

XXXX XXXX,
STUDENT

v.

ANNE ARUNDEL COUNTY
PUBLIC SCHOOLS

*** BEFORE ANN C. KEHINDE,**
*** AN ADMINISTRATIVE LAW JUDGE**
*** OF THE MARYLAND OFFICE**
*** OF ADMINISTRATIVE HEARINGS**
*** CASE No.: MSDE-AARU-OT-16-01502**

*** * * * ***

DECISION

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STATEMENT OF THE CASE

On January 13, 2016, XXXX XXXX (Parent), filed a Request for Mediation with the Office of Administrative Hearings (OAH). On January 14, 2016, the Parent amended her filing to also include a Request for Due Process Hearing (Request). The Parent alleged that Anne Arundel County Public Schools (AACPS) violated the Individuals With Disabilities in Education Act (IDEA), 20 U.S.C.A. § 1415(f)(1)(A) (2010 & Supp. 2015), by proposing to move the Student from his current placement at [School 1] ([School 1]) to a self-contained class for students with emotional disturbance (ED) at [School 2] ([School 2]). The Parent proposed that the Student remain at his home school ([School 1]) and receive support services there.

On February 3, 2016, the Parent and AACPS participated in mediation but the matter was not settled and I proceeded with the pre-hearing conference (PHC) on that same date. The earliest dates available to the parties to hold the due process hearing were Thursday, March 10,

2016, and Friday, March 11, 2016. Unless waived by the parties, the due process hearing must be held and a decision issued within forty-five days of February 3, 2016, the triggering event for the timeframe for a due process decision, which is Friday, March 18, 2016. 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2014).¹

I convened the hearing as scheduled at AACPS headquarters in Annapolis, Maryland on March 10, 2016, and we completed the hearing that same day. The Parent represented herself and the Student. Manisha Kavadi, Esquire, represented AACPS. The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2010); Md. Code Ann., Educ. § 8-413(e)(1) (2014); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

The contested case provisions of the Administrative Procedure Act; Maryland State Department of Education (MSDE) procedural regulations; and the Rules of Procedure of the OAH govern this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUE

Is the proposed placement of the Student at [School 2] appropriate or should he remain at his current home zoned school, [School 1], with support services?

SUMMARY OF THE EVIDENCE

Exhibits

The Parent did not offer any exhibits.

AACPS offered the following exhibits which were admitted into evidence:

1. Individualized Education Program (IEP) Team Meeting Report, September 30, 2015
2. IEP Team Meeting Report, October 8, 2015
3. IEP Team Meeting Report, November 4, 2015

¹ Forty-five days from February 3, 2016, is Saturday, March 19, 2016. Therefore, to comply with the deadline, the Decision must be issued on or before Friday, March 18, 2016.

4. IEP Team Meeting Report, January 5, 2016
5. IEP, dated November 4, 2015
6. IEP, section IV. Goals
7. School Bus Behavior Report, dated May 6, 2013; Discipline Referral Form, dated June 12, 2013; Letter to Parent, dated June 13, 2013; Discipline Referral Form, dated June 13, 2013; School Bus Behavior Report, dated October 17, 2013; Discipline Referral Form, dated April 8, 2014; Discipline Referral Form, dated May 8, 2014; Discipline Referral Form, dated May 25, 2014; Letter to Parent, dated May 29, 2014; School Bus Behavior Report, September 24, 2014; Letter to Parent, dated February 11, 2015; Discipline Referral Form, dated April 30, 2015; Discipline Referral Form, dated May 5, 2015; Incident Report, dated May 5, 2015; Letter to Parent, dated May 6, 2015; Discipline Referral Form, dated May 20, 2015; School Bus Behavior Report, dated May 21, 2015; School Bus Behavior Report, dated June 2, 2015; Discipline Referral Form, dated June 3, 2015; Incident Report, dated June 3, 2015; Standard Student Accident Report, dated June 3, 2015; Discipline Referral Form, dated August 31, 2015; Discipline Referral, dated September 1, 2015; Informal Office Referral, dated September 1, 2015; Discipline Referral, dated September 9, 2015; Discipline Referral, dated September 24, 2015; Discipline Referral, dated October 5, 2015; Letter to Parent, dated October 5, 2015; Discipline Referral, dated October 9, 2015; Informal Office Referral, dated October 29, 2015; Discipline Referral, dated November 19, 2015; Letter to Parent, dated November 19, 2015; Discipline Referral, dated December 4, 2015; Letter to Parent, dated December 4, 2015; Discipline Referral, dated December 16, 2015; Discipline Referral, dated January 20, 2016; Classroom Think Sheet; Informal Office Referral, dated February 10, 2016; Informal Office Referral, dated February 18, 2016; Informal Office Referral, dated February 19, 2016; Informal Office Referral, dated February 19, 2016; Informal Office Referral, dated February 23, 2016.
8. Referral for initial evaluation, dated September 1, 2015
9. Comprehensive Evaluation Review, dated October 8, 2015
10. Academic Assessment Report, dated September 15, 2015
11. Functional Behavior Assessment (FBA) Report, dated September 24, 2015
- 12, 13. Not offered
14. Behavior Plan for [Student], dated September 1, 2015
15. Not offered
16. IEP, dated January 5, 2016
17. Not offered

18. *Curriculum Vitae* for XXXX XXXX, M.Ed., School Psychologist
19. *Curriculum Vitae* for XXXX XXXX

Testimony

The Parent testified and did not present any other witnesses.

