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Dispute Resolution &
Administrative Services

**VIRGINIA DEPARTMENT OF EDUCATION**

**DUE PROCESS HEARING**

**In re: Child**

**Due Process Hearing**

**Findings of Fact**

**and Decision**

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**Counsel for Petitioner:**

Drew R. Page, Esquire
Jack T. Randall

**Counsel for City Public Schools:**

Wendell M. Waller, Esquire

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This matter came to be heard upon the complaint for due process filed on August 7, 2014 by the Petitioner ("Petitioner"), [1] against City Public Schools, ("Respondent" or "the LEA"), under the Individuals with Disabilities Education Act, ("the IDEA"), 20 U.S.C. 1400, *et seq*., and the regulations at C.F.R., Part B, Section 300, *et seq*.

The due process hearing was held before the undersigned Hearing Officer over four days, on October 6th and 7th and October 13th and 14th, 2014 at the City Industry and Technology Center, City, Virginia. The hearing was open to the public and transcribed by a court reporter. Counsel represented Petitioner [2] and the Child at the hearing. School Board Counsel and the

[1] The Child's mother initially filed the due process request. But at the hearing, the mother and father's interest were parallel.

Special Education Director represented the LEA.

This decision is timely and within the 45 day time limitation period under the IDEA.

The record includes written motions, orders, closing remarks, pre-hearing reports, the LEA's exhibit book, LEA and Petitioner's exhibits and deposition exhibits. [3]

Petitioner seeks to overturn the LEA's Emotionally Disabled (ED) labeling decision for the Child and objects to the LEA's placement decision for a Private Therapeutic Day School. Petitioner does not believe that the LEA's Individualized Education Program, ("IEP"), provides the Child a free and appropriate public education, ("FAPE"), in the least restrictive environment, ("LRE"). Petitioner asserts that the Private School provides a FAPE to the Child. Petitioner alleges that the LEA committed fraudulent acts in the Child's IEP formulation.

Thus, Petitioner asserts mistrust for the LEA. The LEA mistrusts the Petitioner's Advocate. Petitioner asserts that this factor adversely impacted the decision making process. Petitioner asserts that she was never advised that the ED label change on August 8, 2012 meant that the Child would be ousted from the Private School. When Petitioner came to believe that the ED label had an adverse impact upon the Child, Petitioner asserts that she objected to the ED label, the IEP, the Private Therapeutic Day School and eventually initiated due process.

In response, the LEA asserts that the Child's behavior and mental status in the school environment justify the ED special education label and that the LEA's IEPs fully provide the Child a FAPE in the LRE at the Private Therapeutic Day School. Also, the LEA asserts that the Child's special education label is not so important as the needs and services provided to him which are sufficient because the Child is successful in the Private Therapeutic Day School where he has shown academic progress. The LEA asserts that the Petitioner consented to the IEP, to

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[2] The Child's Advocate, a Clinical Psychologist, who was also a significant witness in this case, had to step aside and permit himself to be called by the LEA for the due process hearing per the Hearing Officer's pre-hearing ruling.
[3] Parent's Exhibits are marked "Petitioner's, P1-15." The LEA's Exhibits are marked "LEA A-GG." Exhibits appearing in the LEA's exhibit book are marked numerically and referred to as "EB00001-001031." The LEA's Treating Neurologist *de bene esse* deposition exhibits are marked, "DE1-26").

the ED special education label and to the Private Therapeutic Day School placement decision. Thus, the LEA asserts that the Petitioner did not meet the burden of proof and that the LEA's Motion To Strike should be granted.

## BURDEN OF PROOF

As above stated, Petitioner challenges the Child's identifying label as ED and the LEA's decision, per his IEP, to place the Child in a Private Therapeutic Day School instead of assisting and supporting his re-entry back into the Private School. In response, the LEA asserts that Child has behavioral issues and poses a threat to himself and to others. Thus, the LEA asserts, the record will show that the Private Therapeutic Day School is an appropriate placement.

In *Schaffer v. Weast,* 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of proof, in an administrative hearing challenging the IEP, is properly placed upon the party seeking relief, whether that is the disabled child or the school district. *Id.,* at 537.

Petitioner filed this due process hearing request. Accordingly, I find that the Petitioner has the burden of proof at this due process hearing.

