10-015

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION

In Re: Child

Due Process Hearing

Findings of Fact
and
Decision

Parents:

Parents, *Pro se*

Counsel for the City
Public Schools:

LaRana J. Owens, Esq.
Drive
Building , Suite
, Virginia

This matter came to be heard upon the complaint for due process filed by the Parents, ("the Parents"), against City Public Schools, ("the LEA") under the Individuals With Disabilities Education Act, ("the IDEA"), 20 U.S.C. 1400 et seq. and the regulations at 34 C.F.R., Part B, Section 300 et seq., and the Virginia Special Education Regulations, ("the Virginia Regulations"), at 8 VAC 20-80 et seq.

This due process hearing was held before the undersigned Hearing Officer over eight days, on November 3, 4, 5, 6, 9, 10, 16, & 17, 2009 at the , Virginia. The hearing, which was closed to the public, was transcribed by a court reporter. The Parents appeared at the hearing, *pro se*. The LEA was represented by a Special Education Coordinator, and by counsel.

Parents' original due process request was filed on September 16, 2009, Thereafter, Parents requested leave to amend. Parents amended the due process complaint

and it was submitted, together with the Motion for Maintenance of Current Educational Placement, on September 22, 2009. This decision is timely and within the 45 day limitation period.

Parents' and the LEA's Motions and the Hearing Officer's Pre-Hearing Report, briefs, rulings, Temporary Placement Order and other documentation submitted in preparation for this hearing have been included in the evidentiary record of this matter and are herein submitted.

In the present complaint, parents allege that the LEA has not provided a free appropriate public education to their daughter, ("student"), in the least restrictive environment by failing to provide student FAPE through a sufficient IEP. Parents seek reimbursement for tuition and related costs of their unilateral placement in private day school in Virginia. Parents formerly enrolled student in this LEA in May, 2008 for completion of her grade year and the for her entire grade year, 2008-2009. Parents removed student from this LEA in August, 2009. Parents enrolled student at the private placement in September, 2009 where student currently attends school in a day program. Parents allege that the private placement is an appropriate placement for student.

ISSUES PRESENTED:

1. "Did this LEA provide a FAPE to student in the least restrictive environment?"

2. "If the LEA did not provide a FAPE to student, is the Parents' unilateral private placement of student an appropriate placement for which parents are entitled to receive reimbursement for tuition and related costs?"

ARGUMENT

The LEA asserts that Parents' due process request should be dismissed, with prejudice, on the merits in its entirety.

1. Student's mental health issues, originating in Oppositional Defiant Disorder, Bi-Polar Disorder, Depression or Adjustment Disorder, do not occur at school. Student's behavior problems only happen at home because of unrest and general upheaval in the home setting. Environmental factors: the family's peripatetic lifestyle, familial discord, mental and medical instability, financial woes, excessive unexplained absences and the cramped confines of the grandparents' home were factors which exacerbated student's problematic behavior at home. At school, student exhibited the behavior of a child with ADHD.

Student's IEP is appropriate and provides student with a FAPE in the least restrictive environment. Student's OHI category is correct pursuant to the IDEA. When indicated, the LEA properly reviewed student's psychological data and timely convened meetings

of the IEP committee to consider new information provided by the Parents. Additional evaluation by the LEA is not suggested nor required by student's school performance.

If the parent or parents of a child with a disability, who previously received special education and related services under the authority of a local school division, enroll the child in a private preschool, elementary, middle or secondary school without the consent of or without referral by the local school division, a court or a hearing officer may require the agency to reimburse the parent or parents for the cost of that enrollment. Reimbursement is required only if the court or hearing officer finds that the local school division had not made a free and appropriate public education available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the standards of the Virginia Department of Education that apply to the local school division. 34 CFR 300.148(c); 20 USC1412(A)(10)(c)(ii).

2. Because Parents believed that student's IEP was inappropriate and the school environment hostile, Parents chose to enroll student at the private school prior to review by a hearing officer. Parents who remove a child prior to or during a due process hearing or judicial proceeding, do so at their own financial risk.

Student was unilaterally placed by Parents at the private school. Without the LEA's consent to private placement, the law does not require the LEA to bear the expenses of reimbursement unless the hearing officer rules in favor of Parents. Parents who make a unilateral placement do so at their own financial risk,

Private tuition costs are not required to be reimbursed unless the hearing officer first finds that the LEA failed to provide a FAPE and further, that the private school placement is appropriate pursuant to the IDEA.

FINDINGS OF FACT:

1. Student is a year old child whose date of birth is November 3, . Student is enrolled in a local private school where she is in the grade. Formerly, she attended a portion of 6th grade and all of 7th grade at an LEA middle school after transferring into this school district from the state of West Virginia. Student became eligible for IDEA on November 21, 2005 having qualified for special education and related services as Other Health Impaired ("OHI") primarily because of Attention Deficit Disorder ("ADD"). (A-1) (B-9)(B-40) (Testimony/Guidance Counselor, Parent, West Virginia principal) (C4-16) (F133-134).

2. Student's current placement at this LEA is in the public day school. Her current IEP provides for resource classes in English and Math. Pursuant to the most recent IEP, student is able to speak to a guidance counselor if she feels she needs a "time-out." (B32-59)(B61-76)(B80-81)(B-84, 85) (B87-103)

3. Student came to this state with her father and sister in the Spring, 2008 after moving here from West Virginia. Prior to the move, student lived on a farm with her mother, father and sister. At the farm, student's family had raised a herd of emus as a therapeutic, entrepreneurial endeavor. Unfortunately, the family farm was not financially successful and parents endured grave financial difficulties during student's 2007-2008 school year. Ultimately, student's parents lost the farm where student had lived for many years. The move from West Virginia created turmoil in student's academic career: Student had to leave the school district where she had been enrolled since kindergarten. Student's principal testified that she had been student's academic mentor and had personally assisted student for student's entire elementary school years in West Virginia. Testimony revealed also that student's mother traveled to the state of Georgia to find work. Eventually, the whole family returned to Virginia where student's father moved his two daughters into the home of his parents in Virginia Beach, Virginia. Unable to find work, student's mother came to reside with her family and in-laws in Virginia Beach. Thus, by necessity, both families came to reside together in a modest, single family home in this LEA school district. (Testimony/West Virginia principal, student's paternal grandmother, parents, F133-134)

4. There was a three week delay in student's initial enrollment at this LEA because parent did not have all the necessary paperwork to establish residency at this LEA. Upon Student's enrollment, she completed 6th grade at this LEA, the LEA having accepted "as written" student's "transfer IEP" dated September 26, 2007. The 2007 IEP was not signed by Parents. Testimony at the due process hearing established that the LEA correctly identified the "transfer IEP" as the latter 2007 unsigned IEP. West Virginia statutory law permits implementation of an IEP without obtaining parental signature to the proposed IEP if Parents are provided notice of its contents. Student's prior principal testified that she did provide notice of the above IEP to the Parents. Though soon after the 2007 IEP was created, student left the state of West Virginia. (Testimony/West Virginia Principal, Father, Paternal Grandmother, Parent) (B1-7, B8-16, B24-31)

5. In September, 2008, the LEA reviewed the transfer IEP from West Virginia. Changes were made and accommodations created to suit the needs of a child with ADHD. Parents alleged at the due process hearing that this LEA had made a mistake in that student was placed in 7th grade curriculum at this LEA because student's "transfer" West Virginia IEP required that student be retained in 6th grade. Also, parents allege substantive procedural error in that this LEA did not implement an IEE request Parents stated they made in West Virginia. These issues appear to be moot in that Parent signed off on the September 29, 2008 IEP at this LEA indicating that student was placed in 7th grade curriculum in an inclusion classroom. The LEA expressed concern in e-mails contained in student's academic file indicating that the LEA could not understand why student's mother wanted her to receive failing grades. Parent reasoned that the LEA had inflated the grades in order to pass student on to 7th grade. In any event, this issue was presented in infinite detail at the due process hearing. It does not require serious consideration: Parent affirmed the LEA's 7TH grade placement decision when she signed the above IEP on September 29, 2008. (B8-16)((B1-7)(B24-31)(B32-59)(F66-71)(F92-F93) (Testimony/parents)

