**19-053**

**VIRGINIA DEPARTMENT OF EDUCATION**

**DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES FOR THE**

**OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATION SERVICES**

# DECISION

 Public Schools

**School Division Name of Parents**

**Division Superintendent Name of Child**

Alan D. Bart, Esquire Kandise Lucas, Advocate

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

Robert J. Hartsoe, Esquire Parent/Child

**Hearing Officer Party Initiating Hearing**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

# LEGEND

Child

Mother

LEA Public Schools

Parties Parent/Child & LEA

Private Teacher

LEA Representative

Special Education Teacher

# DECISION

**INTRODUCTION**

This was a difficult matter insofar as all the witnesses were found, to a certain extent, credible. For reasons stated herein, the Due Process Request is dismissed with prejudice. The Parent/Child failed to prove, by a preponderance of the evidence, that the Parent/Child should be granted the relief requested. With that said and as allowed by 8VAC20‑81‑210P8, the LEA shall conduct an Independent Educational Evaluation (IEE) of the Child at public expense and in

accordance with 8VAC20‑81‑170. In addition, the LEA is strongly requested, but not required, to conduct a non-independent Functional Behavioral Evaluation (FBA) in a timely manner to allow such result to be considered with the performance of the IEE, **but only if** requested by the IEE evaluator. The Child is starting his academic journey. All involved want him to academically thrive. The hope is that all participants, especially the Parent/Child, will re-evaluate their respective positions and work together in the cooperative approach as contemplated, and indeed mandated, by IDEA--to ensure the Child’s receiving FAPE. This hope’s objective does not exist at this time. Failure to work together will negatively affect the Child’s academic potential.

# PROCEDURAL BACKGROUND

On March 27, 2019, the Parent/Child filed a Due Process Request. The LEA timely filed its responses. Procedural matters were address *via* prior PreHearing Reports. Several issues were raised and addressed as referenced in the PreHearing Reports. Unless addressed herein, all procedural issues were not at issue.

**ISSUES PRESENTED**

I. Whether the LEA unnecessarily delayed or denied the Parent's request for an Independent Educational Evaluation and/or an independent Functional Behavior Assessment?

II. Assuming the existence of such delay regarding the Parent's request for an Independent Educational Evaluation and/or an Independent Functional Behavior Assessment FBA, did the delay deny the Child FAPE?

III. Assuming the existence of such delay regarding the Parent's request for an Independent Educational Evaluation and/or an Independent Functional Behavior Assessment FBA, did such delay interfere with the Parent's participation in the special education process including meaningful participation in the relevant Child's IEP meetings?

IV. Assuming the existence of such delay regarding the Parent's request for an Independent Educational Evaluation and/or an Independent Functional Behavior Assessment FBA, did such delay prohibit or hinder the Parent's ability to provide "informed consent" due to their not having access to all relevant information regarding the Child's academic performance and progress?

V. Whether the LEA failed to evaluate the Child in accordance with IDEA during the 2017 and 2018 school years?

VI. Whether the LEA intentionally excluded the Parent's input in the IDEA process by failing to perform independent evaluations since September, 2017?

# SUMMARY OF PERTINENT TESTIMONY

**Parent/Child Witnesses**

The following witnesses testified on behalf of the Parent/Child: Private Teacher; the Mother; and the LEA Representative.

