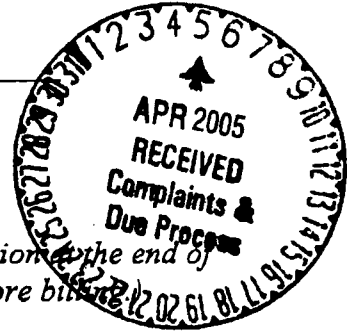


Local Hearing

05-068

State Level Appeal



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...

School Division Public Schools Name of Parents

Name of Child Date of Decision March 31, 2005

Counsel Representing LEA Kathleen S. Mehfoud; Jason H. Ballum Counsel Representing Parent/Child n/a

Initiating Hearing Parent Prevailing Party School Party

Hearing Officer's Determination of Issue(s):

- 1. The proposed placement of student by School as per its proposed IEP of Feb. 15, 2005, namely at locus of school is appropriate
2. Parents request that the Feb 15 IEP be implemented at School is denied

Hearing Officer's Orders and Outcome of Hearing:

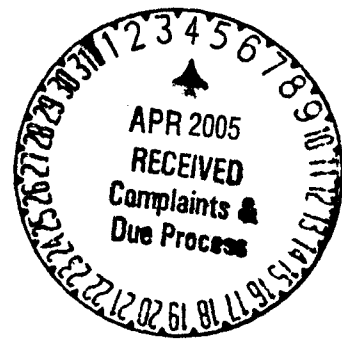
- 1. The IEP for student dated February 15, 2005 is appropriate; it provides student with FAPE, and it is therefore confirmed.
2. Parents request for the implementation of said IEP at School is denied

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.

William E. Rolloca Printed Name of Hearing Officer

William E. Rolloca Signature

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF EDUCATION



v. [redacted] )  
Parent, )  
IN RE: )  
Student )  
)  
)  
)  
)  
)  
)  
)  
)

**DECISION**  
**(a)**  
**I**  
**PROCEDURAL HISTORY**

On February 16, 2005, Parent filed a formal request for a Due Process Hearing arising from her dissatisfaction with the current placement of her youngest son (Student) and her dissatisfaction with the IEP and placement proposed for her son by the IEP Committee dated February 15, 2005. Parent and Student had due notice of, and attended that Committee meeting (School Ex. 60). Parent was advised of the option of mediation by School (See Request for Due Process Hearing and School's letter of February 22, 2005) and by the undersigned at Pretrial (See Pretrial Order attachment). Parent, instead, requested a prompt due process hearing.

The undersigned was advised of his appointment on February 25, 2005. A telephonic pretrial was held on March 3, 2005. The hearing was set forth, and held on March 18, 2005.

Parent asked to be advised of the undersigned's decision as soon as possible so that she could make "other arrangements" in the event her requests were not granted. She asked, and School agreed, that the undersigned advise her (and School) of his decision by telephone conference call prior to the filing of the written decision. All agreed that the written Decisions herein would nonetheless be timely filed, namely by April 2, 2005.

Parent was timely advised of her procedural rights (See School letter of February 22, 2005 and attachment). Parent elected to appear pro se. She also requested that Student and his oldest brother be allowed to testify. School objected on the ground that the names of these witnesses were belatedly disclosed. Undersigned overruled that objection, as well as School's objection to Parent's three exhibits, on the ground that these procedural violations were technical and resulted in no harm to School's case, School being fully aware of Parent's position prior to trial. The substance of the Decision and Order herein were orally conveyed to the parties on March 29, 2005. The written Decision was filed on March 31, 2005.

## II.

### ISSUES

The principal issue raised by Parent's Request for a Due Process Hearing herein is whether the School's proposed placement of Student (who all agree is properly designed as emotionally disturbed) at School's "1" facility, a school designed to educate emotionally disturbed students) is appropriate. Conversely, should Student be placed, as Parent wishes, in a self-contained setting at School, where Parent is an art teacher. An earlier issue was whether Student's home-bound placement should

continue. All parties now agree it should not, so this issue is moot.

### III

#### SUMMARY OF THE TESTIMONY \*

##### (i)

##### Student

Student, a well dressed, slight boy of twelve years was polite. He intelligently responded to all questions put to him. He impressed the undersigned with his sincerity, his mature attitude for his age, and what appeared to be a genuine desire to improve both his demeanor and grades while at school. He candidly admitted that in the past there had been numerous incidents of aggressive behavior by him; and that he had threatened to harm or kill others. In his defense he felt that he had been provoked, and was reacting to persecution and teasing by other students. He stated that when these incidents occurred his mind went blank, or sometimes black, and that he really was impulsively responding to a bad situation. He also believed that more often than not, he was solely blamed by School when others were equally or more at fault. He felt that his teachers would not protect him or take his side, which aggravated his behavior. Student added that his outbursts were spontaneous often arising from his frustration when no one would understand his position. Student, nonetheless, expressed remorse and believed he had outgrown or changed his aggressive conduct.

\* **The transcript of the testimony herein was not received prior to the preparation to the instant decision. Accordingly, no citations to the transcripts are set forth herein.**

Student pleads to be returned to \_\_\_\_\_ School, where he had earlier attended, had obtained good grades and felt comfortable. He believes he could do well there. Student said that he now had two primary goals: First to do well in his studies, achieving "A's", and secondly to play basketball. He did not want to return to live with his father in West Virginia, nor did he wish to attend the \_\_\_\_\_ School.

