COVER PAGE FOR HEARING DECISION, NOT TO BE PUBLISHED

VIRGINIA:

# SPECIAL EDUCATION DUE PROCESS HEARING

 , by and through , Parents,

XXXXX & XXXXX XXXXXX,  Complainants

v.

XXXXXXXXXXXXXX PUBLIC SCHOOLS Respondent.

**Student & Parent:** **Administrative Hearing Officer:**

Xxxxxx X. XXXXXx John V. Robinson, Esq.

XXXXX & XXXXX XXXXXx 7102 Three Chopt Road

Richmond, Virginia 23226

**Child's Attorney:** (804) 282-2987 (Telephone)

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**LEA's Attorney:**

Joi N. Brown, Esq.

## DECISION OF THE HEARING OFFICER

## I. Findings of Fact[[1]](#footnote-1)

1. The requirements of notice to the Parents were satisfied[[2]](#footnote-2).
2. The Student's date of birth is Xxxxxxxxxxxxxxxxxxxx. XXS 2[[3]](#footnote-3).

3. The Student is eligible to receive special education and related services pursuant to the *Individuals with Disabilities Education Improvement Act of 2004 (*as amended, the “IDEA”*)* as a student under the disability category autism. XXS 2 at 259. The student suffers from XXXx syndrome, a rare disorder. Tr. 13, 141. The student is xxxxxxxxxxxx and relies on augmentative communication devices. Tr 13. The student needs full support with limited hand function and mobility. TR. 13.

4. The Parents requested an administrative due process hearing under the IDEA, as specified in the initial request for due process hearing received by the LEA and the SEA on October 24, 2023 (the “Request” or the “Complaint”), which is incorporated herein by this reference.

5. The Parents, the LEA’s Director of Special Education, the School Board’s attorney, the SEA evaluator and the hearing officer participated in the first prehearing conference call at 11:00 am on Monday, November 6, 2023.

6. All participants agreed to written communication by email alone.

7. On November 7, 2023, the School Board, by counsel, timely filed a Notice of Insufficiency and Motion to Dismiss.

8. Before the hearing officer ruled on the sufficiency challenge, on November 9, 2023, the Parents emailed to the hearing officer, the School Board and the Virginia Department of Education an amended request for due process hearing (the “Amended Request”). Accordingly, the sufficiency challenge was subsequently rendered moot when the hearing officer granted permission for the amendment.

9. OnNovember 16, 2023, at 11:00 am**,** the parties held a second pre-hearing conference call. The hearing officer granted permission for the Parents to file the Amended Request, which the hearing officer and the parties deemed filed on November 16, 2023.

10. Accordingly, pursuant to 8VAC20-81-210(G), the timeline for the due process hearing began again November 16, 2023.

11. Because of a medical emergency, the Parents moved for a continuance of the hearing. The School Board did not object to the continuance and the hearing officer found good cause to continue the hearing to March 18 and 19, 2024, starting at 8:00 am. The hearing officer also found the continuance to be in the best interests of the student.

12. On February 28, 2024, following 5 prehearing conference calls, the hearing officer entered his Fourth Amended Scheduling Order, incorporated herein by this reference.

13. The Scheduling Order specified the issue for hearing:

“Regarding the Student’s Individualized Education Programs (“IEPs”) for school years 2022-2023 and 2023-2024, the Parents contend that the Student was denied a free appropriate public education (“FAPE”) as a result of the LEA’s failure to provide the Student with services, related services and accommodations in conformance with the Student’s applicable IEPs. In short, the parents contend that the LEA materially failed to implement the subject IEPs.”

14. The matter proceeded to a hearing on March 18-19, 2024, on the issue specified above.

15. The Student’s IEP created on August 5, 2022, for xxx xxxxxxxxxx year at Xxxxx School, required specially designed instruction in reading for 100 minutes every 2 weeks in the general education setting; 100 minutes every 2 weeks of written language instruction in the general education setting; 90 minutes of study skills and work completion, 5 times every 2 weeks in the special education setting. XXS 2 at 103.

16. In addition to a full-time one to one instructional aide, the LEA also provided the student with a nurse during the school day to assist with mobility, transitions, feeding, suctioning of saliva (using a machine), toileting, seizures, personal hygiene, and other needs. XXS 2 at 102.

17. The IEP also required related services, all in the general education setting, of speech language therapy of 30 minutes monthly; indirect physical therapy services of 80 minutes monthly; and indirect or consultative occupational therapy of 60 minutes monthly. XXS 2 at 103.

18. The IEP Amendment created on September 8, 2022, for the remainder of the student’s xxxxxxxxxx year, continued these services and related services. XXS 2 at 209.

19. Numerous accommodations and modifications were provided concerning the student’s unique individualized educational programming. XXS 2 at 94-97 and 223-226.

