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Dispute Resolution &
Administrative Services

**COMMONWEALTH OF VIRGINIA**
**DEPARTMENT OF EDUCATION**

**In Re: Child**

**Due Process Hearing**

**Findings of Fact and Decision**

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Counsel for Parents:

Lois N. Manes, Esq.
Post Office Box 1675
Williamsburg, Virginia 23187-1675

Counsel for City Public Schools:

Kathleen S. Mehfoud, Esq.
Jason H. Ballum, Esq.
ReedSmith, LLP
Riverfront Plaza-West Tower
901 East Byrd Street, Suite 1700
Richmond, Virginia 23219-4069

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This matter came to be heard upon the complaint for due process filed on December 17, 2009, by the Parents, ("Parents"), against City Public Schools, ("the LEA") under the Individuals with Disabilities Education Act, ("the IDEA"), 20 U.S.C. 1400, *et seq.*, and the regulations at 34 C.F.R., Part B, Section 300, *et seq.*, and on December 18, 2009, under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. Section 794, and the Virginia Special Education Regulations, ("Virginia Regulations"), at 8 VAC 20-81-10, *et seq.*

This due process hearing was held before the undersigned hearing officer over three days, on February 16, 17 and 18, 2010, at the City School Administration Building, City, Virginia. The hearing was open to the public and transcribed by a court reporter.

Counsel represented Parents and the Child at the hearing. [1] A Special Education Compliance Officer and counsel represented the LEA.

Parents filed the due process request on December 17 and 18, 2009. Parents amended the complaint. Parents resubmitted the complaint on January 11, 2010. This decision is timely and within the 45 day limitation period under the IDEA.

The record includes: written motions, orders, exhibits, closing briefs and memoranda, transcripts, and the written decision.[2]

Parents claim that the LEA's Individualized Education Program ("IEP") does not provide the Child a free appropriate public education ("FAPE") in the least restrictive environment ("LRE"). Parents seek tuition reimbursement and related costs for the Child's unilateral placement at a private school ("Private School") near City, Virginia.

The Child was enrolled at this LEA on September 4, 2007, when she was in 5th grade. SB 3, SB 4. [3] Parents removed the Child in March 2008 and placed her at the Private School in September 2009. The Child has severe medical issues. The Child's disability is Other Health Impairment ("OHI") because of hydrocephalus (excess fluid on the brain) and VATER Association medical difficulties. Parents allege that the private residential placement is an appropriate placement. SB 3.

Parents dispute the LEA's proposed IEP because of the Child's placement in an Autism Spectrum Disorder ("ASD") class because Student does not have autism. Nor

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[1] Originally, a Special Education Advocate represented the Parents. The Special Education Advocate withdrew before the hearing began. Parents' counsel asserted that she represented only the biological father and the Child. The Child's mother, a nurse, and stepfather, a medical doctor, also participated in the hearing.

[2] After the hearing concluded, Parents also submitted closing remarks which are in the evidentiary record as the "Addendum." This Hearing Officer reviewed the Addendum but it was not given due weight.

[3] School Board Exhibits are marked "SB" in this Decision.

does the Child exhibit autistic characteristics. Thus Parents do not believe that the ASD class is appropriate for the Child.

The LEA asserts that its IEP placement decision for the Child is appropriate: The ASD class is "rigorous" and it suits the Child's special education needs.

**Burden of Proof**

In this case Parents challenge the sufficiency of their daughter's IEP and the LEA's proposed placement for her in an ASD classroom. In so doing, Parents allege denial of FAPE in the LRE for their daughter. In *Schaffer v. Weast,* 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of proof, in an administrative hearing challenging an IEP, is properly placed upon the party seeking relief, whether that is the disabled child or the school district. *Id.* at 537.

Accordingly, I find that the burden of proof is on the Parents at this due process hearing.

**Findings of Fact**

1. The Child is 14 years of age. Student is now enrolled in a private residential placement in City, Virginia. The Child was enrolled at this LEA in the 2007-2008 school year. She attended a portion of fifth grade there after transferring from Florida. The Child qualified under IDEA for special education and related services as ("OHI") mainly because of hydrocephalus. Her medical condition now requires continual shunt-monitoring to check ventricular pressure inside her brain. Hydrocephalus is a permanent condition but its effects can be relieved by surgical measures and shunt-monitoring to check for malfunctions. Shunt malfunctions can be life-threatening. SB 3A, MED 11, 15,

16, TR 49.[4]

2. Parents agreed to an IEP on August 14, 2007, at the LEA. The Child was placed in an inclusion classroom. Reading comprehension was a concern. But the Child made the honor roll during the first nine weeks of school. Parents did not request Extended School Year services in the IEP. SB 6.

