

JUN 18 2014

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

**Dispute Resolution &  
Administrative Services**

**Re: Child, by and through his parent(s), Parent v. LEA**

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**Child & Parent(s)/Guardian:**

Child, child  
Mr. Parent, parent(s)

**Administrative Hearing Officer:**

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

**Child's Attorney Advocate:**

Child Attorney, Esq.  
Advocate for Child

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**School Division Attorney**

LEA Attorney, Esq.

**Superintendent of LEA:**

Dr. Superintendent

**DECISION**

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

Parents filed a request for an expedited due process hearing on April 3, 2014. The pleading was received by the Local Educational Agency (LEA) on the same date. (HO Exh. 25, p. 2). The request contained IDEA and Section 504 issues. As referenced, one IDEA issue was subject to expedited proceedings. As such, the Hearing Officer bifurcated this matter and first held a hearing that addressed the issue required to be expeditiously adjudicated. The Hearing Officer issued a decision regarding that issue on May 15, 2014. That decision was amended on June 4, 2014. The decision on the remaining non-expedited issues is set forth here.

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<sup>1</sup> 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.

Prior to holding the hearings, the Hearing Officer scheduled a pre-hearing conference (PHC) setting the hearing dates. (HO Exh. 3). Subsequent to the initial PHC, Parents retained an attorney. Accordingly, a second PHC was held. After hearing from the parties, an April 15, 2014 scheduling order was issued which, among other matters, established the hearing dates for the non-expedited matters. Consistent with that schedule, this hearing was held on May 12 and 13, 2014. (HO Exh. 1).

During the hearing the Hearing Officer admitted Parents' Exhibits P1 through P 50 and P 100 through P 111; LEA's Exhibits A1 - A22, B 1 - B 46, C 1 - 57, D1 - 105; Hearing Officer's Exhibits 1 through 25; and the transcripts from the expedited due process hearing - April 29, 2014 Vol. I Transcript (Tr.); April 30, 2013 Vol. II Tr., and May 1, 2014 Vol. III Tr. III.

## II. ISSUES

### A. IDEA Issues

1. Whether the IEP fails to provide a Free Appropriate Education (FAPE) in that it does not address all the child's disabilities and limitations?
2. Whether the LEA denied the child a FAPE when it failed to conduct any evaluations during the child's reevaluation on or about October 2013/at the October 2013 reevaluation meeting?
3. Whether the LEA denied the parents input by predetermining that no evaluations of the child would be conducted during the reevaluation process?

### B. Section 504 Issues

1. Whether the LEA failed to hold a MDR review under Section 504 when it suspended the child for more than 10 days?
2. Whether the LEA failed to evaluate the child before it made a significant change in placement when it suspended or recommended suspending the child?
3. Whether the LEA denied the child equal educational opportunities by failing to evaluate the child and determine if he has a disability requiring special education and related services?

considered the main one. Accordingly, the private psychologist who performed the June 2010 evaluation considered Child's Mood Disorder as the most predominant diagnosis. (May 12, 2014 Tr. 240-241).

### **NOVEMBER 8, 2010 INITIAL IEP**

3. After the SEC determined Child eligible for special education and related services, the IEP team developed the initial IEP on November 8, 2010. The IEP stated that Child was found eligible for special education and related services because of a disparity between his cognitive abilities and his academic performance. Further, it indicated that Child had been diagnosed with ADHD and comprehensive assessments showed he had difficulties with impulsiveness and lack of attentiveness. In addition the IEP mentioned that Child was extremely inattentive, whether in a one on one situation or in a larger group; he displayed aggressive behavior and anxiety over social situations. The IEP team decided a behavior intervention plan (BIP) was appropriate and implemented one. (P Exh. P 16, 16f).

Under the Present Levels of Academic and Functional Performance (PLOP) section of the IEP and subheading "Social Performance," the IEP team noted in pertinent part that "[Child] exhibits low self-esteem and does not seem to understand social cues." (P Exh. P 16g).

4. One of the several goals established in the IEP addressed social/emotional development. It reads:

"By 11/14/2011, [Child] will increase social/emotional skills to a developmentally [sic] age appropriate level."

(P Exh. P 16 I)

5. Also, the IEP team determined benchmarks were appropriate for this goal and among others, set the those listed below:

#### **Objective/Benchmark #: 6 Maintain appropriate school skills**

By 11/14/2011, review behavior checklist with teacher and parents. Have checklist signed

#### **Objective/Benchmark #: 7 Maintain appropriate behavior**

By 11/14/2011, continue to maintain appropriate behavior, by going to a quiet place, talking to an adult, or ignoring others, even when frustrated or stressed

(P Exh. P 16 K)

6. Accommodations for Child included, among others, a behavioral plan/checklist, throughout the school building from November 15, 2010 to June 17, 2011, and from September 6, 2011 to November 14, 2011. (P Exh. P 16 P)

### **III. BURDEN OF PROOF**

The United States Supreme Court held in *Shaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed.2d 387 (2005), that the party seeking relief bears the burden of proof. Therefore, in this case the Parents bear the burden of proof as they are challenging the I.E.A's actions.

### **IV. FINDINGS OF FACTS**

1. October 19, 2010, the I.E.A's Special Education Committee ("SEC") found Child eligible for special education and related services under the category Other Health Impaired (OHI) due to his Attention Deficit Hyperactive Disorder (ADHD) combined type, mood disorder, sleep problems, processing disorder and visual motor integration difficulties. (I.E.A Exh. D 23; P Exh. P 11 C, F). The I.E.A has also found Child gifted and therefore Child is twice exceptional. (May 1, 2014, Vol. III Tr. 6).

Assessments and reports used to make the eligibility determination included a comprehensive June 23, 2010 Psychological Report (June 2010 Psychological Report) which contained cognitive and academic testing, a social history and a medical report. The parents provided the report to the I.E.A. Other information considered to make the eligibility determination included an educational report submitted from the child's teacher, a classroom observation, and input from the parent. (I.E.A Exh. D 24; P Exh. P 11G).

The I.E.A conducted no testing to make the eligibility determination. (May 12, 2014 Vol. I, Tr. 197). As an illustration, the SEC had no social-cultural evaluation done. (Testimony of Social Worker May 12, 2014 Vol. I Tr. 171).

2. Under the DSM-IV and AXIS I, the psychologist conducting the private June 2010 Psychological evaluation diagnosed Child with the following:

296. 90 **Mood Disorder Not Otherwise Specified** with anxious, depressed features (w/emerging conduct disorder tendencies) - laid over an:

300. 9 **Mental Disorder Not Otherwise Specified** with Attachment and Stress Reactivity features - laid over a;

314. 01 **Attention Deficit Hyperactivity Disorder, Combined type** – coexisting with;

315.9 **Learning Disorder Not Otherwise Specified** expressive writing disability and relatively lower than expected reason, reasoning comprehension and written mathematic operations.

(I.E.A Exh. D 50, 54).

The diagnoses above are listed in the order of their dominance with the first diagnosis listed

7. Special Education services identified in the IEP included services for social/emotional development for 30 minutes a week, five times a week in the ODC from November 11, 2010 to June 17, 2011, and September 6, 2011, to November 14, 2011. (P Exh. 16Q).

8. The prior notice regarding the IEP in the section about the actions proposed and the reason for the proposal states in pertinent part the following:

To implement the IEP as written under guidelines of IDEA. [Child] was found eligible for services this year due to extreme visual motor integration skills deficits, deficits in the area of writing and reading skills. In addition, writing skills are labor-intensive and very weak, so an occupational therapy evaluation will be conducted. [Child] has trouble staying on task and focusing on assignments. [Child] has been diagnosed with ADHD combined type as well as a mood disorder and a mental disorder NOS, with attachment and stress reactivity features. [Child's] grades have fallen and all areas of academics and social skills have been affected. Goals and objectives have been written to address following directions (written and oral), self clarification, demonstrating on task behavior of goals for visual motor integration and organization skills and behavior management.

(P Exh. P 16 T)

9. A hand written note on the IEP indicated that the committee's decisions were based on the comprehensive June 2010 Psychological Report, socio-cultural assessment<sup>2</sup>, classroom observations, report cards, SAT 10 scores, classwork and homework, and input from the teacher and parent. (P Exh. P 16 U)

#### **MODIFICATION TO INITIAL IEP ON JANUARY 20, 2011**

10. On January 20, 2011, an IEP team meeting was held and Child's IEP was modified. Accommodations in the modified IEP maintained the behavioral plan/checklist throughout the school building from January 20, 2011 to November 14, 2011, as well as the services, to include 30 minutes for social/emotional development 5 times a week.<sup>3</sup> (P Exh. P 17E).

#### **NOVEMBER 4, 2011 IEP**

11. The IEP team developed Child's first annual IEP on November 4, 2011. The PI.OP noted that Child's social skills were weak. Particularly, the PI.OP stated that Child is very sensitive to others' perception of how he compares to his peers. And further, he historically

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<sup>2</sup> As stated previously here, the evidence shows that no formal social-cultural assessment was completed by the I.E.A.

<sup>3</sup> Modifications consisted of a calculator, a more consistent communication system, and an extra set of textbooks for home use. (P Exh. P 16 H)

experiences anxiety and/or becomes depressed and withdraws from people around him when he fails to perform up to his expectations. Comments about Child's social skills concluded by stating that there had been some improvement in this area. (P Exh. P 20E).

The social emotional goals were removed from the November 4, 2011 IEP as well as the behavior plan/checklist. The three goals appearing on the November 4, 2011 IEP addressed only organizational skills, writing, and keyboarding. (P Exh. 20 H, I, and K).

### **FEBRUARY 24, 2012 PSYCHOLOGICAL REPORT AND ADMISSION TO THE GIFTED PROGRAM AT MAGNET SCHOOL**

12. On February 24, 2012, the school psychologist conducted a psychological evaluation for the sole purpose of determining if Child met eligibility requirements for gifted educational services. Intelligence testing revealed Child's Verbal IQ score was 130 and his performance IQ score was 129, indicating very superior and superior intelligence in the respective areas. Child's full scale IQ was scored at 133, in the very superior range.<sup>4</sup> (LEA Exh. D75).

During testing, School Psychologist observed Child's attentiveness, motivation, cooperation, and effort. (LEA Exh. D75).

13. Child applied for and was admitted as a sixth grader to the Magnet School for the gifted during the 2012/13 school year. He continued his enrollment as a seventh grader in the Magnet School from the beginning of the 2013/14 school year until Assistant Principal removed him from enrollment in March, 2014, due to his being suspended and recommended for an alternative school. (April 29, 2013, Vol. I, Tr. 129; Testimony of Assistant Principal).

