14-044

VIRGINIA DEPARTMENT OF EDUCATION DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES OFFICE OF DISPUTE RFESOLUTION AND ADMINISTRATIVE SERVICES

CASE CLOSURE SUMMARY REPORT

Public Schools

School Division

Name of Parents

6/23/14

Date of Decision

Name of Child

Kamala Lannetti

Counsel Representing LEA

Advocates Representing Parent

Alan Dockterman

Hearing Officer

Parents

Party Initiating Hearing

Hearing Officer's Determination of Issues: The LEA is the prevailing party on all issues. See decision of 6/23/14.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing.

6-23-14
Date

Alan Dockterman

Form

DUE PROCESS EDUCATIONAL APPEAL

AND)
Appellants)
)
v.)
) In re:
)
PUBLIC SCHOOLS)
Respondent)

LEGEND FOR DECISION

Personally identifying information has been replaced with non-identifying terms in this Decision. This has been done to protect the confidentiality of the student. This legend provides the omitted names and other information for the benefit of the parties in order for identification of specific witnesses and other relevant persons and entities. It is designed to be detached before release as a public record.

	Student
	Mother or Parent
	Father
Public Schools	School System, School District, or LEA
	Advocate
	Second Advocate
	Attorney
Mary Dees	Disciplinary Hearing Officer
	Principal
	Private Psychologist
	Private Speech/Language Pathologist

English Teacher
School Speech/Language Pathologist
Parents' Attorney (Disciplinary Matter)
School Psychologist
Director, Office of Student Leadership
Assistant Principal
Special Education Coordinator

Middle School
Academy

Home School
Private School

DUE PROCESS EDUCATIONAL APPEAL

PARENTS	)	
Appellants	)	
	)	
v.	)	
	)	In re: STUDENT
	)	
CITY PUBLIC SCHOOLS	)	
Respondent	)	

DECISION

I. INTRODUCTION AND PROCEDURAL HISTORY

The School District received a request for a due process hearing (Request) from the advocate for the parents on April 7, 2014. They claim, *inter alia,* that the school system committed procedural and substantive violations which denied their son a free appropriate public education (FAPE) by (i) failing to provide proper notice for the Individualized Education Program (IEP) meeting on June 10, 2013 with regard to the attendance of counsel for the district; (ii) continuing that meeting without parents' participation or consent; (iii) holding the August 26, 2013 eligibility meeting without parents' participation or input; (iv) failing to evaluate or identify all areas of his disability; (v) failing to revise the IEP despite knowledge that he was not making adequate progress toward his goals; (vi) failing to develop an IEP reasonably calculated to meet the student's needs by not writing measuring goals; (vii) failing to enumerate specific services he would be receiving; and (viii) failing to conduct a proper and complete Manifestation Determination Review (MDR). (See Request of April 5, 2014, pp. 1-2, 4-5.)

As relief, the parents sought determinations that the above actions denied FAPE and requested compensatory educational services, an independent speech and language evaluation, and training of staff in special education. They further

sought reimbursement for attorneys fees paid in connection with the MDR and for the cost of private placement from the date of their notification to the district of such placement. (See Request of April 5, 2014,. pp. 5-6).

Two advocates represented the parents; the Deputy City Attorney and an Assistant City Attorney represented the local educational agency (LEA)[1]. I was appointed as the hearing officer from a list supplied by the Supreme Court of the Commonwealth of Virginia and certified by the Virginia Department of Education.

On April 14, 2014, a pre-hearing teleconference was conducted. The order of witnesses, issues in the appeal, exploration of settlement, and procedures for the conduct of the hearing were among the matters discussed. The parties believed that the hearing could be completed in four to five days, but agreed to schedule a sixth day if necessary. (See e-mail of April 12, 2014 and letter of April 16, 2014).

The school district submitted its Reply to the Request, denying each of the allegations. It incorporated into its response the Letter of Inquiry from the Virginia Department of Education (VDOE) of June 26, 2013 which found that the school system had not violated any of the requirements of special education law and/or regulations. (See Letter of April 17, 2014 from counsel for the school district).

I issued subpoenas for a number of the parents' witnesses without objection. Two additional prehearing teleconferences were held on May 20, 2014 and May 23, 2014. The major purpose of the hearings was to discuss witnesses and to resolve the district's motion to dismiss and/or limit certain claims. It also requested a protective order barring the calling of counsel for the school system as an adverse witness. (See Motion to Dismiss, May 19, 2014). The parents submitted a Reply on May 19, 2014. The parties appeared able to resolve the scheduling of witnesses without difficulty. After review of the motion and the parents' Reply filed May 23, 2014, I made a number of rulings.

I rejected the school system's argument that findings by VDOE were dispositive of issues raised in this hearing. I found that although they were

[1] The assistant city attorney did not appear at the hearing.

entitled to some evidentiary weight, the two proceedings were far different; *e.g.*, the other proceeding did not permit the parties to call witnesses or subpoena documents.

I granted the school system's request for an order prohibiting the advocates from calling its counsel as an adverse witness. The proposed line of inquiry indicated that the attorney-client privilege would preclude her testimony. I also refused to limit the scope of inquiry of the MDR where there appeared to be genuine issues of fact in dispute.

The parties timely filed their exhibits and list of witnesses prior to the hearing. The hearing began on June 2, 2014 and concluded on June 5, 2014. Seventeen witnesses testified at the hearing. At the end of the hearing, the parties elected to submit closing and reply memoranda in lieu of oral argument.

References in this Decision refer to the transcript of each of the four consecutive days of the proceedings (TRI-TRIV.). The LEA submitted seven group exhibits consisting of nearly 600 pages with a compact disc and the parents submitted seventy-three exhibits separated into eight sections. References to those exhibits are identified as either from the school district (S.D.) or the Parents (P.) No objection was made to their admission into the record. (TRI-23, 39).

II. FINDINGS OF FACT

The following represents findings of fact based upon a preponderance of evidence derived from the testimony of the witnesses and the documents admitted into evidence. Additional findings will be found in other portions of this decision.

A. Factual Background prior to November IEP

1. The student is fourteen years old and is an eighth grader at a private school in Virginia. He resides with his parents, a brother who is two years older, and his maternal grandmother. (P.6.1a).

2. The student had verbal apraxia until the age of six, when he finally began speaking. (P.6.1b). He was initially determined eligible for special education as a preschooler with a developmental disability in another state. (P.6.5a). He received speech-language therapy services with goals added to improve his articulation. (P.6.3a.b). The Speech and Evaluation report dated November 6, 2003, when he was 3 years and 5 months old, indicated that receptively he was at age level in his responses, but that expressively he demonstrated delayed language skills and communicated primarily through gestures, facial expressions and signs. (P.6.1c).

3. Speech/language therapy was recommended, and he received one hour of therapy three times a week for a receptive language disorder until July of 2004. On April 1, 2004, he was found eligible for services in the developmentally delayed category. The results indicated his cognitive abilities were within the normal limits, auditory comprehension was within the high average range, and his expressive communication was in the very low range. (P.3a).

4. When the family moved to another state in the summer of 2004, the services continued, although his communication skills improved enough to discontinue augmentative communication. In first grade, he received additional special education services consisting of one hour of resource support in writing and ninety minutes of speech and language support. In second grade, the program was changed to consultative speech and language services because of the significant progress he made. He was dismissed from special education on May 19, 2008. The family moved to Virginia in the summer of 2008. (P.3b, 6,; S.D., F.64, 81).

5. After he enrolled in elementary school in the LEA school district, he was found eligible for special education services in November of 2008 under the identification of Other Health Impaired (OHI) with an Attention-Deficit Hyperactivity Diagnosis (ADHD). Although he had been utilizing augmentative communication, it was discontinued in the spring of 2006 because of improvement in his language skills. (P.6.5a). The school psychologist prepared a report in the fall of 2008 in which she found that his general intelligence was in the average range. However, his mathematics performance scores were within the

low average range, well below his predicted level based on his the current measure of intellectual ability. His behavioral and emotional testing showed variable and inconsistent attention and hyperactivity concerns. He met the diagnostic criteria of ADHD of the predominantly inattentive type. (P.6.3i).

6. In the beginning of the 2011-2012 school year, the student performed well and was considered a good student. (TRI-264). However, on October 16, 2012, he sustained a concussion when he was hit by baseball while playing on a field outside of school. It caused constant left frontotemporal headaches, and he remained out of school for ten days and then returned for half days for approximately another month. His mother testified that he suffered from severe headaches for two months. (P. 6.7, 6.8; TRIII-706-708). According to his English teacher, when he returned full time he was not completing his work and his performance began to deteriorate. (TRI-265-266). Once the teachers were notified of the situation by the nurse, they extended greater accommodations to the student and instituted a concussion management plan. (TRI-304, TRII-388). After he was cleared to return to full-time school, the assistant principal did not see any lingering effects which should have been addressed by the IEP team. (TRII-388-389).