AACPS presented the following witnesses:

1. XXXX XXXX, M.Ed., School Psychologist, AACPS, was qualified to testify as an expert in school psychology.
2. XXXX XXXX, Behavioral Specialist, AACPS, was qualified to testify as an expert in special education generally and as a behavioral specialist specifically.

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. [Student] is nine-years old and in the fourth grade. He has always attended schools in AACPS: for first and second grade he attended [School 3]; and, for third and fourth grade, he attended [School 1].
2. [Student] is average to above-average in academic areas. Outside of school, [Student] plays football, basketball, and runs track. [Student] is a gifted athlete and he enjoys drawing. Some of [Student]'s teachers have gone to see him play sports.
3. During the 2012-13 school year, [Student] was in the first grade. Towards the end of that year, [Student] was involved in the following incidents at school:
 - On May 6, 2013, [Student] grabbed a student's shirt and threatened to punch the student.
 - On June 12, 2013, [Student] hit another boy in the back during recess.
 - On June 13, 2013, [Student] was suspended for one day after he yelled and kicked cabinets in the classroom. [Student] picked up a chair and held it over his head towards the teacher. School personnel met with the Parent and [Student] to talk about the incident and the suspension.

4. During the 2013-14 school year, [Student], was in the second grade. On October 17, 2013, [Student] refused to sit in his assigned seat on the bus and was jumping over the seats. School personnel informed the Parent.
5. In approximately March 2014, [Student] was hit by a moving vehicle. He was taken to the hospital and had an MRI of his head. [Student]'s face was swollen and puffy. [Student] has never been evaluated by a neurologist or other specialist as a result of the accident.
6. In the spring of [Student]'s second grade year he was involved in the following incidents:
 - On April 8, 2014, [Student] told his teacher he wanted to be “bad” in class so the class would not get a reward. The teacher told [Student] that he was not bad and that she knew he could do better. The teacher stated that [Student] hit her in the arm and [Student] denied it. [Student] refused to go to the office and had to be physically brought to the office. [Student] served detention and the Parent was informed.
 - On May 8, 2014, [Student] refused to transition to the next classroom. He raised his voice and began pushing chairs around. The Parent was notified. [School 3] had a partnership with XXXX. Counselors from XXXX, who were not AACPS employees, came to the school and worked individually with students. [School 3] recommended that [Student] see one of the XXXX counselors.
 - On May 29, 2014, another student accidentally stepped on [Student]'s foot while they were waiting in the lunch line. [Student] punched the student in the chest. When a staff member tried to remove [Student] from the lunch line, [Student] either punched or pushed the staff member in the chest. [Student] was suspended for one day. On June 2, 2014, the principal met with the Parent to discuss the matter.
7. During the 2014-15 school year, [Student] was in the third grade. On September 24, 2014, [Student] purposefully got off the bus at the wrong stop. The Parent was notified.
8. Later in his third grade year, [Student] was involved in a series of behavioral incidents:

- On February 11, 2015, [Student] was suspended for one day after he punched a student in the face. A conference was held with the Parent on February 11, 2015.
- On April 30, 2015, [Student] was involved in a verbal altercation that led to a physical attack on another student. [Student] was placed on in-school suspension for the remainder of the day on April 30, 2015, and was given detention during lunch and recess for four days.
- On May 5, 2015, [Student] hit another student in the chin. He then left the classroom without permission. After [Student] was taken to the office, he repeatedly left the office without permission; he was screaming and crying. The principal called the parents and [Student]’s father told her that he did not have transportation to come to the school to pick up [Student]. [Student]’s father gave the principal permission to drive [Student] home but when she tried to take him to her car, [Student] would not cooperate. They returned to the principal’s office and [Student] continued to scream, cry, and attempt to leave her office. The principal went and picked up [Student]’s father and drove him back to school. After a period of time, [Student]’s father was able to calm [Student] down and the principal and [Student]’s father took [Student] home. [Student] was suspended for two days. On May 8, 2015, a conference was held with [Student]’s parents regarding the incident.
- On May 20, 2015, [Student]’s class had a substitute teacher. The substitute teacher requested help and two school employees came to the classroom. [Student] appeared angry and staff requested that he step out of the room. [Student] started pushing past staff to get to another student in the classroom and was yelling. It took ten minutes to remove [Student] from the classroom and he served in-school suspension for the remainder of the day and the next day. School staff contacted and spoke with the Parent about the incident.
- On May 21, 2015, [Student] was fighting with another student on the bus and walking over the top part of the seats. When the bus aide told [Student] to stop, he said, “Shut the fuck up.” School staff reviewed the bus rules with [Student] and the Parent was informed. He was escorted home on the bus at the end of the day.
- On June 2, 2015, [Student] was bothering another student on the bus. The bus aide told him to leave the other student alone. [Student] replied, “Don’t tell me what to do, XXXXX.” When [Student] was exiting the bus, he again called the aide a “XXXXX.” The bus aide asked [Student], “Is that what you’d call your mother?” [Student] re-entered the bus and said, “I will kill you, XXXXX. Don’t talk about my mother.” [Student] was suspended from using the bus from June 4, 2015 through June 12, 2015.
- On June 3, 2015, [Student] was in the learning lab for a lunch detention. He and another student began screaming and shouting at each other. The school psychologist took [Student] to her office with the assistance of another staff

