22-101
VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
OFFICE DISPUTE RESOLUTION AND ADMINISTRATION SERVICES
VDOE CASE NO. 22-101

DECISION

Public Schools **School Division**	 **Name of Parent**
 Division Superintendent	 **Name of Child**
Nicole M. Thompson, Esquire **Counsel Representing LEA**	Sa'ad El-Amin, M.A., J.D. **Advocate for the Parent/Child**
Robert J. Hartsoe, Esquire **Hearing Officer**	Parent/Child **Party Initiating Hearing**

DECISION

INTRODUCTION

The Child possesses great gifts and potential, academic and otherwise but possesses difficulties. All involved displayed a commitment to allowing this Child to succeed. Material facts and law are undisputed. In this adversarial matter, the Parties, counsel and witnesses are commended for their presentation and professional manner-a blessing.[1] The Parties and witnesses are identified by the Confidential Legend attached hereto as Attachment 1. This matter was brought in the shadow of additional, post-hearing, positive, IDEA efforts by the Parties which may have, quite frankly, rendered this matter moot in whole or in part. Unfortunately, IDEA procedures including the need for an evidential hearing, prevent summary

[1] On the first day, the Advocate was detained for reason stated on the record. This circumstance was not considered negatively against the Parent/Child or the Advocate. On the second day, the Coordinator was detained due to a flat tire. This circumstance was not considered negatively against the Parent/Child.

judgment in the absence of stipulations.

PROCEDURAL BACKGROUND:

Pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"), this matter came upon the Parent/Child's Request Due Process, filed on March 24, 2022. Several issues were raised and addressed as referenced in the PreHearing Reports which are filed and incorporated herein by reference.

ISSUES DEFINED:

I. For the 2021-2022 school year, did the LEA commit procedural errors regarding the child's tri-annual evaluation and, if so, did such errors deny the child FAPE?

II. Does the Child's IEP (as existing on the date of the Due Process Request) provide the Child FAPE?

III. Has the LEA denied the Child FAPE by not effectuating (as required by the IDEA) the methods and goals of the Child's IEP (as existing on the date of the Due Process Request)?

IV. Whether the Child should receive compensatory education services and, if so, what should be these services and, if so, should the LEA be responsible?

V. Should the Parent/Child be reimbursed "replacement services for tutoring" since September 27, 2021, and if so, what amount?

VI. Should the Parent/Child be reimbursed for "replacement of the Related Services of Parent training and consultative services" since September 27, 2021, and if so, what amount?

VII. Should the Parent/Child receive psychological and counseling services and if so, what should be these services?

VIII. Should the Parent/Child be reimbursed for counseling services since September 27, 2021, and, if so, what amount?

IX. Should the Child be placed in private placement?

PERTINENT TESTIMONY REVIEW:

The Parent/Child called two witnesses: the Parent and the Consultant.

The Parent testified as a fact witness. Although she provided opinions, such testimony was only considered as concerns. (HT at 20.) She testified:

- Child was born in 20██. (Hearing Transcript (HT) at 11.)

- The Parent expressed sincere concern that the Child was, from her testimony only, diagnosed with autism at "VCU" in April 20██ when the Child was three. (HT at 20-22.) By this witness, Parent's Exhibit 6 on page 4 under "Assessment," a document from a medical provider was placed in evidence and states, in pertinent part regarding autism:

  Assessment
  Diagnosis:
  Developmental delay
  Speech and language delay
  Atypical behaviors ***concerning for likely*** *Autism spectrum disorder*
  [Emphasis added.]

  The document further requests "**Return to clinic: 6 months or as needed**" and provides resources regarding autism. [Emphasis added.][2]

- The Child has difficulties with toilet training and related issues. (HT at 12 & 38.) ███ lack of attention span mandates that an adult be present at all times to assist. (HT at 13.) The Parent had concerns regarding the change of diapers while attending school. (HT at 49-50.)

- The Child's lack of attention span undermines ███ efforts in all activities. (HT at 38.)

- The Child lacks the capacity to perceive danger. (*Id.*)

- The Parent enjoys, by implication, a significant governmental position as an ████████ for at least the past ten years-a licensed professional by implication. (HT at 14.)

- While the Child can independently feed himself and navigate stairs (implying some motor skills), the Child cannot independently dress ██self, use the toilet and, by implication, do similar such activities. (*Id.*)

[2] Note: these emphasized references indicate that the Parent may, (and by implication most likely) has documents to confirm or rule out the autism diagnosis as opposed to the referenced "likely," since April 2018. Failure to introduce relevant evidence on this issue must be considered.

- The Child has problems with ███ hearing, referencing a concern regarding a medical diagnosis of "otitis media" in the right ear. (HT at 14-15, 20-21.) Eye contact is necessary to ensure the Child understands. (HT at 15.) A hearing screening is planned. (*Id.*) To date, attempts to teach sign language to the Child have been unsuccessful but evidences, by implication, the hearing problem. (HT at 16.) The use of ear tubes was not helpful. (HT at 24.)

- The Child was transferred to the LEA from the Prior LEA in September 2021. (HT at 16.) By implication, a re-evaluation (implying the tri-annual evaluation) was required by the Child's IEP received from the Prior LEA. (*Id.*) Seven months transpired from initial enrollment with the LEA to the date of the hearing. (*Id.* & HT at 37.) As of the date of the Hearing, no re-evaluation (implying the tri-annual evaluation and otherwise) was completed. (*Id.*)

- The LEA and Prior LEA were advised of the Parent's concern regarding autism. (HT at 24 & 74.)

- The Parent testified that she routinely provided medical evidence (Child's pediatrician) to the Prior LEA who confirmed the diagnosis of autism. (HT at 25.)[3]

- The Parent Consented to the IEP in September 2021, Parent/Child's Exhibit 10. (HT at 26.)

- The Parent testified that she was concerned that autism was not discussed at any IEP she attended. (HT at 27, 74 & 135.)

- The Parent testified that she did not recall the Child hearing being specifically discussed. (*Id.* & HT at 32.)

- Speech therapy was discussed at an IEP meeting, implying a meeting in the Fall of 2021. (HT at 30-31.)

- ESY services were not discussed at an IEP meeting, implying a meeting in the Fall of 2021. (HT at 33.)

- The use of a BIP (behavioral improvement plan) was not discussed at an IEP meeting, implying all IEP meetings with the LEA. (HT at 38-39.)

- The LEA did not provide "courses or any instructions" regarding the IEP process or explain "development delay." (*Id.*)

- The Re-evaluation process (implying tri-annual evaluation) will be completed after the Hearing, May 12, 2022. (HT at 35 & 130-131.)

- The Child elopes implying that ███ physically removes ███self from a structured

[3] However, no supporting documentation was introduced except Parent/Child's Exhibit 6.

environment, without warning. (HT at 39.) The LEA or Prior LEA failed to address this problem with such remedies as a BIP or "one-on-one" assistance. (HT at 40-41.)

- The Child demonstrates an unwanted behavior of placing objections, *etc*., in ███ mouth, a choking hazard. (HT at 41.) The LEA or Prior LEA failed to address this problem with such remedies, implied, as a BIP or "one-on-one" assistance. (HT at 41-42.)

- Although the behavior has not been seen "in a while," the Child has demonstrated seizures; loss of focus for a few seconds. (HT at 45 & 48.) These seizures require supervision for safety reasons; loss of balance. (*Id*.) Such circumstances were not discussed by, by implication, any LEA or Prior LEA, IEP team. (HT at 46-47.)

- The Parent expressed concerns regarding the Child's safety while in school and the LEA's response. (HT at 133-134.)

- The Parent testified as to her sincere concern that the IEP and its implementation failed to provide the Child access to ███ curriculum. (HT at 49-51.)

