**19.028/19.036**

# VIRGINIA DEPARTMENT OF EDUCATION

# DUE PROCESS HEARING

**In Re: The School Board of the of , Virginia,**

**Complainant/Counter-Defendant,**

**VDOE Case No. 19-028**

**v.**

**, a Minor, by and through Parents,**

**and ,**

**Defendants/Counter-Claimants,**

**VDOE Case No. 19-036.**

# Decision and Order

1. **BACKGROUND**

# A. Procedural History

This matter came to be heard upon two Due Process Requests seeking a Hearing Officer’s decision. The Complainant/Counter-Defendant, a City School Board (the “School Board” or the “LEA”), originally filed a Due Process Request on December 28, 2018 under the Individuals With Disabilities Education Act (the “Act”), 20 U.S.C. 1400, *et seq*., and under C.F.R., Part B, Section 300, *et seq.* (the “Regulations”). This decision is timely and within the statutory limitation period under the Act. The Child (“ ” or the “Child”), appearing by and through Parents (the “Parents,” and together with the Child, the “Defendants/Counter-Claimants”), filed a responsive Due Process Request (the “Counter-Claim”) on January 23, 2019 against the LEA.

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The due process hearing was held before the undersigned Hearing Officer over a period of five days, March 25 - 29, 2019, at the City’s Special Education Building, City, Virginia. The hearing was open to the public and transcribed by a court reporter.1 Counsel (“School Board Counsel”) represented the Complainant/Counter-Defendant at the hearing. The Defendants/Counter-Claimants were also represented by Counsel at the hearing (the “Parents’ Counsel”). The City Director of Compliance and Special Education Services (“LEA Compliance Director”) represented the LEA at the hearing.

The record includes the LEA’s Due Process Request, the Parents’ Due Process Request, the Parents’ Motion For Stay and Extension Pursuant To The Servicemembers’ Civil Relief Act, the Parents’ Motion For Stay-Put Placement, the Parents’ brief in support of Stay-Put Placement and the LEA’s responsive brief, written orders, closing remarks, nine Pre-Hearing Conferences, seven Pre-Hearing Reports, Hearing Officer Orders, the LEA’s Exhibit Binder and Witness List, the Child/Parents’ Exhibit Binder and Witness List, testimony by twenty witnesses, the LEA’s written closing remarks, the Parents’ written Closing Remarks, five transcript volumes containing 1306 pages, and the Hearing Officer’s Decision.2

The LEA seeks the Hearing Officer’s determination that the LEA’s proposed Individualized Educational Program (“IEP”) provides the Child with a free, appropriate public education (“FAPE”), in the least restrictive environment (“LRE”). Thus, the LEA asserts, the Child’s proper stay-put placement for the 2017-2018 school year, the 2018-2019 school year, and the 2019-2020 school year, was at the Public Middle School and the financial reimbursement to the Parents’

1. In this Decision, the Hearing Officer will refer to the Due Process Hearing transcripts numerically, in chronological order, as follows: “Tr.” for transcript page, followed by the page(s). Parents’ Counsel also described the transcripts by dating each one according to volumes 1-5 as follows: March 25, 2019 (“T-1”), March 26, 2019 (“T-2), March 27,

2019 (“T-3”), March 28, 2019 (“T-4”), and March 29, 2019 (“T-5”).

1. The LEA’s Exhibits are marked “**SB 1-** .” The Child/Parents’ Exhibits are marked “ -01.”

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unilateral placement of the Child at a private school (“Private School”) for the above school years is not warranted.

The Parents assert that the LEA was unable to provide FAPE in the least restrictive environment to the Child in the 2017-2018 school year, and that IEP deficiencies persisted in the Child’s 2018-2019 proposed IEP to which the Parents assert they did not consent to anything other than Private School placement. The Parents further assert that the proposed IEP is inadequate and does not provide FAPE to the Child for the 2019-2020 school year and, therefore, reimbursement for the Private School the Child attends, and continues to attend, is warranted.

# Factual Findings

1. is an -grade student at the Private School located in City, Virginia. is -years old. . first qualified for special education services in 2005 under Developmental Delay.

In 2009, eligibility designation was changed to Orthopedic Impairment (“OI”), which designation changed again in 2012 to include Other Health Impairment (“OHI”) along with OI. The most recent Eligibility Reevaluations reaffirmed the OHI and OH designations on September 25, 2018.  **-02.**

1. was premature at birth resulting in a cerebral hemorrhage that affects growth, development, and special education. These physical disabilities are:
   1. Right Hemiplegia;
   2. Chronic Periventricular Leukomalacia associated with prematurity;
   3. Intracranial Hemorrhage;
   4. Left Grade IV Hemorrhage due to prematurity;
   5. Retinopathy in both eyes due to prematurity;
   6. Broncho pulmonary dysplasia;
   7. Status post tracheostomy;

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1. Dysphonia;
2. Auditory Processing Disorder with deficits in overloading, temporal extraction, lexical extraction, auditory memory, auditory phonological processing, and auditory integration;
3. Neurodevelopmental Disorder with deficits in executive functioning, visual figure ground, visual tracking, and sensory processing secondary to brain hemorrhage;
4. Language Disorder with deficits in auditory sequencing, auditory organization, auditory extraction, oral pragmatics and oral comprehension;
5. Attention Deficit Hyperactivity Disorder (“ADHD”), predominantly inattentive type with deficits in sustained visual and auditory attention;
6. Developmental Coordination Disorder;
7. Learning Disorder with deficits in higher order reading comprehension, written expression, and arithmetic calculation secondary to verbal and non-verbal process deficits;
8. Anxiety Disorder;
9. Obsessive Compulsive Disorder (“OCD”);
10. Dermatillomania, picking at one’s own skin causing bloody lesions;
11. Trichotillomania, pulling out one’s own hair to relieve stress;
12. Sensorineural hearing loss, permanent nerve damage in the right ear;
13. Cerebral Palsy;
14. Clonus, central nervous system disease, disrupted signals between the brain and body; and
15. Generalized constipation due to cerebral palsy. **-02.**

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1. Currently, is enrolled at the Private School for the 2018-2019 school year. The Private School is a state accredited school for disabled children in grades kindergarten through 12th

grade.3  **-02.**

1. The LEA proposes a Public Middle School for to attend for the 2019-2020 school year. The proposed May 7, 2018 IEP calls for to attend school with disabled peers for one-half of school hours. The proposed IEP states that will spend the remaining school hours, about a half-day, with non-disabled peers during which would eat lunch and attend gym classes. would be attended all day by a one-on-one assistant.
2. The previous Hearing Officer on this matter held a hearing over a period of three days in September, 2016. That Hearing Officer made her written decision on October 30, 2016, finding that: (1) the LEA failed to properly implement a prior IEP from a [Virginia] state school district; (2) the LEA’s proposed IEP for the 2016-2017 school year failed to provide with FAPE because was provided *de minimus*

educational benefit at the school; (3) the LEA should consider private school testing and also conduct their own testing during the 2016-2017 school year to determine ’s current level of need; and (4) the private school was the appropriate academic placement for .  **-02.**

1. The prior Hearing Officer stated as follows in her decision: “[ ] will continue education at the Private School, at public expense, for the 2016-2017 school year,” and “[the LEA] will draft an IEP for [ ] with placement at the Public School for the 2016-2017 school year.”  **-02.**
2. The prior Hearing Officer ordered the LEA to be provided with ’s progress reports

from the [Private School] and she noted that should be “evaluated, assessed and tested in accordance with the [Private School’s] protocol.”  **-02.**

1. The Private School is also accredited by the VDOE, the National Association of Independent Schools, the Virginia Association of Independent Schools, and the Virginia Council for Private Education.

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1. The LEA filed a motion for summary judgment, appealing the Hearing Officer’s decision

on January 30, 2017, in the United States District Court of the District of Virginia, Division (“U.S. District Court”).  **-02.** The Parents also filed a motion seeking summary judgment and appealing the Hearing Officer’s decision. The Court affirmed the prior Hearing Officer’s decision and denied the Parents tutoring and social skills training reimbursement.

1. The U.S. District Court found that the LEA materially failed to implement the 2014-2015 IEP such that it denied a FAPE to ; that the LEA failed to offer a FAPE for 2015-2016 because it sought to place in an academic program beyond abilities, namely, grade; that the proposed IEP for 2016-2017 failed to offer a FAPE because less detailed IEPs had

not worked for ’s complex needs, because the LEA had the necessary information to address ’s audio logical disorders in detail in time for the IEP for 2016-2017, and because the LEA failed to add that necessary level of detail; that the Private School offered FAPE to ; and that is not entitled to reimbursement for tutoring and social skills training.4

1. The U.S. District Court also stated that “[t]he Court further **ORDERS** the stay-put will last

through final resolution of this case.”