3. When the Child entered school at this LEA, she already had sixteen shunt revisions. She also was on a gluten free diet. But medical accommodations for the Child were limited. She was given Tylenol or Advil for headaches every morning. For her kidney problems, she was given a glass of water at her desk and seating near the restroom. SB 3A.

4. When the above IEP was modified to add a Learning Disability class on January 10, 2008, the Child's mother noted the Child's progress. SB 4, SB 6.

5. The Child was placed on homebound instruction in January 2008 because of her medical needs. SB 5.

6. Parents removed the Child from the LEA in March 2008. Parents did not provide a ten (10) business day removal notice to the LEA before she was removed. At the hearing, Parents and the Child asserted that the Child had been bullied at the LEA school she attended. Neither Parents nor the Child reported bullying in the past. Testimony showed that the child has been bullied at the Private School. TR 91, 956.

7. Parents prefer the physicians and psychologists associated with the University Hospital in City, Virginia, which is located near the Private School. But the Child has

[4] The transcript of this proceeding is identified as "TR" in this Decision. Medical exhibits are marked "MED" from the Parents' Exhibit Binder.

gone to many hospitals and doctors for treatment. In January 2008, the Child received shunt adjustments at the University Hospital in City, Virginia; in February 2008, the Child received shunt adjustments at a local Children's Hospital in City, Virginia; in February-March, 2008, the Child received shunt adjustments at a hospital in City, Arizona; in May 2008, the Child received shunt adjustment at a hospital in City, Florida; in June 2008, the Child received a shunt check at the University Hospital, City, Virginia; from September-May, 2008, the Child received treatment for a shunt infection at a hospital in City, North Carolina; and in February 2009, the Child was treated for pain medication withdrawal and for pain control at the Kennedy Krieger Institute, ("National Institute") City, Maryland. MED 1, MED 11, TR 46, 47, 76.

8. The Child's Physician has stated that the Child can be treated by other doctors at other hospitals. The Child's Physician testified that it is "helpful" for the Child to be in City, Virginia, if she needs treatment. TR 57 But the Child has not required a shunt adjustment since May 2008 (in City, Florida). The Child's Physician has not seen the Child since June 2008. She has not been hospitalized at the University Hospital since October 2008. TR 45, TR 79, MED 4, MED 9.

9. The Child has endured extreme pain caused by hydrocephalus in the past. Because of the success of recent surgeries to relieve the Child's pain, the pain has dissipated. The Child's Physician was unable to connect the Child's decreased pain level and lack of hospitalizations to Private School placement. But the Child did not require shunt repair for nearly one year before her admission to the Private School. The Parents' experts testified that the Private School is an appropriate placement for the Child and that the ASD class is not proper. Though Parents' experts are qualified to treat the Child's

medical or psychological issues, these individuals did not qualify as educational experts. The Child's Physician admitted that he was limited in his knowledge of the Child's educational issues. Parents' experts admitted they were unfamiliar with the specific ASD program being offered to the Child. MED 5, TR 78, MED 6.

10. The Child attended a self-contained day school program at the National Institute from March 6, 2009, until April 22, 2009. The Child learned pain strategies and experienced only one severe pain-related incident during her stay there. Upon her discharge from the medical center, the report referred to a "return to school." The National Institute reported that the Child made "vast improvements in her ability to manage pain." The National Institute's discharge notes did not mention residential placement or the necessity for a doctor to be near the Child. SB 12A, SB 13.

11. The Child attended public day school in North Carolina at the beginning of the 2008-2009 school year. SB 7, 9, 10, 11.

12. The Child last attended the LEA in January 2008. After her removal from school in March 2008, there was no interaction between the Parents and the LEA until the Child's father enrolled her at the LEA in City, Virginia, in October 2009. POE 9, [5] TR 717.

13. The Child's mother limited the LEA's effort to create an acceptable IEP for the Child. The record reflects communications with the Private School in which the Child's mother asked employees to evade information requests. For the most part, the Child's biological father has complied with requests for information from the LEA to develop an

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[5] Exhibits marked "POE" are from the Parents' Exhibit Binder.

IEP. [6] SB 24, 25, 28, 29, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41.

14. The IEP was created during three meetings occurring on November 9, 2009, November 24, 2009, and December 7, 2009. Parents fully participated at these meetings or were provided the opportunity to participate and chose not to. Parents delayed the IEP process by refusing to provide relevant information on the Child from the National Institute. The information was not provided until the second IEP meeting. Parents and the IEP team created "draft IEPs" at the first two meetings. The final IEP was presented to the Parents after they provided detail. SB 54, 55, 56, 57, 57-A, 97.