## FINDINGS OF FACT

1. The Child's special education categories are ED, OHI and SLD. He is 14 years old. Petitioner removed the Child from the LEA in 2012 and placed him at the Private School. Petitioner initiated due process in 2012. Then both parties signed a Resolution Agreement in which the agreed placement for the 2012-103 school year was the Private School. When the 2012-2013 school year ended, Petitioner and the LEA agreed that the Child was to return to the LEA for the 2013-14 but then Petitioner refused. The LEA initiated truancy proceedings. The Child then enrolled in a homebound placement. Then the LEA offered a continuum of six possible LEA approved private school programs to the Petitioner which she rejected. Later, Petitioner signed an IEP wherein consent is provided but her notes, negating consent, are written

on the face of the IEP. The last agreed IEP places the Child at the Private Therapeutic Day School. The Child says he was bullied at the LEA and does wants to return to LEA. Regarding his school preference, the Child has reportedly said, "I would rather kill myself than return to the LEA." (P-1, P-2, P-3, P-4, P-5, P-6, P-7, P-8, T655, T262).

**2.** Petitioner asserts that the Child should be permitted to attend the Private School because the Child is not ED. Petitioner proffered, through experts, that the Child has Pervasive Developmental Disorder (PDD) or autism for which a special education category exists. But the Child has many other special education needs, originating in his psychological and neurological profile, the experts say. The Child also suffers from Post Traumatic Stress Disorder (PTSD), allegedly from riding the school bus and attending school at the LEA, SLD for math deficits, dysgraphia, processing speed difficulties, oppositionally-defiant aggression, myopia for which he refuses his glasses and severe attention deficit hyperactivity disorder (ADHD). The Child now tests in the low average range of intelligence but the Independent Evaluator questions the Wechsler's accuracy for this Child. He asserted at the hearing that his other high-functioning autistic students have actually tested much higher after receiving low IQ scores. Thus, the Child has, proverbially, global school issues. But prior to the LEA's ED finding, the LEA classified the Child only as OHI and SLD. [4] (P-1, P-10, P-13, P- 14).

**3.** This Hearing Officer is convinced that the Child is primarily autistic and that it is this factor that adversely affects academic performance. Per the independent experts, the ED label simply does not fit this Child because the ED label springs from a character disorder with an underlying psychiatric component. Autism is a neurological, genetically based diagnosis. The Child has an Advocate who is a clinical psychologist. He qualified as an expert in school psychology and has provided cognitive behavioral therapy to the Child for about ten years. He also asserts that the Child is autistic. In April 2013, a second licensed clinical psychologist, who

[4] "Other Health Impaired" and "Severely Learning Disabled."

is also a state licensed school psychologist, performed an Independent Educational Evaluation (IEE) upon the Child. When the Independent Evaluator tested the Child, he concluded also that the Child is autistic. The LEA then entertained a third opinion: The Second Independent Evaluator, who is also a clinical psychologist and a state licensed school psychologist, also asserted that the Child is autistic, not ED. The LEA responds that ED is an educational label, not a psychological one. But all clinicians, who practice at the doctorate level of expertise and have renowned school psychology credentials, concur that the Child is autistic, not ED. The consensus among them is that the Child should not be educated in a Private Therapeutic Day School that is primarily disciplinary in focus. The outside experts all opt for the Private School's less restrictive program. (T606, LEA"V," P-10, 13 & 14, T215, P-9, T208-214, T-252)

**4.** The Resolution Agreement, signed by the Petitioner and the LEA, clearly states that the LEA will have no future financial responsibility if the Petitioner attends the Private School beyond the 2012-2013 school year. But this Hearing Officer notes that the LEA cannot abdicate its responsibility to provide the Child a FAPE. The Special Education Director then offered many LEA approved placements. But this factor did not assist the Petitioner. She has no expertise in this area. Thus, the LEA's instruction to the Petitioner, "Just pick one [placement for the Child]," was not helpful. The LEA must select a proper placement for the Petitioner. In turn, Petitioner may reject or accept the LEA's placement decision. But, to offer the Petitioner a continuum of placements, was confusing and contrary to the IDEA's provision of FAPE to the Child. (P-8, LEA-15, LEA-16, LEA-17, T287)

