

#22-094
COMMONWEALTH OF VIRGINIA
VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION & STUDENT SERVICES
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES

Re: Child, by and through [REDACTED] parent(s), Parent v. County Public Schools
Case No. 22-094

Child & Parent(s)/Guardian:
child
parent(s)

Administrative Hearing Officer:

Child's Attorney/Advocate(s):
Advocate

County Public Schools' Attorney
Attorney for LEA

Superintendent of [REDACTED] County Public Schools:
Dr. Superintendent

DECISION

I. PROCEDURAL HISTORY¹

On February 28, 2022, the parent filed a due process complaint (DPC/complaint). (P 2).

The Hearing Officer (HO) held several prehearing conferences regarding the case. The initial prehearing conference (PHC) was held on March 16, 2022, to address, among other matters, scheduling and clarification of the issues. Subsequent to this PHC, the HO issued a scheduling order/summation report of the PHC. *See* Order issued March 18, 2022 and Amended Scheduling Order issued on March 21, 2022, to correct clerical errors.² (P3). The scheduling order memorialized the hearing date, April 15, 2022.³ The HO held a second PHC on March 21, 2022,

¹ Throughout the decision, the Hearing Officer will use the following abbreviations:

Transcript	-	Tr.
Parents' Exhibit		P
Local Educational Agency Exhibit	-	S

² Orders referenced are incorporated herein.

³ During the initial PHC, parents' advocate represented needing one half day to present the parents' case. LEA counsel requested a full day for the hearing. Hence, the HO set the hearing for one day.

and issued the related order and summary report on March 28, 2022. *See* Order issued on March 28, 2022. A third PHC took place on April 13, 2022, to address objections to any proposed exhibits or witness testimony. The HO issued the related order and summary report on April 14, 2022. *See* Order issued on April 14, 2022.

Both parties requested the HO issue orders for the production of documents. Particularly, on March 22, 2022, LEA counsel requested the issuance of three orders for the production of documents. The HO afforded Parents' advocate an opportunity to respond to the LEA's request. Parents' advocate responded indicating that Parents did not oppose the request. Accordingly, the HO issued the orders. *See* Order issued on March 24, 2022. On March 23, 2022, Parents' advocate requested the HO issue one order for the production of several documents. The LEA was allowed to respond. In doing so, the LEA filed a Motion to Quash the parents' request. By order issued March 30, 2022, for a subset of the documents requested, the HO directed the LEA to produce a fraction of them and denied the production of the remaining documents in that subset. Moreover, in that same order, the HO held in abeyance her ruling on the other documents requested. Further, the HO directed the Parents' advocate to provide clarifying information on the documents that were subject to the abeyance.⁴ *See* HO Order issued on March 30, 2022. Thereafter, the HO issued an additional order addressing the matters previously held in abeyance. *See* HO Order issued on April 5, 2022.

Moreover, prior to the hearing, the parents' advocate asked the HO to immediately issue an order that placed the child at Private Day School IV. Parents' advocate argued that the parties had agreed on this placement and therefore the HO had the authority to place the child at Private Day School IV. LEA counsel denied there was such an agreement. By order issued on March 28, 2022, the Hearing Officer denied the request. However, the HO granted Parents' advocate permission to file a motion for reconsideration. The reconsideration motion was filed. The Hearing Officer granted LEA counsel an opportunity to respond.⁵ After considering Parents' motion and arguments and the LEA's response to the motion, the HO denied parents' motion. *See* HO's Order issued April 5, 2022.

The Hearing Officer held the hearing as scheduled on April 15, 2022. The HO notes that she provided each party ample opportunity to present his/her/its case. Prior to commencing the taking of evidence, the Hearing Officer addressed matters of concerns by the parties. The LEA expressed no matters of concern. Parents' Advocate contended that the Hearing Officer had afforded LEA counsel an extension to respond to a pleading, but the advocate was not provided an extension of time to submit the parents' exhibits. After considering the arguments/statements of both parties regarding the allegation, the HO determined that she remained impartial throughout the due process proceedings.

