

2018, and a decision issued by the LHO on December 4, 2018. The LHO found the District attempted to accommodate the Student, the Student poses a physical threat to other students and teachers at the school, and therefore, residential placement is appropriate. The Parents appealed this decision on December 13, 2018, and I was assigned to serve as the State Review Officer. Both parties agreed to a briefing schedule, and both parties submitted both initial and reply briefs.

The final witness in the hearing, was evaluating S.R. prior to the hearing and had not yet finished the report at the time of the LHO decision. Both parties agreed to allow the report to be submitted to me during the review period, and both parties submitted comments related to the report. There was also a 2-page addendum to the report. The District objected to sharing this addendum. Consequently, I have not reviewed or considered it.

2. Factual Background

S.R. is a 10-year old, male student who has been served by the District since he was in pre-school. He has been found to have an intellectual disability with a primary category of Autism and a very low cognitive ability. In the spring of 2016, S.R. was educated at home for medical homebound reasons (District Exhibit 6), but moved back to a regular placement in May 2016. (District Exhibit 7).

2016-2017 School Year

In August 2016, the school and family developed a Behavioral Intervention Plan (“BIP”) to address S.R.’s physical aggression and moving around the classroom. (District Exhibit 8). This BIP included a requirement to have two staff members with him at all times. In January, Gina Baker, the school psychologist, completed a psychoeducational assessment that classified

S.R. as having Autism Spectrum Disorder. (District Exhibit 2, Day 1 Tr. p. 322). She noted very low intellectual ability and adaptive behavior skills. (Day 1 Tr. p. 323). Included in her assessment was a previous evaluation from a professor at USC which noted that the parents were involved and caring but lacked training. (District Exhibit 2). This report was also based on observations from an outside consultant, Dr. Leach, a board-certified behavior analyst. Dr. Leach observed S.R. for 2 hours and developed a set of recommendations including a visual schedule, a token reward system, a sensory diet, and partner activities. (District Exhibit 2). The District reported that some of the feedback from Dr. Leach was incorporated into an update of S.R.'s BIP. (Day 1 Tr. p. 345-346). The teachers and assistants were trained by the Autism Project on ABA training as well as in Crisis Prevention and Intervention (e.g., Day 1 Tr. p. 104, p. 212). In May 2017, S.R. was working with a teacher and struck her with scissors. (Day 1 Tr. p. 124-125). The manifestation determination meeting concluded that the incident was a manifestation of his disability. (District Exhibit 12). The District suspended S.R. for the remainder of the year and the team discussed Brooklyn Springs as another educational option. (District Exhibit 12). After this incident, S.R.'s developmental pediatrician submitted a letter stating that there was a change in medication over this time period and that he is not a danger to others. (Parent Exhibit p. 19).

2017-2018 School Year

The parents testified that over the summer, they were told that S.R. was now enrolled in Brooklyn Springs, but because the parents had not agreed to this at an Individualized Education Program ("IEP") meeting, the parents rejected the transfer. (Day 2 Tr. p. 95) and S.R. returned to McDonald Green. From September 2017-February 2018, the school kept very specific behavior checklists of S.R.'s behaviors, noting all of his negative behaviors and "cheer" moments.

(District Exhibit 4 and 5). In October, 2017, S.R. received an assistive technology report and the IEP was updated to state that services will continue to be provided in the classroom (District Exhibit 6).

In the winter and spring of 2018, S.R. injured two other teachers. In February 2018, S.R. injured a teacher who was attempting to calm him down, resulting in a concussion to the teacher. (Day 1 Tr., p. 223). He was placed in an Interim Alternative Educational Setting (“IAES”) as a result of this injury. (District Exhibit 15, Day 1 Tr. p. 263). S.R. was placed at Barr Learning Center with a teacher and an assistant in a classroom. (Day 1 Tr. p. 263-265, District Exhibit 15). The second injury took place in this setting, where he repeatedly hit his head against a staff member’s chest. (Day 1 Tr. p. 275). In April 2018, the IEP team met (without the Parents present) and the District recommended a residential setting. (District Exhibit 16). On May 3, 2018, the team held another meeting with the parents present and the parents signed that they were not in agreement with the move to a residential placement. (District Exhibit 17). The team also extended S.R.’s time in the IAES until September 27, 2018.