B. November 2012 IEP and IEP Modifications Prior to Suspension

7. On November 14, 2012, the annual IEP was held. As a result of his deficits in attention and organization, he received services through a self-contained math class, inclusion English, and a special education core support period. He received specially designed instruction in organizational skills fifty minutes a day and self-management for one hundred ten minutes five times every two weeks in the special education classroom. He also received organizational skills in the general education classroom for fifty minutes five times during a two week period. (S.D., C. 171-184).

8. The IEP team provided for a number of accommodations in the special and general education classroom. These included the use of a standard of learning (SOL) and regular calculator, ten second response wait time for an oral question,

up to twenty-four additional hours for assignment completion, use of a highlighter, and frequent prompts. It also set forth a set of goals and short term objectives. (S.D., C. 177-178). The parents agreed to the placement. (S.D., C. 182).

9. On January 4, 2013, the IEP team convened to review the student's lack of progress in English and social studies. The teachers told the parent that he needed to turn in his assignments to pass the English class. (S.D., C-153; TRI-296. The English teacher recalled that she discussed various strategies she used such as allowing him to highlight work, providing extra time, permitting computer use, working with the collaborative teacher and providing multiple prompts. She acknowledged that these interventions were in the current IEP, and explained that it was difficult to get an accurate assessment of the student because of the number of absences. (TRI-266-270, 288-290). The English teacher also tried giving him more time outside the classroom and more breaks, which sometimes succeeded. She did not recall whether the possibility of additional assessments was discussed. (TRI-266-270, 277-278). The mother testified that she did not understand that she was at an IEP meeting and thought it was a progress meeting. The focus was on her son's failure to do work in class and the need to complete his homework. (TRIII-697-698).

10. The English teacher reviewed the student's level of academic performance from the November 12, 2012 IEP and testified that he worked hard and completed 100% of his class work and scored 80% or higher on his quizzes. (P.5.10d; TRI-261). He was a very good student the first quarter but upon return from the concussion, he was not completing his work during the second nine weeks. (TRI-263).

11. On February 28, 2013 the Special Education Committee (SEC) held its triennial meeting to determine whether the student continued to be eligible for special education and whether the school system needed to conduct additional assessments. The assistant principal testified that the team decided no additional assessments were necessary and stressed that everyone needed to work harder with current accommodations and strategies to motivate the student. (TRI-366-374). The mother recalled that there was discussion about more testing because her son kept complaining he couldn't express what he wanted to say. (TRIII-700-

701). The prior written notice stated that the mother agreed with the team's decision and that no other options were explored or rejected. (S.D., F. 83, 92).

12. When the SEC meeting ended, the IEP team convened to consider the student's poor progress in mathematics and English since he was failing in both courses. The parent urged the team to place her son in a special education setting for all subjects due to the benefit of smaller class size but the request was rejected by the team. (S.D., C. 145). The team reminded the student to ask questions and write assignments in his planner. The school psychologist did not recall if the benefit of additional testing was discussed by the team then. (TRI-376; TRIV-857).

13. On April 12, 2013, the team met to discuss the student's lack of progress in English and social studies, two subjects he was failing. (TRII-378-380). It was suggested that the student use colored paper to inform his teachers that he needed help. The student stated he would not be comfortable doing so. (S.D., C. 136; TRII-378-380). The social studies teacher told the team that she had been successful by delivering work to the student when he was in the core support room or by removing him from core support and bringing him back to the classroom. (TRI-310). She sometimes was able to motivate him especially when he worked alone or on subjects that were of special interest. He did not pass the social studies SOL that year (TRII-309-312, 324). She testified that the team did not discuss modifications or changes in the IEP but focused on his lack of progress. (TRII-378-380).

14. The IEP amendment[2] in the section "IEP Modification on 04/12/2013" described the student's performance, stating that he was failing math and health/physical education and had Ds in other subjects. He often failed to ask for or accept help for his assignments, shut down in class, took considerable time to begin assignments, did not take home makeup work, and performed with great inconsistency from day to day. (S.D., C. 140).

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[2] Although the title of the document is "[t]he [IEP] Amendment," in many instances, there may be no amendment to the IEP as such, other than teachers updating information. These review meetings have also been referred to as progress report meetings, which the parent, not surprisingly, found confusing. (TRI-205; TrII-369, 375; TRIII-697).

student's needs. Thus, accommodations which provided him up to twenty-four hours additional time to complete assignments, when he didn't know what to do, and which allocated ten additional seconds of wait time when he had trouble expressing himself, were arbitrary and lacked follow-up. He also thought a highlighter would be unlikely to be helpful. Based on the performance of the student, the psychologist concluded that the teachers had not figured out or understood the student's needs or recognized the disability part of his difficulties. (TRIII-618-620, 633-635, 644-646).

C. Manifestation Determination Review

20. On May 10, 2013, the student was involved in an incident in which he poked[3] another student in the leg with a pencil. That student was sent to the clinic and reported that he felt a small amount of pain. The assistant principal of the home middle school obtained statements from the two students and a teacher. On the same day the principal decided to suspend the student, effective May 13, 2013, for assault and possession of a weapon and recommended expulsion. (S.D., E. 3-8; P. 2.5, 2.6; TRII-389-391). There were significant discrepancies between each statement and the administration's version of what was written. (P.3.7b; TRIV-875-877). The principal sent a letter to the mother stating that her son was entitled to a disciplinary hearing before a hearing officer for "assault and possession of other weapon" and that she would receive a packet of documents from the Office of Student Leadership (OLC). (F.2.2).

21. The Student Discipline Profile, printed on May 14, 2013, identified a prior incident on April 15, 2013, in which the a bus driver gave the student a verbal warning/reprimand for being on his knees and moving up four seats while the bus was moving. There were other minor incidents which occurred more than one year before the suspension. (P.2.8, 2.9). As for the suspension, it was characterized as "... assault of a student and possession of other weapon." (P. 2.2).

[3] The attack had been variously described as a poking, a jabbing, a stabbing, and an assault with a weapon.

22. The mother testified that on May 10, 2013 she received a phone call telling her to pick up her son and that he had been expelled due to an incident. At the school that day, she was given an incident report which stated that he was recommended for expulsion. Soon thereafter, she learned about an organization that represents parents in special education and retained the current advocates. (P.2.7; TRIII-710-712). She conceded on cross examination that even though she thought the school had expelled her son, the written communications she received indicated that there was a recommendation for expulsion, and later a recommendation for long term suspension. (TRIII-748-750, 753-755)[4]

23. On May 13, 2013, the parent's advocate sent an email, stating that her organization was representing the parents, that they needed certain documents, and that they could participate in a hearing by telephone on May 16th or May 17th. (P.1.1).

24. On May 15, 2013, the principal prepared a statement of factors considered in her recommendation. She classified the seriousness of the violation and danger to the school community as medium, although it posed a significant danger to the other student. She also mentioned his poor grades and failure to work diligently, noting that his refusal to do work hindered the achievement of others. She concluded that he had caused a significant disruption to the learning environment and that his behavior would not be tolerated. (S.D., E.5).

25. On May 16, 2013, the MDR was held. Present were the parents, the assistant principal from the student's school, the special education coordinator, and various school officials. The two advocates participated by telephone. According to the disciplinary manifestation determination form, the committee determined that the behavior was not a manifestation of the child's disability and, as a result, the disciplinary procedures for students without disabilities were applicable. The team wrote that the student had been identified as OHI due to a diagnosis of the ADHD-inattentive type and met the criteria for that category. The document further stated that the parents complained of prior instances of bullying and

[4] It is not surprising that a parent would be confused about the relationship between the MDR and the SLC proceedings or the meaning of some of the correspondence she received. It seems unusual that the confusion would not have been cleared up, however, given the representation of two advocates and, later, an attorney.

interpreted the incident in question as bullying by the other student because he kicked their son before their son jabbed him. (S.D., E-12-13).

26. Many of the team members in the MDR testified at the hearing. The school psychologist stated that the team concluded the behavior was impulsive and that the student did not have a history of impulsive behaviors. The team also did not determine bullying was a factor in the incident. She did not believe that lack of social skills or ADHD contributed to the behavior in question. The team rejected the parents' position that the IEP had not been appropriately implemented. (TRIV-848-852).

27. The assistant principal testified that the team only was "allowed" to consider the behavior in relation to the diagnosed disability. She was not sure whether the mother had mentioned the bullying at the MDR or a prior IEP, but said she had related that it had occurred in the prior year (2011-2012) but that the situation was much better in the then current year. (TRII-382-383). The assistant principal said that there had been one occasion in March of the 2012-2013 school year when the student was pushed, but the student said it was an isolated incident. Beyond that, she was not aware of any other incidents. (TRII-382-384).

