed (in addition to other sections) the adaptive behavior scales. She noted that they indicated Child's adaptive behavior is adequate. However in one area that is included in the composite adaptive behavior rating, Child was noted to perform in the low range for socialization. Social Worker also asked for any social updates during the meeting, to which Parents responded that Child was no longer taking his asthma medicine. Social Worker recalls the MDR team finding that Child's behavior was not a manifestation of his disability because Child made a choice to misbehave and disobey. (Tr. 154-158, 174, 248-250; LEA Exh. C 191-196, 294-295).

27. In addition, Social Studies Teacher participated in the MDR meeting. He holds bachelor's and master's degrees. He is also provisionally qualified in special education. Social Studies Teacher has been teaching for about three years. He was Child's social studies' teacher and the general education teacher member of the MDR committee. During the MDR meeting, he provided information regarding how Child behaved and performed in his social studies classroom. (Tr. 167-168, 172-173, 294).

28. SEC Chairperson was also a member of the MDR team. For 18 years, she has taught special education for the LEA. Among other degrees, she holds a master's degree in special education with endorsements in special learning disabilities and emotional disturbances. She recalls the MDR team discussing/receiving the 2010 Psychological Report, Child's social history, Child's BIP, the incident, parental input, input from the general education teacher, and teacher observations. (Tr. 243-248).

29. In addition, Case Manager was a member of the MDR team. She has been employed with the LEA for 18 years. For the past 14 years she has held the position of special education teacher and case manager. (Tr. 267-268). She holds a bachelor's degree. She also has taken coursework towards her master's degree in special education. Case manager is certified to teach special education to emotionally disturbed and learning disabled students in grades kindergarten through grade twelve. Case Manager was Child's case manager and special education teacher during the 2013-14 school year. Also, she was Child's academic support and English inclusion teacher. (Tr. 268-269). During the MDR meeting, Case Manager provided teacher observations. Additionally, she recalled that the team discussed Child's disciplinary record, the incident, the current IEP and BIP, and the psychological and social history reports. (Tr. 294-295).

30. Moreover, Special Education teacher attended the MDR meeting. She also recalls a review or discussions pertaining to the 2010 Psychological Report, social history, IEP, BIP, the incident, the teacher observations, and file pertaining to Child's eligibility. In addition she referenced that Child's disabilities were discussed as well as teacher observations. She also noted Parents provided input. (Tr. 115-117).

31 Special Education Coordinator participated in the MDR meeting. Among other degrees, she holds a master's in special education. She is the coordinator of special education services at Middle School and participated in an April IEP meeting regarding Child. She recalls that at the MDR meeting, the team reviewed or discussed the administrative statement regarding the incident, the sociological report, psychological report, any updates to the social history report, the IEP and BIP, disciplinary history, child's attendance, and teacher observations/reports. (Tr.

295, 115-116, 362-365). She recalls the team determined that the BIP had been followed because (i) Child was given warnings and choices, (ii) he understood them, and (iii) Child elected to disobey. (Tr. 368).

32. Special Education Coordinator noted that the MDR team also considered Child's disabilities, ADHD and Asperger's traits. She recalls that the MDR team decided that Child's behaviors were purposeful to avoid doing the class assignment. She noted the team discussed Child misunderstanding social cues, his social interactions, and a low frustration tolerance level when he is not able to do things the way he wants to. The team determined that Child had appropriately interpreted social cues when given direction by Assistant Principal and Child had simply made the choice not to obey. (Tr. 365-367, and 402).

33. Parents provided input during the MDR meeting. (Tr. 31). However, they provided no documentation during the meeting. Neither did they mention that Child was participating in outside counseling during the meeting. (Tr. 363, 379)

34. Psychologist also attended the MDR meeting. He presented the 2010 Psychological Report and discussed previous testing and interpreted the results for the MDR team. Tr. 174, 250.

