06-016

VIRGINIA DEPARTMENT OF EDUCATION

AMENDED DUE PROCESS HEARING REPORT

SCHOOL DIVISION: PUBLIC SCHOOLS ("LEA")
LEA COUNSEL:
NAME OF PARENTS: MR./MRS. ("Parents")
NAME OF CHILD: ("Student")
NAME OF COUNSEL: PERRY H. HARROLD, ESQUIRE/ CHERYL A. POE, ("Advocate")
PARTY INITIATING HEARING: PARENTS

HEARING OFFICER: SARAH SMITH FREEMAN

INTRODUCTION

This matter came for hearing on October 5, 6, 7, 26, 27, 28, November 28, 29, 2005 and January 18, February 6, 13, 2006 in , Virginia, before a duly appointed hearing officer. Present in person, in addition to the Hearing Officer and Court Reporter, were the mother and father, ("Parents"), Parents' counsel, Parents' Advocate ("Advocate"), Counsel for the local educational agency ("LEA) and the LEA Representative.

The due process hearing was requested in writing. The request was received by the LEA on August 26, 2005 and this Hearing Officer was assigned to hear the case on August 30, 2005.

Parents allege that their son, a special education student, ("Student"), did not receive sufficient rehabilitative services pursuant to Section 504 of The Rehabilitation Act of 1973, as amended, 29 U.S.C. Title 701 et seq., or a "free and appropriate education" ("FAPE") pursuant to federal special education law, the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. 1400 et seq., and the regulations at 34 C.F.R. Part B,

Section 300 et seq. Parents have filed a due process hearing request to contest the LEA's failure to evaluate their son and failure to conduct certain procedures required by IDEA. Ultimately, Student's placement was changed in response to disciplinary offenses that occurred on April 22, 2005. Student was charged with possession of marijuana and with possession of drug paraphernalia.

Parents allege that the LEA violated the "Child Find" initiative of IDEA and Section 504 of the Rehabilitation Act of 1973, as amended. Parents allege that the LEA failed to fully evaluate their son's needs at the eligibility determination. Parents allege that the LEA committed certain substantive and procedural violations, contrary to IDEA requirements, by virtue of which their son has been denied a FAPE. The cumulative effect of the omissions, Parents allege, directly caused the LEA's inability to address their son's academic deficits and to control their son's behavior at school.

Parents, by counsel, assert that the LEA wrongfully failed to convene a manifestation determination review ("MDR") upon their son's absence from school in December, 2004, when he attended a substance abuse prevention course for 18 days. Parents contend that the 18 day absence was, in effect, a long-term suspension and removal which should have initiated an MDR and an individualized education program ("IEP") review. The omissions, Parents allege, were tantamount to a denial of their

procedural due process rights: Parents were not notified of the change of placement prior to removal; parents were not notified of their right to refuse placement and initiate due process; a behavioral intervention plan ("BIP") was not created and the IEP was not reviewed by a fully convened IEP team contemporaneously with the change pursuant to IDEA requirements at 20 U.S.C. 1415(k)(4)(A-B); 34 C.F.R. Sec. 300.532 (a,b).

Parents further allege that if the LEA had strictly adhered to the long-term removal procedure outlined by IDEA, that their son's educational disability, which originates from a medical diagnosis of attention deficit hyperactivity disorder ("ADHD"), could have been managed in the home school setting. Parents reason that the change of placement to an alternative placement might not have been the IEP team's eventual recourse if the LEA had complied with IDEA.

Regarding the IEP meeting of May 6, 2005, when change of placement to a disciplinary environment was made, Parents allege that numerous IDEA procedural defects occurred, resulting in a denial of their right of parental participation in the the development of their son's IEP, guaranteed to them by the IDEA. Further, Parents assert that they were denied their due process right to representation at the May 6, 2005 IEP meeting because their advocate was unable to attend.

Parents' most compelling complaint is their assertion that they were verbally threatened and intimidated by the presence of a security guard who was asked to stand at the door outside the conference room when the change of placement was made at

the above IEP meeting. Parents assert, as rationale for the LEA's overall management of their son's special education and for the atmosphere of friction between these parties, that the LEA is racially biased against them because they are African-American. Further, Parents proffer the theory that their son's change of placement decision was prompted by the LEA's discriminatory practice of placing black special education students into the disciplinary setting after unjustly removing them from this predominantly white school district.

Parents maintain that the LEA's bias against their family caused a progression of events, and, ultimately, the placement decision on May 6, 2005 after which their son was required to attend Academy, an alternative school, prior to his re-entry into his home school on January 27, 2006, after the long-term suspension.

Parents contend that they were fearful of the LEA to the extreme that they believed that they could be charged with truancy if they did not consent on May 6, 2006. Fear, threats, and a general sense of foreboding, Parents assert, negated their consent to the change of placement. Parents allege, therefore, that they did not freely consent to the change of placement decision that occurred on May 6, 2005.

Specifically, Parents have requested as relief the following educational services: one-on-one tutoring by a trained ADHD tutor; monetary reimbursement for the private tutor; meetings occurring twice weekly with a school psychologist to address their son's feelings of discrimination by the LEA;

remediation for all subject areas; one-on-one special education training for Parents and for their son; Student's teachers to be trained in working with children with ADHD and training which is to be approved by Parents' advocate; Parents request that Student's IEP team have diversity training.

As monetary reimbursement for this Student's claim, Parents request private tutoring services, attorney's fees, and advocacy fees.

FINDINGS OF FACT

This Hearing Officer makes the following findings of fact:

1. The Student was born on April 19, 1990. (Parents' Exhibit, "PE", C-19)

2. The Student was found eligible for special education services through Public Schools ("LEA") on September 30, 2004 under the OHI model or "Other Health Impaired." (PE/C-19)

3. This Student qualified for accommodations for ADHD pursuant to Section 504 of the Rehabilitation Act of 1973, as amended. (PE/C-19)

4. The Student's academic history in this district was uneventful until his 8th grade year. Through seventh grade, academics were "okay" and he did not act out at school, "only at home." (PE/A-1)

5. Behavior problems began for this Student in October or November, 2002. (PE/A-1)

6. Student's academic career changed drastically in eighth grade. The Student failed all of his subjects and

his report card reflects that he was retained. (PE/B-1)

7. Although the Student failed eighth grade, quarterly grades demonstrate some sporadic progress with a range from a "B" in Band, to some "C's" and "D's", and many "F's." (PE/B-1)

8. Written comments to Parents on the eighth grade report card indicate that the Student's lack of academic progress was attributable to "inattention in class" (3 teachers commented), "doesn't prepare satisfactorily" (2 teachers commented), "lacks organization" (one teacher commented), and "class participation" (one teacher commented). The thrust of the remarks could suggest ADHD causation. (PE/B-1)