6. On September 29, 2008, Parent executed consent to the LEA's IEP which had been created based upon student's Present Level of Performance ("PLOP"). Student's PLOP indicates that student's academic deficiencies were primarily in Math and English for which she was to receive special accommodations. In West Virginia, on the sixth grade level general skill tests ("Westests"), equivalent to 6th grade SOL's, student received partial mastery scores in mathematics, reading & language arts and mastery scores in science & social studies. Regarding student's West Virginia partial mastery scores in mathematics, the PLOP states: "Partial Mastery in Mathematics indicates [student] shows basic but inconsistent performance of fundamental knowledge of skills needed to estimate, solve problems in context, convert fractions, and organize and display data. (B32-59) (C22-23)

Student's PLOP of September 28, 2008 also states: "Due to Attention Deficit Disorder, [student] needs assistance with regular education classes. [Student] would also benefit from priority seating near the teacher and redirection to stay on task. [Student] needs to have directions repeated and clarified at times while completing school work. Using her planner to record homework will help her to stay organized."

And further the PLOP clarifies regarding student's ability to communicate with her teachers and peers: "Life skills: [Student] is capable of communicating effectively with others... No auditory visual, articulation, or fluency problems have been observed."

Most significantly, regarding student's behavior and her social/emotional state, the PLOP summarizes: "[Student's] behavior is consistent with her diagnosis of Attention Deficit Disorder. [Student] is impulsive at times and occasionally asks questions before she has attempted the work. [Student] has difficulty with organization.... [Student] is a friendly, talkative, outgoing individual, who seems to make friends easily. [Student's] course of study will remain academic. [Student] transitions throughout the school well." (B40)

7. Student's last agreed IEP provides for the following accommodations for student: priority seating, redirection, textbooks at home, use of a planner and repetition and clarification of test directions. Also, special education accommodations were provided for Math and English, 30minutes at 5 days per week, in an inclusion module. The box marked "no" has been checked off for medical or nursing services required to implement the IEP. Under the heading "Least restrictive environment," the "public day school" box is checked as the selection made by the LEA from the continuum of educational placements. Parent agreed to this placement on September 28, 2008. (B32-59)

8. Subsequently, the September 28, 2008 IEP was modified on February 23, 2009. Parent "bargained" with the LEA that she would send student to school if the LEA agreed to make a referral to day treatment. The LEA explained at the IEP meeting that student was not eligible for day treatment because she had no behavioral issues at school, only at home. Parent insisted on the referral anyway and the referral to day treatment was made.

(B61-76) (Testimony/parent, LEA representative)

9. An additional IEP meeting occurred on June 11, 2009 but no IEP changes were considered at all primarily because of the combative behavior of Parent's advocate who participated in the IEP meeting by telephone. Notwithstanding the advocate's truculence and his refusal to allow the meeting to progress without telephonic harangue, it was obvious to all meeting participants that changes to the IEP were unnecessary: The IEP was not deficient. The IEP fully supported student's academic needs. Modifications had already been entertained and made. Student had excelled after IEP modifications were made on February 23, 2009. (B47-50)(Testimony/ special education coordinator, parent) 7th grade teachers) (Tape of the June 11, 2009 IEP meeting) (A1-5)(B78-79)(F72-73)

10. Late October, 2008, e-mails in student's educational record reveal that a serious homework issue developed early on between Parent, student, the English teacher and student's special education teacher. Student lied to her mother about completion of her homework. Student would not complete her homework or would not turn in completed work. Parent reported that she fought bitterly at home with student over completion of assigned homework. The e-mails reveal that student's mother became frustrated that she was unable to manage her daughter's homework on-line. The on-going discourse between the Parent and student's special education teacher regarding the homework issue escalated into an "on-line" diatribe by Parent against the special education teacher and the other teachers. Finally, Parent demanded that student not be subjected to consequences or "any form of punishment" for failing to complete test corrections, failing to return a signed homework detention slip and failing to bring in homework. Though Parent admitted to the teacher that she knew of her daughter's propensity for "storytelling" at times, Parent cast angry accusations against the special education teacher. Parent continually questioned the methods utilized by student's special education teacher. Parent challenged the special education teacher's rules and requests for compliance with her daughter's teachers. Though given ample advance notice of assignment completion and makeup work deadlines in writing and on line by the special education teacher, Parent defied the LEA's requests for assistance with homework and assignment completion. In advance of any bullying or academic issues, via one of Parent's e-mails, Parent advises the LEA of her intent to remove student and have the LEA provide funds for student's tuition for "alternative education." (F1-12)

11. On October 21, 2008, Parent concludes one of her e-mails as follows: "So when you add another hurdle of me not being able to confirm WHAT she is supposed to do at all, then homework becomes an unreasonable burden on my entire family. Her doctor appointment is tomorrow morning and I really hope that getting her back on Concerta will make a very big difference. Otherwise we might need to explore funding to put her back into a smaller school with other kids that have attention issues and who are better equipped to help her navigate successfully through school. If your system is not working for her and everyone continues to create more barriers, the county is obligated to pay for alternative education. Her medication will not resolve the staff's refusal to give me access to [online homework site], and as long as I do not have it she will fail...If this continues after she is on her meds for a few days, we will all need to have another

meeting to discuss alternatives." Student's special education teacher responded that student had likely changed the password on the homework site to prevent parent's access. (F4-5)(Testimony/parent, special education teacher)

12. It is apparent that the special education teacher was challenged by student's defiance regarding her instructions for work completion. Student preferred carrying colored markers and drawing pictures instead of doing her school work. Student was required to complete one administrative detention of thirty minutes for not bringing in her homework. When asked why she did not bring in her homework, student often replied, "Oh, I didn't take my medication today," to her special education teacher. In order to expedite homework completion, student was required to transport a daily planner between home and the classroom. Student's special education teacher testified that student typically left the planner in her locker. Allowing student to leave the class to retrieve the planner was disruptive because student had to exit class to get it. Student's special education teacher admitted frustration with student concerning all of these issues. Student's special education teacher indicated that student was "defiant:" Student did not follow directions. Often, the special education teacher had to tell student to stop what she was doing (drawing with crayons, talking on a cell phone). (F5, Testimony/special education teacher)

13. Student's special education teacher notified Parent of student's non-compliance with her instructions. Student's special education teacher became frustrated with Parent's malaise regarding student's daily diary which student was expected to return signed each morning. E-mails sent by parent to student's special education teacher are hostile, mistrustful and confrontational in tenor. Notably, one e-mail sent by Parent accuses the special education teacher of physically assaulting student by "grabbing" a dictionary out of student's hand. During the due process hearing, student's special education teacher explained that she removed the dictionary from student's possession because student had disobeyed the school rule not to use a dictionary to look up terms. (F4-5, Testimony/special education teacher, parent)

14. Student had not been on her ADHD medication for months in the first half of 2008-2009 school year. Student's teachers complained to Parents of student's failure to complete schoolwork. Parent complained by e-mail to the school that she was unable to locate missing work from the school. Arguably, student's behavior at home escalated as her school work declined because of organizational issues. (F193) (F4) (F-12) Testimony/psychiatrist, parents, special education teacher) (C28)

