

**COMMONWEALTH OF VIRGINIA
VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION & STUDENT SERVICES
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES**

**Re: KO, by and through his parent(s) Ms. O and Mr. L v.
Public Schools (LEA)**

Child & Parent(s)/Guardian:

KO, child
Ms. O and Mr. L, parent(s)/

Child's Attorney Advocate:
(none)

Administrative Hearing Officer:

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Superintendent of LEA:
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DECISION CORRECTING TYPOGRAPHICAL ERRORS ¹

I. PROCEDURAL HISTORY

The parent filed a request for a due process hearing which the LEA received on May 19, 2010. (HO Exh. 10).

After being appointed to serve as hearing officer in this case,² with the parties' agreement, I scheduled an initial telephonic pre-hearing conference ("PHC") and held it on May 24, 2010. (HO Exh. 8). After that, I issued a scheduling order which set forth

¹ Throughout the decision, I will use the following abbreviations:

June 28, 2010 Transcript	Vol. 1 Tr.
June 29, 2010 Transcript	Vol. 2 Tr.
Parent's Exhibit	P Exh.
Hearing Officer Exhibit	HO Exh.
Virginia Beach City Public School Exhibit	LEA Exh.

² The Virginia Department of Education certifies attorneys who have met certain requirements to serve as Special Education hearing officers. On a rotating basis the Supreme Court of Virginia assigns these hearing officers to preside over due process disputes.

among other matters the issues; the date, time, and location of the hearing; and applicable deadlines. (HO Exh. 6).

On motion of the LEA I held a subsequent telephone PHC on June 18, 2010, to consider further clarification of the issues. Following discussions I determined the issues were sufficiently stated. During that PHC, I also considered the LEA's motion requesting leave to allow a certain witness to testify by telephone. Because the LEA had not yet determined the necessity of the witness, I found that motion premature, pending LEA provision of necessary information. (HO Exh. 13).

During a third PHC held on June 23, 2010, I heard additional arguments from the parties regarding the LEA's motion for leave to allow telephonic testimony. I denied the LEA's request for telephonic testimony of three of its witnesses because the parent objected and one witness was available to testify on the first scheduled day of the hearing. Further, I found telephonic testimony would preclude the parent from confronting the witnesses and make it impossible to observe their demeanor. (HO Exh. 18).

I held the due process hearing on June 28, 2010, and June 29, 2010, as scheduled. Exhibits admitted during the hearing included hearing officer exhibits one through eighteen; parent exhibit one; LEA exhibits A-G; and joint exhibit one. The decision appears below.

II. STATEMENT OF ISSUES

A. IDEA ISSUES

1. Should the child be placed in a regular public high

- school?³
2. Did the LEA adequately address any bullying toward the child? If not, did the LEA's failure deny the child a free appropriate public education?

B. Section 504 of the Rehabilitation Act of 1973 ("Section 504") ISSUE

1. Did the LEA discriminate against the child because of his disability?

II. STATEMENT OF FACTS

1. The child displayed difficulty with socialization and academics throughout elementary school. As a result of these concerns, the LEA evaluated the child and found him eligible for special education and related services as a student with an Other Health Impairment ("OHI") for the diagnosis of Attention Deficit-Hyperactive Disorder ("ADHD"). (LEA Exh. D 6-7).

2. Due to the child displaying "bizarre" behaviors in middle school, the eligibility team reassessed him. February 2008 the school psychologist conducted a psychological assessment and determined the child has significant psychological and emotional problems and difficulty in peer and familial relations. The assessment also noted the child likes to annoy teachers at school, is maladapted across several emotional domains, and has significant difficulty with executive function. Based on information collected during the evaluation, the child's current and historical profile suggested significant mental health disturbance.

That assessment also indicated that the child has a birth defect in which the

³ The LEA refers to a regular public high school as a comprehensive public high school, designed to serve the needs of all students, disabled and non-disabled.

structure that connects the two hemispheres of the brain is partially or completely absent. Further the assessment reported the child having ataxia (neurological dysfunction that impacts coordination). (LEA Exh. D6-D8).

