DECISION

COVER SHEET

DUE PROCESS HEARING

DOCKET NUMBER:	DO9-014
SCHOOL DISTRICT (LEA):	[redacted] County Schools
SCHOOL DISTRICT COUNSEL:	[redacted] Esquire
STUDENT:	[redacted]
PARENTS:	[redacted]
COUNSEL FOR STUDENT/PARENT	[redacted] Esquire
INITIATING PARTY:	Parent/Student
DATE OF REQUEST:	March 3, 2009
DATE OF HEARING:	March 24-25, 2009
PLACE OF HEARING:	[redacted] County School Board Office
OPEN V. CLOSED HEARING:	Open
STUDENT PRESENT:	Yes, but only to testify
RECORD:	Verbatim-Court Reporter
DECISION TYPE:	Written
DUE DATE FOR DECISION:	April 8, 2009
HEARING OFFICER:	James Gerl

DECISION

DUE PROCESS HEARING

Docket No.: DO9-014

PRELIMINARY MATTERS

The hearing in this matter was an expedited due process hearing pursuant to IDEA Section 615(k)(4) and Policy 2419, chapter 7, section 3. The quality of legal representation for both parties was consistently excellent throughout this proceeding.

Subsequent to the hearing, both parties filed a written brief and proposed findings of fact. All proposed findings, conclusions and supporting arguments submitted by the parties, have been considered. To the extent that the proposed findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and views stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

ISSUES PRESENTED

The issues presented in this expedited due process hearing, as identified by the parties in their joint prehearing memorandum, are as follows:

1. Whether the schools violated the Individuals with Disabilities Education Act ("IDEA") and West Virginia Department of Education Policy 2419 by predetermining the result when it sent a notice of recommendation of expulsion and a prior written notice of proposing expulsion prior to any manifestation determination meeting;

2. Whether the manifestation determination on February 13, 2009 was correct and whether prior written notice should have been provided to the parents following that meeting rather than before;

3. Whether the schools are currently providing a Free Appropriate Public Education ("FAPE") to the student, and more specifically, whether the schools have violated Policy 2419 in not convening an IEP meeting to update the student's IEP for his new placement at the alternative school, and whether the student is being taught by a highly qualified special education teacher; and

4. Whether the schools conducted a proper annual IEP meeting on January 31, 2008 and whether the IEP produced on that date was appropriate.

FINDINGS OF FACT

Based upon the parties' stipulations of fact as contained in their joint prehearing memorandum, the hearing officer has made the following findings of fact:

1. The student is a thirteen-year-old eighth-grade student at the district's middle school.

2. The student has a history of psychiatric treatment, including treatment for AD/HD. He has also been found to be in the borderline to low-average range of functioning.

3. The student has had a difficult young life, including the death of his mother a few years ago and the subsequent transition to live with his father and stepmother.

4. On January 31, 2008, the student's IEP from February 1, 2007, was amended, although the present levels of performance were not updated and no other changes to the IEP were made.

5. On March 24, 2008, another IEP meeting occurred, and the student's IEP was changed.

6. On February 3, 2009, another student at school gave the student a pill and told the student it was a Valium. The student ingested the pill believing that it was a Valium. On the same day, the student's principal suspended the student for ten days.

7. On February 9, 2009, a prior written notice stating that the school was proposing to expel the student was sent to the student's parents.

8. On February 10, 2009, a letter stating that an expulsion hearing was set for February 16, 2009 was sent to the student's parents by the superintendent of schools.

9. On February 13, 2009, a manifestation determination meeting was held. The IEP team determined that the conduct in question was not a manifestation of the student's disabilities. The student's stepmother disagreed with this determination.

10. On February 16, 2009, an expulsion hearing was held by the board of education.

11. On February 17, 2009, the student's father received a letter of expulsion and was told in that letter to contact the special education director about an "alternative plan."

12. The student began his studies at the alternative school on February 18, 2009 with no updated IEP.

Based upon the evidence in the record, the hearing officer has made the following findings of fact:

13. When the student was in the first grade in the schools, he was referred for an AD/HD evaluation because of concerns by his mother and teacher. The evaluation on January 18, 2002 revealed that the student was having difficulty in the areas of impulsivity and inattention.

14. On September 18, 2002, the student was diagnosed by a psychiatrist as having attention deficit hyperactivity disorder and borderline intellectual functioning. The psychiatrist increased the student's prescription for Adderall for his AD/HD.

15. On February 2, 2004, the schools conducted a reevaluation of the student and found him to be eligible for special education because he met the criteria for the exceptionality of mentally impaired.

16. On September 3, 2004, the student's psychiatrist added intermittent explosive disorder and possible bipolar disorder to the student's diagnosis, and she increased two prescription medications the student was taking – Trileptal, for mood instability, and Concerta, a stimulant.

17. On March 4, 2005, the student's IEP team, consisting of the student's mother, a special education teacher and an occupational therapist, met and decided that they would keep the student's IEP goals and program from the 2004-2005 school

year for the next school year. Occupational therapy was removed as a related service and crossed out on the IEP form. Otherwise only the dates on the IEP form were changed.

18. On July 1, 2005, the student's psychiatrist added a diagnosis of oppositional defiant disorder for the student. The psychiatrist continued the prescriptions for the student for Concerta, Trileptal and Remeron, a sleep aide.

19. On November 30, 2005, the office of the student's physician faxed to the school district copies of school administration of medicine forms relating to the student's prescriptions for Trileptal and Concerta. The form notes that copies of it are to be sent to the special education director, the school nurse and the student's school folder.

20. On October 6, 2006, an eligibility committee met and found that the student was no longer eligible for speech-language services.

21. On February 1, 2007, an eligibility committee met and decided to change the student's category of eligibility from mentally impaired to specific learning disability. The committee recommended a "...change of placement from MI to LD."