The relationship between McDonald Green and the Parents deteriorated over the last two years as well. Calls to the Department of Social Services (“DSS”) regarding potential abuse by S.R.’s parents were made. DSS determined that all of these reports were unsubstantiated. (Parents’ Exhibit p. 58-65). Reports against S.R. have been filed with the Sheriff’s office. (Parents’ Exhibit 69-78, Multiple points in testimony). The Parents have also filed reports with the Sheriff’s office against staff members. (Parents’ Exhibit 69-78, Multiple points in testimony).

3. Standard of Review

Federal and state regulations provide that a party aggrieved by a LHO decision may appeal to a state review officer (“SRO”) and that the SRO must “[e]xamine the entire hearing

record” and “[m]ake an independent decision on completion of the review.” 34 C.F.R. § 300.514(b)(2)(i) and (v) (2014). The state review officer must also consider the hearing officer’s advantage of examining the demeanor of the witnesses when credibility determinations are at issue. *Id.*; *Shore Reg’l High Sch. Bd. Of Educ. v. P.S. ex rel. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In doing so, the findings of fact of the local hearing officer are entitled to great deference and are considered prima facie correct. *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 326 (4th Cir. 2009); *Doyle v. Arlington Cnty. Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991). However, the state review officer must still determine the weight of the evidence and questions of law independently. *Springer v. Fairfax Cnty. Sch. Bd.*, 134 F.3d 659, 663 (4th Cir. 1998) (differentiating itself from *Doyle*).

4. Hearing Officer’s Findings

The LHO argued that placing the student back into the school environment would be dangerous and not in the educational interest of the student, in light of the serious injuries suffered by staff members. He therefore concluded that S.R.’s medical, emotional and academic needs were so intertwined that the District’s request that the student be educated in a residential setting is supported by evidence and required for the student to receive FAPE. (LHO Decision p. 13).

5. Discussion

While the appeal raises many questions of fact, the underlying question to be decided is whether the District has met the burden of proof required to place a student in a residential setting over the Parents’ objection. The District argues that it has tried all available options, without success, and therefore, residential placement is the best possible option. The Parents

argue that, while it is clear that McDonald Green Elementary is not an appropriate placement, other placement options and other experts ought to be considered.

Standard for Unilateral Residential Placement

Much of the case law around unilateral residential placement addresses situations in which parents are seeking residential placement against district opposition. Few cases address a district's wish for residential placement against parent opposition. The standard for deciding whether a child needs education in a residential placement is similar in both situations. If anything, the standard should be higher for a district seeking to place a child in a residential program over a parent's objection for one primary reason – in the latter, the district is effectively removing a child from his parent's physical custody and care against the parents' wishes.¹ See *Troxel v. Granville*, 530 U.S. 57 (2000) (holding that the parents have a fundamental right to the care, custody and control of their children).

Generally, a child with a disability is entitled to a FAPE that is designed to meet the student's individual needs. 20 USC §1400(d)(1)(A). FAPE must be “reasonably calculated to confer some educational benefit on a disabled child.” *MM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 526 (4th Cir. 2002) (citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)). A school district must offer an IEP that is reasonably calculated to enable a child with a disability to make progress appropriate in light of the child's circumstances. *Andrew F. v. Douglas County Sch. Dist. RE-1*, 580 U.S. ___, 137 S. Ct. 988; 69 IDELR 174 (U.S. 2017). A FAPE must also provide the least restrictive environment that is appropriate for the child. 20 U.S.C. § 1412(a)(5)(A). That said, mainstreaming under the IDEA is a preference, not a mandate. *DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 879 (4th Cir. 1989). Mainstreaming

¹ Note that the district did call the Department of Social Services regarding the family in this case more than once. DSS determined no intervention was necessary. (Parents' Exhibit p. 58-65).

is not required where the disabled child is a disruptive force in the regular classroom. Further, Congress recognized that in some instances home instruction or residential placement would be required for the handicapped child to benefit educationally. See 20 U.S.C. § 1401(16); *id.* § 1413(a)(4)(B); 34 C.F.R. §§ 300.302, 300.551.

