

Local Hearing X



CASE CLOSURE SUMMARY REPORT

(This summary sheet must be used as a cover sheet for the hearing officer's decision at the end of the special education hearing and submitted to the Department of Education before billing.)

Public Schools
School Division

Name of Parents

Name of Child

Date of Decision

Counsel Representing LEA

Counsel Representing Parent/Child

Parent
Initiating Hearing

LEA
Prevailing Party

Hearing Officer's Determination of Issue(s): _____ was not denied FAPE; there were no procedural flaws in the manifestation review held; a behavioral intervention plan was properly developed by the LEA; _____ was properly placed on homebound instruction per agreement with the parent and subsequently pursuant to court order; _____ was not provided with educational services in the _____ school year because of the parent's failure to make _____ available and to cooperate in evaluations and assessments needed to assess _____ educational needs.

Hearing Officer's Orders and Outcome of Hearing: The LEA has prevailed on all issues raised in the hearing

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing. The written decision from this hearing is attached in which I have also advised the LEA of its responsibility to submit an implementation plan to the parties, the hearing officer, and the SEA

within 45 calendar days.

Printed Name of Hearing Officer

Signature

VIRGINIA DEPARTMENT OF EDUCATION
DUE PROCESS HEARING

v.

PUBLIC SCHOOLS



This Hearing Officer was appointed to hear the referenced due process case, pursuant to the Individuals with Disabilities Education Act (hereinafter IDEA). THE hearing was held and concluded on October 9, at the School Administration Building of Public Schools (hereinafter the LEA). A transcript of the proceeding was received by this hearing officer on , Esq. Represented the parent. , Esq., Associate City Attorney, represented the LEA. Ms , Special Education Coordinator for the LEA, was also present throughout the hearing, as was , Esq., court-appointed guardian ad litem for .

PROCEDURAL BACKGROUND

On June 30, , requested a due process hearing respecting her , age nine, and a fourth grade student at Elementary School. In a multi-page complaint, she alleged violations of numerous sections of IDEA and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia, as revised on March 27, (hereinafter the Regulations). She also filed a concurrent complaint with the Office of Due Process and Complaints of the Virginia Department of Education. She did not, however, specify just how these sections were violated. The hearing was scheduled for July 22, . On July 9, , a telephonic pre-hearing conference was held by this hearing officer with Ms. and Ms. in

order to specify the issues and address procedural matters. Ms. raised the following issues which she wanted addressed at the hearing:

1. The Lea failed to provide a free and appropriate public education (hereinafter FAPE) to ;
2. has not been provided special education services although the LEA has been on notice that qualifies for such;
3. The LEA has improperly assessed for services, as a consequence of which has been misclassified respecting the nature of disability;
4. Because of disability, has been subjected to emotional and physical distress by LEA staff;
5. The current IEP is inappropriate;
6. The LEA has failed to follow required procedures in conducting recent manifestation reviews respecting alleged misconduct by and
7. The determinations reached in recent manifestation reviews held to determine whether or not 's alleged misconduct was related to disability were incorrect.

Ms. , on the other hand, stated that does not have a current IEP, and LEA staff have been attempting to assess the nature of disability, although was identified as eligible for special education in 19 . She noted that withdrawal from the LEA when relocated to another state resulted in the termination of proposed services (proposed because mother never agreed to the 19 IEP). Ms. also stated that Ms. had refused to allow an updated assessment of in order to determine needs. At the time of the pre-hearing conference, the parties had agreed that

would receive home-based services during the summer months. It was unclear from the conference, given Ms. [redacted]'s emotions, just what remedies she was requesting.

The hearing was originally scheduled to commence on July 22, [redacted], however, Ms. [redacted] waived the timelines and requested a continuance in order to obtain an independent psychological assessment on [redacted] in order to help clarify [redacted] disability. The new hearing date was set for August 22, [redacted]. However, Ms. [redacted] was again granted a continuance in order to obtain counsel to represent her at the hearing. She had been approved for representation by [redacted], however, there was a delay on the part of that organization in selecting the attorney. Ultimately, Attorney [redacted] was retained to represent her.

On August 25th, this hearing officer conducted a second pre-hearing conference with Ms. [redacted] and Ms. [redacted]. On August 28, [redacted], as a consequence of the LEA's petition for a Honig injunction, the [redacted] Circuit Court ordered [redacted] not to come onto LEA property and to receive home-based instruction by the LEA, pending a decision in this case. On September 14, [redacted], MS. [redacted] added the following additional issues to the hearing agenda:

1. [redacted] is denied FAPE when [redacted] behavior intervention plan has not been reviewed and modified to address the behaviors which caused [redacted] removal from regular classroom placement to a change in placement in a more restrictive environment, pursuant to 8 VAC 20-80-68(C)(2)(d)(4);
2. [redacted] is denied FAPE when the manifestation determination process has not been timely completed to date, under 8 VAC 20-80-68(C)(5);
3. [redacted] is denied FAPE when no interim alternative placement has been

determined by the IEP team, under 8 VAC 20-80(C)(2)(c);

4. is denied FAPE when the court-ordered homebound placement has not been developed, provided, or implemented by the LEA; nor has this LEA initiated placement met the requirements of 8VAC 20-80-68(C)(2)(c)

5. is denied FAPE when has received no educational services from the LEA since the beginning of the school year, pursuant to 8 VAC -20 -80-40;

6. is denied FAPE when the LEA has not provided Ms. with a contact person for purposes of communication and for scheduling, and has not scheduled homebound services or provided an alternative placement and

7. is denied FAPE when the LEA did not schedule evaluations, which the LEA alleged were needed to provide with special education services.