22. On December 12, 2007, the student's stepmother telephoned his special education teacher and informed her that the student was on a new medication for AD/HD, Strattera in place of Trileptal. She asked the teacher to watch for any changes in the student's behavior. Documentation of the conversation by the teacher states that the teacher "...let the team know." Since this change in his medication, the student has had a number of discipline problems at school.

23. When the student took the Valium pill on February 3, 2009, he was in the bathroom at school with a group of boys. A bigger boy gave each of the boys a

Valium pill. Although the other boy did not insist that the student take the pill, the student felt intimidated by the other boy and the situation, disregarded the potential consequences and impulsively swallowed the pill.

24. The student did not ask for Valium or other drugs from the other boy on previous occasions. The student had not previously taken any non-prescribed drugs or alcohol and was not aware of the effect that taking the drug would have on him.

25. As a result of his attention deficit hyperactivity disorder, the student has a tendency to be impulsive. He has a history of acting impulsively without thinking of the consequences and of being easily talked into things and succumbing to peer pressure. The student also has the disability of oppositional defiant disorder. The student's conduct in ingesting the Valium pill had a direct and substantial relationship to the student's AD/HD impulsivity and to his oppositional defiant disorder. As a result of the student's disabilities, he is easily manipulated, and he can be talked into wrongdoing and he succumbs easily to peer pressure.

26. On February 3, 2009, at 2:15 p.m., the principal of the student's school met with the student's special education teacher and another teacher. The student's parents and other members of his IEP team were not invited to this meeting. The participants at this meeting did not review the student's IEP or any of the other documentation concerning the student. At this meeting, the principal, the special education teacher and the other teacher concluded that the incident of the student taking the Valium pill was not the result of a handicapping condition. The principal suspended the student for taking the Valium pending further action and sent a form documenting this meeting to the student's parents by sending it home with the student. The principal and the special education teacher were also members of the manifestation determination review committee that met on February 13, 2009.

27. On February 9, 2009, the principal of the student's school mailed the student's parents a prior written notice of the school district's proposed expulsion of the student for the incident. The prior written notice stated that the action was the result of an IEP team meeting on February 13 at 1:00 p.m.

28. On February 10, 2009, the schools' superintendent sent a letter to the student's father noting that the student's principal had recommended the student's expulsion for possessing and taking a controlled substance. The letter mentioned an expulsion hearing before the school board on February 16, 2009.

29. The student's IEP team met on February 13, 2009 to conduct a manifestation determination review. Present were the student's principal, the special education director, the assistant principal, the student's special education teacher, another teacher and the student's stepmother. The schools' school psychologist did not attend the meeting. When the meeting began, the principal read the student's attendance record and related records. Then the special education teacher read a series of observation reports that were provided by the teachers who work with the student. Then a form stating that the conduct in question was not a manifestation of the student's disabilities was circulated and all participants signed it except the stepmother, who noted her disagreement with the conclusion. The stepmother mentioned the change in medication, but there was no other discussion at this meeting of the nature of the student's disabilities or the possibility of their relationship to the conduct giving rise to the discipline. There was no discussion at this meeting of the diagnoses of the student or of the medications the student was receiving, other than the comment by the stepmother. The meeting lasted approximately twenty minutes.

30. One of the teacher observation reports submitted to the IEP team for the manifestation determination review stated "...I have noticed that he is easily misled, fooled, coerced or manipulated into actions and activities that have placed him in a position where he either just didn't appear too bright, was humiliating for him or caused him to be in trouble because the actions were socially unacceptable." A second teacher observation report notes that the student"... wants everyone to like him." A third teacher observation report states that the student "... tries to please others... by doing something silly or inappropriate."

31. Other teacher observation reports submitted for the manifestation determination review noted that the student's "reading skills are below level," and that his "reading skills are very low."

32. The school district staff on the student's IEP team predetermined their conclusion that the student's misconduct in taking the Valium pill was not a manifestation of his disabilities. In so doing, the school district did not provide the student's parents a meaningful opportunity to participate in the IEP team's manifestation determination review.

33. On February 16, 2009, the school board held an exclusion hearing for the student. The student testified at the expulsion hearing. He testified that he took the Valium pill. He was not asked about and did not testify there concerning any prior requests by the student for pills or concerning the effect that taking the pills might have on him. Also present at the hearing were school board members, the student's stepmother, the superintendent, the principal, the assistant principal and the special education director.

34. On February 17, 2009, the superintendent sent a letter to the student's father stating that the school board had voted to expel the student for ingesting the

Valium pill. The letter instructs the parents to contact the schools' special education director to begin developing an alternative plan for the student's education.

35. Since his expulsion, the student has been attending the school district's alternative school from 3:00 p.m. to 5:30 p.m. four days per week. While there, the student receives instruction from a special education teacher. The student's alternative placement was not determined by his IEP team. The student's educational program during his alternative placement is not recorded in an IEP.

36. On January 31, 2008, the student's IEP team met. The team retained the exact language of the student's February 1, 2007 IEP, except that the dates were changed. The student's present levels of academic achievement and functional performance showed that he was reading on a fourth-grade level. The IEP called for 450 minutes per week of special education in language arts, 450 minutes per week of special education in math and 150 minutes per week in science and social studies and an undetermined frequency of the related services of speech and counseling. The student was in the special education environment fifty per cent of the time.

37. On March 24, 2008, the student's IEP team met and prepared a new IEP for the student. The student's present levels of academic achievement and functional performance notes that the student is reading nearly on grade level (eighth grade). The IEP calls for a general education full-time placement. The student was to receive thirty minutes per week each of special education instruction in language arts, math and social studies.

38. The January 31, 2008 IEP was not developed pursuant to the legally required procedural safeguards and it is not reasonably calculated to provide meaningful educational benefit to the student.

