**#20-057**

 **VIRGINIA DEPARTMENT OF EDUCATION**

**DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES**

**OFFICE DISPUTE RESOLUTION AND ADMINISTRATION SERVICES**

**VDOE Case No. 20‑057**

# **DECISION**

XXXXXXXXXX Public Schools XXXXXXXXXXX

**School Division Name of Parents**

XXXXXXXXXXXXXXX XXXXXXXXX

**Division Superintendent Name of Child**

Anne E. Mickey, Esquire Harold G. Belkowitz, Esquire

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

Robert J. Hartsoe, Esquire Parents/Child

**Hearing Officer Party Initiating Hearing**

**LEGEND**

Parents XXXX X XXXXXXXXXX

Mother XXXX XXXXXX

Father XXXXXXXXXX

Child XXXXXXX XXXXXX

LEA XXXXXXXXXXXXXX Public Schools

Supervisor XXXXXXXXXXX

Administrator XXXXXXXXXXXXX

Teacher XXXXXXXXX

Consultant XXXXXXXX

Physical Therapist XXXXXXX

Assistant Director XXXXXXX

**DECISION**

### **INTRODUCTION**

This matter was an extremely difficult case under the shadow of the Covid-19 virus which greatly affected deadlines. Material facts and law were greatly disputed. The Due Process Request included complex claims under IDEA as well as under Section 504. In this adversarial matter, the Parties and their counsel are commended for their presentation and professional manner - a blessing. For the reasons stated herein, the LEA is the prevailing party.

## **PROCEDURAL BACKGROUND:**

Pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEA), this matter came upon the Parent/Child’s Request for Due Process Hearing, filed on February 12, 2020, regarding the Child’s Individual Education Program (IEP), dated May 8, 2017, as amended. As a part of the Due Process Request, the Parents included claims of violations under Section 504 of the Rehabilitation Act of 1973. Several issues were raised and addressed as referenced in the PreHearing Reports which are filed herein and incorporated by reference.

# **ISSUES DEFINED:**

**I. Whether the LEA denied the Child FAPE by allegedly improper use of mechanical restraints for the 2017‑2018 school year?**

**II. Whether the LEA denied the Child FAPE by allegedly failing to create effective behavioral goals in the Child's IEP for the 2017‑2018 school year?**

**III. Whether the LEA denied the Child FAPE by allegedly failing to have and/or implement an effective Behavior Implementation Plan to address the Child's dropping and mouthing for the 2017‑2018 school year?**

**IV. Whether the LEA denied the Child FAPE by allegedly failing to have and/or implement an effective Behavior Implementation Plan to address the use of restraints for the 2017‑2018 school year?**

**V. Whether the LEA denied the Child FAPE by allegedly failing to provide physical therapy as a direct service in the 2017‑2018 school year and thereafter?**

**VI. Whether the LEA committed procedural errors under the IDEA regarding the May 7, 2018, IEP meeting where the Parent/Child alleges, under Issue No. 4 of the Due Process Complaint and, if so, did such errors deny the Child FAPE?**

**VII. If the LEA committed violations or procedural errors regarding the IEP or its implementation of FAPE under the IDEA, are any such violations barred by the statute of limitations?**

**VIII. Whether the LEA violated the Child's rights under Section 504 of the Rehabilitation Act by its use of mechanical restraints and/or its failure to document such use during the 2017‑18 school year and, if so, what are the remedies required?**

**IX. If the LEA is found to have violated Section of 504 of the Rehabilitation Act of 1973, are any such violations barred by the statute of limitations?**

## **PERTINENT TESTIMONY REVIEW:**

The Parent/Child called eight fact witnesses: the Mother, the Supervisor, Administrator, Teacher, Consultant, Physical Therapist, Assistant Director and the Father.