20. The Student’s IEP created on May 19, 2023, for xxx xxxxxxxxxxxx year at Xxxxx School, included specially designed instruction in study skills and work completion for 450 minutes every 2 weeks in the special education setting. XXS 2 at 137.

21. In addition to the full-time one to one instructional aide, the LEA also continued to provide the student with a nurse during the school day to assist with mobility, transitions, feeding, suctioning of saliva (using a machine), toileting, seizures, personal hygiene, and other needs. XXS 2 at 136.

22. The IEP also required related services, all in the general education setting, of indirect physical therapy services of 80 minutes monthly; indirect or consultative occupational therapy of 15 minutes every 9 weeks; and behavioral support of 300 minutes every 2 weeks. XXS 2 at 103.

23. The IEP Amendment created on June 14, 2023, added speech therapy services of 60 minutes monthly back into the IEP, in the special education setting. Other than this addition, the services and related services continued to be the same.

24. The IEP Amendment concerning the September 29, 2023, IEP Team meeting, dropped the services concerning study skills and work completion. XXS 2 at 269.

25. Again, numerous accommodations and modifications were provided to the student in the IEP. XXS 2 at 130-133.

26. The Parents did not present probative evidence that the LEA failed to implement a material or significant portion of the IEPs covering school years 2022-2023 and 2023-2024.

27. While not required to prove this, the LEA presented significant evidence supporting its assertion that it reasonably and substantially implemented the subject IEPs for school years 2022-2023 and 2023-2024.

28. The LEA ensured that each subject IEP was accessible to each regular education teacher, related services provider, and any other service provider who was responsible for implementation (collectively, the “Responsible Persons”). *See, e.g.,*Tr. 22, 31-32, 207, 286, 289, 364.

29. The Responsible Persons were familiar with the subject IEPs. Tr. 31-32, 55-56, 100, 105, 185, 364.

30. The IEPs were implemented daily, with Responsible Persons acting in a collaborative and coordinated manner. Tr. 58, 61, 207, 356, 364.

31. The IEPs were materially implemented concerning services, related services, accommodations, and modifications. Tr. 67, 157, 194-195, 325.

32. Concerning the subject IEPs, each Responsible Person was informed of his specific responsibilities related to implementation, and the specific accommodations, modifications, and supports that must be provided for the student in accordance with the IEP.

33. The testimony of the educators and the LEA witnesses was credible and consistent concerning the material issue before the hearing officer. The demeanor of such witnesses was open, frank, and forthright.

## II. Additional Findings, Conclusions of Law and Decision

8 VAC 20-81-210(A) provides:

“A. The Virginia Department of Education provides for an impartial special education due process hearing system to resolve disputes between parents andlocal educational agencies with respect to any matter relating to the: (§ 22.1-214 of the Code of Virginia; 34 CFR 300.121 and 34 CFR 300.507 through 34 CFR 300.518)

1. Identification of a child with a disability, including initial eligibility, any change in categorical identification, any partial or complete termination of special education and related services;

2. Evaluation of a child with a disability (including disagreements regarding payment for an independent educational evaluation);

 3. Educational placement and services of the child; and

 4. Provision of a free appropriate public education to the child.”

Hearing officers are limited in subject matter jurisdiction or power in the types of disputes they can hear and decide to those enumerated above and to certain school disciplinary matters. Hearing officers do not have even close to the plenary jurisdiction of state or federal judges. Any allegations raised by the Parent that do not relate to one of those issues must be dismissed and related requests for relief are denied. Accordingly, the Parents’ request for relief of placement by the hearing officer within another school district is beyond the subject matter jurisdiction or power of the hearing officer and must be denied.

In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017), the Supreme Court reaffirmed and further explained the fundamental standard of appropriateness under the IDEA first set out in its decision 35 years ago in *Hendrick* *Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). In *Endrew F.*, the Supreme Court refined the FAPE test, defining “some educational benefit” as requiring a school division to offer an IEP which is reasonably calculated to enable a child to make educational progress in light of the child’s individual circumstances.

The United States Court of Appeals for the Fourth Circuit in *R.F. v. Cecil County Public Schools, et al*., 919 F.3d 237 (4th Cir. 2019) stated that "this standard is framed in terms of each child's unique circumstances because “a focus on the particular child is at the core of the IDEA.”"(citing Endrew F., 137 S. Ct. at 999).

Of course, the IEP is the backbone of a student's special education program. “Participation in the IEP and educational placement process is critical to the organization of the IDEA." *Doug* C. *v. Hawaii Dept. of Educ.,* 720 F.3d 1038, 1043 (9th Cir. 2013) (citations omitted).