(ii)

\_\_\_\_\_ is Student's oldest brother. \_\_\_\_\_ a well mannered and well spoken freshman at George Mason University, who is active there in a band and other extra curricular activities, strongly defended Student. \_\_\_\_\_ felt that one of Student's problems was that Student could not appropriately express himself which frustrated him and often led to Student's aggressive conduct. \_\_\_\_\_ did not believe that Student's middle brother was a good influence and represented a poor role model. \_\_\_\_\_ felt that Student needed to be with his mother and was now making real progress in controlling his conduct. \_\_\_\_\_ also did not believe that Student really wished to harm or kill others - such outbursts being more in the nature of reaction to situation where Student felt he was being misunderstood and unfairly singled out for punishment.

(iii)

Ms. \_\_\_\_\_

Ms. \_\_\_\_\_ is an experienced, certified Special Education (Sp. Ed) teacher. She taught Student in two of his academics while Student was in a self-contained class at \_\_\_\_\_ School, \_\_\_\_\_ Public School ( \_\_\_\_\_ ). She was also a member of the IEP team

which prepared the December 9, 2004 IEP for Student covering his home-bound education (i.e., from December 2004 up to April 15, 2005).

Ms. described Student as an alert, appealing young boy who had serious emotional problems. She said that she always had to be "on guard" with Student, who could quickly become aggressive and/or confrontational. At other times he was polite and contributed to the class. In response to a question by Student's mother, Ms. testified that sometimes Student was provoked into his misconduct, yet on other occasions he initiated the problem. In one week she had to remove Student three times - usually for fighting.

Ms. Givens detailed two of the more serious disturbances involving Student. Thus, on one occasion, Student induced himself to throw up - thereafter challenging Ms. and the class, to "lick it up". She testified that her class, which normally contained ten or so students, was horrified by this incident.

A more serious incident occurred on December 2, 2004. At this time, after returning from lunch, Student got into an altercation with a fellow student, calling him names and pushing and shoving him. Ms. intervened but Student persisted in his conduct, saying he would punch out any teacher if he so wished.

While Ms. was trying to calm Student, Student said he was going "to kill his classmate", stating that "he wished his teachers would let him do what he wished", which is "kill, kill, kill"; that all he wanted for Christmas was to be able to kill.

Student also related to Ms. at this time that he would end up just like [one of] his brothers, in a straight jacket...in a padded cell, then telling her about his family history.

Ms. [redacted] was of the opinion that the December 9, 2004 IEP and the proposed IEP of February 15, 2005 were reasonably calculated to provide Student with a meaningful educational opportunity and would provide him with an appropriate free public education.

(iv)

Dr.

Dr. [redacted] is a licensed clinical psychologist. She received her doctorate at George Washington University and her Doctoral Fellowship at Johns Hopkins in 1995. She has been the School's psychologist for [redacted] since October 2004 and, as the Central Office Threat Assessment Coordinator, conducted the Threat Assessment of Student on January 18, 2005 (See Sch. Ex. 59).

Dr. [redacted] explained that the threat assessment test used by her was adopted from an FBI model which objectively ascertains 24 risk factors as well as 6 protective factors. Student displayed 19 out of the 24 risk factors but only 2 out of the 6 protective factors.

Student was referred to her for evaluation and testing after the incident on December 2, 2004, (earlier set forth by Ms. [redacted]) and his subsequent hospitalization (See Facts, infra).

As a result of the aforesaid test and her in depth evaluation of Student, Dr. [redacted] assessed Student as presenting a high risk with regard to harming himself or others. (Her detailed report of February 2, 2005 is in evidence as Sch. Ex. 59 and will not be repeated here). She recommended that Student, at Parent's expense and choice, obtain outside psychiatric treatment for Student.

Dr. [redacted] pointed out that Student's disorder was relatively severe and thus he needed well defined boundaries and direct instruction to succeed. It was her expert opinion that the proposed February 15, 2005 IEP would provide Student with a reasonable opportunity to

acquire a meaningful educational benefit. She also believed that Student would be best served in the public day school ( ) as distinguished from a less restrictive setting. It was her opinion, likewise, that ( ) was the least restrictive environment in which to educate Student.

Upon cross examination Dr. ( ) explained that she had treated numerous children who had emotional disorders similar to Student's. She also explained that one of the characteristics of this type of emotional disorder was the belief by the child that he or she was always being picked on and merely reacting to the perceived oppression. Dr. ( ) noted, that sometimes this was the fact, but at other times the child was the initiator. It was also noted that, at this time (i.e., January 2005) Student is not capable of expressing his emotions in an age-type manner. (Thus, in her report which she affirmed in her testimony, she stated: "He currently struggles with emotional extremes and aggressive behavior. Most importantly, he responds to auditory and visual hallucinations which makes his behavior unpredictable and potentially dangerous")

(v)

Mrs.

Mrs. (certified in regular and special education as well as in school supervision) is the supervisor of special education for the ( ) since 1991. She is familiar with Student's file and history, and was a member of the IEP Committee preparing the February 15, 2005 IEP proposed for Student.

Mrs. ( ) verified that School's Exhibits 1 through 62 (which were heavily relied upon by the undersigned) were true and accurate to her best belief and were records kept in the ordinary course of business by School or duly received by School.

Mrs. ( )'s evaluation of Student and his needs were similar to the views expressed by Ms. ( ) and Dr. ( ). Mrs. ( ) was of the firm opinion that the February 15



proposed IEP was reasonably calculated to provide Student with a meaningful educational opportunity at the public day school (PACE).

She described \_\_\_\_\_ as follows: It is a small school of about 40 students, all of whom were classified as emotionally disturbed (ED). It is staffed by highly qualified Sp. Ed. teachers experienced in teaching ED students. It has on staff a psychologist able to intervene, on a moment's notice, in a behavioral situation. It also has on staff roving security experts who can protect the students when necessary. While \_\_\_\_\_ is an academics school, folded into its instruction and environment is behavior intervention and counseling.

