

### CASE CLOSURE SUMMARY REPORT

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

_____	_____
School Division	Name of Parent
_____	_____
Name of Child	Date of Decision or Dismissal
_____	_____
Counsel Representing LEA	Counsel Representing Parent/Child
_____	_____
Party Initiating Hearing	LEA Prevailing Party

Hearing Officer's Determination of Issue(s): Child is a danger; No procedural flaws

Proposed placement by LEA is appropriate for FAPE, and least restrictive environment

Hearing Officer's Orders and Outcome of Hearing: Child to be placed at

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing. The written decision from this hearing is attached in which I have also advised the LEA of its responsibility to submit an implementation plan to the parties, the hearing officer, and the SEA within 45 calendar days.

_____	_____
Printed Name of Hearing Officer	Signature

**VIRGINIA DEPARTMENT OF EDUCATION  
DUE PROCESS HEARING**

vs.

SCHOOLS

This Hearing Officer was appointed to hear the referenced due process case pursuant to the Individuals With Disabilities Education Act. The hearing commenced, at the Schools Administration Building, on , was continued to and ended on . Transcripts of the proceeding were received by this Hearing Officer between and Public School's case was presented by Attorney, ; and the parent's case was presented by Attorney At Law. The primary issue was what constitutes an appropriate educational placement for A secondary issue is whether or not a manifestation review was procedurally flawed.

**PROCEDURAL BACKGROUND**

This matter was assigned to this Hearing Officer on . A pre-hearing conference was held with the parties on during which the issues and order of proceedings were addressed. The hearing was scheduled to commence on , at 9:30 A.M., at the Public Schools Building.

According to the parties, the issues presented are as follows:

- 1) What is the appropriate educational setting for :s:
  - a) Is a more restrictive environment necessary for to receive a free and appropriate public education ( hereinafter FAPE );
  - b) Will a continuation of placement at School constitute a threat to self or others.
- 2) Whether or not a manifestation review conducted by School on was procedurally flawed, in that

misconduct was determined to be a manifestation of disability, but was, nevertheless, removed from the school and placed on home-based instruction.

In addition to addressing the above issues, the parties debated the appropriate forum for the hearing. Ms. [redacted], through counsel, urged that the hearing being held at the Law Library of the [redacted] Circuit Court. In her view, convening the hearing at the administration building of the [redacted] City Public Schools ( hereinafter the LEA ) would have a “chilling affect” on the proceedings. Mr. [redacted] however, noted that the LEA by regulation ( 8 VAC 20-80-76(I)(8), Regulations Governing Special Education Programs for Children with Disabilities in Virginia [ hereinafter the Regulations ] assists the Hearing Officer in arranging for the setting of the hearing. He further noted that the Circuit Court would be an inconvenient forum, especially for the witnesses. This Hearing Officer agreed and determined that the hearing would be held at the School Administration Building.

A further issue addressed at the pre-hearing conference was whether or not the hearing should be expedited. Mr. [redacted] argued that the LEA did not request expedition and that the hearing should proceed under the normal timelines for a due process hearing. However, this Hearing Officer approved the parent’s request for an expedited hearing based on the regulations governing due process proceedings. While it is true that a LEA may request an expedited hearing, a parent may also do so, under the regulations governing disputes resulting from disciplinary actions. Under the facts in this case, the school determined that [redacted]’s misconduct was a manifestation of disability. The school then immediately convened an IEP meeting and determined that it would be best to remove [redacted] from his then educational placement. 8 VAC 20-80-68(C)(6)(a) provides that “if the parent ... disagrees with any decision regarding placement under these disciplinary procedures, the parent ... may request an expedited due process hearing.” See also 8 VAC 20-80-76(B)(3)(b). Since the IEP meeting and the consequent

decision to change [redacted]'s placement flowed from the proceedings detailed in the section of the Regulations governing disciplinary actions, this Hearing Officer determined that the parent had a right to an expedited hearing.

On [redacted], another pre-hearing conference was held to address the issue of which party would first present evidence at the hearing. The parent alleged that the LEA was the moving party since this hearing is an offshoot of the LEA's petition to Circuit Court for an injunction regarding [redacted] placement, as will be addressed infra. The LEA, on the other hand, argued that the parent is objecting to [redacted] proposed placement and, therefore, has the burden of proof. As such, the LEA should not have to justify its proposed placement and the parent should proceed first. This Hearing Officer advised the parties that the Fourth Circuit Court of Appeals has not yet determined which side has the burden of proof in due process proceedings under IDEA, with the exception of manifestation reviews, and that in [redacted] opinion, it is a shared burden. [redacted] further noted that the order of the evidence is a moot point as it relates to the shared burden of proof. It was, therefore, determined that the LEA would proceed first, with any changes in the order of presentation of witnesses, as the parties might agree.

Prior to this matter being referred for due process, it was entertained by a judge of the [redacted] Circuit Court. On [redacted], the [redacted] Attorney's Office, in the person of [redacted] filed a Bill of Complaint and Petition for Injunction, seeking an order to injoin [redacted] from being on the premises of [redacted] School and to further require Ms. [redacted] to enroll [redacted] in a school run by the [redacted] a regional school operated by a consortium of eight local school districts, pursuant to Section 22.1-26 of the Code of Virginia, 1971, as amended.

At the time of the court action, [redacted] was, and continues to be, on home-based instruction. In support of its petition, the LEA alleged that [redacted] would represent a danger to [redacted] self and others were [redacted] to return to [redacted] School. On [redacted]

, the Court held a hearing at which evidence was taken. After the hearing, the Court ordered the parties to participate in mediation, which was to commence no later than . . . . . The Court further ordered that [redacted] was not to return to School and to continue on home-based instruction until further order of the Court. The parties were ordered to return to court on [redacted] with a progress report. Finally, the Court declined to take any further action on the Bill of Complaint. The parties subsequently returned to court on [redacted] and advised the Court that mediation was not successful. The Court then ordered the parties to resolve their disputes in a due process hearing. The previous order directing [redacted] to continue in home-based instruction remains in effect and a status conference was scheduled for [redacted]. The Court additionally ordered the LEA to compensate [redacted] for any lost home-based instruction, which instruction had been delayed.