15. In November, 2008, student's family became connected with a city entity charged with providing assistance to necessitous families, a "FAPT team." With the FAPT team, family therapists came into the grandparents' already overcrowded home to assist the family to deal with student's behavior and to provide all members with family therapy. In-home therapists attested, quite convincingly, to student's wildly out-of-control antics at home. Given to prolonged rages, student was loud and profane at home if she "did not get her way." Mother and daughter fought venomously. In-home family therapists reported that student's outbursts lasted upwards of two hours at a time. From

the testimony of the Parents and the in-home therapists, there is no doubt that student's at home behavior is diametrically different from her school behavior. Though consensus of the teachers was uniform: Student was meek at school. (Testimony/parents, 7th grade teachers, in-home family therapists, C24-33)

16. In November 2008, student was evaluated by an outside school psychologist. The outside school psychologist provided Parent with his opinion that he suspected student to be ill with mental illness – Depression, Oppositional Defiant Disorder & Adjustment Disorder in addition to ADHD. Student was provided medication for ADHD by a treating psychiatrist who saw student for about 15 minutes and who spoke to student mainly through discussion with one of the in-home therapists and with the outside school psychologist. Student's in-home therapist related student's at home behavior and her "school issues" to the psychiatrist. Student related personal problems at home to the psychiatrist: the move, her problem with her grandfather, her issues with her mother, anger, her sense of being "separate" from her family. The psychiatrist, speculating about whether or not student was undergoing mere hormonal changes or emerging Pediatric Bi-Polar Disorder, prescribed student a prescription to treat ADHD. By virtue of student's "compromised mental status" via her mother's representations to the school, Parent permitted student to stay home from school for a week in November, 2008 to permit the medications to take effect. (Testimony/outside school psychologist, psychiatrist, parents) (F12) (C35-45)

17. When student was first tested by the outside school psychologist, student's mother and special education teacher assisted with the testing. The special education teacher reported clinically significant results for student in the area of social problems, attention problems and rule breaking behavior. The outside school psychologist suggested individual and family therapy for student, medical management of medications, and recommendations to address student's attention issues in school. Student's IQ score had dropped from a high of 124 (earlier IQ testing completed at the age of 7 years, 3 months) to a low of 75 full scale ("FSIQ"). The outside school psychologist reported regarding student's testing demeanor:

"[Student's] conversational proficiency seemed advanced for her age level. She was uncooperative and appeared fidgety or restless at times during examination. [Student] sometimes responded too quickly to test questions and she gave up easily after attempting difficult tasks." The outside school psychologist reported student's math computational skills to be comparable to those of a child at age 8-7 years. He concluded, "The scores she received suggest impatience, restlessness, impulsivity, and a fast paced personal tempo... She may have a problem exaggerating or be in a severe pattern of maladjustment."(C4-7, C31-45)

18. Subsequent to the above activities at the outside school psychologist's/psychiatrist's office, Parent reported to the LEA that her daughter was "silently suffering" from mental illness. At the hearing, Parent proffered that she was afraid for student to come to school because of furtive bullying and the mean-spirited middle school children who did not like her daughter and teased her. On November 17,

2008, Parent complained of a "hostile environment" at school, yet she admitted that student, known to have ADHD, had not been on her medication and "has gone for several months without medication." Student's father recalled his daughter's "bawling" daily after school. There was one incident he witnessed: a female child asked his daughter, "Where are you going Miss Piggy?" in his presence. Another child stated to student, "You're ugly." Parents asserted that student's teachers all "lied" under oath at the hearing. Student reported that "peers pick on her at the bus stop." There was documentary evidence that student steals from other children and forged her mother's handwriting in notes to the LEA. (C25, Testimony/parents, PMisc1-4, F-193)

19. Student's guidance counselor stated that he sat in the lunchroom daily with student: He never observed any of the events student reported to her parents though he admitted that students sometimes do make fun of "Special Ed" children. On one occasion after student's schedule was changed to include resource classes, student asked her guidance counselor for assistance in the lunchroom because "she [a classmate] was staring at student." Student's guidance counselor clarified that no one stared and no one bullied student in his presence. There was an additional assertion by the Parents that student had been "hit" and that the school nurse's notes would somehow bear out this fact. This fact was not proven. There were many nurse office trips.

At its best, Parents' presentation of evidence on the bullying and hostile school environment was contradictory and confused. Parents have not proven that student was either bullied or hit by schoolchildren nor treated badly by any of her teachers at this LEA. (Testimony, school guidance counselor, 7th grade teachers)

20. Student's father testified that he did complain once of bullying behaviors by other children but he did not request a conference with the LEA to discuss bullying or teasing. Contrarily, student's mother requested meetings, she created and responded to e-mails, she issued ultimatums and directives regarding student's IEP, she demanded behavioral plans, and she bargained terms for student's ultimate return to school. Bullying did not appear to be a parental concern during Parent's on-going discourse with the LEA from September thru October, 2008 though Parent was engaged in on-line discussions with 7th grade teachers. The hostile environment issue was not raised until November 17, 2008 and the same was mentioned concurrently with Parent's admission that student "had not been on medication for months." Parent alludes to "peer and teacher perception" problems only in her October 6, 2009 request for out-of-zone placement but attributes this issue to lack of medication. (Testimony/parents) (F1-158) (F159-178) (F193)(G31)

21. Parent requested a meeting with all of student's teachers to discuss "the homework problem" in mid-November, 2008. Parent suggested that student be given a "clean slate" for missed work. Parent requested that all of student's teachers needed to confer with the student's "in-home therapist" about getting student do her homework.

Parent implored student's teachers not to hold student accountable for any missed or incomplete work. Student had accumulated only one 30 minute detention for missing work. (F193) (Testimony/parents)

22. For the first quarter of the 2008-2009 school year, student earned the following grades at the LEA's middle school: French –D, English – E, Math – E, Health – B, Life Science – C, Social Studies. Student's final grades were as follows: English –D, Math 7 –B, Art –B, Health –B, Life Science C, Social Studies – B, Life Science –C, French-C. Student's fourth quarter grades (after taking her medication along with the resource class assistance) were as follows: Math 7- A, English-B, Chorus-C, Health-A, Life Science-B, Social Studies-B.

Student passed grade 7 Reading and US History SOL's. Student did fail her Math SOL.

Out of 177 days of school, student was absent for 31 days, 20 days being "unverified absence" and 4 days being marked "Excused." (D148, D149, D151, F181-192)

23. Student's father removed her from class in December, 2008 to attend to a family emergency. Student was scheduled to serve detention later that day. When student did not serve the detention for missed work, student was required to serve an additional administrative detention. Parents denied that student was responsible for serving the second detention. Student's mother complained to the LEA about student having to serve the second detention. Parents stated that student should not have to receive consequences for missing a detention. Student's father asserted that student should not be required to keep her locker tidy and organized because of her mental disorder. Student's mother asserted that the special education teacher singled student out in class and drew attention to student as she said to her, "You're not worth the trouble." The LEA asserted at the hearing that these events either did not occur or were misconstrued to Parent by student's reports to Parents. In light of the evidence and testimony at the hearing, it is more likely that events were misreported to Parents by student than it was likely that the teachers were all dishonest. (Testimony/parents, 7th grade teachers, special education teacher. (E-1, E-2, E3-4, E-5-6, F134)

24. On December 31, 2008, the family was evicted from the home of the grandparents. Student's mother was hospitalized. Parent attempted to seek placement for student at a residential placement for the city which is primarily a behavior modification program. Parent sought and obtained a temporary residential placement for student from the city. Student was ejected from the program because she refused to follow rules imposed. (Testimony/Parents, LEA representative, C24-30, G-29)