The eligibility committee then determined that the child remained eligible for special education and services as a child with an Emotional Disability. (LEA Exh. D6-12); Vol. 1 Tr. 49).

3. Born December 31, , during the 2008 - 2009 school year the child was 16 years of age and a ninth grader at HS. His 2008 -2009 Individual Education Program ("IEP") placed him in self-contained classes for his core subjects and in adaptive physical education ("PE"). He obtained passing grades in special education math, art, and adaptive PE and failing grades in English and reading due to his refusing to complete assignments. He declined to finish work even when school staff made modifications to assignments to address his needs. He stated he only did what he wanted to do. Due to behavior concerns, the LEA attempted to design a behavior intervention plan ("BIP") for him. (LEA Exh. B. 122; Vol. 1 Tr. 28).

4. Psychological testing conducted on February 10, 2009, showed the child's general cognitive ability fell within the borderline range as compared to his peers. (LEA Exh. D1-D4).

5. At the beginning of the 2009 - 2010 school year the child was a tenth grader at HS enrolled in self contained special education classes for his academic/core subjects (math, world geography, science, social studies, and English). Class enrollment in the self-contained classes ranged from 8 to 12 students and in addition to a special education

teacher each class had a teacher assistant. The child's scheduled classes also included an elective class, foods, and adaptive PE. The child's placement in the latter class was due to his being unable to function in the regular PE class which had a larger student enrollment. Also, the IEP provided for extra assistance in the child's adaptive PE class to assist him in dealing with anxieties associated with PE class. (Vol. 1 Tr. 29, 175, 189, 210-212).

6. The child failed many of his core academic classes during the 2009-2010 school year. Further, he experienced significant problems in his adaptive PE class such as disrespecting the teacher, not dressing out, and refusing to participate in and do assignments. (LEA Exh. B 122; Vol. 1 Tr. 58-59, 141).

7. During the 2008-2009 school year, the IEP/Placement team recommended placing the child in a program at the Educational Programs ("EP"); however, he did not attend that year. During the 2009-2010 school year the child had significant behavior problems and his teachers believed he could not be educated in his current placement which consisted mainly of special education self-contained classes for his core subjects, adaptive PE, a resource class, and an elective class. Thus, at the annual IEP meeting on October 29, 2009, discussions continued about placing the child at EP. Because the parent desired to visit the program prior to a placement decision being made, the IEP team agreed that the child would be provided home based services from October 29, 2009 to November 13, 2009. The parent did not visit the program during that two week period and in November 2009, the child resumed his prior placement at HS. (Vol 1 Tr. 30; LEA Exh B 111-112).

8. On January 14, 2010, the LEA determined the child made a threat to injure or kill staff. The LEA recommended expulsion of the child. A manifestation determination committee decided the child's conduct was related to his disability; therefore, the LEA did not discipline him. But the child's IEP team met and determined his current IEP placement at HS in self contained classes was inappropriate. On January 21, 2010, the IEP team proposed placement at the EP Re-Ed Program (Re-Ed Program" or "program"). To permit the parent time to visit the program, the IEP team changed his placement to home based services. The LEA attempted to hold several IEP meeting to discuss and resolve the child's placement. However, due in part to the mother's health issues, the meetings were delayed. On April 16, 2010, the parent finally visited the program. She then declined to agree to the proposed placement. (LEA Exh. C.; Vol. 1 Tr. 23, 56-58; Vol. 2 Tr. 56, 66).

9. The child has not been successful in the general education environment at HS and has not acquired any credits toward a general diploma. (Tr. 66).

10. EP offers among other programs the Re-Ed Program which is designed to reeducate emotional disturbed/disabled children. (LEA Exh. E-1).

11. The program provides intensive instruction in a structured environment and is designed to meet the educational and behavior needs of its students. It is located in the Academy Building. The students in the Re-Ed Program do not mingle with students from other programs because it is housed separate from other programs in the building. Also, the program has its own separate entrance. (Vol. 1 Tr. 27, 39-46; LEA Exh. E-1).

