19-059

COVER PAGE FOR HEARING DECISION, NOT TO BE PUBLISHED

VIRGINIA:

SPECIAL EDUCATION DUE PROCESS HEARING

**, by and through his Grandparent,**

**,** Complainants

v.

**SCHOOL BOARD**, Respondent

**Student & Grandparent:** **Administrative Hearing Officer:**

John V. Robinson, Esq.

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Richmond, Virginia 23226

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### DECISION OF THE HEARING OFFICER

**INTRODUCTION**

The grandparent and guardian (the “Grandparent” or “Grandmother”), by counsel, requested an administrative due process hearing in her Special Education Due Process Hearing Request dated April 5, 2019 (the "Request") under the *Individuals with Disabilities Education Improvement Act of 2004* (as amended, the “IDEA”).

The parties and the hearing officer held a second pre-hearing conference call at 11:00 a.m. on Monday, May 13, 2019. The parties agreed that the issues for the hearing are those stated in paragraph 7 of the Request (the fourth delineated issue was resolved by the parties by the time of the hearing):

Issues to be Resolved:

1. Did the 6/23/17 Draft IEP fail to offer the Student FAPE as a result of its

improper assessment of the Student’s primary and secondary disability categories in violation of 34 CFR § 300.8(c)(1)(ii) and 8 VAC 20-81-10?

1. Did the 6/23/17 Draft IEP fail to offer the Student FAPE because it did not propose a private day placement (1) that was reasonably calculated to enable the Student to make appropriate progress on his IEP goals in light of his circumstances, (2) that would meet the Student’s unique needs related to his Autism, or (3) that was “as close as possible to the child’s home,” as required by 34 CFR § 300.116 and 8 VAC 20-81-130(C)(1)(b)(3)?
2. Did the Guardian unilaterally place the Student in an appropriate academic setting at Academy?
3. Did the LEA fail to provide FAPE when the Student received no educational services between April 6, 2017 and July 10, 2017?

Accordingly, the hearing officer incorporated the agreed upon issues into his Amended Scheduling Order of May 23, 2019.

The three-day hearing began on May 29, 2019 and ended May 31, 2019.

### FINDINGS OF FACT

1. In 2016, the Student transferred from Public Schools (“ PS”) where he was receiving special education services under the disability category of Autism in the SECEP-ASD program. He was in the re-evaluation process at the time he transferred to Public Schools (“ PS” or the “School Board”). PE 1(a);[[1]](#footnote-1)  Day 1, Tr. 32.

1. The Student's date of birth is , , and he is eligible to receive special

education and related services.[[2]](#footnote-2)

1. The Student is a 13-year old boy who at the time this due process proceeding was

filed, temporarily resided in a group home while his maternal grandmother/guardian, convalesces following multiple hospital stays.

1. The Student has a long history of disruptive behaviors in the classroom that include verbal threats to staff and students, bullying, swearing, elopement, and aggressions. Other behaviors have included making sexual comments and gestures in front of staff and peers and exposing himself to staff and peers.
2. These behaviors have significantly and increasingly interfered with the Student’s

education during his enrollment in PS.

