VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
OFFICE DISPUTE RESOLUTION AND ADMINISTRATION SERVICES

DECISION

Public Schools **School Division**	**Name of Parents**
Division Superintendent	**Name of Child**
Nicole M. Thompson **Counsel Representing LEA**	/ **Advocates for the Parent/Child**
Robert J. Hartsoe, Esquire **Hearing Officer**	Parent/Child **Party Initiating Hearing**

LEGEND

Mother	
Child	
Parent	Mother/Child
LEA	City Public Schools
HS	High School
HS	High School
Parties	, and Public Schools
Brother	
Boyfriend	[Last Name Unknown]
Day Treatment	A non-LEA Employee Hired by the LEA to overview the Implementation of the Child's IEP
Assistant Principal	, Assistant Principal at HS

, Former School Board Representative for the District

, , , identified in the First Day Transcript as "Ms. ."

formerly , M.Ed Secondary School Coordinator, Office of Exceptional Education, Public Schools

, Instruction and Compliance Coordinator, High School

, M.Ed., Instructional and Compliance Coordinator, High School

, , Manager of Pupil Placement Services, Public Schools

, Principal of High School

, Instruction and Compliance Coordinator for High School

Superintendent , LEA Superintendent

School Psychologist for Public Schools

DECISION

INTRODUCTION

This was an uncomplicated case involving an eighteen-year-old young lady. The law is straightforward. Material facts are not in dispute. The Parties and their counsel or advocates presented an excellent case in a professional manner. For the reasons stated herein, PS is the prevailing party.[1]

PROCEDURAL BACKGROUND:

Pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), this matter came upon the Parent/Child Request for Due Process Hearing, regarding the Child's current Individual Education Program. Several issues were raised and addressed, as referenced in the PreHearing Reports which are filed herein.

ISSUES DEFINED:

I. **Was the Child's removal from her current placement a manifestation of the Child's disability?**

II. **If the Child's removal from her current placement was in violation of the special education disciplinary procedures, whether the Child was denied FAPE on the basis that the LEA failed to effectuate a Manifestation Determination Review with its opportunity to develop a Functional Behavior Assessment/Behavior Intervention Plan?**

III. **If the Child was removed from her current placement in violation of the special education disciplinary procedures or if the Child was denied FAPE as described by the Due Process Request, whether the LEA should convene an IEP Meeting and/or Manifestation Determination Review to address a Functional Behavior Assessment and/or Behavior Intervention Plan?**

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[1] This is an Expedited Hearing. The references to the transcripts are based on the transcript received on May 28, 2017, via email from the LEA. The parties' Closing Arguments also references the pages of these transcripts. These transcripts are provided with the official record. With that said, official transcripts, complete with certification, were unavailable when the Closing Arguments were filed and this Decision was published.

IV. **If the Child was removed from her current placement in violation of the special education disciplinary procedures or if the Child was denied FAPE as described by the Due Process Request, whether the LEA should convene an IEP Meeting to address deficiencies, if any, with the current IEP and its implementation?**

V. **If the Child was removed from her current placement in violation of the special education disciplinary procedures or if the Child was denied FAPE for any reason as described by the Due Process Request, whether the LEA should provide compensatory and/or ESY services?**

VI. **If the Child was removed from her current placement in violation of the special education disciplinary procedures or if the Child was denied FAPE for any reason as described by the Due Process Request, whether the balance of the remedies requested are available to the Parents/Child in this proceeding?**

VII. **If the Child was removed from her current placement in violation of the special education disciplinary procedures or if the Child was denied FAPE for any reason as described by the Due Process Request and any of the balance of the remedies requested are available, what relief should be granted?**

VIII. **What impact, if any, does the Child's being an adult and competent, if evidenced, have on these issues and proceeding?**

PERTINENT TESTIMONY REVIEW:

The following witnesses testified: the Child, her Mother, and , , ., , , , , ., Superintendent and . By agreement, several witnesses testified for both parties which each provided sufficient opportunity to question via direct examination, cross-examination and/or redirect examination, as needed.

The Child was called as a fact witness. She is eighteen. (First Day Transcript (FDT) at Page 14.) She was enrolled at High School. (*Id.*) This was not her home school. (*Id.*) She signed Parent/Child Exhibit 2, entitled "Open Enrollment Contract Excessive Tardiness and Discipline Referrals ." (Parent/Child Exhibit 2; FDT at 16.) She

was an adult at the time. (Derived from the document's reference to "9-22-16," its hand-written notation of "(*adult student*)" and the Child's birth date referenced on Parent/Child Exhibit 4; SDT at 14.) She read it, but did not understand it. (SDT at 16.) The Assistant Principal was present but did not explain it to her. (*Id.*) The LEA employee assured her that it was nothing bad. (*Id.*) She was told not to sign anything from the LEA by her Mother. (SDT at 17.) She denied being absent for 26 class absences. (*Id.*) She denied skipping classes. (FDT at 39.) Teachers routinely sign passes for her. (FDT at 18-19.) Teachers routinely approved her leaving classes. (FDT at 19.) She suffers from anxiety. (FDT at 17.) She addresses it by medication and diet. (FDT at 18.) Further, she addressed immediate anxiety by excusing herself from class and withdrawing to the restroom, to collect herself. (*Id.*) Teachers normally give five to fifteen minutes for these breaks. (*Id.*) The teachers routinely approve these breaks. (*Id.*) She also left classroom for visits, *e.g.*, to her school counselor. (SDT at 19.) She struggled during transfers between classes. (SDT at 22.) She relied on her Brother and Boyfriend, both enrolled students, to allow her to address the anxiety she feels daily at school. (FDT at 21.) No one else, LEA employee (*i.e.*, Day Treatment) or otherwise, walks her to classes. (FDT at 22.) During a previous anxiety episode in 2015, she was found unconscious during school hours on school grounds. (FDT at 25.) She does not have any other close friends at HS except, by implication, her Brother and Boyfriend. (FDT at 26.) The Brother and Boyfriend would not be available to her at HS. (SDT at 26.) She had never seen HS. (*Id.*) No LEA employee offered a method of transition for her from HS to HS. (FDT at 31.) She was intimidated by the size and number of students at HS. (FDT at 27.) She has no close friends or "trusted adults" at HS. (FDT at 28.) At HS in December, 2016, she was arrested by uniformed

police for trespassing at HS including handcuffs, detention, transport and booking at the local police station. (FDT at 29-36.) The incident caused her to be nervous or anxious. (FDT at 31, 36.) The Child was able to navigate her way through her freshman year at HS without the aid of the Brother and Boyfriend. (FDT at 41-42.) She attended HS Prom, but left after an hour due to anxiety. (FDT at 48.) She stated that she is currently being "home schooled." (FDT at 50.) Overall, there was no implication that she was incompetent. There was no evidence that she was the subject of an Order finding her incompetent; *i.e*, guardianship. No party requested to *voir dire* her concerning competency. With the exception of her arrest and resulting detention, the witnesses testimony was discounted due to her interest in the case and her demeanor. Her testimony appeared rehearsed.

