VIRGINIA DEPARTMENT OF EDUCATION

DUE PROCESS HEARING

In re: Child **Findings of Fact**

Due Process Hearing **and Decision**

Parents Pro Se:

and
1706
, Virginia

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This matter came to be heard upon the amended complaint for due process filed on September 3, 2012 by the Parents, ("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 Virginia Special Education regulations, ("Virginia Regulations"), at 8 VAC 20-80, *et seq*.

The due process hearing was held before the undersigned Hearing Officer [1] on one day,

[1] Both school counsel and the Parents were advised of the 5 day limitation for exhibit book and witness list delivery. Parents did not present any documents in an exhibit book format on the exchange date. Parents did provide on that date seven handwritten pages, loosely comprising their case, which identified the witnesses and documents possibly relevant and material. School counsel objected and requested dismissal of Parents' due process claim. This hearing officer ruled that the Parents' exhibit submission was not timely. Parents were allowed to testify because their handwritten document was more similar to a witness list. This procedure afforded Parents the opportunity to "speak their peace." School counsel agreed to move forward at the hearing if Parents only testified within imposed time constraints. Thus, Parents were permitted to testify, without any supporting documents, to avoid dismissal of their

October 1, 2012, at the School Administration Building, City, Virginia. The hearing was closed to the public and transcribed by a court reporter. Parents appeared pro se at the due process hearing.[2] A City Director of Special Education and legal counsel represented the LEA.

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

The record includes written motions, hearing officer orders, closing remarks, the hearing officer's pre-hearing report, the school board's exhibit book and the Parents' hearing notes. [3]

Parents now seek reversal of the Manifestation Determination Review, ("MDR"), occurring on May 25, 2012, which ultimately resulted in the Child's long-term expulsion from comprehensive regular public day school. Parents reject the IEP team's placement decision for the Child to attend school for one (1) year at the Academy, a separate public day school, located in City, Virginia.

Parents assert the grounds that the LEA's Individualized Education Program, ("IEP"), does not provide the Child a free and appropriate public education, ("FAPE"), in the least restrictive environment, ("LRE"). Parents seek reversal of the IEP team's placement decisions of October 13, 2011 and August 8, 2012. [4] For their Child to be successful in the "normal" [5] school,

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case. School Board exhibits are marked by the letters, "SB" in this written decision. This hearing officer conducted at least 5 pre-hearing conferences. Parents presented motions, objections and instructions. This hearing officer provided a lengthy pre-hearing report outlining instructions. Parents were fully advised of the time, date and place of the hearing. Parents were notified of the exhibit and witness list exchange date. Parents have been afforded their procedural and substantive rights at this due process hearing.

[2] At the October 1, 2012 due process hearing, Parents appeared pro se. The Child's mother represented her son at the initial stages of this hearing. During the due process hearing, both Parents took turns and posed questions to each other during direct examination. Parents actively cross-examined the school's witnesses. This hearing officer frequently requested that Parents take breaks and ponder strategy with each other in an outside hallway. When the mother became emotionally upset at the hearing, she was allowed to compose herself and handed tissues. Parents were also provided paper and pens. Without providing substantive legal advice directly to the Parents, this hearing officer explained hearing procedure during the hearing and advised them how to best proceed as pro se Parents. They were confident, capable and composed at the due process hearing. Parents never appeared to be at a disadvantage and expressed satisfaction with their hearing participation. Both Parents were actively involved in their Child's representation at the due process hearing.

[3] Parents' seven page handwritten notes are marked by the letter "P" in this written decision. Parents' notes are included in the evidentiary file in this case.

[4] The Child's placement was originally changed on October 13, 2011. Parents did not consent. The LEA reluctantly agreed to a temporary home-based plan in December, 2011.

[5] Parents refer to the City's comprehensive day school program as "normal" school.

T51, Parents proffer that their Child requires a one-on-one assistant, a therapist, "competent staff," and a medical doctor, in the comprehensive public day school program. T51. In the alternative, Parents propose continuing the Child's school structured educational program at home on a longer-term basis, with the above supports and academic assistance.

Regarding Parents' specific objections to the Academy, Parents do not believe that the Child belongs "in a place like that" because Parents assert that the Child's school demeanor will disintegrate further by "picking up bad behaviors of kids who have conditions far worse than his." T53. Parents also urge that the sum total of the Child's disabilities cause him to act out inappropriately. Curiously, Parents equivocate regarding the Child's appreciation of the wrongfulness of his actions. He's not just "misbehaving," it's "actually his disability," Parents stated in their opening remarks. T54.

But Parents also asserted at the hearing that the Child knows right from wrong. Parents attribute the Child's dangerous actions and bad acts to the Child making poor choices because of his intellectual and emotional disabilities and to developmental delays. Parents assert that the Child has not yet fully developed the ability to understand what he's doing. T52, T53, T54.

The LEA strenuously rejects Parents' proposed educational plans for the Child. The LEA asserts that it has tried all options suggested by the Parents to improve the Child's school behavior issues. The LEA now asserts that the Child's school behavior has deteriorated to a point of no return. When the Child is at school, his behavior poses a danger to himself and to others.

The LEA also asserts that the Child's mother interferes with the Child's ability to access a FAPE because early morning school dismissals have become a pattern negating the Child's ability to improve in class. When the Child is at the regular day school, the Child's mother picks

him up nearly every morning. [6] T218-219.