39. The student did not suffer educational harm or loss from the deprivation of a free and appropriate education from January 31, 2008 to March 24, 2008. The student is not entitled to compensatory education for that period.

40. The school district denied FAPE to the student from the date of his expulsion. The student's program at the alternative school was not developed pursuant to the legally required procedural safeguards and it was not reasonably calculated to provide meaningful educational benefit to the student. The student has suffered educational harm from the date of his expulsion to the date that this matter is resolved. The student is entitled to compensatory education for that period equal to the education he would have received under his March 24, 2008 IEP during that time minus any comparable education he received at his alternative placement.

41. The school district's violations of the law in the area of discipline of the student were egregious.

CONCLUSIONS OF LAW

1. Student is a child with a disability for the purposes of the Individuals with Disabilities Education Act (hereafter sometimes referred to as "IDEA"), 20 U.S.C. Section 1400 et seq., and he is an exceptional child within the meaning of West Virginia Code Section 18-20-1 et seq., and Policy 2419, Regulations for the Education of Students with Exceptionalities (West Virginia Department of Education – effective September 11, 2007)(hereafter sometimes referred to as "Policy 2419").

2. Student is entitled to a free appropriate public education (hereafter sometimes referred to as "FAPE") within the least restrictive environment under the meaning of IDEA, 34 C.F.R. Section 300.1 et seq., and Policy 2419.

3. The schools violated IDEA and Policy 2419 by concluding that the student's conduct in ingesting a Valium pill on February 3, 2009 was not a manifestation of the student's disabilities. Said behavior was caused by and had a direct and substantial relationship to the student's disabilities and, therefore, was a manifestation of the student's disabilities. IDEA Section 615(k)(1)(E); 34 C.F.R. Section 300.530; Policy 2419, Chapter 7.

4. The schools violated IDEA and Policy 2419 by predetermining the result of the manifestation determination review on February 13, 2009, thereby depriving the parents of any meaningful opportunity to participate in the process. Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 42 IDELR 109 (6th Cir. 2004); J.D. v. Kanawha County Bd. Of Educ., 48 IDELR 159 (S.D.W.V. 2007).

5. The schools violated IDEA and Policy 2419 by failing to conduct a functional behavioral assessment for the student and to develop a behavioral intervention plan to address his conduct in ingesting a non-prescribed Valium pill after the manifestation determination review committee meeting on February 13, 2009. IDEA Section 615(k)(1)(F); 34 C.F.R. Section 300.530(f): Policy 2419, Chapter 7, Section 2(A).

6. To the extent that the West Virginia Safe Schools Act, West Virginia Code section 18A-5-1a, et seq. may conflict with IDEA, a federal statute, IDEA prevails pursuant to the Supremacy Clause of the United States Constitution. Article VI, Cl. 2; English v. General Elec Co 496 U.S. 72, 78-79 (1990); Lower Merion Sch Dist v. Doe 931 A.2d 640, 48 IDELR 255 (Penna. S.Ct. 9/26/7); In Re: Student With a Disability 108 LRP 45824 (SEA WV 6/4/8); Denver Public Schs 108 LRP 24068 (SEA Colo 2/13/8).

7. The school district denied FAPE to the student by placing him in an alternative school despite the fact that the behavior for which the student was disciplined was a manifestation of his disabilities. The student lost educational benefit as a result of said disciplinary change in placement. Bd. Of Educ. v. Rowley, 458 U.S. 176, 103 L.R.P. 31848 (1982); School Board of Henrico County v. Z.P., 399 F. 3d 298, 42 IDELR 299 (Fourth Cir. 2005).

8. The IEP which was adopted for the student on January 31, 2008 was inappropriate and failed to provide a free and appropriate public education to the student because there were substantial deviations from procedural safeguards established by the Act and because it was not reasonably calculated to confer meaningful educational benefit. Bd. Of Educ. v. Rowley, 458 U.S. 176, 103 L.R.P. 31848 (1982); School Board of Henrico County v. Z.P., 399 F. 3d 298, 42 IDELR 299 (Fourth Cir. 2005).

9. Although the student's January 31, 2008 IEP denied FAPE to him, the denial did not result in a deprivation of educational benefit for the student. IDEA Section 615(f)(3)(E)(ii); Policy 2419, Chapter 11, Section M.

10. A due process hearing officer has broad discretion to fashion an appropriate remedy when there has been a violation of IDEA or Policy 2419. School Committee Town of Burlington v. Department of Educ., 471 U.S. 358, 369, 105 S.Ct. 1996, 556 IDELR. 389 (1985); Garcia v. Bd. of Educ. of Albuquerque Public Schs, 530 F.3d 1116, 49 IDELR 241 (10th Cir. 3/25/8); Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp.3d 815, 46 IDELR 252 (C. D. Calif. 3/10/8); Bishop v. Oakstone Academy, 47 I.D.E.L.R. 125 (S.D. Ohio 2007); Brockton Central Sch. Dist. 49 IDELR 24 (SEA N.Y 2007); In re Student With a Disability, 108 LRP 45824 (SEA WV 6/4/8).

11. The function of compensatory education is to place the student where he would have been but for the denial of FAPE. An award of compensatory education should be based upon fact-specific information pertaining to the educational deprivation. Reid ex rel Reid v. District of Columbia, 401 F.3d 516; 43 IDELR 32 (D. C. Cir. 3/25/05).

12. The school district did not violate IDEA or Policy 2419 merely by sending a prior written notice concerning the proposed disciplinary action before the date the expulsion began. IDEA Section 615 (k)(1)(H); Policy 2419, Chapter 7.

DISCUSSION

1. Merits

a. The parents' challenge to the correctness of the February 13, 2009 manifestation determination review and whether the schools improperly predetermined the results of the manifestation determination.