 To that end, the Supreme Court of Virginia has recognized that an appropriate set of IEP goals is in and of itself is a significant factor in determining whether a school district has offered an appropriate program. *See School Bd. v. Beasley*, 238 Va. 44, 52, 380 S.E.2d 884, 889 (1989).

In this case, the Parents have hampered the LEA’s ability to develop an appropriate IEP because they have refused to consent to the LEA’s requests for reevaluation of the Student. As an aside, both parties now request that the hearing officer order an independent educational evaluation.

Parental consent is required for reevaluation. 34 CFR 300.300(c). If the parents refuse consent, the LEA may but is not required to pursue the consent override procedures in 34 CFR 300.300(a)(3).

 As no assessments were made to measure the Student’s present levels of academic achievement and functional performance (the “PLAAFP”), it was well nigh impossible for the LEA to establish reliable baselines for the PLAAFPs in the applicable IEPs, for the IEP Teams to address each of the Student’s unique disability-based needs in the PLAAFP, and to develop meaningful and appropriate measurable annual goals, including academic and functional goals. Congress expressed a state’s eligibility for federal IDEA funds in terms of whether a FAPE is “available” to all children with disabilities. 20 U.S.C. § 412(a)(1)(A) & (B). Thus, since the stated purpose of the regulations is to ensure that children with disabilities have FAPE “available to them” (34 C.F.R. § 300.1(a)), if a school district has made FAPE available, then neither the fact that a family does not access it nor the reason that they elected not to access it is evidence of a school district’s noncompliance with the IDEA.

 Compliance with the IDEA turns on the appropriateness of what was offered, not on whether a school district overcomes the misgivings of parents who are deciding whether to have their child attend the public-school program that is offered based on their own belief that their child is not safe at school. Congress did not express the duty in terms of whether each child actually attends public school and receives the public education that a school district makes available.

Accordingly, **the availability of a FAPE** is key under the IDEA, but if the family fails to allow the school district to provide the available educational opportunities because the parent refused to send the student to school, the school is not responsible for the provision of the services. See, e.g., *Pedraza v. Alameda Unified Sch. Dist*., 117 LRP 3792, 676 F.App'x 704 (9th Cir. 01/26/17, unpublished) (The three-judge panel echoed the District Court’s holding in *Pedraza v. Alameda Unified Sch. Dist*., No. 05-04977 CW, 2011 WL 4507111, at \*11 (N.D. Cal. Sept. 29, 2011) that a school district is not liable for failing to provide services to a student when that failure is caused by the parents’ own lack of cooperation).

 Nevertheless, as the LEA argues, by counsel, in its Post-Hearing Brief, LEA staff have made a good faith, coordinated, collaborative effort to take measures, including conducting informal assessments (for which parental consent is not required), in order to meet the needs of the Student. During the 2022-2023 school year, following the approval of the parents (later withdrawn), the LEA made a good faith attempt to meet the needs of the Student in a more restricted, self-contained setting, for which the LEA has long been advocating.

 The law does not require that a school district perfectly adhere to an IEP; minor implementation failures will not be deemed a denial of FAPE. *Van Duyn v. Baker Sch. Dist.,* 502

F.3d 811, 820-22 (9th Cir. 2007). However, a school district's "failure to implement a material or significant portion of the IEP can amount to a denial of FAPE.” *Sumter Cty. Sch. Dist. v. Heffernan,* 642 F. 3d 478 (4th Cir. 2011). *See also, Houston Indep. Sch. Dist. v. Bobby R.,* 200 F. 3d 341 (5th Cir. 2000).

 34 CFR § 300.323(d) provides:

Each public agency must ensure that— (1) The child’s IEP is accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation; and (2) Each teacher and provider described in paragraph (d)(1) of this section is informed of— (i) His or her specific responsibilities related to implementing the child’s IEP; and (ii) The specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.

 The LEA has taken reasonable steps to implement the Student’s applicable IEP, as written, including ensuring that assignments were modified, notes were provided, and the Student’ various communication devices were accessible to xxx and in working order.

 The LEA has monitored xxx progress through regular and frequent communication of all staff working with the Student, shared spreadsheets, and daily check-ins between the Student’s instructional assistant and case manager.

 When LEA staff reasonably felt that changes were needed to help the Student succeed, they attempted to communicate the needs with the Parents and documented when the recommended changes were rejected by the Parents.

In a special education administrative due process proceeding initiated by the parents, the burden of persuasion is on the parents to establish by a preponderance of the evidence that the LEA has failed to provide the student with a free appropriate education (“FAPE”) concerning the issues they have raised. *Schaffer, ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). Pursuant to the Scheduling Order, the burden of production was also on the Parents.

