

Local Hearing X

State Level



CASE CLOSURE SUMMARY REPORT

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

School Division

Name of Parents

Name of Child

Date of Decision

Counsel Representing LEA

Counsel Representing Parent/Child

 parent

Party Initiating Hearing

Prevailing Party

Hearing Officer's Determination of Issue(s): offered FAPE; proposed placement appropriate. Tuition reimbursement denied.

Hearing Officer's Orders and Outcome of Hearing: Proposed placement of _____ in _____ program reasonably calculated to provide educational benefit. Parent received all procedural and notice protections. FAPE offered. See accompanying decision.

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

Printed Name of Hearing Officer

Signature

Virginia and certified by the Virginia Department of Education. The hearing began on December in , Virginia, continued on January , and then concluded on January . The court reporter delivered the final transcript on January , and the parties submitted opening and reply briefs.

, Esq. and , Esq. represented PS; , Esq. and , Esq. represented . Ten witnesses, some of whom were examined via the telephone, testified.

References in this Decision refer to the transcript for each day of the proceedings (TR1, TR2 and TR3, respectively). filed 59 exhibits and PS filed 81 exhibits prior to the hearings, as well as exhibits during and after the hearing. References to those exhibits are identified as PS () and ().

II. PROCEDURAL HISTORY

On May , sent PS a letter stating that had recently moved into from , VA and that had enrolled in School. was then a -old student in the grade at (), in , requested that a meeting be convened to determine 's eligibility for special education. (. 7). Pursuant to the request, an eligibility meeting was held on August and the committee found that was not eligible for special education services, concluding that the record contained insufficient evidence

to establish an adverse educational impact from psychological condition. (15).

On September , submitted a request for a due process hearing, challenging the eligibility determination. argued that the decision was erroneous for a number of reasons, including the failure of PS to assess or observe . (2).

On September , a pre-hearing conference was held in the Education Center of PS. The order of witnesses, issues raised in the appeal, and procedures for the conduct of the hearing were among the matters discussed (See Pre-hearing Order of September). stated that wanted the hearing to be private. The hearing was scheduled to begin on October .

PS requested that I issue an order requiring to travel to for an evaluation. objected based on 's medical condition. The parties agreed to submit memoranda and, based on a review of the arguments of counsel and case law, I concluded that PS had the right to insist that travel to for assessments by its personnel. I also granted the right to withdraw stipulation that tuition reimbursement not be considered at the hearing. (See letter of October).

came to for evaluation on October and from School () in , where had transferred from on September . On October , we held a pre-hearing teleconference. The parties filed a joint motion to extend the forty-five day period for rendering a decision, as provided for in 34 C.F.R. §300.511, on the basis that to

do so would be in the best interest of . I agreed and found that the motion should be granted on the grounds that there would be no issues ready for resolution if the hearing were to have been held on October because the eligibility committee needed to meet again. By agreement of the parties, the hearing was reset for November . (See Amended Pre-hearing Order of October).

On November , the eligibility committee met and determined that was eligible for special education and related services based on the disability of emotional disturbance. (G. 52-53). The parties informed me of that determination at a teleconference later that day and stated that an Individualized Education Plan (IEP) meeting had been scheduled for November .

The parties jointly requested a second continuance of the hearing date on the basis that to do so would be in the best interest of . I agreed and found that the motion should be granted on the grounds that the parties could not be expected to assemble documents due just one day after the IEP or be ready for a hearing only ten days after an IEP. By agreement of the parties, the hearing was reset for December , (See Second Amended Pre-hearing Order of November).

The IEP team met on November and reconvened on November . The school team members recommended placement in the Program of PS; declined to consent to the proposed placement. (77, 79-81).

On December , an ice storm shut down much of the metropolitan area and the schools were closed. By

agreement of the parties, the hearing began on the following day, December , at the Education Center of the PS, , VA . The second and third days of the hearing were held on January and January .