9. This Student has tried many medications since third grade to treat his ADHD, reported his Parent. (PE/B-2)

10. In a letter to the LEA dated August 4, 2004, Student's father stated that he had struggled to "stay on task" in the 2003-2004 school year. (PE/B-2)

11. Except for eighth grade, Parent asserted that Student has made the honor roll at least once each year since he began middle school. (PE/B-2)

12. During the summer of 2004, Student attended Academy where he received a "C+" in Math 8/Pre-Algebra, a "B" in Science, and a "C-" in Military Science. (PE/C-18)

13. Citing Student's inability to focus or concentrate, the summer school teacher urged the LEA to evaluate Student for IDEA disability upon his return to school. (PE/C-17)

14. In the letter witten by student's father to the LEA

on August 4, 2004, he referred to his son's "disability beyond Attention Deficit" and requested Student's evaluation for Section 504 and an IEP. (PE-B-2)

15. Student's father related that his son's classroom behavior has never been a "significant issue" for this child. (PE/B-2)

16. Student's eighth grade retention was waived and he was promoted to ninth grade in his home school district. (PE/B-3)

17. In spite of retention into eighth grade, Student passed all Grade 8 SOL's except for his English:Writing which he missed by four points. (School Board Exhibit "SBE"/F-25)

18. The first meeting held to determine Student's eligibility for IDEA was on August 12, 2004 which was before the beginning of ninth grade at the LEA. (PE/C-1)

19. In addition to IEP team members, Student's mother, father, and Student attended the above meeting. Parents agreed to the evaluations to be used to determine Student's IDEA eligibility and IEP. (PE/C-4)

20. Initial evaluation of Student for IDEA identification included educational assessment, medical evaluation, and sociocultural evaluation. A psychological evaluation was not undertaken by the LEA to determine eligibility. (PE/C-5) The LEA performed an academic record review to accomplish educational assessment.

21. In lieu of psychological evaluation, the LEA relied upon "parent student input; review of historical

records; review of documentation of private doctors and private schools." (PE/C-7) Both parents signed off on the consent to evaluate forms for student.

22. Parents now assert that they disagree with the scope of testing used to evaluate their son's special education needs. Parents' testimony that they did not understand that they could request more testing is not credible. The eligibility notes are straightforward regarding the extent of evaluation. Parents are intelligent, articulate, and college educated. Parental consent to the eligibility process and to the scope of LEA evaluation of Student's disability was competently given by the Parents. (PE/C-4)

23. On August 12, 2004, Student's educational record contained correspondence from his medical doctors dated June 11, 2003, August 13, 2003, January 5, 2004, March 22, 2004, and May 24, 2004. (PE/A-1 to A-4) Review of these medical reports was adequate to provide medical, physiological and mental health information to the eligibility committee.

24. Medical notes through August, 2003 indicate that the parents did not believe that Student's school behavior was a major issue. Medical visits were meant to adjust Student's attitude and to somehow make Student more receptive to doing daily school work. Student's mother described his attitude as "occasionally nasty and frequently defiant." (PE/A-1,2)

25. Letter from medical doctor dated June 11, 2003 stated purpose of medical visit was to provide behavioral management at home. Student, then 13, was described as having "excessive

anger, short attention span, possible depression, poor self motivation, and excessive moodiness." Parent stated to the medical doctor: He does not act out at school, only at home. Student was prescribed medication to control his impulsivity. (PE/A-1)

26. Student's mother denies that she told Student's medical doctor that Parents believed the medication to be "far more expensive than they could afford" ($6.00 daily). Correspondence from medical doctor dated August 13, 2003 indicated that the primary reason for the visit was "to explore alternative pharmacologic and behavioral approaches" with Student and his Parent. Although Student's overall behavior had improved, Student began a new regimen of medications because Student seemed uneasy about schoolwork. The medical doctor and family concluded that "distractibility and attention span" were the "primary" issues at school. (PE/A-2)

27. At the time when a "trial" of medications was recommended by the physician to treat Student's inattention and distractibility, Student was "regarded well by parents, peers, and teachers." He was "less angry" and "more appropriate at home and with friends." Student and his doctor were concerned about Student's distractibility at school, but school had not yet begun. (PE/A-2)

28. Follow-up with this doctor was scheduled to occur in six weeks. Student and his mother were to confer regularly by telephone to monitor the new prescription. The doctor questioned whether an extra morning dose would be required

for Student. There were no new medical reports until January 5, 2004. (PE/A-2)

29. The next medical report dated January 5, 2004 begins to describe difficulty at school and at home. The report indicates the necessity to return to Strattera because the trial medication was "ineffective at the present dose." The doctor mentioned cost of the drugs to be a factor in his consideration: He referred to Parents' change of insurance to pay for the original drug. (PE/A-2)

30. On March 22, 2004, a medical doctor reported seeing Student for another follow-up visit. Student, who was then nearly 14 years, is described as having ADD, episodic dyscontrol and a "possible depression." Student reported sleeping and eating satisfactorily. Student stated that, academically, he was doing better in school "for a while" until recently, then events became "worse." The medical doctor noted that the improved grades occurred while while Student was on medication. Academic decline, the medical doctor stated, "... probably coincides to the period during which he was taking the Strattera. His decline probably coincides with a reduction in his dose regularity." Further, Student admitted that he does not "usually" take any medication. (PE/A-2)

31. Student's refusal to take the medication was an ongoing, major problem. The March 22, 2004 medical report indicates that the doctor assisted Student's mother to get Student to take the medication which was prescribed to

treat Student's distractibility: A seven day pill holder was suggested; Student's mother was requested to alter her morning schedule to ensure that Student ate before taking his medication. Again, the doctor stressed dosage regularity. (PE/A-3)

32. Early reports regarding Student's mental status depicted a teen who rebelled most at home: He was "defiant and angry" at home yet "sometimes he got his homework done." Student experienced a "poor attention span" at school, but he was able to participate meaningfully in band, a class he seemed to like. Student claimed he had "few friends," yet his extracurricular pursuits proved that he was respected by superiors and peers: He earned a Scouts' life badge and was working toward becoming an Eagle Scout when the report was written. (PE/A-2)

33. The March 22, 2004 report to the LEA alluded to the termination of Student's counseling services and urged Parent to "return to that program." Follow-up was scheduled to ensure that the family had complied with recommendations to resume counseling and to monitor behavior modification medications. (PE/A-3)

34. During medical appointments, the physician provided complete physical examinations to Student and no changes were noted. (PE/A-1 to A-4)

35. The medical report of May 24, 2004 describes medical treatment for attention difficulties and a "possible" depression. Student's mother now describes his school situation as "struggles, inattention and not caring." At that time, Student was passing two subjects (Art and Band) and failing in three others. Student's mother, at times, vacillated in reports to the medical doctor regarding Student's school situation: "Sometimes [Student] did his homework, hadn't been been in trouble and had no behavior problems at school." Student's mother reported that he was "moody and withdrawn" at home, but his extracurricular pursuits contradicted that assessment of his demeanor: Student was still working toward his Eagle Scout badge. (PE/A-4)

36. The medical report dated May 24, 2004 does not provide any requested data from the parent regarding the monitoring of Student's medications or the physician's referral for Student to receive regular mental health counseling. At the prior appointment, March 22, 2004, the doctor had indicated to Student's mother that she seek regular counseling and that she provide medication follow-up data in order to stabilize Student's medications. The medical doctor stressed these concerns as a primary component for consideration in the treatment of Student's ADHD. (PE/A-2, A-4)

37. The last report to the school requested follow-up by the family in August, 2004 but the next medical letter to the educational record is dated April 25, 2005.

