

MAY 19 2017

Dispute Resolution &
Administrative Services

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

Re: _____, by and through his parent, _____ v.
County Public Schools (LEA)

Child & Parent(s)/Guardian:
_____, child
_____, parent(s)

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

Child's Advocate(s):
_____, _____

County Public Schools' Attorney
Patrick Andriano, Esq.
Kathleen Mehfoud, Esq.

Superintendent of _____ County Public Schools:
Dr. _____

COVER PAGE

Child/Student

Parent/Mother

Mental Health Case Worker

Dean/Dean of Students

High School/School

High School

Assistant Principal

Special Education Liaison/Special Education Expert Dr.

Exceptional Special Education Liaison

Special Education Coordinator

bovic 2021

School Counselor

General Education Teacher

aide/staff

Special Education Case Manager/Special Ed Teacher

Parent's Advocate

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Child
Parent(s)

Administrative Hearing Officer:

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Child's Advocate(s):

Advocates for Child

LEA's Attorney

Attorneys for LEA

Superintendent of LEA:

Dr. Superintendent

DECISION

I. PROCEDURAL HISTORY¹

Parent filed a request for an expedited due process hearing. The Local Educational Agency (LEA) received this request on March 30, 2017. (HO Exh. 6).

Prior to holding the expedited due process hearing, the Hearing Officer scheduled a pre-hearing conference (PHC) setting the hearing dates, identifying the issues, and addressing other relevant matters. A subsequent PHC was held on April 27, 2017. The Hearing Officer issued orders following the referenced PHCs memorializing the discussions.

The Hearing was held as scheduled on May 2, 4, 2017. During the hearing, the Hearing Officer admitted Parent's Exhibits 1 through 26; the LEA's Exhibits 1 through 57²; and IIO Exhibits 1 through 21.³

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

Transcript	-	Tr.
Parents' Exhibit		P Exh.
Local Educational Agency Exhibit	-	LEA Exh.
Hearing Officer Exhibit	-	HO Exh.

² Of note, LEA's Exhibit 49 is a blank divider page.

³ After the hearing, the parties submitted written closing arguments. The Hearing Officer has admitted those arguments as HO Exh. 22.

The Hearing Officer now issues her decision in this matter.

II. ISSUES

1. Whether or not the Manifestation Determination Review Committee had sufficient Information about the current state of Child's disability to determine whether the incident occurring on or about December 9, 2016 ("the incident"), was a manifestation of Child's disability?
2. Whether or not the incident was a manifestation of Child's disability?
3. Whether or not there was a violation of the IDEA and a denial of FAPF?

III. BURDEN OF PROOF

The United States Supreme Court held in *Shaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed.2d 387 (2005), that the party seeking relief bears the burden of proof. Therefore, in this case the Parent bears the burden of proof because she challenges the manifestation determination.

IV. FINDINGS OF FACTS

DECEMBER 9, 2016 INCIDENT

1. On the morning of December 9, 2017, Dean is in the conference area of High School observing the students as they are entering the school. Dean observed Child entering the school with a hooded sweatshirt. Child had the hood on covering his head. For security reasons and to be able to identify students, school rules prohibit students from covering their heads. Dean asked Child to remove the hood. Child stated he would and complied. A few minutes later, Dean observed Child again with the hood covering his head. Dean again asked Child to remove the hood. Child smiled, stated he would take off the hood, and then did so.

Child was in a playful mood. Child then headed to gym area and socialized with some of his friends. He could be seen on video playing and talking to some of his friends. When the bell rang for the students to make their way to their first period class, Child took a detour to his class. Along the way he was seen on video giving high fives to individuals and waving. As he made his way to his class, Child put his hoody back on his head for the third time. After putting the hoody back on, Child encountered a teacher just before reaching his first period math class. The teacher he encountered instructed Child to remove the hoody. Child did not comply. Then the teacher followed Child into his math class and informed Child's math teacher that Child had not removed his hoody from his head. Knowing that Dean was a trusted person⁴ for Child, the math

⁴ A trusted person for Child was someone to which Child had an established relationship. The trusted person was

teacher escorted Child to the Dean and informed Dean of the hoody issue. Dean and Child met in Dean's office. Dean good-naturedly stressed that the rule prohibiting students from covering their heads is important for safety reasons. Dean told Child in effect that he needed to be able to see Child's face/hair. Child indicated he understood by saying "Yeah."

Child was not upset. In fact the conversation then turned to NFL football. After about 15 to 20 minutes of conversation between the two, Child had the mindset to return to class. Dean then indicated it was time to return to class, and Child agreed. Child was not in trouble and there were to be no consequences for the hoody incident. Child understood this resolution of the hoody matter.

Dean decided that before returning Child to class, he would telephone Child's mother and let her know what had occurred regarding the hoody. This decision was made because the school and Mother had an understanding that the parent would be informed of any incidents involving Child at school. Mother was called and told that Child was not in trouble but Dean had called to let her know what had happened that morning regarding the hoody. Dean then informed Mother. At that point, Mother asked to speak to Child. Child was allowed to speak to his mother. Within a few seconds, Child became agitated and started screaming and cursing. He stated words to the effect of "You want to send me back to my dad. Just do it. I don't give a fuck. I don't give a fuck." Dean asked Child to calm down. Child then slams the telephone on Dean's desk. Next, Child knocks everything off Dean's desk. Dean unsuccessfully attempts to grab Child. Child then bolts out of Dean's office which is located in the rear of the main office area of the school. Child runs to a secretary's desk and punches it and breaks off pieces of the desk. Child also punches a bookcase and breaks it. In addition, he hits a security panel. Assistant Principal, aware of the commotion, stops what he is doing in an effort to de-escalate the situation. Several staff instruct Child to stop, but he continues the rampage. He is cursing saying, "Fuck this and Fuck that." Child's behavior occurs in the presence of office staff, students, and parents who happen to be in the main office at that time.

Next, the assistant principal grabs Child. Dean is behind the principal saying to Child "calm down." At this point Child slides through Assistant Principal's arms. Child runs out of the office into the back hall where some classes were taking place. Other students are watching the incident as it unfolds. Child runs full speed through the hallway while continuing to curse and scream. Assistant Principal and Dean run along parallel hallways to catch Child. Assistant Principal locates Child outside. They sit along the curb outside. Dean joins the assistant principal and Child seated on the curb. Dean asks Child what happened. Child stated that the comments made by his mother about sending him to live with his father upset him. The child and Dean remain outside for several minutes to give Child an opportunity to calm down.

The school's nurse also comes outside to see if Child injured his hand during the rampage. The principal also came outside to check on Child. Because it was cold outside, after

also considered a "safe person" for Child and an individual the Child was comfortable talking to. The evidence establishes that Dean was such a person. He had been Child's social studies teacher the prior school year and during the current school year was the assistant principal assigned to Child. In addition, Child was able to converse with Dean. Through their conversations, Dean learned that Child liked sports. Dean then talked to the wrestling coach and was able to help Child become a member of the wrestling team for a time during the 2016/17 school year. (Tr. 278).

about 10 minutes, the Child was taken to the math resource room for additional time to cool off. Dean remained with Child during this period and is talking to him. Child again indicated that comments made by his mother "set him off." The school's nurse attended to Child's hand and provided Child with ice and bandages for his hand. Child was taken to principal's office. Parent was called and a determination was made that under the circumstances, Child likely could not make it through the remainder of the school day. Mother indicated she did not have transportation and could not pick up Child. Therefore, the school's student resource officer transported Child home. Dean also accompanied Child on the ride to his home. Child remained calm during the ride to his house and was able to provide directions on how to get there.