1. On February 3, 2017, the LEA and the Parents met to formulate an IEP for The Parents and the LEA agreed on the Private School as ’s proper placement for the 2016-2017

school year, but the LEA stated that ’s placement for the 2017-2018 school year to be the Public Middle School.  **-02.**

1. The Parents signed the February 3, 2017 IEP stating as follows: “[t]he consent and

agreement to implement this IEP is restricted to the IEP Goals, Accommodations, Services, and

1. The U.S. District Court also awarded attorney’s fees to the Parents’ Counsel.

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Placement related to the 2016-2017 school year. (Private Day School – [Private School Named]). We do not consent to the IEP Services (including related services) and the rationale for LRE selection as it pertains to the 2017-2018 school year.” **-02.**

1. The IEP team met again on June 21, 2017 to consider ’s academic work at the Private School and to discuss Extended School Year Services (“ESY Services”). The LEA rejected ESY Services.  **-02.**
2. was examined originally by the Private Audiology Speech-Language Pathologist on June 22, 2017, which evaluation he updated on July 16, 2018. He found that has a Central

Auditory Processing Disorder (“CAPD” or “APD”). experiences APD difficulties in the following processing areas: Auditory Overloading, Auditory Temporal Extraction, Auditory Lexical Extraction, Auditory Memory, Auditory Phonological Processing, and Auditory Integration. Also, the Private Audiology Speech-Language Pathologist found sensorineural hearing loss in ’s right ear and referred to an audiologist. He opined that ’s APD issues affect communication skills (input/receptive language abilities), ability to access education, ability to read and comprehend what reads, and ability to process what hears. He asserted that can compensate for APD issues but that will need accommodations and to be taught compensation techniques, though hearing will never reach a ‘normal’ level of functioning.  **-02.**

1. The LEA found a normal hearing ability but concluded in the LEA’s neuropsychological

independent educational evaluation (“IEE”) that had APD issues without specifying exactly what the issues were. The Private Audiology Speech-Language Pathologist specified six deficit areas. The LEA did not offer any APD compensation techniques in subsequent IEPs dated May 7, 2018 or on November 27, 2018.  **-02.**

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1. Each party moved exhibit books into evidence at the initiation of the due process hearing.

**Tr. 48:3-16.** Certain exhibits were later added and are included in the hearing file.

1. The following witnesses jointly testified at the due process hearing:
   * 1. LEA Compliance Director
     2. LEA First School Psychologist
     3. LEA Second School Psychologist
     4. LEA Special Education Teacher
     5. LEA Occupational Therapist
     6. LEA Physical Therapy Teacher
     7. LEA Department Chair/Teacher of the Deaf and Hard of Hearing
     8. LEA Speech –Language Pathologist
     9. Private School Secondary Mathematics Teacher
     10. Private School Nurse
     11. Private School Language Arts Teacher
     12. Private Clinical Neuropsychologist
     13. Private Audiology-Speech Language Pathologist
     14. Private Speech Language Pathologist/Social Communications Expert
   1. The following witnesses appeared for the Parents at the due process hearing:
      1. Private School Reading/Literacy Special Education Teacher
      2. Private School Middle School Director
      3. Private School Director
      4. Child
      5. Mother
      6. Father

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* 1. Child’s Pediatrician

1. The LEA Compliance Director referred to the February 3, 2017 IEP to which the Parents

executed “partial consent” to “private day school” for ’s 2016-2017 school year. **Tr. 49: 20-**

**25; Tr. 50:1-2.**

1. On July 10, 2017, the LEA refused the Parents’ request for Private School placement. **SB-**
2. The LEA proposed placement in the Public Middle School for ’s 2017-2018 school year.

**SB-33.**

1. The LEA gave notice to the Private School attended that the LEA intended to update information to provide for an IEP team meeting on May 7, 2018. **SB-79**. The LEA notified the Private School that LEA personnel would conduct observations. **SB-79.**
2. The LEA proposed another IEP on May 7, 2018. **SB-81.** Parents did not consent to the IEP.

**SB-81.** TheParents’ objection tothe IEP is stated as follows:

“We disagree with the proposed IEP goals, accommodations, Services and Placement, as (1) [ ’s] disabilities have not changed and have worsened in certain areas; (2) the testing relied upon was from [the] 2015-2016 school year

(other than [the Pediatrician’s] letter, the Audiology Speech-Pathologist’s] IEE, and the audiology evaluation; and (3) [ continues to require private day

placement, namely, [the Private School] which is also the stay-put placement per the [prior Hearing Officer] decision as affirmed by the 4th Circuit.” **SB-81-105.**

1. The LEA’s May 7, 2018 IEP, to which the Parents did not consent, contained extensive accommodations and goals and placed for the 2018-2019 school in the Public Middle School in classes for reading, written expression and academics, attention, working memory and social/emotional skills for 50% of the day. In these academics, was to participate 50% of the day in the general education classroom with non-disabled peers during electives for English, math,

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and social skills. There were no auditory processing disorder goals, services, or recommendations in the May 7, 2018 IEP. **SB-81.** A one-on-one assistant was to be assigned to .

1. The LEA proposed another IEP to the Parents on November 27, 2018. The Parents did not consent to the November 27, 2018 IEP which contains changes in goals and accommodations, but essentially, is a nearly identical IEP. **SB-143.**
2. The LEA Compliance Director testified as a joint witness. **Tr. 39: 22-25.** She qualified as an expert witness in special education, delivery of instruction and development of an IEP, and in compliance with LEA regulations and state and federal regulations regarding specially designed instruction. **Tr. 45: 9-22.** The LEA Compliance Director testified that the LEA and the Parents

“consent and agreement” related only to the May 7, 2018 “partial consent for “ ’s placement in the Private School for the 2016-2017 school year.” After that, she testified, “[t]he IEP team will reconvene prior to the 2017-2018 school year to examine the data from the 2016-2017 school year at the Private School and propose placement for the 2017-2018 school year.” **Tr. 52: 12-19.** But the LEA Compliance Director also testified as follows:

“So while within this IEP we actually indicated services back in the public day school for the ’17-’18 school year, we agreed that we would come back to the table to meet to determine what placement would be.” **Tr. 53: 1-5.**

1. The Parents had already rejected the May 7, 2018 IEP as it pertained to the 2017-2018 school year’s placement as follows: “[w]e do not consent to the IEP services (including related services) and the rationale for the LRE selection as it pertains to the 2017-2018 school year.” **Tr.** **53: 15-18.**
2. The LEA’s Special Education teacher testified as a joint expert as a special education

teacher. **Tr.** **344: 7-8.** The LEA Special Education teacher described the role of a one-on-one

assistant in whichan **a**ssistant is assigned to a particular student’s IEP to ascertain the student’s

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education needs are followed in the classroom. **Tr. 344: 9-25; Tr. 345: 1.** The LEA Special Education Teacher also explained that a self-contained class has only a few special education students in it. **Tr. 346:18.** He also explained that an inclusion class hasa “mix” of disabledand non-disabledstudents in it. **Tr. 346: 22-24.** In an inclusion class, he explained, there are two teachers, one general education teacher and one special education teacher. **Tr. 347: 3-4.**

1. The LEA Special Education Teacher observed at the Private School setting in language arts class. was “engaged with learning” and “compliant with the teacher’s

directions.” **Tr. 353: 3-25.** He observed writing and doing word identification. The students had a teacher, a teacher’s assistant, and nine students in a small classroom. **Tr. 353:18-25**

1. The LEA Physical Therapy Teacher testified as a joint witness who qualified as an expert in physical therapy. **Tr. 425: 13-16. SB-414.** The witness provided an updated physical therapy assessment dated May 31, 2018 following an SEC meeting. **Tr. 17-19.** She concluded that

was able to participate in “naturally occurring school day.” **Tr. 442: 16-22.** The LEA Physical Therapy Teacher testified that “[t]here was a variety of transfers, transitions, for class participation and for PE class” and that “[ ] was independent with the necessary ambulation that was required in that setting.” **Tr. 442: 18-21.** The LEA Physical Therapy Teacher testified that all physical therapy goals and accommodations she recommended have been included in the May 7, 2018 IEP, the proposed IEP. She concluded by stating in her expert opinion that the recommendations she made could be accomplished by the LEA.5 **Tr. 443: 16-25: Tr. 444: 1-25;**

**Tr. 445: 1-25; 446:1-25; Tr. 447:1-13; SB-174; SB-414.** She testified on cross-examination,

however, that under the proposed IEP, would not be provided any physical therapy support.

