**VIRGINIA DEPARTMENT OF EDUCATION**

**DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES**

**OFFICE DISPUTE RESOLUTION AND ADMINISTRATION SERVICES**

# VDOE CASE: No. 24-042

## DECISION

XXXXXXXXXXXX Public Schools XXXXXXXXXXX, Legal Custodian

**School Division Name of Parent**

Dr. XXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXX

**Division Superintendent Name of Child**

Mary Kathryn Hart, Esquire

Senior Assistant County Attorney Dr. Kandise Lucas

**Counsel Representing LEA Advocate for the Parent/Child**

Robert J. Hartsoe, Esquire Parents/Child

**Hearing Officer Party Initiating Hearing**

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## LEGEND

Parent XXXXXXXXXXX, Legal Custodian

Child XXXXXXXXXXXXXX

LEA XXXXXXXXXXXX Public School

Proposed Private Placement XXXXXXXXXXXXXXXXXXXXXXXXXCenter

XXXX School XXXXXXXXXXX School

Current IEP SB Exhibit 48

Parent Testimony Hearing Transcript

LEA Admission LEA’s Post-Hearing Brief

## DECISION

### INTRODUCTION

At first, the matter was an extremely complicated matter. The Child was involved in an assault by a “mob” and subject to criminal charges in the local juvenile court. The Manifestation Determination Review (MDR) team determined that the Child’s negative behavior was a manifestation of XXX disability. As a result, the Child was returned to the Current IEP, consistent with the IDEA. Despite this MDR team’s determination and in violation of IDEA, the LEA “re-assigned” the Child per LEA school policy. Specifically, this LEA policy, in violation of IDEA, required the Child to be “re-assigned” from the Current IEP placement to “home-based services” when criminal charges were filed, in violation of the IDEA. As a result, the Child was placed in IDEA’s most restrictive environment, home-based service. Consequently, the Child was robbed of the IDEA services of the Current IEP from March 2023, to present. This was admitted by the LEA in their Post-Hearing Brief and consistent with the evidence including admissions by LEA witnesses. As a further result, the Child was negatively affected academically, socially and emotionally by this LEA violation of the IDEA per Parent Testimony. As a result of the LEA Admission, the law and facts became straightforward, undisputed. The Parties and their counsel or advocates presented an excellent case in a professional manner. For the reasons stated herein, Parent/Child is the prevailing party.

PROCEDURAL BACKGROUND:

Pursuant to the Individuals with Disabilities Education Improvement Act (“IDEA”), this matter came upon the Parent/Child Request for Due Process Hearing, regarding the ramifications of a MDR team’s review and LEA following actions in violation of IDEA–”re-assignment.” Several issues were raised and addressed, as referenced in the PreHearing Reports which are filed herein. As a result of the LEA Admission and the lack of persuasive evidence of other issues, witness summations are unnecessary.

LEA ADMISSION[[1]](#footnote-1)

In the LEA’s Post-Hearing Brief, the LEA admitted and the following is found to be true:

***Issue #7: The LEA Committed Procedural Errors in Violation of the IDEA regarding the IEP Meeting held in March 2023. Those Violations Robbed the Child of FAPE for a period of approximately two months from March 9, 2023 to May 2023.***

***The LEA failed to make the determination that the [the Child] shouldn’t be re-assigned despite criminal charges that were re-assignable because of the previous determination that XXX behaviors were a manifestation of a disability.*** *There was clearly miscommunication among staff and a perception by school staff that a re-assignment was different than a disciplinary consequence. Hr’g Tr. 282:8-13, 756:4-21.* [Emphasis added.]

ISSUES DEFINED:

1. Whether the LEA violated IDEA by improperly recording nonexistent events in the Child’s academic file and, if so, what is the remedy?
2. Whether the LEA violated IDEA by not properly memorializing records as required by IDEA and, if so, what is the remedy?
3. Whether the LEA violated IDEA by not allowing the Parent/Child to copy the Child’s records as defined by the IDEA and, if so, what is the remedy?
4. Whether the LEA violated IDEA by not allowing the Parent/Child to inspect the Child’s records as defined by the IDEA and, if so, what is the remedy?
5. Whether the LEA’s implementation of the Child’s current IEP was consistent with FAPE and, if not what is the remedy?
6. Whether the LEA committed procedural errors in violation of IDEA regarding the IEP Meeting held in March 2023 and, if so, did such errors rob the Child of FAPE?
7. If such errors robbed the Child of FAPE, what is the remedy?
8. Whether the LEA committed procedural errors in violation of IDEA regarding the IEP Meeting held in September 2023 and, if so, did such errors rob the Child of FAPE?
9. If such errors robbed the Child of FAPE, what is the remedy?

