19-065

COVER PAGE FOR HEARING DECISION, NOT TO BE PUBLISHED

VIRGINIA:

# SPECIAL EDUCATION DUE PROCESS HEARING

**by and through next friends and Complainants**

**parents, &**

**v.**

# PUBLIC SCHOOLS Respondent

**Student & Parents:** **Administrative Hearing Officer:**

John V. Robinson, Esq.

7102 Three Chopt Road

Richmond, Virginia 23226

**Attorneys for the Parents:** (804) 282-2987

Michael Eig, Esq. (804) 282-2989 (facsimile)

Paula Rosenstock, Esq. E-mail: jvr@jvrlawpc.com

**LEA's Attorneys:**

John F. Cafferky, Esq.

Melissa Little, Esq.

# DECISION OF THE HEARING OFFICER

# INTRODUCTION

The Parents requested an administrative due process hearing under the *Individuals with Disabilities Education Improvement Act of 2004* (as amended, the “IDEA”) as specified in the request for due process hearing dated May 23, 2019 (the “Request”), which is incorporated herein by this reference. The Request was received by the LEA and the SEA on May 23, 2019.

The parties and the hearing officer held a second pre-hearing conference call at 2:00 p.m. on June 27, 2019. The parties agreed that the issues for the hearing are those specified in the Request.

The Parents seek tuition reimbursement for the cost of tuition and related services at the named private school for the 2018-2019 school year and to place the student prospectively at the private school. During the second pre-hearing conference call the parents, by counsel, confirmed that they do not allege any procedural violations that rise to a level which denied the student a FAPE. 9/24/19 Tr. at 9. The hearing officer incorporated the agreed upon issues into his Status Report and Scheduling Order of July 3, 2019.

The six-day hearing was held September 24-25, September 27, October 1-2 and October 18, 2019.

# FINDINGS OF FACT

1. The Student's date of birth is , and is eligible to receive special education and related services.[[1]](#footnote-1)

2. The Student, who is currently a -year old grader, has a complicated diagnostic picture. 9/25/19 Tr. at 62 .

3. The Student was unilaterally placed by Parents at School (“ ”) in , prior to the beginning of -grade year (2018-19).

4. Before that, the Student attended neighborhood public school, Elementary School (“ ”) from through grade.

5. Because the Parents were concerned that the Student had previously been known at school as a and subsequently asked to be identified as a , school staff offered the option of obtaining an administrative transfer to a neighboring public day school, if the Parents desired. 10/1/19 Tr. at 289. Ultimately, however, the Parents were not interested

6. Cognitively, the Student has average abilities in processing speed, fluid reasoning, and visual spatial abilities, with high average abilities in working memory, and superior ability in verbal comprehension. SB 67-001.

7. The Student’s overall measured cognitive ability is in the high average range (112 full-scale IQ score). PE P-2-19.

8. Academically, the Student is on grade level in the areas of math and reading, but does have difficulty with math calculation, solving multi-step math problems, and reading fluency. SB 81-013-014; SB 86-006.

9. The Student is below average in writing performance. SB 69, 71, and struggles with pragmatics, (reading the social situation correctly), and narrative language skills. SB 56.

10. The Student has been privately diagnosed by private medical or mental health practitioners as having, among other conditions, asthma; Attention Deficit Hyperactivity Disorder (“ADHD”); Autism Spectrum Disorder; anxiety; and depression. PE P-20; 21.

11. The Student takes medications for these conditions.

12. The Student has been hospitalized for asthma 9/25/19 Tr. at 68; SB 3-006; PE. P-21-2.

13. In addition, in March 2017 and May 2018, the Student was hospitalized for mental health reasons. (PE P-14; 9/25/19 Tr. at 25-26, 68.

14. In the home, the Student’s behaviors have sometimes been violent, such as sticking a pencil in younger brother’s back over a toy. 9/25/19 Tr. at 26.

15. The Student did not display these same extreme aggressive behaviors at . According to a private psychiatric report, “[the Student’s] parents noted that [ ] behavior is significantly better at school than at home.” PE P-2-14; *see also* P-2-8.

16. The Student also shared, during a student interview, that will exhibit some poor behavior at home but insisted that does not display such behaviors in the school setting. SB 35-003, see also 9/27/19 Tr. at 141-142.

17. The Student is . Although , around age the Student began to express questions and discontent concerning . In grade the Student began wearing to school. 10/1/19 Tr. at 267, 10/2/19 Tr. at 7-9.

18. In grade, the Student preferred the pronoun, but continued to go by “ .” 10/1/19 Tr. at 11 and 267-271. Currently, the Student consistently refers to self as “ ”.

19. As a , due to adverse, problematic behaviors, the Student was referred in to a student study for consideration of special education eligibility. The Student had difficulty keeping hands to self and had trouble with peer relationships. SB. 1, 2, 7.

20. Developmental testing, completed on , showed the Student had cognitive abilities slightly above average, average gross motor and language skills, but below average self-help, social and emotional development skills, with a delay in acquisition of fine motor skills and sensory processing difficulties. SB 5.

21. On , an PS eligibility committee found the Student eligible for special education services under the classification of “Developmental Delay.” SB. 9. This is an eligibility category pertaining to children between the ages of two and six years old. *See* 8 VAC 81-10; 9/27/19 Tr. at 126-127. The Parents consented to this eligibility classification. SB.

9-005.

22. From preschool through first grade, the Student received special education services under agreed-upon IEPs.

23. On May 1, 2014, under an agreed IEP, PS placed the Student in a preschool special education program at Elementary School, a public school within the district.

24. The Student spent most of day in the special education setting, (20.75 hour per week), with 8.25 hours per week in the general education setting for social emotional instruction.

25. Under this educational program, the Student did well. mastered all of behavior goals and one of motor functioning goals. SB 13.

26. Based upon the Student’s progress, on May 26, 2015 the IEP team at proposed that the Student transition to a general education kindergarten at base school- . SB 15.

# 27. As a kindergartner at , the Student received specifically designed instruction in social emotional (2.5 hour per week) and attention (1.0 hour per week) areas in the general education setting. SB 14.

# 28. As reflected on report card, the Student performed very well with a relatively minor amount of special education support in the general education setting. SB 17. By the end of the school year, the Student was consistently meeting school standards and expectations as reflected on progress report card. SB 17.

29. In first grade, the Student continued in a regular education class, with special education support. Under agreed-upon IEP, received 2.5 hours per week of written language in the general education setting and 2.5 hours per week of social emotional instruction in the general education setting. As a related service received .5 hours per week of occupational therapy in the special education setting. SB 21-009.

30. Overall, the Student had a successful first grade year. With this special education assistance, mastered goal in social emotional functioning and written expression and made sufficient progress in motor functioning. SB 23.

31. As reflected on the Student’s report card, made expected progress throughout the school year in all academic areas. In social and work characteristics, the Student earned the highest mark of satisfactory. SB 23 and 29; 10/2/19 Tr. at 23-24.

32. According to first grade general education teacher, , the Student consistently met the benchmarks for reading, writing and math, based on quarterly assessments. 10/2/19 Tr. 21. For example, for the first quarter, the Student was at a developmental reading assessment (“DRA”) level 14, 4 points above the DRA 10 benchmark. By the 4th quarter, the Student had progressed to a DRA 20. 10/2/19 Tr. at 21- 23. The end of first grade is a DRA level of 18 and the Student had reached that benchmark in the third quarter. 10/2/19 Tr. 23.