38. The medical doctor agreed with the decision

to send Student to a summer session at military school, "a highly disciplined environment," though Student was not thought to have behavior problems at school. (PE/A-4)

39. After the summer session at military school, the Parents became convinced that Student's school distractibility was attributable to "disability beyond attention deficit." Parents demanded a Section 504 Plan and an IEP because of their belief that Student had failed eighth grade because of the LEA's failure to address Student's ADHD. Parents appear to have been motivated by the cavalier statements made to them by the military school teachers regarding causation for Student's eighth grade failure. (PE/B-2)

40. Without extensive review by a collegial team of educators convened for the purpose of IDEA eligibility, it is not appropriate for a single individual to promote a particular special education strategy. To do so, is not in keeping with the spirit of IDEA. As any responsible educator will inform a parent who requests segmented input into an IEP, classification of a student or modification of the IEP, without contribution from the entire IEP team, places the proverbial cart before the horse: An IEP team must be convened to consider the student's whole presentation to the committee. (PE/C-17)

41. Although the military school teacher wrote, in good faith, to Student's home school in order to "help" the student, the military school teacher's comments to the Parent went way beyond the suggestion that the LEA evaluate Student for IDEA. Comments made by the military summer school teacher appear to

be based upon the unfair presumption that the LEA had not properly educated this Student. Parent's letter dated August 4, 2004 reflects the fact that the military school assessed Student, without having access to a properly convened IEP team, and misinformed the Parents about student's special education status. Parent's letter to the LEA states as follows:

> "The teachers at [Military Academy] assessed 's [Student's] condition as a disability beyond attention deficit. They recommended he work with a resource teacher with an Individual Education Plan." (PE/B-2)

42. In fact, the military school teacher's letter to the LEA does not actually say what the parents seem to have inferred from the summer school: Correspondence from the summer school teacher notes only that inattention is Student's problem and that Student will achieve his full potential only after his distractibility has been addressed. (PE/C-17) These issues were identical to the concerns raised by Student's parents, by his medical doctors, and by his eighth grade teachers. (PE/B, G-6 to G-12)

43. Upon Student's return to the LEA in ninth grade, the Student was evaluated promptly and found eligible for IDEA classification as "other health impaired" ("OHI"). (PE/C-7)

44. The eligibility committee characterized the basis of Student's disability as "ADHD [which had] negatively [impacted] his ability to progress in the academic environment; needs accommodations to make progress." (PE/C-7)

45. Parents believe that the combination of evaluations utilized by the LEA to determine their son's disability was

incomplete. Specifically, they now state that the LEA should have completed a psychological evaluation and additional educational assessment. Parents insist that the medical reports dating back to June, 2003 should have alerted the LEA to the urgency of their son's academic needs.

46. Parents base the above contention largely upon the conclusions of their expert witness, , an educational specialist. She stated that Student's IEP did not offer him an "appropriate" education because his present level of performance ("PLOP") was not based upon a complete battery of tests to define Student's mental and educational achievement levels and deficits. (TR., p. 270, October 27, 2005)

47. The above expert witness testified that Student scored in the "low average range to the average range, average range in all areas." She referred to the two lowest scores being math computation and oral expression. (TR., p. 31, January 18, 2006) The testing undertaken by the above witness was completed only recently. Student's eligibility occurred in August, 2004 and he has not attended the LEA's schools since May, 2005. Classroom observation occurred at another school. (TR., p.19, January 18, 2006) A great deal of time has passed since Student's last performance levels were examined.

48. Parents request that the Hearing Officer consider the intervening year between Student's eighth and ninth grade year to be "lost time." It is inaccurate to assume

that Student would have qualified as an IDEA eligible special education student before he experienced eighth grade failure. "Adverse impact" must be reflected in a Student's academic performance before the student may be IDEA classified. Isolated comments on a report card such as "inattention in class ... doesn't prepare satisfactorily" are not synonymous with IDEA eligibility. If these terms were uniformly descriptive of IDEA disability, the majority of school aged children would have to be identified.

49. Until his eighth grade failure, Student had made reasonable academic success even though it is accurate to infer that Student has never achieved his full potential. Parent's statement that "During the 2003-2004 school year [Student] struggled to keep on task" and that Student was "unable to focus" is contradicted by the statements made to the medical doctors by the Student who reported that he was "doing better" academically then events became "worse." (PE/A-2)

50. Student's initial IEP called for consultative services one time monthly for 15 minutes each (PE/D-7), promote use of his planner which was to be initialed by teachers and parents, prompts and cues to stay on task, and preferential seating (PE/D-11). Parents' contention is that these accommodations were minimal and that Student should have received a more intense level of services on September 30, 2004. (PE/D-7)

51. Student's standardized testing scores taken in his ninth grade year, in October, 2004, reflect solidly average performance on all academic testing. (PE/J-18) When a student

performs well on outside test sources such as the Stanford and the SOL's, it is likely that this student is also capable of achieving academic success in school. It is less likely that the student is incapable of doing his assigned school work. Motivation, individual choice, interest, all of these factors may affect a child's decision to follow through with relatively mundane tasks of completing homework and studying for tests.