She, as Ms. \_\_\_\_\_ and Dr. \_\_\_\_\_, believed Student needed direct instruction in a structured environment, which \_\_\_\_\_ could supply. Thus, Student would be in a class with 4 or 5 other students, taught by a Sp. Ed. teacher and a trained assistant. She felt this high ratio of teachers to students was needed in order to educate pupils such as Student here. Accordingly, Mrs. \_\_\_\_\_ was of the opinion that PACE constituted the least restrictive environment (LRE) in which to afford Student an appropriate free public education (FAPE).

iv.

Mrs. \_\_\_\_\_

Mrs. \_\_\_\_\_, Student's mother (Parent), lives with Student in \_\_\_\_\_ County. Student's father, for job reasons, moved to \_\_\_\_\_ County, West Virginia. She testified that she intended to rejoin her husband as soon as circumstances permitted.

Mrs. \_\_\_\_\_ is the Art teacher at \_\_\_\_\_ School, \_\_\_\_\_ and feels that she has considerable experience in teaching middle school students, some of whom are problematic.

Parent appeared pro se, so her testimony is derived primarily from her opening and closing remarks, which she verified as truthful.

Parent's position is this: While she recognizes Student's ED and supports his education by way of Sp. Ed classes (such as self-contained classes at a general school), she feels that the exhibits and School's case unduly stresses Student's negative behavior while ignoring his many good qualities. And, while she does not dispute the major behavioral incidents, she feels that most were caused by Student's classmates' conduct - and that Student was reacting for the most part. She also believed that many suspensions were based on minor incidents which could have been resolved in other ways - and that also Student's teachers did not understand his problems or take his side.

Parent was particularly opposed to the selection of \_\_\_\_\_ as the location for Student's proposed future education. Thus, while she did not disagree with much of the February 15<sup>th</sup> IEP, she was, and is, adamant, that Student not attend \_\_\_\_\_ - where one of his brothers attended with dismal results. She also did not like \_\_\_\_\_ where, she believed, several of his classmates, had ganged up on Student. Instead, she urged that Student be taught in a self-contained class at \_\_\_\_\_ School, where he earlier attended and received good grades. Parent stressed that she would make other arrangements, regardless of the hardships to her, if Student could not return to \_\_\_\_\_

Finally, the principal basis of Parent's request that Student return to \_\_\_\_\_ was that since early January 2005, Student was a changed person - now a man willing to take responsibility for his actions, desiring to achieve "A's" in his studies. She attributed this to recent psychological treatment and use of Ridlin. She felt \_\_\_\_\_ with its more disruptive pupils, would counteract Student's newly achieved progress.

#### IV.

#### DISCUSSION

(a)

#### Facts

There is very little controversy, if any, as to the governing facts, most of which are set forth in contemporaneous records kept in the ordinary course of business by the School. The issue is, given these undisputed facts, where should Student be placed, at School or at the School?

Student began his schooling in Public Schools in the First Grade (Sch. Exs. 2, 3) where he was initially determined to have developmental delays (Sch. Ex. 3). This classification was later changed, to emotionally disturbed (ED) (Sch. Ex. 5) which continues to this day (Cf. Sch. Ex. 60). He is, and always has been, determined to be eligible for special education (Sp. Ed) services and is entitled to the protection of the Individuals with Disabilities Education Act (IDEA).

Beginning from the Student's early days in the School system, Student was given to aggressive, inappropriate and disrespectful behavior (See e.g., Sch. Exs. 4, 9). These incidents were meticulously documented by School (See e.g. Sch. Ex. 4, 9, 11). Appropriate intervention by School was promptly instituted (Sch. Exs., 4, 9, 11)

In May 2001 when Student was 9 years old and at Elementary School, Student was extensively evaluated by School's child psychologist intern (Sch. Ex. 11). She placed Student's cognitive assessments in the low average range, due to his ED. With regard to his behavior she noted:

“ has had a history of behavioral difficulties which continue to escalate. His own assessment of himself indicates he is at risk. There is evidence of aggressive, acting-out behavior as well as oppositional defiant behavior.

\*\*\*

He does appear to need a highly structured setting which uses behavioral management techniques to help him learn how to internalize better self-control. Academically, needs skills taught in a very concrete manner, with much drill and repetition. He does best with hands-on learning.” (Sch. Ex. 11).

This same aggressive pattern continued as Student progressed through grade school (See Sch. Exs. 12-14); also see Sch. Ex. 18, wherein it was noted that Student had threatened to blow up his house as well as threatening to commit suicide, expressing himself through cartoons as well as words. In March, 2002, Student was briefly suspended because of this and similar conduct (Sch. Ex. 18).

School responded swiftly and appropriately to correct Student’s acts of aggression/defiance seeking to not only protect Student and his classmates but also to keep Student on task (See Sch. Ex. 20). Another constant in the history of this case was the prompt preparation by School of IEP’s for Student, as to which Parent always gave her consent. (See e.g. Sch. Exs. 7, 15, 20, 26, 34, 41 and 55)

Turning to Student’s more recent history, the same types of inappropriate behavior persisted, even increasing in severity (Cf. Sch. Ex. 37, 39, 44 and 46-50). A referral of home based counseling to correct Student’s aggressive behavior was, at best, moderately successful. Thus, when Student was at School (where he was transferred to at Parent’s request (Sch. Ex. 22)), Student was briefly suspended in September 2003 for assault on a fellow

student without a weapon (Sch. Ex. 25); in December 2003 for fighting (Sch. Ex. 23); and again in March 2004 for fighting (Sch. Ex. 23). The report from [redacted] Child Study (to whom Student was referred in October 2003) noted that Student was talking "quite a bit" about "the devil and death" (Sch. Ex. 24). On the plus side, Student achieved better grades at [redacted] than those he received in grade school (Sch. Ex. 35). And, he often participated in class discussions, responding in a thoughtful, well mannered fashion.

