

Received

NOV 19 2009

**Dispute Resolution &
Administrative Services**

**Virginia Department of Education
Due Process Hearing**

School Division: City of _____ Public Schools, "LEA" or "school"
LEA Counsel: Derek A. Mungo, Assistant City Attorney, "LEA counsel," or "school
 counsel"
LEA Representative: _____ – Senior Coordinator

 Special & Gifted Education Services, "LEA Representative"
Parents: _____, aunt & _____, mother, "Parent," "Parents," or
 "mother"
Name of Parents' Counsel: Lois N. Manes, Esquire, "parent(s)' counsel"
Name of Parents' Advocate: Cheryl A. Poe, "Advocate"
Party Initiating Hearing : Parents
VDOE Reviewer: Reginald B. Frazier, Sr., Esquire, "VDOE Reviewer"
Hearing Officer: Sarah Smith Freeman, Esquire, "hearing officer"
In re: _____, "Child" or "student"
Date of Birth _____

IN RE: _____, Child,
 _____, Aunt, Legal Guardian, and _____, mother, Parents,

 Petitioners,

v.
 School Board of the City of _____, LEA or school,
 Respondent.

Received

NOV 19 2009

**Dispute Resolution &
Administrative Services**

DECISION

Introduction

This matter came for hearing on September 14, 15, 23, 29, October 6, 12 & 20, at the School _____, Virginia and on October 16, 2009 at the _____ Building, _____ Street, _____, Virginia and by telephone conference on October 21, 2009 before a duly appointed hearing officer. Present, in addition to this hearing officer and the court reporter, were the parent, parents' counsel, the child's advocate, LEA counsel, the LEA representative, and the VDOE evaluator.

Parents requested this due process hearing in order to resolve this dispute and request a written decision in conformity with special education law, the Individuals With Disability Education Act, ("the IDEA"), 20 U.S.C. 1400 et seq., as amended by the Individuals With Disabilities Education Improvement Act of 2004, effective on July 1, 2005, the regulations at 34 C.F.R., Part B, Section 300, et seq., the Virginia Special Education Regulations, ("the Virginia Regulations") at 8 VAC 20-80, et seq., and Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 701 et seq.

ISSUES PRESENTED

I. Is the LEA's proposed disciplinary placement for student, The _____ Program, at _____ School, for the 2009-2010 school year, the least restrictive environment in which student will be provided a FAPE?

Pursuant to the IDEA and to Section 504, in order to make a substantive factual determination in this case to resolve the dispute existing between the parents and the LEA, parents posed these questions on the face of their due process request which define the existing controversy and form the subject matter of this due process hearing:

(a) Did the LEA fully evaluate student and fail to identify all of student's suspected disabilities in the 2007-2008 & 2008-2009 school years?

(b) For the 2007-2008 & 2008-2009 school years, did student's emotional and behavioral needs indicate that the LEA should assess him and provide specifically designed instruction and/or an FBA and a BIP in order to avoid a disciplinary incident?

(c) During the March and July, 2009 MDR meetings, did the LEA fully observe state and federal regulations pursuant to the IDEA and Section 504 or did the LEA deny a FAPE to student at the MDR meetings?

(d) Did the LEA fully implement the VDOE's corrective action plan and resolve the parents' complaint regarding the March 3, 2009 MDR meeting?

(e) Did the LEA wrongfully place student in The [redacted] Program, primarily a disciplinary placement, by action of the school board on June 8, 2009, in that there was no consensus of the IEP team in violation of the IDEA and Section 504?

(f) Did the LEA wrongfully refuse to acknowledge that student's aunt had a parental role which resulted in an adverse impact upon student when the LEA did not re-evaluate student after his release from the psychiatric center?

(g) Upon release from the psychiatric center until the present time, was student entitled to ESY services or has student been fully compensated and achieved the same educational opportunities as his peers?

ARGUMENT

In support of the LEA's Motion To Strike the Evidence for insufficiency of law and fact, the LEA asserts that parents' due process request should be dismissed in its entirety.

1. Student's disciplinary placement resulted from a single incident of bad conduct for which student was given a long-term suspension. Student may be disciplined in the same manner and to the same extent as his non-disabled peers because the MDR team determined that his action was not a manifestation of his disability.

For disciplinary changes in placement exceeding ten (10) consecutive school days, if the behavior giving rise to the violation of the school's conduct code is not determined to be a manifestation of the child's disability pursuant to 34 CFR 300.530(e), school personnel may apply disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except that disabled children must be provided appropriate educational services in conformity with 34 CFR 530(d).

2. Although the manifestation determination review conducted on March 3, 2009, arguably, was flawed, the VDOE corrective action plan required only that the MDR be conducted again so that the committee could apply the appropriate legal standard to the review. The Committee reconvened the meeting on July 9, 2009, applied the correct legal standard and the Committee reached the same result. It is this decision which student now appeals at this due process hearing. Assuming that the LEA did apply an incorrect legal standard to the first MDR on March 3, 2009, the LEA has not substantively impacted student's right of due process.

The purpose of the second MDR on July 9, 2009 was to redo the question and answer it properly within the context of IDEA's requirements for a proper MDR determination. The Committee reconvened the MDR and correctly applied the correct legal standard. The Committee reached the same conclusion regarding student's removal. The LEA's error, now corrected, was procedural and de minimis. The LEA permanently changed its standard form for MDR hearings.

The MDR Committee has permanently changed its MDR form to accurately reflect the IDEA regarding the assessment to be made prior to removal of a student when the LEA contemplates a change of placement pursuant to 34 CFR 300.530(e). The Committee must make the following assessment when considering the nexus between the student's disciplinary event and the child's disability: (i) the conduct in question was caused by or had a direct and substantial relationship to the child's disability, or (ii) the conduct in question was a direct result of the LEA's failure to implement the Child's IEP.

The VDOE's corrective action plan described above referenced a constructive knowledge concept implicit in the IDEA: "The regulations further provide that these protections extend to students not yet eligible for special education and related services, if the school has a 'basis of knowledge' that the student is a child with a disability."
(R-108)

3. Student is not entitled to additional compensatory educational hours. Student has received appropriate special education and related services in conformity with his IEP wherein the LEA has provided student a FAPE in the least restrictive environment. The LEA's allocation of special education and related services to student since his removal from his current educational setting adequately addresses all of student's special education needs.

A child may be removed from the child's current educational placement pursuant to 34 CFR 300.530(c), to a disciplinary of placement of more than ten (10) consecutive school days, where the behavior is determined to be not a manifestation of the disability. During the pendency of the disciplinary placement, however, the LEA must provide special education services while the disciplinary placement is in effect.

A child who has been so removed must continue to receive education services sufficient to provide student with a FAPE pursuant to 34 CFR 300.101(a) so as to enable the child to continue to participate in the general education curriculum though student is in another setting. Student's educational progress must show progress toward goals set out on the child's IEP.

Only in instances when it is deemed appropriate by the LEA does the student receive a functional behavior assessment (an FBA) and behavior intervention services and modifications (BIP). It was only after this conduct violation occurred that the LEA became aware and it became apparent to school personnel that Student required behavior

intervention. When it became evident that student required behavior intervention, the LEA addressed student's behavior so that it would not recur.

4. At all times relevant during the 2007-2008 and 2008-2009 school years, the LEA evaluated student either when a referral was made or when it became clear to the LEA that student required evaluation for his unique special education needs. Student's parent did not request referral to the child study committee for behavior. Student's mother executed consent to all of the IEP's and she equivocated on student's necessity for behavior modification at the school. Student's pediatric neurologist did not indicate behavioral issues, specific academic needs only were addressed by the student's pediatric neurologist.

Applicable Child Find regulations set forth at 34 CFR 300.121(e), 300.125 and at 8 VAC 20-80-50 require that the LEA "identify, locate and evaluate" those children within its school jurisdiction who are in need of special education and services and who are "suspected of having a disability," 8 VAC 20-80-52. The LEA is not legally obligated to evaluate children unless a student's disability is at issue or a student's need for a particular educational service, alleged to be deficient, is a matter of controversy. Only in the event of the latter circumstance is the process initiated for a student's eligibility for special education services. The LEA properly evaluated student when the need to do so was indicated and there was no need to "suspect" student required additional evaluation for services pursuant to 8 VAC 20-80-54 A.3. & 34 CFR 300.121(e); 300.125.

Additional data was not required to review student because no related service was missing from student's special education needs. The LEA concedes that the team did not meet to review student's behavioral data after student's return from The Program: Student achieved success in the Program (BRP) he attended after the 2008 misconduct incident. Student satisfactorily completed the program. Further, student's IEP was reasonably calculated to provide him a FAPE. No IEP academic or behavioral issues were apparent to alert the LEA of a necessity to evaluate student upon his completion of the Program. Thus, the LEA did not believe that there was a necessity to evaluate student's need for behavioral modification in his last agreed IEP pursuant to 8 VAC 20-80-54 (D)(b)(1-4), 34 CFR 300.533.

5. Student's behavior is not the result of the LEA's failure to identify his disability as emotional disturbance or the product ADHD causation. Student's acts of misconduct most closely align with the behavior of socially maladjusted young man for which he may be disciplined accordingly.