**5.** The Principal (Principal) of the Private Therapeutic Day School testified. She candidly stated that she was not aware of the Child's recent progress report notes but that she knew about the Child's behavior at the LEA placement. The Child's behavior has regressed. At the Private School, the Child never threw objects, did not use profanity as much and did not knowingly repeat teacher instructions and student utterances. The Principal testified that the

Child now participates in these behaviors. Petitioner confirmed the Principal's statement to the effect that the Child mimics other classmates' utterances. Thus, the LEA's educational placement, Private Therapeutic Day School, does not appear to suit the Child's social needs even if he shows some academic progress. The Child has special education needs and was not a behavioral problem at the Private School, only at home or on the bus.
(T580, T573).

**6.** The LEA School Psychologist, was extremely knowledgeable in her field and her report, dated January 27, 2012 was credible and informative regarding the Child's Present Level Of Performance. But later, the Independent Evaluator submitted additional credible evidence to superimpose over the LEA School Psychologist's findings. This Hearing Officer cannot dismiss the intense level of professional acrimony and animosity between the LEA and the Child's Advocate. The LEA Second School Psychologist testified regarding the inability to correlate findings with the Child's Advocate. He testified that there was "no collaborative" sense between the LEA's educators and the Child's Advocate. The Special Education Director confirmed this observation and reaffirmed the need for the Advocate's written "reports" because as he stated, "if it isn't written, it doesn't exist." (T189). Thus, it appeared to this Hearing Officer that the LEA did not fully consider the Advocate's data or the Independent Evaluator's report. To the LEA, both therapists became "suspect" and their findings did not appear to be properly considered by the LEA School Psychologist. She offered anecdotal information regarding other autistic students and did not seem open to the Independent Evaluator's autism findings. She made derogatory references to the Independent Evaluator's testing tools and to his designation of the Private School. But most importantly, after the Independent Evaluator gave his opinion that the Child has autism, the LEA School Psychologist chose not to do any further autism testing and did not provide the Petitioner with an oral explanation or written notice to that effect. (LEA "CC", T186, T414, T430-434, T296-300, LEA

"D").

7. The LEA's IEP team implemented a Resolution Agreement which placed the Child at the Private School. Later, the Special Education Director testified that he considered the Private School placement improper though he acknowledged that the LEA agreed with the Parent that the LEA could not provide a proper placement. The Hearing Officer opines that the the LEA either acquiesced to an improper placement or properly placed the Child at the Private School during the 2012-2013 school year. The Child's bad behavioral incidents occurred prior to the Private School placement. There were no "new" in-school incidents for the LEA's eligibility committee to consider. Also, the Child now wears a medication patch. The patch greatly benefits the Child and assisted him to quell behavior at the Private School. The only aberrant behavioral outbursts the Child has experienced recently have occurred at home, not at school. At home behavior does not support an ED special education label unless out-of-control behaviors spill over into the Child's school setting and adversely impact academic performance. There was no due process hearing evidence presented to show that the Child's academic performance has been adversely affected by the Child's bad behavior. (T44, LEA "FF," DE26, LEA "EE," T194, T180, T187).

8. The Child was academically successful for one year in the Private School. Teachers noted hyperactivity and structural needs in school. Private School reports indicated as follows regarding the Child's academic performance at the Private School from August 22, 2012 to June 14, 2013:

> [The Child] does well in a supervised classroom situation as he has not had any referrals when instruction is occurring. However, he has received referrals when the situation is not structured such as on the bus." (P-2, EB000219, DE26).

9. This Hearing Officer deems credible the Independent Evaluator's report stating that the Child has internalized bullying perceptions that support the notion that he is an anxious, hypervigilant child. But this Hearing Officer makes no assessment regarding the bullying other

than to acknowledge that the Child is fearful of bullying. However, three clinical psychologists have stated that the Child is afraid of bullying at the LEA. In any event, the bus is not the school environment though the Child must also control himself there. But even the bullying perceptions subsided at the Private School. (EB000159, P-4, P-10, P-13, P-14, DE26).