25. Parent's ongoing on-line discourse with the LEA continued into January, 2009. Parent demanded voluminous IEP concessions from the IEP team based upon the information contained in student's outside psychological report. Parent wanted modifications to be expeditiously completed. Parent demanded that the LEA execute additional IEP goals and behavioral accommodations. When she was in school, student's behavior continued to be to be without incident. (F13-142) (Testimony/7th grade teachers)

26. In fact, Parent called many of student's 7th grade teachers to testify. Generally, student's 7th grade teachers agreed that student was not a behavior problem at all or, alternately, that student's behavior "didn't stand out." Many teachers could not remember student at all. Parent asserted that student's teachers "lied" under oath at the hearing. Parent made declaratory statements indicating that teachers who testified at the hearing were individually dismissive of student's erratic bad behavior at school. Parent testified the teachers' ubiquitous claim that they did not remember student for her bad behavior was a collective "lie." Parent beseeched this hearing officer not to believe "their" testimony wherein they stated that student was a good student and not a behavior problem at all. Soon after teacher witnesses concluded their hearing testimony, student's mother ran out of the room and demanded that the hearing be stopped or delayed in order for "a circuit court judge" to review the proceeding for fairness to her claim. This hearing officer declined parent's request for interlocutory review of the proceeding in the best interest of the child in order to reach a prompt resolution of this case. (Testimony/parents, 7th grade teachers)

27. In late January, 2009, Parent contacted the LEA representative to solicit her opinion about "what she should do about student's school problem." Parent did not deem that the LEA had given credibility to the outside school psychologist's report. Parent asserted that student had academic deficits yet to be addressed by the IEP team. Parent asked the LEA administrator for an out-of-zone placement for student. The LEA representative referred the parent back to the IEP team. Parent's out-of zone placement request was subsequently refused. At the hearing of this matter, it did appear that the middle school principal did not fully consider the out-of-zone placement request because student had a disciplinary matter on her academic record. Admittedly, the principal did not strictly follow school procedure in that all out-of-zone requests are to be sent to "the [LEA's] main office" for final determination. The LEA's failure to follow procedure in the out of zone request is not a procedurally substantive mistake and therefore it is *de minimis*. (Testimony/middle school principal, parents, LEA representative) (G31, G32-42, F25) (G43-44, 45, 46, 47, 48, 49)

28. Student was again out-of-school from February 4, 2009 thru February 23 , 2009. Without justification, Parents refused to send student to school. Parent requested homebound placement for student during the time period when student was permitted by Parents to be truant from school. Parent has stated on numerous occasions that she would rather "go to jail" than to send her daughter back into "the hostile [LEA] environment." Rather than working on school assignments with student during the three week interlude from school, Parent admitted that she and her daughter collaborated on a "make-up for kids" entrepreneurial project. Upon questioning by this hearing officer, Parent testified that she understood that student was unable to receive a FAPE at home. (D149)(Testimony/parent)(A1-5, A13-17)

29. The IEP team reconvened on February 23, 2009 to modify student's IEP.

Parent requested that the IEP team insert "her" behavior goals and accommodations in student's IEP. The IEP team declined Parent's request. The IEP team did modify student's IEP by placing student in resource classes for Math and English. Also, student's group designation was changed in response to her mother's request. Parents wanted student to eat lunch with a different group of children at school. (Testimony/parent) (B61-76) (F15-20)

30. Parent agreed to place student back at school if student could be reviewed for suitability for the day treatment program. Parent executed consent to the February 23, 2009 modification of student's IEP. (F24)

31. Student was deemed not to be suitable for day treatment because student functions well in a school setting. Day treatment is not appropriate for students unless they cannot succeed in regular day school. Student is not a behavior problem in school. At the hearing, Parent emphasized that student was unruly at the day treatment interview site and that parents had to be interrupted to calm her down. While waiting for her parents that day, student left the interview site and entered a dentist's office in the building. When asked why she did not wait for Parents to complete the interview, student stated that she wanted to get a free toothbrush at the dentist's office. After the impromptu dentist's office visit, student was interviewed privately by the day treatment assistant director. Student indicated dissatisfaction with her mother's plan to remove student from her current school setting. Student indicated that she had finally made a friend at school and did not want to leave the LEA middle school. Finally, student lamented, "Well, I guess I'll have to go to day treatment anyway. Mom always gets what she wants." Parent's request for day treatment was denied. (Testimony/parents, day treatment coordinator) (C46-50)

32. In the Spring, 2009, Parent was contacted by the security guard of a local department store. Parent was told that her daughter's friend had been caught stealing items of costume jewelry from the store. Student denied any involvement. Parent later discovered necklaces from another local novelty store in student's possession. Upon questioning by this examiner, Parent indicated that she made student suffer the consequences of her act by denying the necklaces to her daughter: Parent testified that she threw the necklaces in the trash and did not make her daughter return the necklace to its rightful owner. Parent admitted that her next step was to call one of the family therapists for assistance with student's mental health. (Testimony/parent)

33. After the theft incident, student was admitted to a city psychiatric hospital from April 10, 2009 thru April 19, 2009. Student's illness was attributed to Bipolar Disorder. School problems were noted. Student's medications were reviewed and dosages increased. Student was reported to be happier and her mood was stable upon discharge. Student was then released from the facility. Individual and family therapy was recommended. Anger management was suggested for student.

Curiously, these two items have been "marked over" on the report: "hitting her dad and pushed her mother" has been changed to "hitting her dog and pushed her mother," and

"The patient has a lot of friends" has been changed to "The patient has a history of troublemaking." Notably, the family dog had been noted earlier to be "the sweetest dog in the world" in the family's interview to obtain services from the city FAPT team. (C25, C51-55, C56-59, C60-68, C69-70)

34. At the end of the year student made the honor role and she achieved a Citizenry Award from her teachers based upon her overall success. Parent questioned the teachers regarding their scoring of particular work submitted by student. Parent pointed out deficiencies in grading and deficiencies in student's provision of correct responses to her teachers. Parent disputed the validity of student's academic accomplishments with her English and Math teachers. (C77-78, C72-76) (D52-55, D56-143) (Testimony/parents)

35. At the conclusion of student's 7th grade year, Student's parent attempted to have student's West Virginia grades changed to "failed sixth grade." It is arguable that student would not have been validly in the 7th grade. The West Virginia principal explained that she believed originally that student could benefit by maturing another year before entering a large school. Ultimately, the principal left the decision to LEA administrators. (F87) (Testimony/parents, West Virginia principal)

36. On May 28, 2009 both parents arrived at the LEA for an unannounced visit to the school and "demanded" to see their daughter's educational file. Parents were taken to the conference room. Student's mother began to yell in the conference room so loudly that the sound could be heard through a closed door. "The mother would not stop her hostile behavior and I told her to leave the building. She refused. I told her that we could resume again if she remained calm. She yelled again and I reissued my directive to leave school property. When she didn't I told her that I would be forced to call the police. She replied, Go ahead."

With the assistance of student's father and various LEA administrative personnel, student's mother did become calm. Apparently, student's parents expressed to the LEA that they believed their daughter should have been retained. Parents were "puzzled" and did not believe that student was doing better in school.