The current standard for residential placement in the Fourth Circuit can be found in *Burke County Board of Education v. Denton*, 895 F.2d 973 (4th Cir. 1990), where a child was denied residential placement because the student showed educational progress at the local school. “If the educational benefits which can be provided through residential care are essential for the child to make *any* educational progress at all, then residential care is required under the EHA [the precursor to the IDEA].” *Id.* at 980 (emphasis in original). Where medical, social, or emotional problems are intertwined with educational problems, courts recognize that local education agencies must fund residential placements. *Id.* The determination of whether services beyond the regular school day are essential for the child to receive any educational benefit is necessarily fact and case specific. *Id.* On the other hand, if a residential placement is necessitated by medical, social or emotional problems that are segregable from the learning process, then the local education agencies need not fund the residential placement. *Id.*

Fourth Circuit cases which rely on *Denton* demonstrate the high bar necessary to prove the necessity of residential placement. In one case, a child’s medical and safety needs were incredibly severe, with multiple suicide attempts, but the court found them to be severable from her educational needs and denied a residential placement. *Shaw vs. Weast*, 364 Fed. Appx. 47 (4th Cir. 2010). In this case, the court specifically noted that the goals and objectives of the IEP did not require time with the child outside the school day, which is why the team recommended a day school. *Id.* at 3. The Fourth Circuit distinguished that case from *Kruelle v. New Castle County*

Sch. Dist., 642 F.2d 687 (3d Cir.1981), which found that a mentally retarded child who could not speak or was not toilet trained and needed around the clock care (cited in *Denton*, 895 F.2d at 980) needed residential placement. For the student in *Kruelle*, medical and educational needs became so intertwined, they were not segregable. More recently, in *Lexington County School District One v. Frazier*, 2011 WL 4435690 (D. S.C. 2011), the U.S. District Court for the District of South Carolina determined residential was necessary based on evidence in the record that educational progress required 24-hour care, and that the IEP was reasonably calculated to demonstrate that need.

Both parties cite *Horry County School District v. P.F.* 29 IDELR 354 (D. S.C. 1998) as the primary case analyzing a district's request for residential placement. In *Horry*, a student had a constellation of behavioral problems that required a "round-the-clock consistently applied behavior modification program . . . to make educational progress." (*Horry* in Section 4). The need for this program was demonstrated by evidence that the student's parents could not implement the behavior management system at home, including assaults by the child on family members and home caregivers. The need for residential care was backed up a pediatric expert, three court-appointed experts, and even the student's own psychiatrist. In short, the *Horry* decision to require residential placement was premised on the proven record that educational progress required 24-hour, round the clock care, based on a combination of medical and educational diagnoses.

Application of Standard to This Case

As the filing party, the District bears the burden of proof to show that residential placement is required for S.R. In other words, the District must demonstrate that for S.R. to make *any* educational progress at all, residential placement is essential. The District has not met that

burden. The District's case clearly demonstrates that the current IEP and current placement is not appropriate, and demonstrate that mainstreaming S.R. is not appropriate at this time. The parents do not contest that the current placement is not appropriate for S.R. However, the evidence from the District staff that testified, from the IEP, and from outside experts does not demonstrate the need for 24-hour round the clock care in a residential setting away from his family. The District did not provide evidence of validly considering options that do not remove S.R. from his family.

District Staff: Each District staff member who testified stated that they believe residential care to be necessary. The reasons listed for this belief are based on speculation about the underlying issues, concerns for safety of staff and students, or the feeling that there are no other options, none of which provide adequate grounds for a unilateral residential placement.