15. The final IEP provides for placement in the Autism Spectrum Disorder (ASD) Program. Testifying on behalf of the LEA were the following: LEA Special Education Administrators, a Special Education Compliance Officer, a School Psychologist, a Speech-Language Pathologist and an Occupational Therapist. LEA experts all agreed that the ASD classroom is appropriate for the child. The ASD class is designed for children of average abilities who have demonstrated learning deficits in the areas of communication, socialization, interest activities, anxiety, language and academics. The Child has demonstrated deficits in all of these areas and delays in academics. She requires a small, structured classroom. LEA experts testified the ASD class is not a program for children with autism. The ASD class size and structure are designed to address individual special education needs. The LEA's academic testing, recently completed, shows that the Child has experienced regression in the above areas. This placement also offers mainstreaming

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[6] LEA counsel claimed often that Parents failed to comply with document duplication and subpoena return requirements. Some documents were presented in "landscape" format. Some documents were not returned. LEA counsel's Parent Exhibit Binder did not conform to Parent Exhibit Binders provided to others at the hearing. The hearing officer advised LEA counsel of the LEA's alternate right to seek a remedy in a state circuit court or in a federal court of competent jurisdiction for failure to comply with a subpoena. LEA counsel was provided another Parent Exhibit Binder. The binder problem was resolved at the hearing. Parents' returns were deemed made in good faith at the hearing.

to the Child to the maximum extent. LEA experts testified credibly. They are entitled to due weight. SB 57-A, 99, 100, 101, TR 567, 972, TR 576.

16. A Special Education Administrator described a sample day in the Child's schedule set out in the final IEP: TR 598-601, SB 99, SB 100.

(1) Arrival to school - The Child is met by a paraprofessional.

(2) First bell – The Child attends Read 180. This is an intensive, individualized computer program designed to increase reading skills. (No children with autism are in the class).

(3) Second bell – math. ( There are eight children in the class. Six children are classified "SLD". A child is "OHI" one has autism).

(4) Third bell – history or science. (There is one child with autism in the class).

(5) Fourth bell – art (or other elective). (Ten students from the general education population are in the class).

(6) Fifth bell – physical education or health. (Twenty-five students from the general education population are in the class).

(7) Cafeteria – lunch with non-disabled peers.

(8) Sixth bell – social skills. Direct instruction.

(9) Seventh bell – math or English with an emphasis on the SOLs. (There are seven special education students with a teacher and a paraprofessional in the class).

(10) Dismissal.

17. In the first through third bells, the Child learns basic concepts to enable her to pass SOLs. Direct instruction in life-skills will be given daily. The IEP also provides for speech-language services,[7] occupational therapy ("OT") [8] and psychological consultation.

[7] The LEA's IEP provides 40 minutes twice weekly. The Speech-Language Pathologist's e-mail stating, "If they ask me for speech do you want me to say that five days a week is fine?" was not dispositive.

[8] Occupational therapy is provided for a period of 30 minutes weekly by direct instruction or in class.

## DECISION

Parents claim that they are entitled to reimbursement for their unilateral placement of the Child at a private residential facility in City, Virginia. Parents claim that the Child is denied a FAPE by the LEA. Parents object to the IEP because it places the Child in an ASD special education classroom for a portion of the day.

For the following reasons, I find that there has been no denial of FAPE to the Child in the LEA's placement decision. Also, I find that the IEP proposed for the Child is appropriate for her educational needs.

*1. Under IDEA the Child Is Deemed To Reside in the School Division.*

The special education hearing officer has no jurisdiction in child custody or residency determinations. [9] Except for the limited purpose of deciding IDEA issues, this hearing officer does not determine the Child's custody or residency. Court adjudication of these issues is best determined by general district family courts or state circuit courts of competent jurisdiction.

The evidence showed that the Parents lived in Virginia during their marriage. The final divorce decree was entered in Virginia. The Child has lived with both Parents in City, Virginia. When Parents divorced, the final decree gave the Child's sole custody to the mother. Since the divorce, the Child has lived in other states with her mother. The Child testified that she lives with her mother and stepfather who do not reside in Virginia. But the Child also testified that she is with her biological father "all of the time." Also, she testified she "lives with" him "once in a while." Her biological father now lives in

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[9] In Virginia, hearing officers are appointed by the Office of the Executive Secretary of the Supreme Court of Virginia to render decisions in administrative hearings. Hearing officers are not judicial officers of the state courts. See 8 VAC 20-81-210. H (2009).

City, Virginia. TR 109. When the Child enrolled at the Private School in September 2009, she enrolled from her mother's residence in California. But the biological father recently filed to obtain joint custody of the Child in City, Virginia. No decree has been entered in the case. Thus, the Child's residency status is a disputed issue. The IDEA does not permit delay in the delivery of FAPE for residency status adjudications.