III. FINDINGS OF FACT

The following represents findings of fact based upon a preponderance of evidence derived from the testimony of the witnesses and the documents admitted into evidence. Additional findings will be found in other portions of this decision.

A. Factual Background Prior to IEP and Diagnosis of 's Psychological Condition

was born on March . When was three years old, began experiencing unusual . difficulties with sleeping and mood disturbances. These problems worsened and saw a counselor in fifth grade. attended pre-school in , VA, kindergarten through third grade in , VA, and fourth through eighth grade in , VA. During this period, was a good student, but appeared overly sensitive, moody, and emotional. had trouble getting along with other children and falling asleep at night.

's , , was diagnosed with an inoperable brain tumor when was in second grade, and the family changed residences in an effort to obtain better medical care for . passed away on January . (See, generally, TR1, 27-31; 14, 26).

In November of , ingested Comet and Clorox. (TRII, 452). In October of , was hospitalized at the Hospital in , VA for three days. had taken all the pills in a bottle of Zoloft, which had been prescribed for during the summer of , in addition to half a bottle of Paxil. (TR1, 34-36). After the hospitalization, returned to eighth grade class in , but the school system was uncooperative in accommodating condition or coordinating with psychiatrist and psychologist. Disciplinary problems continued and had trouble completing schoolwork as would often remain awake for consecutive nights. (TR1, 36-39).

In December of , was again hospitalized at after threatened to hurt self. remained there for four days, and the dosage of Zoloft was increased. Upon release, the family took a cruise, where hit sister and remained in the cabin nearly all the time. (TR1, 41-42).

In April of , was hospitalized at for a third time after swallowed a large quantity of Tylenol. remained there for five-six days. For ninth grade, began at the School, a boarding school in , had been there for only about two weeks when mood swings and depression convinced the school that should return home. At that time, learned that had been cutting self. (TR1, 44-48; TRII, 458-459; and 45).

refused to return to the public school system and an attempt to have tutored failed. often stayed up all-night and slept during the day, refusing to

do homework and exhibiting great hostility to

. damaged doors and windows, threw shows and other items at , struck , and attempted to set a fire in the home. (TR1, 53).

took to in the fall of for an evaluation by , a psychiatrist recommended to . (TR1, 55). determined that

had a form of bipolar manic depressive illness. The mental illness manifested itself in two phases: When was in the irritable and high stage, behavior became provocative, uncontrollable and aggressive; when was in the depressed stage, became suicidal. (G.7).

This diagnosis was supported by the report and testimony of , a local psychiatrist who has been treating since the fall of . experienced great instability of mood, with suicidal ideation, rages, irritability, and depression. considered a diagnosis of bipolar disorder variant quite severe, where, in 's situation, can be so overrun with emotions that has no ability to assess the reality of situation and becomes a danger to self and others. (TR1, 72-82).

In October of , moved to the metropolitan area so that could obtain treatment from and , a psychopharmacologist. Unfortunately, on one of the trips to to prepare the home for sale, went out with friends and was sexually assaulted repeatedly. (TR1, 57-60).

contacted after the incident who recommended that be hospitalized due to suicidal

and hopeless feelings and failure to respond to outpatient treatment. (TR1, 72-74). remained at Hospital in , for four days during the period. (14).

At that point, had not been in school since August of and the family had been staying with friends in . During the period of September through December of , was generally unable to get up in the morning and slept during the day. (TRII, 464-466). and , a school counselor advising , recommended residential placement. After rejected a school in , , learned about an opening at and enrolled on December . (TR1, 59-63).

is a residential treatment center for adolescent who are 13-17 years of age. It is a therapeutically intense facility with a highly structured program. provides extensive individual, group, family and recreation therapy to a wide range of with mental disorders. A private, accredited school is located on the campus. (28, 30). Students begin at the safety level where they are supervised at all times and then graduate to higher levels of freedom as their behavior improves and the risk to themselves and others decreases.

eventually reached level three, although regressed when attempted to seriously hurt self in the summer of . (TRII, 431-433).