- For the 2021-2022 school year, the Child did not attend school due to, by implication, LEA transportation issues for approximately two months. (HT at 59-60 & 76.) No instructional services (including homebound services) were provided by the LEA for reasons unexplained. (HT at 60-61.) The circumstances undermined the Parent's faith in the LEA. (HT at 64.) Both the Prior LEA IEP on page 9 and the IEP on page 20 require transportation.

- The Parent had great concerns regarding the IEP's use of a "Rifton chair." (HT at 66-73, 111.)

- The Child, by implication, was sent home in the Fall of 2021, due to the LEA's inability to provide FAPE. (HT at 75.) This undermined the Parent's faith in the LEA; "red flag." (*Id*.)

- The Parent filed the necessary documents to generate the State Complaint. (HT at 76.)

- The Parent requested "private placement" by implication in the Due Process Request. (HT at 77.)

- The Parent testified that she should be reimbursed for expenses and costs for "replacement services." (HT at 79.) (No amount or entity was provided for reasons unclear.)

- The Parent did not observe the Child in a classroom setting. (HT at 80.) The Parent was denied access, according to her undisputed testimony due to COVID restrictions. (*Id*.)

- The Parent is not licensed as a teacher or medical provider. (HT at 80-81.)

- LEA Exhibit 5, the last agreed upon IEP from the Prior LEA, was consented to by the Parent. (HT at 81.) This was the IEP transferred from the Prior LEA to the LEA. (*Id*.)

- She did not recall meetings with the LEA including the need for re-evaluation in the Fall of 2021. (HT at 61-64.) She did recall about a "procedure" regarding evaluations in "a little bit later." (HT at 83.) She similarly recalled a discussion with the LEA regarding "occupational therapy" by, implication, in the Fall, 2021. (HT at 85.)

- On March 10, 2022, the Parent and LEA agreed that the Parent can conduct a private hearing evaluation. (HT at 88; LEA Exhibit 10, page 1.)

- On October 21, 2021, the Parent consented to the IEP, LEA Exhibit 4. (HT at 90 & LEA Exhibit 4, page 23)[4]

- The Parent does not recall the discussion regarding re-evaluation in the process of generating, the IEP including the reference in the IDEA, page 24, Box 2, regarding "testing." (HT at 92-93.)

- The Parent participated in the IEP process creating the IEP including the opportunity to ask questions. (HT at 96.)

- The Parent testified that she filed the State Complaint, LEA Exhibit 15, because the LEA was not attending school due to transportation and, therefore, not obtaining FAPE. (HT at 97.)

- Re-evaluation was not a subject of the State Complaint. (HT at 98.)

- The Parent signed the First IEP Amendment. (HT at 104-105.)

- By implication, the Teacher and the Support Teacher have been available to the Parent as a source of information as needed. (HT at 105-110.)

- The Parent had not "really spoken with [the LEA] about private placement." (HT at 109.)

- The Parent consented to the Second IEP Amendment on February 25, 2022. (HT at 112; LEA Exhibit 2, page 24.)

- The Parent consented to the Third IEP Amendment on March 8, 2022. (HT at 114.)

- The LEA placed the Child first at First School in September of 2021. (HT at 122, 125-126.)

- The Parent observed the Child's emotional response, crying and yelling, upon ███ being picked up from the Second School (implying routinely), atypical of ███ normal behavior. (HT at 126.)

---

[4] The IEP, LEA Exhibit 4, Box 2, on page 24 states, in pertinent part: "[T]his IEP will serve as a continuation of [the Prior LEA's IEP] as further data is collected.... [This IEP shall] remain in place until components of eligibility can be completed. [The Parent] provided verbal consent to do testing during the IEP meeting on 09/29/2021. [The LEA] IEP team will provide [the Parent] with the appropriate paperwork."

- By implication, the Current School has not found that the Child requires discipline by, implication, under IDEA. (HT at 127.)

As a rebuttal witness, the Parent was called.

- She found her signature to the Parental Consent, LEA Exhibit 10, simply as her agreement to "initiate the evaluation process." (HT at 536.)

- She testified that "[h]ad ever been offered such a consent or given such a consent which" she "refused" to sign. (HT at 537.)

- She denied discussions with the Coordinator. (HT at 538.)

- The Parent did not feel her communications impeded the LEA from performing evaluations (implying re-evaluations and/or tri-annual evaluations. (HT at 543.) She denied receiving emails regarding such evaluations including the Hearing exhibits introduced. (*Id*.)

- The Parent discussed the need for re-evaluation (implying the tri-annual evaluation) with the Assistant Principal. (*Id*.)

- She spoke with the Coordinator several times. (HT at 552.)

- Re-evaluations could not occur at the First School or Second School because the Child was not "in attendance." (HT at 552.)

The Parent was found to be credible except insofar as her testimony which was inconsistent with documents she signed, consented to or emailed and, especially regarding notice of re-evaluation (implying tri-annual evaluation). On the specific issue of evaluations, the Parent appeared to be "stalling" as opposed to addressing the issue. To her credit, "stalling" may have been appropriate to allow for the arrangement of private evaluations. However, given the period of time from September 2021 to May 2022, such conduct cannot be found against her or the LEA. Overall, she appeared as a loving, educated, parent devoted to the Child and cooperative with the LEA.

The Consultant was qualified as an expert in special education as described on HT at 171. (HT at 154-178.) However, any purely legal opinions were not considered and found as concerns and allowed only as an accommodation to the Parent/Child. (*See* '8.01-401.3 of the

Virginia Code.) Similarly, opinions outside of the designation were not considered except as such may be part of her designation as found as concerns. She testified to the following:

- The Consultant reviewed LEA Exhibit 5, apparently a draft IEP. (HT at 181; LEA Exhibit 5.) This document incorrectly references the Child under the IEP category of "developmental delays." (HT at 182.) This IDEA category is unavailable to the Child based on [redacted] age. (HT at 183-184.)

- The Consultant reviewed the IEP, LEA Exhibit 4. (HT at 185.) This document incorrectly references the Child under the IEP category of "developmental delays." (HT at 185.) This IDEA category is unavailable to the Child based on [redacted] age. (*Id.*)

- The LEA has a responsibility to trigger a referral on the basis of the autism notification provided by the Parent. (HT at 191.)

- The IEP does not, and should have, referenced autism. (HT at 190-193 & 201.) If such diagnosis is found and received by the LEA, the LEA should have instantly taken action to obtain data, tests, *etc*. (HT at 193.) With such diagnosis of autism, the LEA was required to expedite a response. (HT at 206.)

- The Child's hearing issue could affect [redacted] accessing curriculum. (HT at 197-199.) A hearing evaluation is required. (HT at 197-198.)

- The Child's hearing difficulties should have been contained in the IEP, Parent/Child's Exhibit 10. (HT at 199-201.)

- A psychologist and hearing professionals should have been on the IEP team. (HT at 201 & 204.)

- The Child was due for re-evaluation (implying tri-annual evaluation). HT at 205.

- The child had difficulty communicating. (HT at 209-211.)

- The IEP is "problematic." (HT at 217.)

- The Third Amended IEP does not provide the Child FAPE. (HT at 221-225.)
- Use of the Rifton chair was unwarranted. (HT at 227.)
- The Child required an applied behavioral analysis (FBA). (HT at 231.)
- Use of the Rifton chair denied the Child FAPE implying overall use. (HT at 232.)
- If the IEP is deficient under IDEA, implementation of its services would deny the Child FAPE. (HT at 240.)
- The Consultant did not attend any "meetings" implying meetings between the Parent and LEA and Prior LEA including IEP meetings. (HT at 246.)
- The Consultant did not observe the Child in any classroom environment. (*Id.*)
- Any LEA drafts and IEP must have "current data." (HT at 262.)
- The Child required transportation under IDEA, implying at all relevant times. (HT at 268.) (See, by implication, the Prior LEA IEP on page 9 and the IEP on page 20 both requiring transportation.)
- The IEP should include toileting goals. (HT at 292 & 295.)