In August 2004 Student, transferred, at Parent's request, to the [redacted] (Middle) School in [redacted] County, West Virginia. At this time Student lived with his father, who, for work reasons, had earlier moved to [redacted]. Suffice it to say this was not a good environment; and the role model set by another elder brother of Student, who was also living with Student's father, was poor. Student's behavior at [redacted] was no better than at [redacted] (See e.g. Sch. Ex. 36-41). Student returned to [redacted] School in [redacted] School in November 2004 (Sch. Ex. 42).

Upon his return to [redacted], Student's aggressive and disruptive behavioral pattern persisted (Cf. Sch. Exs. 43, 44), including a bizarre event when Student purposely threw up and challenged his teacher and his classmates to "lick it up" (Sch. Ex. 44). On November 29, 2004, Student was suspended by [redacted] for physical altercations (Sch. Ex. 45).

On December 2, 2004 at [redacted], just after lunch, Student tried to attack one of his classmates but was restrained by his Sp. Ed. Teacher, Mrs. [redacted]. At this time Student repeatedly said he wanted to kill his classmate; and that he wished his teachers would let him do what he wanted to do, namely to "kill, kill, kill"; that he wanted to end up like one of his other brothers - namely "in a straight jacket" "in a padded cell" under a suicide watch, "just like my

brother”, adding “all I want to do is think of killing myself. My brother did it and he went to , you know” (Sch. Ex. 47).

After being taken to the assistant principal, Student repeated his wish to kill himself. (Sch. Ex. 48); and in front of the head of security at Student repeated his threat to kill someone, saying “give me a knife and I will show you” (Sch. Ex. 49).

Student was then removed from School, and on the same day (December 2) taken to Community Services and then to CJW Medical Center in Richmond, where he was admitted for evaluation (Sch. Ex. 52).

Student was discharged by CJW into the mother’s care on December 6, 2004. The Discharge Summary set forth a history of self-mutilating behavior by Student (Sch. Ex. 22, p. 1) This Report also reflected a chaotic home environment for Student and referred also to his admissions of having hallucinations (Sch. Ex. 52, p. 2)

CJW recommended medicinal intervention, which Parent refused. CJW further recommended that Student be treated by a psychiatrist of mother’s choosing, at her expense, along with outpatient therapy at Kimberly Carr Clinic (Sch. Ex. 52, p. 2).

On December 12, 2004, Student was temporarily withdrawn from School. Home based instruction was requested and granted (Sch. Exs. 54, 55). On January 18, 2005, Student, with mother’s consent was referred to School’s Threat Assessment Program. (Sch. Ex. 58). In this regard, School had earlier adopted the FBI’s model for threat assessment. It provides a fact-based determination of the risk of a student harming himself (herself) or others (Sch. Ex. 58). After an extensive assessment and review, Student was found to display 19 out of the 24 risk factors, only 2 out of 6 inhibiting factors (Sch. Ex. 58, p. 3). The Threat Assessment’s Report concluded that Student represented a “high risk for violence toward others” (Sch. Ex. 58, p. 4),

which was incident specific and could arise anytime if the right circumstances arose (Sch. Ex. 58, p. 4) The report urged psychiatric treatment at Parent's option and expense as well as parental conducted behavior modifications (Sch. Ex. 58, p. 5).

Student's temporary withdrawal ("furlough") from school ended on January 19, 2005, but he continued to be home-bound. Earlier, on December 9, 2004, an IEP was developed for Student calling for home based instruction, to begin on December 12 and end on April 15, 2005. Parent consented to this IEP (See Sch. Ex. 55).

In the interim Parent had requested that Student be transferred from \_\_\_\_\_ back to \_\_\_\_\_

This request agreed to on January 5, 2005 (See Parent's Ex. 1, 2) but later rescinded (Parent's Ex. 3). Student was and will be Home Schooled until April 15, 2005 pursuant to the aforesaid IEP. Student has done well academically while being home schooled.

On February 15, 2005 an IEP Committee was convened to prepare a new IEP for Student for the period beginning April 15, 2005. Both Parent and Student attended the IEP meeting. While Parent agreed with the substance of this proposed IEP, (namely the objectives and proposed instructional methods) she disagreed with the geographical placement of Student at the \_\_\_\_\_ School. Both she and Student were adamant that Student return to \_\_\_\_\_ School.

At this point, it is helpful to briefly review the substance of the various earlier IEP's prepared for Student up to February 15, 2005 (See Sch. Exs. 7, 15, 20, 34, 41 and 55). All of these IEP's were consented to by Parent. All recognized Student's ED disability and the need for special educational services. All recognized that Student's ED interfered with the ability of \_\_\_\_\_ School to give academic instruction and Student's ability to receive instruction. All provided \_\_\_\_\_ for special educational services; all mandated that Student be educated in a small classroom

setting by Sp. Ed. Teachers (along the lines earlier suggested by Dr.      ). Accordingly, virtually all of Student's academics up to his withdrawal in December 2004 were provided in self-contained classes located within a general school setting but conducted by Sp. Ed. teachers.

In recognition of Student's needs, School in its proposed February 15, 2005 IEP, now at issue, recommends placement at the      School (Sch. Ex. 60).