Under the IDEA at 8 VAC 20-81-30(B)[10] the LEA must deliver a FAPE to the Child if she is "residing in" the school district. A child is deemed to "reside in a school district" if he or she is "living with a biological parent whose rights have not been terminated." The LEA's assertion that the Child does not "live with" the biological father was not dispositive of the Child's residency status for the purpose of IDEA. The evidence is merely contradictory that the Child "lives with" this Parent in City, Virginia. Thus, I find that the Child is deemed to reside in this school district under the IDEA.

*2. Parents Failed to Give Timely Notice of the Child's Removal to a Private School.*

Reimbursement may be awarded to Parents only if the LEA is given advance written notice of the Parents' intent to remove the Child from the school district. The written notice is to be given 10 business days before the Child's removal. [11] The

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[10] "Each local school division shall ensure that all children with disabilities, aged two to 21, inclusive, residing in the school division have a right to a free appropriate public education. The children include: (C) Every child with a disability is deemed to reside in a school division when 1. The child is living with a biological parent whose parental rights have not been terminated." *See* 8 VAC 20-81-30(B); 8 VAC 20-81-30(C)(1) (2009).

[11] The cost of reimbursement may be reduced or denied "If (1) At the most recent IEP meeting the parents attended prior to the removal of the child from the public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the local school division to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or (2) At least 10 business days (including any holidays that occur on a business day) prior to the removal of the child from public school, the parents did not give written notice to the school division of the information described above;" *See* 8 VAC 20-81-150(B)(4)(a)(1); 8 VAC 20-81-150(B)(4)(a)(2) (2009).

notice provides the school district an adequate opportunity to correct IEP deficiencies.

Here, the facts show that Parents removed the Child from this LEA in March 2008. Parent did not contact the LEA prior to the Child's removal. Then Parent applied to the Private School on July 15, 2009. SB 15. On August 10, 2009, Parent informed the Private School that she would enroll the Child if admitted. SB 16. On September 14, 2009, the Child began the Private School. SB 19. Parents did not provide the written notice of the Child's removal from the LEA until December 8, 2009. [12] SB 61. Thus, Parents' request for reimbursement fails. Parents did not timely notify the LEA of any issues nor did Parents give the LEA any opportunity to correct perceived problems. It was only after the Child entered Private School that Parents notified the LEA of their special education issues. Thus, Parents' notice of intent to remove the Child from the LEA, provided in December, 2009, was not timely. Parents' written notice provided on December 8, 2009, only informed the LEA of the Parents' intent to seek monetary tuition reimbursement for private placement.

In sum, the LEA was denied any actual opportunity to correct the Child's special education issues before the Parents requested tuition reimbursement. The record showed that when Parents provided written notice of their Child's removal on December 8, 2009, the Child had already been removed from this LEA. Parents had contracted with and enrolled the Child at the Private School. There was never a real opportunity for the school to correct problems or make changes. This is the meaning of the written notice requirement at 8 VAC 20-81-150(B)(4)(a)(2). The LEA must be provided substantive notice that a parental complaint exits or the LEA cannot be charged later with actual

[12] The LEA contended that the written notice was not provided until September 9, 2009, because it was not submitted to the LEA until 6:23 P.M. after business hours typically end.

knowledge of its existence. *Thompson v. Board of Special Sch. District No 1,* 144 F.3d 574 (8th Cir. 1998), *Combs v. Sch. Bd. of Rockingham Co.* 15 F.3d 357 (4th Cir. 1994) (School boards must be given adequate notice of problems and sufficient time to respond if they are to be held liable for failure to act). *Jennings v Fairfax County School Board,* 35 IDELR 158 (E.D. Va. 2001) (Reimbursement denied when Parents placed the child first in a residential facility then notified the IEP team of her placement).

*3. The Child's Medical Issues Do Not Require a Residential Setting.*

It is evident that this Child suffers from major medical issues which, in the past, interfered dramatically with the Child's ability to attend school. The Child's hydrocephalus requires intra-cranial shunts inserted to relieve pressure inside her brain. Pressure-caused headaches can be extremely painful. When the Child's headaches occur, if her pain becomes debilitating, medical intervention may be necessary to relieve the pressure.

The Child's Physician testified convincingly that the Child's pain level has been extreme. Photographs of the Child's cranial area and expert medical testimony attested graphically to the intensity of the Child's surgical interventions. Her Physician indicated that shunts require "continual shunt-monitoring" because ventricular shunts sometimes malfunction. But the headaches "don't rise to the level of a severe problem." TR 407. The Child has developed coping skills to manage her pain. TR 47, 48, 485, 486.

The Child's Physician indicated that surgical measures have been successful for the Child. The Child's Clinical Psychologist stated that the Child's pain level has dissipated and he indicated that the Child mastered pain-management-skills. Now, the Child describes herself as "happy" and as "not having any headaches." TR 115.