## EXHIBITS

The matter was transcribed by a court reporter who recorded the exhibits as entered. The transcript shall be the proper source of the introduction of exhibits. The following may be an imperfect attempt to capture the introduction of such exhibits with knowledge of the transcript:

From the Parent/Child, the following Exhibits were introduced into evidence by page number: Parent Exhibit 1, Parent Exhibit 2, Parent Exhibit 32B, SB 3, SB 8, SB 16, SB 16A (Back Page), SB 20, SB 23, SB 25, SB 27, SB 28, SB 31, SB 32B, SB 34, SB 37, SB 40, SB 42, SB 44, SB 45, SB 46, SB 51, SB 52, SB 55, SB 56 (Joint Exhibit), SB 59, SB 61, SB 64, SB 66 and SB 69.

From the LEA, the following Exhibits were introduced into evidence: SB SB1, SB2, SB5, SB6, SB9, SB11, SB12, SB13, SB14, SB15, SB17, SB18, SB21, SB24, SB26, SB29, SB32, SB35, SB38, SB39, SB41, SB43, SB45, SB48, SB50, SB54, SB55, SB59, SB60, SB62 and SB65.

*Errata* Sheets are filed herein. All introduced *errata* sheets, exhibits, regardless of source were

considered and weight, if any are considered by the Hearing Officer in accordance with the

Regulations and IDEA.

## FACTUAL FINDINGS (By a Preponderance of the Evidence)

After reviewing the transcript, testimony, exhibits, pleadings and matters filed herein and especially the LEA Admission, the following factual findings are made:

1. As stated in the LEA Post-Hearing Brief, “the LEA failed to make the determination that the [the Child] shouldn't be re‑assigned despite criminal charges that were re‑assignable because of the previous determination that XXX behaviors were a manifestation of a disability. There was clearly mis‑communication among [LEA] staff and a perception by [LEA] staff that a re‑assignment was different than a disciplinary consequence. (HT at 282 & 756.)
2. The “re-assignment” of placement as referenced in SB Exhibits 40 and 42 was an extreme violation of IDEA and inconsistent with the Current IEP. (LEA Admission and the Current IEP.)
3. All referenced written communications in the testimony and evidence referencing the Child and by and between any LEA employee are imputed to all LEA employees, especially LEA Exhibit 45.
4. Any IEP team action taken after the date of the MDR’s decision as contained in SB Exhibit 45, dated February 13, 2023, was an extreme violation of IDEA and inconsistent with the Current IEP. (LEA Admission & the Current IEP.)
5. After February 13, 2023, the LEA’s implementation of home-based services was an extreme violation of IDEA and inconsistent with the Current IEP. (LEA Admission & the Current IEP.)
6. The Parent notified the LEA of the intention for private placement timely as contained in SB Exhibit 23 in July 2023 (or as of August 31, 2023)–timely notice of private placement as required by IDEA. (SB Exhibit 14.)
7. The LEA’s failure to implement the Current IEP from March 2023 to August 31, 2023 (in violation of IDEA) has extremely, negatively affected the Child academically, socially, and emotionally. (Parent Testimony.)
8. The Current IEP does not provide the Child FAPE given the failure of the LEA to provide FAPE, consistent with the Current IEP from March, 2023 to present on the basis that the Child’s exposure to non-sanctioned IEP actions (*i.e*., failure to implement the Current IEP as well as implementation of home based services) by the LEA (in extreme violation of IDEA) has caused the Child actual harm academically, socially and emotionally. (LEA Admission & Parent Testimony.)
9. The LEA’s implementation of home-based services imprisoned the Child in the most-restrictive IDEA environment in violation of IEP and inconsistent with this Current IEP in violation of IDEA. (LEA Admission and Parent testimony.)
10. The LEA team, despite the Parent’s objection, placed the Child in home-based services on the misconception that such action was required due to the erroneous “re-assignment” referenced in SB Exhibit 42. (LEA Admission and Parent’s Testimony.)
11. Home-based services, provided, implemented, or otherwise contemplated by the IEP team after February 2023, were inconsistent with the Current IEP (LEA Admission.)
12. The Child has not attended the placement under the Current IEP from March 2023, to present. (Undisputed from all Witnesses.)
13. The Child has not attended the placement under the Current IEP from August 30, 2023, to present. (Undisputed from all Witnesses.)
14. After receipt of the LEA letter, dated August 30, 2023, the Parent was notified that the Child will be placed into the LEA per the Current IEP. (SB Exhibit 15.)
15. The Parent/Child has failed to place the Child in the Current IEP placement from August 30, 2023, to present was without justification or excuse under IDEA. (SB Exhibit 15 and Parent Testimony.)
16. No persuasive evidence was introduced that the LEA recorded nonexistent event in the Child’s academic file as required by IDEA.
17. No persuasive evidence was introduced that the LEA failed to properly memorialize records required by IDEA.
18. No persuasive evidence was introduced that the LEA failed to allow the Parent/Child to inspect the Child’s academic records.
19. No persuasive evidence was introduced that the Security Resource Officer (SRO) was an employee or agent of the LEA.
20. No persuasive evidence was introduced that the LEA provided law enforcement information protected by applicable laws including IDEA.
21. No persuasive evidence that the video, SB Exhibit 56, is part of the Child’s commutative file, subject to inspection by the Parent per Regulation and IDEA.
22. The IEP meeting of March 2023, was in violation of IDEA, given the LEA Admission insofar as the IEP Team’s mistaken premise that the “re-assignment” was mandatory per LEA policy. (LEA Admission.)
23. The IEP meeting of September 2023, was in violation of IDEA, given the LEA Admission insofar as the IEP Team’s mistaken premise that the “re-assignment” was mandatory per LEA policy. (LEA Exhibit 45 & LEA Exhibit 42.)
24. The September 2023, IEP Meeting was conducted after the LEA communicated to the Parent that placement for the Child would be returned to XXX current IEP on August 30, 2023 (Current IEP and SB Exhibit 15).
25. The LEA’s termination of the September IEP meeting was reasonable given the circumstances; *i.e*., the negative behavior of the Parent/Child. (LEA Exhibit 56).
26. The Parent and Advocate’s participation in the September 2023, IEP meeting was reasonable and foreseeable, given the LEA Admission and the negative effect of the “re-assignment” on the Child (LEA Admission, SBA Exhibit 42 and Parent Testimony).
27. At no time has the Parent accepted the need for “re-assignment” or home-based placement as a member of the IEP team. (Parent Testimony.)
28. The Current IEP was a product of all members of the IEP to cooperate including the Parent. (Current IEP with its parental consent.)
29. The LEA’s reliance on any parental notification that the LEA of the status of the Child’s criminal charges (*i.e*., reduced or dismissed) was found to be unpersuasive and inconsistent with IDEA. (SB Exhibit 43 and LEA Admission.)
30. The LEA extremely violated IDEA by failing to coordinate the IEP team and other LEA employees regarding the effectuation of the Current IEP at all times after February 2023.
31. SB Exhibit 16A is a true and accurate copy of the Order, entered, June 16, 2023 (“Order”).
32. The Child violated criminal laws (*i.e*, found delinquent per applicable statutes regarding juveniles) at the XXXX School during lunch in XXX participation with the incident referenced in the Order: simple assault and eluding police.
33. The Order’s reference to a juvenile charge of “eluding police” supports the strong implication, but not conclusion, that the Child was the source of XXX personal information upon XXX confrontation with law enforcement as opposed to the LEA.
34. No persuasive evidence was introduced that the LEA disclosed information protected by applicable law and IDEA.
35. The Parent’s testimony regarding the effect of the “re-assignment” home-based services was found credible--the Child’s resulting negative academic, social and emotional reaction. (Parent Testimony.)
36. The Parent demonstrated an outstanding, indeed herculean, intention and design to take such action as is necessary to effectuate FAPE for the Child. (Current IEP & Parent Testimony.)
37. The Parent possesses actual animosity towards the LEA based on her credible testimony; however, such reaction is reasonable due to the failure of the LEA to implement the Current IEP and the LEA Admission.
38. After the “re-assignment” in March 2023, the Parent’s negative feelings and efforts (including a desire not to cooperate) regarding the LEA were sincere and realistic, based on the LEA Admission and the Parent testimony.
39. The testimony of the LEA witnesses, consistent with the LEA Admission, were found credible.
40. The Parent’s testimony regarding the negative affect of the “re-assignment” in violation of the Current IEP was found credible. (Parent Testimony.)
41. LEA testimony that the Current IEP (qualified expert or, by implication, expert without qualification) provided FAPE was found incredible given the Parent’s credible testimony regarding the LEA’s violation of IDEA robbing the Child of services under XXX IEP from March 2023, to present and, instead, required the most-restrictive environment, home-based services. (LEA Admission and Parent Testimony.)
42. No evidence was introduced that IDEA evaluations (Independent Educational Evaluation ((IEE) or otherwise) have been conducted on the Child since, at least, February 2023.
43. No evidence was introduced that IDEA evaluations (IEE or otherwise) have been conducted on the Child since the finalization of the Current IEP.
44. With the exception of unpersuasive observations from home-based instructors, the LEA lacks the necessary data to formulate a viable IEP.
45. With the exception of unpersuasive observations from home-based instructors, the LEA lacked the necessary data (or other IDEA information) to confirm that the Current IEP would provide the Child FAPE currently.
46. For purposes of IDEA’s “stay put” requirements, the Current IEP is found to be the last agreed-upon IEP.
47. No credible or persuasive evidence (expert or otherwise) was introduced that the Private Placement would provide the Child FAPE as required by IDEA.
48. No evidence (expert or otherwise) was introduced that placement of the Child at the Private Placement would be the least restrictive environment as required by IDEA.
49. LEA evidence that the Private Placement would not be the least-restrictive placement per IDEA mandates was found unpersuasive given the lack of current data, current IDEA evaluations as well as the failure of the LEA to provide FAPE, consistent with the Current IEP from March, 2023 to present on the basis that the Child’s exposure to non-sanctioned IEP actions (*i.e*., failure to implement the Current IEP as well as implementation of home based services) by the LEA and the negative results inflicted on the Child. (Parent Testimony.)
50. No evidence (expert or otherwise) was introduced as to the cost of the private placement including other associated costs such as transportation, *etc*., were introduced.[[2]](#footnote-2)
51. No evidence (expert or otherwise) was introduced on the subject of the amount, type or cost of compensatory services.
52. No evidence (expert or otherwise) was introduced regarding the Child’s present academic levels.
53. No evidence (expert or otherwise) was introduced regarding the Child’s academic levels in March 2023.
54. No evidence (expert or otherwise) was introduced regarding the Child’s academic levels in September 2023.
55. The video was not shown to MDR team during the MDR proceeding.
56. Regardless of the law, no persuasive evidence supported the remedy that the LEA pay the attorney’s fees (perhaps as related IDEA costs) incurred by the Parent in paying defense counsel to represent the Child in juvenile court on the assault charge.
57. The communications and actions of the Advocate are imputed to the Parent/Child in matters raised by the Due Process Request.
58. Under IDEA, the Parent/Child could not use the any person (including the Advocate) to be a “proxy” to replace the Parent and/or the Child at any IEP meeting.
59. The negativity caused by the Parent’s participation with the LEA has caused the Parent to endure health-related consequences. (Parent Testimony.)