**10.** Petitioner was provided a contract to enter the Child in the Private School for the 2013-2014 school year. Then the New Private School Director retracted the re-entry request after the prior private school director left the school. But the New Private School Director testified by telephone. At times, the New Private School Director was extremely loud. She attempted to blurt out narratives regarding incidents that occurred at the Child's home, not in the Private School setting, then ended the call by hanging up abruptly on Petitioner's counsel. Thus, even though the New Private School Director appeared to be professionally qualified to testify at this hearing, her assessment of the Child's emotional status, is not relevant to the fact-finder. But the New Private School Director is not intractable regarding the Child's Private School re-entry. She identified two contingencies as follows: (1) the ED label must be deleted because the school's licensure does not permit ED students to attend, and (2) the Child must not pose a threat to the school, himself or to other children. The New Private School Director admitted that the child attended, without incident, the Private School for over a year with the ED label. (P-11, EB000821, T119-121, T128).

**11.** Petitioner asserts that the New Private School Director and the LEA conducted "*ex parte*" meetings with the LEA'S Special Education Director. This Hearing officer has no comment regarding the veracity of this report, but the New Private School Director related overwhelming detail regarding the Child's prior emotional status and home life. The New Special Education Director and the LEA's Special Education Director confirmed that planning meetings occurred, excluding the Petitioner and his father, between the LEA and the Private

School. The meetings may have been planning meetings or they could have been substantive in nature. But, soon after the New Private School Director came on board, the Private School retracted its tuition contract. (P-11, EB000819, T191).

**12.** The hearing record is unclear regarding the Petitioner's assent to numerous IEPs. On August 8, 2012, when the ED label change was effectuated, the Petitioner and the Child's father, quite clearly, did not understand the import of the ED label change. Later, during the re-evaluation meeting on August 8, 2012, an emergency erupted when the Child cut his hand. Both Petitioner and the Child's father left the re-evaluation meeting for the hospital. [5] Many IEPs have extensive notes and parental redrafts. The IEPs do not, on their face, show that Petitioner ever consented unconditionally to a properly drafted IEP. Also, upon review, the IEPs are all notable for the number of questions, notes and objections handwritten upon them. Thus, the Hearing Officer does not deem that Petitioner ever executed, without reservation, a properly drafted IEP providing this Child a FAPE in the LRE. The IEPs are substantively defective and ought to be redrafted after due collaborative effort with the Child's therapists. Also, the IEPs do not provide placement in a LRE that is in conformity with therapeutic evaluations submitted to the LEA. (P-1, P- 2, P-3, P- 4, P-5, P-6, LEA "AA," LEA "H, LEA"V," T274, T486, T534).

## APPLICABLE FAPE LEGAL STANDARD

In order to determine if the IEP provides the Child a FAPE, the Hearing Officer must ask: First, does the IEP comply procedurally with Virginia Regulations and IDEA? And, if the IEP is procedurally correct, this Hearing Officer must then determine: Is the IEP reasonably calculated to enable the Child to receive educational benefit?

In *Board of Educ. of Hendrick Hudson Central School District, Westchester County v. Rowley,* 458 U.S. 176, 102 S. Ct. 3034 (1982), the U.S. Supreme Court defined a "free and appropriate education," (FAPE) as one that provides "personalized educational instruction. "

[5] The Child's mother hurriedly left the meeting which soon ended so the father could meet her at the hospital.

FAPE is "provided in the IEP if it is specially designed to meet the unique needs of the handicapped child, [and is] supported by such services as are necessary to permit the child to 'benefit' from the instruction."

In *Hartman v. Loudoun County,* 118 F.3rd 996, 1004 (4th Cir. 1997), cert. denied, 552 U.S. 1046 (1998), the 4th Circuit, quoting the *Rowley* decision, stated that federal courts cannot run local schools and that schools must be given "latitude" in creating an IEP.

Thus, "[t]he IDEA does not deprive educators of the right to apply their professional judgment. Rather, it establishes a 'basic floor of opportunity' for every handicapped child." *Rowley,* at 201. States must provide specialized instruction and related services "sufficient to confer some educational benefit" on the handicapped child, *Id.* at 200. But [a] student receives a free appropriate public education through the IEP process. *See M.M. v. School District of Greenville County,* 303 F.3d 523 (4th Cir. 2002).