### **JUNE 8, 2012 IEP**

14. On June 8, 2012, the IEP team met. The team retained the three goals in the prior IEP making minimal changes to them. (P Exh. P21 G). Regarding Child's social skills, the IEP's PLOP noted in identical language the same weaknesses regarding Child's social skills as in the November 4, 2011 IEP. (P Exh. 21E, P Exh. 20 F. See Statement of Fact 11 (SF # 11).

### **OCTOBER 15, 2012 and NOVEMBER 29, 2012 IEPs**

15. The IEP team developed another IEP on October 15, 2012. (P Exh. P 22B). Goals remained identical to the ones in the June 8, 2012 IEP addressing typing speed and accuracy, organizational skills, and writing skills. The team determined Child did not need positive behavioral interventions. (P22E, F).

Regarding Child's social skills, the IEP's PLOP noted in identical language the same weaknesses regarding Child's social skills as in the November 4, 2011, and June 8, 2012 IEPs. (P Exh. 22D, P Exh. 21E, P Exh. 20 E, SF # 11).

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<sup>4</sup>IQ scores between 90 and 109 are considered average. (Testimony of School Psychologist; LEA Exh. D75).

16. Accommodations in the October 15, 2012 IEP are set forth below:

<b>General</b>	<b>Frequency</b>	<b>Location</b>	<b>Setting</b>
Access to a word processor for all lengthy written assignments.	When written work is assigned.	Public Day School	Gen./Special Ed. Classroom
Extra time to complete written work. (not more than one extra day).	When written work is assigned.	Public Day School	Gen./Special Ed. Classroom
Repeat and clarify instruction And check for understanding		Public Day School	Gen./Special Ed. Classroom

<b>Testing Accommodations</b>	<b>Frequency</b>	<b>Location</b>	<b>Setting</b>
Extra time to complete tests with written responses up to one class bell or block	During tests that require written responses.	Public Day School	Gen./Special Ed. Classroom

(P Exh. 22G).

17. The October 15, 2012 IEP contained the same services as the previous IEP. They appear below:

<b>Services</b>	<b>Frequency</b>	<b>Location</b>
<b>Special Education</b>		
Consultation	30 minutes One time a week	Special Ed. Classroom in a public day school

(P Exh. 22G).

On November 29, 2012, Child's IEP was modified only to add the Scholastic Math Inventory (SMI).<sup>5</sup> (P Exh. 23 B).

### **TRIENNIAL REVIEW**

18. On October 1, 2013, the SEC met again to conduct the triennial review to determine if Child continued to be eligible for special education and related services. Those attending the meeting were Child's mother (Mother), general education teacher, assistant principal, school

<sup>5</sup> The SMI is a division wide assessment used to help teachers instructing students in Algebra in gathering assessment data about a student's strengths and weaknesses in math.

psychologist, social worker, case manager, and an intern. (LEA Exh. D 30).

The triennial review focused only on Child's ADHD, particularly Child's organizational skills and his difficulty turning in assignments. Also, the sole checklist used to determine eligibility was the ADHD worksheet. (May 12, 2014 Vol. I, Tr. 175). The committee determined that Child's ability to focus was affected by his ADHD and that his impairment resulted in an adverse impact on his educational performance. The SEC then found Child remained eligible for special education and related services under the category OHH due to his ADHD. (LEA Exh. D 33-34).

The SEC did not consider Child's disciplinary history. Further, even though Child had a history of behavior problems in school resulting in both in school suspensions (ISS) and out of school suspensions (OSS), there were no discussions regarding Child's inappropriate behaviors. (May 12, 2014 Vol. I, Tr. 175).

The SEC was aware at the meeting that Child was on Focalin for Mood Disorder. (LEA Exh. D 32; P Exh. P 13B).

19. In reaching the eligibility decision, the SEC did not conduct any testing or formal, standardized assessments of Child. By way of example, there was no social-cultural assessment available for review by the SEC conducting the triennial evaluation. (May 12, 2014 Vol. I, Tr. 171- 175). The first assessment of that kind was done by LEA's Social Worker on March 24, 2014, almost seven months after the triennial review. (May 12, 2014 Vol. I, Tr. 171). The March 24, 2014 social-cultural report, among other things, identified Child's disciplinary history, which began in the third grade and continued through his current seventh grade year. Misconduct referenced included lying, stealing, plagiarism, and sexually inappropriate behaviors, for which Child received suspensions both ISS and OSS. The referenced school infractions occurred prior to the triennial review, except for the sexually inappropriate behaviors. (May 12, 2014 Vol. I, Tr. 171-175; LEA Exh. D80).

20. The only formal assessment with standardized testing the SEC possessed and reviewed in determining continued eligibility was the June 2010 Psychological Report provided to the LEA by Child's parents. As previously noted, that report specified that Child was diagnosed with (among other health conditions) a Mood Disorder NOS with anxious and depressed features as well as emerging conduct disorder tendencies; a Mental Disorder NOS; and ADHD, combined type, coexisting with Learning Disorder NOS. The report identified the Mood Disorder as the most prominent of the Axis I diagnoses.

In the "Assessment Impressions" section of the June 2010 Psychological Report, the psychologist wrote in pertinent part, the following:

There appears an interaction of anxiety (obsessive compulsive, general worry), emerging mood, attentional, expressive writing and psychosocial issues that can produce the presenting symptoms that prompted this assessment. Psychosocial issues include stress of parent separation and some possible sibling over intensity. Possibility of exposure to the disinhibited Internet activities through teen



sibling/peer activities should also be explored. Given his higher intelligence that often is a product of "inquiring mind older than age", such obsession with that Internet material may also be seen. Overall the emergence of conduct disorder features noted by the teacher is a definite source of concern.

(LEA Exh. D 53).

In reaching the eligibility decision the SEC considered also parental input; a classroom observation from Child's case manager; educational summaries from a fourth grade teacher of child, Child's 7<sup>th</sup> grade English and Social Studies teachers, and another 7<sup>th</sup> grade teacher of child. The reports indicated that from the beginning of the 2013/14 school year, Child was not completing many assignments. Consequently, his class grades were negatively impacted. (P Exh. 13G-H; P Exh. 34.1 - 34.8; LEA Exh. D 37 - 49).

Even though Child consistently failed to complete assignments, struggled academically, and was engaged in inappropriate behaviors, the LEA/IEP team did not consider obtaining formal assessments and testing of Child until after he was suspended on February 6, 2014, four months after the triennial review. (May 13, 2014 Vol. II, Tr. 144).

#### **OCTOBER 7, 2013 IEP**

21. After the eligibility determination, the IEP met on October 7, 2013, and developed Child's IEP. The PLOP remained virtually unchanged from Child's prior IEP. (LEA Exh. C 9-10; LEA Exh P 22C-D). Of particular note, statements describing Child's social skills remained identical to the statements in at least the last three IEPs dated November 4, 2011, June 8, 2012, and October 8, 2012. (P Exh. P 20E, P Exh. 21E, P 22D, LEA Exh. C 9-10. Specifically, with respect to social skills, as a strength, similar to the prior IEPs, the October 7, 2013 IEP states the following:

[Child] is very social and gets along with peers and teachers. He is eager to please and very considerate of others. He has the ability to cooperate with others in group situations.

(LEA Exh. C9).

As a weakness the October 7, 2013 IEP noted similar to the prior IEPs, the following:

[Child] is a very sensitive to how he is perceived compared to his peers and has a history of becoming depressed when he does not perform to his expectations. When this happens he can become withdrawn from the people around him. This can also result in anxiety. These situations have improved over time.

(LEA Exh. C10).

22. Even though the SEC committee did not consider Child's disciplinary history nor obtain a formal social-cultural assessment providing such, the IEP states that Child's behavior did not

impede his learning or others. The team did not implement a behavior intervention plan. (LEA Exh. C 11).

23. In developing the October 7, 2013 IEP, the IEP team eliminated the typing goal from the prior IEP. Although Child was not mastering his organization skills goal or showing any signs of progressing toward meeting the goal, it was maintained on the October 7, 2013 IEP with no modifications. (LEA Exh. C 12; Testimony of Case Manager May 13, 2014 Tr. : May 13, 2013 Vol. II, Tr. 144).

24. The main goal in the IEP addresses Child's organizations skills. It reads as follows:

[Child] would demonstrate organizational skills that are appropriate for his age level. By the next annual date on this IEP, [Child] will successfully write down all homework assignments in planner, complete homework and have parents sign that homework has been completed. To be measure [sic] at 100% accuracy on five out of five consecutive data sessions.

(LEA Exh. C 12).

The organizational skills goal in the October 7, 2013 IEP is identical to the one in the October/November 2012 IEPs. (P Exh. P 22F, P Exh. P 24E).

Under the October/November 2012 IEPs which were in place during the 2012/2013 school year, Child experienced difficulty completing assignments and submitting them. As such, Child's grades suffered and he was placed in academic support. (May 13, 2014 Vol. II, Tr. 150, 188).

25. Accommodations in the October 7, 2013 IEP are set forth below:

<b>General</b>	<b>Frequency</b>	<b>Location</b>	<b>Setting</b>
Access to a word processor for all lengthy written assignments.	When written work is assigned.	Public Day School	Gen./Special Ed. Classroom
Extra time to complete written work. (not more than one extra day).	When written work is assigned.	Public Day School	Gen./Special Ed. Classroom
Repeat and clarify instruction and check for understanding	When instructions are given	Public Day School	Gen./Special Ed. Classroom
<b>Testing Accommodations</b>	<b>Frequency</b>	<b>Location</b>	<b>Setting</b>

Extra time to complete tests with written responses up to one class bell or block

During tests that require written responses.

Public Day School

Gen./Special Ed. Classroom

(LEA Exh. C 13).

26. Services included in the October 7, 2013 IEP included the following:

<b>Services Special Education</b>	<b>Frequency</b>	<b>Location</b>
Consultation	15 minutes two times every two weeks	Special Ed. Classroom in a public day school

(LEA Exh. C 13).

27. In Child's prior IEP, consultation services were to occur one time a week for 30 minutes. Thus, the IEP team reduced his consultation services by 50% when it developed his October 7, 2013 IEP. The IEP team provided no certain reason for the reduction in consultation services. (May 13, 2013, Vol. II, Tr. 128-129).

28. The October 7, 2013 IEP team was aware child was struggling academically and Child was not writing his assignments in the planner. Further it recognized that the planner was not helping Child complete his homework assignments. Even so, the IEP team did not consider obtaining formal testing and assessments of Child. Neither did it modify the goal. (May 12, 2014 Vol. I, Tr. Testimony of Assistant Principal; May 13, 2014 Vol. II, Tr. 144).