52. Student's final grades for the ninth grade year reflect grades that had "slipped" from some "B's and C's" to "C's, D's & F's" but Student had certainly made some academic progression. Comments on the Student's report card demonstrate primarily organizational problems and a lack of preparation. (PE/G-15)

53. Parents consented to the initial IEP dated September 30, 2004. (PE/D-16)

54. Student was suspended from his home school district on December 17, 2004 for being "under the influence of marijuana." (PE/E-1) Testimony indicated that a teacher had suspected marijuana use by Student who had "acted giddy" which was not characteristic of him. When confronted, Student stated that he had used marijuana before he returned to school for tutoring. A marijuana baggy was not located. (PE/J-7, TR., p. 170, October 26, 2005)

55. At first, Parents were informed by the LEA principal that he would recommend expulsion or suspension. Student agreed to go to a substance abuse intervention program

("SAIP") so the violation was downgraded to an 18 day attendance at SAIP "in lieu of suspension." (PE/E-4,5 & L-1)

56. According to the testimony, two additional incidents of marijuana use were reported on April 5, 2005 and on April 22, 2005. Student was not charged for the April 5, 2005 incident which resulted from a teacher having "smelled" marijuana on Student. In this incident, the Student's bookbag was searched and only a small amount (less than 1/32 ounce) of finely grated "remnants" of marijuana leaves were found. Student denied having smoked marijuana and claimed that the nearly empty marijuana baggy was "left over" from before he entered SAIP. The school security officer testified that the LEA believed Student's explanation so the baggy was thrown into the trash. (TR., p. 208, 179, October 26, 2005)

57. The third incident involving this Student's marijuana use occurred on April 22, 2005. Student brought to school a homemade pipe that he had apparently made from a musical instrument containing green plant material which field tested "positive" for marijuana. (TR., p. 149, October 26, 2005) Student admitted having "smoked" marijuana on this occasion.

58. Parents were convinced that Student had not used marijuana because Student had tested "clean" on independent drug tests alleged to have been done after the first incident. Parents referred to Student's admission of drug use on December 16, 2004 as a false statement, a tactic he had used to divert away from the poor progress report he had received. (PE/E-3) Parents stated that Student feared repercussions at

home for the poor progress report. (PE/L-2, F-1)

59. It is difficult to reconcile the charges of marijuana use by the Student. After the first marijuana charge in December, 2004, the parents maintained that this Student was tested regularly for "drug use" and that Student has always tested "clean." On the other hand, Student did admit to his teachers and to LEA personnel on December 16, 2004 and on April 22, 2005 to being under the influence of marijuana or to marijuana paraphernalia possession on school grounds. Parents did not admit any exculpatory drug tests into evidence at this hearing to disprove Student's marijuana use or possession even though the LEA's charges were based, in part, upon Student's admissions. (PE/F-1)

60. Mother's testimony that she did not suspect that Student was a drug user contradicts earlier statements she made to the school social worker: Mother admitted to her that she suspected drug use as the cause for her son's sudden, "complete personality change." According to the mother, however, Student's urine screening was negative. (PE/C-16)

61. Regarding the December, 2004 incident, would the Student make up this story to avoid facing his parents? Does Student's disciplinary history or medical information indicate a propensity to lie in order to avoid conflict at home? From medical reports, sociological data, and Parents' testimony, it is evident that Student and his parents share a loving parental bond.

62. Upon learning of the December, 2004 incident,

Student's mother expressed typical maternal concern: " [Student] needs to know that he is screwing up his future and what it takes to salvage the remainder of the year." (PE/E-3)

63. Though Student's father has bristled, at times, during meetings with the LEA, his anger has been directed at the LEA for his perception of unfair treatment by the school. Student's father is protective of Student's welfare: This father has worked many long hours and has expended enormous sums to do what he personally believes is "right" for Student's education. Upon notification by the LEA to Student's father of the April 22, 2005 charge, father's reaction was to shield Student from the school, not to punish him. (PE/J-3)

64. There is no evidence that Student privately harbored fear of Parents or of their retribution at home. Volumes of testimony regarding this family's home life revealed that this Student was not intimidated, in the least, by his parents. Although mother agonized over what might best be referred to as Student's "rebelliousness," malaise, and a general "blue funk" around the house, there is not an iota of evidence that Student would risk making an incriminating statement at school to avoid his parents' reaction to a poor progress report.

65. Regarding the April 5, 2005 incident which was not reported on Student's disciplinary record, Parents' perception that the teacher is suspect because she lodged the complaint for merely "smelling" marijuana on Student

is not necessarily indicative of racial bias or unfair treatment because Student is of African-American descent: A teacher may detect the scent of marijuana on a student who has been smoking with the same degree of accuracy as she might sense the odor of alcohol on a student who has just been drinking. Informed parents and teachers, unfortunately, become familiar with these distinct "smells." (PE/J-3)

66. Regardless of the circumstances preceding the Student's admissions on December 16, 2004 and on April 22, 2005, the reality is that Student's statements to his teacher that he was "high on weed" and, later, to the MDR committee that he had resumed smoking marijuana, were credible. Student did violate the LEA's rules of conduct for which he was subject to discipline.

67. Parents opine that Student's 18 day SAIP attendance was, in fact, involuntary. Parents propose that Student's SAIP attendance was actually a long-term removal for which procedural safeguards are in place for parents to refuse the LEA's proposed change. Long-term removal (over 10 successive days out of school) means that parent has a right to have an MDR hearing to determine causation for the offense; to have the child's IEP reviewed and modified, if changes are required upon review by the IEP team. An FBA is done. Based on the FBA, a BIP is implemented, reviewed or amended, in light of the IEP team's assessment regarding causation, in order to prevent future offenses. (Va. Code Sec. 22.1-277.05(B), 8 VAC 20-80-68(C)et seq.)

68. Parents contend that Student's special education teacher was not attentive to Student's needs. This fact was not proven by the evidence: Upon notification of the drug charge and possible suspension, the teacher personally checked to ascertain that Student received all of his work during Student's absence, arranged a parent-teacher conference, and he provided Student's music to him so that Student could practice at home. (PE/E-3)

69. It is the Parents' position that if the MDR team had met after the December, 2004 incident, Student's change of placement, which was set into motion by a final marijuana related offense on April 22, 2005, might have been avoided.

70. Whether or not an MDR should have occurred after the December, 2004 incident requires a great deal of reflection. On one hand, Parents' argument that Student might have been suspended if he had not agreed to SAIP "in lieu of" suspension or expulsion is compelling. The obligatory aspect of the SAIP attendance appears to invoke the requirement for an MDR followed by IEP review as above stated. If Student's "SAIP attendance in lieu of suspension" was, in reality, a long-term removal and change of placement, the LEA violated Parents IDEA due process procedural rights if the MDR and IEP review never occurred before "removal to SAIP."

71. The LEA denies that Student's or Parents' procedural due process rights were denied by Student's SAIP attendance. The LEA asserts that the Parents have confused special education terminology: Change of "place" does not mean that a change of

"placement" has occurred. Placement refers to the identification of services provided pursuant to the IEP. Change of location alone is not a "change of placement."