28. The assistant principal further testified that under the categorical identification, ADHD, inattentive-type, the incident was not related to it and not related to lack of implementation of the IEP. The team did not reach a consensus as to whether there was a manifestation; therefore, she said, the school system had the responsibility to make the decision, and the parents would be left to pursue other avenues of redress, such as due process. (TRII-391-392).

29. The special education coordinator testified that MDR teams accept the decision of the principal at face value based on the administrative statements; the members are not an investigative body. In MDRs, she observed, they do not interview witnesses or determine whether the school made the correct decision. (TRI-58, 69, 72). The team members in this case took into consideration social skills deficits and functional communication needs of the student as set forth in the November 14, 2012 IEP. Their discussion included the student's difficulty in interacting with peers when he wanted to be off task due to frustration with

performing his school work and his processing of information deficits. (TRI-72-76).

30. The coordinator further contended that the processing delays had no impact on the pencil incident. She characterized the confrontation as one where the boys were engaged in horseplay which got out of hand and the student made a bad choice due to his anger. (TRI-76-78). The student admitted that he accidentally stabbed the other student too hard, not that the act itself was accidental. Therefore, the team reasoned, his was purposeful conduct, unlike prior actions where he playfully jabbed his peers with a pencil to gain attention rather than try to hurt them. (TRI-66-67).

31. The English teacher participated in the MDR and reported that the team discussed the student's poor grades. However, she did not believe that a behavior intervention plan was necessary. The incident, which happened in her classroom, was not typical of the student because he had not exhibited aggressive behavior before. She had no reason to be concerned about his attacking other students. She had never seen any instances of the student being bullied. (TRI-293-294). The coordinator related that the mother asked for comprehensive evaluations at this meeting. (P.3.10b; TRI-173).

32. The mother testified that she and her husband attempted to argue the specifics of the occurrence, but they were not allowed to do so. She also tried to argue that the disability category was too narrow and that he had disabilities beyond ADHD of the inattentive type, but the team refused to consider other disabilities. (TRIII-714-716). According to the mother, one of the school officials said that if the student would just do his work, everything would be ok. (TRIV-917).

33. The student never resumed his studies at the middle school again after the suspension on May 10, 2013. (TRI-293-294, 312; TRII-384, 394). The mother testified that her son asked not be forced to return because he was anxious and afraid. (TRIII-748). She had lost trust in the school after she saw the hostility of the teachers at the MDR, where she perceived that they regarded her son as a troublemaker and were afraid of him. (TRIII-721-722: TRIV-902).

34. The student testified that he did not like his home school. He had been bullied there in sixth grade, and in one instance, the perpetrator had been given a two day suspension. He said that bullying occurred less in the 2012-2013 school year. He provided no examples of bullying in the seventh grade and acknowledged that he was never physically hurt. He claimed he would not feel safe going back to the school. (TRIII-654-660, 663). He reported that he had received compensatory services at the local high school in the summer of 2013 and said he felt safe there. (TRIII-654-660, 663-664).

35. The father testified concerning bullying incidents where his son was being harassed, chased, and punched in connection with rides on the school bus during the winter of 2011-2012. He also spoke about the incident his son referred to that occurred about the same time. (P.1a-1b; TRIII-669-673). He thought that as a result of his involvement, the problems basically disappeared. He had no specific information about any bullying incidents during the seventh grade year. (TRIII-673-675).

36. The father stated he also believed that his son was expelled based on the initial communications from the school. At that point he and his wife were "fed up" with the school. His son was "...kicked out of school for the most ridiculous—in our opinion the most ridiculous zero tolerance non-common sense ...[reason].[5]" (TRIII-677-678). The expulsion, he complained, was not an isolated event; there had been "...two years of frustration... of getting no help, no academic[s[, the IEP[s], the bullying and then the zero tolerance nonsense. We were done." (TRIII-678).

37. On May 16, 2013, the director of the Office of Student Leadership (OSL), acting in the capacity as the superintendent's designee, sent a letter to the parents recommending the reduction of the expulsion to a long-term suspension, and

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[5] It would not be unreasonable for one to agree with the parents' view that the pencil incident was such a minor, isolated, even inconsequential, event that it hardly could be the basis for such a drastic disciplinary measure as expulsion. One could also speculate from the documentation about the charges and the testimony at the MDR that had the student not had such poor grades and attendance, the recommendation for expulsion might not have gone forward. The problem with the parents' perception, of course, is that their son was never expelled; the recommendation was changed to a long-term suspension five days after the incident with the right to expeditious appeal.

scheduling a hearing before a disciplinary hearing officer to consider the recommendation. (S.D., E-2).

38. On May 23, 2013, the disciplinary meeting was held before the school hearing officer who also served as the coordinator of student conduct and discipline within OSL. According to the hearing officer, the parents were given the disciplinary packet prior to the hearing to review. (TRIV-944-946). The parents, the student, the student's grandmother, the principal and assistant principal participated. (TRIII-755; TRIV-902). At the hearing, the hearing officer reviewed the student's grades and general behavior. The principal read the administrative statement and presented her case, and the parents had an opportunity to ask questions and respond. She explained the appeals process to the school board if they were dissatisfied with her decision. (TRIV-948,950-951).

39. The hearing officer took the case under advisement after the hearing to review the student's grades, the submissions, and the testimony at the hearing, including the remarks of the student. She did not support the recommendation for a long-term suspension because she found that there was no prior extensive discipline, the student was not a risk to other students, and the effects of the concussion were a mitigating circumstance. (TRIV-952-954).

40. She explained that the school board disciplinary committee on appeal from a hearing officer decision could uphold, modify, or overturn the decision. The committee could also place the student at another school administratively or remove the disciplinary action from the student's file. (TRIV-958-960).

41. The hearing officer further stated that she had the authority to grant a request for transfer to another school. Parents could also appeal a denial of a request for an out of zone transfer, which information was generally given them and wass available on the website. (TRIV-960-962, 979-980). The stipulations that the student maintain good behavior, regular attendance, and academic progress were typical of those placed on students who have been returned to school after an out-of-school suspension. Their goal, she stated, was to get the student back on track; only a major infraction will trigger the process for revocation of probation. (TRIV-954-958).

42. The parents' recollection of the meeting differed sharply from that of the hearing officer[6]. The mother testified that the family was not allowed to discuss the substance of the charges or the severity of the penalty. The hearing officer called the husband belligerent when he repeatedly tried to discuss the incident, and he called her belligerent. (TRIV-903, 929).

43. On May 24, 2013, the director of OSL sent a letter to the parents stating that the decision had been made to hold the suspension in abeyance. The student was permitted to return to his school on a strict probationary status through March 31, 2014, with the requirements that he demonstrate good behavior, maintain regular attendance and achieve academic progress. The parents were advised of their right to appeal within five school days. (S.D., E.1).

44. The director testified that he thought the principal made the right recommendation. He said that there had been instances in which pencil attacks had resulted in serious injury to students. The decision to hold the suspension in abeyance was made because of the nature of the incident and the student's disciplinary record which showed that the student had not previously exhibited particularly aggressive behaviors. According to the director, the appropriate response was to return the student to his home school. (TRI-235, 237, 240-243).

45. On June 3, 2013, the parent filed an appeal and a hearing was scheduled for June 24, 2013. (TRI-242). On June 7, 2013, the attorney for the parents sent an e-mail and letter confirming her representation of the student in the parents' appeal of the suspension decision of May 24, 2013. She asked for additional documents and noted that the parents sought an out-of-district transfer rather than return to the home school. She wrote that parents had pursued transfer but had been frustrated by the school system. The attorney proffered that should acceptable alternative placement be found, she thought the appeal to the school board could be dismissed. She stressed that she was not involved in the IEP proceedings. (S.D., D.14).

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[6] There was considerable questioning of witnesses regarding when the parents received documentation about the proposed discipline, how complete it was, and why and when certain redactions were made. It did not appear that the school system did anything improper in this regard or that the dispute had any impact on the outcome of the proceedings.

46. The mother testified that she terminated the appeal because her attorney informed her that there would have been no opportunity to discuss the incident and that she could not compel a principal to accept her son at his or her school. The parents were also concerned about how their son would handle testifying before a disciplinary committee. (TRIV-883-885). In response to questions from LEA counsel, she further answered that the appeal was dismissed because she believed that all the committee would have wanted from them was an apology and statement of lessons learned. It would not have considered any of the circumstances relevant to the incident. (TRIII-779-780). The mother said that she had not hired the attorney for the MDR and special education issues and contended that she would not have had to hire an attorney for the disciplinary proceedings if the MDR decision had turned out favorably. (TR-III-718).