12. In September 2009, the child's mother reported to assistant principal Mr. D that others were bullying her son at HS and away from school. Neither the mother nor the child provided specific names of those allegedly committing the bullying. Also in September 2009 another student reported to the assistant principal that other students were "picking on" the child. The reporting student informed the principal he had resolved the matter. Like the mother and the child, the student reporting the bullying did not identify any bullies. (Vol. 1 Tr. 133, 167).

13. Immediately after receiving the report about bullying, the assistant principal at HS instructed the child and mother to relay any bullying behaviors to him and the child's teachers. The assistant principal also emailed the child's teachers informing them of the concern and requesting they be on guard for the reported behavior and inform him of any perpetrators' identity. (Vol 1 Tr. 154-155, P's Exh. 1).

14. The child's teachers did not observe him being bullied; but they did observe the child instigating trouble. (Vol. 1 Tr. 133-134; 177, 201).

15. During the 2009-2010 school year at HS, the child met with the assistant principal several times. Other than when he was meeting with the assistant principal in his mother's presence and responding to her questions, the child did not report any bullying incidents. Also, he never sought out assistant principal Mr. D to report any bullying. (Vol 1 Tr. 133-134).

16. Among other policies, the LEA maintains a policy that precludes bullying. It states the follows:

Bullying is defined as negative behaviors intended to frighten or cause harm, which may include, but are not limited to verbal or written threats,

physical harm. Bullying will not be tolerated and students shall be referred to the principal or the assistant principal for appropriate disciplinary action which may include suspension and/or recommendation for long-term suspension or expulsion.

(Vol. 1 Tr. 137; LEA Exh. F8).

17. The LEA maintains a separate anti-Harassment and nondiscrimination policy regarding race, color, sex, disability, national origin, ethnicity, or religion. (Vol 1 Tr. 136-137; LEA Exh F5).

18. An August 8, 2008 psychiatric evaluation gave the child a diagnosis of probable schizophrenia. (LEA Exh. D 34-35).

19. The party seeking relief in this case is the parent. (HO Exh. 10). Thus, I find under applicable case law that the parent bears the burden of proof. *Schaffer v. Weast*, 126 S. Ct. 528 (2005) (ruling in pertinent part that the burden of proof in an administrative due process hearing under IDEA is on the party seeking relief).

IV. APPLICABLE LAW AND ANALYSIS

A. Should the child be placed in a regular public high school?

A crucial purpose of the Individuals with Disabilities Education Act (“IDEA”) is to ensure that students with disabilities have available a free appropriate public education (“FAPE”). See *Bd. Of Educ. V. Rowley*, 458 U.S. 176, 179-81, 200-01. A FAPE includes special education and related services planned to meet the student’s unique needs and provided in conformity with a written individual education program (“IEP”). 34 C.F.R. Section 300.17[d] and 34 C.F.R. Section 300.320. A school district must offer FAPE to a student through an IEP that is reasonably calculated to enable the

child with a disability to receive educational benefits. *Rowley*, 458 at 206-07.

Also, the IDEA requires that “[to] the maximum extent appropriate, children with disabilities ... are [to be] educated with children who are not disabled’ and that children with disabilities are not to be placed in special classes or otherwise removed from ‘the regular educational environment’ except when ‘the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.’” 20 U.S. C. Section 1412(a)(5)(A). Under the IDEA, a child must be educated in the “least restrictive environment” (“LRE”). 20 U.S.C. Section 1421(a)(5)(B); *see also*, 8 VAC 20-81-130. This requirement indicates a strong preference for mainstreaming. That preference, however, is not an inflexible mandate. This is so because the child’s needs may dictate a more restrictive placement is suitable. *DeVries v. The Fairfax County School Board*, 882 F 2d 876 (4th Cir. 1989). For instance, a child’s disruptive behaviors can be a significant factor in determining the appropriateness of a placement. *Hartman v. Loudoun County Bd. Of Educ.*, 118 F.3d 996 (4th Cir. 1997); *see also, Renollett by Renollett v. Independent Sch. Dist. No. 11, Anoka-Hennepin*, 42 IDELR 201 (D. Minn. 2005), *aff’d* 45 IDELR 117 (8th Cir. 2006) (Finding that the child’s aggressive behaviors justified his removal from mainstream classes to a special education setting).