33. In writing, by the 4th quarter, the Student met the expected benchmark for the 4th quarter. SB 24-003. The Student was able to write realistic fiction pieces, use correct capitalization and spell high frequency words accurately. SB 24-003.

34. In Math, the Student earned 80% on the PS end of the year assessment which met the benchmark. SB. 24-003.

35. Both because was aging out of the “Developmental Delay” category, and because the three-year timeline for a reevaluation was approaching, PS staff made plans for a reconsideration of the Student’s special education eligibility, to take place in the spring of first-grade year.

36. In preparation for that, school staff completed updated evaluations in January and February 2017.

37. On the educational assessment, the Student’s overall broad achievement score was in the superior range. SB 34.

38. An occupational therapy (“OT”) evaluation was also conducted. SB 36. With the exception of social participation, where some problems were noted, the Student’s scores were typical in all areas of sensory processing. SB 36-003.

39. A psychological evaluation assessed the Student’s social, emotional, and behavioral functioning. SB 35. Within the school setting, behaviors were consistent with a typically developing peer age. SB 35-004 and 010. Within the home setting, however, parents rated the Student’s behaviors at-risk or clinically significant for hyperactivity, aggression, anxiety, depression, and withdrawal. SB 35-003-005.

39. The Student also completed a self- report of anxiety symptoms which overall resulted in average range scores. SB 35-003, 007-008.

40. Due to potential concerns expressed by parents, the Student’s teachers and parent also completed the Autism Spectrum Rating Scale (“ASRS”), which measures behaviors that are associated with the Autism Spectrum Disorder.

41. The Student’s private psychologist had noted in December 2016 that she was hesitant to diagnose the Student with Autism based upon the Student’s complicated profile. SB 27-005.

42. As reported on PS’ 2017 assessment results, there were minimal to moderate concerns with the Student’s peer socialization. However, no other indicators across the raters suggested Autism. SB 35-008-009.

43. A private neuropsychological evaluation completed in December 2017 came to substantially the same conclusion, i.e. that the evidence did not point to Autism as the basis for the Student’s educational issues. PE P-2.

44. Overall, the PS testing showed significant improvements within the school setting. 9/27/19 Tr. at 128-140.

45. On March 2, 2017, the eligibility committee convened to discuss the evaluations and the Student’s progress. Based upon the Student’s present levels of performance, did not meet the criteria as a student with a disability under IDEA and was not found eligible for special education. SB 39.

46. As explained:

And across every single scale, all teachers'

reports and the Student's reports were all within typical

limits. . . .

So across four rating scales and two teachers

every single area came within normal limits. I think

the one teacher noted mild problems on one scale with

peer socialization which we ended up reporting in the

eligibility documents. But other than that it

was -- it was really exciting for me. I mean, this is

what we want to see -- this progress. That we can see

at this point.

9/27/19. Tr. at 137-138.

And we also look at, you know, the history and

had continually met all of goals. goals

had been reduced every single IEP. I believe at the

time of the eligibility had already met one

remaining social/emotional goal. service hours

were very minimal. . . .

So we look at all that -- all of that as well.

How has responded? What sort of accommodations

did need? And was a success story at this

time. It was -- it was really exciting.

9/27/19 Tr. at 140.

47. Importantly, at the time, the Parents agreed to this determination, and did not at any point seek to appeal it. SB 39-006, 9/27/19 Tr. at 40-41. Any attempt to do so now in this hearing would be barred by IDEA’s two-year limitations period.

48. At the same time, the eligibility committee referred the Student to a 504 Committee. SB 40.

49. On April 5, 2017, the Student was found eligible for a 504 plan for attention/concentration, breathing, and impulse control. SB 44- 46.

50. In light of the Student’s , the Parents were concerned about psychological wellbeing and wanted some form of support for . As a result, PS, led by school psychologist, , drafted a safety plan for the Student, SB 42. See also 9/27/19 Tr. at 143-144.

51. Accordingly, following the ineligibility decision, consented to by the Parents, the Student did not receive any special education for the 2017-2018 school year.

52. Nonetheless, the Student continued to make meaningful, material educational progress, at this point under just a 504 plan.

53. The Student’s 504 plan included, amongst other things, movement breaks, redirection, flexibility in completing classroom assignments, and access to the school counselor. SB 46; 10/1/19 Tr. At 18-19, 26-27**.**

54. As reflected on report card, the Student was making expected progress in Language Arts/Reading; Oral Communication; Mathematics; Social Studies; Science; and Foreign Language and earned satisfactory marks in social development and work habits. SB 51. The Student’s report card does not show 4th quarter marks because was hospitalized in May 2018. never returned to after was discharged. SB 51-003.

55. Although the Student was not at grade level in written communication, was making progress. SB. 64-001; 70-002.

56. In Math, the Student received a 90 % on the third quarter power test (a county test that covers cumulative material taught throughout the school year). 10/1/19 Tr. 43. In Reading, the Student had met the June DRA benchmark by April. SB 70, 10/1/19 Tr. at 58.

57. Behaviorally, the Student was also improving in the school setting. During the first semester of second grade, had difficulties following classroom rules, working with others, accepting authority at school, and showing respect. In the second quarter made improvements, and by third quarter the Student was able to express feelings when became upset and would identify ways to improve behavior. 10/1/19 Tr. at 45-46, 59-63. In addition, was not chasing or picking on other students as much as had before. 10/1/19 Tr. at 45-46; 59-61.

58. This was due in part to the positive reinforcement system that was implemented by regular teacher in November 2017. 10/1/19 Tr. at 49.

59. would collect data on the Student roughly 27 times throughout the school day. 10/1/19 Tr. at 48, and 53.

60. For every 20 checks the Student received indicating appropriate behavior, earned a reward. The Student and teacher came up with a list of possible rewards. 10/1/19 Tr. at 48. These included, among others, going to the “breath bin” (a bin filled with calming objects from which the Student could select) and going to the office to speak with preferred adults. 10/1/19 Tr. 48-49.

61. As previously found, a “safety plan” also was implemented to assist the Student behaviorally. SB 42-002. This included access to sensory supports, frequent check-ins by support staff, staff monitoring, access to a fast-pass to see student support staff, strategic grouping with peers, and frequent home school communication by staff. SB 42-002; 9/27/19 Tr. at 145-146.

62. Additionally, the Student participated in a social skills group where was able to practice with other students the lessons had been taught. 10/1/19 Tr. at 281.

63. In the fall of 2017, consulted the PS Autism Specialist, who believed the Student’s behaviors at the beginning of second grade sounded liked emotional dysregulation rather than Autism.

64. began collecting data on the Student every 15 minutes, beginning around November 13, 2017 through May 8, 2018. 10/1/19 Tr. at 47; PE 34, 74.

65. From January 3rd to April 27th, the school psychologist reviewed and analyzed that data. 10/1/19 Tr. at 51. During this 61-school day period, there were roughly 1,650 segments where took data. 10/1/19 Tr. 51-54.

66. Out of those 1,650 segments there were only about 67 incidents of inappropriate behaviors- and most of those involved things such as crumpling up paper, temporarily declining to do work, sometimes chasing other students, and not following instructions. 10/1/19 Tr. at 53-54, Parents Ex. P-36 and 74. Furthermore, in many cases, the Student was able to utilize the accommodations that were in place and return to work.