1. The Student was first diagnosed with an Autism Spectrum Disorder (“ASD”) at the age of 5. At that time, he was also diagnosed as having Attention Deficit Hyperactivity Disorder, Oppositional Defiant Disorder, and Mood Disorder (Not Otherwise Specified).
2. In 2014, clinical psychologist, , Ph.D., confirmed the diagnosis of Autism Spectrum Disorder in her Psychological Evaluation Report.
3. In the Student’s most recent Psychological Evaluation (2018), clinical psychologist , Ph.D., diagnosed the Student as having Autism Spectrum Disorder, ADHD (Combined Type), and Oppositional Defiant Disorder.
4. The Student first enrolled in public education in September 2011, at the age of 5, while still residing with his mother. At that time, he enrolled in PS.
5. PS found the Student eligible for speech and language services in January 2012.
6. On May 13, 2013, the Special Education Committee (“SEC”) at Elementary School, the Student’s home school, determined that the Student was eligible for additional special education services under the category of Autism.
7. In October 2014, PS placed the Student in the SECEP Autism Spectrum Program (ASP”) at Elementary for his third grade year. The Student remained in a SECEP-ASP classroom until he transferred to Public Schools (“ PS”) in 2016.
8. Due to an increase in emotional and behavioral difficulties the Student was referred for a re-evaluation by PS to consider whether or not he met the criteria for services under another eligibility classification, namely ED. At the time of referral, the Student was receiving services in the SECEP-ASD program under the category of Autism with OT and Speech/Language as related services. Upon transferring to PS, the Student began receiving services at SECEP Re-Ed (as defined below). It was noted that the Student had a history of behavioral support needs and has received services from the Center for Children and Adolescents and Behavioral Health.
9. His mother enrolled the Student in PS on or about March 1, 2016. At the end of March 2016, the Student required psychiatric hospitalization at Center for Children and Adolescents (“ ”). The Student was discharged on April 2, 2016.
10. On April 14, PS placed him in the SECEP Re-Education of Children (Re-ED) program, an educational program for children with emotional disabilities.
11. Soon after the Student’s placement in SECEP-Re-ED, he began to display “hyper- sexualized behaviors (taking his clothes off and exposing himself to peers and staff, making sexual comments and/or gestures.) SB I (B)(1)(g) at 3.
12. At the time, it was unclear what prompted these behaviors, but the Student later stated to an in-home counselor that he had been sexually abused during his inpatient stay in . The Student has experienced numerous traumas during his short life which have resulted in increasingly more, severe and problematic behaviors
13. In May 2016, the Student was referred to the Community Services Board for access to additional community-based services and resources. At the time, the mother was considering a possible residential placement because she had recently given birth to a third child and wanted to ensure that the Student could be sufficiently supervised.
14. At that point, the maternal grandmother took the Student into her home and, in agreement with the mother, initiated proceedings to obtain custody. The Grandmother suggested that community-based services were more appropriate than a residential placement in light of the Student’s unique needs. The EDCAT/FAPT team agreed to fund additional mental health services for the Student.
15. On June 22, 2016, the PS Special Education Committee (“SEC”) re-evaluated the Student’s eligibility for special education services and determined that he qualified for special education services under the categories of Emotional Disability and Other Health Impairment (Attention Deficit Hyperactivity Disorder) in addition to Autism. Rather than maintaining Autism as the Student’s primary disability, PS identified ED as the Student’s primary disability, Autism as his secondary disability, and OHI as his tertiary disability.
16. On July 7, 2016, the Student’s IEP team concluded that the Student needed a more restrictive setting than the Public Separate School Center-Based option due to the Student’s “severely interfering behaviors (in following directions, sexual comments and gestures, physical aggression, running out of class and school, and threats)” and his “insufficient IEP goals progress” SB I(B)(g) at 12. The team explicitly stated “the Student did not achieve his previous IEP goals, due mostly to off-task and disruptive behaviors in the classroom affecting his progress.” The team noted that a referral would be made to the EDCAT/FAPT team “to propose a more restrictive placement (Private Day).” SB I(B)(g) at 12.
17. On July 14, 2016, the Grandmother received the final order granting her physical custody and joint legal custody of the Student. On that same day, the Student began receiving intensive in-home counseling through , P.C. (“ ”). On August 1, 2016, initiated a Virtual Residential services program for the Student, which included Applied Behavioral Analysis (“ABA”), mentoring, parenting coaching, and family therapy. The Student continued to participate in intensive in-home counseling.
18. On August 22, 2016, the IEP team met again to discuss the Student’s placement. PS initially advocated for residential placement but ultimately agreed to a private day placement at (“ ”) on the condition that the Student receive a psychosexual assessment and outpatient treatment with a Certified Sex Offender Treatment Provider (“CSOTP”).
19. The Student began receiving CSOTP services through Center on September 1, 2016, and EDCAT/FAPT team ultimately approved the private day placement.
20. The Student started 5th grade at on September 6, 2016. is licensed to provide services to students with IEPs for Autism, ED, and OHI.
21. In the Student’s first monthly progress report (September 2016), noted that the Student’s “areas of concern” included behavior such as “[t]hreatening staff (i.e. ‘Shoot You’, ‘Stab You’, and ‘Beat You Up’)” and “[p]hysical aggression (i.e. Fighting, Kicking, and Spitting).” In the Student’s second monthly progress report (October 2016), noted additional concerns with the Student’s “[s]exualized demonstrations”; “inappropriate language (i.e. calling his peers and staff Niggers)”; and “sexualized comments”.
22. On November 28, 2016, implemented a PBIS Plan with the long-term goal of decreasing “the frequency of negative peer interactions,” including “negative comments, cussing, posturing, threats to peers.”
23. On December 9, 2016, the objective of “decreasing episodes of sexual misconduct was added.” Sexual misconduct was defined to include “sexual comments/gestures, physically exposing his genitals, visiting websites with sexual content.” Progress updates on both goals indicated “Regression” at the end of December 2016, “No Change” at the end of January 2017, “Regression” at the end of February 2017, and “Regression” at the end of March 2017.
24. ’s update to the EDCAT/FAPT team for December 1, 2016-February 23, 2017 noted a litany of sexual comments, inappropriate comments including profanity and racial slurs, bullying acts, physically aggressive acts, and threats of physical and sexual violence.