When the Child is at home being provided educational services, he receives limited academic instruction and no peer contact. Thus, the only acceptable educational plan, the LEA asserts, is to address the Child's intellectual, emotional, therapeutic, medical and social needs in the structured program offered at the Academy. Thus, for many reasons, the LEA asserts that the comprehensive public day school or the Parents' home-based plan do not adequately serve the Child's educational needs.

BURDEN OF PROOF

In this case, Parents challenge the MDR team's finding which resulted in long-term expulsion[7], on May 25, 2012, and the IEP team's renewed placement decision contained in the proposed August 8, 2012 IEP to serve the Child at the Academy, an academic and disciplinary placement.

In *Schaffer v. Weast,* 546 U.S. 49, 126 S.Ct.528, 168 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of proof, in an administrative hearing challenging the IEP, is properly placed upon the party seeking relief, whether that is the disabled child or the school district. *Id.,* at 537.

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

FINDINGS OF FACT

1. This Child is 10 years old. When the Child last attended regular school in the 2011-2012 school year, he was enrolled in the fourth grade at City School, a comprehensive public

[6] The City Special Education Director testified that Parent was called to school only three times monthly but that the mother came daily to the school and picked the Child up every morning. T219.

[7] "If the IEP team determines that the child's behavior was not a manifestation of the child's disability, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same disciplinary action as the procedures would be applied to children without disabilities, except that services shall be provided in accordance with subdivision C.6.a. of this section." *See also Regulations Governing Special Education Programs For Children With Disabilities In Virginia, Discipline Procedures,* p.47 (2010) and *see also* 8 VAC 20-81-160.D.7.

elementary school, in the inclusion model, within the City school district. Though the Child was originally declared eligible for IDEA special education services under the category of Intellectual Disability, ("ID"), on October 13, 2011, the Eligibility Committee determined, per additional testing by the School Psychologist, that the Child also qualified for special education services under the category of Emotional Disability, ("ED"). T61. The Child also has Attention Deficit Hyperactivity Disorder, ("ADHD"), for which the Child takes medication prescribed by a medical doctor. The Child's WISC and RIAS scores indicate that he tests in a lower intelligence percentile, scoring at least two standard deviation points below the normed IQ range for his age group. Parents consented to the child's first IEP on November 19, 2010. SB3. Because of escalating maladaptive behaviors occurring daily in the 2011-2012 school year, the IEP team changed the Child's placement in October 2011 from regular public day school to separate public day school at the Academy. SB5-SB10, T188.

2. The Child was labeled ED primarily because the IEP team determined that the Child cannot make friends and does not act appropriately with adults or children. The IEP team determined that the Child's mental health deficits adversely impact the Child's educational performance. T187.

3. Parents did not consent to the changed IEP placement decision. Beginning in October 2011, the Child's mother intervened at school and requested a home-based IEP. At first, the school rejected Parent's home-based educational plan. When the LEA did not immediately assent to the Parent's home-based proposal, Parent repeatedly contacted the school superintendent's office. [8] But during most school days, the Child's mother appeared at school, without being called there, and pulled the Child out between 10:00 A.M. to 10:30 A.M. T60, T194, T196, T218. In December 2011, a horrific incident occurred. The Child bit a teacher so deeply that the Child's bite drew blood from the teacher's leg. SB31. [9] The LEA sought to avoid

[8] Testimony revealed that Parent called the School Superintendent's office 66 times in a given 24 hour period. T261.

additional injuries to school personnel or children and finally conceded to Parents' home-based educational plan. The LEA accepted Parents' home-based IEP addendum under the assumption that Parent best knew the Child and might be able to correct the Child where school strategies had failed. Also, at the time, the LEA opined that sending the Child home for a brief period might break the Child's bad behavior cycle at school. Aside from these considerations, the LEA asserts that the IEP team never agreed for the Parents' home-based educational plan to be a permanent educational plan. In fact, the record reflects that the home-based IEP functioned only on a short term basis from December 2011 to early April 2012. SB13.

4. When the Child returned to school in April 2012, it was apparent that Parents' home-based plan had not improved the Child's behavior at all. LEA personnel immediately realized that the Child's behaviors had deteriorated drastically. On occasion the Child received accolades for sitting down for a short span of time, but the Child completed virtually no academic work during this timeframe. His mother continued to pick him up from school. On May 22, 2012, another horrific behavioral incident occurred. Per numerous witness statements, the following incident was reported resulting in the Child's suspension and long-term removal. The teacher who accompanied the Child that morning stated:

> "I was administering the 3rd grade SOL Math test today to [the Child]. [The Child] and I sat at a back table with [the proctor teacher] sitting at a table about 10 feet away. The substitute and security guard were seated on the opposite sides of the room. [The Child] sat across from me following along in his test booklet as I read the text to him. [The Child] was behaving very well during the test. We took two breaks to exercise and the Child also politely asked to use the restroom.
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> We continued the test with me reading the questions and [the Child] marking the answers on his test booklet. After I read test question #44 out of 50-question test, [the Child] said he didn't want to do this anymore. He went to the circle rug and put his head down. [The TA] and the substitute told [the Child] that he was almost finished and he only needed to do six more problems. [The Child] just shook his head no. I got down on the rug with [the Child] and said that we were almost done. So let's complete the test, then he could have computer time. [The Child] ran away from me. I was not going to chase him around the room, so I moved towards the door.

[9] This incident and at least one other incident, in which a teacher's arm was twisted, prompted the LEA employees to file Worker's Compensation claims. SB31.