67. Considering the Student’s academic progress in first and second grade, it is clear that the Student’s behaviors were not so substantial that they prevented from being able to learn. 10/1/19 Tr. at 62-63.

68. The Student enjoyed school at . SB 33-003; 9/27/19 Tr. at 36, 55-56.

69. On January 25, 2018, the teacher noted that the Student was no longer focusing on other students, could ask for peer support in the classroom without teacher support, and that the behavioral checklist implemented in November 2017 had been effective. SB 64, 10/1/19; Tr. at 49-51. The teacher notes on April 3, 2018 that the Student continued to make progress when interacting with peers. was able to ask peers to play a game with during math workshop and was not taking other students’ belongings or assignments as much. SB 70-001-002.

70. However, when the Student missed school, was tardy, or there were changes to medication, adverse behaviors were more likely to occur. 10/1/19 Tr. at 62, 284-6, 289.

71. The Student missed a substantial amount of class time due to private appointments scheduled by parents during school hours. SB 53; 10/1/19 Tr. at 55-56, 284-285; 10/2/19 Tr. at 19-20.

72. In second grade, every Wednesday the Student would leave around 10:30 a.m. and would not come back until 1 p.m. would miss word study instruction, reading, lunch and recess. 10/1/19 Tr. at 55-56.

73. On August 30, 2017, PS received and reviewed a private speech and language evaluation that the Parents provided. The team discussed concerns regarding the Student’s

pragmatic language and PS agreed to conduct its own speech language evaluation. This was completed in September 2017. SB 56.

74. The Student’s core language score was above average. demonstrated age appropriate expressive and receptive language skills, articulation skills and fluency. SB 56-007. However, pragmatic language skills (reading the social situation correctly) and narrative language skills were below average. SB 56-007.

75. Areas of need for pragmatic language included following conversational rules, understanding humor/jokes, participation, and sharing/responding to reactions.

76. Accordingly, on October 12, 2017, the eligibility committee found the Student eligible for special education under the classification of “Speech or Language Impairment.” SB 60-005. The Parents did not consent, contending that the Student’s primary disability was Autism. SB 60-006.

77. In January 2018, the Parents provided to PS a private report from Children’s National Center for Autism Spectrum Disorders that had been conducted in July 2017. PE. P-20.

78. On January 25, 2018, the student study team convened to review this report. The team proposed a full evaluation—observation, occupational therapy, psychological, sociocultural, teacher narrative, vision screening, educational and hearing screening. SB 65.

79. Those assessments were promptly completed.

80. On the teacher narrative, the Student’s teacher reported the Student was making progress and exhibiting appropriate behavior most of the time. was also passing all core subject areas except writing, without an IEP. SB 70. The Student’s classroom performance in written language aligned with the scores received on the educational assessment. SB 71.

81. On the updated psychological evaluation conducted by PS School Psychologist , the Student’s scores on the Behavior Assessment System for Children-Third Edition (“BASC-3”) were elevated in emotional areas including aggression, anxiety, atypicality, adaptability and social skills scales, with clinically significant scores from all 5 raters for depression and withdrawal. SB 67-005-011.

82. On April 26, 2018 the special education eligibility committee found the Student eligible for special education services under the classification of “Emotional Disability.” SB 74. The committee found that the Student has an emotional condition, as reflected in the March 2018 psychological evaluation.

83. The Student exhibits the characteristics required for this label including an inability to build or maintain satisfactory interpersonal relationships with peers and teachers, inappropriate types of behaviors or feeling under normal circumstances, a general pervasive mood of unhappiness or depression as documented in reports and information. SB 74-012.

84. The disability was adversely impacting educational performance. SB 74-011-013.

85. In addition, in coming to this determination, the committee considered the following educationally relevant medical diagnoses: Autism, ADHD, Asthma, and Depression.

86. The Committee concluded that the Student did not meet the criteria for Other Health Impairment or Autism. SB 74; 9/27/19 Tr. at 151-163.

87. Concerning Autism, the IEP team reasonably concluded that it could not rule out emotional disability as the primary cause of an adverse effect on the Student’s educational performance. 9/27/19 Tr. at 160-163; SB 74-019.

88. Contrary to the Parents’ claims, went out of their way to make sure the Student felt connected and comfortable at school. is a diverse school. There are children from 38 countries, who speak various languages, and dress in a variety of ways. 10/1/19 Tr. at 275.

89. The Student is by no means the first student who has attended . 10/1/19 Tr. at 11 and 268.

90. The Student’s has been supported by the staff at . 10/2/19 Tr. at 8- 12; 9/27/19 Tr. at 55-56.

91. As explained:

And what we really want to teach is

that we need to be comfortable asking each other

questions in a respectful way so that we can respond.

Whether it is what you eat, how you dress,

who -- how you perceive yourself. And so that is

really the environment we were creating and continue

to create so that children can ask you, you know, why

do you when you didn't.

It is in a very supportive way. And one of

the things that we really worked with [the Student] on and we

would have loved to have continued to do that work

with was advocating for self and talking about that.

10/1/19 Tr. at 275-276.

92. recognized that was supporting the Student in March 7, 2017 psychotherapy note. SB. 27-008.

93. The Parent also confirmed this:

Q During the three years that [the Student] was at

School is it fair to say that [the Student's]

identify and preference and presentation regarding

were changing and becoming -- were evolving?

A Yes.

Q And were there some things that the staff at

did to try to -- to try to be

sensitive to [the Student's] situation in that regard?

A Yes.

Q Like what sort of things?

A Well I know that -- that [the Student] was allowed to

go and talk to pretty much

whenever -- whenever wanted to. I think the

teachers were supportive and empathic or empathetic

and -- which word is right. But I never had any

problem with the -- with the actual interactions that

[the Student] had with the staff or the teachers. I thought

they did as good as job as anybody could.

9/27/19 Tr. at 55-56.

94. The staff made themselves available to the Student both formally and informally whenever needed the extra support. The Student could, and did, go speak with the school counselor, , and the school social worker, , at any time during the school day. 9/27/19 Tr. at 55-56.

95. There were also designated times when and worked with the Student individually as well as in a small group setting. 10/1/19 Tr. at 274-276. One of the Student’s goals that worked on with the Student was in self-advocacy. 10/1/19 Tr. at 272-276. This included helping the Student formulate appropriate responses when children would inquire about the Student wanting to be referred to as a or to school. 10/1/19 Tr. at 276.

# 96. The school staff at went to great lengths to ensure staff were well informed about these issues and that all children, regardless of differences, felt welcomed. For example, contacted the education center in order to acquire more developmentally appropriate literature discussing topics such as for students at . 10/1/19 Tr. 270-277. She testified:

So we now have a set of 24 books, K, 2, 3,

5, and then there had already been lists in middle and

high school. So things such as "The Color Red," "Be

Who You Are." But there is a list of 24.

So we used those in the classroom with the

children just to talk about differences. Not only

, but divorce. Also, what makes up a

family. As the world changes, we want to respond to

that and be able to have our children learn in a very

accepting environment.

Q And this list of books and the books that

you just showed us, were those books available during

the time that [the Student] was attending

?

A Yes. They were and we used some of these as

well as our counselor, , had several

# other books before that.

# 10/1/19 Tr. at 273.

# 97. The school administrators also made sure the Student had access to bathrooms, and that staff participated in trainings. 10/1/19 Tr. at 271-274; 10/2/19 Tr. at 9-15.