The Mother was a fact witness. She testified that the Child has the following disabilities: autism, anxiety, ADHD and sensory processing disorder. (FDT at 53-54; Exhibit 1.) Under the current IEP, the Child's disability is described as "Other Health Impairment." (Exhibit 8, page 5.) She has a history of self mutilation. (FDT at 54.) ("IEP") With the exception of 2015-2016, the Child attended HS for high school. (FDT at 55.) The Child relies on the Brother, Boyfriend and teachers or "trusted adults" at HS. (FDT at 55-56.) The Child is required to miss classes as a result of professional appointments. (FDT at 57.) The Child was not required to sign Exhibit 2, entitled "Open Enrollment Contract Excessive Tardiness and Discipline Referrals ," for her freshmen or sophomore years. (FDT at 58.) The Mother never saw Exhibit 2. (FDT at 59.) She instructed the Child not to sign anything from the LEA. (*Id.*)) She had "one-on-one" attention from the Day Treatment until high school (*Id.*) She did not have one-on-one in 2016, due to funding. (FDT at 62-63.) No escort was provided. (FDT at

63.) She signed the current IEP without getting a copy, implying that she assumed that the one-on-one would continue. (*Id.*) The Mother made her concerns regarding the Child's condition and attendance routinely to the LEA. (FDT at 63-68, 80). She emailed Parent/Child Exhibit 14 with Exhibit 13 to the LEA's Superintendent and others. (Exhibit 14 was a short note from the Doctor opining that the transfer to HS would be detrimental to the Child. (FDT at 75-77.) (The professional was not called as a witness and, therefore, little, if any, weight was placed on the contents of Exhibit 14. (FDT at 73-76.)) Exhibit 14 was placed in the Child's academic file. (FDT at 78.) The Mother disagreed with the Child's attendance records. (FDT at 81-89.) The Child was "home schooled" for academic year 2015-2016. (FDT at 91-92, 95.) The Mother is familiar with the "open enrollment" program. (FDT at 102.) There are safety concerns for the Child at any school setting including HS. (FDT at 107.) The Mother did not reach out to anyone at HS upon notification of the Child's transfer. (FDT at 109.) HS is the Child's "home school." (FDT at 110.) LEA Exhibit 17 was the last agreed upon "Eligibility" for the Child. (FDT at 115.) The Eligibility is valid until May, 2018. (FDT at 116-117.) The Mother consented to the IEP for 2016-2017. (Parent/Child Exhibit 8 and LEA's Exhibit 1) She was not an expert on IEP's and had reservations regarding the level of services. (FDT at 121.) She described that she consistently communicated the Child's inability to attend classes due to her disability even to where the Child's neurologist had recommended placing a bracelet on the Child, due to her seizures. (*Id.*) The Mother delivered Parent/Child Exhibit 3, entitled "Psychological Evaluation," on January 29, 2017. (FDT at 127.) (Although part of the record, the clinical findings in Exhibit 3 were not considered insofar as the expert who performed the evaluations was not called as a witness.) (FDT at 130.) The Mother received a communication

from the LEA that HS was "overcrowded." (FDT at 132.) In contrast, HS is not overcrowded to the best of the Mother's knowledge. (FDT at 133.) The Child is currently at the "Autism Center." (FDT at 121.) For the most part, her factual testimony was undisputed and her responses candid. There is no doubt that she routinely communicated the need for services for the Child regarding attendance. Further, her implied reliance on the professionals on the IEP team was reflected in her testimony. However, her testimony was discounted on disputed matters insofar as she showed a bias towards the Child (which is understandable).

was a fact witness. She was a school board representative for the LEA from January 1, 2013, until December 31, 2016. (FDT at 135, 138.) The Superintendent is responsible for implementing polices for the Virginia School Board. (FDT at 136.) She served on the "discipline committee." (FDT at 138.) "Open Enrollment Students" are not treated any different from "other" students. (*Id.*) With all due respect to her credentials and strong commitment to the education of children, this Witness was given no weight. Her testimony on many points was so general as to be irrelevant. Further, her opinions were given no weight either because they were legal opinions and/or because she was not qualified as an expert, despite the direction from the Hearing Officer.

was qualified as an expert in the area of special education. (FDT at 155; Parent/Child Exhibit 24, pages 4-7.) Autism has a negative effect on children at school. (FDT at 157.) The Child should have been provided a transition plan to transfer from HS to HS. (FDT at 158.) The LEA did not provide for such transition. (*Id.*) The Child should have been given the opportunity to form bonds with "trusted adults" at HS during the transition. (*Id.*) In any location, the Child required a "shadow" or escort to promote her transferring from class to

class, to reduce her anxiety. (*Id.*) The need for such escort is written in the IEP. (*Id.*) Without such escort, the Child will not make it from class to class due to distraction or any number of reasons. (FDT at 159.) No such escort was provided at HS. (*Id.*) Without the escort, Brother or Boyfriend to escort her at HS, she would start "shutting down." (*Id.*) When the LEA received Parent/Child Exhibit 14 in December 2016 (recommending against transferring the Child to HS), the LEA should have either followed the recommendation or have effectuated a psychological evaluation. (Parent/Child Exhibit 14; FDT 162.) A LEA should follow the Child's IEP over a school's policy such as "open enrollment." (FDT at 162-163.) In addition, the LEA failed to monitor properly the Child's progress regarding the IEP's goals and her attendance at class. (FDT at 164.) Her testimony was credible and given some weight, but discounted because there was no evidence that she saw the Child in a school setting or even met the Child. Further, her opinion of the IEP regarding the need for an escort was given no weight. While the IEP references (on Parent/Child Exhibit 8, Page 10 under the section entitled "Present Levels of Academic and Functional Performance," subsection entitled "Effect of [D]isability on Student") that the Child "has a Day Treatment Program person who looks for her during her day to make sure she is in classes," this notation is merely a historical description and not a mandate to the LEA to provide a escort or "shadow" to the Child. Similarly, the other references to attendance in the LEA are similarly not a mandate for this effort.