(Tr. 69-82 and 281-303; LEA Exhs. 10 – 13).

2. Dean determined that it was appropriate for Child to have consequences for his rampage precipitated by the phone conversation with his mother. Dean telephoned Mother to schedule a due process meeting with Child, Mother, and Dean about the incident. The purpose of this meeting was to hear from Child regarding the incident and for Dean to determine what, if any, consequences Child would have. The due process meeting was held on December 13, 2016.⁵ Those attending were Dean, Parent, and Child. During the meeting held on December 13, 2016, Child again stated that he was upset with his mother. He apologized to Dean. At the conclusion of the December 13, 2016 meeting, Dean determined Child would be suspended with a recommendation of long term suspension for use of profanity; disruption of campus; dangerous behavior toward staff, students, and self; destruction of property resulting in injury to Child; and defiant toward teacher and administration. (Tr. 306-314; LEA Exh. 14).

Child was disciplined for the conduct triggered by his conversation with his Mother. (Testimony of Dean).

3. The Hearing Officer finds that the statement regarding defiance toward teacher and administration is as a result of actions following Child's telephone conversation with his mother. This is so because before the telephone call, the evidence demonstrates Child was in control and prepared to return to class. (Tr. 295; LEA Exh. 11, pp. 2-3).

4. During the December 13, 2016 meeting with Dean, Mother was also informed of the right to petition for restorative justice by meeting with the principal. This type meeting was required to take place within five days of being suspended. During such a meeting the principal, parent, child, and administrator who suspended the child meet for a discussion. The goal of restorative justice is to modify the discipline so a child receiving a long term out of school suspension can be returned to school sooner. Mother declined to schedule the restoration meeting.

Mother was also informed of her right to appeal the suspension with recommendation of long term suspension. By letter dated December 13, 2016, mother noted her appeal of the out of school suspension to the Office of the Student Conduct.

(Tr. 311-312; LEA Exhs. 14 thru 16; P Exh. 15).

⁵ The meeting had been scheduled for December 12, 2016. Mother did show for the meeting, but Child was not present due to illness. Thus, the meeting was rescheduled for December 13, 2016.

5. Subsequent to the suspension on December 13, 2016, the LEA communicated with Parent that a Manifestation Determination Review (MDR) meeting would be held. The LEA also notified Parent of the scheduled date for that meeting. The Notice informed Mother of the persons the LEA had invited to the meeting. Specifically, those persons the LEA invited were Child, Mother, Assistant Principal, Coordinator of Special Education, General Education Teacher, School Counselor, Special Education Liaison, Special Education Liaison, and Special Education Teacher. (LEA Exhs. 16, 25, 27; Tr. 489).

The Notice also informed Parent that she may invite persons with expertise or knowledge about Child. In addition the notice stated the following:

We have made efforts to contact you to schedule this meeting at a mutually convenient time. Based upon these efforts, we have scheduled the meeting to occur at:

Meeting Location	[High School]
Meeting Date	12/16/2016
Time	9:00 AM

We welcome your participation. If you are unable to attend this date/time and wish to reschedule at a mutually convenient date/time during school hours, please call the person listed below. If we do not hear from you, we will assume this meeting is convenient for you.

[Special Education Coordinator] at [xxx-xxxx ext. xxxx]

Please contact the staff member at the number noted above if you wish to provide input prior to the scheduled meeting.

(LEA Exh. 23).

Mother received the notice and was notified of the meeting by multiple means – telephone, email/mail, and in person. She did not attend the MDR meeting. Neither did she contact the LEA in advance of the meeting to reschedule the meeting. (P Exh. 19; LEA Exhs. 16, 23, 25, 26, 27; Tr. 391).

The LEA normally does not invite individuals who are not employed by the division to MDR meetings. The parent has the right and responsibility to invite non employees of the school to the MDR meeting. Parent did not invite anyone to attend the MDR meeting on Child's behalf, including the child's Mental Health Case Manager and YCAPP person. (Tr. 235, 365, 486-87, 547-48; P Exh. 19).

The Hearing Officer finds that Parent did not work in collaboration with the LEA to schedule the MDR meeting.

MANIFESTATION REVIEW MEETING AND DETERMINATION

6. The LEA held the manifestation determination review (MDR) meeting as scheduled on December 16, 2016. Those in attendance were Dean, Special Education Liaison, Exceptional Special Education Liaison, Coordinator of Special Education, School Counselor, Special Education Teacher and Case Manager, Assistant Principal, and General Education Teacher. (P Exh. 19; LEA Exhs. 25 and 26).
7. The Child's file was brought to the MDR meeting. Coordinator of Special Education who participated in the meeting directed the meeting. She also addressed Child's most recent eligibility determination during his triennial review and paperwork related to that eligibility finding. (Tr. 393,485, 489).
8. Dean acted as the administrator at the MDR meeting. Specifically, he informed the participants of the incident that resulted in the discipline and need for the MDR meeting. Dean witnessed the incident. He had also reviewed a videotape of Child's movements during the school day on December 9, 2016. Because Dean had established a working relationship with Child during the prior and current school years 2015/16 and 2016/17 as a teacher and administration, he shared his experiences with the committee noting that Child did not exhibit any behavior concerns as an eighth grade student of his. Dean expressed that he had not witnessed prior to the date of the incident the behavior that the MDR team was considering. In addition, Dean related that from his observations of the incident, what upset Child was the mother's comments to him. (Tr. 280- 287, 364, 485, 390).
9. Assistant Principal was also a participant in the MDR meeting to discuss the incident that led to the MDR and discipline. He was an eye witness to the conduct in question. (Tr. 390 -91).
10. Case Manager oversaw the implementation of Child's IEP and was responsible for making sure it was implemented. At the MDR meeting she addressed Child's current IEP – the IEP developed on December 6, 2016. (Tr. 388).
11. General Education Teacher attending the MDR meeting was Child's science teacher. Her role was to participate in the meeting as a teacher who did not work specifically as a special education teacher, but as a general education teacher collaboratively with special education teachers. General Education Teacher provided input during the meeting. (Tr. 389-90).
12. The Exceptional Special Education Liaison participant in the MDR meeting had worked with Child in middle school and in high school during the current 2016/17 school year. (Tr. 390).
13. Child's school counselor participated at the MDR in that role; Special Education Liaison participated to ensure that the procedures were followed. (Tr. 389-91).
14. Child's relationship with his father is estranged and "touchy." (Testimony of Mental Health Case Worker; Tr. 74).

15. When Child was on the telephone with his mother as referenced in "Finding of Fact" #1, Mother stated the following to Child:

If you don't get your **shit** together and use your words and stop giving them people what they want, which, them people, the school what they want, then I'm going to send you with your **father**. (emphasis added).

(Tr. 122).

16. The Hearing Officer finds that a reasonable person could conclude Mother's statement to Child was insulting and threatening.

17. The MDR team focused on Child's conduct that was triggered by Mother's above-referenced statements to her son. (Tr. II, p. 469).

18. As mentioned above, the MDR team had the Child's entire file. From this file, the team reviewed several documents/papers. One document reviewed was Child's current IEP as of December 9, 2016. The current IEP is dated December 6, 2016. (LEA Exh. 8).