Emotional disturbance is a condition exhibiting one or more of the following features over a long period of time, to a marked degree, adversely affecting a child's educational performance and defined generally as: an inability to learn that cannot be explained by intellectual, sensory or health factors, an inability to build or maintain satisfactory interpersonal relationships with peers and teachers, inappropriate types of behavior under normal circumstances, a general pervasive mood of unhappiness or

depression, and a tendency to develop physical symptoms or fears associated with personal or school problems. (34 CFR 300.7 (c)(4))

Further, the special education category “emotional disturbance” does not include students who are merely socially maladjusted unless the student is also determined to be “emotionally disturbed.” Without specific notice, proven by way of this child’s educational record, IEP’s, teacher observations, medical reports provided to the LEA, parent requests for services, the LEA’s position is that this student’s school history does not define him as emotionally disturbed, only socially maladjusted. Further, the LEA asserts that student’s ADHD symptoms, if present, do not adversely affect student’s school performance. Witnesses who testified did not note an adverse academic impact caused by ADHD on student in the 20007-2008 & 2008-2009 school years.

6. Prior to the subject incident in which student threatened to kill the principal and burn down the school, student is described as young man who poses academic problems but no pivotal behavior problems. Incidences of suspensions and disciplinary events are mundane from which no discernible pattern in student’s behavior or activities can be delineated retrospectively.

In instances wherein the child has “commenced a removal that constitutes a change in placement,” including one designated an “interim alternative educational setting,” if an FBA and a BIP had not been developed prior to the disciplinary incident, the IEP team shall convene to make a behavioral assessment. An FBA may include only a review of existing data. After the IEP team completes behavioral assessments and a plan, the team must reconvene “as soon as practicable” to “implement appropriate behavioral interventions to address the behavior.” 34 CFR 300.520; 300.522

Given student’s negligible accumulation of suspensions during the relevant school years, student did not present a behavior problem. Behavioral issues had improved during this timeframe. After the disciplinary incident occurred giving rise to student’s change of placement, the necessity for an FBA and a BIP was noted by the IEP team. During student’s homebound placement, the necessity for behavioral intervention is a moot issue because student has not been in school since this incident.

FACTUAL BACKGROUND

1. Student is a year old to grade student who attends school at this LEA. Student initially became eligible for special education and related services pursuant to the IDEA on December 14, 2006 after student met the criteria for Other Health Impairment (OHI). Student has a medical diagnosis of right side hemiplegia or hemiparesis (some right side paralysis caused by cerebral palsy & mother’s stroke at birth) and seizure disorder. Student’s disability means that he tires easily from physical activity and he is easily frustrated when he tries to complete academic tasks. The school psychologist testified also that student’s right side paralysis affects student’s fine motor coordination skills and this deficit has “impacted [student] negatively academically.” In

addition to fine motor skill coordination, student's right side partial paralysis affects academic achievement and student's gait. Student walks with a slight limp. Student has a history of seizures. Student has strabismus, an eye disorder in which the optic axes cannot be directed to the same object because of lack of coordination between eye muscles and the eyeballs. (R-107) (T104/15-21)(R-35, PE-25a-g)(R-30,31) (Webster's Complete Dictionary)

2. Student lives with his aunt, who is his legal guardian, and his 15 year old twin cousins. Per the report of the school psychologist, student is the "product of a caring and supportive home environment." Student's mother resides in a rehabilitation facility because of the after effects of a stroke. Student has no contact with his father. Student misses his mother but he sees her often. On the 2006 social history notes, signed by student's aunt, it is noted that student acts in an appropriate manner. Therein, student's aunt noted that student "behaves" when he is with her family because he knows that "positive behavior is expected of him." Student's aunt has stated that she spansks student if his "behaviors are too negative." (R-35, PE-25 a-g, R-33, R-41)
3. Student's last agreed IEP dated January 9, 2009, states that student who was then a grader, is entitled to receive special education in a collaborative/inclusion setting. Student is also entitled to receive physical therapy, and monitor/consult services once per month. Student reads on a first grade level. He requires preferential seating, prompting and redirecting as accommodations. Additional special education services are as follows: communication skills 300 minutes per week and math skills 150 minutes per week. Student receives the following along with his non-disabled peers: P.E., Art, Music, Technology, Media, Field Trips, Assemblies, Lunch, & Parties. Student also has a Section 504 Plan. (R-18, R-23)((R-30,31)
4. On February 24, 2009 the LEA learned that student committed a code of conduct violation at his home school: Student made telephone threats to the principal's office which were recorded on voice mail. Because the calls were deemed to be threats to LEA personnel, the LEA made a crisis referral. (R-35, PE- 25a-g)
5. On February 24, 2009, student was interviewed by the school guidance counselor. She determined that "disciplinary action" should be taken against student for threats to the principal, the principal's family and against the school. During her interview with student, the school guidance counselor believed that she needed assistance with student because of his compromised mental state: Believing that student posed a threat to himself and to others, she described student as "having no remorse" and "as if his [violent] thoughts were normal." The school guidance counselor contacted one of the school psychologists who works "on rotation basis" and participates in school emergencies primarily ("the crisis school psychologist"). (R-107, Testimony/ School Guidance Counselor
6. The crisis school psychologist made a limited assessment of student's mental status. He asked student if he still "wanted to kill the principal." Student equivocated and said, at various times, "Yes, no, neither." The crisis school psychologist stated that [student's]

chief complaint about the principal was that he “acts like his father.” Student stated that he would press charges against [the principal] if he could. The principal testified that he understood that student missed a prior female principal who had left the principal’s position at the end of the prior school year. (R-G, Crisis Intervention Report, Testimony/Principal)

7. Student expressed suicidal thoughts to the crisis school psychologist:

Student related that he has thought of suicide since the age seven years “because people mess with me and I cuss them out.” Student added that he tried to commit suicide at the age of five years. Student related that he had tried to stab himself but it seemed “hard.” When asked about a specific plan, he replied, “No, but I be trying.” He added that if he wanted to kill himself, no one else could stop him. Student denied feeling “down” or “depressed” but stated that he often “gets mad” because “kids mess with me.” Student reiterated further regarding suicidal thoughts, “I can’t wait until I die. I’m tired of living. I want to be a death person. I want to be like that (grim reaper) or kill people.” (R-G, Crisis Intervention Report, Testimony/Crisis School Psychologist)

8. At the conclusion of the crisis report, the crisis school psychologist asserts as follows:

“Student has physical issues which may be a factor in his self perception and his peer relationships. Family relationships may also be significant, especially his limited relationship with his father. Student did not speak about his mother but her illness and nursing home placement may also be significant. Student presents as an angry youngster who is at risk for directing his anger at himself, authority figures or the entire school community. The presence of a firearm in his aunt’s home, which [student] knows about, warrants extreme caution. Matches and knives are readily available. [Student] should be closely monitored to insure his safety and the safety of others.”

On the basis of the above, the crisis school psychologist referred student to a local psychiatric hospital where student was admitted for five days. (R-107, Testimony/School Guidance Counselor, Crisis School Psychologist, T104/16-21, R-G, Crisis Intervention Report)

9. On February 26, 2009, prior to the convening of an MDR, the school board recommended long-term suspension with special conditions for student because of telephone threats student left on the principal’s office voice mail. Student must apply for re-entry into the LEA after completion of the LEA’s level disciplinary program. The separate placement constitutes student’s removal from his current placement. If student completes the LEA’s level disciplinary program, student will attend classes in an inclusion setting at the other school for the remainder of the year. Parents assert that the disciplinary program is too restrictive and does not provide student a FAPE with non-disabled peers. (R-107) (R-52, 53)

10. On March 3, 2009 a manifestation determination review (MDR) occurred in response to the above disciplinary event. The MDR committee ruled that the disciplinary event –

student's threatening phone calls to the principal's office – were not a manifestation of student's disability, OHI. (R-32)

11. Upon admission to the psychiatric hospital on February 25, 2009, student was deemed to have “psychotic features” to his illness. Student's was released from the psychiatric hospital, on March 6, 2009. Upon discharge, student's medical diagnosis was Major Depression, Single Episode, Moderate, without psychotic features, and with a possible diagnosis of Oppositional Defiant Disorder. Student was prescribed Depacote, Prozac, and Risperdal. At discharge, student's treating psychiatrist recommended follow-up care with student's regular physician, a pediatric neurologist. (R-35, PE-25a-g)

12. The LEA elected to conduct an early triennial evaluation in response to the disciplinary incident. The LEA completed academic testing for the triennial by the school psychologist on April 10, 2009. Testing showed that student's scores fell into the low average to moderately below average range. His verbal intelligence IQ was 83, 13th percentile (drop from IQ score of 106) and his non-verbal intelligence index was 76, 5TH percentile. Student's composite IQ score was 77, in the 6th percentile which fell in the moderately below average range of intelligence. (R-34, R-35)

Further, student obtained a “total achievement score of 60 that fell in the deficient range which was below the first percentile. When student tested, however, the school psychologist testified that student rushed through his work without taking time to consider his responses. Although student's performance fell significantly below average in comparison to other students of his age in reading, written language and math, the school psychologist stated that test results were “felt to be an underestimate of his actual skills.” The school psychologist also reasoned that second quarter grades for student were higher than student's test scores in her report. Student's grades for this time period reflect performance in the “satisfactory” to “barely passing” range: Reading-D, Writing-C, Math-D, Social Studies-C, Science D. The school psychologist's report noted: “His teachers report that when [student] is focused, he listens to directions and is able to complete assignments.” (R-35, PE-25a-g)

13. Student's teachers reported to the school psychologist that student's behavior in the school setting is “atypical.” The school psychologist obtained teacher reports on student's behavior in class. The school psychologist deems the teachers' reports and concurrent personality testing to indicate “clinically significant” results suggestive of student's high level of “maladjustment.” Although student indicated to the school psychologist that he had stolen a watch from a peer, student also admitted that he didn't mean the threats to the principal. Teachers' reports stated as follows:

Student often threatens to hurt others, often bullies others, is easily annoyed by others, always seeks revenge, calls other children names, is easily distracted from class work, says things that make no sense and “sometimes acts confused.” “[Student] almost always acts without thinking and exhibits poor self control.” He sometimes refuses to join group activities and often gets upset when plans are changed. “In the classroom, he almost

always disobeys and is often pessimistic and negative about things.” Student falls in the “At Risk” range on the school problems composite.