25. On April 6, 2017, notified the Grandmother at an IEP meeting that it was terminating the Student’s services because it was “concerned for the safety of the Student as well as the interaction of peers/staff in regard to the Student.” SB I(C)(4)(b) at 1. The school noted a particular decline in the Student’s behavioral and educational progress following the Winter break.
26. Specifically, the proposed IEP Amendment dated April 6, 2017 noted that “[s]ince after the Winter break, the Student has stopped doing his homework. He does not complete any classwork. From the time he enters the class, he is constantly talking or disrupting classroom instruction. There are interventions in the school setting to support the Student, but he is not responding positively to the supports that is [sic] being implemented.” SB I(C)(4)(b) at 1.
27. Following the Student’s dismissal from , at the IEP meeting on April 6, 2017, PS informed the Grandmother that there were no other private day placements available and that PS would only propose a residential placement with home-based services pending residential placement.
28. PS did not propose a specific school for the residential placement. The Grandmother refused to agree to a residential placement in light of the Student’s significant attachment issues because she believed that the Student’s intensive wraparound community-based services provided him with the supplemental support he required. The Grandmother also informed PS that she worked full-time which she believed would interfere with home-based instruction.
29. The Student was an inpatient at Medical Center between April 14-19, 2017.
30. The Student was re-enrolled in PS on May 24, 2017. On May 30, 2017, PS held the IEP meeting requested by the Grandmother. The purpose of the meeting was to discuss “the guardian’s concerns in relation to the IEP Amendment meeting that was 4/6/17.” SBI(C)(3)(c) at 1. The Grandmother again expressed her opposition to a residential placement. She explained, the Student had experienced estrangement from his mother, siblings, and his mother’s husband. The Grandmother was concerned that a residential placement could further add to the Student’s loss and trauma. SB I(C)(3)(b) at 2. At the meeting, the Student’s ABA Therapist agreed that a residential placement would not be appropriate for him. SB I(C)(3)(b) at 2.
31. The Grandmother stated that she had researched a range of educational options for the Student and had determined that a placement at Academy (“ ”) in would be appropriately suited for the Student based on his IEP and unique needs.
32. While PS neither approved nor denied a placement at , it did agree that a private day placement would be appropriate. PS agreed to meet again to discuss the Student’s placement. The IEP team again proposed home-based instruction until a longer-term private day placement could be secured.
33. The Grandmother signed the IEP Amendment proposed by PS at the meeting.
34. On June 23, 2017, the IEP team met again to discuss the Student’s placement. The 06/23/17 Draft IEP did not propose a specific private day placement. However, PS continued to advocate verbally for a placement at Academy. The Grandmother expressed concern that would not sufficiently address the Student’s needs concerning his Autism because of the length of the drive to Academy and because did not provide ABA therapy, an evidence-based, discrete-trial practice for children with Autism. SB I(C)(1)(b) at 2.
35. Academy is approximately 24 miles away from the Student’s home and requires travel through the Hampton-Roads Bridge Tunnel. is 15 miles from the Student’s home and requires travel through the mid-town Bridge Tunnel. PS again rejected the proposed placement at and insisted that the only available option was a placement at Academy.
36. At the IEP meeting on June 23, 2017, the Grandmother also “raised concern in regard to the primary disability category being Emotionally Disabled.” SB I(C)(1)(b) at 1. The Grandmother and her sister, , who was also in attendance, stated that they did “not believe that this category should be primary and additionally shared that they do not believe that there was ample information/discussion in the Special Education Committee’s documentation to support this finding.” SB I(C)(1)(b) at 1. They requested that the SEC Team reconvene for an early re-evaluation to discuss the Student’s eligibility categories.
37. The hearing officer specifically finds that there was ample evidence before the School Board to support the School Board’s decision to classify ED as the primary disability category. This finding is discussed in greater detail below.
38. At the conclusion of the meeting on June 23, 2017, the Grandmother provided verbal and written notice to PS that she would be placing the Student at on July 10, 2017 and would be seeking reimbursement for the cost of his tuition.
39. On July 10, 2017, the Student was enrolled at .
40. The School Board reasonably determined that was not an appropriate placement for the Student. This finding is discussed in greater detail below.
41. On July 11, 2017, PS representative, e-mailed the Grandmother concerning the inability “to agree on a private day placement for the Student.” The e-mail acknowledged receipt of the Grandmother’s written notice of private placement at the IEP meeting on June 23, and attached “the required paperwork for filing a Due Process complaint.”
42. The Student remained enrolled at for the 2017-18 school year.
43. The Student was enrolled in between September 2016 and April 2017.
44. For a period of time, the Student demonstrated progress on several of his IEP goals, including three academic goals as well as behavioral and work habit goals addressing elopement, physical aggression towards staff, and the completion of class assignments.
45. However, by the time that the Student was dismissed from in April 2017 because of safety concerns for the Student, peers and staff arising out of his deteriorating, uncontrolled behaviors, the Student’s progress has stalled.
46. The Student began the 2018-2019 school year enrolled at . During the summer of 2018, the Grandmother became ill and had to have an extended stay at a hospital. Due to his guardian requiring medical attention, the Student had to change his living arrangement to a group home. The Grandmother has had to be re-hospitalized multiple times since the initial hospitalization.
47. The change in home placement from his Grandmother to a group home triggered a further deterioration in the Student’s behavior. This change in behavior, due to the loss of living with his Grandmother, was anticipated, and was one of the reasons that the Grandmother and others felt a residential placement in 2017-2018 would be too restrictive a placement for the Student.
48. An example of the change in behavior is that in October 2018, the Student had 104 incident reports of physical aggression. This is in contrast to the 2017-2018 school year at , where in October he had 70.
49. The rise in aggressive behaviors ultimately caused to dismiss the Student on November 28, 2018.
50. Following the Student’s termination at , PS and the Grandmother agreed that Private Day School was still the least restrictive environment for the Student. The IEP team then suggested a placement at the recently opened Academy in . All parties of the IEP team agreed to this placement and setting, and the Student began attending Academy. The Student continues to be enrolled at Academy.