Parent disputes the above account because the school guidance counselor did not note this behavior in her testimony regarding this incident. This hearing officer takes note that the e-mail describing this event was created on June 11, 2009 and not on the above date. This account is credible because it coincides with Parent's often recalcitrant hearing demeanor. (F131-132) (Testimony/admission guidance counselor)

37. On June 6, 2009, student's outside school psychologist prepared a follow-up evaluation in which he recommended the private school student now attends. The outside psychologist admitted that he did not have much information about student's present educational status other that the information provided to him by Parent and by graded work. (C72-76) (Testimony/outside school psychologist)

38. Another IEP meeting convened on June 11, 2009. Parents' out of town advocate participated by phone. Parent, the special education coordinator, student's special education teacher, the middle school principal, and other LEA administrators attended the meeting. A taped recording of the meeting was made for the participants and this recordation was played at the due process hearing. During most of the recording's duration, Parent was barely audible. Contrarily, Parent's out of town advocate was rude, disrespectful and confrontational to the LEA administrator conducting the meeting, a special education coordinator. Assertions conveyed by the advocate regarding special education law were faulty or misleading. The LEA administrator was assertive and focused. Notwithstanding the advocate's belligerence and meretricious arguments, the LEA special education coordinator directed the meeting. Although the special education coordinator commented innumerably many times regarding the advocate's surly tone and nasty comments, the LEA administrator did not hang up on the advocate until about 45 minutes into the call. If there was a mistake made at this "meeting," it was in the duration of the call: The meeting could have been terminated earlier. (CD of June 11, 2009 IEP meeting)

39. Soon after disengagement of the call, Parent, who had been sitting peaceably in her seat, apparently took control of the tape and attempted to walk out with it. Thereafter, she refused to turn the tape over to any of the LEA employees or to the school's security officer. When Parent attempted to exit the building with the tape, she was ordered to turn the tape over to the officer. Parent refused and she was subsequently handcuffed, arrested and prosecuted for disorderly conduct and for petit larceny. Parent brought cross criminal warrants against two LEA administrators for misdemeanor simple assault against her. Parent has appealed her convictions. Parent believes that she was wrongfully convicted. The LEA administrators were exonerated of criminal charges. Parent testified that she believes that communication "broke down" entirely after June 11, 2009. This event occurred close to the adjournment of school. There is no credible evidence that communication was impeded between parent and the school. (A1-5) (A34) (Testimony/parent) (Exhibit I – Parent's statement)

40. On August 3, 2009, Parents noticed the LEA of their intent to remove student and to enroll student at a local private school which addresses ADHD behaviors. Parents requested reimbursement. Testimony revealed that the cost for the private placement is in excess of $10, 796 per year. (B84-85) (Testimony/parents) (A35) (A121) (A-147)

41. After receiving Parents' notification of intent to remove student to private placement, the LEA scheduled an IEP meeting to address the unilateral change of placement notice. Parents were effectively noticed to attend the meeting, but Parents did not attend. Upon questioning, Parent stated that she did not attend because the criminal court proceeding was occur on the following day. At the August 19, 2009 IEP meeting, the IEP team elected to continue student's current IEP. The team denied Parents' request for reimbursement of private placement. (Testimony/LEA representative) (A36,37) (B80-81) (A146)

42. On September 15, 2009, a final IEP meeting occurred and Parent attended the meeting. Parent provided additional psychological data regarding student but Parents' request for tuition reimbursement was denied on the basis that the LEA is providing a FAPE to Student in the LRE. Also, the LEA deems the private placement to be "too restrictive" for student. (A41, 42, 43, 44, 45) (Testimony/LEA representative) (B84-85)

43. The LEA school psychologist prepared a report to evaluate student. Describing student as a "hypervigilent" personality, the school psychologist does not disagree with student's bipolar diagnosis. Pursuant to his psychological report prepared on September 29, 2009, the school psychologist concludes that student's ADHD can be effectively addressed in her current educational placement at this LEA. The LEA school psychologist testified that student does not have a "math" deficit," she has an "attention" problem. Student's IQ score was 104 (average). The LEA school psychologist offered extensive educational suggestions which do not differ significantly from those of the Parents' outside school psychologist. (Testimony/school psychologist) (C86-95)

44. Student's disciplinary record reflects one administrative detention to which her Parents objected because it was "not her fault." Student received another detention for throwing a wet object down the stairwell in April, 2009. Aside from the two above detentions, student's disciplinary record is "clean." (E1, 2, 3-4, 5-6) (Testimony/7th grade teachers, vice-principal for discipline)

45. This hearing abruptly ended on November 17, 2009 after nearly eight days of hearing. Prior to and during the hearing, this hearing officer provided instructions and suggested rules for proceeding as accommodations to Parent. These measures were taken in order to permit student's mother to represent student as a pro se parent. Some accommodations were: Initially contacting the city Legal Aid Society to speak with the assigned attorney; lengthy pre-hearing conferences in excess of two (2) hours by phone to assist with Parents' witness list, a one to two hour session with Parent to explain due process procedure, providing Parent with forms for witnesses' subpoenas. At the hearing, student's father assisted during some days of hearing until this Parent had to go to work. There were many "time outs," breaks and directions provided to Parents during the hearing. Grounds for objecting to evidence were explained and Parent seemed to understand the intricate detail of all procedures. Student's mother is highly capable and intelligent. She was never "rushed" nor forced to comply with unreasonable time limitations. All of this was done in the student's best interest at this hearing.

Parents had rested their case on a prior hearing date. On November 17, 2009, LEA counsel represented to this hearing officer that the LEA's last witness was to be the LEA representative. Parent appeared distracted that LEA counsel intended to conclude the LEA's case. Parent requested that the hearing remain open for the "recall" of certain LEA witnesses. This hearing officer granted Parents' motion to recall certain witnesses, but only in rebuttal to specific LEA testimony. The LEA representative concluded her direct testimony and Parent began cross-examination.

During cross examination, LEA counsel objected to one of parent's questions. This hearing officer sustained counsel's objection. Parent questioned the "reason why" this hearing officer had ruled contrary to parent's agenda. Parent then refused to proceed. Parent was provided one more "time-out" of three (3) minute duration. Parent refused to proceed "under duress" after being warned that the outcome for parent's non-compliance could be dismissal of the evidentiary portion of the due process hearing.

At the conclusion of the three minute call, parent placed her head in her hands and looked down. She again refused to proceed. This hearing officer terminated the taking of evidence in this matter.

BURDEN OF PROOF

In this case Parents challenge sufficiency of their daughter's IEP during a portion of the 2007-2008 & the entire 2008-2009 school year. Further, Parents allege that their daughter's poor behavior at school indicated that the LEA should have placed student in an environment more restrictive than the public day school placement offered by the LEA.

In *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005) the United States Supreme Court ruled that the burden of proof in an administrative hearing brought pursuant to the IDEA, challenging an Individualized Education program ("IEP"), properly rests upon the party seeking relief. The Court stated therein: "[T]he burden of persuasion, in an administrative hearing challenging an IEP, is properly placed upon the party seeking relief, whether that is the disabled child or the school district."

In the instant case, Parents bear the burden of sufficiency of the evidence and therefore, Parents bear the burden of proof.

APPLICABLE LAW

Children must receive instruction in the least restrictive environment for their proper placement. Pursuant to 8 VAC 20-80-64 A.1. [1]the general requirements for restrictive environments and placements are as follows:

"Each local educational agency shall ensure:

a. That to the maximum extent appropriate, children with disabilities, including those in public or private institutions or other care facilities, are educated with children without disabilities; and

[1] The above citation represents the IDEA regulation in effect when these events occurred. These regulations became effective on March 27, 2002. On July 7, 2009, Virginia issued revised regulations that sought to implement changes necessitated by the passage of IDEA 2004 and its implementing federal regulations.

b. That special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or the severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Federal law requires that an IEP team consider behavior intervention strategies for any child with a disability whose behavior impedes his or her learning or that of others. 34 CFR 300.346(a)(2)(i).

