**VIRGINIA DEPARTMENT OF EDUCATION**

**DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES**

**OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES**

# DUE PROCESS DECISION

**v. XXXXXXX PUBLIC SCHOOLS VDOE Case No.** – 24-014

**School Division: XXXXXXX**

**Name of Parent: Mrs.**

**( )**

**Name of Student:**

**Counsel Representing LEA: Parent/Student Representatives:**

Nicole Cheuk, Esq. Deborah Goodwin, Esq.

Jessica Berdichevsky, Esq. Dr. Kandise Lucas, Advocate Saad El-Amin, Advocate

**Hearing Officer:** Krysia Carmel Nelson **Party Initiating Hearing: Parent**

**DUE PROCESS HEARING REPORT AND HEARING OFFICER’S DECISION**

## INTRODUCTION

The due process hearing was requested in writing by the Parent on September 30, 2023. I was initially appointed to hear the case on October 9, 2023, but the Virginia Supreme Court then consolidated the case with another that was already pending involving the same school division and the Student’s sibling. The Virginia Supreme Court subsequently deconsolidated the cases and reappointed me on October 17, 2023.

This matter came for hearing on December 1, 4, 5 and 7, 2023. The hearing was held virtually, at the request of the parties. The Parent exercised their right to an open hearing, and the public was afforded viewing access by way of direct sign-on privileges to the virtual meeting platform (Zoom) on December 1 and 4. After a member of the public re-transmitted the proceedings in violation of my Order prohibiting retransmission, sign-on privileges to the virtual meeting platform on December 5 and 7 was limited to the parties and their invited guests. The hearing was never closed; public access on December 5 and 7 was afforded at a viewing room where the public could attend in person to watch the proceedings in real time on a computer screen/monitor.

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There is no dispute that the Student is eligible for special education services under the Individuals with Disabilities Act (“IDEA”).

Every special education due process hearing, by default, involves a dispute between parents and a school division over a child’s educational program. When there is no dispute that the child is eligible to receive special education services, then the dispute typically involves the parents’ disagreement with the school division’s program: what was proposed, what was delivered, how well it worked.

The starting point in these cases is, of course, the IDEA. It is helpful to acknowledge the overarching principles that were the impetus for that law. Namely, that IDEA practically codifies our society’s condemnation of institutionalized settings that isolate disabled children from their peers and family and honors the rights of disabled children to live with their families, be active and present in their communities, and educated with their typically developing peers to the fullest extent possible. IDEA represents Congress’ condemnation of the idea of placing disabled students in exclusionary and/or highly restrictive environments. IDEA requires the starting point for the development of a child’s educational program to be the “general education” placement and inclusive settings. To the extent a child cannot receive meaningful educational benefit in an inclusive setting with supports and accommodations, stepping away from the “least restrictive” setting must be done in the slowest, smallest increments possible. Full inclusion in the general education setting is the conceptual starting point for the development of the child’s educational program.

In this case, the general education setting was the Student’s starting point. The dispute boils down to the Parent’s complaint that the LEA refused to listen to her and should have acted sooner to do more for the Student in a more restrictive environment. To the extent both sides complained about each other’s behavior, the stress levels and miscommunications that plagued the parties’ relationship prior to the hearing were on full display during the hearing.1 Emotions ran very high and all the witnesses who testified had strongly held opinions about the propriety of their behavior and the accuracy of their beliefs. But I must resolve the legal issues before me with reference to established legal standards and competent evidence, without allowing the emotions on display to distort my application of the law to the facts of the case. This is what it means to be impartial.

### ISSUES PRESENTED AND REQUESTS FOR RELIEF

In this case, there is no dispute that the Student is a child with a disability who was found eligible for services and entitlement to a FAPE. The issues the Parent is presenting to me for resolution are:

1 The transcript reflects innumerable incidents of the legal teams interrupting, arguing, and talking over one another in a disorderly manner, ignoring my rulings, and grandstanding. The Parent’s advocate was relentlessly defiant of my attempts to conduct the hearing in an orderly fashion and persistently accused me of bias, unfairness, and incompetence. See, e.g., Transcript pages 415-423. Her demeanor and accusations were ultimately irrelevant to my legal analysis and resolution of the issues before me.

1. Whether the IEP was appropriate. (Substantive noncompliance/Denial of FAPE) The Complaint allegations related to inappropriate placement and content are paragraphs identified as A, B, C, E, G, H, J, and R.
	1. The Parent complains that the school’s “initial evaluation . . . did not include behavior, occupational therapy, sensory or aide evaluations,” and that “the delay in assessing the Student in these areas resulted in delays providing vital services the Student needed to access his educational environment.”
	2. The Parent complains that the school “based its lack of eligibility category for the Student’s IEP on the Student’s trauma, the services and accommodations that were put into place as a part of his IEP and BIP did not adequately address the student’s trauma and how that impacted the student’s education.”
	3. Failure to provide a 1:1 aide

E. Failure to revise the IEP to include the Student’s confirmed medical diagnoses

1. Failure to consider the full continuum of placements for the

Student based on concerns raised by the medical providers.

s and the Student’s

1. The Parent complains that “although the school was provided with an extensive evaluation of the Student from a child psychiatrist, as well as other letters and evaluations from other professionals who work with the Student, the school continued to engage in behaviors toward the Student that aggravated the Student’s responses instead of deescalating the Student’s response.

J. Failure to properly report and document behavioral incidents of the Student in the educational setting.

R. The Parent complains the “LEA improperly determined that the Student does not maintain his FAPE entitlement as a result of [placement in a residential setting for non-educational reasons].”

1. Whether the Parent was denied meaningful opportunity to participate in the development of the IEP. (Procedural noncompliance/Denial of FAPE). The Complaint allegations related to denial of meaningful participation are paragraphs identified as D, F, K, and I.

D. Failure to provide a draft IEP to the at least 48 hours in advance of a scheduled IEP Team meeting, in violation of 8 VAC 20-81-110(E)(8)

F. Failure to allow the and her representatives to meaningfully engage in the IEP team and process, beginning with the December 14, 2022, meeting.

I. Harassing the Student in the educational setting and retaliating against the

, “intentionally creating a hostile and traumatizing environment that obstructs authentic parental engagement.”

1. Failure to allow to copy and review all records, including videos and incident reports relating to incidents involving the Student in the educational setting.
2. Whether the LEA failed to implement the IEP. (Substantive noncompliance/Denial of FAPE). The Complaint allegations related to failure to implement are paragraphs identified as L, M, and N.
3. Failure of special education case manager to provide services and resource coordination services, as a required related service.
4. Failure of the LEA to ensure that special education instructional staff assigned to the Student complied with the mandated professional standards as identified by the VDOE.
5. Failure of LEA to ensure that all IEP Team participants demonstrated a legitimate educational purpose when serving on the IEP Team “as mandated in OSEP’s Letter to Haller (May 2, 2019).”