During the course of the hearing, the Hearing Officer admitted Parent's Exhibits 1 2, 3, 10,

⁴ The HO initially directed the advocate to provide the additional information by 6:00 p.m. on March 31, 2022. The HO extended that deadline until 3:00 p.m. on April 4, 2022.

⁵ The deadline for the response was initially due on March 28, 2022. LEA counsel requested an extension of time to respond. The HO found good cause to do so and extended the time to respond until 3:00 p.m. on April 1, 2022. LEA counsel responded on March 31, 2022. (P11). In addition, if desired, the parents' advocate was granted until 3:00 p.m. on April 4, 2022, to respond to the LEA's response. *See* HO's directives to the parties by email dated March 31, 2022, incorporated by reference here.

11, and 20. The HO determined that Parents' exhibits 4 through 7 and 12 through 19 were not timely disclosed to the opposing party and the HO. Accordingly, the HO excluded those exhibits pursuant to 34 C.F.R. § 300.512(a); 8 VAC 20-81-210 (O) (9); 8 VAC 20-81-210 (P) (1). In addition, the HO admitted School's Exhibits 3 through 14, 15a, and 16 through 22. The HO excluded the School's Exhibit 15 because it was not the electronic version filed by the date the exhibits were due to be exchanged. Instead, the HO has admitted School Exhibit 15a which the HO has determined was timely submitted.

Each party was provided an opportunity to present his/her/its witnesses during the hearing, conduct cross examination of any witness presented by the opposing party, and present opening statements and closing arguments.⁶

OTHER

The Hearing Officer has considered all evidence presented during the hearing, to include oral testimony and exhibits entered as evidence.

II. ISSUES

1. Did the parents partially consent to the November 2021 proposed IEP? Specifically, did the parents' consent to the following provisions:
 - (i) Until private placement could be obtained, the provision of 15 hours of homebased instruction and 30 minutes weekly of speech therapy in a virtual setting; and
 - (ii) Private placement once secured.
2. If the parents provided partial consent to the provisions noted in the November 2021 IEP, has the LEA denied the student FAPE by failing to implement those provisions?⁷

III. BURDEN OF PROOF

The United States Supreme Court held in *Shaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed.2d 387 (2005), that the party seeking relief bears the burden of proof. Therefore, in this case the parent bears the burden of proof as she is challenging the LEA's actions.

IV. STATEMENT OF FACTS

1. The child is [REDACTED] year old and has been determined eligible for special education and related services under the autism disability category. The child's last agreed upon IEP is dated

⁶ Although the parties were afforded the opportunity to present rebuttal testimony, neither party desired to do so.

⁷ The parties were provided an opportunity to object to the issues. Neither party objected to them.

May 17, 2021. (S4 and S 18 at 2).

2. Under the last agreed upon IEP, the child's placement is the regular elementary school. Specifically, Child has been assigned to Elementary School. Also, under this IEP the child receives services in the general and special education settings. The child has not attended school since fall 2021. (S4 at 9-10; Tr. at 80).

3. The IEP team held meetings on September 20, and October 14, 2021. These meetings resulted in an amendment being proposed to the IEP which provided for 1:1 support for the child. The parents did not give written consent to implement the change. (S6 at 18).

4. At the parents' request, the IEP team also held an IEP meeting on November 17, 2021, which continued on November 18, 2021 (November IEP meeting). The parents were requesting private placement for the child. (S6 at 22). The "Placement" section of the proposed IEP developed from this meeting notes, in pertinent part, that "due to the severity of the child's disability, the IEP team proposed changing the child's placement from public day school to private day school." (S6 at 14).

5. Until a private placement could be secured, during the November IEP meeting, the IEP team proposed a modification to the IEP; that is, an IEP addendum which sets forth the modifications. Particularly, those proposed changes were the child would receive homebased instruction for 15 hours a week and virtual speech and language therapy for 30 minutes a week until a private placement could be secured. (S 6 at 14 and 18).

6. During the November IEP meeting, the parents gave verbal consent to the IEP addendum being implemented which provided for the modifications; that is, 15 hours of homebased services per week, 30 minutes of speech therapy to be provided virtually until a private placement could be secured. (S 6 at 18 and Tr. at 185).