The Mother testified as a factual witness. She observed that the Child is constantly in motion unless resting. (Hearing Transcript (HO) at 38.) XX is not visual, but relies on touch and placing tangible items in XX mouth to learn of XX environment. (HR at 39.) In 2014, the Mother agreed with the IEP regarding the use of the “adapted seating." (HR at 45; Parent’s Exhibit 3, page 12.) An Independent Educational Evaluation (IEE) was arranged. (HR at 48-49.) The Child was to use the gait during Community Based Instruction (CBI). (HR at 60.) A Behavior Implementation Plan (BIP) was created on May 30, 2017. (HR at 69; Parent’s Exhibit 11.) The BIP set forth the protocol to address negative behaviors of the Child: mouthing, disruption and dropping. (Parent’s Exhibits 11 and 36; HR at 48-51.) Mouthing was observed to the Child's placing items in XX mouth for sensory evaluation. (*Id*.) Avoidance behavior by disruption, *e.g*., swiping items off XX desk. (*Id.*) Dropping was an escape behavior, *i.e.*, avoidance, *e.g*., by dropping to the floor. (*Id*.) On May 12, 2017, the Parents consented to the Child’s Individualized Education Program (IEP) (Parent’s Exhibit 5) which continued the use of the adaptive chair. On October 27, 2017, the Parties amended the IEP by agreement. (Parent’s Exhibit 14; HR at 76.) The Parties agreed to continue the use of the adaptive chair and, as evidenced by their signature, agreed to the expansion of its use to include “work tasks.” (*Id*.; HR at 77.) (The Mother testified that she signed the document without knowledge of the expansion, implying that the LEA inserted this provision into the Amendment without her knowledge or consent. (HR at 77-78.) There was a team meeting on February 12, 2018, regarding the Child. At that time, the LEA disclosed that it utilized the “lap belt” of the adaptive chair to restrict the Child’ movements for “convenience.” (HR at 82-85; Parent’s Exhibit 63.) In addition, the Parents expressed concerns regarding the Child and XX academic progress, toileting accidents and (*via* the email, dated August 12, 2018) “the amount of time [the Child] is belted into XX stroller.” (Parent’s Exhibit 63.) The Parties held a subsequent meetings on March 12, 2018, and April 6 and 24, 2018. (HR at 96, 98.) The Parents continued to have concerns. (*Id*.) By letter, dated April 10, 2018, the Parents notified the LEA against the use of restraints for the Child. (Parent’s Exhibit 23; HR at 103.) By email, dated April 11, 2018, the LEA responded to the notification with the explanation that the use of the “lap belts” was for the Child’s safety. (Parent’s Exhibit 25; HR at 109-110.) The Mother further testified that safety being a reason for the use of the lap belt was not communicated by the LEA prior to this email. (HR at 108-110.) The Mother observed the Child on April 5, 2019 and had concerns regarding the LEA’s implementation of the BIP. (HR at 117-118.) On May 7, 2018, the Parties conducted an IEP meeting. Beforehand, the Parents had requested an extension to allow a second observation of the Child at school as well as obtain and review LEA data. (HR at 121.) In response to the request, the LEA, *via* email dated May 4, 2018, stated that the IEP was necessary “due to the annual date expiring.” (Parent’s Exhibit 30; HR at 122.) Further, new dates from the Parents were requested. (Parent’s Exhibit 30.) The Parents received a draft IEP three days before the meeting and the LEA conducted the meeting. (HR at 124.) The Parents participated by telephone. (Parent’s Exhibit 34, page 1.) The Parents did not consent to the IEP. (HR at 124.) They did not believe they could meaningfully participate in the meeting without the data and observation. (HR at 123-124.) The Parents left the meeting and it continued in their absence creating a draft IEP, Exhibit 34. (HR at 129.) The Parties conducted two subsequent meetings on June 6 and 13, 2018. (HR at 129.) After the April 10, 2018, letter, the LEA stopped using the lap belt with the Child. (HR at 130.) The Child’s negative behaviors improved according to discussions with the LEA at the Parties’ IEP meetings after April 2018. (*Id*.) In the Fall of 2018, the Child switched schools to an “intensive program.” (HR at 132.) On November 16, 2018, the Parents consented to an IEP (Parent’s Exhibit 51.) Her understanding was that, under this IEP, the lap belt would only be used when the Child is involved with Community Based Instruction (CBI) (learning locations outside of the school, *i.e.*, not during routine academic activities in the school. (HR at 134.) The Child appeared to be happy in this new situation. On cross-examination, the Mother admitted that she was “very happy” with the Child’s academic progress after April 2018. (HR at 147.) As stated in the IEP Amendment, dated May 26, 2020, the Mother confirmed that, as of May 2020: “[the Parents] are pleased with the progress [of the Child] is making in all areas. They appreciate the attentiveness to [the Child’s] unique needs by all who the work with XX. They are happy with the opportunities for inclusion." (LEA Exhibit 57; HR at 148.) Prior to the Due Process Request, at no time have the Parents requested compensatory services or reimbursement for private expenses from the LEA *via* the IEP team. (*Id*.) The Mother admitted that she knew the LEA utilized a lap belt for the stroller and adaptive chair before February 2018. (HR at 149-150.) With the exception of the physical therapy, the Parents have not expressed concerns regarding the lap belt with the LEA since, at least, July 2018. (*Id*.) The existence of such knowledge by the Parents is consistent with the Mother’s testimony that the Child used a lap belt system with XX adaptive chair at home. (HR at 160-161; LEA’s Exhibit 9, page 6.) The implication was that the chair (depicted in Exhibit 9) was identical to the adaptive chair used at school, both with lap belts. Exhibit 9 is a power point, dated August 28, 2017, prepared by the Mother and given to the LEA in preparation of the Child’s attending school in the Fall, 2017. In February 2018, the Mother implied that the use of the lap belt was not objectionable, but the length of time of its use was of concern. (HR at 150.) She agreed that the Parents had notice of the May 7, 2018, IEP meeting before May 4, 2018. (HR at 184.) The Mother did not recall or refute the confirmation of notice to the Parents of the May 7th IEP Meeting on April 24, 2018, as contained in the IEP Meeting Request, dated May 2, 2018. (HR at 184-185; LEA’s Exhibit 31.) The Parents confirmed their attendance at the May 7th IEP meeting by email, dated May 4, 2018, LEA’s Exhibit 33. In response to the Mother’s request for data before the May 7th IEP meeting (LEA’s Exhibit 29), the LEA suggested, by email dated May 1, 2018, that the Mother schedule a meeting to review such data. (LEA’s Exhibit 30; HR 187-188, 199-201.) There was no evidence that the Mother made such an appointment before the May 7th IEP meeting. In regard to the observation of the Child in a school setting, the Mother was familiar with the process insofar as she conducted such action on about April 5, 2018. (HR at 191, 199-201, 207.) There was no evidence that the Mother arranged for such observation. Nevertheless, the Mother maintained that she terminated communication with the IEP team on May 7th because she did not have the data or the second observation. (HR at 189.) The Parents participated in five IEP meetings after the May 7th IEP meeting. (HR at 190-191.) The Mother’s testimony was credible for the most part, but discounted insofar as she was vague on certain key points and, at times, “cherry picked” details to advance her claim. Overall, her devotion to the Child was apparent and, while appropriate, was a source of bias. As a fact witness, her opinions were not considered.