47. The mother described her efforts to find another school for her son. At one middle school, her written request was denied because of poor grades and his disciplinary record. Her attempts to discuss her son's situation with the principal were unsuccessful. She contacted another middle school and was told by the secretary that the school would only consider the school records. During the summer, the student did not go to summer school, but received compensatory services and private tutoring. (TRIII-757-61).

48. The parents' psychologist testified that he agreed with the school psychologist's report of July 24, 2013, that the student had a tendency to become easily upset, frustrated or angry and had difficulty in controlling and maintaining good behavior. It was his opinion that the team should have considered those factors in its determination. (TR.III-589). He reviewed the MDR decision and concluded that it did not contain the relevant information regarding the behavioral aspects of his ADHD, including impulsivity, executive functioning, and language issues. (TR-III-597-598).

D. June 10, 2013 SEC and IEP Meetings.

49. On June 4, 2013, the school system sent the parents a notice that an IEP meeting to review instructional needs and annual goal progress, as well as the

parents' concern regarding services in the areas of speech-language, would take place at 11:30 a.m. on June 10, 2013 . The school attorney was not identified as one of parties invited to attend. (S.D., C.98.). On June 7, 2013, parents received another notice that an IEP meeting to review the same matters as in the prior notice would take place at 12:30 p.m. on June 10, 2013, the date requested by the parents. The school attorney and the assistive technology specialist were added to the list of parties invited to attend. (S.D., C.96-97.). The location was changed from the home school to an administrative building at the parents' request because they did not want to go to the home school. (TRII-393).

50. The mother testified that she was surprised to see an attorney at the SEC meeting since she had never encountered one in prior meetings. She and her second advocate[7] called her attorney who said that she had told counsel for the school district that she would not be there. She then told them that she could not come due to other commitments. (TRIII-725-727). After the SEC meeting, the IEP meeting began. When the discussion turned to why it was permissible for the student to return to the middle school for services when neither the parent nor the student trusted anyone at the school, the assistant principal stated that the student trusted her. The student, she told his mother, recounted an instance where he had complained to her about being tripped at school. After review, the assistant principal had decided it was horseplay. When the mother queried her why the pencil incident was not, counsel for the school district stood up and told the assistant principal not to answer the question. Then argument ensued when the mother tried to see the paper that the assistant principal was holding. The mother stated she became nervous and was no longer comfortable there; as a result, they left the meeting. (TRIII-727-729).

51. The assistant principal testified regarding the departure of the second advocate and the parent from the meeting. There was discussion of an episode in March of 2013 concerning the student who was pushed by another student. When the assistant principal had trouble answering questions because of rapid follow-

[7] The person who is identified as the "advocate" throughout this decision participated by telephone. The other advocate was present at the June 10, 2013 meetings and is identified herein as the second advocate.

up questions with little time to respond, the LEA attorney requested that all parties be permitted an opportunity to speak and ask and answer questions appropriately. After further discussion between the second advocate and the school attorney during which she stated that the attorney should not have been at the meeting, the advocate and the parent left the IEP meeting. (TRII-393-394).

52. Counsel cross-examined the parent about why she left meeting and her prior knowledge about its participants. She mentioned the Letter of Inquiry from VDOE which referred to her complaint about the presence of counsel at the meeting. (S.D., B. 16; TRIII-739-741). The parent conceded that she had written to VDOE that she had read the notification about the meeting, but that she had not noticed that the attorney was named as a potential participant. (TRIII-740-742).

53. The coordinator also provided her recollection of the events surrounding the departures. She recounted that when the second advocate began talking over the assistant principal, the attorney for the school system asked the parties to speak one at a time. The attorney said the meeting would continue regardless whether they remained. (TRI-131).

54. The parties requested that I listen to the tapes of the meetings prior to the hearing.[8] (TRI-11-12). I heard the second advocate complain that the LEA attorney had no right to be at the meeting. I also listened to a later exchange in which the attorney said that the second advocate had been cutting off school staff when they talked and the second advocate said that was not true, and that they were leaving. It was obvious that there was tension and disagreement in the room, but it was apparent that both sides were quite capable of resisting whatever limited intimidation that took place. The second advocate assumed a far more aggressive approach than others at the meeting. I conclude that the parent and second advocate were not justified in leaving the IEP meeting. I also note that no evidence was produced that the interests of the family were prejudiced when they

[8] The school system's list of exhibits referred to two compact discs; I received one with the exhibits. That disc included the SEC meeting and what I believe were the pertinent parts of the IEP meeting. I listened to the recording on June 1, 2014. Counsel for the school system also played a portion of the IEP during the third day of the hearing which I had already heard.

left a few minutes before the second meeting ended or that their absence caused a denial of FAPE.

55. The attorney for the parents in the disciplinary proceedings testified by telephone. She said that she was retained for the disciplinary matter and not for special education issues. She had made this clear to the attorney for the school system by letter and in a conversation with her. She learned for the first time that the LEA attorney would be at the IEP when called by the second advocate at the beginning of that meeting. (TRII-408-412). It was her legal opinion that in a situation where a MDR team determined that conduct had been a manifestation of the student's disability, there would have been no need for OSL procedures. (TRII-416).

56. At a subsequent IEP meeting on June 14, 2013, the parent consented to the offer of 160 minutes of compensatory service during the summer. Her requests that her son receive home-based services while out of school and placement at another school were denied because the school believed it could meet his IEP needs. (TRI-189).

57. The coordinator testified that the student had met many of his goals during seventh grade. He had learned to use a graphic organizer to compose multi-paragraph essays for two trials in a nine-week period; he had mastered the goal of having no more than two prompts of redirection back to a given task, (TRI-169, 171). From his progress reports it was clear he made some of his annual goals. (S.D., C.7-8, 67-95).

E. June-August 2013 Evaluations

58. The parents' psychologist[9] evaluated the student on four occasions in late August of 2013 and continues to treat him. (TRIII-555, 582). The parents brought the student to him because of their concern about his low self-esteem, anxiety, depression, and inability to control his anger. The child behavior checklist the

[9] None of the parties sought to go through the formality of qualifying any of their witnesses as experts, including school officials who were obvious experts in their fields, and none questioned the qualifications of any of these experts. Nor did any party complain that an expert opinion rendered was beyond the area of his or her expertise. I did not deem it necessary to insist that the parties go through a formal qualification process that would have been time-consuming and unproductive. (TRIII-609-610.)

school psychologist prepared showed his aggressive behavior was a significant factor and that other symptoms of inattention were less severe. (P.6.1e; TRIII-556-557).

59. The student's teachers also completed behavior forms. He was rated by the teachers in the clinical range on the ADHD scale in attention, impulsivity, emotional control, executive function. The teachers expressed concern about his lack of effort, inattention, sluggish behavior, difficulty controlling his behavior, and failure to fit in with the other students. (TRIII-558-563).

60. The psychologist administrated the Wechsler Intelligence Scale for Children which addressed cognitive functioning. The test showed that the student's planning were in the below average range, simultaneous processing was in the low average range and successive processing was in the average range. He performed especially poorly on tests which required good strategies for problem solving. His overall memory and reasoning were in the average range. (TRIII-566-570).

61. The student also completed the Kaufman Test of Educational Achievement, Second Edition, which looks at different elements of academic functioning. His reading scores were in the average range: letter and word recognition, reading comprehension, nonsense word decoding and fluency were all average. With regard to mathematics, his overall score was in the below average range with math concepts and applications at the fourteenth percentile and math computation at the first percentile. His written expression fell in the fourth percentile; he had considerable trouble with correct word usage in sentences, capitalization, sentence structure, word form and punctuation. (P.6.1s; TRIII-570-572).

62. The psychologist gave the student the Ability-Achievement Discrepancy Analysis test which revealed significant discrepancies between predicted and actual performance on math, written language and oral expressions. (P.6.1t). According to the psychologist, the student had an anxiety disorder, and was preoccupied with feelings of personal inadequacy, self-doubt, and worthlessness. (P.6.1k; TRIII-573).