The hearing was set to commence on September 18, . However, because of the advent of Hurricane Isabelle, the hearing was postponed and finally held on October 9, , at the School Administration Building of Public Schools. A transcript of the proceeding was received by this hearing officer on October 30, . The record in the case was held open in order that this hearing officer receive the completed psychological evaluation underway on . Pending the decision in this case, this hearing officer placed in an interim alternative educational placement at the LEA's program at Elementary School. On November 26, , given the fact that 's eligibility assessment had not been completed as a result of further delays in completing evaluation and convening an IEP meeting, if appropriate, this hearing officer continued the interim placement until December 14th. Although an eligibility meeting was scheduled for November 26th, it was not held because of Ms. 's unavailability. As of this writing, the LEA was attempting to reschedule the meeting to the week of December 1st.

FINDINGS OF FACT

1. , was born on , . On February 6, , mother referred to the LEA's Pre-School Assessment Center for testing, given possible developmental delay and behavior problems, as noted by pediatrician. LEA Exh. 3A.

In that same year, [redacted] had been diagnosed with the Attention Deficit Hyperactivity Disorder, for which [redacted] was medicated. Ms. [redacted] specifically expressed concern with behavior and [redacted] ability to function in a group setting. LEA Exh. 3Z and 3AA. The screening committee referred [redacted] for a comprehensive evaluation, as more in-depth testing was needed. LEA Exh. 3B. However, on May 27, [redacted], the eligibility committee met, but terminated the process because Ms. [redacted] could not make herself available for scheduled appointments. It was determined that if Ms. [redacted] wanted to continue with the process, she could make another referral. LEA Exh. 3C.

2. Child study meetings were repeatedly cancelled by Ms. [redacted]. Eventually, on April 15, [redacted], [redacted]'s maternal grandmother referred [redacted]. After some further difficulty with obtaining Ms. [redacted]'s cooperation with the evaluation process, [redacted] was tested by a school psychologist. On October 21, [redacted], the eligibility committee found [redacted] eligible for special education, based upon a disability of developmentally delayed. Ms. [redacted], however, disagreed with this finding. LEA Exh. 3HH-JJ.

3. On January 4, [redacted], an IEP meeting was held to develop an IEP for [redacted], however, Ms. [redacted] disagreed with the planned education services. LEA Exh. 4A-4Q. Ms. [redacted] subsequently moved out of the LEA's school district, and enrolled [redacted] in the [redacted] Public Schools' district. On April 14, [redacted], [redacted] Public Schools prepared an IEP for [redacted] based upon the disability category of developmental delay. Ms. [redacted] approved this IEP, which provided for services in the areas of communication and speech. LEA Exh. 4R-V.

4. [redacted] was subsequently disenrolled from [redacted] Public Schools. [redacted] was relocated to [redacted], where [redacted] attended [redacted] Elementary School, in [redacted],

from September 18, to March 18, LEA Exh. 2D-2F. received no special education services in and final report card from , at the time of withdrawal, shows that received a B, a C, a D and two F's in academic subjects. LEA Exh. 2K.

5. In February, , in the latter part of the second grade, was re-enrolled in the LEA, at Elementary School. As part of re-enrollment, Ms. completed a registration form on which she noted that had no active IEP. LEA Exh. 1A. It was not until April, , during the process of screening for special education, that the school became aware of IEP in Public schools. I

6. 's report card for the last quarter of the - school year noted some areas of concern in language arts and math, but was otherwise performing satisfactorily. attended summer school for reading and did well. LEA Exh. 1BB.

7. After enrollment, engaged in four incidents of class disruption and disrespect between April 9, and May 8, . There were no recorded incidents in summer school.

8. After the start of the - school year, 's behavior and work habits deteriorated. In the first quarter, failed language arts, social studies and math. In the months of September and October, , there were two occurrences of insubordination and disruptive behavior. LEA Exh. 6A.

9. In December, , Ms. informed the school of her plan to home school . The LEA acknowledged her intent on December 23, . LEA Exh. 1C. returned to Elementary School on February 12, . stopped attending school on March 17, , and was officially dropped from the school roll on April 7,

, pursuant to LEA policy respecting children not in attendance for fifteen days.
was re-enrolled on April 28, . LEA Exh. 11J.

10. Almost immediately after return to school on February 12, ,
began to experience behavioral problems. Between February 14th and March 12th, there
were nine incidents, which included defiance, insubordination, disruption, bullying and
fighting, both with and without injury. LEA Exhs. 6A-6F.

11. On February 26, , the Child Study Team met to consider 's
educational needs. Ms. was present. old psychological assessment of October
21, , was reviewed, as was educational progress. The team's plan was to conduct
a triennial review of 's eligibility for special education services. However, Ms.

refused to permit a comprehensive evaluation, noting that she needed to think about
whether or not she wanted to be evaluated. The minutes of the meeting reflect that
she refused to give permission for the evaluation, and did not want to receive
services. Despite her resistance, the team decided to meet again at a later date. LEA
Exhs. 8C and 8D.