person who was certified in Crisis Prevention and Intervention. [Student] pushed chairs around in the school psychologist's office and was yelling and screaming. He repeatedly charged for the door and attempted to leave. He picked up a chair and walked with it to the window stating that he would break it. [Student] then tried to open the office door that the other staff member was holding closed; [Student] was hit in the left side of his head (temple area) by the edge of the door and he fell to the ground. The nurse was called and [Student] was given ice. [Student] was taken to the health room and his vital signs were checked and he was given more ice. The nurse contacted the Parent. [Student]'s uncle came to the school to get him.

9. The beginning of the 2015-16 school year, [Student]'s current fourth grade year, started with two behavioral incidents:

- On August 31, 2015, a staff member asked [Student] to follow the lunch rules while he was in the lunch line. [Student] became angry and punched a door and then left the cafeteria without permission. Another staff member found [Student] in the fourth/fifth grade hallway. [Student] punched the wall and a fire extinguisher box. He hit his head against the wall. When the staff member tried to talk with [Student], he yelled at her. He re-entered the cafeteria and sat at his lunch table. An individual behavior plan was developed for [Student] with daily and weekly rewards for good behavior.
- On September 1, 2015, [Student] was supposed to serve lunch detention in the learning lab but he went to the cafeteria instead. The principal and another staff member tried to convince [Student] to go with them to the learning lab. Another student asked [Student] if he was ok or if he was suspended? [Student] became angry and called the student a "n-----" and threatened to punch him. The other staff person stood between [Student] and the other student and the principal tried to calm [Student] down. [Student] tried to punch the other student but missed because the principal and the other staff member were between the students. [Student] hit the other staff member five or six times. A male staff member assigned to cafeteria duty tried to assist in calming [Student] and [Student] hit his body into the male staff member's body. On that same date, [Student] refused to do his work in the classroom. He distracted other students and moved around the classroom without permission.

10. As a result of the incidents in the Spring of 2015, and the two incidents so early in the new school year, an individual behavior plan was developed to address [Student]'s problematic behavior. The behavior plan involved daily point sheets and the behavior criteria [Student] needed to achieve a "gold day" or a "silver day" or neither. [Student] got rewards for a certain number of points and recognition for a

“gold day” or a “silver day.” The behavior plan also outlined disruptive behaviors in categories from mild to moderate to a “major meltdown” and what actions staff should take to address each category. The behavior plan instructed staff not to try to reason or question [Student] when he is in a crisis mode. Instead, school personnel were instructed to briefly and calmly respond but not to ignore [Student], because that also made [Student]’s behavior worse. School personnel were instructed that drawing and coloring help [Student] to calm down.

11. In the fall of 2015, in addition to the behavior plan, [School 1] staff used conferences with [Student]’s parents, self-control and anger management sessions in the learning lab, and a “chill pass” to address [Student]’s behavior.
12. A “chill pass” is a ten minute break [Student] can request as needed. He is not expected to talk, interact, or engage in a skill lesson, although he is supervised by an adult. [Student] requested the pass two to three times per day.
13. On September 3, 2015, [School 1] convened an IEP team to address [Student]’s emotional and behavioral difficulties at school. [School 1] proposed having a school psychologist evaluate [Student] in his cognitive abilities, psychological processing, social/emotional, and behavioral development. They also proposed having a special educator evaluate [Student] in basic reading skills, reading comprehension, math calculation, math reasoning, and written expression. The Parent consented to the evaluations.
14. [Student]’s language arts and math teachers completed teacher rating scales for the Behavior Assessment Systems for Children. [Student] was clinically significant for problems with aggression and self-control. [Student] also displayed symptoms of

depression, anger control, bullying, emotional self-control, executive functioning, negative emotionality, and resiliency.

15. When the school psychologist interviewed [Student], he told her that he knew he had periods of anger but he could not control his feelings of rage.