98. The Student was not bullied at . As explained, in accordance with the culture of acceptance, has a strict bullying policy. If such an allegation is made, the principal and school counselor must be notified, and work together to investigate and meet with the students involved. 10/1/19 Tr. at 277-278.

99. In the Student’s case, as soon as the Parents reported suspected bullying on the playground to in November 2017, notified , who took immediate action. 10/1/19 Tr. at 279-283.

100. talked with the Student, the teacher, and school social worker to gather additional information. 10/1/19 Tr. at 280. also began frequent check-ins on the Student throughout the school day. 10/1/19 Tr. at 280 - 281. On the playground, increased the number of adults observing the Student during recess. 10/1/19 Tr. at 281.

101. Overall, based upon the information that gathered, including the observations at recess and in the classroom, the facts did not support the Parents’ allegations. 10/1/19 Tr. at 282.

102. did find that there were children who would sometimes ask the Student questions about changes in appearance and , but at , explained, asking questions and having a respectful conversation about differences is something that is encouraged. , through the school social worker and counselor, were working with the Student on how to appropriately respond to those types of questions. 10/1/19 Tr. at 275, 282.

103. testified:

Our counselor, , comes

in to the classroom and does small group lessons on

accepting each other. She also had a variety of

conversations with [the Student] when [the Student] would ask questions.

And our goal was to help [the Student] to be able to respond to

questions so that there is a level of comfort.

10/1/19 Tr. at 270.

104. At , the Student was not being bullied, was constantly being monitored because of the allegations that were made, and the teachers and staff had undergone sensitivity training to foster appropriate responses.

105. Although the Student was making progress in second grade without an IEP, having again found the Student eligible for special education, PS continued to believe that the Student would benefit from special education supports targeted to unique, individualized needs.

106. The IEP team met for that purpose on May 17 and May 31, 2018to develop an appropriate IEP for the Student. SB 76, 77.

107. At this point the Parents had already applied to and been accepted at . 9/25/19 Tr. at 231 - 233; PE P-8 and P- 46.

108. The team offered to visit before finalizing the IEP. Members of the team observed on June 6, 2018. SB 79-80.

109. The IEP team reconvened and finalized the IEP on June 15, 2018.

110. The resulting IEP team proposed three hours per week of specially designed instruction in Reading and Mathematics, and two hours per week of specifically designed instruction in Organization, Behavior, Self-Advocacy, and Social Emotional areas in the general education setting. SB 81-017.

111. The team further proposed four hours per week of specially designed instruction in Written Language in a small, special education classroom.

112. Under this proposed IEP, the Student would also receive occupational therapy consult/monitor (.25 hours every month) in the general education setting and speech and language therapy (.50 hours per week), counseling (.50 hours per week), and occupational therapy (.50 hours per week) in the special education setting. SB 81-017-018.

113. Specifically, in social and emotional areas, – the special education teacher who would have taught the Student during third grade – explained that part of the IEP proposal was designed to help the Student with self-regulation in order to follow classroom and school expectations. 10/1/19 at Tr. 186.

114. To work on the Student’s behaviors the team proposed calming strategies, which could include for example, deep breathing, taking a break, or talking with a trusted adult. 10/1/19 Tr. at 186-187.

115. The team further proposed a positive reinforcement system or behavior chart, which the Student’s teachers would implement in each of classes. At the beginning of the Student’s third grade school year, would have met with the Student to discuss the chart and to get input on things that may incentivize to meet behavior goals—such as stickers, time on the iPad, or meeting with a preferred adult. 10/1/19 at 187-188.

116. The Student would have also had counseling as a related service for .50 hours per week. The purpose of the counseling service was to help the Student use new and different strategies to solve social, as well as academic problems. SB 81-018 Tr. 192-3.

117. would have been an appropriate special education teacher for the Student.

118. The school team component of the IEP team agreed or another nearby elementary school was an appropriate placement within which to implement the IEP for the Student. SB 82; 10/1/19 Tr. at 68-73; 289.

119. Furthermore, that IEP and placement constituted the “least restrictive environment” since it included opportunities for time in a regular education setting, in the school that the Student would otherwise attend in neighborhood. SB 81-021; 82.

120. The Parents had been contemplating placing the Student in private school since October 2017. 9/27/19 Tr. at 45. I

121. In November 2017, they applied to , a small, private special education school serving students grades K-12th grade.

122. is located in .

123. All the students there, whether formally designated or not, have educational disabilities. 9/25/19 Tr. at 225. Thus, the school is essentially “self-contained special education” for everything.

124. accepted the Student into its Model Aspergers Program (“MAP”) in February 2018. PE P-8; P-46.

125. Per the Parent’s testimony, before the June 2018 IEP proposal was finalized, the Parents had already decided that the Student would be going to . 9/27/19 Tr. at 57-58.

Q Is it fair to say that really the same day

as the letter you and your wife had decided that [the Student]

was going -- was in fact going to go to ,

right?

A That is correct.

9/27/19 Tr. at 57-58.

126. Accordingly, the Parents had decided even before PS had a chance to develop or propose an IEP or placement for the Student’s third-grade year that they would not accept it. Id.

127. The Student started in the MAP on July 9, 2018. 9/27/19 Tr. at 59, 77.

128. According to ’s website, MAP serves students with Autism, Speech or Language Impairment; Multiple Disabilities, Specific Learning Disabilities, and Other Health Impairments.

129. At , the Student classifies as a student with Multiple Disabilities. 9/25/19 Tr. at 241-242.

130. The Student has a class size of 8 students -- two of which have behavioral issues severe enough to require a 1:1 aide. 9/25/19 Tr. at 229, 160-163.

131. Unlike , which was walking distance from the Parents’ home, it takes the Student 45 minutes each way to get to and from every day. 9/27/19 Tr. at 52-55.

132. On May 21, 2019, PS held another IEP meeting to formulate the Student’s educational program for the 2019-20 school year. SB. 86.

133. Beforehand, in March and April of 2019, the Student’s second grade teacher, ; school psychologist, ; and the special education coordinator, observed the Student at . SB 85.

134. The IEP team reviewed and discussed the observation reports, Dr. ’s written report, and ’s October 24, 2018 IEP. PE P-54.

135. The team identified goals in the areas of attention/organization; behavior; math calculation; math reasoning; reading comprehension; reading decoding; self-determination; (self-advocacy); social-emotional functioning; spelling; written expression; counseling; and pragmatics. SB 86-10-015.

136. Like the prior year’s IEP and proposed placement, this IEP included extensive goals, and supports, in social development, emotional and behavioral areas. For example, the Student would receive 2 hours per week of social emotional instruction in the general education setting; and .5 hours per week of counseling.

137. The Student would also receive numerous accommodations including movement breaks, graphic organizers, checklists, noise cancelling headphones, preferential seating; teacher support for peer conflict/resolution, and access to calm down space and sensory objects for calming or sensory stimulation, small group testing, etc. SB 86-016.

138. Regarding placement and services, the IEP team concluded overall that the general education setting, with special educations supports, was the most appropriate setting for the Student to receive specially designed instruction in most academic areas.

139. Because the Student was still below grade level in written language, the team proposed a special education setting for that area.

140. The PS members of the team determined that a public day school was still the least restrictive environment. SB 86-20.