The Supervisor was called as a fact witness. She works as a Special Education Supervisor for the LEA. (HR at 212.) She supervises a cluster of schools to ensure they are in compliance with the regulations which govern special education. (*Id.*) In March, 2018, the Parents shared concerns regarding the Child’s placement. (HR at 214.) She attended the Child’s IEP meeting on March 12, 2018. (HR at 215.) The use of the lap belt in the Rifton Chair was for the Child’s safety and posture. (HR at 251; Parent’s Exhibit 25.) As stated in the Email, dated April 11, 2018, from the Supervisor to the Mother, “...that due to safety concerns of falling, dropping to XX knees, crashing into furniture and walls, and sliding out of the Rifton Chair, the lap belts that are part of the stroller and Rifton Chair were utilized for safety and to prevent injury, not as a restraint.” (Parent’s Exhibit 25.) For the Child’s safety, the IEP required that an assistant or member of the teaching staff be with the Child at all times. (HR at 242.) Further, the Supervisor testified: “...staff was concerned that, because sometimes [the Child] would slide out of the adaptive chair and that XX could move very quickly, and then would start to navigate around the room and would trip or fall and hit into a wall or furniture occasionally. But, it wasn't the main reason why those devices were being used. They were ‑‑ I recall conversation about the fact that the Rifton “the adaptive chair and the stroller actually helped XX with XX posture and also signaled it was time to learn.” (HR at 243.) The Child did not need to be “strapped” to the chair “all day” for safety because of the existence of the adult assistant. (HR at 247.) Similarly, the use of the lap belt “all day” was also unneeded for the Child to learn, due to the BIP. (*Id*.) The Supervisor observed the Child in the classroom on two or three occasions during the 2017-2018 school year. (HR at 269.) In regard to the May 7th IEP meeting, the Supervisor testified that the Parents started the meeting by telephone and then asked that it be adjourned. (HR at 280.) In response, the other members of the IEP team elected to continue because “[the LEA had sent notification of the meeting time and date in advance, and the location. And we had also sent the draft, I think three days prior. And at that point we asked if the parents would at least like to stay on the phone to go through the present levels. We ensured them that no changes could or would be made without their consent. Prior to the family getting off the phone, we had already scheduled our next meeting.” (*Id*.) The Parents were invited to remain in the meeting which was rejected. (HR at 281.) While the IEP continued to discuss the contents of the draft IEP, no changes were made in the absence of the Parents. (*Id*.) The Supervisor’s testimony was credible and persuasive. Her opinions were not considered insofar as she was not qualified as an expert by any party.

The Administrator testified as a fact witness. Although implied but not stated, the Administrator appears to be the Assistant Principal at the Child’s school for the 2017-2018 school year. (HR at 322.) She testified that the Child could transition through the classroom with the use of a gait belt and hand holding with the adult attendant. (HR at 306.) She attended the IEP meeting on February 12, 2018. (HR at 308.) The letter, dated April 10, 2018, Parent’s Exhibit 23 (wherein the Parents requested the LEA not to use the lap belt) was the first indication the Administrator (and the LEA) received from the Parents (over countless meetings and contacts) that the use of the lap belt was a concern to the Parents. (HR at 317-318.) Instead, the Administrator recollected that the Parents were concerned about the amount of time the Child spent in the seat, not the use of the lap belt. (HR at 316-317.) The Administrator testified that "...any time [the Child] was seated in the stroller, we took off XX helmet to give XX a break with XX helmet, and so for safety reasons, due to frequent seizures, staff would have the lap belt so that ‑‑ you know, so that XX wouldn't fall out and potentially hit XX head and injure XXself." (HR at 318‑319.) The Child’s attendant is used for many reasons including safety. (HR at 319.) The targeted behaviors in the BIP include dropping, mouthing, disruption. (HR at 322.) The Child’s data sheets were routinely reviewed by staff. (*Id*.) On cross-examination, the Administrator clarified that the Child did not continuously sit in the chair for hours at a time. (HR at 342.) She observed the Child in the classroom at least once a week. (HR at 343.) The Child is subject to frequent seizures. (HR at 346.) The use of the lap belt was to protect the Child from injury in the event of a seizure because the helmet is removed when the Child is in the chair. (*Id*.) LEA staff was trained by a physical therapist regarding the use of the lap belt in the chair and stroller. (HR at 349.) The lap belt is necessary even with the attendant. (HR at 354-355.) A seizure could occur while the attendant is manipulating materials or, in an instant, not in a position to prevent the Child from falling. (HR at 355.) The Administrator’s testimony was credible and persuasive. Her opinions were not considered insofar as she was not qualified as an expert by any party.