In response to the above, the school psychologist recommended an FBA to address “specific” behavior concerns “upon [student’s] return to school.” The school psychologist also stated in her report: “Participation in a mentoring program may also be helpful. Close monitoring of his medication is also advised. Participation in a social activity such as Boy Scouts may be helpful in developing social skills and opportunities to develop appropriate peer relationships.” (R-35, PE-25a-g)

14. At the MDR meeting on March 3, 2009, the LEA asserted that the following was reviewed by the Committee: Initial eligibility summary statement, observations and interventions used with student by his teachers, including the AVBP (Alternatives To Violence Program) report; comprehensive guidance report which includes student contacts, dates and intervention strategies, reports of referrals, observation notes; and student’s current IEP. (R-107)(R-32)

15. At the above MDR meeting, the team found that the misconduct was not a “direct result” of the failure to implement the IEP and not a manifestation of the student’s disability. In addition to an early triennial evaluation for student, the team recommended that a Functional Behavior Assessment (FBA) be done to address student’s behavior. The FBA was to be followed by the preparation of a Behavior Intervention Plan (BIP) for student. Parent was provided notice of the triennial and of the IEP meeting which were ultimately planned to occur on March 9, 2009. (R-32) (R-107)

16. At the above MDR meeting on March 3, 2009, participants were: the assistant principal, a general education teacher, an LEA special education administrator, the school guidance counselor, a special education teacher who had never met student and the parent. At the second MDR on July 9, 2009, participants included some individuals who were not present at the first MDR. Discharge notes from the psychiatric center where student was confined for 5 days were not available during the first MDR. Individuals at the second MDR admitted to a record review only of student’s first MDR documentation. (R-31, 32, LEA testimony)

17. Student’s pediatric neurologist prepared a letter dated March 3, 2009 wherein he linked student’s pre-natal brain injury and malformation to student’s “behavior and emotional disorders that are a frequent complication of brain injury.” Student’s pediatric neurologist stated in his letter to the school: “[Student] needs to be in an educational setting that can meet his learning and emotional (psychiatric) needs that are the result of his brain injury/malformation.” During the hearing, the LEA asserted that student’s pediatric neurologist had not mentioned any behavioral issues prior to the MDR. At the due process hearing, MDR team members who testified about the first MDR were not consistent regarding their notice of the above letter from student’s pediatric neurologist. (LEA Testimony) (R-45)

18. Evidence at the hearing showed that the pediatric neurologist had provided a much earlier notice to the LEA of the link between student's brain injury/malformation and student's school misconduct and academic deficits: On May 24, 2005 student's educational record reflects that student's pediatric neurologist had re-evaluated student's neurodevelopment with regard to his right hemiparesis, seizures and learning difficulties. At this time, student was an almost year old boy. Student had been attending school only on half days because of a moderate degree of behavioral outbursts. In an evaluation provided to the LEA, the pediatric neurologist described "rather serious" visual perception deficits" and "right hemiparesis affecting education and underachievement." Behavioral outbursts, he stated, were "decreasing in time but continue to be an issue both at home and at school." Also, [student] has spells when he gets fearful, wets his pants and is tired. "[Student] has a history of seizures in the past but has not been on any anti seizure medication for some time and has not had an electroencephalogram (EKG) in the recent past. There is a concern as to whether these spells are in fact seizures or are emotional and psychiatric difficulties." Describing student as a "very sweet delightful young boy," student's pediatric neurologist assessed student's issues with mathematical calculation: Math yielded a standard score of 70 placing skills at the beginning of kindergarten level. "He is unable to use his fingers as counters, therefore, allowing him to use objects is gonna be important because he is able to use his left hand with fairly good function but has difficulty with the right hand..." Student's pediatric neurologist made the assessment: "possible recurrence of seizures. "If it [the EKG is] without any seizure activity it may be reasonable at this point to have student followed up by a psychiatrist." (R-49)

19. Notes completed on June 9, 2005 by the Eligibility Committee also contradict the LEA assertion that the LEA has no notice of student's emotional issues negatively impacting his academic performance. Therein, the eligibility notes state: "Student is progressing well academically because of interventions put in place. Student has outbursts and moments of fear that have been diagnosed by a neurologist as seizures. Student has motor concerns. Student is eligible for a 504 plan because he has seizures." Although the pediatric neurologist described an existing controversy regarding the origin of student's behavior issues, a Section 504 plan was drafted to address student's "seizures." (R-29)

20. The June 2005 eligibility notes reflect that student's seizure were an issue of controversy for the committee: It was impossible to tell if student had had a recurrence of seizures without an EKG. If the EKG showed that no seizures had occurred, the pediatric neurologist asserted that psychiatric issues could be the basis for student's behavioral issues. Thus, if psychiatric issues are the seminal point of student's behavior issues at school, behavior modification and properly adjusted medications are required to address student's psychiatric needs. (R-29)(R-49)

21. Student Support Team Referral Notes of March 24, 2005 also contradict the LEA theory that the LEA had no notice of student's negative behavior impacting his academic performance. The Referral Notes state as follows: "...impulsive negative behaviors. Behavior/Emotional-threatens harm to self and others; including threatening to kill

others. Student is progressing but not to the fullest extent of his ability.... Student shows fear and panic for no apparent reason.” (R-30)

22. An IEP team meeting occurred on March 3, 2009 to review student’s IEP and to address the need, if any, for IEP modifications. The IEP team scheduled an expedited triennial evaluation for student. (R-17, R-107)

23. Parent filed complaints with the VDOE on April 16 & 24, 2009. Parent complained about the conduct of student’s MDR on March 3, 2009. The VDOE filed a response to parent’s complaint on June 15, 2009. (Originally, two complaints were filed which the VDOE merged into one complaint.) (R-104, 105, 106, 107, 108)

24. In its Letter of Findings, the VDOE required corrective action by the LEA on or before July 16, 2009. Parents’ complaint to the VDOE had stated: The LEA had knowledge of other disabilities because the LEA had a crisis intervention report completed on February 24, 2009 which was available to the MDR team. Parents asserted that the LEA did not consider the school psychologist’s crisis report wherein he stated: Student is a danger to himself and others and he does not realize how inappropriate his behaviors are. Further, student has poor judgment, reasoning skills and some impulsivity. Student was referred by the LEA to a psychiatric center where he was confined for 5 days. (R-104, 105, 106, 107, 108)

The VDOE’s finding was: “The record does show that the MDR reviewed the relevant information in [student’s] file. The VDOE contested the LEA and found the MDR to be non-compliant on the following ground: [T]he relevant information must be reviewed in light of the applicable standard. [The LEA] misstated the inquiry.

The VDOE stated: There are two parts to the inquiry. First the MDR must review whether the behavior was caused by the disability. Second, the team must consider whether the behavior had a direct and substantial relationship to the child’s disability. These are two different questions. The second question “[requires] that the relationship between the disability and the behavior be something other than ‘causal.’ “ The mistake made by the first MDR team was that the LEA had “combined two different concepts into one.” The LEA had required of the MDR inquiry “direct causation” by student’s behavior or that student’s behavior be a “direct result” of his disability. The VDOE concluded then “The [LEA] considered the applicable information, [but] the [LEA] did not consider it in the proper context.

25. Subsequently, the LEA convened a second MDR on July 9, 2009 to make corrections requested by the VDOE’s Corrective Action Plan. At the due process hearing, the LEA asserted that the second MDR was called in order to reflect compliance only with the VDOE’s requirement to redo the MDR form and to answer the “second” question. The LEA has misinterpreted the VDOE’s directive: The LEA was to consider all of the relevant information within the proper context. It does not appear that the LEA reflected again on the whole inquiry regarding student’s behavior, but only on “response to the second question relative to MDR proceedings.

At the second MDR, the LEA stated on its MDR form that the following had been reviewed: evaluation and diagnostic reports, observations of the student, student's IEP, information from the parents and behavioral data. Some LEA witnesses testified at the due process hearing that only a "record review" had been completed in preparation for the second MDR. "Review" at the second MDR meeting did not mean that all of student's records had been examined again.

26. Hearing testimony and the tape of the second MDR revealed that the second MDR Committee convened again only to answer the "second" question on the MDR form. MDR Committee members reasoned that review of student's educational record and documentation had been completed at the first MDR. One of the second MDR team members, the senior coordinator who was not present at the first MDR, candidly admitted that she conducted only a record review prior to the second MDR meeting. (Testimony/Senior Coordinator, Tape of the second MDR)

27. The senior coordinator who conducted the second meeting testified that she understood that only the second question on the MDR form, omitted from consideration before, required completion. Participants at the second MDR meeting were the parent, the assistant principal, a special education teacher (who did not know student), a general education teacher, student's guidance counselor and other LEA personnel who were not familiar with student. On the face of the second MDR form, parent stated that she was not an equal participant at the meeting. (R-31) (R-108, R-109)

28. Prior to the removal incident, the school guidance counselor does not indicate that student's behavior was a problem until the 2008-2009 school year. Earlier that year, however, the school guidance counselor had referred student to the Alternatives to Violent Behavior Program (AVBP) in October, 2008 because of "verbal threats" student made to a female when student was in the classroom and became angry. (R-107)(R-46)

29. The administrative record shows that student attended the AVBP from October 29, 2008 thru November 10, 2008. The AVBP student attended is located at the The Center (BRC) in this LEA district. The program provides intense behavior modification for children with behavior issues in this LEA. When student completed the program, he received a certificate of completion at a graduation ceremony. When student returned to school, he was provided a "Positive Behavior Support Plan." (BRC behavior plan) (R-46)

AVBP documentation from this institution is enlightening regarding student's special education status after he completed the behavior modification program. Although student's exit prognosis is described as "Guarded," student's violence belief has shown "substantial improvement." Overall, his "risk" profile shows "some" improvement. Self esteem showed "no" improvement, however, student's inventory of anger communication (anger management) showed "good" improvement.

