

COMMONWEALTH OF VIRGINIA  
VIRGINIA DEPARTMENT OF EDUCATION  
DIVISION OF SPECIAL EDUCATION & STUDENT SERVICES  
OFFICE OF DISPUTE RESOLUTION & ADMINISTRATIVE SERVICES

Re: \_\_\_\_\_, by and through his parent(s)  
and \_\_\_\_\_ v. \_\_\_\_\_ Public Schools

Child & Parent(s):  
\_\_\_\_\_, child  
and \_\_\_\_\_, parent(s)

Administrative Hearing Officer:  
Ternon Galloway Lee, Esquire  
215 McLaws Circle, Suite 3A  
Williamsburg, VA 23185  
(757) 253-1570  
(757) 253-2534 facsimile

Child's Attorney/Advocate:  
Lois Manes, Esq. (attorney)  
(advocate)

Public School Attorney:  
Kamala Lannetti, Esquire

Superintendent \_\_\_\_\_ Public Schools:  
Dr. \_\_\_\_\_

AMENDED DECISION

I. PROCEDURAL HISTORY<sup>1</sup>

The \_\_\_\_\_ Public Schools District ("LEA") received on April 1, 2008, a due process request for an expedited hearing regarding \_\_\_\_\_. The hearing officer held an initial pre-hearing conference ("PHC") on April 7, 2008 to address various matters pertaining to the expedited due process request. Immediately, thereafter, she issued a scheduling order.<sup>2</sup> The hearing officer held a subsequent PHC on April 15,

<sup>1</sup> Throughout the decision the following abbreviations will be used:

- |               |        |
|---------------|--------|
| Exhibit       | Exh.   |
| Transcript    | Tr.    |
| Joint Exhibit | Exh. J |

<sup>2</sup> Since the parents filed their request for an expedited due process hearing, OSEP issued a letter

2008, wherein the parents, through counsel, moved to proceed on a non-expedited basis. After hearing arguments of counsel, the hearing officer granted the parents' motion and entered a scheduling order on April 17, 2008, vacating the prior scheduling order.

By motion dated April 15, 2008, counsel for the parents filed a Motion for Pendente Lite Relief requesting the hearing officer order the LEA provide educational and related services during the pendency of the hearing officer's decision. Counsel for the LEA submitted her response with attachments on April 16, 2008. In response to a request from the hearing officer for additional information counsel for the parties made further submissions by April 18, 2008, including a rebuttal response from the parents. The hearing office issued an order on April 21, 2008, finding [redacted]'s stay put placement at home and ordering the LEA to provide services.

The hearing officer held a third PHC on April 29, 2008, to address motions from counsel of record. The resulting order was issued on April 30, 2008, (1) affirming the hearing officer's stay put order and ruling that the parents bore the burden of proof and

---

dated May 1, 2008, clarifying expedited time frames in the context of the expedited hearing. Prior to OSEP's letter the 15 calendar day resolution permitted in expedited hearing cases was interpreted by some special education scholars to be separate from the 20 school day expedited due process hearing time. The May 1, 2008 letter opines that the resolution period is "a part of" the expedited due process hearing timeline.

Moreover, the letter noted that while OSEP contemplated a two business day time frame for the exchange of exhibits and witness lists, the final regulations maintained the five business day requirement.

(2) denying counsel for the parents' motion to add issues.

Counsel for the parents filed a Motion for Relief Regarding Stay-Put Educational Services on May 18, 2008, requesting that the hearing officer determine the amount of back services owed to . The hearing officer held a PHC on May 20, 2008, to address objections to witness lists and to hear arguments on the Motion for Relief. The hearing officer afforded counsel for the LEA an opportunity to respond to the motion prior to the commencement of the hearing.

A due process hearing was held over a three day period wherein the hearing officer took testimony as evidence and admitted hearing officer exhibits ("H.O. Exh."), 1 through 35, parents' exhibits ("P Exh.") 1A through 7, LEA exhibits ("LEA Exh.") 1A through 7, and one joint exhibit ("J Exh."). The Hearing officer issued a decision on June 16, 2008. The decision herein amends that decision.

The IDEA 2004 was signed into law on December 3, 2004. With the exception of some elements of the definition of "highly qualified teacher," which took effect on December 3, 2004, the provisions of IDEA 2004 became effective July 1, 2005 (the "Effective Date"). Newly implemented federal regulations became effective October 13, 2006. Any state special education regulation not impacted by the Act remains in effect until newly revised state special education regulations are implemented

## **II. ISSUES**

1. Was the Manifestation Determination ("MD") wrongly decided?
2. Were there procedural violations at the MD meeting?
3. Was the Individual Education Program ("IEP") appropriate?
4. Did the LEA follow the child's IEP and behavior intervention program ("BIP")?

5. Was the functional behavior assessment (“FBA”) appropriate and was it followed?
6. Did the LEA offer appropriate services after March 13, 2008?
7. Was the child provided a free appropriate public education (“FAPE”) at the time of the conduct leading to the suspension?

### **III. STATEMENT OF FACTS**

1. (“ ” or “child”) was born June 13, , according to records admitted into evidence in the case. Accordingly, the child was years and nine months of age on March 12, 2008. LEA Exh. 4.

2. The LEA initially found eligible for special education and related services under the category of seriously emotionally disturbed or emotional disturbance when he was in the first grade. He began receiving services at School. (Tr. 157).

3. ’s parents report that at age 3 he was diagnosed with Opposition Defiant Disorder (“ODD”) and that diagnosis was later changed to ADHD and depression. LEA Exh. 5, E 33.

4. was hospitalized in a psychiatric facility as an in-patient on two occasions in 2006 for high agitation. LEA Exh. 5, P. Exh. 2, B-3; (Tr. 819).

5. ’s triennial review to determine his continual eligibility for special education and related services took place during his fourth grade school year at School. On or about June 7, 2006, the eligibility committee determined he remained eligible and identified his disability as Other Health Impaired (“OHI”). LEA Exh. 5, E 12.

6. enrolled as a sixth grader at School (“SMS”) at

the beginning of the 2007-2008 school year.

7. On March 12, 2008 returned to school from a two day out of school suspension. entered his orchestra class agitated, speaking loudly and expressed he was pissed off because another child named had recently caused him to be suspended. At the conclusion of orchestra class, 's teacher began to escort the class to the cafeteria for lunch. began to speak loudly again and express the same agitation previously displayed as he was entering his orchestra class. After non-verbal and verbal cuing and pulling aside in an effort to alter the behavior, threatened to "kill or beat up" another student. Once the class reached the cafeteria, 's orchestra teacher instructed him to sit in an isolated area in the cafeteria and assistant principal ("Mr. " or "assistant principal "), the administrative representative assigned to sixth graders at SMS, was notified of the incident. (Tr. 389-394, 482).

8. The incident was investigated on March 12, 2008. LEA Exh. 3, C 18-27. Thereafter, Mr. sent home with his mother and informed the mother was suspended. LEA Exh. 3, C 18-27; (Tr. 485-486).

9. On March 13, 2008 Dr. ("Dr. ", or principal of SMS) suspended and recommended the discipline of suspension for the remainder of the school year. LEA Exh. 3, C 16-17.

10. On April 12, 2008, a hearing was held by , hearing officer employed by LEA to render decisions in disciplinary cases, to consider Dr. 's recommendation. That hearing officer made the decision to suspend for the

remainder of the school year, hold the suspension in abeyance and recommend the child enroll in the Center for [redacted] (“CEL”). LEA Exh. 3, C 14; (Tr. 487). The Office of Student leadership (“OSL”) issued the decision on April 7, 2008. The parents appealed the April 7, 2008 OSL decision and on May 9, 2008 the OSL issued a letter stating that on May 6, 2008, the LEA’s School Board Discipline Committee upheld OSL’s recommended discipline. LEA Exh. 3, C 1-96.

11. A Manifestation Determination Review (“MDR”) meeting took place on March 21, 2008. The committee members, who were to determine if the child’s conduct in question was a manifestation of his disability, consisted of the school psychologist Dr. [redacted] (“Dr. [redacted]” or “the school psychologist”), [redacted] (“Ms. [redacted]” or “assistant principal [redacted]”), [redacted] (hereinafter “Ms. [redacted]” or “special education coordinator”), [redacted] and [redacted] (“parent(s)”<sup>3</sup>), [redacted] (“Ms. [redacted]” or “general education science teacher/science teacher”), and [redacted] (hereinafter “Ms. [redacted]” or “the child’s special education teacher/case manager”). P Exh. 1, A 8. The parents were also accompanied by an advocate, [redacted]. H.O. Exh. 19.

12. Assistant principal [redacted] who is the administrator that oversees special education at [redacted] School facilitated the MDR meeting. (Tr. 405, 422).

13. The MDR meeting lasted for at least two hours. Dr. [redacted] left the meeting before it concluded but was present for about one hour and 45 minutes (“1.75 hours”). She decided the conduct in question was not a manifestation of the disability and voted

---

<sup>3</sup> [redacted] participated by telephone.

that the conduct in question was not caused by or directly or substantially related to the disability and that the conduct was not a direct result of the LEA's failure to implement the child's IEP. (Tr. 173-177).

14. During the MDR committee meeting ("Ms. ,” or child's orchestra teacher”) was called in as a witness to tell what happened on March 12, 2008, that resulted in the child's long term suspension. (Tr. 397-398).

15. The majority of the committee members decided 's threat made on March 12, 2008, was not a manifestation of the child's OHI/ADHD disability. The parents disagreed. P Exh. 1, A 8.

16. The MDR committee did not consider whether the conduct was a manifestation of any disability other than OHI/ADHD. (Tr. 758).