The parents contend that the result of the manifestation determination was incorrect, asserting that the behavior of the student for which he was disciplined was directly related to his disabilities. The schools contend that the manifestation determination meeting result was correct. The parents argue that the schools unlawfully predetermined the result of the manifestation determination. The schools contend that Policy 2419 specifically requires that parents be provided with prior written notice on the same day as a disciplinary removal. Because these two issues are necessarily intertwined and connected, they will be discussed together herein.

IDEA provides as follows:

(E) MANIFESTATION DETERMINATION –

(i) IN GENERAL – Except as provided in subparagraph (B),within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP team (as determined by the parent and the local educational agency)shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine-

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

(ii) MANIFESTATION – If the local educational agency, the parent, and relevant members of the IEP team determine that either subclause (I) or (II) of clause (i) is applicable to the child, the conduct shall be determined to be a manifestation of the child's disability.

IDEA Section 615(k)(1)(E)

(2) DETERMINATION OF SETTING – The interim alternative educational setting in subparagraphs (C) and (G) of paragraph (1) shall be determined by the IEP team.

IDEA Section 615(k)(2). See also 34 C.F.R. Section 300.530 and Policy 2419, Chapter 7.

The federal special education law provides specific special protections regarding student discipline because prior to the passage of the predecessor of the IDEA, school districts often misused disciplinary measures in order to exclude children with disabilities from the public school classroom. Honig v. Doe, 484 U.S. 305, 324, 108 S. Ct. 592, 559 IDELR 231 (1988). Accordingly, the United States Supreme Court expressly declined a request by a school district to create a "dangerousness" exception into the discipline protections established by the Act. Honig v. Doe, supra, 484 U.S. at 323.

Among the protections provided in the law is the requirement that students with disabilities not be punished by means of a change of placement for conduct that is a manifestation of their disability. IDEA Section 615(k); 34 C.F.R. Section 300.530(f); Policy 2419, Chapter 7, Section 2(A). Thus, a manifestation determination is required for proposed discipline that would change the placement of a student with a disability.

In the instant case, the parents presented credible evidence that the student's behavior in ingesting the Valium pill had a direct and substantial relationship to the student's disabilities and that, therefore, the student's conduct was a manifestation of his disabilities.

The most compelling evidence offered by the parents in this regard was the expert testimony of the student's physician. The physician testified that the student's behavior in ingesting the Valium was very consistent with his disabilities, especially his AD/HD and his oppositional defiant disorder. The expert physician explained that the student's disabilities cause him to do things impulsively, without thinking about the consequences of his actions. The expert physician also filed a written report to the same effect which was admitted into evidence at the hearing. The schools called no physician or other expert to contradict this testimony. Indeed, the expert testimony of the student's physician in this regard is unrebutted.

The physician's testimony is corroborated by the student's stepmother, who testified that because of his disabilities, he is easily talked into things and manipulated. She noted, "You can talk him into anything."

The schools' cross examination of the expert physician did include questions that were intended to negate or reduce the impact of the physician's testimony by suggesting that the student had admitted to requesting the Valium from the other

student on numerous prior occasions. The schools did not establish this fact, however.

The student's principal and the schools' superintendent both testified that the student had admitted to asking for the drug on prior occasions and that he was aware that the drug would "mess him up." The testimony of these witnesses, however, is not credible. The testimony of the principal is impaired by an evasive and combative demeanor. For example, in response to one question by the parents' attorney concerning predetermination, his answer was, "not necessarily." There were also certain inconsistencies in his testimony that will be discussed later in this decision.

The testimony of the superintendent is diminished by his demeanor and by an apparent bad memory. The superintendent had to ask for help concerning who had attended the school board expulsion hearing where the student allegedly made these statements. Moreover, the schools failed to provide any testimony by the special education director or the assistant principal concerning the alleged admissions by the student at the school board expulsion hearing, even though the superintendent testified that the special education director and the assistant principal were present at the expulsion hearing and even though both persons testified at the expedited due process hearing herein. In addition, the superintendent's testimony was inconsistent with that of the principal in that the superintendent did not testify that the student had asked for the drug on numerous occasions.

On the other hand, the student testified credibly that he did not make these statements, that he had not previously asked for Valium and that he had not stated that the drug would mess him up. He testified that he was in the bathroom with other boys and that a bigger boy gave him the pill. He testified that he didn't know what it was and that although the other boy did not insist that he take the pill, he felt

intimidated by the other boy and by the situation. Two other peers also took and ingested the pills at the same time as the student.

The student's stepmother also testified credibly that the student did not make any statements at the school board expulsion hearing concerning any prior request or requests for the drug or that he knew the effect the drug would have on him.

Moreover, the testimony of the parents' expert physician as well as the student's testimony and the testimony of the student's stepmother at the due process hearing are corroborated by the documentary evidence. One of the written teacher observation reports which was considered at the February 13, 2009 manifestation determination review meeting described the student as follows: "...he is easily misled, fooled, coerced or manipulated into actions and activities that have...caused him to be in trouble because the actions were socially unacceptable." This teacher observation strongly supports the parents' contentions that the student's disabilities cause him to act impulsively, and to be talked into misconduct and succumb easily to peer pressure. A second teacher observation report notes that the student "... wants everyone to like him." A third teacher observation report states that the student "... tries to please others... by doing something silly or inappropriate." These teachers support the parents' argument that the student easily succumbs to peer pressure and can be talked into wrongdoing by his peers with little regard for consequences.

In its posthearing brief, the schools argue that the student testified that he was motivated by fear and not impulsivity. This is not a fair reading of the student's testimony. It is clear from the student's testimony that his impulsivity played a major role in his taking the Valium. The student testified that he and two other boys were given a pill while in the bathroom and that he took the pill with his peers. Although the student testified that he was intimidated by the bigger boy, he never mentioned

fear of the boy and he specifically denied that the other boy insisted that he take the pill. The intimidation in this context would seem to be more from the peer pressure in this situation than fear. It is apparent from the unrebutted testimony of the student's expert witness that the inability to review consequences before action, or impulsivity caused by his disability, had a substantial and direct relationship to the student's misconduct in taking the pill. The testimony of the student does not alter this conclusion. That he is easily talked into things by his peers due to his impulsivity is also supported by the teacher observations quoted above and by the testimony of the stepmother. The schools' argument that fear caused the conduct is rejected.