In fact, for the year just prior to the Child's enrollment at the private school in September 2009, her cranial shunts did not present a significant problem. Hospitalizations for shunt adjustments occurred in February and March, 2008 in City, Arizona, and another shunt adjustment occurred in May 2008 in City, Florida. MED 1, 12, 14, 17, 18. A hospitalization occurred in North Carolina in September 2008 for an infection of the shunt area, not for shunt correction. MED 1. More recently, the Child was hospitalized at the National Institute in February 2009. But this hospitalization was for withdrawal from pain medication and pain control, not for shunt adjustment. MED 1.

Also, it is not accurate to assert that the Child's medical issues require residential placement at a school near the University Hospital, City, Virginia. The Child's Physician did not say that the Child can only be treated at a particular hospital or only by a specific medical doctor. However, it was evident that the Parents prefer medical doctors and psychologists associated with the University Hospital.

If the Child's medical condition ever becomes an emergency at the Private School, testimony revealed that the Private School Administrator will "dial 911" to assist the Child. TR 534. The child will go to one of two local hospitals, not necessarily to the University Hospital preferred by Parents. TR 534. The University Hospital is located about twenty minutes away from the Private school. The local hospital is four miles away from the LEA. TR 527. At the Private School, the Child's medical needs are assisted by a part-time Licensed Practical Nurse ("LPN"). TR 526. The LEA designates a full-time Registered Nurse ("RN") to manage medical needs and oversee health care plans. TR 526.

Admittedly, the LEA's health care plan for the Child is incomplete.[13] TR 516. If the Child goes to school at the LEA, Parents must fully develop a health care plan with the School Nurse. But the school nurse is state-licensed and fully competent to oversee the Child's health care plan and medical emergencies: shunt-monitoring, pain management, nutritional needs, anxiety management, or mild asthma.[14] TR 511, 525, 526.

There is no evidence that the Child requires residential placement. Parents applied their own "litmus test" in their selection of a private school. Contrary to Parents' assertions, neither the Child's access to highly-skilled urgent care nor proximity to a local hospital were exclusive factors in their placement: The LEA provides a quicker, safer option for the Child's health care plan at school. The Child's medical needs did not mandate residential placement at this Private School. *See Martin v. School Board of Prince George County,* 3 Va. 197, 348 S.E.2d 857 (Va. App. 1986). I find that residential placement at the Private School is not medically nor educationally required to provide the Child a FAPE in the least restrictive environment.

*4. Placement in the Autism Spectrum Disorder (ASD) Class Provides a Free Appropriate Public Education (FAPE) To This Child.*

The LEA experts proved that the full scope of the Child's special education needs must be addressed in her academic placement. The Child's productive transition into adulthood requires her mastery of core academic subjects, life skills, social skills, visual-motor skills, speech and language goals. Without consistent academic development

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[13] The LEA contends that the Child's health care plan is incomplete because the Parents refused to sign a medical release form.

[14] The School Nurse reviewed medical reports stating that the Child has mild asthma; it is not deemed life-threatening.

in these areas, the Child will be lost in her educational environment. The LEA's expert witnesses demonstrated the Child's academic deficits in speech, language, visual-motor integration, social and life skills. These are issues which adversely affect the Child's academic performance and limit her access to her curriculum. Thus, the IEP team added speech-language, social and life skills, and occupational technology as related academic services in the Child's IEP with placement in the ASD class. The Private School does not adequately address these issues.

The Child is a poised, confident young lady. By conveying her "story" to all who participated at the hearing, the Child articulated the educational plight of all special needs children. In her own plain, insightful words, she stated as follows: "I'm basically a normal kid except for my learning problems." TR 141.

Sadly, the Child's intervening headaches and hospitalizations have required that the Child spend time away from her peers and school. The Child's absence has caused her to regress academically in core subjects and she needs to develop skills to help her succeed in other areas: reading and writing (moderate delays),[15] speech-language (social interaction deficits: expressive and receptive language deficits, maintaining two-way conversation issues), life-skill development (social, emotional and behavioral deficits) and occupational therapy (visual-motor-integration deficits). It is necessary for the child to focus on core subjects like English and math so she can pass the SOLs and maintain grade-level schoolwork. Psychological counseling will be provided weekly to the Child to address any anxieties or difficulties arising at school.

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[15] The Private School assessed the Child's reading level at mid-fourth grade. The LEA School Psychologist assessed moderate deficits in reading and written language.

Maintaining grade-level-performance will be difficult for the Child if she does not receive remedial assistance in reading and writing. The Private School teachers testified that the Child had made progress in reading but she has not made enough progress in this subject. She is fourteen years of age and has average intelligence. But she reads below grade level. This is unacceptable for a child of her age and cognitive ability. When the Child last attended this LEA, she was placed in an inclusion setting. Reading was a a problem but the Child made progress in it before she was removed. At the hearing, the Child reported that she was "worried" [16] in the collaborative setting. TR 108. Thus, the Child could benefit by the computerized, intensive skill-development course described as Read 180. TR 108.