The      school is (which is referred to as "public day school") is a highly structured school limited to students with Emotional Disorders. It has on staff an experienced school psychologist who can intervene in a matter of a moment if needed. Its Sp. Ed teachers are expert in teaching ED students; and most importantly its classes are much smaller than the self-contained classed at      . Thus, Student would be in a class at      with 4 or 5, but no more than 8 of his age grade peers, taught by a Sp. Ed teacher trained in ED and assisted by an experienced assistant. Such a setting allows for immediate behavioral intervention and more concentrated instruction, all of which is needed to keep Student on task. Given Student's better performance while being home schooled one-on-one, the higher ratio of teachers to pupils and the concentrated manner of instruction proposed by School at      would appear to give to Student a better educational opportunity than offered in a self-contained class at a general school. Indeed, this was uniform opinion of School's three witnesses. In any event, given the relatively poor results, both behaviorally and academically, of Student in self-contained classes, while at a general school, a change to a more structured program such as      provides is clearly warranted.

In sum, the exhibits and testimony herein establish by clear and convincing evidence that the February 15, 2005 IEP proposed by School represents the least restrictive environment in which an appropriate educational opportunity can be afforded to Student; and one which is reasonably calculated to allow Student to achieve meaningful educational benefits. The fact that



one of Student's older brothers had a bad experience while at            does not diminish or refute these conclusions, although it clearly has prejudiced Parent and Student against

Given Parent's dedication to Student and Student's and Parent's heartfelt desire to return Student to            School, coupled with the sincere representations that Student is a "new person" now "in control" and "reformed", desiring only to achieve "A's" in his academics and play basketball, a person with unlimited discretion might well return Student to a self-contained class at            . However, this Hearing Officer does not have that unlimited discretion. He, just as School, is bound by the provisions of IDEA and the cases construing and implementing that Act. And, he, like School, must be mindful not only of the education of Student, but also of the safety of Student and his classmates. As more fully shown below, these strictures require approval of the February 15, 2005 IEP, including the provision of educational services for Student at

(b)

#### Governing Law

The Individuals With Disabilities Education Act (IDEA) 20 U.S. CA 1400 et seq. was enacted by Congress to require a School district which receives Federal funds to provide each disabled child with a "free appropriate public education" (FAPE). 20 US CA 1400 (a)(1)(A) FAPE consists ... of educational instruction specially designed to meet the unique needs of the handicapped child, ...supported by such services as are necessary to permit the child to benefit from the instruction Board of Educ. v. Rowley, 458 US 176, 188-89 (1982).

The appropriate education required by FAPE should

“... not be confused...”with the best possible education...Once a FAPE is offered, the school district need not offer additional educational services.” MM by DM & EM v. School District of Greenville Cy, 303 F. 3<sup>rd</sup> 523, 526-527, 531 (4<sup>th</sup> Cir. 2002).

Nor does FAPE require that a school district provide the best education possible County School Bd. Of Henrico Cy. v. Z.P., Op.p. 3, No. 03-2338 (Feb. 11, 2005). Nevertheless, FAPE requires something more than some “minimal” academic advancement, no matter how trivial” County School Bd. Of Henrico Cy v. Z.P., supra, Hall ex. Rel. Hall v. Vance Cy School Bd, 774 F2d 629, 636 (4<sup>th</sup> Cir. 1985). In short, there must be an educational benefit. County School Bd. Of Henrico Cy v. Z.P., supra; albeit not necessarily the best Hartmann v. Loudoun Cy Bd. Of Educ., 118 F 3<sup>rd</sup> 996 (4<sup>th</sup> Cir. 1997)

FAPE is provided by the development for each disabled child of a periodic Individual Education Program (IEP). This “must contain statements concerning the disabled child's level of functioning, set forth measurable annual achievement goals, describe the services to be provided, and establish objective criteria for evaluating the child’s progress. MM supra at p. 527. See also 20 USCA 1414 (d)(1)(A). And, an IEP is legally sufficient if it is ... reasonably calculated to enable the child to receive educational benefits. Rowley, supra et. p. 207.

Procedurally, a parent must receive notice of and have the opportunity of attending the IEP meeting at which the IEP is developed; and the IEP team must include a representative of the child’s school district, the child’s teacher, and where appropriate, the child. 20 U.S.C.A. 1414 (d)(1)(B). Others deemed desirable may also be invited.

The undisputed facts clearly establish that each IEP prepared for Student by School, including the proposed February 15, 2005 IEP met these requirements. Indeed, Parent does not seriously dispute this. Parent’s disagreement is primarily with the locus at which February 15

proposed IEP is to be implemented. As pointed out by School's counsel, once a valid IEP is created, the legal requirement by IDEA for provision of an appropriate educational placement is met - the selection of the specific school location at which the IEP is to be implemented then becomes an administrative decision which is left to the discretion of the School. AW v. Fairfax County Public Schools, 372 F. 3<sup>rd</sup> 674, 682-83 (4<sup>th</sup> Cir. 2004), accord: Barnett v. Fairfax County School Board, 927 F. 2<sup>nd</sup> 146, at 152-53 (4<sup>th</sup> Cir. 1991).

Moreover, Hearing Officers and courts should defer to the expertise of professional educators when it comes to educational methodologies and strategies required to effectively educate Sp. Ed. Students. Barnett v. Fairfax County School Board, supra, wherein the Court held that ..."while a school system must offer a program which provides educational benefits, the choice of the particular education methodology is left to the school system" at p. 156. Accord: Alexander K. V. Virginia Bd. Of Education, 30 IDELR 967 (E.D. Va 1999); See also Hartmann v. Loudoun Cy School Bd., 118 F. 3<sup>rd</sup> 996 at 1000-01) (4<sup>th</sup> Cir. 1997); and MM by DM and FM v. School District of Greenville County, 303 F. 3<sup>rd</sup> 523 at 531 (4<sup>th</sup> Cir. 2002).