was a fact witness. drafted Parent/Child Exhibit 23 on December 5, 2016, in preparation for the IEP meeting on December 8, 2016. (FDT at 166-168.) Her preparation was hampered by not having the full file "on-line." (FDT at 169, 178, 190-191.) The LEA recipients involved in the IEP process did not respond. (FDT at 184.) She assumed that the recipients

would bring the information or requested documents to the meeting. (*Id.*) Parent/Child Exhibit 23 was not a list of deficiencies in the Child's file. (FDT at 190.) She attended this IEP to respond to questions or concerns from the Mother. (FDT at 179.) The particulars of the IEP were not discussed at the meeting because the enrollment issue dominated the meeting's focus. (FDT at 170-171.) She recalled that it was disclosed that the Child had "broken" her "contract" for "open enrollment" and, as a result, would be returned to her "home" school." (FDT at 171.) Putting "additional supports" in place was also discussed at the meeting. (*Id.*) She had no prior knowledge of the transfer or that attendance was issue before attending the meeting. (FDT at 180.) The meeting escalated into an "high volume, high energy situation where sides were being taken or accusations were being made." (FDT at 171.) The Child denied that she was receiving the proper services and that the attendance records were inaccurate. (FDT at 171-172.) To address the issue of open enrollment, the Principal and Assistant Principal were not available for the meeting, but had a separate meeting afterwards, after she left. (FDT at 172-173.) , Instruction and Compliance Coordinator for HS appeared *via* telephone to participate during the entire meeting. (FDT at 193.) was to provide the IEP meeting with information regarding services available at HS and, by implication, the Child's transition to HS. (*Id.*) Parent/Child Exhibit 6 is a draft IEP. (FDT at 194-195.) The focus on enrollment robbed the IEP Team of the opportunity in December, 2016, to discuss HS and the transfer. (FDT at 212.) By her demeanor and responses, the witness was found to be credible. She possessed active knowledge of the Child and her IEP.

The OT was qualified as an expert in the area of occupational therapy with the subset of sensory integration. (Parent/Child Exhibit 26; FDT at 197.) Occupational therapy concerns the

integration of the sensors and the physical body responding to the challenge of the environment. (FDT at 197-198.) Sensory integration is now called sensory processing and concerns what a person realizes *via* their senses, sight and sound and the integration of these inputs into the brain. (FDT at 198.) She reviewed the current IEP and the psychological evaluation, evidently Parent/Child Exhibit 3. (*Id.*) She also performed a sensory examination on the Child. (Parent/Child Exhibit 27; FDT at 199.) This is a very narrow focused evaluation and not a full evaluation. (FDT at 200.) She interviewed the Child and the Mother. (FDT at 199.) As an expert, she opined that the Child's over reactivity to sensory input interfered with her ability to function. (FDT at 200.) Although the OT did not diagnose, she opined that the Child has autism or at least had some symptoms consistent with autism. (*Id.* and 200-201, 207.) The Child is over reactive to sound. (FDT at 201.) She is startled by loud environments. (*Id.*) "Something perfectly normal will trigger a fight or flight response from her and that really drives her anxiety." (*Id.*) The conditions resulting from a overcrowded school would produce this overreaction in the Child; *i.e.*, threat. (FDT at 203.) Her response is to flee. (FDT at 201.) Significant accommodations would be necessary to allow the Child to attend an overcrowded school. (FDT at 203.) The Child is not faking her response. (FDT at 203.) The OT found that the transfer to HS would not "be in the best interests" of the Child. (FDT at 203-204.) The OT opined that the Child requires predictability. (FDT at 204.) The OT has not been to HS recently or seen its lighting situation or noise situation. (FDT at 207.) The OT did not discuss the transfer of the Child from IS to HS with anyone. (*Id.*) Her opinions and recommendations are contained in Parent/Child Exhibit 27, entitled "Sensory Processing Evaluation":

> The results of the Sensory Profile indicate that has an automatic defensive fight-flight-freeze response to ordinary, innocuous auditory, touch, visual, movement, and smell sensations that is often called "sensory defensiveness." The sense of being threatened by aspects of her environment that teachers, administrators, and other students do not find threatening makes her behavior seem inappropriate and maladaptive to them and interferes with her ability to function within the school environment. The fight-flight-freeze response is a neurophysiological defensive survival response that reduces the capacity for self-control, attention, executive function skills, memory, intellectual functioning, and emotional self-regulation.

(at 214.) The witness and her opinions were found credible and her opinions given great weight based on her expertise, contact with the Parent and Child and demeanor.

By agreement, the Parties called nutually by the parties. Second Day Transcript (SDT) at 2-3. She was called as a factual witness. She is the instructional compliance coordinator for HS. (SDT at 5.) She would oversee, in general, the case managers and students with disabilities and provide teachers with observations and strategies to assist students in their classrooms. (*Id.*) She is familiar with the Child. SDT at 6.) She explained that the September 8, 2016, IEP was focused on what track the Child would take in regard to the different diploma types available. (SDT at 6.) The Child did not attend public school in the previous year and, therefore, the participants required information regarding the Child's educational documentation for the previous year from the Parents. (SDT at 7.) The Parents never provided the documentation. (SDT at 7-8.) LEA Exhibit 2 contains the notes of , memorializing the meeting held on September 8, 2016 regarding the Child's IEP. (SDT at 11.) During the meeting, the Child was warned, with the Mother present, that she needed to attend her classes. (SDT at 15-16.) HS and HS are both "public day schools," as contemplated by the IEP. (SDT at 22.) HS can provide the same IEP's services and accommodations to the Child as HS. (*Id.*) Any LEA's "public day schools" can provide such services. (SDT at 25.)