DISCUSSION AND CONCLUSIONS OF LAW

Student is an exuberant young lady who is artistic, somewhat bossy, and smart. Student loves to draw. With her colored pencils, student creates detailed sketches of the images around her. Many of student's intricate works - smokestacks, houses with many bricks, individuals walking on paths- are insightful. Student's paperwork is pristine and her handwriting meticulous. Contrarily, Student has attention issues which impede her progress in school for which she receives special instruction through resource classes in Math and English. Student's current IEP also allows student to seek counseling when necessary at school.

Though Parents elected not to have student testify at the hearing, student's mother has a computer screen photo of student which Parent displayed prominently for all to see during each day of this approximately eight day hearing. In the photo, student and her sister appear, standing together with their arms entwined and grinning at each other.

Parents Challenge the Sufficiency of Student's IEP During a Portion of the 2007-2008 & the Entire 2008-2009 School Year.

Student's educational record reflects that student was absent for a considerable length of time during the 2008-2009 school year. Parents also admitted that student was not on medication for six months prior to November, 2008. During the due process hearing, student's Parents both offered explanations to justify student's extended absences from school, notably, one week in November, 2008 and three weeks in February, 2009. Student's extended breaks from school are not justifiable by parents and her school work was likely affected by her absences in the Fall to Winter, 2008 & 2009.

Further, Parents deflected teacher's requests for homework, daily planner return and test corrections. There is little credible evidence that student's social life at school was affected by bullying or that student was prevented by a hostile school environment from coming to school. Extensive evidence exists that it was the inconsistent home environment and student's permission to be truant, not inadequacy of the IEP, which directly caused student's poor academic performance during the latter part of the year, 2008.

Pursuant to *Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley,* 458 U.S. 176, 102 S. Ct. 3034, 73 L.Ed. 2d 690 (1982), the Supreme Court held that an LEA provides a FAPE to a child by providing a "free appropriate public education" through personalized educational instruction "specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction."

"Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Rowley, at 203-204.*

The LEA offered the testimony of its expert, a clinical psychologist who functions as a school psychologist. The LEA's witness has dealt with literally hundreds of special needs children and corresponding IEP's. It is the LEA expert's substantial opinion that student's OHI classification, primarily originating in ADHD, is appropriate for student pursuant to the IDEA: Student's current IEP provides a FAPE to student in the LRE. Other than possible refinements to the IEP in the future to be made to student's IEP as student matures, the LEA expert wholeheartedly supports the current IEP.

The LEA's expert witness reviewed the recommendations of Parent's outside school psychologist: Aside from the recommendation that student enter the private school she now attends, the outside school psychologist's findings were not much different than the LEA expert's assessments with one exception: student's math skill. The LEA's expert witness believes that student's decreased math score obtained by the outside evaluator reflects an "outlier." Namely, the score obtained by the outside evaluator is questionable because it is inconsistent with student's prior math reasoning scores. The outside evaluator described student as "fidgety and hurried" in her responses which is in conformity with her ADHD. The school's expert explained that he believes student has the ability to do abstract math reasoning but sometimes her inattention may impede her progress. It is more credible that student's math score is depressed for this reason.

In any event, Parents did not provide student with the necessary medications she needed, by relieving her symptoms of ADHD to be successful in school, until November 2008. Further, Parents permitted student to be truant for unreasonable lengths of time without adequate explanation during the entire school year. Parents may not now complain that student has not been provided a FAPE in the LRE by her IEP. Parents' activities in this regard have impeded student's federal right to receive a FAPE in the LRE.

Tuition Reimbursement for Student's Private Placement by Parents at a Local Private School and Student's Least Restrictive Environment

In addition to an underlying diagnosis of ADHD for which student receives special education services as OHI, student has received medical diagnoses of Pediatric Bi-Polar Disorder, Oppositional Defiant Disorder, Adjustment Disorder and Depression. Student's current IEP provides for educational service delivery in public day school. Parent has requested that the LEA find alternate placements for her daughter. During student's seventh grade year, Parents requested the day treatment program, a behavioral intervention program in a residential placement, an out of zone school assignment, a homebound placement and finally, private placement funding.

Parents removed student from this LEA at the beginning of the 2009-2010 school year on the basis that the LEA did not provide their daughter a FAPE in the LRE. Student attended school at this LEA toward the end of her sixth grade year, in May –June, 2008, and entirely in her seventh grade year, 2008-2009.

When the LEA did not agree to find alternative placement for student, Parents removed student from school and placed her privately. Parents' unilateral placement for which they request reimbursement is a placement which addresses the special needs of children with ADHD. Social contacts, behavior, independent organizational skills and time management are all functions that are monitored by teachers and personal assistants. Students are not allowed to have cliques or express social preferences. Lunchroom conversation is monitored by teachers and advocates who sit with students at their tables. "Homework" is completed at school which is "time managed" by teachers and advocates. Children are forbidden from using nicknames for each other. Student was once accused of "breaking the rules" for giving necklaces only to her friends. Student has been chastised for being "too controlling" and forced to give up a school club office she had attained. There is no art class.

Parents' private placement for student is infinitely more restrictive than the LEA's proffer of public day school placement. On the continuum of placements, it is the LEA's contention that such placement is "too restrictive" for student and that is why public day school placement only has been offered for student at the LEA.

The facts reveal that student does not require restrictive placement in school but her home behavior was indeed challenging. Student's background reflects that in late Spring 2008, student moved to this LEA district with her family. At the time of the move many tumultuous events had occurred in student's young life: The family farm, their livelihood, was lost. Student's mother was gone, looking for work in Georgia. The family was displaced from their home. Testimony revealed that student's personal situation continued to be tenuous after her arrival to Virginia: Student moved into her grandparents' home where the cramped household wore down each of the family members - student and her older sister, parents and two paternal grandparents. Tempers became volatile. Student's immediate and extended relatives verbally conflicted with each other. Time wore on, money ran out and fuses blew. As the paternal grandmother plainly stated, "I didn't mean for them [student and her family] to live with us permanently."

Again, on December 31, 2008, student left her grandparents' home when student's mother was hospitalized. Student was placed temporarily in a city child facility. Chaos, inconsistency and upheaval dominated student's home life in her seventh grade year.

Parents presented convincing evidence that student was rebellious and wildly out-of-control in her home environment. In fact, Parents enlisted the support of in-home therapists to mediate and improve student's at-home behavior. Student exhibited histrionics only in her home environment: Testimony of the LEA's teachers and the teachers at the private school where student is now enrolled attest to her generally compliant school behavior. Detentions at the LEA were negligible. At the private placement, there has been only one insignificant incident requiring administrative attention.

In contrast to the parents' reports of student's screaming fits, meltdowns and rages, student's 7th grade teachers testified that student's school demeanor was never an issue. Student seemed to mesh into the seams of the school. Student was not a troublemaker. Student generated only one or two detentions for not turning in homework. Other than a cell phone violation in the first quarter, student's only recorded school conduct offense for the entire school year was a detention for dropping a wet wad of paper down the stairwell. Student does not present the picture of a child who needs to be separated from the school population. Aside from her multiple diagnoses, student's school behavior is that of a child with ADHD for which she has an IEP and has been provided appropriate special education services at this LEA pursuant to the IDEA.

The LEA's school psychologist opined that often children are able to modify their behavior and conform to behavior norms at school regardless of their diagnoses. Further, fear of non-acceptance by one's peers looms large in the eyes of an impressionable pre-teen. The LEA's expert noted also that student's self image is not particularly positive. Thus, student does not seek to draw attention to herself. Regarding student's poor behavior at home, the school's expert opined that there may be an element of "venting" when student returns home from school. The LEA expert witness believes that public day school is the least restrictive environment to be offered by the LEA and this conclusion appears to be accurate.