The Consultant was found to be credible except her testimony was discounted insofar as no evidence that she observed the Child in the classroom setting or spoke with the Child's educational providers and the IEP LEA members.

The LEA presented four witnesses: Assistant Principal; Coordinator, Teacher and Support Teacher.

The Assistant Principal for the First School testified as a fact witness. (HT at 304.) She was not qualified as an expert. Although she provided opinions and, at times legal opinions, such testimony was only considered as concerns.

- She served at the First School for four years. (HT at 303-304.)
- She possessed the necessary credentials to function in her position. (HT at 309-310.)
- The Assistant Principal and Parent engaged in discussions regarding the Child' placement regarding the First School. (HT at 311-312.) She attended an IEP meeting in September 2021, and a re-evaluation meeting in October 2021. (HT at 363.)
- The Parent did not want the Child enrolled in the First School. (HT at 313 & 316.)

- In regard to Exhibit 7 (implying LEA Exhibit 7), evidences a confirmation that the Parent did not want the Child to attend the First School. (HT at 317 & LEA Exhibit 7.)

- Approximately five conversations occurred between the Parent and the LEA regarding prior placement at the First School. (HT at 319.)

- The IDEA required information from the Prior LEA to establish a new IEP. (HT at 325.)

- The First School, *via* LEA, spoke to the Parent regarding re-evaluation (implying the tri-annual evaluation.) (HT at 328-332 & 336.)

- The Parent did not provide the LEA with consent to evaluate (implying the tri-annual evaluation and otherwise) because the Parent felt the Child "would not do well on testing." (HT at 334.) Further, the Parent was in the process of "getting outside evaluations" for LEA consideration. (*Id*.)

- The First School did not refuse a parental request for an evaluation. (*Id*.)

- Professionals from the First and Second School attended a meeting, implying IEP meeting by implication, in the Fall of 2021. (HT at 334-335.) Re-evaluation was discussed with the Parent. (HT at 336.)

- The Child never attended school at the First School. (HT at 337 & 355.)

- The Parent enrolled the Child in the First School because it was his "zone" school, *via* online, because of relocation. (HT at 338-339.)

- By implication sometime in the Fall of 2021, the Parent and First School discussed the need for a tri-annual evaluation. (HT at 340.)

- The First School received only, by implication, the IEP without requisite paperwork implying when the Child enrolled in September 2021. (HT at 340-341.)

- By implication in the Fall of 2021, the Mother did not refuse re-evaluation but did not provide written consent. (HT at 342.) While she testified that the LEA delivered documents to consent to a re-evaluation (implying tri-annual evaluation), she testified that it was at the "eligibility meeting" but could not remember the date. (HT at 343-345.)
- As reference in LEA Exhibit 4, there was an IEP meeting on September 29, 2021, when it was decided to hold a "re-evaluation" meeting. (HT at 345.)

- On March 12, 2022, the Parent signed LEA Exhibit 10, the "Parental Consent to Evaluation." (HT at 348-349.)
- Parental consent to evaluations (implying the re-evaluation or tri-annual evaluation, *i.e.*, LEA Exhibit 10) was sent to the Parent at the conclusion of a meeting *via* a link on the Parent's personal portal on a web source entitled "Virginia IEP." (HT at 350.) If the Parent had consented, the consent would have been uploaded through this portal to Virginia IEP. (HT at 359.)

- Consent was sent to the Parent *via* email and the Virginia IEP portal. (HT at 363.)

- In regard to tests required by tri-annual evaluation, the Parent was conflicted with concerns regarding the Child being evaluated by the LEA or privately. (HT at 351.) This was at the transitional meeting between the First School and Second School implying sometime in the Fall of 2021. (HT at 352.)

- The Assistant Principal had several conversations with the Parent regarding the need for re-evaluation (implying tri-annual evaluation). (HT at 352.) The Parent did not provide consent to having the Child re-evaluated until ███ was privately tested. (HT at 358, 363 & 365-366.)

- According to the concerns of the Assistant Principal, parental consent to the re-evaluation (implying tri-annual evaluation) is necessary. (HT at 353.) Her concern was expressed as:
    - *According to state regulations you absolutely can file due process against a parent. However, from my extensive knowledge as a exceptional education specialist[,] I would never do that without having data. [She and] never me [the Child]. [She had] never worked with [the Child]. [She had] no knowledge, from[the Prior LEA], what he was evaluated on, what his scores were, so to take a parent to court to say you are not providing us with information, and she never once brought her child to [the First School] to attend, I would not file due process against her.*

    - (HT at 354-355.)

- The Assistant Principal testified that she did not have sufficient data on the Child to file a Due Process on the issue of re-evaluation. (HT at 355.)

- The Child was registered with the First School, but did not enroll and, therefore, truancy was not an issue. (HT at 356.) Further, she testified: "We've had several conversations with [the Parent], like you established, she was a very involved parent, she responded to e-mails by calling me back, she communicated her needs and wants, we had several IEP and reevaluation meetings to make sure that everything was in place for her ███ to start school. And once she had that meeting, she enrolled her ███ at [Second School], so I had no reason to send truancy, because it's a process for special education, and she expressed her concern that she did not want her child starting until she knew everything was in place. Once everything was in place, and she signed that IEP, she enrolled her child. So no, I would not send truancy after her." (HT at 356-357.)

- Because the Parent did not provide consent to re-evaluate, the Prior LEA's IEP must, according to the Assistant Principal, be utilized (implying per IDEA Regulations). (HT at 358.)

- The First School "lost jurisdiction" when the Child "went to another school." (HT at 359.)

- For IDEA purposes, the Child was last evaluated in Kindergarten, approximately three years ago. (HT at 364-365.)

- The remedies described by the State Complaint have been delivered and were considered as part of the evidence. (LEA Exhibit 15.)

The Assistant Principal was found extremely credible based on her demeanor, the consistency between her testimony and the Exhibits.

The Coordinator testified as a fact witness. (HT at 304.) She was not qualified as an expert. Although she provided opinions and, at times legal opinions, such testimony was only considered as concerns.

- For the last three years, her position is the school-based instructional compliance coordinator for the Second School. (HT at 371.)

- Her prior position was a special education teacher at the Second School. (HT at 372.)

- The Second School received LEA Exhibit 4 from the First School. (HT at 376.)

- The First Amended IEP was a result of an IEP process with the Second School which document was consented to by the Parent on November 22, 2021. (HT at 376-378; & Exhibit 3.)

- The First Amended IEP was not an "updated" IEP because the Second School lacked "enough data to support a full IEP change." (HT at 377.)

- At a "greeting meeting" at the Second School, implying in the Fall of 2021, the Second School discussed the importance and need for re-evaluation (implying tri-annual evaluation). (HT at 378 & 382.) In response, the Parent withheld necessary consent because the Child required a medical "procedure." (*Id.* & HT at page 426.) The Parent would update the LEA regarding the scheduling of the procedure. (HT ate 426.) This was not a formal IEP or re-evaluation meeting. (HT at 379.) The procedure should be completed in December of 2021. (HT at 381.) The Parent would provide documentation regarding the diagnosis of autism "after the procedure. (HT at 427.)
- The Child was enrolled and attended the Second School for approximately two months, October and November of 2021. (HT at 379.)