was at for about seven months. transferred to because it had a more advanced and rigorous academic program. (TR1, 65-69). It also provided a less structured environment. (TR1, 187).

did not inform PS of intention to transfer prior to enrollment at and could not have considered the program at that time since did not learn about it until the IEP meetings in November. (TRII, 424, 435).

is a residential school with an emotional growth component. Licensed as a private independent school by the State of , it can issue high school diplomas through its program designed to enable students to fulfill their academic requirements. The emotional growth component is a process of therapeutic support with individual and group counseling, peer support, and mentoring from faculty. (TRII, 375, 377).

has sixty-four students, approximately evenly divided between boys and girls. (TRII, 371, 385). The students are placed in small classrooms, averaging six to ten students. The student to teacher ratio is one-to-six or eight (TRII, 378). For the fall semester, was enrolled in a full schedule of challenging courses. (42-43). At the time of the IEP meeting, was earning four "A"s and two "B"s. (80). Although not a special education school, the facility has staff members who have considerable experience in working with emotionally disturbed children, and some have degrees in special education. (See 41; TR1, 162-165, 211-214). participates in group therapy for six hours a week, individual therapy once a week and on an as-needed basis, and in an addictions group. (TR1, 237-239; TRII, 312). also sees a psychiatrist once a month, (TRII, 347), and there are weekly therapy calls involving , and . (TRII, 399, 449).

, a school psychologist, prepared a psychological evaluation based on interview with on October . concluded that was emotionally fragile and, though had developed some coping skills, continued to struggle with problems related to "low self-esteem, poor social skills, difficulty forming friendships, and defiance towards authority figures." determined that needed an educational environment of small classes and one that will help manage anger and impulsivity. (55; TRI, 248-249, 251, 296-297).

's testimony in support of these conclusions at the hearing was uncontested.

, the clinical therapist at , testified regarding 's current clinical status. still manifested active bipolar and mood symptoms and continued to experience suicidal and self-destructive thoughts. had trouble relating to peers, completing daily routines and getting out of bed in the morning. According to , difficulties included low-level depression and hypersexual impulses, with great difficulty maintaining friendships with and having relationships with that did not involve flirting or overt sexual behavior. (TRII, 313-318; 327) Though able to maintain grades, had not been consistently engaged in the educational process and had struggled with completing work. (TRII, 326, 368-369). This testimony also was uncontroverted.

On January , M.D., a psychiatric consultant for , conducted a comprehensive psychiatric examination. found that continued to experience rapidly fluctuating mood swings and was unable

to function outside of a highly structured setting. (Letter submitted on January by).

B. IEP and Program

The IEP team met on November and November . Staff from participated in both meetings by conference call, although none is listed on the written IEP. (TRI, 166; TRII, 507). At the first meeting, the participants established the present levels of performance and goals and objectives. (TRII, 502-503). was found eligible for special education services as a student with "an emotional disturbance due to poor interpersonal skills and a significant history of mental health issues." The team noted that had always earned very strong grades, primarily "A"s, and intellectual functioning was in the superior range with academic skills considered high average to superior. (80, p.2).

At the second meeting, the team attached a letter from and the Academic and Emotional Growth Plan of , although the PS team members did not agree with all of the statements in the documents. (TRII, 511-514). According to the IEP, the services proposed were as follows: twenty-five hours of instruction in a special education setting, five hours in a general education setting, five hours of curriculum consulting/monitoring per week, one hour of group counseling per week, one hour of individual counseling per week, and one-half hour of therapy consulting/monitoring per week with "ongoing throughout the day additional therapy as needed." (80, p.1; see also TRII, 524-527, 534-539).

The team also discussed 's need for mental health and substance abuse in-home services. School officials

proposed a referral be made to the Community Assessment Team, a multi-agency team constituted under Virginia law. These services would provide help for 's transition, school avoidance, drug, and suicide ideation issues. However, elected not to pursue the process. (TRIII, 680-684).