12. On February 2, , Ms. was given written notice of a meeting
scheduled for March 11, , the purpose of which was to conduct a screening of
information relative to 's educational needs. Along with the notice, she was given
of her procedural safeguards under IDEA. LEA Exh. 8B.

13. On March 18, , Ms. was invited to attend an IEP meeting for the
purpose of reevaluation. Her procedural safeguards were included with the invitation. The
meeting was scheduled for April 1, . On that date, she met with the team, and noted
her refusal to evaluate . LEA Exhs. 8A and 8E.

14. received no grades for the second and third quarters of the school year since was home schooled. However, fourth quarter report shows that received unsatisfactory in citizenship and work habits and failures in all academic subjects. was retained in the third grade. LEA Exhs. 1M-1Q.

15. Ms. enrolled in summer school for at Elementary School. On June 25th, first day there, became disruptive in the classroom, and physically assaulted the Principal, who tried to intervene. As a consequence of the assault, she required medical treatment. As a consequence of the incident, was suspended and expulsion from the LEA was recommended. LEA Exhs. 7A-7F.

16. Given the fact that had previously been identified as a child in need of special education, and given the attempt to assess current eligibility, the LEA decided to convene a manifestation determination review. On June 26, , Ms. was invited to a special education meeting to be held on June 27, . The purposes of the meeting were "to conduct a review of the current records at reevaluation; to conduct a manifestation determination review relative to misconduct which resulted in suspension, and to develop a behavior intervention plan." Ms. was also given a copy of Virginia's Special Education Procedural Safeguards. Ms. , however, rescheduled the meeting to June 30, , and then again to July 3, , on which date it was held. An IEP meeting was also to be held on that date. LEA Exhs. 9A-9C.

17. Because of the outdated (19) components of 's eligibility and the now inappropriate earlier disability classification (developmental delay, which is applied only to children up to the age of eight), the committee decided that further evaluations, specifically psychological, educational, sociocultural and speech/language were needed.

Ms. [redacted] agreed to this reassessment. Tr. 176. Because of the lack of current evaluative information on [redacted], the manifestation determination was inconclusive, and the matter was referred to the IEP team for a full comprehensive assessment and consideration of a behavioral intervention plan. Moreover, the team performed a functional behavioral assessment, and a behavior intervention plan was developed. Since there had been an earlier agreement between Ms. [redacted] and the LEA to place [redacted] on homebound instruction, it was decided that homebound summer school would continue through July 31, [redacted]. Ms. [redacted] concurred with this. Further discipline of [redacted] was placed on hold. Tr. 179. At the meeting, Ms. [redacted] was also given her procedural rights. LEA 9D-9J. Although Ms. [redacted] had agreed to the evaluation process, it is noted that during a later mediation session, she withdrew her permission. Tr. 199.

18. Although the LEA's special education staff attempted repeatedly to contact Ms. [redacted] for further evaluation, they were unable to do so. Given the LEA's concern with [redacted] posing a danger to others if [redacted] returned to school, they sought a Honig injunction from the [redacted] Circuit Court. Tr. 170. On August 28, [redacted], the injunction was granted by the Court, and [redacted] was ordered not to be on the grounds of any LEA property. The Court found that [redacted] was a danger to staff and students of the LEA, and ordered that [redacted] receive home-based services. Ms. [redacted] was also ordered to cooperate with the re-evaluation process no later than September 30, [redacted]. She was further ordered not to impede or delay the completion of the administrative process herein. Finally, the Court appointed a guardian ad litem to protect [redacted]'s interests. LEA Exh. 12.

19. [redacted], Director of the LEA's Office of Programs for Exceptional

Children, which includes the Office of Special Education, Homebound Services, Psychological Services and Social Work Services, testified that staff were ready, willing and able to provide home-based educational services to . After many attempts to reach her, they were finally able to arrange for services to be provided in the evening hours at the Central Library, since Ms. was now homeless. According to the , only one session was actually held. Mr. 's office, which eventually was able to conduct a sociocultural and psychological evaluation on , also provided homeless services to Ms. . Tr. 171-172. staff was also able to assist Ms. with her application for to attend the Center, which has a program, both residential and non-residential, for children who are experiencing behavioral problems at home and at school. noted that is not a part of the LEA, however, they work closely with the LEA in the placement of children. Tr. 173-174.

20. Respecting the LEA's attempts to provide services to , Mr. testified that staff went beyond the call of duty in trying repeatedly to arrange and keep appointments with Ms. and . Their efforts involved considerable time. Mr. himself, in a three to four month period, put in time on a weekly basis to attempt to resolve the problems presented in 's case. Tr. 174-176.

21. Mr. further noted that Ms. 's repeatedly broken promises made it difficult for the LEA to take action respecting . They were trying to work things out with Ms. without the complications imposed by proceeding to a due process hearing, the goal being to provide services to . Tr. 189. At the time of the hearing, was scheduled to receive one to two hours a day of home-based instruction, four to five days a week. He noted that these would not be special education services since those

services would be determined by an IEP team, once [redacted]'s evaluations were completed. He also testified that although Ms. [redacted] requested mediation of the issues, that failed because Ms. [redacted] advised the LEA that she did not want to be bothered. Tr. 183-187.