> When he began to turn over desks, I moved the laptops and the visualizer out of the way so he could not hurt himself or others because they could have been used as projectiles. [The Child] quickly turned over eight desks. At the back of the room he swept the SOL tests off the tables in addition to the items that were on the back counter. When he attempted to flip the back table, the security guard left the room to get a building administrator. The security guard returned with [the school principal]." [10] SB-20, SB-21, SB31.

5. The Child was suspended for the above May 22, 2012 incident. The Manifestation Determination Review ("MDR") team considered the Child's disabilities and the causal connection, if any, to the facts. The MDR review team deemed there was no direct or substantial relationship found and the MDR team determined that the Child's behavior was purposeful. The MDR team determined that the above did not occur because the LEA had not implemented the Child's IEP. SB22.

6. An earlier MDR team met on May 11, 2012 regarding a suspension incident pre-dating this one. The prior MDR team also found no causation between the Child's disabilities and the maladaptive behavior and upheld the suspension. The MDR team deemed that the Child understands the difference between right and wrong, makes choices and understands consequences. "[H]is specific behaviors are more indicative of an oppositional defiant disorder." The MDR team noted that the Parent doesn't believe he knows right from wrong and thinks "...someone is doing something no one sees and this behavior upsets him and causes his behavior." SB18. [11]

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[10] Four LEA school employees verified this incident. The principal said that the Child told him to, "Leave me alone." Then the Child "... ran behind the computer stand and began pulling at wires from the wall." SB20.

[11] Parent did not appeal the MDR team results for this prior May 2012 suspension incident. The MDR team notes state as follows per the classroom teacher's statement: "He refused to go to homeroom. He was outside talking to himself, 'I ain't going.' He refused to go to resource. He was kicking outside the door. He went to the nurse and was brought back. He was instructed to sit down and he refused. His sticker chart was missing and he refused to say where it was. He got up and started wandering around the classroom and picking through items in the classroom, including going through items on the teacher's desk. He was given several redirections but refused to comply. He took the teacher's keys and ran around the room saying, "Ha, ha." [The principal] came down and he ran from him. When the other students were taking the laptops to another room to work on their reading program, he grabbed the teacher's laptop and tried to run with it. When the teacher took it from him, he threw a pack of stickers at her. He left the room and attempted to follow the other students. He attempted to take a laptop and when the [Instructional

7. Parents also assert that the LEA uses negative reinforcements such as blue handcuffs, action figures, comic books and toy weaponry to calm the Child. T89. At the hearing, Parent began to cry as she alluded to the Child having been "taped up" with "feces" [12] but she did not elucidate facts supporting her inflammatory remark. It is difficult for this hearing officer to decipher the source of Parents' anguish with the LEA.

8. The May 25, 2012 MDR team considered all relevant information.[13] Because the MDR team did not deem the Child's May 22, 2012 suspension incident to have a direct and substantial relationship to the Child's disability, the LEA initiated long-term removal procedures to expel the Child.[14] The City school board then expelled the Child until June 2013. His parents did not appeal the expulsion decision to circuit court. The IEP Review team recommended the Academy for the Child's placement during the 2012-2013 school year.

9. The IEP Team met on May 25, 2012 to make revisions to the Child's IEP based upon the MDR causality finding. The LEA formed a home-based IEP beginning on May 22, 2012 and ending on June 14, 2012. SB29. But the Child has not attended school since May 25, 2012.

Assistant] directed him to leave them alone he turned around and hit her. The teacher told [the Child] to go back to the classroom and told the [Instructional Assistant] to take the students to the [guidance] counselor. [The Child] attempted to go to the computer lab but the door was locked. When the teacher directed him to go back to the classroom, he went to the [guidance] counselor's and barreled into the students and knocked one student to the left and one to the right. One of the students fell into the door handle. The students were frightened and held onto the [Instructional Assistant] or asked to be held. [The Child] got on a computer in the [guidance] counselor's room and was directed to go back to class and he refused to do so. He got on the computer with the game he likes to play until his mother came to get him." SB18, at pgs. 3-4.

[12] The Child has a gastric condition requiring that the LEA assist the Child with bathroom needs. Parent asked the hearing officer, "You wouldn't want your child to be taped up with Scotch tape and feces on him …" Parent did not explain this comment at the hearing. T156.

[13] The City Special Education Director stated that the MDR committee reviewed the Child's history, prior behavioral incidents, that particular incident, his evaluation report, and day-to-day reports from the teacher and those in the building who knew him. The MDR committee examined and reviewed all relevant information before them when considering the causation attributable to this incident. T274.

[14] The Child has been expelled but he may return to school in one year conditioned upon completion of the Academy.

Two competent school administrators [15] testified as experts in this case. They stated that the LEA agreed to the home-based addendum with the Parents only because the Child poses a danger to himself and to others. They also asserted that the Child barely attended school after his return in April 2012. The LEA affirmed its October 2011 decision to return the Child to school only in a separate public day placement with academic structure and leveled behavioral supports.

10. The record reflects that a functional behavior assessment was completed for this Child on October 7, 2011, which was implemented appropriately by the formulation of a behavior intervention plan, ("BIP"), on November 9, 2011. After multiple disciplinary incidents occurred involving this Child, the IEP team routinely examined the BIP for possible new strategies to reach the Child to improve his behavior and permit him to be mainstreamed with his same age peers. SB4, SB8, SB12, SB14, SB18, SB22, SB28, SB31, T257.