School officials proposed that the IEP be implemented in the program at School. PS had originally selected School, the school in 's zoned area, but decided after the first meeting that would be a more appropriate site because the program had fewer students and a higher percentage of . (TRII, 553-554). At the conclusion of the second IEP meeting, all PS employees concurred in placement in ; staff, and representatives believed that should remain at . (TRIII, 694-695).

The program is "an intensive alternative special education program for students whose emotional problems and disruptive behaviors interfere with academic achievement and interpersonal relationships and who need therapy to be academically successful." It employs a team approach, drawing "...upon academic, clinical, therapeutic, interagency, and family resources to develop educational and treatment plans to serve the needs of the students." (73). had been in existence for at least twenty years. (TRIII, 638).

Twenty-six students participate in the program, divided about equally between boys and girls. The program uses the same curriculum as general education classes. The three teachers are certified to work

with students with emotional disturbance. The classes, typically containing six-eight students, also have a resource assistant. (TRII, 543; TRIII, 672-675). Each student has a case manager who is responsible to ensure the IEP is implemented. (TRII, 554).

, a licensed psychologist, is a full-time therapist in who would be assigned to . (TRIII, 670-671). testified that current caseload is sixteen students, of which seven have been diagnosed as bipolar. (TRIII, 790). Many of the students, like , use psychotropic medicine and are highly intelligent, with serious mental health concerns including suicidal ideation, a history of self-injurious behavior, and promiscuity. (TRIII, 739-740).

meets weekly with each student, but may meet more frequently, even daily, if a student is in crisis. also meets formally for two case management meetings a week with the teachers and interacts with them daily. spends considerable time in the classrooms observing and interacting with the students. Under the team approach, the meetings may also include a social worker, an academic advisor, who oversees clinical matters for PS, and , who works half time and is the therapist for other students in the program. (TRIII, 741-746, 790-791). Staff in the program participates in regular training over areas relevant to 's disability. The classes include risk assessment, bipolar disorder, and grief counseling. (73).

IV. LEGAL DISCUSSION

A. Basic Legal Framework

The Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq. (IDEA) requires states, as a condition of acceptance of federal financial assistance, to ensure a "free appropriate public education" (FAPE) to all children with disabilities. 20 U.S.C. §1400(d), §1412(a)(1).

Virginia has agreed to participate in this program and has required local education agencies to provide FAPE to all children with disabilities residing within its jurisdiction. Va. Code Ann., §22.1-214-215.

The Act imposes extensive substantive and procedural requirements on states to ensure that children receive a FAPE. 20 U.S.C. §1415. See also *Board of Education v. Rowley*, 458 U.S. 176 (1982). The safeguards guarantee "...both parents an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decision they think inappropriate". *Honig v. Doe*, 484 U.S. 311-312 (1987).

The primary safeguard to protect the child's rights is the IEP. The educational program offered by the state must be tailored to the unique needs of the handicapped child by means of the IEP. 20 U.S.C. §1414. IDEA directs that local school districts, in consultation with parents, the child, and teachers, develop an IEP for each handicapped child. 20 U.S.C. §1414(d)(1)(B). Should there be any complaints regarding the content of a child's IEP, the parents have the right to an "impartial due process hearing" 20 U.S.C. §1415(f); See also *Barnett v. Fairfax County School Board*, 927 F.2d 146, 150 (4th Cir. 1991).

An IEP satisfies IDEA's requirement of FAPE so long as it "consists of education 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." *Rowley, supra*, at 188-189. Each year the IEP sets out a curriculum to address the child's disabilities, with appropriate objective criteria and evaluating procedures and schedules for determining whether the instructional objectives are being achieved. 20 U.S.C. §1414(d).

IDEA does not require the school system to provide the best possible education or to achieve outstanding results. *Rowley, supra*, at 187-192, 198. An appropriate education is one that allows the child to make educational progress. *Martin v. School Board*, 3 Va. App. 197, 210, 348 S.E.2d 857, 863 (1986). The goal is "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Rowley, supra*, at 192.