ANALYSIS**:**

## Legal Analysis

Areas of the law are undisputed. Consistent with Endrew F. v. Douglas County School, 580 U. S. \_\_\_\_ (2017) and Board of Education v. Rowley, 458 U.S. 176, 207, 102 S.Ct. 3034 (1982), the Supreme Court found that a disabled child is deprived of FAPE under either of two sets of circumstances: (1) if the LEA has violated IDEA’s procedural requirements to such an extent that the violations are serious and detrimentally impact upon the disabled child’s right to FAPE; or (2) if the IEP that was developed by the LEA is not reasonably calculated to enable the disabled child to receive a *material* educational benefit. Further, the Supreme Court opined “[i]nsofar as a State is required to provide a handicapped child with [FAPE], we hold that this satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction. (Rowley, 458 U.S. at 200.)

In this administrative due process proceeding initiated by the Parent/Child, they have the burden of proof. Schaffer, *ex rel*. Schaffer v. Weast, 126 S.Ct. 528 (2005).

In DeVries v. Fairfax County School Bd., 882 F.2d 876, 878 (4th Cir. 1989), the Court recognized the importance of main-streaming when it opined that “[m]ainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with non-handicapped children is not only a laudable goal but is also a requirement of the Act.” In accord Barnett v. Fairfax County School Bd., 927 F.2d 146, 153 (4th Cir. 1991). The implication is that the Child receive services in her local or “home based” school. In the instant matter, LEA’s implementation of home-based services extremely violated IDEA.

The standard of proof is a preponderance of the evidence. County Schl. Bd. of Henrico County v. Z.P., 399 F.3d 298, 304 (4th Cir. 2005).

In Arlington County School Board v. Smith, 230 F.Supp.2d 704, 715 (E.D. Va. 2002), the Court reversed the decision of the Hearing Officer on the **basis that he made factual findings that were unsupported by expert testimony**:

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

*See also* Doyle v. Arlington County School Board, 806 F. Supp. 1253 ( E.D. Va. 1992). A review of Smith and Doyle are important to emphasize the restrictions, constraints or limitations placed on hearing officers when deciding IDEA cases in Virginia. Although a child is involved, current law prevents a hearing officer’s reviewing evidence as a Virginia juvenile district court judge must review in a custody matter **with the “best interests of the child” standard** as described in §20-124.1 of the Virginia Code. Instead, hearing officers must respect the limitations that evidence, especially expert testimony, determine the outcome in IDEA cases as well as respect the Federal directive that IEPs are reviewed with the standard established by Rowley and its progeny. In the instant matter regarding private placement, the lack of necessary evidence prevents a finding that the Private Placement was appropriate under IDEA. The difference between the standard established by the “best interests of the child” and the standard established by Rowley (and its progeny) can never be reconciled. Quite frankly, this difference causes a great deal of litigation, cost and heartache.