The testimony of the parents' witnesses is more credible and persuasive than the testimony of the schools' witnesses with regard to these issues.

It is also apparent that the school district failed to consider all of the information that it had concerning the student's disabilities in arriving at its no manifestation conclusion. The evidence showed that the special education director and other witnesses who testified at the due process hearing were unaware of medications that the student was taking. The parents offered documentary evidence showing that forms related to some of the medications that the student was taking had been provided to the school district. Despite directions that copies of the form were to be provided to the special education director and to the student's school folder, the participants were not allegedly aware of the medications.

Moreover, one of the special education teachers who worked with the student testified that she could not recall the stepmother telling her that there had been a change in the student's medications in December, 2007 and asking her to watch for changes in his behavior. The parents, however, produced documentary evidence in rebuttal showing that the stepmother had had such a conversation with the teacher

concerning the changes in the student's medications, that the special education teacher received the information, and that she let the team know about the information.

In its posthearing brief, the schools contend that it was not aware of certain medical conditions of the student and of the medications that he was taking, and, therefore, that it should not be responsible for not using such information. The schools argument is rejected for several reasons. Firstly, the schools did in fact have records concerning the student's medications. The schools should not benefit from the fact that it had not shared the information that it had received with the persons responsible for providing an education to the student or with those responsible for the manifestation review. Secondly, the stepmother produced a document on rebuttal that showed that she had informed the student's special education teacher of changes in his medication and requested that she look for changes in the students' behaviors. Thus, the school district clearly had knowledge of the change in medication which the stepmother mentioned without receiving an audience at the manifestation review. Thirdly, the school district clearly had notice of the student's ADHD. The school district had evaluated him for ADHD and recognized his eligibility as a result. It was his ADHD impulsivity in part that caused his misconduct in taking the valium pill. It is significant that the school psychologist for the district did not participate in the manifestation determination review. The school psychologist who had done the original evaluation for AD/HD for the student may have been able to explain the effects of the student's disabilities to the committee, but she was not included in this meeting. Clearly the school district had sufficient knowledge of the student's disabilities and medications to undertake an appropriate manifestation review. Unfortunately, it did not do so.

In its posthearing brief, the schools argue that their treatment of the student because of his conduct in this case was mandated by the West Virginia Safe Schools Act, West Virginia Code section 18A-5-1a, et seq. As has been shown, however, the treatment of the student by the schools herein violates IDEA, a federal statute. To the extent that the state Safe Schools Act may conflict with IDEA, IDEA prevails pursuant to the Supremacy Clause of the United States Constitution. Article VI, Clause 2; English v. General Elec Co 496 U.S. 72, 78-79 (1990); Lower Merion Sch Dist v. Doe 931 A.2d 640, 48 IDELR 255 (Penna. S.Ct. 9/26/7); In Re: Student With a Disability 108 LRP 45824 (SEA WV 6/4/8); Denver Public Schs 108 LRP 24068 (SEA Colo 2/13/8). Moreover, the Safe Schools Act specifically provides that it may not be construed to be in conflict with the provisions of IDEA. West Virginia Code section 18A-5-1a(k). Accordingly, the schools argument concerning the Safe Schools Act is rejected.

Thus, it is concluded that the manifestation determination reached an incorrect conclusion because the school district failed to consider information it had concerning the medications the student was taking.

As to the closely related issue of predetermination, the parents contend that the schools violated the law by predetermining the manifestation determination conclusion before the manifestation determination review was conducted. The record evidence supports the parents' contention. On February 3, 2009, the day of the Valium incident, the principal of the student's school met with the student's special education teacher and another teacher. The documentary evidence shows that together, the three school district employees determined that the incident of misconduct by the student "...was not the result of a handicapping condition." The student's parents and the other members of his IEP team were not invited to this meeting. This document strongly supports the parents' contention of

predetermination. There could be no legitimate reason for school staff to discuss the issue of manifestation prior to the manifestation determination review meeting, and even less for reaching a conclusion as to that issue. The special education teacher who participated in the February 3, 2009 meeting admitted that those who participated did not review the student's IEP or any other documentation before concluding that the student's conduct was not a manifestation of his disabilities.

In its posthearing brief, the schools contend that the meeting of the three persons was solely for the suspension of the student and not his expulsion. This argument must be rejected. The conduct for which the student was suspended was the exact same conduct as that for which he was expelled. There was no legitimate reason for meeting in this fashion and concluding that the student's taking the pill was not a manifestation of the student's disability. This conclusion was drawn without any participation or input by the student's parents. Thus two of the key players in the eventual manifestation determination review for the expulsion had already reached a conclusion as to the ultimate issue and the parents were clearly deprived of the right to meaningfully participate in the process.

Moreover, the credible testimony of the stepmother was that there was no discussion at the February 13, 2009 manifestation determination review meeting of whether the misconduct by the student was directly related to his disabilities. The stepmother testified that the manifestation meeting began with the principal reading the student's attendance and related records, followed by the special education teacher, who read observation reports provided by teachers. Then a sheet was passed around and everybody present except the stepmother signed a form indicating their agreement that the behavior was not a manifestation. The implication of the stepmother's testimony is that the result was a foregone conclusion. The

stepmother's testimony in this regard is consistent with the above-described documentary evidence.