The Child's mother was unable to attend the IEP meeting held on October 7, 2013, due to her daughter having surgery. The LEA provided her a copy of the proposed IEP and it was signed by the parent on October 9, 2013. (LEA Exh. C 7; P Exh. 24; (May 13, 2013 Vol. II, Tr. Testimony of Parent).

### **INCIDENT AND SUSPENSION OCTOBER 2013**

29. On or about October 28, 2013, child showed his social studies' teacher sexually explicit comments that were written on one of the desk in her class. The teacher had a custodian take a picture of the written comments and asked him to transmit them to her via of his cell phone so she could provide them to the administration. Social Studies' teacher verbally provided her cell telephone number for this purpose while she was in the classroom. Child overheard the number and later that day sent Social Studies teacher sexually explicit text messages referencing the teacher's body parts. Some of the text messages were similar in content to those that appeared on the desk. (LEA Exh. B 24; P Exh. P 32).

The text messages were from Child's mobile electronic device and stated the following at the times noted:

At 4:43 "Your but it's perfectly round have you been getting my notes"

At 4:44 "Butt"

At 4:50: "have you "

At 7:07: "Hi"

At 7:11: "I love you (. Y.) and I get an erection when I stare at your boobs during class"

(P Exh. 33A).

30. Child admitted to the school's administration that he sent the text. He served three days of OSS from October 30, 2013 – November 1, 2013. (P Exh. 33 B – D; LEA Exh. B46). After this October incident, Child's mother obtained sessions with Child and a psychologist, Former Treating Psychologist. Child began meeting with the private psychologist in mid- November 2013. (Vol. I Tr. 309). The sessions were about understanding boundaries. (May 1, 2014 Vol. III, Tr. 16 and April 29, 2013 Vol. I, Tr. 259).

#### **NOVEMBER 19, 2013 MEETING**

31. On November 19, 2013, the IEP team met to discuss Child's recent behavior problems involving the explicit text messages sent to Social Studies Teacher. Other inappropriate sexual behavior that the parent informed the team about was discussed as well. The team also considered Child's poor grades and his substandard progress to determine if modifications were needed to his IEP. (LEA Exh. C 40; April 29, 2013 Vol. I, Tr. 227, 235, 364, 366; May 1, 2013 Vol. III, Tr. 136; May 12, 2014 Vol. I, Tr. 203).

32. Specifically, during the November 19, 2013 meeting, Parent informed the team of Child's exposure at an early age to pornography by his older sibling/father. Parent also stated that Child had videoed a naked female. Parent stated that she had started Child in therapy regarding his problems associated with his exposure to pornography (April 29, 2013 Vol. I, Tr. 413; May 1, 2013 Vol. III, Tr. 18; P Exh. P 44.2; LEA Exh. C 29).

33. Those in attendance at that meeting were the mother, assistant principal, Case Manager, Gifted Specialist, Social Studies teacher, and Science Teacher. (LEA Exh. C 46). Even though Child had only been suspended for three days, the IEP team considered whether the texting incident was a manifestation of Child's ADHD).

During that meeting, Parent informed the committee that Child's treating psychologist at the time recommended Child have all male teachers and be removed from the class. Parent then requested Child be removed from the teacher's class. (LEA Exh. C 29; May 13, 2014 Vol. II, Tr. 38). The team considered the request and determined all the social studies teachers were female and therefore no option existed to move Child to a classroom with a male social studies teacher. Thus, it was decided that in the future Social Studies Teacher would not be alone with

the child. As such, the academic support she previously provided Child after school would be conducted by someone else.

34. In addition, Parent asked for more help, but she did not know enough about special education law to know what kind of help to request. (May 13, 20-14 Vol. II, Tr. 42). The team then decided that the Gifted Specialist, also a psychologist, would provide Child (i) support on improving his organizational skills during Child's academic support bell and (ii) individual counseling regarding appropriate behavior, self-regulation, and transitioning from a boy to a man. Child's mother gave consent for Gifted Specialist to provide the services. (May 12, 2014 Vol. I, Tr. 204-207 and 226-227). The frequency of the Gifted Specialist services and the specifics of the counseling were not determined during the meeting. (May 12, 2014 Vol. I, Tr. 208; May 13, 2014 Vol. II, Tr. 45). But the counseling services were provided to Child on four occasions: November 30, 2013; December 4, 2013; December 11, 2013; and January 13, 2014. After the last session, three weeks passed and no counseling was provided due to scheduling conflicts and school closures because of inclement weather. During that three week period, Social Studies Teacher described two "odd incidents" referenced above where Child touched Social Studies teacher and one incident of Child rubbing up against her bottom. (P Exh. 44.2; LEA Exh. B. 23; April 29, 2014 Vol. I, Tr. 374, 413, 410).

35. IEP team recognized a need to modify what was offered in the Child's IEP because Child was not progressing toward his goal(s) and making progress under the IEP. In fact there was a feeling of frustration during the meeting because of the lack of progress. But the IEP team did not consider obtaining any formal testing and assessments of Child. And while supports were agreed to; that is, the services offered by Gifted Specialist, no changes were made to goals, services, or accommodations in the IEP. (May 13, 2014 Vol. II, Tr. 41-42; Testimony of Science Teacher; LEA Exh. C 29, 46-55; April 29, 2014 Vol. I, Tr. 230, 384; May 1, 2014 Vol. III, Tr. 37). (May 12, 2014 Vol. I, Tr. 217; May 13, 2014 Vol. II, Tr. 143-144).

36. Case Manager stated that he failed to add the services provided by Gifted Specialist to the IEP because he mistakenly believed he needed a special consent form signed by Parent, but sometime after November 19, 2013, he found out otherwise.<sup>6</sup> (May 1, 2014 Vol. III, Tr. 32.).

#### **JANUARY TO FEBRUARY 3, 2014 INCIDENTS**

37. On February 3, 2014, Child's guidance counselor was in Child's social studies' class. Guidance Counselor instructed Child to ask his teacher if he could call his mother. Social Studies Teacher had her back to Child. Child then walked up to Social Studies Teacher and positioned himself very close to the teacher's behind. Although Guidance Counselor saw no hand movement by Child, it appeared to her that Child's body was touching the teacher's body. Social Studies Teacher felt Child touch her butt. As reported, this occurrence happened without delay. The incident along with two others were reported to the school administration as sexual harassment. (Testimonies of Guidance Counselor and Social Studies Teacher; LEA Exh. B 21, 23). Child stated he did not remember touching the teacher and if so, it was by accident. (LEA Exh. B 22).

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<sup>6</sup> Parent did provide consent. The exact date Case Manager determined no special consent form was needed was not provided.

38. In one of the other incidents Social Studies Teacher also reported that about two weeks before the February 3, 2014 incident, that while in close proximity to Child, she "felt something brush her bottom." And when she turned she observed that Child was seated behind her. After that incident, Social Studies Teacher reported that she was careful about avoiding walking directly around Child's desk and making sure her back was not to Child. (April 29, 2014 Vol. I, Tr. 203-204; LEA Exh. B 23). Child reported he accidentally touched the teacher. (LEA Exh. B. 22).

39. Regarding the third incident, Social Studies Teacher reported that a week before February 3, 2014, Child brushed against her while walking back to his seat from doing group work. (Testimony of Social Studies Teacher; LEA Exh. B 23). Child reported he accidentally touched the teacher. (LEA Exh. B 22).

### **MANIFESTATION REVIEW MEETING AND DETERMINATION**

40. Because the LEA contemplated a suspension of more than 10 consecutive school days due to the January/February incidents, under IDEA regulations a manifestation determination meeting was commenced on February 11, 2014, and concluded on February 14, 2014. (LEA Exh. B 28).

41. The LEA has adopted the procedures used for an IDEA Manifestation Determination Review (MDR) pursuant to 34 C.F.R. § 300.530 for a MDR under Section 504. (Testimony of Section 504 Coordinator).

42. Those in attendance were School Psychologist, Parents, the Parents' Advocate, Social Worker, the special education coordinator, the science teacher, the principal designee, the case manager, and Gifted Specialist. (LEA Exh. B 29).

43. School Psychologist is a licensed clinical psychologist who has been employed by the LEA for 11 years. She holds a doctorate degree and master's degree in clinical psychology. School Psychologist was initially involved with Child in 2010 during his eligibility screening. In 2012, she conducted a psychological evaluation for the purpose of determining if Child met eligibility for the Magnet School. She was also involved in the re-evaluation of Child for special education and related services in October 2013. (April 29, 2014 Vol. I, Tr. 241-241).

School Psychologist recalled that during the manifestation determination review (MDR) meeting the June 2010 Psychological Report was reviewed. She also recollected that whether Child displayed symptoms of a mood disorder was discussed. In addition she remembered that the former psychologist testified by telephone and mentioned Child had viewed pornography and child has a sexual fixation that may be an addiction. School Psychologist further noted that the former psychologist recommended behavior interventions. The former psychologist did not indicate that he had conducted any formal assessments of Child. School Psychologist also recalled the disability of OIII as a result of his ADHD was discussed and she felt Child's behavior was not a manifestation of the ADHD. (April 29, 2014 Vol. I, Tr. 257, 258, 262, 265,

308). Particularly, she noted that Child's behavior – touching the teacher's bottom – was planned as Child got up, walked in her direction, and touched Social Studies Teacher. (April 29, 2014 Vol. I, Tr.264).

School Psychologist recalled that her 2012 Psychological Evaluation to assist in determining Child's admission to the Magnet School was not discussed by the team. It was however in Child's cumulative folder. (April 29, 2014 Vol. I, Tr. 256).

44. Science Teacher is a general education teacher. She is endorsed to teach science and gifted students. She is also qualified to teach English and social studies up to grade level eight. (April 29, 2013 Vol. I, Tr. 347-348).

Science Teacher recalled that during the MDR meeting the team discussed Child's ADHD and whether the sexual inappropriate behavior was a manifestation of it. (April 29, 2014 Vol. I, Tr. 357 – 360). She did remember the former psychologist speaking at the MDR meeting about child's exposure to pornography and having a sexual fixation. (April 29, 2014 Vol. I, Tr. 358-359). She recalls the team did not discuss whether the behavior was a manifestation of any sexual fixation. Science Teacher had never seen the June 2010 Psychological Report and at the hearing was not aware of it, to include the diagnosis on the report regarding Child having a mood disorder. She could not remember what documents/records were reviewed during the MDR meeting and she did not feel she had a chance to say much at the MDR meeting. (April 29, 2014 Vol. I, Tr. 355-356).