72. Student seemed to enjoy the small classes at SAIP because he felt "overwhelmed" by school work at his home school. Student responded to the more highly structured environment at SAIP. (PE/E-4)

73. At SAIP, Student "followed directions well and completed [daily] assignments on time." SAIP personnel described Student as "a very nice young man." (PE/E-4)

74. On April 18, 2005, Student's IEP was amended: Parents had sent a letter on April 8, 2005 to the LEA in which they aired many complaints. Parents informed the LEA of their discontent with "... the implementation of [Student's] IEP." In response, the LEA conducted an IEP meeting and both Parents consented to the IEP revisions. (PE/F-1 & G-4)

75. Significant revisions were made to Student's IEP: Two resource blocks were added to Student's schedule and Student was to receive five bi-weekly counseling sessions at school. An academic skills class was added. (PE/G-4, G-5) Because Student was "not doing well academically," the IEP team began to consider the need for a more restrictive environment. (PE/G-17)

76. On April 22, 2005 Parents were notified in writing that Student had been suspended from school for possession of drugs and drug paraphernalia. (PE/H-1)

77. On April 25, 2005 Parents were notified in writing

that Student had been expelled as a result of the LEA's investigation into the charges which were later reduced to a one year suspension held in abeyance to allow Student to attend the alternative high school on strict probation. Ultimately, the one year suspension was reduced to a one semester suspension until January 27, 2006. (PE/H-2,M-7, & SBE/B-1)

78. An LEA report stated the following:

> "[The classroom teacher] noticed a silver pipe looking device and a cigarette lighter extending from [Student's] pocket as he sat in class. When he began to question [Student] he stood to run out of the classroom. [The classroom teacher] talked [Student] back and explained that he would be making the situation worse if he did, indeed, run. [Student] complied and walked with [the classroom teacher] to the main office.

Student was questioned individually by the principal, the assistant principal and the school security officer. Student told them that the "pipe" was an old mouthpiece to a musical instrument he had brought from home. The mouthpiece did not belong to the school. (SBE/B-22)

79. The school security officer stated the following:

> "On 4-22-05 [the teacher who made the complaint] contacted me. I was told that [Student] had been in possession of a smoking device and was caught by [the teacher who first saw the device]. I field tested the substance in the bowl and it came out positive for marijuana. Briefly spoke to [Student]. He stated that he had a narcotics problem but that he thought he could shake it on his own. I attempted to talk to [Student's] father but all he wanted was my badge number. I photographed the evidence and released the pictures to the school. The evidence was released to property and evidence. (SBE/B-26, B-27, B-28)

80. Student was on one year probation after SAIP. (SBE/B-33, B-34)

81. Student relates the following:

> "Last week I was feeling stressed because [of] the IEP meeting [on April 18, 2005]. I felt the meeting was bad because I felt as [if] my parents were making things worse and I didn't know what was going to happen. Things were being put out on the table and it seemed as if everything was being turned down and being made worse. During the week I had many thoughts about how I should deal with my stress. I felt as if I had not been doing good enough for my parents and that made me feel worse. I had thought smoking would help me be less worried. (SBE/B-38)

82. The school security officer admitted that he was not state certified to do drug testing though he "field tested" the top of the mouthpiece. The result was "positive" for marijuana. (SBE/B-26) Testimony revealed that there is no state certification "test" for conducting "field" drug tests. The school security officer stated that he had learned proper procedure for field testing when he attended the police academy in 1989. No field test exists for the testing of residual amounts of marijuana, only small amounts of plant material may be field tested. (TR., p. 152-154, October 26, 2005)

83. Photographs of the items confiscated show a device that looks like a "bowl" used to smoke marijuana. (SBE/B-39, B-26, B-27)

84. Although the above charge might have been dismissed in a Virginia General District Court, the burden of proof for an LEA charge is not the same as the standard of proof in a criminal case. The April 22, 2005 charge against Student is credible because Student's initial inclination was to flee, the Student admitted possession of

the pipe which was positive for marijuana, and the Student admitted marijuana use in his MDR written statement to school personnel.

85. The original LEA report states as follows regarding Student's father's demeanor upon notification on April 22, 2005:

> "[Student's father] arrived to school shortly after the phone call. He wanted to see his son immediately and did not want to entertain any comments regarding the infraction. [A teacher] continued to explain that [student] would be out of school [on] suspension, pending further investigation. [The school security officer] attended the conference as well; and explained exactly what was found and had the evidence for [Student's father's] review. [The school security officer] explained that the material, did, indeed, test positive for marijuana. [A teacher] noted that [Student's father] did not want his son to speak on the matter and wanted [the security officer's] badge number. At that, he collected his belongings and he and his son left the office." (SBE/B-22)

86. During his testimony, the father explained that he was shown only an "empty baggy" as proof of his son's offense. This father was angry but it does not seem that he was out of control. The security officer attempted to show the evidence to the Parent but it is clear that the father did not want to review any of it.

87. Parents are warm, friendly individuals who strive diligently to provide a good life for each of their two children. Their daughter, who attends college, graduated from this LEA.

88. Student came into the hearing room very briefly at at the beginning. He spoke quietly with his mother and he waited patiently for his father to take him home. Student is described as good natured, well mannered and cooperative. "He communicates effectively with peers and adults throughout

the school setting." (PE/D-4)

89. Student enjoys going to his home school. Student wants to be a psychologist or go into the military. Student plays many musical instruments - the trombone, the piano and the guitar. He shares his musical talents with his mother who plays the piccolo and flute. Student is a member of his high school band. (PE/C-15, C-9 & D-6)

90. Student has been a Boy Scout for years, he was voted Assistant Senior Boy Scout Leader by peers. (PE/C-15)

91. Student has accumulated 28 disciplinary infractions since October, 2001. Many of these infractions (15) were attributable to defiance, disrespect, insubordination or disruption. Student had one fight with injuries (October 26, 2001). Student admitted to marijuana possession or use at school twice during ninth grade. (PE/J-4, J-7)

92. Through May 24, 2004, Student's parents apparently reported to their medical doctor that Student "had been in no trouble and [was] having no behavior problems at school." (PE/A-4)

93. On September 7, 2005, Student's medical doctor wrote to the LEA in an attempt to keep Student at his "mainstream" school and to prevent the alternative placement. In the letter, the doctor dismissed the student body at the alternative setting by referring to them as "delinquent adolescents." She acknowledged, however, that Student might "benefit from the structure that [ ] Academy provides." (PE/N-1)

94. On September 7, 2005, Student's disciplinary record reflected a long term record of disciplinary offenses. The medical doctor's assessment: Student ought to behave better at school now because she had figured out the right combination of medications, is an optimistic prognosis, but not necessarily an accurate one. At some point, the safety of the child and his behavior at school have to supersede the wishes of his Parents regarding placement. (PE/N-1)

95. The MDR committee determined on April 26, 2005 that there was no causal relationship between Student's marijuana possession and his disability: Student's disability did not cause him to bring a smoking device and lighter to school so that he could smoke marijuana.