The brevity of the manifestation determination review also supports the conclusion that the schools' personnel had predetermined the result of no manifestation. The stepmother testified credibly that the meeting lasted only fifteen to twenty minutes. This testimony was contradicted by the two witnesses for the school district, including the principal, who testified that the meeting lasted from thirty minutes to one hour. The testimony of the stepmother is more credible and persuasive on this point. The stepmother had a more credible demeanor and the testimony of the stepmother is supported by the logical inference that can be drawn from the testimony of all witnesses who described the meeting: what was discussed at the meeting was about enough to fill fifteen to twenty minutes of time. The short meeting did not permit sufficient time to analyze the relationship between the student's misconduct and his disabilities. It is concluded that the schools denied FAPE to the student by unilaterally predetermining the result of the manifestation determination. In so doing, the school district violated IDEA by depriving the parents of any meaningful opportunity to participate in the process. J.D. v. Kanawha County Bd. of Educ., 48 IDELR 159 (S.D. WV 2007); Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 42 IDELR 109 (6th Cir. 2004).

In its posthearing brief, the schools argue that the "only directive" for a manifestation review is to consider paperwork; that is review the file, the IEP, teacher reports and information provided by the parent. This is not a fair statement of the law. As quoted above, the key consideration to be discussed and determined at such a review is whether the bad conduct was caused by or had a direct and substantial relationship to the child's disability. IDEA Section 6145(k)(E)(1); Policy 2419, chapter 7, section 2. Although it is true that the committee must review the

paperwork listed above, the paper review is not the only directive for the committee. In this case, the manifestation determination review failed to ask or consider the key question of whether the conduct was caused by or had a direct and substantial relationship to the child's disability. The schools' argument is rejected.

The parents argue in their posthearing brief that the mere fact that the school district sent a notice of the proposed expulsion to the parents before the manifestation determination review constitutes unlawful predetermination. As the schools' brief correctly points out, however, the schools were required by IDEA and Policy 2419 to notify the parents on the same day as the disciplinary change of placement is contemplated. IDEA Section 615 (k)(1)(H); Policy 2419, Chapter 7. The parents' argument in this regard is rejected and was not considered in reaching the conclusion that the manifestation determination was incorrect and unlawfully predetermined.

In view of the foregoing, it is concluded that the school district violated IDEA and Policy 2419 by predetermining the result of the manifestation determination and that the school district violated IDEA and Policy 2419 by clearly reaching the wrong conclusion at the manifestation determination review meeting. Accordingly, the expulsion of the student was invalid.

b. Issue No. 3: The parents' challenge to whether the student is receiving a free and appropriate public education in his placement at the alternative school after his expulsion.

It is clear that the student was denied FAPE during his alternative placement. As the previous section explains, the manifestation determination should have concluded that the student's behavior in ingesting the Valium pill was a manifestation of his disabilities. In a situation where the behavior at issue is a manifestation of the child's disabilities, IDEA provides as follows:

(F) DETERMINATION THAT BEHAVIOR WAS A MANIFESTATION- If the local educational agency, the parent and relevant members of the IEP team make the determination that the conduct was a manifestation of the child's disability, the IEP team shall

(i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement described in subparagraph (C) or (G);

(ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior, and

(iii) except as provided in subparagraph (G), return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.

IDEA Section 615(k)(1)(F); See also 34 C.F.R. Section 300.530(f); Policy 2419, Chapter 7, Section 2(H).

Thus, the student's expulsion and subsequent placement at the alternative school were invalid. The IEP team will need to meet and develop a functional behavioral assessment and implement a behavioral intervention plan for the student and, unless the parents and school district agree to a change of placement as a result thereof, the student must be returned to the placement from which he was removed.

It is clear, however, that the alternative placement for the student was not determined by the IEP team as required by Section 615(k)(2) of IDEA, which was quoted in the previous section. The school district's tendency to avoid the procedural safeguards at IEP meetings for this child will be relevant to the relief to be awarded in a subsequent section of this decision.

The stepmother testified credibly that the special education teacher at alternative school begins teaching at 3:00 p.m. and is done at 5:30 p.m. each of the

four nights per week that the school is available. This testimony was not contradicted by the school system. The stepmother testified that the student lacked a qualified special education teacher at the alternative school, but she conceded that she did not have very good information about what had been happening in the student's classroom at the alternative school. The special education director testified credibly that the student had a highly qualified special education teacher while at the alternative school. It is concluded that the student did have a special education teacher while at the alternative school but that he did not receive the education called for by his IEP.

In its posthearing brief, the school district contends that the student received more hours of special education at the alternative school than he would have received in his inclusion classroom. This argument misses the point, however. The wrongful disciplinary change of placement by the school district deprived the student of the benefit of his entire educational plan, not just of its special education components. The student's IEP team clearly determined that he benefitted from inclusion with his same aged peers as well as from his entire educational program. The record evidence reveals that the student was deprived of the educational benefit of his IEP by being placed in the alternative school where he was deprived of peer interaction and the other benefits of his IEP. The argument by the schools is rejected.

Therefore, the student is entitled to compensatory education for the period of his inappropriate disciplinary removal. The student shall be awarded services comparable to what he would have been receiving from his current March 24, 2008 IEP for the period from his unlawful removal from that placement on February 9, 2009, less the education received at the alternative school, until a new IEP and behavioral intervention plan is developed by the IEP team pursuant to the Order herein.

c. Issue 4: Whether the January 31, 2008 IEP team meeting was appropriate and whether the IEP produced on that date was appropriate.

The parents contend that the January 31, 2006 IEP did not provide FAPE to the student. The parents contend that said IEP was exactly the same as the one in effect the previous year and that, with the exception of dates, nothing was changed or updated, including present levels of performance. The schools contend that the January 31, 2008 IEP was merely an amendment to the previous IEP and that the dramatic changes in the student's IEP on March 24, 2008, were the result of the student's good grades and performance.