# 141. The Parents did not consent to this IEP. As a result, the Student has continued at for fourth-grade (2019-20) year.

# ADDITIONAL FINDINGS & CONCLUSIONS OF LAW

To the extent that the Findings of Fact contain Conclusions of Law, they should be so considered without regard to the given labels.

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 Parents must prove the inappropriateness of each year’s IEP. M.S. v. Fairfax Cnty. Sch. Bd., 553 F.3d 315 (4th Cir. 2009) (stating that the appropriateness of a particular placement must be considered on a year-by-year basis); see also Devine v. Indian River Cnty. Sch. Bd., 249 F.3d 1289, 1292 (11th Cir. 2001) citing Bales v. Clarke, 523 F. Supp. 1366, 1370 (E.D.Va. 1981)(“[the] party attacking the IEP bears the burden of showing that the IEP is inappropriate.”). The Parents have not met their burden.

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).

Specifically, the Court reaffirmed that an appropriate education for a student with a disability is one that is, "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” 137 S. Ct. at 999. The Court further explained that an IEP typically should be “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Id.* at 999.

Concerning a child who is not fully integrated in the regular classroom and not able to achieve on grade level, the child's educational program should be "appropriately ambitious in light of his circumstances"*. Id.* at 1000. At the same time, *Endrew F.* reaffirms a related core notion in *Rowley*, i.e., that an IEP must be “reasonable”, but not “ideal.” *Id*. (citing *Rowley*, 458 U.S. at 206-07). The Student’s proposed June 15, 2018 IEP (SB 81) and May 21, 2019 IEP (each, an “IEP” and together, the “IEPs”) clearly meet the threshold requirements set forth in *Endrew F*.

In *Endrew F*., the Supreme Court of the United States confirmed that deference must be given to the professional judgments of educators. It held 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*.; *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, who have familiarized themselves with the private program, 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.

The law retains the previous definition of a “free appropriate public education.” IDEA Section 612(a)(1)(A). See also, *Regulations Governing Special Education Programs for Children with Disabilities in Virginia*, effective July 7, 2009, (the "Virginia Regulations").

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 Parents have 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).

In the present case, there was no denial of FAPE because the LEA component of the IEP Team, for each IEP, reasonably classified the Student as emotionally disturbed and because all of the Student’s unique behavioral and academic needs were addressed in the IEP. This case is distinguished from *Rose.*

Objections to the school division’s proposed IEP and program must be taken with a grain of salt where a parent had made up her mind before the IEP that she would reject whatever the school district proposed, and unilaterally place the student in private school. *M.M*., 303 F.3d at 535 (4th Cir. 2002); *Sanger v. Montgomery County Bd. of Educ*., 916 F. Supp. 518, 527 (D. Md. 1996); *White v. School Bd. of Henrico County*, 36 Va. App. 137, 154-160 (Va. Ct. App. 2001); *see also Doyle v. Arlington County School Board*, 806 F. Supp. 1253, 1261 (E.D. Va. 1992) *aff’d*, 39 F.3d 1176 (4th Cir. 1994) (“Unknown to the school system, the parents had decided even before the first IEP meeting began that they would reject whatever proposal the school system made. Both Mr. and Mrs. Doyle testified they had told Mairin she would stay at LSW regardless of what IEP placement the school system proposed.”).

Clearly, the Parents prefer and believe that it is more beneficial for the Student. However, “the insistence of parents that a non-public school setting is more appropriate does not establish the inappropriateness of the public school, even if the child would have benefitted more in the private setting.” *E.S. v. Smith*, PWG-17-3031, 2018 WL 3533548, at \*15 (D. Md. July 23, 2018), *aff'd sub nom*. *E.S. by B.S. v. Smith*, 767 Fed. Appx. 538 (4th Cir. 2019) (unpublished).

IDEA mandates that a placement be in the “least restrictive environment.” *Rowley*, 458 U.S. at 202. The least restrictive environment is not just a “laudable goal, but also a requirement of the Act.” *DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989); *see also Doyle v. Arlington County School Board*, 806 F. Supp. 1253, 1260 (E.D. Va. 1992), *aff’d*, 39 F.3d 1176 (4th Cir. 1994) (reversing hearing officer who “misunderstood the mandatory nature of the least restrictive environment provisions.”).

The Parents failed to offer any convincing expert testimony that a placement at is the least restrictive environment for the Student. The IDEA requires PS to educate the Student in the least restrictive environment. 20 U.S.C. §§ 1412(a)(5)(A). Specifically, the statute mandates that

[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A); see also 34 C.F.R. § 300.550(b). The regulations promulgated to enforce the IDEA, as well as case law, provide that a student is to be served in the school he would attend if not disabled unless it can be shown that he cannot learn in that environment. 34 C.F.R. § 300.552, Barnett v. Fairfax Cnty. Sch. Bd., 927 F.2d 146 (4th Cir. 1991). The Parents have not made this showing.

The least restrictive environment requirement includes three important facets relevant here. *First*, even where a student requires instruction in a special education setting for his or her academic subjects, the student should nonetheless have the opportunity to be educated with nondisabled students in nonacademic areas to the maximum extent appropriate. As the applicable federal regulations provide:

### § 300.117 Nonacademic settings.

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in §300.107, each public agency must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. . .

34 CFR § 300.117; *Roncker v Walter,* 700 F.2d 1058, 1063 (6th Cir. 1983) (Act requirement that in even nonacademic areas, integration with nondisabled peers “be provided to the maximum extent appropriate indicates a *very strong congressional preference*.”) (emphasis added).

*Second*, a school system must ensure that the student’s placement is “*as close as possible to the child’s home*.” 34 C.F.R. § 300.552(b)(3) (emphasis added); *see also* *Rowley*, 458 U.S. at 202. Unless the IEP requires otherwise, “*the child is educated in the school that he or she would attend if nondisabled.*” 34 C.F.R. § 300.552(c) (emphasis added);

*Third*, school systems should turn to private placements only when the student’s disability is so severe that he or she cannot be educated in a public school setting. 34 C.F.R. §300.550(2). For that reason, Courts have recognized that placement in a regular public school is inherently less restrictive than a private setting. *See*, *Mark and Ruth A. v. Grant Wood Area Educ. Agency*, 795 F.2d 52 (8th Cir. 1986) (recognizing clear preference for public placement).

PS’ June 15, 2018 and May 21, 2019 IEPs and proposed placements satisfy all three prongs of these requirements. The least restrictive appropriate placement for the Student is a special education program where can receive special education support in the general education and special education setting located within local neighborhood public school, .

In assessing the evidence, in this case, the well-founded opinions of PS’ professional educators, with years of hands-on experience serving disabled students, are compelling and entitled to respect. In reviewing an IEP, “IDEA requires great deference to the views of the school system rather than those of even the most well-meaning parents.” *A.B. v. Lawson*, 354 F.3d 315, 328 (4th Cir. 2004). The Supreme Court confirmed this principle in the *Endrew F*. decision. *See* 137 S.Ct. at 1001. Thus, “[l]ocal educators deserve latitude in determining the individualized education program most appropriate for a disabled child.” *Accord* *Hartmann v. Loudoun County Bd. of Educ.,* 118 F.3d 996, 1001 (4th Cir. 1997).

The School Board experts were credible. Their testimony was well considered, consistent and compelling. Their demeanor was open, frank and forthright.