16. During the early fall, [Student] was involved in the following incidents:

- On September 9, 2015, [Student] was kicking another student. When the other student asked why [Student] was kicking him, [Student] used both of his hands to push the other student in the chest and knocked him backwards. [Student] served in-school suspension on September 10, 2015 and his behavior plan was revised.
- On September 24, 2015, [Student] was standing in the classroom doorway when another student stuck his tongue out at him. [Student] began screaming at the student and tried to push past the teacher in an effort to get to the student. The principal intervened and asked [Student] to go to the office with her. [Student] continued screaming, threw himself on the floor, and hit his head against the window. [Student] also punched the lockers and hit the principal's forearm in an effort to get past her and into the classroom. School staff had a conference with the Parent. The Parent told the principal she had not scheduled a psychiatric appointment yet.
- On October 5, 2015, [Student] was in music class and the students were playing instruments and then stopping and switching instruments with another student. [Student] became involved in a verbal altercation with another student. [Student] exchanged his instrument but then became involved in another altercation. [Student] quickly came out of his chair and charged at the other student. The class was removed and two adults stayed in the classroom with [Student] trying to remove him. [Student] was screaming and crying and tried to push past the adults to get out of the classroom. He picked up a chair and slammed it down. The principal called [Student]'s parents but neither parent came to pick him up. [Student] was suspended from October 6, 2015 through October 8, 2015.

17. On October 8, 2015, a Functional Behavioral Assessment (FAB) was conducted to assist in ascertaining the reasons for [Student]'s problematic behaviors. On October 8, 2015, an IEP team met to review the assessments. The IEP team, with the exception of the Parent, concluded that [Student] was eligible for special education services as a student with an emotional disability. The IEP team decided to proceed with developing an IEP

for [Student]. The Parent told the IEP team that she had an appointment for [Student] to see a psychiatrist at XXXX on October 22, 2015. She did not want [Student] to have special education services until [Student] saw the psychiatrist.

18. [Student] had two incidents of rage between the IEP meetings on October 8, 2015 and November 4, 2015:

- On October 9, 2015, [Student] was told by the chorus teacher not to touch the risers because they could fall on him. [Student] refused to move away from the risers, kicked another student's chair, and told the teacher, "I will throw a chair at your face."
- On October 25, 2015, [Student]'s teacher was talking with him about using polite words when speaking with other students. When he went back into the classroom, [Student] had problems staying on task and following directions. When another school staff took [Student] out of the classroom and to her office, [Student] kicked the hallway walls and hit his head against a door. It took approximately twenty minutes for [Student] to calm down. [Student] agreed to come back to the classroom and apologize for being disruptive but when he re-entered the classroom, he became upset and would not apologize but eventually yelled an apology.

19. On November 4, 2015, an IEP meeting was held to develop an IEP for [Student].

The Parent informed the IEP team that she had an appointment at XXXX on November 6, 2015, to find out about counseling supports for [Student]. The IEP team shared the FBA and BIP with the Parent. The Parent was in agreement with the BIP. The IEP team proposed providing [Student] with crisis intervention supports, anger management training, extra time for transitions, frequent breaks, behavior contract, and additional adult support to help him remain in the classroom. The Parent agreed with these services. The following incidents occurred between the November 4, 2015 and January 5, 2016, IEP meetings:

- On November 19, 2015, [Student] was using the bathroom when another student opened the door to the bathroom. [Student] went to the classroom and sat down but then he stood back up and said he was going to beat up another student. The classroom teacher and another teacher blocked [Student] from leaving the classroom. [Student] was suspended for three days from November 20, 2015

through December 1, 2015. On December 2, 2015, school staff met with the Parent.

- On December 4, 2015, [Student] was being removed from class to the learning lab for threatening to hit another student. As [Student] turned to yell something at the teacher he swung his hand and hit the teacher on the hand and arm. [Student] was suspended from December 7, 2015 through December 9, 2015. On December 10, 2015, school staff had a conference with the Parent.
- On December 16, 2015, [Student] stood up, put his arm around a peer's neck and slammed him onto the floor.

20. The parties agreed at the November 4, 2015 IEP meeting to review the IEP and the BIP within thirty days. The purpose of the review would be to assess how [Student] was doing and modify the IEP and/or the BIP as necessary. The review would also consider any information or recommendations provided by the outside counselor. [School 1] gave the Parent prior written notice and attempted to hold an IEP meeting two times before January 5, 2016, but the Parent did not attend. On January 5, 2016, an IEP meeting was held and the team contacted the Parent by telephone. The Parent stated that she could come later in the week and meet with the principal and school psychologist.
21. As of January 5, 2016, [Student] had not made significant progress on the IEP goals. He continued to have major episodes of rage and multiple instances of classroom disruption. [Student] refused to participate in the counseling services offered to him at [School 1] by the school psychologist or the therapist from XXXX.
22. The IEP team proposed that [Student] be placed at a school with a full-time social worker, counseling services embedded in the curriculum, a high degree of structure, a small class size for more individualized attention, and staff trained and experienced in managing emotional needs.