Private Teacher’s Testimony

The Private Teacher was a fact witness and an expert in the field of general education with a subset of referral of students to special education. (HT at 24.) She has provided instruction to the Child on weekends for approximately thirty months in a private, small class-room setting, for three hours at a time. (HT at 25-26 and 31.) She opined that the Child was academically very smart. (HT at 25.) His main issue was focus. (*Id*.) During class, he required redirection to where another student was assigned to enforce focus. (HT at 26.) The Child reads, makes posters, presents information to class, *etc*. (HT at pages 31-32.) He takes his time on writing assignments; he is very exact. (HT at 36.) He dislikes eating his lunch and has difficulty eating on his own. (HT at 32-34.) He is easily frustrated at which time he ”shuts off.” (HT at 37-38.) The Child’s frustration infrequently causes him to ”shut down.” (HT at 67.) He has good days and bad days. (HT at 57.) She opined that the Child was not ready for ”two-step“ direction in a public school setting. (HT at 39.) He only works independently when coloring. (HT at 40.) She disagreed with the LEA’s removal of the adult assistant in the classroom setting. (HT ate 44 and 47.) This included the cafeteria setting. (HT at 47.) The Child follows the classroom school rules most of the time. (HT at 51.) With the Private Teacher, the Child’s curriculum was to educate him, in general, on potential complicated religious learning, *e.g.,* studies and language. (HT at 59-60.) The Child enjoys routine. (HT at 60.) The Private Teacher has not taught the Child in a public, classroom setting. (HT at 63.) She has not provided him special educational services or testing. (HT at 63.) She opined that the Child could not function in an academic-classroom setting with twenty-five students. (HT at 68.) The Private Teacher was found to be a very credible witness, given her expert credentials, demeanor and opportunity to observe the Child in an academic setting. However, her testimony was discounted insofar as she did not have the opportunity to observe the Child in his public classroom setting or review his records. Further, there was no evidence that she had access to the Child’s other professionals involved in his public-school, academic journey. Further, there was no evidence that she had observed the Child in a public school setting. Overall, her testimony was insightful because it provided evidence of the struggles which face the Child academically and socially in, at least, a nonpublic academic setting, over years.

The Mother was called as a factual witness. Any expert opinions rendered were not considered. She testified that the Child was a “very bright, smart kid.” (HT at 69 and 71.) He has issues regarding communication. (HT at 70.) He has space issues. (HT at 70-71.) The Child has issues regarding focus. (HT at 71 and 122-124.) He required redirection. (HT at 71-72.) The Mother felt that she was not an equal member regarding her participation with IEP teams and could not meaningfully participate. (HT at 74, 128.) She felt that denial to data was a cause. (HT at 74-75.) She felt that necessary professionals were either uninformed or uninvited to such meetings. (HT 74-80.) She described incidents when the Child acted inappropriately at school. (HT at 79-80.) She requested a FBA several times. (HT at 82, 109, 126-127.) The Child has lost weight since starting school. (HT at 82-83.) He lacked energy. (HT at 86.) His capacity to eat has been reduced. (HT at 88-89.) (Note: no evidence, expert or otherwise, was introduced to tie the Child’s weight loss or lack of energy to acts or omissions of the LEA.) She testified that she requested an “independent evaluator” without a specific request for an IEE. (HT at 94, 97, 101 and 109; SB9.) The LEA denied her request for a FBA. (HT at 103.) Although inconsistent with the other testimony and documentary evidence, she testified she understood her right to an IEE and had requested it from the LEA several times. (HT at 109; *see, in contrast, e.g.,* SB9, the letter, dated February 26, 2019 wherein the LEA references that the Parent’s first request for an IEP was on February 12, 2019.) She felt her participation in IEP meetings were undermined by the LEA. (HT at 112-115.) The Mother felt the Child’s physical safety was compromised by the LEA (HT at 116-121.) On cross-examination, the Mother stated:

0 She is not a special educational teacher. (HT at 131.)

0 She is not a general educational teacher. (*Id*.)

0 On March 7, 2019, the Mother submitted a document entitled “Gifted Program Services Referral and Review Form,” to the LEA for services. (SB 11; HT 132-133.)