In this case, the child’s IEP team, also serving as the placement team, recommended placing the child at the Re-Ed Program due to his behavior and emotional needs. (LEA Exh. B/19-50, 111-112; Vol. 1 Tr. 30, 143-144. 179, 196-197). The parent contends the appropriate placement for the child is a comprehensive public high school

(in the parent's words " a regular public high school") with one-on-one assistance. (HO Exh. 10; Vol. 2 Tr. 127). I examine the evidence to decide this dispute.

First, I consider school personnel observations and assessments of the child. LEA staff describe the child as disruptive, disrespectful, defiant, and unwilling to complete assignments.

For example, the child's world geography teacher- Ms. RB - testified that the child seldom focused and did his class work. Instead, he constantly caused a commotion in the small class. For instance, the child frequently used profanity and slept a lot during class. Often when Ms. RB attempted to awaken him, he would become combative with her. This conduct resulted in his being removed from the class on several occasions. Also, he would display a negative attitude and blurt out "off the wall" comments such as "I don't want to be here;" "I don't believe in this;" "I sit in the dark"; and "I worship the devil." (Vol 1 Tr. 172, 182). Even when Ms. RB permitted him to engage in activities he enjoyed, his disruptive behaviors persisted. (Vol 1 Tr. 173-174).

Ms. JD, the child's special education English teacher testified similarly. According to her the child chose when he would stay on task and complete assignments. Often he placed his head on the desk, and at times slept for part of the period. Upon his awakening he caused class turmoil. (Vol 1 Tr. 189). Consistently, he antagonized his classmates by making derogatory comments about them such as unflattering comments about what they were wearing or by saying something out of the blue. One incident described by Ms. JD related that as she was instructing the class, the child suddenly yelled "Time Bomb" "Time Bomb" causing great commotion within the class. Also classmates

complained to LEA staff about his behaviors. Ms. JD testified that on several occasions, his disruptions caused her to remove him from class. Once removed, an environment conducive to learning returned. (Vol. 1. Tr. 195-196).

Like Ms. RB and Ms. JD, the child's special education math teacher, Ms. BM observed him sleeping or pretending to be sleeping during portions of class, refusing to complete assignments he was capable of doing, and blurting unexpected comments. Ms. BM testified she made various accommodations or offered incentives such as allowing the child to work with a partner he felt comfortable with, providing and offering as needed one-on-one assistance to complete assignments. Yet, the child generally failed to engage himself and never finished tasks. According to Ms. BM, the child's derogatory attitude toward school and behavior caused mayhem in math class. (Vol. 1 Tr. 212 - 220). For instance, other students observed him sleeping and then claimed that the teacher should also allow them to do likewise. (Vol 1. Tr 214).

The testimony of assistant principal Mr. D regarding the child's disrespect and defiance of authority substantiates the teachers' reports. So too does that of the special education coordinator, Ms. M. (Vol. 1 Tr. 131, 33 - 35).

Having had the opportunity to observe the above-mentioned witnesses and their demeanor as they testified, I find each presented himself/herself in an honest, credible and straightforward way. Further, I take careful note that they had multiple opportunities to observe the child or work with the child in his school setting. Thus, I give significant weight to their testimony.