LEA special education personnel qualified as expert witnesses and testified - LEA Special Education Administrators, a Special Education Compliance Officer, a Speech -Language Pathologist, an Occupational Therapist, and a School Psychologist. The experts evaluated or reviewed information then available to them concerning the Child.[17] They conferred together. Parents either conferred with the experts or could have conferred with them and did not do so. [18] Special education experts agree that the Child's proper placement is in the ASD class for four bells per day. The Child will also be

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[16] An LEA witness contradicted the Child's account of her inclusion experience: The report was that the Child was successful and comfortable in the inclusive model. Students purchased a yearbook for her.

[17] The School Psychologist prepared a report based upon academic testing information from the National Institute and a prior IEP. She provided her report to the IEP team secretary. The School Psychologist then evaluated the Child for 3.5 hours on December 16, 2009. Her psychological evaluation was not available until December 28, 2009, after the placement decision was made. She stated that she agreed with the IEP team's placement decision though she did not participate in an IEP meeting. The School Psychologist did not review the evaluation with the parents because of the due process hearing.

[18] Parents produced a CD of the final IEP meeting. Parents stated they chose not to continue to confer with the LEA if the LEA's placement decision for the Child was in the ASD class.

mainstreamed with her non-disabled peers for the rest of the day. [19] The IEP team used reliable data to create the Child's IEP. [20]

Testimony indicated that the IEP team met with the Parents on three different dates to discuss the Child's placement. The record shows that Parents were provided parental participation opportunities. Parents were invited to provide additional data which they often refused to do. The record also shows that the Parents limited the LEA's access to helpful information concerning the Child's educational needs. Thus, there is no validity to the Parents' claim that they were denied their parental participation right in the development of the IEP. Even if the LEA had committed procedural violations, these do not mean that the Child was denied a FAPE in the IEP's development. *See MM v School District of Greenville County,* 303 F.3d 523 (4th Cir. 2002) (Procedural errors in IEP delivery did not cause the Child to be denied a FAPE).

The record also shows that the IEP team arrived at this placement after the team considered a continuum of placements. Then the IEP team decided on self-contained placement in the ASD classroom for the Child's core subjects with immediate mainstreaming opportunities for her throughout the day.

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[19] The Virginia Regulations, at 8 VAC 20-81-130(A)(1)(a) & (b) (2009), state, with regard to LRE: "1. Each local educational agency shall ensure: (a) That to the maximum extent appropriate, children with disabilities, aged two to 21 inclusive, including those in public or private institutions or other care facilities, are educated with children without disabilities; and (b) That special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. *See* "General least restrictive environment requirements," at 8 VAC 20-81-130(A)(1)(a) & (b) (2009).

[20] The Speech-Language Pathologist prepared a written report based upon the National Institute findings and provided it to the IEP team. The Occupational Therapist did not personally evaluate the Child. Her supervisor did the report for the IEP team. Parents had provided limited information from the Private school to the IEP team and only permitted limited consents to the Child's updated evaluations.

Contrary to the Parents' assertions, this plan was not the exclusive design of any one of the educators. This schedule appears to be uniquely tailored to suit the Child's educational needs. Parents object to placement of the child in the ASD classroom because the Child does not have Autism Spectrum Disorder. The Child will not model behavior repetition because of her intelligence. TR 693. An LEA Special Education Administrator, Special Education Compliance Officer and School Psychologist testified: Most children placed in the ASD class have average intelligence and are classified as OHI. Only a few of them are autistic.

A Special Education Administrator provided a sample "typical school day" to show how the Child's day will be blended. Separate education in the ASD class for academics, math, history, science and English, and inclusion for others, Read 180, art, physical education and health. The Child eats lunch with non-disabled peers.

This special education model is termed "pull-out" (academic classes) and "push-in" (inclusive classes) placement. The ASD class is structured to fit OHI children. It is not suitable for most children with autism. In fact, the Special Education Administrator stated that, there is never more than one autistic child out of seven to eight students in the Child's ASD classes. TR 599. The Special Education Administrator, the School Psychologist and the Special Education Compliance Officer attested to the ASD program's structure and consistency. The Special Education Administrator worked with a behavior consultant to develop the ASD model. The program utilizes positive behavior supports. TR 575. It is not required that the LEA's Special Education Administrator personally observe the ASD program to assure its general "uniformity throughout the district." TR 566. Also, the Special Education Administrator asserted that the ASD

program provides "community based instruction." SB 99, TR 592. The Special Education Administrator intricately knew the ASD model even if he did not observe the Child's specific class. He designed the class. [21]

Parents presented evidence to show that the proposed IEP is inadequate when compared to the Private School's education plan. In a comparison of the two, the course of study offered by the LEA is challenging. The LEA's IEP provides the Child a rigorous, "grade level" curriculum which is "SOL driven." TR 602. The Private School curriculum is "ungraded." *Id.* Social skills at the LEA are taught by direct instruction through an established curriculum. Social skills at the Private School are provided by consultative weekly meetings with a Residential Instructor. The LEA offers a "vast array of technology" but the Private School has only one computer. [22] TR 582, 602. Also, the Special Education Administrator asserted that the LEA's textbooks are current and the teachers are required to continue skills development through research-based practices. Teachers at the Private School did not assert these factors when they testified.