To begin with, this report discussed by Psychologist indicated that Child has a diagnosis of ADHD and exhibits Asperger's traits. Those traits mentioned included poor social skills and difficulty interpreting social cues. The report reflected that Child's intellect and achievement was measured by using several tools. They were the Reynolds Intellectual Assessment Scales (RIAS), the Wechsler Individual Achievement Test – Third Edition (WIAT – III), and the Beery-Buktenica Developmental Test of Visual – Motor Integration –Fifth Edition (VMI). (LEA Exh. C 179).

35. The RIAS was employed to assess Child's intellectual functioning. (Tr. 437; LEA Exh. C179). Although the testing demonstrated that Child's intellect fell in the average range, it also showed Child has difficulty with a component of working memory. (Tr. 438- 439; LEA Exh. C180). In particular, on the verbal memory subtest, Child scored below the 4th percentile. The testing indicated Child had great difficulty in encoding, briefly storing, and recalling verbal material in a meaningful context. In other words, Child's ability to immediately recall information orally presented to him was significantly deficient. However, LEA's Expert Psychologist opined that Child's difficulty recalling information provided to him verbally could be a result of a variety of factors, to include distractibility. (Tr. 439-440; LEA Exh. C 180-181).

36. In addition, the 2010 Psychological Report demonstrates that the psychologist used the WAIT-III to assess Child's achievement in reading, math, and writing. (Tr. 437; LEA Exh. C 181-182). Testing results regarding Child's reading indicated Child has a significant and unusual difference between his ability score and his academic achievement scores in the areas of word reading, decoding, and reading fluency. (LEA Exh. C 182-183; Tr. 440).

37. The psychologist conducting the 2010 evaluation did find that the test results may not accurately reflect Child's written expression functioning. She drew this conclusion because

Child refused to complete all items in that component of the assessment. (LEA Exh. C 178, 182).

MDR DETERMINATION

38. The MDR team decided that Child's behavior was not a manifestation of his disabilities – ADHD and Asperger's syndrome. (P Exh. 3; LEA Exh. C 50).

39. With respect to the ADHD, the team determined that Child's behavior was not indicative of off-task and impulse behavior. The team determined that Child understood the directions he was given during the incident with Assistant Principal. Further, he was given several opportunities to comply but Child made a clear decision not to comply with instructions and basic expectations and commands in the school setting. In addition, the team noted that the behavior continued for about 25 minutes. The team considered Child's low frustration threshold and Asperger's traits (difficulty relating to others or social cues). It found that Child's behavior was not related to these traits, but again Child's conscious choice to disobey. (Tr. 71-76, 86-88, 115-118, 250-252, 295-296).

40. Moreover, the IEP team determined Child's IEP/BIP was being followed. (Tr. 254-255).

41. Parents did not object to the decision of the MDR team. (Tr. 253; P Exh. 3, p. 2).

42. ADHD may have a defiant feature to it. Child's refusal to comply on May 15, 2014, was not ADHD in the form of defiance. This is so as he was able to immediately shut down the disobedience once he was informed the police would be summoned. This immediate calmness indicated Child's behavior was under his control and not impulsive or ADHD in nature. (Tr. 454-455).

43. At the time of the May 15, 2014, there had been no change in Child's medication. (Tr. 485; LEA Exh. G 10-11).

IEP MEETINGS AFTER THE MD DECISION WAS MADE

44. On May 20, 2014, the IEP team met to determine what services Child would receive pending the disciplinary process. The team determined that 1 hour of home-based services per week would be appropriate due to Child receiving special education services less than half his school day and being in a general educational setting during most of the school day. (Tr. 496). These services were provided by Child's case manager from May 20, 2014, to June 9, 2014. The IEP was amended to reflect the change in services and Parents consented to this change in the IEP. (Tr. 296-298, 316-323, and 369; LEA Exh. C 34).