11. The "stay-put" IEP, [16] dated November 19, 2010, provides the Child a FAPE in the least restrictive environment. On October 13, 2011, the IEP team changed the Child's educational placement to the Academy, a separate public day school. The LEA proposed IEP, dated August 8, 2012, affirms the Child's LRE placement at the Academy. But the Child's permanent placement never became his home. This LEA always intended for the home-based addenda to fill a short-term emergency situation initiated by a behavioral incident or suspension. SB3, SB4, SB5, SB6, SB7, SB8, SB9, SB13, SB15, SB23.

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[15] One of the administrators testifying at this hearing was the City Assistant Principal at this City elementary school. She is a doctoral candidate in education and has been a City Assistant Principal at the City elementary school for six years. She also has twelve years of teaching experience. The City Assistant Principal is state licensed to teach pre-K through 6th grade elementary. In her over 18 year teaching career, she has participated in over 350 IEP meetings and 200 eligibility meetings. The City Special Education Director also testified at the hearing. She has a doctorate, in educational administration with a concentration in special education administration. This expert has over 17 years experience as a City Special Education Director or supervisor and over 34 years of teaching experience in this or another capacity. She has attained state licensing in the areas of administration and supervision, pre-K through 12, early education, pre-school through 4; middle education, grades 4 through 8; emotional disturbance, K through 12, and specific learning disabilities, K through 12. She has participated in 1,500 to 2,000 IEP meetings and 900 to 1,500 eligibility meetings in her career. Both LEA experts testified credibly and competently. T178-179, T246-250.

[16] The "last agreed" or "stay-put" IEP means the last IEP to which the Parents and the School agreed. Parent signed off on the November 19, 2010 IEP meaning that they consented to its implementation. This is the last agreed IEP in this case. *See* 8 VAC 20-81-210 J.1.

12. The Child's disciplinary record is extensive and records violent incidents resulting in suspensions back to second grade. This hearing officer also noted an incident similar to the one for which the Child was expelled. On March 8, 2011, pre-dating the May 22, 2012 expulsion incident by one year, the Child also turned over desks and ripped up his agenda. SB31. In fact, the Child's disciplinary record reflects many incidents when the Child destroyed property, caused property damage and committed assaults on school personnel and students by hitting, biting, kicking, and acting aggressively toward them. There are also times when the Child has negligently caused injuries. For example, another child's hand was slammed in a door and a teacher twisted her arm to protect a student. T238. There are instances when the Child makes bad choices and places himself in grave danger. For example, the Child may walk on top of an air conditioning unit or play randomly with electrical cords. For this reason, security personnel are often present when the Child is at school. On occasion, the Child has to be restrained. In at least two incidents, the entire class was removed to avoid the Child's behavior. The record also reflects times when the Child hurled verbal outbursts, disrupted his classmates and interrupted instruction. It is apparent from this disciplinary record that the Child always poses imminent danger to himself and to others whenever he is on school grounds. T187, SB26, SB31.

13. To reach a decision, this hearing officer examined the Child's entire disciplinary record. It is not this hearing officer's function to regurgitate every factual scenario on the face of the Child's disciplinary record. But this hearing officer did note that each incident bears sufficient "tags" to tie it to a prior or new incident. This hearing officer did note an insightful incident occurring in second grade on May 19, 2011, approximately one year prior to the Child's expulsion. This incident demonstrates how quickly the Child's maladaptive behavior escalates. In this earlier incident, the Child began the incident after a refusal to enter class and "flicking pencils." SB31. By the time the Child concluded the incident, the Child had kicked the principal, used profanity toward him, jumped on desks, thrown books and chairs, ripped the teacher's

materials and walked on an air conditioning unit. The principal had to call school security to quell the second grade disturbance. [17] SB-31.

14. After the May 25, 2012 MDR team meeting, Parents filed eight complaints with the Virginia Department of Education, ("VDOE"). This hearing officer will not reiterate the specific details of each complaint. Parents' complaints asserted that the LEA committed minor procedural violations. For example, Parents asserted that the BIP was not signed though it was evident that the Parents consented to the BIP at the meeting when it was proposed. In another complaint, Parents asserted that a delay occurred in ESY service delivery to the Child. There was a short postponement in ESY service delivery caused by the death of the home-based teacher's family member. But the VDOE found no procedural non-compliance issues in the LEA's management of this case. T268, SB25, SB29.

15. On August 8, 2012, Parent proposed permanent home-based placement to the LEA as the Child's best educational option. Parent followed up on this request by making a special appeal to the VDOE to permit her Child to attend school at home. On the face of one of Parent's complaints to the VDOE, she asserts, "[The Child] does well at home." The LEA has consistently rejected this option and provided its rationale. SB26, SB29.