At the due process hearing, parent admitted that she did not attend any sessions of the AVBP nor the graduation ceremony: AVBP documentary notes indicate that student's behavior will improve if he has close and constant supervision and monitoring in the home environment. AVBP notes also indicate that student must receive [behavior] consequences, appropriate support and immediate feedback for him to achieve behavioral modification. (R-46)

30. For the school environment, AVBP notes suggest the following: periodic follow-up with a school counselor, assignment to an in-school advocate, a mentor program, and referral to BRC in home counseling program. The school guidance counselor admitted that the LEA did not incorporate the AVBP suggestions nor convene a child study or IEP meeting to address the AVBP behavior modification notes about student. (R-46)

31. At the BRC program, student was only "marginally satisfactory" in completion of assignments, however, he showed "satisfactory improvement" in communication with others, participation in a group, conduct in a group and in peer interaction.

Most interestingly, although the BRC sent student back to his home school with an already formulated behavior plan, student's guidance counselor testified that she did not utilize this plan or review the same for interpretation by other LEA personnel. She stated that she thought student's behavior had been corrected so there was no need for the BRC behavior plan. (R-46) (Testimony/School Guidance Counselor)

32. The BRC behavior plan is dated November 18, 2008. The BRC behavior plan is remarkably insightful regarding student's behavior issues. On the face of the BRC behavior plan, this statement is made regarding the connection between student's school performance and his behavior: "While attending the AVBP sessions, [student] demonstrated the following behaviors that could negatively impact [student's] school performance: Intentionally aggravating others." (R-46)

The behavior which triggers or prompts the student's negative behavior is defined as an "[e]xtended period without direct peer interaction." The BRC documentation informed the LEA that student's probable goal and feature sustaining it for student (what the child is trying to get or avoid) is his "goal" to receive "attention." Relating an incident on the BRC bus with other BRC students, the BRC documentation states, "Student was trying to get attention from his peers" (Observed when student was seated on a van or involved with other children in structured group activities.) The BRC "recommended intervention strategies" are as follows: Review the 4Cs (BRC behavior goals), encourage positive peer interaction and review ([BRC] behavioral strategy) worksheet with student to encourage a more positive and acceptable plan for getting peers' attention. (R-46)

33. The assistant principal testified that the LEA responded to student's behavior by employing "the usual procedure" for any LEA student who needs assistance dealing with anger. The assistant principal testified that discipline undertaken by the LEA (out-of-school suspension with conditions) is correct in that student is being treated the same as his non-disabled peers "if they were having anger issues." She also testified that she had

received “prank” telephone calls from student at the principal’s office. (R-107)
(Testimony of the Assistant Principal)

34. Contrary to the above BRC documents, the LEA asserts that it was provided no notice that student’s behavior required redress or further evaluation. The LEA asserts that “at no time, did school staff suspect” that student’s “behavior was either the result of another disability or that student required a reevaluation.” Further, the LEA proffers to the VDOE that student had “only [one] discipline report for the 2008-2009 school year.”(R-107) (LEA Testimony: Assistant Principal, School Guidance Counselor)

35. The school psychologist testified that there is no documentary evidence in student’s special education record logically connecting this incident to student’s disability or to his underlying physical condition, right sided pariesis. Further, the school psychologist testified, she is unable to connect student’s misconduct, voicemail threats to the principal, to student’s “undiagnosed” ADHD. (T168/8-22, R-35)

36. Psychiatric discharge notes made on March 6, 2009 appear to contradict the LEA’s report that the LEA had no reason to question the presence of another mental disability when student was referred to the psychiatric hospital by the LEA on February 25, 2009: Upon admission, hospital notes describe student’s mental status after referral by the LEA’s crisis school psychologist: Student’s chief complaint upon admission to the hospital was: “I’m here because I’m angry and upset.”

In addition, hospital notes indicate that student admits to feeling sad, unhappy, hopeless, helpless and worthless. “He feels nobody loves or cares about him anymore. He admits that sometimes he has suicidal thoughts and wants to kill himself and other people” Student denies alcohol, drug or cigarette use. “[Student] does not have many friends.” Upon admission to the hospital, Student’s seizure medication (Depacote) level was checked and it was found to be in an “acceptable therapeutic” range. Upon admission to the psychiatric hospital, student’s admission diagnosis was (1) Major Depression, single episode, moderate, with psychotic features and (2) Oppositional Defiant Disorder. Global assessment: 20. (extremely low) (R-44)

37. Student’s psychiatric hospital notes reveal student gradually decompressed from a high level of aggression upon admission down to a state of mental stabilization. Student’s hospital notes also reflect that student’s medications were changed during his hospital stay as follows:

2/25/09 – Student was placed on Level II suicide watch but he “settled down pretty well.” Upon admission, student was described by hospital staff as impulsive, angry, irritable, upset, frustrated and agitated easily. “[Student] was still verbalizing suicidal thoughts and death wishes, and he was unable to contract for safety outside the hospital. Student continued on with the same medication (Depacote twice daily) he had been taking prior to admission, however, Prozac was added to his medication protocol and the dosage was steadily increased that day.

2/27/09 - Student denied having any suicidal or death wishes. And his [crisis] level was lowered down. He was still very impulsive, moody and labile(unstable).

3/2/09 - Student was placed in seclusion that day for being verbally and physically aggressive toward staff, and he was attempting to hit staff. On this date, student started a new medication, Risperdal, and the dosage was slowly increased during the day.

After the additional medication was added to student's daily regimen, the following staff note is written: "With the introduction of medications and other therapeutic modalities, [student] responded well. [Student] was feeling better. [Student] was feeling happier. [Student] was much more calm, social, active and interactive with staff and peers. [Student] attended school regularly. [Student] attended all the groups and program activities on the unit. [Student] received individual and family therapy on a regular basis. In therapy, [student] learned how to express his anger and feelings appropriately rather than channeling them through aggressive and destructive drives."

3/6/09 - [Student] was stabilized, having reached "maximum therapeutic benefit" and released to "a lower level of care." (R-43)

38. Upon release on March 6, 2009, in addition to seizure disorder, depression and cerebral palsy, student's discharge notes indicate that student has school problems and a poor social network system. Student's prognosis after discharge is "Good." Discharge notes written by the psychiatrist who oversaw student's hospital treatment indicate that student must continue with his medical care by a "neurology follow-up" and student's "pediatric" doctor is recommended. (R-43)

39. The psychiatrist who treated student during his care at the psychiatric hospital is highly qualified to diagnose student's psychiatric condition. His psychiatrist is the Medical Director, Children's Psychiatric Services, for this hospital. She is also an Associate Clinical Professor, Department of Psychiatry and Behavioral Sciences, Eastern Virginia Medical School. In her last note upon student's discharge, student's psychiatrist indicated that student should receive additional follow-up through individual therapy, family therapy and medical medication management. Finally, student's treating psychiatrist indicated that a local community services board should provide further follow-up. (R-43)

40. Regarding counseling follow-up, a licensed clinical social worker and member of the community services board wrote parent a letter on September 4, 2009. The LCSW confirmed that student has improved in his behavior because of on-going behavior modification therapy she has conducted with student. The LCSW who manages student's counseling relates that student is working on "managing his emotional responses to stressors and increasing his coping and communication skills." To this hearing officer, therapeutic counseling by a thoughtful, yet highly skillful therapist provides this child the

essential lifeline he requires to be successful academically and, ultimately, to stay in school. (PE-93)

41. Student's official discipline record is not particularly extensive. At the due process hearing, testimony and exhibits revealed that the official disciplinary record did not include all disciplinary events, some of which were significant. Testimony provided by the school guidance counselor revealed that the LEA afforded her a great deal of discretion regarding the application of disciplinary measures by the LEA. The school guidance counselor stated that she distinguished between those events which were "investigated" and those events for which student was provided counseling sessions. (Testimony of School Guidance Counselor)

42. The school guidance counselor appeared to be completely candid in her discussion of school disciplinary procedure: The school guidance counselor made a distinction between guidance events and disciplinary events. "Guidance events" meant those events not subject to discipline and permitted to "die in her office." On the other hand, she describes "disciplinary events" as those events which were recorded for disciplinary scrutiny. This hearing officer has attempted to compile a "master list" of all guidance & disciplinary events and the punishment and/or intervention strategies utilized by the school guidance counselor, all within the timeframes when these events occurred, which are described as follows:

- 2/15/05 Student was out of his seat during reading instruction. Student hit another student and dug his thumb into the student's arm. Three day suspension. This incident is described as "multiple disruptive behaviors." (R-52) (official record)
- 9/14/07 Disciplinary referral: Student threatened to kill two of his classmates because "they were messing with me." Student indicated that he would punch a female in the private "if she did not stop messing with him." Counselor discussed teasing and accepting responsibility for actions. On 9/18/07, Student relates that he "does not like school and would rather be home with his mother playing video games." "School is boring and takes too long," the school guidance counselor relates of student's perceptions. She discusses his career goals (policeman) and she provides "bibliotherapy," "A New True Book: Police." (R-62, Interventions)
- 9/27/07 Intervention with student. Student reports to the school guidance counselor that he has learned how to behave and keep his hands and feet to himself. The school counselor discusses peer relations with student. She assigns a book to him for reading, "bibliotherapy:" "The Crayon Box That Talked." The school guidance counselor then states, "[Student] appeared happy and positive. (R-G, Interventions)
- 10/4/07 Intervention with student: "Student shares with [school guidance] counselor that some of his classmates are now his friends. Student drew a picture of good dreams and bad dreams and interpreted them as God destroying people. He

continued talking about, hell, fire and earth.” (R-G, Interventions)

10/18/07 Intervention: Discussed coping skills. Student indicated he read a book he did not like. (R-G, Interventions)

10/26/07 Disciplinary Referral: Student left class without authorization from teacher. It was at this counseling that student was informed that no more counseling would be provided to student. The school guidance counselor told student that he could come to the counseling office whenever he liked. Student indicated that he wanted to continue sessions and he was reminded of his desire to return to class last session. Student drew a picture of a family doing something together. Student again appeared positive and happy. (R-G, Interventions)

5/29/08 Disciplinary referral: Student punched a student in the stomach. The other child called him a “jackass.”