1. The witness has been personally acquainted with since was “a little tike…with ” in pre-school. **Tr. 448: 11-14.**

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Instead, she testified, the proposed IEP calls for a monthly 30-minute consultation. **Tr. 448: 5-8.** She admitted she observed for one hour in the morning and the “classes appeared to be relatively close.” **Tr. 450: 7-8; Tr. 450: 18-10.**

1. The LEA Teacher of the Deaf and Hard of Hearing testified as a joint witness and qualified as an educational expert in teaching for the deaf and hard of hearing. **Tr. 472: 17-21; -09.**
2. The witness is the LEA Department Chair for the Deaf and Hard of Hearing as well as being

a traveling “itinerant” teacher. **Tr. 479: 1-10.** The LEA Teacher of the Deaf and Hard of Hearing testified that she observed on May 21, 2018 in ’s language arts class at the Private School. **Tr. 483: 7-8.**

1. The LEA Teacher of the Deaf and Hard of Hearing testified she observed that wore hearing aid in class and “self-advocated” by requesting help from the teacher. Then, inexplicably shook hand out and sighed, “Aah” after writing for two minutes. The LEA Teacher of the Deaf and Hard of Hearing noted that “took a break but kept going.” **Tr. 486:** **15-19.**  then worked in a small group [of students]and “[e]ven though the door was open it

was quite quiet in the hallway. [ ‘s] peers were working silently next to .… it was an

acoustically quiet environment.” **Tr. 489: 6-10.**

32**.** The LEA Teacher of the Deaf and Hard of Hearing testified further about the Private School observation. That day in language arts class, was required to silently and read a story presented to the class about wolves. The Private School teacher then asked the class about the story. When the Private School teacher called on to respond to a question about the story, answered, “I don’t know. I don’t remember.” **Tr. 490: 11- 21.** The Private School teacher then introduced the abstract concept of “pack leader” in relation to wolves and asked the children, “where is the information about “pack leaders” provided?” was able to read the paragraph

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and underline the sentence indicating that there were nine wolves in the pack after the Private School teacher directed where the information was. The LEA Teacher of the Deaf and Hard of Hearing testified, “[s]o with that kind of direct prompting and redirection to the text, was able to find the answer.” **Tr. 491: 4-15.** But when the teacher turned the class discussion to the abstract concept, “dominance,” and asked **, “**[w]ho’s more dominant, you or your dog?” replied, “[m]y dog.” **Tr. 491: 16-25; Tr. 492: 1-4.** And when the teacher later asked to tell how many wolves were in a pack after reading there were nine wolves, replied, “I don’t know. Maybe five or maybe a million.” **Tr. 491: 2-3.** Clearly, did not understand the literal content or the abstract concept presented to .

1. The LEA Teacher of the Deaf and Hard of Hearing reviewed the Private Audiology Speech

Language Pathologist’s report dated July 16, 2018. **Tr. 494: 16-22.** The report states that has mild hearing loss in right ear and that hearing approaches normal in left ear. ’s right ear hearing loss is caused by nerve damage which is permanent. **Tr. 497: 8-19.** The LEA Teacher of the Deaf and Hard of Hearing testified that “[o]nce a hearing loss is identified typically students are monitored over time.” **Tr. 498: 18-20.** The LEA Teacher of the Deaf and Hard of Hearing testified also that has nearly normal functioning in both ears when wears hearing aid. **Tr. 501: 3-9. SB-176.** She concluded by testifying that many of the Private Audiology Speech-Language Pathologist’s recommendations have been incorporated into “three pages of accommodations” and that ’s needs can be met through the proposed IEP. **Tr. 505: 6-7; Tr. 505: 14-25; Tr. 506: 1-25; Tr. 507: 1-25; Tr. 508: 1-13; SB-175.**

1. A Private Clinical Neuropsychologist completed an I.E.E. on the in 2015, and again in 2018. He testified jointly at the hearing as an expert witness regarding his findings. **Tr. 733:**

**15-18**; **-29**. He also observed for two days at the Private School. **Tr.783:10-15; Tr. 775:**

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1. Compared to his 2015 evaluation, he found to be “more sensitive, more fragile.” **Tr.** **786:1-2.** The Private Clinical Neuropsychologist found to have experienced“greater

difficulty in meeting challenges on a day-to-day basis with consistency” **Tr. 786:1-2.** He described

’s vulnerability as a “fragility of functioning” and stated further: “[I]t means that is highly

vulnerable.” **Tr. 782: 4-5**. He clarified:

“[I]t means that is highly vulnerable to a day-to-day variance depending on how those factors are interacting with each other… what you can see is a fluctuation for [] of performance from the first percentile up to the fiftieth. That is spanning the range of average functioning that is consistent with that expected in neurotypical peers to those which are for individuals who are significantly cognitively challenged.” **Tr. 786: 9-20.**

1. When questioned by the Parents’ Counsel, the Private Clinical Neuropsychologist testified as follows regarding ’s fragility and how the issue adversely impacts ’s ability to receive FAPE:

“…[] has multiple processing difficulties and issues that affect ability to participate meaningfully in a neuro-typical classroom as compared to peers. That those issues are general in nature. That they include all portions of – neurocognitive processing. It includes ability – sensory ability, that is ability to orient and to prioritize ingestion of information which is sensory in nature, to be able to sustain attention, to be able to process language based information, to be able to process, learn and recall visual – spatial information, to be able to run those through thalamus 6 to be able to coordinate that information in a meaningful and efficient manner, that it has a specific impact on learning, particularly with regard to oral comprehension, ability to replicably demonstrate knowledge in written expression and with regard to the speed of processing from an academic fluency perspective.…The reports of parents suggest that the impact of this combination of factors results in [] being quite vulnerable to periods of anxiety, particularly with exacerbations in anxiety or feeling of stress associated with engaging in trichotillomania, or eating hair.” **Tr. 792:1-25.**

1. The thalamus comprises either of two masses of gray matter lying between the cerebral hemispheres on either side of the third ventricle, relaying sensory information and acting as a center for brain perception.

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1. With regard to transition to public school, the Private Clinical Neuropsychologist advised against the move to a public school. He cited the foregoing neurocognitive issues and testified that his concern was for ’s “… anxiety and the tendency for to be

sensorically overwhelmed and shut down.” **Tr. 793:14-15**. Also, he doubted ’s ability

to “interact” in a public school environment or that would experience “movement” within a

public school setting. **Tr. 793:17-22.**

1. The LEA First School Psychologist has obtained doctorate status and qualified as an expert in Neuropsychology and School Psychology. The witness also had extensive training in Clinical Psychology. **Tr. 199:14-17; Tr. 204: 17-24.** The LEA First School Psychologist reviewed ’s

most recent IEP, previous psychological and neurological testing, 2012-2015 prior school

district evaluations, an evaluation done by the LEA and another done by the Private Clinical

Neuropsychologist who was the independent evaluator. **Tr. 209: 12-25; Tr. 210: 1-3.**

38**.** The LEA First School Psychologist described ’s executive functioning deficits and

later explained that executive functioning is a form of APD. She provided an extensive evaluation

of focusing on that issue. She testified:

“[E]xecutive function looks at how a student processes. And there are different pieces

to that. We’re looking at how well they initiate, how well they can sustain mental effort, how well they can take in information and hold it and then give it back to you, how well they can inhibit.” **Tr. 215:12-17.**

1. After testing to explore apparent executive functioning difficulties, the LEA First School Psychologist opined regarding ’s obvious retention issues during testing and

testified:

“[] struggled with being able to give me the information that had given before. So why did struggle with giving that information? Did struggle

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because it never registered all the way and did not learn it, you can’t give it back. If you can’t retain, you’re not retaining it. You can’t give it back.” **Tr. 223:7-14**...Oftentimes, information may enter your short-term memory but it doesn’t goall the way to long-term memory. Long-term memory is where the learning takes place.” **Tr. 223:15-18.** “So for [] it depended on – so delayed memory was lower than immediate memory.” **Tr. 223:19-20.**7

1. The LEA First School Psychologist also noted in her findings that ’s transitioning

skills and ability to initiate and switch score was “pretty low for .” **Tr. 227:16-23.** And,

she testified, ’s motor coordination skills are weak. **Tr. 230:1-2.** To address these problems**,**

the LEA First School Psychologist recommended visual supports and role playing activities to help

with [the] emotional and behavior skills, verbal mediation, and [learning] coping skills. **Tr. 239:**

**1-8.**

1. The LEA First School Psychologist described it as “rare” that a student would have 21

diagnoses. **Tr. 253: 1-12.** She admitted during her testimony that she was unaware that also

has dysplasia and OCD and, since completing her report, she did not know that has been

diagnosed with clonus, dermatillomania and generalized constipation. The LEA First School

Psychologist did not express an opinion if this knowledge would change her earlier findings and

recommendations.

1. The LEA First School Psychologist affirmed her opinion the LEA’s IEP is appropriate in

its goals and accommodations offered to **Tr. 240:16-17; Tr. 241: 1-18.** She enumerated

these accommodations: one-to-one personal assistant, have teacher check for understanding, use

of calculator, read aloud, access to word prediction, access to speech-to-text, dictation to scribe,

1. ’s executive functioning scores, overall, however were in the low end of average for immediate memory with visual memory being slightly higher. Tr. 222:22-25; Tr. 222:1-2.

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copies of class notes, small group testing, planned breaks, assignments/answers reduced without impacting the integrity of what’s been assessed, graphic organizers, highlight key word concept, written directions accompanying oral directions, access to the text books/copy of the class notes/dictation to scribe in a testing context. **Tr. 241: 18-25.** In tests: adult to record answers, chunking lengthy instructions, extended time, advanced organizers, increased wait time, verbal prompts, simplify, clarify, repeat instructions, get student’s visual attention before presenting information, trusted adult when doing verbal mediation and reflection. **Tr. 243:1-25; Tr. 244:1-3**.