PS personnel acted in a professional, collaborative, coordinated manner to develop the 2 appropriate proposed IEPs at issue for the Student.

Parents rely heavily upon the testimony of their educational consultant, Dr. . However, her expert opinions are not as compelling as those of the LEA educators for the following reasons. Dr. is not a psychologist or behavior therapist. She did not become involved in the Student’s case until after the Student was already attending . 9/24/19 Tr. at 176.

During the relevant time period, Dr. did not attend any meetings concerning the Student’s educational programming at ; did not reach out to any PS staff concerning the Student and educational programming there; and failed to observe the educational program proposed by – something does from time to time in other cases. 9/24/19 Tr. at 181-183, 194-195.

Dr. neither taught nor tested the Student. 9/24/19 Tr. at 179. Indeed, her teaching credentials expired “decades ago.” Id at 175.

Consequently, Dr. ’s opinions were not as well founded as those of the LEA professionals. For example, Dr. did not think the Student had an emotional disability at all 9/24/19 Tr. at 132, despite parent and teacher rating scales showing clinically significant scores for depression and withdrawal and elevated scores for aggression, anxiety, atypicality, adaptability and social skills, (SB 67), in addition to the Student’s private diagnoses of anxiety and depression. 9/27/19 Tr. at 158.

In this hearing, Dr. explained that testifying is something that she is “good at.” 9/24/19 Tr. at 172. Yet in another private school case over 30 years ago, U.S. District Judge Claude Hilton did not find Dr. ’s testimony convincing. *Doyle v. Arlington County Sch. Bd.*, 806 F. Supp. 1253, 1254 (E.D. Va. 1992), aff'd, 39 F.3d 1176 (4th Cir. 1994). The Court found that Dr. had little first-hand knowledge of the student, and almost no knowledge of the school system's proposed program. *Id. (“* 's contact with Mairin had been a few sessions to write her “evaluation” report, plus a few incidental encounters at LSW while observing other children.” 953 F.2d at 104.

Importantly, none of the teachers or other staff who actually teach the Student at testified in the hearing. Rather, both witnesses who testified were administrators who support classes or the program generally. 9/25/19 Tr. at 112-13 ( ); 223 ( ). See also, 9/25/19 Tr. at 172.

In this case, PS members of the IEP team who drafted the proposed 2018-19 and 2019-20 IEPs, and who testified in the hearing, were qualified as experts in their respective fields. This includes , who served as the case carrier and would have been the Student’s third grade special education teacher, as well as the school psychologist, , who evaluated the Student in first and second grade, participated in the eligibility determinations, and observed the Student at and . 10/1/19 Tr. at 171-72, 174, 9/27/19 Tr. at 118.

Other LEA personnel who provided compelling testimony included the school principal, , who has over 20 years of experience as a principal at , and 40 years in the field of education, 10/1/19 Tr. at 263; and the 1st and 2nd grade general education teachers, and , who worked directly with the Student throughout first and second-grade school years, respectively. All also participated in drafting the Student’s IEP.

Accordingly, the hearing officer has accorded the greatest weight to the testimony and opinions of PS’ witnesses, who have personally participated in IEP meetings, taught, evaluated, and/or observed the Student at PS and .

A considerable portion of the Parents’ evidence here was devoted to showing that the Student had been diagnosed by some private practitioners as having autism. As noted above and further explained by PS Psychologist , however, a private medical diagnosis is different than a special education identification that is done for school purposes. 9/27/19 Tr. at 122-124. While several of the Student’s private therapists (including and ) declined to diagnose the Student as having autism, and , a psychiatrist and neuropsychologist at Children’s Hospital, at some point did.

Under the IDEA, however, a *medical* diagnosis does not determine eligibility for special education purposes. Instead the IEP team - composed of parents, regular education teachers, special education teachers, and a representative of the local educational agency considers multiple data points. That *educational* process may accurately find the child ineligible for special education or not educationally classified as “autistic” for special education purposes, despite having a medical diagnosis of autism. *See Marshall Joint School Dist. No. 2 v. C.D. ex rel. Brian D*., 616 F.3d 632 (7th Cir. 2010) (A “physician's diagnosis and input on a child's medical condition is important and bears on the team's informed decision on a student's needs. But a physician cannot simply prescribe special education.”); *S.D. v. Starr*, CIV. JFM-12-149, 2012 WL 6019347, at \*1 (D. Md. Nov. 30, 2012) (explaining the school division fulfilled its obligation under the IDEA to evaluate the student by assembling an IEP team of educational experts and was not required to include an evaluation by a medical doctor in its analysis of the student’s health condition).

As stipulated by the parties, a student who meets the eligibility criteria for Emotional Disability, can also be found eligible for Autism, unless “the child’s educational performance is adversely affected primarily because the child has an emotional disturbance”, as defined in 8VAC20-81-10. In that case, a child cannot be found eligible under the classification of Autism. Joint Ex. 1.

In this case, unlike *Rose,* the eligibility committee in April 2018 properly determined that emotional disability was the Student’s primary disability. SB 74-010- 019. This was based on several data points including the Student’s teacher narrative, PS’ psychological report, and observations. Although the Student was making progress with behaviors, still noted concerns regarding the Student’s peer interactions/relationships and emotional self-control. SB 67-006; 67-011. On the psychological evaluation, the Student’s scores for depression and withdrawal were clinically significant, and scores for aggression, anxiety, atypicality, adaptability and social skills were elevated. SB 67. These results correspond with the Student’s private diagnosis of anxiety and depression. 9/27/19 Tr. at 158. As explained by :

And then for Virginia you have to be able to rule

out emotional disability as a primary cause and, you

know, this is a child who has had a slew of diagnoses

related to anxiety and [depression]. Was on medication

for anxiety and depression. That was most endorsed in

the school setting. And so we couldn't rule out and

didn't have the data to rule that emotional disability

wasn't the primary.

9/27/19 Tr. at 160.

Additionally, the Student did not meet the Autism criteria for special education purposes. Specifically, in the school setting, the Student did not show atypical pervasive patterns in behavior, interest and activities. 9/27/19 Tr. at 159-160, SB 74-017. It was not endorsed on the psychological report, in the teacher narrative, or in the observation reports. 9/27/19 Tr. at 160. Contrary to ’s testimony, the Student’s behaviors documented on Parents exhibits P-36 and P-74 also do not reflect repetitive behaviors or fixations necessary to meet the criteria. reviewed both exhibits. From January 3, 2018 through April 27, 2018, she identified the types of behaviors being observed, and tallied the antecedents when noted and number of times the Student acted inappropriately. testified that the behaviors were more reflective of a student with mood instability and anxiety. In her expert opinion, as a school psychologist, the Student’ chasing, crumpling paper, and crying did not qualify the necessary type of repetitive behavior. 9/27/19 Tr. at 160.

The Parents appear to argue that PS did not offer the Student an appropriate education for third or now fourth grade because, they allege, the eligibility committee designated as emotionally disabled rather than autistic. This argument is flawed.

Indeed, IDEA does not require school districts to identify students with disabilities by any specific label *at all*. “[n]othing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in section 1401 of this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this subchapter.” 20 U.S.C. § 1412(a)(3)(B). Moreover, ***“[t]he IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education***.” *Heather S. v. State of Wisconsin,* 125 F.3d 1045, 1055 (7th Cir.1997) (emphasis added); See *e.g. R.C. ex rel. S.K., D.H. v. Keller Indep. Sch. Dist.,* 958 F. Supp. 2d 718, 730–31 (N.D. Tex. 2013) (school division’s proposed IEP was appropriate irrespective of the student’s eligibility classification.