- The Second School and the Parent had several discussions (approximately five) by, implication, in the Fall, 2021. (*Id.*)

- In response to the subject of re-evaluation (implying tri-annual evaluation), the Coordinator testified: "[w]e discussed it, but after -- I mean, she shared, you know, her feelings towards the procedure, and we need to wait until after that, and we understood that ... was what she wanted, and we didn't want to pressure her into doing something that she isn't feeling comfortable with, so it wasn't, you know, the forefront of my conversations with her, but it was something that we brought in and had a conversation about, early, when ███ first started at [the Second School]." (HT at 380.)

- She testified that the LEA, *via* its Office of Exceptional Education (implied directive), does not allow a re-evaluation (implying tri-annual evaluation) without parental consent. (HT at 381-382.)

- The Coordinator participated in the creation of the First Amended IEP, LEA Exhibit 3, as the "manager of the child" implying the Child's caseworker. (HT at 383 & 385.) On page 2, paragraph 1, the document references the need for a re-evaluation, implying the tri-annual evaluation, in 2020. (HT at 383-384; & LEA Exhibit 3.)

- The Second School recognized that the designation under the First Amendment was out of date. (HT at 385.)

- The Coordinator observed the Child placing objects in ███ mouth by, implication, in the Fall, 2021, while attending the Second School. (HT at 386.) Such conduct was a source of concern but there existed "enough supervision" to ensure safety. (HT at 387.) No "safety plan" was in place. (HT at 388.) While a "safety plan" is available, it was unnecessary. (HT at 394 & 419.)

- The Child demonstrated a "short attention span" while attending the Second School. (HT at 390.)

- The Child's eloping was not subject of a "safety plan" but sufficient staff was available to where this behavior did not occur or not observed while attending the Second School. (HT at 392, 395 & 419.) While a "safety plan" is available, it was unnecessary. (HT at 394.)

- Despite references in the IEP and First Amended IEP, the Child did not need a Rifton chair while attending the Second School. (HT at 397.) The Child was not observed using the Rifton Chair by the Coordinator. (HT at 419.)

- On page 24 of the First Amended IEP (LEA Exhibit 3), private placement was discussed (including the subject of least restrictive environment) but rejected by the IEP team. (HT at 398-399.)

- The Second School did not receive consent for re-evaluation (implying a tri-annual evaluation) from the Parent. (HT at 399.)

- The Parent shared the "diagnosis" of autism with the IEP by implication, in the creation of the First Amended IEP, LEA Exhibit 3. (HT at 400.) The notification did not trigger the need to change the Child's IDEA designation because such designation exists for "autism," a medical diagnosis. (HT at 401.) A "checklist" of criteria was needed. (*Id.*) Parental notification of autism triggers the need for such condition's impact on the Child's educational needs. (HT at 405 and 424.)

- The LEA, *i.e*., the Second School, did not have the medical documentation to substantiate the Parent's allegation that the Child was diagnosed with "autism" when, by implication, the First Amended IEP (LEA Exhibit 3.) (HT at 402.) On this issue, the Coordinator testified:

- *We just had the parent tell us that ██ was medically diagnosed with autism, but we did not have any medical documentation of it, and when we asked to do the eligibility paperwork, where we would gather more information,* ***including outside medical reports, the parent indicated that she didn't want to proceed with that process yet, and she wanted to wait until after the procedure was completed.***

- [Emphasis added.] (HT at 402-403 & 424.)

- In regard to scheduling an "eligibility meeting," the Mother demurred on the basis that she wanted the "label (*i.e.*, Development Delay) to remain, implying during the creation of the First Amended IEP (LEA Exhibit 3.) (HT at 403.)

- The meeting referenced in the First Amended IEP of November 22, 2021, was an IEP meeting, not an eligibility meeting. (HT at 404.) The IDEA subjects of eligibility and re-evaluation are different. (HT at 405.)

- Amendment to an IEP allows review of certain specific parts and, by implication, not a full review. (HT at 410.)

- The Mother (by implication) the necessary meeting which generated the First Amended IEP virtually. (HT at 414-415.)

- An LEA "private placement specialist" or "private day specialist" attended IEP meetings which generated the First Amended IEP (LEA Exhibit 3). (HT at 420 and 422.)

The Coordinator was found credible based on her demeanor, the consistency of her testimony with the Exhibits and contact with the Child.

The Teacher testified as a fact witness. (HT at 442.) She was not qualified as an expert. Although she provided opinions and, at times legal opinions, such testimony was only considered as concerns.

- For the past five years, when was the "instructional compliance teacher" for the Current School. (HT at 442.) Prior, she served as an "exceptional case manager, K through 5. (*Id.*) She possesses a license to teach and as an administrator. (HT at 443.) She is familiar with the Child. (*Id.*)

- The Child attends the Current School. (*Id.*) The Teacher has observed the Child in the classroom. (HT at 444.)

- Since arrival at the Current School, the IEP has been amended twice, Second Amended IEP (LEA Exhibit 2). (HT at 445-446.)

- The Child arrived at the Current School in December, 2021. (HT at 447.) Upon arrival, the Current School further had not the opportunity to obtain data: Winter break, COVID quarantine (ten days) and non-unusual absences. (HT at 447-448.) This precluded other updates to the IEP implying the Second Amended IEP (LEA Exhibit 2.) (HT at 448.)

- The meeting regarding the Second Amended IEP did not occur on February 4, 2022, because the Parent was unavailable due to a new job. (HT at 448-449.) The meeting was conducted on March 2, 2022. (HT at 460.) The Parent appeared virtually at a subsequent meeting. (HT at 449.) She received the document afterward *via* email or Virginia IEP. (*Id.*) LEA employees were available at the meeting to answer the Parent's questions. (HT at 451.)

- The Teacher was available, implied as needed, to answer, and has answered, the Parent's questions. (HT at 451-454.)

- The Parent regularly reaches out to the classroom teacher at the Current School with questions. (HT at 454.)

- The Third Amended IEP, LEA Exhibit 1, is the last agreed-upon amendment to the IEP. (HT at 455.)

- During the "prior meeting" which generated the Third Amended IEP, the LEA and the Parent discussed the need to re-evaluate the Child, implying the tri-annual evaluation. (HT at 456.) The Teacher discussed re-evaluation with the Parent prior to February 21, 2022. (HT at 457.)

0 The Teacher testified that on March 2, 2022:

So I noticed, you know, [with] Virginia IEP online[,] you have a little red dot that says that there needed to be ... a re-evaluation. So I talked to [the Parent] and told her that [the LEA] that we had a due diligence to move forward with the re-evaluation, but also I explained to her, too, that to better help [the Child] and to put things into perspective, and for [the LEA] to collect the data that [it] needed to make sure [it] could make informed decisions about developing a new IEP for -- that information was important for us to move forward with that, and she -- she agreed. And the reason being is because she wanted to hold off until after [the Child] was tested, he went through his surgery, but that kept being pushed back. So I explained to her, well, while that's being pushed back we want to make sure that we're doing everything that we can for [the Child], the best that we can to help service this child. So I said, would you allow [the LEA] to please go ahead and go through with the re-evaluation process so we can get things moving.

(HT at 457-459 & 463.)

0 On March 2, 2022, the Mother willingly consented to the re-evaluation (implying tri-annual evaluation. (HT at 461 & 488.)

0 The Current School required additional data to complete the re-evaluation process. (HT at 464 and LEA Exhibit 10, page 4.) Additional data was required by the Child who had aged-out of the IDEA designation of "developmental delay." (HT at 464.)

0 Review of the Child's evaluations as referenced in LEA Exhibit 10, by IEP team decision, is scheduled for May 10, 2022, after the Hearing. (HT at 465 & 481-482.)

0 To the knowledge of the Teacher based on daily observations, the Rifton chair has not been used at the Current School. (HT at 466, 468 & 470.) All the chairs in the Child's classroom are "regular" implying no Rifton chair therein. (HT at 468-469.) The use of the Rifton Chair was removed from the Third Amended IEP. (HT at 480; & LEA Exhibit 1.)