Second, I consider the October 29, 2009 present levels of academic functional

performance ("PLOP"). Regarding the child's academics, the PLOP noted in pertinent part that the child refused to do many assignments; does what he desires to do; and was failing three of his core classes, (LEA Exh. B 72). Regarding Standard of Learning (SOL) testing, the PLOP reported while he passed his Grade 8 Science SOL, he failed Grade 8 reading, writing, and math SOL assessments. (LEA Exh. B,72). The child did not take SOL assessments in the ninth grade because his classes did not require them. (Vol. 1 Tr. 37) Further, the PLOP indicates, the child has problems staying on tasks, makes verbal threats, speaks negatively and of liking the darker side, frequently voices his dissatisfaction with teachers, puts his head down on his desk and shuts his eyes when overly stimulated, and pretends to be asleep. (LEA Exh. B122-123). Hence, the PLOP corroborates the LEA witnesses' assessments.

Third, in my inquiry, I consider the child's recent disciplinary history set forth below:

<u>Behavior's date</u>	<u>K's Behaviors</u>	<u>Disposition</u>
3/5/2009	[K] threw a book across the classroom at another student. He also said "I am tired of that fucking bitch" referring to another student in the class."	One day out of school suspension (OSS)
3/13/2009	Teacher writes: [K] was asked to remove his Desk from on top of his book bag several times. [K] then said all you teachers get me sick you Bitches. Mom contacted to pick up [K]-mom Did not return call nor did she arrive at HS. Consider 3/13/09 one day of ISS.	1 day in school suspension (ISS)

9/24/2009 [K] started class by yelling to leave the room Numerous times. The teacher explained that he Was in class and that he could not just leave the Room. [K] left the room without permission. He Returned to class and became disruptive. He said To [Ms. JD] "I don't care what your name is Woman" He was escorted from the room by Ms. [Mo]. He called Ms. [JD] a "witch" as she left The room. A meeting was scheduled with mother To discuss behavior concerns. 1 day ISS

10/12/09 [K] has been repeatedly redirected today. When

Behavior's date K's Behaviors Disposition

The timer went off, he began yelling time bomb, Time bomb. He was asked to stop, he replied with "stop what." [K] was given paper and pencil from A peer and instead of working he chose to doodle. Mr. [D] met with Ms. [O], Ms. [GR] (Special Education Dept. Chair), and Ms. [H] [FCC] to discuss [K] Behavior. [K] will be monitored for the next 2 Weeks and he will be referred to Mr. [C], Student Support Specialist. Conference with admin. & parent

11/24/09 [K] did not dress out for P.E. He refused to stay on The wall with the other students that did not dress out. He walked outside. The teacher said "It would be your Best interest if you followed my directions and come Back inside." [K] replied "It would be your best Interest if you shut the fuck up!" A phone message Was left for Mr. [L] regarding disciplinary action. Assigned 1 day of OSS for 11/25/09. 1 day OSS

1/14/09 [K] threatened both the substitute teacher and teacher Assistant that "One of these days I'm going to take you Teachers out--and that's not even a threat, it's going to Expulsion recommended

Happen.. I don't care if I end up in court." While being
Escorted to the office by the TA, [K] insisted on
Walking behind the TA and made inappropriate gestures
That made the TA fearful.

(LEA Exh. C).

This disciplinary history substantiates staff's observations and the PLOP's reports.

I note the IEP/Placement team deliberated about the child's above-noted behavior, performance, and functioning; determined that the child needed a more structured environment with more therapeutic and behavior interventions; and recommended the Re-Ed Program. (LEA Exh. B 112; Vol. 1 Tr. 50-52)

By testimony, Ms. M and Ms. D described this program as therapeutic and designed to meet the educational and behavior needs of students with behavior disorders that require intensive instruction in a structured environment. The program proposes to teach alternative behaviors to the negative ones that students often exhibit and to reintegrate students back to their home schools upon their being taught appropriate behaviors. All students in the program have emotional disabilities. Further Ms. M noted enrollment in the Re-Ed Program classes is typically 10 students with two full time teachers who are also certified counselors. In addition to providing academic instruction, they provide group and individual counseling on a daily basis. When behavior problems arise, the child is not subjected to a manifestation determination and possible suspension/expulsion. Instead the program offers therapy to address the behavior. Also, an educational specialist provides additional assistance to a class. This staff person rotates between two classes providing needed help. The program's increased staffing enhances opportunities to provide one-on-one assistance to the child. (Vol. 1 Tr. 124;

LEA Exh. E).