As here, Plaintiff focused heavily on the eligibility classification and spent comparatively little time explaining what additional services the school division should have provided, and how those services would have made plaintiff's IEP sufficiently individualized. *See also Ft. Osage R-1 Sch. Dist. v. Sims ex rel. B.S*., 641 F.3d 996, 1004 (8th Cir. 2011) (“Given the mixed record on whether B.S. actually suffers from autism or merely displays some autistic traits as a result of her other disabilities, we find it difficult to discern how the IEP failed to adequately identify B.S.'s disabilities. However, even assuming that B.S. does suffer from [autism](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ib0dd4e74475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), and that the IEP materially failed to include this diagnosis, the Sims cannot show that this purported procedural error was harmful. This is because the IEP was substantively reasonable and because the error did not deprive B.S. of any educational benefits.”); *D.B. v.* *Houston Indep. Sch. Dist.,* No. Civ. A. H–06–354, 2007 WL 2947443, at \*10 (S.D.Tex. Sept. 29, 2007) (“IDEA does not require that children be classified by their disability so long as each eligible child is regarded as a child with a disability under the Act.”); *Pohorecki v. Anthony Wayne Local School Dist*., 637 F.Supp.2d 547,557-558 (2009) (“The very purpose of categorizing disabled students is to try to meet their educational needs; it is not an end to itself. The classification of [Student] as a child with ‘emotional disturbance’ was a reasonableone and was appropriate for his educational needs.”).

The goals, services, and accommodations on the Student’s proposed June 2018 and May 2019 IEP were appropriate irrespective of the Student’s eligibility classification. As shared by school psychologist , a student’s eligibility label does not determine what services a student receives. Instead, those services are a function of the strengths, weaknesses, and educational goals on the IEP. 9/27/19 Tr. at 124-125. According to , “The needs then drive the accommodations, the goals, and the services.” 9/27/19 Tr. at 125. As explained by :

A It is something that we look at. It is something that is obviously listed on the documents that we pay attention to, but it doesn’t drive the services. Because we have students who have emotional disabilities that have a lot of academic instruction. We have students that have a learning disability that receive counseling through our, you know, “ ” program with the psychologist. So it is something that we look at, but it doesn’t drive what we determine as a team to be the services that we put in place to meet the needs of the student.

10/1/19 Tr. at 217-218. For the reasons discussed above, the proposed educational program for the Student was appropriately based on unique needs and was appropriately individualized and calculated to address unique needs ambitiously in view of circumstances.

Two recent cases have reaffirmed the principle that the key concern is whether the student receives FAPE, not whether the LEA has labeled properly. *See*, *Bentonville Sch. Dist. v. Smith*, 73 IDELR 203 (W.D. Ark. 2019) and *Lauren Indep. Sch. Dist.,* 72 IDELR 262, 904 F. 3d 363 (5th Cir. 2018).

In the Student’s case, the IEPs and placements proposed by PS fully meet the standards of appropriateness, and the least restrictive environment. On this record, and under *Schaffer v. Weast*, Parents clearly have not carried their burden of proving the contrary.

The cornerstone of an appropriate education is an appropriate IEP, one which is crafted based upon the student’s individual needs. *See, e.g*, *R.F. v. Cecil County Public Schools*, 919 F.3d 237, 241 (4th Cir. 2019), citing *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 550 U.S. \_\_\_, 137 S. Ct. 988, 994 (2017).

In this case, PS offered an appropriate IEP for the 2018-19 and 2019-20 school year. On June 15, 2018, the IEP team reviewed, and updated, on the IEP, the Student’s present levels of academic achievement and functional performance. SB 81-0006- 016, 10/1/19 Tr. at 176-177. explained there were numerous data points considered when going over the Student’s strengthens and needs as reflected in SB 81-006-009.

Based upon the information reviewed, the team proposed goals to address the Student’s problem areas. Specifically, in the area of Attention/Organization, the Student had difficulty staying engaged during longer class lessons. testified that a goal was proposed to help the Student stay alert and actively involved through the entire class lesson. 10/1/19 Tr. at 185-186. Behaviorally, the Student had difficulty monitoring behaviors when missed school or was tardy and had a hard time keeping hands to self when upset. 10/1/19 Tr. at 283-285, 289. Because of the progress noted in this area using the behavior chart and breath bin, a goal was drafted with similar strategies and accommodations in mind. 10/1/19 Tr. at 45, 49, 187. The Student also had a social-emotional goal to help interact better with non-preferred peers. 10/1/19 Tr. at 190-191. There was also a self-determination goal, as the Student was having difficulty voicing needs and would become frustrated. 10/1/19 Tr. at 189-190; SB 81-0006- 016.

Academically, although the Student was on grade level in the areas of math and reading, according to , the team still proposed goals to address some areas of weakness 10/1/19 Tr. at 189. For example, the Student had difficulty with multi-step problem and regrouping and ungrouping double digit addition and subtraction equations without teacher prompting; also had some difficulty interpreting stories and reading aloud smoothly; and in spelling and written expression. The Student has difficulty applying learned spelling words into a sentence, editing work, and using correct punctuation. 10/1/19 Tr. at 189, PS Ex. 81- 013-014, 014A.

To further help manage the Student’s behaviors, the team proposed accommodations such as movement breaks for the Student to get up and walk around the room, or possibly outside of the classroom, with an adult when needed; and access to calm down spaces and sensory objects for calming or sensory stimulation. 10/1/19 Tr. at 67-68. In second grade the Student’s designated calm area was a corner in the room where breath bin was located. 10/1/19 Tr. at 68. also had a special chair that allowed to bounce feet when needed. 10/1/19 Tr. at 68. Some of the Student’s accommodations were intended to help focus and stay organized throughout the school day. This included visual aids, checklist for daily tasks, prompts and positive redirection for off-task behaviors. SB 81-017.

The IEP team reconvened in May 2019 to propose an IEP for the 2019-20 school year. Academically, after a year of being at , the Student still was below grade level in written language and went down in reading. 10/1/19 Tr. at 245-246, SB 92. The PS team again proposed pull out services in writing, and special education support in the general education setting for math, reading, social emotional, self-advocacy, behavior and organization. SB 86, 10/1/19 Tr. at 79, 290.

The team again concluded that was the least restrictive appropriate environment for the Student. According to , who visited to observe the Student, at that school, the Student did not require more than the basic classroom behavioral strategies. 9/27/19 Tr. at 171-172.

Regarding ’s Applied Behavioral Analysis (“ABA”) curriculum, , who is nationally licensed as a board certified behavioral analyst and has been qualified as an expert in school psychology and behavior analysis, testified that the Student does not require such a restrictive program. 9/27/19 Tr. at 85, 96, 168-169. Instead, the more appropriate approach for the Student’s individualized needs, would be to implement evidence-based strategies that are rooted in behavior analysis, which PS special education teachers are trained in. 9/27/19 Tr. at 169.