Many of the issues raised by the Parents in their Amended Complaint are not covered in the IEP and are therefore not subject to an implementation challenge. For example, “lack of staff training on AAC device”, “[Student] had limited access to communication and xxx 1:1 was not proficiently trained on working with [Student]”, etc. Furthermore, no probative evidence was presented concerning many of the parental complaints, while educator after educator testified convincingly and specifically to negate these allegations, including the allegations regarding abuse by the aide.

 The IDEA and its accompanying regulations do not require the School Board to accede to a parent's demands at any IEP meeting. While the IDEA and the IEP process are designed to ensure parental participation in decisions concerning the educational programming for their child, the IDEA does not permit parents to usurp or otherwise hinder a LEA's authority and duty to provide FAPE to the student.

 Such an interpretation could result in delays, stalemates and impasses that would leave educators hamstrung. *Fitzgerald v. Fairfax County Sch. Bd.,*, 556 F.Supp.2d 543 (E.D.Va. 2008).

In *Endrew F*, the Supreme Court of the United States confirmed that deference must be given to the professional judgments of educators. A court or hearing officer is required to give deference to the opinions of school board witnesses who are professional educators “based on the application of expertise and the exercise of judgment by school authorities.”  *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, No. 15-827, 137 S.Ct. 988 (2017); *see also Rowley*, 458 U.S. at 206-208; *M.M*., 303 F.3d at 533.

Like *Rowley*, *Endrew F.* is also careful to recognize the importance of leaving the business of running schools to the considered judgment of local educators. This Circuit has always recognized this mandate:

In *Hartmann v. Loudoun County*, the Court stated: 

*See also Springer v. Fairfax County*, 134 F.3d 659, 663 (4th Cir. 1998) (holding that “[a]bsent some statutory infraction, the task of education belongs to the educators who have been charged by society with that critical task”); *Barnett v. Fairfax County School Board*, 927 F.2d 146, 151-52 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991) (recognizing Congressional intent to leave education decisions to local school officials and recognizing the importance of giving school officials flexibility in designing educational programs for students); and *Tice v. Botetourt County,* 908 F. 2d1200 at 1207 (4th Cir. 1990)(once a “procedurally proper IEP has been formulated, a reviewing court should be reluctant . . . to second-guess the judgment of education professionals” – rather, the court should “defer to educators’ decisions as long as an IEP provided the basic floor of opportunity that access to special education and related services provides”).

Accordingly, hearing officers must not succumb to the temptation to substitute their judgment for that of local school authorities in IEP or educational matters. *Arlington County Sch. Bd. v. Smith*, 230 F.Supp. 2d 704, 715 (E.D. Va. 2002).

Educators exercising their considered professional judgments to implement a procedurally correct IEP should be afforded significant academic autonomy and should not be easily second-guessed by reviewing persons. *Hartmann v. Loudoun County Bd. of Educ.,* 118 F.3d 996, 1000-1001 (4th Cir. 1997); *Johnson v. Cuyahoga County Comm. College*, 29 Ohio Misc.2d 33, 498 N.E.2d 1088 (1985).

Professional educators in the school division, who are the ones most familiar with the Student, the child study process, the special education eligibility process, and the educational programming available within the school division, have testified consistently and convincingly regarding the appropriateness of the educational decisions rendered concerning the Student.

## DECISION

 Based on the documentary and testimonial evidence, Parent have not met their burden to show a denial of FAPE to the Student and the evidence warrants a decision in favor of XXS on all issues, and dismissal of this proceeding.

## ORDER

In keeping with LEA’s policies and procedures, LEA/Respondent shall fund independent educational evaluations (IEEs) by evaluators of the Parents’ choosing of Student in all areas of suspected disability, including but not limited to autism and OHI related to XXXx syndrome, including an academic achievement assessment, a Functional Behavioral Assessment (FBA) by a Board-Certified Behavior Analyst (BCBA), an assistive technology (AT) assessment, and any additional assessments deemed necessary.

The LEA should convene an IEP meeting within 30 days of the completed IEE, with payment for the attendance of the evaluators to attend the IEP meeting.

Student's Parents shall cooperate and provide LEA with the necessary consents for evaluations.

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

ENTER: 4 / 19 / 2024

John V. Robinson, Hearing Officer

cc: Persons on the Attached Distribution List

1. To the extent the other section entitled, “Additional Findings, Conclusions of Law and Decision” includes findings of fact, these findings are incorporated into this section. [↑](#footnote-ref-1)
2. The Parents and the Student are referred to generically to preserve privacy. [↑](#footnote-ref-2)
3. Exhibits submitted by the LEA and admitted into evidence in this proceeding are cited as "XXS <Exhibit Number> <page reference, if any>". The transcript of the hearing on March 18-19, 2024, is cited “Tr. page”. [↑](#footnote-ref-3)