0 The Teacher was unaware of a "diagnosis" of autism. (HT at 488.)

0 Between the date the Parent consented, March 22, 2022, and the date of the review of resulting evaluation results of May 20, 2022, is reasonable. (HT at 491.)

0 The Parent was cooperative with the Teacher. (HT at 493.)

The Teacher was found credible based on her demeanor, the consistency of her testimony with the Exhibits and contact with the Child.

The Support Teacher testified as a fact witness. She was not qualified as an expert. Although she provided opinions and, at times legal opinions, such testimony was only

considered as concerns.

0 For the last four years, the Support Teacher taught students with multiple disabilities, from kindergarten to fifth grade. (HT at 497.) She has been licensed as an exceptional education teacher for twenty-six years. (*Id.*) She has a applicable license in intellectual disabilities, from kindergarten to twelfth grade. (HT at 498.) Of the IEP team, she is the closest and more persistent contact with the [Child]. (HT at 528.)

0 As a student in the Support Teacher's classroom, she is familiar with the Child and implemented his IDEA requirements. (*Id.*)

0 The Child arrived with the IEP and Second Amended IEP to the Current School. (HT at 499-500.)

0 During the creation of the Third Amended IEP was proposed, the LEA did not have the opportunity to collect data-December 1st starting date, Winter vacation, COVID, *etc*. (HT at 500-501.)

0 The Support Teacher made herself available for inquiries at all times including, at times, daily updates. (HT at 504-505 & 509.) The Support Teacher and Parent have successfully communicated (implying routinely) since his enrollment at the Current School. (HT at 505.)

0 No Rifton chair is not in the classroom or used in the classroom. (HT at 506.)_

0 The subject of re-evaluation (implying tri-annual evaluation) was discussed once between the Support Teacher and the Parent. (HT at 507.) The Parent responded that Child required a "procedure" before testing. (HT at 507-508.)

0 The Support Teacher testified:

Q. *You had also said that [the Child] was doing well in your classroom, can you explain to the hearing officer what that looks like and why you are saying that?*
A. *When [the Child] first came to us, he had very little attention. He would come in the room and just run from one side to the other and really just not have a routine. And since we've had [the Child], my room is very structured, it's very same -- same thing every day.· He has his visual schedule and he just knows his expectations, plus he now trusts us. So now he comes in, he walks in, puts his bag down, with assistance he'll unpack his bag. He knows to eat his breakfast. He helps clean up. He gets ready for his day. He just -- he knows the schedule and his attention has increased.*

Q. *And have you made [the Parent] aware of his progress?*
A. *Yes, ma'am.*

(HT at 508-509.)

0 On March 10, 2022, the Parent consented to getting on the "testing calendar." (HT at 517.) Further, she testified:

Q. .... So you never suggested to the team that -- that you do the autism checklist?
A. We have to follow protocol, sir. So first we have to get on the testing calendar, then we have to get permission to test, then once we get the results and we meet with the results then we go through the checklist.

(HT at 527.)

0 The Parent was (implied sincerely) concerned about the Child's progress. (HT at 519.)

0 The Parent did not disclose her concern regarding autism. (HT at 521.)

0 The Child is a "loner" and "reluctant" to communicate with others. (HT at 522.)

The Supporting Teacher was found credible based on her demeanor, the consistency of her testimony and the Exhibits and contact with the Child.

EXHIBITS INTRODUCED

1. The Parent/Child introduced into evidence the following Exhibits: 6, 10 & 11.

2. The LEA introduced into evidence the following Exhibits: 1, 2, 3, 4, 5, 7, 8, 9, 10 and 15.

RELEVANT FACTUAL FINDINGS (By a Preponderance of the Evidence)

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

1. The Child lacks the capacity to perceive danger mandating supervision.

2. The Child can independently feed himself and navigate stairs.

3. The Child cannot dress himself as well as related activities.

4. The Child has hearing difficulties.

5. The Child's difficulties with toilet training and related issues mandate supervision.

6. The Child elopes implying that he physically removes himself from a structured environment, without warning--a source of danger mandating supervision.

7. The Child places objects in his mouth, a source of dangerBpicaBmandating supervision.

1) Although the behavior has not be seen "in a while," the Child has demonstrated

seizures-loss focus for a few seconds, a source of danger or at least a cause for redirection, mandating supervision.

8. The Child's lack of attention span mandates supervision for redirection and safety.

9. The Child's profound difficulties (academic and otherwise) as well as his academic record were communicated to the LEA from the prior LEA timely.

10. The Parent did not provide the Prior LEA with consent to conduct re-evaluations and/or the tri-annual evaluation.

11. The First School did not receive consent from the Parent to conduct a re-evaluation and/or tri-annual evaluation.

12. The Second School did not receive consent from the Parent to conduct a re-evaluation and/or tri-annual evaluation.

13. No persuasive evidence was introduced by the Parent/Child from any medical source that the Child had been medically diagnosed with Aautism@ except as found in Parent/Child's Exhibit 6 under AAssessment,@ a document from a medical provider which states, in pertinent part:

Assessment

Diagnosis:
Developmental delay
Speech and language delay
Atypical behaviors ***concerning for likely*** *Autism spectrum disorder*

[Emphasis added.]

14. The Child was transferred to the LEA from the Prior LEA in September, 2021.

15. The LEA and Prior LEA were advised of the Parent's concern regarding autism.

16. The Parent Consented to the IEP in September, 2021.

17. The Re-evaluation process (implying tri-annual evaluation) will be completed after the Hearing on May 12, 2022.

18. The Child's eligibility for an IDEA designation will be reviewed after the Hearing on May 12, 2022.

19. IDEA services for the Child will be reviewed after the Hearing on May 12, 2022.

20. The Prior LEA IEP on page 9 requires transportation by the LEA.

21. The IEP, as amended, on page 20 requires transportation by the LEA.

22. In the Fall of school year 2021-2022 school year, the Child did not attend school or received IDEA services for approximately two months through no fault of the Parent.

23. Failure to provide transportation for the Fall of 2021-2022 was in violation of the requirements of the IEP on page 9, requiring the LEA to provide transportation.

24. The Child was denied FAPE when the LEA failed to transport the Child for approximately two months in the Fall of school year 2021-2022 in violation of the requirements of the IEP, page 9.

25. The LEA sent the Child home in the Fall of 2021, due to the LEA's inability to provide FAPE as described by the IEP.

26. The Parent/Child filed the documents which generated the State Complaint which findings are incorporated herein by reference as if set forth in full.

27. No persuasive evidence was introduced regarding a specific "private placement" other then the LEA's not providing FAPE; *i.e.*, no evidence of a specific private placement was introduced regarding its providing FAPE.

28. No persuasive evidence was introduced regarding the cost of reimbursement of "replacement services for tutoring."

29. The Parent is not licensed as a teacher or medical provider.

30. On March 10, 2022, the Parent and LEA agreed that the Parent shall conduct a private hearing evaluation.

31. The Teacher and the Support Teacher have been available to the Parent as a source of information as needed.

32. The Parent had not Areally spoken with [the LEA] about private placement.@

33. The Parent consented to the Prior LEA’s IEP.

34. The Parent consented to the IEP.

35. The Parent consented to the First Amended IEP.

36. The Parent consented to the Second Amended IEP.

37. The Parent consented to the Third Amended IEP.

38. The Parent signed and consented to the Parental Consent.

39. The Parent discussed the need for re-evaluation (implying the tri-annual evaluation) with the Assistant Principal.

40. Re-evaluations could not occur at the First School or Second School because of the Child was not “in attendance.”

41. The IEP (and consequently the First Amended IEP, Second Amended IEP and Third Amended IEP) incorrectly references the Child under the IEP category of “developmental delay” which is unavailable under the IDEA due to the Child’s age.