0 The Mother observed the Child in the lunchroom in calendar year 2019. (HT at 134.)

0 The Mother has participated in IEP meetings. (*Id*.)

0 The Mother declined to appear at an IEP meeting. (HT at 305.)

The Mother’s demeanor was earnest and her love for the Child apparent. With that said, her credibility was discounted. She testified more as an advocate as opposed to a factual witness: demeanor. For example, the overwhelming evidence was that she repeatedly requested the LEA to perform a FBA since, at least, May 1, 2018. The Mother lost credibility by attempting to substitute (by implication, vagueness or otherwise in her testimony) these requests for a FBA for a request for an IEE, a request not received by the LEA until February 12, 2019, as referenced in SB9 (the letter, dated February 26, 2019). Further, the Mother endorsed the Child to be screened for the Gifted Program in March, 2019, which undermined her testimony regarding the Child’s extreme academic difficulties. Similarly, her actions at the March, 2019, IEP meeting completely undermined her credibility as described herein. Overall, the Mother’s testimony was inconsistent with the other witnesses and unsupported (or contradicted) by the documentary evidence. While she obviously loves the Child, she may wish to direct her focus to constructive efforts to achieve FAPE for the Child.

LEA Representative was called as a factual (and by implication as an adverse) witness. (His testimony regarding the Resolution efforts and mediation efforts were not considered on the basis that such alternative dispute methods require parties to conduct candid discussions which, by design, may contain settlement discussions unrelated to the merits of a case.) The Parent did not request an IEE prior to February 12, 2019 (HT at 189; SB 9.) The IEP team had not been given the opportunity to review the Parent/Child’s request for an IEE. (HT at 161 and 182.) This is consistent with the contents of: Parent’s Exhibit 5 and SB 5 (Prior Written Notice, dated May 31, 2018); Parent’s Exhibit 6 (Prior Written Notice, dated September 12, 2018); SB4 (Individualized Education Program, dated May 1, 2018). These documents do reflect that the Parent did request a FBA, a different request than an IEE, under the IDEA. (See. *e.g*, SB9.) The LEA Representative was found extremely credible. His testimony was consistent with admitted documents and the testimony of other witnesses.

**LEA Witness**

The following witness testified on behalf of the LEA: the Special Education Teacher.

The Special Education Teacher was found as an expert in the area of special education with kindergarten children. (HT at 210.) She is the Child’s case manager. (HT at 232.) She saw the Child daily during school hours. (HT at 212) He was a great student and very smart. (HT at 214 and 229.) He made academic progress. (HT at 215-216.) He is probably the smartest child in the class. (HT ate 215.) He is in the highest math group. *(Id*.) He is at the top of his class. (HT at 217-220 and 222-224.) Socially, the Child is confident interacting with his peers. (HT at 224-225.) While an issue of concern in the beginning of the school year, frustration is not an issue for the Child. (HT at 225-228.) The Special Education opined that the Child: does not require special educational services (HT at 230.); does not require one-on-one services (*Id.*); and, will perform wonderfully in the next academic year (*Id*.). The Special Education Teacher was concerned about the Child’s weight loss, but relied upon the Parent to provide medical documentation to address such concerns. (HT at 232-233.) No such documents were provided by the Parent. *(Id*.) The Child’s autism has no impact on his educational capacity. (HT at 245.) Crying is not a typical behavior for the Child as of the date of the Hearing. (HT at 251.) The Child mastered his IEP goals including speech or was on task to complete his goals timely. (HT at 275-276.) At no point did the Parent request an IEE in the presence of the Special Education Teacher. (HT at 279.) At no time did the Parent request support outside the IEP services. (HT at 280.) The Mother declined to appear at an important, timely and recent IEP meeting. (HT at 305.) The Special Education Teacher was found extremely credible given her expertise, demeanor, daily contact and professional relationship with the Child. Her testimony was consistent with admitted documents and testimony of the other witnesses.