Science Teacher decided the behavior was not a manifestation of Child's ADHD because she understood ADHD symptoms to consist of problems paying attention, focusing, having too much energy, and staying organized, and the Child's behavior did not correlate with those symptoms. (April 29, 2014 Vol. I, Tr. 358 - 360).

45. Case Manager is certified in special education and endorsed in the areas of learning and emotional disabilities. He is also certified to teach English and has been a special education case manager for 12 years. (May 1, 2014 Vol. III, Tr. 4-5).

During the MDR meeting, Case Manager recalls that Oppositional Defiance was discussed. Further, he recollected that the MDR committee considered the June 2010 Psychological Report and reviewed the AXIS I diagnoses mentioned in the report. Case Manager did not know how any of them manifested themselves in the behavior of Child and the MDR team found Child's behavior was not related to his ADHD. (May 1, 2014 Vol. III, Tr. 20).

He understood that the Mood Disorder NOS, Mental Disorder NOS, and Learning Disorder, NOS – diagnoses cited on the June 2010 Psychological Report - were emerging and not definitive. (May 1, 2014 Vol. III, Tr. 49).

Case Manager's impression was that, while a lot of time was spent conducting the MDR meeting over a two day period, it was difficult and uncertain how much was accomplished because the meeting was very heated and emotional and it was "difficult to get a sense of what was going on." (May 1, 2014 Vol. III, Tr. 22).

46. The Committee also conferred with Child's former treating psychologist who provided therapy to Child from November 2013, to sometime in February 2014. During the February 14, 2014 MDR meeting the former treating psychologist informed the MDR committee that Child's behavior was a moral problem rooted in part to Child not getting enough reinforcement from his father; that during therapy sessions Child had not shown any signs of mood disorder; that Child exhibited a sexual fixation and possibly a sexual addiction. Former psychologist opined that Child's behavior was not a manifestation of Child's ADHD. Further, he noted Child was in need of behavior interventions. (Testimonies of Case Manager and School Psychologist; LEA Exh. B 28).

47. Former psychologist provided Child therapy, but never formally evaluated Child. No credentials were provided for the former psychologist. (May 1, 2014 Vol. III, Tr. 120).

48. Gifted Specialist holds a pupil personnel license in the Commonwealth of Virginia and is endorsed as a school psychologist. Gifted Specialist is not a clinical psychologist. (April 29, 2014 Vol. I, Tr. 362-363).

Gifted Specialist recalled that at the MDR meeting, the only disability category that applied was ADHD. (April 29, 2014 Vol. I, Tr. 398). He determined behavior was not a manifestation of the disability because he determined Child was aware of his need to control sexual urges. Further, he testified that from his experience, it is uncommon for a child with ADHD to engage in sexual inappropriate behavior. Gifted Specialist defined ADHD as things happening so quickly child did not have a chance to stop himself. He defined ADHD symptoms, particularly impulsivity as a "ready, shoot, aim" type behavior. (April 29, 2014 Vol. I, Tr. 380-383). Gifted Specialist recalls Child's former psychologist discussing Child's exposure to pornography and expressing that the incident was one of moral judgment and child needed to be disciplined for his behavior. Former psychologist also noted Child had a sexual fixation and maybe a sexual addiction and he recommended behavior intervention. Gifted Specialist could not recall if a mood disorder was considered during the MDR meeting and the only evaluation reviewed was the 2010 Psychological Report. (April 29, 2014 Vol. I, Tr. 385 - 398).

49. Special Educational Coordinator is endorsed in emotional disturbance, learning disabilities, and administration in the Commonwealth of Virginia. He has been a special education teacher for the LEA as well. (Vol. I, Tr. 8-9).

Special Educational Coordinator first interaction with the Child was at the MDR meeting. He reviewed Child's entire file prior to the MDR meeting. At the MDR meeting, he recalls that the June 2010 Psychological Report was reviewed in depth. He stated Child's behavior was not found a manifestation of ADHD or any of the other diagnoses mentioned on the report. (Vol. I, Tr. 9 - 11). Special Educational Coordinator also recalls the former psychologist providing information regarding Child. (Vol. I, Tr. 28-29).

50. During her testimony regarding the MDR meeting, Social Worker recalled that the committee discussed the 2010 Psychological Report, and that Child had viewed pornography. (April 29, 2014 Vol. I, Tr. 336-337).



Social Worker remembers the committee discussing the Child's ADHD and its symptoms as they relate to the child: that is, impulsivity, organizational difficulties, lack of focus, difficulty completing assignments. Social Worker then agreed that the behavior was not a manifestation of the ADHD. (April 29, 2014 Vol. I Tr. 338).

Social Worker could not remember if the MDR committee discussed Oppositional Defiance or behavioral interventions for Child. She testified the committee did not discuss mood disorder or child's fixation with sex and whether either of the two caused the Child's behavior. At the time of the February 2014 MDR meeting, Social Worker had not interacted with Child since the triennial eligibility process in early October 2013, and she was unaware of Child's difficulties in school since that time. (April 29, 2014 Vol. I, Tr. 334-338).

There had been social cultural changes with Child since he initially became eligible for special education in 2010. Those changes included receiving counseling, changes in family structure, medication, and behavior. Social Worker had not conducted a formal social-cultural assessment of Child at the time of the MDR. (April 29, 2014 Vol. I, Tr. 333, 341 – 352).

As a result of the MDR committee obtaining additional information about Child at the MDR meeting, it determined that formal assessments would be conducted on Child. (April 29, 2014 Vol. I, Tr. 340).

51. Assistant Principal has functioned in that capacity for 13 years. She is endorsed in English 8 – 12 and administration. She also holds a gifted endorsement. Assistant Principal is not endorsed in special education. (April 29, 2014 Vol. I, Tr. 126-127).

The Assistant Principal determined during the MDR meeting that ADHD was the appropriate disability category to consider with regard to the conduct. She did not consider Oppositional Defiance or Conduct disorder as a disability. She did consider the former psychologist's comment and the June 2010 Psychological Report and determined that the other Axis I diagnoses listed on the report had not shown themselves in the school setting. (April 29, 2014 Vol. I Tr. 140, 146, 150, 162, and 164).

52. The guidance counselor only attended the first day of the MDR meeting. She was not familiar with the June 2010 Psychological Report. (April 29, 2014 Vol. I, Tr. 161; I.E.A B 29).

53. The MDR committee did not consider all Child's diagnoses or suspected disabilities prior to determining if the behavior on February 3, 2014 was caused by Child's disability. Nor did the MDR committee/IEP conduct additional testing or assessments before making the MD decision. (Collective Testimonies of MDR team members).

#### **FEBRUARY 26, 2014 IEP MEETING**

54. After the MDR committee found Child's conduct was not a manifestation of his disability, by letter dated February 21, 2014, the Office of Student Leadership (OSL) recommended holding the suspension in abeyance and allowing Child to enroll under strict

probation in the alternative school. Upon the recommendation of the principal of the alternative school, Child would be eligible for consideration to return to his zoned school after June 13, 2014, on strict probation through January 28, 2015. The IEP team at Magnet School was informed of the alternative placement recommendation. (LEA Exh. B 3).

55. On February 26, 2014 an IEP meeting was held to consider the appropriateness of the alternative school placement. During that meeting, Child's assessments, PLOP, goals, accommodations, and services that are stated on the February 26, 2014 IEP were never discussed during the meeting. (May 12, 2014 Vol. I, Tr. 176-177).

The February 26, 2014 IEP is a draft IEP and its contents are identical to the October 7, 2013 and November 19, 2013 IEPs. (May 12, 2014 Vol. I, Tr. 177 – 179; LEA Exh. D6-16, P Exh. P 24; P Exh. P 25).

During the February 26, 2014 IEP meeting the parent disagreed with the proposed IEP, Child's placement at the alternative school. Parent had concerns about her Child's safety if he attended the alternate school as she knew of incidents of violence associated with the school and others attending it. Further, she understood Child would be unable to continue to receive instructions in all the courses he was presently taking, to include Latin II. (May 13, 2014 Vol. II, Tr. 52).

The IEP team determined the alternative school was an appropriate placement for Child as Child could receive the 15 minutes per week of consultation required in his IEP. The Child could not enroll in advanced courses or Latin II at the alternative school. (April 29, 2013 Vol. I, Tr. 83-86; May 12, 2014 Vol. I, Tr. 126 – 130).

Also during the February 26, 2014 IEP meeting, the team determined additional assessments were needed. Parent provided consent for the LEA to conduct social-cultural and psychological assessments. The parties disagreed on if and when a functional behavior assessment would be conducted (FBA). Thus, no FBA was arranged. (Testimony of Parent; May 12, 2014 Vol. I, Tr. 182 - 183; LEA Exh. D1).

Even though Child consistently failed to complete assignments, struggled academically, and was engaged in inappropriate behaviors, the LEA/IEP team did not consider obtaining formal assessments and testing of Child until after he was suspended on February 6, 2014. (May 13, 2014 Vol. II, Tr. 144).

## **OTHER**

56. Child's grades for the first semester of the 2013- 2014 show a range from failing to satisfactory. As his grades were Latin II F (failing), Algebra I Honors C-, Social Studies C+, Advanced Science D, Advanced English 7 C, and PE B. In addition, during the first marking period, Child was failing both Latin II and Advanced Science. (P Exh. 32 J – O).

57. At the end of the 2012/13 school year, Child received an ISS suspension for plagiarism. He had turned in an assignment and represented it as a current assignment when it had previously

been turned in for a prior assignment. Child had committed this same offense twice before during the 2012/13 school year. (LEA Exh. B 24).

58. All Child's 2013/14 teachers noted his work habits are unacceptable. Specifically, Science Teacher reported that Child fails to complete and turn in assignments. English Teacher noted that even though Child is capable of producing quality work, he rarely does and is often off-task and unprepared. She also commented that Child lies directly and repeatedly to adults and when confronted with his lies, he is unapologetic. She also noted that Child's attitude, general behavior, and effort to achieve were unacceptable. Latin II Teacher noted that Child consistently fails to complete assignments and lies. She noted he seems to have no interest in learning even though he is capable. Honors Algebra I Teacher reported that Child is capable of high quality work and that all his teachers have intervened to assist him. She noted that without those interventions Child would not be passing her class. Algebra I Teacher noted that even though Child was offered after school tutoring, he rarely attended. She rated his work habits and effort to achieve as unacceptable. Social Studies Teacher also indicated Child's work habits and effort to achieve were not acceptable. She stated some days Child talks out, cannot sit in his seat, and harasses other students. Other days she noted he was almost unresponsive. She reported homework is done only with a lot of intervention from his teachers. She also commented that he lies about homework completion. Child's PE teacher commented that Child does the bare minimum, does not put forth much effort in PE. In Health class, the teacher commented that Child is distracted and misses instruction, and does not complete work. (LEA Exh B, pp. 31 – 36; Testimony of Social Studies Teacher).