17. At the request of the parents, Dr. (“ Dr ” or child's treating psychologist”) provided input for the MDR committee. He participated by telephone for about five minutes. Dr. informed the MDR committee that the child had been diagnosed with bipolar disorder, that the child was co morbid with a dual diagnosis of ADHD and bipolar, and that he had been treating the child for about two years. (Tr. 174, 190).

18. Dr. 's Psychological Report and FBA was not presented at the MDR committee meeting on March 21, 2008. (Tr. 169).

19. Dr. 's Psychological Report and Functional Behavior Assessment (“FBA”) existed in writing prior to the April 14, 2008 IEP meeting. (Tr. 776).

20. Dr. was not invited to attend the MDR committee

meeting; her neuropsychological report was not presented either and there was no input from Dr. [REDACTED] or on her behalf at the MDR committee. (Tr. 169).

21. Dr. [REDACTED] (“Dr. [REDACTED]” or Neuopsychologist”) existed in writing prior to the April 14, 2008 IEP meeting. (Tr. 776).

22. At the MDR committee meeting, the committee considered the following:

(i) Documentation regarding the child’s current IEP, to include the BIP, and IEP meetings on March 3, 2008; February 1, 2008; January 15, 22, 2008; December 13, 2007; October 18, 2007; August 30, 2007; May 15, 31 2007; January 15, 2008;

(ii) Eligibility documentation concerning the child’s triennial review in 2006 to determine his continual eligibility to include the eligibility meeting minutes and evaluations - January 2007 Psychological Achievement evaluation from Psychotherapy, Educational Evaluation with test date of April 13, 2005, and 2003 Psychological and educational report by the LEA;

(iii) Observations as reported by teachers;

(iv) Ms. [REDACTED]’s factual account of what occurred on March 12, 2008, causing the child’s suspension;

(v) Dr. [REDACTED]’s comments about the child’s bipolar diagnosis and treatment for it;

(vi) The child’s statement regarding the conduct in question; and

(vii) Input from the parents.

(Tr. 170, 672, 755-756, 762-767).

23. [REDACTED]’s disciplinary record for his sixth grade year at SMS from September 4, 2007, to March 12, 2008, consists of 12 student code violations for which he was disciplined. There were also six infractions which had been held in abeyance. LEA Exh. 3, C 18, 28; (Tr. 575).



24. Achievement tests show [redacted] has average to above average intellectual ability. LEA. Exh. 5, E 3, 33; P. Exh. B-2. At the time of his long term suspension, [redacted] was failing or almost failing most classes. LEA Exh. 3, C 37-43.

25. [redacted] failed to return homework assignments and was not consistent in preparing for tests. (Tr. 310, 313, 335).

26. During suspensions of less than 11 days ("short term suspensions") [redacted]'s social studies teacher provided him with make up work; however, very little of it was completed and returned. (Tr. 322).

27. [redacted]'s 2003 psychological report notes he experienced some difficulties with work habits and social skills in the first grade and that behavior aggression and failure to complete work were present from the beginning of the school year. LEA Exh. 5, E 33.

28. Comorbid means that distinct disorders such as ADHD and bipolar are cohabitating in one individual. (Tr. 26-27).

29. [redacted] Academy ("CBA") is a private school. Classes are small at CBA with a student teacher ratio of five to one. The school cannot accommodate students with severe emotional disturbance and physical aggression. P. Exh. 4, D-5; (Tr. 71-73, 84).

30. The Center for [redacted] (" [redacted] ") is an alternative center for middle school students grades six through eight experiencing minimal academic success and exhibiting behavior difficulties in regular school. H.O. Exh 26.

31. The child's current IEP is the August 30, 2007 IEP with modifications made at an IEP meeting held January 15, 2008. LEA Exh. 4, D 73-82; (Tr. 278).

32. The parents consented to both a BIP and IEP on August 30, 2007, approximately four days before students returned to school for the 2007-2008 school year. (Tr. 452-453).

33. As a toddler and preschooler, [redacted] exhibited behaviors such as screaming, biting, pulling hair, kicking, hitting, and fidgeting. Family and friends of the parents would not baby sit [redacted] because of his behavior and when [redacted] was a preschooler, he was dismissed from several preschools because of behavior problems. (Tr. 793, 801-806).

34. The LEA scheduled an IEP meeting to immediately follow the MDR committee meeting; however, that meeting did not take place. H.O. Exh. 19; (Tr. 243, 842-843).

35. The LEA offered services for [redacted] on April 7, 2008 and April 14, 2008. (Tr. 712, 717-718).

#### IV. APPLICABLE LAW AND ANALYSIS

##### A. **WAS THE MANIFESTATION DETERMINATION WRONGLY DECIDED?**

's conduct that gave rise to the violation of the school code is a manifestation of his disability if:

- (i) The conduct was caused by, or had a direct and substantial relationship to the child's disability; or
- (ii) The conduct was the direct result of the LEA's failure to implement the IEP.

34 CFR Section 300.530(e).

##### 1. **Did the Manifestation Determination Review Committee Consider Whether The Conduct Was Caused by All of the Child's Disabilities?**

On March 12, 2008, threatened "to kill or beat up" another student. After an investigation of the incident, Assistant Principal suspended . On March 13, 2008, the principal, Dr. , suspended with a recommendation that the suspension remain in effect for the remainder of the 2007-2008 school year. LEA Exh. 3, C 16. The LEA had recently suspended for incidents occurring on March 5, 2008, involving disrespecting staff and threatening staff. For each offense, he received one day of out of school suspension ("OSS") which he served on March 10-11, 2008. LEA Exh. 3, C 28. The LEA determined that the two offenses occurring on March 5, 2008, and the March 12, 2008 offense constituted a pattern of behavior involving threats. (Tr. 788).

The suspension and recommended length of it resulting from the March 12, 2008 threat was a change in placement for and triggered the manifestation

determination review provisions of the IDEA which prohibits disciplining a child with a disability for more than ten days if the conduct in question was caused by, or had a direct and substantial relationship to the child's disability. 20 USC section 1415 (k)(1)(E)(i)(ii). 34 CFR Section 300.530(e). Accordingly, school officials scheduled a manifestation determination review ("MDR") committee meeting for March 21, 2008. On March 21, 2008, the MDR committee met. The committee consisted of school psychologist, Dr. [redacted]; assistant principal in charge of special education, Ms. [redacted]; special education coordinator, Ms. [redacted]; the parent, Ms. [redacted]; general education teacher, Ms. [redacted]; and special education teacher and the child's case manager, Ms. [redacted]. During the meeting, the majority of the committee members determined [redacted]'s conduct in question on March 12, 2008, was not a manifestation of the child's OHI/ADHD disability.

The parents who were accompanied by their advocate contend the decision was wrongly made.

The parents argue in effect that in deliberating the causal effect between the child's disability and the conduct in question, the MDR committee should have considered not only whether [redacted]'s OHI/ADHD caused his conduct but whether his bipolar disorder and/or co morbid diagnosis caused the conduct in question.

The hearing officer examines herein whether the MDR committee should have determined whether the child's bipolar disorder, emotional disturbance, or co morbid diagnosis caused the conduct or did the conduct have a direct and substantial relationship to this diagnosis.

To determine if the child's conduct was a manifestation of his disability, the MDR committee was required to, within ten school days of the decision to suspend for the March 12, 2008 conduct, review all relevant information in his file, including the child's IEP, any teacher observations, and any relevant information provided by the parents. 34 CFR Section 300.530(e).

A review of evidentiary IEP documentation reveals [redacted] has a history of behavior and emotional problems. The child's treating psychologist testified at the hearing that a bipolar disorder is a kind of emotional disturbance. (Tr. 67)

The child's current IEP is the August 30, 2007 IEP with modifications made in an IEP meeting, January 2008. LEA Exh. 4, D 73-82; (Tr. 278). However, the LEA did not submit as evidence the August 30, 2007 IEP in its entirety as one document. The formulated August 30, 2007 IEP did not change the child's "Present Levels of Academic and Functional Performance" (Levels of Performance) as set forth in the child's May 31, 2007 IEP. Therefore, the Levels of Performance enumerated in the May 31, 2007 IEP remained the current ones in the August 30, 2007 IEP.<sup>4</sup>

[redacted]'s IEP dated May 31, 2007, indicates he received services during his fifth grade year at [redacted] Center, a school for behaviorally disturbed children with a strong counseling component. LEA Exh. 4, D120; (Tr. 185).

The Levels of Performance section of [redacted]'s IEP dated May 31, 2007, notes in pertinent part under the subheading "Social/emotional" that even in small settings where [redacted] usually functions the best he has difficulty with peers and sometimes

---

<sup>4</sup> Changes to goals and services were implemented January 2008. LEA Exh. 4, D 73-82; (Tr. 278).

adults; he frequently engages in inappropriate behavior and therefore has trouble making and keeping friends; he struggles with following class and school rules and needs constant teacher monitoring in this area; he can become silly and impulsive throughout the school day; and he needs constantly to be reminded of problem solving steps. LEA Exh. 4, D 120.

A prior notice in \_\_\_\_\_'s August 30, 2007 IEP comments that data reflects \_\_\_\_\_ exhibits inappropriate behavior such as being off task, talking out without permission, refusing to complete work, disrupting peers during classroom instruction and behavior infractions in less structured environments. LEA Exh. 4, D 105.

IEP documentation on a prior notice with printed date of December 13, 2007 remarks that \_\_\_\_\_ rarely had self-management deficits in his core classes, but noted he exhibited those deficits in his special education classroom by talking out, disrespecting adults, and having off task behaviors. LEA Exh. 4, D 92.