The Parent seeks the following relief:

1. That I order the Student be placed in either residential or (in the alternative) private day placement
2. That I order the Student receive a 1-1 aide
3. That I order the LEA to pay for an IEE to respond to the original LEA evaluation of the Student with which the Parent disagreed
4. That I order the LEA to disclose to the Parent the Student’s “complete academic record,” which the Parent argues includes video footage from school surveillance cameras, police reports, and school “incident” reports documenting episodes of the Student’s concerning behaviors. [NB: Based on the discussion during the PHC, it appears that the Parent takes the position that (a) there items that exist but are being withheld and, (b) such items, whether or not they exist, should as a general proposition be created and maintained as part of the Student’s educational record.]
5. That I order the LEA to reflect the Student’s medical diagnosis in the IEP in the eligibility criteria section
6. That I order the LEA to disclose to the Parent the identity of the Student’s case manager

### SUMMARY OF THE EVIDENCE AND FACTUAL FINDINGS

At an unspecified point in time after the Student was born, he resided with his biological parents and a approximately . His observed signs of developmental delay at an early age but reports that his failed to seek evaluation or intervention thereof. The Student spent time in daycare. In late 2021, LEA staff interviewed some of his daycare providers (see Exhibit S-7) who generally reported on the Student in positive terms, but described him as “busy” and noting that he benefitted from close adult support.

The Student’s allegedly suffered from mental health and substance abuse issues and was while the Student was very young. At some point, the biological parents physically separated, with the retaining physical custody of the Student and his and at some point thereafter allowed a to move into

the residence with them. The partner was allegedly abusive to all members of the household, the details of which are unclear except to suggest that the children were

inappropriately exposed to substance use and domestic abuse, and may themselves have suffered physical and/or abuse in the home by the . In June, 2021, the the while the children were in the home, and the evidence

suggests that the Student witnessed his at close range. By all accounts, the

of their

Student suffered “complex trauma.” After the

went to live with their guardian shortly thereafter.

, the Student and his who became their legal

At some point in June or early July, 2021, the Student attended a two- week, XXXXXXXXXX readiness program sponsored by the LEA called “ Camp.” (Ex. P-1) Thereafter, on July 13, 2021, the (who I shall refer to hereinafter as “the Parent”) raised concerns about the Student’s behavior and learning “noting she feels he has a disability or disabilities.” (Ex. P-1) The LEA treated this as a referral and a Child Study Committee was convened on July 27, 2021, at which time the Parent met with the Camp teacher and the school special education supervisor and school psychologist for the elementary school the Student was enrolled in to start XXXXXXXXXX the next month. In addition to reflecting the Parent’s concerns and background information provided by her, the notes of that meeting document the Student’s generally positive experience and behavior during “Camp.” The notes indicate “the child study team plans to reconvene to review [the Student’s] progress in October, 2021, but can meet as needed prior to or after if needed. continue to monitor; put interventions in place and monitor

progress.” A Prior Written Notice issued as a result of this meeting (Ex. P-1, page 5 of 7) notes “it was determined not to evaluate [the Student] at this time due to concerns about the impact of [his] having been exposed to trauma and an unstable, unstructured home environment prior to being placed with his s. He has not participated in structured educational programming prior to his enrollment in the last two weeks of Camp.”

The Student began attending XXXXXXXXXXXX in August, 2021. After less than a full month of attendance, on September 3, 2021, the Parent renewed her referral, indicating she believed the Student should be evaluated for eligibility for special education services. The first meeting to start the eligibility process was held on September 14, 2021, at which time the Parent signed the consent for evaluations to be conducted. (Exhibits P-2, P-3)

As part of the evaluation process, numerous observations of the Student occurred in the elementary school building where he attended XXXXXXXXXX. The eligibility team met on December 1, 2021 and found the Student eligible for special education services under the category of “developmental delay.” The team discussed other eligibility categories but the Parent reported the Student was going to a nearby state university teaching hospital to be tested for suspected autism spectrum disorder. (Ex. P-5, page 6 of 12). It appears the Parent reported a medical diagnosis of ADHD to the team, but that she also discouraged the team from relying on that diagnosis. The team notes that it questioned whether the Student’s struggles were caused by “trauma or another disability.” The team and school staff strategized about specific interventions and accommodations and I find their decision to give themselves more time to evaluate the effectiveness of interventions and develop data to correlate positive results with specific interventions/accommodations was reasonable and appropriate.

The Student’s behavior was described by numerous witnesses who had occasion to observe him with varying intensity and across a variety of settings. The Parent and the general education

XXXXXXXXXX classroom teacher provided observations that I find to be more reliable than those of other witnesses whose interactions with the Student were more sporadic or of limited duration. The Student’s behavior was described as touching upon both ends of the spectrum – from laudable, age-appropriate to isolated incidents of “out of control”/meltdown mode, and just about everything in between. There were more reports of episodes on the laudable end of the spectrum, but no dispute that the Student had “melted down” at school on at least one occasion, although witnesses were not clear on when this may have occurred. The XXXXXXXXXX teacher observed in her November 22, 2021 report that “he spends much of his day upset” and that his behaviors had deteriorated since the beginning of the school year (in August). More commonly reported were episodes of distraction and elopement and attention seeking behavior even at times when the Student was already the center of attention in both group and 1-1 settings. His mood swings were described as frequent and extreme and seemingly unprovoked. No witness testified to any apparent triggers, and there was no evidence to correlate the variety of observed behavior to specifically re- creatable or predictable situations. The closest thing to a trigger that was described was that at times his behavior would deteriorate “when things are not going the way [he] thinks they should.” (See Ex. S-7). At that point, it didn’t matter if he had an adult with him “1-1” or not. That some of his behaviors were atypical, “odd,” and alarming is not in dispute. At moments he was fine, and other moments he was not. These episodes of behavior (good, bad and everything in between) were observed by witnesses across all settings. Again, certain witnesses who spent less time with the Student than the Parent and XXXXXXXXXX teacher may have found his behavior less disconcerting, but in general the evidence painted a very clear picture: the Student’s behavior was oddly unpredictable and sometimes unpredictably odd in an age-inappropriate way.

The intensity of adult supervision did not correlate with the Student’s good behavior. Witnesses testified that he could be sweet and loving with a person one minute, and turn on them the next, both in terms of making unexpected threats of injury (like telling his Homebound Instructor that he while they were doing a paper cutting exercise) and expressing fondness for a person one moment and then unexpectedly declaring his dislike of that same person the next moment. At the point the Student “turned” on an adult, he became defiant, noncompliant and would attempt to elope or otherwise “refuse” to be with them. The XXXXXXXXXX classroom teacher testified that prior to the development of the IEP, she enlisted the assistance of a variety of school staff, including the Principal and a guidance counselor, to provide the Student with 1-1 support throughout the school day. Given witness testimony describing the Student’s unpredictable and extreme swings of preference for school staff members, it is understandable why school staff was reluctant to commit a single adult to the role of the Student’s 1-1 aide on an assigned, full-time basis. I find the record reflects that the LEA effectively provided 1-1 adult supervision/support to the Student most of the time.

Obviously, the fall of his XXXXXXXXXX year was not going great, but his teacher testified that he showed improvement all through the semester even without the benefit of an IEP. (Transcript, page 315) The IEP Team met for the first time to develop the initial IEP on December 15, 2021. The prior written notice that was issued after that meeting notes that the team sought the Parent’s consent to conduct a Functional Behavioral Assessment (“FBA”) for purposes of developing a Behavior Intervention Plan (“BIP”), and that the team considered but rejected the Parent‘s request that the Student be assigned a full time 1-1 aide and placement in a self-contained special education class. The explanation noted: “the team determined that additional adult support during the school day is appropriate but that [the Student] does not require this for the entirety of the school day.