**DECISION**

I find that there has been a denial of FAPE to the Child in the IEP's creation, the Child's special education labeling as ED, and in the LEA's placement decision at a Private Therapeutic Day School. I will examine the issues presented in this case:

*1. Did the LEA deny the Child a FAPE?*

Yes. Usually, the Hearing Officer gives proper deference to the opinions of LEA staff. And, it is well settled that the IDEA does not deprive educators of the primary role in developing an IEP. *Hartmann v. Loudoun County Board of Education,* 118 F.3d 996, 1001 (4th Cir. 1997); *See also, Springer By Springer v. Fairfax County School Board,* 134 F.3d 659, 663 (4th Cir. 1998) ("The task of education belongs to the educators who have been charged by society with that critical task…").

But the fact-finder is not always entitled to rely upon or defer to professional educators' decisions if the reliance upon them is misplaced. In this instance, the record shows

that it is. It follows that "the fact-finder is not required to conclude that an IEP is appropriate simply because a teacher or other professional testifies that the IEP is appropriate. *Z.P.*, 399 F.3d at 307. The requirement for deference to professional educators is clearly set out in *Tice v. Botetourt County School Board,* 908 F.2d 1200, 1207 (4th Cir. 1990), *See also, M.M.,* 303 F.3d at 532. (School officials determine the content but the fact finder examines whether the IEP provides a FAPE.). In other words, does the record reflect that the Child was able to receive educational benefit from his IEP?

Here, professional objectivity did not prevail. The record is unclear that the LEA fully considered the adverse effect of the Child's autism in his special education plan. This omission calls into question the Child's IEP development. Instead, the LEA and the experts battled with the Advocate, took opposite sides and polarized into one camp or another regarding this Child's special education needs. But the IDEA requires that educators consider specialized information and expertise regarding the Child. The LEA must show that it fully considered the Child's educational plan with professionals who best know the Child. And, the Advocate was contentious. By all accounts, there was bad blood running between the Advocate and the LEA. But the LEA likely deemed the Independent Evaluators' data to be tainted, and did not fully consider it either, because of the alleged connection to the Advocate.

The LEA's animosity toward the Child's Advocate does not constitute grounds for the LEA to dismiss a vast array of competent expert opinion, based upon responsible testing, to arrive at insightful conclusions regarding the Child's educational requirements. But the LEA's obvious dislike and visceral hostility toward the Advocate obliterated any cohesion or discussion between the Advocate, the outside psychological experts and the LEA's school psychological team. As the Second School Psychologist pertly noted, "There was no collaborative effort

[with the Advocate]. The Special Education Director described the discourse failure as a sense of "obstruction" and "condescension" in the Child Advocate's dealings with the LEA about the Child's needs. (T296, T308, T297). But the fact-finder acknowledges that the Child's educational needs were adversely affected by the communication breakdown.

The expertise revealed that the Child is autistic. Thus, the IEP benchmarks selected for him by the LEA may not be relevant, realistic goals. Also, the benchmarks noted in the June 11, 2014 IEP may not be applicable to the Child because the same are couched in choice-of-action terminology. The Child did not "choose" autism. But he must attend school. Thus, the Child's behavioral triggers and goals have more to do with outside stimuli and environmental cues, not interpersonal relationships and "making good choices" as are outlined in the June 11, 2014 IEP. In fact, these benchmarks may hinder or prevent a good outcome for the Child in a school environment because he is autistic. (LEA "AA").

For example, on January 6, 2012, the LEA's School Psychologist reports that the Child's psychological evaluation notes clinically significant behaviors on the BASC 2 in "hyperactivity, aggression and somatization." Professional opinion rendered by the Independent Evaluator, pursuant to the IEE on April 13, 2012 and on April 17, 2012, attributed these behaviors to autism or Pervasive Developmental Disorder (PDD). Instead of conducting additional testing to sort out the causation factor, properly draft the IEP and, ultimately, make a placement decision, the School Psychologist effectively dismissed the Independent Evaluator's findings. The LEA School Psychologists appear to have reached a consensus that the Independent Evaluator, together with the Advocate, render professional opinions solely to support the Advocate's view, namely, that the Child is autistic, not emotionally disabled. But this Child's social issues are characterized by developmental delays caused by autism, not by lack of good

choices from an emotional disconnect as is the case for a child with ED. (LEA "V").

Because the IEP was not developed with collaborative expertise, this IEP was is not reasonably calculated to confer educational benefit because it is not the product of collegial information objectively shared between LEA administrators, the Advocate and the Independent Evaluators. Thus, the Child's IEP is not specifically designed to meet this Child's needs. The Child's IEP must be redesigned to give full consideration to his therapists.