December 6, 2016 IEP

19. Child's IEP team met and developed the current IEP on December 6, 2016. Those present for that IEP meeting, included the parent, Child, Dean/Assistant Principal, Coordinator of Special Education, General Education teacher, School Counselor, Special Education Liaison, Special Education Teacher, Exceptional Special Education Liaison, and YCAPP person. This IEP indicates the disabilities for which Child had been deemed eligible for special education services. Those identified on this IEP are Emotional Disability and OHI due to ADHD for anxiety, aggression, and depression. This IEP also sets forth Child's present level of academic and functional performance (PLOP). In the PLOP section of the IEP, teacher observations were noted as well as parental input and concerns. The IEP made note of successful interventions and strategies. They included preferential seating, small group assessments, and Child's ability to take breaks when feeling anxious and angry. (P Exh. 14/ LEA 8, p. 4).

20. The IEP addressed Child's behavior and social development. Specifically, the plan recognized Child had a need for behavior interventions, strategies and supports which the IEP addressed by goals, short term objectives. Those goals and objectives are set forth below:

Goal Category: Social Skills

[Child] will across a variety of settings demonstrate the social/communication skills necessary to interact with peers in various activities, to earn an average of 80% of documented opportunities and the school setting May 2017.

Short-Term Objectives/Benchmarks

[Child] will accept feedback, with 3 verbal prompts without arguing when given to him by his peers on 4 out of 5 opportunities. [Child] will appropriately initiate and maintain appropriate social interactions with 3 verbal prompts, with peers in 4 out of 5 opportunities.

Goal Category: Social/Coping Skills

[Child] will demonstrate appropriate adult interactions, with 80% accuracy with 3 verbal prompts, in the school setting by May 2016 [sic]

Short-Term Objectives/Benchmarks

[Child] will follow directions from an adult 4 out [sic] 5 documented opportunities. [Child] will accept feedback when given by an adult without arguing 4 out of 5 documented opportunities.

[Child] when angry, anxious or frustrated will use a learned strategy to demonstrate self-control and problem solve 80% of documented opportunities, with 3 verbal prompts from a school adult, 4 out of 5 times, in the school setting by May 2017.

Short-Term Objectives/Benchmarks

[Child] will use self-monitoring strategies when he becomes frustrated and choose an appropriate option (relaxation, exercising, walking with staff) 80% of the time. [Child] will verbalize when he feels the need to release energy when he feels stressed or anxious on 4 out of 5 documented opportunities. [Child] will talk to an adult before acting negatively (verbally or physically) to problem solving and generate options 80% of documented opportunities.

The IEP further established that the goals would be measured by observations and checklists.

(P Exh. 14, pp. 5, 6).

21. Additionally, the current IEP provided for accommodations and services to address Child's behavior. For example, the IEP established a behavior checklist to monitor Child's behavior. Services included placing Child in collaborative classes in the general education setting for his academic classes, a social skills class held to help develop his social skills, and consultation in the general education classroom. (P Exh. 14/ LEA 8, pp. 8-9).

22. The IEP also provides input from Child's current teachers, Child, and Parent. (P Exh. 14/ LEA 8, pp. 3-4, 8).

23. The IEP noted that Child could advocate for himself when he needs to speak to an adult or needs a break. The IEP provided that Child could seek out "trusted staff" when he has a concern he cannot solve. (P Exh. 14/ LEA 8, p. 3).

evaluation report discussed the psychologist's findings regarding Child's behavior, neurocognitive functioning, and emotional status.

29. Based on the findings of the evaluator, the psychologist diagnosed Child with Severe ADHD; Severe Depression; Severe Anxiety; and Somatization Disorder. (LEA Exh. 5, p. 5).

The Hearing Officer finds the August 6/7, 2014 Psychological Evaluation was comprehensive and more recent than the April 7, 2014 psychological report.

Eligibility Summary

30. A third document reviewed by the MDR team from the Child's file was his most recent eligibility summary which was completed on May 11, 2014.

The LEA's eligibility committee had completed this summary during the Child's triennial reevaluation for special education services as required by 34 C.F.R. §300.303(b)(2). As part of that reevaluation, the LEA obtained a Psychological Evaluation of Child that was conducted on April 7, 2014; an updated Sociological Assessment that was conducted on April 27, 2014, and an Educational Evaluation that was administered on April 25 and 29, 2014. (LEA Exhs. 1-3; P Exhs. 5 – 6).

31. The Hearing Officer finds that the evidence demonstrated that the eligibility committee carefully reviewed the Sociological, Psychological, and Educational evaluations named above. Then that committee determined that Child remained eligible for special education and services. (LEA Exh. 4). The disabilities identified by the eligibility committee were Other Health Impaired (OHI) due to Child's ADHD and Emotional disability. (LEA Exh. 4).

32. Before the eligibility committee identified these disabilities, it utilized relevant check lists to determine Child's particular disabilities. Specifically, the eligibility committee completed an OHI checklist and found that based on the evaluations Child OHI/ADHD adversely affects his/her educational performance because (i) Child's work quality and/or quantity is significantly limited due to a health impairment and (ii) the impairments resulted in extended absences, inability to attend a full academic schedule and/or inability to sustain attention to tasks for the same length of time as peers. In addition, the eligibility committee completed the emotional disability checklist. As noted on this checklist, specifically, the eligibility committee determined that (i) Child has an inability to learn which cannot be explained by intellectual, sensory, or other health factors. The eligibility committee further determined that the inability had been sustained over a long period of time, it was to a marked degree, and it adversely affects Child's educational performance. Moreover, as noted on the checklist, the eligibility committee after utilizing the assessments determined that Child had an inability to build or maintain satisfactory interpersonal relationships with peers and teachers. And that this had been the case to a marked degree, over a long period of time and it adversely affected his educational performance. (Tr. 482-83; LEA 4, pp. 3).

33. Parent was a member of the eligibility committee and consented to its findings. (LEA Exh. 4).

24. The parent consented to this IEP being implemented. (P Exh. 14, p. 13).

25. Behavior goals, benchmarks, accommodations, and services in the December 6, 2016 IEP address the information about Child's behavior mentioned in the Functional Behavior Assessments (FBA) dated November 17, 2014, and May 20, 2015, as well as strategies and interventions noted on the Behavior Intervention Plan (BIP) dated December 1, 2014. (Tr. 497-98; P Exh. 14/LEA 8 pp. 6, 8; P Exhs. 3 and 7).

August 6/7, 2014 Psychological Evaluation

26. The MDR committee also considered the psychological evaluation dated August 7, 2014, (August 7, 2014 Psychological Evaluation) that had been provided by Child's parent to the LEA. (LEA Exh. 26, p. 2; Tr. 402).

27. There were two psychological assessments in Child's file – one dated April 7, 2014, the other dated August 7, 2014. The MDR team reviewed the August 7, 2014 evaluation because it was the most recent and deemed the relevant evaluation to consider. (Tr. 419; LEA Exhs. 1 and 5; P Exh. 5; Testimony of Special Education Liaison).