42. The Child’s hearing difficulties should have been contained in the IEP.

43. Use of the Rifton chair was unwarranted for the school year 2021-2022.

44. The Current School did not utilize the Rifton chair.

45. The Third Amended IEP correctly removed the use of the Rifton chair.

46. The Child required his IDEA tri-annual evaluation in 2020.

47. The IEP lacked sufficient timely and current data, evaluations, tests and components as required by IDEA.

48. The IEP contained outdated information, data, goals, evaluations tests and components required by IDEA.

49. The IEP references an out-of-date designation for the Child.

50. The IEP denies the Child FAPE.

51. The First Amended IEP lacked sufficient timely and current data, evaluations, tests and components as required by IDEA.

52. The First Amended IEP contained outdated information, goals, data, evaluations tests and components required by IDEA.

53. The First Amended IEP references an out-of-date designation for the Child.

54. The First Amended IEP denies the Child FAPE.

55. The Second Amended IEP lacked sufficient timely and current data, evaluations, tests and components as required by IDEA.

56. The Second Amended IEP contained outdated information, goals, data, evaluations tests and components required by IDEA.

57. The Second Amended IEP references an out-of-date designation for the Child.

58. The Second Amended IEP denies the Child FAPE.

59. The Third Amended IEP lacked sufficient timely and current data, evaluations, tests and components as required by IDEA.

60. The Third Amended IEP contained outdated information, goals, data, evaluations tests and components required by IDEA.

61. The Third Amended IEP references an out-of-date designation for the Child.

62. The Third Amended IEP denies the Child FAPE.

63. The IEP, as amended by the First Amended IEP, Second Amended IEP and Third Amended IEP, does not provide the Child FAPE.

64. Given the Child's difficulties (*e.g.*, incapacity to perceive danger, pica and eloping), the Child was denied FAPE by the LEA's failure to provide transportation (or amend the IEP to require transportation) for two months in the Fall of 2021.

65. The overwhelming evidence was that the Parent was notified of the importance of arranging a re-evaluation (and/or tri-annual evaluation) of the Child at all times relevant hereto.

66. The delay for arranging a re-evaluation (and/or tri-annual evaluation) was solely caused by the Parent's decision.

67. The LEA did not refuse to arrange for a re-evaluation and/or tri-annual evaluation.

68. The LEA did not file a Due Process Request to effectuate a re-evaluation and/or tri-annual evaluation.

69. The Child never attended school at the First School.

70. The composition of the members who participated in the IEP process which created the IEP was in accordance with IDEA.

71. The composition of the members who participated in the IEP team which created the First Amended IEP was in accordance with IDEA.

72. The composition of the members who participated in the IEP team which created the Second Amended IEP was in accordance with IDEA.

73. The composition of the members who participated in the IEP team which created the Third Amended IEP were in accordance with IDEA.

74. On March 12, 2022, the Parent signed LEA Exhibit 10, the "Parental Consent to Evaluation."

75. No designated expert testified on behalf of the LEA.

76. The Parent cooperated with the LEA.

77. The Parent was an "hands-on" parent to the advantage of the Child and the LEA.

78. The Parent possessed the commitment a well as the necessary knowledge (or resource to necessary knowledge) to interact with the LEA in regard to the issues raised by the IEP process.

79. In the Fall of 2021, the LEA lacked the necessary data, *e.g*., daily contact with the Child and his special needs in a classroom setting, to meaningfully develop a revised IEP.

80. The structure of the Current School has allowed the Child to progress although no persuasive evidence (by, *e.g*., a designated expert) was introduced that such progress included material academic progress as described by the IDEA.

81. No persuasive evidence was introduced to allow the award of compensatory education services or the cost thereof.

82. No persuasive evidence was introduced to allow the award of replacement of the related services of parent training and consultative services or the cost thereof.

83. No persuasive evidence was introduced to allow the award of psychological and counseling services or the cost thereof.

84. No persuasive evidence was introduced to allow the award to reimburse the Parent regarding counseling services or the cost thereof.

85. The Child was not transferred within the same school year as referenced in

8VAC20-81-120A.

86. The State Complaint addressed the two-month period wherein the Child did not receive educational services in the Fall of 2021.

87. The LEA complied with the mandates of 8VAC20-81-80.

88. The LEA complied with the mandates of 8VAC20-81-120.

ANALYSIS:

Legal Analysis

Major areas of the law are undisputed.

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

In Endrew F. *ex rel*. Joseph F. v. Douglas Cty. Sch. Dist., 580 U.S. ___ 15827, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated in Rowley, *supra*, for what constitutes an appropriate IEP under the IDEA: "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Endrew F., 137 S.Ct. at 999.... The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id*. ...Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. *Id*. . . . The IEP must aim to enable the child to make progress. . . . [T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement. *Id*. . . . **A focus on the particular child is at the core of the IDEA**. [Emphasis added.].... *Id*., 137 S.Ct. at 1002. *See, also*, T.B., Jr. by & through T.B., Sr. v. Prince George's Cty. Bd. of Educ., 897 F.3d 566, 571 (4th Cir. 2018), *cert. denied sub nom*. T.B., Jr. ex rel. T.B., Sr. v. Prince George's Cty. Bd. of Educ., 139 S. Ct. 1307, 203 L. Ed. 2d 415 (2019).

In this administrative due-process proceeding initiated by the Parent/Child, they have the burden of proof in this **formal** hearing. Schaffer, *ex rel*. Schaffer v. Weast, 126 S.Ct. 528 (2005). The standard of proof is a preponderance of the evidence. County Schl. Bd. of Henrico County v. Z.P., 399 F.3d 298, 304 (4th Cir. 2005).

In DeVries v. Fairfax County School Bd., 882 F.2d 876, 878 (4th Cir. 1989), the Court recognized the importance of mainstreaming when it opined that "[m]ainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with non-handicapped children is not only a laudable goal but is also a

requirement of the Act." *In accord* Barnett v. Fairfax County School Bd., 927 F.2d 146, 153 (4th Cir. 1991).

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

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

A review of Smith is important to emphasize the restrictions, constraints or limitations placed on hearing officers when deciding IDEA cases in Virginia. Although a child is involved, current law prevents a hearing officer's reviewing evidence as a Virginia juvenile district court judge must review in a custody matter with the "in the best interests of the child" standard as described in '20-124.3 of the Virginia Code. Instead, hearing officers must respect the limitations that

evidence, **especially expert testimony**,[5] determine the outcome in IDEA cases as well as respect the Federal directive that IEPs are reviewed with the standard established by Rowley and its progeny. The difference between the standard established by the Abest interests of the child@ and the standard established by Rowley (and its progeny) can never be reconciled. Quite frankly, this difference causes a great deal of litigation, cost and heartache. Educational determinations by LEA experts involved in the Child's education are entitled to deference. A.B. v. Lawson, 354 F.3rd 315 at 328 (4th Cir 2004); Hartmann v. Loudoun County Board of Education, 118 F.3rd 996, 1001 (4th Cir. 1997).

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

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

---

[5] The only witness who was designated as an expert was the Consultant who testified on behalf of the Parent/Child. No LEA designated expert testified.