56. The Grandparent has not challenged the appropriateness of the School Board’s offer of a FAPE in the June 23, 2017 IEP (the “Proposed IEP”) concerning: (a) the Student’s Present Levels of Academic and Functional Performance (the “PLAAFP”), (b) the description of all of the Student’s disability-based needs, and how the disabilities affect the Student’s involvement and progress in the general education curriculum, (c) the addressing of each of the Student’s unique disability-based needs in the PLAAFP, (d) the measurable annual goals, including academic and functional goals, (e) the description of how the Student’s progress towards meeting those goals will be measured, (f) the special education services (specifically designed instruction), (g) accommodations, (h) related services, or (i) educational placement (LRE). Rather, this due process complaint arose out of a disagreement between PS and the Grandmother as to which private day school should be selected as the appropriate private day placement location for the Student for the school year 2017-18. The Grandmother was “adamant” about whilst the School Board favored because is not appropriate for the Student for several reasons discussed below. Day 3 Tr. 83.

57. The IEP addressed each of the disability-based needs of the Student, including those rooted in his autism.

58. The educators acted in a professional, collaborative, balanced and expert way in designing for the Student the individualized IEP, which is reasonably calculated to enable the Student to make progress in view of the Student’s unique circumstances.

59. The PLAAFP of the Proposed IEP contained all necessary information about the Student to accurately identify his disability-based needs. The information in the PLAAFP served as the basis for developing the other parts of the Proposed IEP. During the Grandparent’s case in chief, there was no testimony from the Grandparent or her experts, and , that either questioned or refuted the information in the PLAAFP of the Proposed IEP.

60. Accordingly, the Student’s disability-based needs were identified properly. The School Board’s assessment of which disability category was primary and secondary was irrelevant to the process of identifying the Student’s disability-based needs.

61. Furthermore, the Grandparent’s evidence failed to establish that the School Board erred in finding that the Student had primarily an Emotional Disability.

62. The Grandparent did not refute the School Board’s conclusion that the Student’s extreme behaviors arose primarily from his Emotional Disability; and those behaviors were the most significant barriers to his access to the general curriculum and obtaining educational benefit.

63. The provisions of the Proposed IEP addressed the Student’s disability-based needs identified in the PLAAFP.

64. The annual goals, specially designed instruction, accommodations, related services and educational placement (LRE) of the Proposed IEP are derived directly from the Student’s disability-based needs identified in the PLAAFP.

65. The Grandparent presented no evidence to establish that the annual goals of the Proposed IEP were not derived directly from the information contained in the PLAAFP to address the revealed needs of the Student. A review of the Proposed IEP reveals that the annual goals related directly to the documented unique needs of the Student. SB C(1)(a). Accordingly, the annual goals were reasonably calculated to address the Student’s unique needs and to enable progress in the general education curriculum, appropriate in light of his circumstances.

66. The Grandparent offered no evidence to prove that the special education services (i.e. specially designed instruction) provided in the Proposed IEP were not reasonably calculated to address the Student’s needs and to enable him to progress appropriately in the general education curriculum in light of his circumstances. A review of the Services pages of the Proposed IEP reveals that the special education services aligned directly with the academic and behavioral goals of the IEP. SB C(1)(a). There was no probative testimony from the Grandparent or her experts that challenged the proposed special education services as inappropriate.

67. The Grandparent offered no evidence to show that the accommodations provided in the Proposed IEP were not reasonably calculated to address the Student’s needs and to enable him to progress appropriately. A review of the Accommodations pages of the Proposed IEP reveals that the instructional and testing accommodations aligned directly with the Student’s needs identified in the PLAAFP. SB C(1)(a). The Grandparent and her experts offered no testimony that criticized the suitability of the instructional and testing accommodations provided in the Proposed IEP.

68. With respect to related services, the Grandparent presented no evidence that addressed the appropriateness of the related services provided in the Proposed IEP. A review of the Related Services page of the Proposed IEP shows that the related service (occupational therapy) addressed the Student’s needs revealed in the PLAAFP. SB C (1)(a). Again, there was no probative testimony from the Grandparent or her experts that even suggested that the proposed related service was inappropriate.

69. The Grandparent agreed that the Student required a more restrictive placement in a private day school. However, she disagreed with School Board’s choice of private day school, which is essentially a disagreement with the location where the Student would receive special education services. “Educational placement” and the location where a student is assigned to receive special education services are not the same thing. “Educational placement” in the regulations refers to the general type of program in which the Student is placed, the array of services and the place on the continuum of services where the disabled child will be educated; it refers to the extent to which the student is segregated from his non-disabled peers, and not the physical location (or facility) where the Student is assigned to receive the special education services specified in the IEP. A.W. ex rel. Wilson v. Fairfax County School Board, 372 F.3d 674, 681-682 (4th Cir. 2004). See also, [T.Y. v. N.Y. City Dep’t of Educ*.*, 584 F.3d 412, 419 (2nd Cir. 2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2020067725&pubNum=0000506&originatingDoc=Id64c61c0fcbc11e681b2a67ea2e2f62b&refType=RP&fi=co_pp_sp_506_419&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)#co_pp_sp_506_419) (“ ‘Educational placement’ refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the ‘bricks and mortar’ of the specific school.”); [A.M. v. Dist. of Columbia*,* 933 F. Supp. 2d 193, 199 (D.D.C. 2013)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030240480&pubNum=0004637&originatingDoc=Id64c61c0fcbc11e681b2a67ea2e2f62b&refType=RP&fi=co_pp_sp_4637_199&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)#co_pp_sp_4637_199) (“plaintiffs tend to blur the distinctions between the development of an IEP, the determination of an educational ‘placement’ under the IDEA, and the selection of a particular school location for the implementation of that program.”).

70. Furthermore, it is well settled law that school administrators have authority to select the location where a properly formulated IEP shall be implemented. The determination of the specific school the student will attend is an administrative decision. [Deer Valley Unified Sch. Dist. v. L.P. ex rel. Schripsema, 942 F. Supp. 2d 880, 887 (D. Ariz. 2013)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030440071&pubNum=0004637&originatingDoc=Id64c61c0fcbc11e681b2a67ea2e2f62b&refType=RP&fi=co_pp_sp_4637_887&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)#co_pp_sp_4637_887). In this case, the Grandparent exercised her procedural right to participate in the creation of the IEP, but she did not have a procedural right to choose the physical school to implement the IEP. Id*.* at 889 (finding that when “the parent has fully participated in developing the IEP plan, a District has the administrative authority to choose the physical location of the school without the parent’s additional participation.”). Consequently, “[t]he mere fact that the ultimate location of the placement is determined by an administrator in a central office does not violate the procedural mandates of IDEA.” [Brad K. v. Bd. of Educ. of City of Chicago*,* 787 F. Supp. 2d 734, 743-44 (N.D. Ill. 2011)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2024983883&pubNum=0004637&originatingDoc=Id64c61c0fcbc11e681b2a67ea2e2f62b&refType=RP&fi=co_pp_sp_4637_740&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)#co_pp_sp_4637_740). Therefore, the Grandparent’s evidence failed to establish that the School Board’s LRE decision and private day school selection violated the IDEA and its implementing regulations.