January 2008 IEP documentation indicates the parent requested several evaluations to include, among others, (1) a neuropsychological test to assess the child's executive functioning and (2) a FBA to be conducted by a school psychologist knowledgeable about ADHD and Bipolar behaviors. LEA Exh. 4, D 82-83, and 86-87.

Included in the January 2008 IEP documentation is a letter dated January 11, 2008, which is addressed to Mr. \_\_\_\_\_, Director of the Program for Exceptional Children from Attorney Lois Manes and Advocate \_\_\_\_\_. LEA Exh. 4. The Program for Exceptional Children includes programs for Special Education and Section 504 students. (Tr. 519). That correspondence explicitly notes concerns about the

appropriateness of [redacted]'s education and lists with specificity the five evaluations requested, to include the FBA by a school psychologist knowledgeable about ADHD and bipolar behaviors and the evaluation by a neuropsychologist to obtain data about the child's emotionality ability. Asserting the child had 11 behavior infractions related to his disability with disciplinary actions taken against him, the January 11, 2008 correspondence also requested a modification to the BIP once the new data was collected. LEA Exh. 4, D 86-89.

Documentation regarding [redacted]'s proposed IEP dated February 1, 2008, indicates [redacted] exhibited attention seeking and distracting behaviors when he was enrolled in a resource math class and other non core classes during the current school year.<sup>5</sup> Documentation also noted a few behavior infractions in unstructured environments such as the library, hallway, and cafeteria. The proposed IEP again states the parents' specific request for several evaluations, to include (1) the request for a new FBA by a school psychologist for purposes of addressing ADHD and bipolar behaviors and (2) a neuropsychological evaluation to obtain, among other information, data regarding problem solving skills and emotionality ability. LEA Exh. 4, D 45-46.

Documentation concerning a March 3, 2008 IEP meeting notes a recent incident in math class that resulted in the child receiving ten days of OSS. The parents then requested the March 3, 2008 IEP meeting to address changing [redacted]'s BIP because they believed the child's behavior needs had changed. Documentation regarding this

---

<sup>5</sup> Core academic subjects denote English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts history and geography. 34 CFR Section 300.10. Prior to his long term suspension, [redacted] was enrolled in orchestra which would be considered a non-core class.

meeting also noted the aforementioned specific request for evaluations by the parents. That documentation referenced the co morbid diagnosis of ADHD and bipolar disorder and requested data on the child's emotionality ability. LEA Exh. 4, D 18, 31.

The above referenced IEP documentation was a part of the child's file at the time of the MDR committee meeting on March 21, 2008. LEA Exh. 4. The documentation shows [redacted]'s longstanding history of emotional disturbance/emotional inconsistencies and behavior difficulties, reported concerns about the appropriateness of the child's educational plan and reported diagnosis of bipolar disorder as early as January 2008. An appropriate review of this information should have put the MDR committee on notice that the members should have considered not only the child's OHI/ADHD disability but his disability or suspected disability of emotional disturbance/bipolar disorder.

The hearing officer's review of [redacted]'s eligibility documentation also shows [redacted]'s history of behavior and emotional difficulties.

A psychological and educational report from 2003, summarized [redacted] at 6 years and 9 months as having a long history of behavioral and emotional difficulties involving a wide range of symptoms including behaviors associated with ADHD, acting out behaviors such as aggression and conduct problems, and internalizing problems including depression and anxiety. The report also noted that at age three, [redacted] was diagnosed with Oppositional Defiant Disorder (hereinafter "ODD") and later ADHD with depression. At 6 years and 9 months, the report notes that [redacted] had poor adaptive skills, frequently withdrew and at times displayed unusual behaviors. LEA Exh. 5, E 33-



36.

At \_\_\_\_\_'s triennial eligibility meeting on or about June 7, 2006, committee minutes note that \_\_\_\_\_ was still in-patient at an in-house psychiatric facility for aggressive and emotional behaviors and undergoing a complete psychiatric evaluation and that he had been in house for evaluation twice within the past month. Committee minutes also indicated \_\_\_\_\_'s weakness was his inability to handle stress in interpersonal relationships. Although a summary of the deliberations for \_\_\_\_\_'s eligibility noted that he was a well mannered and cooperative student, it also remarked that \_\_\_\_\_ has difficulty making the right decisions when he has a conflict with another student. The June 7, 2006 eligibility committee found \_\_\_\_\_ continued to be eligible for special education and related services, but amended his prior eligibility label from emotionally disturbed to OHI. LEA Exh. 5, E 8, 12-13; (Tr. 157).

In spite of the documentation in the child's file indicating his history of social and emotional difficulties, the MDR committee limited the scope of its consideration to whether the child's ADHD caused the conduct in question.

The hearing officer finds the MDR committee's narrow consideration in the face of the aforementioned documentation was improper. See Fulton County School District, 49 IDELR 30 (SEA,GA, 2007) where ALJ found the MDR committee improperly limited the scope of its review.

Moreover, a child who has not been determined to be eligible for special education and related services and who has engaged in behavior that violated a code of student conduct, may assert the protections regarding the discipline of students with

disabilities under IDEA if the LEA had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action. 34 CFR Section 300.534. Although [redacted]'s situation does not fit squarely within the confines of the wording of the regulation because he had been found previously eligible under the category of emotionally disturbed in 2003, which was later changed to OHI/ADHD in 2006, the intent of the law is clear - to afford IDEA protection to children with disabilities of whom the LEA has knowledge of or should have knowledge of.

The LEA should have suspected an emotional disturbance disability prior to the March 12, 2008 conduct. First, since January 2008, the child's case manager wrote four IEPs or proposed IEPs.<sup>6</sup> Each referenced the request for evaluations, to include among others neuropsychological testing to determine the child's emotional ability and an FBA to be conducted by a school psychologist knowledgeable about ADHD and bipolar behaviors. Moreover the case manager admits she had been told that the child had a bipolar disorder. Also at the MDR committee meeting she heard testimony from Dr. [redacted] that he had been treating [redacted] for close to two years for bipolar disorder.

Second, the hearing officer's belief that the LEA "had knowledge" is advanced by the letter January 11, 2008 letter, to [redacted], the Director of Programs for Exceptional Children. Although the parent's letter is not date stamped by the LEA at the time of its receipt, the LEA had included the correspondence in documentation regarding the January 15, 2008, IEP. Accordingly, the hearing officer finds Mr. [redacted] received the letter on or about January 15, 2008. That letter expresses parental concern that the

---

<sup>6</sup> Case manager [redacted] testified that as case manager one of her duties is to write the IEPs. (Tr. 271).

child is not receiving appropriate services. Specifically, the letter (1) contends the goal stating the child “will make progress toward appropriated social skills” is immeasurable and vague<sup>7</sup>, (2) reports the child “has had 11 behavioral infractions related to his disability with disciplinary actions taken against him,” and (3) contends the child has not been placed in his least restrictive environment. LEA Exh. 4, D 87. Further, as noted previously herein that correspondence requests with specificity five evaluations, to include the FBA by a school psychologist knowledgeable about ADHD and bipolar behaviors and the evaluation by a neuropsychologist to obtain data about the child’s emotionality ability. LEA Exh. 4, D 86-88. The hearing officer finds, therefore, that Mr.

, as director, was also on notice that the child was, at a minimum, suspected of being emotionally disturbed because the letter regarding , reported the child had 11 disciplinary infractions because of his disability, referenced bipolar behaviors, and expressed concerns about the child in need of special education and related services. Because the LEA had knowledge of this disability, emotional disturbance/bipolar disorder, the MDR committee should have expanded its consideration and inquired whether the conduct was caused by emotional disturbance/bipolar disorder.

Third, further evidence that corroborates the LEA should have known of the disability or suspected area of disability is the approval of the neuropsychological evaluation requesting data on the child’s emotionality ability. The school psychologist also testified she had verbally been told the child had a bipolar disorder. At a January 15,

---

<sup>7</sup> On January 15, 2008, that goal was changed to ones concerning work study and organization skills. LEA Exh. 4, D 73-82.

2008 IEP meeting wherein the school psychologist was not in attendance, approval for the neuropsychological evaluation was not granted but tabled until the school psychologist, knowledgeable in ADHD and bipolar behaviors, could attend. LEA Exh. 4, D 82; (Tr. 655). At that ensuing meeting on January 22, 2008, wherein the school psychologist attended, permission was granted for the neuropsychological evaluation so that data could be collected regarding, among other areas of concern, the child's emotionality ability. An LEA is not required to test all children for whom evaluations are requested. The most reasonable inference, therefore, from the LEA's grant of permission for the neuropsychological evaluation is the school psychologist- obviously instrumental in the approval- believed the request for such data was well-founded and suspected a disability in the area of emotionality. The hearing officer finds and notes her inference is substantiated by the special education coordinator's testimony that neuropsychologists are "consulted when there is **significant need** and the psychologist feels the expertise of a neuropsychologist needs to be accessed". (Tr. 656). (emphasis added).

The LEA's knowledge of \_\_\_\_\_'s suspected emotional disturbance disability is further substantiated by Assistant Principal \_\_\_\_\_'s acknowledgment that Mrs. \_\_\_\_\_ had shared \_\_\_\_\_'s history of treatment, placement in residential psychiatric facilities, and intake of certain medications with him. (Tr. 588).

For the reasons stated herein, the hearing officer finds the MDR committee should have considered the child's bipolar disorder or emotional disturbance disability. Because the MDR committee did not, its decision was wrongly decided.

2. Was the Conduct the Direct Result of the LEA's Failure to Implement the IEP?

The child's IEP contained a Behavioral Implementation Plan (hereinafter "BIP"). LEA Exh. 4, D 111-112. The parents contend the LEA failed to properly implement the child's BIP on March 12, 2008.