Similarly, in E. L. v. Chapel Hill-Carrboro Bd. of Educ., 773 F.3d 509, 517 (4th Cir. 2014), the Court confirmed that it afforded A**great deference to the judgment of education professionals in implementing the IDEA.@ As long as an individualized education program provides the basic floor of opportunity for a special needs child, a court should not attempt to resolve disagreements over methodology**.[6] [Emphasis added.] *In accord,* O.S. v. Fairfax County Sch. Bd., 804 F.3d 354, 360 (4th Cir. 2015). Reviews of Heffernan and E.L. are important to show that the Parent was required to prove, by a preponderance of the evidence, that the LEA denied the Child FAPE by failing to implement material portions of the IEP as amended. In other words, a court, a hearing officer or a parent cannot micro-manage the implementation of an IEP, deferring to the expertise of LEA professionals.[7]

In R.F. v. Cecil County Pub. Sch., 919 F.3d 237 (4th Cir. 2019), *cert. denied* 140 S. Ct. 157 (Oct. 7, 2019), the Court found that "...and all must answer each of the following in the affirmative to find that a procedural violation of the parental rights provisions of the IDEA constitutes a violation of the IDEA: (1) whether the plaintiffs >alleged a procedural violation, (2) whether that violation significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child, and (3) whether the child did not receive a FAPE as a result."

---

[6] The evidence supports the conclusion that the LEA=s failure to provide the Child educational access or services for two months is inconsistent with the referenced Amethodology.@

[7] A court or hearing officer is required to give deference to the judgment of school board witnesses who are professional educators. Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, No. 15-827, 137 S. Ct. 988 (2017); Springer by Springer v. Fairfax Cnty. Sch. Bd., 134 F.3d 659, 663 (4th Cir. 1998) ("[C]ourts are required to give deference to the state and local education authorities whose primary duty is to administer the IDEA."); M.M. by DM and EM v. Sch. Dist. of Greenville Cnty., 303 F.3d 523, 531 (4th Cir. 2002) ("The court is not, however, to substitute its own notions of sound educational policy for those of local school authorities." *Citing* Hartmann v. Loudoun County Bd. Of Educ., 118 F.3d 996, 999(4th Cir. 1997)). The IDEA requires "great deference to the views of the school system rather than those of even the most well-meaning parent." A.B. v. Lawson, 354 F.3d 315 (4th Cir. 2004).

Virginia Regulation 8VAC20-81-150B3 describes the analysis regarding private placement. In summary, (1) did the IEP provide FAPE and, if not, (2) does the specific private placement provide FAPE with consideration to the least restrictive environment.

The LEA has previously argued, during prehearings, that certain issues are barred by doctrines of *res judicata* and, implied, collateral *estoppel*, based on the State Complaint. Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were or could have been raised in that action. Under collateral *estoppel*, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude re-litigation of the issue in a suit on a different cause of action involving a party to the first case. *Res judicata* and collateral *estoppel* relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. *See* Capuano *ex rel.* Torda v. Fairfax County Pub. Bd., 62 IDELR 81, 113 LRP 43987, 1:13-cv-00568-GBL-TRJ (E.D. Va. 2013) (*quoting* Allen v. McCurry, 449 U.S. 90, 94 (1980) (*citations omitted*)). In the context of IDEA litigation: "the Court holds that issue preclusion (collateral *estoppel*) does apply in the context of IDEA cases regarding eligibility and services provided in different school years if an issue has been fully litigated and decided on the merits and no new evidence of a material change in circumstances has been presented." *Id.* (ruling that claims are barred by collateral *estoppel* where a parent relied on the same evidence submitted in earlier years to show son had autism and an auditory processing disorder). A valid *res judicata*/collateral *estoppel* defense claim has three basic elements: (1) a final judgment issued on the merits of a prior claim or issue; (2) the identity of parties between the prior and present suits; and (3) the claim or issue was brought in the prior proceeding or arose out of the conduct,

transaction, or occurrence as the subject of the prior proceeding. Davison v. Rose, No. 1:16cv0540 (AJT/IDD), 2017 BL 265005 (E.D. Va. July 28, 2017), citing Lee v. Spoden, 290 Va. 23, 804-06 (2015). All three elements are not present in the current proceeding. By law, the Virginia Department of Education cannot be a party to the instant matter, a Due Process Request. (*See* 8VAC20-81-210A). Moreover, procedures, formal hearings and remedies available in the instant matter were not available in the procedures involving the State Complaint. The two matters contemplate different procedures, parties. remedies, *etc*. Therefore, the LEA arguments on this issue are denied. With that stated, the relief granted in State Complaint, especially regarding services, were considered in the instant matter.

8VAC20-81-80G states:

G. Parental consent for reevaluation. (34 CFR 300.300(c) and (d))

1. Informed parental consent is required before conducting any reevaluation of a child with a disability.

a. If the local educational agency can demonstrate that it has taken reasonable measures to obtain consent and the child's parent(s) has failed to respond, the local educational agency shall proceed as if consent has been given by the parent(s). Reasonable measures

include providing notice to the parent(s) in writing (or by telephone or in person with proper documentation).

b. *If the parent(s) refuses consent, the local educational agency may continue to pursue those evaluations by using due process or mediation procedures.* ***The local educational agency does not violate its obligation under this chapter if it declines to pursue the reevaluation.*** [Emphasis added.]

8VAC20-81-120C states: *If the local educational agency determines it necessary to conduct an evaluation of the child, the local educational agency shall provide proper notice, initiate evaluation procedures, conduct the evaluation, determine eligibility, and develop an IEP* ***in accordance with this chapter***. [Emphasis added.]

<u>Specific Issues</u>

I. For the 2021-2022 school year, did the LEA commit procedural errors regarding the child's tri-annual evaluation and, if so, did such errors deny the child FAPE?

On this issue, the law is clear.

The LEA committed no IDEA procedural errors. 8VAC20-81-80G & 8VAC20-81-120 mandate parental consent to re-evaluations (implying tri-annual evaluations). Specifically, under 8VAC20-81-120 "[t]he local educational agency does not violate its obligation under this chapter if it declines to pursue the reevaluation." 8VAC20-81-80C8 states "[t]he local educational agency shall obtain written parental consent for the initial eligibility determination. Thereafter, written parental consent shall be secured for any change in **categorical identification** in the child's disability." [Emphasis added.]. Therefore, parental consent to re-evaluations (implying tri-annual evaluations) under IDEA are required.[8] Based on the decisions of the Parent at all times relevant hereto, such consent was not provided until March 21, 2022. (LEA Exhibit 10.)

---

[8] By argument, the Parent/Child opined that the LEA should have filed a Due Process Complaint. Under the Regulations and by evidential implication, this extreme effort would have alienated the Parties and not mandated by IDEA. (*See* 8VAC20-81-120.)

The result was that an IEP team could not generate IDEA documents including an IEP and related documents until after review of the results of the evaluations until after the HearingBMay 12, 2022. The evidence was overwhelming that the LEA notified the Parent of the need to conduct a re-evaluation and/or tri-annual evaluation. The Parent withheld consent until March 22, 2022, due to the Parent's desire to pursue private evaluations, the Child's medical procedure, perhaps mistrust, *etc*.[9] While such parental conduct may be reasonable and with all due respect, the result cannot trigger a procedural violation by the LEA. Overall, these evaluations require parental consent under IDEA. Consistent with the IDEA, the Current School and the Parent appeared to work in good faith. With that stated and assuming, but not finding, that the LEA committed a procedural error, no persuasive evidence was introduced that the Child was denied FAPE as a result thereof especially after the relief granted under the State Complaint.