The additional adult assistance may support other students in the classroom. As this is his initial IEP, the least restrictive environment at this time is the general education classroom with special education support and instruction, as noted in the proposed IEP.”

Significantly, the Parent did not immediately consent to this IEP or for the Student to participate in the FBA.

The school was closed for winter break from December 16, 2021 until January, 2022. The Student did not return to school when classes resumed in January, 2022. There is some evidence in the record to suggest that the Parent initially reported the whole household was stricken with a bug, but eventually medical providers recommended he receive homebound services because of a mental health crisis. On February 18, 2022, the LEA reached out to the Parent regarding getting some kind of medical certification from a medical provider for homebound. The certification provided (Ex. S-13) notes a physician’s examination date of February 16, 2022 and is dated February, 22, 2022 and signed by the Parent on March 3, 2022. The LEA acknowledged receipt of the certification on March 4, 2022.

On March 7, 2022, the Parent signed the December, 2021 IEP, consenting to its implementation and the Student’s participation in the FBA. The Student received no services from the LEA in January, February, or March, 2022, but was also not physically present in school during that period having been kept home by the Parent for reasons that were not documented to the LEA until March 4th.

An amendment to the IEP was drafted on March 11, 2022, reflecting 5 hours per week of homebound instruction. The Parent consented to the implementation of this IEP amendment on March 15, 2022. A homebound instructor was assigned, and homebound instruction began on April 11, 2022. The Student received homebound instruction for the balance of the 2021-2022 school year.

There was an IEP Team meeting held on May 24, 2022, for Extended School Year Services (“ESY”) to be delivered for four weeks during the summer months in the school setting. Witnesses observed that the Student had regressed since he had last attended school in the general education setting in the fall of 2021 (at which point he had attended a general education XXXXXXXXXX class without the benefit of any IEP).

The Student attended ESY. The Student then returned to school in August, 2022, pursuant to the December 15, 2021 IEP – meaning he was receiving direct instruction in certain academic areas in a self-contained special education classroom from a special education teacher (who I shall refer to hereinafter as the “XXXXXXXX sped teacher”). This teacher testified that she stayed in frequent communication with the Parent, using both “Communication Charts” (see Ex. S-65), and later a communication notebook and, at the Parent’s request, using her personal cell phone to text and call the Parent during the school day to let the Parent know if the Student was having a difficult time. This teacher testified that she did occasionally call the Parent more than once in a given day but could not recall the specific dates she may have called her. This teacher denied ever asking the Parent to pick the Student up from school.

On August 29, 2022, there was another IEP Team meeting. (Ex. S-19) The purpose of this meeting was to develop the “annual” IEP for the 2022-2023 school year and discuss the Student’s “least restrictive environment and placement.” The Parent expressed her belief that the Student “should be restricted from the general education setting” and reported behaviors that school staff had not observed during ESY. “In an effort to reach consensus” the LEA proposed that the Student “receive reading, math, history, and science instruction in a special education classroom. Additionally, the IEP team proposed special education behavioral support for arrival and dismissal, lunch, recess, and encore (I.e., music, art, PE, and library). It was also discussed that a Functional Behavioral Assessment (FBA) for [the Student] is ongoing and the IEP team will meet promptly to review results and determine need for additional behavioral supports.”

On September 16, 2022, the Parent consented to the implementation of the IEP dated August 29, 2022. On September 29, 2022, there was another IEP Team meeting to review the FBA and develop a BIP. An IEP amendment was developed on that date, incorporating the BIP. The Parent consented to the implementation of this amendment on October 14, 2022.

The XXXXXXXX sped teacher’s testimony suggested that the Communication Charts admitted into evidence were a fair reflection of how the fall 2022 term went – the Student had good days and bad days. Some days he slept a lot. The dates of the charts that were admitted into evidence are for: September 26, 28; October 7, 17, 26; November 1, 2, 11, 15 and 30; December 12 and 16,

2022; January 5, 6 and 9, February 1, 2023. On the November 30th chart, the Parent praised the teacher, saying she had “been the game changer” in the Student’s life.

Ex. P-82/S-22 purports to be a “Psychological Evaluation Report” from a psychologist at Bon Secours Neuroscience Institute and Neurology Clinic. This report was admitted into evidence but not authenticated by its preparer. The document indicates that the Student visited the Clinic on November 11 and 28, 2022. The document indicates “Report Completed 12/5/22” but the electronic signature on the document indicates it was printed by the psychologist at 1/27/2023 12:20 PM. Although titled a “Report,” the 9 page document reads more like medical chart notes. No witness testified to preparing the document, and so the authenticity of the document and the reliability of the information contained therein is not ascertainable. There are statements attributed to the Parent that do not align with other information provided by the Parent to the LEA or to which she testified during the course of the hearing. For example, the Parent repeatedly suggested that the Student “may” have been , but P-82, on page 5 of 9 notes that “ both boys. The was trying to protect them and walked in on him [the Student].” That is a stark and unequivocal description of a assault of the Student, and the record does not reflect the Parent described this incident to LEA staff with such graphic detail at any time. The number of irregularities associated with this document, and the fact that it was not authenticated by its preparer, cast a shadow of unreliability on the document.

On page 5 of 9 of P-82 is the following note on the Student’s emotional status: “On clinical interview, the patient presented as appropriately dressed and groomed. His mood and affect were within normal limits. There was no obvious indication of a mood disorder noted upon interview. Suicidal and/or homicidal ideation were denied. There is no concern for psychosis. Behaviorally, he did not appear aggressive, nor did he attach to myself or the psychometrist inappropriately. He interacted with the rest of the staff and other clinicians in this office, as well as other patients in

the waiting room very appropriately. He was hyperactive throughout this examination.” This description is consistent with observations of the Student made by other witnesses who testified at the hearing.

Under a section labeled “Impressions & Recommendations”, the document notes: “in addition to continued medical care, my recommendations include consideration for a 30 day trial of an appropriate attention related medication. During this trial, the patient and guardians should keep track of his response to this medication and provide the prescribing clinician with feedback at the end of the month regarding its efficacy. I also recommend continued psychiatric medication management for behavioral and mood concerns. Active engagement in intensive trauma informed therapy is very strongly advised. We need to look at this therapy is not brief with no end date in mind. He needs mentorship and emotional support and guidance throughout his young life as he has been exposed to more than most have or would in a lifetime. He may require residential/long term placement. He is and others. He laughs and smirks and tells me these behaviors make him happy. At times he “dissociates.” Consult with OT. I suggest smaller sized classrooms, cues, and redirection, ensure he comprehends tasks prior to moving on to the next, reduced academic courseload, extended time on tests, testing in a distraction-reduced environment, preferential seating, the use of a resource room if needed, and behavioral therapy to address intellectual concerns, ADHD, and trauma, mood, behavior, interpersonal dynamics, etc. Appropriate sexual education with respect to anatomy, function, respect, consent, boundaries, etc must be established early. In school, it is important to mitigate these behaviors during his behavioral escalations, not ignoring them and then providing a consequence after an extreme behavior has occurred. He cannot be “bribed” and I suggest his attention seeking behaviors not be ignored. We may need to consider an alternative learning environment. Baseline now established. Follow up prn. Clinical correlation is, of course, indicated. I will discuss these findings with the patient and family when they follow up with me in the near future. A follow up Psychological Evaluation is indicated on a prn basis, especially if there are any cognitive and/or emotional changes.”