71. The Proposed IEP offered the Student a FAPE because: (1) the Student’s disability categories and the School Board’s designation of them as either primary or secondary is irrelevant to the FAPE determination because all the Student’s unique disability-based needs were addressed and provided for in the IEP, including those rooted in his autism, and, (2) the PLAAFP of the Proposed IEP identified all the Student’s disability-based needs, which were addressed in the provisions of the document, including the LRE (educational placement) decision. Therefore, the applicable law and evidence in the record refutes the Grandparent’s claim that the Proposed IEP denied the Student a FAPE due to an alleged erroneous assessment of the Student’s primary and secondary disabilities.

72. The Grandparent’s denial of a FAPE claim based upon alleged deficiencies with the private day school the school administration selected has no foundation in IDEA, its implementing regulations, or case law regarding educational placement under the IDEA. The Grandparent did not disagree with any aspect of the Proposed IEP, including the LRE decision that a private day school was the appropriate educational placement for the Student. The Grandparent disagreed with the particular private day school that the school administration selected. However, as previously stated, the school administration has authority to select the location where the Student will be assigned to receive special education services under the Proposed IEP. This denial of a FAPE claim is based upon alleged deficiencies with the assigned location where the Proposed IEP would be implemented.

73. Following the development of the Proposed IEP, there was no disagreement that the Student needed a private day school placement. The disability-based needs of the Student, and the proposed special education and related services, and accommodations in the IEP compelled the decision that a private day school placement was required to implement the Proposed IEP. When that decision was made, a FAPE was offered by the Proposed IEP. The only thing left for the school officials to do was to identify and choose a private day school that was willing and able to implement the Proposed IEP. The School Board’s evidence established that Academy was able to implement the Proposed IEP, and the director was willing to meet with the Grandparent and Student as the first step in the intake process. S. Whitley, Day 3, Tr. 29:4-16; 31:21-25; 32:24 – 34:9. However, the Grandparent was “adamant” about (Day 3, Tr. 83), refused to proceed with the intake process for Academy and unilaterally placed the Student at Academy.

74. The Grandparent’s evidence did not prove that the location chosen by the school officials to assign the Student was not “as close as possible” to the Student’s home or that was either unwilling or unable implement the Proposed IEP. Therefore, her denial of a FAPE claim fails.

75. The Grandparent asserts that the Proposed IEP denied a FAPE because could not meet the Student’s unique needs. In order to prove this allegation, the Grandparent had to present evidence that Academy could not implement the Proposed IEP, which addressed the Student’s disability-based needs identified in the PLAAFP. However, she failed to present such evidence during the hearing. The testimony of the Student’s great-aunt, , who visited the facility once, but did not observe the school in operation, did not establish that Academy could not implement the Proposed IEP. , Day 1, Tr. 79:12-20.

76. Furthermore, as stated earlier, the School Board’s evidence established that the Academy’s director stated that the school was able to implement the Proposed IEP, subject to completion of the intake process. , Day 3, Tr. 28-34; See, also, , Tr. 121. The Grandparent, however, refused to complete the intake process and unilaterally placed the Student in Academy. Accordingly, the Grandparent failed to prove that the School Board denied the Student a FAPE due to Academy’s inability to implement the Proposed IEP.

77. The Grandparent asserts that Academy was an appropriate private day placement for the Student because it allegedly addressed his autism-based needs using ABA therapy. See, e.g. SB I(C)(1)(b) at 2; Day 1, Tr. 9:4-8; 53-54; 56:19-57:7; 58 and 61; Day 3, Tr. 22. However, the evidence clearly established that does not use ABA therapy, See, e.g., Day 3, Tr. 117. The evidence presented by the Grandmother was insufficient to establish that actually had the requisite features and services to be considered an appropriate private day school for the Student. Furthermore, the Grandparent’s own evidence exposed the inappropriateness of for the Student. Additionally, the testimony of School Board’s expert witnesses, Teacher Specialist, , and Senior Coordinator, , exposed fully the inappropriateness of . For the following reasons, was not an appropriate educational placement for the Student.

78. was not appropriate for the Student because it does not have a mental health component to meet the Student’s emotional and behavioral needs. , Day 2, Tr. 63:1 – 64:14; , Day 3, Tr. 36:12-18; 43:8-12.

79. The Grandparent’s evidence did not establish that could implement the Proposed IEP. It was not established that  had an SOL based academic curriculum that would have allowed the Student to pursue the academic goals of the Proposed IEP and to take the SOL exams for his grade level. Moreover, the School Board’s evidence proved that did not have an SOL based curriculum, and therefore could not serve appropriately a child on the SOL track like the Student. , Day 3, Tr. 26:17 – 28:1. Furthermore, ‘s lack of a curriculum and lack of academic rigor did not foster in the Student the development of the academic endurance necessary to return to a less restrictive placement in public school. , Day 3, Tr. 28:5-19.

80**.** In a similar vein, school officials also noted also that is not accredited , Day 2, Tr. 55:16-22; See also, PE 14. admitted that does not offer a diploma and is not accredited. Day 3, Tr. 108. These factors expose the inappropriateness of for the Student.