63. In his written summary, he concluded that the student's overall intelligence was in the average range of ability, with a full scale IQ of 95. His performance on the Universal Nonverbal Intelligence Test indicated that his memory abilities appeared commensurate with his reasoning skills. However, the results in the Cognitive Assessment System test indicated that his planning and attention fell in the below average range and his processing speed was in the borderline range.
64. The academic assessment showed that his performance was average in reading and oral language with significant weakness in all areas of mathematics and written expression. Therefore, he opined that the student had specific learning disabilities in math and written expression. (P.6.1g, 6.1h; TRIII-573, 578). The psychologist also found that the student had an expressive language disorder, which was exacerbated by his ADHD and slow processing speed.
65. As a result of his expressive language disorder, the psychologist opined that the student could understand, but had problems expressing himself due to lack of persistence and organization skills. These problems were complicated by his anxiety and anger. (TRIII-580-581).
66. The psychologist made a number of recommendations. He advised that the student should be provided additional external structure and assistance with organization, be given modified assignments so that he spends no greater time on them than his peers, but if need be, should be provided additional time, such as two-three days, for completion, and be provided study guides. He should also be provided teacher intervention and guided assistance in those instances when he gives up quickly on assignments and that long-term and multi-step tasks be divided into smaller parts. According to the psychologist, the student knows what to do but experiences difficulty in doing the task. (P.6.1m,1n; TRIII-584-585).
67. The psychologist reviewed the July 24, 2013 evaluation prepared by the school psychologist. He basically concurred in her findings except for her view that written expression was not a major problem. (TRIII-588).
68. The student did not tell the psychologist of specific instances of bullying but did tell him that he didn't feel safe at the school and that the teachers were unresponsive to his concerns. (TRIII-592).

69. The psychologist was asked to review the psychological report prepared in the fall of 2008. He testified that the findings in that report with regard to ADHD, language, or emotional issues were not properly considered by the MDR team. (TRIII-602-603).

70. The school psychologist testified that she saw the student for a psychoeducational evaluation during three days in June and July of 2013 due to concerns the parents had with regard to his functional communication skills and processing speed which they believed impacted all his subjects. (TRIV-799).

71. The student's cooperation and abilities varied during the three meetings depending on how much, if any, medication he had taken. The most significant concern he expressed to the psychologist was his difficulty in saying what he wanted to say in the manner he wanted to say it. He told her that because of that frustration, he would become distracted and anxious. (TRIV-802-804).

72. She administered the Reynolds Intellectual Assessment Scales (RIAS), which indicated that the student's cognitive ability was in the average range. She also gave him the Wechsler Intelligence Scale for Children, fourth edition (WISC-IV) to assess his processing speed in light of his intellectual skills. She found that verbal comprehension skills were in the low average range, and his perceptual reasoning and working memory skills were in the average range. His processing speed, however, fell in the borderline range. Overall, his general ability index rating was average. (P.6.4c; TRIV-806-811).

73. In the Wechsler Individual Test (WIAT-III[10]), which is designed to determine a current level of academic achievement, the student's scores ranged from below average in math, to average in comprehension, oral expression, word reading, pseudo word decoding and spelling, to above average in sentence composition. He performed in the average range in basic reading and written expression, but in the below average range in math. (P.6.4d; (TRIV-811-813).

74. In comparing his achievement levels to his intellectual capability, she found that all achievement levels were commensurate with expected levels given his intellectual abilities except for math, particularly numerical operations.

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[10] In the report, it is incorrectly written as "II" instead of "III" due to typographical error. (TR.IV-813-814).

2013 and administered the Clinical Evaluation of Language Fundamentals (CELF). She found that his score was low in concepts and directions, semantic relationships, word structure and sentence recall. The total language score was seventy, indicating greater than a three year delay.

83. She also assessed his auditory processing through the SCAN-A Test. His composite score was sixty-two, more than two standard deviations below the mean. She concluded he would benefit from intensive therapy for his language weaknesses and his auditory processing impairments and recommended therapy twice a week for six weeks, followed by reassessment. (P. 6a,b).

84. The school speech language pathologist expressed concerns about the report. She testified that parents' pathologist had used a ten year old edition for testing that had been superseded by subsequent versions. It was not best practices to use an out-of-date edition; the test would not have been standardized for the current population and would not have included updates. She also contended that it appeared the pathologist was not a certified audiologist and should not have administered the test which, in any event, was also out of date. She requested that the parent obtain an updated report, but none was provided. (TRII-476-481, 486).

F. Developments After June 10, 2013 Meetings

85. On June 14, 2013 another IEP meeting was held. The mother consented to the team's offer of 160 minutes of compensatory services. The school members refused occupational therapy evaluation until an occupational therapist could attend the meeting. (S.D., C.131). Her request that her son receive home-based services while out of school and placement at another school was denied because the team determined that the home school could meet his IEP needs. (TRI-189).

86. On June 18, 2013, Davis B. Jones, III, M.D., a physician treating the student, submitted a letter and medical certification of need stating that he believed the student should receive instruction at home or in another school because he did not feel safe physically or emotionally at the home school. (S.D., D.21-22).

87. On July 8, 2013, counsel for the parents sent an e-mail to the school system attorney in which she again sought settlement through transfer of the student to another school and reported that the parent had continued to be unsuccessful in securing alternate placement. (S.D., D.18).

88. On August 26, 2013, the SEC met without the presence of the parents who could not attend. (TRII-356). They had rejected the proposed dates of August 22, 2013 and August 23, 2013. (S.D., C. 46-51; TRIII-730-731). The members proposed that the student be found eligible for special education as a student with the primary disability of OHI due to ADHD and anxiety and a secondary disability of specific learning disability in the area of numerical operations. They reviewed the current psychological and speech language assessments. The team mistakenly believed then that it had to meet on the 26th because of the sixty-five day requirement for determining eligibility. (P.4.5a; TRI-133-134,342; TRII-342, 356).

89. On August 27, 2013, the committee held a follow-up meeting at which the mother did attend. She was represented by the second advocate. The parent provided the report of the parents' pathologist. The team discussed what occurred at the August 26, 2013 meeting, reviewed the reports again, and essentially redid the meeting that occurred the day before. (TRI-134: TRII-339, 734). The mother submitted a letter asking that the documentation developed on August 26, 2013 be stricken as the meeting was held without her consent or participation. The request was ultimately denied. ((P.4.8; TRII-336-337, 735). Another meeting was then scheduled for September 5, 2013. (P.4.10b).

90. On August 27, 2013, the parents provided written notice of their intention to place the student at a private school. (P.8.6). The school system at the IEP meeting on August 30, 2013, rejected private placement on the basis that the student's programming needs could be best met at his neighborhood school.

91. On September 5, 2013, another meeting took place. The mother was represented by the second advocate who participated by telephone. The members added specific learning disability as a secondary disability and expanded OHI to include anxiety and slow processing speed. It rejected the eligibility category of speech language impairment and refused to refer the student for a central

auditory processing evaluation. (P.4.10a; TRII-345). In making its decision, it considered the evaluation of the parents' pathologist and the evaluations of the school system's pathologist and her remarks at the meeting. (TRII-480-481). It rejected placement at the private school because the team believed it could provide FAPE at the student's home school. (TRII-345).

92. The parents did not present the report of their psychologist to the SEC committee meetings in August or in September. (TRIII-842).

93. On October 4, 2013, another IEP meeting was held without the parents' presence. (S.D., C.2; TRIV-843). The team identified recent evaluations and substantially expanded the number of services. (S.D., C.4) The school psychologist reviewed many of these accommodations and concluded that they would be appropriate and beneficial for the student. (S.D., C. 11-12; TRIV-843-848).

94. The coordinator testified regarding changes made to the accommodation page from the accommodation page in the June 10, 2013 IEP. She recalled that the wait time was increased to fifteen seconds and the time to complete assignments was doubled. (TRI-211-212). Moreover, the list of accommodations was expanded from eleven to nineteen. (S.D. C.11, C.111). These included assignments and directions broken down to no more than two tasks at a time, additional adult assistance in the science and social studies class, access to a word processor, and frequent breaks after fifteen minutes of participation on the same task. (TRI-213). The school system prepared these new accommodations to reflect the new goals addressed and the results of the new evaluations. (TRI-161-162).

III. GENERAL LEGAL FRAMEWORK

The Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §1400 *et seq.* (2005) amended the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* (1997) (IDEA). IDEA 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). Virginia has elected to participate in the program and has required its public schools, which include this school district, to provide FAPE to all children with disabilities residing within its jurisdiction. Va. Code Ann., §22.1-214-215.

The Act establishes significant procedural requirements to safeguard the rights of the student to receive a FAPE. 20 U.S.C. §1415. *Rowley, supra,* at 207. These safeguards "guarantee the parents an opportunity for meaningful input into all decision affecting their child's education." *Honig, supra,* at 311-312 (1988). "Congress placed every bit as much emphasis on compliance with procedures giving parents...a large measure of participation at every stage of the administrative process...as it did up the measurement of the resulting IEP against a substantive standard." *Rowley, supra,* at 205-206.

The primary safeguard to protect the child's rights is the IEP. The educational program offered by the state must be tailored to the unique needs of the handicapped child by means of the IEP. 20 U.S.C. §1414. IDEA directs that local school districts, in consultation with parents, the child, and teachers, develop an IEP for each handicapped child. 20 U.S.C. §1414(d)(1)(B). Should there be any complaints regarding the content of a child's IEP, the parents have the right to an "impartial due process hearing" 20 U.S.C. §1415(f); See also *Barnett v. Fairfax County School Board,* 927 F.2d 146, 150 (4th Cir. 1991). The safeguards guarantee "...both parents an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decision that think inappropriate." *Honig v. Doe,* 484 U.S. 311-312 (1987).