96. On May 6, 2005 both Parents consented to the IEP modification - placement was changed to the alternative school setting on that date. The BIP was formulated based upon information initiated by the FBA on April 26, 2005. The BIP, which assigned Student research on substance abuse, seems adequate. (PE/K-7)

97. Student's medical doctor sent the LEA a letter stating that Student had been drug tested on January 11, 2005 and on March 10, 2005 and the "specimins" were negative. Parents reported this information to the LEA, the implication being that the LEA should not pursue the charges against Student because of their outside drug testing results and their position that Student had "no chronic drug problem." (SBE/D-13)

98. It seems that the basis for Parents' belief that the LEA is racially or personally biased against them was formulated after they realized that the drug charges against their son would be pursued even if they conveyed a medical doctor's allegation of negative drug test results. It was for this reason that Student's father referred to being "railroaded" for the drug charges. He made many references to the "empty baggy" (residue) of the April 5, 2005 incident. The principal candidly admitted that the April 5, 2005 incident was based upon a "modicum" of marijuana. The school security officer attempted to show the father a baggy with a minute quantity on April 22, 2005. Because the baggies contained very little marijuana, Parents question the validity of the LEA's charges against their son. Communication between the LEA and the Parents broke down over this issue.
(TR., p. 172, October 27, 2005, TR., p.370, October 7, 2005)

99. The LEA cannot alternately function as a drug testing facility. The LEA cannot make student disciplinary decisions based upon the report of an outside drug test. It would be unfair to treat Student as if he is immune from school discipline because of reports of private tests. If a student admits to marijuana possession or use on school grounds, the LEA must act based upon Student's admission unless Parents prove that Student did not know the import of his statement.

100. Further, the MDR committee deemed that Student's disability did not prevent him from knowing the wrongfulness of his act. In fact, Student admitted to the MDR committee

that "he didn't want anyone to know he uses drugs." (PE/I-2)

101. Parents insist that they were not provided adequate notice of the IEP meeting that occurred on May 6, 2005. Student's mother insisted that she notified the LEA, in writing, of her difficulty in attending the meeting. (PE/K-1)

102. Assistant Principal, Dr. , testified that Student's mother and she had spoken about the IEP meeting originally on May 3, 2005 and that, at that time, the Parent had agreed to attend the IEP meeting set for May 4, 2005 prior to the formality of the LEA's issuance of the written notice to Parents. Later, Student's mother testified, she sent a letter by facsimile to the LEA in which she asked to have the IEP meeting rescheduled. The Assistant Principal testified that she was unaware of the mother's faxed letter. The IEP meeting was conducted on May 6, 2005 though parents deny they agreed to a "mutually agreed time and date." (TR., p. 97, October 26, 2005)

103. Review of the facts reveals that both parents and their son had attended the prior MDR meeting. Parents' counsel was available at the MDR by speaker phone. It was at the earlier MDR meeting that parents and their son had had a full opportunity to be heard and to explain their position regarding the final disciplinary charge supporting the LEA's change of of placement decision. (TR., p. 92, October 26, 2006)

104. Regarding the later IEP meeting originally discussed with the mother on May 3, 2005, the Parents, with counsel's assistance, postponed the date of May 4, 2005 until May 6, 2005.

(TR. p. 97, 292, October 26, 2005)

105. At the commencement of the May 6, 2005 IEP meeting when the change of placement would be discussed, both parents voiced concerns about returning to the family owned insurance business. (TR., p.98, October 26, 2005)

106. Both parents did attend the above IEP meeting, however, when the change of placement occurred. Parent's counsel, who represented them at the MDR, had obtained a continuance of this IEP meeting, and could have been available by speaker phone if the Parents had elected to have him present at the May 6, 2005 IEP meeting.

107. From her testimony at the hearing and the tenor of her comments, all indications are that the Assistant Principal, Dr. , and Student's father are not on good terms. Dr. , who chaired the May 6, 2005 IEP meeting, cited personal reasons why Student's father's behavior on school grounds and at a prior MDR offended her. She stated: "He's rude, he interrupts, he 'stormed' down the hallway ...He flipped his chair around and faced outside while meeting was being conducted." (TR., p. 370, October 7, 2005)

108. There is no basis for assuming, however, that LEA personnel retaliated against this Student because of animosity or racial bias against either of the Parents. LEA personnel appear to have closely bonded with Student. They seem genuinely fond of each other. Dr. made statements about Student which were consistent with other reports of Student's character: "We know [Student]." School

personnel believe "he's [Student's] been very honest." (TR., p. 371, October 7, 2005) Dr. described a lengthy relationship with Student's mother as well. (TR., p.386, October 7, 2005)

109. The assistant principal's statement to the father before the IEP meeting of May 6, 2005 did not deny either one of the Parents their right of parental participation: "I told him if he needed to go back to work, he was free to go back. I could continue with mom." (TR., p.384, October 7, 2005) Parents object to Dr. 's remark: "I told him [father] that if he did not settle down he would be escorted from the room," the assistant principal said to the father after he began to "yell" at the meeting. (TR. p. 398, October 7, 2005) When the administrator chaired the above IEP meeting, she believed that the mother had orally agreed to the meeting because they had discussed it earlier. Under the circumstances, it was permissible to conduct the meeting. During discussions, the mother never said, "We can't have this meeting." As the administrator explained, "It was difficult finding a mutually agreeable time with all three." (TR., p.384, October 7, 2005)

110. Given Dr. 's honest perception, from a prior meeting, that this IEP meeting could become volatile because a change of placement would be considered on May 6, 2005, it was not unreasonable nor a denial of Parents' participation rights at the IEP meeting, for the chair to secure the door by placing the school security officer outside the conference room door.

111. Regarding bias, it should be mentioned that the school principal exercised discretionary judgment to keep Student at the home school, rather than to move for long-term suspension or expulsion for the first offense, in December, 2004, however, the Student opted for SAIP. (TR., p. 151, October 27, 2005) Further, the second incident on April 5, 2005 would certainly have resulted in expulsion. The principal elected to give Student the benefit of doubt concerning this incident.