In D.H. v. Fairfax Cty. Sch. Bd., No. CR 1:19‑CV‑1342, 2021 WL 217098, at \*8B9 (E.D. Va. Jan. 19, 2021), U.S. District Judge T. S. Ellis, III, explained the requirements for an appropriate IEP:

At the center of the IDEA’s education delivery system is the IEP. A student’s IEP is a document that is created through collaboration between school staff and parents that ‘describes the child’s unique needs and the state’s plan for meeting those needs.’ R.F. by & through E.F. v. Cecil Cty. Pub. Sch., 919 F.3d 237, 241(4th Cir.), cert. denied, 140 S. Ct. 156 (2019) (*quoting* M.S. *ex rel*. Simchick v. Fairfax Cty. Sch. Bd., 553 F.3d 315, 323 (4th Cir. 2009)).R.F., 919 F.3d at 241(*citing* Endrew F. *ex rel*. Joseph F. v. Douglas Cty. Sch. Dist. RE‑1, 137 S. Ct.

988, 994 (2017)). Under the IDEA, IEPs must include ‘a statement of the child’s present levels of academic achievement and functional performance... a statement of measurable annual goals, . . . a description of how the child’s progress toward meeting the annual goals . . . will be measured, . . . , [and] a statement of the special education and related services and supplementary aids and services . . . to be provided to the child.’ 20 U.S.C. ' 1414(d)(1)(A)(i). The IEP team is required to revise the IEP ‘as appropriate,’ at least once a year, to address ‘lack of expected

progress’ among other factors. Id. ' 1414(d)(4)(A). The Supreme Court has made clear that, in order ‘[t]o meet its substantive obligation under the IDEA [to prove a FAPE], a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.’ Endrew F., 137 S. Ct. at 999. In addition to this substantive requirement, the IDEA also requires that “each disabled student receive instruction in the ‘least restrictive environment’ (‘LRE’) possible.” AW *ex rel*. Wilson v. Fairfax Cty. Sch. Bd., 372 F.3d 674, 681 (4th Cir. 2004) (*citing* Bd. of Educ. v. Rowley, 458 U.S. 176, 180B 82 (1982)). The Fourth Circuit has explained that the LRE requirement reflects the IDEA’s preference that “[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled.” AW ex rel. Wilson, 372 F.3d at 681.

D.H., 2021 WL 217098, at 8:9. The Current IEP, although outdated given circumstances stated herein, was appropriate when completed but now is outdated bordering on irrelevant.

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

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

Similarly, in E. L. v. Chapel Hill‑Carrboro Bd. of Educ., 773 F.3d 509, 517 (4th Cir. 2014), the Court confirmed that it afforded “**great deference to the judgment of education professionals in implementing the IDEA.”** As long as an individualized education program provides the basic floor of opportunity for a special needs child, **a court should not attempt to resolve disagreements over methodology**. [*Emphasis added*.] *In accord,* O.S. v. Fairfax County Sch. Bd., 804 F.3d 354, 360 (4th Cir. 2015). Reviews of Heffernan and E.L. are manifestation to show that the Parent/Child was required to prove, by a preponderance of the evidence, that RPS denied the Child FAPE by failing to implement material portions of the Current IEP. In other words, a court, a hearing officer or a parent cannot micro-manage the implementation of an IEP, deferring to the expertise of LEA professionals. In the instant matter, the LEA avoided implementation of the Current IEP by the mistaken premise that the Child’s “reassignment” (SBA Exhibit 42) required the most extreme placement of the Child in home-based services, robbing him of mandatory services per the Current IEP. This improper LEA (excluding methodology) was a clear violation of IDEA by denial of the Child FAPE as contained in XXX Current IEP.

Unfortunately, no persuasive evidence was introduced on whether the Private Placement would provide the Child FAPE or if such placement is the least-restrictive environment as required by IDEA. **Such required evidence, for reasons unexplained, may have been the basis to allow private placement including the Private Placement.** As the Fourth Circuit Court of Appeals explained in M.S. *ex rel*. Simchick v. Fairfax Cnty. Sch. Bd., 553 F.3d 315 (4th Cir. 2009), the IDEA provides for private school tuition reimbursement ‘if (1) the school district fails to provide a FAPE and (2) the **parental placement is reasonably calculated to enable the child to receive educational benefits**. [Emphasis added].’ *Id*. at 325, *citing* Carter By & Through Carter v. Florence Cnty. Sch. Dist. Four, 950 F.2d 156 (4th Cir. 1991), *aff’d*, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993); Sch. Comm. of Burlington v. Dep’t of Educ. of Mass., 471 U.S. 359, 369, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). *See, also, e.g.*, Fairfax Cnty. Sch. Bd. v. A.G., No. 121CV00840‑MSN‑JFA, 2022 WL 4016882, at \*2 (E.D. Va. Sept. 2, 2022). (Parents may be reimbursed for unilateral private placement when a court or hearing officer determines that (1) a school district failed to provide a FAPE and (2) **the private placement was suitable** [Emphasis added.); Lexington Cty. Sch. Dist. One v. Frazier ex rel. D.T., No. 3:10B01808BMBS, 2011 WL 4435690, at \*8 (D.S.C. Sept. 22, 2011). (‘Under what has been denominated the Burlington‑Carter framework, a parent may recover tuition reimbursement if: (1) the proposed IEP was inadequate to offer the child a FAPE, and (2) **the private education services obtained by the parents were reasonably calculated to enable the child to receive educational benefits**’). [Emphasis added.] A hearing officer must also consider the appropriate and reasonable level of reimbursement and may even deny full reimbursement for tuition if he finds such expenses unreasonable. *See* M.N. by & through Norman v. Sch. Bd. of City of Virginia Beach, No. 2:17CV65, 2018 WL 717005, at \*14 (E.D.Va. Feb. 5, 2018) (*citing* Carter, 510 U.S. at 16). Failure to introduce such evidence mandates the utilization of an Independent Educational Evaluation (IEE) and the IDEA necessity to require the Child to remain in the placement described by XXX Current IEP–IDEA “stay-put” requirement.[[3]](#footnote-3)