described as an incident where the Child refused to go to class. (SDT at 29-30; LEA Exhibit 14.) The Child is not a behavior problem. (SDT at 30.) She was suspended (in school) for skipping class. (LEA Exhibit 14.) She was suspended (in-school) a second time. (SDT at 34; LEA Exhibit 14.) These were behavior problems. (SDT at 30-34.) The Child's attendance problem was discussed during the creation of the IEP, Parent/Child Exhibit 8. (SDT at 39.) Without being qualified as an expert, she provided opinions regarding the Child's attendance and the IEP. (SDT at 41-44.) The "day treatment program" is an outside agency that works inside the school to assist children with disabilities. (SDT at 45.) Parent/Child Exhibit 2, page 4, is a template. (SDT at 52-53.) The Child was provided no "related services" under the IDEA in regard to her class attendance. (SDT at 61.) This witness was called by both parties and found credible. Her testimony was given great weight based on her actual knowledge of events and demeanor. Further, she observed the child in the academic setting.

was a factual witness. He is the manager of people placement services for the LEA. (SDT at 79.) As such, his job duties included: home bound/home based services, the comprehensive lottery for the open enrollment program, the foster liaison for the school division. (SDT at 80.) He addressed calls from parents regarding bullying and safety concerns. (Id.) He was not part of the Child's IEP team. (SDT at 131.) LEA Exhibit 20, entitled "Open Enrollment Lottery Procedures & Information," governed the open enrollment procedures for the 2016-2017 school year. (SDT at 81.) This document was provided to every applicant to the open enrollment process for that year. (SDT at 82.) The procedures applied to all student including students who are the subject of an IEP. (SDT at page 82-83, 96, 99-101.) Students can be removed from the open enrollment program for nondisciplinary or violations of the LEA's "code

of conduct" or disciplinary reasons including failure to attend classes. (SDT at 83-84, 114, 117-119.) This "code of conduct" is institutionally referred by the LEA as "SCORE." (SDT at 128.) The removal of a child from the open enrollment program does not require consultation with such child's IEP team. (SDT at 127.) Page 2 of LEA Exhibit 20, contains the following warning:

OTHER IMPORTANT INFORMATION

- The principal reserves the right to remove students at the end of the semester because of unacceptable behavior and/or poor attendance. Prior to removal, the principal, in collaboration with the student and parent, will develop a contractual improvement plan. The plan, not to exceed four-weeks, will allow the student time to demonstrate improvement in behavior and /or attendance.

This provided the principal the authority to return any student, including the Child, back to her home school, *i.e.*, HS. (SDT at 84-86, 92.) The Child was given special permission to attend HS for school year 2016-2017 in August, 2016. (SDT at 86-87; Parent/Child Exhibit 10.) The permission was despite the Child's being home schooled for the previous year and based on the Child's prior attendance at HS and the attendance of her sibling. (SDT at 87-89, 103, 106-107; LEA Exhibit 15; Child/Parent Exhibit 11.) In August 2016, specifically warned the Child that she would be returned to her home school (HS) if she had attendance problems. (SDT at 104-106.) For all students including those subject to an IEP, the failure to attend or to skip classes is a violation under the LEA's "code of conduct," SCORE. (SDT at 115-116.) The IEP meeting held on December 8, 2016, was unproductive. (SDT at 125-126.) The LEA had performed their "due diligence" with the Child on the issue of attendance. (*Id.*) His

testimony was credible and given great weight because of his actual knowledge of events, relevant policies and demeanor.

is the principal of HS. (SDT at 136.) He was called as a factual witness. His primary duty is a structural leader of the building, maintaining and overseeing the support and instruction of the students as well as the day-to-day operation of the school. (*Id.*) HS is a "public day school" as defined by the regulations published by the Virginia Department of Education. (*Id.*; LEA Exhibit 19.) He has 570 students. (SDT at 184.) The Child was given special permission to attend HS under the open enrollment program. (SDT at 140.) LEA Exhibit 13 reflects that the Child was routinely absent from classes and school from September 8, 2016 through December, 2016, a majority of which was without excuse. (SDT at 140-147; LEA Exhibit 13.) LEA Exhibit 14 reflects to behavior incidents involving the Child. (SDT 148-150.) LEA Exhibit 5 (Enrollment Contract) required the Child to attend school without any un-excused absences. (SDT at 160.) Despite the requirement of the Enrollment Contract, the Child incurred un-excused absences. (SDT at 161.) There were multiple un-excused absences between September 22, 2016, and October 22, 2016, in violation of the Enrollment Contract. (SDT at 161-163.) On November 7, 2016, PS sent a letter notifying the Mother of the Child's relocation to her home school due to lack of attendance. (SDT at 163-164; LEA Exhibit 10.) A second letter was sent by PS on November 15, 2016, which stated, in pertinent part:

> ....[The Child] is required to be enrolled at her zoned school, [HS] on or before Monday, November 21st. **If she reports to [HS] after Friday, November 18th[,] she will be considered Trespassing [*sic*] and subject to disciplinary action under the Student Code of Responsible Ethics [*i.e.*, SCRORE].**"

(LEA Exhibit 11; SDT at 166-167.) The Child remained on the rolls of HS until December 9, 2016. (SDT at 169.) The Child withdrew from attendance from HS on December 9, 2016. (SDT at 170.) The IEP was finalized on September 20, 2016, after had decided to return the Child back to her home school. (SDT 173-174.) The IEP's goals regarding attendance were longer than the limitations placed on the Child by the open enrollment program. (SDT at 175-184.) As a fact witness, he opined that there was no need for a Manifestation Determination Review (MDR) for the Child. (SDT at 187-188.) No MDR was called. (SDT at 188.) Consistent with Parent/Child Exhibit 21, arranged for the Child to be arrested. (STD at 195-201.) HS is a "public day school," consistent with HS and, by implication, as defined by the regulations published by the Virginia Department of Education. (SDT at 205; LEA Exhibit 19.) As a fact witness, he opined that no MDR was required because there was no change of placement as contemplated by the regulations. (SDT at 206.) As a factual witness, his testimony was credible based on his actual knowledge of events and demeanor. However, his testimony was discounted in regard to his providing opinions as a non-expert or irrelevant generalities regarding policy.