112. Dr. , Psy.D., a Clinical Psychologist, testified for the LEA concerning his psychological report completed on September 20, 2005 (SBE/E-21). Student told the doctor that he felt he had done well academically until eighth grade when he began to have "problems" he referred to as "depression." He reported that he began to use marijuana then but had "currently stopped using." (TR., p. 24, November 29, 2005)

113. On the WISC-IV, Student scored in the high average range of intelligence. Student scored low in Processing Speed (13th percentile) and low average in memory tasks. Dr. stated that he does not know why the processing speed score is discrepant with his other cognitive skills. Upon his re-entry into the LEA, it is anticipated that his special education coordinator will address this issue on a future IEP revision. (SBE/E-24)

114. Another witness, , Chairman of the Social Studies Department at the alternative school testified that the facility is not a "warehouse" for "bad kids to keep

them out of school." Most children return to their home school. About 55 to 65 percent of the population is African-American, and the SOL pass rate is 74 percent (score of 70 is average). There is a very "stringent disciplinary environment" which is based upon the level behavior system (TR., pps. 258, 264-269, November 29, 2005)

115. Dr. , Ph.D., a Licensed Clinical Psychologist, testified as a rebuttal witness on behalf of the Parents.

116. Dr. corroborated 's educational assessment of Student, namely, that Student now has a below average processing speed score and a low average working memory score. These kinds of scores, Dr. testified, are to be expected of an ADHD child. Dr. indicated that he would have done more investigation, however, to determine how the low scores could be addressed in the IEP. (TR., p.161, January 18, 2006)

117. Dr. disputed the adequacy of the LEA's initial IEP because he believed that a student with failing grades and a diagnosis of ADHD required more "support, treatment, and interventions." Dr. disputed the LEA's IEP goals because he believed the goals could not be met. 'The student will complete classwork and homework 100 per cent of the time. [IEP goal]' "That's unrealistic. Ain't going to happen." (TR., p. 165, January 18, 2006)

118. Further, Dr. ' apparent premise was that the LEA must somehow work around the ADHD child's known

deficiencies and, because of his ADHD related disability, excuse him from the duties other school age children must obey: Examples were leaving books at home, not doing homework, using a planner in class, being prepared for class. Dr. seems to believe that structure and discipline do not correct an ADHD child's deficiencies. Dr. testified:

> "... if the problem is that he [the ADHD student] doesn't have the paper he needs, just give him the paper because we want him to be doing work in class. But if you allow him to sit there and say, Well, you didn't bring all your papers, and you're not going to get your grade now, that is not going to teach him anything. He's going to continue to fail because of the ADD. He's not going to be able to think ahead." (TR., p. 167, January 18, 2006)

119. Dr. does not appear to approve of disciplinary measures or structure to address ADHD in special education students: "... despite knowing the kid is ADD, the way they're [the LEA] trying to deal with it through this discipline and detentions and this and that, well, if that had worked, we wouldn't have had a few pages of this [record]." (TR., pps. 175 & 176, January 18, 2006) This expert's opinion was troubling: According to Dr. , behavior modification of the ADHD child is hopeless.

120. Parents also called to testify, Ms. , a parent from this school district and Ms. , Claims Specialist and Secretary, for the National Association for the Advancement of Colored People ("NAACP"). These witnesses were called to rebut presumptions of educational bias against special education parents and racial discrimination against persons of African-American descent, respectively.

121. Although Parents' due process notice had not listed an allegation of racial discrimination, the Parents requested compensatory educational services to address Student's sense of "discrimination" by LEA staff. Parents requested that LEA staff receive "intensive diversity training," Parents' inference being that the LEA has "singled out" this child and somehow treated him differently because of his race. Notwithstanding the fact that IDEA does not provide the proper forum for racial complaints, the Parents did pursue racial discrimination as at issue in this matter. On one occasion, the Parents asked the LEA principal regarding the ethnic make-up of students, "Were they black?" In two other instances, the Assistant Principal was questioned regarding the demeanor of Student's father which she had alleged to be "threatening" during school meetings. Counsel asked the witness twice regarding her allegation of threatening behavior, "Is it because he is a large black man?" (TR., p. 401, 402, October 7, 2005 & Tr., p. 143, October 26, 2005)

122. The rebuttal witnesses who testified, Ms. and Ms. , were sincere. Both of them made a good faith effort to assist the Parents by testifying, though their testimony was not especially helpful toward the decision in this case. Both individuals expressed dissatisfaction with this LEA, however, the information they provided was basically anecdotal and not necessarily reliable.

123. Ms. was called to prove the "linchpin" of the Parents' case, namely, that this LEA has a policy of

discriminating against Parents by dismissing their child's special education needs to a bad home life. This parent had filed a state complaint which resulted in a Corrective Action Plan requiring sensitivity training for LEA teachers. Ms. 's complaint was motivated by her dislike of a an LEA employee who was not involved in this case. The Virginia Department of Education has "closed" this complaint indicating that the LEA resolved the issue by the corrective action.

124. Ms. testified regarding her impression that the LEA is racially biased. Her testimony was rejected, in most part, because her statements were based on hearsay.

ARGUMENTS RAISED

Parents drafted the following complaints that this hearing officer has attempted to quote as closely as possible to Parents' due process request:

(1) "The LEA ignored the major purposes and their responsibility to guarantee the availability of special education programs for Student even though they had knowledge that his disability was adversely affecting his opportunity to have equal access to the general curriculum and gain educational benefit. This is evident by the school's refusal to identify Student as a child with a disability and offer an Individualized Education Program."

(2) "The LEA ignored their responsibilities to Student under the 'Child Find' component of IDEA and 504 that requires schools to identify, locate, and evaluate all children with disabilities, aged birth to 21, who are in need of early intervention or special education services. Again, Student was diagnosed with ADHD and medicated. The LEA had knowledge that Student had been struggling academically since the 6th grade. He failed many classes and the school wanted to retain him. However, the school never held an Eligibility Meeting/Child Study Team to appraise if Student would benefit from a specialized and individualized instruction from an IEP or a 504 Plan until an outside educational entity made the recommendation."

(3) "The LEA failed to conduct a full and individual initial evaluation for Student, in accordance with Sec. 300.532 and 300.533. The LEA made both substantive and procedural

violations when they failed to follow certain components of the law for the initial evaluation of Student... The LEA **NEVER** conducted an evaluation to identify all suspected areas of disabilities. The LEA used the limited procedures of record review and sociocultural report to judge Student's eligibility for special education services."

"The LEA failed to use technically sound instruments to assess cognitive and behavioral issues; to evaluate Student in a satisfactorily comprehensive manner to identify all his special education and related service needs; to use assessment tools and strategies that provide relevant information; to use tests and other evaluation materials including those tailored to assess areas of educational need; to use a test or evaluation so as not to be discriminatory on a racial or cultural basis."

(4) "A change of placement occurred when Student was suspended for 18 days from December of '04 to January '05. The LEA failed to hold a Manifestation Review Hearing to determine if the behavior was a manifestation of his disability or if the IEP at that time was deficient. The school failed to convene an IEP meeting to conduct a functional behavior plan (FBA) or develop a behavior intervention plan (BIP) for the behavior when they changed his placement and for when he returned to his home school."