Mr. D and Ms. M by testimony continued describing features of the program. Skills required to obtain and retain employment are taught. If a student returns to his home school, the program provides continuing support as staff at the Re-Ed Program follows the progress of the child after his return to a comprehensive public high school. I also note that during the 2009 - 2010 school year the child received no credits toward a general diploma. That said, according to Ms. M, the child can elect to pursue a general diploma while in the program.

Ms. M and Ms. D presented themselves as knowledgeable about the Re-Ed program. Ms. M is the special education coordinator for HS. Prior to holding this position she taught school for at least nine years. Three of her teaching years were in the Re-Ed Program. Mr. D taught in the PS for 12 years. The 2009-2010 school year is his second year as assistant principal at HC. During his tenure with the LEA he has become familiar with the Re-Ed Program. Thus, I find Ms. M and Mr. D have considerable knowledge about the Re-Ed Program and their descriptions regarding its operations are credible.

Scrutiny of the evidence in this case shows the child's needs can not be met in a mainstreamed environment or comprehensive public high school in self contained classes with small student enrollments.

Among other needs, the child especially requires intensive therapeutic and behavior interventions. This is evident not only by observations of the child's behaviors but also by formal assessments. I note a psychological assessment conducted February

10, 2009, when the child was a grader in self contained classes, recommends the special education committee consider a more intensive special education program that would allow for therapeutic or behavioral interventions. (LEA Exh. D1 - D5). The previous year a psychological and educational assessment dated February 1, 2008 similarly recommended. (LEA Exh. D 6 - D12). Further, a February 2008 developmental sociological report noted the child struggles academically, hears voices, and is having increasing bizarre and problematic behaviors at school. (LEA Exh. D13 - D16).

What is more, the evidence shows the child functioning poorly in self-contained classes for the reasons previously explained. (LEA Exhs. B 72, C 13). General accommodations under that placement included the following:

- (i) extended time to complete assignments;
- (ii) breaks or change of task when not focused;
- (iii) reduction in number of problems when child not focused;
- (iv) monitoring by teacher;
- (v) seating in the least distracted area; and
- (vi) verbal prompts.

In addition, testing accommodations included the following:

- (i) clarification of directions or instructions during testing;
- (ii) extended time of 48 hours on all tests during tests;
- (iii) as needed, small group testing for major tests, if requested by the child; and
- (vi) use of books and notes while taking tests, if allowed, while in special education classes.

(LEA Exh. B 137).

Moreover, while in the self-contained placement, the LEA provided additional services, aids, and accommodations to address the child's needs. The child's IEP

contained behavior objectives targeting his defiance, disrespect of others, disruption, criticism of others, and difficulties following directions and staying on tasks. (LEA Exh. B 133- 134). Further, the child was allowed to go to the assistant principal's office to "cool off." One-on-one assistance was available in his classes because there was a teacher in each self contained class and a teacher's assistant. Vol. 1 Tr. 175, 189). However, the evidence shows the child did not take advantage of this service. Staff often tried to redirect the child during class and offered him incentives if he would engage in assignments.

Despite interventions and modifications the child's academic and behavior difficulties persisted. After the child threatened a substitute teacher and aide on January 14, 2010, the IEP/Placement team determined the child's self contained placement was inappropriate and proposed the Re-Ed Program.

I am persuaded and conclude that this program is an appropriate placement for the child. It offers the intensive behavior and therapeutic interventions recommended by the educational professional. It is particularly designed for children with emotional disabilities and is more structured than the child's self-contained classes. Class size would include approximately 10 students working with two teachers who are certified in counseling. One-on-one assistance is available. The child is almost eighteen years of age and the program offers job skills training/transitional services. Further one of the program's goals is to reintegrate the child to general education. Thus, the program affords the opportunity to mainstream the child. Once a child is reintegrated, the program provides supports to enhance the child's success in general education. Another advantage

of the program is behavior problems do not subject the child to manifestation determinations and possible long term removals from the program. Instead the child would receive therapy.