## Specific Issues

1. **Whether the current IEP fails to provide the Child’s current FAPE and, if not, what is the remedy?**

Despite unpersuasive LEA evidence to the contrary, the overwhelming evidence is that the Current IEP is outdated, bordering on irrelevant. Specifically, the Child has been denied access to the services of the current IEP from March 2023. The issue is what now must be done to effectuate the goals of IDEA, not blame. **The isolation of the prison of home-based services coupled with the failure to allow the Child to participate in the services of the IEP from March 2023 to present must be a premise to any future actions.**  The Child’s education must be the Parties’ highest priority. Blame cannot be the issue. According to the credible Parent Testimony, the Child has experienced trauma by the denial of such implementation of the Current IEP: lack of academic, social and otherwise resources. As a result, the outdated IEP fails to address the negative consequences caused thereby including academic, social and emotional as described by the Parent’s testimony. In addition, there is no evidence that the IEP has reviewed new tests or evaluations since the finalization of the current IEP in 2022. Finally, any data, including sparse data from home-based services in outdated bordering on irrelevant in March 2024. The failure to implement the current IEP, regardless of blame, must be the remedied as soon as possible! The Child must be the focus! Blame should not be the focus. The Parties are encouraged to allow the IDEA process to continue: cooperate with the IEE, review of the IEE results and IDEA “stay put” requirement. Further, all Parties should take such actions as necessary to allow the Child to obtain any and all IDEA benefits.

1. **Whether the LEA violated IDEA by improperly recording nonexistent events in the Child’s academic file and, if so, what is the remedy?**

The Parent/Child failed to carry the burden on this issue on the basis that no credible evidence was introduced. Although there was a superficial assertion, by witness examination, regarding “homebound” services (medical) vs. home-based services, the difference appeared to be a typographical error or oversight as opposed to a LEA design to deceive or violated applicable laws and the IDEA. Similarly, the use of the word “present” in LEA records was not fully explained by either party and, therefore, the Parent Child failed to carry the burden of proof.

1. **Whether the LEA violated IDEA by not properly memorializing records as required by IDEA and, if so, what is the remedy?**

The Parent/Child failed to carry the burden on this issue on the basis that no credible evidence was introduced. Although there was a superficial assertion, by witness examination, regarding “homebound” services (medical) vs. home-based services, the difference appeared to be a typographical error or oversight as opposed to a LEA design to deceive or violate IDEA. Similarly, the use of the word “present” in LEA records was not fully explained by either Party and, therefore, the Parent Child failed to carry the burden of proof.

1. **Whether the LEA violated IDEA by not allowing the Parent/Child to copy the Child’s records as defined by the IDEA and, if so, what is the remedy?**

Per VAC 8VAC20‑81‑170A1(a)(1), the Parent/Child is entitled to inspect, not copy, the Child’ records. As a result, the Parent/Child failed to establish this issue as a violation of IDEA.