was a factual witness. She was the Instructional Compliance Coordinator for HS. (SDT at 216.) She is responsible for approximately 240-260 students with disabilities that vary from visually impaired, wheel-chair bound to OAI autistic. (SDT at 216-217.) She had eighteen managers who support all of the teachers cases for the parents and students ensuring that the students' academic curriculum are effectuated. (SDT at 217.) She never met the Child. (*Id.*) She attended the IEP meeting in

December, 2016. (SDT at 218.) She attended the meeting for forty minutes by telephone. (*Id.*) As a fact witness but based on her "experience as Instructional Compliance Coordinator at HS," she opined that the IEP could be effectuated by HS. (SDT at 223.) Similarly, she opined that HS is a "public day school." (*Id.*) Similarly, she opined that she could work with HS to create a transition plan. (STD at 225.) As a fact witness, she committed that she could work with HS to form a transition plan. (STD at 225-226.) H is a much larger facility then HS. (SDT at 251-252.) HS has "a little under 1,700" students. (SDT at 252.) HS has 537 students. (STD at 253-254.) never spoke with the Child or Mother with the exception of a telephone conversation in August, 2016, regarding the Child's potential attendance. (SDT at 254.) She has no knowledge of the Child's disabilities. (SDT at 255-256.) She planned to integrate the Child to HS by visiting the facility. (SDT at 256.) Insofar as no transfer occurred, no actual transition plan was created. (SDT at 265-268.) As a factual witness, she was credible based on her knowledge of fact and demeanor. However, her testimony was discounted in regard to his providing opinions as a non-expert or irrelevant generalities regarding policy.

The Superintendent appeared as a factual witness. He is the Superintendent of Schools for the LEA. (SDT at 231.) He received emails from the Mother requesting that he reverse the decision of PS to relocate the Child to HS. (SDT at 234.) He never met the Mother or Child. (*Id.*) He chose not to overrule the process, i.e., decision to relocate the Child. (SDT at 235.) He found that the necessary process and procedures were followed. (SDT at 237, 240.) He received Parent/Child Exhibits 13 and 14, the

Doctor's note recommending against relocation. (SDT at 243-245.) He forwarded to the appropriate administrator. (SDT at 245-246.) He was found credible based on his recollection of factual events and demeanor. His opinions regarding policy were given no weight based on his being a factual witness as well as relevance.

is a factual witness. She is a school psychologist at HS. (SDT at 273-274.) She evaluates students regarding exceptional education. (SDT 273-274.) She provides support to teachers and sometimes students regarding exceptional education. (SDT at 274.) She was familiar with the Child. (*Id.*) completed the re-evaluation of the Child in 2014. (*Id.*) She continued to have informal contact with the Child during the 2016-2017 school year. (SDT at 274-275.) came across the Child multiple times in the hall ways and, as needed, redirected her to class. (SDT at 276.) In September 2016, confronted the Child while in the hallway. (SDT at 278.) communicated to the Child that she was in danger of being asked to return to her home school (HS) because she was skipping classes. (SDT at 278-279.) The Child's response was, basically, "I don't really care." (SDT at 279.) During a five to six minute discussion, attempted to communicate her frustration to the Child regarding her skipping class as well as its consequences. (SDT at 282.) referred the Mother to therapists for the Child, at the Mother's request. (SDT at 285-286; LEA Exhibit 7.) The Mother and Child did not follow up on this referral. (SDT at 290-292.) HS is a "public day school similar to HS." (SDT at 292-293.) performed the "Confidential Psychological Report," Parent/Child Exhibit 4. (SDT at 297.) She cannot diagnose the Child with autism. (SDT 299-327.)

EXHIBITS ADMITTED INTO EVIDENCE

1. All Parent/Child Exhibits were admitted into evidence with the direction that the weight to place on each and every exhibit, if any, was reserved by the Hearing Officer. The following Exhibits were given great weight except as described, given the relevance to the issues, authenticity of the document and the testimony referencing such Exhibits: 1; 2; 4 (as delivered to the LEA but without giving any weight to the opinions contained therein); 5; 6; 8; 10; 11; 12; 13; 14 (without giving weight to opinions contained therein); 15; 16; 19; 21: 23;26 and 27. The balance of the exhibits were considered.

2. With the exception of Exhibit Nos. 21 through 30, the LEA's Exhibits were admitted into evidence with the direction that the weight to place on each and every exhibit, if any, was reserved by the Hearing Officer. The following Exhibits were given great weight except as described, given the relevance to the issues, authenticity of the document and the testimony referencing such Exhibits: 1, 2, 5; 7; 8; 10; 11; 13; 14; 15; 16; 17; 19; and, 20. The balance of the admitted exhibits were considered.

FACTUAL FINDINGS (By a Preponderance of the Evidence)

After reviewing the testimony, exhibits and the closing arguments, the following factual findings are made:

1. With the exception of the matters raised by the pleadings, all procedural issues not at issue.

2. PS personnel involved in implementing the IEP were duly qualified.

3. The Child attended HS for her freshman and sophomore years.

4. The Child did not attend HS for the academic year 2015-2016.

5. The Parent/Child did not provide the necessary documents regarding the Child's previous "home schooling," mental health or otherwise in a timely manner for the IEP meetings in both September and December, 2016.

6. The Child attended HS from the first day of school to December 8, 2016.

7. The IEP was finalized on September 20, 2016, after had decided to return the Child back to her home school.

8. The Child is competent to sign contracts and appear as a witness, *etc.*

9. The Child signed Parent/Child Exhibit 2, entitled "Open Enrollment Contract Excessive Tardiness and Discipline Referrals ."

10. The Child addresses immediate anxiety by excusing herself from class and withdrawing to the restroom, to collect herself.

11. The Child leaves the classroom for visits, *e.g.*, to her school counselor.

12. The Child struggles during transfers between classes.

13. The IEP described the Child's disability classification as "Other Health Impairment."

14. The Child had "one-on-one" from the Day Treatment until high school.

15. By expert opinion, the Child should have been provided a transition plan to transfer from HS to HS.

16. In any location, the Child required a "shadow" or escort to promote her transferring from class to class, to reduce her anxiety.

17. No escort was provided at HS.

18. The Parent/Child provide no information to the IEP regarding "home schooling" for 2016-2017 school year.

19. In August 2016, the Child was specifically warned she would be returned to her home school if she had attendance problems.