# EXHIBITS ADMITTED INTO EVIDENCE

1. The following LEA Exhibits were admitted into evidence: SB3, SB5, SB6, SB7, SB10, SB11, SB12, SB13, SB21 and SB22. Of note is the disturbing description of behavior of the Parent and her advocate as contained in the Prior Written Notice, dated March 1, 2019, SB 10:

The parent participated in the IEP meeting in person. The parent’s advocate participated [*via* telephone.] **The parent [and advocate] were afforded an opportunity to meaningfully participate in the IEP meeting.** The [Advocate] continuously impeded the IEP process by interrupting IEP team members, raising her voice, and ignoring request that she allow other members of the team to speak without continuous interruption and to refrain from speaking loudly to the team. After approximately 1 hour and 15 minutes because the parent’s advocate continued to impede the meeting, the [IEP] ... team dismissed the advocate from the meeting and asked the parent to terminate the call. Prior to dismissing the advocate from the meeting, the parent’s advocate was informed that if she continued to engage in the inappropriate behaviors, she would be precluded from further participation in the IEP meeting. The school principal explained to the parent that the IEP meeting would continue after the advocate disconnected from the phone. The parent was also invited to continue to participate in the IEP meeting without her advocate. **The parent, however, refused to end the call with the advocate on her cell phone and refused to leave the meeting room. The advocate continued to speak loudly through the parent’s cell phone and continued to interrupt members of the team and imped the meeting.**  Therefore, the ... the IEP team left the room to continue the [IEP] meeting in another location, ... [without the parent or advocate participation.] [Emphasis added.]

Such bizarre, outrageous, negative and unnecessary misbehavior was undisputed and, quite frankly, disturbing and unrelated to the advancement of any cause referenced or even suggested by the evidence or issues raised by the Due Process Request. Such misbehavior strongly suggests that the Parent (or her advocate) are forwarding an agenda--unrelated to the Child**.** In any event and as a direct result of this misbehavior, the Mother’s credibility as a witness was discounted at the Hearing.

2. The following Parent/Child Exhibits were admitted: P5; P6, pages 1‑2; P7, page 1‑4; P9, pages 1‑2, 4; P10, pages 1‑6; P11; P13; and, P15, pages 1‑3.

**FACTUAL FINDINGS**

After reviewing the PreHearing Reports, testimony, exhibits and the memoranda, the following factual findings are made:

1. In November 2016, the LEA evaluated the Child as contained in SB3, a document entitled “Confidential Early Childhood Multidisciplinary Assessment.”
2. No “Evaluation” as defined or contemplated by the IDEA was conducted by the LEA upon the Child since November, 2016.
3. The Mother requested a FBA several times from at least March, 2018.
4. The Mother did not request an IEE until February 12, 2019.
5. The LEA properly responded to the IEE request.
6. Given the timing of the Due Process Request’s filing (March 2019), the LEA was not delinquent in reviewing the Mother’s request for an IEE on February 12, 2019, as reference in SB9.
7. The Mother’s several requests for an FBA or independent FBA or “independent evaluator” are not equal to a request for an IEE under IDEA.
8. The reference that the Mother did not request a FBA, as contained in FB9, is inaccurate
9. The Child is thriving academically and socially.
10. The Child is confident when interacting with his public-school peers.
11. The Child succeeds under the current IEP.
12. The Child was diagnosed with autism.
13. As referenced in SB10, the Mother (and her advocate) intentionally disrupted the referenced February, 2019, IEP meeting, a litigation ploy.
14. The LEA committed no procedural requirements of the IDEA including, but not limited to, IEP meetings, notice, *etc*.
15. On March 7, 2019, the Mother requested the LEA to screen the child for a gifted/talented program.
16. The Child's autism had no impact on his educational capacity.
17. The Child does not require special educational services.
18. The Child does not require one-on-one services.
19. Implementation of one-on-one services would undermine the Child’s participation in a general education classroom.
20. The Child demonstrated consistent difficulties or, at least, concerns when attending the private, three hour per weekend, academic setting over the last thirty months.
21. The LEA conducted IDEA-defined evaluations in 2016.
22. No evidence suggests that the LEA should be sanctioned. In contrast, the LEA performed its duties under the IDEA as an example.
23. At no time was the Child’s physical safety an issue as a LEA student.
24. At no time did the Parent request support for the Child outside the IEP services.
25. The LEA performed its duties and/or obligations under the IDEA.