- *Speculating on underlying issues:* Several staff members noted that residential centers could monitor S.R.'s behavior and make adjustments to his medication. (See, e.g. testimony of the District's lead school psychologist, Day 2 Tr. p. 29-30: "The staff would monitor his behavior and see if he needs adjustments to his medication. . . Either the medication hasn't been administered consistently or the prescription that he has isn't working. It's one or the other. And I think with having, you know, someone look at him that closely, that could be improved, monitoring by the staff."; see also testimony of the school psychologist, Day 1 Tr. p. 356 and teacher, Day 1 Tr. p. 128-129). Based on the standard set forth, residential placement is not appropriate simply to administer or monitor medication. (See *Shaw* 364 Fed. Appx. 2010). The medical needs that lead to residential placement are usually much more severe. (See, e.g. *Kruelle*, 642 F.2d 1981). Further, no testimony from doctors or other medical professionals was provided that indicate that medication management was even a problem. The behavior

forms that were used by the school to communicate with the parents did not include any tracking of medication. (District Exhibit 4). S.R.'s mother, in fact, testified to tracking S.R.'s medication carefully on a daily basis and showing this log to a police officer when asked. (Day 2 Tr. p. 90-91). In the aforementioned report, S.R.'s mother indicates that S.R. has had non-effective medication in the past. (Parent's Exhibit Addendum – Report). Assuming this fact to be true, the District still has not demonstrated that residential placement is essential to find an effective medication. Speculation that medication is the issue does not meet the burden of proof. (*Compare Horry*, 29 IDELR 354, at section 1, where medical experts provided detailed testimony that demonstrated how the medical and educational needs of the student were deeply intertwined, and *Horry*, 29 IDELR 254 at section 4: “Indeed, it is significant to the court that since 1992, every medical, psychiatric, and psychological professional to evaluate K.L. has recommended or found appropriate K.L.’s hospitalization or residential placement.”). The District's lead psychologist suggested that residential placement would allow a behavior plan to be implemented both at school and in his living situation. (Day 2 Tr. p. 19). The District did not provide evidence to prove that there was no implementation of the behavior plan in his living situation. (c.f. *Horry* 29 IDELR 354 “. . . the record is replete with instances in which P.F. could not implement consistently the behavior management plan in the home.”)

- *Protecting staff and students*: Several staff members argued that residential placement was the best course of action because of the danger to staff and students. (See, e.g., testimony of school psychologist, Day 1 Tr. p. 21: “. . . I would worry a lot about more staff being injured in a school environment. I would worry about students

being injured. . . I don't think there's a place in the school that's appropriate for him.”; see also testimony of the assistant principal, Day 1 Tr. p. 229). Safety of staff and students is of course paramount, and mainstreaming is not required in this case. *DeVries* 822 F.2d (1989). However, while S.R. may exhibit negative behaviors at home² (Parents' Exhibit Addendum – Report), given the severity of his disability, one would be surprised had he not exhibited such behaviors. More relevant for this appeal, no evidence was presented that suggested the parents were concerned about the safety of any individuals in their home, nor that being in a residential setting would protect the safety of staff and students in that setting. In contrast, *Horry* relied upon finding that the child was a threat to the family's safety at home and significant evidence was presented about the challenges in the home. Clearly, a stronger plan for regulating S.R.'s behavior is needed, but no evidence was presented to prove that residential placement is essential to implement that plan.

- *Feeling like there are no other options:* (see, e.g. Testimony of principal, Day 2 Tr. p. 59: “I truly believe that our school and the district has done everything we can to help S.R. be as successful as he can. I believe in a residential facility he will get the medical help he needs. He will get the behavioral help he needs and that he'll get the academic help that he needs. And I believe that placement will help him succeed to his potential.”; see also Testimony of assistant teacher, Day 1 Tr. p.193 and Testimony of the transition coordinator, Day 1 Tr. p. 280). The staff at McDonald Green have attempted a number

² The District suggested that because these behaviors happen at home as well, residential placement is justified. However, the report is ambiguous about which behaviors are at home or at school (“negative behaviors in the home setting and previously in the school setting as evidenced by the client exhibiting angry outbursts consisting of throwing things, knocking items off the counter kicking items, hitting, biting himself and exhibiting temper tantrums when becoming angry and frustrated”). We cannot make the conclusions the District requests about the severity of behavior at home. The District bears the burden to demonstrate the severity, and an ambiguous statement coupled with ambiguous testimony does not meet that burden.

of strategies for working with S.R. The failure of these strategies, however, is not in and of itself a reason for placement in a 24-hour setting. No evidence was presented that showed the 24-hour setting would have stronger strategies to meet S.R.'s academic, behavioral or medical needs nor does it meet the steep burden of proving that a residential setting is essential to making any academic progress.