On the day the conduct in question occurred, the child entered Ms. 's orchestra class speaking loudly and expressing his agitation with another student in the class named whom stated had caused him to be suspended several weeks ago. Ms. redirected the child and remained in close proximity to him during the class period. Her actions seemed to yield appropriate behaviors from him throughout the class period. There were no other outbursts until class adjourned and Ms. proceeded to escort the class of about 15 students to lunch. While en route in the hallway, the child began to speak loudly again and express his agitation with , who was not with the group. Initially, Ms. gave the child a nonverbal cue to be quiet by raising her hand to her mouth signaling the child should be quiet. Then Ms. asked the child to walk with her away from the other students in line. Once there, she spoke to the child about what was appropriate behavior in the current setting. The child was then allowed to return to the line with the other students. He then continued to speak loudly about to the other students stating he was "pissed off and was going to kill that little boy." When the students arrived in the cafeteria with Ms. , she instructed the child to sit in a secluded area of the lunch room. She then alerted administration and was subsequently suspended that day. LEA Exh. 3, C 19; (Tr. 389-394, 482).

According to a statement by Assistant Principal [redacted] the child's most recent two day suspensions on March 10, 11, 2008, were unrelated to [redacted]. LEA Exh. 3, C 18.

The BIP strategies are not hierarchical. Strategies employed by Ms. [redacted] and noted above included several verbal prompts, encouragement to engage in appropriate behavior, at least one non-verbal cue, speaking quietly to the child when he engaged in the loud talking, and speaking to the child out of the hearing of the other students. Ms.

[redacted] used several strategies in the few minutes it took her to walk with the group of students to the cafeteria. Considering the methods employed and the time frame the teacher had, the hearing officer finds Ms. [redacted] implemented the BIP on March 12, 2008.

**B. WERE THERE PROCEDURAL VIOLATIONS AT THE MDR MEETING?**

As noted previously herein the members of the MDR committee were, assistant principal [redacted] as the principal designee; Ms. [redacted], special education teacher; Ms. [redacted], regular education teacher; Dr. [redacted], school psychologist; Ms. [redacted], special education coordinator; and Mr. and Mrs. [redacted], parents. LEA Exh. 2, B1.

The parents also argue a procedural error occurred because the school psychologist MDR committee member left before the MDR committee meeting concluded.

Dr. [redacted] remained in the MDR meeting for one hour and 45 minutes ("1.75 hours"). (Tr. 169, 173). She left before the meeting adjourned to attend a prior

engagement for which she was already late; however, during the 1.75 hours she attended the meeting she was present when Ms. [redacted] was called in to describe what happened on the day of the incident. (Tr. 173). She also was there to answer the facilitator's two questions: (1) was the conduct caused by, or did it have a direct and substantial relationship to the child's disability; or (2) was the conduct a direct result of the LEA's failure to implement the IEP. Dr. [redacted] gave her opinion that the conduct was not caused by the disability OHI/ADHD because she believed [redacted]'s conduct was not an impulse as he had premeditated it. (Tr. 173). As a result of what she heard, Dr. [redacted] concluded the IEP had been implemented in a reasonable way considering Ms. [redacted] had other students with her and was walking them to the cafeteria when the threat occurred. (Tr. 173, 175-177). Dr. [redacted] also was present and heard Dr. [redacted]'s input concerning [redacted]'s diagnosis of a bipolar disorder. Dr. [redacted] recalls Dr. [redacted] spoke for about five minutes and stated he was treating [redacted] for bipolar disorder. At the time of the March 21, 2008 MDR committee meeting, Dr. [redacted] had seen no formal written diagnosis or treatment notes for the bipolar diagnosis. (Tr. 174).

The hearing officer does not find any evidence contradicting Dr. [redacted]'s testimony that she stayed 1.75 hours, heard the presentations of Ms. [redacted] and Dr. [redacted] and she was also there and answered when Ms. [redacted] asked the questions concerning whether the conduct was caused by the disability, and if the IEP was implemented. Considering the above, the hearing officer does not find that Dr. [redacted]'s leaving the meeting before it adjourned was a procedural error. In the alternative, even if the early departure constitutes a procedural error, the hearing office finds that it was

harmless.

Applicable law also requires the MDR committee to 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. 34 CFR Section 300.530 (e)(1).

Regarding the consideration of information, Dr. testified that she reviewed psychological reports of the child from pre-school, psychological and educational reports from testing conducted March 2003, psychological intelligence testing by Psychotherapy conducted on January 29, 2007, and achievement testing by Pendelton Child Development Center and IEPs. (Tr. 170).

Ms. focused on 's ADHD to make her decision whether there was a causal relationship at the meeting. She only remembers focusing on the BIP part of the IEP. (Tr. 229). What convinced her that his actions were not a manifestation of the ADHD is that she recalls a situation where had gone to the library by mistake instead of the resource room. The library was an unstructured setting; however, he controlled himself and did not misbehave even though he had the opportunity to do so. (Tr. 254). After listening to Ms. explain how she handled the situation, Ms.

believed the BIP had been implemented. (Tr. 255). Ms. does recall Dr. telephoning in and stating he was treating the child for bipolar disorder.

Ms. also recalled Dr. mentioned he had been treating the child for bipolar disorder. When Ms. reached her decision regarding the manifestation determination she based it on the child's ADHD diagnosis. (Tr. 300-301).

Ms. testified that the MDR committee reviewed the most recent eligibility



minutes from the June 7, 2006 eligibility committee meeting and evaluations contained in [redacted] 's recent eligibility documentation. She also testified that the MDR committee reviewed the child's IEP and current series of IEP meetings, observations from teachers, and statement from [redacted] the he was trying to scare the kid. (Tr. 672, 755-756, 762-767).

Accordingly, the hearing officer finds the MDR committee considered the following:

- (i) Documentation regarding the child's current IEP, to include the BIP, and Documentations from IEP meetings on March 3, 2008; February 1, 2008; January 15, 22, 2008; December 13, 2007; October 18, 2007; August 30, 2007; May 15, 31 2007; January 15, 2008;
- (ii) Eligibility documentation concerning the child's triennial review in 2006 to determine his continual eligibility to include the eligibility meeting minutes and evaluations - January 2007 Psychological Achievement evaluation from Psychotherapy, Educational Evaluation with test date of April 13, 2005, and 2003 Psychological and educational report by the LEA;
- (iii) Observations as reported by teachers;
- (iv) Ms. [redacted] 's factual account of what occurred on March 12, 2008, causing the child's suspension;
- (v) Dr. [redacted] 's comments about the child's bipolar diagnosis and treatment for it;
- (vi) The child's statement regarding the conduct in question; and
- (vii) Input from the parents.

(Tr. 170, 672, 755-756, 762-767).

The MDR committee did not consider eligibility minutes and documentation from the child's initial eligibility meeting wherein [redacted] was found eligible under the

category of emotional disturbance. (Tr. 757).

The MDR committee also did not review the psychological report and FBA of Dr.

On January 24, 2008, as a result of the parents' January 2008 request for the FBA, Dr. observed in his physical education ("P.E.") class and social studies class; she also interviewed 's English and math teachers on February 29, 2008, and caused the child's English, social studies, and science teachers to complete Behavior Rating Scales.<sup>8</sup> P Exh. 2, B-2. Also, as a result of the parents' January 2008 request for psychological intelligence testing, Dr. conducted intelligence testing of on March 3, 2008. Dr. 's testing included looking at the child's social component. (Tr. 167).

The results of Dr. 's FBA assessment showed that the teachers rated as having difficulty controlling his anger. Dr. then opined that had difficulties with anger control and emotional self-control. (Tr. 158). After assessing , Dr. opined that emotional disturbance would be a more appropriate classification of 's disability. (Tr. 158, 165). Dr. concluded from her FBA and review of the neuropsychological evaluation conducted by Dr.

, which is discussed infra, that is bright and has high average intelligence with strengths in mechanical reasoning and verbal concepts. He has difficulty with emotionally modulating in situations that may challenge him due to his deficiency in

---

<sup>8</sup> The psychological report of Dr. scales. P Exh. 2, B-2.

does not indicate when the teachers completed the behavior

executive functioning. She also concluded that social situations are challenging for [redacted] and that this deficit impacts on his functioning with peers and teachers. She also noted that testing shows he has attention deficits. (Tr.161-163). Dr. [redacted] also concluded that the child's deregulation makes it hard for him to make good decisions. (Tr. 168-169).

The MDR committee also did not review the neuropsychological report of Dr. [redacted].

Dr. [redacted] conducted testing of [redacted] on March 10, 2008. Her testing and evaluation focused on the child's executive functioning; that is, the child's emotional control, ability to problem solve and control his emotions. As part of her evaluation she had three of the child's teachers and Mrs. [redacted] complete behavior rating inventories. Mrs. [redacted] and the child's social studies teacher, Ms. [redacted], completed their inventories on March 10, 2008. The child's English teacher, Ms. [redacted], and orchestra teacher, Ms. [redacted], completed their behavior inventories on March 12, 2008. P. Exh. 2, B-3. Based on Dr. [redacted]'s evaluation, she found [redacted] had executive functioning deficits and found he had deficits in being able to modulate in situations of shifting from one situation to another. (Tr. 167-168). Dr. [redacted]'s report indicated that the assessment reveals the child has consistent evidence of impairment in aspects of executive functioning consistent with his behavioral history and will prove academically relevant. P. Exh. 2, B-3.