# ANALYSIS

**Legal Analysis**

This administrative proceeding was initiated by the Parents/Child and have the burden of proof and production. Schaffer, *ex rel*. Schaffer v. Weast, 126 S.Ct. 528 (2005). Further, the Parents/Child must prove their case by a preponderance of the evidence. Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 458 U.S. 176, 206 (1982).

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

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

A review of Smith is important to emphasize the restrictions, constraints or limitations placed on hearing officers when deciding IDEA cases in Virginia. Although a child is involved, current law prevents a hearing officer’s review of 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. 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 DeVries v. Fairfax County School Bd., 882 F.2d 876, 878 (4th Cir. 1989), the Court recognized the importance of mainstreaming when it opined that “[m]ainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with nonhandicapped 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).

Educational determinations by LEA experts involved in the Child’s education are entitled to deference. A.B. v. Lawson, 354 F. 3rd 315 at 328 (4th Cir 2004); Hartmann v. Loudoun County Board of Education, 118 F.3rd 996 at 1001 (4th Cir. 1997).

To rule that the LEA violated the IDEA where a procedural violation has been alleged, a hearing officer must find: (1) that the Parent/Child alleged a procedural violation; (2) that the violation “significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of FAPE to the child; and (3) the Child did not receive FAPE as a result. (*See* R.F. v. Cecil Cnty. Pub. Schs., 919 F.3d 237, 248 (4th Cir. 2019). In short, unless a procedural violation denies a child FAPE, a hearing officer “may only order compliance with the IDEA’s procedural safeguards and cannot grant other forms of relief, such as private placement or compensatory education.” *Id.*

In an official publication entitled “Letter to Baus,” reported at 65 IDELR 81 and dated February 23, 2015, the United States Department of Education opined that a parent may seek an IEE in an area that was not previously assessed by the LEA. This non-legally binding opinion is inapplicable insofar as the letter’s referenced LEA performed an IDEA-defined evaluation and the parent requested an IEE in an area outside thereof. In other words, the triggering event was an IDEA-defined evaluation by the LEA. In the instant matter, the Parent failed to request an IEE until February, 2019. (SB9.) Given the timing of the Due Process Request filing (March, 2019), the LEA was denied the opportunity to perform such an evaluation. While the evidence supports that the Parent requested a FBA several times, the Parent did not specifically request an IEE until February, 2019. As a result, no IDEA-defined evaluation was conducted by the LEA and, therefore, no actual disagreement or controversy existed as defined by the IDEA in the instant matter. In other words, there is no evidence that the LEA performed the necessary IDEA-defined evaluation and, therefore, there is no IDEA-defined “evaluation” upon which the Parent may disagree. (Although the Parent may be arguing that IDEA-defined evaluations were conducted by the LEA in 2016, the Parent did not file a request for an IEE within the applicable statute of limitations.) Overall, granting any parental request for an IEE without the existence of an IDEA-sanctioned evaluation would open the flood gates, saddling any LEA with the expense of an IEE without controversy as required by IDEA. IDEA does not invite a “fishing expedition” by parents at public expense. While no Virginia court has addressed the issue, the holdings in D.S. Ex rel. M.S. v. Trumbull Board of Education, 357 F. Supp. 3d 170, 175 (2019) are found persuasive:

The Hearing Officer correctly recognized that, because the right to a publicly funded IEE depends on the parents' disagreement with an existing IEE, there must necessarily be a connection between the evaluation with which the parents disagree and the independent evaluation which they demand be funded at taxpayer expense. **After all, the right to a publicly funded IEE turns on the parents' disagreement with an evaluation that was actually done, not a parent's disagreement with an evaluation that was not done.** The IEE regulation's requirement that there be a disagreement with an existing evaluation would be meaningless if a parent could lodge a "disagreement" with any particular evaluation as no more than a device to demand a publicly funded IEE for testing beyond the intended or proper scope of the evaluation with which the parents purportedly disagree. [Emphasis added.]