1. The LEA Second School Psychologist testified that she met with for two hours on August 16, 2018 to complete her evaluation of for the LEA. **Tr. 293: 17-18; Tr. 294: 20-25; Tr. 295: Tr. 296: 22.** Just prior to initiating updated cognitive and achievement assessmentsfor the LEA, she reviewed ‘s 2012 evaluation from the Prior School District, the LEA’s

evaluation from February, 2015, and the Private Clinical Neuropsychologist’s evaluation8 from September, 2015 and reviewed also ’s medical diagnoses “in the file.” **Tr. 294: 1-9**. The LEA Second School Psychologist testified that she used widely accepted standard student testing for ’s updated cognitive and achievement assessments and found “fairly consistent results over time with the cognition and achievement in addition to comparing my own results that were reflected in August [2018].”9 **Tr. 294: 18-19. 15-19.** The Second LEA School Psychologist asserts

8 The LEA Second School Psychologist testified that she specifically reviewed only the Private Clinical Neuropsychologist’s earlier report though she described her review as covering the “totality” of the Private Clinical Neuropsychologist’s report. **Tr. 311:21-24.** In her testimony, when asked “which particular report of [the Private Clinical Neuropsychologist] she reviewed, she stated, “The psychological report.” Overall, his findings were similar but “a little bit lower.” “He measured ’s cognitive abilities to be 63, in the mildly deficient range, whereas what I measured was in the low-range, which was 75.” **Tr. 312:9-24.**

1. The LEA Second School Psychologist testified that she used the WIAT for the Achievement assessment and the WISC to assess cognitive abilities. She also completed BASC-3 behavioral rating scales collected from , parents, three Private School Teachers and the Private School Reading Specialist. **Tr. 295: 8; Tr. 295: 15; Tr. 298:** **1-7; Tr. 298: 11-16.** The WIAT is a measure of academic achievement. The WISC is a cognitive ability assessment. **Tr. 295: 18-19; Tr. 295:5-10**. Behavioral rating scales consist of a questionnaire that provides a given student’s

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her findings were valid because seemed friendly, offered to share snacks with evaluator, and was able to “self-advocate,” for breaks, **Tr. 297: 10.** She testified that “was working hard and [was] focused and attentive.” **Tr. 297: 4-12.**

1. The LEA Second School Psychologist testified that she noted from the teacher input an

“elevated emotionality.” **Tr. 299: 10.** She also noted elevated scales for depression symptoms as well as “somatization” indicating a tendency to complain about health issues “like my stomach hurts, my head hurts, possibly in response to internal distress.” **Tr. 299:10-14**. She reported also that the behavioral charts from Private School teachers indicate that struggles most with internalizing behaviors, which are most elevated in learning difficulty areas. She surmised, “So there might be a link with learning struggles and maybe those negative thoughts” which the LEA Second School Psychologist opined was a “significant consideration.” **Tr. 299: 21-23.** The LEA Second School Psychologist concluded, “[S]truggles with learning lead to internal distress for []” **Tr. 299: 24-25; 300:1-5.**

1. The LEA Second School Psychologist noted that rated self “at-risk” for anxiety and interpersonal relationships. She attributed this to “acknowledging own difficulties with building relationships and feeling liked by peers.” **Tr. 301: 9-14.** But the Private School teachers disagreed with the Parents in one category: ’s adaptive skills. The “adaptive skill”

rating scale subjectively measures ’s independent “self-help” and “self-care skills.” **Tr. 302:** **5-10.** The witness later explained that adaptability is the ability to cope with changes andtransitions. **Tr. 322:9-11.** Adaptability also includes social skills, leadership in decision making self-help skills is getting your daily needs met and functional capability is the ability to answer

behavior and feelings on a rating scale that indicates “always, often, sometimes, never” to the respondent reporters who indicate how frequently, in the reporter’s opinion, the behavior or feelings occur in the student. **Tr. 298: 1-16.**

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questions and obtain or provide needed information. **Tr. 322: 12-25.** In the “adaptive skills”

section, ’s Private School teachers rated as “average.” **Tr. 301: 23-25; Tr. 302: 1-4.**

1. The LEA Second School Psychologist noted that she found to have a “significant processing weakness,” and that that would need “extended breaks “ and “a lot of repetition to get the information to stick.” **Tr. 304: 20-23; Tr. 308: 4-8.**
2. The LEA Second School Psychologist testified regarding ’s academic level. WIAT

(achievement testing) showed that scored higher than WISC (cognitive testing). Regarding ’s higher reading score and reading comprehension score in the “average” range, she stated, “It’s highly likely that the difference is due to the fact that ’s been taught those reading skills.” **Tr. 306: 15-23.** She testified, “Those skills have been taught and reviewed and repeated over time. ’s had a lot of time to practice with these skills, so ’s learned how to answer those questions.” **Tr. 306: 21-23.** ’s spelling was in the low-average range, mathematical skills and essay were also significantly low. “It was evident,” she testified, “that struggled more significantly with the mathematical skills.” **Tr. 305: 7-20.**

1. The LEA Second School Psychologist made recommendations on ’s emotionality which she defined as “a significant area of concern.” **Tr. 308: 12-15.** Her recommendation was for a short-term attainable goal to be set “so can feel that sense of accomplishment.” **Tr. 308:** **17-19.** Also, she advised“identifying triggers for negative thoughts and to help challengethose thoughts, [to] get to think more positively.” **Tr. 308: 19-21**.
2. The LEA Second School Psychologist attributed the great discrepancy between her spatial score of 86 and the Private Clinical Neuropsychologist’s spatial score of 54 to the possibility that

could have “just been experiencing a bad day. [ ] could be tired. [] can be hungry. [] might not feel great. ” **Tr. 313: 15-18**; **Tr. 314:11-19.** She testified that a score of 4 “would

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not be within the confidence interval for visual spatial. The range – the confidence interval range

that I had was 79 to 95.” **Tr. 315:22-24.**

1. Regarding ’s elevated depression and anxiety ratings, the LEA Second School Psychologist was asked how these symptoms could affect in an academic environment. She testified:

“… might be negative about things, might seem lonely, might say ‘I

don’t have any friends,’ be afraid of making mistakes, or become easily stressed. So, those might be the things that might encounter when ’s in school… [and] could impact learning if ’s feeling frustrated.” **Tr. 325: 19-**

**25; Tr. 326: 1-2.**

1. The Private Audiology Speech-Language Pathologist testified that he is a licensed audiologist and speech-language pathologist. He estimated that “probably 90% of [his] practice involves children with special needs and has completed evaluations for school districts. **Tr. 840:**

**22-23; Tr. 841: 3-8.** He qualified as an expert witness in speech-language pathology and auditory

processing for children **Tr. 845: 9-19; -26.**

1. The Private Audiology Speech-Language Pathologist evaluated on June 22, 2017.

**Tr. 848: 15-19.** He found that has a hearing loss which meant that he had to make certain

the testing was suitable for a student with hearing loss. He determined that ’s auditory

processing issue is in “auditory lexical extraction.” **Tr. 849: 11-15.** He explained that ’s

auditory difficulty originates as follows:

**“**What that means is the ability to get the key, important information and to processjust those key things. What system is doing is probably processing all the words and it can’t get the key words. It gets overloaded and overwhelmed. So that there can be emotional reactions because ‘I didn’t get that, I didn’t get those kinds of things that go on.’ Okay?” **Tr. 849: 16-23.**

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1. The Private Audiology Speech-Language Pathologist testified about the other auditory

processing issue which was ’s auditory memory. He explained further, “Because []

didn’t get all the information, how could [ ] remember it for the test tomorrow or for even

answering questions?” **Tr. 852:10-13.**

1. The Private Audiology Speech Language Pathologist related ’s auditory memory difficulty to a school setting and testified:

“There’s some aspects of both educational and academic learning as well as social. There’s a lot of socialization, especially when you get to be a teenager. I’m sorry but, hey, that’s the truth. There’s a lot of socialization that also occurs in school, such as group discussions, small group learning, as well, you know, as in the hallway, you know, whatever extracurricular activities are going on in school. And ’s going to have great difficulties because of communication problem.” **Tr. 852: 14-24.**

1. The Private Audiology Speech-Language Pathologist stated that another problem with

’s auditory processing is speed which he described as “very poor” and he suggested

accommodations, treatment and visual cues “like picture points” to assist with auditory

processing. **Tr. 850:6-9; Tr. 850: 1-9.** He identified another deficit in ’s auditory processing

as “sound-symbol association” which he described as the ability to blend sounds together to make

1. word. **Tr. 850: 10-19.**

56**.** The Private Audiology Speech-Language Pathologist stated also that “overloading” is

another problem area. **Tr. 852: 1-9.** He explained that overloading happens when speakers are

“talking too fast for .” **Tr. 852: 3-4.** When is verbally overloaded, [auditory

processing] system shuts down and [ ] stops taking in information. **Tr. 892:7-9.** He related

’s auditory processing overloading issue to a school environment as follows:

“[] is also going to have problems in group discussions, in class discussions, in small group activities where there’s discussions going on. In social communication what we tend to do is rarely one person speaks in a social setting or even in a discussion group. It’s usually a lot of people. It’s too much. It becomes overloading and

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overwhelming for . can get lost. And just for survival what the system does is it shuts down and stops processing just to get what it did get, but then when it comes back, it’s lost what was going on in that time period that is shut down.” **Tr. 854: 1-12.**

1. The Private Audiology-Speech-Language Pathologist related how language speed relates to a school setting. He testified that ’s auditory system requires that teachers will need to

speak slowly in lesson presentation because “gets overloaded, overwhelmed, and cannot

take the speed. So ’s going to lose information because it’s coming at too quickly.” **Tr.**

**853: 20-22.**

1. The Private Audiology Speech-Language Pathologist explained the symbiotic link between

’s anxiety and auditory processing difficulties as follows:

“So one is the auditory system links very closely with the emotional system, but then the emotional system links very closely with how we process and take in information. When we get overloaded and overwhelmed emotionally for survival our system shuts down, our listening. It becomes too much… So this whole aspect of anxiety and auditory processing – they go hand in hand, confusion, increased anxiety, and anxiety can cause auditory processing to shut down.” **Tr. 855: 21-25;**

**Tr. 856: 1-6.**

1. The Private Audiology Speech-Language Pathologist disputed the LEA’s overall scores on the CASL-2 and CELF-5 and testified as follows: a low subscale score of 68 in figurative or non-literal language, coupled with a 101 on ability to recognize words that mean the same thing means that there is a 30 point difference, or two standard deviations, between lowest score and highest score. The CELF-5 presents the same issues in interpretation in that the sub-scores of
2. and 98, with an overall score of 101 indicates a similar point discrepancy. He interpreted the results obtained by the LEA to mean “[ ] ability to understand language varies very significantly and needs language therapy – which I did review the IEPs. There is no language therapy being provided in the IEPs.” **Tr. 861:21-24; Tr. 862: 1-25; Tr. 863: 1-25; Tr. 864: 1-2; -30.**

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1. The Private Audiology Speech-Language Pathologist was asked if the November 27, 2018

IEP addresses ’s needs. He responded “…not at all.” He opined that the area of language is

not addressed at all in the proposed IEP though ’s voice [issues] are addressed in it.10 He

stated “The only thing [the IEP] addresses from the speech point of view is one factor and that’s

voice. That’s all that it addresses.” **Tr. 865:20-23.** “[T]here’s no language therapy goals

provided at all.” **Tr. 868: 12-13.**

1. He testified further emphasizing the necessity for more than “voice” goals in the IEP and

stated as follows:

“Yes, [] has difficulty getting voice projected out. And that’s the only speech goal in the IEP. There’s nothing for language. There’s nothing for vocabulary for language knowledge. There’s nothing for ability to follow directions. There’s nothing at all in any of the auditory processing areas we discussed. There’s nothing in the accommodations related to pre-teaching. There’s nothing related to slowing down. There’s nothing – related to giving extra time to complete – in other words, when you ask a question, to respond, yes, there’s extra time, but what about when we talk to or when we ask for to get involved in group discussion or class discussion? Are we giving the extra time to answer? And the answer is there’s no accommodations. The IEP is not addressing auditory processing or language needs.” **Tr. 866: 20-25; Tr. 867: 1-12.**

1. The LEA Occupational Therapist testified jointly and qualified as an expert witness at the hearing. She was asked by the LEA’s SEC team to conduct a functional assessment of ’s ability to “access and benefit from a special education program.” **Tr. 400: 20-23; Tr**. **403: 15 17;** **SB-408.** The LEA Occupational Therapist went to the Private School on May 29, 2018 to observe at school, spoke with teacher and worked with the one-on-one. **Tr. 404: 8-9.** Prior to the observation, the LEA Occupational Therapist reviewed ’s records, the 2015

independent assessments and the 2015 Clinical Neuropsychologist’s report. She also researched

1. ’s voice quality was depicted by most witnesses as having a breathy, raspy quality due to scarring from a tracheostomy which narrows the air tube used to create one’s speech. At the hearing, the Hearing Officer observed that when testified, spoke only in a whisper.

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’s medical history, revealing motor impairment from right side hemiplegia, along with fine motor and visual perception skills. **Tr. 405: 1-22; SB-408.**

1. The LEA Occupational Therapist observed ’s grasp patterns, in-hand manipulation, ability to transition from classes, range of motion and muscle tone in

upper left extremity, all of which she found to be “normal” and “with good dexterity.” **Tr. 409:21-25; Tr. 410:1-6.** She saw that was able to stabilize a bookbag though wears a Beniksplint 11 on right hand and was able to change a hearing aid battery when it went dead. She testified, “[’s] got really good left hand skills. **Tr. 410: 11-12; Tr. 410:18-19.** “ is integrating that side of body for some bilateral hand skills.” **Tr. 410: 24-25; Tr. 411:1.**

1. The LEA Occupational Therapist related additions to accommodations and goals in the May 7, 2018 IEP as follows: bilateral activities like **s**tabilizing the paper with two hands. The bilateral hand use by May 6, 2019 appears to be an achieved goal if had already demonstrated to the witness during her observation on May 29, 2018 which she noted in her testimony. **Tr. 415:** **2-29.** The witness testified, “Based on my observation, ’s showing me has the skills to dothat.” **Tr. 415:18-19.**
2. The LEA Occupational Therapist cited the need for the LEA related services as follows: access to speech to text when completing assignment that require lengthy written expression,

dictation to scribe for ’s fatigue, copies of classroom notes, graphic organizer, chunking complicated directions, highlighting key words, extended time, visual aids, simplify or repeat oral instructions, access to the elevator, adaptive paper, use of a locker with a lock, access to the school nurse for hygiene, access to a water bottle, occupational therapy consultation 30 minutes once

1. A pediatric glove-style hand splint.

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monthly with suggestions on how can conserve energy. **Tr. 415: 24-25; Tr. 416: 1-25; Tr.**

**417: 1-25; Tr. 418: 1-25; Tr. 419: 1-1-2.**

1. The Private School Nurse, is a registered nurse, who testified and qualified as an expert in school nursing and clinical nursing. **Tr. 702: 20.** She assists throughout the day at the Private School. During the first year, she testified, needed lunchtime medications for ADHD and

“assistance for many different things.” **Tr. 703: 5-8.** The Private School Nurse’s office is in the

school’s main hallway on the way to the common area. Often, stopped in to see her if

forgot something upstairs. “ rides the elevator, so needed somebody to ride the elevator

with upstairs to get PE clothes.” **Tr. 703: 10-18.** The Private School Nurse also sees

regularly throughout the day to give “P.R.N. medications for headaches,” assist with ’s

nerve stimulator for right knee because it would slip or be uncomfortable and needed

assistance to readjust it. She testified that there were “[s]o many things that I assisted with.”

**Tr. 703: 19-25.**

1. The Private School Nurse related that has personal needs to which she regularly attends as follows:

“So if I may get graphic, when [] – when it was a little overwhelming because one of sides is paralyzed, so really only had one hand to assist or to use when was . So to and be able to and , and then with just was difficult. And actually tried several times, had because was placed and so through , through . So I assisted with . And probably for at least six months we worked on how could start to do this on own, but I was the one that would have to go in and on for so didn’t have any along the way.” **Tr. 704: 11-24 … “**It took many months of talking about it and doing it over and over. And that would take 15 to 20 minutes when we started out.” **Tr. 707: 9-10… “**Now it takes about ten minutes.”… “ ’s gotten a little bit faster.” **Tr. 707: 13-14.**

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1. The Private School Nurse described ’s school supplies that manages with one

arm: carries books on one arm, uses a rolling backpack along with a bag containing

P.E. clothes in it. Another bag, “ ” carries essentials. **Tr. 705: 18-23.**

Sometimes, asked the school nurse to retrieve the bag from “upstairs.” **Tr. 705: 18-25.**

is often concerned about being late to class and often asks the school nurse to call ahead for .