28. A review of the August 7, 2014 psychological evaluation shows that the evaluator administered multiple tests to assess the child. Those tests included the following:

Neuropsychological Mental Status Exam, Connors' Continuous Performance Test-III, Wechsler Intelligence Scale for Children – IV, NEPSY-II Selected Subtests, Brown Adolescent ADD Scales, CATA, Speech-Sounds Perception Test, Children's Auditory Verbal Learning Test –II, PASAT, Mesulam Unstructured Visual Search for Letters Test, Reynold's Adolescent Depression Scale -2, Personality Assessment Inventory – Adolescent, Beck Anxiety Inventory, Behavior Assessment System for Children – 2 Edition, Social Responsiveness Scale, Age Appropriate History Taking & Clinical Interviews with the Patient, Incomplete Sentences, Projective Drawings, Additional History Taking with the Patient's Mother, Developmental Questionnaire.

(LEA Exh. 5, pp. 2-3).

The testing included the evaluator obtaining parental input by having Child's mother complete the Behavior Assessment System for Children – 2nd Edition. According to the mother's assessment, the psychologist indicated in his evaluation that the mother reported clinically significant concerns for hyperactivity, aggression, conduct problems, externalizing problems, anxiety, depression, internalizing problems, atypicality, overall behavior symptoms, ADLs, functional communications, and overall adaptive skills. In addition, this psychological report noted that the parent also completed the Social Responsiveness Scale II. As a result, the psychologist found that Child was not autistic. (LEA Exh. 5, pp. 3- 4).

As noted in the evaluation, the psychologist also received input from Child through the testing previously mentioned, behavior observations, and clinical interview. The psychological

34. The Hearing Officer finds that information from the April 2014 Sociological, Psychological, and Educational Evaluations is incorporated in the eligibility summary and checklists. (Testimony of Special Education Liaison; I.E.A Exh. 4).

Other Considerations

35. The MDR team considered input from Child's current and past educators. (Tr. 485).

36. Further, it considered Child's anxiety, impulsivity, depression, and educational progress. Parent's appeal letter was also reviewed. The MDR team reflected on the telephone conversation between Child and his mother that triggered the conduct. (LEA Exhs. 5, 26; Tr. 452.)

37. After its deliberations, the MDR team determined that Child's behavior on December 9, 2016, was not a manifestation of his disability. (P Exh. 19; I.E.A Exh. 25; Tr. 406).

LEA's educational experts continue to agree with the MDR team's determination. (Testimonies of Special Education Liaison and Dean).

Following the Manifestation Determination Meeting

38. After determining that Child's Conduct was not a manifestation of his disability, the LEA immediately sent Mother an email and correspondence informing her that Child could access his class assignments on Google Classroom. Mother then emailed Dean to inquire about Child receiving his accommodations to which the LEA responded that Child's accommodations remained in place as he worked on his assignments. Regarding frequent breaks, preferential seating, and extended time on assignments, the LEA informed Parent that they were available because Child was working at school. Moreover, the LEA informed Parent that testing would occur at a later date and therefore it was not currently an issue. (I.E.A Exh. 24).

39. The LEA then reached out to Parent on January 3, and 6, 2017, inquiring about Parent's availability for an IEP meeting on January 16, 2017, to discuss Child's IEP. The LEA also requested that Parent inform the LEA if she is available to meet on that date. The LEA indicated that if it did not hear back from Mother that she could not attend, it would send her a notice of the meeting. The LEA set the meeting for January 17, 2017, notified Mother again on January 12, 2017, and held the IEP meeting. Mother did not attend. (I.E.A Exhs. 29-32 and 34).

The Hearing Officer finds that Mother did not work in collaboration with the LEA to set the January 17, 2017 IEP meeting to discuss Child's IEP.

40. During the January 17, 2017 IEP meeting, the IEP team proposed homebased services for Child. (LEA Exh. 34, pp. 14-16) Child would continue to receive his services and supports, although in the interim alternative setting. (Tr. 409 - 414; I.E.A Exh. 34, p. 8); 35; and 44). Parent did not consent to the homebased services. Hence the services were not provided. (Tr. 409-414).

41. The services would have provided FAPE. (Tr. 409-414).

42. On February 14, 2017, the IEP team met and proposed providing services in a private day school as well as services through home-based instruction while parent and school division work together to secure private placement. Mother attended this IEP meeting. Parent did not consent to the IEP.

On March 8, 2017, the IEP team met again and proposed providing services in a private day school in special education. Parent attended and consented. (LEA Exh. 34)

As of the last day of the hearing – May 4, 2017 - Child had not commenced the private day school. Further, the process to get Child admitted and enrolled in a private day school has been hampered by Mother not providing information that has been requested by the private day school. (LEA Exhs. 47 and 48).

43. The Child's current IEP is now the March 8, 2017. The Hearing Officer finds that the LEA is not required to conduct an FBA because the behavior which was the subject of the conduct in question has been addressed by the current IEP. (LEA Exh. 34).

Other

44. The MDR team did not focus on the minor hoody incident nor Child's suicide attempt at school that occurred in October 29, 2016. (Tr. II, p. 469).

Regarding the October suicide attempt. The Hearing Officer finds that the evidence did not show that the suicide attempt is relevant to the conduct in question. Of note, Child returned to school in November 2016, after the suicide attempt. The LEA put in place interventions and supports for Child. For example, certain persons/staff were designated as "trusted persons." As referenced previously, Dean was considered a "trusted person." Also, the LEA permitted Child to take frequent breaks. If Child felt he needed a snack, at any time with "no questions asked" he was able to go to the principal's or Dean's office and have a snack. Child also was escorted to class. Staff and checked in on Child to see how his day was progressing. But as time went on Child requested that some of those interventions be removed. For example, he no longer wanted someone to walk him to class. (Tr. 359-361).

Then on December 6, 2016, as previously stated an IEP meeting was held to amend Child's IEP. Mother and Child attended it and provided input. The Mother's input on the current IEP does not mention the suicide attempt. Further, during the December 6, 2016 IEP meeting, Mother did not present any records from Child's reported hospitalization after the suicide attempt. A review of Child's input illustrates he made no comments regarding the reported suicide attempt. In addition, there was no request for a "hoody" accommodation so Child could feel more secure. As mentioned above, Mother agreed to this IEP. (LEA Exh. 8; Tr. 500-501)

45. LEA did reach out to the mental health agency servicing Child after Child's October 29, 2016, suicide attempt. (Tr. 242, 246)

46. Dean investigated allegations of bullying and concluded Child was not bullied. In addition, although Child alleges he was teased on the December 9, 2016, prior to the conduct in question taking place, Dean's observations of Child in person and on videotape show Child in a playful mood that morning. Dean described Child as talking to his friends, taking a detour to his first period class, and high-fiving and waving at individuals. (Tr. 284-287).

Thus, the Hearing Officer finds the evidence is insufficient to establish Child was bullied.

47. The April 7, 2017 Psychological Evaluation states in pertinent part that "[c]urrent teachers report that [child] behavior and emotional control have improved since entering the middle school IDP. If [child] does act out or breaks rules it is felt that he chooses his behaviors and is not being influenced by emotional distress. When confronted or disciplined [child] rarely accept responsibility for his behavior and frequently blames others for his problems." (P Exh. , 5, p. 1)

48. The evidence does not establish an axis between ADHD and ODD or ED and ODD. The MDR team did not consider Child's diagnosis of ODD. (Tr. II, p. 532-34).