The unacceptable work habits mentioned in teacher reports dated February 2014 persisted from early in the 2013/14 school year. (May 13, 2014 Vol. II, Tr. 26-27).

59. Child consistently experienced difficulty writing. (Testimony of Social Studies Teacher; October 7, 2013 and November 19, 2013 IEPs).

60. The March 24, 2014 Social-cultural assessment reported that in addition to Child videotaping someone showering during Summer, 2013, other inappropriate behaviors of Child of a sexual nature consisted of Child asking a female cousin to show him her private parts and at age nine/ten Child taking an inappropriate picture on his phone. (May 12, 2014 Tr. 172).

The assessment also noted that Child's mother reported that she had requested assistance from the school over the years regarding Child's sexually inappropriate behaviors, but the school declined to provide assistance stating the problem had not manifested itself at school. (LEA Exh. D 82).

The social-cultural assessment also mentioned that Child wakes up a lot while trying to sleep. (May 12, 2014 Tr. 186).

61. School Psychologist II conducted a psychological assessment of Child on April 25, 2014. The evaluation assessed Child's personality only. Based on testing School Psychologist II concluded that Child has strong indications of an ADHD Disorder and a Conduct Disorder. (Testimony of School Psychologist II; LEA Exh. D 87; May 12, 2014 Vol. I, Tr. 246-247).

According to School Psychologist II sexual fixation/addiction is an emotional problem. (May 12, 2014 Vol. I, Tr. 215).

62. Parent has been cooperative with the LEA and made all IEP meeting with the exception of the October 7, 2013 IEP meeting where she was absent due to her daughter having surgery. (May 13, 2014 Vol. II, Tr. 11, 267). Parent has also consistently provided counseling and therapy for Child since primary school. (May 13, 2014 Vol. II, Tr. 13-14).

Child's mother (Parent) speaks English as a second language. However, Parent is able to read and write English easily. She had no problems understanding questions asked of her in English during the hearing nor responding to them in English. (Testimony of Parent; Observations of Hearing Officer).

However, Parent was not very knowledgeable about Special Education Law until after Child was disciplined for the February 3, 2014 incident and she sought the assistance of an advocate and an attorney. (Testimony of Parent).

At the time Child was found eligible for Special Education and related services, Parent believed that the LEA OHI label included not just the ADHD but the Mood Disorder. As a result of the October 28, 2013 texting incident, Parent believed the LEA was addressing Child's ADHD, Mood Disorder and sexually inappropriate behaviors as well. (May 13, 2014 Vol. II, Tr. 33-35). Fall 2013

63. Child has been treated for a Mood Disorder. The LEA was aware of this condition and that Child was prescribed medication for it. (May 13, 2014 Vol. II, Tr. 30-33; LEA Exh. D 32).

64. Services or accommodations provided to Child during the 2012/2013 school year, but not included in Child's IEP, included an academic support bell and a check list for homework and behavior. During the 2013/14 school year, accommodations and services provided, but omitted from the IEP, included an academic support bell; parent, teacher, and Child checking or confirming homework assignments by email; "Focus" period; individual counseling by Gifted Specialist; additional consultation time; and use of an accordion. Even with the academic support bell and "Focus" time, Child continued to not complete or turn in assignments. The checklists proved to be too burdensome for the teachers. The accordion and emails did not yield improvement in Child's organizational skills. Specifically, the emails did not work because Child lied about whether he completed assignments. (Testimony of Case Manager and Parent; May 13, 2014 Vol. II Tr. 22-29). In sum none of the supports improved Child's organizational skills. And Child continued to perform poorly and struggle academically. (Testimony of Case Manager and Parent; May 13, 2014 Vol. II Tr. 22-29, 154-167).

65. While Child needed, required, and often received more than 15 minutes of consultation a week, his October 7, 2014 and November 19, 2014 IEPs were written to only require 15 minutes of consultation per week, a 50% reduction in this service from Child's prior IEP. No logical reason was provided for this modification. (May 13, 2014 Vol. II, Tr. 54, 167).

66. At the end of the school's 2013/14 first semester, Child had failed Latin II class and barely passed his remaining seventh grade classes. (May 13, 2014 Vol. II, Tr. 179-181).
67. Prior to Child's suspension, Child's case manager realized Child's IEP goal was not being met. (May 13, 2014 Vol. II, Tr. 169).
68. Child's mother and father separated in 2005, when Child was approximately three years of age. The father would show up unannounced on occasions and then he would disappear. Consequently, Child was uncertain when or if he would see his father again. (May 13, 2014 Tr. 35; LEA Exh. D 54).
69. Child continues to need the academic support and individual counseling. (May 12, 2014 Vol. I, Tr. 211; Testimony of Gifted Specialist).
70. Child also needs tighter monitoring regarding whether he completes his work; therapy for sexually acting out and being manipulative; and behavior interventions, to include rewarding positive behavior, providing incentives, addressing behaviors on progress reports on the behavior intervention plan, and constant reminders regarding appropriate behaviors. (May 12, 2014 Vol. I, Tr. 230- 231, and 268-278).
71. The Magnet School has not offered a special education resource period because the student population is small and in the past there has not been a need for one. Special resource periods are offered at regular middle schools. Child would benefit from a special education resource bell. (May 13, 2014, Vol. II, Tr. 53).
72. A FBA would be helpful in addressing Child's behaviors regarding turning in and completing assignments. (May 12, 2014 Vol. I, Tr. 213 - 229).
73. Child has had difficulty completing and handing in assignments since at least the sixth grade. (LEA Exh. D 31). Child passed his courses during the sixth grade by the "skin of his teeth." (Testimony of Case Manager).
74. The LEA was aware that Child had a history of not understanding social cues. (Prior IEP).
75. Case Manager agreed the October 7, 2013 and November 19, 2013 IEPs were not helping Child to meet his main goal. (May 13, 2014 Vol. II, Tr. 179).
76. Child screened positive for an autism spectrum disorder, but has not received a comprehensive evaluation for the disorder. (April 29, 2014 Vol. I, Tr. 297).

## V Legal Analysis and Conclusion of Law

### A. IDEA Issues

- a. **Whether the IEP(s) failed/fails to provide a Free Appropriate Education (FAPE) in that it did/does not address all the child's disabilities and limitations?**

In *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. V. Rowley*, 553 IDELR 656 (U.S. 1982), the United States Supreme Court held that the question regarding whether the LEA has provided a FAPE is twofold; that is, (i) has the LEA adequately complied with the procedures set forth in the IDEA and (ii) is the IEP reasonably calculated to enable the child to receive educational benefits. The benefit must be more than *a de minimis* one. *Polk v. Central Susquehanna Intermediate Unit 16*, 441 IDELR 130 (3<sup>rd</sup> Cir. 1988).

In *S.H. v. Fairfax County Board of Education*, 875 F. Supp. 2d 633, IDELR 73 (United States District Court, Eastern District, Virginia (2012)), the court adopted the factors utilized in *Cypress-Fairbanks Indep. Sch. Dist. V. Michael F.*, 26 IDELR 303 (5<sup>th</sup> Cir. 1997) to determine if the IEP provided a FAPE. Those factors include (1) Is the IEP individualized based on the student's assessment and performance; (2) Is the program administered in the least restrictive environment; (3) Are the services provided in a coordinated and collaborative manner by the key "stakeholders"; and (4) Are positive academic and non-academic benefits demonstrated.

First, the parents assert that the IEP fails to provide a FAPE because it does not address all Child's disabilities and limitations. The Hearing Officer finds the October 7, 2013 IEP as well as the November 19, 2013 and February 26, 2014 IEPs - which are identical to the October 7, 2013 IEP - fail to provide Child a FAPE for the reasons mentioned here.

#### **October 7, 2013 IEP**

The October 7, 2013 IEP fails the *Cypress-Fairbanks* test because the IEP is not based on the student's assessment and performance. At the time the IEP team developed the October 7, 2013 IEP, the team had conducted no testing or formal, comprehensive assessments of Child. The only formal evaluation of record was the June 2010 Psychological Report.<sup>7</sup> This report was a major consideration of the team in developing the IEP even though it was over 3 years old and conducted when Child, currently in his second year of middle school, was attending primary school. In addition, the IEP team failed to consider the Child's discipline record which the evidence shows contains conduct infractions from third grade to the end of the child's sixth grade year. School code of conduct violations included lying and stealing. Additionally, Child plagiarized on three occasions in the sixth grade. Child's current teachers continued to report Child lies. The "organizational skills goal" set forth on the IEP, is another example of the IEP team failing to base the IEP on Child's assessment and/or performance. This was the IEP's main goal. Its aim was for Child to use his planner to facilitate his completing assignments. The team was aware, however, that the planner was unsuccessful. Persistently from the beginning of

<sup>7</sup> Excluding the 2012 IQ Testing to determine if Child was eligible for the gifted Magnet School program.

school, Child failed to complete many assignments and the quality of his work was poor. Yet the IEP team did not modify his goal(s). Also, ironically, in the face of Child not succeeding and the evidence showing that Child needed more than 30 minutes of consultations a week, the IEP team reduced these services to only 15 minutes per week. Science Teacher, the team leader, testified credibly that there was no certain reason for the reduction. In sum, knowing about Child's lack of progress toward meeting his goal and ensuing poor academic performance, the IEP team obtained no further evaluations to determine Child's needs and then to develop a meaningful IEP.

Of note as well with regard to whether the IEP was based on Child's assessment, the June 2010 Psychological Report identified Child as having four Axis I diagnoses under the DSM IV: Mood Disorder NOS with anxious, depressed features (w/emerging conduct disorder tendencies); Mental Disorder NOS with Attachment and Stress Reactivity features; ADHD, Combined type – coexisting with; Learning Disorder NOS expressive writing disability and relatively lower than expected reason, reasoning comprehension and written mathematic operations. As previously noted, the IEP team was well aware of the June 2010 Psychological report and the above referenced diagnoses in addition to ADHD. It also knew that Child was taking medications for a mood disorder. In addition, the team was aware that Child carried a history of depression with withdrawal and anxiety symptoms. Some of Child's current teachers reported observing some of these symptoms. He struggled academically with being motivated and completing assignments. At times, Child was unresponsive; he continued to lie. Yet the evidence demonstrates that the October 7, 2013 IEP team (similar to the October 1, 2013 SEC) focused entirely on the Child's ADHD in developing the October 7, 2013 IEP.<sup>8</sup>

Accordingly, for the reasons noted above, the Hearing Officer finds the IEP is not based on assessments of Child's disabilities and limitations. Further it is arbitrary as services were reduced for no apparent reason and the organizational skills goal retained when it was unworkable. Clearly this IEP violates IDEA regulation at 34 C.F.R. §300.324(a)(iv). Hence the Child has been denied FAPE.