### THE POSITION OF THE PARTIES

#### THE LEA

According to the LEA, [redacted] is not making academic progress at School, despite being provided a free and appropriate public education ( hereinafter FAPE ). [redacted] educators believe [redacted] is intellectually capable of academic success. However, they allege that [redacted] behavior in school interferes with the learning process. Further, the LEA argues that [redacted] behavior has escalated in this school year, with verbal aggression now being combined with physical aggression. It is the opinion of the staff and administration at [redacted] School that [redacted] is a danger to [redacted] self and others. The Individual Education Plan ( hereinafter the IEP ) committee has, therefore, recommended a more restrictive educational environment for [redacted], in particular in a [redacted] school, which focuses on behavior modification, as well as the standard academic curriculum, which would enable [redacted] to achieve credits for graduation.

#### THE PARENT

mother, prefers that remain at School, in a collaborative educational placement, in which would have a special education teacher assist in the regular education classrooms for certain subjects, with instruction in a self-contained resource room for weaker academic subjects. She has rejected, stating that it would be too restrictive, and that her would not be able to reintegrate into a regular school. Moreover, she denies that presence at School represents a danger to self or others. She is asking that return to School.

### STATEMENT OF FACTS

is a year-old student who is enrolled at School, in the Virginia. has been a recipient of special education since 1995. While outside clinicians have diagnosed with Attention Deficit Hyperactivity Disorder, Depression and Oppositional Defiant Disorder, special education designation is Emotionally Disturbed. mother has not objected to disability label. For at least eight years, has received mental health services from community-based organizations, to no avail. In fact, at two such agencies, those services were discontinued because of lack of progress in curtailing behavioral issues. is currently followed by a psychiatrist for medication management of ADHD.

enrolled as a grader at School in . However, because of lack of academic progress, was retained in grade. has also failed to make academic progress in this school year, and will likely be retained again. The LEA's concern with increased after the Christmas vacation in the current school year. Although in the prior school year, received many disciplinary referrals, some of which resulted in out-of-school suspensions, behavior escalated at the start of , with verbal aggressiveness becoming more physical. In addition to regular and on-going disruptions and insubordination in both the regular education and resource classrooms, as well as in the hallways, was referred for two instances of

assault against a teacher and a security officer. The assault involving the security officer is pending adjudication in the Juvenile and Domestic Relations District Court. Given the alleged assaults on the staff, in addition to which, the LEA viewed as dangerous to self, the IEP team determined that would be best served in an interim home-based setting, until such time as a more permanent educational setting could be determined. Ms. agreed to the home-based placement. At the end of home-based placement, the team recommended that be enrolled at the , a facility run by , which is approximately twenty minutes by car from home. The goals at the are both academic instruction and intensive behavior modification. Ms. , who has met with the Principal of the , objects to the placement and has filed the due process request herein to prevent implementation of the plan. In her opinion, such a restrictive environment will result in quitting school out of frustration.

#### FINDINGS OF FACT

1 ) has been diagnosed as suffering from ADHD, Depression and Oppositional Defiant Disorder. psychiatrist, Dr. has only diagnosed as ADHD, however, the , which provides family counseling, notes in its records that also suffers from Depression and Oppositional Defiant Disorder. Dr. only treated since 2003, since another psychiatrist previously followed . is prescribed Adderall, Wellbutrin and Zyprexa to control ADHD. Parent's Exh. 2 and LEA Exh. 98.

2 ) According to the 90 Day Clinical Progress Assessment Report from : dated , additionally has problems in primary support group, social environment, educational setting and other undefined psychosocial areas. Parent's Exh. 4.

3 ) has received special education services from the LEA since subsequent to initial evaluation as emotionally disturbed. LEA Exh. 106. The most

recent Psychoeducational Evaluation was performed on [redacted] between [redacted] and [redacted] LEA Ex. 106. According to [redacted], the School Psychologist who conducted the evaluation, [redacted] "overall cognitive ability and intellectual functioning is strong and evenly developed across domains." The only area in which [redacted] scored below average was Mathematics.

4) The aforesaid evaluation also noted that [redacted] has behavioral issues. While Ms. [redacted] was not able to fully assess [redacted] in [redacted] classroom environment because [redacted] was usually not in [redacted] assigned classroom when she attempted the observations, she considered the behavior assessments completed by [redacted] teachers. All those assessors commented upon [redacted] aggression, depression, poor study skills and hyperactivity. LEA Exh. 106.

5) According to the testimony of Ms. [redacted], who has a Master's Degree in Education and is a licensed School Psychologist, [redacted] is very bright and has great potential, however, [redacted] negative behavior is causing [redacted] school failure. In her opinion, the more structured setting and close behavioral monitoring at [redacted] would benefit [redacted] academically. If [redacted] were to remain at [redacted] School, in her professional opinion, [redacted] would continue to fail. [redacted], p. 144 et. seq.

6) During the approximate two school years of knowing [redacted], Ms. [redacted] would be called upon by the school administration to counsel [redacted]. This crisis intervention occurred often, during the times when [redacted] was out of control, usually in the school's hallways. Typically, it would take a considerable amount of time and intervention for [redacted] to calm down. [redacted], 140-141, 144, 153. See also, LEA Exh. 47, a Contact Report dated [redacted] which documents the witness' involvement when [redacted] has been out of control. On that occasion, [redacted] explained that [redacted] just "explodes," without giving a reason why. Although this witness has personally seen [redacted] running through the halls bumping into people, [redacted] did not appear to be dangerous. [redacted] 3.