Behavior inventories also indicated that the child has difficulty performing one activity and shifting to another, to include a behavioral incident wherein he is involved in

an inappropriate response. Dr. \_\_\_\_\_ concluded from those inventories that \_\_\_\_\_ has a break down in his executive functioning. Although Dr. \_\_\_\_\_ was not tasked to diagnose \_\_\_\_\_ with bipolar disorder, she concluded her evaluation did show that the child's deficits in executive functioning are consistent with the diagnosis of bipolar disorder. (Tr. 99).

The hearing officer finds that the reports of Dr. \_\_\_\_\_ and Dr. \_\_\_\_\_ should have been reviewed by the MDR committee in whole or in part by means of written submission or oral submission. A review of the reports by the hearing officer reveals their contents are substantially relevant to the child's emotional disturbance/bipolar disability or suspected disability.

The hearing officer notes that classroom observations took place as early as January 24, 2008, and that teacher interviews took place on February 29, 2008. Those interviews indicated, among other findings, that less structured environments such as hallways and the cafeteria and interpersonal relationships with peers proved more challenging to \_\_\_\_\_. Moreover, the LEA had at its fingertips, in whole or in part, psychological and neuropsychological testing results, behavior rating inventories and scales, and information from interviews conducted by the school psychologist with teachers of \_\_\_\_\_, that shed enormous light on the child's emotion disturbance disability or suspected disability. None of that information was reported to or discussed by the MDR committee members nor did the LEA make any effort to provide it to the MDR committee for the hearing. No effort was made by the LEA to expedite the evaluation process either before or after the child's suspension on March 13, 2008.

Further, the evidence shows that the LEA made no effort to canvass the psychologists to obtain the information showing the child had deficits in his executive functioning that could impact his ability to behave appropriately. The hearing officer notes that Dr.

was not invited to the MDR committee meeting. The hearing officer is cognizant of the fact that the LEA can select its MDR committee members. However, the MDR committee has a duty to review relevant information about the child. Prudence dictates that the source of that relevant information should be considered when selecting the committee members. Moreover, even though Dr. was in attendance at the MDR committee meeting, she provided no information on her psychological evaluation and FBA. The hearing officer finds that the LEA in effect had in the child's file crucial information and the LEA did not consider this relevant information. This non-compliance is a procedural error.

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (1) impede the child's right to a FAPE; (2) significantly impedes the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the parents' child; or (3) cause a deprivation of educational benefits. 20 U.S.C. Section 1415 (f)(3)(E)(ii), see also M.M. ex. rel. D.M. v. School District of Greenville County, 303 F.3d 523, 533 4<sup>th</sup> Cir. 2002. The hearing officer finds the LEA's failure to review the psychological reports impeded the child's right to FAPE. As discussed previously herein, the LEA had knowledge of the child's emotional disturbance/bipolar disability. The reports from Dr. and Dr. illustrate the child had deficits in executive functioning which were

consistent with a diagnosis of bipolar disorder. Findings also note the child has difficulty shifting from one situation to the other, to include behavior incidents where he is involved in inappropriate behavior, similar to the one that occurred on March 12, 2008.

Had these reports been shared with and reviewed by the MDR committee a causal relationship between his bipolar disorder and the conduct is likely to have been found. Since the MDR committee found no direct manifestation of the disability, the child was suspended long-term and for a period of time received no services.

Accordingly, the hearing officer finds as a result of the procedural error, the child has been deprived of educational benefits.

Moreover, the hearing officer notes that under the "child find" provisions of IDEA, the state or LEA has an affirmative duty to identify locate, and evaluate children with disabilities residing in state. 34 CFR Section 300.111. The child find provisions apply to, among others, children suspected of having a disability and in need of special education services. 103 LRP 36798.

The LEA had reason to suspect [redacted] had an emotional disturbance disability for the reasons previously enumerated herein. [redacted] was therefore covered by the protections afforded in 34 CFR Section 300.534.

The hearing officer has also considered the demeanor of witnesses in her deliberations and as such is further persuaded that the LEA should have considered the child's reported diagnosis of bipolar disorder as a suspected emotional disturbance disability. The conclusion is bolstered by the school psychologist's demeanor while testifying. The hearing officer notes that at times, Dr. [redacted] responded to some

questioning regarding the manifestation determination with hesitancy and facial expressions that conveyed a desire to revisit the MDR determination. In fact, when asked by counsel for the LEA if there was anything now that changed her (Dr.       's) mind about the MDR decision, Dr.       hesitated in responding and then stated that there was no place that says during the manifestation review that the committee can stop and go to eligibility. Dr.       then stated "And I do wonder about his classification of ADHD." (Tr. 177-178).

Accordingly, considering the above, the hearing officer finds the MDR committee erred when it failed to review the reports, data, and or information from Dr.       's FBA and psychological evaluation and Dr.       's neuropsychological evaluation. Further the hearing officer finds for the reasons stated herein that the procedural error was substantial and denied the child educational benefit.

LEA contends the parents withheld the child from one evaluation and presumably argues the with-holding rebuts its knowledge of the child's suspected disability. Evidence of record suggests that on April 21, 2008, Mrs.       wrote a note to the special education administrator at SMS indicating she would not allow the child to be further evaluated for the speech and language assessment until the LEA provided her with the prior notice resulting from the April 14, 2008 IEP meeting. The hearing officer notes that the LEA's knowledge of the suspected disability concerning the MDR committee meeting was relevant on March 21, 2008, a month before the LEA contends the parent withheld the child from the speech and language testing. Further, the hearing officer notes that by April 21, 2008, the parent had produced the child for Psychological (Intelligence) and

Educational testing, the Neuropsychological testing, Occupational Therapy Evaluation, and the initial testing for the Comprehensive Speech and Language testing. Moreover, the hearing officer notes that the Speech/Language Assessment Report shows was further evaluated for testing on April 28, 2008, a week after he was originally scheduled to complete the speech and language test and approximately the same amount of time it took the LEA to provide the parent with the prior notice of the April 14, 2008 IEP meeting. Assuming the action of the parent to be as represented by the LEA, the hearing officer does not condone the parents' action but finds the LEA has not been harmed.

**C. WAS THE INDIVIDUAL EDUCATION PROGRAM (“IEP”) APPROPRIATE?**

A “reasonableness” standard governs the provision of special education to eligible students with disabilities. Board of Educ. Of Hendrick Hudson Central Sch. Dist. V. Rowley, 5553 IDELR 656, 458 U.S. 176, 189 (1982). Moreover, an IEP must be judged as to its appropriateness at the time that it is written, and not with respect to subsequently obtained information about the student. Roland M. v. Concord Sch. Committee, 16 IDELR 1129, 910 F.2d 983, 992 (1<sup>st</sup> Cir. 1990), cert. denied, 111 S.Ct. 1122, 133 L.Ed 2d 230 (1991) (“an IEP is a snapshot, not a retrospective,” and “must take into account what was objectively reasonable at the time the IEP was drafted.”).

The parties did not dispute that the child’s current IEP at the time of the March 12, 2008 conduct leading to the long term suspension was the August 30, 2007 IEP. That IEP’s “Present Levels of Academic and Functional Performance” incorporated the ones



from the May 31, 2007 IEP. On January 15, 2008, the August 30, 2007 IEP was amended by changing the child's goals and math class and by adding the Salem Bell study hall service. LEA Exh. 4, D 73-82; also see HO Exh. 19 (parents' rebuttal letter).

The "Present Levels of Academic and Functional Performance" section of the current IEP notes in pertinent part the following:

(i) is having adaptive behavior problems getting along and relating to most of his peers;

(ii) His social and emotional progress is inconsistent and is characterized by his, (1) having difficulty with peers and sometimes adults, (2) not being able to function as well in larger settings, (3) not being able to make and keep friends because he engages in inappropriate behavior such as name calling - making inappropriate remarks - not staying in his personal space, being silly and impulsive throughout the day, (4) having difficulty following school rules and needing constant monitoring by teachers in this area, and (5) needing constant reminders of problem solving steps such as ignore, move away, ask politely, ask firmly, give warning and tell a responsible adult;

(iii) has trouble following rules also on the bus and in the cafeteria and after being spoken to about not following the rules, he appears to have no regret for his behavior usually stating he does not understand why he can not do something or questioning why the school has rules and how he does not agree with them;

(iv) As of May 15, 2007, regarding his academic behavior, was having difficulty staying on task and completing his work. The input also noted that when he is absent or late, he does not take the responsibility to see what he has missed and tends to do the least amount of work in order to finish an assignment. On May 31, 2007, it was further noted that his academics remained on grade level and currently was receiving Science and Social Studies instruction within a regular education gifted cluster classroom on a trial basis as decided by the IEP team meeting and that it was too early to note progress. However comments indicated that within the two weeks he had begun receiving instruction in the regular education gifted structure, he was cooperating with peers and getting along with them. Notations were made on May 31, 2007, that continues to struggle to act appropriately in unstructured settings such as PE, lunch, and bus and that he has not always come to class regularly due to going home early or not feeling well.

LEA Exh. 4, D120, 123.

Accordingly, the hearing officer finds the child's needs as of August 30, 2007, were in the area of monitoring the child in unstructured environments such as the bus, cafeteria, bathroom, hallway. Further, the hearing officer finds the child needs to acquire age appropriate social skills to enable him to get along with others including authority figures/adults and peers. Moreover, the child needs to improve work/study habits in class and at home to enable him to complete tasks, take responsibility or the initiative to obtain assignments he missed in his absence, promptly report to class and remain at school the entire school day, and stay on task.

The child's annual goals and corresponding objectives to those goals as set forth on the current IEP are stated as follows:

#1 Annual Goal: Organizational

(i) By 02/01/2008, \_\_\_\_\_ will demonstrate the use of organizational skills, identified in the objective, that will lead to independent self management/work habits; and

#2 Annual Goal: Study Skills

(ii) By 02/01/2008, \_\_\_\_\_ will demonstrate the use of study skills to be successful in all academic areas as stated on the objectives of this goal.