49. Dean served in the capacity of his title from August 2016 to April 2017. The role of the Dean of Students is to take on the responsibilities of an assistant principal. Specifically, Dean of Students was assigned the responsibility of students with surnames ending in " " through " " In addition, Dean of Students was responsible for coordinating the maintenance of the high school. For 14 years, Dean of Students taught social studies and math as a general education teacher. He served as a department chair in the school division for three years prior to becoming Dean of Students at High School. (Testimony of Dean; LEA Exh. 52).

Before becoming Dean of Students at High School, Dean of Students taught Child social studies in the eighth grade when Child attended middle school. While Child was in Dean of Students social studies class, Child worked hard, observed the classroom rules, and had no behavior problems. (Testimony of Dean).

Dean of Students attended several of Child's IEP meetings during the 2016 – 2017 school year. He also attended at least one IEP meeting when Child was in the eighth grade. Dean of Students also attended Child's Manifestation Review Determination meeting on December 16, 2016. (Testimony of Dean).

The Hearing Officer qualified Dean as an expert in the areas of general education curriculum and school administration. (Tr. 276).

50. Special Education Liaison holds a doctorate in education, a masters of arts and a bachelor of arts. (LEA Exh. 51).

She has been involved with Special Education for 16 years. During her 16 years, she taught special education for over five years. She worked as a special education coordinator and liaison for five years. She worked with special education students that were incarcerated as well. Special Education Liaison has attended approximately 500 eligibility meetings; 1000 IEP meetings; and 200 manifestation determination review meetings. (Testimony of Special Education Liaison).

The Hearing Officer qualified Special Education Liaison as an expert in the area of special education. (Tr. 385).

Special Education Liaison had knowledge of Child before the December 9, 2016. (Testimony of Special Education Liaison).

Mental Health Case Manager

51. Mental Health Case Manager has worked in the community with Child for about seven (7) years. He links Child to services in the community. He is not a mental health professional or an educator. Mental Health Case Manager has observed that conflicts exist between child and Mother at home. (Tr.185, 226; LEA Exh. 50). He has observed that the topic of Child's father is a touchy subject in the home. (Tr. 228).

Parent has invited Mental Health Case Manager to attend IEP meetings at school before, but she did not invite Mental Health Case Manager to the Manifestation Determination Meeting. (Tr. 231, 235). Had Mental Health Case Manager attended the MDR meeting on December 16, 2016, he does not know if he could have determined the conduct in question was a manifestation of child's disability. (Tr. 219-220).

52. The Psychological Evaluation dated April 7, 2014, contained observations from Child's teachers and from Parent. (LEA Exh. 1, pp. 3-4).

53. Regarding the MDR determination, the MDR team also did not consider bullying.

54. The LEA's MDR meeting and determination were not illegal.

55. Child was 16 years of age at the time of the conduct in question. He is classified as a ninth grader. (P Exh 14).

V. Legal Analysis

The Individuals with Disabilities Education Improvement Act (IDEA/Act), 20 U.S.C. § 1400 et seq., requires states, as a condition of acceptance of federal financial assistance, to ensure a "free appropriate public education" (FAPE) to all children with disabilities. 20 U.S.C. § 1400(d), § 1412(a)(1). The Commonwealth of Virginia has elected to participate in this program and has required its public schools, including the LEA here, to provide FAPE to all children with disabilities residing within its jurisdiction. Va. Code Ann., § 22.1-214-215.

The Act imposes extensive substantive and procedural requirements on states to ensure that children receive a FAPE. 20 U.S.C. § 1415. See also *Board of Education v. Rowley*, 458 U.S. 176 (1982) and *Endrew v. Douglas County - School District RE-1*, 580 U.S. _____ (2017) (ruling that the FAPE test is more than “*de minimus progress*” and a child’s educational program must be appropriately ambitious in light of the child’s circumstances). This includes, certain obligations of the LEA when a child with a disability is recommended for a long term suspension. 20 U.S.C. § 1415(k). In this case, the LEA recommended Child for a long term suspension and was therefore required to hold a manifestation determination review (MDR) meeting to decide if the conduct in question was a manifestation of Child’s disability.

In determining whether Child’s conduct was a manifestation of the disability, applicable law under the IDEA requires an assembled MDR Team to review all relevant information in Child’s file, including the child’s IEP, any teacher observations, and relevant information provided by the parents to determine the following:

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

20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e).

Further, that authority mandates that a child with a disability who is removed from the child's current placement for greater than 10 consecutive school days for disciplinary reasons must continue to receive educational services or a FAPE so as to enable the child to continue to participate in the general educational curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. 34 C.F.R. §300. 530 (d)(1).

Parent contends that the LEA failed to meet its obligations during the MDR meeting and the LEA has denied Child a FAPE. Thus, here the Hearing Officer examines the evidence to determine if the Parent has met her burden.

A. Whether the incident (the conduct in question) was a manifestation of Child’s Disability?

1. Did the conduct in question have a direct and substantial relationship to the child’s disability?

a. Was All Relevant Information in Child’s File Reviewed

Essentially, Parent is claiming that the MDR team’s examination on the specific inquiry referenced above was flawed because the MDR team (i) failed to review all relevant information in Child’s file and (ii) did not have sufficient information to make the manifestation

determination.

The evidence demonstrates that the MDR committee brought the Child's entire file to the MDR meeting. During the meeting, the MDR team reviewed three documents from that file.

(i). Review of Current IEP

One of the papers the MDR team considered was Child's current IEP. The evidence shows that the IEP team met and developed the current IEP on December 6, 2016. Those present for that IEP meeting, included the parent, Child, Dean/Assistant Principal, Coordinator of Special Education, General Education teacher, School Counselor, Special Education Liaison, Special Education Teacher, Exceptional Special Education Liaison, and person. The parent consented to this IEP being implemented.

The Hearing Officer has carefully studied this IEP. It indicates the disabilities for which Child had been deemed eligible for special education services. Those identified on this IEP are Emotional Disability and OHI due to AD/HD for anxiety, aggression, and depression. This IEP also sets forth Child's present level of academic and functional performance (PLOP). In the PLOP section of the IEP, teacher observations were noted as well as parental input and concerns. The evidence shows that the IEP made note of successful interventions and strategies. They included preferential seating, small group assessments, and Child's ability to take breaks when feeling anxious and angry. What is more, the evidence demonstrates that this IEP addressed Child's behavior and social development. For example, the IEP included, among other goals, measurable annual goals pertaining to Child's social skills and behavior. Short-term objectives and benchmarks related to the annual goals were also established. Additionally, accommodations and services were provided for regarding Child's behavior. For example, the IEP established a behavior checklist to monitor Child's behavior. Services included placing Child in collaborative classes in the general education setting for his academic classes, a social skills class held to help develop his social skills, and consultation in the general education classroom. The IEP also provides input from Child's current teachers, Child, and Parent.

The IEP indicated that Child could advocate for himself when he needs to speak to an adult or needs a break. The IEP provided that Child could seek out "trusted staff" when he has a concern he cannot solve.

Of note also, the behavior goals, benchmarks, accommodations, and services in this current IEP that have been mentioned here address information about Child's behavior that is mentioned in the FBAs dated 2014 and 2015.