The Child requires related speech-language and social-skills related services. Speech-language services are provided to Private School children on a contractual basis. It is not clear that the Child now receives any speech-language services. Psychological counseling is to be provided by the LEA on a weekly consult basis. In contrast, the Child's treating Clinical Psychologist sees the Child only sporadically and in a group

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[21] Parents objected to the Special education Administrator's testimony because he did not observe the actual ASD classroom the Child would be in. This argument has no merit. An educational expert provides opinion evidence as well as direct testimony.

[22] The Special Education Administrator testified that he visited the Private School. He saw only one computer.

setting. Residential instructors at the Private School, not the Clinical Psychologist, regularly address social-skills development.

Social skills development and maintaining consistency are extremely important factors for the Child. There are similarities between her social skill needs and an autistic spectrum disorder program. Thus, there is an "overlap". Overall, the ASD program provides consistency in structure and routine. TR 583. The Child's Neuropsychologist testified that the Child requires a consistent, structured academic environment to address her "executive functioning" deficits. TR 257, 580. The ASD's small class size (7 to 8 students) and small teacher to student ratio (1 to 5) permits the teacher to focus attention on the Child if her anxiety level increases. TR 581. The social skills curriculum permits students to develop social skills through modeling real life experiences. [23] Students use role-play from scripts developed for that purpose. Two-way conversation is taught. The ASD class is "data-driven" which means that data is collected every 4.5 weeks for ASD placed children. Each child is regularly monitored by examining data collected on the children to insure that progress is being made. TR 583.

In contrast, it is difficult to ascertain the Child's progress at the Private School because it is not known if she takes SOLs. The Private School Administrator reports that the Child has made academic progress. She has made honor roll at the Private School many times. Her Physician suggested that the Child has made academic progress at the Private School. But her Physician's report of the Child's current academic progress is not reliable. Her Physician admitted that he is not an educator. He received academic reports

[23] The Child's biological father was concerned that the Child would model "flapping" or other behaviors characteristic of children with autism. The biological father visited the ASD class but the observations he provided were not given due weight. His depiction of disabled children was merely anecdotal.

either second-hand or loosely-based on testing. [24]

The Child's academic progress cannot be reliably measured by gathering anecdotal reports from the Private School. It is essential to measure the Child's academic progress more accurately through dated-based instruction and testing.

The Child's report, that she had been bullied by schoolmates when she attended the LEA, is not pertinent. The "bullying" issue is moot because it is time-barred by the statute of limitations. A two year statute of limitations attaches to this IDEA claim which pre-dates the Parents' due process request by two years. Also, the IDEA does not support the concept of "continuing violations" or "continuing injuries." *Jaynes v. Newport News School Sch. Bd.,* 2000 U.S. District Lexis 21684 (E.D. Va. 2000*), aff'd* 13 Fed.Appx. 166 (4thCir. 2001).

But the fact that the Child now says that she was bullied at the LEA correlates to present social skill deficits noted by the Child's Clinical Psychologist at the hearing. He testified that the Child sometimes perceives being "bullied" when she is instructed or when she chooses not to complete a task. Because of her medical and associated relationship issues, the Child has heightened anxieties and occasional skewed perceptions. Thus, it is difficult to know when her thoughts indicate an actual conflict such as bullying, if she has misconstrued a situation or if she does not want to complete a task. [25] TR 408, 409.

The Child's psychologists and Private School personnel confirmed the LEA's assessment that the Child's social skills are a concern. They stated that she needs regular

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[24] The Private School teacher who testified was not familiar with specific test protocol.

[25] Private school personnel confirmed that several "bullying" incidents have occurred at the school. The Child also stated that she was bullied at this school.

instruction, not inconsistent, anecdotal attention. Her psychologists and the Private School personnel testified that there are times when the Child is "bossy." TR 198 On occasion, she does not interact well with other children.

It is prudent for the Child to correct these problems now. But the Child testified that she enjoys her current placement at the Private School. Their personnel testified that the Child has developed life skills, she has not had medical issues and her reading skills have improved. At the Private School, the Child has learned how to sweep her room, brush her horse and fold her napkin. Some academics are provided. Her doctor and psychologists stated that the Child has been successful there. Her parents believe that the Child is "happy" at the Private School. TR 115.