An IEP Team meeting was scheduled for December 14, 2022 to develop a new IEP. This meeting date is significant because it represents a change in staff assignment in the role of LEA Representative to the IEP Team. Much of the Parent’s case alleges she was denied a meaningful opportunity to participate in the IEP Team and the development of the Student’s educational program, but the Parent testified at the hearing that she did not become dissatisfied with the process until the new LEA Representative entered the scene and facilitated Team meetings from the December 14, 2022 meeting onward. The Parent specifically testified that she was generally pleased with the prior meeting facilitators and the Student’s special education and general education teachers and her participation in the IEP Team meetings up to that point. (Transcript, page 769)

The IEP document that came out of this meeting is Ex. S-26 and includes accommodations and modifications that were not part of the August 29, 2022 IEP with the September 29, 22 BIP amendment (that was consented to October 14, 2023). The LEA Representative at this December 14, 2022 meeting testified that at the time of this meeting the LEA did not have a copy of the Ex. P-82/S-22 document “Psychological Evaluation Report.” The Parent consented to the implementation of this December 14, 2022 IEP on December 16, 2022. The Prior Written Notice issued by the LEA on December 15, 2022 notes that the Parent informed the Team about the

Psychological Evaluation Report and the LEA agreed to reach out to the Parent to discuss the Report once they had received a copy of it.

Exhibit S-27 is dated December 15, 2022 but contains notes dated December 16, 2022. Despite this minor, but confusing date discrepancy, the document represents the progress notes on the Student’s progress towards mastering the measurable annual goals of his IEP. The dates of the three progress notes are: June 8, 2022, October 14, 2022, and December 16, 2022. The Student mastered his “Attention/Focus” goal, his “Behavior” goal, his “Academic Skills” goal, and his “English” goal. He did not master his writing goal and one of his counting goals, although progress was noted.

The LEA was closed for the winter break from December 16, 2022 until January 2, 2023.

The XXXXXXXX sped teacher’s “Chart” note for January 5, 2023 noted the Student had a difficult day. The Parent responded with a lengthy note that the Student “seems to be going through something” and had similar difficulties at the same time the year prior. On the Chart note for January 6, the Parent noted “Please make sure [the Student] stays away from other children. He has started having some bad episodes of very bad behavior. Please keep your eye on him closely.”

On January 20, 2023, the Parent retrieved the Student from school due to an episode the Parent characterized as a “mental health breakdown.” The XXXXXXXX sped teacher did not describe the episode in those terms. A school resource officer was asked by the Parent to go to the classroom to address the Student, and that officer testified that he was not “alarmed” by what he witnessed of the Student’s behavior. Part of the interaction between the Parent, the XXXXXXXX sped teacher, the resource officer and the Student was captured on a school surveillance video (without audio) which clip was admitted into evidence as Parent’s Exhibit 87. The clip does not capture anything of particular relevance regarding the Student’s behavior. The Parent testified that the exhibit had been altered to remove images of another child and appeared to be “too slow.” It shows the Student leaving the building with the Parent.

The Student attended school on February 1, 2023, and allegedly reported to the Parent that the XXXXXXXX sped teacher had “scared him and made him nervous.” The teacher testified at the hearing that she did not recall any interaction with the Student that day that would justify that comment to the Parent. The Parent removed the Student from school on February 7, 2023, for reasons personal to her and unrelated to any incident directly involving the Student.

On February 10, 2023, an IEP Team meeting was held during which the LEA proposed an amendment to the December 14, 2022 IEP. Exhibit S-32 is the prior written notice and proposal to amend the IEP and conduct a current psychological evaluation in response to the LEA’s review of the psychologist’s “Report,” Ex. P-82/S-22. An amendment to the IEP was developed by the Team during the February 10 meeting, and a copy of the amendment was sent to the Parent thereafter. She did not consent to its implementation.

Consent for an evaluation was sent to the Parent on February 14, 2023. The Parent did not sign the consent form. This, despite the fact that Ex. P-82 includes the recommendation that a follow up psychological evaluation of the Student might be needed. I find that the LEA’s desire to conduct a psychological evaluation of the Student was reasonable and appropriate under the circumstances,

particularly given the unreliable features and internal inconsistencies of Exhibit P-82. However, the Parent never consented to the LEA’s evaluation, and no follow up psychological evaluation of the Student by the LEA ever occurred.

A psychiatric nurse practitioner testified to completing a psychiatric assessment of the Student on April 17, 2023 and preparing the document that was admitted as Exhibit P-85. The Parent did not move to qualify the witness as an expert and her testimony was basically limited to describing her single (virtual) interview with the Student that led to the preparation of Ex. P-85. The witness did testify that she has checked in with the family monthly to provide medication management support.

P-85 indicates the Student was referred for assessment by the XXXXXXX Community Services Board (“CSB”) following an emergency room visit on April 13, 2023 “for a breakdown.” Significantly, the report states, on page 2 of 12, that the Parent “reports that she has been trying to get him into a group home, however facilities refuse and they say he is too aggressive. [She] reports that she is struggling to try to get him into facilities.” On page 9 of 12, the report states the nurse practitioner discussed with the Parent “that the patient may need a higher level of care in a patient, [Parent] reports that she has been trying to get the patient inpatient and Chippenham, MCV, and xxxxxxxxxxxxx Provided [Parent] with resources to Newport News behavioral health for residential.”

The witness testified that it was her understanding the Parent was seeking in-patient psychiatric treatment for the Student. (Transcript page 368) She also testified that the only diagnosis she made was that the Student suffered from major depressive disorder. (Transcript page 374) She testified that the other diagnoses noted on page 10 of 12 of P-85 were based on Parent report and not verified by any medical provider or documentation. (Transcript page 371)

The IEP Team met virtually on July 6, 2023 to review the Parent’s residential placement request, to consider new data and current data; and to determine whether additional evaluation data was required in order to hold an eligibility meeting to adjust the Student’s eligibility category (which was at that point “developmental delay”). The LEA proposed to reevaluate the Student, which consent the Parent did not give. The LEA refused to change the Student’s current educational placement. Of note in Ex. S-58 is reference to a “medical certification of need for admission to a residential psychiatric treatment facility (dated 5/5/23)”, which document was not proffered for admission as an exhibit and is not contained in the record of the case. The only request for homebound instruction, or certification of medical need for homebound instruction, in the record is S-13, which dates back to 2022.

Ex. S-58 describes the Parent’s request for the Student’s placement to be changed “to a residential placement for educational reasons due to his history of trauma, behaviors in the home, and a medical certification of need.” Again, there is no such medical certification of need in the record of the case. A review of the parties’ proposed exhibits does not even identify such a document, so there is not even an issue that the document was proffered but rejected.