A handwritten note on the face of the notice states: [Student] was hit first by the[other] student. The notes also recites that “[student] refused to stop talking!” Four day suspension. (R-58, 59) Examination of the disciplinary report concerning this event reflects that this event also involved student committing other negative behaviors: harassing & use of profanity. (PE-95 a & b)

9/29/08 Disciplinary referral. “Sexual harassment/accused.” Suggested outside counseling and visit to neurologist.(Incident described below on 10/20/09) Intervention: provided bibliotherapy “Sexual Harassment in Schools.”

10/3/08 Intervention: Suggested to student alternatives to threats.

10/10/08 Disciplinary referral: Student referred by teacher. Issues with glasses, altercation, not wanting to test, does not want to be corrected. Discussed accepting responsibility for his actions and his education. (R-G, Comprehensive Guidance Record)

10/20/08 Student told female to “Suck his d--- and displayed middle finger to her.”

In school mentor program suggested to parent. Parent opts instead for out-of-school behavior modification program. “Out of school 8 days to attend “Alternatives To Violence Behavioral Program.” (“AVBP”) (R-G, Comprehensive Guidance Report, PE-95c)

11/14/08 Disciplinary referral: Student showed disrespect and was “talking back.” (R-54)

Student was noted to have cursed an adult, threatened her for leaving the class without permission and he was “very disrespectful.” (R-52) Student

threatened to leave the building. Intervention: discussed making appropriate choices, alternatives to leaving the building. (R-G) Individual counseling. Principal in attendance. Three day suspension. (R-52, 53, Comprehensive Guidance report) (Official record)

2/3/09 Disciplinary referral: Student involved in altercation provoked by classmate. Intervention: discussed lying. Student told to “read a book about telling the truth.” bibliotherapy – “Know what? Lying Hurts Everyone.”(R-G, Comprehensive Guidance Report)

2/9/09 Intervention: discussed character trait, “responsibility.”

2/11/09 Safe schools referral – collaboration with school principal. Student ran out of the building. Defiance, profanity, and capacity to be physical. This incident involved discipline being imposed by the principal shortly before the subject incident occurred. Three day suspension. (R-103) (PE-51a)

2/23/09 Intervention: Student is assigned a paragraph by the school guidance counselor on the topic “Responsibility” in which the thesis is: “How would things be different for me at home, school or in the community if my parents, teachers, or people in the community were not responsible?” Student did not complete the assignment. (PE-51a)

2/24/09 Crisis referral. Student threatened the principal by leaving threatening messages on the principal’s telephone. [Student] said [on voice mail at the principal’s office] “You are going down. You are going to die at 3 p.m. sharp.” [Student] also made threats against the principal’s family. Additionally, [student] threatened to burn the school down. Long term suspension with special conditions was recommended. (R-52, 53, PE-51a) (official record)

43. The school guidance counselor admitted that she “did not know that student had an IEP” Although the school guidance counselor’s records were detailed regarding student’s counseling sessions, no inference can now be made that the school guidance counselor ever intended to utilize her counseling notes to identify student’s behavioral triggers. (Testimony/School Guidance Counselor)

Preparation of an FBA/BIP requires examination of a given student’s entire disciplinary record. By examination of troubling disciplinary incidents, the FBA/ BIP designates student’s “bad” behaviors subject to correction by the IEP team through a behavioral goal. Examination of the above notes do not indicate that the school guidance counselor knew that she needed to keep accurate accounts of all of student’s infractions for retrospective purposes: No inferences can be made from these notes regarding student’s behavioral motivations or that creation of an FBA/BIP could be prepared therefrom if required by the IEP team.

44. In contrast, the school guidance counselor made extensive notes regarding inferences she made from student's statements to her about the subject incident as follows: Student stated on February 19, 2009 contemporaneously: "See you [principal] at 3 PM sharp."

Friday, February 20, 2009: "You're [the principal] going down."

On another date his message was, "You're messing with my son (student changed his voice). If you keep messing with him, I'll burn this school down."

To the school guidance counselor he stated, "I'm for real. I do stupid stuff like that! I burned my cousin's pom-pom." On burning buildings he stated, "I was trying to burn the house down. I wasn't trying to burn the house down. I like playing with fire. That would be a good idea to burn him [principal] with fire. He's lucky we can't bring guns to school. I was about to bring my aunt's gun to school. I showed it to my cousin and he took it away from me." About the principal he stated, "He's trying to act like my daddy. He's so hard on me. He keeps putting his hands on me." (Student demonstrated what he meant by grabbing her right hand and pulling her) (R-G, Crisis Interview with School Guidance Counselor)

During the above interview, student related the details of an earlier disciplinary incident from two weeks prior: Student had been referred to the principal's office for fighting and student left the office without permission to return to class. When the principal found this out and retrieved student from class, student related that he said to the principal "I told him I would kick him in his balls" and "Get your hands off me or you will be in big trouble." Student said, "If he puts his hands on me again, I'm going to kill him with a gun." "I can't wait until I grow up so I can get him back." "Wait till I get twelve. I want to get him a little early so I can have his funeral early." When asked if he knew what he had said, student responded, "Yes, I don't care about [the principal]. If he keeps messing with me, I'm going to kill him and his whole family. Now, he's scared because I said I'll be there at 3PM sharp." Then student boasted to the guidance counselor, "If I did go there, I would have messed him up." Student was asked to demonstrate what he would do and student said, "Punch him in his face. Punch him in his stomach. Kick him in his balls." When asked how his aunt would react to this information, student said that his aunt (parent) had called the police in response to his threats against the principal." (R-G, Crisis Referral Interview of 2/24/09 with School Guidance Counselor)

46. In addition to the school's official record code of conduct violations, the principal recites the following incidents in his email to LEA safety personnel regarding the ongoing problem with student:

For the past few months, I have been addressing issues with a grader [student] (other health impaired.) Issues such as running out of classes and building...Last week, I was called to assist with [student] due to his defiance, profanity and capacity to be physical. This situation resulted in an out of school suspension. The disposition was determined to be based on threats to the building, faculty, staff and me.

[Student] returned from his suspension and experienced successful days until last Friday, February 20, 2009. [Student], who has called our school several times prior to this event, during and after hours, left a voice message on my phone stating: “[Principal] you are going down at 3PM sharp.” He has called my extension twice before and left messages. However, those were times when he played on the phone. (R-103)

47. The crisis school psychologist’s report completed in connection with this incident relates that student’s paternal aunt, parent, stated that student is increasingly difficult to manage at home and at school. (R-G, Crisis Intervention Report)

48. Upon student’s eligibility for services on November 3, 2006, a psychoeducational evaluation was prepared. Student tested in the low-average ability when compared to students of his age group in broad reading, mathematics and math calculation skills. Student’s verbal IQ is 106 which fell in the average range overall. The school psychologist asserted that student’s non verbal reasoning, visual organization, and visual perception skills fell in the low average range. Student’s physical impairment at the time of eligibility was defined as his right side hemiplegia. “The physical impairments appear to have impacted his skills in this area.” The school psychologist related that student would benefit from receiving extra assistance to assist with academic weaknesses. Further, she suggested, “...summer enrichment may be helpful.” Concluding her report, the school psychologist stated that “Qualitative test results and interview impressions do not suggest the presence of emotional factors at this time.” Student is identified as Other health impaired (OHI). (R-42)

49. On April 10, 2009 the early triennial evaluation prepared for student showed that student’s Composite Index IQ score of 77 is much lower than his Composite IQ Index score of 95 when he was tested on November 3, 2006 upon eligibility. The lower score, the evaluator explained was because student “rushed” his work and did not always put forth his “best effort.” She concluded that student’s lower score “may be an underestimate of his current level of functioning.” The school psychologist reiterated Student’s teacher’s characterization of student’s “atypicality” and ADHD-like symptoms.