**Tr. 706: 1-12. “**And ’s talkinga mile a minute and can’t focus on what we’re doing.” **Tr.**

**706: 11-12.**

1. The Private School Nurse described ’s demeanor when is anxious or late to class

as follows:

“…[W]hen feels like ’s stressed because ’s going to be late to class and ’s going to miss class or doesn’t have a change of clothes, starts to speak very quickly. respiratory rate increases. shoulders, you know, get very, very stiff and raised. And has a really hard time focusing on the task at hand.” **Tr. 732: 12-21.**

1. The Private School Nurse related ’s “accident” at school. **Tr. 708: 2-3.** The Private School Nurse related a school incident when did not make it in time to the restroom and second set of clothes became soiled. Regarding the incident, the Private School Nurse stated that is on medication “to help with bowel movements” and she has helped have to locate a third set of clothes to wear. **Tr. 710: 22; Tr. 711: 1-15; -25-0042-0048.** mother related,

“We always try to manage constipation because that is part of cerebral palsy. I know that. Things don’t move through your body.” **Tr. 1237: 18-20.** And, as the Private School Nurse candidly stated, “[N]o student – I don’t care if they’re in kindergarten or middle school or high school -- wants to walk around with a stool smear on their pants.” **Tr. 711: 12-15.**

1. The Private School Nurse related also that is able to change hearing aid batteries with one hand but the process is extensive. She testified the hearing aid batteries are “very tiny”

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with a “tiny door.” **Tr. 712: 25; Tr. 713: 1-4.** . must remove the battery from inside the door by using only two fingers, removing the old battery, then closing the door. Then, must reach across whole body again to put the hearing aid back in ear. **Tr. 713: 1-6.** Often, the Private School Nurse stated, the battery is not stabilized because must reach over ear to place the batteries in the door. “So ’ll put it in and start to walk away and it falls out on the floor. So needs assistance with many, many things.” **Tr. 713: 8-11.**

1. The Private School Nurse admitted she has never worked in a public school setting. She testified about the significant time she has spent in working with for to function in a

school environment. She concluded by testifying, “There’s no way that a school nurse that has that many [public middle school] students could spend the time with that I spend with .” **Tr.**

**713: 22-25.**

1. The Private Social Communication/Speech-Language Pathologist testified jointly for the parties. She qualified as an expert in speech–language pathology and social skills. **Tr. 952: 23-**
2. She provides social skill therapy to the Private School. has been one of her students for four to five years. also participates in the witness’ social skills program consisting of social skills therapy services provided to local private schools. **Tr. 952: 1-14; Tr. 952: 1-7; Tr. 953: 24-25;** The Private Social Communication/Speech-Language Pathologist is ASHA12certified and hasattained a certificate of clinical competency in her field. She testified, “I target voice and auditory memory. We’re working on ability to recall information heard auditorily.” **Tr. 956:** **1-3.** The witness testified she has observed “slow but steady progress” in  **Tr. 957: 6.**
3. The Private Social Communications/Speech-Language Pathologist testified that she has worked with on social skills for five to six years, once weekly in the summer and twice
4. American Speech Hearing Association.

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weekly during the school years. **Tr. 17-20; Tr. 966: 1-4.** The witness stated that works in a group on social skills. has issues with making eye contact and body language, and in asking friends questions. was hesitant to participate in group activities but has improved in that area. But the witness testified, “Now that ’s older there’s a lot of the social cognition and that [’s] having difficulties with and this is where the executive functioning falls in… If we have them doing a team building activity has to work with peers to come up with a plan.”

**Tr. 966: 19-25.**

1. ’s father testified he stated that he and ’s mother took a tour of the proposed

Public Middle School to see the distance would have to travel in a particular day. He testified that “[T]here are certain things that get in the way of [] being able to access education. One is anxiety and one is fatigue.” **Tr. 1146:7-8.** “[W]hen gets fatigued it’s harder for to pay attention in class and do well. So that’s why I was concerned about the distance.” **Tr. 1146:14-17.**

1. ’s father created four pages of notes and a diagram regarding his and his wife’s visit to the Public Middle School to see how far would have to walk and to “assess” the sensory

environment” while other students were in school on a school day. **Tr. 1175:1-3. - 47**. He testified that must walk 200-210 yards from the school bus to first class.13 **Tr. 1176: 12-**

1. Between the two different special education classrooms, excluding the bathroom or nurse trips, or to the lunchroom, would need to walk between 810 and 910 yards. **Tr. 1177: 11-13.**

father also testified that would need to travel an additional 300 yards roundtrip “from the center of where classes were to the nurse or to the counselor’s office.” **Tr. 1177: 7-25.**

1. ’s father testified that he “…worked on construction sites all growing up so I do know distances of buildings based on that.” **Tr. 1177: 1-2.**

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1. The Private School Reading Specialist testified for the Parents. She has attained a doctorate level degree and qualified as an expert in special education as well as in reading literacy, K-12 to

12th grade. **Tr. 904: 5-10; Tr. 905: 1-7.** She testified she has taught for three years. **Tr. 906:** **6-9.** She testified also that she taught “visualizing and verbalizing which is a small pull group

– pull out group for inference – making references.” **Tr. 906: 11-15.**

1. The Private School Reading Specialist stated that she reviewed all educational documents and evaluations for ., and attended all the IEP meetings related to including the May 7, 2018 IEP meeting. In a classroom setting, she testified, ’s physical needs impact learning

– it’s difficult for to write thoughts down, has auditory processing needs in that has

difficulty understanding what is said to the first time it is said. **Tr. 910: 9-25.** ’s anxiety

impacts work as well. Tr. **910: 25; Tr. 911: 1-4; -08-0026.**

1. The Private School Reading Specialist stated that she conducts “formative” assessment

with her students during class which is “asking questions” of each student as she moves around the room to check on each student’s understanding of the lesson. **Tr. 916: 19-25; Tr. 917: 1-13.**

1. The Private School Reading Specialist confirmed that has made progress. **Tr. 917:**

**15-18.**

1. The Private Middle School Director testified for the Parents at the due process hearing. She taught in fifth grade. **Tr. 988: 1-6.** She testified that has made progress while at the

Private School stating, “You know the trajectory is not a straight line up, but has made gains.

**Tr. 1003: 7-10.**

1. The Private School Director testified for the Parents. She has attained a doctorate level degree and qualified as an expert in special education K-12. **Tr. 1022: 2-8.** The Private School is accredited both by the Virginia Department of Education and the Virginia Association of

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Independent Schools. **Tr. 1022:20-23.** She testified that all core teachers and all but one teacher,

an art teacher, are state-licensed. **Tr. 1024: 8-12.** There are 107 students, 42 of whom are in the

middle school. All have disabilities. Most students, like , have mixed diagnoses. **Tr. 1025:**

**6-10.** Most classes contain seven or eight students. In the last four years, students have earned 36

standard diplomas. **Tr. 1026: 12-22.** The Private School partners with a private child therapy group

for occupational, physical, and speech-language services. **Tr. 1027: 13-21.**

1. The Private School Director testified regarding ’s access to academic curriculum:

“I am not in the classroom with but regularly needs support to redirect self. attention and working memory are issues that are well documented. So having in a situation where ’s got an individual – not a one-on-one assistant who is trained to carry bag, but a teacher who is understanding and, you know, checking for understanding and reteaching as necessary – those things are going to be critical to ability to access the curriculum. **Tr. 1042: 20-25; Tr. Tr. 1043:**

**1-5.**

1. ’s father testified that the Private School is a three story building and everything is in

one building.” **Tr. 1178: 23-25.** “ entire day at equates to 180 yards and an additional 35

yards if needs to travel roundtrip to the nurse’s office.” **Tr. 1179: 1-7.**

1. ’s father testified that he believes his ’s anxiety is being addressed at the

Private School. **Tr. 1157: 2-7.**

1. ’s father testified that an LEA Speech Language Audiologist formerly agreed with the 2018 conclusions of an LEA Audiology Speech-Language Pathologist who testified at the hearing. She agreed that has an identified hearing deficit and auditory processing disorder. She recommended the same goals, services, accommodations and placement at a private day setting as the Private Audiology-Speech Pathologist who testified at the hearing. **Tr. 1147: 11-25; Tr. 1149:** **1-7; -16.** None of the auditory processing disorder goals, services, accommodations or the

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private placement recommendation she recommended appeared in the May 7, 2018 or in the

proposed November 27, 2018 IEP. **Tr. 1147: 11-25; Tr. 1148: 1-25.**

1. ’s father testified regarding the proposed November 27, 2018 IEP, subsequent to both audiology speech-language findings including the LEA’s, “I did not find a lot of changes.” **Tr.** **1149: 3; -16.** He testified, “So we had done a slew of recent testing and there was not anaddition of any goals.” **Tr. 1149: 11-13.** And, “[T]hese goals … are not a bad idea, they’re just

not appropriate for what needs. .. coping strategies, that is fine, but needs to have some

adult that can help guide through those emotions because they overwhelm when feels

those.” **Tr. 1152: 11-17.**

1. ’s father testified regarding his conclusions about the inability for a one-on-one assistant to be charged with responsibility for at the Public Middle School setting. He stated as follows:

