##  COVER PAGE FOR HEARING DECISION, NOT TO BE PUBLISHED

VIRGINIA:

## SPECIAL EDUCATION DUE PROCESS HEARING

**Xxxxxxxxxxxxxxxxxxxxx, by and through his Parent,**

**Xxxxxxxxxxxxxxxxxxxxx** Complainants

v.

**XXXXXXXXXXXXXX SCHOOL BOARD**, Respondent

**Student & Parent:** **Administrative Hearing Officer:**

Xxxxxxxxxxxxxxxxxxxxx John V. Robinson, Esq.

Xxxxxxxxxxxxxxxxxxxxx 7102 Three Chopt Road

 Richmond, Virginia 23226

**Advocates for the Parent:** (804) 282-2987 (Telephone)

Xxxxxxxxxxxxxx (804) 282-2989 (Facsimile)

Martin Jeffrey jvr@jvrlawpc.com (E-mail)

**LEA's Attorneys:**

Patrick Andriano, Esq.

LaRana Owens, Esq.

## DECISION OF THE HEARING OFFICER GRANTING LEA’S MOTION TO DISMISS

## INTRODUCTION

The Parent, by counsel, requested an administrative due process hearing in her undated Special Education Due Process Hearing Request (the "Request") under the *Individuals with Disabilities Education Improvement Act of 2004* (“IDEA”). The Request was received by the School Board on December 21, 2018.

On January 16, 2019, the parties agreed during the second pre-hearing conference call, that the issues to be considered at the due process hearing were as follows: The Parent contends that the Student’s IEP dated October 18, 2017 and his IEP dated October 18, 2018, for the 2017-18 and the 2018-19 school years, respectively, failed to provide a free appropriate education to the Student.

The issues were so described in the Amended Status Report and Scheduling Order of January 30, 2019, which is incorporated herein by this reference. *See*, *also*, Transcript of the Second Pre-hearing Conference Call also incorporated herein by reference.

# FINDINGS OF FACT

1. The Student is a ten (10) year old fifth grade student who is eligible for special education services pursuant to the IDEA under the categories of Other Health Impairment and Emotional Disability. The Student has been medically diagnosed with Attention Deficit Hyperactive Disorder (“ADHD”), Oppositional Defiant Disorder, and Disruptive Behavior Disorder.
2. During the 2017-2018 school year, the Student received services in a self-contained regional program for students with emotional disabilities at Xxxxxxxxxxxxxx Elementary School in Xxxxxxxxxxxxxx, Virginia.
3. The IEP team proposed that the Student be provided a modified schedule from 7:15 a.m. until 11:30 a.m. as he exhibited significant and disruptive behaviors which occur more frequently in the afternoon.
4. The class included no more than eight students and four adults – one teacher and three instructional assistants. One of the three instructional assistants was assigned to the Student as a one-to-one aide who provided emotional and behavioral support.
5. The Parent provided consent to implement the IEP on September 5, 2017.
6. A behavioral intervention plan and additional support from a Board Certified Behavioral Analyst (“BCBA”) was also in place to support the Student behaviorally, socially and emotionally.
7. In addition, the Student received Therapeutic Day Treatment (“TDT”) services –

a Medicaid funded program that provides interventions and counseling services in both the school and home settings. TDT services are designed to support students with mental health, emotional and behavioral issues.

1. Although numerous supports and strategies were in place for the Student, he continued to engage in aggressive behaviors towards students and teachers such as hitting, biting, and kicking as well as disrupting the class on multiple occasions.
2. While staff attempted to incorporate and vary numerous behavior modifications, the Student’s inappropriate behaviors persisted and even increased in frequency during the course of the 2017-2018 school year despite the significant behavioral supports that were put in place by XXPS.
3. The Student continued in the self-contained program at Xxxxxxxxxxxxxx Elementary School on a modified schedule at the beginning of the 2018-19 school year. On September 5, 2018, XXPS conducted an updated functional behavioral assessment to amend his behavior intervention plan to provide additional strategies and interventions to support the Student. However, the Student continued to exhibit behaviors such as frequent non-compliance, physical aggression, and verbal aggression each school day.
4. Despite being provided a variety of substantial supports and interventions, on a daily basis, the Student continued to engage in numerous, violent, aggressive, sexual and disruptive behaviors. The Student exhibited these noncompliant, threatening, and aggressive behaviors, regularly, each day.
5. On a daily basis, a substantial amount of time and resources were expended by teachers, instructional assistants, BCBA, and school administration to address the Student’s behaviors.
6. Further, the assistance of multiple staff members was frequently needed to de-escalate the Student. In addition, the Student’s behaviors disrupted the educational environment of the school and of his classroom.
7. On November 12, 2018, the Parent provided consent to the October 18, 2018, IEP which provides that the Student receive home-based services pending a private day school placement.