(ii). Review of August 2014 Psychological Report

In addition to reviewing the current IEP, the MDR team considered a psychological evaluation dated August 6/7, 2014. The evidence establishes that there were at least two psychological assessments in Child's file – one dated April 7, 2014, the other dated August 6/7, 2014. The evidence establishes that the MDR team considered the latter one because it was the most recent. In addition, Parent had provided this report to the LEA. A review of the August

2014 psychological evaluation shows that multiple tests were administered during this evaluation. They included the following:

Neuropsychological Mental Status Exam, Connors' Continuous Performance Test-III, Wechsler Intelligence Scale for Children – IV, NEPSY-II Selected Subtests, Brown Adolescent ADD Scales, CAT-A, Speech-Sounds Perception Test, Children's Auditory Verbal Learning Test –II, PASAT, Mesulam Unstructured Visual Search for Letters Test, Reynold's Adolescent Depression Scale -2, Personality Assessment Inventory – Adolescent, Beck Anxiety Inventory, Behavior Assessment System for Children – 2 Edition, Social Responsiveness Scale, Age Appropriate History Taking & Clinical Interviews with the Patient, Incomplete Sentences, Projective Drawings, Additional History Taking with the Patient's Mother, Developmental Questionnaire.

As noted by the testing, in evaluating Child, the psychologist received parental input by having Child's mother complete the Behavior Assessment System for Children – 2nd Edition. According to the mother's assessment, the psychologist indicated in his evaluation that the mother reported clinically significant concerns for hyperactivity, aggression, conduct problems, externalizing problems, anxiety, depression, internalizing problems, atypicality, overall behavior symptoms, ADLs, functional communications, and overall adaptive skills. In addition, this psychological report noted that the parent also completed the Social Responsiveness Scale II. As a result, the psychologist found that Child was not autistic.

As noted in the evaluation, the psychologist also received input from Child through the testing previously mentioned, behavior observations, and clinical interview. The psychological evaluation report discussed the psychologist's findings regarding Child's behavior, neurocognitive functioning, and emotional status. Based on those findings, the psychologist diagnosed Child with Severe ADHD; Severe Depression; Severe Anxiety; and Somatization Disorder.

The Hearing Officer finds that this more recent psychological evaluation was comprehensive.

(iii). Review of Eligibility Summary

A third document reviewed by the MDR team from the Child's file was his most recent eligibility summary which was completed on May 11, 2014.

Regarding the eligibility summary, the evidence establishes that on May 11, 2014, the I.E.A's eligibility committee had completed this summary during the Child's triennial reevaluation for special education services as required by 34 C.F.R. §300.303(b)(2). As part of that reevaluation, the I.E.A obtained a Psychological Evaluation of Child that was conducted on April 7, 2014; an updated Sociological Assessment that was conducted on April 27, 2014, and an Educational Evaluation that was administered on April 25 and 29, 2014. The Hearing Officer

finds it significant to note, that the evidence demonstrated that the eligibility committee carefully reviewed the evaluations named earlier. Then that committee determined that Child remained eligible for special education and services. The disabilities identified by the eligibility committee were Other Health Impaired (OHI) due to Child's ADHD and Emotional disability.

However, before the eligibility committee identified these disabilities, it utilized relevant check lists to determine Child's particular disabilities. Specifically, the eligibility committee completed an OHI checklist and found that based on the evaluations Child OHI/ADHD adversely affects his/her educational performance because (i) Child's work quality and/or quantity is significantly limited due to a health impairment and (ii) the impairments resulted in extended absences, inability to attend a full academic schedule and/or inability to sustain attention to tasks for the same length of time as peers. In addition, the eligibility committee completed the emotional disability checklist. As noted on this checklist, specifically, the eligibility committee determined that (i) Child has an inability to learn which cannot be explained by intellectual, sensory, or other health factors. The eligibility committee further determined that the inability had been sustained over a long period of time, it was to a marked degree, and it adversely affects Child's educational performance. Moreover, as noted on the checklist, the eligibility committee after utilizing the assessments determined that Child had an inability to build or maintain satisfactory interpersonal relationships with peers and teachers. And that this had been the case to a marked degree, over a long period of time and it adversely affected his educational performance.

Parent was a member of the eligibility committee and consented to its findings.

(iv). Further analysis

Having just discussed in detail the eligibility summary, the Hearing Officer continues her scrutiny of the MDR team's determination.

As mentioned here, Parent avers that the MDR team failed to review all relevant information from Child's file. First, Parent contends that the team should have considered the Child's FBAs and BIP. The evidence establishes that the matters concerning Child's behavior that were set forth in the FBAs and BIP were also covered in Child's most recent IEP. What is more, to address those issues, the IEP included, among other goals, measurable annual goals pertaining to Child's social skills and behavior. The current IEP also established short-term objectives and benchmarks related to those annual goals. Additionally, accommodations and services were provided for regarding Child's behavior. For example, the IEP established a behavior checklist to monitor Child's behavior. Services included placing Child in collaborative classes in the general education setting for his academic classes, a social skills class held to help develop Child's social skills, and consultation in the general education classroom. The Hearing Officer is also cognizant of the fact that one of the FBAs and the BIP was over two years old, the other over 18 months old, at the time of the conduct in question. In contrast, the current IEP was recent and only 3 days old at the time of the December 9, 2016 incident. Thus, the Child's current IEP at the time of the incident (which Parent agreed with), provided the most recent information about his behavior and functioning. In addition, the current IEP focused on behavior and social concerns noted in the aged FBAs and BIP.

Hence, the Hearing Officer is not persuaded that the MDR team was required to review the Child's FBAs and BIP.

Second, Parent contends that the MDR team should have reviewed the April 7, 2014 Psychological Evaluation in Child's file. Parent argues that the April 2014 evaluation contains input from the Child's teachers and parent. She claims that because the MDR team did not review the April 7, 2014 psychological evaluation, the team could not consider that teacher and parental information. The evidence shows that the April 7, 2014 psychological evaluation was generated at least four months prior to the August 6/7, 2014 psychological evaluation – the one that the MDR team considered. The evidence establishes that the MDR team determined that the August 2014 psychological report was relevant because it was more recent. In addition, a careful reading of the August 2014 evaluation demonstrates that it also contained parental input. Further this more recent psychological evaluation covered feedback from Child. Moreover, a review of this more recent psychological evaluation shows the evaluator utilized multiple testing, clinical interview and observations of Child to determine his diagnoses.

In addition, concerning the claim that the MDR team failed to receive adequate input from the Child's teachers, the MDR team was comprised of prior and current teachers and other educators of Child. This gave the MDR team an opportunity to obtain not only data about Child's past behavior from those who directly worked with the Child previously in the school setting, but also the same from Child's current teachers, administrators, and other educators.

Hence, the Hearing Officer is not persuaded that the MDR team was required to consider the older psychological evaluation.⁶

Third, Parent argues that not only should the MDR team have reviewed the eligibility summary, but also the Sociological Evaluation and the Educational Evaluation. The evidence establishes that the eligibility summary reviewed by the team was based on the eligibility committee's review of the evaluations conducted during Child's most recent triennial review. Evaluations considered during the reevaluation process included the April 2014 Psychological, Sociological, and Educational evaluations. What is more, the evidence establishes that data from those reports was incorporated in the eligibility summary and checklists, which the MDR team did review. In addition and as noted here, the MDR team studied Child's current IEP dated December 6, 2016. That IEP discusses the Educational Evaluation and information contained in the eligibility summary, which as discussed above incorporated data from the triennial evaluations done in April 2014.