7. During the November IEP meeting, Special Education Lead Teacher informed the parents that before the addendum could be implemented, the parents also needed to provide written consent for the addendum. (Tr. at 171/16-20; S6 at 14).

8. Following the November IEP meeting, Special Education Lead Teacher along with Behavior Specialist, who also attended the November IEP meeting, drafted the prior written notice (PWN) after clarifying amongst themselves the discussions that occurred during the meeting. (Tr. at 181).

9. In pertinent part, the PWN reads as follows:

[Parent] provided partial consent for the implementation of this IEP addendum to reflect 15 hours a week of homebased instruction with 30 minutes a week of speech-language therapy virtually while a private day placement can be obtained and secured.

(S6 at 18).

10. During the November IEP meeting several prospective private day schools were discussed as possible private schools that could implement the child's IEP. They included Private Day Schools I, II, and III. Parents preferred Private Day School 1. Parents understood from comments made by Parents' advocate that Private Day Schools II and III were not suitable private day school assignments for the child. (Tr. at 196-201).

11. On November 29, 2021, the parents signed a "Consent for Release of Confidential Information" which granted the school district permission to release information to Private Day School I, a prospective school assignment for the child's private day school placement. (S7).

12. As a result of receiving the release, Behavior Specialist emailed documents pertaining to the child to Private School I on November 30, 2021, to enable the private school to start the review of information on the child for the purpose of determining if the Private School 1 would admit the child as a student. Behavior Specialist did indicate in her email that she had not received a "signed document." (S 8 at 1).

The Hearing Officer understands from testimonial evidence and documentary evidence that the reference to not yet receiving a "signed document" was to the LEA still not receiving a signed document from the parents.

12. On or about December 2, 2021, a text was sent from the child's mother to the school staff. The text message stated "I give partial consent to homebased and private placement to [Private Day School I]." (S 10).

13. Per the child's mother testimony during the hearing, the mother sent a text to Special Education Lead Teacher that stated I[Parent] provide partial consent to home-based services of 15 hours a week, and 30 minutes of the speech therapy, along with private placement." (Tr. at 50-51).

14. A screen shot or hard copy of the text message was not entered as evidence. The Hearing Officer identifies the text message content as stated in the "Findings of Fact" # 12 above; that is,

"I give partial consent to homebased and private placement to [Private Day School I]."

This finding is based on the Hearing Officer's observations during the hearing. Regarding the mother's testimony about the text's content, the witness appeared coached on what to say. In addition, the testimony was self-serving. Accordingly, the Hearing Officer did not find the mother's testimony regarding the exact content of the text reliable.

Assistant Superintendent of Special Education did receive the text. In addition, she reviewed it several times. (Tr. at 278, 318-19). The Hearing Officer did find the testimony of Assistant Superintendent of Special Education regarding the text's content credible and supported by other evidence of record.

15. Parents contend that written consent has been provided by the referenced prior written notice and by the text message. (Tr. at 104).

The Hearing Officer finds that any partial consent purportedly provided in the referenced text was ambiguous. Hence, the parents have not provided clear partial consent to the November 2021 IEP Addendum. Accordingly, the LEA made reasonable requests for the parents to provide written consent for those parts of the November 17-18, 2021 IEP to which they agreed.

16. [Private Day School I] did not admit the child and by letter dated December 8, 2021, informed the LEA's behavior specialist and the parents. (S 9).

17. By letter dated December 9, 2021, Assistant Principal of Special Education sent a letter to the parents. In pertinent the letter reads:

On December 2, 2021, you apparently sent a text message to the school principal's phone. That text message states, "I give partial consent to homebased [sic] and private placement to [Private Day School I] [sic]" Clarification is needed from you. Please confirm that you are indeed providing consent to the implementation of the November 18, 2021 proposed IEP Amendment, to include the present services, and placement in a special education private day school and interim home-based services. The IEP Amendment cannot be implemented without your clear signed consent. For your convenience, I have enclosed another copy of the November 18, 2021 proposed IEP Amendment. Please endorse the IEP Amendment and return the signed document to me as soon as possible so that [the LEA] can secure a school assignment for your student.