16. The City Special Education Director testified that she believes that the Academy provides a FAPE to the Child in the least restrictive environment. She testified that the Academy offers significant academic structure and small class size to the Child. Classes at the Academy

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[17] The Child's disciplinary record states as follows: "[The Child] refused to go to class today. He began flicking pencils off desks. At 8:00 [the Child] started standing on desks and jumped from the desk to a chair several times. The Instructional Assistant asked him to stop several times. At 8:04, [the Child] threw a book and a pencil at a wall and ripped the teacher's materials. At 8:06, he threw a desk and a chair and called the [Instructional Assistant] a 'pussy as-.' At 8:09, the principal entered the room. [The Child] continued to be defiant and mentioned, "My momma says you pissed her off and you pissed my daddy off, my brother off, and me off." He also continued to use profanity saying, "You all can kiss all of our black as-." and "You mother f-cker ass." "You little black as-." "My momma says you are a black asshole." He then climbed on the air conditioning unit and sat on it. While continuing to curse, the principal called school security personnel. After getting off the phone with the officer, the principal tried to calm [the Child] down. At 8:14, the principal tried to encourage [the Child] to get down from the air conditioning unit. [The Child] then kicked the principal in the right knee and said, "You black as-, get away from me," and stood on the air conditioning unit and walked back and forth on the unit. He then kicked the window at 8:18. SB31.

are small and comprised of 6-8 students who are monitored by a trained staff of three professionals, one of whom is a licensed special education teacher. Students in the class have similar emotional and intellectual disabilities as the Child. Classes are taught in a self-contained class for about 5.5 hours daily. Children are "pulled out" for recreational activities and other additional services. Children are given kinesthetic activities to keep them moving and energized. T270. The Academy provides a level behavior system that is "very" systematic. Behavior reports are prepared daily. Transportation is provided to students. The teacher to student ratio is optimal. T269-270. The class is supervised by a behavior specialist who monitors student behavior all day long. The Academy provides an on-site psychologist who provides therapeutic intervention if a crisis occurs. Regarding teaching credentials at the Academy, teachers are state licensed, hold a special education license, general curriculum, teaching K through 12. Academy teachers must all meet the state's "highly qualified standard." T269-271. Academy staff have a high degree of training in behavioral intervention, behavior management and positive reinforcement. "Positive reinforcement is a big part of their program there." T272.

17. The City Special Education Director does not deem the Parents' home-based plan to sufficiently provide FAPE to the Child in the least restrictive environment. The City Special Education Director testified that home-based placement is a more restrictive placement. Home-based placement removes students from the general education building and from their peers. She testified that home-based children do not receive the same level of instruction and "certainly not the same level of behavioral support and instruction that he needs for social and emotional gains." T274.

DECISION

Parents claim that the Child can be provided a FAPE in the regular education setting with supplemental aids and support, or, in the alternative, that their home-based plan is sufficient to provide FAPE to the Child.

For the following reasons, I find that there has been no denial of FAPE in the LEA's proposed IEP dated August 8, 2012. The Academy placement is the least restrictive environment for the delivery of FAPE to the Child:

DISCUSSION OF FACTUAL FINDINGS

1. *Parents Challenge May 25, 2012 MDR Findings. Parents Erroneously Assert That The Expulsion Incident Was A Manifestation Of The Child's Disabilities.*

The MDR team determined that the Child's maladaptive behavior on May 25, 2012 exhibited purposefulness. The MDR team made these assessments about the Child's mental state when he acted defiantly. The Child "knew what he was doing," the MDR team determined in a suspension pre-dating this one by a week. The MDR team then alluded to contemporaneous statements the Child makes, indicating he knows he's being watched, at the time of the behavior. The MDR team analyzed the Child's behavior and determined that these elements distinguish the Child's maladaptive behaviors from his ID and ED disabilities. The MDR team identified these features of the Child's behavior:

(a) Watching backwards – The Child always looks behind to see if adults are watching him when he acts badly. Teachers remark often about this feature, usually, when they are forced to contain him after he runs away from them. In the expulsion incident, the Child waited until the principal and security members were called to the room before sweeping all of the items off of a table at the back of the room. SB20.

(b) Taking steps – The Child takes steps to get what he wants. For example, he will plan to go to the computer lab by taking the teacher's keys or he will systematically shove objects off of tables until they are all empty. In the expulsion incident, he moved to the circle rug, refused to return to work, then turned over the desks and chairs. SB20.

(c) Gradual progression – In the expulsion incident, he completed work but then made a decision he didn't want to do any more problems. He then refused to continue. He moved to the rug, overturned the desks and chairs and swept objects off the tables. In another maladaptive incident, he began the episode by "flicking" pencils from his desk. T212, SB20.

LEA personnel took photographs just after the expulsion incident occurred and these were authenticated by LEA personnel. The photos clearly show the property damage caused by the Child. SB21, SB22.

This hearing officer noted the predictability of the Child's behavior outbursts. As the LEA testified, the Child's maladaptive behaviors are initially preceded by the Child's blanket refusals to do anything suggested by the adults. If the adults want him to go to class, he stands at the door and refuses to enter. If the adults want him to complete school work, he wants to go to the computer lab to play. If the adults want him to cease acting poorly in the SOL testing classroom, he refuses to answer questions. But when the Child begins to act poorly, a maladaptive behavior usually follows the defiant act. SB26.

As evidence of the Child's intent, the hearing officer also noted that the Child makes comments when initiating a behavioral incident. For example he turns and says, "Ha ha," or "You can't catch me" before he runs away from LEA staff. His own commentary on his behavior shows that he is aware of his actions. Also, running requires some planning – making larger steps, moving feet faster, gaining momentum and focusing farther away. In the Child's case, running is the last activity in a gradually escalating stream of maladaptive actions.

The LEA asserted at the hearing that the Child's defiance and escapism reflect his plan to be at home, not in school. The LEA suggested that the Child's mother condones his maladaptive behaviors because she wants the Child at home with her. Also, the City assistant principal stated that she twice overheard the Child comment to his mother when she picked him up from school, "Mommy, I did what you told me to do. Can we go to Walmart now?" T197.