The Teacher testified as a fact witness. She was the Child’s special education teacher for 2017/2018 school year for XX XXX grade. (HR at 368.) She taught in a self-contained classroom consisting of special education students. (*Id*.) Although not qualified to provide expert opinions, her description of the Child's disabilities appears not to disputed. (*Id*.) She observed that, under the Child's IEP, XX was a student with intellectual disability and other health impairments due to seizure disorder, XXXXXXXXX XXXXXX, a disorder that is a rare form of epilepsy. (*Id*.) XX presented with profound delays in XX cognition, social/emotional, motor, communication, and adaptive skills. (*Id*.) XX had pretty severe delays. (*Id*.) XX was a mobile student, ambulatory. (*Id*.) XX condition caused XX also to be very often very tired and sleepy and in need of a lot of rest in the chair. (HR at 369.) The Child can suffer seizures at anytime during the day. (HR at 371.) XX BIP addressed XX three target behaviors, mouthing, dropping and disruption. (HR at 373.) The use of the lap belt in the chair was for safety as well as for posture and learning. (HR at 390-391; 433-434.) The Child lacked safety awareness. (HT at 394.) The attendant must ensure that the Child does not swallow items or slam into walls. (HT at 392-394.) The Child was not potty trained. (HR at 399.) The Child was out of XX chair for more than two hours. (HR at 402.) The Child had a tendency to elope or walking five feet from the attendant. (HR at 429.) The Teacher attempted to seat the Child without the lap belt, which resulted in avoidance behavior. (HR at 434.) The attendant is not a substitute for the belt especially where random seizures are involved and the helmet is not worn. (HT at 446-448.) The Teacher was trained in the use of the chair and its lap belt by a physical therapist. Parent’s Exhibit 59 are “data goals” created by different LEA employees and contains raw data for the Child’s daily progress. (HR at 461-467.) Parent’s Exhibit 61 is the Child’s record of seizures at school. (HT at 468-469.) Upon cross-examination, the Teacher confirmed that the use of the chair and stroller was consistent with the accommodations described by the IEP. (HR at 473.) The Teacher would have additional discussions with the physical therapist about the use of the chair throughout the school year. (HR at 475.) Although not qualified as an expert, the Teacher observed that the Child made academic progress in the 2017-2018 school year. (HT at 475.) In addition to safety, the attendant was required: to effectuate the BIP by redirecting the Child's task, mixing the preferred work by the Child with the non-preferred work; to provide positive reinforcement as need; to facilitate communication by manipulating the paper or symbol exchange; to assist the Child in using the toilet; and, to assist in data collection. (HR at 476-478.) Seizures occurred at any time regardless if the Child was awake, sleeping, sitting or standing. (HR at 480.) The Teacher’s testimony was credible and persuasive. Her opinions were not considered insofar as she was not qualified as an expert by any party.