7) . 's most recent triennial eligibility meeting was held on , at the request of mother. wanted to address significant behavioral and academic issues, and requested an updated Functional Behavioral Assessment ( hereinafter FBA ) and Behavioral Intervention Plan ( hereinafter BIP ). The team considered the aforesaid psychoeducational evaluation completed by Ms. : and emotional, behavioral assessments completed by teachers. Those assessments showed areas of concern as follows: a) hyperactivity and attention problems; b) high risk of aggression; c) poor study skills, with typically completing only half of work. teachers additionally noted that refuses adult intervention, often misses classes, roams the hallways and is frequently referred for discipline. The consensus of opinion was that works better in a smaller group setting. was found to be still be eligible for special education services, with a disability category of emotionally disturbed.

8 ) The parent offered the testimony of Ms. , a Mental Health Child and Adolescent Case Manager at Community Services Board. For approximately seven years, she worked as case manager and coordinated services. As such, she attended IEP meetings at school, presented case to the Community Assessment Team ( hereinafter CAT ) and worked with Ms. in order to help It was through Ms. started receiving mentoring services when was in school. , 295, 296. She further testified that case was closed because failed to make progress in treatment. , 305. Although she has not been involved in treatment for the last nine months, during the time period she was case manager, she never felt that was dangerous. , 299. Ms. confirmed that she has no familiarity with recent school behavior.

9) Since has been in therapy with the and which provides family and individual therapy and behavior management. meets with counselor, , at least twice a month. The therapist has been working on ways for to overcome problems associated with

ADHD. However, the primary goal has been to keep [redacted] in school, by focusing on behavior management, social adjustment in school and an understanding and acceptance of school rules and regulations. During [redacted] treatment of [redacted] Mr. [redacted] has seen progress in [redacted] management of ADHD. [redacted], 92-94.

10 ) A 90 Day Clinical Progress Assessment Report from the [redacted] and [redacted] dated [redacted], was identified by Mr. [redacted] admitted into evidence without objection. The report, which was completed by [redacted], the Clinical Director of the [redacted] indicates that [redacted] behavior is out of control, with a lack of response to numerous interventions. LEA Exh. 93. An additional progress note from Ms. [redacted] dated [redacted] notes several areas of impairment in [redacted] mental status, including thought processes, judgment, impulse control and attitude. LEA Exh. 105.

11 ) [redacted] testified on behalf of the parent. Mr. [redacted] who counsels teenagers at [redacted], was [redacted] in-home counselor from [redacted] until [redacted], after [redacted] was referred by [redacted]. The focus of [redacted] work with [redacted] was on [redacted] problem behaviors in school and at home. After an initial period of reluctance by [redacted], [redacted] began to cooperate with Mr. [redacted]; and [redacted] improved in [redacted] behavior and performance at school. However, after Christmas, [redacted] again started to experience [redacted] problems. [redacted] 310-311. During this time, [redacted] was also uncooperative with Mr. [redacted].

[redacted] 313. This witness also testified that he did not observe anything in [redacted] behavior which would suggest that [redacted] might be a danger to [redacted] self or others. [redacted] 314. [redacted] case with [redacted] was closed in [redacted] because of show [redacted] progress toward the goals in [redacted] treatment plan, as well as misbehavior and poor [redacted] academics in school. LEA Exh. 101.

12 ) A Clinical Assessment was performed on [redacted] by Mr. [redacted] and others at [redacted] on [redacted] at the request of the Ed-Cat Team. The assessment summarizes [redacted] history and Mr. [redacted] experience with [redacted]. The report notes [redacted] need for [redacted].

continued in-home counseling in conjunction with medication compliance. Ms. [redacted] had reported to [redacted] that [redacted] was not taking [redacted] medication. The assessment also noted that Ms. [redacted] reported [redacted] unwillingness to work with [redacted] teachers, counselors or herself. By [redacted] mother's report, [redacted] was not on [redacted] medications for most of the [redacted] school year. Ms. [redacted] also reported to [redacted] that [redacted] had failed most of [redacted] courses in the [redacted] school year. [redacted] teachers advised her that [redacted] failures resulted from [redacted] behavior and excessive absenteeism. LEA Exh. 99.

13) The LEA presented the testimony of [redacted], Assistant Principal at [redacted] a part of whose responsibilities is to oversee special education at the school. Ms. [redacted], who has a Master's Degree in Social Work, with a focus on clinical social work, is very familiar with [redacted], having sat in on various IEP meetings respecting [redacted] and interacted with [redacted] personally. She has also frequently observed [redacted] in the school setting. Ms. [redacted] testified that she attends on-going seminars and training in the area of special education. [redacted] 189-194.

14) Ms. [redacted] often saw [redacted] in [redacted] classrooms, in the hallways, during discipline referrals and in one to one visits. Her involvement with [redacted] became more intense in the current school year [redacted]. In [redacted], she started to do classroom observations of [redacted]

15) In the fall of [redacted], Ms. [redacted] became aware of a deterioration in [redacted] behavior. She became aware of this from various sources, including her own observations, the reports [redacted] paraprofessional who "shadowed" [redacted], the monitoring reports of [redacted] special education case manager, comments at IEP meetings [redacted] quarterly progress reports and from [redacted] self. [redacted] negative behavior included: classroom disruptions; use of profanity; disruption of tests; not following the instructions of any adults in authority, including [redacted] paraprofessional and case manager; not going to the resource room. ( [redacted] IEP called for instruction in [redacted] academic subjects in the general education classroom with the assistance of a collaborative special education

teacher, and assistance with assignments and testing in a resource room with a special education teacher. ) , 197-199. Moreover, Ms. herself had to assist in looking for on occasions when was running away from classes, or when was given time out and : failed to return. 219 -221. What is more, on one occasion, Ms. saw i commit an act that could have caused harm to self. On that occasion, jumped from a railing on a portable classroom, which was over five feet from the ground. There was a car parked very close to where landed. In addition, the material of the driveway was coarse and rough. 221-224; LEA Exh. 102

16 ) IEP Progress Report , which includes all quarters between and shows that is failing all academic subjects. For the first two quarters, was passing Algebra, but also failed that subject in the subsequent quarters. LEA Exh. 33.