“[T]he May 2018 IEP meeting wasn’t the first time we had discussed a one-to-one assistant for []. We have discussed it in many previous meetings for []… The key concepts that I got from that discussion based on my questions and the answers from [the LEA] was that a one-to-one assistant is a personal assistant that is an adult there to help , that that assistant is not allowed to give instruction on the academics nor is that assistant allowed to talk or communicate in any manner with the parents. And the one-to-one assistant can only talk to the teacher who is coordinating the special education…So it is quite different than what we talked about later in one-to-one. It’s quite a different concept. It’s just someone that is there to help with superficial things but not with educational things and is not what I consider part of a team to help out with [’s] education. It’s just kind of a – like a helper. It is not someone that is trained or qualified to ensure that understands through all of challenging disabilities the education that is presented to … I’ll take you back to [the Private School Reading Teacher’s] conversation with us in this room. She used the term ‘back and forth.’ Previous to that in IEP meetings she used the term ‘push and pull.’ But what she was talking about was one-to-one assistance of [] but in a completely different concept. She was talking about it from a certified and trained teacher who had awareness of what [] was doing on a continual basis throughout the classroom. And, if you recall, she said there were not many students in the class room so she could continuously monitor and she could use that back and forth to make sure that

was on task, because she’s the teacher and she could provide that instruction, to make sure that [] is working through executive functions, auditory processing anxiety and all the other issues that can take place all at once in the classroom and make sure ’s understanding what needs to and what is doing. Not someone to help when doesn’t need help… And needs that independence, but that independence needs to gain is not something that needs for a large part of day or for even several minutes of a class period. It is something that you build slowly by that push and pull, as she stated in this room, that back and forth continual one-to-one and the same term used by [the Private Clinical Neuropsychologist] – one-to one with the teacher or someone qualified to give that instruction and be a part of the broader team that needs in community to access the education and to be able to take advantage of the opportunities has when everything is aligned in fragile functioning, to continue to learn and process and live up to potential as a student. It can be a confusing concept.” **Tr. 1295: 16-25; Tr. 1296: 1-25; Tr. 1297: 1-25; Tr. 1298:1.**

* 1. ’s father testified that he would like for to continue to work toward a standard diploma but that at the Public Middle School would attend classes primarily in a separate special education classroom. When reaches Public High school, would be ineligible to use special education classes toward standard diploma. **Tr. 1299: 20-24.** The Private School offers a standard diploma to **Tr. 938: 15-18.**
  2. ’s father testified that plays volleyball at the Private School with disabled classmates. He opined, “Realistically, I don’t see any way that could continue to play volleyball or work toward a standard diploma [in the Public School environment] even with the one-to-one assistant -- adult helper next to all day in school.” **Tr. 1300:7-11.**

# II.LEGAL STANDARDS AND FINDINGS

**A.** Procedural Considerations and Burden of Proof

1. Each party bore the burden of proof in each case presentation, *see Schaffer v. Weast,*

546 U.S. 49 (2005) (“The burden of proof in an administrative hearing challenging an IEP is

properly placed upon the party seeking relief.” In this case, the parties filed cross petitions for

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relief, thus the Hearing Officer assigned the burden of proof to each party at the point when each side presented its case-in-chief. Prior to the due process hearing, the parties designated five joint witnesses. At the hearing, each party conducted direct-examination, which was immediately followed by the opposing party’s cross-examination. During the hearing, the burden of proof did not shift unfairly to either side during each party’s respective case-in-chief. Both sides participated in redirect testimony and were each equally afforded adequate rebuttal opportunities. After five hearing days, the Hearing Officer states that both sides rested simultaneously and were given ample time to submit closing remarks.

1. I find that the Parents met the burden of proof.
2. I find that the LEA did not meet the burden of proof.
3. The IEP dated May 7, 2018, followed by the IEP dated November 27, 2018, does not adequately, or sufficiently provide with FAPE.

**B.** Provision of a Free, Appropriate Public Education

1. The Act “ensures that all children with disabilities have available to them a free, appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent

living.” 20 U.S.C. Sec. 1400(d)(1)(A). In order to achieve the Act’s purpose, the Act authorizes federal **a**ssistance to states that comply with the Act. Thus, a free, appropriate public education (“FAPE”) means a “special education and related services that have been provided at public expense, under public supervision, and direction, and without charge … and are provided in conformity with the individualized education program (an “IEP).” *See* 20 U.S.C. Sec. 1401(9). Quite literally, FAPE is defined by the IEP. The document represents “educational instruction specially designed to meet the unique needs of the handicapped child … supported by such services

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as are necessary to meet the unique needs of the handicapped child to benefit from the instruction.” *See County Sch. Bd. of Henrico v. Z.P. ex Rel. R.P.*, 399 F.3rd298 (4thCir. 2005).

1. An IEP is a written statement describing each special education student’s disability, present academic progress, including how the disability affects that student’s progress, and a statement of the child’s academic and functional goals. 20 U.S.C. Sec. 1414(d)(1)(A). The school board must provide to the student an IEP for each child with a disability, 20 U.S.C. Sec. 1412(a)(4). When the IEP team develops an IEP, the team must consider the strengths of the child, parental concerns, and **any** evaluation results. Thus, an IEP is sufficient if it is ‘reasonably calculated to enable the child to receive educational benefits.’ ” *Z.P.*, 399 F.3d 298, at 300, (quoting *Rowley*, 458 U.S. 176, at 207).

And, in determining whether the LEA provides with a FAPE in the proposed IEP, the Hearing Officer adopts a two part assessment: First, the Hearing Officer decided if the state complied with the procedure specified in the Act. Second, the Hearing Officer decided if the IEP is reasonably calculated to enable to receive educational benefits. *Rowley,* at 207; *See also* *Jaynes ex rel. Jaynes v. Newport News School Board*, 13 Fed. Appx. 166, 172 (4thCir. 2001).

1. In this case, it is not clear to the Hearing Officer that the LEA fully considered private school placement or the latest evaluations from the Private Clinical Neuropsychologist

regarding ’s “fragility of functioning.” The LEA filed for due process on December 28, 2018 before another IEP meeting could be held to fully consider the updated IEE from the Private Clinical Neuropsychologist who has assisted ’s family with all of ’s educational decisions. The LEA elected not to enter into mediation with ’s family prior to filing for due process though the LEA representative indicated “[We] would be willing to participate in it.” **Tr.** **1280:25; Tr. 1281: 1.** But the LEA had already filed for due process on December 28, 2018. When

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the LEA initiates due process, before obtaining complete evaluative information from the Parents, the LEA’s decision to commence due process produces a chilling effect on discussions toward resolution with parents. In this case, the Parents were scheduled to tour the Public Middle School (which they later rejected) and for an update from the Private Clinical Neurologist.

Thus, there was never an opportunity for these parties to meet to achieve resolution of this case, after full consideration of the updated evaluation from the Private Clinical Neuropsychologist, dated November 29, 2018, with the Parents prior to the LEA filing for due process. The LEA had presented multiple IEPs to the Parents to which they did not agree. That is their right per the IDEA. And the Parents continued to seek evaluative information about from their trusted consults regarding ’s education. Apparently, the parties did not meet again after the Parents reviewed the November 27, 2018 IEP, but prior to the LEA filing for due process on December 27, 2018, to achieve a compromise solution.

The Parents had not reached a final decision regarding their consent to the proposed IEP. The Parents testified they thought that they were to tour the Public Middle School and that the LEA was awaiting the updated report from the Private Clinical Neuropsychologist. The Parent stated,

“I had no intention of considering it in a final approval/disapproval back in November [2018] because we hadn’t finished all of our evaluations … I fully expected to continue working with the IEP team to discuss the findings that [the Private Clinical Neuropsychologist] had and the findings that the parents had during their tour as we continued on in this process of developing an education plan for []. **Tr. 1189: 3-**

**15.**

In the Hearing Officer’s humble opinion, the LEA’s decision to file for due process was premature and amounted to a substantive procedural error by the LEA. If the LEA had waited until all evaluative information could be considered, the case might have resolved.

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1. The Hearing Officer is not convinced that the proposed IEP is reasonably calculated to enable to receive educational benefits. The proposed IEP does not have the auditory processing goals or services such as language goals or language therapy to which the Private Audiology Speech-Language Pathologist referred. Also, because the IEP document appears to predetermine that 2017-2018 placement will be at the LEA’s Public Middle School, it does not seem logical that the LEA ever considered Private School placement that was recommended by the Private Clinical-Neuropsychologist to address ’s special education needs.

**C**. Least Restrictive Environment

1. State school boards must demonstrate that all handicapped children enrolled in its public programs are receiving a FAPE in order for a state to receive federal funds. 20 U.S.C. Sec. 1412(i). Also, the state must demonstrate that all its handicapped children have been placed in the

least restrictive environment (“LRE”) to accommodate a special education student’s disabilities. 34 C.F.R. Sec. 300, 552(d). Additionally, the Act requires that a student’s special education needs must then be “tailored to the needs of an individual handicapped child by means of an [IEP], which must be prepared at meetings between school representatives and the child’s parents. 20 U.S.C. Sec. 1401(a)(19), 1414(a)(5).

1. ’s least restrictive environment at this time is the Private School. is unable to receive FAPE in the Public School environment, with supplementary aids and services, because of auditory processing disorder and fragility of functioning. ’s updated evaluations and diagnoses, completed by the Private Audiology and Speech-Language Pathologist and the Private Clinical Neuropsychologist, describe comorbid physical, cognitive and psychological deficits, exacerbated by orthopedic issues, fatigue and overwhelming disorganization, anxiety and various executive functioning issues. The debilitating effects of these

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disorders emanate directly from ’s twenty-one disabilities. ’s insurmountable physical and mental conditions adversely affect ’s ability to achieve success in school. ’s disabilities present an impediment to ’s ability to access FAPE in Public School in the 2017-2018, 2018-2019 and the 2019-2020 school years.