Hearing officers ordinarily engage in a two-step inquiry to decide whether FAPE has been provided under IDEA. First, they determine whether school officials have complied with the procedures contained in the Act and, secondly, whether the IEP is reasonably calculated to enable the child to receive educational benefits. *Rowley, supra*, at 181.

Turning to the question of procedure, there does not appear to be any dispute as to whether the school district followed the procedures set forth in IDEA. does not allege any violations. In any event, technical violations that do not obstruct the student's participation

in the process do not make a proposed program inadequate. *Burke County Board of Education v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990). In this case, the record demonstrates that [redacted] had a full opportunity to participate in a meaningful way in the decision making process that resulted in the proposed placement. See *Rowley, supra*, at 205-206.

The second area of analysis concerns whether the proposed IEP is calculated to enable the child to receive educational benefits under *Rowley*. The issue is not whether [redacted] offers a better educational program than that proposed by PS in the November [redacted] IEP, but, rather, whether the offered program was appropriate. By enrolling [redacted] in [redacted] without obtaining permission of the school system, the parent did so at [redacted] own financial risk. If it is ultimately determined that the proposed placement was appropriate, [redacted] is barred from receiving tuition reimbursement. *Burlington School Committee v. Department of Education*, 471 U.S. 359, 372-374 (1985).

Once a FAPE is offered by the public school system, further enhancements to the program are not required. *Matthews by Matthews v. Davis*, 742 F.2d 825 (4th Cir. 1984). Nor is the school system under an obligation to consider the program proposed by [redacted]. See *Hessler v. State Board of Education of Maryland*, 700 F.2d 134, 138 (4th Cir. 1983).

Applying the *Rowley* legal standard of some educational benefit to the facts in this appeal is not an easy task and requires focus on the unique needs of [redacted]. There is no one test for determining the adequacy of educational

benefit conferred upon all children covered by the Act. *Rowley, supra*, at 202.

Benefit that is only *de minimis* does not appear sufficient. *M.C. v. Central Regional School District*, 81 F.3d 389, 393 (3rd Cir.) *cert. denied*, 519 U.S. 866 (1996). As this Circuit has held, a school district cannot discharge its duty under the Act by proposing a program that produces minimal academic advantage, no matter how trivial. *Hall by Hall v. Vance County Board of Education*, 774 F.2d 629, 636 (4th Cir. 1985).

The defined purpose of the Act is to provide handicapped children full educational opportunity 20 U.S.C. §1412(a)(2). It is necessary to determine how much "benefit is sufficient to be meaningful" See *Rowley, supra*, at 192. Is the placement offered in the November IEP reasonably calculated to enable to receive educational benefits under the *Rowley* standard?

B. Analysis of Parent's Objection to Program
argues that the level of structure offered by provides with "...the necessary amount of clinical support and related services which permit to benefit from and access an education program. PS cannot provide this level of support or continuity at this time through a day program such as the program." PS, asserts, lacks a relapse prevention program, risk assessment procedures for transition from to PS, or a description of services addressing the difficulties is expected to encounter in the transfer. (Op. Brief of , p.6).

With regard to these objections, 's witnesses described programs and policies designed to address these

issues. Based on the testimony of the Special Education professionals and a review of the resumes of those who would be involved in providing services to in the program, it is evident that they are well-qualified by both experience and educational background for the positions they hold.

The contours of the relapse prevention plan established by and implemented also by are unclear, but it appears to deal with suicide prevention, depression and substance abuse. (TRI, 260, TRII, 624-627).

staff has had considerable training and experience in dealing with students who have the same disabilities as . 's team approach appears well designed to meet the emotional and educational needs of students such as . could meet immediately with should a crisis arise, and and other staff would be in daily contact with . staff has participated in professional programs, which identify risk factors for violence and suicide, and the school system has crisis intervention teams at each high school. (See, generally, TRII, 527, 559-561).