The United States Supreme Court has established a two-part test for determining whether a school district has provided FAPE to a student. There must be a determination as to whether the schools have complied with the procedural safeguards set forth in the IDEA and whether the IEP is reasonably calculated to enable the child to receive educational benefits. Bd. of Educ., etc., v. Rowley, 458 U.S. 178, 103 LRP 31848 (1982). The United States Court of Appeals for the Fourth Circuit has noted that although a school district is not required to provide the best possible education to a child with a disability, a FAPE requires more than mere minimal or trivial educational benefit. County Sch. Bd. v. Z. P., 399 F.3d 298, 42 IDELR 229 (Fourth Cir. 2005).

It is disturbing how little information the schools have concerning the student's educational needs. The testimony and documentary evidence show that from 2004 through 2007, the school district provided services to the student in a classroom for mentally impaired students. In 2007, the student's placement was changed to a separate class for learning-disabled students. If the student had a learning disability, the schools clearly denied FAPE to the student by placing him in a class for MI students.

The school district's concern about the category of the student's eligibility rather than his individual needs was misplaced. "The IDEA does not concern itself with labels but whether a student with a disability is receiving a free and appropriate public education. A disabled child's IEP must be tailored to the unique needs of that particular child." Heather S. v. State of Wisconsin, 125 F.3d 1045, 26 IDELR 870 (7th Cir. 1997). Regardless of the category of eligibility, each child with a disability is entitled to individually designed special education and related services. DB by LB v. Houston Independent School District, 48 IDELR 246 (D.Tex. 2007); Letter to Anonymous, 48 IDELR 16 (OSEP 2006). See also, Analysis of Comments (pertaining to federal regulations), 71 Fed. Register 156 at p.46586, 46588 (OSEP August 14, 2006). Although this issue is not raised by the instant due process complaint, it is clearly relevant background for understanding the educational needs of the student and the relief to be awarded herein.

The schools are required to review the IEP of students with a disability at least annually to determine whether annual goals are being met and to make appropriate revisions thereto. IDEA Section 614(d)(4)(A); Policy 2419, Ch. 5, Sections A and B. Although it is true that the parents and school district can agree to amend an IEP in between annual reviews, such an amendment cannot take the place of an annual review. 34 C.F.R. Section 300.324(a)(4) and (6). See, Analysis of Comments to Regulations, 71 Fed. Register No.156 at page 46547 (OSEP August 14, 2006).

Inasmuch as the January 31, 2008 IEP replaces a February 1, 2007 IEP, it was clearly the annual review for the student. The January 31, 2008 IEP is slipshod at best. A review of the IEP yields a conclusion that the school district put very little if any thought into this child's education.

Particularly when contrasted to the March 24, 2008 IEP, which was prepared less than two months later, the January 31, 2008 IEP is highly inappropriate. The second IEP cuts the student's special education and related services to ninety minutes per week from 1050 minutes per week in the IEP at issue. Moreover, the present levels of performance in the January 31, 2008 IEP have the student reading at a fourth-grade level. Less than two months later, the March 24, 2008 IEP shows the student as reading at a seventh-grade level.

The testimony of the schools' witnesses at the due process hearing was that the student was now reading at nearly grade level. Indeed, in its posthearing brief, the schools refer to the "amazing strides" the student was allegedly making. Unfortunately, however, this testimony is contradicted by the documentary evidence. Two of the teachers who submitted written observations for the manifestation determination review commented upon the student's then current problems with reading. One stated that his "...skills in reading are below level...." Another stated that "(His) reading skills are very low."

When coupled with the school district's uncertainty as to the student's medications and changes of medications as well as the previous "change in placement" from mentally impaired to specific learning disability, the school district's lack of clarity concerning the student's present levels of academic achievement and functional performance is quite troubling.

It is clear that the January 31, 2008 IEP runs afoul of IDEA's prescribed procedures and that the IEP is not reasonably calculated to lead to meaningful educational benefit. Accordingly, said IEP does not provide FAPE to the student.

The schools assert, in its posthearing brief, that the parents contentions regarding the student's IEP should not be credited because they never complained

before his expulsion. The parents' due process complaint is timely with regard to the allegations pertaining to the IEP. IDEA, Section 615 (b); Policy 2419, chapter 11, section A. The fact that the parents may not have been aware of deficiencies in the IEP process prior to consulting with an attorney does not require that legitimate concerns be ignored. This argument is rejected.

There is no evidence in the record, however, concerning how the inappropriate January 31, 2008 IEP had an adverse impact upon the education of the student. Despite a request at the outset of the hearing by the hearing officer for evidence concerning whether the alleged denial of FAPE had educational impact upon the student given the request by the parents for compensatory education, no evidence as to this point was offered by the parents. The function of compensatory education is to place the student where he would be but for the denial of FAPE. Thus, an award of compensatory education should be based upon fact-specific information concerning the student's educational deprivation. See, Reid ex rel Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 3/25/05).

It should be noted that the parents seek relief only for the short period of time that the January 31, 2008 IEP was in effect. The parents have not challenged the March 24, 2008 IEP. Accordingly, this discussion only pertains to whether relief should be awarded for the period from January 31, 2008 to March 24, 2008. Because the parents have not proved any educational harm suffered by the student during this period, the parents' request for compensatory education for the period from January 31, 2008 to March 24, 2008 is denied.

b. Relief

Where there has been a violation of IDEA, the hearing officer has broad discretion to fashion an appropriate remedy. School Committee Town of Burlington

v. Department of Educ., 471 U.S. 358, 369, 105 S. Ct. 1996, 556 IDELR 389 (1985); Garcia v. Bd. of Educ. of Albuquerque Public Schs, 530 F.3d 1116, 49 IDELR 241 (10th Cir. 3/25/8); Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp.3d 815, 46 IDELR 252 (C. D. Calif. 3/10/8); Bishop v. Oakstone Academy, 47 IDELR 125 (S.D. Ohio 2007); In re Student With a Disability, 108 LRP 45824 (SEA WV 6/4/8).