22. [redacted], a school psychologist for the LEA, testified as to psychological report she prepared on [redacted] on September 30, [redacted]. LEA Exh. 13. She had been given the referral in July, however she had difficulty establishing contact with Ms. [redacted] via the phone numbers which she had been given. She finally reached Ms. [redacted] on another number, however Ms. [redacted] failed to appear for the first two scheduled appointments. Tr. 26. She finally kept the appointment on September 30th, the last day granted by the Circuit Court for her to comply with [redacted]'s evaluations. On that date, Ms. [redacted] performed two intellectual assessments on [redacted], in addition to a review of [redacted] academic record, [redacted] visual/motor skill assessment and a behavioral assessment completed by Ms. [redacted]. Tr. 25-28.

23. Ms. [redacted]'s work was not, however, completed on September 30th. One day before the hearing, she received the behavioral assessment from [redacted]'s last teacher, a needed component for a balanced binaural assessment. Additionally, she was unable to complete the evaluation because she required input from [redacted]'s mental health therapist, Dr. [redacted]. The latter agreed, pursuant to Ms. [redacted]'s request, to do an in-depth mental health assessment, although she had just recently started seeing [redacted]. Dr. [redacted] advised Ms. [redacted] that she wanted to do the assessment as an aid to preparing a treatment plan for [redacted] and to assist in determining an educational placement for [redacted]. Ms. [redacted] noted that Dr. [redacted] was considering a variety of mental health issues, a definition of which would, in Ms. [redacted]'s opinion, be invaluable in devising specific

behavioral objectives for . Tr. 60-62. However, she noted that had she had sufficient time, she herself could have done this type of evaluation. Moreover, the evaluation was deficient in another respect given the fact that she had been unable to observe in an educational setting. Tr. 31.

24. As a result of her partial assessment, Ms. determined that has learning disabilities, specifically with language processing and receptive language and in mathematics, in addition to symptoms of ADHD. Tr. 46; Tr. 57. She also detected possible problems with visual/motor abilities, which would require further assessment by an occupational therapist. Given her partial assessment, she recommended that educational placement focus on learning disabilities and contain a behavioral component to address significant level of frustration which she observed. She stated, however, that any educational plan should contain a comprehensive behavioral component. Tr. 38. She specifically testified that given 's attention deficit problem and learning disability, could very well experience academic frustration, which would negatively impact upon in-school behavior. Tr. 49.

25. On November 26, , the hearing officer received an addendum to Ms. 's initial report, for which the record had been held open. Hearing Officer's Exh. 1. - The addendum served to complete 's psychological report, and focused on Ms. 's observations of at the program, her further interview with and reports from past and present teachers. , who has engaged in instances of disruptive behavior while at , which have required physical restraint and time away from the classroom, admitted to Ms. that was physically aggressive with adults at , including incidents of spitting at them. response to 's discipline

purportedly caused [redacted] to miss many days from school. The report indicates that [redacted], in discussing the events with Ms. [redacted], refused to take responsibility for actions.

26. Both of [redacted]'s teachers noted a significant level of hyperactivity, aggression and depression in [redacted] demeanor, not to mention problems in adapting, in social skills and study skills.

27. In summary, [redacted] significant behavioral and emotional issues are thought to impede [redacted] ability to function independently in an academic setting. In Ms. [redacted]'s professional opinion, the appropriate educational setting for [redacted] would be one in which [redacted] would be provided both correction of [redacted] academic problems and also behavioral consistency and controls aimed at restructuring [redacted] behavior.

28. Ms. [redacted], the Principal at [redacted] Elementary School, testified as to [redacted]'s performance while there and her personal involvement with [redacted]. She stated that in the period from [redacted], [redacted], when [redacted] returned to the LEA, to the end of that school year, [redacted] only demonstrated minor disruptive behavior and some incomplete class work. She frequently consulted with Ms. [redacted] regarding [redacted]'s issues. Ms. [redacted]'s response was that she would take [redacted] to see [redacted] pediatrician, which she did.

Tr. 63-64. [redacted] was placed on medication, which managed [redacted] behavior. Tr. 91.

29. During the last school year, [redacted] did not have an LEA IEP, and there was no reason to suspect that [redacted] had a disability which was negatively affecting [redacted] school work. Tr. 64. Moreover, [redacted] successfully completed second grade and started third grade without initial problems in [redacted], [redacted], although there was again some minor disruptive behavior and being off task in [redacted] class work. There had, however, been

escalation in these respects since the previous school year. Again there were meetings and conferences with Ms. , who threatened to home school . The threat was carried out and started home schooling in , . Tr. 65-68.

30. Although was not identified as needing special education prior to withdrawal from school in ; , the school, nevertheless, made the same accommodations for as it would have for other children with the problems noted above. According to Ms. , those accommodations and modifications included a classroom behavioral management plan, shortened homework assignments and a modified extended time period for turning in homework. Tr. 66-67. 's classroom behavior plan and a daily planner, communication tools between the teachers and Ms. , were regularly sent home. Parent's Exh. 9. In addition, was permitted time out to leave the room and confer with Ms. , on an as needed basis. School personnel did not, however, at that time consider 's behavior or performance to be indicative of a need for special education services. Tr. 67-69.