Objectives/Benchmarks

Objectives/Benchmark # 1 Study Skills 1

(i) By 02/01/2008, \_\_\_\_\_ will review study guides, class-work and notes with direct instruction/support before all core area tests; and

(ii) By 02/01/2008, \_\_\_\_\_ will organize class notes, projects and assignments with direct instruction/support to easily access information needed to study.

LEA Exh. 4, D 76-78.

A review of the above listed goals shows while they do address some of 's needs as indicated in the present levels of functioning section of the IEP such as the need to improve work/study habits at home and at school, they do not address the child's difficulties with social functioning and behaving in unstructured environments such as the hallway, cafeteria, or bus. Likewise, a review of the services offered on the current IEP shows a focus on study skills only. LEA Exh. 4, D 79.

The formulated current IEP also contains a BIP. LEA Exh. 4, D 111. As previously mentioned, the present levels of functioning noted deficits in 's behavior in unstructured environments. An examination of the BIP shows no specific prevention activities and or intervention strategies to address the child's difficulties in behaving in unstructured environments. Moreover, no annual goals address the child's social and adaptive skills.

Moreover, the hearing officer finds the present level of assessment and functioning contradictory to the child's placement in advanced classes. The May 31, 2007 IEP reports in the social/emotional section that the child performs better in smaller settings both academically and socially. LEA Exh. 4, D 120. However, the August 30, 2007 IEP that incorporated the levels of functioning set forth in the May 31, 2007 IEP placed the child in advanced English, advanced Science, and regular Social Studies, presumably with each of these classes having the typical size teacher student ratio of 1 to 25- 28.

Further, the hearing officer finds that even though the child has been and

continues to have emotional and social difficulties, no current assessment of his emotional ability existed at the time the IEP team formulated the child's educational program.

Accordingly, the hearing officer finds the child's current IEP is not appropriate and therefore does not provide the child a FAPE because the goals and objectives fail to address the child's social and adaptive needs, and because no current assessments or evaluations were obtained and utilized at the time the IEP was implemented.

The special education coordinator, Ms. \_\_\_\_\_, contends the "Social Skills" goal(s) set forth in the child's August 30, 2007 IEP is the current goal of the child. (Tr. 706-707). The evidence shows otherwise. A prior notice signed by the parent on January 15, 2008, wherein the parents agreed to changes in the child's goals and math class was submitted by the LEA and received as evidence at the hearing. The prior notice states the child's goals were changed. LEA Exh. 4, D 73, 82. Those new goals, as noted previously herein, pertained to study and organizational skills. LEA Exh. 4, D 76-78. Documentation regarding the January 15, 2008 IEP meeting also indicates the parties agreed to the Salem Bell study block and that the changes to the August 30, 2007 IEP were implemented. Those changes were to the goals and the child's math class which was changed from a resource math class to a regular math class. Moreover, as noted previously the child was given a 25 minute study hall.

Assuming, in arguing however, that the January IEP meeting did not change the goals of the August 30, 2007 IEP as asserted by the special education coordinator, the hearing officer examines below the appropriateness of that "unmodified August 2007

IEP.”

The pertinent portions of the “Present Level of Academic and Functional Performance” section of the unmodified August 30, 2007 IEP remain as previously stated herein. The unmodified August 30, 2007 IEP indicates the child needs are the same as those shown in the modified August 30, 2007 IEP and discussed previously herein.

The child’s needs included the necessity to monitor him in unstructured environments as well as the child’s need to obtain age appropriate social skills and appropriate work/study habits.

The child was placed in core social studies, advanced English and science, and resource math at the beginning of the 2007-2008 school year. The child’s annual goals and corresponding objections to those goals as set forth in the unmodified August 30, 2007 IEP are stated as follows:

#1 Annual Goal: Social Skills

By 02/01/2008, will make progress toward appropriate social skills.

Objectives/Benchmark # 1 Follow directions

(i) By 02/01/2008, will follow directions with no more than two teacher prompts;

Objectives/Benchmark # 2 Remain on task

(ii) By 02/01/2008, will remain on task throughout the instructional day;

Objectives/Benchmark # 3 Get along with peers

(iii) By 02/01/2008, will get along with peers in a respectful manner.

Objectives/Benchmark # 4 Problem Solving

(iv) By 02/01/2008, will follow his problem solving steps (1. Ignore, 2. Move away, 3. Ask politely, 4. Ask firmly, 5. Give warning, 6. Tell a

responsible adult).

LEA Exh. 4, D 125.

A review of the unmodified August 30, 2007 IEP shows the goals, objectives, benchmarks and BIP do not adequately address the child's behavior problems in unstructured environments such as the hallway, cafeteria, or bus. Below, the hearing officer takes notice of some inappropriate behaviors of [redacted] in unstructured environments during the 2007-2008 school year.

[redacted] was in the hallway, when he violated the school's code of conduct on March 12, 2008, and threatened to kill a student. He received a long-term suspension which is the subject of the due process proceeding before the hearing officer.

[redacted] was in the cafeteria when he disrespected the security assistant on March 5, 2008 and received a one day school suspension. (Tr. 573-574). That conduct led to his receiving another one day suspension when he threatened office staff.

Ms. [redacted] 's advance science teacher testified she had behavior problems out of [redacted] when he was in her unstructured Salem Bell and in the hallway. (Tr. 298-299). [redacted], for example, would not stay in his seat during Salem Bell and picked on other students. Reportedly, [redacted] 's parents took him out of the Choices Program, a program teaching students how to deal with challenges, because [redacted] was bothering other students in the bathroom during breaks. (Tr. 589).

The aforementioned examples of [redacted] 's inappropriate behaviors in unstructured settings show the IEP needs to provide specific ways to monitor and

improve [redacted]'s behavior in unstructured environments. Accordingly, the hearing officer finds the unmodified August 30, 2007 IEP is also deficient in that it does not adequately address the child's need for monitoring in such environments.

The hearing officer also finds regarding the unmodified August 30, 2007 IEP that even though the child was having emotional and social difficulties at the time the 2007 IEP was drafted, there was no current assessment of his emotional ability as it existed at the time. Accordingly, the hearing officer finds even the unmodified August 30, 2007 IEP is inappropriate and denied the child a FAPE.

**D. DID THE LEA FOLLOW THE CHILD'S IEP AND BIP?**

The parents contend the LEA did not follow the child's IEP and BIP.

As previously noted the child's IEP goals as of January 2008, focused on [redacted]'s organizational and study skills. [redacted]'s IEP also provided for the service of a daily 25 minute study block known as Salem Bell, wherein [redacted] would receive one on one assistance toward reaching the goals. (Tr. 341).

Initially the child's science teacher Ms. [redacted] monitored the Salem Bell study block. The class size was small. The child had behavior problems such as bothering other students, tapping students, not staying in his seat, and not doing his work. Ms. [redacted] was familiar with the BIP and utilized strategies by refocusing the child, giving positive behavior reinforcement, monitoring [redacted] and refocusing him. (Tr. 294-299).

Ms. [redacted] then became the child's Salem Bell teacher. She worked with [redacted] one on one, on a daily basis. Assistance provided included helping [redacted] with work Ms. [redacted] received from his teachers and or make up work [redacted] would

bring with him.                    was not always able to complete the work during the study block. Ms.                    also worked with                    on test taking strategies. The study block was also a time that                    could talk about matters he desired to discuss. (Tr. 214, 241, 247-250). Ms.                    was familiar with the BIP. And although                    was usually not a behavior problem in the study block, she did use several strategies from the BIP such as speaking to him in a calm voice and redirecting him when helping him with his studies. (Tr. 217-218).

Ms.                    taught the child social studies in a regular structured classroom with mostly students considered advanced. The structure consisted of a visual agenda for each class, handouts, and a table of contents for the students. There were planners for the students to write their homework assignments down on. (Tr. 325). She was familiar with the child's IEP and had familiarized herself with his BIP two weeks into the school year.

                  got along with other students in the class. The child, however, maintained a D average in her class, mainly because he failed to consistently do homework assignments and prepare for tests. (Tr. 313-14, 319). The child's academic progress in the class was also impacted by his being tardy and/or missing class which resulted in his not completing class assignments. (Tr. 321-322). When off task, she would quietly cue him usually by putting her hand on his desk and touching the paper he was supposed to be working on. (Tr. 314). When he worked in groups, she often redirected him to the purpose of the assignment. (Tr. 323).

                  ("                    ") was the child's advanced English teacher. (Tr. 334). She described the class as being very structured. (Tr. 349-350). She had been familiar



with the child's BIP since the early part of the school year and his diagnosis of ADHD. In February or March of 2008, she became familiar with his being diagnosed with bipolar disorder. Overall the child did not have behavior problems in her class. He did poorly academically because he did not complete homework and assignments and goofed off in class and lacked some basic skills. (Tr. 335, 337). There was however one incident that resulted in a referral. Prior to the referral, the teacher called the child out in the hallway and spoke to him about the inappropriateness of some gestures he made in class. Subsequently, other students came to her at the end of the class and reported engaged in inappropriate conduct involving a sexual innuendo; Ms. wrote up the incident on a referral. (Tr. 342-343). also reported the child had problems goofing off when he worked in groups of 3-4 students. (Tr. 337, 343). She modified his group size to two persons which corrected the behavior problem. (Tr. 335). reported that the parent had informed her that at times there were things going on at home that prevented the child from doing his homework. (Tr. 348). E-mails in evidence indicates Ms. made regular contact with the parents. LEA Exh. 6.