2. *Was The Child Properly Identified As ED?*

No. Generally, LEA educators are entitled to a great deal of deference. But the Parent proved that this Child has autism, not emotional disability as the Child's primary special education label. The rationale for this assessment is that three psychological experts delivered this opinion to no avail. The LEA appeared to dismiss these clinical findings because of the LEA's distaste for the Advocate's zeal to prove that the Private Day School is the only proper placement for the Child.

But, the Petitioner showed that the LEA either overlooked this Child's disability and did not test him for it or that there was no reasonable excuse for failing to test the Child for autism which is his disability, not emotional disability or ED. *See also Bd. of Educ. of Fayette Cnty. Ky. v. L.M.*, 478 F.3d 307, 313 (6th Cir. 2007).

Also, procedurally, this Hearing Officer finds it significant that Petitioner was not provided notice, written or oral, to the effect that the ED label, if appended to the child's educational profile, meant that he could no longer attend the Private School. Parental input is an essential requirement for special education. But it is most essential when significant changes to a child's educational plan are imminent.

Because the IDEA's linchpin is parental participation in major educational decisions.

the LEA's label change, adding ED, to OHI and SLD, was a major departure from the Child's prior educational record. The ED change precluded him from many school placement options. Parents should have received oral or written notice of the LEA's label change to ED long before it occurred in August 2012. This substantive procedural defect contravenes the spirit of the IDEA to which the *Rowley* decision refers.

3. *Was The Child's Private Therapeutic Day School Placement Proper?*

No. School Board Counsel asserted that "Choosing one location over another does not deny a student a FAPE." *See Wood v. Strickland,* 420 U.S. 208, 306 (1975). This Hearing Officer wholeheartedly agrees that "needs and performance" do "drive" a placement decision but disagrees with School Board Counsel regarding this Child's requirements. *Id.* at 306. The Hearing Officer does not agree that this Child's "needs" dictate placement in a highly structured level system environment, with a timeout and decompression room, as is provided at the Private Therapeutic Day School. The evidence did not reflect much more about this Child's school behavior than hypervigilance, distraction and hyperactivity. There is no showing that much more than a structured behavior plan, as the Private School utilized, is necessary to manage the Child in the school environment.

Thus, the Child's exclamatory statement to Petitioner, "If I have to go back to the LEA, I will kill myself," without clinical support to determine its factual or mental import, amounts to nothing more than an anecdotal comment made by a frustrated child. And the evidence did not show the Child experiences homicidal or suicidal ideations in a school environment. Also, the Independent Evaluator did not support the Private Therapeutic Day School's rigid disciplinary environment. Even the Child's physician refers to the ED label as a mistake and explains that the label was "inadvertently used." (DE26).

This Hearing Officer also compared the two placements. Upon review, the two placements are vastly different, not virtually the same as School Board Counsel asserts. The Private School is small, with a low student to teacher ratio and without a strict behavioral support level system. But, Petitioner and her witness, the Child's father, indicated that the Private School environment is structured and that students are required to respect one another. On the other hand, the Private Therapeutic Day School has a strict disciplinary focus, with "time-out" rooms and counselors, some of whom function as guards, to direct behavior. (T542). It is quite rigid and a more restrictive alternative for the Child's educational service delivery. By comparison, the Private School is less rigidly structured. It is a not a restrictive environment. Petitioner prefers this educational option and this Hearing Officer concurs with Petitioner that the hearing evidence did not show that the Child needs the highly structured environment offered at the Private Therapeutic Day School. Also, this Hearing Officer considered the Independent Evaluator's learned opinion that this highly structured environment is not suitable for the Child.

Also, it does not appear to the Hearing Officer that the LEA fully examined the structural nature of the school placements offered to the Petitioner. The LEA's placement at the Private Therapeutic Day School appeared to be the result of the LEA's confusing instruction to the Petitioner to "Just pick one [school]. Parent is not an educator and is not equipped to "pick" a placement for her multi-disabled son. *See also A.K .v. Alexandria City School Board,* 484 F.3d. 672 (4th Cir. 2007). Parent was offered a continuum of placements that were acceptable to the LEA. By offering this vast assortment of placements to the Petitioner, and permitting her to "pick any one of them," the LEA effectively delegated the placement decision to Petitioner who has no special education expertise. The LEA may not "pass the baton" to parents to make special education placement decisions for the Child.