45. The previously referenced recommendation of the principal for long-term suspension or expulsion was forwarded to the Office of Student Leadership (OSL). This was done so that a hearing could be set before a hearing officer to determine if the recommendation would be upheld. OSL held the hearing on June 6, 2014, and the hearing officer in the case decided to suspend Child for one year, hold the suspension in abeyance and recommend that Child receive

home-based instruction for the remainder of the 2013-14 school year. Also, under the OSL decision, at the beginning of the 2014-15 school year, Child would be permitted to enroll in Alternative School on strict probation. Upon recommendation of the Alternative School principal, Child could be considered to return to a regular school under his IEP on April 13, 2015. On June 9, 2014, OSL forwarded its decision and recommendation to the Child's IEP team. Parents did appeal that hearing officer's decision. On appeal, it was upheld. (LEA Ex. B 2 - 11; Tr. 76).

46. Thereafter, on June 19, 2014, the IEP team met again to consider the OSL decision/recommendation that Child attend Alternative School during the 2014-2015 school year. The IEP team determined Child's services could be provided at Alternative School. The IEP team amended the IEP accordingly, rejecting Parents' proposal for private day school. (LEA Ex. C 14, Tr. 298-300, 369).

47. During the June 19, 2014 IEP meeting, Parents had also requested updated diagnostic testing to determine Child's reading ability. The IEP team reviewed child's 2010 reading assessment and recent classroom based assessments. It then determined that Child's reading was proficient and no further reading testing was necessary. Accordingly, Parents' request for testing was rejected. (Tr. 370- 372, 403, and 499).

48. Parents agreed to the June 19, 2014 amended IEP. (LEA Ex. C 16).

ACCOMMODATIONS AND SERVICES

49. The LEA provided Child with many accommodations, to include, but not limited to, those detailed in his IEP.

By way of illustration, Child's math teacher removed Child from distractions to help him focus. As such, Child was given preferential seating at the front of the class. Math teacher also stayed in constant contact with Child's father. For example, if Child failed to complete an assignment, they were emailed to Father or to Child's Case Manager. Child was allowed to submit assignments late and receive full credit for them. (Tr .207- 209). Moreover, Science Teacher provided accommodations for Child. For example, Science Teacher would permit Child to step outside the classroom to cool down or go to the self-managing room. Child was permitted to turn in work after the due date and receive credit for it. Child was praised for doing good work. Child was assisted with missed assignments and allowed to make them up. (Tr. 231-232).

50. An additional accommodation made available for Child was the self-management room. The LEA has established this room for students to self-regulate themselves. It also provides positive reinforcement for students and can assist them in building social skills. For example, if a student was overstimulated or stressed, he/she could go to the room and use several items there to assist him/her in regulating his/he emotions. Those items included a balance ball, punching bag, computer, etc. This room was also staffed with two teachers who provided nurturing and could assist students in self- regulating. On several occasions when Child was agitated, overstimulated or stressed, he had been sent to this room. (Tr. 177-178, 281-282, 492).

51. Similarly, the LEA offered the Choices Program to Child. This program is an intervention plan utilized to assist a student to correct defiant, disobedient, or disrespectful behavior. The program is voluntary, but it does require the consent of the parent and the appropriate school personnel. If deemed appropriate, this specific plan allows Child to complete the program in lieu of being suspended. (LEA Exh. B 60; Tr. 491). Child participated in the program with the consent of his father from March 14, 2014 to May 2014. He was released from the program upon his suspension and assessed as making only marginal progress. (Tr. 342; LEA Exh. B 31; LEA Exh. B 61; Recording of OSL Hearing).

52. In addition, the LEA offered the Century 21 program, a before and after school tutorial program. (Tr. 491).

53. Further, the LEA held referrals in abeyance. By April 21, 2014, Child had received several referrals for behavior infractions. Child had been skipping some of his classes. Principal had met with the father regarding Child's behavior and had considered disciplining him that day when the father requested Child be placed in classes with fewer students. Principal delayed disciplining Child to allow time for the IEP team to meet to address the parent's request and Child's behavior. The IEP team met on April 28, 2014. The team decided that a conference would be held with Child to discuss the behaviors and inform him that the referrals would be held in abeyance to give Child a second chance. During that conference, Child was also informed that any further behavior problems may cause the referrals to be activated and Child disciplined. (Tr. 416-417; LEA Exh. C 73).