15. During the third pre-hearing conference call of the parties on January 29, 2019,

the hearing officer granted the continuance requested by the Parent over the School Board’s objection. During the conference call, at the request of the Parent, Mr. Jeffrey was also recognized as an advocate of the Parent.

1. On March 15, 2019, Mr. Jeffrey wrote to the hearing officer requesting clarification concerning the issues for the hearing scheduled for March 20, 2019 and sought to amend the issues.
2. By e-mail dated March 15, 2019, the School Board objected to the request to amend the issues for the due process hearing so close to the scheduled hearing contending that the assertion that there is a “fundamental disagreement” about the issues for the hearing is without merit.
3. The issues were defined by the Parent and her first advocate, Mrs. Xxxxxxxxxxxxxx, during the January 16, 2019 pre-hearing conference call.
4. According to 8 VAC 20-81-210(F)(1), a party requesting a special education due process hearing must do so in writing.
5. The requirement that the party requesting the due process hearing state the issues in writing is appropriate because it give the opposing party an opportunity to respond to the issues and puts the opposing party on notice of the issues in dispute. See, e.g., Combs v. School Bd. of Rockingham Cnty., 15 F.3d 357, 363-364 (4th Cir. 1994) (“[S]chool boards must be given adequate notice of problems if they are to remedy them, and must be given sufficient time to respond to those problems before they can be held liable for failure to act).
6. In this instance, the School Board was neither provided notice nor an opportunity to respond to the new/additional issues which the Parent wanted to address in the hearing.
7. The hearing officer had already granted one continuance to the Parent over the objection of the School Board and the hearing officer was unwilling over the objection of the School Board to exercise his discretion to allow amendment of the issues causing another significant delay in the hearing with the deadline for exchange of exhibits and the long scheduled hearing concerning the determined issues fast approaching.
8. Accordingly, by letter dated March 18, 2019, the hearing officer decided that the issues for hearing were those previously delineated in the Amended Scheduling Order.
9. The Parent did not produce any exhibits for the hearing nor did the Parent present any material probative evidence supporting her case at the hearing.

## ADDITIONAL FINDINGS & CONCLUSIONS OF LAW

In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017), the Supreme Court reaffirmed and further explained the fundamental standard of appropriateness under the IDEA first set out in its decision 35 years ago in *Hendrick* *Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

In a special education administrative due process proceeding initiated by the parent, the burden of proof is on the parent to establish by a preponderance of the evidence that the LEA has failed to provide the student with a free appropriate public education (“FAPE”) concerning the issues they have raised. *Schaffer, ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

 The law retains the previous definition of a “free appropriate public education.” Section 612(a)(1)(A) of the *Individuals with Disabilities Education Improvement Act*, December 3, 2004 (the "IDEA 2004"). See also, *Regulations Governing Special Education Programs for Children with Disabilities in Virginia*, effective July 7, 2009, (the "Virginia Regulations"). Accordingly, any analysis of the standard of FAPE must begin with *Rowley. Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982).

The *Rowley* Court held that by passing the Act, Congress sought primarily to provide disabled children meaningful access to public education.

 The *Rowley* analysis provides that the disabled child is deprived of a free appropriate public education under either of two sets of circumstances: first, if the LEA has violated IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon the disabled child’s right to a free appropriate public education or, second, if the IEP that was developed by the LEA is not reasonably calculated to enable the disabled child to receive educational benefit. *Rowley*, *supra*, 206-7 (1982).

 In order to meet the second prong of the Rowley test regarding a school district’s substantive obligation under the IDEA, “. . . a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew v. Douglas Cty. Sch. Dist. RE-1, 2017 WL 1066260 (2017)*. The Court also stated that “. . . the essential function of an IEP is to set out a plan for pursuing academic and functional advancement.” *Id.*

 With regard to the first part of the *Rowley* Test, the IDEA states that the hearing officer may find that the student was denied a FAPE for procedural inadequacies only if they: (1) impeded the student’s right to a FAPE, (2) significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a FAPE to the parents' child, or (3) caused a deprivation of educational benefits. *34 CFR 300.513*; *8 VAC 20-81-210(O)(17)*.

The Supreme Court of the United States has recently confirmed that deference must be given to the professional judgments of educators. It held in a decision last year that a court or hearing officer is required to give deference to the opinions of school board witnesses who are professional educators “based on the application of expertise and the exercise of judgment by school authorities.” Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, No. 15-827, 137 S.Ct. 988 (2017); see also Rowley, 458 U.S. at 206-208; M.M., 303 F.3d at 533.