20. drafted Parent/Child Exhibit 23.

21. Parent/Child Exhibit 6 is a draft IEP.

22. The OT's evaluation is a very narrow focused evaluation and not a full evaluation.

23. The OT's opinions and recommendations are value and contained in Parent/Child Exhibit 27, entitled "Sensory Processing Evaluation":

> The results of the Sensory Profile indicate that has an automatic defensive fight-flight-freeze response to ordinary, innocuous auditory, touch, visual, movement, and smell sensations that is often called "sensory defensiveness." The sense of being threatened by aspects of her environment that teachers, administrators, and other students do not find threatening makes her behavior seem inappropriate and maladaptive to them and interferes with her ability to function within the school environment. The fight-flight-freeze response is a neurophysiological defensive survival response that reduces the capacity for self-control, attention, executive function skills, memory, intellectual functioning, and emotional self-regulation.

24. The Child was suspended in school twice for attendance, consistent with a disciplinary action by PS.

25. The "day treatment program" is an outside agency that works inside the school to assist children with disabilities (DTP).

26. In prior years, the DTP effectuated the Child's transfer from class.

27. No such escort was provided at HS.

28. LEA Exhibit 20, entitled Open Enrollment Lottery Procedures & Information, governed the open enrollment procedures for the 2016-2017 school year.

29. The Parent/Child was familiar with the policies described in LEA Exhibit 20.

30. Students can be removed from the open enrollment program for nondisciplinary or violations of the LEA's "code of conduct" or disciplinary reasons including failure to attend classes.

31. Parent/Child Exhibit 23 was not a list of deficiencies in the Child's IEP file.

32. The Parent/Child were timely notified with the warning on Page 2 of Exhibit 20 contains the following warning:

OTHER IMPORTANT INFORMATION

- The principal reserves the right to remove students at the end of the semester because of unacceptable behavior and/or poor attendance. Prior to removal, the principal, in collaboration with the student and parent, will develop a contractual improvement plan. The plan, not to exceed four-weeks, will allow the student time to demonstrate improvement in behavior and /or attendance.

33. Skipping classes and absences from school violate both the open enrollment policy and the disciplinary rules governing the Child.

34. The Child was notified via LEA Exhibit 11 that:

....[The Child] is required to be enrolled at her zoned school, [HS] on or before Monday, November 21st. If she reports to [HS] after Friday, November 18th[,] she will be considered Trespassing [sic] and subject to disciplinary action under the Student Code of Responsible Ethics [*i.e.*, SCRORE]."

35. The Child was arrested, handcuffed and detained at a police detention center for trespassing on December 9, 2016.

36. HS is a "public day school" as referenced by regulations of the Virginia Department of Education.

37. HS is a "public day school" as referenced by regulations of the Virginia Department of Education.

38. HS, HS or any PS high school, can provide the Child with the services required by the IEP.

39. The transfer of the Child from HS to H was not a change of "placement" as referenced in the Virginia Department of Education regulations.

40. There exists outstanding mental health evaluations not available to, and therefore not considered by, the IEP Team at its meeting in September or December, 2016.

41. A transitional plan for the Child could have been derived, with cooperation with the Parent/Child and notice of the actual transfer for the 2016-2017 school year.

42. The LEA was not given the opportunity to derive a transitional plan for the Child.

43. The Child incurred multiple un-excused absences between September 22, 2016, and October 22, 2016, in violation of the Enrollment Contract.

44. On November 7, 2016, PS sent a letter notifying the Parent/Child of the Child's relocation to her home school due to lack of attendance, which was received.

45. On November 15, 2016, PS sent a letter to the Parent/Child which was received that stated, in pertinent part:

> ....[The Child] is required to be enrolled at her zoned school, [HS] on or before Monday, November 21st. If she reports to [HS] after Friday, November 18th[,] she will be considered Trespassing [sic] and subject to disciplinary action under the Student Code of Responsible Ethics [*i.e.*, SCRORE].

46. The Child remained on the rolls of HS until December 9, 2016.

47. The Child withdrew from attendance from HS on December 9, 2016.

48. The Child was given special permission, outside the regular directives, to attend HS for academic school year 2016-2017, under the open enrollment program.

49. The open enrollment program and its implementation has nothing to do with the Child's IEP or its implementation.

50. At relevant times hereto, the Child demonstrated a lack of commitment to attend classes.

51. The child failed to fulfill her obligations to attend class and/or attend as required by open enrollment program or the Contract.

52. The December 8, 2016, IEP meeting failed due to the Parent/Child insistence to require the Child to be placed at HS.

53. attended the IEP meeting in December to address all issues regarding the Child's transfer to HS.

54. The IEP was reasonably calculated to provide the Child with FAPE.

55. The Child's attendance issues were not a manifestation of her disability.

56. The Child was provided FAPE *via* the IEP and its implementation by the LEA.

57. The Child was not removed from HS for disciplinary reasons.

58. The Child was removed from HS for violations of the open enrollment policy.

59. LEA's open enrollment policy has no authority over IDEA; an IEP team can place a child at any location it deems appropriate under its applicable laws, regulations, *etc.*

60. The IEP states that the Child "functions independently throughout the school environment."

ANALYSIS:

Legal Analysis

Major areas of the law are undisputed. Consistent with Endrew F. v. Douglas County School, 580 U. S. ____ (2017) and Board of Education v. Rowley, 458 U.S. 176, 207, 102 S.Ct. 3034 (1982), the Supreme Court found that a disabled child is deprived of FAPE under either of two sets of circumstances: (1) if the LEA has violated IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon the disabled child's right to FAPE; or (2) if the IEP that was developed by the LEA is not reasonably calculated to enable the disabled child to receive a *material* educational benefit. Further, the Supreme Court opined "[i]nsofar as a State is required to provide a handicapped child with [FAPE], we hold that this satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction. (Rowley, 458 U.S. at 200.)

In this administrative due-process proceeding initiated by the Parent/Child, they have the burden of proof. Schaffer, *ex rel.* Schaffer v. Weast, 126 S.Ct. 528 (2005).