**Specific Issues**

**I. Whether the LEA unnecessarily delayed or denied the Parent's request for an Independent Educational Evaluation and/or an independent Functional Behavior Assessment?**

The overwhelming credible evidence was that the Mother failed to request an IEE until February 12, 2019. The LEA lacked the opportunity to effectuate such IEE. In addition, the LEA properly denied the Parent’s request for an FBA given the Child’s progress in the public-school setting (both academically and socially) as supported by the credible testimony and exhibits. Further, the overwhelming evidence is that the Child thrived in his current academic setting; *i.e*., he received FAPE. Assuming without finding, no LEA procedural irregularity had an impact on the Child’s receiving FAPE. Although the LEA lacked the opportunity to address the Parent’s requests for an IEP, the Parent’s February 2019 request for an IEE must be denied insofar as no IDEA-defined evaluation was performed within the statute of limitations. This is in accordance with the applicable regulations and D.S. Ex rel. M.S. v. Trumbull Board of Education, 357 F. Supp. 3d 170, 175 (2019).

**II. Assuming the existence of such delay regarding the Parent's request for an Independent Educational Evaluation and/or an Independent Functional Behavior Assessment FBA, did the delay deny the Child FAPE?**

Given the previous findings and the overwhelming evidence, no such delay occurred. The Child was not denied FAPE. The Child thrived in his current academic setting. Although the LEA did not decide implementation, the Parent’s February 2019 request for an IEE must be denied insofar as no IDEA-defined evaluation was performed within the statute of limitations. This is in accordance with the applicable regulations and D.S. Ex rel. M.S. v. Trumbull Board of Education, 357 F. Supp. 3d 170, 175 (2019). Assuming without finding, no LEA procedural irregularity had an impact on the Child’s receiving FAPE.

**III. Assuming the existence of such delay regarding the Parent's request for an Independent Educational Evaluation and/or an Independent Functional Behavior Assessment FBA, did such delay interfere with the Parent's participation in the special education process including meaningful participation in the relevant Child's IEP meetings?**

Given the previous findings and the overwhelming evidence, the Child was not denied FAPE. In contrast, the Child thrived in his current academic setting. Although the LEA did not decide implementation, the Parent’s February 2019 request for an IEE must be denied insofar as no IDEA-defined evaluation was performed within the statute of limitations. This is in accordance with the applicable regulations and D.S. Ex rel. M.S. v. Trumbull Board of Education, 357 F. Supp. 3d 170, 175 (2019). Any issues regarding the Parent’s participation were caused by her actions alone. Assuming without finding, no LEA procedural irregularity had an impact on the Child’s receiving FAPE.

**IV. Assuming the existence of such delay regarding the Parent's request for an Independent Educational Evaluation and/or an Independent Functional Behavior Assessment FBA, did such delay prohibit or hinder the Parent's ability to provide "informed consent" due to their not having access to all relevant information regarding the Child's academic performance and progress?**

Given the previous findings and the overwhelming evidence, the Child was not denied FAPE. In contrast, the Child thrived in his current academic setting. Although the LEA did not decide implementation, the Parent’s February 2019 request for an IEE must be denied insofar as no IDEA-defined evaluation was performed within the statute of limitations. This is in accordance with the applicable regulations and D.S. Ex rel. M.S. v. Trumbull Board of Education, 357 F. Supp. 3d 170, 175 (2019). Any issues regarding the Parent’s participation or “consent” were caused by her actions alone. Assuming without finding, no LEA procedural irregularity had an impact on the Child’s receiving FAPE.

 **V. Whether the LEA failed to evaluate the Child in accordance with IDEA during the 2017 and 2018 school years?**

The overwhelming evidence was that the Child received FAPE including IDEA evaluations. Although the LEA did not decide implementation, the Parent’s February 2019 request for an IEE must be denied insofar as no IDEA-defined evaluation was performed within the statute of limitations. This is in accordance with the applicable regulations and D.S. Ex rel. M.S. v. Trumbull Board of Education, 357 F. Supp. 3d 170, 175 (2019). The Child thrived in his current academic setting. Assuming without finding, no LEA procedural irregularity had an impact on the Child’s receiving FAPE. With that stated, as allowed by 8VAC20‑81‑210P8, the LEA shall conduct an IEE. The basis for this mandate arises from the authority of the Hearing Officer, not the merits of the Due Process Request and not requested therein. The basis for the mandate arises from the credible evidence of the Private Teacher’s concerns as well as evidence regarding the Child’s young age, maturity and diagnosis. His academic setting will change in the Fall. The mandate is in no way an indication that the LEA failed to perform its duties under IDEA.