Student is provided a FAPE in the LRE through preparation of an IEP pursuant to the IDEA. Special classes, separate schooling, or other removal of disabled children should occur only when the nature and severity of the disability is such that education in a regular classroom environment cannot be satisfactorily achieved, 20 U.S.C. 1412(a)(5)(A).

Though this case is not dispositive of the instant case, the present case is similar to the scenario presented in an Orgeon case, *Ashland School District v. Parents of Student R.J.*, 585 F. Supp. 2nd 1208, (D. Or. 2008) recently affirmed by the 9th Circuit Court of Appeals in *Ashland School District v Parents of Student R.J.*, (_____ F.3d ___, C.A. 9 (Or.), December 7, 2009.

In the District Court decision in *Ashland*, as in the instant case, parent placed her child in residential placement and demanded payment for the placement from the school district. The District Court held that the student did not need a residential placement to receive a FAPE. The court acknowledged that student had some difficulties with focus and concentration, but observed that student received good grades when she completed assignments and turned them in.

The court noted that student's attention difficulties were addressed in her IEP's. Not only was parent able to monitor student's completion of assignments using an on-line tracking system, but she had regular communications with school personnel about missing assignments, *Id.*

Student's main problem, the court noted, was her home life. "It was mostly her behavior away from school that was the issue," the court stated." "[R.J.] was well regarded by her teachers, able to learn in regular classes, and capable of benefiting from the education provided to her by the school." *Id.*

In that the District Court found that student did not have an educational need for residential placement, the court reversed an ALJ's reimbursement order. The District Court sympathized with parent's concerns about the student's behavior, which included defiance and sneaking out of the house, but noted that the district was not responsible for addressing such conduct. Further, the court distinguished parent's residential placement from regular school in that private placement was, in essence, a behavior modification facility, *Id.*

R.J. was easily distracted by personal events and she liked to read in class instead of paying attention. Like the student in this case, R.J. had also recently moved because of the breakup of her parents' marriage which upset her. R.J. was anxious about her father's remarriage. R. J. was a procrastinator, needed organizational skills, sometimes lost assignments, and was not always honest about missing work. R.J. was very quiet and not a behavior problem at school. R.J.'s schoolwork suffered when she began to experience personal problems at home. R.J. received three failing grades because she did not turn in her assignments. *Id.*

R. J's mother took her for an outside evaluation when R.J. experienced suicidal ideations briefly and began a course of self-mutilation. After a break-up with her then boyfriend, R.J. inserted "one or more safety pins in her arm." Parent took R. J. to the family doctor. R.J. related issues consistent with depression, family relationship problems "and some other things not uncommon in adolescent girls." Soon thereafter, R.J was "provisionally" diagnosed with Adjustment Disorder and possibly Major Depressive Disorder by a Psychiatric Mental Health Nurse Practitioner. *Id.*

R.J.'s mother requested that the school re-evaluate her daughter's IEP based upon the recent diagnosis. R.J. fought with her mother. Eventually, parents warned R.J. that

unless she followed their rules and kept her grades up, she would "leave us with the choice of putting you into a residential facility or juvenile detention." R.J's father remarried. R. J. began a romantic relationship with the school custodian. *Id.*

R.J.'s grades continued to take a nosedive. Thereafter, R.J's mother asked for status checks on all of R.J.'s assignments from her teachers. R.J.'s mother continued to receive reports from R.J.'s teachers whenever she had a question or concern. Dissatisfied, R.J.'s mother began to inform the school that R.J. needed residential placement. The school fired the janitor. Numerous IEP meetings were scheduled. Feedback from R.J.'s teachers was generally favorable. R.J.'s grades did improve. *Id.*

R.J.'s mother secretly taped a meeting of the IEP team. The conversation between IEP team members included the following statements, "R.J. needs a very structured environment in order to function well. Very structured. I mean it. And she needs to be held accountable for her actions. And, you know, academically, emotionally. I mean there is such a large thing going on here." *Id.*

R.J.'s mother wanted R.J. to be re-classified as ED. The school's special education director pointed out that most of R.J.'s incidents occurred at night and on the weekends. The school's special education director suggested to parent that R.J. needed to have consequences imposed upon her behavior by her parent. R.J.'s mother replied that R.J. needed behavior modification therapy because it was "beyond her scope as a parent." About R.J., her mother stated to the director, "..she is defiant. And not openly defiant as in, yelling, screaming, openly defiant type attitude, but still she is just going to go and do whatever it is that she is going to do." *Id.*

R.J.'s mother then placed R.J. in a residential facility in another state and requested reimbursement from the school. *Id.*

The ALJ hearing the case originally found for the parent and ordered reimbursement. The ALJ equated past omissions in prior IEP's to constitute a denial of a free and appropriate public education to R.J. which justified removing her from the district for several years and placing her in a private facility, That was error." *Id.*

The *Ashland* court utilized *M.S. v. Fairfax County School Board,* 47 IDELR 289 (E.D. Va. 2007) in reaching a decision. The *Ashland* court stated, "These earlier IEP's and the manner in which they were implemented, may be relevant to show what information the district had regarding R.J.'s needs. Prior IEP's and their implementation may also be relevant in evaluating the adequacy of the current proposed IEP, deciding it was reasonably calculated to meet R.J.'s educational needs..." *Id.*

Further, the *Ashland* court stated in its opinion: "The IDEA is not a tort remedy to compensate parents with money damages for past wrongs. Even assuming [prior IEP's] are inadequate, those IEP's are superseded by [later IEP's.] Defects in a superseded IEP do not ordinarily (if ever) justify removing the child from school several years later and requiring the District to pay for her future private schooling... Rather, the

inquiry must focus on the child's IEP at the time she was removed from school, whether she was then receiving a free appropriate public education, and whether the appropriate placement is the one being proposed by the District or the one proposed by the parents, or some other placement." *Id.*

In the instant case, the facts do not show that this student required the program offered at the private school for any educational reason, *Clovis Unified School District v. California Office of Administrative Hearings,* 903 F.2d 635, 643 (9th Cir. 1990). In the 4th Circuit, in *Springer v. Fairfax County School Board,* 134 F. 3d 659, 661, 664 (4th Cir. 1998) the court declined to require a school district to pay for residential placement when the student's poor grades resulted from a lack of motivation, truancy and a refusal to study. Therein the court opined: "[I]t is not intended to be the duty of special education to force socially maladjusted children to school by residentially placing them if they choose to remain truant."

Quoting *Rowley* in the *Ashland* case, the court opined: "The IDEA focuses more on open[ing] the door of public education to handicapped children... than..guarantee[ing] any particular level of education once inside ...*Rowley,* at 192.

Examination of 4th Circuit case law regarding appropriate placement of disabled children reflects the IDEA's language that shows a "strong, congressional preference for mainstreaming. Mainstreaming, however, is not appropriate for every handicapped child." *Devries v Fairfax County School Board,* 882 F. 2d 876 (4th Cir.1989)

Case law in the 6th Circuit Court of Appeals acknowledges the congressional preference for mainstreaming. Proper examination of the mainstreaming issue requires that the IEP team consider whether the proposed placement is appropriate under IDEA.

The 6th Circuit's reasoning in *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983), cert. denied, 464 U.S. 864, 78 L.Ed.2d 171, 104 S. Ct. 196 (1983) states as follows regarding the conflict between the mainstreaming requirement and a segregated placement decision:

> The proper inquiry is whether a proposed placement is appropriate under the Act. In some cases, a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide mainstreaming. The perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept. Such a disagreement is not of course, any basis for not following the Act's mandate. In a case where the segregated facility is considered superior, the court should determine whether the services which make the placement superior could be feasibly provided in a non-segregated facility. If they can, the placement in the segregated school would be inappropriate under the Act. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some children simply must be educated in segregated

> facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could be provided in the non-segregated setting, or because the handicapped child is a destructive force in the non-segregated setting.