Next the Hearing Officer considers the November 19, 2013 IEP. The November 19, 2013 IEP is identical to the October 7, 2013 IEP. Thus, for the reasons noted above, it too fails the *Cypress-Fairbanks* test and denies Child a FAPE. In addition and more compelling, by November 19, 2013, Child had been suspended for sending a text to Social Studies teacher with inappropriate language of a sexual nature. Further, Child's mother had informed the LEA that Child had been exposed to pornography at an early age and had exhibited hyper interest in activities of a sexual nature. She gave them the example of Child videotaping someone in the shower. Also, Child's academic performance continued to be poor as he persisted to not turn in assignments. On November 19, 2013, the IEP team met regarding making amendments to Child's IEP due to his conduct and poor academic performance. Mother requested help from the educators. But no modifications were made to the IEP. Of note, the LEA did obtain Mother's consent so that Gifted Specialist, a psychologist, could provide Child in addition to academic support, counseling about, among other things, being a man and controlling sexual urges.

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<sup>8</sup> The Hearing Officer takes note of School Psychologist's testimony that the SEC team considered other diagnoses at the SEC meeting. But conflicting testimony was presented during the hearing which the Hearing Officer finds more persuasive.

Accordingly, the Hearing Officer finds the team determined child needed this service. However, the agreed upon services were not acknowledged in writing in Child's IEP. Hence the LEA was not obliged to perform them under Child's IEP.<sup>9</sup> Further, the team did not establish the duration of the services and when they would be offered.

In addition, at this time it was even clearer than in October 2013 that Child's academic behavior was impeding the Child's learning and at times that of others. Yet the IEP team did not conduct a functional behavior assessment and subsequently establish positive behavior supports to address the behavior. With respect to a behavior intervention plan (BIP), under the IDEA the IEP team must consider the use of positive behavior interventions supports and other strategies, to address behavior that impedes the student's learning or that of others. See 34 C.F.R. §300.324(2)(i). Whether to develop and implement a BIP is decided on a case by case basis by the IEP team. Here the IEP team did not develop a BIP. But the Hearing Officer finds that the seriousness of Child's behavior demonstrates it should have. In particular, week one of school Child was not doing his assignments. Academic support was added with no meaningful results. Child's case manager reported to Child's class, wrote down assignment for Child, with no meaningful outcome, Parent was supportive and stayed in contact with the school to make sure Child was doing his work. This too failed to foster progress. Emailing did not work, because child would tell a "bold face" lie that he completed an assignment when he did not. In addition, he was not apologetic for the lying when caught. In some classes Child appeared nonresponsive at times. Coupled with this poor academic behavior (which as noted persisted from the beginning of the school year), Child displayed at home and at school inappropriate behavior of a sexual nature.

The evidence demonstrates that the IEP team was frustrated and knew the goal was not working. Yet it failed to obtain additional assessments and/ modify Child's IEP.

Thus, the Hearing Officer finds the November 19, 2013 IEP fails to provide FAPE because (1) like the October 7, 2013 IEP, it is not individualized and based on the student's assessment and performance, and (2) the services/supports (to include the services that the IEP team agreed would be provided by Gifted Specialist) were not provided in a coordinated and collaborative manner by the key "stakeholders" as the frequency of the services were not provided and they were not listed in the IEP, and (3) Child's main goal was not realistic and not likely to provide positive academic benefits.

Accordingly, for the reasons noted, the November 19, 2013 IEP fails the *Cypress-Fairbanks* hallmarks of an appropriate IEP. For the IEP fails to meet the academic, developmental, and functional needs of Child. Without a doubt this IEP violates 34 C.F.R. §300.324(a)(iv).

Now turning to the draft IEP dated February 26, 2014, the Hearing Officer notes this IEP is identical to the October 7, 2013 IEP and the November 19, 2013 IEP. By February 3, 2014, Child continued to not progress toward meeting his goal. Overall, as described by Child's case manager, Child barely passed the first semester. Additionally, no FBA had been conducted and

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<sup>9</sup> The LEA claims the counseling was not a special education service and therefore did not need to be in Child's IEP. The Hearing Officer finds otherwise.



consequently, the Child did not have a BIP. Further, Child was suspended long term for sexual harassment. The IEP team had not conducted any additional evaluations. The Child was to receive his services – 15 minutes of consultation – at an alternative school. Goals, accommodations, and services remained the same. Accordingly, for reasons noted previously regarding the October 7, 2013, and November 19, 2013 IEPs, the Hearing Officer finds that this draft IEP was also not appropriate.

Of note the IEP team met on February 26, 2014, to change Child's placement to Alternative School, a non-regular public day school. The IEP team determined Child could receive 15 minutes of consultation a week. But the evidence shows Child could not enroll in the advanced courses and Latin II which were the courses he took at Magnet School.

**b. Whether the LEA denied the child a FAPE when it failed to conduct any evaluations during the child's reevaluation on or about October 2013/at the October 2013 reevaluation meeting?**

During the reevaluation process, the LEA must assess Child in all areas of suspected disabilities. 34C.F.R. §300.304(c)4. The evidence demonstrates that Child had a Mood Disorder, or at the minimum, was suspected of having such a disorder. This is so because Child's June 2010 Psychological Evaluation (of which the LEA has been well aware of since 2010) detailed this disorder with annotations indicating features of the mood disorder included anxiety, depression, and emerging conduct disorder tendencies. The evidence demonstrates that Child persistently lied representing that he had completed assignments when in fact he had not. And further when Child recognized his teacher "caught him" in these lies, Child was not apologetic. In addition, the evidence shows that Child's conduct involving misrepresentations was not a new behavior problem as he had plagiarized assignments on three occasions as recently as the prior school year. Child disciplinary record indicated he had received ISS for the third misrepresentation. The evidence shows this behavior could be signs of a conduct disorder, and as referenced in the June 2010 Psychological Report, therefore manifestations of Child's Mood Disorder. Moreover, notes from the eligibility meeting referenced Child taking a medication for a mood disorder. Child's failure to complete assignments adversely affected his progress in school. Accordingly, the evidence shows that the LEA had reasonable notice that Child had a Mood Disorder or was suspected of such and it was affecting him academically. Thus, during the triennial reevaluation, the LEA was required to formally assess Child for a mood disorder. It did not in violation of 34 C.F.R. §300.304(c)4

Further, LEA reasonably should have suspected a learning disability. IDEA defines specific learning disability as follows:

a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations including conditions such as perceptual disabilities brain injury minimal brain dysfunction dyslexia and developmental aphasia.

34 C.F.R. §300.8(c)(10).

Under the PLOP on Child's October 7, 2013 IEP notations, which were based on determinations made during the triennial review, indicate that writing is a weakness of child and remains so even though he has IEP supports. The PLOP further states that Child struggles to organize his thoughts on paper. Further, the June 2010 Psychological Report detailed Child as having a Learning Disability NOS. Annotations accompanying the diagnosis mentions that Child has an expressive writing disability and relatively lower than expected reading comprehension and mathematic operations. Considering this evidence, the Hearing Officer finds the LEA reasonably should have known or suspected a learning disability and thus Child should have been formally assessed in this area to determine his educational needs as well. IDEA regulation at 34 C.F.R. §300.304(c) (4) requires the LEA to assess Child in all areas related to the disability/suspected of disabilities. The LEA failed to do so. Consequently the LEA violated 34 C.F.R. §300.304 (c)(4).

Additionally, Child struggled to complete assignments during the sixth grade. The problem persisted in the seventh grade. Of note, the second day of school, Child's teachers recognized Child was not completing assignments. Also, it was evident by the triennial review that Child was not progressing toward meeting his main goal on his current IEP and later October 7, 2013 IEP. Considering these factors, the LEA was compelled to obtain additional assessments on Child. It failed to do so, undoubtedly in violation of its responsibility under 34 C.F.R. §300.304(b).

In conclusion, the LEA's failure to conduct additional evaluations during the triennial process was substantive error and thus denied Child a FAPE. This is so because Child continued to struggle academically and was not progressing toward meeting his goal. Existing data failed to provide sufficient data to design a meaningful IEP that provided Child with more than a *de minimus* benefit. Thus, during the triennial, the SEC was required to obtain additional assessments. The Hearing Officer makes this finding being cognizant of the psychological report dated April 25, 2014 finding ADHD and Conduct Disorder indicators with at risk level of depression at school and significant risk level of depression at home.

- c. Whether the LEA denied the parents input by predetermining that no evaluations of the child would be conducted during the reevaluation process?**

The evidence was insufficient to illustrate any predetermination by the LEA during the reevaluation process.

**B. Section 504 Issues**

- a. Whether the LEA failed to hold a MDR under Section 504 when it suspended Child for more than 10 days?**

As a recipient of federal financial aid (FFA), the LEA is subject to Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794. The regulation implementing Section 504 at 34 C.F.R. § 104.4(b)(1)(i) prohibits a recipient of FFA from discriminating against a

handicapped person. An individual is considered handicapped if he has a physical or mental impairment that substantially limits one or more major life activities. 34 C.F.R. § 104.3 (j). Implementing regulations of Section 504 identify, among others, learning as a major life activity. 34 C.F.R. § 104.3 (i).

The Office for Civil Rights (OCR) has determined that Section 504 regulation at 34 C.F.R. § 104.35 requires a MDR prior to the suspension of a handicapped person for greater than 10 school days. *See* 52 IDELR 138 (OCR 2009). *See also* OCR Senior Staff Memorandum, 16 IDELR 491 (OCR 1989). Parents contend the LEA failed to conduct such a review prior to the LEA issuing Child's long-term suspension.

Turning to the evidence, it shows that Child is handicapped within the meaning of Section 504 because at the time of the MDR he had been diagnosed with, at least, those Axis I impairments identified in the June 2010 Psychological report. Further, the evidence demonstrates that Child's learning was substantially and adversely affected by at least some of those handicapping conditions: that is the ADHD, Mood Disorder NOS, and Learning Disability NOS.

The evidence also establishes that the LEA's Section 504 MDR procedures are identical to those employed during such a review under IDEA. This review process is set forth in 34 C.F.R. §§ 300.530 through 300.534. Moreover, the evidence shows that the LEA held a MDR under IDEA regarding the student's behavior. The LEA claims this review sufficed for any required MDR under Section 504.