31. In late , , was re-enrolled at Elementary School. After re-enrollment, aberrant behavior escalated, with an increase in aggressive behavior. LEA Exhs. 6, 6A, 6B, 6C and 7.

32. After the escalation in 's negative behavior, Principal became more actively involved, spending time in 's classroom, to help succeed, and even having lunch with to curtail behavior in that setting. She also reassigned a teacher's assistant to help complete class work. Tr. 79. At time, Ms. had to physically restrain from leaving the building by putting in her lap and holding . This intervention usually took place on a daily basis. Tr. 80-82.

33. [redacted] was often in a rage, and was causing the other children to be uncomfortable, inasmuch as [redacted] would lick them, touch them or use inappropriate language around them. When reprimanded by [redacted] teachers, [redacted] would run out of the building or race down the halls, tearing things off the walls. Tr. 84-85. Ultimately, on May [redacted], Ms. [redacted] removed [redacted] from school for the remainder of the school year. The LEA provided [redacted] a home-based teacher for the rest of the school year. Tr. 85-86. At that time, [redacted] had no IEP and, therefore, no formal behavioral intervention plan. Ms. [redacted] first learned in March, [redacted], that [redacted] had been found eligible for special education in 19 [redacted], under the category of "developmentally delayed", even though Ms. [redacted] had refused services. Tr. 89; Parent's Exhs. 9 and 10.

34. In third grade, [redacted] was receiving Title I assistance in reading and math since [redacted] scored in those areas at or below the 25th quartile. Tr. 107-108. [redacted] was observed to become frustrated and anxious when [redacted] could not or would not do academic work. Tr. 109. Ms. [redacted], an experienced special education teacher, also noted that as early as the spring [redacted], she observed some aspects of [redacted]'s behavior which were similar to those demonstrated b children with ADHD. She discussed these observations with Ms. [redacted]. Tr. 111-112.

35. Upon being questioned by this hearing officer, [redacted] alleged that [redacted] was mistreated on occasion by school personnel, including being locked up in a room [redacted] Elementary School, and being choked and kicked by a physical education teacher. However, the school's investigation determined that the allegation of physical assault was unfounded. Tr. 113-114. Notably, the physical education teacher was prosecuted in the [redacted] Juvenile and Domestic Relations District Court, but the charges were

dismissed by the Court. Tr. 160. Ms. [redacted] also had no knowledge of instances in which [redacted] was locked in rooms at [redacted] Elementary School.

36. [redacted] further stated that [redacted] was picked on by other students, but school personnel did nothing about it. [redacted] further stated that [redacted] was hit and stabbed with pencils because [redacted] did [redacted] work better than the other children. However, [redacted] complained that when [redacted] hit others, in self defense, they became involved and would lock [redacted] up in a classroom. Tr. 123. There was no documentation offered in support of [redacted]'s contentions.

37. Dr. [redacted], the LEA's Special Education Coordinator, testified and identified the LEA's chronology respecting [redacted], which she had prepared. LEA Exh. i and ii. She noted that in [redacted], [redacted], the LEA had offered [redacted] an IEP, with a disability of developmentally delayed, however, Ms. [redacted] disagreed with the categorization and refused the IEP. Tr. 191; LEA Exhs. 4A and 4Q. She noted that eligibility would have expired in late [redacted].

38. Dr. [redacted] explained why the school had no knowledge that [redacted] had actually received special education services from [redacted] Public Schools, after leaving the LEA in the year [redacted]. She testified that because [redacted] had last attended [redacted] school in [redacted], [redacted] Elementary school sent only for [redacted] records from that state. Those records showed no indication of [redacted] having received special education services in [redacted]. LEA Exhs. 2H and 2K-P. It was only after [redacted]'s misbehavior escalated that Ms. [redacted] informed LEA staff that [redacted] had had an IEP in [redacted], where she alleged that [redacted] had been re-evaluated. Upon later communicating with [redacted] Public Schools, Dr. [redacted] learned that [redacted] had been given an IEP in [redacted].

based on earlier eligibility in the LEA. Given that the LEA's eligibility had expired, the decision was made to re-evaluate in . . . re-evaluation was, moreover, even more important given escalating behavior. Tr. 194-95.

39. After Ms. refused in . . . , . . . , to give permission for to be re-evaluated, Dr. advised Ms. that the LEA would take the matter to a due process hearing. However, shortly thereafter, Ms. filed her own request for due process as well as a complaint with the Virginia Department of Education. Upon the advice of VDOE, the LEA did not file for due process so that all issues could be combined in one hearing. Although Ms. was not offered an IEP for . . . , services were addressed with her. She, however, refused services, advising the LEA that she did not believe that required any special education services. Tr. 195-196.

40. Dr. was also the author of 's first behavioral intervention plan, which she created, after a functional behavioral assessment, for the manifestation determination review held on July , . The plan was presented to the IEP team on July , and was approved by Ms. . LEA Exhs. 9A-9J. However, the plan was never implemented because was no longer in attendance at any LEA school. Tr. 197. The team, including Ms. , agreed to continue home-bound education previously-requested by Ms. in May, .