**VI. Whether the LEA intentionally excluded the Parent's input in the IDEA process by failing to perform independent evaluations since September, 2017?**

No credible evidence was introduced to support this assertion. In contrast, the LEA’s involvement with the Child, the IDEA procedures, *etc*., were exemplary. Although the LEA did not decide implementation, the Parent’s February 2019 request for an IEE must be denied insofar as no IDEA-defined evaluation was performed within the statute of limitations. This is in accordance with the applicable regulations and D.S. Ex rel. M.S. v. Trumbull Board of Education, 357 F. Supp. 3d 170, 175 (2019). The Child thrived in his current academic setting. To address issues raised by the Due Process’ request for relief, absolutely no evidence or legal authority exists to “sanction” the LEA as requested by the Due Process Request. Similarly, its request to communicate a governmental statement is equally denied. Assuming without finding, no LEA procedural irregularity had an impact on the Child’s receiving FAPE. Overall, the LEA performed its duties under the IDEA.

# CONCLUSION

The Due Process Request is dismissed with prejudice for reasons stated herein, withe exception that, as allowed by 8VAC20‑81‑210P8, the LEA shall conduct an Independent Educational Evaluation (IEE) of the Child at public expense and in accordance with 8VAC20‑81‑170. This effort arises from the authority of the Hearing Officer and not the merits of the Due Process Request. In addition, the LEA is strongly requested, but not required, to conduct a non-independent FBA in a timely manner to allow such result to be considered with the performance of the IEE, but only if requested by the IEE evaluator. The LEA shall determine the evaluator for the IEE, after allowing the Parent/Child the opportunity for input. The evaluator is strongly encouraged, but not required, to interview the Private Teacher. The basis for the IEE is stated herein. Moreover, such efforts may motivate the IEP participants to re-evaluate their respective positions, to re-direct their efforts constructively, and to allow the cooperative effort required by IDEA. All involved want this Child to academically thrive.

**RELIEF GRANTED:**

The issues raised by the Due Process Request are denied with prejudice; notwithstanding, the LEA shall conduct an IEE of the Child at public expense and in accordance with 8VAC20‑81‑170. In addition, the LEA is strongly requested, but not required, to conduct a non‑independent FBA in a timely manner but only if requested by the IEE evaluator, to allow such result to be considered with the performance of the IEE. The LEA shall determine the evaluator for the IEE, after allowing the Parent/Child the opportunity for input.

**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 LEA is deemed the prevailing party.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Hearing Officer Date

**CERTIFICATE OF SERVICE**

I certify that on this 10th day of June, 2019, a true and accurate copy of this pleading was mailed, *via* First-class, postage prepaid mail, to:

Parent

Ms. Kandise Lucas, Advocate

Saad El-Amin, M.A., J.D

Advocates for Equity in Schools

4206 Chamberlayne Avenue

Richmond, Virginia 23227

Advocates for the Parent/Child

Alan Bart, Esquire

Reed Smith LLP

Riverfront PlazaWest Tower

901 East Byrd Street, Suite 1700

Richmond, Virginia 23219

Counsel for the LEA

Kathryn D. Jones, Esquire

Coordinator for Due Process Services

ODRAS/VDE

PO Box 2120

Richmond, Virginia 23218-2120

LEA

Reginald B. Frazier, Sr., Esquire

1998 Angora Drive

Chesapeake, Virginia 23325

VDOE Evaluator

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Robert J. Hartsoe