II. Does the Child's IEP (as existing as on the date of the Due Process Request) provide the Child FAPE?

The IEP, as amended by the First Amended IEP, the Second Amended IEP and the Third Amended IEP, does not provide the Child FAPE. The Child displays profound difficulties, academic and otherwise. These circumstances were communicated to the LEA from the prior LEA and Parent timely. These IDEA documents are out-of-date both in time and in reality; *see*, *e.g*. the inappropriate IDEA designation, the need for the tri-annual evaluation, the outdated goals, goals based on outdated data, goals based on outdated evaluations, the outdated, reference to the use of the Rifton chair, *etc*. Further, as evidenced by the LEA's several attempts to arrange a re-evaluation and/or tri-annual

---

[9] Although not a duty, IDEA allows a parent to conduct an educational evaluations (and otherwise) to be considered by the IEP team, Due Process Requests, the instant mater, *etc.*, at such parent/child's own expense. No such evaluations were introduced into evidence.

evaluation as well as obtain classroom data, these IDEA documents do not possess current data, tests, evaluations, observations, *etc*., as required by IDEA. By the evidence introduced, the Prior School was tasked with effectuating the IDEA tri-annual evaluation without completion, for reasons unknown. The LEA inherited the issue and, without parental consent to conduct evaluations, acted in accordance with IDEA. (*See* 8VAC20-81-120C.) Nevertheless, the IEP, as amended, lacked the necessary current information, *etc*., to provide the Child FAPE. By implication from the evidence presented, arguments of the Parties and exhibits, this reality was known to all Parties at the Hearing, *e.g.*, no designated expert from the LEA testified.

III. Has the LEA denied the Child FAPE by not effectuating (as required by the IDEA) the methods and goals of the Child's IEP (as existing on the date of the Due Process Request)?

The IEP, as amended, does not provide FAPE. Implementing the IDEA deficient IEP, as amended, supports the conclusion that the Child was denied FAPE. No expert testified that the IEP, as amended, provided FAPE. In contrast, the Coordinator, designated as an expert in special education, testified the flawed document did not provide FAPE. (HT at 240.) FAPE denial is further supported by, *inter alia*, the LEA's failure to transport the Child or provide the Child with IDEA services for approximately two months in violation of the IEP in the Fall, 2021. With that as a premise, the Parent/Child did not introduce any persuasive evidence as to the relief outside of ordering the LEA to effectuate an IEP and/or eligibility team to ascertain IDEA eligibility and resulting IDEA services, a process already triggered by Parent's signature to the Parental Consent and to be reviewed on May 12, 2022, after the Hearing.

IV. Whether the Child should receive compensatory education services and, if so, what should be these services and, if so, should the LEA be responsible?

The Parent/Child failed to carry the burden of proof on this issue. No persuasive

evidence, expert or otherwise, was introduced that such services were required (or cost) especially in the existence of the relief required by the State Complaint.[10]

V. Should the Parent/Child be reimbursed "replacement services for tutoring" since September 27, 2021, and if so, what amount?

The Parent/Child failed to carry the burden of proof on this issue. No persuasive evidence, expert or otherwise, was introduced on this issue, regarding specific services or cost.

VI. Should the Parent/Child be reimbursed for "replacement of the Related Services of Parent training and consultative services since September 27, 2021, and if so, what amount?

The Parent/Child failed to carry the burden of proof on this issue. No persuasive evidence, expert or otherwise, was introduced on this issue, regarding specific services, training and/or cost.

VII. Should the Parent/Child receive psychological and counseling services and if so, what should be these services?

The Parent/Child failed to carry the burden of proof on this issue. No persuasive evidence, expert or otherwise, was introduced on this issue, regarding specific services and/or cost.

VIII. Should the Parent/Child be reimbursed for counseling services since September 27, 2021, and, if so, what amount?

---

[10] In the document entitled "Parent Closing Argument," the Parent/Child, by implication, requests leave to re-open the evidence in this matter to introduce additional evidence regarding costs as referenced in issues raised. This implied motion is denied. IDEA matters require a formal hearing with drastic deadlines. There exists no basis to extend the IDEA deadlines to allow the Parent/Child to re-open the evidence. Such evidence should have been introduced during the Hearing.

The Parent/Child failed to carry the burden of proof on this issue. No persuasive evidence, expert or otherwise, was introduced on this issue, regarding specific services and/or cost.

IX. Should the Child be placed in private placement?

The Parent/Child failed to carry the burden of proof on this issue. While the IEP, as amended, has been found not to provide the Child FAPE, no persuasive evidence, expert or otherwise, was introduced on the "appropriateness" of any specific placement including areas of least-restrictive environment and providing FAPE as well as cost. (*See* 8VAC20-81-150B3.)

CONCLUSION

The Parent/Child introduced sufficient evidence to carry the burden of proof that the IEP, as amended, failed to provide the Child FAPE. Consequently, the implementation of the IEP, as amended, did not provide the Child FAPE based on the evidence provided, *inter alia*, the Child' needs, the outdated goals, the two-month denial of IDEA services in the Fall of 2021, *etc*. However, the IDEA problems with IEP, as amended, do not appear to be an issue for the Parties, overall. For example, the Parties were scheduled to review the Child's eligibility and IDEA services on May 12, 2022, after the Hearing, as a result of the Parental Consent with new data, evaluations and circumstances outside the scope of the instant matter. Matters after the Hearing cannot be considered in the instant matter. By observation and consistent with the evidence, this proceeding focused on issues presented that, by circumstance, were most likely mooted by actions of the Parties after the Hearing. (While such issues were raised by the LEA in prior pleadings, a summary decision or "summary judgment" could not be completed in the absence of a formal hearing with evidence, *etc*. IDEA contemplates that Parties have

access to an independent hearing officer and a formal hearing. Finally, the Parent/Child provided no evidence on remedies other than the relief granted per IDEA, a process that will be completed after the Hearing as triggered by the parental signature to the Parental Consent.

RELIEF GRANTED:

The LEA shall take such action as required under IDEA to effectuate a review of all applicable past IEPs, academic records (in the LEA's files), evaluations, tests and data, the State Compliant, *etc.*, to complete IDEA's eligibility process and, if found eligibility under IDEA, IDEA services to be rendered. The services required by the State Compliant must be considered by the eligibility and/or IEP team(s).[11]

APPEAL, IMPLEMENTATION AND PREVAILING PARTY NOTIFICATIONS

1. **Appeal**. Pursuant to 8 VAC 21-81-T and '22.214 D of the Virginia Code, this decision is final and binding unless either party appeals in a federal district court within 90 days of the date of this decision, or in a state court within 180 days of the date of this decision.

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

3. **Prevailing Party**. The Parent/Child prevailed on the Second and Third issues. On the other issues, the LEA prevailed.

[11] By evidence, this process has already been triggered by, *e.g.*, the May 12, 2022, meeting; this mandate does not require a duplicate effort.

_______________________________ _________________________

Hearing Officer Date

CERTIFICATE OF SERVICE

I certify that on this 7th day of June, 2022, a true and accurate copy of this pleading was mailed, *via* First-class, postage prepaid mail, to:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED], Virginia [REDACTED]
Parent/Child

Sa'ad El-Amin, M.A., J.D. Advocate
SLC Associates
Strategic and Litigation Consultants
4206 Chamberlayne Avenue
Richmond, Virginia 23227
Advocate

Nicole M. Thompson, Esquire
Harrell & Chambliss LLP
707 East Main Street, Suite 1000
Richmond, Virginia 23219
Counsel for LEA

Hallie J. Bereny, J.D.
Coordinator for Due Process Services
ODRAS/VDE
PO Box 2120
Richmond, Virginia 23218-2120

Brian K. Miller, Esquire
2119 West Main Street
Richmond, Virginia 23220
VDOE Evaluator

____

Robert J. Hartsoe

CONFIDENTIAL LEGEND

Parent	
Child	
LEA	Public Schools
Prior LEA	Public Schools
Consultant	
Prior LEA IEP	LEA Exhibit 5
IEP	LEA Exhibit 4
First Amended IEP	LEA Exhibit 3
Second Amended IEP	LEA Exhibit 2
Third Amended IEP	LEA Exhibit 1
Parental Consent	LEA Exhibit 10
State Complaint	LEA Exhibit 15
First School	School
Second School	School
Current School	School
Assistant Principal	
Coordinator	
Teacher	
Support Teacher	

Attachment 1