17 ) On , after repeated efforts to schedule the meeting with Ms. , the IEP team convened to develop a FBA for and consider any needed changes to existing BIP. Generally, teachers considered behavior to be negative, reporting classroom disruption, leaving the classroom without permission, tardiness and disrespect. Other records, including disciplinary reports, medical records, psychoeducational report, academic records, notes to parents, Community Assessment Team ( CAT ) reports, social history ad child study notes were reviewed. All data collected support the view that \_ misbehaves in order to attract attention to self. The team considered the existing BIP and determined that the goals and objectives stated therein should continue to be addressed. Specifically, the team endorsed redirection of behavior by use of a paraprofessional assigned to alone, use of parent contact, teacher conferences, and seating at the front of the classroom. Additional tactics include teaching social skills in every class setting and during transition in the hallways, the use of a mentor in the form of a teacher

likes, that is, Mr [redacted] and the utilization of student monitoring sheets. A review date of [redacted] was noted. LEA Exh. 46.

18) At an IEP meeting on [redacted], to review [redacted] FBA and BIP, the team considered various monitoring reports from [redacted] teachers. Those reports show that [redacted] behavior and academic performance was deteriorating. Most of the reports show that [redacted] sometimes to rarely completes classroom or homework assignments, that [redacted] is rarely attentive and frequently disruptive. In the course of the meeting, [redacted] disciplinary record was reviewed. Generally, [redacted] failed to comply with [redacted] BIP. LEA Exh. 18.

19) In the months after the [redacted] meeting, Ms. [redacted] had frequent contact with Ms. [redacted] respecting [redacted] behavior.

20) In a student assessment completed by one of [redacted] academic teachers, it is noted that when the issues of [redacted] poor performance in class and [redacted] misbehavior was addressed, [redacted] indicated that [redacted] did not care and that [redacted] "Mom would appeal and [redacted] pass." LEA Exh. 56.

21) The school's Star-Based Discipline Detail shows that in the period between [redacted] and [redacted], [redacted] misbehavior escalated. LEA Exh. 47. Ms. [redacted] also testified to the deterioration in [redacted] behavior after Christmas vacation.

212. This is consistent with the comments of [redacted] home-based counselor.

22) [redacted], the LEA's Director of Special Education and Chairwoman of the ED-CAT committee testified on behalf of the LEA. Representatives from various city agencies comprise the ED-CAT committee, whose purpose is to work with and provide services to at-risk students. Ms. [redacted] holds a Master's Degree in Special Education and has over ten years of experience in working with and teaching special education students with various disabilities, including emotional disturbance. She knows [redacted] because ED-CAT provided [redacted] services. [redacted], 156-158. The ED-CAT committee, after reviewing [redacted] records, recommended [redacted] have a mentor in the home and community setting to address [redacted] social behaviors and problem-solving skills, and a

one-to-one paraprofessional to provide academic and behavioral support in school. Tr.

159.

23 ) According to \_\_\_\_\_'s mentor, \_\_\_\_\_, of \_\_\_\_\_, who worked with \_\_\_\_\_ from \_\_\_\_\_ to some time in \_\_\_\_\_; made no progress with \_\_\_\_\_. In his anecdotal notes, Mr. \_\_\_\_\_ documented \_\_\_\_\_ lack of progress in behavior correction, social skills or anger management. \_\_\_\_\_ also referred to \_\_\_\_\_ failure to complete homework or class assignments. LEA Exhs. 95, 96, 97 and 98.

24 ) While one-to-one paraprofessionals for special education students is rare in the LEA ( there are only twelve with a special education student population in excess of five thousand ), \_\_\_\_\_ was provided one from the start of the school year.

167.

25 ) Ms. \_\_\_\_\_ being familiar with problems \_\_\_\_\_ has had, in \_\_\_\_\_, recommended that \_\_\_\_\_ be considered for the Re-Ed program at \_\_\_\_\_. Ms. \_\_\_\_\_ very familiar with the \_\_\_\_\_ program since she is the person authorizes the referrals. In that capacity, she works \_\_\_\_\_ on an almost daily basis. Once a student is placed at \_\_\_\_\_, it is Ms. \_\_\_\_\_'s responsibility to remain involved in the student's education, which includes reviewing the student's progress and IEP's. She also is the person involved in the student's reintegration into the regular school program and the student's one-year follow-up by \_\_\_\_\_, 168-171.

26 ) According to Ms. \_\_\_\_\_, who has had the bulk of her training in the education of emotionally disturbed children, emotionally disturbed children typically do well in \_\_\_\_\_ Re-Ed program, because of the smaller classrooms, the lower student - teacher ratio, and the setting itself, which is safer and more secured. The availability of trained counselors in the classroom and a role-modeling methodology also help the program to be successful. Ms. \_\_\_\_\_ does not believe a self-contained or regular education classroom in a large high school would give the same advantages to a student

with severe behavioral problems, such as [redacted] In her opinion, the school experience in such a large setting can be overwhelming to a student such as [redacted] 179-182.