Now, the Hearing Officer undertakes an analysis to determine whether the LEA was required to conduct an MDR under Section 504; and if so, did the MDR held for IDEA purposes meet the requirements of a Section 504 MDR.

The LEA had found Child eligible for special education and related services under the OHI category for Child's ADHD. It then developed an IEP to address that disability. Because the LEA has not found Child eligible for special education and related services due to any of the other diagnoses in the June 2010 Psychological Report, it does not address them in the IEP. Further, the evidence shows that the LEA has made no determination that a Section 504 Plan is appropriate for other disabilities of Child, including those detailed in the June 2010 Psychological Report.

Even so, with regard to Section 504, if the LEA had knowledge of Child's diagnoses referenced above before the behavior that triggered the disciplinary action, the LEA was obliged to conduct a Section 504 MDR under 34 C.F.R. § 300.530. *See* 34 C.F.R. § 300.534. The Hearing Officer finds that the LEA is deemed to have had that knowledge for reasons discussed previously here and additional reasons discussed below:

First, as previously discussed here in the section discussing the IDEA issues, the evidence shows that the LEA, to include supervisory personnel and the special educational case manager, had notice of Child's Axis I impairments: Mood Disorder NOS, Mental Disorder NOS, ADHD, combined type, and Learning Disorder NOS.

Second, with respect to Child's mood disorder, several IEPs prior to the behavior that triggered the disciplinary action, specified Child's history of depression, withdrawing, and experiencing anxiety. While there was mention that Child had improved in this area, not one of the IEPs indicated Child was no longer affected by this mental impairment. In addition and as referenced previously, as late as October 2013, the triennial eligibility committee noted that Child was taking a specific medication for mood disorder. Of note, each document referenced here was signed by supervisory personnel. This provides affirmation of the LEA's knowledge of Child's diagnosed mood disorder.

In addition, behavior problems were brought to the attention of school administrators and special education staff prior to the behavior considered at the MDR meeting. As an illustration, at the beginning of the 2013/14 school year, Child's English teacher sent an email to the guidance counselor noting that it was only day two of the school year and "red flags for [Child]" were waving as he was off task an enormous time during the class period, looking around in class instead of doing his assignment, occasionally trying to start conversations with other students, coming to class without materials, and not completing homework. The evidence established that these behaviors displayed themselves in several of Child's other classes during the first semester as well. What is more, in late October, 2013, Child received three days of OSS for sending an inappropriate text message of a sexual nature to Social Studies Teacher. Further, by November 19, 2013, Parent informed the IEP team that Child was exposed to pornography at an early age and was exhibiting inappropriate hypersexual activity. As an example, Parent informed the IEP team that Child had inappropriately videoed a friend/relative taking a shower, Summer, 2013.

The referenced behaviors in their totality, in addition to the documented Mood Disorder diagnosis with comments referencing depression, and an emerging conduct disorder, provided the LEA with reasonable notice that Child had a Mood Disorder or was suspected of having one.

In addition, the LEA had been informed by Child's former psychologist during the MDR that Child may have a sexual fixation and a diagnosis of oppositional defiance. The evidence shows that both conditions could be symptoms of Child's Mood disorder and or ADHD.

Under applicable procedures governing the manifestation determination review, the MD committee must consider all relevant information. 34 C.F.R. § 300.530(e)(1). This means the LEA under its Section 504 manifestation review was required to consider the diagnoses in the June 2010 Psychological Report, to include the Mood Disorder. Likewise, the MD committee was required to consider the provisional diagnoses; that is, sexual fixation and oppositional defiance, it became aware of from Child's former psychologist. The latter was especially required considering that prior to the suspension the referral noted two other related incidents with Social Studies Teacher in January 2014, where she suspected that Child may have inappropriately touched her.

The Hearing Officer now examines the evidence to determine if a proper Section 504 MDR occurred.

The Evidence shows that the Social Worker recalled during her testimony that Child's Mood Disorder was not discussed during the MDR. Her testimony was corroborated by two other committee members. Gifted Specialist and Science Teacher as neither recollected the MD committee considering Child's Mood Disorder. While the school psychologist's and case manager's testimonies indicated the mood disorder disability may have been mentioned during the MD meeting, this evidence fails to establish what if any deliberation was undertaken to decide if Child's conduct was a manifestation of this impairment. Therefore, the Hearing Officer is persuaded by the testimony of Social Worker and finds the MD committee failed to consider Child's mood disorder in deciding if the Child's conduct was a manifestation of his disability. Clearly this lack of careful review of the mood disorder violates the "review all relevant information" mandate under 34 C.F.R. §104.35 (requiring a MDR under Section 504) and 34 C.F.R. §300.530(e) (setting forth the MDR procedures, to include a review of all relevant information).

What is more, the evidence demonstrates that provisional assessments, although pertinent, were not considered by the MDR committee when determining if Child's behavior was a manifestation of his disability. This is so even though the IFA acknowledges that Child's former psychologist informed the MD committee that Child may have a sexual fixation and tendencies of Oppositional Defiance. Yet the testimony of several committee members – Social Worker, Assistant Principal, and Science Teacher - shows that the committee failed to consider these assessments in any deliberations during the meeting. In fact, the IFA espouses the view that the aforementioned assessments are conduct disorders and not relevant. And therefore, the IFA was not required to consider them and, according to Assistant Principal's testimony, did not consider them regarding whether Child's behavior manifested a disability. Clearly the lack of careful review of the aforementioned relevant assessments also violates 34 C.F.R. §300.530(e).

Regarding IFA's position that sexual fixation and oppositional defiance are conduct disorders that the MD committee need not consider, the IDEA requires the MD committee to deliberate on all relevant information. The testimony of the School Psychologist and Parents' Psychologist demonstrate that AD/HD combined with another disorder such as a mood disorder could cause sexual hyperactivity. As such, sexual misconduct could be a symptom of AD/HD, the disability category for which Child was found eligible. The Hearing Officer found the referenced testimony by the two psychologists credible. And from their testimony as well as the 2010 Psychological Report she finds a relationship exists to determine that Oppositional Defiance could be a symptom of an IDEA/Section 504 disability such as AD/HD as well. Considering the testimony of the psychologists, the Hearing Officer finds the evidence insufficient to establish that both oppositional defiance and sexual fixation are conduct disorders only and not symptoms of an IDEA disability. This is so especially observing that in addition to AD/HD, under the June 2010 Psychological Report, Child carried diagnosis of Mood Disorder NOS with anxious, depressed features (w/emerging conduct disorder tendencies). Accordingly, both the Mood Disorder and Oppositional Defiance data about Child were relevant information that the MDR committee should have considered, but the evidence shows that it was not properly taken in account by the committee.

Of note as well, another example of the MD committee's failure to consider all relevant information in violation of 34 C.F.R. § 300.530 (e) is it did not review the 2012 Psychological

Evaluation. This report was also pertinent as a portion of it addressed Child's behavior during a testing session while at school. Yet the evidence demonstrates that not one committee member reviewed this report.

The LEA's failure to carefully consider all relevant information about Child that it was provided is more than a harmless procedural error. A thorough review of the evidence suggests that had the MD committee considered all relevant information, the committee may have determined that Child's behavior was related to his handicapping conditions. If such a determination had been made, Child would not have been suspended. Accordingly, the failure to consider all relevant information was a substantive error and denied Child FAPE.

What is more, the Hearing Officer is not persuaded that the behavior on February 3, 2014, was not due to ADHD impulsivity. That said, the Hearing Officer recognizes precedent in this federal judicial circuit, requiring that due deference be given to the opinion of the professional educators. *See, e.g., County School Bd. Of Henrico County, Virginia v. Z.P. ex rel. R.P.*, 1399 F.3d 298, 313 (4<sup>th</sup> Cir. 2005). The Hearing officer finds, the evidence of record provides sufficient reason for her to give little weight to the educators' assessment that the conduct was not a manifestation of Child's disability. As noted here the MDR review violated 34 CFR §300.530 (e) and is substantially flawed.

In addition, the facts support Child's actions on February 3, 2014, may have been impulsive. Particularly, they show that Child was in his social studies class and had been instructed by the guidance counselor to ask his teacher if he could contact his mother and inquire if he could stay after school that day for a meeting. Child without delay walked up very closely to his teacher whose back was turned to him. The teacher felt her bottom being touched. No hand movement was observed. The actions of Child occurred quickly and do not suggest Child deliberately and with premeditation made contact with the teacher's bottom, but rather the action was in response to sudden stimulus typical of the reaction of an ADHD child. *See, generally, Fitzgerald v. Fairfax County School Board*, 556 F. Supp. 2d 543 (E.D. 2008). Given this conclusion, the Hearing Officer cannot find Child was cognizant of his behavior at the time. In fact a description of Child's behavior and careful scrutiny of it matches the Gifted Specialist's and School's Psychologist's definitions of what ADHD impulsivity can entail; that is unplanned and quick actions. Further, although it may be considered self-serving, Child's statement of what occurred does not support the claim that he was aware of his actions.

The Hearing Officer is cognizant of the court's ruling in the above referenced *Fitzgerald* case where the MD decision was upheld. *Fitzgerald*, 556 F. Supp. 2d at 556. The case at bar contains distinguishable facts. Thus, a similar ruling is not warranted.

For one, in *Fitzgerald* the court noted that parents have a right to participate in the MD meeting and be heard. It found that the parents were afforded those rights. *Fitzgerald*, 556 F. Supp. 2d at 558. In contrast to *Fitzgerald*, the parents in the case at bar were not heard during the MD meeting because they requested all Child's disabilities be considered. To this point, the evidence shows that the LEA detailed its MD decision on a form the LEA titled "Disciplinary Manifestation Determination." Of note, consistent with what the Hearing Officer has found, the parents and her advocate memorialized the LEA's failure to consider all Child's disabilities. As

on that form, the parents wrote the following:

I disagree [sic] with this resolution because not all of his medical record has been considered to develop an adequate IEP and the LEA failed to consider All his disabilities during this meeting. The LEA failed to provide and honor my son's rights under ADA/section 504.

[Parents]

I agree [with] the parents [sic] position. [Advocate]

Because the LEA ignored Parent's request, consequently and secondly, all relevant information was not considered in the case before this Hearing Officer in violation of IDEA regulation at 34 C.F.R. §300.530(e). This factor is also opposite to what occurred in *Fitzgerald*.