OTHER

54. Parents, particularly Child's father, had daily contact with school personnel. He was approachable and the relationship between Parents and school was positive. (Tr. 40, 83-84, 118, 171, and 198).

55. Parents provided no documents/medical reports for the MDR meeting. Subsequent to the meeting, the parents provided the LEA with a medical note written on a prescription form stating "[Child] is under care and evaluation for Asperger's with severe irritability related to the condition. He is a special needs child requiring appropriate disciplinary interventions."

[signed Doctor]

The prescription pad note was dated June 5, 2014.

(P Exh. 2, p. 1; Tr. 140).

56. In addition, following the MDR meeting Parents provided the LEA with a letter dated July 18, 2014, from Child's clinical psychologist. The letter stated the following:

July 18, 2014

RE: [Child]

To whom it may concern:

[Child] has been in individual therapy with me beginning 6/7/2013. Child had been previously diagnosed with Asperger's disorder – 299.80 and ADHD – Combined Type – 314.01. [Child] has had some success with chemical interventions but his medical doctors are still trying to find medications that will effectively reduce problematic symptomology. Obsessive compulsive behaviors have manifested due to some of his past medications. [Child] compulsively snaps his fingers and blows his nose. This has become conditioned obsessive compulsive behavior. He is currently in a residential facility to work on these types of behaviors and to adjust his medications.

The incident at school is not indicative of this client's normal behavior pattern and his medication management played a major role in his behavior. I believe this suspension should be dismissed due to [Child] not being an aggressive young man who is violent. He is addressing his behavior issues and medication will be stabilized during his stay at the residential facility. There would be no benefit for [Child] to then have to attend [Alternative School] Academy. Another school placement at a regular education facility would seem to be a more reasonable choice.

Sincerely,
[Licensed Clinical Psychologist]

(P Exh. 2, p. 2).

57. Prior to providing the prescription note and letter from the clinical psychologist referenced above, Parents had not given the LEA any documentation from this treating source. Neither had they signed a release permitting the LEA to obtain medical records from this source. (Tr. 39-41).

58. LEA's Expert Psychologist has been an employee of the LEA for 34 years. Currently he is the Administrative Coordinator for psychological services for the LEA. He has held this position for 20 years. He is a former school psychologist and teacher. In his teaching capacity he has taught 6th graders. In the school setting, he has had many experiences with children with ADHD and Asperger's. Expert Psychologist also has experience working in the private sector as a clinical practitioner. In this role, he provided group and individual therapy to children and adolescents diagnosed with, among other psychological problems, ADHD. LEA's Expert Psychologist holds a doctoral degree in psychology, a master's degree in school psychology, and a bachelor's degree in psychology. He is licensed as a clinical psychologist. (Tr. 426-429, 466-468).

59. Inclusion means a class has two teachers in the room. Child's English class was considered an inclusion class. (Tr. 221)

V. LEGAL ANALYSIS AND CONCLUSION

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 its jurisdiction. Va. Code Ann., § 22.1-214-215.

The Act imposes extensive substantive and procedural requirements on states to ensure that children receive a FAPE. 20 U.S.C. § 1415. *See also Board of Education v. Rowley*, 458 U.S. 176 (1982). This includes, certain obligations of the LEA when a child with a disability is recommended for a long term suspension. 20 U.S.C. § 1415(k). In this case, the LEA recommended Child for a long term suspension and was therefore required to hold a manifestation determination review (MDR) meeting to decide if the conduct in question was a manifestation of Child's disability.

Parents now contend that Child's behavior on May 15, 2014, was a manifestation of his disability. Below the evidence is examined to determine if Parents' assertion is accurate.

Did the LEA review all Relevant Information?

In determining whether the Child's conduct was a manifestation of his disability, the MDR Committee is required to review all relevant information in Child's file, including the child's IEP, any teacher observations, and relevant information provided by the parents. 20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e).