The Consultant was called as a fact witness. She worked as an autism consulting teacher for the LEA for the 2017-2018 school year. (HR at 501, 504.) She had worked with the Child since preschool, approximately two years previous. (HR at 501-502.) She attended most of the Child’s IEP and bimonthly team meetings. (HR 504-505.) The Child was subject of a BIP and an Independent Educational Evaluation in 2016. (HR at 506-507, 509; Parent’s Exhibits 11 and 4.) The Consultant clarified her statements regarding Parent’s Exhibit 13 by stating that she misunderstood the Teacher’s original chart. (HR at 520-521.) Specifically, the Consultant misunderstood the time the Child actually was in the stroller when she responded to the email. (*Id*.) The LEA employees (who directly worked with the Child) gathered data daily on XX progress regarding IEP goals. (HR at 521-522, 525.) She played the lead role in collecting this important data and creating an Excel spreadsheet, Parent’s Exhibit 54. (HR at 523-525.) Exhibit 54 is the raw data regarding the Child’s targeted behaviors as referenced in the BIP and IEP for the 2017/2018 school year. (HR at 524-526.) She checked the data to ensure accuracy. (HR at 530.) Despite her efforts, the data and charts may have issues due to software. (HR at 532-536; 541-546.) In the Spring of 2018, the occasions and LEA professionals conducted several discussions regarding the Child’s behavior, sleepless nights, seizures, target behaviors, safety and related issues. (HR at 535-541.) The existence of the attendant was for safety and curriculum access. (HR at 541, 563-566.) The Consultant attended the IEP meeting of February 12, 2018. (HR at 456.) The Parents expressed a desire for the Child to receive ESY services during the Summer including the use of familiar LEA staff. (HR at 548.) There were concerns regarding the Child’s time sitting in the chair or stroller and its impact on XX wetting XXself. (HR at 554.) The Consultant attended the April 6, 2018 IEP meeting. (*Id*.) The Parents requested the Teacher to disclose the amount of time the Child sat in a chair or stroller during the school day and, in response, the teacher gave a general answer or “guesstimate.” (HR at 555-556.) In the 2017/2018 school year, the Consultant specifically observed the Child on at least fifty occasions in XX academic environment. (HR at 556-557.) Because of her affection and longtime relationship with the Child, the Consultant interacted with the Child weekly if not daily. (HR at 558-560.) Parent’s Exhibits 57 and 58 reference the raw data of the Child’s target behaviors after April 2018, when the lap belt was discontinued. (HR at 586-587.) The Consultant attempts to be accurate in data collection. (HR at 593.) The Consultant’s testimony was credible and persuasive. Although later qualified as an expert by the LEA, her opinions rendered as a witness for the Parents were not considered insofar as she was called as a fact witness, not designated by the Parents as an expert.

The Physical Therapist was called as a fact witness. She works for the LEA as a physical therapist. (HR at 599.) She worked with the Child during the 2017/2018 school year. (*Id*.) The physical therapist worked with the Child to achieve IEP goals. (HR at 600-602.) On cross-examination and although not qualified as an expert, the Physical Therapist observed that the Child completed the applicable goals under the IEP. (HR at 604.) The Physical Therapist’s testimony was credible and persuasive. Her opinions were not considered insofar as she was not qualified as an expert by any party.

The Assistant Director was called as a fact witness. She works as one of the assistant directors for the LEA and supervises supervisors in the individual schools. (HR at 627.) Parent’s Exhibit 4 is the IEP requested by the Parents in 2016. (HR at 630.) The Assistant Director was found to be credible and persuasive.

The Father testified as a fact witness. Although not designated as an expert, he observed that the Child suffered from different types of seizures usually when XX is asleep. (HR at 644-655.) For the 2017-2018 school year and apart from the IEP, the Parents presented a “power point” to LEA staff at the beginning of the year, LEA Exhibit 9. (HR at 644-645.) The purpose was to educate LEA staff as to procedures when the Child suffers a seizure. (HR at 647-648.) He observed that the Child needs frequent movement and becomes frustrated when such movement is prevented. (HR at 663.) The Father testified that, by implication, certain terms in the 2017/2018 IEP as amended were not disclosed to the Parents before consent was provided. (*Id*.) (The inference is that the LEA inserted terms into these documents without the Parents knowledge before consent.) The Parents learned of the “excessive use” of the lap belt during February 18, 2018 meeting. (HR at 685.) The Parents have not requested compensatory services or reimbursement for private services in the agreed-upon IEPs for the two school years after the 2017-2018 school year. (HR at 687.) The Father was found to be credible, but discounted due to his relationship with the Child. As a fact witness, his opinions were not considered.

The Parent’s rested their case, subject to calling rebuttal witnesses.

The LEA called one witness: the Consultant.