Parents are required to be members of the group that makes the decision on educational placement. 20 U.S.C. §1414(e). Under 34 C.F.R., §300.345,(2006), the school district is required to ensure that parents are present or have had an opportunity to participate at each IEP meeting. See also 8 VAC 20-81-110.E. The written notice for an IEP meeting must indicate the individuals who will be present. 8 VAC 20-81-110.E.2. However, the right to participate does not give parents the power to dictate the outcome of the IEP team or veto educational decisions for their child without congressional mandate. *See, e.g., A.W. v. Fairfax County School Board,* 372 F.3d 674, 683, n.10 (4th Cir. 2004).

Once the school district decided to suspend the student for more than ten days or expel him, it was required to convene an MDR committee to determine whether the conduct was a manifestation of his disability. 20 U.S.C. §1414(k).

IDEA directs the team to determine whether the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability and whether the conduct was the direct result of the failure of the school district to implement the IEP. 20 U.S.C. §1415 (k) (1) (E) (i), 34 C.F.R. §300. 530(e).

The MDR committee is also required to review all pertinent information in the student's file, including any teacher observations and information provided by the parent. 20 U.S.C. §1415 (k) (1) (E) (i); 34 C.F.R. §300.530(e). Should the team decide that the behavior is not a manifestation of the child's disability, the disciplinary procedures applicable to children without disabilities may be applied in the same manner as applied to children without disabilities. 20 U.S.C. §1415 (k) (1) (C).

The United States Department of Education's Office of Special Education and Rehabilitative Services (OSERS) has issued a letter which provides its definition of bullying. It defines bullying as being "...characterized by aggression used within a relationship where the aggressor has more real or perceived power than the target, and the aggression is repeated or has the potential to be repeated, over time. Bullying can involve overt physical behavior or verbal, emotional, or social behaviors... and can range from blatant aggression to far more subtle and covert behaviors...." The Department further advised that bullying that results in the student not receiving meaningful educational benefit could result in a denial of FAPE. *Dear Colleague Letter,* 61 IDELR 263 (2013). Virginia defines bullying as "any aggressive behavior and unwanted behavior that is intended to harm, intimidate or humiliate the victim; involve a real or perceived power imbalance between the aggressor or aggressors and victim, and is repeated over time or causes severe emotional trauma." It excludes ordinary horseplay or peer conflict. Va. Code Ann., §22.1-276.01.

A school district fulfills its obligation to provide FAPE as long as the IEP "consists of education instruction specially designed to meet the unique needs of the handicapped child...supported by such services as are necessary to permit the

child to 'benefit' from the instruction." *Rowley, supra,* at 188-189. Each year the IEP sets out a curriculum to address the child's disabilities, with appropriate objective criteria and evaluating procedures and schedules for determining whether the instructional objectives are being achieved. 20 U.S.C. §1414(d).

IDEA does not require the school system to provide the best possible education or to achieve outstanding results. *Rowley, supra,* at 187-192, 198. An appropriate education is one that allows the child to make educational progress. *Martin v. School Board,* 3 Va. App. 197, 210, 348 S.E.2d 857, 863 (1986). The goal is "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Rowley, supra,* at 192.

"Congress did not intend that a school system could discharge its duty under the [ACT] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Board of Education,* 774 F.2d 629, 636 (4th Cir. 1985). The Supreme Court has held that an IEP meets the requirements of IDEA if it is "reasonably calculated to enable the child to receive educational benefits." *Rowley, supra,* at 207. The Fourth Circuit has determined that educational benefits meant "some form of meaningful education". *Conklin v. Anne Arundel Board of Education,* 946 F.2d 306, 308 (4th Cir. 1991).

Once there is a determination that the IEP is designed to permit the student to receive meaningful educational benefits, it is irrelevant that the private placement of the parents proposed would have provided greater benefits. *M.M. v. School District of Greenville County,* 303 F.3d 523, 526-527 (4th Cir. 2002); *A.B. v. Lawson,* 354 F.3d 315, 326-327 (4th Cir. 2004).

An IEP shall include "A statement of the child's present levels of academic achievement and functional performance...", and "(a) statement of measurable annual goals, including academic and functional goals designed to" enable him to make progress in the general curriculum. 34 C.F.R. §300.320(a)(1), §300.320(2)(i)(A).

The applicable Virginia regulations provide that the present level of performance should be written in objective measurable terms, to the extent

possible. Test scores, if appropriate, should be self-explanatory or an explanation should be included. 8 VAC 20-81-110 G.1. The IEP should also include "a statement of measurable annual goals, including academic and functional goals, relating to meeting the child's needs that result from the disability to enable him to progress in the curriculum. 8 VAC 20-81-110 G.2.

Under 20 U.S.C. §1412(a) (3), the school district is required to evaluate and identify all areas of suspected disability. If the school district has knowledge that the student is not making adequate and expected progress in achieving his annual goals, the IEP should be revised. 34 C.F.R. §300.324. The IEP is also required to set forth the specific services the student will receive to progress toward his goals, 34 C.F.R. §300.320 (a) (4), and to prepare measurable goals. 34 C.F.R. §300.320 (a) (2).The IEP shall also include a statement of the special education and related services and supplementary aids and services,...to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child" to advance toward his goals and progress in the curriculum. 34 C.F.R. §300.320(a)(4).

Hearing officers ordinarily engage in a two step inquiry to decide whether FAPE has been provided under IDEA. First, they determine whether school officials have complied with the procedures contained in the Act and, secondly, whether the IEP is reasonably calculated to enable the child to receive educational benefits. *Rowley, supra,* at 181.

Technical violations that do not obstruct the student's participation in the process do not make a proposed program inadequate. *Burke County Board of Education v. Denton,* 895 F.2d 973, 982 (4th Cir. 1990).

Procedural deficiencies alone are insufficient to set aside an IEP unless there is a rational basis to conclude that the defects hampered the parents' opportunity to participate in the decision making process, thereby compromising the child's ability to receive an appropriate education and depriving him of educational benefits. *O'Toole v. Olathe District School Unified School District,* 144 F.3d 692, 707 (10th Cir. 1998); *See also Roland M. v. Concord School Committee,* 910 F.2d 983, 994 (1st Cir. 1990).

A child is denied FAPE where the procedural defects cause a material and inherently harmful impact on the IEP committee's ability to develop a plan reasonably calculated to enable the child to receive meaningful educational benefits under the *Rowley* standard. *M.L. v. Federal Ways School District,* 394 F.3d 634 (9th Cir. 2005); *Amanda J. v. Clark School District,* 267 F.3d 877 (9th Cir. 2001); *Deal v. Hamilton County Board of Education,* 392 F.3d 840 (6th Cir. 2004). The procedural violation must therefore *actually* interfere with the provision of FAPE. *DiBuo v. Board of Education of Worcester* County, 309 F.3d 184, 190 (4th Cir. 2002) (emphasis in original).

Procedural flaws do not automatically require a finding of denial of FAPE. However, procedural inadequacies that result in a loss of educational support, or which seriously infringe on the parent opportunity to participate in the IEP, result in a denial of FAPE. *Hall ex rel Hall, supra,* at 635; *Burke County Board of Education V. Denton,* 895 F.2d 973, 982 (4th Cir. 1990) Thus, If a school district has already determined placement prior to the IEP meeting, then that would constitute such a serious procedural infraction that it would deny a parent of her right to meaningful participation in the development of the child's IEP in violation of 20 U.S.C. §1414(e) and 20 U.S.C. §1415; *Spielberg v. Henrico County Public Schools,* 853 F.2d 256 (4th Cir. 1988).

The federal regulations promulgated under IDEA provide that the school district shall take steps to ensure that a parent is present at IEP meetings and given the opportunity to participate with regard to the identification, evaluation and educational placement of the child and the provision of FAPE. 34 C.F.R. §300.322. If the parents do not attend despite having received notice and an opportunity to participate, the school district may proceed with the meeting. 8 VAC 20-81-170 A.

Hearing officers have the authority to grant relief as deemed appropriate based on their findings. Equity practices are considered in fashioning a remedy, with broad discretion permitted. *Florence County School District Four v. Carter ex rel Carter,* 510 U.S. 7, 17 (1993).

The burden of proof on the issues of whether the IEP is deficient and whether any procedural violations deprived the student of a FAPE rests upon the

party challenging the IEP. *Schaffer v. Weast,* 546 U.S. 49 (2005). For this hearing, that is the parents.