⁶ Of note also, the Hearing Officer finds even the April 2014 psychological report lends support to the LEA's position that Child's conduct was not a manifestation of his disability. This is so, because the report notes that "[c]urrent teachers report that [child] behavior and emotional control have improved since entering the middle school IDP. If [child] does act out or breaks rules it is felt that he chooses his behaviors and is not being influenced by emotional distress. When confronted or disciplined [child] rarely accept responsibility for his behavior and frequently blames others for his problems." (P Exh. , 5, p. 1)

Accordingly, the Hearing Officer finds Parent has not met her burden and shown the MDR team was required to specifically review each of the April, 2014 evaluations.

Moreover, regarding the Sociological Evaluation, parent contends that the MDR team was required to review the Child's Oppositional Defiant Disorder (ODD) diagnosis mentioned in that evaluation. The Hearing Officer is not persuaded. First, Parent failed to put on evidence regarding ODD and its symptoms experienced by Child. The Hearing Officer does note that the Child's advocate attempted to cross examine the LEA's Special Education Liaison on the ODD. But that witness was not a psychologist and or expert on such matters. Second, the evidence fails to show that Child's ODD diagnosis was associated with any IDEA recognized disability. As such, the Hearing Office does not find that the MDR team was required to consider the ODD. Third, the evidence does not demonstrate that Child was being defiant. Indeed, after speaking with his trusted adult, the Dean, he remained calm and was ready to return to class. A telephone call was made to Mother. Mother asked to speak to Child. The Hearing Officer finds that the evidence leads to the conclusion that a reasonable person would find Mother's comments to Child both insulting and threatening. The Child's conduct in question ensued. The Hearing Officer finds Child was not being defiant, but his behavior was triggered by Mother's comments, not by any action of the school. Further, even if the LEA was required to consider the ODD diagnosis, the Hearing Officer finds that in effect the MDR team did so. This is so, because the team considered the Eligibility Summary with the attached checklists. And as noted before, that summary and checklists were based on the eligibility committee's consideration of several evaluations. One of those was Child's sociological evaluation which discussed Child's ODD's diagnosis.

Hence, the Hearing Officer is not persuaded by Parent's contention.

Fourth, the parent contends that the MDR team should have considered written accounts of what occurred during the conduct in question by other staff at the school. The evidence establishes that Dean was an eye witness to the conduct in question, as well as, Assistant Principal. Dean also viewed a video of the incident. Dean and Assistant Principal were both in attendance at the MDR team meeting and participated. Accordingly, the Hearing Officer does not find that it was necessary for the MDR team to also consider written accounts of the conduct in question.

Of note as well, the Hearing Officer finds that both Dean and Special Education Liaison testified on behalf of the LEA as experts. Both opined that the relevant information from Child's file was reviewed. Further, Special Education Liaison qualified as an expert in the area of special education. She attended the MDR meeting and testified that the committee reviewed all relevant information. Both educational professionals knew Child and/or had worked with him. The Hearing Officer had an opportunity to observe the demeanor of the witnesses and found both experts credible. Hence, the Hearing Officer gives deference to their opinions. *See, e.g., County School Bd. Of Henrico County, Virginia v. Z.P. ex rel. R.P.*, 399 F3d 298, 313 (4th Cir. 2005).

That said, the Hearing Officer is also cognizant of the testimony of Mental Health Case Manager. He testified on behalf of Child. He stated that after the child had a suicidal attempt in January 2017, he came to the conclusion sometime early 2017 that the December 9, 2016

conduct was probably a manifestation of the child's disability. Mental Health Case Manager is not an educator and was not qualified as an expert. Moreover, he did not attend the Manifestation Determination meeting. Therefore he did not have the opportunity to benefit from input from the entire team before making a determination of whether the conduct was a manifestation of the disability. Also, his opinion is based on information he received weeks after December 9, 2016. Accordingly, the Hearing Officer does not defer to his lay opinion.

b. Was the Composition of the MDR Team Sufficient?

The parent also argues that the MDR determination was flawed because Child's Mental Health case manager and YCAPP staff should have participated.

The evidence shows that the LEA informed Parent of the MDR meeting in advance. The LEA normally invites staff from the division. On the meeting notice to Parent, the LEA informed Parent of those it had invited. On that same notice, Parent was told that she could also invite participants. During the hearing, Parent testified that she wanted the child's mental health case manager and a staff person from YCAP to attend. Yet, Parent invited no one. Parent also elected to not to attend the MDR meeting. Also, the Hearing Officer finds that Parent could have, but did not contact the school in advance of the scheduled MDR meeting date to get another date for the MDR meeting.

In addition, regarding YCAPP being represented at the MDR meeting, Parent contends YCAPP was a trusted person and should have definitely been in attendance. The evidence does not establish that the YCAPP person had a conflict and could not attend the meeting. Accordingly, the Hearing Officer finds that YCAPP was not in attendance because Parent failed to invite someone from that agency to attend the meeting.

In addition, the evidence demonstrates that while an individual from the YCAPP had come to know Child about two months before the conduct in question, Dean was a trusted person and safe person for Child. Dean had taught Child during the prior school year and was also Child's administrator during the current school year. Dean and Child had a good relationship and the child trusted Dean. Dean was present at the MDR meeting and based on the evidence had more background and information about Child to provide to the MDR team than the YCAPP person.

The IDEA envisions a collaborative approach by the parties. *See Rockwall Independent School District* 67 IDELR 108 (United States Court of Appeals, 5th Cir. 2016). The Hearing Officer concludes that regarding the MDR, Parent's actions illustrate that she did not work together with the LEA to schedule and conduct the review.

Accordingly, the Hearing Officer does not find a flaw in the MDR team's deliberation because the Mental Health Case Manager, YCAPP staff, or the parent did not attend the MDR meeting.

c. Whether the MDR committee had sufficient information about the current state of Child's disability to determine if the conduct in

question was a manifestation of Child's disability?

Parent propounded more claims of a flawed MDR team meeting. For example, she contends that the MDR committee should have considered what triggered Child's conduct when references were mentioned about Child's father during the telephone conversation she had with him. The evidence establishes that during that conversation, mom used profanity and made a threat to her son. The mother testified that she stated the following to Child during the telephone conversation:

If you don't get your **shit** together and use your words and stop giving them people what they want, which, them people, the school what they want, **then I'm going to send you with your father.** (emphasis added).

The evidence clearly shows that the mother's comments to Child triggered the conduct. This is so because the evidence establishes that prior to being on the telephone with his mother, Child had meet with his trusted adult, the Dean, regarding the minor hoody incident. After Dean and Child discussed the issue, Child was seated in Dean's office, remained calm and was ready to return to class. Child was informed that there were no consequences for wearing the hoody. Dean informed Child he was going to call his mother to keep her informed as had been requested of the mother. Child remained calm until his mother made the comments referenced here. Mother could have attended the MDR team meeting and presented information regarding why she believed Child reacted as he did to her comments. She elected not to attend and invited no participants. Now the parent contends that somehow the LEA is at fault for not inquiring about a topic that the Hearing Officer reasonably finds the mother was the one in the position to clarify had she attended the MDR meeting.

Mom also contends the LEA should have considered the child was bullied and attempted suicide at school in October 2016. The evidence does not establish bullying. Parent reported bullying or child being teased in October 2016. Dean testified credibly that he investigated the allegation of bullying and determined Child was well liked. Child had gotten on the wrong bus one day. He fell and someone laughed at him. He also testified regarding his observations of Child on the day of the incident. The Hearing Officer did consider the testimony of Child regarding bullying and other evidence of record. She had an opportunity to observe the demeanor of the witnesses. She notes that Child, 16, spoke in a soft voice and certain statements were contradicted by Dean's observations which the Hearing Officer finds credible. After careful deliberation of the evidence, the Hearing Officer gives great weight to the Dean's testimony and finds the evidence does not establish Child was bullied. Accordingly, the Hearing officer does not find MDR team had a reason to consider bullying during the MDR meeting.