The school psychologist testified that she was unable to complete testing for ADHD because parent had not followed through with rating scales. Parent admitted only confusion regarding completion of the ADHD rating scales. (R-35, Parent’s Testimony, School Psychologist’s Testimony)

50. The last agreed IEP was completed on January 9, 2009 for student. Originally, parent testified that she wanted behavioral goals added to the IEP so she was directed by the LEA to check the “behavior box” on the IEP form. Later, the LEA noted on the IEP meeting notes “student does not require a formal, written behavioral intervention plan or specific behavioral goals on his IEP.” At the due process hearing, the LEA testified that although the “behavior box” was checked “indicating that behavior is related to the disability,” parent has “signed off” on this IEP indicating that she did not insist on behavioral goals during the January, 2009 IEP review. Clearly, parent wanted behavioral

goals included in the IEP. The last agreed IEP places student in grade regular education curriculum, collaborative setting. (R-18, 19, Testimony/parent)

51. On May 18, 2009 the eligibility summary statement indicates that student's psychiatric facility notes were not considered by the team because parent refused to provide the notes to the LEA. (R-22)

52. On May 20, 2009 parent requested full psychological, educational and neuropsychological assessment at public expense. Parents disagreed with the results of the psychoeducational evaluation and the speech language evaluation. Apparently, the LEA responded to parents' request with instructions regarding obtaining the evaluations privately. The LEA agreed to assume the costs for the evaluations. It is unclear whether or not private evaluations have been completed by the parents. (R-51)

53. Home based and homebound services have been provided to student. Compensatory home-based services in the amount of 108 hours were required by the VDOE to be delivered to student. Pursuant to a subsequent order, student's pediatric neurologist required the delivery of 72 compensatory education hours in homebound placement. Subsequently, by hearing officer directive pending the outcome of this hearing, the LEA was required to provide compensatory educational service hours in an amount "identical to the IEP" which the LEA interpreted as an additional 72 hours of compensatory education hours in the homebound placement. The total amount of compensatory homebound placement hours to be delivered to student is 252 hours of which 69.5 have been provided. Thus, there are 182.5 compensatory education hours remaining to be delivered to student. The LEA's schedule for provision of services during this period is adequate to address student needs. All providers of compensatory educational services are special education certified and appear to be very diligent in attending to their weekly schedule for the delivery of services to student. The LEA has addressed student's special education needs in this interim setting.

BURDEN OF PROOF

In Schaffer v Weast, 126 S. Ct. 528, the United States Supreme Court ruled that under the IDEA, in an administrative hearing, the burden of proof properly rests upon the party seeking relief. The Court stated therein: "[T]he burden of proof in an administrative proceeding challenging an IEP, is properly placed upon the party seeking relief, whether that is the disabled child or the school district."

In the instant case, the parents bear the burden of sufficiency of the evidence. Therefore, the parents bear the burden of proof in this case.

DISCUSSION AND CONCLUSIONS OF LAW

Student is a child who has a multitude of special education needs because of his physical disabilities. Some of student's disabilities are apparent – his right sided paralysis, the thick glasses he must wear, that he drags his right foot and walks with a slight limp, that he cannot grasp well with his right hand. All of these external signs of disability are clearly visible. Internal manifestations of student's disabilities are more insidious and therefore more difficult to identify for the purpose of addressing special education needs through the IEP.

If student has had seizures, an EKG most likely will identify the existence of seizure activity on an EKG instrument. Mental status is not so easily inferred or measured by mechanical means or electronic mechanism. A given student's behavior must be scrutinized for aberration when mental health issues arise. Measurement of a given student's behavior is performed by documenting a student's behavioral progress in school. If the behavior requires redress, behavioral goals must be implemented in the IEP through a behavior intervention plan. A behavioral plan cannot be created in a vacuum. There must be an examination of the disciplinary record for the evidence to be properly analyzed.

In the instant case, the number of disciplinary events "missing" from consideration is alarming. Serious behavioral transgressions (sexual incidents, threats to kill, harassment, use of profanity, issues with authority figures) were either not documented, treated with little scrutiny or simply forgotten, erased or omitted from the school's disciplinary radar. Fortunately, the school guidance counselor kept a record of her counseling sessions with student. From these events it is possible to loosely extrapolate, with limitation, student's progression toward his psychotic meltdown at school which evolved later, into a suicide watch, at the psychiatric hospital in March, 2009. It is not reasonable nor accurate for the LEA to now claim lack of notice regarding student's "sudden" escalation of bad behavior on February 20th thru February 24th, 2009.

In fact, the school principal noted that student had been suspended about a week prior for an incident similar to the one he experienced on the above dates in February, 2009. Student had just returned to school when the subject incident occurred. Both the assistant principal and the principal admitted during this hearing, that student had been making annoying phone calls to the principal's office prior to the subject disciplinary incident. Upon receipt of student's telephone calls to the principal's office, these administrators deemed student's telephone calls to be either "pranks" or "not threatening" though they knew that student was making the calls and that he was a special education student. At the hearing, the LEA dismissed the possible behavioral implications of student's calls but they did not deny that they had notice of student's prior "threatening telephone call" behaviors to the principal's office.

Until student's telephone calls escalated to form the basis of this disciplinary event, the fact is that school administrators never addressed student's behavior causing him to

make these telephone calls. Ideally, if a BIP had been in place to address student's behavior before these activities occurred, the LEA might have utilized strategies and interventions contained therein to deflate the situation – a mentor, a peer interaction, a behavioral chart to consult for appropriate strategy, or a counseling session with a trained psychologist to avert the telephone threat to the principal's office.

It is plainly difficult to view this disciplinary event myopically. This incident appears to present a serious psychiatric "break" in this young man's life. Social maladjustment alone cannot fully explain this event without the exploration of physical causation: seizure effects on student's brain or a brain malformation, the possibility that seizures have now materialized into more overwhelming psychiatric issues, the episodic nature of student's depression and its effects on him. Physical infirmities may explain this disciplinary event. All of the school's disciplinary and guidance events are topics of interest for one who is qualified to determine if physical symptoms may be excluded from causation for the above disciplinary incident.

If medical issues have changed the focus of student's special education needs, his special education category requires re-examination by the IEP team. The fact that student has only been identified to date as OHI because of his known physical disabilities does not mean that the IEP team may now rule out what may be an emerging illness such as ADHD or ED because student's only known ailments so far have been defined, to date as right side hemiplegia, an in vitro stroke and eye coordination problems.

In any event, the school psychologist's testimony revealed that she seemed to believe that she could designate only one disability as student's primary disabling condition – OHI. By virtue of student's known disabilities, student fits neatly into the special education category, OHI, because of his physical conditions. In fact, there is evidence that other psychological elements overlap student's primary handicapping condition: ADHD, ED, Major Depression or ODD.

Also, the school psychologist stated that she was unable to complete the ADHD assessment with parent. There was evidence at the hearing suggesting that parent was non-compliant with the school psychologist's request for parental input. This evaluation must be completed with the parent: Student's teacher related that student's ADHD like symptoms made her wonder whether student has ADHD. The school psychologist related that student falls into the clinically significant range for ADHD. The school psychologist must complete testing student for ADHD and parent must provide the information to the school psychologist.

Student's school psychologist does not believe that emotional difficulties exist sufficiently to qualify student for the ED category. The school psychologist attributes this finding primarily to the fact that student's major depression is deemed to be a single episode. Student's parent disagrees with the school psychologist's assessment. It should be noted that student's emotional distress was apparent at home, at the BRC and at the psychiatric center this past year.

For this reason, the parent is entitled to an IEE at public expense to determine the pervasive nature or solitary feature of student's Major Depression. If all of the above point to student's maladjustment alone, and student's remaining diagnosis is ODD, then he must be treated prospectively the same as other children who do not have a mental infirmity. If student's mental difficulties are caused by seizure disorder and the IEE is completed by a qualified provider, the full effect and extent of student's seizure disorder will be shown.

All of these competing mental diagnoses were known to the LEA and no referral was made nor evaluation completed to rule out or in all of the above to explain or disregard the effect of mental difficulties on student during the subject incident of February, 2009. Instead, student was removed from school and kept out for a long period of time. Student was confined to a psychiatric hospital after referral by the LEA. It appears that the LEA did not consider all aspects of student's mental difficulties: No additional testing was completed regarding the above to determine if any overlapping mental disease factors into student's special education needs. To this hearing officer, this factor indicates a substantive violation of the Child Find provisions of IDEA.

Whether or not student's seizure disorder poses behavioral issues for him or whether he has psychiatric issues has been a matter of controversy in student's special education at least since the time he qualified for services in 2006. Student's pediatric neurologist alluded to this matter in his letter of May 24, 2005. The fact that parent has signed off on IEP's and has not checked the "behavior box" does not mean that the LEA is relieved of its federal duty to identify student's disabilities if suspected. The LEA cannot claim it has no notice of disability because of faulty recordkeeping. Student's behavior is an issue and has been so for a long duration. Whether or not student's behavior adversely affects his academic performance at school is a matter of controversy, therefore, a detailed record of his behavioral events was essential information for consideration by the IEP team. Examination of the record that does exist, interventions used, chronology of disciplined and undisciplined matters, all of these events must be examined for the emergence of patterns and themes if an FBA/BIP requires formulation at a later date.

For a disabled child who may be disciplined the same as his non-disabled peers in the event that his disability is not connected logically to the disciplinary act, it does not benefit a special needs child to "forgive" incidents by dismissing their seriousness. Asking a disabled child to read a book on sexual harassment does not address his behavior pursuant to the IDEA or to Section 504. The IDEA proposes preparation of an FBA/BIP to address problematic behavior when it becomes necessary to do so, namely when the behavior adversely affects academic performance.

Being "shut down" from participation in the general education inclusion environment with one's non-disabled peers presents a denial of FAPE to this child because he will not be educated in the least restrictive environment. Requiring student to attend The Program, primarily a disciplinary placement, is more restrictive than the general education inclusion environment of his last agreed IEP. Student's attendance at _____, where he would attend school with other children who have discipline

problems, is not the same nor equal to being educated with one's non-disabled peers in a general education, inclusion environment.

It is plausible that student's behavior did not begin to adversely affect his academic performance until the sexual harassment incident of September, 2008 for which student's parent elected to have him attend the BRC behavior modification program. The fact that student's parent did not attend graduation ceremonies or that the in school mentor program was available and first suggested to parent, that one program may or may not be more stringent than another, all of these factors have little or no significance. The fact that the school guidance counselor did not follow-up or address the BRC information in student's special education is a significant substantive violation of the IDEA.