But the Child's speech and language deficits, visual-motor integration problems, and life and social skill issues will not resolve on their own. These academic issues will not be corrected through weekly meetings with an untrained residential instructor and occasional discussions with a psychologist. Though the Child says she is "happy" at the Private School, the Child's ebullience is not the best measure of the Child's educational needs.

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

In *Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley,* 458 U.S. 176, 102 S. Ct. 3034, 73 L.Ed.2d 690 (1982), the U.S. Supreme Court defined a "free appropriate public education" (FAPE) as one that provides "personalized

educational instruction." FAPE is provided in the IEP if it is "specially designed to meet the unique needs of the handicapped child, [and] supported by such services as are necessary to permit the child 'to benefit' from the instruction."

> "Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if he child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Rowley,* at 203-204.

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

Thus, "The IDEA does not deprive educators of the right to apply their professional judgment. Rather it establishes a 'basic floor of opportunity' for every handicapped child." *Rowley,* at 201. States must provide specialized instruction and related services 'sufficient to confer some educational benefit' on the handicapped child, *Id.* at 200, but the IDEA does not require 'the furnishing of every special service necessary to maximize each handicapped child's potential.' *Id.* at 199.

The record shows that during the 2007-2008 school year, the Child was successful and derived benefit from the LEA's IEP. She made actual educational progress. Parent commended the LEA for the Child's success. Soon after, the Child was removed by the Parents from this LEA. It was not until the Child had already entered Private School after a nearly two year absence that Parents informed the school district that they were dissatisfied. It does not appear that the Parents' notice of intent to remove the Child from

the LEA of December 8, 2009, was made for any reason other than to make a demand for private placement tuition reimbursement, not to give actual notice of IEP deficits.

Also, the record shows that Parents have been evasive in the creation of the IEP. Parents withheld educational information from the LEA when they met with school administrators to develop the IEP. The final IEP was prepared with information that was then available. Even if the Parents do not agree with the final IEP, Parents fully participated in the decision making process. The IDEA does not require that the LEA duplicate the Private School program. An "appropriate" education does not mean "a potential maximizing education." *See School Board of Campbell County v. Beasley,* 238 Va. 44 (1989). Parents do not have that right under the IDEA. *Bales v. Clark,* 523 F.Supp. 1366 (E.D. Va. 1981) (Parents are seeking an ideal education for their child).

Neither the Child's medical and psychological issues nor her educational needs require that she be placed in a residential facility. LEA personnel are most qualified to make sound educational decisions. The IEP team designated the self-contained ASD classroom for her core academic classes with mainstreaming, to the maximum extent. A residential facility is not the LRE in which the child may receive a FAPE. It is too restrictive. The LEA's IEP placement decision is proper for this child.

In order to be successful in a claim for reimbursement by a parent for private tuition placement, the fact-finder must first determine that the public school failed to provide the child with a free appropriate public education and then that private placement is appropriate under the IDEA. *See County School Board of Henrico Co. v. R.T.,* 433 F. Supp.2d 692, 697 (E.D. Va. 2006); *See also School Comm. of Burlington v. Department of Educ.,* 471 U.S. 359, 371-372 (1985); *Tice v. Botetourt Co. Sch. Bd.,* 908 F.2d 1200

(4th Cir. 1990). I find that FAPE has been provided to the Child in the LEA's placement decision. The IEP provides the least restrictive environment (LRE) for the Child. Thus, the second inquiry is irrelevant.

Parents who make a unilateral placement run the significant risk that a court will find against them and they will be left bearing the cost of the placement. *See Burlington v. Department of Ed.*, 471 U.S. 359, at 371-372 (1985); *Millay v. Surry Sch. Dept.*, 584 F.Supp. 219 (D. Me. 2008); *see also Linkous v. Davis,* 633 F.Supp. 1109 (W.D.Va. 1986); *Florence County School District Four v Carter,* 114 S.Ct. 361 (1993).

Parents did not prove that the LEA had failed to provide student with a FAPE in the IEP. Parents' request for tuition reimbursement of private placement under the IDEA is DENIED. Parents' presented no evidence on a Section 504 issue. The Section 504 issue is DENIED.

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

***Right of Appeal Notice***

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

**Date of Decision: March 26, 2010**

Hearing Officer

I do hereby certify that I have mailed the above Decision to both counsel on this date.

Hearing Officer

**Sarah Smith Freeman, Esquire, VSB# 21354**
**210 East Road**

**Portsmouth, Virginia 23707**
**(757) 399-8105 (757) 399-2004 Facsimile**
**esqfreeman@aol.com**