Ex. P-75 is a letter to the Parent dated August 2, 2023 from the XXXXXXX Community Policy Management Team (CMPT). The letter notes that the CPMT held an appeal hearing in regards to FAPT recommendations. The CPMT recommended that the Student “should be placed in a residential facility in Virginia to address his behavior and mental health needs.” The CPMT also

recommended that the Parent and Student “cooperate with outpatient, intensive in-home, and medication management services, including a minimum of one monthly face to face contact with a provider” and that the family should pursue crisis services, should they be needed.” The letter is addressed to the Parent (and not to the LEA). Neither the document, nor any testimony from a CPMT representative, describes the person or entity expected to effectuate the recommended placement.

The Student’s CSB case manager testified generally about the services she coordinated for the Student beginning in October, 2021. The Parent did not move to qualify the case manager as an expert witness. She testified the Student has not been able to enter residential treatment but that it was her role to assist the family in trying to find those services. (Transcript, page 447) She testified that the recommendation for residential treatment was based on the Parent’s reports that his “behaviors were becoming unmanageable in the home.” (Transcript page 450) The witness confirmed that the request to the CSB to place the Student in a specific residential treatment facility (that the witness did not identify on the record) was pending the Parent’s completion of the application. (Transcript, pages 453, 468) The witness never completed any evaluation of the Student, but did complete a CANS assessment, the results of which she did not share with the LEA because the Parent did not authorize their release. (Transcript page 459) No written, nor verbal, report of the CANS assessment was made part of the record of the case.

Ex. P-77 is an email dated September 12, 2023, from the Parent to the LEA. The exhibit is 2 pages in length, and while the body of the e-mail references attachments, the document as admitted into evidence did not include any attachments. The e-mail requests the scheduling of an IEP meeting for the Student “to amend his IEP to Residential Placement immediately. I have enclosed the documents that certify that [the Student] is approved for Residential Placement.”

Although the document referenced in the e-mail was not made a part of the record of the case, LEA witnesses testified that the documents they were provided by the Parent established the CMPT had only approved funding for the Student’s residential placement for non-educational reasons, and not that it had ordered or secured a placement for non-educational reasons. This testimony is consistent with the notes in S-58 related to the “medical certification of need for admission to a residential psychiatric treatment facility (dated 5/5/23)” which suggests some medical provider had recommended the Student be hospitalized or admitted to an inpatient psychiatric treatment facility. As noted above, the CSB witness’ testimony suggests that admission is pending Parental completion of the facility application.

Again, although pertinent documentation was not made a part of the record, the evidence in the record establishes that the Parent was requesting the LEA to make a residential placement for “educational reasons” on the basis of (1) the recommendation of medical providers that the Student required admission to a residential psychiatric treatment facility for medical reasons, and (2) the CMPT’s willingness to fund an in-state residential placement for medical reasons. The Parent also testified that she believed the medical diagnoses needed to be reflected in the IEP so he could get the “treatment” he needed. (Transcript page 783)

There is no evidence in the record to establish that the Parent requested the LEA deliver educational services to the Student while he was admitted to a treatment facility, nor that he was ever admitted to a psychiatric treatment facility for medical reasons. To the extent the Parent

testified he had “been in an acute mental facility” (Transcript page 708), there was no evidence in the record to corroborate her testimony.

The Parent’s only qualified expert witness was a professor from Virginia State University (CV admitted as P-91) in the departments of sociology and criminal justice. She was qualified as an expert in youth trauma. She did not generate any written report related to the Student or her testimony in this matter. She testified that she had never attended any LEA meeting related to the Student, nor reviewed any Student specific records, nor spoken to any LEA staff about the Student. She confirmed that she never made any recommendations to the LEA that were specific to the Student. She testified generally about how children who have experienced trauma will manifest maladaptive behaviors in the school setting and opined that multidisciplinary teams aren’t always equipped to respond to childhood trauma. She testified that the term “trauma informed” in her field is a technical term that requires certain qualifications. But other than suggesting that she had those qualifications, she did not specifically describe what those qualifications entailed, nor did she opine about the “trauma informed” qualifications of any specific LEA staff person. Her testimony did not include expressing any opinion about services or treatments delivered to or proposed for the Student by the LEA or any private provider. (Transcript pages 537-590)

The Parent called as a witness the president of a social charity who was currently retired, holding a bachelor’s degree in psychology. This witness participated in several IEP meetings for the Student, at the Parent’s request, in 2023. He testified to his impressions from one meeting, that the “solution” for the Student was “beyond the capacity” of the school based IEP Team members, and suggested to them that they consult with a children’s hospital or child psychologist. He confirmed that the Parent was given an opportunity to speak and express her concerns, opinions, and suggestions, but he felt that the school based members of the IEP Team who were participating in the meeting were “dismissive.” (Transcript pages 501-532)

Ex. P-78 is a prior written notice dated September 19, 2023, noting the LEA’s refusal to reconvene the IEP team to “discuss items already considered by the IEP team on July 6, 2023, including a request for a change in placement, absent new or additional information and/or absent [the Student’s] enrollment in a residential treatment facility for non-educational reasons.”

On September 30, 2023, the Parent filed for due process.

My overall impression of the evidence is that the Parent’s requests to the LEA were convoluted, as was her testimony and argument presented by her legal team throughout the hearing. The Parent seems to argue, without the benefit of the testimony of a qualified medical or educational expert witness, that the Student requires intensive therapy services/psychiatric treatment in an in-patient setting and believes the LEA is unreasonably refusing to make that happen or is otherwise the obstacle to the realization of that (medical) admission. As a practical matter, I find neither the LEA nor I is legally authorized to order/require the admission of a Student to a psychiatric, in-patient medical treatment facility.

This dilemma highlights another deficiency in the Parent’s case. While requesting I order either a private day or residential placement for the Student, the Parent has failed to articulate with any specificity what educational services she believes the LEA must provide to afford the Student FAPE, which services can only be provided in the more restrictive placement she demands.

Obviously, the Parent has lost confidence and all patience with the LEA staff and wants the Student to learn (and possibly live) in a location other than a public day school and/or her home. But her desperate complaints and pleas for relief do not constitute evidence sufficient to carry her burden to legally sustain her Complaint.

Furthermore, the evidence establishes that she has both refused consent for the LEA to conduct an updated psychological evaluation (which would allow it to determine the Student’s current needs) and has also failed to sign the application for the Student’s admission to a residential therapeutic facility for medical reasons, which placement the Community Services Board is attempting to facilitate or effectuate. Neither the LEA nor I have the authority to override these standoffs.

Finally, while the record is replete with testimony and argument from the Parent’s witnesses and legal team claiming that the Student and the Parent felt harassed and retaliated against, I find their claims that the LEA intentionally created a hostile environment that denied the Parent “authentic engagement” are unsustainable. I do not find any evidence in the record that LEA staff behaved unreasonably or unlawfully toward the Student or the Parent. The Parent was intensely engaged with school staff and witnesses testified to the regularity and substance of communications that took place between the Parent and the LEA. While it is unfortunate that the Parent felt harassed and retaliated against, there was no evidence that LEA staff intended to create a hostile environment for either the Student or the Parent, and I cannot find that the tone or substance of LEA staff communications or behavior were outrageous enough to be objectively offensive or reasonably perceived as hostile or retaliatory.