41. Dr. testified that the LEA suspects that may now be eligible for special education services under the disability category of emotionally disturbed, as well as under other health impaired and learning disabled. She noted, however, that in addition to Ms. 's completed psychological evaluation, the eligibility committee would need to reports from teachers. This, she stated, is a crucial piece of

information needed for eligibility. Without all the evaluative information, she stated that the LEA was not in a position to say whether or not [redacted] requires special education services and what, if any, placement would be appropriate for [redacted]. Tr. 203.

42. Ms. [redacted] testified as to her belief that the LEA wanted to reassess [redacted] in order to find [redacted] ineligible for special education and to then expel [redacted]. She offered no proof of this. She also alleged, without proof, that the school said [redacted] had no behavioral problem. Tr.231. Ms. [redacted] additionally believes that [redacted] was erroneously assessed as developmentally delayed by the LEA when [redacted] was in kindergarten. This, she said, shook her confidence in LEA personnel. She also asserted, without documentation, that [redacted] has always scored three and a half years above [redacted] chronological age. She did not elaborate on what measurements she based this statement. Tr. 235. According to Ms. [redacted], because she "stepped on toes," [redacted] was victimized by the LEA. Again, however, she offered no proof of this allegation. Tr. 240.

43. [redacted]'s primary care physician, Dr. [redacted], on August [redacted], wrote a letter in which she stated that [redacted] suffered from school phobia that has resulted from [redacted] and resulted in conduct issues at school. Dr. [redacted] also recommended that [redacted] be placed in a general education setting until completion of [redacted] evaluations. Parent's Exh. 2; Tr. 243.

44. Ms. [redacted] expressed the her desire that [redacted] attend the [redacted] Center since she understands that it is the best school for children with behavioral problems. She explained that the delay in the process of applying to [redacted] resulted from her inability to complete the written application without help from the LEA, and her lack of success in contacting LEA staff. Tr. 245-246.

45. Ms. testified that in , she refused permission to evaluate because she felt that the school had harassed her and , and she did not want Elementary School to do the evaluation. However, she made no other arrangements for an independent evaluation. Tr. 268-69.

46. Ms. defends her failure to proceed with the evaluation, even after obtaining counsel, by explaining that she was evicted from her home in August. She stated that she is temporarily staying with a friend in . She additionally noted that she became ill in August, which also prevented her from being available to present for testing. Tr. 271-272. What is more, after she lost her job, also in August, gas money even became a problem for her. In fact, she stated that Ms. , the school psychologist, had to meet her and at therapist's office to start evaluation. Tr. 278.

47. Upon inquiry by this hearing officer, Ms. said that the remedy she was seeking was for to go to school and feel secure in education. Tr. 279. Ms. expressed her opinion that she does not believe that the LEA can educate because it has "dumb teachers." should, therefore, attend . She stated that should attend and they succeed in stabilizing behavior so that can return to a general education setting, she will not have educated by the LEA. Tr. 280.

48. Ms. acknowledged that there was only one home-based education session at the Library this past summer. Ms. would not permit the home-based services in the home where she was living because, according to her, her "babysitter would not agree to it Tr. 312-313. The Library was selected as the neutral setting which Ms. wanted. Arrangement were made with the LEA's home-

based teacher. However, numerous unsuccessful attempts were made to get the sessions going. Notably, Ms. [redacted] did not attempt to contact the home-based teacher until after the departure of Hurricane Isabelle, about September 18th, despite the fact that home-based education for [redacted] had been agreed to with the LEA in early July and also ordered by the [redacted] Circuit Court on August 28th. There was great difficulty getting in touch with Ms. [redacted]. Tr. 313 et seq.

CONCLUSIONS OF LAW

ISSUE 1: IS [redacted] ENTITLED TO RECEIVE SPECIAL EDUCATION SERVICES AS A CHILD WITH A DISABILITY?

The parties do not dispute that [redacted] has been identified as a child with a disability recognized under IDEA. There was a considerable time period between [redacted]'s first enrollment in the LEA in kindergarten in 19 [redacted] and re-enrollment in 20 [redacted]. The LEA found [redacted] eligible as a child with a developmental delay. [redacted] Public Schools then utilized that eligibility to provide [redacted] with special education services. However, that category of disability only extends to children aged two to eight, inclusive. See 8 VAC 20-80-56 (F) (1) and 34 CFR Section 300.313. Clearly, then, [redacted] would not now be eligible under that disability category. However, once [redacted] has been determined to be eligible, the LEA cannot conclude that [redacted] is no longer eligible without first evaluating [redacted]. 8 VAC 20-80-58 (A) provides that services cannot be terminated without first evaluating [redacted] to determine if [redacted] no longer suffers from a disability. See also 34 CFR Section 300.534(c). Although it is clear from the psychological evaluation just recently completed that [redacted] suffers from more than one disability which might render [redacted] eligible for

special education services, the question before this hearing officer is whether or not, prior to this new information, the LEA had an obligation to provide [redacted] with special education services. The answer to the question is no. Clearly, [redacted] could not have been provided services as developmentally delayed since [redacted] no longer qualifies under the label. However, under the aforesaid regulatory provisions, the LEA, once they belatedly learned that [redacted] had previously had an IEP in [redacted], had an obligation to evaluate [redacted] to see if [redacted] still required special education. This is precisely what they attempted to do for approximately seven months, and in which effort they were obstructed by Ms. [redacted].