In DeVries v. Fairfax County School Bd., 882 F.2d 876, 878 (4th Cir. 1989), the Court recognized the importance of main-streaming when it opined that "[m]ainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with non-handicapped children is not only a laudable goal but is also a requirement of the Act." *In accord* Barnett v. Fairfax County School Bd., 927 F.2d 146, 153 (4th Cir. 1991). The implication is that the Child receive services in her local or "home based" school.

The standard of proof is a preponderance of the evidence. County Schl. Bd. of Henrico County v. Z.P., 399 F.3d 298, 304 (4th Cir. 2005).

In Arlington County School Board v. Smith, 230 F.Supp.2d 704, 715 (E.D. Va. 2002), the Court reversed the decision of the Hearing Officer on the basis that he made factual findings that were not supported by expert testimony:

> In summary, the preponderance of the record evidence points persuasively to the conclusion that APS's proposed placement of Jane in the Interlude program would provide her with a FAPE because it was "reasonably calculated to enable [her] to receive educational benefit." *See* Rowley, 458 U.S. at 206-07, 102 S. Ct. 3034. The hearing officer's contrary conclusion that Jane would not benefit from the Interlude program finds no support in the record, **as no expert testified to this effect**, and Jane had not yet fully experienced the program. It is apparent that the hearing officer succumbed to the temptation, **which exists for judges and hearing officers alike in IDEA cases,** to make his own independent judgment as to the best placement for Jane, instead of relying on the record evidence presented in the hearing. This temptation stems from the fact that judges and hearing officers are typically parents who are in the habit of making such judgments. Yet, the Supreme Court and Fourth Circuit **have admonished** hearing officers and reviewing courts alike when they substitute personal opinions or judgments as to proper educational policy, and best placements for the disabled student, in the place of the local educators' expert judgments. *See* Rowley, 458 U.S. at 206, 102 S. Ct. 3034; Hartmann v. Loundon County Bd. Of Educ., 118 F.3d 996, 1000-1001. These courts have also reminded hearing officers and reviewing courts that school districts are not required to provide a disabled child with the best possible education. *See* Rowley, 458 U.S. at 192, 102 S. Ct. 3034. The result reached here is properly deferential to Jane's educators' unanimous determination that the Interlude placement was appropriate. *See also* Hartmann, 118 F.3d at 1001 (holding that "local educators deserve latitude in determining the [IEP] most appropriate for a disabled child") [Emphasis added.]

See also Doyle v. Arlington County School Board, 806 F. Supp. 1253 (E.D. Va. 1992). A review of Smith and Doyle are important to emphasize the restrictions, constraints or limitations placed on hearing officers when deciding IDEA cases in Virginia. Although a child is involved, current law prevents an hearing officer's reviewing evidence as a Virginia juvenile district court

judge must review in a custody matter with the "best interests of the child" standard as described in §20-124.1 of the Virginia Code. Instead, hearing officers must respect the limitations that evidence, especially expert testimony, determine the outcome in IDEA cases as well as respect the Federal directive that IEPs are reviewed with the standard established by Rowley and its progeny. The difference between the standard established by the "best interests of the child" and the standard established by Rowley (and its progeny) can never be reconciled. Quite frankly, this difference causes a great deal of litigation, cost and heartache.

In Sumter County Sch. Dist. 17 v. Heffernan, 642 F.3d 478, 484 (4th Cir. 2011), the Court addressed situations where a local school board failed to implement, in material part, an IEP by opining:

> Given the relatively limited scope of a state's obligations under the IDEA, we agree with the District that the failure to perfectly execute an IEP does not necessarily amount to the denial of a free, appropriate public education. However, as other courts have recognized, the failure to implement a material or significant portion of the IEP can amount to a denial of FAPE. *See* Van Duyn *ex rel.* Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007) ("[A] material failure to implement an IEP violates the IDEA."); Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 (8th Cir. 2003) ("[W]e cannot conclude that an IEP is reasonably calculated to provide a free appropriate public education if there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit."); Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000) ("[A] party challenging the implementation of an IEP **must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.**"). Accordingly, we conclude that a material failure to implement an IEP, or, put another way, a failure to implement a material portion of an IEP, violates the IDEA. [Emphasis added.]

Similarly, in E. L. v. Chapel Hill-Carrboro Bd. of Educ., 773 F.3d 509, 517 (4th Cir. 2014), the Court confirmed that it afforded "**great deference to the judgment of**

education professionals in implementing the IDEA." As long as an individualized education program provides the basic floor of opportunity for a special needs child, a **court should not attempt to resolve disagreements over methodology**. [Emphasis added.] *In accord,* O.S. v. Fairfax County Sch. Bd., 804 F.3d 354, 360 (4th Cir. 2015). Reviews of Heffernan and E.L. are manifestation to show that the Parent/Child was required to prove, by a preponderance of the evidence, that PS denied the Child FAPE by failing to implement material portions of the Current IEP. In other words, a court, a hearing officer or a parent cannot micro-manage the implementation of an IEP, deferring to the expertise of LEA professionals.

Specific Issues

I. Was the Child's removal from her current placement a manifestation of the Child's disability?

The Parent/Child did not prevail on this issue. The Child is competent. The LEA provided her FAPE. Although implied, there was no direct, expert opinion that the Child was autistic. In contrast, the overwhelming evidence revealed that the Child simply did not want to attend class in violation of the open enrollment policy.

II. If the Child's removal from her current placement was in violation of the special education disciplinary procedures, whether the Child was denied FAPE on the basis that the LEA failed to effectuate a Manifestation Determination Review with its opportunity to develop a Functional Behavior Assessment/Behavior Intervention Plan?

The Parent/Child did not prevail on this issue. The Child was provided FAPE. The relocation of the child from HS to HS was not a change of "placement" as contemplated by IDEA or Virginia Department of Education regulations insofar as each are "public day schools." (LEA Exhibit 19; 8 VAC 20-81-10 Definitions of the

Regulations Governing Special Education Programs for Children with Disabilities in Virginia.) In addition, the relocation was not part of a disciplinary action by the LEA, but simply its enforcement of the open enrollment program. Under case law, the LEA has the duty and authority to implement a child's IEP. In other words, the Parent/Child cannot micro-manage the implementation of the IEP by demanding that services be provided at a particular "public day school," *i.e.*, HS.