In view of the foregoing, the following relief is hereby awarded:

A. The expulsion and the February 13, 2009 manifestation determination

1. The conclusion of the manifestation determination committee of February 13, 2009 is hereby reversed.

2. The expulsion and suspension of the student for the conduct in question are hereby invalidated, and the school district shall correct student's records to show that the student committed the actions on February 3, 2009 as alleged but that said actions were a manifestation of his disabilities.

3. The placement at the alternative school is hereby overturned. After the outside behavioral consultant develops an appropriate behavioral intervention plan for the student pursuant to the relief set forth herein, the student's placement shall be that specified in the March 24, 2008 IEP, or some other placement if the parents and the schools so agree.

B. The Behavioral Intervention Plan/Additional Evaluations

1. The school district is hereby ordered to pay a qualified outside consultant to perform a thorough functional behavioral assessment and to develop an appropriate behavioral intervention plan for the student. The consultant shall also determine whether any other educational evaluations of the student are required. An outside

consultant is being ordered because of the school district's clear disregard for well-settled law concerning disciplinary changes of placement for students with disabilities. Especially egregious was the conclusion by the principal and two teachers that the behavior was not a manifestation of the student's disabilities without seeking any input at all from the student's parents. It is concluded that the equities of the matter require an outside consultant to perform the tasks required by IDEA after a finding of manifestation.

The procedure to be followed for selection of the consultant is as follows:

a. Counsel for the parties shall immediately attempt to agree upon the identity of the qualified outside consultant. If they do agree, the parties should skip to subparagraph d, with all timeframes correspondingly reduced;

b. If the parties do not agree on or before April 15, 2009, as to whom shall be the outside consultant, counsel for the parents shall provide the names and addresses of three qualified consultants to counsel for the schools by the close of business on that date;

c. If the parties do not agree, counsel for the schools shall notify counsel for the parents on or before the close of business on April 22, 2009 as to which of the three consultants has been selected by the schools;

d. Counsel for both parties shall promptly notify the consultant that he or she has been selected and provide the consultant with a copy of this decision;

e. Counsel for the schools shall, on or before April 29, 2009, send to the consultant copies of all previous evaluations of the student and any relevant educational records of the student;

f. Counsel for the parents shall, on or before May 4, 2009, send to the consultant any additional medical records, medication records or educational records. The parents shall immediately sign any necessary consents or releases;

g. The consultant should be specifically advised that time is of the essence and that an appropriate behavioral intervention plan is needed immediately;

h. Within two weeks of the receipt of the consultant's plan, the student's IEP team shall convene and adopt said behavioral intervention plan for the student, unless the IEP team agrees otherwise. At the same time, the IEP team shall conduct any additional evaluations found necessary by the consultant and make any changes to the student's IEP that may be necessary.

2. The school district shall pay for and arrange for the aforesaid behavioral consultant, or another consultant if the parties so agree, to train any school district personnel who might possibly be responsible for implementing the behavioral intervention plan concerning how they should implement the plan while the student is at school and to conduct or cause to be conducted any other necessary evaluations of the student.

3. In the event that the parties cannot agree to the exact nature and specific details of the compensatory education awarded to the student in the next section, the consultant shall determine the exact nature and specific details of the compensatory education to be awarded.

C. Compensatory Education

1. For the reasons set forth above, compensatory education is denied for the period between the January 31, 2008 IEP and the March 24, 2008 IEP;

2. For the reasons set forth above, compensatory education is hereby awarded to place the student in the position he would have been in but for his unlawful expulsion. The student shall, unless the parties agree otherwise, receive compensatory education comparable to the education that he would have received under his March 24, 2008 IEP for the period from his unlawful removal on February 9, 2009, less the education he received at the alternative school, until a new IEP and behavior plan are developed as provided herein.

3. In making recommendations concerning the behavioral needs of the student, the consultant shall be permitted to make recommendations for other educational evaluations that the student may need. The school district seems to have been confused by the student's educational needs the entire time the student has been in the school system. It is instructive that the school system has decided that the student was mentally impaired and later that he just had a learning disability. The school system changed the student from a separate class to a full-time inclusion classroom. School personnel were unaware of their own records as to the prescription medications the student is taking. Also, the student's reading level increased at least three grade levels in less than two months, although two of the student's teachers filed reports with the manifestation determination review committee stating the he continued to have serious reading problems. None of these issues were raised by this due process complaint, and indeed, some of these issues are now time-barred. As a result, no specific relief is awarded herein.

The consultant who is developing the behavior plan needs to be made aware of these past problems, however, in order to determine whether any other educational evaluations may be necessary. If these other educational issues may be affecting the student's behavior, they should be addressed in order to give the behavior plan a reasonable chance of success.

4. In the event that the parties fail to agree to the nature of the compensatory education as specified herein, the consultant identified above shall determine the exact nature and specific details of the compensatory education.

D. Other Relief

The parents have requested certain other relief. The record evidence, however, does not establish a basis for any such relief, however, and all such other relief is hereby denied.

ORDER

It is hereby ORDERED

1. That the relief as specified herein is hereby awarded to the parents and the student as aforesaid;

2. All other relief is hereby denied; and

3. Within one hundred and eighty days of the date that this Decision is issued, the schools shall submit a written report to Ghaski Browning at the West Virginia Department of Education, Office of Assessment and Accountability, documenting all steps the schools have taken to comply with this Order.

APPEAL RIGHTS

Any party aggrieved by the findings or the decision herein has a right to bring a civil action in any state court of competent jurisdiction within one hundred and twenty days from the date of the issuance of the hearing officer's decision, or in a district court of the United States. Policy 2419, Chapter 11, Section 3(N).

ENTERED April 8, 2009

James Gerl, CHO
Hearing Officer