ISSUE 2: HAS THE LEA DENIED [redacted] FAPE BY FAILING TO PROVIDE [redacted] WITH EDUCATIONAL SERVICES THROUGH A CURRENT IEP?

Ms. [redacted] contends that, pursuant to 8 VAC 20-80-64, [redacted] has been denied FAPE because [redacted] has received no special education services since [redacted] return to the LEA, although the LEA has been on notice that [redacted] qualifies for such. See also 8 VAC 20-80-40. The parent's argument is not persuasive because as of the date of the hearing, qualification for services had yet to be determined. Because [redacted]'s original disability category is no longer appropriate, the LEA was faced with the task of determining whether or not [redacted] had an on-going disability and the nature of that disability, before an appropriate IEP could be developed for [redacted]. There is no question that, given [redacted] acting-out behavior in school, in particular between March and June, [redacted], one could reasonably conclude that [redacted] might, at minimum, have an emotional disability. However, that would have been purely speculative without clinical corroboration. What is more, a correlation between [redacted] disability and [redacted] academic performance would have been necessary under

IDEA.

The appropriate approach would have been for the LEA to follow the usual evaluative steps taken with a child who has never received services, but is suspected of having a disability, under 8 VAC 20-80-52, that is, by first convening a child study team to address the concerns with The next step would have been to refer . . . for the appropriate evaluations, under 8 VAC 20-80-54. This is, in fact, the course embarked upon by the LEA. However, the record is replete with instances of interference and lack of cooperation by Ms. . . . in this process. Upon the escalation in . . . 's negative behavior and . . . decline in academics, school staff attempted to arrange for the appropriate evaluations. After repeatedly refusing the evaluations, she only complied, and belatedly at that, once she was under court order to do so. Another example of her obstruction of the process was her insistence that . . . 's recently retained therapist conduct the evaluation. Yet, she submitted no diagnosis from any clinician, and advised that it would take about six months for such an evaluation to be completed. The LEA was left with no documentation as to . . . 's disability and cannot be held accountable for the parent's failure to act in this respect. See Costello v. Mitchell Public School District, 35 IDELR 159 (U.S. Court of Appeals, 8th Circuit (200)). Even after this hearing officer . . . directed that the school psychologist proceed post haste with completing the psychological evaluation which remained incomplete at the time of the hearing, Ms. . . . still prevented its timely completion by not making . . . available.

ISSUE 3: DID THE LEA IMPROPERLY ASSESS . . . FOR SPECIAL EDUCATION SERVICES, AS A CONSEQUENCE OF WHICH . . . WAS MISCLASSIFIED RESPECTING THE NATURE OF . . . DISABILITY?

This hearing officer notes that the parent raised the aforesaid issue, but it is unclear as to the basis of this contention, which was not addressed at the hearing. As noted above, the LEA has been unable to assess [redacted] qualifying disability. If the parent is basing this claim on [redacted] label of developmentally delayed in [redacted], not only should she have raised that issue with [redacted] Public Schools, which actually provided [redacted] with an IEP, but the issue is also time barred under the two-year statute of limitations. It is, therefore, dismissed. See Letter to Zimberlin, 34 IDELR 150 (OSEP (2000)).

ISSUE 4: DID THE LEAS FAIL TO REVIEW [redacted]'S BEHAVIORAL INTERVENTION PLAN BEFORE REMOVING [redacted] FROM [redacted] REGULAR EDUCATION SETTING TO A MORE RESTRICTIVE ENVIRONMENT

Even though [redacted] has no current disability label and no IEP with the LEA, they nevertheless were on notice that [redacted] might be a child with a disability. The disciplinary procedures of 8 VAC 20-80-68 are, therefore, applicable. Subsection (C) (2) (d) (4) thereof is relied on by Ms. [redacted] in her contention that the LEA denied FAPE to [redacted] when [redacted] was placed on homebound instruction after the June 25, [redacted] attack on the school Principal. Her argument is clearly erroneous and not supported by the facts in this case. Given that [redacted] had no IEP with the LEA there was no behavioral intervention plan to be reviewed. However, one was created and considered at the IEP meeting of July 3, [redacted]. What is more, since [redacted] had no special education placement with the LEA, the aforesaid subsection is not relevant. The issue is further made moot by the fact that the LEA did not change [redacted] placement. Ms. [redacted] had requested homebound instruction for [redacted] in May, [redacted], and she and the IEP team merely agreed to continue it until the end of July, pending the completion of [redacted] evaluations.

ISSUE 5: WAS FAPE DENIED A FAILURE OF THE IEP TEAM TO DEVELOP AN INTERIM ALTERNATIVE PLACEMENT?

Ms. argues that the LEA violated 8 VAC 20-80-68 (C) (2) (c) because it did not develop an interim alternative placement for before removing from educational placement. Her reasoning is, however, faulty for the following reasons. To begin with, the subsection in question relates to long term removals from the LEA for disciplinary reasons. The record shows that was not removed from the LEA. The recommended expulsion was placed on hold, pending the outcome of evaluations. Secondly, 's placement before the misconduct in question was homebound instruction. was simply continued in that placement.

ISSUE 6: WAS SUBJECTED TO EMOTIONAL AND PHYSICAL DISTRESS BY LEA STAFF BECAUSE OF DISABILITY?