There exists a difference of opinion in the federal circuit courts regarding the IDEA's mainstreaming provision: The 4th Circuit follows the logic of the 6th Circuit above in the *Roncker* decision. The 3rd , 5th, & 11th, Circuits follow the logic elucidated in *Daniel R.R. v. State Board of Education,* 874 F.2d 876 (5th Cir. 1989) which concluded that the student's presence in the classroom had to be harmful to the other general education students for removal to a separate facility be justified.

The two-part test proffered by the *Daniel R.R.* decision is as follows: (1) Whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily and, (2) If the Court finds that the placement outside of the regular classroom is necessary for the child to benefit educationally, then the court must decide, whether the school has mainstreamed the child to the maximum extent appropriate.

In the case of *Hartmann v. Loudoun County,* 118 F.3d 996, 1004 (4th Cir. 1997), cert. denied, 552 U.S. 1046 (1998), the 4th Circuit employed the *Roncker* test above and rejected the 3rd, 5th and 11th Circuit's *Daniel R.R.* analysis.

As set forth in the *Hartmann* decision, these factors are to be considered when the issue of the appropriateness of a particular non-mainstream placement is presented: (1) whether the disabled child would receive educational benefit from mainstreaming into regular class; (2) whether any marginal benefit from mainstreaming would be significantly outweighed by benefits which could be achieved which could be feasibly obtained only in a separate instructional setting; or, (3) whether the disabled child is a disruptive force in a regular classroom setting; (4) whether there is any cost savings to educating the child in the proposed separate instructional setting.

The appellate court in the *Hartmann* case reversed the district court. Therein the court stated the mainstreaming provision of the IDEA establishes only a presumption in favor of mainstreaming. Mainstreaming, is not an "inflexible federal mandate."

By reference to *Board of Education of Hendrick Hudson Central School District, Westchester County, v. Rowley,* 458 U.S. 176, 102 S. Ct. 3034, 73 L.Ed. 2d 690 (1982), the *Hartmann* court quoted the *Rowley* decision: Mainstreaming "is by no means an invitation to the courts to substitute their own notions of sound educational policy to for those of the school authorities which they review." Further, the *Hartmann* court quoted *Rowley* in stating that "the task of education belongs to educators. Courts must afford due weight to school administrator decisions and school administration decisions should be afforded due weight." *Id.* On occasions when the district courts do not follow

decisions made by the LEA, the district court must explain why it has not done so. *Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100 (4th Cir. 1991)

Quoting the *Rowley* decision, the *Hartmann* court reiterated: "These 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." And, further, "The 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 the IDEA does not require 'the furnishing of every special service necessary to maximize each handicapped child's potential.' *Id* at 199.

In consideration of the least restrictive environment, the LEA must prove that the child with disabilities is being educated "to the maximum extent appropriate" with children without disabilities. It follows that IDEA deems special classes, separate schooling or other removal of the student **only** when the nature or severity of the disability is such that education in regular classes, with the use of supplementary aids and supports **cannot** be satisfactorily achieved. *cf Rowley.*

In order to be successful in a claim for reimbursement by a parent for private tuition placement, the fact-finder must first determine that the public school failed to provide the child with a free appropriate public education and that the private placement is appropriate under the IDEA. *See County School Board of Henrico Co. 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); *Tice v. Botetourt Co. Sch. Bd.*, 908 F.2d 1200 (4th Cir. 1990)

Parents who make a unilateral placement run the significant risk that a court will find against them and they will be left bearing the cost of the placement. *Burlington v. Department of Ed.,* 471 U.S. 359, at 371-372 (1985), *Millay v. Surry Sch. Dept.,* 584 F.Supp. 219, 229 (D. Me. 2008); *see also Linkous v. Davis,* 633 F.Supp. 1109 (W.D.Va. 1986), *Florence County School District Four v Carter,* 114 S.Ct. 361 (1993).

Parents did not prove that the LEA had failed to provide student with a FAPE in the LRE, therefore, parents' request for reimbursement of private placement is DENIED.

PROVISION of FAPE

Based upon all of the evidence presented, applicable statutes, regulations, case law, and the arguments presented by the parties, the hearing officer makes the following conclusions of law:

1. Student is a handicapped child, having the category, "Other Health Impaired," (OHI), and comes within the purview of IDEA;

2. Student requires specific conditions and related services in order to derive educational benefit from her education.

3. At all times relevant hereto, Student and Parents have resided in Virginia, thus the local educational agency, the LEA, is responsible for educating student by providing her with a free and appropriate public education, a FAPE.

In consideration of the Parents' and the LEA's evidence presented at the hearing, testimony of the witnesses and presentation of the exhibits, it does appear to this hearing officer that student, who now attends private school, was and is provided a FAPE by the LEA in the LRE.

4. I find that parental notice requirements were satisfied by the LEA.

Accordingly, I find that:

5. Parents have properly requested a due process hearing because parents contest the LEA's provision of FAPE in the LRE pursuant to student's IEP. Parents request reimbursement of private placement tuition and related costs. Parents request a decision pursuant to 8 VAC 20-80-76. The LEA, in public day school placement, provides a FAPE in the least restrictive environment for delivery of direct instruction, supplementary aids and related services pursuant to 8 VAC 20-80-64 A.1.

6. Parents did not prove that the LEA has been unable to provide a FAPE to student in her current placement at this LEA.

DATE OF DECISION:

December 7, 2009

Hearing Officer

IDENTIFICATION OF THE PREVAILING PARTY

This hearing officer has the authority to determine the prevailing party on each issue as follows:

"Did this LEA provide a FAPE to student in the least restrictive environment for part of the 2007-2008, all of the 2008-2009 & for the proposed 2009-2010 school year? Yes, public day school at this LEA, is proper placement and the least restrictive environment in which student may receive a FAPE. Parents have not proven that the

student may not be educated in the current setting with supplementary aids and related services. The LEA's IEP provides for student to receive the "basic floor of opportunity that special education provides" to which Student is entitled pursuant to *Rowley*, at 201, and to the IDEA.

"If the LEA did not provide a FAPE to this student, is the Parents' unilateral placement of student at the private school an appropriate unilateral placement for student for which Parents are entitled to receive reimbursement for tuition and related costs?" This issue is DISMISSED WITH PREJUDICE, this hearing officer having determined on the merits of this case that student was and is provided a FAPE in the LRE at this LEA. Parents' request for reimbursement is DENIED.

APPEAL INFORMATION

8 VAC 20-80-76 O.1 states as follows:

1. 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.

2. The appeal may be filed in a state circuit court or in a federal district court without regard to the amount in controversy.

3. If the hearing officer's decision is appealed in court, implementation of the hearing officer's order is held in abeyance except in those cases where the hearing officer has agreed with the child's parent or parents that a change of placement is appropriate in accordance with Subsection E of this section. In those cases, the hearing officer's order must be implemented while the case is being appealed.

IMPLEMENTATION PLAN

It is the LEA's responsibility to submit an implementation plan to the parties, the hearing officer and the Virginia Department of Education within 45 calendar days.

Date: December 7, 2009

Hearing Officer

I do hereby certify that I have mailed/e-mailed/faxed the above decision to LaRana J. Owens, School Board Attorney, , Virginia and to Drive, , Suite & , 5812 , # , , Virginia on this 7TH day of December, 2009.

Hearing Officer

Sarah Smith Freeman
Attorney at Law
210 East Road
Portsmouth, Virginia 23707
(757) 399-8105 (757) 399-2004 Facsimile
esqfreeman@aol.com