With regard to your student's school assignment, [LEA] has applied for your student's admission to Private Day School I. Unfortunately, on December 8, 2021, Private Day School I notified us that it cannot accept your student to its school. As a result, LEA must apply for admission to other special education private day schools. During the November 18, 2021 IEP meeting, the IEP team discussed that, in addition to Private Day School I, the proposed IEP Amendment could be implemented at the following schools: [Private Day School II], and [Private Day School III]. In order to complete the application process to those schools, please sign and return the enclosed consent for release of confidential information and CSA consent to exchange information forms. Once we receive those signed forms back from you, [LEA] will then be able to complete the school assignment process.

(S10 at 1-2; Tr. at 277-78).

18. Assistant Superintendent of Special Education enclosed with the December 9, 2021 letter (i) the proposed amended IEP dated November 18, 2021, (ii) two forms titled “consent for release of confidential information” to be completed by the parents for Private Day School II and Private Day School III, (iii) the Consent to Exchange Information form to be completed by the parents, and (iv) a guideline informational sheet titled “[LEA] Guidelines and Criteria for Independent Educational Evaluations.” (S 10 at 5-34).

19. On or about December 28, 2021, Assistant Superintendent of Special Education sent the parents a second letter requesting the parents’ written consent to the Amended IEP dated November 18, 2021, the completed and signed consent to release forms, and the completed and signed CSA release form. The December 28, 2021 letter also informed the parents that the LEA would continue to implement the last agreed upon IEP/IEP amendment until the LEA received the parents’ written consent to implement the November 18, 2021 IEP addendum. The letter that the child’s placement under the last agreed upon IEP is the Public Day School and the child is assigned to Elementary School. (S 11; Tr. at 283).

20. On or about January 11, 2022, the parents signed a release form granting the LEA permission to release the child’s records to Private Day School IV. A hand written statement on the form reads “Please CC myself in electronic communication.” (S12).

21. Parents sent Special Education Lead Teacher an email on January 20, 2022, contending that the parents had already provided partial consent for homebased instruction. In the parents’ email, they refer the Lead Special Education Teacher to page 18, referring to page 18 of the November 18, 2021 IEP which contained the LEA’s PWN regarding the November 2021 IEP meetings.

Special Education Lead Teacher responds by email on January 21, 2022, stating that the LEA needed signed consent to implement the November 18, 2021 amended IEP; that is, the change the child’s placement to private day school and homebased instruction until a private day school could be secured. (S13).

22. Assistant Superintendent sent the parents a third letter on or about February 3, 2022. Among other matters, Assistant Superintendent reminded the parents of the LEA’s prior requests for the parents’ signed consent to the Amended IEP dated November 18, 2021. Assistant Superintendent then asked the parents to promptly sign and return the November 18, 2021 amended IEP. In addition, the Assistant Superintendent again requested the parents return the completed and signed release of information forms for Private Day Schools II and III as well as the CSA release form. (S14).

23. Parents received the letters referenced above sent to them by Assistant Superintendent of Special Education, but did not respond to them. (Tr. at 107-120).

24. A letter dated February 10, 2022, indicates the LEA sent the parents a letter on or about that date inviting the parents to attend an IEP meeting scheduled for February 23, 2022. The letter stated the purpose of the meeting was to review and/or develop the child’s IEP. (S15).

25. Also, a letter dated February 22, 2022, indicates the LEA sent the parents a letter on or about that date inviting the parents to attend an IEP meeting scheduled for February 25, 2022. The letter stated the purpose of the meeting was to review and/or develop the child's IEP and consider the parents' requests for school assignment and compensatory education. (S16).

A letter from Assistant Superintendent of Special Education indicates that the February 25, 2022 IEP was convened but could not be completed. The IEP meeting was reconvened on March 10, 2022. (S117 and S18 at 2). The parents had agreed to the March 10 meeting date and time and the parents with their advocate did attend a portion of the IEP meeting. (S18 at 25). An IEP dated March 10, 2021 resulted from the March 10, 2021 IEP meeting. Placement proposed in the March 10, 2022 IEP was private day school. The parents have not consented to the IEP's implementation. (Tr. at 128).