81. Based upon evaluation criteria set forth in the Autism Programming Evaluation Rating Scale (“APERS”), school officials noted that does not meet minimum professional standards for academic and behavioral programming for schools that serve students with autism. , Day 2, Tr. 62:5-25. The school does not utilize visual strategies, which are fundamental to teaching students with autism. , Day 2, Tr. 54-55;and, the school’slesson plans were below LEA standards. , Day 2, Tr. 55.Furthermore, does not utilize distinct positive reinforcements to modify student behavior, which is also an essential practice in teaching students with autism. , Day 2, Tr. 55-56; 60:1-8. Additionally, does not even meet the minimum standards required of Public Schools district-wide autism program/classrooms. , Day 2, Tr. 57:7-11; 61:10-21. Therefore, school officials concluded correctly that was not appropriate for the Student who needed a more restrictive placement in a private day school. , Day 2, Tr. Vol. II, 57:7-11.

82. The Grandparent’s own evidence revealed that does not meet minimum professional standards for data collection in schools serving students with autism. , Day 2, Tr.34-45; 57; Day 2, Tr. 57-58; Day 3. Tr. 125-157. The substandard data collection is another compelling justification for school officials’ rejection of as an appropriate private day school for the Student. , Day 2, Tr. 98:20 – 99:14. The data collection summaries submitted into evidence were so vague that an expert reviewer could not ascertain from the documents relevant information to evaluate the effectiveness of the school’s efforts in serving the Student and modifying his extreme, problematic behaviors , Day 2, Tr. 57:1-11).

83. Furthermore, the only data collected was frequency data.  did not collect ABC (antecedent, behavior, and consequence) data to ascertain the functions of the Student’s behaviors. ABC data collection is fundamental to ABA practicebecause it is the best way to determine the function of a behavior. , Day 2, Tr. 38:13-40:13, Day 2, Tr. 60:19-24; 158: 14 - 159:47. Additionally, ABC data collection is the most effective data collection method because, among other things, it also captures other types of data frequency and durational). , Day 2, Tr. 39:14-40:13; 158:11-13. ABC data also provides insights into the behavior that facilitate program modifications to help bring the behaviors under control so that learning can occur. In this case, took no ABC data; therefore, it is highly unlikely that the school made informed modifications to the Student’s program. , Day 2, Tr. 82:15 – 83:2.

84. The following problems are also evidence of the substandard quality of ’s data collection:

(a) the data summaries could not be verified because the raw data was not maintained or presented , Day 2, Tr. 85:11 – 86:13;

(b)the data summaries recorded behaviors that were not target behaviors defined in the Student’s goals ( , Day 2, Tr. 100:16-101:9; 108:22-109:3; 114:5-13; 115:12-18; 116:16-18);

(c) the data summaries had gaps where it was apparent that data was not collected on certain school days; and, there were no explanation for the gaps noted on the data sheets. Gaps in data collection reduces the accuracy and sufficiency of the data collection in determining whether the Student progressed toward his behavior goals ( , Day 2, Tr. 102:19-103:9; 107:5-108:3; 116:19-22; 118:9-17);

(d) the data summaries lacked sufficient information to explain why there were spikes in the Student’s behaviors ( , Day 2, Tr. 80:10-15; 108:13-21);

(e) the data graphs were insufficient because they did not include baseline information or phase change lines to indicate the start or change in behavioral interventions the school employed with the Student ( , Day 2, Tr. 87:1-5);

(f) the data summaries cannot be used to verify that a FAPE was provided because the data entries cannot be validated ( , Day 2, Tr. 88:5- 89:18; 97:4 - 98:19);

(g) the data summaries provide no information about the implementation of or change in behavioral interventions to address the targeted behaviors ( , Day 2, Tr. 92:2-23);

(h) the data summaries contain no information about the positive reinforcements, if any, that were used to help modify targeted behavior ( , Day 2, Tr. 106:14-20);

(i) the data summaries contain no information that would enable a reviewer to determine if decreases in behavior incidents were the result of behavioral interventions or due to reducing the Student’s work demands ( , Day 2, Tr. 109:16-23); and,

(j) the absence of ABC data and information about interventions makes it impossible for a reviewer to ascertain why the Student had zero behavioral incidents on certain days following days where he had many incidents of behavior ( , Day 2, Tr. 113:6-10).

85. The Student’s lack of progress toward his behavioral goals showed that was not an appropriate placement for the Student. testified that the school’s data collection was insufficient to constitute evidence of appropriate progress. , Day 2, Tr. 77:10 - 78:23; 79:20 - 80:9; 92:9-17; 99:21-25; 118:18 - 120:17. She concluded that the school’s data was actually proof that the Student did not progress because: (1) the data was highly variable; and, (2) the data showed that the behavioral control was never established for the Student during his time at . , Day 2, Tr. 76:5-24; 80:16 - 81:3; 91:4 - 92:1; 117:11 - 118:1; 171:18-21.

86. Finally, the fact that the Student was dismissed from because of escalating behaviors attributed to trauma is dispositive evidence that the school was not an appropriate educational placement for the Student. The Grandparent’s evidence established that Student had experienced trauma several times in his life. , Day 1, Tr. 30:15; 41:16-18; 43:19 - 44:9.