IEP: Should the testimony not have demonstrated the need for 24-hour care, it is possible for the IEP to have indicated the intensive services were essential. However, the goals and objectives of S.R.'s latest IEP that call for residential placement are similar or identical to those that called for in-school placement. The IEP that changed S.R.'s placement (District Exhibit 16) lists 2 math goals, 2 reading goals, 1 written expression goal, and 5 communication/speech and language goals, in addition to the below goals referencing his behavior:

- Goal 6: By the projected achievement date, to reduce aggressive behaviors, S.R. will request help or a break by using words, picture cards, or a voice output communication device in 3 out of 5 opportunities as measured by teacher observation and data.
- Goal 9: "By the projected achievement date, S.R. will greet adults with minimal prompting by saying "Hello, ___" by using words or a voice output communication device in 4 of 5 trials as measured by curriculum based measurement."
- Goal 10: By the projected achievement date, S.R. will carry the symbol from his visual schedule for the next activity and line up at the classroom door, completing the transition with minimal prompting, in 4 of 5 trials as measured by curriculum based measurement."

These goals do not suggest a placement in any place but a regular school environment. The accommodations provided to S.R. in his IEP also can be provided during a regular school day -- oral administration of tests, use of manipulatives, visual cues, preferential seating, and multiple or frequent breaks, use of visual schedules and first-then schedule, access to sensory diet items, and preferential seating. If a future IEP calls for such goals, the parents would, of course, remain free to challenge whether the facts of their son's situation requires such goals.

Experts: In *Lexington County* and in *Horry*, teams of outside experts were called upon to make the argument that 24-hour residential care was necessary. In *Horry*, in fact, three court-appointed experts agreed on the need for residential care. The only outside expert called upon by the District was Dr. Leach, who did one two-hour observation of S.R. and helped develop a BIP. Dr. Leach did not testify at the hearing, and we did not hear her opinion as to whether residential care was needed. I do not question the expertise of the professionals involved in this case, but none of them had deep knowledge of residential placements and the services provided therein. Nor did they express a strong understanding of the plan of action that could work for S.R. should he be in 24-hour care. The District's lead school psychologist stated only that he had sent one other student to this residential site and they had been responsive. (Day 2 Tr. p. 23-25). However, that student did not have a permanent guardian so the residential placement served a dual purpose. In this case, the Parents and S.R. have a strong relationship. (Parents' Exhibit Addendum – Report ; LHO Decision p.7). The lead psychologist further could not answer specific questions about what the residential site would provide, but simply said “he's exhausted what we know to offer.” (p. 28). No testimony described how the services provided at the residential setting would support S.R.'s behavior or his family. Instead, the only information presented about the residential setting was paperwork from the website. (Day 2 Tr. p. 25, District

Exhibit 36). The social worker who assessed S.R. on behalf of the parents, recommended individual and family counseling, rather than residential placement. (Parents' Exhibit Addendum – Report). *Compare Lexington* F. Supp. 2011 at 4 (noting that the director at the residential placement testified to explain how their services supported the child); *Horry* (noting that teams of experts, including parent's experts, all agreed that residential services were necessary).

The Parents questioned whether the District consulted with an appropriate number of outside autism experts to develop the IEP. I do not need to resolve that question given that the record lacks *expert* testimony to justify residential placement, and the fundamental question at hand here is whether residential placement is required.

Other Options: Districts are required to have a continuum of placement options from less restrictive to more restrictive. 34 C.F.R. § 300.551. The jump from McDonald Green Elementary to a residential placement skips many steps on this continuum. In many residential placement cases, the student serves in multiple placements, such as private day schools, before residential is suggested. *E.g. Shaw* 364 Fed. Appx (2010) at 2. For S.R., the decision to go to residential did not include a careful review of other options. *See e.g.*, District Exhibit 17, IEP Conference Minutes (“The IEP team met for a special review of S.R.’s IEP. Due to the serious bodily injury to a staff member, the district proposes an interim alternative educational placement with the extension of the 45 days to September 27, 2018, based on the recent disciplinary incidents. The team further discussed options to meet S.R.’s current behavioral and educational needs. The District proposes residential treatment. The parents do not agree with the residential placement.”) The lead school psychologist mentioned that he only looked at