Like *Rowley, Endrew F.* is also careful to recognize the importance of leaving the business of running schools to the considered judgment of local educators. This Circuit has always recognized this mandate:

In *Hartmann v. Loudoun County*, the Court stated:

Although section 1415(e)(2) provides district courts with authority to grant ‘appropriate’ relief based on a preponderance of the evidence, 20 U.S.C. 1415(e)(2), that section ‘is by no means an invitation to courts to substitute their own notions of sound educational policy for those of the school authorities which they review.’ (citations omitted)… [t]hese principles reflect the IDEA’s recognition that federal courts cannot run local schools. Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment.

118 F.3d 996, 1000-1001 (4th Cir. 1997).

 *See also Springer v. Fairfax County*, 134 F.3d 659, 663 (4th Cir. 1998) (holding that “[a]bsent some statutory infraction, the task of education belongs to the educators who have been charged by society with that critical task”); *Barnett v. Fairfax County School Board*, 927 F.2d 146, 151-52 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991) (recognizing Congressional intent to leave education decisions to local school officials and recognizing the importance of giving school officials flexibility in designing educational programs for students); and *Tice v. Botetourt County,* 908 F. 2d1200 at 1207 (4th Cir. 1990)(once a “procedurally proper IEP has been formulated, a reviewing court should be reluctant . . . to second-guess the judgment of education professionals” – rather, the court should “defer to educators’ decisions as long as an IEP provided the basic floor of opportunity that access to special education and related services provides”).

 Accordingly, hearing officers must not succumb to the temptation to substitute their judgment for that of local school authorities in IEP or educational matters. *Arlington County Sch. Bd. v. Smith*, 230 F.Supp. 2d 704, 715 (E.D. Va. 2002).

Educators exercising their considered professional judgments to implement a procedurally correct IEP should be afforded significant academic autonomy and should not be easily second-guessed by reviewing persons. *Hartmann v. Loudoun County Bd. of Educ.,* 118 F.3d 996, 1000-1001 (4th Cir. 1997); *Johnson v. Cuyahoga County Comm. College*, 29 Ohio Misc.2d 33, 498 N.E.2d 1088 (1985).

One of the professional educators in the school division, who are the ones most familiar with the Student, the child study process, the special education eligibility process, and the educational programming available within the school division, has testified regarding the appropriateness of the educational decisions rendered regarding the Student.

The School Board’s witness who testified as part of the Parent’s case in chief regarding the Student has substantial training, expertise and experience in working with children with disabilities, in educational programming in the public school setting, and with the Student. Her testimony was credible and convincing concerning the issues before the hearing officer. Her demeanor was open, frank and forthright.

By contrast, the Parent presented no material probative evidence concerning the School Board’s failure to develop IEPs which were reasonably calculated to enable the Student to make progress in light of the Student’s circumstances. Similarly, there was a dearth of meaningful evidence concerning any procedural violations by the School Board.

In *City of Hopewell v. County of Prince George, et als.*, 240 Va. 306, 314, 397 S.E.2d 793, 797 (1990), the Virginia Supreme Court specifically left open the question whether the trial judge in that case even had the discretion to allow a rebuttal witness to testify where Petersburg had not previously named such witness in accordance with the court’s pretrial order entered January 30, 1989. In any event, the Court decided that the trial judge clearly had not abused his discretion in refusing to allow such witness to testify even under circumstances where Petersburg was arguing that there were good reasons why the witness was not named on the witness list filed by the deadline in the pretrial order.

By contrast, in this proceeding the Parent advances no good reasons for her failures. *See*, School Board Motion to Dismiss of March 15, 2019, which is incorporated herein by this reference.

The Virginia Supreme Court looks with favor upon the use of stipulations and other pre-trial (or in this proceeding, pre-hearing) techniques which are designed to narrow the issues or for the settlement of litigation. *McLaughlin v. Gholson*, 210 Va. 498, 500, 171 S.E.2d 816, 817 (1970). The Scheduling Order in this proceeding and, specifically, the parties’ statement of issues and stipulated deadline concerning exchange of witness lists and exhibits, was a set of rules which the parties agreed to live by and constituted precisely such a pre-hearing technique.

## CONCLUSION AND DECISION

The Parent has failed to meet her burden of proof and, as a result, the hearing officer grants the School Board’s Motion to Dismiss. The Parent’s claims must be dismissed and the Hearing Officer enters a decision in favor of the School Board on all issues brought by the Parent.

**Right of Appeal.** This decision is final and binding unless either party appeals in a federal district court within 90 calendar days of the date of this decision, or in a state circuit court within 180 calendar days of the date of this decision.

ENTER: 3 / 28 / 2019

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

John V. Robinson, Hearing Officer

cc: Persons on the Attached Distribution List (By Email)

3-27-29 Decision of the Hearing Officer Granting LEA’s Motion to Dismiss