III. If the Child was removed from her current placement in violation of the special education disciplinary procedures or if the Child was denied FAPE as described by the Due Process Request, whether the LEA should convene an IEP Meeting and/or Manifestation Determination Review to address a Functional Behavior Assessment and/or Behavior Intervention Plan?

The Parent/Child did not prevail on this issue. The Child was provided FAPE. The relocation of the child from HS to HS was not a change of "placement" as contemplated by IDEA insofar as each are "public day schools." (LEA Exhibit 19; 8 VAC 20-81-10 Definitions of the Regulations Governing Special Education Programs for Children with Disabilities in Virginia.) In addition, the relocation was not part of a disciplinary action by the LEA, but simply its enforcement of the open enrollment program. Under case law, the LEA has the duty and authority to implement a child's IEP. In other words, the Parent/Child cannot micro-manage the implementation of the IEP by demanding that services be provided at a particular school, *i.e.*, HS. With that said, the LEA is encouraged to attempt, again, to convene an IEP meeting to discuss the Child's current academic status or level, her IEP, the evaluations from the Child's mental-health professionals with the goal of placing this Child back on track, academically. However,

the evidence does not support the need for a Functional Behavior Assessment or Behavior Intervention Plan. The overwhelming evidence revealed that the Child simply did not want to attend class in violation of the open enrollment policy.

IV. If the Child was removed from her current placement in violation of the special education disciplinary procedures or if the Child was denied FAPE as described by the Due Process Request, whether the LEA should convene an IEP Meeting to address deficiencies, if any, with the current IEP and its implementation?

The Parent/Child did not prevail on this issue. The Child was provided FAPE. The relocation of the child from HS to HS was not a change of "placement" as contemplated by IDEA insofar as each are "public day schools." (LEA Exhibit 19; 8 VAC 20-81-10 Definitions of the Regulations Governing Special Education Programs for Children with Disabilities in Virginia.) In addition, the relocation was not part of a disciplinary action by the LEA, but simply its enforcement of the open enrollment program. Under case law, the LEA has the duty and authority to implement a child's IEP. In other words, the Parent/Child cannot micro-manage the implementation of the IEP by demanding that services be provided at a particular school, *i.e.*, HS. With that said, the LEA is encouraged to attempt, again, to convene an IEP meeting to discuss the Child's current academic status or level, her IEP, the evaluations from the Child's mental-health professionals with the goal of placing this Child back on track, academically. However, the evidence does not support the need for a Functional Behavior Assessment or Behavior Intervention Plan. The overwhelming evidence revealed that the Child simply did not want to attend class in violation of the open enrollment policy.

V. If the Child was removed from her current placement in violation of the special education disciplinary procedures or if the Child was denied FAPE for any reason as described by the Due Process Request, whether the LEA should provide compensatory and/or ESY services?

The Parent/Child did not prevail on this issue. The Child was provided FAPE.

The Parent/Child did not prevail on this issue. The Child was provided FAPE. The relocation of the child from HS to HS was not a change of "placement" as contemplated by IDEA insofar as each are "public day schools." (LEA Exhibit 19; 8 VAC 20-81-10 Definitions of the Regulations Governing Special Education Programs for Children with Disabilities in Virginia.) In addition, the relocation was not part of a disciplinary action by the LEA, but simply its enforcement of the open enrollment program. Under case law, the LEA has the duty and authority to implement a child's IEP. In other words, the Parent/Child cannot micro-manage the implementation of the IEP by demanding that services be provided at a particular school, *i.e.*, HS. With that said, the LEA is encouraged to attempt, again, to convene an IEP meeting to discuss the Child's current academic status or level, her IEP, the evaluations from the Child's mental-health professionals with the goal of placing this Child back on track, academically. However, the evidence does not support the need for a Functional Behavior Assessment or Behavior Intervention Plan. The overwhelming evidence revealed that the Child simply did not want to attend class in violation of the open enrollment policy. Based on the evidence, no compensatory and/or ESY services should be provided. However, this decision does not preclude the review of these services at the next IEP, in the discretion of the IEP Team.

VI. **If the Child was removed from her current placement in violation of the special education disciplinary procedures or if the Child was denied FAPE for any reason as described by the Due Process Request, whether the balance of the remedies requested are available to the Parents/Child in this proceeding?**

The Parent/Child did not prevail on this issue. The Child was provided FAPE. Assuming, but not deciding, that the remedies are available, no remedies are awarded.

VII. **If the Child was removed from her current placement in violation of the special education disciplinary procedures or if the Child was denied FAPE for any reason as described by the Due Process Request and any of the balance of the remedies requested are available, what relief should be granted?**

The Parent/Child did not prevail on this issue. The Child was provided FAPE. Assuming, but not deciding that the remedies are available, no remedies are awarded.

VIII. **What impact, if any, does the Child's being an adult and competent, if evidenced, have on these issues and proceeding.**

The Child is competent and, therefore this evidence had no impact. The Child was provided FAPE. In contrast, the overwhelming evidence revealed that the Child simply did not want to attend class in violation of the open enrollment policy.

RELIEF GRANTED:

None. However, the Parties are encouraged to convene an IEP as soon as possible to: confirm the Child's commitment to education; to evaluate the Child; to consider all evaluations available; and, to take such actions are as necessary to ensure this Child succeeds academically or vocationally.

CONCLUSION

The Parent/Child failed to introduce sufficient evidence to carry the burden of proof to grant the relief requested in their Due Process Request.

APPEAL, IMPLEMENTATION AND PREVAILING PARTY NOTIFICATIONS

1. **Appeal.** Pursuant to 8 VAC 21-81-T and §22.214 D of the Virginia Code, this decision is final and binding unless either party appeals in a federal district court within 90 days of the date of this decision, or in a state court within 180 days of the date of this decision.

2. **Implementation.** The LEA shall develop and submit an implementation plan within 45 calendar days of the rendering of a decision.

3. **Prevailing Party.** The LEA is deemed the prevailing party.

Hearing Officer

May 30, 2017
Date

CERTIFICATE OF SERVICE

I certify that on this 30th day of May, 2017, a true and accurate copy of this pleading was mailed, *via* First-class, postage prepaid mail, to:

Ms.
Ms.

, Virginia
Parents/Child

Ms.

, Virginia
Advocates for the Parents/Child

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