The Consultant testified as a fact witness with an expert designation. She was qualified as an expert witness in the field of the development and monitoring of special‑education programs for students with disabilities. (HR at 714-715.) She testified that she was professionally involved in the academic development of the Child for three years prior to the 2017-2018 school year. (HR at 721.) As a consultant, she was part of the LEA team regarding the Child’s education for this school year. (*Id*.) She would train and monitor LEA staff as to the comprehensive requirements of the Child and XX IEP. (HR at 721-722.) She observed the Child biweekly in XX academic setting fifty to sixty times during the 2017-2018 school year. (HR at 723.) She attended a lot of IEP and Team meetings regarding the Child. (*Id.*) The LEA’s Team meeting were held bimonthly and lasted approximately thirty minutes to an hour wherein all topics regarding the Child were discussed. (HR at724.) The Parents participated in the Child’s meetings and provided input freely. (HR at 724-725.) The Consultant attended the IEP Meeting on May 8, 2017, producing the Child’s IEP for the 2017-2018 school year. (HR at 725-726; LEA Exhibit 2.) The IEP was the result of a very collaborative team including the Parents. (HR at 724-725, 728; 793-794.) The Consultant opined that this IEP required “a very systematic behavior‑intervention plan.” (HR at 726.) This was a result of an elevated number of seizures suffered by the Child in April, 2017. (HR at 727.) In response to the inquiry of whether the Consultant, during observations, saw the Child in seated and non‑seated positions, the Consultant stated that the Child "... was out of XX seat as many observations as XX was in. XX was a child who enjoyed movement. And XX had a little bit of breaks as part of XX IEP. And XX also was free to move about and request ‑‑ again, XX was not seated during any of XX sensory activities unless XX chose to be seated, but mostly, XX was not. And during choice, XX was not seated. XX could play on the floor or wherever XX chose.” (HR at 738-739.) The IEP (as amended for the 2017-2018 school year) was appropriated. (HR at 744.) The IEP allowed for implementation of behavioral correction protocols as well as methods to communicate to the Child--despite XX disabilities. (HR at 751-754.) The BIP was appropriate for the Child given XX unique academic requirements. (HR at 755-761.) On cross-examination, the Consultant stated that she is not a seizure expert. (HR at 767.) The purpose of the lap belt was not to modify behavior. (HR at 772.) The use of the adaptive chair was required by the IEP for the Child’s safety. (LEA Exhibit 2; HR at 772-773.) The lap belt was part of the adaptive chair. (HR at 772.) With the lap belt and given ”XX developmental profile, [the Child] was learning to accept commands and complete work tasks, having been introduced to sensory and then choice [consistent with the IEP and BIP].” (*Id*.) The Child could possibly learn without a lap belt but XX progress would be slowed. (HT at 775.) However, the failure to use the lap belt would place the Child in danger; learning and safety cannot be separated. (HR at 794-795.) The Consultant was found to be extremely credible, unbiased and persuasive based on her expertise, experience, extensive contact with the Child over two years, extensive knowledge of the Child’s academic and social progress, extensive knowledge of the Child’s educational record, extensive observation of the Child in an academic setting over years and the apparent affection for the Child.

In rebuttal, the Parents called the Mother as a fact witness. Her testimony implied that the Consultant’s reliance upon the Child’s use of a toy as an indication of academic progress in the 2017-2018 school year was flawed. (HR at 799-800.)

## **FACTUAL FINDINGS (By a Preponderance of the Evidence)[[1]](#footnote-1)**

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

1. The IEP for the 2017-2018 school year is LEA Exhibit 2 (“Current IEP.”).
2. The Child’s medical history as contained in the IEP for the 2017-2018 school year and contained (under LEA Exhibit 2, page 2, section “Medical History,”) is true and states:

[The Child] has a significant medical history for a diagnosis of XXXXXXXX, a form of Epilepsy. XX began having seizures in November, 2010 and was formally diagnosed in February 2011. XX seizures were described as drop seizures that occur in clusters. [The Child] wears a padded helmet to protect XX during XX seizures. XX is currently taking medications to try to control XX seizures. [The Child’s] parents report that [XX] lost developmental skills following the onset of the seizures, and that it is not taking longer for XX to gain new skills. On 8/30/12, [the Child] was given a new medical diagnosis of XXXXXXXXXXXXXXX. [The Child] has been identified as having an Intellectual Disability as well as Other Health Impairment by [the LEA in regard to IEPs. The Child] has delays in all areas of development (Cognitive, Social/Emotional, Motor, Communication, and Adaptive.) [The Child] has uncontrolled seizures everyday, most often occurring during sleep.