The City Assistant Principal asserted that she "understood" that Parent "really wanted [the Child] home." T198. She explained further, "I feel like she told him to go to school to

misbehave. And if he misbehaved, she knew she could come and get him and he would be able to be home with her. But we wanted [the Child] in the school setting." T198.

Is there any truth to the City Assistant Principal's assessment that Parent actively manipulated the Child to misbehave so he would be released from school on a daily basis? For example, one of Parents' complaints at the hearing was the LEA's use of reinforcements on the Child to elicit positive behavior from him. Parent testified that she questioned the LEA's alleged use of plastic handcuffs and action figures to coax the Child to act properly. [18]

Per hearing testimony, the Child's outbursts often referenced his mother. For example, he stated, "My momma says you can't touch me." T199. Often, when the Child was offered behavior incentives by the LEA, he responded, almost automatically, "Well, you can't touch me. I'll do what I want to do." T195.

In addition, the City Assistant Principal testified that Parent's habit was to show up at the school "often," 3-5 times per week, though Parent was only "occasionally" called during this timeframe to pick up the Child in April through May, 2012. T194. The facts reveal that Parent was indeed able to leave daily with the Child between 10:00 A.M. to 10:30 A.M. T194, T218-219.

Another pattern emerged daily and also diverted the Child from school. Each morning, the Child escaped to the computer lab whenever he wanted. The Child knew that he was to be in his homeroom class first in the morning but he regularly refused to enter the classroom. Instead, he routinely ran to the computer lab. He played games, ran under the computer table or fiddled with electrical wires. School administrators testified that it was "very difficult to get him out of the

[18] Parent made the claim that the LEA used blue plastic handcuffs, fighting figures, comic books with fighting figures inside, and wrestlers spitting and punching as reinforcers for the Child. Parent implied that the LEA incited the Child's maladaptive behaviors. But no testimony was presented in response to these allegations. Parent also stated, "I am not going to let nobody frame my [the Child]." No testimony or evidence presented revealed any LEA plan or design to "frame" the Child. T89.

computer lab." T192 -194. When he decided to leave the lab, however, he exited, and ran outside and around the circular school building. This daily behavior forced the school principal to stand at one end of the building and the City Assistant Principal waited at the other end. Every morning, one of the administrators had to catch the Child as he ran from them. T192 -194. Thus, the Child and LEA staff encountered a life-threatening event each time the Child opened the computer lab door. At the hearing, Parent noted that the Child "was promised to play those games to redirect himself." T191.

Whether or not the Parent participated in providing any structure to the Child's maladaptive behavior is not this hearing officer's "call." Suffice it to say that the hearing record clearly shows that the Child developed a daily pattern in his routine refusals, defiance and escape behaviors indicative of intent. His mother did say that she wanted him home. Certainly, he was not safe at school. But this Child is quite capable of making his own choices – especially bad ones. Having reviewed the Child's maladaptive behaviors contained in his disciplinary record, this hearing officer opines that the MDR team had sufficient evidence to find as they did. Thus, the MDR team made proper assessments regarding the causal nexus between the Child's behavior and his disability.

2. *The Proposed IEP Provides A FAPE To The Child In The Least Restrictive Environment.* [19]

When the due process hearing began on October 1, 2012, the Parent shared some of the Child's artwork with the hearing participants. The Child had energetically recreated action

[19] The Virginia Department of Education regulation at 8 VAC 20-81-130 states as follows: "Each local educational agency shall ensure: a. That to the maximum extent appropriate, children with disabilities, aged two to 21, inclusive, including those in public institutions or other care facilities, are educated with children without disabilities; and b. That special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." (2010).

figures on paper. His human figure drawings were identifiable for the active forms they depicted. This hearing officer surmises that Parents' theory is that their Child can exercise self-control long enough to create these figures.

Though these drawings were not entered into evidence, this hearing officer accepts Parents' interest in sharing them with hearing participants. Parents are hesitant regarding the Academy. Parents do not believe that their little boy, who may be calm with them when he draws, requires correction by way of a separate school.

"Why not educate him at home," they ask. He does not belong "in a place like that," they assert, "Give this boy a chance. Stop throwing him away." T90.

The LEA has not "given up" on the Child by changing his placement for one year to the Academy. But the Child will not get much done in school if he continues to demonstrate the wild, chaotic behaviors associated with his school presence since second grade.

Since that time, the record reflects that the Child's refusals and defiance have escalated. His maladaptive behaviors now are monumental in scope. The record also shows that this Child's behavior is unresponsive to adult correction in his current school setting. The Child's systematic non-compliance is the only area in which this Child shows any degree of consistency at school. SB19, SB26.

But the Child is not the only school member affected by his maladaptive behavior. The Child's behavior causes precarious safety situations every time he enters a school building. He endangers himself or causes others around him to be injured. He destroys school property and instructional materials, quickly ripping them to shreds, in the blink of an eye. SB17, SB27. As the MDR team school psychologist opined, the Child's disciplinary record now reflects the emergence of oppositional defiance in his personality profile. This ominous personality trait

shapes every school experience presented to the Child. Thus, it is essential that the Child learn other behavioral alternatives. SB17, SB18, SB27,

At school, the Child resists all LEA corrective efforts. If the Child is directed to act at school, he simply refuses to do it. He runs from it, calls it names, injures or destroys whatever "it" happens to be. There are no times when this Child's school non-compliance is an acceptable circumstance. The Child's ID or ED does not excuse these acts – biting, hitting, cussing, smashing, twisting, sweeping, flipping, screaming, ripping, tearing, destroying, refusing or flicking. Thus, the number of "smiley faces" [20] he receives during the day before he bites a teacher or slams another child's hand into a door, is immaterial. SB17, SB31, T238.