23. [Student]’s IEP behavioral goals cannot be met at [School 1] which has a school psychologist only three days per week. After the last IEP meeting in January 2016, [Student] has had the following behavioral incidents:

- On January 20, 2016, [Student] was told that another student called him a name. [Student] entered the classroom without permission and picked the student up and attempted to slam him to the floor. [Student] then left the room and would not come back when a staff member called him.
- On February 10, 2016, [Student] put another student in a choke hold. He stopped after the teacher told him to stop.
- On February 18, 2016, [Student] was told to return something to another student. After he returned the item, [Student] walked out of the media room without permission.
- On February 19, 2016, [Student] walked out of STEM lab without permission after he became upset that the class was using the Chromebooks when he wanted to use the iPads. Later that day, [Student] became upset during gym class about taking turns during a game. After gym, when his class was lining up, [Student] pushed a chair, and hit the wall and a fire pull box. He said he should hit a male staff member.
- On February 23, 2016, [Student] was in art class. The teacher told him to follow directions and to take his hood off. [Student] refused. The teacher asked another staff member to take [Student] out of the classroom but [Student] refused to leave with her and hit her hand off the table.

DISCUSSION

Legal Framework

The IDEA requires “that all children with disabilities have available to them ... a free appropriate education that emphasizes special education and related services designed to meet their unique needs[.]” 20 U.S.C.A. § 1400(d)(1)(A). The IDEA provides federal money to the states to educate disabled children on condition that states comply with the extensive goals and procedures of the IDEA. 20 U.S.C.A. §§ 1412-1414; 34 C.F.R. § 300.2; *Board of Educ. of the Hendrick Hudson Central School Distr. v. Rowley*, 458 U.S. 176 (1982). Maryland’s special education law is found at

Maryland Code Annotated, Education Article § 8-101 *et seq.* (2014). The regulations governing the provision of special education to children with disabilities are found at COMAR 13A.05.01.

A free appropriate education (FAPE) is defined in COMAR 13A.05.01.03B as follows:

(27) “Free, appropriate public education (FAPE)” means special education and related services that:

- (a) Are provided at public expense, under public supervision and direction;
- (b) Meet the standards of the Department, including the requirements of 34 CFR §§300.8, 300.101, 300.102, and 300.530(d) and this chapter;
- (c) Include preschool, elementary school, or secondary education; and
- (d) Are provided in conformity with an IEP that meets the requirements of 20 U.S.C. § 1414, and this chapter.

FAPE is similarly defined in the IDEA and in the applicable federal regulations. 20 U.S.C.A. § 1401(9); 34 C.F.R. § 300.17.

FAPE is, in part, furnished through the development and implementation of an IEP for each disabled child. *Rowley*, 458 U.S. at 181-182. COMAR 13A.05.01.09 defines an IEP and outlines the required content of an IEP as a written description of the special education needs of the student and the special education and related services to be provided to meet those needs. The goals, objectives, activities, and materials must be adapted to the needs, interests, and abilities of each student. 20 U.S.C.A. § 1414(d). A student’s IEP must be reasonably calculated to enable the child to receive educational benefits. *Rowley*, at 182.

FAPE does not require “the best possible education that a school system could provide if given access to unlimited funds.” *Barnett v. Fairfax Co. School Bd.*, 927 F.2d 146, 154 (4th Cir. 1991). It does, however, require the State to provide personalized instruction with sufficient support services to permit the handicapped child to benefit educationally. The IDEA requires that an IEP allow for a “basic floor of opportunity that access to special education and related services provides.” *Tice v. Botetourt County School Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990).

Although the law in special education has undergone a significant evolution in the past few decades, the *Rowley* case still sets the standard for determining whether a child is being accorded a free appropriate public education under the IDEA. In *Rowley*, the Supreme Court set forth a two-part analysis. First, a determination must be made as to whether there has been compliance with the procedures set forth in the Act. Second, it must be determined whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive educational benefits.

Once an IEP is shown to be procedurally proper, the judgment of education professionals regarding the child's placement should be questioned only with great reluctance by the reviewing authority. *Tice*, 908 F.2d at 1207. There are many cases that support the proposition that substantial deference must be given to educators and school officials to allocate scarce resources as they see fit as long as there are sufficient options available to provide reasonable opportunities for the disabled child. *A.B. by D.B. v. Lawson*, 354 F.3d 315, 325-329 (4th Cir. 2004); *M.M. ex rel. D.M. v. School Dist. of Greenville Co.*, 303 F.3d 523, 532-533 (4th Cir. 2002); *Barnett v. Fairfax County School Board*, 721 F. Supp. 757, 762 (E.D. Va. 1989). Courts have held that “[l]ocal educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment.” *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997). Additionally, to the maximum extent possible, the IDEA seeks to include the child in regular public schools; at a minimum, the statute calls for school systems to place children in the “least restrictive environment” (LRE) consistent with their educational needs. 20 U.S.C.A. § 1412(a)(5)(A).