Applying these legal directives to the instant case, the choice by School of for Student's educational location must be respected. This is particularly apt here when it is recalled that has very small classes, a high ratio of teachers to pupils (here 1 to 3), the instant availability of experts trained in behavioral intervention and the opportunity for much direct instruction.

Nor does the doctrine of LRE compel the selection of a self-contained class at a general school. For the doctrine of LRE does not require mainstreaming where (1) the disabled child would not receive an educational benefit from mainstreaming; (2) any marginal benefits of mainstreaming are outweighed by benefits obtainable in a more selective setting; or (3) the

disabled child is a disruptive force impeding education in a regular classroom setting.

Hartmann, supra at 1001-1002).

If Student had been obtaining good grades with few behavioral incidents while in self-contained classes in a general school setting, the School's choice of \_\_\_\_\_ might be challenged. But the uncontroversial evidence reveals the opposite - namely, relatively poor academic progress coupled with escalating behavioral incidents while Student was in self-contained classes at a general school. Conversely when there was direct control and one on one teaching, such as while Student was being home taught, there was greater academic progress.

Significantly School's three witnesses, Dr. \_\_\_\_\_ (a highly skilled child psychologist) and Mrs. \_\_\_\_\_ (Student's Special Ed teacher at Godwin) and Mrs. \_\_\_\_\_ (an experienced, highly qualified Director of Sp. Ed. For \_\_\_\_\_ Schools) fully concurred with decisions to send Student to \_\_\_\_\_. They believed it was the least restrictive environment in which to provide Student with FAPE. As before noted, their expertise and views are entitled to great weight. MM, supra, Hartmann, supra; and accordingly must be deferred to by the undersigned.

Although school did not rely upon the added safety provided for Student and his classmates at \_\_\_\_\_ this is an added reason for the selection of \_\_\_\_\_ in the proposed IEP now under consideration. True it is that School reacted effectively to minimize the adverse effects of Student's behavior while he was in self-contained settings. However, \_\_\_\_\_ provides an even more effective educational platform which can provide even faster behavioral intervention, thus reducing the loss of educational time for Student due to his outbursts as well as enhancing the safety of Student and his classmates.

In summation, the IEP proposed by School for Student on February 15, 2005, is reasonably calculated to provide Student with a meaningful educational opportunity, designates Student's learning disorder - namely ED; it meets his needs; it sets forth his level of functioning; it provides for effective and proven teaching methodologies; it sets forth clear objective annual achievement goals with the means to objectively determine if these goals are being met, in considered the least restrictive environment and it describes the services to be provided. In short, it fully meets the requirements of a valid IEP (Cf. Rowley). It thus supplies Student with FAPE. Therefore it must be confirmed.

V

**OTHER MATTERS**

Two further matters should be briefly discussed: School urges that this case be decided in its favor because, inter alia, Parents have failed to carry their burden of proof to establish by a preponderance of the evidence, that the February 15, 2005 IEP will not supply FAPE, citing Weast v. Schaffer, 377 F.3d 449 (4<sup>th</sup> Cir. 2004). The United States Supreme Court is currently considering in Shaffer v. Weast, 104 LRP 35502, 4<sup>th</sup> Cir. 03-1030 who has the burden of proof - Parent or School. Accordingly, the undersigned has evaluated this case under the assumption that the Supreme Court may apply the stricter standard of requiring School to prove the suitability of its IEP by a preponderance of the evidence. Applying this standard, School nonetheless prevails here. Indeed, it has proved the suitability of the February 15, 2005 IEP by more than a preponderance of the evidence.

Secondly, Parent now has misgivings about her consent to the Threat Assessment of Student conducted in January, 2005. She believes she instead should have requested a Manifestation Hearing. This misgiving misunderstands the difference between the two. The

Threat Assessment is totally divorced from and separate from a student's manifestation determination. A threat assessment may be given to any Student, general or special ed, when circumstances warrant. A Manifestation hearing on the other hand is needed to determine if the misconduct in question is related to or caused by a special ed student's learning disorder. If it is, educational services under IDEA must be continued. If not, the student could be summarily dismissed from school. Here, Student's aggressive behavior is clearly intertwined with and caused by his learning disability, namely his ED. Both Parent and School accept this as a given. Accordingly, there was never a question as to the fact that Student's misconduct was due to his ED. Thus, under IDEA School must continue to provide him with educational services, which it did and continues to do.

## VI

### NO PROCEDURAL ERRORS

No procedural errors were alleged by Parent with regard to the February 15, 2005 IEP. A review of the record reveals none: Due notice was given to Parent, Parent and Student attended; the pertinent IEP committee was validly constituted, its contents were fully discussed and appropriately set forth. See: MM, supra, 1t p. 527 Accordingly, the February 15, 2005 IEP must stand.

Notwithstanding Parent's sincere pleas for her son's returned to \_\_\_\_\_, the governing law and evidence herein require the following:

## VII

### FINDINGS OF FACT

1. Student is a well mannered, slight boy, twelve years old (born ) who currently is receiving home-bound Sp. Ed. Instruction.
2. Student lives with his mother (Parent) in where she is an Art teacher at the School, Public School System ( ).
3. Student's father recently relocated to , West Virginia for job related reasons.
4. Parent testified that she intended to return to live with her husband as soon as circumstances permitted.
5. Student began his education in the
6. Student was early classified as having a developmental disorder ("DD") and entitled to special education (Sp. Ed.) Services pursuant to the Individuals with Disabilities Education Act (IDEA).
7. With Parent's consent Student's pertinent IEP's called for his education in a self-contained class (Sch. Exs. 2, 6).
  - a. The May 12, 2000 Individualized Education Program (IEP) noted: "[Student] requires a small class environment with strong limits and boundaries to help him demonstrate appropriate behavior. He also needs a small class environment to help him achieve academic skills" (Sch. Ex. 2, p. 2)
  - b. This recommendation is in accord with the psychological evaluation conducted by Ms. on May 19 (Sch. Ex. 3).