As stated above, I find that FAPE has not been provided to the Child in the LEA's IEP development, special education labeling and placement. The Child is autistic because three learned psychological clinicians, at the doctorate level of expertise, who have extensively tested and evaluated the Child, report that he is autistic and there is no irrefutable evidence to the contrary. The outside psychological testimony was credible. The IEP does not provide the least restrictive environment for the Child who has not been shown to have behavioral issues that adversely impact him in a school environment, only in a home setting. But the Child does now have "new" problematic behaviors that he exhibits only in the Private Therapeutic Day School.

Finally, the LEA freely admits that it cannot provide a FAPE to this globally disabled student. The LEA disputes which private placement is appropriate under the IDEA. This Hearing Officer concurs with the Petitioner that, in this case, the LEA's Private Therapeutic Day School Placement is improper. The Child was successful in the academic environment provided by the Private School and had no PTSD. At the Private School, there were only two minimal behavioral incidents which resulted in trips home after the Child's medication patches fell off. Thus, this Hearing Officer deems that the Private School placement is appropriate. *See also County School Board of Henrico County v. R.T.*, 433 F. Supp. 2d 692, 697 (E.D. Va. 2006); *See also School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 371-372 (1985); *See also Tice v. Botetourt Co. Sch. Bd.*, 908 F.2d 1200 (4th Cir. 1990); *See also Honig v. Doe*, 484 U.S. 305 (1988); *See also Florence County Sch. District Four v. Shannon Carter*, 510 U.S. 7 (1993).

*4. Did the Petitioner prove that The LEA Committed Fraud?*

No. This allegation was not asserted and is hereby stricken from the record in this case.

Sarah Smith Freeman, Esq.

**HEARING OFFICER ORDER:**

(1) The LEA admits that it cannot provide the Child a FAPE. The IEP is not appropriate for the Child. His IEP must be redrafted to suit his educational needs. For special education labeling purposes, this Child is deemed an autistic child, not a child who has an emotional disability. Thus, the LEA is hereby directed to delete the ED label from the Child's educational record. The Private Therapeutic Day School placement is improper.

(2) The Independent Evaluator will make an immediate determination regarding the Child's current mental status and ability to attend school without injury to himself or others. If he does pose a risk, per the Independent Evaluator's assessment, or, if the Private School is no longer available to the Child after learning of the child's changed special education status, the Petitioner may select an alternate Private Day School for the Child which conforms to his special education needs.

(3) Because the LEA admits that it cannot provide the Child an appropriate placement at this LEA and the Parent's preferred Private School placement appears to fit the Child's needs, the Private School is deemed the least restrictive environment for his educational service delivery. The Hearing Officer affirms placement at the Private School until the Child graduates on or about June 14, 2019 or until he leaves the LEA, whichever event shall first occur. The LEA will reimburse the Petitioner for tuition and transportation costs as the FAPT team deems appropriate and in conformity with the prior Resolution Agreement for the LEA to reimburse for one-half of the tuition cost.

(4) The Hearing Officer does not condone the Advocate's prior contentious stance and recommends that the Advocate make an apology to the LEA's Special Education Department, to the LEA's School Board and, most specifically, to the LEA's Special Education Director for making certain unwise remarks to them This Child's special education needs require that all professionals "get along" in order to achieve a FAPE for him.

***Right of Appeal Notice***

This decision shall be final and binding unless either party appeals in 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.

**Decision Date: October 22, 2014**

Sarah Smith Freeman, Hearing Officer

**CERTIFICATE OF MAILING**

I have emailed the above Decision to counsel on this date and will follow-up by mailing a hard copy of the decision to all counsel and parties.

Sarah Smith Freeman, Hearing Officer

**Sarah Smith Freeman, Esquire, VSB# 21354**
**Freeman and Associates**
**999 Waterside Drive, Suite 2525**
**Norfolk, Virginia 23510**
**(757) 777-3775 Office**
**(757) 777-3410 Facsimile**
**(757) 535-4767 Mobile**
**sarah.s.freeman.esq@gmail.com**