The nature of the LRE necessarily differs for each child but could range from a regular public school to a residential school where 24-hour supervision is provided. COMAR 13A.05.01.10B. Although the IDEA requires specialized and individualized instruction for a

learning- or educationally-disabled child, it also mandates that “to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities,” must be “educated with children who are not disabled[.]” 20 U.S.C.A. § 1412(a)(5)(A). It follows that the State and federal regulations that have been promulgated to implement the requirements of the Act also require such inclusion. 34 C.F.R. § 300.114 through 120; COMAR 13A.05.01.10A(1). The IDEA mandates that the school system segregate disabled children from their non-disabled peers only when the nature and severity of their disability is such that education in general classrooms cannot be achieved satisfactorily. *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996 (4th Cir. 1997).

The Parent testified that her son is a typical nine-year-old boy and that he does not need to be educated outside of his home-zoned school. She further questioned whether he was emotionally disturbed and testified that many of the incidents were the result of [Student] feeling targeted. She testified that [Student] recently started counseling every other week with a social worker and she would like to see if [Student] makes progress before he is placed in a more restrictive setting. Finally, she testified that she was never told that [Student] had “put his hands on” any teachers or students.

The evidence clearly supports the conclusion that [Student] has been properly identified for special education purposes as a student with an emotional disturbance. Emotional disturbance is not a diagnosis that can be found in the Diagnostic and Statistical Manual, fifth edition (DSM-5), used by psychiatrists, psychologists, and clinical social workers to make psychiatric diagnoses. It is solely the creation of educational law. Federal regulations define “emotionally disturbed” under the IDEA, to be a condition in which one or more of the following characteristics has existed over a long period of time and to a marked degree that negatively affects the child’s educational performance: (a) An inability to learn that cannot be explained by

intellectual, sensory, or health factors; (b) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (c) Inappropriate types of behavior or feelings under normal circumstances; (d) A general pervasive mood of unhappiness or depression; or (e) A tendency to develop physical symptoms or fears associated with personal or school problems. 34 C.F.R. § 300.8(c)(4)(i).

In [Student]'s case, the evidence shows that both factors (b) and (c) have existed, at first mildly but by the end of third grade and throughout fourth grade, markedly. Ms. XXXX testified, and the exhibits support her testimony, that when [Student] is calm and having a good day, he is a pleasant, compliant, and an academically capable student. However, when he has a "rage" (as [School 1] staff have called [Student]'s behavior) he is dangerous to himself and/or other students. The behavior plan developed on September 1, 2015, notes that it is impossible to reason with [Student] when he is in a rage. If a student is unable to reason, he is clearly unavailable for educational instruction during those periods of time. Ms. XXXX also testified that at times, even if [Student] is not in a "rage," if he is very upset or frustrated, he will "shut down." During those time periods, [Student] is also unavailable for educational instruction. Finally, I noted that in every behavioral incident in which [Student] had to be removed from the classroom, was suspended, or was serving an in-school suspension, the school staff noted that he was missing class time. Therefore, there is clear documentation that these incidents are adversely or negatively affecting [Student]'s educational performance.²

In carefully reviewing the disciplinary record, I noted that it was not one or two staff members that [Student] has had difficulty with maintaining a satisfactory interpersonal relationship. [Student] has had difficulties interacting with bus personnel, different teachers

² The Parent characterized some of the behavioral incidents involving [Student] as "petty." I want to be clear that the reason I listed each behavioral incident in the Findings of Fact, and am discussing them here, is because an IEP team is required to collect data that relates to the student's educational disability. The IEP team must then develop an IEP to address the deficits identified by the data. Finally, the IEP team must propose a placement that can meet the needs of the goals and objectives in the IEP.

(math, art, gym, etc.), administrators, and other school personnel (school psychologist, custodian, etc.).

In reviewing the evidence, it is also clear that [Student] has exhibited inappropriate behavior under normal circumstances. Ms. XXXX testified that [Student] hit his fists and hands against hard objects (walls, floor, lockers, etc.) and screamed, cried, and growled during these incidents. She also testified that it is the unpredictable nature of when [Student] will react, as well as the intensity of his reaction that is of great concern. Although the school staff has identified some patterns in [Student]'s behavior, Ms. XXXX testified that they do things for [Student] which they do not do for other students in order to try and avoid [Student] becoming frustrated and going into a rage. For example, she noted that teachers will try to answer [Student]'s questions first, they allow him to go first in the line of students even if he was not first in lining up, and the math teacher always pairs himself up with [Student] when they are doing cooperative learning to avoid having him involved in a conflict if he was working with a peer. Although I recognize that there is a wide range of "typical" responses from nine-year-olds, these reactions on the part of [Student] are well outside the "typical" reactions of most nine-year-olds.