The school system has developed a risk assessment protocol for students considered at risk of causing harm to themselves or others. (TRI, 273-275). argues that this procedure has never been applied to . However, the school district could not have been expected to do so until such time as enrolls in its school system when such an assessment would routinely be done. (TRII, 644-646; TRIII, 699-701; and TRIII, 822).

There was sharp conflict regarding the difficulties would have in transitioning back to .

testified the transition would be significant and a "shock" to , (TRI, 92), opined that would sustain "significant harm," (TRI, 194-195), and said that transitions were the "worst part of abilities...taking three to six months to transition well." (TRII, 361-362).

In contrast, school personnel testified that the transition should prove successful. Director of Special Education, said that due to the wide range of resources at the school and in the community, PS had been very successful with helping students get acclimated to school environments. (TRII, 559).

, clinical advisor for PS, and , Supervisor of Special Programs testified that historically had transitioned successfully from school to school and could be expected to do so again. (TRII, 644; TRIII, 823-825; and TRIII, 711-712, respectively). PS would work with to effect a smooth transition and would be able to have community services in place when came to . (TRIII, 717-720). testified regarding

frequent experience with students transitioning from a different setting and the steps takes to ease the transition, including contacting prior therapists and educators. (TRIII, 759-761).

In weighing the testimony of the witnesses and considering 's current psychological condition, I concur with 's witnesses who believe that 's transition from to would likely be quite difficult. However, for basically the same reasons that I concluded that the program

appeared well designed to deal with 's suicide ideation and depression, I find that the program has procedures in place designed to effectively facilitate any transfer from to .

Throughout the hearing, there was testimony concerning 's great difficulty in getting up in the morning. (See testimony of , TRII, 409-417, 464-468; of , TRII, 320-326; and of , TRI, 85-91, 101). Regardless of how competently educators prepare a program to meet 's individual educational needs, the effort would prove fruitless if refuses to attend school.

The IEP team discussed the question of school avoidance but the proposed IEP did not address it directly and no one asked that it be included. believed it would be addressed through the therapeutic services provided by , which would treat the issues contributing to the school avoidance program. (TRII, 649-650). As noted above, one recommendation was that seek help from the county, (TRII, 410-411), but elected not to pursue that suggestion. (TRIII, 680).

officials testified regarding services available to confront school avoidance. Therapists could, and routinely do, call students in the morning, send a taxi driver who is sometimes accompanied by a member of the instructional staff, provide for pick up by a regular or special bus, assign a social worker to visit the home, or adjust the arrival time. Staff closely monitors school absences and commonly devise solutions. (TRII, 564-565; TRIII, 674-676; and TRIII, 755-757).

Based on the testimony of officials that they have considerable experience in dealing with school

avoidance issues and based on their testimony regarding their methods to convince students similarly situated to attend school, I conclude that such measures are tailored to be effective in enabling to attend school and derive educational benefit from the program.

During the hearing, PS staff did not consider school refusal as a major concern because they believed that the documentation did not support such a conclusion. It appears to me that there was documentation that school avoidance was a serious problem. Regardless, after the testimony at this hearing, there should be no question that school refusal must be considered a significant impediment to accessing any school program. While it is clear to me that does have an effective school avoidance program in place, I have some doubt whether PS' efforts would be successful. But the fact remains that has never attended an school; thus, one cannot say the program is destined to fail based on experience or, since its terms appear reasonable and staff testified to its effectiveness for other students, that it will fail in 's case.

maintains that the placement proposed in the IEP is not appropriate to 's needs because it does not provide "...sufficient structure, safety or services which will allow to consistently access an educational program and provide with a meaningful educational benefit." (Op. Brief of , p.1). In support of this position, has presented written documentation from professionals as well as the testimony and documents referred to above.