1. The Child’s Functional Behavior Assessment as referenced in the Decision and pleadings is found as LEA’s Exhibit 4.
2. The Child’s Behavior Intervention Plan as referenced in the Decision and the pleadings is found as LEA’s Exhibit 5.
3. The Child’s Behavior Intervention Plan (LEA’s Exhibit 5) was appropriate and provided the Child FAPE.
4. The LEA staff properly implemented the Child’s Behavior Intervention Plan, LEA Exhibit 5.
5. The Child’s Independent Education Evaluation as referenced in the Decision and the pleadings is Parent’s Exhibit 4.
6. The Parents knowingly and voluntarily consented to the Amendment of Current IEP on November 2, 2017 (as evidenced by their signature in LEA Exhibit 14) to expand the use of the adaptive chair to include "work tasks."
7. The Current IEP was amended on February 12, 2018, by consent of the Parents as found in Parent’s Exhibit15.
8. The Current IEP was appropriate and provided the Child FAPE.
9. The LEA properly implemented the Current IEP and provided the Child FAPE.
10. For the 2017-2018 school year, the LEA provided the Child FAPE.
11. The Current IEP was replaced on November 19, 2018, when the Parents consented to a subsequent IEP as found in Parent’s Exhibit 51 (November 2018 IEP).
12. The November 2018 IEP was amended on October 1, 2019, by consent of the Parents as found in LEA Exhibit 52.
13. The November 2018 IEP was replaced on November 6, 2019, when the Parents consented to a subsequent IEP as found in Parent’s Exhibit 53 (November 2019 IEP).
14. The November 2019 IEP was amended on May 26, 2020, by consent of the Parents as found in LEA Exhibit 57.
15. On June 25, 2018, the Child underwent an extensive Psychological Evaluation as described in the document entitled “Psychological Evaluation,” LEA Exhibit 44.
16. As stated in LEA Exhibit 57, the signed Amended IEP, dated May 26, 2020, and as of May, 2020: “[The Parents] are pleased with the progress [the Child] is making in all areas. They appreciate the attentiveness to [the Child’s] unique needs by all who work with XX. They are happy with the opportunities for inclusion.”
17. Prior to the Due Process Request, at no time have the Parents requested compensatory services or reimbursement for private expenses from the LEA *via* the IEP team or otherwise.
18. The letter, dated April 10, 2018, Parent's Exhibit 23 (wherein the Parents, by counsel, requested the LEA not to use the lap belt) was the first indication the LEA received from the Parents (over countless meetings and contacts) that the use of the lap belt was a concern to the Parents.
19. The LEA stopped using the lap belt in April 2018.
20. The Parents knew the LEA utilized a lap belt for the stroller and adaptive chair before February 2018.
21. With the exception of the physical therapy, the Parents have not expressed concerns regarding the lap belt with the LEA since, at least, July 2018.
22. LEA personnel involved in implementing the Child’s various IEP-related services were duly qualified.
23. The LEA employees (who directly worked with the Child) duly gathered data daily on XX progress regarding IEP goals.
24. The Parents had reasonable notice of the May 7, 2018, IEP meeting.
25. The Parents attended the May 7th IEP meeting by telephone.
26. The Parents voluntarily terminated their participation in the May 7th IEP meeting without excuse, legal or otherwise.
27. Despite LEA request, the Parents did not make timely and proper arrangements to review data before the May 7th IEP meeting.
28. Despite LEA’s request, the Parents did not make timely and proper arrangements to observe the Child before the May 7th meeting.
29. The LEA properly conducted the May 7th IEP meeting after the Parent’s terminating their participation.
30. The LEA did not change the Current IEP during the May 7th IEP meeting.
31. The Parties conducted multiple, subsequent IEP meetings after the May 7th IEP meeting, creating a subsequent IEP, consented to by the Parents.
32. While the Child could possibly learn without a lap belt, XX progress would be slowed.
33. The failure to use the lap belt would place the Child in danger; *i.e.*, seizures with no helmet.
34. The Child could suffer seizures at any time regardless if the Child was awake, sleeping, sitting or standing.
35. The IEP’s requirement for an attendant was for multiple reasons including safety and access to academic requirements.
36. The lap belt was required despite the existence of the IEP attendant due to the attendant’s multiple IEP tasks and the Child’s safety.
37. The Child suffered an elevated number of seizures in the 2017-2018 school year on or before April 2017.
38. During the 2017-2018 school year and in seated and non‑seated positions, the Child was out of XX seat as many as XX was in; XX enjoyed movement.
39. The Child greatly benefitted from the Parents extreme involvement in XX education.
40. The Due Process Request was filed on February 12, 2020.
41. All IDEA claims on or before February 12, 2018, are barred by the statute of limitations.
42. All Section 504 claims are barred by the applicable statute of limitations.
43. LEA complied with all procedural requirements under the IDEA as to matters raised by the Due Process Complaint.
44. No persuasive evidence was introduced regarding compensatory services.
45. No persuasive evidence was introduced as to damages under Section 504.
46. No persuasive evidence was introduced that the LEA acted in bad faith in regard to the use of the lap belt.
47. No persuasive evidence was introduced that the use of the lap belt by the LEA constituted gross misjudgment.

### ANALYSIS:

**Legal Analysis**

Major areas of the law were disputed by the Parties.

In Board of Education v. Rowley, 458 U.S. 176, 207, 102 S.Ct. 3034 (1982), the Supreme Court found that a disabled child is deprived of FAPE under either of two sets of circumstances: (1) if the LEA has violated IDEA’s procedural requirements to such an extent that the violations are serious and detrimentally impact upon the disabled child’s right to FAPE; or (2) if the IEP that was developed by the LEA is not reasonably calculated to enable the disabled child to receive an educational benefit. Further, the Supreme Court opined [i]nsofar as a State is required to provide a handicapped child with [FAPE], we hold that this satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction. (Rowley, 458 U.S. at 200.) In Hall v. Vance County Board of Education, 774 F.2d 629, 636 (4th Cir. 1985), the Court opined that no single substantive standard can describe how much educational benefit is sufficient to satisfy IDEA and that educational services must be reasonably calculated to produce more than some minimal academic achievement. (*See* Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988), where the Court stated that IDEA “calls for more than a trivial educational benefit,” but requires that the child receive a meaningful benefit and an opportunity to receive significant learning.)

In this administrative due-process proceeding initiated by the Parent/Child, they have the burden of proof. Schaffer, *ex rel*. Schaffer v. Weast, 126 S.Ct. 528 (2005). The standard of proof is a preponderance of the evidence. County Schl. Bd. of Henrico County v. Z.P., 399 F.3d 298, 304 (4th Cir. 2005).