The evidence also does not support the Parent's argument that [Student]'s rage is the result of AACPS targeting [Student] for unfair treatment. The incidents documented by AACPS occurred in many different settings (bus, principal's office, math classroom, school psychologist's office, gym, cafeteria, learning lab, playground, etc.) and involved many different teachers and administrators as well as different children. A careful review of the incidents show

that in each one, teachers, staff, or administrators made a reasonable request, to which [Student] reacted in an unusually emotional manner.³

In the incidents in which there was a precipitating event with another student, it appears that [Student] reacted in a disproportionately aggressive manner. For example, on September 24, 2015, [Student] was standing in the classroom doorway when another student stuck his tongue out at him. [Student] began screaming at the student and tried to push past the teacher in an effort to get to the student. The principal intervened and asked [Student] to go to the office with her. [Student] continued screaming, threw himself on the floor, and hit his head against the window. [Student] also punched the lockers and hit the principal's forearm in an effort to get past her and into the classroom. Although it was clearly inappropriate behavior for the other student to stick his tongue out at [Student], most nine-year-old children can tolerate this behavior by ignoring it, telling a teacher, or telling the student to stop. The fact that two adults had to intervene to prevent [Student] from physically confronting the other student is serious. [Student] hit into the principal's forearm in attempting to confront the other student. If [Student] does not learn how to control his behavior, adults may not be able to successfully intervene as he becomes older and stronger. The consequences to the adults who try to intervene, and to the other students if the adults are unsuccessful, could be very dangerous. Moreover, the fact that [Student] was not able to "let go" of his anger about the other student sticking his tongue out at him, but instead threw himself on the floor, hit his head against the window, and punched the lockers is also clearly dangerous to himself.

³ From the documentation of the incidents (AACPS Ex.7) and Ms. XXXX's testimony, the staff at [School 1] have thoughtfully considered many strategies to deal with [Student]'s emotional outbursts. They have tried taking him out of the classroom or having the classroom cleared. They have tried to reduce the time [Student] has to wait to have his questions answered so that he does not get frustrated. The one exception to this exemplary record is the bus incident on June 2, 2015. Although it was proper for the bus aide to reprimand [Student] for bothering another student on the bus, the bus aide did not need to respond to [Student] calling her a "XXXX" when he was exiting the bus. The bus aide's response to [Student] ("Is that what you'd call your mother?") escalated the situation when [Student] re-entered the bus.

Although the Parent generally argued that [Student] was singled out and that there might be other explanations for [Student]'s reactions, she did not point to any examples other than the incident in the bathroom. Although the details of the incident are not completely clear, it is apparent that someone opened the door to the bathroom while [Student] was using it. The Parent testified that she has taught her son about privacy and perhaps this is why he reacted the way he did. Although it is understandable that [Student] would be upset if his privacy was violated, his response was unreasonable. Threatening to beat up another student, and then standing up to walk out of the classroom to try and carry out the threat, is unreasonable behavior to expect under the circumstances. The fact that [Student] would require several adults to restrain him is completely disproportional to the offense against [Student] and outside the expected response of a nine-year-old boy.⁴

The Parent also argued that [Student] has recently begun to see a clinical social worker every other week and she would like to see if that can help [Student] before moving him to a more restrictive placement. The Parent told school staff in September 2015 that she planned to have [Student] evaluated by a psychiatrist. Unfortunately, this never happened. (AACPS Ex. 7, p. 7y). At this point, outside counseling every other week, although certainly helpful, is insufficient to address [Student]'s behavioral and emotional needs in school. Ms. XXXX testified that [Student]'s rages are unpredictable and intense. He can have them as often as three times per week and he can have more than one in one day. She opined that he needs access to trained staff and a social worker every school day.⁵

⁴ The Parent also testified that any child would react negatively if he was surrounded by multiple adults. However, again, from carefully reading every disciplinary report, it is clear that additional adult assistance was only called when [Student] was incapable of being re-directed by one adult. AACPS also has a responsibility for the safety of all the children in the classroom. If the teacher is concerned that [Student]'s behavior is becoming out of control and the teacher is unable to provide for the safety of all the children by him or herself, the teacher has no other alternative than to request assistance from other adults in that situation.

⁵ Due to the fact that [Student] had a serious accident in the spring of his second-grade year, I asked Ms. XXXX if a traumatic brain injury (TBI) could be related to his behavioral issues. Ms. XXXX said that if TBI could be ruled

Ms. XXXX testified that [Student] has resisted engaging in counseling with her or with the XXXX counselor at [School 1]. The Parent testified that [Student] told her that the XXXX counselor was unavailable, not that he refused to go. She testified that she should have been told that [Student] was refusing to engage in counseling at school.

Even if there was a breakdown in communication between [School 1] and the Parent concerning [Student]'s refusal to engage in counseling with the XXXX counselor, I do not believe it would have changed the outcome of this case. The Parent was clear that she did not want anyone in the school system to provide counseling to [Student] because they were biased. I conclude that she would have extended that belief to the XXXX counselors despite the fact that they are not AACPS employees. Moreover, as the Parent expressed her belief that [Student] is a typical nine-year-old boy, I conclude that if the Parent had known that he was refusing to engage in counseling, she probably would not have taken any direct steps to try and get [Student] to engage in the counseling, or that it would have been effective, because she does not believe [Student] needs counseling services at school.