## LEGAL ANALYSIS AND DISCUSSION

The IDEA and its implementing regulations promise students with disabilities a "free appropriate public education" tailored to their individual needs. 20 U.S.C. § 1400(d). Only children with at least one qualifying disability are entitled to services. The statute includes 10 categories of disability. 20 U.S.C. § 1401(3)(A). Federal law allows States to develop their own criteria for assessing whether a child falls within a qualifying category. 34 C.F.R. § 300.111.

If a child has a qualifying disability, the IDEA requires the relevant educational agency to create an individualized education program (IEP). See, generally, 20 U.S.C. § 1414(d). An IEP must lay out measurable annual goals designed to meet the child's needs and provide accommodations and services to aid in academic achievement and functional performance. 20 U.S.C. § 1414(d)(1)(A).

Parents have several procedural protections under the IDEA. A parent who believes their child is eligible for services "may initiate a request for an initial evaluation to determine" whether the child has a qualifying disability. 20 U.S.C. § 1414(a)(1)(B). "[I]f the parent disagrees with an evaluation obtained by [a] public agency," the "parent has the right to an independent educational evaluation at public expense." 34 C.F.R. § 300.502(b)(1).

A parent who questions "the identification, evaluation, or educational placement of [their] child" may also commence a formal adjudicative process. 20 U.S.C. § 1415(b)(6)(A). In Virginia, a parent begins that process by filing a complaint with the Virginia Department of Education, which triggers "due process" proceedings before a hearing officer.

Among the procedural rights the IDEA and its regulations grant the parents of a child with a disability is the right to "examine all records" relating to that child and to "participate in meetings with respect to the identification, evaluation, and educational placement" of the child. 20 U.S.C. § 1415(b); *see* 34 C.F.R. § 300.322 (setting out parent participation regulations for IEP development). The IDEA also "grants parents independent, enforceable rights" that are not limited to procedural matters, including "the entitlement to a [FAPE] for the parents' child." Winkelman ex rel. Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 533 (2007).

In general, the hearing officer must determine whether a school violated the IDEA by deciding on substantive grounds whether the child received a FAPE. 20 U.S.C. § 1415(f)(3)(E)(i). However, in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE if they determine that a procedural right was violated and that the violation significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child. 20 U.S.C. § 1415(f)(3)(E)(ii)(II).

Under 20 U.S.C. [§ 1415(f)(3)(E)(ii)(II),](https://advance.lexis.com/document/documentlink/?pdmfid=1000516&crid=dbd25a0d-f718-4ceb-96b3-23bbdbb62576&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5VR6-9RD1-JGHR-M4RK-00000-00&pdpinpoint=PAGE_251_1107&pdcontentcomponentid=6388&pddoctitle=R.F.%2C%2B919%2BF.3d%2Bat%2B251-52&pdproductcontenttypeid=urn%3Apct%3A30&pdiskwicview=false&ecomp=krsyk&prid=06c7a7ec-2060-4a2f-b592-1ba63466cb5c) the hearing officer 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 Parents 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. Unless the hearing officer determines that a given procedural violation denied the child a FAPE, they may only order compliance with the IDEA's procedural requirements and cannot grant other forms of relief, such as private placement or compensatory education. See*,* Fry v. Napoleon Cmty. Sch*.*, 137 S. Ct. 743, 754 n.6, 197 L. Ed. 2d 46 (2017) ("Without finding the denial of a FAPE, a hearing officer may do nothing more than order a school district to comply with the [IDEA's] various procedural requirements."); See, R.F. v. Cecil Cty. Pub. Sch., 919 F.3d 237, 251-52 (4th Cir. 2019).

Accordingly, my analysis begins with the question of whether the LEA violated the IDEA by failing to provide the Student with an IEP that was sufficient to meet his needs, or failed to faithfully implement the IEP, thus denying him a FAPE.

To “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. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 137 S. Ct. 988, 999 (2017). This analysis must be conducted with an understanding that "crafting an appropriate program of education requires a prospective judgment by school officials." Id.

The burden of proof in this proceeding is on the Parent who initiated the hearing, and encompasses both the burden of persuasion and the burden of production. Schaffer v. Weast, 546 U.S. 49, 61 (2005). There is no presumption of inadequacy as it pertains to the IEP. Weast v. Schaffer, 377 F.3d 449, 456 (4th Cir. 2004). Parents attacking the terms of an IEP bear the burden of showing

why it is deficient, and parents must offer expert testimony to show the IEP(s) to which they object is (are) inadequate.2 Id. The Parent must prove how and why the Student was denied FAPE.

The Parent utterly and completely failed to satisfy her burden of proof by failing to offer any expert testimony opining on the inadequacy of the LEA’s proposed educational program for the Student or the impropriety of his placement, or even the progress he made or lack thereof. The Parent only moved to qualify a single expert witness. This expert witness was a sociology professor qualified as an expert in “childhood trauma,” who made no comments on any aspect of any IEP implemented or proposed for the Student. The Parent’s sole expert failed to opine that the LEA’s placement of the Student was incorrect or risked denying the Student a FAPE. The expert’s testimony that multidisciplinary teams aren’t always equipped to respond to childhood trauma (Transcript pages 568-569) was not definitive enough, nor specific enough to the Student’s situation, to be meaningful or relevant to the Parent’s burden of proof.

The specific allegations raised by the Parent in her complaint do not, in and of themselves, prove anything. The Parent’s advocate did not seek to be qualified as an expert witness and the arguments she presented are not evidence. The Parent’s documentary and testimonial evidence did little more than establish the Parent’s dissatisfaction with the LEA’s refusal to order “residential placement” for the Student. It must also be noted that the Parent failed to present any evidence regarding the attributes of any residential placement or private day school that she felt would better serve the Student’s needs, specifically or in general. 3

In her closing brief, the Parent argues that the decision to “only” qualify the Student under the category of Developmental Delay restricted the specific services and accommodations that would be considered and that the Student would need in order to be successful in the educational setting. I observe that not only did the Parent fail to introduce any expert witness testimony to support the assertion that any such restriction existed, no expert opined that additional or different eligibility category(ies) would have afforded the Student access to services and accommodations that he needed and that he was “unsuccessful” as a result.

I find the Student’s IEPs and amendments thereto were "reasonably calculated" to enable him to progress in light of the Student's circumstances at the time those documents were created, and the LEA did not deny him a FAPE. I make this finding primarily in reliance on the testimony of the

2 In her closing brief, the Parent argues that “IEP Teams and other school personnel should be able to demonstrate that they are providing” a FAPE under the standards expressed by the U.S. Supreme Court in Endrew F. As framed, this argument suggests the Parent was mistaken about who bears the burden of proof and persuasion in this proceeding.

3 I note, however, that the evidence established the Parent’s demands were themselves confusing. While no expert witness testified to the Student’s medical need for in-patient psychiatric treatment, the Parent’s presentation did suggest that the Student’s mental health needs might necessitate admission to a hospital or other in-patient medical (psychiatric) facility. There were repeated insinuations that the Parent expected the LEA to effectuate such a medical admission by designating the Student’s educational placement as “residential.” The LEA refused the change the Student’s educational placement to “residential,” but no matter the Parent’s demands, there was no evidence that the LEA would be able to admit any student to a residential treatment facility for medical reasons.