87. It was also established that trauma may result in an emotional disability to the traumatized person ( , Day 1, Tr. 110:13 – 111:4); and, most of the Student’s extreme, problematic behaviors were generated by and/or associated with his emotional disability. , Day 2, Tr. 145-150; , Day 3, Tr. 46:1-9; 46:18 - 47:11; 47:14- 48:3; 48:20- 49:4; 49:12-23. These behaviors were never brought under control while the Student attended , which could be reasonably attributed to the lack of mental health services at the school, among other things. , Day 2, Tr. 92:23 – 93:6.

88. finally conceded that it could not manage the Student’s extreme, problematic behaviors, which were attributed to trauma. Thus, the same extreme, problematic behaviors generated by and associated with the Student’s emotional disability, which were exhibited before he was unilaterally placed at ultimately led to his dismissal from the school.

89. This fact is irrefutable evidence that was not an appropriate placement for the Student, as it lacks the capacity to address the mental health needs of a student with an emotional disability caused and aggravated by traumatic life experiences.

1. Based upon the above described deficiencies of , it is clear that the Grandparent failed to meet her burden of proof on this issue. Accordingly, it must be concluded that the Grandparent did not unilaterally place the Student in an appropriate special education placement.

### ADDITIONAL FINDINGS & CONCLUSIONS OF LAW**[[3]](#footnote-3)**

As the complaining party, the Grandparent bears the burden of proof in this matter. The United States Supreme Court has held that the party initiating a hearing bears the burden of production and persuasion to the evidentiary standard of a preponderance of the evidence. Schaffer v. Weast, 126 S.Ct. 528 (2005).

The testimony of School Board employees and the proposed IEP plainly demonstrated that the School Board offered the Student an appropriate education. Several school staff members, including , and testified regarding the Student’s meetings, educational programming, and evaluations. These individuals were familiar with the Student, reviewed the Student’s cumulative education file, and participated in meetings regarding the Student.

The Supreme Court of the United States has recently confirmed that deference must be given to the professional judgments of educators. It held in a decision last year that a court or

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

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

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

Although section 1415(e)(2) provides district courts with authority to grant ‘appropriate’ relief based on a preponderance of the evidence, 20 U.S.C. 1415(e)(2), that section ‘is by no means an invitation to courts to substitute their own notions of sound educational policy for those of the school authorities which they review.’ (citations omitted)… [t]hese principles reflect the IDEA’s recognition that federal courts cannot run local schools. Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment.

118 F.3d 996, 1000-1001 (4th Cir. 1997).

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

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

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

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

The School Board’s witnesses who testified regarding the Student have substantial training, expertise and experience in working with children both with and without disabilities, in educational programming in the Virginia public school setting, and with the Student.

By contrast, none of the Grandparent’s experts had the same familiarity. To support her case, the Grandparent relied on the testimony of (her sister), , and the Grandparent herself.

only visited once and did not observe the Student in class. Day 1, Tr. 78-79. visited once and did not see the school in operation. Day 1, Tr. 79, has never visited . Day 1, Tr. 53.

The School Board also informed itself about ’s educational programming. Accordingly, the School Board’s expert witnesses are entitled to deference in their considered professional judgments concerning the Student.

The School Board experts were credible. Their testimony was well considered, consistent and compelling. By contract, ’s testimony was inconsistent. For example, at first, admitted that “ABC data is fundamental to the ABA process for behavior modification.” Day 1, Tr. 57. However, her later testimony was evasive on this issue. See, e.g., Day 1, Tr. 58-70.

Similarly, was confusing and inconsistent, for example, on ’s treatment of raw data. See, e.g., Day 3, Tr. 157.

The Grandparent has failed to meet her burden of proof.

In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017), the Supreme Court reaffirmed and further explained the fundamental standard of appropriateness under the IDEA first set out in its decision 35 years ago in *Hendrick* *Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

In a special education administrative due process proceeding initiated by the parents, the burden of proof is on the parents to establish by a preponderance of the evidence that the LEA has failed to provide the student with FAPE concerning the issues they have raised. *Schaffer, ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

The law retains the previous definition of a “free appropriate public education.” Section 612(a)(1)(A) of the *Individuals with Disabilities Education Improvement Act*, December 3, 2004 (the "IDEA 2004"). See also, *Regulations Governing Special Education Programs for Children with Disabilities in Virginia*, effective July 7, 2009, (the "Virginia Regulations"). Accordingly, any analysis of the standard of FAPE must begin with *Rowley. Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982).

The *Rowley* Court held that by passing the Act, Congress sought primarily to provide disabled children meaningful access to public education.

The *Rowley* analysis provides that the disabled child is deprived of a free appropriate public education under either of two sets of circumstances: first, if the LEA has violated IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon the disabled child’s right to a free appropriate public education or, second, if the IEP that was developed by the LEA is not reasonably calculated to enable the disabled child to receive educational benefit. *Rowley*, *supra*, 206-7 (1982).

In order to meet the second prong of the Rowley test regarding a school district’s substantive obligation under the IDEA, “. . . a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew v. Douglas Cty. Sch. Dist. RE-1, 2017 WL 1066260 (2017)*. The Court also stated that “. . . the essential function of an IEP is to set out a plan for pursuing academic and functional advancement.” *Id.*

With regard to the first part of the *Rowley* Test, the IDEA states that the hearing officer may find that the student was denied a FAPE for procedural inadequacies only if they: (1) impeded the student’s right to a FAPE, (2) significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a FAPE to the parents' child, or (3) caused a deprivation of educational benefits. *34 CFR 300.513*; *8 VAC 20-81-210(O)(17)*.

The Grandparent has not alleged any procedural inadequacies which deprived the Student of FAPE.