Factually, the due process hearing revealed: Student's prognosis upon his return to school after the BRC was termed "guarded." When student returned to school in November, 2008, he was "armed" with a definitive behavior intervention plan with informative information about triggers to his behavior and insight regarding situations likely to cause escalation of his behavior. Certain extremely positive behavioral modalities were suggested: a mentor program, an advocate with whom student could consult, counseling sessions, the LEA did not employ any of the above measures.

In fact, student's guidance counselor testified that she did not know that student was a special education student. Also, student's counseling sessions with his school guidance counselor terminated though student apparently enjoyed them and/or was benefiting from the sessions. Student informed his counselor that he did not want to stop coming to guidance sessions but the meetings ended summarily anyway in 2007.

Counseling sessions likely provide the necessary link between student's ability to be included in his environment with non-disabled peers and his confinement to a more restrictive, primarily disciplinary placement. The preparation of an FBA/BIP can provide the structure necessary for student to stay in the inclusion placement.

Applicable law states that children must be educated in the least restrictive environment for placement to be proper. Pursuant to 34 CFR 300.550(b) general requirements for restrictive environments and placements are that "... to the maximum extent appropriate, children with disabilities, including those in public or private institutions or other care facilities are educated with children with disabilities; and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or the severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

Federal law requires that an IEP team consider behavior intervention strategies for any child whose behavior impedes his or her learning or that of others, 20 USC Sec. 1414(3)(3)(B)(i); 34 CFR 300.346(a)2(i).

In Board of Education v Rowley, 458 U.S. 176 176, 188-89, 102 S.Ct. 3034, 3042, 7 L.Ed. 2d 690 (1982) the Supreme Court held that a “free and appropriate public education” under the Act “consists of education specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child ‘to benefit from’ the instruction.”

In which placement is the child most likely to ‘benefit from instruction’ pursuant to the IDEA? Fourth Circuit case law regarding the appropriate placement of disabled children reflects the IDEA’s language that shows a strong preference for mainstreaming. DeVries v Fairfax County School Board, 882 F.2d 976 (1989)

Contrarily, the Sixth Circuit follows the holding set forth in the case of Roncker v Walter, 700 F.2d 1058, 1063 (6th Cir), cert. denied, 464 U.S. 864, 78L.Ed. 2d 171, 104 S.Ct. 196 (1983) which defines the conflict existing between the mainstreaming requirement and a segregated placement decision. The Fourth Circuit follows the Sixth Circuit in the above Roncker decision in determination of mainstreaming requirements in placement decisions as follows:

“The proper inquiry is whether a proposed placement is appropriate under the Act. In some cases, a placement may be considered better for academic reasons that may not be appropriate because of the failure to provide mainstreaming. The perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept. Such a disagreement is not, of course, any basis for not following the Act’s mandate. In a case where segregated facility is considered superior, the court should determine whether the services which make the placement superior could be feasibly provided in a non-segregated facility. If they can, placement in the segregated school would be inappropriate under the Act. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could be provided in the non-segregated setting, or because the handicapped child is a destructive force in the non-segregated setting.

The 3rd, 5th, & 11th Circuits follow the logic elucidated in the case of Daniel R.R. v State Board of Education, 874 F.2d 876, 5th Cir., (1989) which clarifies a two part test in the question of whether or not a child may be mainstreamed: (1) Whether or not education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily and (2) If the Court finds that placement outside the regular classroom is necessary for the child to benefit educationally, the court must decide whether the child has been mainstreamed to the maximum extent appropriate.

In the case of Hartmann v Loudon County Board of Education, 118 F.3rd 996, 1004, 4th Cir., (1997), the Fourth Circuit employed the Roncker test above and rejected the 3rd, 5th and 11th Circuit's Daniel R.R. analysis. Now, as clearly set forth in the Hartmann decision, these factors are to be considered when the issue of appropriateness of a particular non-mainstream placement is presented: (1) whether the disabled child would receive educational benefit from mainstreaming (2) whether any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in a separate instructional setting; or (3) whether the disabled child is a disruptive force in a regular classroom setting (4) whether there is any cost savings to educating the child in the proposed separate instructional setting.

Examination of the instant case reveals that student does receive educational benefit from the inclusion setting which he would not receive at the separate setting. He enjoys P.E., Music, Art, Technology, Media & Field Trips which are now written into his IEP. Student now relates to his peers at lunch and recess as well. At _____, there will be no P.E. with regular education students. The disciplinary program is maintained separately from the regular education elementary school where it is located. Social skills and development of peer relationships are essential to student's school experience. Student's only peer relationships at the proposed placement will be with other children who have serious behavior problems and who have also been long-term suspended with terms. Other children will enter the disciplinary program on a bi-weekly basis but these individuals are short term students. Student's association with these students will be sporadic at best. It is clear that student would not participate in the separate placement with any children from the regular education elementary school until he has graduated from the disciplinary level program. Only then would student be mainstreamed into inclusion classes with other regular education students without disciplinary problems.

Student has not yet functioned in the regular education setting with a formal BIP. If discipline is the primary reason to move student to a separate facility, student should be permitted to function first with a properly formulated BIP: Evidence presented at the hearing shows that student's behavior required that IEP goals or a BIP be implemented prior to February 24, 2009. On the subject date, Student had not yet had the opportunity to function in school with a properly formulated BIP or appropriate IEP behavioral goals.

Testimony by LEA personnel revealed uncertainty regarding student's ability to interact with peers. It is not clear that peer relationships would develop at The _____ Program. The _____ Program is inadequate to address student's social needs.

Further, it is apparent that special education services would be provided but it is unclear how closely student's IEP would be followed in the separate setting. Student's needs are comprehensive. If student's academic needs are not met in the separate setting, it is likely that academic functioning could create additional regression for student. From the testimony at this hearing, it does not sound as if The _____ Program is the LRE in which student may receive a FAPE.

Testimony revealed at the hearing that LEA personnel may or may not be able to provide student a FAPE in the LRE: Although the individuals who oversee this program are highly qualified academically in their fields, it is evident that student's special education needs are secondary to the primary function of this program. Student may require a psychologist to oversee his special education needs. Testimony reflected that a psychologist will not be on staff regularly for consult at

Regarding the March 3, 2009 and July 9, 2009 MDR meetings, in consideration of the tenor of these two meetings, the LEA did not afford student his right to have a properly conducted manifestation hearing on either occasion. IDEA's disciplinary regulations at 34 CFR 300.530(e) state as follows regarding a manifestation determination:

(e)(1) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine –

(i) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(ii) if the conduct in question was the direct result of the LEA's failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP team determine that a condition in either (e)(1)(i) or (e)(1)(ii) was met.

In response to parents' complaint regarding the first MDR meeting, the VDOE determined that the March 3, 2009 MDR was flawed: The LEA did not apply the correct legal standard in answering the MDR questions, namely: (1) Was the conduct in question caused by or did it have a direct and substantial relationship to the child's disability; or (ii) Was the conduct in question the direct result of the LEA's failure to implement the IEP?

The VDOE states that the LEA did review documentation relevant to this MDR but that the information was not reviewed in the proper context and in light of the applicable standard. In the process, the VDOE asserted that the LEA "misstated" the MDR inquiry by joining the two concepts together as one and asking whether or not the behavior was the product of "direct causation" of the disability or whether or not the behavior is the "direct result" of the disability. Instead, the inquiry should have been, per the VDOE, did the MDR team first consider whether the behavior was caused by the disability? Secondly, did the MDR team also consider whether or not the behavior had a "direct and substantial relationship" to the child's disability?

When the LEA received word that the VDOE required that the MDR be redone, the LEA interpreted that “only the second question” relating to “the conduct in question being a direct result of the LEA’s failure to implement the IEP” needed to be completed again. The LEA admits that at the second MDR meeting the LEA did not conduct the inquiry all over again but convened merely to “answer the second question.” This is not the interpretation this hearing officer infers from the VDOE’s directive set forth in the corrective action plan. Per the VDOE’s findings, it is this hearing officer’s assessment that the MDR should have been reconvened in order to consider all of the facts in the correct context with the appropriate legal standard in place. Fragmenting the VDOE’s corrective action conflicts with the spirit of IDEA in the conduct of a complete MDR.

Moreover, the LEA admits that individuals from the first meeting were not necessarily all in attendance at the second meeting. Some of the individuals at both MDR meetings did not even know student. Parent was denied parental participation at the second MDR meeting: Parent was told that there would be no additional record review, the LEA having said to her, “We are just meeting for the purpose of re-doing the second question on the form, that’s it.” Some members of the LEA admit that only a “record review” was made prior to the second MDR.

Most importantly, if the psychiatric center discharge notes only became available on March 6, 2009 the first participants could not have reviewed the psychiatric report. Some of the LEA personnel did not attend the second MDR. When the second MDR occurred, the additional individuals present admitted to a only a record review prior to the meeting. This means that if the psychiatric report appeared later, on March 6, 2009, some members of the second MDR team could not have formally discussed the psychiatric report with each other at all. Discussion of the MDR issues is a vital aspect of an MDR meeting. The fact is that formal discussion between the MDR members never really occurred with all of the relevant information, at the same time, in the same room with the correct legal standard in place and with the exact determination to be made pursuant to the IDEA. Thus, the entire MDR process was flawed.

From examination of this child’s entire educational record, the official and unofficial record of disciplinary infractions, guidance reports, teacher’s reports, parental reports, outside medical and psychological reports and from the testimony of LEA witnesses at the hearing, there is sufficient evidence to indicate that the LEA did not timely modify this child’s IEP by the incorporation of behavior goals or a BIP into student’s IEP. Evidence taken at the hearing reflected that LEA personnel had prior notice of similar displays of this child’s behavior which escalated into the subject event. Thus, the LEA should have earlier undertaken an FBA and a BIP to address this child’s behaviors.