To receive a FAPE, this Child must first learn how to behave at school. The LEA proposes placement at a public separate day school, the Academy. Parents have consistently rejected the Academy as a placement option.

This hearing officer has attempted to identify the factors to which Parents object at the Academy. Neither one of the parents has visited the Academy. LEA administrators testified that they offered to provide Parents a visit. But Parent strenuously voiced her objection to visiting the Academy. The LEA is willing to provide a meeting with Academy behavior specialists, principal and teachers. To these requests, Parent testified, "I am not going to." T131.

The LEA presented convincing expert and factual witnesses. Their testimony was credible. The LEA witnesses who testified regarding the Child have substantial training and experience in working with children with disabilities who require special education. The LEA witnesses had direct knowledge of the Child's educational program and his behavioral needs.

[20] The Child's mother asserted at the hearing that the LEA had not accurately presented the Child personality profile. She alluded to the number of "smiley faces" he received. "Smiley faces" indicate good work at school. T238.

The City Special Education Director testified that the IEP team reached consensus on the Child's academic, social and behavioral goals. The IEP team agreed on the Child's placement at the Academy and the team agreed that the Academy provides the least restrictive environment in which the Child may be sufficiently provided a FAPE. T214.

Also, the City Special Education Director provided the reasons why the Academy is the appropriate placement for the Child. This hearing officer concurs with the educators.

The Academy placement is preferable for this Child because it provides specialized staff who are specifically trained to deal with students who have emotional and intellectual disabilities similar to the Child's. The Child's social and emotional deficits will be addressed at the Academy. LEA staff at the Academy can provide academic structure and behavioral supports to the Child within a proven positive reinforcement level system. The Child's academic profile and disciplinary record, the successive IEP modifications and placement changes, the multiple BIP reviews, and the testimony presented at the hearing demonstrate that the Child cannot receive a FAPE in the regular public school setting at this time. T215

Comparison between the Academy setting and the regular school reveals that the academic classroom at the Academy contains only 6 to 8 children. At his regular school, there are between 23 and 24 children in an inclusion class. Thus, there are too many children in the regular school class to address this Child's specific needs. The Academy student to teacher ratio is minute. Also, at the Academy, a psychologist and a behavioral specialist check on students all day long. If a crisis develops with this Child or any others, LEA staff members are specifically trained to keep disturbances under control. At his regular school, the Child's principal and school security guards were required to oversee the Child. This fact renders regular school placement unduly restrictive for the Child. T216-217.

The LEA Special Education Director also testified that the home-based plan proposed by the Parents is inappropriate. She stated that the primary issue she has with a home-based plan is that the Child is unable to receive enough academic instruction at home. Also, the Child's social and emotional deficits are not met. There is no opportunity for the Child to interact with his same age peers. Thus, the home-based plan is also too restrictive, she testified. T217.

This hearing officer gives deference to the expert opinions of the LEA staff. The IDEA does not deprive educators of the primary role in developing an IEP. *Hartmann v. Loudoun County Board of Education,* 118 F.3d 996, 1001 (4th Cir. 1997); *See also, Springer By Springer v. Fairfax County School Board,* 134 F.3d 659, 663 (4th Cir. 1998) ("The task of education belongs to the educators who have been charged by society with that critical task..."); *MM by DM and EM v. School District of Greenville County,* 303 F.3d 523, 531 (4th Cir. 2002) ("The court is not, however, to substitute its own notions of sound educational policy for those of local school authorities.").

Does the LEA's IEP provide a FAPE to the Child? This is a two part inquiry. First, does the LEA's IEP comply with Virginia Regulations and the IDEA? Second, if the IEP complies with procedural requirements, is the IEP reasonably calculated to enable the Child to receive educational benefits?

The record in this case reflects that the Child's procedural rights have not been violated. There is no validity to Parents' procedural violation claims or, the claims are de minimus, and the LEA's mistakes never substantively violated the Child's procedural rights. It is safe to say that any small procedural error the LEA committed has now been corrected.

The Child has been at home now since June 2012. Prior to the Child's expulsion, his school behavior was disruptive and dangerous to himself, to other children and to LEA staff. The

Child desperately needs behavioral structure and correction to succeed in school. Thus, the Child needs to attend school because there is overwhelming evidence that the Child's home-based plan is long past its original short-term function. The Parents' proffered home-based plan is insufficient to provide the Child a FAPE and is substantively inadequate.

More importantly, the Child's behavior cannot be corrected at home. The Child's social needs are not met at home because the Child is not being educated along with his same age peers. This placement option is overly restrictive for that reason.

LEA experts agree that this Child needs a structured educational program with behavioral support and social skill development. The Child's academic needs will be met only if he receives instruction with a small number of students who have similar emotional and intellectual deficits. Instruction in regular education classes, at this point, does not work for this Child. The Child's educational requirements are best met within a small academic classroom. As the LEA educators testified, the Academy best addresses the Child's overall academic and behavioral goals. Regular comprehensive school has too many students, not enough behavioral support and is unsafe for the Child.