The evidence demonstrates the MDR team considered all relevant information. For example, Assistant Principal presented the behavior that was the subject of the MDR meeting. The general education teacher who was Child's social studies' teacher communicated his observations of Child. In addition, Child's special education case manager, also Child's English teacher, discussed her observations of Child. Moreover, Social Worker examined for the team the 2009 Social History Report. She also asked for updates, to which the parents only noted that Child had stopped taking medications for asthma. Further, Psychologist discussed the 2010 Psychological Report. Too, the team reviewed Child's current IEP and BIP and his entire eligibility file was shared with the MDR team. Also, the team considered Child's disciplinary record and his attendance. Furthermore, as discussed in more detail below, the LEA considered all Child's disabilities.

Having found the team reviewed all relevant information, the Hearing Officer takes note of two medical documents presented by the parents from the child's psychologist. The parents submitted this evidence to support its claim that the MDR team failed to consider all pertinent information. The first document is a note on a prescription pad indicating Child was being evaluated for Asperger's with severe irritability related to the condition. The note goes on to say that Child requires appropriate disciplinary intervention. The second document is

correspondence from the child's psychologist inferring that Child's behavior on May 15, 2014, was the result of the medications he was on for his disabilities. This letter also references that Child has been in therapy with the psychologist since June 2013. The prescription pad note and letter are dated June 5, 2014, and July 18, 2014, respectively. As such, both came into being after the MDR meeting. Hence, these documents were not relevant information in existence for the MDR team to review.

What is more, any assertion by Parents that LEA knew of additional relevant information and failed to obtain it is unsubstantiated. In particular, Parents claim that prior to the conduct in question, they had provided the LEA with a release for the LEA to obtain the records of Child's psychologist. Yet when the mother was asked at what time was the LEA provided the release, she conceded that she had not given one. In addition, her testimony illustrated that she was not sure if the father had provided a release. Accordingly, the Hearing Officer finds this claim of providing the LEA with a release is not supported by the evidence of record. Neither does the record show that the LEA had been informed Child was in therapy for his disabilities.

Reflecting on the above, the Hearing Officer finds the MDR considered all relevant information during the MDR meeting. Accordingly, clearly the team satisfied the requirements of 20 U.S.C. § 1415(k)(1)(E)(i) and 34 C.F.R. § 300.530(e).

Was the Conduct in Question Caused by the Disability?

Next, the Hearing Officer considers that applicable law dictates that if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability, the MDR team must find that the behavior was a manifestation of the disability. 34 C.F.R. § 300.530 (e) (i). Child's behavior is not rehashed here as it is set forth above in detail at "Findings of Facts" numbers 15 through 19.

Next, the hearing Officer gives serious thought to the MDR team's consideration of Child's behavior in question and his disabilities. To this point, a review of the evidence clearly shows, the MDR team deliberated about Child's disabilities. As mentioned previously, the evidence establishes that those disabilities are ADHD and Asperger's traits. Regarding the ADHD, the team found that Child's behavior was not indicative of off-task and impulsive behaviors. The team noted that Child's actions showed that he understood the directions given during the incident. Furthermore, Child was given several opportunities to comply with the directions, but made a clear decision not to obey. The team was also cognizant of Child's behavior continuing for about 25 minutes. And further, that it shut down immediately upon being told that the police would be called. These factors demonstrated to the team that Child selected to misbehave and when faced with the negative consequence of an encounter with the police, he chose to stop his misconduct. Equally as important, the team deliberated over Child's Asperger's traits and determined the behavior was not related to this disability either. The team, except the parents, was made up of educators/those providing services to Child in the educational setting. All members of the team were familiar with Child. They found no relationship between the disabilities and the conduct. Indeed, Parents agreed with this finding at the MDR meeting. The Hearing Officer finds the educators' decision and the rationale for it persuasive.

Of note, the team's finding is consistent with the LEA's Expert Psychologist who opined that Child's ability to shut off the misconduct immediately upon being told that the police would be summoned illustrated Child's behavior was not by impulse, but selection. He also testified that based on his experience with Asperger's the conduct was not consistent with that diagnosis. The Hearing Officer had an opportunity to observe the expert's demeanor and considered his extensive experience in psychology. His corroborating testimony was also persuasive.