26. The PWN regarding the March 10, 2022 IEP meeting states that the parents and advocate attended the meeting for about 45 minutes by telephone conference. All IEP team members were permitted to provide input. PWN further notes that after several reminders from the principal about the need to behave professionally during the meeting, the parents' advocate was disconnected from the meeting after 45 minutes. Notations indicate the cut off took place because the advocate continued to engage in disruptive behavior: constantly interrupting school staff when they were speaking, demanding that the team discuss topics not related to the child's IEP. Per the PWN, before the advocate was disconnected, the parents were informed they would be called back to continue the parents' participation in the meeting if they desired to do so. The parents were called back twice, but there was no answer either time. A message was left for the parents with a call back number. (S18 at 25-26).

27. The PWN concerning the March 10, 2022 IEP meeting indicates that private day placement was discussed. Parents requested that the child be placed at Private Day School IV. The IEP team determined that the child's IEP could be implemented in four private day schools. Specifically, Private Day Schools II, III, IV, and V. (S 18 at 25).

28. The decision concerning which private day school the child will be assigned to is made by the IEP team, not by the parents. (Tr. at 114, 308).

OTHER FACTS

31. Consent may be provided by electronic means. (P 10).

32. Assistant Superintendent of Special Education supervises all special education teachers, including special education lead teachers. (Tr. 275). This means Assistant Superintendent of Special Education supervises Special Education Lead Teacher who was the parents point of contact for the child.

33. The LEA has made provisions for the child to receive special education and related services at Elementary School in light of the LEA not receiving (i) clear consent from the parents for the school to implement the November IEP Addendum and (ii) consent to implement the March 10, 2021 IEP which placed the child in a private day school. (S 14).

34. The Hearing Officer has reviewed the parents' exhibit one pertaining to retaliation. (P1). The Hearing Officer does not find that the LEA has retaliated against the parents or child.

35. The Hearing Officer has reviewed the parents' exhibit which is a letter dated April 5, 2022, addressed to Assistant Superintendent of Special Education, with signatures of Parents concerns "[Child]/Interim Agreement During Pendency of Due Process Hearing (Parents' Counter Offer) (P 13).

36. Based on the evidence of record, to include the IEPs made a part of the record, the Hearing Officer finds that the child's behaviors due to his disability are so severe that he requires private day placement. (S6)

V. LEGAL ANALYSIS

Congress passed the Individuals with Disabilities Education Improvement Act (IDEA/Act) to guarantee that children with disabilities have available to them a Free Appropriated Public Education (FAPE). 20 U.S.C. § 1400 *et seq.* For this purpose, the federal government provides funds to states in exchange for the states' compliance with a set of regulations aimed at providing "special education and related services designed to meet" disabled children's "unique needs and prepare them for further education, employment, and independent living." *Id.* The IDEA anticipates cooperation between the schools and parents to best identify and serve the needs of disabled children. *See id.* §1400(d)(1B), (d)(3); *Schaffer v. Weast*, 546 U.S. 49, 53 (2005). (identifying that the "core of the statute" as "the cooperative process that it establishes between parents and schools").

The individualized education program (IEP) is the mechanism established in the statute to be employed to deliver the child a FAPE. *Honig v. Doe*, 484 U.S. 305,311 (1988). As defined by the IDEA, an IEP is "a written statement for each child with a disability that is developed, reviewed, and revised" according to specific procedures and that includes a roadmap for the child's academic growth and development. 20 U.S.C. §1414(d)(1)(A)(i). It is expected that the parents and educators will collaborate as "the IEP team" to draft, revise, and update a child's IEP. In addition to the provisions of the IDEA addressing the IEP, the statute requires the school to offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S.Ct. 988, 999 (2017). Further, in addition to this substantive obligation of the schools, the IEP affords parents of disabled children certain procedural safeguards.

One such procedural safeguard is parental consent. Under the applicable law, consent means that-

- (a) the parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or through another mode of communication;

(b) the parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and

(c) (1) the parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

(2) If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).