(" ") was the child's regular physical education teacher. She became aware of child's BIP late September 2007 or early October 2007. (Tr. 362). Upon receipt of the BIP, Ms. assigned the child to preferential seating. The child usually had no behavior problems; however, at times she needed to use reinforcement techniques. (Tr. 356-57). Ms. also received from the LEA a copy of the accommodation/modifications page from the child's May 31, 2007 IEP. LEA Exh. 4, D 126. She, however, never received a copy of the child's current IEP in its entirety.

(Tr. 365-66). Ms. [REDACTED] stated she did not know the child's disability. (Tr. 368).

Ms. [REDACTED] was the child's orchestra teacher and she was familiar with his BIP and understood his disability labels were Bipolar, ADHD, and OD. (Tr. 374). Techniques and strategies she regularly used with the child to foster appropriate behavior included speaking to him and encouraging him before he entered the classroom, reminding him of what was expected, having problem solving techniques posted in the class on how a person should respond appropriately, and redirecting the child when off task to get him on task. (Tr. 375). Ms. [REDACTED] experienced difficulty redirecting the child at times. (Tr. 400).

Having considered the IEP, the testimony of the child's teachers and case manager, the hearing officer finds the teachers' testimonies credible and find the IEP and BIP were followed.

**E. WAS THE FBA APPROPRIATE AND WAS IT FOLLOWED?**

A student with a disability who is removed from his current placement for more than ten consecutive school days for behavior not determined to be a manifestation of his disability must "receive, as appropriate, a functional behavior assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so it does not recur." 34 CFR Section 300.530(d)(ii).

The hearing officer previously found herein that the manifestation determination was wrongly determined. However, approximately three months ago, the LEA found [REDACTED]'s conduct was not a manifestation of his OHI/ADHD disability. After making that determination, pursuant to the above-cited applicable law, the LEA was required to

conduct, as appropriate, a FBA of the child and to formulate behavior interventions and modifications designed to address the behavior with the goal of precluding any recurrence of the conduct. Id.

The only FBA in evidence is the one conducted by school psychologist Dr. [REDACTED] with a test date of March 3, 2008. P Exh. 2, B2. As of April 30, 2008, the LEA conceded it ceased working on the child's IEP to include modifying the IEP's BIP. Accordingly, although a FBA was conducted prior to or at the time of the conduct in question, it has not been updated. Neither has any of its recommendations been employed to modify the child's current BIP.

The hearing officer finds a FBA is appropriate in this case considering that the child's IEP has contained a BIP since the beginning of the 2007-2008 school year. However, that BIP did not preclude the student from obtaining at least 16 referrals for violating the student code of conduct during the 2007-2008 school year of which six have been held in abeyance and 12 have resulted in the child being disciplined. The infractions for which the child was disciplined, including the March 12, 2008 incident, are set forth below:

<u>Date of Incident</u>	<u>Description of Incident</u>	<u>Discipline</u>
9/21/07	Misrepresentation	Saturday School (9/22/07)
10/18/07	Obscene language had both his hands under his shirt with his fingers pointed outward imitating breasts. After his teacher spoke with him in the hall about these inappropriate actions, he reentered the	ISS

class and started making lewd gestures to other students by moving his hand up and down his pencil.

10/29/07	Class Disruption was a continual class disruption. He acted with defiance and spoke disrespectfully to his teacher. Appealed two times by parents and the original discipline of 1 day ISS was changed to 1 day Saturday detention.	Saturday School
11/16/07	Tardiness to school	Verbal warning
11/17/07	Unexcused detention absence. Did not attend Saturday school so it was rescheduled.	12/01/07
12/1/07	Detention refusal.	ISS 1 day 12/4/07
12/1/07	Detention refusal. Failure to show for Saturday detention on 12/1/07.	12/8/07
12/10/08	Class Disruption (referring to work, walking out of classroom without permission, making inappropriate noises, making an inappropriate gesture to teacher)	In School Suspension (ISS) 12/12/07
12/12/07	Unexcused tardy to school.	Saturday School 12/15/07
12/14/07	Defiance 1 day ISS. Acting and making inappropriate statements during class and being defiant to teacher.	12/17/07
2/5/08	Physical assault and battery/harassment While the teacher was instructing the class yelled out of nowhere, "Then STOP messing with ME, MAN!" When taken out in the hall to discuss the matter stated that the other student was	2/6/08 OSS 10 days

breathing loud and wouldn't stop so punched him.

- |         |  |   |
|---------|--|---|
| 3/5/08  | Threatening staff. Speaking in a threatening manner and speaking inappropriately to Secretarial staff in the office.   | 3/10/08 OSS 1 day   |
| 3/5/08  | Disrespect. After being told breakfast was over he told the security assistant she was wrong and this is bullshit.   | 3/11/08 OSS 1 day   |
| 3/12/08 | Threaten student. On the way to lunch [redacted] was loudly announcing to the students that he was "pissed off." He claimed the only reason he was OSS was due to another student and that he was "gonna kill that little boy." "I'm gonna kill him." He said, "I beat him up, I'll beat him up." The teacher asked to stop talking and he continued his threat. | 3/13/08<br>Recommended suspension. Parent telephoned by assistant principal and instructed to pick up child and consider him suspended. |

LEA Exh. 3, C 28 -29; (Tr. 570-578).

Moreover, the child's inappropriate behaviors and violations of the student code of conduct had escalated by March 12, 2008, and the child's behavior had become in the words of the assistant principal "erratic and unpredictable." LEA Exh. 3, C 18. Moreover, the LEA had determined the child's behavior represents a pattern of making threats. (Tr. 788). Clearly, the evidence shows a FBA is appropriate in [redacted]'s case.

As referenced above, Dr. [redacted] did conduct a FBA that included observing the child in class in January 2008, conducting teacher interviews in February 2008, and obtaining behavior rating scales from the child's teachers. P Exh. 2, B-2. The report shows a test date of March 3, 2008. The evidence does not show the FBA has been updated to include the evaluations or considerations of the evaluations requested by the

parents which were written or made available after the MDR committee meeting. Neither did the FBA include a review of the April 1, 2008 letter report from the child's treating psychologist. Although the eligibility committee or IEP team did meet to review test results on or about April 21, 2008, no behavior intervention services and modifications were designed to address the behavior violation so the conduct does not recur as mandated by 34 CFR Section 300.530(d)(ii). The committee did not modify the BIP at its April 30, 2008 IEP meeting either.

The hearing officer therefore finds that the FBA is inappropriate for several reasons. Additional evaluations, to include the Neuropsychological Report of Dr.

addressing the child's deficits in executive functioning/emotionality ability were not considered when the assessment was made. Moreover, the measures employed to obtain the FBA predated the child's March 12, 2008 conduct, in some instances by six weeks. The child's treating psychologist's April 1 2008, letter addressing the child's comorbid diagnosis and behaviors was not in existence for consideration when the FBA was conducted and recommendations made. Moreover, the hearing officer finds even after Dr. completed her FBA and it was presented to the IEP committee, no behavioral intervention services and modifications were designed to address the behavior to preclude recurrence.

**F. DID THE LEA OFFER APPROPRIATE SERVICES AFTER MARCH 13, 2008**

From April 1-17, 2008, the parents' request for a due process hearing proceeded on an expedited basis. H.O. Exh. 23. Applicable regulation requires the LEA to hold a

resolution meeting within seven days of a request for an expedited due process hearing. 34 CFR Section 300.532(c). Discussions regarding offers of services for [redacted] to resolve the matter would be appropriate in such a setting. The evidence shows that the LEA held the resolution session on April 7, 2008, and made certain offers to provide services; however, the parties were unable to settle the matter. The hearing officer finds the offer of services, to include offering homebound services, was appropriate in the context of settlement discussions during a resolution session.

The Hearing officer next examines whether the services contemplated by 34 CFR 300.530(d) were offered by the LEA after March 13, 2008. The parents contend appropriate services were not offered; the LEA asserts appropriate services were tendered, or alternatively, offered for all but three days.

The LEA contends after the MDR committee meeting on March 21, 2008, it was prepared to offer home based services, but the parents, acting on the advice of their advocate, [redacted], refused to meet. The parents deny any refusal and provided, in addition to other evidence, an affidavit from their advocate in support of their assertion.

In that affidavit, the advocate states she was retained by the parents for the MDR committee meeting only and that after the lengthy MDR committee meeting<sup>9</sup> concluded, the assistant principal stated that an IEP meeting needed to occur to change [redacted]'s placement to home based services for three days because the discipline hearing scheduled by the OSL would take place beyond the ten day rule. The advocate goes on to state that

---

<sup>9</sup> According to the advocate's affidavit, the MDR committee meeting lasted 2..5 hours. 19, Aff. [redacted], April 18, 2008.

she advised the parents she needed to attend an IEP meeting regarding home based services but, she (Ms. ) would be unavailable for the meeting. The affidavit continues and states that "Mrs. (the special education coordinator) reported that Mrs. and Mr. participated in an IEP meeting after the discipline hearing and that I (the advocate) advised them not to agree to or sign an IEP for homebound. This information is in correct...., I deny Mrs. 's purposeful false allegations documented by Mrs. to the hearing officer." H.O. Exh. 19, Aff. , April 18, 2008. (parentheticals added).