Regarding the October suicide attempt. The evidence did not show that the suicide attempt is relevant to the conduct in question. Of note, Child returned to school in November 2016, after the suicide attempt. The LEA put in place interventions for Child. Thereafter, on December 6, 2016, an IEP meeting was held. Mother and Child attended it and provided input. The Mother's input on the current IEP does not mention the suicide attempt. Further, the Hearing Officer finds that while the MDR team did not consider the suicide attempt per say, it

did review Child's mood disorder, anxiety, depression. The MDR team also considered Child's current IEP which addressed, among other things, Child's current behavior and functioning.

In sum, Parent alleges that the MDR team should have considered Child's October 29, 2016 suicide attempt, that he was bullied, the relationship between Child and his father, input from Child's mother, Mental Health Case Manager, and someone from YCAPP; written accounts of the incident, and any video of the conduct in question. For the reasons already stated here, the Hearing Officer finds the Parent has not met her burden and shown the MDR team had insufficient information to determine if the conduct in question was a manifestation of Child's disability.

2. Whether the conduct was the direct result of the failure of the LEA to implement Child's IEP.

Parent had the burden of showing that the IEP was not implemented. Parent has not met her burden. To extent parent is arguing the FBA/BIP was a part of the IEP and was not implemented, the evidence fails to support such. Further, the evidence did establish that in lieu of a BIP, the December 6, 2016 IEP addressed Child's behavior through goals, accommodations, services, and objectives.

The Hearing Officer also considers Parent's argument that Child needed to wear a hoody. Mother appears to be arguing that Child needed to wear a hoodie to feel secure. This accommodation should have been a part of his IEP and it was not implemented at the time of the incident. Of note, Child testified that the hoodie helped him feel secure and he told that to school staff. To the contrary, Dean – a trusted adult of Child – testified that Child did not communicate a need to cover his head with a hood. In fact, the evidence establishes that Child smiled at one point and apologized to Dean after being instructed to take off the hoodie on December 9, 2016. Child removed the hoodie. Also, Parent and Child attended the December 6, 2016 IEP meeting. Each provided input. Special Education Liaison also attended the IEP meeting. She testified that to her knowledge there was no request for a hoodie accommodation. Of note Parent consented to this IEP without anything being mentioned concerning a hoodie. Having considered the contradictions in the evidence about the claim, the demeanor of the witnesses, the Hearing Office is not convinced that a hoodie accommodation was ever proposed during an IEP meeting.

Mom also contends she requested a one on one aide. Again other credible evidence of record fails to support the allegation. Mother attended the December 6, 2016 IEP meeting. A review of that document reveals that mother consented to the IEP which does not provide for a one on one aide.

Hence, considering the above, the Hearing Officer finds that Parent did not meet her burden and show that the IEP was not implemented because the alleged accommodations mentioned here were supposed to be included in the IEP but were not and therefore not employed.

B. Was there a denial of FAPE

A child with a disability who is removed from the child's current placement for greater than 10 consecutive school days for disciplinary reasons must continue to receive educational services or a FAPE so as to enable the child to continue to participate in the general educational curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. 34 C.F.R. §300. 530 (d)(1)(i).

After determining that Child's Conduct was not a manifestation of his disability, the LEA immediately made services available for Child. The evidence shows that on the same day the MDT team rendered its decision, Child could access his classwork on Google classroom. Moreover, Child's accommodations were available. Further, on multiple occasions, the LEA contacted Parent to schedule an IEP meeting with Mother. When Mother failed to respond to provide her availability for a meeting, the IEP set the meeting for January 17, 2017. The evidence demonstrates that Mother received advance notice of this meeting.

The IEP team held the January 17, 2017 IEP meeting, but Mother elected not to attend. The IEP team proposed homebased services for Child. A review of that IEP shows Child would continue to receive his services and supports, although in the interim alternative setting. Parent did not consent to the homebased services. Hence the services were not provided. The evidence was insufficient to establish that the IEP would not have provided Child FAPE.

On February 14, 2017, the IEP team met again and proposed providing services in a private day school as well as services through home-based instruction while Parent and school worked together to secure private placement. Mother attended this IEP meeting; however, Parent elected to not consent to the IEP. Of note, the parent did request a FBA.

Under 34 C.F.R. §300. 530 (d)(1)(ii) services must also include, as appropriate, a FBA, and behavior intervention services and modifications that are designed to address the behavior or violation so that it does not recur.

Although Parent requested a FBA/BIP at the February 14, 2017 IEP meeting, the Hearing Officer finds the LEA was not required to conduct one. This is so because the evidence establishes that the information in the prior FBAs and BIP were incorporated in the IEPs proposed. In addition those IEPs address the behavior displayed during the December 9, 2016 incident.

The evidence also establishes that on March 8, 2017, the IEP team met again and proposed providing special education services in a private day school. Parent attended this meeting and consented to the developed IEP. The evidence shows that Child has not commenced the private day school and the process to get Child admitted and enrolled in a private day school has been hampered by Mother's failure to provide information requested by the private day school. Although, Mother testified at the hearing that the private school has all the information it needs, the Hearing Officer is not convinced by Mother's statement considering her demeanor and contradictory evidence of record. Specifically, the evidence shows that as late as April 17, 2017, the prospective private day school sent Parent a letter. That correspondence

indicated that Child's admission status was in limbo because additional paperwork was requested of Mother and Child needed to be interviewed by the school.

In sum, the Hearing Officer recognizes precedent in this federal judicial circuit, requiring that due deference be given to the opinion of the professional educators. *See, e.g. County School Bd. Of Henrico County, Virginia v. Z.P. ex rel. R.P.* , 399 f.3d 298, 313 (4th Cir. 2005). Parent has not presented evidence to permit the Hearing Officer to reject the expert opinions of the educational professions. Hence, the Hearing Officer finds the Parent has not met her burden. Accordingly, she upholds the Manifestation Determination decision and finds the LEA has offered Child a FAPE.

VI. DECISION AND ORDER

For reasons stated above, the Hearing Officer finds the manifestation determination review was consistent with applicable law under 34 C.F.R. § 300.530 (e). Therefore the Hearing Officer upholds the manifestation determination decision of the MDT team. Specifically, the Hearing Officer finds the MDR teams determination that Child's conduct was not a manifestation of his disability is supported by the evidence of record; that the MDR team had sufficient information about the Child's current state of his disability; and that there was no denial of FAPE by the LEA.

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

The Hearing Officer notes the LEA has offered/or provided Child FAPE and instructs the LEA to continue to offer or make FAPE available to Child in the homebased setting until Child commences private day school as agreed to by the parties in the March 8, 2017 IEP.

VII. PREVAILING PARTY

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

VIII. APPEAL INFORMATION

This decision is final and binding, unless either party appeals in a federal district court within 90 calendar days of the date of this decision or in a state circuit court within 180 calendar days of the date of this decision.

ENTERED THIS 18th day of May, 2017.



Terner Galloway Lee, Hearing Officer

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