Ms. alleges that was physically and emotionally abused by LEA staff because of disability. This contention is completely without merit, and is not supported by any evidence in the record.

ISSUE 7: IS 'S CURRENT IEP INAPPROPRIATE?

According to Ms. , 's IEP is inappropriate. Such a contention is groundless inasmuch as has no current IEP, given the fact that the LEA was not provided the opportunity to evaluate relative to possible devising an IEP for . The only IEP ever had is an expired one from the Public Schools.

ISSUE 8: DID THE LEA FAIL TO FOLLOW REQUIRED PROCEDURES IN CONDUCTING THE MANIFESTATION DETERMINATION REVIEW OF JULY 3, , AND WAS THE DETERMINATION REACHED INCORRECT?

Ms. [redacted] alleges that the LEA conducted the July 3, [redacted] manifestation determination review without following the procedures prescribed under IDEA and the Regulations. Her contention is not supported by the written record of those proceedings. This hearing officer can find no deviation from the established procedures, and Ms. [redacted] was provided with all of her procedural rights under IDEA. The second aspect of her complaint regarding the manifestation determination review is also without merit. As noted previously in the findings of fact, no determination was reached by the committee since further evaluations were needed in order to determine the nature of [redacted]'s disability.

ISSUE 9: HAS [redacted] BEEN DENIED FAPE BY THE LEA'S FAILURE TO TIMELY COMPLETE THE MANIFESTATION DETERMINATION REVIEW?

The manifestation determination review at issue was, as noted above, unable to be completed because of the lack of current evaluations on [redacted]. As is apparent throughout the record, Ms. [redacted] has willfully and continually prevented and delayed the evaluation of her [redacted]. She cannot now seek to gain an advantage from her own misdoings.

ISSUE 10: HAS THE LEA FILED TO DEVELOP AND IMPLEMENT THE [redacted] HOMEBOUND SERVICES ORDERED BY THE CIRCUIT COURT?

The LEA, through no fault of its own, has been unable to provide homebound services to [redacted] both before and after the Court's order. For various reasons indicated by Ms. [redacted], she did not make [redacted] available for these services, right up to the time of the due process hearing. From the testimony of the LEA's special education staff, it is clear that they went to great efforts to provide education to [redacted] at a time and place

convenient to Ms.

ISSUE 11: DID THE LEA DENY FAPE BY FAILING TO
SCHEDULE COMPREHENSIVE EVALUATIONS?

There is no question that Ms. [redacted] delayed the evaluation process for months. Ms. [redacted], the school psychologist, testified that Ms. [redacted] failed to keep appointments and to make [redacted] available for assessment until September 30th, months after she became aware that new evaluations were needed in order to provide services to [redacted]. Given Ms. [redacted] continued failure to make [redacted] available even after the conclusion of the hearing, the psychological evaluation, a key component of the overall assessment of [redacted] was not completed until late November, [redacted].

ISSUE 12: HAS [redacted] BEEN DENIED FAPE BY THE FAILURE OF THE
LEA TO PROVIDE AN ALTERNATIVE PLACEMENT FOR [redacted] AT
[redacted] OR ANOTHER LEA FACILITY?

Once the Circuit Court ordered that [redacted] receive education at home pending the outcome of the instant proceeding, the LEA could not, without being in contempt of court, change that placement. Furthermore, there was never any agreement by the LEA that it would place [redacted] at [redacted]. Clearly, no decision could be made as to an appropriate educational setting for [redacted] until after [redacted] disability was determined. As noted above, [redacted] interim placement at [redacted] was made by this hearing officer.

CONCLUSION

There is no question in the mind of this hearing officer that Ms. [redacted] has obstructed the LEA every step of the way in attempting to determine if [redacted] is entitled

to special education services and to provide those services, if appropriate. She had repeatedly stalled in making conference appointments, failed to attend scheduled meetings and broken promises to permit [redacted] to be evaluated. Given her apparent belief that LEA staff are aligned in some type of conspiracy against herself and [redacted], she has been reluctant to permit them to guide [redacted] education. Evidence of her disturbing belief in this respect is found in her repeated withdrawals of [redacted] from the LEA and/or keeping out of school for lengthy periods of time. Moreover, the record shows that she has, at every step, been fully apprised and given notice of her procedural rights under IDEA. This hearing officer can find no procedural or substantive errors in this record. For this reason, the LEA has prevailed on every issue raised in this proceeding. The parties are hereby notified that should either wish to appeal this decision, they have up to one year from the date of this decision to note the appeal in either State or Federal court

Dated:

Hearing Officer

Attorney and Counsellor at Law



BY FACSIMILE

, VA.

, Esq.
Office of the City Attorney
School Administration Building

, VA.

RE: vs. Public Schools

Dear Ms. and :

This is a follow-up to my decision of relative to the referenced due process hearing. It has been brought to my attention by the Virginia Department of Education that the wording in the decision relative to the parties' appeal rights may be misleading. Pursuant to Virginia law, the parties have one year from the issuance of the decision to note an appeal to the Virginia Circuit Court. This one year period, however, does not apply to the right to file an appeal in a United States District Court, where the appeal must be filed within two years from the date of the decision.

Very truly yours,

Cc: Virginia Dept. of Education