Hearing officers are to give appropriate deference to local educators. *Hartmann v. Loudoun County School Board,* 118 F.3d 996, 1000-1001 (4th Cir. 1997, *cert. denied,* 522 U.S. 1046 (1998). They are entitled to latitude in the development of an IEP appropriate for the student. *A.B. v. Lawson,* 354 F.3d 315, 328 (4th Cir. 2004). However, that does not relieve the hearing officer of the responsibility to determine as a factual matter whether the IEP is appropriate. *County School Board of Henrico v. Z.P. ex rel. R.P.,* 399 F.3d 298, 307 (4th Cir. 2005).

An IEP which lacks relevant goals, ignores the unique needs of the child, or fails to establish any baseline for determining the goals or for monitoring progress may well deny FAPE to the child. However, momentary lapses in implementation or insufficient details on the present levels of academic achievement and functional performance, where the failure does not substantially impair the provision of services to the child, may not result in a defective program. The procedural deficiencies must be material.

If an IEP is reasonably calculated to enable the child to receive benefits, the hearing officer cannot reject it based on a belief that a different methodology is better for the child. *County School Board of Henrico, supra* at 308. In order to prevail in a claim under IDEA, the parent must show that the failure of the district to implement all the aspects of an IEP is material, that there was a failure to carry out substantial or significant provisions of the IEP. Such an approach enables school systems to exercise flexibility in implementing IEPs but holds them accountable for material failures and for providing the child a meaningful educational benefit. *Houston School District v. Bobby R.,* 200 F.3d 341, 349 (5th Cir. 2000), *cert. denied* 531 U.S. 817 (2000). This approach has been accepted by other circuit courts. *See Fisher ex rel. T.C v. Stafford Township Board of Education,* 2008 WL 3523992 n.3 (3d. Cir. 2008); *Van Duyn v. Baker School District 5j,* 502 F.3d 811, 821-822 (9th Cir. 2007); and *Neosho R-V School District v. Clark,* 315 F.3d 1022, 1027 (8th Cir. 2003).

district added specific learning disability as a secondary disability and expanded OHI to include anxiety and slow processing speed. The parents have not challenged those specific designations. Both psychologists came to well-reasoned but different conclusions with regard to the need for a designation of speech language impairment. Therefore, I find that the parents were unable to carry their burden of proof on that issue. The school system appropriately identified and evaluated the student's disabilities and did so in a timely fashion.

B. The IEPs offered by the school system was reasonably calculated to offer the student educational benefits based on the standard set forth in Rowley.

The educational progress of the student under his IEPs, despite the significant impact of his absences from school, establishes the appropriateness of the program. The actual progress made is a factor to be considered in determining the appropriateness of an educational program under IDEA. *M.M. v. School District of Greenville County*, 303 F.2d 523, 532 (4th Cir. 2002).

The student made progress on some of his goals in the IEP and mastered others. The teachers enumerated the accommodations provided to the student once he returned from his absence due to the concussion. He continued to make some educational progress in his home school in the months before the May suspension as a number of strategies and support were employed to assist him. The parents did not object to the specific goals or services provided during this period and signed consent to all the IEPs. There is sufficient evidence that the IEPS were reasonably calculated to offer meaningful educational benefit to the student under *Rowley*.

Once the evaluations were completed over the summer and the SEC meeting was held, the IEP team on October 4, 2013 made major revisions in the IEP. The psychologist and coordinator enumerated many of the new accommodations and services enumerated in the new IEP and explained how the changes and additions would provide educational benefit to the student. There was no rebuttal testimony on the October IEP at the hearing. I find that the IEP was reasonably calculated to provide FAPE to the student.

There was limited testimony at the hearing about flaws in the preparation or revision of goals and in the services to advance the goals. The parents asserted that progress reports did not enable them to determine whether progress had been made and the LEA had provided insufficient information to assess progress. However, there is no proscribed format for reporting such information.

The IEPs contained numerous accommodations and services. The teachers testified on how they implemented the provisions in light of the student's disability. The IEP team met with the parents for IEP meetings frequently during the 2012-2013 school year. Until after the MDR, they signed off on all the IEPs. The parents did not challenge any of the goals or accommodations during this period. Even assuming, *arguendo,* that there were minor deficiencies in development, revision or measurement, the parents have not shown how those deficiencies deprived the student of educational benefit. Failure to include all required elements of the IEP within the document itself will not invalidate an IEP as long as the parents and administrators have the information. *Doe v. Defendant I,* 898 F.2d 1186, 1190 (6th Cir. 1990).

The parents failed to carry their burden of proof that the manner in which the school system prepared the annual goals, revised the annual goals, or enumerated the specific services to advance those goals deprived the student of FAPE.

C. The school system provided the parents with proper notice for the June 10, 2013 SEC and IEP meetings, properly informed them of the attendance of its attorney at the meeting, and did not deprive their son of any loss of educational opportunity or deny him FAPE.

The mother conceded during her testimony that she received notification that the LEA attorney would be present but had not read the entire notice. The parent was given the opportunity to participate and, without cause, chose not remain at the meeting. As the court held in *Fitzgerald v. Fairfax County School Board,* 556 F. Supp.2d 543, 551, 553 (E.D. Va. 2008), the parents are given the opportunity to participate, but they do not have the right to veto a decision nor

are they required to consent. See also 34 C.F.R. §300.322, 501. They do not have the right to object to the individuals the school system bring to the meeting. *Fitzgerald v. Fairfax County School Board, supra,* at 553.

The parents cite, on page three of their closing statement, guidance provided in the regulations promulgated pursuant to IDEA in 1997, which are found in Question 29 in Appendix A to 34 C.F.R. part 300. Therein, it was recognized that attorneys could contribute to a potentially adversarial atmosphere and because that would not be in the best interest of the child, attendance should be discouraged.

That certainly makes sense for the typical IEP meeting. However, here the parents were represented by not one, but two advocates in a series of interactions that became increasingly confrontational in the weeks before the meeting. It is not surprising that school system personnel would want the presence of their attorney[11], who unquestionably had special expertise and satisfied the qualifications in 34 C.F.R. §300.321(a)(6). The school system was entitled to invite the attorney even if the parent's attorney did not attend. *See Letter to Anonymous,* 50 IDELR 259 (OSEP 2008).

It is obvious that there was ill feeling and friction among the individuals in the room, but both sides had the assistance of representatives with special expertise and considerable experience in special education matters. They and their client were quite capable of resisting whatever limited intimidation took place. Based on the testimony and the tape I reviewed, I conclude that the parent and second advocate were not justified in leaving the meeting and that their actions rather than those of the LEA attorney were primarily responsible for the tense atmosphere. I also note that no evidence was produced that the parent and second advocate were prejudiced by departing a short time before the meeting ended or that their absence caused a denial of FAPE. But even if there were a procedural violation, that would not be dispositive of the question whether FAPE

[11] At the meeting, the parent contacted her attorney in the disciplinary matter for representation, even though the attorney had made it clear she was not representing the family in the IEP matters and was not knowledgeable about the parent's special education issues. It must have been confusing for the LEA and its counsel to decide who to contact as issues arose given the considerable overlap in the two proceedings. In any event, the complications of divided representation were certainly apparent here.

had been denied as the conduct must actually interfere with the provision of FAPE. See *DiBuo v. Board of Education,* 309 F.3d 184, 190 (4th Cir. 2002). That did not happen in this case.

D. The school system did not deny the student FAPE by holding a SEC meeting without the presence of the parents on August 26, 2013.

The school system mistakenly believed that the hearing had to be held before August 27, 2013, to meet the regulatory deadline[12]. It first attempted to set up meetings on August 22, 2013, and on August 23, 2013. When those dates were rejected by the parents, the LEA sent notice received on August 22, 2013, that the meeting would be on the August 26, 2013. The parents told them the date of August 26, 2013 did not work for them; the school system proceeded regardless because of the deadline. Once the school system realized that it had additional time, the parties reconvened on the 27th of August and redid the meeting. At that meeting the mother had a full opportunity to participate in the discussions in a meaningful fashion and to have input into the determination. She also had the same opportunity at the September 5, 2013 follow-up meeting.

The parents cite *Amanda J. v. Clark County School District,* 260 F.2d 1106 (9th Cir. 2001) for the proposition that protection of the right to be involved in the development of their child's educational plan is one of the most important procedural safeguards since they not only represent the best interest of the child but have critical information for the development of the IEP. (closing statement of parents, pp. 3-4). However, in *Amanda*, the parents were not given the reports from the psychologist or speech pathologist. The psychologist recommended further psychiatric testing. The medical information was crucial, and the school system had prevented the parents from learning that critical information about their child. In this case, the evaluations were provided and no important information was withheld from the parents.

[12] 8VAC 20-81-70 H2 sets a sixty-five business day time frame from the referral date for completion of the reevaluation process.