The evidence includes the letter from a psychologist, _____, Psy. D., recommending that _____ attend a small therapeutic school instead of a large public school (5), the letter from a psychiatrist, _____, M.D., stating that _____ was appropriate and, implicitly, that _____ would not be (70); the letter from _____ that a residential school was the only option (9); and the letter from one of _____ psychiatrists, _____, M.D., that _____ would best benefit from a residential placement. (13).

_____ testified that _____ should not be in a public school setting and were _____ to be in one, _____ would find the experience so stressful that _____ would self-treat in destructive and maladaptive ways. _____ would become so over-run with _____ emotions that _____ would exercise poor judgment, such as using drugs, engaging in sexual behavior, and acting in a self-injurious or suicidal manner. (TRI, 101-105, 148-150).

_____, the Assistant Head of School for _____, who participated in the second IEP meeting, supported _____'s view that only through a twenty-four program could _____ get the immediate assistance necessary to deal with _____ disabilities; on-call school staff, available during school hours only, would be inadequate. (TRI, 181-187). In rebuttal, _____ officials testified that _____ could benefit from the _____ program, and that _____ would be an appropriate placement for _____. (TRI, 296-298; TRII, 570, 608; and TRIII, 796, 827).

It is apparent that _____ has marshaled considerable evidence in support of _____ claim that the residential placement at _____ would be a better

placement than the program in . While not necessary for my decision, I find that the 's program, at least in terms of limiting the risk that would engage in self-injurious and suicidal behavior and of discouraging from refusing to attend school, as outlined in the exhibits and the persuasive testimony of both and , (See, generally, TRI, 162-165, 169-182, 185-189; TRII, 311-329, 347-353, 392-393), appears superior to meeting the educational needs of . I also conclude that the placement is appropriate. has established that would derive considerable educational benefit from . I further reject the argument that because the parent's placement is primarily for non-educational reasons, would not be entitled to reimbursement. (Op. Brief of PS, pp. 28-31). I find that 's depression and bipolar disorder are so intertwined with educational needs that such placement would not bar reimbursement, if the program did not offer a FAPE.

C. Case Law in the Fourth Circuit

The appropriateness of the placement is relevant, however, only if the PS proposed placement is not found appropriate. While the placement at may be better, that does not resolve the issues in this appeal. IDEA does not require PS to provide the best possible education for , or the placement would prefer, See *MM v. School District of Greenville County*, 303 F.3d 523 (4th Cir. 2002). As long as the IEP provides a "basic floor of opportunity" that enables to access special education and related

services, the requirements of the IDEA are met. *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990), citing *Rowley, supra*, at 201.

The IEP team developed an IEP that is reasonably calculated to provide a FAPE for . As found above, Highly experienced and trained staff in the program testified credibly regarding effective policies and services they would offer to meet the particular educational challenges that identified would face in a day program. The evidence in the record does not support the contention of that PS has merely offered a "one size fits all" program, a "patchwork of suggested services," in which the school district "grudgingly" proposes a "least common denominator" to satisfy in statutory obligations. (Reply Brief of , p.3).

With the possible exception of , 's witnesses were not familiar with the program. Nor had ever participated in it. Thus, there was little direct evidence that it would not offer educational benefit, only speculation that because of the severity of 's disabilities, no day program would be appropriate.

The strong evidence adduced from officials and 's medical providers surely lends much credence to such speculation. But the decisions of the Fourth Circuit Court of Appeals and the district courts applying that precedent warn hearing officers not to second guess professional educators and to allow them the "latitude in determining the individualized educational program most appropriate for a disabled child. The IDEA does not deprive

these educators of their right to apply their professional judgment." *Hartmann v. Loudoun County*, 118 F.3d 996, 1001 (4th Cir. 1997), cert. denied, 522 U.S. 1046 (1998). See also *Springer v. Fairfax County School Board*, 134 F.3d 659, 663 (4th Cir. 1998); *MM v. School District of Greenville County*, 303 F.3d 523 (4th Cir. 2002).