My conclusion that the Re-Ed Program is an appropriate placement for the child is guided in part by the principle(s) set forth in *Hartman, 118 at 996*. In that case, the Fourth Circuit upheld an administrative officer's decision that the LEA's more restrictive proposed placement was appropriate. It noted that in the existing fully inclusive program the child made minimal progress and repeatedly disrupted class with his/her behaviors. Further, the Fourth Circuit held that the LEA had not failed to make adequate accommodations for the child and the proposed placement provided the child with educational benefit and mainstreaming opportunities. *Id. 1005*.

In the case before me, by the end of the 2009-2010 school year, the child was failing all classes. Further, as noted previously the LEA made numerous accommodations for the child. Regarding his behaviors, the evidence shows they are extensively inappropriate and frequently pull other students off tasks. Moreover, teachers spend much of the class period trying to redirect the child. Thus, I find the child's substantial disruptions along with his poor academic progress justify the LEA's proposed more restrictive placement.

Further, I find the LEA has complied with the requirements under 34 C.F.R. 300.115(a)⁴ which mandates the LEA ensure a continuum of alternative placements are available to meet the child's needs. To that end, the child was unsuccessful in general

⁴ 8 VAC 20-81-130(B) under *The Regulations Governing Special Education Programs for Children with Disabilities in Virginia* establishes a similar requirement.

education. The LEA then placed him in self-contained classes with accommodations for the 2008- 2009 and 2009 - 2010 school years. But during the 2009 - 2010 school year, the IEP team determined that placement was not meeting the child's needs. It then made available a more structured and restrictive placement, the Re-Ed Program, that could meet the child's needs.⁵ Thus, I find the LEA has satisfied the requirements under 34 C.F.R. 300.115(a) regarding continuum of placement.

Moreover, where the dual interest of FAPE and LRE compete, FAPE overrides the latter. *Hartmann*, 118 F.3d at 996; *see also*, *City of Chicago Sch. Dist. 299*, 50 IDELR 300 (SEA IL 2008) (The hearing officer found that the school district made a costly mistake when it afforded more concern to a student's placement on the LRE continuum than the student's educational needs). Although the parent desires the child placed in a less restrictive environment (at a comprehensive public high school) his educational progress, or lack thereof, and behavior needs require placement in the more restrictive setting, the Re-Ed Program, for the reasons noted previously.

Also, I am reminded that the IDEA does not grant me as adjudicator a license to substitute my own notion of sound educational policy for that of the LEA. *Rowley*, 458 at 176. The educators provided more than sufficient accommodations, services, and aids for the student. After observing and working with the student for months and in some cases years, the educators considered his present levels of academic performance and functioning and determined they could not meet the child's need at the regular high

⁵ Also, I note that the LEA made available home-based services, not as a permanent placement but to allow time for the parent to visit the Re-Ed Program. When the parent declined to agree to the more restricted proposed setting, the child's placement remained at home. The parent filed the due process matter now before me asserting the child's placement should be returned to HS.

school whether in an inclusive or self-contained setting. After careful thought, they proposed placement at the Re-Ed Program. I find nothing in the record that shows their decision is erroneous. Thus, I defer to it.

B.. Did the LEA adequately address any bullying toward the child? If not, did the LEA's failure deny the child a free appropriate public education?

The parent claims the LEA failed to address the child being bullied at school and its inaction denied the child FAPE.