XXXXXXXX sped teacher, who was qualified (on the LEA’s motion) as an expert in special education and who saw the Student on a daily basis when he was in attendance during the 2022-2023 school year. She testified that she believed the IEP accommodations and BIP addressed the Parent’s concerns about the Student’s social development and his behavior. (Transcript pages 982-986). She opined that the placement decision was appropriate. (Transcript page 986) She opined that the Student benefited from being in the general education classes. (Transcript page 986). She testified that he had constant, 1-1 adult supervision (even though he was not assigned a 1-1 full time aide). She testified that he was able to interact with his peers at recess in an age appropriate way. She testified that she did not observe any behavior during recess that caused her any concern for the Student’s safety. She testified that he mastered most of his IEP goals and made progress on all of them.

Although my analysis could both start and end there, I will address the second prong of the standard: whether a violation of parents' procedural rights under the IDEA "significantly impeded" their opportunity to participate in decision-making regarding their child's education. The Parent contends that the LEA violated her parental participation rights under the IDEA by denying her a meaningful opportunity to participate in the development of the IEP and in IEP Team meetings, by denying her access to the Student’s educational record, and by failing to include in the Student’s record various incident reports and data relating to the Student’s progress on his IEP goals, and by failing to change the Student’s placement in line with the Parent’s expressed wishes. Every one of the Parent’s own witnesses confirmed that she attended and actively participated in every IEP Team meeting. See, D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 565 (3d Cir. 2010) (holding that a school district did not violate the IDEA when it ignored parents' letters for months but included the parents in their child's IEP meeting because "they ultimately had an opportunity to participate meaningfully in the creation of an IEP" for their child).

The LEA did not violate her parental rights under the IDEA by failing to include certain items in the Student’s record. IDEA and the Family Educational Rights Privacy Act (FERPA) grants parents the right to review and inspect their child’s educational records. VAC 20-81- 170(A)(1)(a)(1); 34 C.F.R. 99.10; 34 C.F.R. 300.501(a) and 34 C.F.R. 300.613. Except where a

limitation applies, an LEA must provide a parent or eligible student with an opportunity to inspect and review the student’s educational records. Apart from specifically enumerated exceptions, education records under FERPA are those records that directly relate to a student and are maintained by an education agency or institution or by a party acting for the agency or institution. 34 C.F.R. 99.3. The IDEA incorporates FERPA’s definition. 34 C.F.R. 300.611(b). Education records may be recorded in any manner, including but not limited to handwriting, print, computer media, video or audio tape, film, microfilm, or microfiche. 34 C.F.R. 99.3 The designation of a document as an education record depends on who maintains it, not who originates it. 34 C.F.R.

99.3. Email that is not in a student’s permanent file is not considered “maintained” and thus is not an education record. S.A. v. Tulare County Office of Educ., 53 IDELR 143 (E.D. Cal. 2009) The IDEA does not specify how often a school system should collect data or how long it should be maintained. Instead, it only requires that the IEP describe how the child's progress toward their goals will be measured. 20 U.S.C. § 1414(d)(1)(A)(i)(III). FERPA specifically excludes several types of records from consideration as education records even though they may contain information directly related to a student and may be maintained by the educational agency. 34

C.F.R. 99.3. Among these exceptions are records kept in the sole possession of the maker and are

used only as a personal memory aid, and records created by a law enforcement unit of the educational agency that were created for the purpose of law enforcement. While photos and videos depicting a student may meet the definition of an “education record,” they are not necessarily so unless, for example, the individual taking the photo or video intends to make a specific student the focus of the photo or video or, the LEA uses the video for disciplinary actions against the Student or, the video depicts an activity that resulted or may result in the use of that video for disciplinary action. See, Frequently Asked Questions on Photos and Videos under FERPA, 118 LRP 16524 (FPCO 4/19/18). I conclude that the items the Parent claims were either omitted from the Student’s record, or to which she claims to have been denied access, were not “education records” of the Student. Accordingly, there was no “wrongful denial” of access by the LEA and the Parent failed to prove any attendant violation of FERPA or IDEA by the LEA.

I in no way minimize the necessity of compliance with the procedural requirements of the IDEA, including those pertaining to parental participation. See, [DiBuo ex rel. DiBuo v. Bd. of Educ., 309 F.3d 184, 191 (4th Cir. 2002)](https://advance.lexis.com/document/documentlink/?pdmfid=1000516&crid=dbd25a0d-f718-4ceb-96b3-23bbdbb62576&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5VR6-9RD1-JGHR-M4RK-00000-00&pdpinpoint=PAGE_251_1107&pdcontentcomponentid=6388&pddoctitle=R.F.%2C%2B919%2BF.3d%2Bat%2B251-52&pdproductcontenttypeid=urn%3Apct%3A30&pdiskwicview=false&ecomp=krsyk&prid=06c7a7ec-2060-4a2f-b592-1ba63466cb5c) (explaining, in a case before 20 U.S.C. [§ 1415(f)(3)(E)(ii)(II)](https://advance.lexis.com/document/documentlink/?pdmfid=1000516&crid=dbd25a0d-f718-4ceb-96b3-23bbdbb62576&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5VR6-9RD1-JGHR-M4RK-00000-00&pdpinpoint=PAGE_251_1107&pdcontentcomponentid=6388&pddoctitle=R.F.%2C%2B919%2BF.3d%2Bat%2B251-52&pdproductcontenttypeid=urn%3Apct%3A30&pdiskwicview=false&ecomp=krsyk&prid=06c7a7ec-2060-4a2f-b592-1ba63466cb5c) was enacted, that "[w]e have no doubt that a procedural violation of the IDEA . . . that causes interference with the parents' ability to participate in the development of their child's IEP will often actually interfere with the provision of a FAPE to that child"). But here, I cannot find on this record that the LEA significantly impeded the Parent’s participation rights under the IDEA.

The Parent’s Complaint suggests that certain alleged acts or omissions by the LEA are “strict liability” violations of IDEA. I disagree, but will discuss some of those alleged violations:

## Failure to designate the Student’s medical diagnosis as his IDEA eligibility “category”

The focus in eligibility determinations is on educational impact and the child’s strengths and needs, and not on a medical diagnosis. See, Edkey Inc. Sequoia Choice Sch. Az. Distance Learning Sch., 121 LRP 34226 (SEA A 9/15/21). While the Parent desired a different eligibility category than “developmental delay,” and/or wanted the IEP to reference a medical diagnosis, she in fact proved that the LEA *did* examine the educational impact of the various medical conditions she brought to the LEA’s attention with which the Student may or may not have been diagnosed during the relevant time frame.

IDEA provides for the following eligibility categories: intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this title [20 USCS §§ 1400 et seq.] as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities. The term “child with a disability” for a child aged 3 through 9 (or any subset of that age range, including ages 3 through 5), may, at the discretion of the State and the local educational agency, include a child experiencing developmental delays. Nonetheless, the record established that none of the Student’s various medical diagnoses that the Parent reported to the LEA obviously aligned with an eligibility category. Specifically, the

Parent’s emphasis seemed to be on the inclusion of the PTSD diagnosis.4 However, PTSD is not one of the eligibility categories. So not only did the Parent fail to prove that the selected eligibility category resulted in a denial of FAPE, no qualified expert even attempted to explain how any medical diagnosis the Student had actually received correlated to a specific eligibility category in a way that was determinative of educational impact.