27) [redacted], a paraprofessional with the LEA, worked with [redacted] between [redacted] and [redacted]. He was given the task of shadowing and re-directing [redacted] whenever necessary. Mr. [redacted] kept a daily anecdotal record of his contact with [redacted]. According to his notes, Mr. [redacted] observed the same behaviors in [redacted] as have been reported by others in the school, including running in the halls, leaving class without permission, class disruptions, refusals to complete assignments, refusal to take tests, punching lockers, use of profanity. [redacted] also constantly ran from the paraprofessional, and would frequently arrive late for class and leave early. On one occasion, in [redacted] haste to get away from Mr. [redacted], [redacted] almost slammed Mr. [redacted] hand in a door. Behavioral problems with [redacted] were almost daily. LEA Exh. 41 and Tr. [redacted] 20-24.

28) The LEA presented the testimony of [redacted] a school security officer who became involved in [redacted] misbehavior on more than one occasion. He testified that he had incidents with [redacted] on almost a daily basis, in particular with [redacted] running through the halls. However, three incidents stand out. On two occasions [redacted] had a laser marker in the classroom, which is against school rules. On that occasion, Mr. [redacted] was called to the classroom. However, [redacted] refused to give him the light. On the subsequent occasion, when [redacted] again refused to give up the laser light after [redacted] had been shining on other students, when Mr. [redacted] intervened, [redacted] became verbally abusive and threatening to the witness, following [redacted] through the halls and taking an aggressive posture, with [redacted] fist balled. [redacted] 234-236. LEA Exhs. 40 and 41. The most serious incident with [redacted] occurred on [redacted] when the security officer attempted to prevent [redacted] from running through the hall by extending [redacted] arms out horizontally. On that occasion, which was witnessed by [redacted] paraprofessional,

forcefully pushed Mr. [redacted] out of his way. Criminal charges were subsequently filed against [redacted], 232-233, 236; LEA Exhs. 32 and 31 and Parent's Exh. 12.

29) The notes of [redacted] special education case manager, [redacted] were entered into evidence. A reading of those notes, which detail Mr. [redacted] frequent interaction with [redacted], indicate that [redacted]; behavior between [redacted] and [redacted] continued to be a problem, and nothing seemed to help. He noted that pulling [redacted] out of the classrooms did not work; nor did other types of interventions work. He observed [redacted] both disruptive in [redacted] collaborative and resource classes, as well as in the hallways, noting that [redacted] on occasion disappeared, only to return twenty minutes later. LEA 54.

30) In an internal memorandum, dated [redacted], Mr. [redacted] reviewed [redacted]; history at [redacted] School. He noted that in the [redacted] school year, [redacted] had thirty-nine disciplinary referrals for behaviors including class disruptions, insubordination, refusal to obey rules and use of profanity. [redacted] noted that despite additional interventions, including the one - on - one paraprofessional, implementation of the FBA/BIP and social skills conferencing with [redacted] had by the date of the memorandum, accumulated sixteen referrals. He, moreover, noted that [redacted] failed all core subjects in the last school year and was doing the same in the current school year. On one occasion, [redacted] confided that [redacted] cannot focus on [redacted] class work at the same time that [redacted] focuses on [redacted] behavior, and vice versa. He further noted that when behavior is under control, [redacted] grades increase considerably. In his opinion, [redacted] would be better served in a in setting in which distractions are controlled. LEA 29.

31) Also testifying on behalf of the LEA was [redacted], a Teacher Specialist for the LEA's [redacted] schools. With over twenty-six years of experience, he has worked with children with various disabilities, including emotional disturbance. He has written hundreds of IEP's, FBA's and BIP's. He has also known [redacted] for about three



years, has had many meetings concerning [redacted]. He has also met with and talked with both [redacted] and [redacted] mother, especially in the last six months. [redacted] 17-21.

32 ) On [redacted] Mr. [redacted] was present at a manifestation review to consider whether or not [redacted] multiple disruptions and assault on Mr. [redacted] was a manifestation of [redacted] disability. The committee concluded that the incidents were a manifestation. An IEP meeting immediately followed, in which the team considered a more restrictive educational setting for [redacted] who was then in a collaborative model, with instruction in the general education class, assisted by a special education teacher, with time spent also in the resource room with a special education teacher. The team considered the Re-Ed program at [redacted], however, Ms. [redacted] wanted the team to consider a self-contained setting at [redacted] School or keeping [redacted] in collaborative setting. [redacted] 23-26. LEA Exh. 28.

33 ) The IEP team decided on [redacted] convene another meeting to further address [redacted] placement. Prior to adjourning, the team wrote up a Notice of Intent to Change ( [redacted] ) Program. The team determined, after reviewing records, record of parent conferences, the FBA, the BIP and the teacher monitoring reports, that [redacted] was becoming increasingly aggressive and combative, with an escalation in the frequency and duration of the incidents. Moreover, they noted that [redacted] was achieving no success in [redacted] courses, with the exception of Physical Education and Band.

34 ) On [redacted], another IEP meeting was convened to review FBA and BIP. Again [redacted] was considered. Ms. [redacted] who was present with her advocate, agreed to pay a visit to [redacted]. LEA Exh. 16. Ms. [redacted] was also given another Notice of Intent to Change ( [redacted] ) Program, in that case to home-based instruction from [redacted] to [redacted], based upon escalating behavior. Ms. [redacted] consented to the proposed change. LEA 16.

35) On [redacted], another manifestation review was held, in that case to address an alleged assault by [redacted] on a teacher, specifically [redacted] causing a classroom door to hit her on two occasions. Although the LEA presented no direct evidence of this assault, the minutes from the manifestation review were admitted into evidence. The team determined [redacted] behavior was again a manifestation of [redacted] disability. The team again addressed a more restrictive environment, noting that everything which had been tried to help [redacted], such as the BIP, the paraprofessional, mentoring, medication and counseling, had failed. LEA 14.