The IDEA defines FAPE as special education and related services that (i) have been provided at public expense and under public supervision and direction; (ii) meet the standards of the state educational agency; (iii) include an appropriate preschool, elementary or secondary school education in the state involved; and (iv) are provided in conformity with an IEP. 20 U.S.C. § 1401(8).

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

The reasoning of the Court in *Fitzgerald v. Fairfax County Sch. Bd.,*, 556 F.Supp.2d 543 (E.D.Va. 2008) is instructive. The legal obligation to provide FAPE to the student is squarely imposed on the LEA.

Similar or identical IEP goals do not prove a denial of FAPE. See F.L. v. Board of Educ., 70 IDELR 182 (E.D.N.Y. 2017) (stating that “a school district does not deny a student a FAPE by developing an IEP that is the same as a prior year’s IEP so long as it ‘enable[s] [the student] to receive meaningful educational benefits and make progress.’”) (citation omitted).

Autism as it relates to special education is defined in Virginia by 8VAC20-81-10. The regulation states in relevant parts “‘Autism’ means a development disability significantly affecting… social interactions…that adversely affects a child’s educational performance. Other characteristics often associated with autism are… unusual responses to sensory experiences. Autism does not apply if a child’s educational performance is adversely affected primarily because the child has an emotional disturbance.” 8VAC20-81-10.

The Eastern District of Virginia interpreted this in the case School Board of Suffolk v. Rose. That Court interpreted that regulation as stating that a child cannot be designated as autistic if emotional disability is primarily affecting their education, but nothing prevents the IEP team from designating both emotional disability and autistic if the primary adverse effect is not the emotional disability. *Sch. Bd. of Suffolk v. Rose*, 133 F.Supp.3d 803, 822 (E.D. Va., 2015).

Accordingly, even though was not licensed at the time by the SEA to provide services to the disability category of autism, (it has since become so licensed), there was no denial of FAPE because it could provide ED services and because of all of the Student’s unique behavioral and academic needs were addressed in the IEP. This case is distinguished from  *Rose*.

8 VAC 20-81-150 provides in part:

B. Placement of children by parents if a free appropriate public education is at issue.

...

3. If the parent(s) of a child with a disability, who previously received special education and related services under the authority of a local school division, enrolls the child in a private preschool, elementary, middle, or secondary school without the consent of or referral by the local school division, a court or a special education hearing officer may require the local school division to reimburse the parent(s) for the cost of that enrollment if the court or the special education hearing officer finds that the local school division had not made a free appropriate public education available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a special education hearing officer or a court even if it does not meet the standards of the Virginia Department of Education that apply to education provided by the Virginia Department of Education and provided by the local school division. (34 CFR 300.148(c)).

4. The cost of reimbursement described in this section may be reduced or denied. (34 CFR 300.148(d))

a. If:

(1) At the most recent IEP meeting that the parent(s) attended prior to removal of the child

from the public school, the parent(s) did not inform the IEP team that they were rejecting the placement proposed by the local school division to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(2) At least 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parent(s) did not give written notice to the local school division of the information described above;

b. If, prior to the parent's (s') removal of the child from the pubic school, the local school division informed the parent(s), through proper notice of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parent(s) did not make the child available for the evaluation; or

c. Upon a judicial finding of unreasonableness with respect to actions taken by the parent(s).

In *Florence Cnty. Sch. Bd. v. Carter,* a 1993 decision in the United States Supreme Court, the court held that in cases where a school district has failed to provide FAPE to a disabled child and the parent has unilaterally sought private special educational services/placement for the child, the parent is entitled to “reimbursement of tuition and other costs,” so long as the services obtained are “appropriate” with regard to the needs of the child. *Florence Cnty. Sch. Bd. v. Carter,* 510 U.S. 7 (1993); codified at 34 CFR § 300.148(c) and 8 VAC 20-81-150 above.

The hearing officer has found no denial of FAPE by the School Board but the Grandparent also failed to choose private educational services that conferred educational benefit on the Student.

In *Sch. Comm. of Burlington v. Dept. of Ed. of Massachusetts*, 471 U.S. 359 (1985), the Supreme Court of the United States determined that it was possible for the LEA to be responsible for the reimbursement of costs associated with unilateral private parental placement of a student with disabilities in cases where: (1) The school’s IEP is found to be inappropriate, and; (2) The private program is found to be appropriate under the IDEA. *Id.* In this case, as stated above, the Grandparent’s choice of did not satisfy the unique needs of the Student expressed in his agreed upon IEP.

Accordingly, the hearing officer finds that the private placement for the Student is inappropriate.

### Conclusion.

The hearing officer decides that the School Board offered the Student a FAPE in the June 23, 2017 IEP and that was inappropriate for the Student.

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

ENTER: 7 / 15 / 2019

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John V. Robinson, Hearing Officer

cc: Persons on the Attached Distribution List (By Email)

7-15-19 Decision

1. References to the verbatim transcript of the IDEA hearing held on May 29-31, 2019 are cited as “Day 1, 2 or 3 Tr. <page number>.”References to the Grandparent's post-hearing Opening Brief are cited in the following format: "POB<page number>". References to the LEA's post-hearing Opening Brief are cited in the following format "SOB<page number>". References to the parties exhibits are to the designations at the hearing e.g., “SB <Exhibit Number>” and “PE <Exhibit Number>”.

   2 The Grandmother and the Student are referred to generically as preserve privacy. [↑](#footnote-ref-1)
2. [↑](#footnote-ref-2)
3. To the extent the above section entitled, “Findings of Fact” includes conclusions of law, these conclusions are incorporated into this section. [↑](#footnote-ref-3)