some 2-3 week short-term programs. (Day 2 Tr. p. 23). At the end of the 2016-2017 school year, the District proposed a placement at Brooklyn Springs Elementary but the parents rejected it because of a procedural issue. Now, the District says “. . . even in the classroom that he had at McDonald Green, we pretty much set up what he would have had at Brooklyn Spring.” (Day 2 Tr. p.28), and that it would not be appropriate for him at this point. (Day 2 Tr. p. 28). The special education teacher, who is also the transition coordinator, stated that she had tried to set the family up at the Chrysalis Autism Center in Rock Hill (Day 1 Tr. p 272) for some additional training. She did not argue for, nor did the IEP team at any point recommend, that center as a placement. While the District may not have available other options, no private *day* special education programs were considered or rejected. When compared with the myriad of placements attempted in the case law cited, this continuum of services seems lacking.³

The District has argued that it attempted to serve S.R. in multiple placements at McDonald Green as well as in an IAES on a 2 teacher:1 student basis. Given the failure of the attempt to serve him in such an intensive setting, the District does not believe another non-residential setting would be a possibility. (See Day 2 Tr., Testimony p. 29: “I mean, we’ve had him just in a room alone with a teacher and an assistant, and it’s still not working.”) S.R. was in the IAES as a result of a disciplinary measure and was sent to the district’s alternative school for that instruction. Even when lawful and justified by severe disciplinary incidents, placement in an alternative school for disciplinary reasons can, of course, be stigmatizing to children and affect children negatively. Failure in this environment, without more, does not establish that similar modifications in other environments will not succeed. While the District claimed the setting in

³ I am not arguing that S.R. needs to be mainstreamed. In fact, under the standard in *DeVries*, and the real concerns for safety of staff and students, mainstreaming at this point is not required. The jump from not mainstreaming to removing him from his home against parent objection is large, however, and without merit until other strategies have been attempted.

the IAES mirrored the modifications that would have been in place in his regular classroom (Day 1 Tr. p. 265) and the teachers worked to keep S.R. safe in the alternative school, S.R.'s IEP was not actually modified to address his needs in a 1:1 setting as opposed to a group setting. In fact, the IEP remained substantially similar throughout the full two years, despite the parties' agreement that it was not working. Absent an appropriate IEP that explained more intensive day placements, or attempting to implement such an IEP in a school that is not a disciplinary statement, the IAES does not constitute a valid attempt at another setting in the District.

The IDEA has set a high bar for residential placement for students with disabilities. When a District is hoping to unilaterally remove a child from his parents and place him in residential treatment, they must meet at least the same bar that parents have to meet when they want to unilaterally place their child in a residential setting against district objection. The District in this case did not meet that bar and demonstrate that residential placement is the only way that S.R. can meet any of his educational goals.

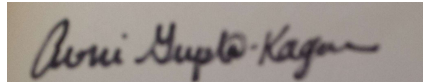
6. Conclusion

The Parents raised a number of other challenges to the LHO's decision. However, all the questions raised point to an ultimate decision about the appropriateness of residential placement. S.R. can no longer be educated at McDonald Green Elementary. That fact does not lead to a necessity of residential placement and the District has not met the burden of proof required to place S.R. at a residential site over parent objections. The District's request for a residential placement is denied. This decision does not prejudge what placement the IEP team may determine going forward. The IEP team should investigate all options available. Any residential

placement – especially one over any party’s objection – requires proof that such placement is essential to achieving any educational progress.

7. Notice of Appeal Rights

Any party aggrieved by this decision may commence a civil action with respect to the complaint presented in any state court of competent jurisdiction or in a district court of the United States within ninety (90) days of the date of this decision. 20 U.S.C. § 1415(i)(2)(A)-(B) and 34 C.F.R. § 300.516.



Avni Gupta-Kagan
Administrative State Review Officer

Columbia, South Carolina
January 11, 2019