36) Upon the request of Ms. [redacted] another IEP meeting was convened on [redacted]. At that time, she rescinded her agreement to home-based services, and asked the team to consider a collaborative or self-contained setting at [redacted] School. Parent's Exh. 8. However, on [redacted], Ms. [redacted] wrote the school a letter in which she again changed her mind and asked for home-based instruction. Parent's Exh. 11. As a follow-up to this letter, [redacted] Principal, [redacted], wrote Ms. [redacted] a letter offering her home-based instruction, with a revised starting date of [redacted] and an end date of [redacted]. LEA Exh. 9. Pursuant to the Orders entered by the [redacted] Circuit Court on [redacted], [redacted] remains on home-based instruction pending further order of the Court. Parent's Exhs. 10 and 13.

37) Dr. [redacted], the LEA's Coordinator for Special and Gifted Education, and Mr. [redacted] supervisor, testified that she attended various IEP meetings earlier this year in which the focus was on the appropriate placement for [redacted]. Based on her review of [redacted] records, including the reports from [redacted] outside counselor and mentor, she concluded that [redacted] is a danger to [redacted] self and others at [redacted] School, and that in order to succeed academically, [redacted] needs to be in the highly structured, limited environment offered by [redacted], in which [redacted] would receive systematic instruction and behavior modification. In her view, a [redacted] center would be a more

secure setting for , with less stimuli to distract or frustrate . 69-72.

Ms. ) further stated that she was unaware of any communication outside counselors had with school of LEA personnel, even though the conclusions those entities reached respecting ; lack of progress were consistent with those reached by educators. , 71-75.

38 ) Senior Coordinator for program, with responsibility for the Re-Ed and alternative programming, testified. Mr. , who has a Master's Degree in Special Education, with an endorsement in special education, described the program at the , the proposed site for . He noted that the Center has less than one hundred students who are served on a regular, daily basis by at least four and sometimes six educational professionals, all of whom are trained to teach and counsel emotionally disturbed children. In each classroom there will be at least two specially trained teachers and an assistant, with a liaison teacher counselor ( similar to a social worker, but with a classroom role also ) who spends forty to fifty percent of each day with the students. 190-195. The classes are arranged as close to grade and age as possible, with an average of eight to ten students. 196-197.

39 ) T-Ed program has a behavioral component, which utilizes a three stages concept, whereby the students obtain more and greater responsibility and independence, which reflects their progress. The reward-based, student driven system is geared toward helping the students with social skills, with a view toward their reintegration into a regular school. , 197-201.

40) The Re-Ed staff receive extensive training in serving emotionally disturbed students who are typically more aggressive than ED students who are serviced in the regular schools. The staff are trained in a crisis intervention methodology called the Mandt system, which stresses a non-physical intervention with the students. Tr. 201-203.

41 ) Mr. reviewed school records since first found eligible for special education, and based on that review, he believes would be a good candidate for the , given the constant supervision and the consistency between the teachers and the team. Further, would receive individual and group counseling in the classroom setting, throughout the day, which is facilitated by the large number of staff ( twenty-five staff to eighty-five to ninety students, 203-205, 207-209.

42 ) The has a physical education component, with a field for playing sports, although they are non-competitive. Thus, would be able to continue involvement in physical education, which is one of areas of enjoyment.

215-216.

43 ) Students in follow the regular LEA curriculum, and if they are successful in their studies, they will receive graduation credits from the LEA. will formally petition the LEA for those credits. 223-224.

44 ) Typically, a student at the will take all of instruction in one classroom, but on occasion, may transition to another classroom. Depending on at what stage the student is, when moving through the halls. may be accompanied or unaccompanied.

45 ) The parent presented the testimony of psychiatrist, Although, in his opinion, would do better in a smaller, more contained environment with less stimuli and a very tight structure, he disagrees with a placement in . He feels placing in , although he has no knowledge of program, would have a detrimental effect on because there would be increased labeling. Yet, he acknowledges that even in a self-contained classroom at would also be labeled. However, this witness agreed that educating in a collaborative setting in the general education classroom would not be good because the degree of stimulation would make it difficult for to control his impulsiveness.

46) On the question of [redacted] dangerousness, Dr. [redacted] expressed the opinion that [redacted] was not dangerous in the sense of willful harm to [redacted] self or others. See Parent's Exh. 3. However, upon being informed of some of [redacted] behavior in the school setting, of which he had been previously unaware, such as racing through crowded halls, banging fist on a locker, jumping from a five foot railing or being non-compliant with fire drill procedures, Dr. [redacted] acknowledged the possibility of dangerous results in those instances.

47) Ms. [redacted] testified that she wants [redacted] to be educated in either a collaborative or self-contained classroom at [redacted] School. After visiting the [redacted] on [redacted], and meeting briefly with and questioning the Principal there, she decided that it would not be appropriate for [redacted]. In response to this Hearing Officer's questions as to why she felt this way, Ms. [redacted] stated that she had observed a student in the hall at [redacted] who appeared retarded, and [redacted] is not like that. [redacted], 126. She did not, however, observe any classroom activity. She further expressed her opinion that if [redacted] were placed in such a structured setting, [redacted] would drop out of school, just as [redacted]. She stated that her [redacted] who was labeled emotionally disturbed, received special education in a self-contained setting. Tr.

She also said that [redacted] indicated that [redacted] would drop out of school if [redacted] could not get a diploma. Further, she objected to [redacted] because [redacted] could not participate in band, a subject [redacted] does well in. [redacted].