1. Mainstreaming is not appropriate for every handicapped child. Segregated placement is sometimes the only educational option for severely handicapped children. The test to determine the adequacy between two alternative placement is: Whether the services that make that placement superior could be feasibly provided in a non-segregated setting. If the services can be provided, placement in the segregated setting would be inappropriate under the Act. *Roncker v.* *Wilson*, 700 F.2d 1058 (6thCir. 1983). And, often, some children must be educated in a segregated

setting. (“marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting”) (*see* *also DeVries v. Spillane*, 853 F.2d 264 (4thCir. 1988).

Mainstreaming is a goal to be reached, if possible, by all disabled students. Unfortunately, it is not possible to educate all disabled children, to the maximum extent possible, with non-disabled peers, in a public school setting as is demonstrated by ’s current educational status. Under the *Roncker* test, the Hearing Officer must examine the special education services provided to at the Private School which would not be available to in the Public School setting: has access to a trusted adult in close proximity to ; the Private School in which all classes occur are contained within a three story building in which all parts are centrally located and easily accessible to which lessens anxiety and fatigue; the LEA’s representative identified the “trusted adult” at the Private School to be the “case manager” or the “guidance counselor” which “[i]n any given moment, that could change.” **Tr. 1286: 11-12.**

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is relatively independent in daily functioning at the Private School and does not require a one-on-one assistant to help get through the day from the moment departs the bus; mobility issues, due primarily to right side paralysis, are challenged in a Public Middle School environment where students bump and push each other up and down stairwells and hallways; aside from mobility problems, does not presently possess the social skills necessary to successfully participate in Public Middle School; needs the School Nurse to be available to immediately assist when knee slips and can’t readjust nerve simulator to walk; it is not feasible to expect a Public School Nurse to tend primarily to ’s needs for medications, to retrieve adaptive equipment or to help with personal needs if the Public School Nurse has many other school children to oversee. **Tr. 713: 22-25.** The Private School is fully accredited. All core teachers are state licensed. The Private School provides a FAPE to

**D.** Reimbursement

* 1. Reimbursement of special education expenses under the Act is appropriate when it is determined that (1) the public school placement was not providing the child with a FAPE; and

1. the parents’ placement was proper under the Act. *See Sch. Comm. of Town of Burlington Mass.* *v. Department of Education of Mass.*, 471 U.S. 359 (1985); *see also Jaynes ex rel. Jaynes*, *v. Newport News School Board*, 13 Fed. Appx. 166 (4thCir. 2001).
   1. The LEA does not offer FAPE to The Parents have unilaterally placed in a Private School for disabled children.
   2. The Private School offers FAPE because of its small classroom with little noise distraction, attention to ’s overwhelming anxiety and mobility issues; it teaches to independently manage school day. At the Private School learns also the pragmatic social

skills will need in “the real world,” where will be required to navigate without a one-on-

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one assistant or a trusted adult to attend to medical and personal needs. will require auditory processing skill development at the Private School before re-enters a Public Middle School. Parents shall be reimbursed for the 2017-18 school year; Parents shall be reimbursed for the 2018-2019 school year. Parents shall be reimbursed for the 2019-2020 school year.

# DISCUSSION

’s disabilities have increased in number since the last due process hearing. And, at the same time, has become a few years older and has encountered a myriad of issues associated with adolescence. is now a teenager. anxiety is palpable and debilitating. tires very quickly during the day and educational plan must permit flexibility during periods of fatigue. To make matters worse, ’s special education program at school is more difficult as the years progress. ’s anxiety and ADHD is interwoven with social issues and tends to isolate from peers – inability to interact with others brings on a cascade of disorganized thoughts. constantly questions teachers and, at the same time, apologizes to them. seeks continual reassurance from the trusted adults in educational environment and experiences great anxiety and stress in any educational setting.

The LEA has been away from for nearly three years since entered the Private School. As well-meaning as the LEA expert witnesses were, they observed in school settings for thirty minutes to upwards of an hour. In contrast, the Private School representatives have been intimately acquainted with for about three years. The Private School representatives depict a more vulnerable child. This evidence is corroborated by the Private School teachers and administrators. The Public School plan offers an IEP that might eventually serve well except the totality of present circumstances precludes from its delivery in a public school environment. The LEA accommodations offered to may function well for when and if

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develops the auditory processing skills necessary to participate meaningfully in a public school

environment – to enter into group discussions with non-disabled classmates, to walk

confidently, without falling down, in a middle school hallway or to understand a teacher’s question

and be able to respond to questions correctly in class. But academic skills now elude

primarily because of well documented auditory processing deficits.

At this time, the LEA’s effort to include in Public Middle School is premature. As

well intentioned as the LEA educators have been in organizing what appears to be a constructive

I.E.P. for , the accommodations are inadequate to encompass the totality of circumstances

or the fragility of functioning. The Hearing Officer agrees with the Parents that , if

required now to attend Public Middle School, would be lost in a deluge of disorganization, anxiety

and chaos. As the independent evaluators testified, is not yet ready for Public Middle School.

When the Private Clinical Neuropsychologist was asked if ’s disabilities could be “parsed

out,” he responded, “I believe that you can identify what those processing issues are individually,

but with specific regard to [] I don’t think it’s possible to talk about them in isolation because,

as stated, those issues have an interactive effect for []. **Tr. 788: 20.**

The interactive issues are present every day at the Private School as struggles to get

to classes. The Private Clinical Neuropsychologist also observed transition from

P.E. class to chemistry class at the Private School in preparation for his evaluation. He stated

at the hearing:

“It’s noted that during the course of that transition [] was the last student who entered into the chemistry class and was also --- entered into the classroom after the instruction for the class had started…Now you have a situation which because of physical difficulties couldn’t get to the classroom for the start of the class. has processing issues which made it so that ’s entering into an instructional setting after the teacher had already set expectations, which then requires that the instructor provide with specific instruction to help catch up

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to where she is. And even under the circumstances the observation suggested that was still having difficulties orienting so could participate meaningfully in whatever lesson the classroom was focused on…. So you see that kind of cascading

series of events which occur is built on, A. physical disabilities, B. processing issues, C. attention. And those are acting in this changing fashion during the course of the observation, which makes it extremely difficult then to say, ‘Okay. Let’s look at the processing issue. What impact does that have on ?’” **Tr.** **790: 7-25; Tr. 791: 1-8.**

The Hearing Officer considered ’s present ability to move quickly and efficiently

through a large Public Middle School, from class to class, from the lunchroom, to the resource

room, to the guidance counselor and to visit the school nurse. The evidence is clear that ’s

ability to access FAPE, in a public school setting at this time, will be completely obliterated by

confusion, anxiety and fatigue. Perhaps with auditory processing and language therapy provided

to on a regular basis, may one day re-enter public school. The Private Clinical

Neuropsychologist suggested the possibility when he stated at the hearing:

“I supported the placement at the Private School at the time of the evaluation … if there was a meaningful plan to do the transition to determine if the transition would be successful for … And that, therefore, I don’t believe that curriculum allows the capacity to play… The issue is that there’s a limited time available to . That as the child advances in grade the difficulty is that the demand in the curriculum is to do more.” **Tr. 794: 23-25; Tr. 796:9-12.**

For the above reasons, the Hearing Officer rules ’s proper placement is at the Private

School for the 2017-2018, 2018-2019 and 2019-2020 school years.

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# ORDER

The Hearing Officer hereby **ORDERS** the LEA and the Parents to do the following:

1. The parties will revisit the proposed IEP and jointly develop a plan to provide

language therapy services and language therapy goals to ’s IEP the 2019-2020 school year.

1. The LEA will add auditory processing goals and services to ’s IEP for the 2018-2019 school year and for the 2019-2020 school years.
2. The LEA will change ’s proper placement on the IEP to Private School for the 2017-2018, 2018-2019, and 2019-2020 school years The Hearing Officer identifies the stay-put placement to be the Private School for the 2017-2018 school year.
3. The Private School will share ’s school work and evaluative information with the LEA on at the end of each school year, for the 2018-2019 school year and for the 2019-2020 school year.
4. The LEA will reimburse the Parents, at the state’s expense, for Private School tuition for the 2017-2018, for the 2018-2019, and for the 2019-2020 school years.
5. The Private School will develop an educational plan for the child for the 2018-2019 and 2019-2020 school years and share the educational plan with the LEA.
6. At the conclusion of the 2019-2020 school year, will be re-evaluated by the LEA to test readiness for Public School. The LEA and the Private School will promptly share all evaluative and testing information with each other during assessment.

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Sarah Smith Freeman. Hearing Officer

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**RIGHT OF APPEAL NOTICE**

This decision shall be final and binding unless either party appeals in 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.

**Decision Date: May 10, 2019**

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Sarah Smith Freeman, Hearing Officer

**CERTIFICATE OF MAILING**

I have emailed the above Decision and Order to counsel on this 10th day of May, 2019 and

will mail a hard copy of the Decision and Order to counsel of record.

Sarah Smith Freeman, Hearing Officer

Sarah Smith Freeman, Esquire, VSB# 21354

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