A student with a disability is to be provided with specialized instruction developed through IEP procedures in order that a free appropriate public education is available under the IDEA. See Board of Educ. v. Rowley, 458 U.S. 176, 195 (1982). A free appropriate public education is designated through the IEP process. M.M. by DM and EM v. Sch. Dist. of Greenville County, 303 F.3d 523, 527 (4th Cir. 2002). An IEP is reviewed on a prospective basis for appropriateness on the basis of whether it was developed in accordance with the procedures of the IDEA and whether it is reasonably calculated to confer the necessary quantum of educational benefit. Rowley, 458 U.S. at 206-07.

“To meet its substantive obligation under the IEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Endrew F. ex. rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017); see also M. L. v. Smith, 70 IDELR 142 (4th Cir. 2017). “Benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable at the other end, with infinite variations in between. … so the IEP must be evaluated through the lens of the student’s present level of achievement, disability, and potential for growth.” Endrew F., 137 S. Ct. at 999. Further, there is no obligation to provide the best education or an ideal education in order to provide FAPE. Rowley, 458 U.S. at 200.

In sum, the goals, services, and accommodations that were proposed in the June 2018 and May 2019 IEPs, and the proposed placements in a regular school such as , were reasonably calculated to ensure that the Student received FAPE. 9/27/19 Tr. at 168-169, 172; 10/1/19 Tr. at 80-82, 193-205, 211-212, 290.

As the Supreme Court said in *Endrew F.*, its earlier decision in *Rowley* "sheds light on what appropriate progress will look like in many cases." 117 LRP 9767 at \*6. Specifically, for a student such as the Student who can progress in the regular curriculum and is on grade level, the touchstone of an appropriate education is whether the student is able, “to achieve passing marks and advance from grade to grade.” *Id.* at \*2, quoting *Rowley*, 458 U.S. 203-04.

The Student was able to do precisely that during first and second-grade year at . In fact, in second grade, the Student made great progress utilizing the many accommodations that were on 504 plan, which were later included in the June 2018 and May 2019 IEP. As discussed above, the Student’s progress was shown in passing report card grades, teacher narratives, criterion-referenced assessments, such as the DRA, as well as standardized educational achievement testing.

Parents contend, notwithstanding the Student’s academic progress, PS’ proposed educational program is inappropriate on account of the Student’s behaviors in the school setting. However, the Student’s behaviors, with the appropriate accommodations and coping strategies, were being reasonably managed in the school setting even without an IEP and were improving. 10/1/19 Tr. at 49.

With that plan, according to , the Student was typically able to follow classroom and school expectations. SB 81-006. Moreover, the team believed the emotional and behavioral goals, services, and accommodations that were proposed would meet the Student’s needs. As discussed in detail above, is clear that the Student’s behaviors were improving, even without an IEP, based upon the strategies that school staff already had in place. Moreover, with a more formal plan in place- like the IEPs proposed on June 15, 2018 and May 21, 2019- The Student would have continued to make meaningful progress.

As discussed above, the IDEA does not deprive the local educators of their primary role in developing an IEP. Hartmann v. Loudoun Cnty. Bd. of Educ., 118 F.3d 996, 1001 (4th Cir. 1997); see also, Springer by Springer v. Fairfax Cnty. Sch. Bd., 134 F.3d 659, 663 (4th Cir. 1998) (“the task of education belongs to the educators who have been charged by society with that critical task…”); M.M. by DM and EM v. Sch. Dist. of Greenville Cnty., 303 F.3d 523, 531 (4th Cir. 2002) (“The court is not, however, to substitute its own notions of sound educational policy for those of local school authorities.”).

The Supreme Court of the United States has recently confirmed that deference must be given to the professional judgments of educators. It held in *Endrew F.* that a court or hearing officer is required to give deference to the opinions of school board witnesses who are professional educators. 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 208; MM, 303 F.3d at 533.

Accordingly, professional educators in the LEA, who are the ones who are most familiar with the Student, have testified as to the appropriateness of the offered IEPs. The LEA witnesses who testified regarding the Student have substantial training and experience in working with children with disabilities and with the Student. School Board witnesses were admitted by the hearing officer to offer testimony as expert witnesses. They also had expertise regarding the Student, unique needs, the proposed LEA IEPs or the placements. None of the Parents’ experts had that familiarity. Thus, PS’ expert witnesses are entitled to deference in their judgment that the proposed IEPs and placement were appropriate.

Those LEA experts also expressed concern about the appropriateness of the program at for the Student because it deprived of contact with general education peers. These concerns expressed by the LEA experts were not effectively refuted in the Parents’ case. Even if the private school placement were a better program, which it is not, reimbursement is not necessary where the public program is appropriate. See Hessler v. State Bd. of Educ., 700 F.2d 134, 139 (4th Cir. 1983).

As measured by IDEA’s standards, the program at is clearly much less restrictive than . is the Student’s neighborhood school. It has both students with disabilities and nondisabled students. The Student would be involved in classes at with both special education peers as well as general education peers, giving the Student many opportunities to interact with nondisabled students.

The Student would spend most of day in the general education setting with special education support. SB 81, 86. In the Student’s case, there is every reason to think that can benefit from this less restrictive environment based upon performance at during first and second grade (even without an IEP). Furthermore, to the extent that the Student has in the past encountered some concerns regarding peer relations, the answer is to give additional opportunities to interact with nondisabled peers, not to isolate from them. 9/27/19 Tr. at 172; 10/1/19 Tr. at 73-74; SB 82.

On the other-hand, , which is located in , resulting in a long commute to and from there, requires the Student to be in a self-contained special education setting for all subject areas, even those where is on grade level and meets all grade-level requirements. Additionally, The Student has no alternative but to have all of non-academic activities – including Physical Education, Art, Music, and for that matter lunch and recess in essentially a self-contained special education setting.

If the hearing officer determines that the Student could receive benefit from each proposed IEP calling for a placement in the PS program, a private school placement at public expense would be inappropriate. A private school placement is not appropriate unless the Parents prove that the school division’s program is inappropriate and that the Parents’ proposed program is appropriate. See Burlington Sch. Comm. v. Dep’t of Educ., 471 U.S. 359 (1985); Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7 (1993); see also Martin v. Prince George Cnty. School Bd. 3 Va. App. 197, 348, S.E. 2d. 857 (1986).

A private placement at public expense is not appropriate in this case because PS had an appropriate program for the Student within the public school and the private day school placement is not required. A private placement is required only when “a [private] setting is the only educational placement ‘reasonably calculated to enable [the child] to receive educational benefits.’” Martin, supra, 3 Va. App. at 210, 348 S.E.2d at 865. The placement at does not meet that standard. The Student benefited from prior education in the programs in PS. The expert testimony from PS witnesses clearly established that there is an appropriate program available for the Student in the public schools pursuant to the proposed IEPs.

Under the requirements of IDEA set forth above, the Student’s needs could be met at or a public day school, and is unnecessarily restrictive.

# Conclusion.

The hearing officer decides that the School Board offered the Student a FAPE in the June 15, 2018 IEP and the May 21, 2019 IEP and that was inappropriate for the Student because it violates the LRE mandate. Accordingly, the Parents’ requested relief is denied.

# 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: 11 / 19 / 2019

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John V. Robinson, Hearing Officer

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

11-19-19 Decision

1. For purposes of this Decision, the hearing officer adopts the Parents’ practice of using only the gender while the Parents and the Student are referred to generically so as to preserve privacy. References to the verbatim transcript of the IDEA hearing are cited as “9/24/19 Tr. <page number>.” References to the Parents’ post-hearing Opening Brief are cited as 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>”. [↑](#footnote-ref-1)