## Failure to follow recommendations of private evaluators

I also reject the Parent's claim that the IEP team acted wrongfully in failing to follow the recommendations of private evaluators in determining the Student’s eligibility category or placement. The IDEA does not require school districts to defer to the opinions of private evaluations procured by a parent. See, Miller v. Charlotte-Mecklenburg Sch. Bd. of Educ., 64 F.4th 569 (4th Cir. 2023). To the contrary, the IDEA instructs school districts to rely on diverse tools and information sources in making an eligibility assessme[nt. 20 U.S.C. § 1414(b)(2)(A).](https://advance.lexis.com/search/?pdmfid=1000516&crid=06c7a7ec-2060-4a2f-b592-1ba63466cb5c&pdsearchterms=Miller%2Bv.%2BCharlotte-Mecklenburg%2BSch.%2BBd.%2Bof%2BEduc.%2C%2B64%2BF.4th%2B569&pdstartin=hlct%3A1%3A1&pdcaseshlctselectedbyuser=false&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdqttype=or&pdquerytemplateid&ecomp=5wvdk&prid=6f6865a5-927b-4476-b6c6-85b6859a7c14) Furthermore, the evidence in the case established none of the privately retained providers ever participated in any of the IEP Team meetings or communicated directly with LEA staff.

## Failure to provide timely IEP drafts

The Parent claims the LEA violated 8 VAC 20-81-110(E)(8), which provides: If the local educational agency elects to use a draft version of an IEP in any IEP team meeting, such draft shall be developed and a copy shall be provided to the parent at least two business days in advance of the IEP meeting. The testimony of the preparer established that a draft version of an IEP was only used at the December 15, 2021 IEP meeting. Exhibit P-7, on page 3 of 26, does indicate that the Parent was notified of the meeting date and time on December 6, 2021, and given a copy of the IEP draft on 12/15/21. While this is a technical violation of the regulations, on direct examination the Parent testified that her complaints regarding denial of meaningful opportunity to participate related specifically to the IEP Team Meetings that occurred in December, 2022 and thereafter. Witnesses testified that the LEA did not use any draft versions of any IEP after the December 15, 2021 meeting because the Parent had specifically requested that she participate in the development of any drafts and that they not be developed in advance by school staff. While the Parent disputed this, she failed to produce drafts to refute the testimony of the LEA staff that no drafts had been relied upon or developed in advance. I conclude that the single, untimely provision of a draft IEP in 2021 did not deny the Parent a meaningful opportunity to participate in its development, particularly in light of her testimony and my finding that the Student was not denied a FAPE.

4 In her closing brief, the Parent argues that the eligibility team should have used “trauma” “as another qualifying category.”

## Parental confusion about the identity of the Student’s “case manager”

The Parent claims a lack of case management services constituted a failure to implement the IEP. While the Parent’s advocate argued strenuously that the Parent was not made aware of the identity of the Student’s case manager, LEA witnesses uniformly testified that the “case manager” was simply the Student’s assigned special education teacher. There was no evidence introduced to substantiate the Parent’s claim that her confusion on this point constituted a failure by the LEA to provide case management services or to implement the IEP. LEA staff witnesses testified that case management services were provided. Likewise, there was no evidence introduced that the special education instructional staff assigned to the Student were not appropriately qualified. Articulating these complaints as a “failure” by the LEA because it did not provide the Parent with the assurances she demanded does not result in a shifting of the burden of proof on this point in this context.

## Non-compliance with “Letter to Haller” mandate re: IEP Team participants

Finally, the Parent complains that the LEA failed to implement the IEP by failing to “ensure that all IEP Team participants demonstrated a legitimate educational purpose when serving on the IEP Team as mandated in OSEP’s Letter to Haller (May, 2019).” My review of Letter to Haller leads me to conclude that OSEP was clarifying its position on the role of school administrators in IEP Team meetings. My understanding of the Parent’s objection was to the attendance by LEA counsel at IEP Team meetings, but Letter to Haller does not address attendance at IEP Team meetings by school division attorneys. Furthermore, it is unclear to me how this allegation is related to failure to implement the IEP.

## Request for IEE

As to the specific request for an IEE: an IEE responds to some other evaluation with which the Parent has disagreed. I deny the Parent’s request for an IEE to respond to the original evaluation of the Student that occurred in 2021 given she did not voice her disagreement within a relevant time frame and the parties now agree that evaluation is no longer relevant. The LEA proposed to re-evaluate the Student and the Parent has refused consent to the re-evaluation. I cannot override the Parent’s refusal to consent to a re-evaluation. I find there is no evaluation to which an IEE would now be responsive because there is no current/recent evaluation with which the Parent disagrees.

## SUMMARY OF LEGAL CONCLUSIONS AND IDENTIFICATION OF PREVAILING PARTY

In conclusion, having considered all arguments and all evidence, testimonial and documentary, I conclude the Parent failed to meet her burden of proof and failed to establish that the LEA denied the Student FAPE. The Parent failed to meet her burden of proof and failed to establish that the LEA committed procedural violations of the IDEA that either impeded the Student’s right to FAPE, or significantly impeded her opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the Student; or caused a deprivation of educational benefits.

Accordingly, I deny all Parental requests for relief. I find in favor of the LEA and identify it as the prevailing party on all issues.

# APPEAL RIGHTS

Right of appeal. ([34 CFR 300.516](https://advance.lexis.com/document/?pdmfid=1000516&crid=7ded24c4-5207-4dbf-81b0-f100ca26045e&pddocfullpath=%2Fshared%2Fdocument%2Fadministrative-codes%2Furn%3AcontentItem%3A69T8-NJ61-JCBX-S1WH-00009-00&pdcontentcomponentid=154866&pdteaserkey=sr0&pditab=allpods&ecomp=twkmk&earg=sr0&prid=7f023981-4868-455b-a9a9-c254812aeb6b); § 22.1-214 D of the Code of Virginia)

1. A decision by the special education hearing officer in any hearing, including an expedited hearing, is final and binding unless the decision is appealed by a party in a state circuit court within 180 days of the issuance of the decision, or in a federal district court within 90 days of the issuance of the decision. The appeal may be filed in either a state circuit court or a federal district court without regard to the amount in controversy. The district courts of the United States have jurisdiction over actions brought under § 1415 of the Act without regard to the amount in controversy.
2. On appeal, the court receives the record of the administrative proceedings, hears additional evidence at the request of a party, bases its decision on a preponderance of evidence, and grants the relief that the court determines to be appropriate.
3. If the special education hearing officer's decision is appealed in court, implementation of the special education hearing officer's order is held in abeyance except in those cases where the special education hearing officer has agreed with the child's parent(s) that a change in placement is appropriate in accordance with subsection J of this section. In those cases, the special education hearing officer's order shall be implemented while the case is being appealed.
4. If the special education hearing officer's decision is not implemented, a complaint may be filed with the Virginia Department of Education for an investigation through the provisions of 8 VAC 20-81-200.

*Krysia Carmel Nelson*

Krysia Carmel Nelson, Hearing Officer Dated this 17th day of December, 2023

CERTIFICATE OF SERVICE

I, Krysia Carmel Nelson, do hereby certify that this 17th day of December, 2023, I e-mailed a copy of this decision to:

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