8. On May 24, pursuant to an earlier evaluation consented to by Parent, Student's disability was changed from DD to Emotionally Disturbed (ED) (Sch. Ex. 6)
9. The (IEP) for Student, dated Jun 5, 2000, consented to by Parent, continued the earlier placement, noting also that Student displayed an expressive language impairment, with the Student being eligible for (and receiving) speech (language) related services (Sch. Ex. 7, p. 2).
10. Student's classification as ED and placement in a self-contained class (in a general school taught by a Sp. Ed teacher continued, for the same reasons as earlier set forth (See Finding of Fact 7) as Student progressed from grade school to Middle School and up to December 2004. (See Sch. Exs. 2, 3, 5, 9, 11, 15, 17, 20, 26, 34, 55, 60).
  - a. Each of the requisite IEP's for Student prepared by up to February 15, 2005, was consented to by Parent and provided Student with FAPE. (See Sch. Exs. 2, 7, 15, 17, 20, 26, 34 and 55).
  - b. Student's academic marks were relatively poor although he progressed with his peer group from grade to grade.
11. In December, 2004, due to behavioral programs set forth more fully herein, Student was furloughed from School and given home-bound education.
  - a. The IEP covering Student's home-bound education was consented to by Parent and provided him with FAPE (See Sch. Ex. 55).
12. Student's ED disorder was and is relatively severe, screening his ability to receive educational input.



- a. As a result of Student's ED he needs a small classroom setting with clear limits and bounds, prompt behavioral intervention and direct instruction, either in one-on-one or in a very small class with a high teacher to student ratio in order to learn (See e.g. Sch. Ex. 11).j
  - b. Conversely, Student often had good days, contributing to his class.
13. Student's ED manifested itself by emotional outbursts, verbal threats, pushing and shoving, physical altercations and similar aggressive conduct together with refusals to accept teacher behavioral guidance (See Sch. Exs. 9, 11, 18, 23 and 44).
- a. As a result, Student was often suspended from School (See e.g. Sch. Exs. 18, 23, 43 and 44).
14. During his progress from elementary school to middle school, Student was repeatedly evaluated by \_\_\_\_\_ for his ED and strategies were designed and implemented to control his aggressive behavior while increasing his educational opportunity (See e.g. Sch. Exs. 9, 24, 28, 29, 31 and 39).
15. In August 2004 Student at Parent's request transferred to \_\_\_\_\_ School in \_\_\_\_\_ County, West Virginia.
- a. Student returned to the \_\_\_\_\_ in the Fall of 2004 at \_\_\_\_\_
16. Student's behavioral problems, which were unpredictable, reached a zenith in November and December 2004 while Student was in a self-contained class at \_\_\_\_\_ School, \_\_\_\_\_.
- a. Student was repeatedly talking about the Devil and death (Sch. Ex. 24).

- b. On November 17, 2004, Student purposely induced his vomiting, then told his teacher (Mrs. ) "you can lick it up - the class can lick it up" (Sch. Ex. 44, p. 1).
  - c. Student's earlier proclivity toward talking about suicide and killing others climaxed on December 2, 2004. At this time, after lunch, he got into a fight with one of his classmates. He threatened to kill the "fat bastard"; told his teacher, Ms. that he had the right to punch his teacher if he wanted to; that he wanted to kill his classmate; that he wished his teachers would let him do what he wanted to do - namely, to "kill, kill, kill", that he would end up in a straight jacket at Juvenile Detention just like one of his brothers; and he repeated to the security guard that he wanted to kill students or anyone (See Sch. Exs. 47, 48, 49).
17. Student, on December 2, 2004, was taken from school directly to a Community Service Board then to CJW Medical Center (Chippenham & Johnson Willis) for evaluation and treatment (See Sch. Ex. 52).
- a. Parent refused to allow CJW to implement drug intervention due to her concerns about Student's health.
  - b. CJW noted Student's admission of having hallucinations.
18. Student was discharged into Parent's care by CJW on December 6, 2004 (See Sch. Ex. 52)
- a. CJW recommended psychiatric treatment by a psychiatrist of Parent's choice (and at Parent's expense).

- b. CJW recommended behavioral intervention by Parent while Student was at home.
19. An interim IEP was developed for Student on December 9, 2004 which Parent consented to; it provided for home based instruction until April 15, 2005 (See Sch. Ex. 55).
- a. This IEP provided Student with FAPE.
20. Student did not return to School, after discharge from CJW; instead he was “furloughed”, namely, removed from to home based instruction on December 13, 2004 because of his aforesaid threats to kill himself or others (Sch. Ex. 54).
21. Parent, during this period, requested that Student be transferred from to School, where he had earlier achieved better grades. This request was first granted and then revoked (See Sch. 56-57).
22. On January 18, 2005, Student, with Parent’s then consent, was referred to Threat Assessment Process (See Sch. Ex. 58).
- a. had earlier adopted an FBI assessment program which, by objective testing, evaluated a child’s propensity to harm himself (herself) or others.
  - b. Student was determined, after a thorough evaluation, to be of high risk, scoring 19 out of 24 threat indicia and only 2 of 6 inhibiting indicia (See Sch. Ex. 59, p. 3)
23. During the period from his withdrawal from School, Student was provided with home based educational services as per the December 9, 2004 IEP and thus was receiving FAPE.
- a. Student did well academically while being home-schooled.