48) Ms. [redacted] testified that if [redacted] were placed in a self-contained setting at [redacted] School for [redacted] academic subjects, [redacted] would not receive graduation credits for those subjects since the State requires that teachers endorsed in those subjects teach [redacted], not a teacher endorsed only in special education. Given staffing and budgeting constraints, the LEA would be unable to hire teachers to go to a self-contained room and teach one student, as opposed to teaching a full classroom of students.

132-135. She additionally noted that she had also observed \_\_\_\_\_ being disruptive even in \_\_\_\_\_ resource room, which is self-contained.

49 ) Despite her understanding that if \_\_\_\_\_ received academic instruction in a self-contained room at \_\_\_\_\_ would not receive graduation credits for \_\_\_\_\_ efforts, Ms. \_\_\_\_\_ testified that she would overcome that by sending \_\_\_\_\_ to night and/or Summer school.

50 ) This Hearing Officer called \_\_\_\_\_ as witness. Inquiry was made as to \_\_\_\_\_ feelings about \_\_\_\_\_ proposed placement. \_\_\_\_\_ testified that while \_\_\_\_\_ likes \_\_\_\_\_ teachers and being at \_\_\_\_\_ School, \_\_\_\_\_ is frequently \_\_\_\_\_ because \_\_\_\_\_ is a special education student. This upsets \_\_\_\_\_ and this upset often leads to \_\_\_\_\_ leaving the classrooms. Several of the students who attend \_\_\_\_\_ have known \_\_\_\_\_ for years, and \_\_\_\_\_ will not take \_\_\_\_\_ seriously. This also upsets \_\_\_\_\_ particularly noted that at times, when \_\_\_\_\_ leaves a resource room \_\_\_\_\_ is ridiculed. 137-139.

51 ) \_\_\_\_\_ stated that \_\_\_\_\_ opposed the \_\_\_\_\_ placement because someone told \_\_\_\_\_ would not get a high school diploma if \_\_\_\_\_ went there. After sitting through the hearing, however, \_\_\_\_\_ now understands that \_\_\_\_\_ could still get a \_\_\_\_\_ School diploma through \_\_\_\_\_ However, \_\_\_\_\_ still has a problem with going to \_\_\_\_\_ because it's a special school, and \_\_\_\_\_ expects \_\_\_\_\_ friends to tease \_\_\_\_\_ when \_\_\_\_\_ goes home. Tr. \_\_\_\_\_ 139-142.

52 ) \_\_\_\_\_ advised this Hearing Officer that when \_\_\_\_\_ was in middle school and had a problem or was feeling bad, \_\_\_\_\_ had a special teacher \_\_\_\_\_ would go talk to in order to feel better. \_\_\_\_\_ indicated that \_\_\_\_\_ would be receptive to the idea of having a counselor/teacher available to \_\_\_\_\_ on the spot at \_\_\_\_\_ if \_\_\_\_\_ had problems. 146-147.

### CONCLUSIONS OF LAW

I. IS \_\_\_\_\_ A DANGER TO \_\_\_\_\_ (SELF OR OTHERS AT \_\_\_\_\_ SCHOOL.

There is no doubt in the mind of this Hearing Officer that behavior at neighborhood school has placed both self and others at risk of harm. With the exception of two incidents, the record does not show that had a malicious intent to harm self or anyone else. Although some of the parent's witnesses testified that in their view, does not pose a danger to self or others, significantly, none of them have observed in school setting or have first hand knowledge of any antics at school, relying instead on the reports of and mother.

Not only do the written records entered into evidence, in particular the notes of the paraprofessional, establish dangerousness, but the testimony of the witnesses such as Mr. and Ms. establish it. With repeatedly racing down hallways full of other students, clearly there is a risk of a collision and resulting harm. In fact, on one such occasion, an altercation developed between and other students because knocked a girl against a wall. The incident in which jumped five feet from a railing onto a paved surface, with a car in close proximity, speaks for itself. While this Hearing Officer does not believe that the LEA established the assault on the teacher, it certainly established that on the security officer, by that officer's testimony and that of the paraprofessional. They appeared credible. Clearly, in that instance there was a deliberate assault and batter. Further, was deliberately assaultive on the occasion when encroached on the security officer with a balled fist. While may not have intended harm to anyone, could have caused harm by shining the laser light on two occasions on other people. Further, not only does banging one's fist into a locker pose a risk of harm to the banger, but on at least one occasion had to be taken to the nurse for treatment to hand. It is also apparent that, given the short time span in which these events occurred, frustration level and aggressive behavior was escalating. Thus, the IEP team's decision to place on home-based instruction pending a decision respecting a longer-term placement was appropriate.

## II. WAS THE MANIFESTATION REVIEW OF

## PROCEDURALLY FLAWED

The parent contends that the manifestation review of [redacted], which was convened to determine if [redacted] alleged assault and battery of a teacher was a manifestation of [redacted] disability, was flawed. The committee determined that the incident was a manifestation and recommended that [redacted] receive a more restrictive placement. In arriving at this recommendation, the committee considered [redacted] overall record, with attention given to [redacted] BIP, the utilization of a paraprofessional, mentoring and counseling services in place and on-going conferences with Ms. [redacted]. They believed that everything practical had been attempted to address [redacted] behavior and make [redacted] successful in school.

The recommendation on [redacted] was a reiteration of the IEP team decision of [redacted], which was specifically convened to review [redacted] FBA and BIP. On that occasion, for the same reasons as noted above, the team determined that [redacted] should be placed on home-based instruction. Ms. [redacted] was at the meeting and concurred with the decision. Therefore, the home-based decision did not flow from the manifestation review, and was not a form of discipline, which the LEA could not engage in once a manifestation was found.