1. **Whether the LEA violated IDEA by not allowing the Parent/Child to inspect the Child’s records as defined by the IDEA and, if so, what is the remedy?**

The Parent/Child failed to carry the burden on this issue by providing persuasive evidence that the LEA did not allow the Parent/Child to inspect the Child’s records. While the Parent/Child, by witness examination, presented evidence of the existence of a video of the assault, the Parent/Child failed to carry the burden of proof that the video was part of the Child’s IDEA cumulative file subject to inspection per 8VAC20-81-170A1(a)(1), after reviewing the testimony of all witnesses. As an aside, the video was not shown to the MDR team during the MDR. By implication, the video of the assault was used by law enforcement in regard to criminal charges by law enforcement, law enforcement (*i.e*., SRO) are not agents of the LEA. Although not established, the evidence implied that the creation of the video was standard practice by the XXXX School

1. **Whether the LEA’s implementation of the Child’s current IEP was consistent with FAPE and, if not what is the remedy?**

As stated above, the overwhelming evidence was that the LEA failed to implement the current IEP which negatively affected the Child academically, emotionally and socially as stated herein. In regard to the remedy, the Parent/Child failed to introduce any persuasive evidence that the Private Placement would provide the Child FAPE or that this placement was the least-restrictive environment as mandated by IDEA and case law. As a result, the only realistic remedy is the effectuation of an IEE with the Child’s remaining in the placement established by XXX last agreed upon IEP, before the “re-assignment” in March 2023. IDEA requires all members of an IEP to cooperate and exchange information in a meaningful way to allow the creation of an IEP which is consistent with IDEA. While blame may be a focus, the Parties are encouraged to allow the IDEA process to continue: review of the IEE results and IDEA “stay put” requirement and take such actions to allow the Child to obtain any and all IDEA benefits.

1. **Whether the LEA committed procedural errors in violation of IDEA regarding the IEP Meeting held in March 2023 and, if so, did such errors rob the Child of FAPE?**

The overwhelming evidence was that the LEA violated IDEA by requiring the Child to be “re-assigned” to home base services in violation of the Current IEP. As a result, the premise of the March 2023, IEP was flawed and, therefore, inconsistent with the IDEA. (LEA Admission.)

1. **If such errors robbed the Child of FAPE, what is the remedy?**

The overwhelming evidence was that the LEA failed to implement the current IEP which negatively affected the Child academically, emotionally and socially as stated herein. In regard to the remedy, the Parent/Child failed to introduce any persuasive evidence that the Private Placement would provide the Child FAPE or that this placement was the least-restrictive environment as mandated by IDEA and case law. As a result, the only realistic remedy is the effectuation of an IEE with the Child’s remaining in the placement established by XXX last agreed upon IEP, before the “re-assignment” in March 2023. IDEA requires all members of an IEP to cooperate and exchange information in a meaningful way to allow the creation of an IEP which is consistent with IDEA. While blame may be a focus, the Parties are encouraged to allow the IDEA process to continue: review of the IEE results and IDEA “stay put” requirement and take such actions to allow the Child to obtain any and all IDEA benefits.

1. **Whether the LEA committed procedural errors in violation of IDEA regarding the IEP Meeting held in September 2023 and, if so, did such errors rob the Child of FAPE?**

This issue is complicated because the IEP meeting was conducted after the Child was allowed to attend the placement as required by the Current Placement. With that stated, the premise of the IEP Meeting was flawed insofar as it accepted, as an improper premise, that the “re-assignment” was acceptable under IDEA. As a result, the communications between members of the IEP team were negatively affected. With that stated the LEA’s actions to terminate the IEP were consistent with IDEA, although the Parent/Child’s involvement was understandable. Overall, the LEA’s actions regarding “re-assignment” and its negative effect on the Child must be recognized. As a result, the participation of the Parent/Child was reasonable and foreseeable.

1. **If such errors robbed the Child of FAPE, what is the remedy?**

As stated above, the overwhelming evidence was that the LEA failed to implement the current IEP which negatively affected the Child academically, emotionally and socially as stated herein. In regard to the remedy, the Parent/Child failed to introduce any persuasive evidence that the Private Placement would provide the Child FAPE or that this placement was the least-restrictive environment as mandated by IDEA and case law. As a result, the only realistic remedy is the effectuation of an IEE with the Child’s remaining in the placement established by XXX last agreed upon IEP, before the “re-assignment” in March 2023. IDEA requires all members of an IEP to cooperate and exchange information in a meaningful way to allow the creation of an IEP which is consistent with IDEA. While blame may be a focus, the Parties are encouraged to allow the IDEA process to continue: review of the IEE results and IDEA “stay put” requirement and take such actions to allow the Child to obtain any and all IDEA benefits.