I found Ms. XXXX's testimony credible and persuasive regarding [Student]'s behavior, what [School 1] has tried to do to address it, and her opinion that he needs more intensive services. She was clear and thoughtful in her responses and there were several times when she was forthright about her inability to answer a question. When she was asked about whether staff disliked [Student], her body language and tone of voice were consistent with her response, which was that staff do not dislike [Student] and feel he has considerable potential. Her testimony that [School 1] wants [Student] to get services to address his emotional needs now, before he enters middle school, appeared genuine and caring.

out, it would be very helpful. Of course, a complete neurological work-up would be outside the scope of the IDEA process.

Ms. XXXX testified that she is only at [School 1] three days per week but at [School 2] there is a school social worker present five days per week. She also testified that at [School 1], [Student] does feel singled out if he has to leave class to receive services or if someone comes into the classroom to provide services only to him. In contrast, she testified that at [School 2] the services are “embedded” throughout the curriculum and program. The class size is smaller and is taught by a special educator with an assistant with specialized training and experience in working with students with emotional disturbance. She testified that [Student] will continue to work on grade level academically and he will continue to be on a diploma track. There will be opportunities for [Student] to be with his nondisabled peers in lunch, recess, and cultural studies (music, art, etc.) because the program is within a comprehensive school of nondisabled students. The goal is for [Student] to receive the services and learn how to control his rage and the accompanying behaviors so that he can go back into a general education setting.

I also found Ms. XXXX’ testimony credible and persuasive. She does not work at [School 1] but is a behavioral specialist for AACPS. She has no reason or motive for wanting to move [Student] from [School 1] other than for him to get the services she believes he needs to be successful in school. Ms. XXXX has observed [Student] in the classroom on several occasions, reviewed his records, spoken with his teachers, and served on two of the IEP team meetings. She testified that at [School 2], all the staff in the program are trained at de-escalating conflict and anger management. She further testified that [Student] would not stand out as “different” in the program at [School 2] because all of the students there would be on daily point sheets customized to address the goals they are working on in their IEP, and that services to help the students in self-awareness and self-regulation are provided in the classroom to all of the students. She also noted that [Student] would academically be on grade level at [School 2], would be

eligible to participate in the extra-curricular activities, as well as lunch, recess, and cultural arts with his non-disabled peers.

The Parent did not have any specific complaints about [School 2]. She was offered an opportunity to visit the school but declined because she does not want her son moved in the middle of a school year and she does not want him in a small class-size setting. In concluding that the evidence demonstrates that [Student] should be moved to [School 2] in order to meet his special educational needs, I am not minimizing the Parent's concern about moving [Student] in the middle of the school year. It is clear that [Student] has difficulty with transitions and I have considered this factor carefully. However, I feel the evidence is overwhelming that [Student]'s needs cannot be met at [School 1]. For a child only in the fourth grade, he has been outside of the classroom (out of school suspension, in-school suspension, in lunch detention, etc.) for significant periods of time. The evidence demonstrates that not only does [Student] feel the effects of this, but the other students have noted it as well. For example, on September 1, 2015, [Student] was asked to follow a staff member (for his lunch detention) and another student asked him if he was suspended. Although it can be difficult for a student to move in the middle of a school year, it can also be an opportunity for [Student] to have a fresh start with different teachers and peers.

Finally, the Parent testified that the school never told her that [Student] "put his hands" on anyone. The evidence suggests otherwise. In the documentation of almost every incident, there is a notation that a telephone call was made to the Parent, a conference was held with the Parent, or a letter was sent to the Parent. Although certainly not all of the incidents involved [Student] hitting another student, there were many incidents in which [Student] threatened another student verbally or by his actions (moving towards a student, trying to push or charge

past a teacher to get to a student, etc.) that would have resulted in [Student] most likely hitting another student if adults had not intervened.

In sum, the Parent has not met her burden in demonstrating that [Student] should remain at [School 1] with support services as opposed to being placed in the program at [School 2]. The evidence is clear that [Student] has not made sufficient progress on his goals at [School 1] and that, despite their best efforts, they cannot meet his needs. The evidence is also clear that [School 2] would be able to implement [Student]’s IEP in the least restrictive environment which is also consistent with his needs.

CONCLUSIONS OF LAW

[Student] was properly coded as a student with an emotional disturbance. 34 C.F.R. § 300.8(c)(4)(i)(b), (c). The AACPS has demonstrated that the nature and severity of [Student]’s emotional disturbance disability is such that education in a general education classroom at [School 1] cannot be achieved satisfactorily. Placement at [School 2], in a self-contained classroom with the resources it has to provide educational benefit to [Student], is the least restrictive environment that is XXXXX appropriate for [Student]. *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996 (4th Cir. 1997).

ORDER

I **ORDER** that [Student] be placed at [School 2] and that the Parent’s request that he remain at [School 1] with additional services is **DENIED**.

March 17, 2016
Date Order Mailed

Ann C. Kehinde
Administrative Law Judge

ACK/cj