Under applicable law the IEP team determines the appropriate services for a child with a disability whose removal is a change in placement due to a disciplinary action. 34 CFR Section 300.530(d)(5). Before his suspension on March 12, 2008, received his educational instruction in regular education classes at . Therefore, his IEP team must include at least one regular education teacher. 34 CFR Section 300.321(a). The special education coordinator testified that after the MDR committee meeting, the general education teachers were released to return to their classes. (Tr. 691). Her testimony is corroborated by Mrs. 's recollection of what occurred immediately following the MDR committee meeting. Mrs. testified that after the MDR committee meeting she asked Ms. about the homebound services and was told by Ms. "...we're out of time and the teachers have gone back to class and Dr. has already left." (Tr. 842-843) (Mrs. quoting Ms. ). The hearing officer notes that Ms. did testify that the parents had been offered home based



however, the hearing officer finds Ms. [redacted]' testimony contradictory, vague, and unpersuasive regarding what home based services were offered and what actions were taken by the LEA to effectuate the child's receipt of homebound services. (Tr. 464-476). The hearing officer therefore affords little weight to that testimony.

Considering the affidavit and the testimony of the special education coordinator, the parent, and Ms. [redacted], the hearing officer finds (1) the MDR committee meeting went on longer than expected or planned by the LEA and (2) after that meeting, some of the necessary participants for the IEP meeting were no longer available, and (3) the special education administrator, Ms. [redacted], determined she could not hold an IEP meeting to determine services for [redacted] at that time.

Accordingly, the hearing officer finds the parents did not refuse an offer for [redacted] to receive homebound services for the remainder of the school year on March 21, 2008. Neither did they refuse to meet on March 21, 2008, immediately after the MDR committee meeting, to address [redacted] receiving homebound services.

The LEA contends also that at an IEP meeting on April 14, 2008, the IEP team offered [redacted] services at [redacted] after it was determined the [redacted] could provide those services. (Tr. 444). The hearing officer notes that documentation of the April 14, 2008, IEP meeting is lacking and contains inaccuracies, confusing language and or omissions. See LEA Exh. 5, D 157-159. Ms. [redacted] testified that while the first page of that IEP meeting documentation reflects a date of April 21, 2008, the correct date is April 14, 2008. Further the documentation does not reflect who attended the meeting. While there was testimony at the hearing indicating that the special education coordinator, the

principal designee, the parent and child, and the special education teacher attended the meeting, the evidence does not indicate what, if any, general education teacher attended the meeting. As previously noted, applicable law requires that a regular education teacher be a member of \_\_\_\_\_'s IEP team. See 20 USC 1414(d)(1)(B), see also 34 CFR Section 300.321(a). The absence of the regular education teacher from the IEP team is more than a minor error considering all of the child's classes were in the general and regular educational setting.

Although Ms. \_\_\_\_\_ testified that the IEP team determined the \_\_\_\_\_ was appropriate for \_\_\_\_\_ to receive his services, Ms. \_\_\_\_\_, \_\_\_\_\_'s special education case manager testified that she only remembered "bits and pieces" about the meeting. (Tr. 288). She did not shed light on what occurred at the meeting, to include divulging if there was any input from a general education teacher. Moreover, those who met on April 14, 2008, did not consider the current psychological report of Dr. \_\_\_\_\_ and the neuropsychological report of Dr. \_\_\_\_\_. As discussed previously herein, those reports contain relevant information showing the child has deficits in executive functioning that adversely affect his ability to regulate his emotions and likely impact his academics. The hearing officer is not persuaded that the LEA had a legitimate reason to not consider those reports considering they existed in writing on April 14, 2008 and just one week later the IEP team met for their presentation and consideration.<sup>10</sup>

Moreover, the prior notice does not offer in writing services at \_\_\_\_\_. In the

---

<sup>10</sup> LEA contends on April 14, 2008, it did not consider the reports because they had not been presented. (Tr. 776).

“Options or Actions proposed” section of the Prior Notice, the LEA only agrees with the recommendation of the OSL for the child to attend the . Language in that section goes on to agree to a temporary change in placement to home-based services for the remainder of the school year as well as an agreement to a more restrictive placement during the next school year contingent upon the parents’ written agreement to drop the due process proceedings and waive the right to all future filings regarding the disciplinary matter. LEA Exh. 4, D 158. The hearing officer notes that the special education coordinator did testify that the April 14, 2008 meeting served the dual function of determining the appropriateness of the and attempting to resolve the case. However, the prior notice does not reflect that the LEA made a formal written offer to place the child at the . Accordingly, the hearing officer finds that the Prior Notice provided to the parents only proposes an offer of homebound services contingent upon a withdrawal of the due process proceedings. The hearing officer does note this contingent offer was made in the context of resolving the case.

Moreover, the LEA has also contended that the was not a change in placement for the child; however, the LEA did provide the parents a prior notice which suggests the LEA did in fact construe the child’s receipt of services at the as a change in placement. See LEA Exh. 4, D 158-159. Further, testimony at the hearing suggests the LEA provided the prior notice to the parents because the LEA was attempting to propose or proposing a change in the educational placement of the child.

Assuming, in arguing the matter, the LEA is correct in its assertion that the is not a change in placement, the hearing officer finds the is not an appropriate

location for receipt of services because as discussed previously herein, once the child was disciplined, a FBA was appropriate to determine the child's needs with respect to behavior interventions. 34 CFR Section 300.530(d)(ii); see also 34 CFR Section 300.324(a)(2)(i). The FBA by Dr. [redacted] was no longer appropriate for reasons previously set forth herein.

Without the FBA, the IEP team could not determine the appropriateness of services at the [redacted]. The hearing officer is mindful that under IDEA 2004 a FBA may be discretionary in some cases. Under the facts of this case, the FBA is not discretionary as it is appropriate as noted previously herein considering the child was disciplined at least 12 times and had six disciplinary infractions held in abeyance by March 12, 2008, of the school year.

The hearing officer also notes that the LEA did present testimony that the [redacted] could offer [redacted], among other services, smaller classroom sizes, a resource bell, and therapeutic services. However, the hearing officer finds the LEA's determination that the [redacted] is an appropriate location for [redacted] to receive his services premature. This is so because the members of the IEP team who met on April 14, 2008 did not include a general education teacher, evidence does not show a general education teacher had any input in the decision that the [redacted] is appropriate, members failed to consider relevant and current psychological evaluations of the child to determine what services were appropriate for the child and if those services could be offered at the [redacted], and no current FBA was before the members of the team meeting on April 14, 2008.

With respect to offers of service after March 13, 2008, the hearing officer finds (1) the LEA did not offer home base services on March 21, 2008, because it was unable to hold an IEP meeting to discuss the services, (2) services offered to resolve the due process matter on April 7, 14, 2008 were appropriate offers in the context of the parties engaging in settlement negotiations and (3) the offer to provide services at [redacted] was inappropriate for the reasons previously noted herein.

**G. DID THE LEA PROVIDE THE CHILD A FAPE?**

For the reasons previously discussed herein, the hearing officer finds the child has been denied a FAPE.

**V. DECISION AND ORDER**

The hearing officer finds all requirements of notice to the parents have been satisfied and that the school reports the child has been diagnosed with ADHD and Bipolar disorder. The child is a child with a disability as defined by applicable law 34 C.F.R. Section 300.8 and is eligible for special education and related services. Moreover, the hearing officer finds the LEA failed to provide the child with a FAPE during the 2007-2008 school year for the reasons stated previously herein.

Accordingly, the hearing officer orders the following:

- (i) The LEA is ordered to reconvene another MDR committee and review and (1) consider all relevant information, to include but not limited to, the FBA and psychological evaluation of Dr. [redacted] and Dr. [redacted] 's neuropsychological report; and (2) consider the child's bipolar disorder and his ADHD to determine if the conduct was caused by, or had a direct and substantial relationship to the child's disability;

- (ii) Formulate an appropriate IEP by utilizing current evaluative data on the child and addressing all the child's needs, to include, but not necessarily limited to the child's social, adaptive, and behavior needs;
- (iii) Conduct an appropriate FBA and implement behavioral intervention services and modifications, that are designed to address the behavior violation so it does not recur pursuant to 34 CFR Section 300.530(d)(ii); 34 CFR Section 300.324(a)(2)(i).
- (iv) Provide the child with an additional 29 days of home based services to compensate for days of services not provided from March 13 to April 30, 2008 minus any days of home based services the LEA has provided as a result of the hearing officer's order issued June 16, 2008, that order now amended by the order herein.

The hearing officer finds the Motion filed by counsel for the parent on May 18, 2008, that request certain remedies has been addressed by the hearing officer in her order. Accordingly, the motion is dismissed.

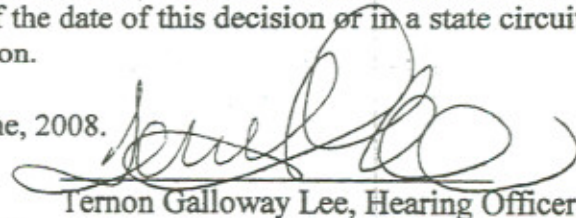
## VI. PREVAILING PARTY

The hearing office finds the prevailing party on issues 1, 2, 3, 5, and 7 set forth on pages three and four herein is the parents. The hearing officer finds the prevailing party on issue 4 set forth herein on page four is the LEA. On issue 6, the parents prevailed on the sub issue of whether services offered after March 13, 2008, pursuant to 34 CFR Section 300.530(d)(I) were appropriate and the LEA prevailed on the sub issue of whether services offered after March 13, 2008 in settlement negotiations was appropriate.

## VII. APPEAL INFORMATION

This amended decision is final and binding, unless either party appeals in a federal District court within 90 calendar days of the date of this decision or in a state circuit court within one year of the date of this decision.

Entered into this 25<sup>th</sup> day of June, 2008.



Teron Galloway Lee, Hearing Officer

cc: Kamala Lannetti, Counsel for LEA  
Lois Manes, Counsel for the parents  
and \_\_\_\_\_, parents  
\_\_\_\_\_, Dir. of Prog. For Exceptional Children  
Virginia Dept. of Education