(5) "The LEA failed to give the Parents notice of the May 6, 2005 IEP meeting which happened immediatelv after the Student Leadership Hearing at the . The Parents were denied the opportunity for their outside Advocate to participate in the meeting. Also, at this meeting the Parents were denied the opportunity to be full participants in their child's special education process. The Assistant Principal threatened the Student's father when he said that he was unprepared to have the meeting and stated 'we are going to have this meeting with or without you and you may leave if you have to go back to work.' She also stated that she would not reschedule the meeting for a more convenient time. The Parents felt threatened with a charge of truancy if they did not enroll their child in the alternative setting of Academy. When Student's father raised his objection about being forced to have the IEP meeting immediately following the Student Leadership hearing and without being given notice, the Assistant Principal stated that she did not like his attitude. The Assistant Principal made a verbal threat and she had a security officer sitting outside the meeting door who was prepared to escort him from the premises. The Student's father remained quiet for the duration of the meeting. As an educational Advocate who has attended over fifty IEP meetings, I have never witnessed a security guard present at the meeting or sitting outside the meeting door. This was obviously done to threaten the parents."

"Compensatory education services to include: one-on-one

tutoring services from a trained ADHD educator; monetary reimbursement for the private tutor; twice a week meetings with the school psychologist to address Student's feelings of discrimination by the LEA staff; remediation for all subject areas; one-on-one special education training for Parents and Student; all Student's teachers to be trained in working with children with ADHD, training content to be approved or reviewed by Parent's Advocate; all future members of Student's IEP team to take intensive diversity training with no personnel exclusions and to include the special education coordinators."

"Monetary reimbursement for private tutoring service; attorney's fees and advocacy fees."

DISCUSSION AND CONCLUSIONS OF LAW

Based upon all of the evidence presented, the applicable statutes, regulations, and case law, and the arguments presented by the parties, the Hearing Officer makes the following conclusions of law:

1. (the "Student") is handicapped, having "Other Health Impairment" and comes within the purview of IDEA.

2. The Student requires specific conditions and related services in order to derive benefit from his education.

3. At all times relevant hereto, Student's Parents have resided in Virginia, thus the local educational agency ("LEA") is responsible for educating the Student and providing him with a Free and Appropriate Public Education ("FAPE").

FAPE

The LEA attributes the Student's academic failure to social maladjustment yet the Parents are certain that Student's academic failure was caused by the LEA's omissions. The immediate case, in reality, turns upon a single legal issue:

causation. Did the evidence presented in this case show that Student's academic decline occurred in eighth grade because of personal issues that overcame him: drug use, inability to manage his temper at home, juggling of medications, refusal to take medications to manage ADHD, and failure to attend regular mental health counseling. Or, is it more likely that his underlying ADHD symptoms worsened so dramatically in eighth grade that he resorted to drugs because he was distraught about his school work? Obviously, the latter factual scenario makes less logical sense.

The burden of proof rests with the Parent in this case: Parent requested the due process hearing. Virginia case law, federal decisions and administrative decisions support placing the burden of proof on the party who challenges the administrative action.

In the 4th Circuit, affirmed by opinion of the United States Supreme Court, the court has held that the party who initiates a due process hearing bears the burden of proof in challenging the IEP. Shaffer v. Weast, 126 S.Ct. 528 (United States Supreme Court - November 14, 2005).

In the instant case, the LEA utilized the information available to formulate the IEP. Student had been enrolled in this school system for eight years. He had achieved academic success although he had not maximized potential. IDEA does not require the LEA to maximize a student's potential. IDEA requires that the IEP provide a basic "floor of opportunity" to each special education student.

Further, psychological data spanned from June 11, 2003 to May 24, 2004. Though the IEP expert was well versed in the requirements of the "ideal" IEP, the fact that one specialist might craft an IEP somewhat differently does not render the IEP defective pursuant to IDEA.

In this case, the LEA has properly utilized existing information to create this student's initial IEP pursuant to the requirements of 8 VAC 20-80-54(D)(1)(a-b). Adverse academic impact was not reflected by isolated comments on this student's eighth grade report card. Student was continuing to make academic progress until he could no longer function in school because of personal issues, refusal to take his medication or, possibly, drug use.

Regarding the alleged procedural violations derived from the 18 day SAIP attendance, an IDEA procedural violation did not occur because there was never an interruption of services, thus, no change of placement. The LEA has not violated the provisions of 8 VAC 20-80-68. It was not necessary for the LEA to convene an MDR. There was no requirement that the LEA review Student's IEP, formulate an FBA and BIP.

Parents were provided timely notice of the IEP meeting occurring on May 6, 2005. Timelines and scheduling constraints dictated that the LEA have the IEP meeting. Not only did the parents attend personally the IEP meeting, their counsel could have represented the parents by speaker phone at this meeting in the same manner as he had been available

at the prior MDR. The evidence is insufficient to show that Parents were denied their right of representation. The evidence did not reflect that the LEA has acted with bias, discriminated against this student, or singled him out for discipline. The fact that a school security officer was posted outside the door of the IEP revision conference room was a reasonable measure to prevent a disturbance. The LEA has not violated the requirements of 8 VAC 20-80-62(D) regarding parental participation.

4. I find that parental notice requirements were satisfied by the LEA.

Accordingly, I find that:

5. The evaluations completed by the LEA child study team determining eligibility on September 22, 2004 were adequate on the following grounds:

The LEA has not violated any provisions of IDEA, the Child Find initiative of IDEA, or Section 504 of the Rehabilitation Act of 1973, as amended.

The parents consented to the battery of tests to be completed by the LEA and all procedural safeguards were afforded to them. The parents consented to the initial evaluations to be used and to all IEP revisions. Parents' consent was never compromised by the LEA.

Academic services were not denied to Student because he attended SAIP. Therefore, it was not necessary for the LEA to convene an MDR. Student is not entitled to the relief sought by his parents.

The U.S. Supreme Court in Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley, et al. (102 S. Ct. 3034, IDELR 553:656 (1982) provides the ultimate analysis in FAPE determinations:

(1) Did the LEA meet the procedural requirements of IDEA? The LEA has met the procedural requirements of IDEA.

(2) Is the IEP reasonably calculated to enable the student to receive educational benefit? Student's IEP is reasonably calculated to enable him to achieve academic success.

6. The LEA has provided this student, with a FAPE.

DATE OF DECISION: June 6, 2006

Sarah Smith Freeman,
Hearing Officer

IDENTIFICATION OF PREVAILING PARTY

Pursuant to 8 VAC 20-80-76(K)(11) this Hearing Officer has the authority to determine the prevailing party on each issue that is decided. Having found that the LEA provided with a FAPE and that his eligibility determination was in compliance with Virginia regulation provided in 8 VAC 20-80-54(D)(1)(a), the Hearing Officer identifies the LEA as prevailing party on all issues.

DATED: June 6, 2006

Hearing Officer

APPEAL INFORMATION

8 VAC 20-80-76 O.1 states:

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

2. The appeal may be filed either in a state circuit court or in a federal district court without regard to the amount in controversy.

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

IMPLEMENTATION PLAN

The LEA is responsible to submit an implementation plan to the parties, the hearing officer, and the Virginia Department of Education within 45 calendar days.

DATED: June 6, 2006

Hearing Officer