Whether or not this child’s behaviors substantially relate to his disability remains a matter for determination by the IEP team pending completion of additional medical and psychological evaluation. Presently, this information is inconclusive regarding the adverse educational impact, if any, of student’s possibly emerging disabilities: ADHD or

ED caused by new seizure activity. These aspects may not now be excluded from student's disability category by an eligibility committee convened to fully consider student's special education needs after additional evaluation is completed.

Regarding the VDOE corrective action plan: (1) The LEA has revised its forms for MDR hearings and the correct legal standard appears on the face of the document. (2) For the above rationale, however, the corrective action plan appears not to have been followed regarding the MDR.

This hearing officer concludes that The _____ Program is not the LRE in which student will provided a FAPE. Pursuant to the IDEA, placement must be made by the IEP team, not by the school board.

The evidence is insufficient to establish that the LEA's wrongful refusal to acknowledge student's aunt's parental role resulted in any adverse educational impact on student and this allegation is therefore DISMISSED.

The evidence is insufficient to establish that student was entitled to ESY services or to any compensatory educational services other than the 182.5 compensatory educational hours already established and which the LEA has agreed to provide. The request for ESY services is hereby DISMISSED.

PROVISION OF FAPE

Based upon parents' evidence presented in this matter, applicable statutes, regulations, case law, and the arguments presented by the parties, this hearing officer makes the following conclusions of law:

1. Student is a handicapped child and comes within the purview of the IDEA.
2. This student requires specific conditions and related services in order to derive educational benefit from his education.
3. At all times relevant hereto, student's parents have resided in Virginia, thus the local educational agency, the LEA, is responsible for educating student by providing him with a free and appropriate education, a FAPE,

In consideration whereof and in light of the parents' evidence presented at this due process hearing, testimony of the witnesses and presentation of the exhibits, it does not appear that student has received a FAPE on some of the enumerated issues and he has received a FAPE on other issues as enumerated and fully set forth herein.

4. I find that parental notice requirements were satisfied by the LEA.
5. Parents properly requested a due process hearing because they believe that

certain provisions of the IDEA and Section 504 violations have occurred. Also, parents request a ruling on the following issues:

I. Did the LEA's proposed disciplinary placement for student, The _____ Program, at _____ School, for the 2009-2010 school year provide the least restrictive environment in which student will be provided a FAPE? No

(a). Did the LEA fully evaluate and fail to identify student's suspected disabilities which adversely impact his school performance during the 2007-2008 & 2008-2009 school years? No

(b) For the 2007-2008 & 2008-2009 school years, did student's emotional and behavioral needs indicate that the LEA should assess him and provide specifically designed instruction, an FBA and a BIP, in order to avoid a disciplinary matter? Yes

(c) During the March 3, 2009 and July 9, 2009 MDR meetings, did the LEA fully observe state and federal regulations pursuant to the IDEA and Section 504 or did the LEA deny a FAPE to student at the MDR meetings? No violation of Section 504 was found. The LEA denied FAPE to student at the March 3, 2009 and at the July 9, 2009 MDR meetings.

(d) Did the LEA fully implement the VDOE's corrective action plan and resolve the parents' complaint regarding the March 3, 2009 MDR meeting? No.

(e) Did the LEA wrongfully place student in The _____ Program, primarily a disciplinary placement, by action of the school board on June 8, 2009, in that there was no consensus of the IEP team in violation of the IDEA and Section 504? No evidence of a Section 504 violation was presented and this request for relief was dismissed. Pursuant to the IDEA, a placement decision may occur only by consensus of the IEP team.

(f) Did the LEA wrongfully refuse to acknowledge that student's aunt had a parental role which resulted in an adverse impact upon student when the LEA did not re-evaluate student after his release from the psychiatric center? Request for relief on this issue was dismissed.

(g) Upon his release from the psychiatric center until the present time, was student entitled to ESY services or has student been fully compensated and achieved the same educational opportunities as his peers? Student is entitled to 182.5 compensatory educational hours only. The request for ESY service hours was dismissed.

The LEA's Motion To Strike is hereby granted in part and denied in part. Parents' Motion for Summary Judgment is hereby granted in part and denied in part. Both the parents' counsel and parent's advocate and the LEA's counsel incorporated applicable case law, written motions and briefs in support of their legal arguments in this matter. This hearing officer hereby makes reference thereto and includes the parties' documentation in the evidentiary file contained in this matter.

HEARING OFFICER ORDER

1. Student's educational record for the subject disciplinary incident of February 20, 2009 thru February 24, 2009 requires amendment: In response to the MDR inquiry "Was the conduct in question the direct result of the LEA's failure to implement the IEP?" the answer is "Yes." Sufficient evidence at this hearing supports the parents' allegations in this regard. Student's IEP required the implementation of an FBA and BIP prior to the date of the subject disciplinary incident. MDR actions of March 3, 2009 and July 9, 2009 are hereby **OVERRULED** and student's educational record regarding this incident should be adjusted accordingly.
2. Parent is entitled to an IEE at public expense because she disputes the results of the psychological report prepared by the school psychologist. It is hereby **ORDERED** that parent receive an IEE at public expense as herein set forth.
3. It is suggested that parent obtain medical data from a licensed physician qualified to conduct an EKG to determine if student has had any additional seizure activity, to define how student's brain malformation causes student's negative behaviors, or to report if any other physical causes exist to impact student's school performance. The school is not responsible for any of petitioner's medical costs. It is petitioner's responsibility to maintain student's medications for successful school performance. It is in the child's best interest for parent to promptly provide medical information to support student's school performance.
4. The school psychologist and parent must complete ADHD testing required by the school psychologist for addendum to her report of April 10, 2009. It is hereby **ORDERED** that parent and the school psychologist complete testing for student's ADHD as fully set forth herein.
5. Additional findings, if any, by the school psychologist or by the independent educational evaluator regarding student's psychoeducational profile, must be considered by the eligibility committee to address adverse educational impact, if any, on student's special education needs. If the child study team/eligibility committee determine that modifications must be addressed to serve this child's special education needs, an IEP team must be convened to amend this child's IEP and implement the changes accordingly and these meetings are hereby **ORDERED** to occur upon completion of the above testing and reports.
6. Separate placement at The _____ Program is not the LRE in which this child may receive a FAPE, therefore, the school board's designation of placement at the disciplinary program is hereby **OVERRULED**.
7. The LEA has demonstrated that 182.5 compensatory educational hours are sufficient to address student's special education needs and this hearing officer **ORDERS** compensatory educational services equal to that amount.

8. Insofar as the parent has stated that she is satisfied with “the draft IEP” in all other respects, this hearing officer hereby ORDERS implementation of the draft IEP.

9. Evidence at this hearing showed that student would benefit from the in-school mentor program and this hearing officer recommends this program to supplement student’s special education needs. Student requires guidance counseling services regularly to be successful in school. This hearing officer hereby ORDERS the LEA to provide this student with regular guidance counseling services as an IEP accommodation in his collaborative placement.

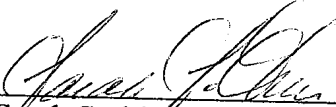
10. Evidence presented at this hearing showed that this disciplinary event occurred after a series of telephone calls were made by student when he was not being supervised by an adult. All of the calls appeared to have been the product of student’s attention seeking behavior. Student intentionally aggravates others. Student has a history for making poor behavioral decisions. Thus, student must never be at home in an unsupervised capacity or left under the supervision of his 15 year old cousins. It is also suggested that parent obtain the advice of a LCSW regarding behavioral modifications to be utilized at home to assist with student’s school performance. It is suggested that parent continue student’s private therapeutic counseling with a qualified professional.

IDENTIFICATION OF PREVAILING PARTY

Pursuant to 8 VAC 20-89-76k.11 the hearing officer has the authority to determine the prevailing party on each issue as follows:

Parents prevail on issue numbered “I” and on issues (a), (b), (c), (d), & (e).

LEA prevails on issues (f) & (g)



Sarah Smith Freeman
Hearing Officer

APPEAL INFORMATION

8 VAC 20-80-76.0 states as follows:

1. This decision shall be final and binding unless either party appeals in 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.


2. This decision shall be final and binding unless either party appeals in a federal district court without regard to the amount in controversy.

3. If the hearing officer's decision is appealed in court, implementation of the hearing officer's ORDER is held in abeyance except in those cases where the hearing officer has agreed with the parent or parents that a change of placement is appropriate. In accordance with subsection E of this section. In those cases, the hearing officer's order must be implemented while the case is being appealed.

IMPLEMENTATION PLAN

It is the LEA's responsibility to submit an implementation plan to the parties, to the hearing officer and to the Virginia Department of Education within 45 calendar days.

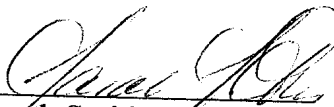
Dated: October 23, 2009



Sarah Smith Freeman
Hearing Officer

CERTIFICATE OF MAILING

I do hereby certify that I have mailed/faxed a true copy of the above to Derek A. Mungo, Assistant City Attorney, for the School Board of the City of _____, Virginia at _____ Street, _____ Avenue, _____, Virginia and to Lois N. Manes, Esquire, Post office Box 1675, Williamsburg, Virginia 23452 and to Cheryl A. Poe, Advocate, Advocate4Kids, LLC, 3788 Stoneshore Road, Virginia Beach, Virginia 23452 on this 23RD day of October, 2009.



Sarah Smith Freeman
Hearing Officer

Sarah Smith Freeman, Esquire
210 East Road
Portsmouth, Virginia 23707
(757) 399-8105
(757) 399-2004 (FAX)
esqfreeman@aol.com