Thus, this hearing officer concurs with LEA administrative personnel. For the above reasons, the Child cannot receive educational services permanently at home or in the comprehensive regular public day school program at the City elementary school.

Even if the LEA had committed procedural violations, these do not mean that the Child was denied an educational opportunity unless the procedural flaws resulted in a denial of FAPE to the Child. There has been no FAPE denial. *See MM v School District of Greenville County,* 303 F.3d 523 (4th Cir. 2002) (A procedural violation in IEP delivery which does not cause a denial of FAPE, does not contravene the IDEA); *See also Gadsby v Grasmick,* 109 F.3d 940

(4th Cir. 1997).

In *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 U.S. Supreme Court defined a "free appropriate public education," ("FAPE"), as one that provides "personalized educational instruction." FAPE is provided in the IEP if it is "specially designed to meet the unique needs of the handicapped child, [and] 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.

There is no obligation to provide the best education or an ideal education in order to provide a FAPE. *Id.* at 200.

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

The legal framework dictates a decision in favor of the LEA because the Parents have failed to establish the inappropriateness of the proposed IEP and its proposed placement in a separate public day program.

Thus, "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. The IDEA does not

require "the furnishing of every special service necessary to maximize each handicapped child's potential." *Id.* at 199.

A student receives a free appropriate public education through the IEP process. *MM v. School District of Greenville County*, 303 F.3d 523 (4th Cir. 2002). This hearing officer has reviewed the IEP for its appropriateness on the basis of whether or not it is reasonably calculated to confer some educational benefit. *Rowley*, 458 U.S. at 206-207. The LEA is not required to provide the best education or an ideal education in order to provide a FAPE to the Child. *Id.* at 200.

Parents have not shown that this IEP is inappropriate or that it is not reasonably calculated to provide this Child a FAPE in the least restrictive environment.

This hearing officer gives deference to the LEA's educators for the decisions made on behalf of this Child. *Hartmann v. Loudoun County Board of Education*, 118 F.3d 996 (4th Cir. 1997); *see also, Springer v. Loudoun County School Board*, 134 F.3d 659 (4th Cir. 1998). (The court may not substitute its own notions of sound educational policy for those of local school authorities.); *MM by DM and EM v. School District of Greenville County*, *Id.* at 531 (4th Cir. 2002).

I find that FAPE has been provided to the Child in the proposed August 8, 2012 IEP. The LEA's proposed placement at the Academy provides the least restrictive environment for this Child. The Child cannot be educated in the comprehensive regular day program at his home school and cannot be educated adequately in the Parents' home-based plan.

Per the IDEA, the Child is to be mainstreamed, with his same age peers, to the maximum extent possible. The home-based placement fails to provide mainstreaming opportunities for the Child. This attribute of the parents' home-based proposal for their son's educational plan

contradicts the IDEA.

The Parent's home-based proposal is also limited in its provision of academic resources to address the Child's behavioral, social and academic issues. Parents proffer that the Child can be successful in school with the assistance of a one-on-one assistant, competent teaching staff, their medical doctor's advice and oversight, proper medication, and adequate redirection and behavioral support from the LEA,

First of all, the LEA is not required to provide an ideal education to the Child, the LEA is legally required to deliver a FAPE to the Child. Also, per the Parents' description of the Child's regular school needs, it is the Academy program, not the regular school or the home-based plan, that most closely resembles the Parents' description of their preferred educational plan for the Child.

But the LEA is not required to provide a maximum or optimal education to the Child. The concept of maximization was rejected long ago in *Rowley, supra.* The *Rowley* court held that "to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than congress intended to go." *Rowley, supra* at 199; *see also School Board v. Beasley, supra* at 49 ("By specifying an 'appropriate' education, Congress did not mean 'a potential maximizing education.'"); *see also Bales v. Clark,* 523 F. Supp. 1366, 1370-71 (E.D. Va. 1981).

HEARING OFFICER DECISION AND FINAL RULING

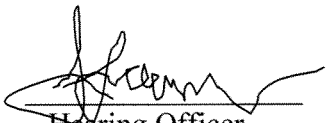
Parents did not prove that the LEA had failed to provide the Child a FAPE in the proposed IEP dated August 8, 2012. The LEA has proven that a FAPE is provided to the Child in the proposed IEP dated August 8, 2012. The proposed IEP placement decision, which designates placement in a separate public day school, is appropriate. Parents' proposed home-based

placement is not appropriate and does not provide this Child a FAPE. LEA placement at the City comprehensive public day school is not appropriate and does not provide this Child a FAPE. This hearing officer **ORDERS** implementation of the August 8, 2012 IEP with placement at the Academy.

The LEA is the prevailing party in this due process hearing.

Right of Appeal Notice

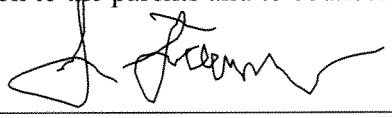
This decision shall be final and binding unless either party appeals in federal district court within 90 calendar days of the date of this decision, or in a state circuit court within 180 calendar days of the date of this decision.



Hearing Officer

Decision Date: November 9, 2012

I have mailed the above Decision to the parents and to counsel on this date.



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COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION

In Re: **, Child** **Findings of Fact and Decision**

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School Representative: Dr.
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, Virginia

Identification of Witnesses

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Father

Mother

City Assistant Principal

City Elementary School Elementary
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The Academy Academy
, Virginia