RELIEF GRANTED**:**

1. An IEE is ordered to be completed forthwith.
2. The Parties are ordered to take such reasonable action as is necessary to effectuate such IEE forthwith including cooperation, signing releases, completion of forms, *etc*.
3. This IEE shall review all categories allowed by IDEA as well as make recommendations regarding placement, compensatory services and all other services available to this Child under IDEA.
4. Any Party’s unreasonable failure to effectuate the creation of such IEE may be deemed a lack of cooperation inconsistent with IDEA.
5. Failure of any Party to satisfy the mandates of “stay-put” requirements may be deemed lack of cooperation inconsistent with IDEA goals.
6. Failure of any Party to cooperate with any private IEE evaluators may be deemed lack of cooperation inconsistent with IDEA goals.
7. At all times, the Parents may choose private IEE providers (or any professional) to evaluate the Child at the Parent’s expense with the limitation that time is of the essence and at the expense of the Parent; in addition, such incurred expense may be raised at a future IDEA Due Process hearing for reimbursement per Regulations.
8. The Parties are ordered that all participants who participate in any subsequent IEP meetings act professionally and consistent with the Regulations; i.e., failure on this effort may be a basis to conclude a lack of cooperation regarding IDEA as referenced in IDEA and Regulations.
9. The IEP Team (including the Parent/Child) are ordered to meet timely to deliberate all matters related to any IDEA including the Child’s current educational level, the cumulative file, **all exhibits introduced herein**; the results of the IEE, any potential private IEE and related matters to effectuation of the Child IDEA’s requirements.
10. Failure of any Party to participate reasonably in subsequent IEP meetings in good faith may be reviewed, by a subsequent Due Process request (by a Parent or LEA) as lack of cooperation inconsistent with IDEA goals.
11. The Parties are ordered to effectuate the Current IEP **forthwith** in accordance with IDEA’s stay put requirements.
12. The Parent/Child utilization of a “proxy” to an IEP meeting (including an advocate) may be deemed failure to cooperate under IDEA.
13. Although such cannot be ordered and with great respect, the Parent may wish to seek a substitute regarding legal custodianship as a result of health-related issues and the instant matter.

## CONCLUSION

The Parent/Child introduce sufficient evidence to carry the burden of proof to find the LEA extremely violated IDEA requirements by ignoring the Child’s Current IEP and, instead, required the Child to undergo (without justification) the “prison” of home-based services, IDEA’s most restrictive environment. The Child was negatively affected academically, socially, and emotionally. With that stated, the Parent failed to introduce the necessary evidence to allow placement at the Private Placement, *i.e*., **any persuasive evidence** that this placement would provide FAPE and that such placement the least restrictive placement. As a result, an IEE is required. The hope is that the Parties cooperate to allow the creation of an IEP as such effort succeeded in the finalization of the Current IEP. The sincere hope that the Parties to review all information from the IEE and other sources to allow this Child to obtain all resources available under IDEA. Blame is not the issue. The effectuation of resources provided by the IDEA is the focus!

## APPEAL, IMPLEMENTATION AND PREVAILING PARTY NOTIFICATIONS

1. **Appeal**. Pursuant to 8 VAC 21-81-T and §22.214 D of the Virginia Code, this decision is final and binding unless either party appeals in a federal district court within 90 days of the date of this decision, or in a state court within 180 days of the date of this decision.

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

3. **Prevailing Party**. The Parent/Child is deemed the prevailing party.

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Hearing Officer Date

**Dates, Deadlines, *etc*.**

Filing Date: December 11, 2023

Date Hearing Officer Appointed: December 18, 2023

Administrative Hearing: December 21, 2023 at 1:00 PM

Date Resolution scheduled/conducted: December 20, 2023

PreHearing: January 12, 2024

Last day of Resolution Period: January 10, 2024

Five Day Rule Deadline: January 12, 2024

Due Process Hearing: January 22-26, 2024 at 9:00 AM

Hearing Location: xxxxxxxxxxxxxxxxxxxxxxxxxx Virginia

Decision date: February 24, 2024

## CERTIFICATE OF SERVICE

I certify that on this 24th day of February 2024, a true and accurate copy of this pleading was mailed, *via* First-class, postage prepaid mail, to:

XXXXXXXXXXX, Grandparent

XXXXXXXXXX

XXXXXX, Virginia XXXXX

Parent/Child

Kandise Lucas, M.S.Ed., QMHP, FFT, Doctoral Candidate

Physical Address Not Provided

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Advocate

Megan L. Watkins, Deputy County Attorney

XXXXXXXXXXXX

XXXXX, Virginia XXXXX

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VDOE Evaluator

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Robert J. Hartsoe

1. The LEA Admission creates an usual circumstance. The effort renders most LEA testimony moot and, quite frankly, creates a decision based on undisputed factual matters–an anomaly. [↑](#footnote-ref-1)
2. Evidence of the FAPE appropriateness of the Private Placement was not introduced; *e.g*., the Child was screened and approved, the facility’s attributes, the facility’s limitations; *etc*. No witness, expert or otherwise, testified that this facility could provide FAPE to the Child. The Parent/Child failed to call any witness from the Private Placement to address such fundamental IDEA issues for reasons unknown. [↑](#footnote-ref-2)
3. Although the Parent/Child introduced relevant, reasonable evidence that the Parent possessed animosity toward the LEA regarding the “re-assignment” and other negative LEA actions, no Regulation or case law supports the legal conclusion that such parental animosity requires, or as argued, private placement or placement outside the LEA. [↑](#footnote-ref-3)