Was the IEP Followed?

Applicable law also dictates that if the conduct in question was the direct result of the LEA's failure to implement the IEP, the MDR team must find the conduct was a manifestation of the child's disability. 34 C.F.R. § 300.530 (e) (ii). A review of the evidence clearly shows, the IEP was put into practice. For example, teachers read aloud to Child. Child was given extended time to complete assignments. Regarding Child's social/behavior goal, teachers collected data so that his compliance could be measured.

Moreover, Child's BIP - also a segment of his IEP - was followed. By way of illustrating this point, during the incident, Child was given choices and warnings. Attempts were made to give him cool down time. In addition, Assistant Principal made efforts to engage Child in discussions about the incident and alternative ways to have handled the situation.

After review of all the relevant information and its relationship in the implementation of the IEP, the MDR team found Child's IEP was being followed. The Hearing Officer finds the same.

Furthermore, the Hearing Officer finds the LEA offered services/accommodations in excess of those required by the IEP. By illustration, Child was enrolled in the Choices program and the LEA voluntarily participated in it with Child. Child received time beyond that granted by his IEP in the self-management room. The LEA offered Child tutoring before and after school. Accordingly, it is abundantly clear to this Hearing Officer that Child received not only the accommodations and services offered in his IEP, but additional ones as well. Therefore, the Hearing Officer finds there was no basis to find Child's behavior was a manifestation of his disability under 34 C.F.R. § 300.530 (e) (ii).

Summation

In sum, Parents essentially argue that Child's behavior was a manifestation of his disability. Further they claim that not all relevant information was considered. While Parents now oppose the educators' manifestation determination, which they previously supported when the decision was made, Parents fail to provide the evidence to support their now changed position. The Hearing Officer recognizes precedent in this federal judicial circuit, requiring that due deference be given to the opinion of the professional educators. *See, e.g., County School Bd. Of Henrico County, Virginia v. Z.P. ex rel. R.P.*, 1399 f.3d 298, 313 (4th Cir. 2005). Further, she notes that the evidence of record fails to provide the Hearing Officer with a reason to give little weight to the educators' assessment. Thus, the Hearing Officer finds Parents cannot meet their

burden and show that the MDR team's decision is erroneous.³

VI. DECISION AND ORDER

For reasons stated above, the Hearing Officer finds the manifestation determination review was conducted consistent with 34 C.F.R. § 300.530 (e). Therefore the LEA's determination that Child's conduct was not a manifestation of his disability is upheld.

Further, regarding this issue before her, the Hearing Officer finds that all requirements of notice to the parents have been satisfied; that the school reports Child is one with a disability as defined by applicable law (34 C.F.R. § 300.8); that Child is in need of special education and related services; and, also, that the LEA has provided Child with a FAPE.

I have further denied the LEA's motion to strike the parents' case on the issues set forth in the due process complaint, because at the conclusion of the parents' case, it was not conclusively apparent that the parents had proven no cause of action against the LEA. *See, Williams v. Vaughan*, 214 Va. 307, 309, 199 S.E.2d 515, 517 (1973) (quoting *Leath v. Richmond, Fredericksburg & Potomac R.R. Co.*, 162 Va. 705, 710, 174 S.E. 678, 680 (1934)).

VII. PREVAILING PARTY

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

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 18th day of September, 2014.

Ternon Galloway Lee, Hearing Officer

Cc: Parents
Counsel for LEA
Dir. of Special Education for LEA
VDOE

³ Under 34 C.F.R. §300.330 (d) (1) special educational services must be provided to a child who is removed from his current placement for more than 10 consecutive school days due to a finding that the conduct exhibited by the child was not a manifestation of his disability. In this case, pursuant to 34 C.F.R. §300.330 (d) (5), the IEP team determined initially that Child should receive home-based services from May 20, 2014, to the end of the 2013-2014 school year. The team then determined that for the 2014-2015 school year, Child's IEP could be implemented at Alternative School. Parents have provided no evidence to show Alternative School is an inappropriate setting for implementation of Child's IEP.