The application of these deference principles can be most recently seen in *Arlington County School Board v. Smith*, 38 IDELR 8, F. Supp. 2d (E.D. Va. 2002), decided during the pendency of this appeal. The plaintiff in that case was a seventeen-year-old student who had many of the afflictions suffered by _____, including suicidal ideation and depression, and whose family also rejected the proposed placement at _____ in favor of a private residential placement. _____, too, though having a strong history of academic success, had begun refusing to attend school. Unlike in the instant situation, however, the student had already failed in a partial placement in the _____ program, although the challenged IEP proposed a significant increase in services. The Court credited _____ PS witnesses who uniformly argued that her participation in the complete _____ program would provide a FAPE.

_____ distinguishes the *Smith* case on two bases. First, _____ argues that _____ had been a student in _____ with an IEP since seventh grade, while _____ had never had an IEP and had not been in the school system at the time _____ was found eligible for special education. The evidence showed, _____ maintains, that _____ was not ready for discharge, while Jane Smith was functioning better than _____ at the time _____ was recommended. (Op. Brief of _____, pp. 8-9).

If anything, I find the distinction in their educational settings presents an even stronger case for finding a FAPE in the instant case. In *Smith*, there was substantial evidence in the record that prior IEPs had not been successful and that the _____ program—even though the Court discounted the relevance of her lack of progress in the program—had not proven successful. The Court pointedly rejected the Hearing Officer's prediction that the student would not succeed in the full _____ program despite what, at least in my view, was ample evidence in support of that position. As noted above, there is no such track record of failure in _____ schools or in its special education program from which one could postulate future educational difficulties.

Secondly, _____ contends that the Smiths presented no evidence that _____ was inappropriate, while _____ expert witnesses unanimously supported the need for residential placement. _____ argues that the testimony of _____ experts, some of who had substantial contact with _____, should be given greater weight than the professional staff at PS who had little, if any, contact with _____. (Op. Brief of _____, pp. 9-10).

As found above, criticism of _____'s program by _____'s experts is of limited evidentiary value given their lack of knowledge of its components. While it would have been preferable for PS to have had the substantial experience with _____ that it had with _____, the fault does not lie with _____ because _____ never attended school in _____. In any event, for the reasons already outlined, I have found that PS has established that the _____ program is reasonably

calculated to provide educational benefits to _____ and
that it has offered a FAPE.

V. ISSUES

1. Whether the school district offered a FAPE where it
proposed placement of the student in the _____ Program
in its public school system.

2. Assuming the student was not provided a FAPE by the
school district, whether the unilateral placement of the
student in a private residential school is appropriate, and
if so, whether and to what extent the parent is entitled to
tuition reimbursement and future expenses.

VI. CONCLUSIONS OF LAW AND FINAL ORDER

1. _____ is a student who qualifies for
special education and related services due to
exhibiting a serious emotional disturbance, a qualifying
disability under 34 C.F.R. §300.7c(4).

2. _____ has been afforded all procedural and
notice protections required by IDEA and an opportunity to
fully participate in the IEP process.

3. The _____ Public Schools provided a FAPE
to _____ under IDEA in that the proposed November _____ IEP
was appropriate and the proposed placement in the
program was reasonably calculated to provide _____ the level
of educational benefit required under IDEA.

4. Since PS offered FAPE, _____ is not
entitled to tuition reimbursement for the unilateral

placement at _____ even though that placement was appropriate.

5. This decision is final and binding unless a party appeals within one year to a circuit court of the Commonwealth of Virginia or a ~~federal~~ district court.

Date: _____

Hearing Officer, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I have, this third day of February, _____, caused this Decision to be sent via first-class mail, postage prepaid, to _____, VA; Esq. and _____, Esq. counsel for _____, VA; _____, Esq. and _____, Esq. counsel for _____, Public Schools, _____, VA; _____, Director of Special Education, PS, _____, VA; _____; and Judy A. Douglas, Esq., Department of Education, Commonwealth of Virginia, P.O. Box 2120, Richmond, VA 23218-2120.