24. On February 15, 2005 a new IEP was (Sch. Ex. 60) prepared to cover the educational period for Student beginning April 15, 2005 (when he is due to return from home based instruction) and ending in April 2006.
- a. This IEP was prepared after due notice to Parent.
  - b. Both Parent and Student attended, along with Student's regular teacher, a representative of the School, his Sp. Ed. teacher and the supervisor of Sp. Ed. at
  - c. This IEP contained statements of the Student's disability, his level of functioning, measurable annual achievement goals, the special education services to be provided, objective criteria to measure Student's progress and success and the locus fro the provision of said Program (which after discussion was considered to be the LRE) namely at the School.
  - d. This IEP supplied FAPE, namely, it set forth an individualized educational program for Student which was reasonably calculated to provide him with a meaningful educational opportunity at public expense taking into full account his ED and providing appropriate strategies to address this disorder and increase Student's learning opportunity.
25. The School (sometimes referred to as "public day school") is a small school limited to pupils who have ED.
- a. It has very small classes with a high ratio of teachers to pupils.

- b. Student's class would have 5 or 6 students (including Student) and would be taught by an experienced Sp. Ed. Teacher plus an assistant both of whom are skilled in teaching ED students; and who, also are skilled in behavioral intervention with ED students.
  - c. It will provide Student with extensive direct instruction, one-on-one teaching, in an environment with clear limits and boundaries.
  - d. It is designed to keep ED students, such as Student, on task thereby optimizing their educational opportunity.
  - e. It has on staff a child psychologist experienced in treating ED students and who can respond in a matter of moments thereby minimizing any threats of physical harm.
  - f. It has appropriate security to protect its students.
  - g. Once a student at PACE demonstrates he or she has achieved appropriate scholastic and behavioral levels, he or she can transition to a self-contained setting at a public general school.
26. Parent and Student strongly object to the February 15, 2005 IEP proposed for Student because it designates the \_\_\_\_\_ School as the locus for Student's educational services.
- a. One of Student's older brothers apparently attended \_\_\_\_\_ with poor results.
27. According to Parent and Student, Student has matured greatly in the last two months; is currently under appropriate medical treatment and medicinal intervention; is no longer suicidal; no longer wishes to harm others; and wishes only to return to \_\_\_\_\_ in order to achieve "A's" in his academics and play basketball with his peers - in short a totally changed person.

28. Parent has indicated that rather than have Student attend she will make other educational arrangements.

### VIII

#### CONCLUSIONS OF LAW

1. Student, a child suffering from ED, is a child entitled to the protection and terms of IDEA, 20 U.S.C.A. 1400 *et seq.*
2. Student has heretofore been provided with FAPE by PWCS Rowley, *supra*, M&M, *supra*.
3. Parent has not sustained her burden of proof to establish that the proposed February 15, 2005 IEP is inappropriate.
4. School has proved more than a preponderance of the evidence that the February 15, 2005 IEP proposed for Student will provide him with FAPE. JH v. Henrico County School Board, 395 F.3d 185 (4<sup>th</sup> Cir. 2005).
  - a. The February 15, 2005 proposed IEP was the result of a validly formed and compositionally correct IEP Committee as to which Parent had due notice and attended; accordingly, there are no valid procedural faults. Cf. MM, *supra*.
  - b. School has the discretion to select the appropriate methodology of instruction, which was reasonably exercised here. Cf. Hartmann, *supra*.
5. Once an IEP is deemed an appropriate scholastic placement, the choice of the geographical locus (i.e., local school) is vested in absolute discretion of the appropriate school authorities. Cf. A.W. v. Fairfax County Public Schools, *supra*
  - a. Even if said discretion is reviewable, School's exercise of it here was reasonable, and the undersigned therefore must defer to it. See Barnett, *supra*, A.W., *supra*

Amended p. 30. Please substitute

- 6. represents the Least Restrictive Environment for Student. See Hartmann, supra.
- 7. Parent's (and Student's) strong opposition to , primarily because of the perceived maturity of Student, his perceived change of conduct, an earlier unfortunate experience with one of Student's brothers at , and the fact that , may contain some fellow students whom parent and Student feel will be a bad influence, do not constitute legally sufficient reasons to overturn the selection of as the locus for Student's proposed educational placement as per the IEP proposed for Student on February 15, 2005.

IX

ORDER

The proposed IEP for Student dated February 15, 2005 should be and hereby is confirmed. Parent's request for provision of special educational services for Student at School is denied.

March 31, 2005

  
William E. Rollow  
Hearing Officer

X

RIGHT OF APPEAL

Any party aggrieved by this Decision has the right to seek review thereof by any court of competent jurisdiction in the Commonwealth of Virginia within <sup>one (1)</sup> ~~two (2)~~ years from the date hereof, or, regardless of amount in controversy, by bringing a civil action in an appropriate United States District Court to review the same.

CERTIFICATE OF SERVICE

I hereby certify that on ~~April~~<sup>March 31,</sup> 2004, I mailed, by First Class mail, postage prepaid, a copy of the foregoing Decision to each: Jason H. Ballum, Esquire, Reed Smith, 901 East Byrd Street, Suite 1700, Richmond, Virginia 23219-4068, counsel for School; Mrs. \_\_\_\_\_, \_\_\_\_\_, Parent; \_\_\_\_\_, Director of Special Programs, and to the Virginia Department of Education, P.O. Box 2120, Richmond, Virginia 23218-2120, Education; and Dr. Judith Douglass.

  
William E. Rollow  
Hearing Officer