(3) If the parent revokes consent in writing for their child's receipt of special education services after the child is initially provided special education and related services, the public agency is not required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent.

20 U.S.C. 1414(a)(1)(D); 34 C.F.R. §300.9 (**emphasis added**).

Under the IDEA parental consent is required for (i) the initial evaluation of a child to determine if the child is eligible for special education and related services, (ii) the initial provision of special education and related services, and (iii) largely for reevaluations.⁸ Consent is also required in other circumstances such as, but not limited to, the excusal of an IEP team member from attending an IEP meeting in which the member's area of the curriculum or related services is being changed or discussed and accessing the parent's private insurance to pay for educational services. *See* 34 CFR § 300.321 (e)(2) and 34 CFR § 300.154(e)(2); 34 CFR § 303.520(b)(1)(i).

In addition to the circumstances requiring consent under federal law, states may elect to impose additional parental consent requirements in conjunction with other activities and services. 34 CFR §300.300(d)(2). The Commonwealth of Virginia, under the state's special education regulations require parental consent for any revision to a child's IEP services. 8 VAC 20-81-170(E)(1)(d).

Did the Parents Provide Clear Consent?

In the case at bar, the parents contend they have provided partial consent such that the November 18, 2021 IEP Addendum can and should have been implemented. The LEA avers that the parents have not provided clear consent and that the last agreed upon IEP is the one that is operative.

The Hearing Officer finds instructive the Virginia Department of Education's response to a Q & A addressing partial consent to an IEP. The question(s) and pertinent response are set forth below:

⁸ Parental consent need not be obtained if the provisions of 34 C.F.R. §300(c)(2) are met

[Questions] Must a school division implement any and all parts of a child's IEP that have been clearly consented to by the parent, even if the parent has refused consent for the implementation of some parts of the IEP? How does a school division determine what constitutes "clear" consent in these situations?

[Virginia Department of Education's Answer]

Virginia Regulations clearly mandate school divisions to ensure that an IEP is implemented as soon as possible following parental consent to the IEP. (8 VAC 20-81-110 B.2). This regulation does not explicitly require the LEA to implement portions of the child's IEP in the instance where the parent has not consented to the entire document; however, when read in conjunction with two other regulatory provisions, the law does not prohibit the LEA from implementing those parts of the IEP that are consented to by the parent, as it is critical that the student's receipt of a [FAPE] not be interrupted. (8 VAC 20-81-170 E.1.d, and 34 CFR § 300.300 (d)(2)). Thus, it is important that the denial of consent to one provision for a service not deny another which may be essential to the student's receipt of FAPE.

For these reasons, VDOE has held historically and consistently that in such instances, the school division must implement those provisions **on which the parties clearly** agree and document what actions will be taken to resolve the items in dispute. If the parent's notations are illegible, consent boxes are unclearly identified, and/or the parent provides commentary that make it impossible to ascertain the parent's intentions to any degree of certainty, the IEP team may conclude that the parent has not "clearly" conveyed consent and provide the parent with prior written notice. If following an IEP meeting but prior to consent, the parent provides notations attempting to add services or establishing conditions to the provision of services, another IEP meeting needs to take place so that the other IEP team members review the additional requests and determine their appropriateness.

VDOE Q & A 016-11 Partial Consent to IEP (emphasis added).

In essence, according to VDOE's response to the question(s), if the consent provided by the parent does not clearly indicate to what the parent agrees, then the LEA may conclude the parent has not provided consent/clear consent. The LEA should then take action in an attempt to obtain clear consent.

After carefully considering the evidence, the Hearing Officer finds the parents' consent lacks sufficient clarity. The November 18, 2021 IEP Addendum proposed to change the child's placement to private day school. However, until a private day school could be secured, in the interim, the proposal was for the child to receive homebased instruction in the amount of 15 hours a week and 30 minutes of speech therapy in a virtual setting. During the IEP meeting held on November 17-18, 2021, the parents provided verbal consent to the child receiving 15 hours weekly of homebased instruction with 30 minutes a week of speech-language therapy virtually until a private day placement could be secured. Then on or about December 2, 2021, the child's mother sent a text to the school staff/principal stating "I give partial consent to homebased and private placement to [REDACTED]." The text does not identify the number of hours being agreed to nor the frequency of those hours. In addition, there is no mention of any agreement to virtual speech-language therapy. Further, the parent specifies that they are only agreeing to private school placement at one school. The school identified in the text from the parent was "[REDACTED]." The Hearing Officer finds the content of the verbal consent provided at the IEP meeting and the text message differed considerably. Further, the private school that the parent named in the text declined to accept the child. Accordingly, parents consent is not clear.