Third, in *Fitzgerald* the court found the MD committee did not approach the MD meeting with a closed mind. *Fitzgerald*, 556 F. Supp. 2d at 560. The evidence in the case before the Hearing Officer illustrates as previously noted that the Assistant Principal, supervisory personnel, came to the meeting with the belief that a conduct disorder could not be a disability and therefore would not be considered. She failed to take into account any conduct disorders. As such the assessments of sexual fixation and oppositional defiance were not considered by at least several committee members. Science Teacher testified that she did not associate ADHD with hypersexual activity. The testimony of Gifted Specialist and School Psychologist also indicated a fixed definition for impulsivity that could not relate itself to hypersexual activity. Accordingly, unlike *Fitzgerald* an atmosphere of open-mindedness was absent at the MD meeting.

Fourth, in *Fitzgerald* the court noted that the student, Kevin Fitzgerald (Kevin), played a dominant role in planning and executing the spray painting of the school with paint balls. Kevin was a junior in high school and receiving special education and related services. On December 16, 2006, he suggested to four other boys that they drive to his high school and spray paint the school. The boys went to the high school and did so. A paint ball malfunctioned and Kevin drove the boys to retrieve additional paint balls. Kevin drove the boys back to the school where they proceeded to spray the school again. After the second trip to school, two of the boys decided they no longer wanted to participate and Kevin drove them home. Kevin returned with the other two boys and spray painted the school again. The incident lasted several hours. Kevin was eventually linked to the vandalism at the school and when questioned by the school's police officer and told the school would not pursue criminal charges, Kevin admitted his involvement. *Fitzgerald*, 556 F. Supp. 2d at 547. The MD committee found Kevin's behavior was not a manifestation of his disability. The court in *Fitzgerald* found that Kevin played a predominate role in planning and executing the activity. It noted the activity lasted several hours. The court found Kevin's actions were not due to impulsivity.

As noted above, the facts in the case at bar fall short of showing planning by Child, but impulsivity on February 3, 2014.

In sum, the *Fitzgerald* ruling upholding the MD is inapplicable here because the facts are different.<sup>10</sup>

**b. Whether the LEA failed to evaluate the child before it made a significant change in placement when it suspended or recommended suspending the child?**

Section 504 implemented regulation at 34 C.F.R. §104.35 requires the LEA to conduct an evaluation of any student who because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.

As previously mentioned, Child had previously been evaluated in 2010 and found eligible for special education and related services under IDEA. The LEA obtained no formal assessments during the process. Child's eligibility was continued following a triennial review of existing data in October 2013. At the time it suspended Child, the LEA knew he was handicapped under Section 504. The LEA's long-term suspension of Child in February 2014 was a significant change in placement. Thus, Section 504's implemented regulation at 34 C.F.R. § 104.35 required the LEA to reevaluate Child (including making a MD decision) before taking any action. *See* 56 IDELR 14 (D. Md. 2011).

That said, the facts show that by letter dated February 5, 2014, Child's principal recommended Child be suspended from the school division for one year. (LEA Exh. B 16). After a disciplinary hearing regarding the matter, by letter dated February 21, 2014, the Office of Student Leadership (OSL) informed parents that Child had been suspended for one year due to his February 3, 2014 behavior; however, in lieu of the one year suspension, the OSL recommended Child be placed in an alternative school with strict probation until the end of the 2013/14 school year. Child would be eligible for consideration to return to his zoned school for the following school year upon recommendation of the principal of the alternative school. (LEA Exh. B 14). The recommendation for the alternative school was forwarded to the IEP team for consideration. February 26, 2014, the IEP team met, reviewed existing data, and determined that the alternative school was an appropriate placement for Child. Parents disagreed with the February 26, 2014 placement and IEP. (LEA Exh. D 4-16). Parents also contends the LEA failed to conduct a reevaluation as required by 34 C.F.R. §104.35(a) before acting on the decision to suspend Child.

Now the Hearing Officer considers if the LEA review of existing data was sufficient to satisfy its obligation to re-evaluate Child prior to the suspension. The evaluation, or in this case reevaluation, is fundamental to detecting the existence of a student's disability or disabilities. It sets the parameters for the course of special education and accommodations that will follow if the student is determined to be eligible.

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<sup>10</sup> Further, the Hearing Officer has considered the reported statements made by former psychologist of Child and she is not persuaded by them. The Hearing Officer does note the evidence fails to show Child was evaluated by the former psychologist. Also, no credentials of this psychologist were provided.



A student's special education needs are likely to change throughout the course of his or her educational career. The reevaluation requirement exists to address such changes, and to enable an LEA to continue providing students with FAPE. Under Section 504, an IEA is required to reevaluate students with disabilities on a periodic basis. In addition, they must reevaluate students before subjecting them to any "significant change in placement." A long-term suspension such as in this case is a significant change in placement. Based on testimony presented by the LEA, the Hearing Officer finds the LEA has adopted IDEA procedures at regulations 34 C.F.R. §§ 300.304 through 300.306 for its Section 504 evaluation procedures.

Regarding evaluations and reevaluations, in pertinent part, 34 C.F.R. § 300.304 requires the LEA to

- (i) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child 34 C.F.R. § 300.304 (b) (1);
- (ii) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child 34 C.F.R. § 300.304 (b) (2);
- (iii) assess the child in all areas related to the suspected disability, including, if appropriate, ..., social and emotional status, ....; 34 C.F.R. § 300.304 (b) (4)
- (iii) and in evaluating each child with a disability, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services in the, whether or not commonly linked to the disability category in which the child has been classified 34 C.F.R. § 300.304 (b) (6)

A careful examination of the evidence demonstrates that the LEA did not obtain any new assessments on Child, but reviewed existing data. Major existing dated consisted of Child's IEPs, the June 2010 Psychological Report.

Psychological Report had aged by three years and eight months. Of note also, it was conducted when child was in primary school and 8 years old. When the February 3, 2014 incident occurred, Child was in the second semester of his second year of middle school and 12 years of age. The psychological report noted not only a diagnosis of ADHD, combined type but diagnoses of Mood Disorder NOS, Mental NOS, and Learning Disorder NOS. The Mood Disorder assessment also noted conduct disorder tendencies were emerging. His Mental Disorder also was also annotated and commented that Child was experiencing attachment and stress reactivity features.

A careful review of several of Child's IEPs leading to his most current one prior to the incident reveal they basically said the same thing. And as previously discussed here, those IEPs were inappropriate and denied Child a FAPE for the numerous reasons detailed.

The reevaluation following the February 3, 2014 incident and consisting of only a review of existing data was insufficient. The facts of this case compelled the LEA to obtain more formal testing and assessments considering the following:

- (i) Child consistently did not meet his IEP organizational skills goal;
- (ii) the LEA had tried numerous services and supports such as academic support, focus, individual counseling with Gifted Specialist, use of a planner and accordion, emailing between parent, Child, and teacher, and Case Manager instead of Child writing down Child's assignments;
- (iii) the aged June 2010 Psychological Report;
- (iv) escalated behavior problems to include lying and inappropriate behaviors of a sexual nature at school and home; and
- (v) persistent poor academic performance.

Considering the above, the Hearing Officer finds that the LEA failed to evaluate Child prior to the significant change in placement in violation of Section 504 regulation 34, C.F.R. §104.35 and 34 C.F.R. §300.304(b).

- c. **Whether the LEA denied the child equal educational opportunities by failing to evaluate the child and determine if he has a disability requiring special education and related services?**

Because the LEA failed to properly evaluate Child, the LEA was ill-equipped to address any changes in Child's educational needs and provide Child FAPE. Hence the LEA has denied Child denied equal educational opportunities.

## **VI. DECISION AND ORDER**

The Hearing Officer has carefully considered all evidence whether specifically mentioned or not. For reasons stated above, the Hearing Officer finds with respect to the IDEA and Section 504 issues the following:

**IDEA Issue 1:**The LEA's October 7, 2013, and November 19, 2013, IEPs, as well as the February 26, 2014 proposed IEP, deny Child a FAPE because they fail to address all Child's disabilities and/or limitations;

**IDEA Issue 2:**The LEA denied Child a FAPE when it failed to conduct additional testing/evaluations during the triennial review process;

**IDEA Issue 3:**The evidence is not sufficient to show the LEA denied parental input by predetermining that no additional evaluations of child would be conducted during the triennial review process;

**Section 504 Issue 1:** The MDR was substantially flawed and failed to meet the requirements of Section 504. Accordingly, the MD denied Child a FAPE;

**Section 504 Issue 2:** The LEAs failure to obtain additional testing/assessments of Child prior to the long term suspension was a substantive error and denied Child a FAPE; and

**Section 504 Issue 3:** The LEA denied Child a FAPE by failing to evaluate him and determine if he has a disability requiring special education and related services.

Further, the Hearing Officer finds that with regard to the issues before her that requirements of notice to the parents have been satisfied with the exception that the prior written notice regarding the November 19, 2013 IEP meeting was deficient in that it failed to mention all actions proposed; that is, the parent's request to have Child removed from Social Studies Teacher class. The Hearing Officer also finds 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 failed to provide Child with a FAPE since on or about October 1, 2013.

Accordingly, the Hearing Officer orders the following:

The LEA is ordered to

1. immediately vacate the determination that Child's conduct on February 3, 2014, was a manifestation of his disability;
2. conduct a Functional Behavioral Assessment and implement a Behavior Intervention Plan with positive behavior supports and strategies to address Child's academic and non-academic behaviors impeding his learning and others;
3. re-enroll Child at Magnet School if such has not been done;
4. conduct a comprehensive assessment to determine if Child has indicators of an Autism Spectrum Disorder;
5. within 14 calendar days of receiving the completed evaluations, convene an SEC/IEP meeting to revise the IEP such that the PLOP and needs statements are consistent with current evaluations and other supporting data;
6. develop appropriate goals that address Student's academic, developmental, and functioning needs
7. the evidence demonstrates that Child would benefit from a resource bell and regular

individual counseling regarding appropriated behavior. Accordingly, the LEA is also ordered to provide a resource bell and individual counseling as accommodations/services on Child's IEP.

Further, the Hearing Officer notes Parents have requested compensatory education. This is an equitable remedy. The Hearing Officer finds compensatory education is not appropriate considering she previously ordered Child receive 15 hours a week of individual home-based services. And on May 15, 2014, the Hearing Officer ordered the LEA to re-enroll Child in Magnet School.

## VII. PREVAILING PARTY

I have the authority to determine the prevailing party on the issues and find the prevailing party on IDEA issues 1 and 2 and Section 504 issues 1, 2, and 3 are the parents. Further, the Hearing Officer finds the LEA has prevailed on IDEA issue 3.

## 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 17<sup>th</sup> day of June, 2014.

  
Teron Galloway Lee, Hearing Officer

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