There has been no testimony that the student lost any educational benefit because of the absence of the parents at the August 26, 2013 meeting. I find that the parents were given notice and full opportunity to participate in the decisions made by the committee.

E. The MDR committee conducted an appropriate manifestation determination review in deciding that the behavior of the student was not a manifestation of his disability.

The parents maintain that statements of the two students and the assistant principal do not support the findings of the principal as set forth in her administrative statement and, in any event, the penalty was far too harsh for such an insignificant event. The MDR team concluded that it could not address the merits of the charges and had to accept the facts and position of the principal at face value. The team, therefore, had the duty to determine whether the conduct of the student, as set forth by the principal, was a result of the manifestation of the student's disability and whether it was caused by a failure to implement the IEP. It answered both questions in the negative.

Counsel for the school district maintained that the principal made the right decision with proper analysis of the evidence and that the offense was sufficiently serious that discipline was justified. (closing statement of the school district, pp. 6-8).

I was unable to find a definitive ruling on whether the hearing officer has the authority to decide whether the school system is correct in its determination of the facts in the episode that gave rise to the discipline. However, I find the reasoning in *Danny K. by Luanna K. v. Department of Education, State of Hawaii,* 57 IDELR 185 (D. Ha.2011) persuasive. In that case, the MDR team was required to determine whether the detonation of an explosive device was triggered by the student's disability. In finding its review proper, the court noted that it was not the role of the team, hearing officer or the court to decide whether the student's conduct in question occurred as found by the school district. The team should make its determination based on whether the actions leading to the

potential discipline, as established by the investigator, were a manifestation of the disability and not make a determination on the merits of a school system's finding that the student violated the code of conduct. The court reasoned that such a requirement would have deputized the MDR teams, and, in turn, hearing officers and courts, as appellate deans of students. The court further stated that IDEA was not intended to provide another avenue for disabled children to contest the findings of misbehavior.

The proper place to challenge the principal's findings and her recommended penalty is through the disciplinary proceedings. I conclude that a hearing officer should not second guess her with regard to whether the misbehavior occurred as she found. I also find that the hearing officer does not have jurisdiction to rule on the penalty imposed.

The MDR team appropriately considered all relevant information in the student's educational file, observations of teachers and information from the student's parents. There appears to be no binding precedent on whether the MDR team is limited to addressing only the eligibility category in the IEP or whether it should also review other accepted diagnoses where there is evidence of disabilities and impairments that are not identified as categories in the IEP. I think the better practice is to consider all known impairments.

Some team members testified that the team could not consider other disabilities beyond ADHD, inattentive type, but I conclude from the record that it did so. The members considered whether the action was intentional or impulsive. Having decided it was purposeful, and not impulsive, it found no manifestation. The team also addressed the student's slow processing speed, functional communication needs, social skills, and his interactions with peers. I disagree with the parents' psychologist who testified that the behavioral aspects of the student's ADHD disorder, including impulsivity and executive function difficulties, were excluded from review.

I also find that regardless of whether the student's expressive language deficits should have been an additional category of disability, the deficit had no relevance to his intentional decision to poke the other student with a pencil. I conclude that the student exercised poor judgment that was not linked to his

disability. See, *e.g., Oconee County School System,* 27 IDELR 629 (Ga. Sea 1997) (leaving a shotgun in a car in the school parking lot not related to disability since impulsivity was part of ADHD, but bad judgment was not). *Madison County Board of Education* 25 IDELR 1033 (Al. Sea 1997) (possession of marijuana by a student with a learning disability reflected poor judgment unrelated to the disability). The pencil incident was intentional and isolated, but not linked to any of the student's disabilities.

The parents contended at the MDR that the student had been subjected to bullying in the past and was the object of bullying in the pencil incident. They also contended that the failure to address bullying denied FAPE to the student. I find that regardless of which statement of the two students is accepted, the incident did not fall within the definition set forth by OSERS or the Virginia Code. I also find that the horseplay incident referred to by the assistant principal did not constitute bullying. It is true that the student was subjected to bullying in the 2011-2012 school, but the father acknowledged that other student's misconduct had ended. All school witnesses who were asked denied being informed of any bullying in the 2012-2013 school year. The parents, their son, and the psychologist could not identify a single event of bullying in that school year. The notion that the student should not have returned to the home school because of bullying or that the claim of bullying had any relevance whatsoever to the issues in this appeal is wholly without foundation.

The parents seek reimbursement of attorneys fees and deletion of the disciplinary record from the student's files. They did not prevail on the merits on the MDR claim and, thus, no relief is available regarding the LEA records. Even had they prevailed, I could not have ordered reimbursement for attorneys fees. Only a court of law can award attorneys fees; a due process hearing officer does not have such jurisdiction. Further, the request is not even for representation in the due process hearing but for representation in the disciplinary proceedings which, they maintain, would not have been necessary if they had succeeded before the MDR committee. There is no basis for this contention: Hearing

officers in due process hearings also lack the authority to order attorneys fees for matters that are not part of IDEA[13].

The parents also seek reimbursement for the cost of private placement for the 2013-2014 school year[14]. Since the parents are not the prevailing party, they are not entitled to relief. Given the appropriateness of the IEPs offered by the LEA, it is not necessary to evaluate the appropriateness of the private placement. *Burlington School Committee v. Department of Education,* 471 U.S. 359 (1985).

I recognize that the parents have demonstrated extraordinary devotion to their son and tried to act in his best interest with great concern and dedication. They have shown a strong commitment to public education. Another son is enrolled in a public school and, even though they felt betrayed and victimized by the special education and disciplinary processes and frustrated by their son's academic progress during the school year, they still tried to obtain an out of zone transfer so that their son could remain in the city public schools. It is lamentable that the LEA did not assist them or that the pencil incident was not handled with greater sensitivity and wisdom.

Nevertheless, under the low threshold of the *Rowley* case, I have found that the IEPs were reasonably calculated to offer educational benefits to the student and that he was not deprived of FAPE. The parents were not able to establish that because of any procedural deficiencies the student lost educational benefit or FAPE was denied to him.

V. ISSUES

1. Whether the school system failed to timely identify and evaluate all areas of suspected disability during the 2012-2013 school year.

2. Whether the IEPs offered by the school system were reasonably

[13] The parents seek reimbursement for attorneys fees even though the attorney did not represent them in the initial disciplinary hearing and represented them in the appeal but dismissed it. Moreover, they did not submit a retainer agreement or any statement of fees incurred.
[14] It would have been difficult, in any event, to determine how much to award for the private school expenses given that the parents did not submit any evidence of the cost of the education or make a claim for related expenses.

calculated to offer the student educational benefits based on the standard set forth in *Rowley*.

3. Whether the school system provided the parents with proper notice for the June 10, 2013 SEC and IEP meetings, properly informed them of the attendance of their attorney at the meeting, deprived their son of any loss of educational opportunity or denied him FAPE.

4. Whether the school system denied the student FAPE by holding a SEC meeting without the presence of the parents on August 26, 2013.

5. Whether the MDR committee conducted an appropriate manifestation determination review in deciding that the behavior of the student was not a manifestation of his disability.

VI. CONCLUSIONS OF LAW AND FINAL ORDER

1. The student has the primary disability of other health impairment, due to ADHD and anxiety and a secondary disability of specific learning disability in the area of numerical operations, and thereby qualifies for services under IDEA.

2. The parent was afforded all procedural and notice protections required by IDEA.

3. The school system did not fail to timely identify and evaluate all areas of suspected disability during the 2012-2013 school year.

4. The IEPs offered by the school system were reasonably calculated to offer the student educational benefits based on the standard set forth in *Rowley*.

5. The school system provided the parents proper notice for the June 10, 2013 SEC and IEP meetings, properly informed them of the attendance of their

attorney at the meeting, and did not deprive the student of any loss of educational opportunity or deny him FAPE.

6. The school system did not deny the student FAPE by holding a SEC meeting without the presence of his parents on August 26, 2013.

7. The MDR committee conducted an appropriate manifestation determination review in deciding that the behavior of the student was not a manifestation of his disability.

8. The LEA is the prevailing party on all issues.

9. This decision is final and binding unless either party appeals to a federal District Court within ninety calendar days of the date of this decision, or to a state Circuit Court of local jurisdiction within one hundred eighty calendar days of the date of this decision.

date: 6/23/14

Alan Dockterman
Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that I have, this 23rd day of June, 2014, caused this Decision to be sent via first-class mail, postage prepaid, and by e-mail to the parents, advocates for the parents, counsel for the LEA and to Patricia V. Haymes, Esq., Director, Dispute Resolution/Administrative Services Department of Education, Commonwealth of Virginia, P.O. Box 2120, Richmond, VA 23218-2120.

Alan Dockterman

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