The evidence shows that the LEA attempted to obtain clarification of what the parent was consenting to on multiple occasions. Parents were sent correspondence inquiring about consent to the addendum on December 9, 2021, December 28, 2021, January 21, 2022, and February 3, 2022. In addition, the parents' point of contact transmitted an email to the parents requesting the parents provide consent. The evidence shows the parents have yet to clarify their partial consent. Accordingly, the November 18, 2021 IEP Addendum was never implemented.

Having made this finding the Hearing notes that providing consent by an electronic method such as a text is not necessarily constitute "unclear consent." More important, than the mode of communication is the statement or statements provided in the consent. In the case at bar, the text message simply did not provide enough information for the LEA to determine that consent had been given. Ambiguity heightened by the fact that the private school named in the text had rejected the child.

The Hearing Officer also notes that an IEP meeting was held on March 10, 2022, and the IEP team again proposed private day placement and determined that four private day schools could implement the child's IEP. Yet, the parents have provided no consent so that the IEP can be implemented in full or part.

In addition to finding the parents' text was unclear and therefore failed to satisfy the consent requirement, the Hearing Officer finds the parents have not supplied consent under applicable law. As referred to previously, under law consent means that "the parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom. 20 U.S.C. 1414(a)(1)(D); 34 C.F.R. §300.9. Parents' verbal communications during the IEP meeting on November 17 and 18, 2021, and subsequent text message also fail to show clear consent.

What is the Child' Least Restrictive Environment? (LRE)

The LEA has requested the Hearing Officer order placement in a private school.

To the maximum extent appropriate children with disabilities are to be educated with children without disabilities and segregation should only occur when 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. 34 CFR § 300.114. If a student is a disruptive force in a regular classroom setting, his LRE may be a more restrictive setting such as private day school. *See DeVries v. Fairfax Cty. Sch. Bd.*, 882 F.2d 876, 441 IDELR 555 (4TH Cir. 1989). In the case at bar, the evidence shows that the child's behaviors – acts of aggression – resulting from his disability are so severe that he requires a more restrictive setting than the regular classroom. In addition, the IEP proposes a private day school placement. Accordingly, the Hearing Officer finds such a placement is the LRE.

VI. DECISION AND ORDER

The Hearing Officer finds the parents have not provided clear consent to any part of the November 18, 2021 IEP Addendum. Therefore, the LEA could not implement the November 18, 2021 IEP Addendum which proposed weekly (i) 15 hours of homebased instruction and (ii) 30 minutes of virtual speech and language therapy until a private placement could be secured. Accordingly, the child's last agreed upon IEP was the operative May 17, 2021 IEP. Under that IEP the child is placed at Elementary School. While the LEA made provisions for the child to receive special education and related services at the school, the child has not attended.

Further, the parents have not consented to the implementation of the March 10, 2022 IEP, which proposed private day placement and identified four schools that could implement the child's IEP.

The LEA has not denied the child a FAPE. Consequently no compensatory education is due.

ORDER:

Based on the evidence of record, to include the IEPs made a part of the record, the Hearing Officer finds that the child's behaviors due to his disability are so severe that he requires private day placement.

Accordingly, the Hearing Officer orders placement in a private day school.

VII. PREVAILING PARTY

I have the authority to determine the prevailing party on the issues and find the prevailing party is the LEA.

VIII. APPEAL INFORMATION

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

ENTERED THIS 13th day of May 2022.

Ternon Galloway Lee, Hearing Officer

Cc: Parents
Advocate for Parents
Counsel for LEA
Dir. of Special Education for LEA
VDOE Coordinator
Hearing Officer Monitor of the Proceedings