The Third Circuit has addressed this issue and held that bullying may deny FAPE if it precludes the LEA from providing for the child's needs. *Shore Regional High School Board of Education v. P.S.*, 381 F.3d 194 (3rd Cir. 2004). In this Third Circuit case, the appellate court upheld an administrative law judge's ("ALJ") decision finding that the school district had denied FAPE because it could not prevent harassment from the child's peers and therefore could not provide for the child's emotional needs. Both parties in the Third Circuit matter had agreed that the child was subjected to extensive harassment which was emotional and physical. A case worker with the school district determined the harassment had caused the child's grades to drop dramatically. The school district offered programs to combat bullying; however, the adjudicator found the school district, particularly the high school serving the child's community, could not prevent all bullying such as that occurring in unsupervised areas like on the bus. The court affirmed the ALJ's ruling that the school district was unable to provide for the emotional needs of the child. *Id at 201.*

Unlike the Third Circuit case, the evidence in the case before me fails to show that the child experienced bullying and fails to show that his needs could not be provided for because of bullying. In September 2009, the mother and a student reported the child was being bullied; however, no person provided the names of those carrying out the alleged behavior. Immediately after receiving the report, the assistant principal acted and instructed the child's teachers, the child, and parent to report any bullying and the identity of those committing it. Subsequent school reports state no observations of the child being bullied, but that the child was the source of objectionable behavior and instigated incidents with his disrespectful and defiant mannerism. Further I take note that the LEA has been pro-active toward preventing bullying and harassment by adopting and implementing anti-harassment and bullying policies and informing parents and students of them. (LEA Exh. F5 - 8).

Considering the above, I find that the LEA neither condoned, ignored, or tacitly approved of any inappropriate behavior/bullying; that it addressed the claims of objectionable behavior; and that there is no merit to the parent's claim that others bullied the child.

C.. Did the LEA discriminate against the child because of his disability?

The parent contends the child is being bullied and discriminated against and denied educational opportunities at HS because of his disability.

Applicable law, Section 504, provides in pertinent part the following;

[no] otherwise qualified individual with a disability ... shall, solely by reason of her or his disability ... be subjected to discrimination under any program or activity receiving Federal financial assistance....

29 U.S.C. Section 794(a).

I find the Supreme Court case *Davis v. Monroe County Bd. Of Educ.* 143 L Ed 2d 839 (1999) instructive on this issue. In that case the Court addressed under Title IX of the Education Amendments of 1972 whether a school district could be held liable for student-on-student harassment. The Court determined that liability could be imposed in the face of harassment and upon a showing of deliberate indifference on the part of the school. *Id.* at 861.

In the case before me, I previously found the evidence insufficient to show bullying/harassment. What is more, I find that the LEA was not indifferent but rather acted swiftly on reports of bullying. Considering the above, I find the evidence does not support the discrimination claim based on bullying.

I also find no merit to the parent's claim that the LEA discriminated against the child by denying him educational opportunities at HS. As discussed *supra*, the LEA correctly determined the child's needs could not be met at HS and the proposed placement was appropriate.

V. ORDER

I have reviewed and considered all evidence of record whether specifically mentioned in the decision or not.

I find placement at a regular public high school is inappropriate and the LEA's proposed placement of the child in the Re-Ed Program is appropriate and is calculated to provide the child an educational benefit and therefore FAPE.

I further find all requirements of notice to the parent have been satisfied; that the

child is a child with a disability as defined by applicable law 34 C.F.R. Section 300.8 and is in need of special education and related services. I also find that the LEA has provided for a free appropriate public education; however, the parent has not allowed the LEA to implement the proposed placement.

VI. PREVAILING PARTY

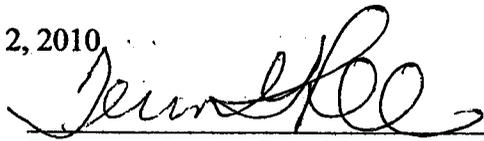
I find the LEA is the prevailing party on all issues.

VII. APPEAL INFORMATION

This decision is final and binding, unless either party appeals in a 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.

ENTERED Nunc Pro Tunc August 2, 2010

Date September 1, 2010


Ternon Galloway Lee, Hearing Officer

Cc: Parent(s)
Counsel for LEA
Ms. M, Special Education Coordinator for LEA/FCHS
VDOE

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