As a sub-issue, the parent states that the LEA did not proceed properly after the [redacted] manifestation review. The parent relies on 8 VAC 20-80-68 (C)(5)(c)(2). That subsection requires the IEP team to "develop or modify strategies, including positive behavioral interventions and supports to address the behavior," once a manifestation is found. In this Hearing Officer's opinion, the IEP team did just that in recommending that [redacted] be placed in a more restrictive environment. That more restrictive environment, that is, [redacted] had already been addressed at earlier IEP meetings. Certainly placing [redacted] in a [redacted] Re-Ed program constitutes a positive behavioral intervention and support, given the description of that program. This plan is certainly pro-active. Counsel for the parent places much weight on the fact that the BIP



was not modified. Nowhere in the Regulations does it state that the school must modify a BIP. The references to the LEA's responsibility vis-à-vis BIP's is found in the regulatory section pertaining to discipline, which again is not at issue in this case. But even if a disciplinary removal were, arguendo, at issue, the school would not have been compelled to modify the BIP. The key word in 8 VAC 20-80-68(C)(2)(d)(4) is "as necessary." This Hearing Officer finds that [redacted] BIP was sufficient, however, [redacted] simply would not comply with efforts to implement the goals therein.

### III WHAT IS THE APPROPRIATE EDUCATIONAL SETTING FOR [redacted]

The main issue in this case is what is the educational setting for [redacted] which will provide [redacted] a free and appropriate public education. The LEA contends that FAPE would be provided by a placement in [redacted] Pursuant to the U.S. Supreme Court in Board of Education of the Hendrick Hudson Central School District, et. al. ( 102 S. Ct. 3034, IDELR a553:656 ( 1982 ), a key question to be addressed in determining whether [redacted] proposed placement is reasonably calculated to enable [redacted] to receive educational benefits. The record in this case supports that the [redacted] program would likely benefit [redacted]

Various educational professionals, including a director of that program, testified that the [redacted] program is specifically set up to address the education of students with serious behavioral issues, such as [redacted] has. The reports of [redacted] teachers and administrators who worked with [redacted] daily as to the negative impact of [redacted] behavior on [redacted] academic performance must be given great weight See Faulders v. Henrico County School Board, ( E.D. VA. (2002)). The fact that [redacted] and [redacted] mother do not want [redacted] to be labeled because of [redacted] attendance at [redacted] does not determine the appropriateness of the placement.

The parent, moreover, contends that the [redacted] setting would be too restrictive. 20 U.S.C. Section 1412(a)(5) CFR 550-556 provide that to the maximum extent appropriate, children with disabilities shall be educated with children who are not disabled. Moreover, there is a presumption in the case law interpreting IDEA that [redacted]

disabled children will be placed in a regular education setting with peers of similar age who are not disabled. However, this presumption can be rebutted by a showing the student's educational needs require removal from the regular education environment. Regan-Adkins v. San Diego Unified School District, 37 IDELR 69 ( United States Court of Appeals, 9th Circuit ( 2002)). There is no question that the LEA bears the burden of proving compliance with the least restrictive environment provisions of IDEA. See Oberti v Clementon School District et. al., 19 IDELR 908 ( U. S. Court of Appeals, 3rd Circuit ( 1993 )). The record is replete with evidence that [redacted] cannot be educated pursuant to [redacted] present IEP at [redacted] School. The school and LEA has gone to great length to attempt to educate [redacted], including utilizing community-based mentoring services and counseling, use of a one-on-one paraprofessional assigned to [redacted] and crisis intervention by the school's professional staff. However, none of these strategies have worked with [redacted]. [redacted] out-of-control behavior has prevented [redacted] from making even minimal progress in school. It would appear that the expertise of the staff in intensive behavioral modification is just what [redacted] needs. As noted by the LEA professional educators, [redacted] will continue to fail at [redacted] School, whether in the regular education or self-contained setting. Moreover, [redacted] mother's proposed plan for [redacted] to be educated in a self-contained room, for which [redacted] would receive no graduation credit is totally unreasonable and would likely result in [redacted] dropping out of school, just the thing she wishes to avoid.

The parent also argues that under IDEA, the first placement option for [redacted] should be [redacted] present school, which is [redacted] neighborhood school. This is not, however, supported by the case law. See, for example, Murray v. Montrose County School District, 51 F. 3d 921 ( U.S. Court of Appeals, 10th Circuit ( 1995)), in which the Court held that a student's neighborhood school was not the least restrictive environment appropriate to meet his needs.

Moreover, Ms. [redacted] apparently does not want [redacted] educated with other students at [redacted] who are disabled. From what this Hearing Officer could glean from somewhat vague responses to the questions posed to her, she would prefer that [redacted] interact with "normal" children. However, assuming there would be social benefits to [redacted] from interacting with the regular education children at [redacted] School, such an objective is held to be subordinate to the objective of [redacted] receiving academic benefit from [redacted] program, which does not happen in [redacted] current placement. Hartmann v. Loudon County Board of Education, 26 IDELR 167 ( U.S. Court of Appeals, 4th Circuit ( 1997 )). Review denied by the U.S. Supreme Court.

#### CONCLUSION

This Hearing Officer finds that the [redacted] Public Schools has gone to great length to educate [redacted] and to provide [redacted] with a free and appropriate public education. However, because of [redacted] emotional problems, [redacted] has been unable to be educated in [redacted] present placement at [redacted] School. The proposed placement at [redacted] represents, at this time, the least restrictive environment, with due consideration to the risk of harm [redacted] poses for [redacted] self and others at [redacted] and the fact that [redacted] intensive behavioral intervention is needed on a daily basis for [redacted] to make academic progress. Further, there have been no procedural violations in the IEP or manifestation review processes at [redacted] School. As such, the LEA has prevailed on all issues, and the placement at [redacted] should be implemented.

The parties are further advised that they will have one year from the date of receipt of this decision to appeal it to either state or federal court.

Dated: [redacted]

Hearing Officer