In DeVries v. Fairfax County School Bd., 882 F.2d 876, 878 (4th Cir. 1989), the Court recognized the importance of mainstreaming when it opined that [m]ainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with non-handicapped children is not only a laudable goal but is also a requirement of the Act. *In accord* Barnett v. Fairfax County School Bd.*,* 927 F.2d 146, 153 (4th Cir. 1991).

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

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

A review of Smith is important to emphasize the restrictions, constraints or limitations placed on hearing officers when deciding IDEA cases in Virginia. Although a child is involved, current law prevents an hearing officer’s reviewing evidence as a Virginia juvenile district court judge must review in a custody matter with the “best interests of the child” standard as described in 20-124.3 of the Virginia Code. Instead, hearing officers must respect the limitations that evidence, **especially expert testimony**, determine the outcome in IDEA cases as well as respect the Federal directive that IEPs are reviewed with the standard established by Rowley and its progeny. The difference between the standard established by the “best interests of the child” and the standard established by Rowley (and its progeny) can never be reconciled. Quite frankly, this difference causes a great deal of litigation, cost and heartache. Educational determinations by LEA experts involved in the Child's education are entitled to deference. A.B. v. Lawson, 354 F. 3rd 315 at 328 (4th Cir 2004); Hartmann v. Loudoun County Board of Education, 118 F.3rd 996, 1001 (4th Cir. 1997).

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

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

Similarly, in E. L. v. Chapel Hill‑Carrboro Bd. of Educ., 773 F.3d 509, 517 (4th Cir. 2014), the Court confirmed that it afforded “**great deference to the judgment of education professionals in implementing the IDEA.”** As long as an individualized education program provides the basic floor of opportunity for a special needs child, **a court should not attempt to resolve disagreements over methodology**. [Emphasis added.] *In accord,* O.S. v. Fairfax County Sch. Bd., 804 F.3d 354, 360 (4th Cir. 2015). Reviews of Heffernan and E.L. are important to show that the Parent was required to prove, by a preponderance of the evidence, that RPS denied the Child FAPE by failing to implement material portions of the Current IEP. In other words, a court, a hearing officer or a parent cannot micro-manage the implementation of an IEP, deferring to the expertise of LEA professionals.

In R.F. v. Cecil County Pub. Sch., 919 F.3d 237 (4th Cir. 2019), *cert. denied* 140 S. Ct. 157 (Oct. 7, 2019), the Court found that “...an ALL must answer each of the following in the affirmative to find that a procedural violation of the parental rights provisions of the IDEA constitutes a violation of the IDEA: (1) whether the plaintiffs alleged a procedural violation, (2) whether that violation significantly impeded the parents’ opportunity to participate in the decision‑making process regarding the provision of a FAPE to the parents’ child, and (3) whether the child did not receive a FAPE as a result.”

Section 504 of the Rehabilitation Act prohibits discrimination based on a student's disability. 34 CFR 104.1. To establish a violation of Section 504, the parents must prove that the student was subjected to discrimination solely based on his disability. Power *ex* *rel.* Power v. Sch. Bd. of the City of Virginia Beach, 276 F.Supp.2d 515, 519 (E.D. Va. 2003) (*citing* Pandazides v. Virginia Bd. of Educ., 14 F.3d 823, 833 (4th Cir. 1994)). To prove discrimination in the educational context, "something more than a mere failure to provide [FAPE] required by [the IDEA] must be shown." Sellers v. Sch. Bd. of Manassas, 141 F.3d 524, 529 (4th Cir. 1998). The Parents must demonstrate that the School Board acted with "bad faith or gross misjudgment." *Id*.; *see also* Greenhill v. Loudoun Cty. Sch. Bd., 2020 BL 61841, 11 (E.D. Va. Feb. 20, 2020). Demonstrating that a School Board acted with bad faith or with gross misjudgment is "extremely difficult," due to the "great deference to which local school officials' judgments are entitled." B.S. v. Parkman, 2018 BL 532031, 5 (E.D. Va. Aug. 02, 2018)(*citing* Doe v. Arlington Cty. Sch. Bd., 41 F. Supp. 2d 599, 608‑09 (E.D. Va. 1999).) A mere claim of negligence is insufficient to make out a Section 504 claim. Sellers, 141 F.3d at 529. A mere disagreement with a student's IEP or Section 504 plan or a disagreement with the "administration" of these plans is also not enough to meet the "high bar" required to establish a claim under Section 504. Greenhill v. Loudoun Cty. Sch. Bd., 2020 BL 61841, 12 (E.D. Va. Feb. 20, 2020)(internal citations omitted). Bad faith or gross misjudgment also requires "something more" than showing non‑compliance with applicable federal statutes; the "non‑compliance must deviate so substantially from accepted professional judgment, practice, or standards as to demonstrate that the defendant acted with wrongful intent." D.N. v. Louisa Cty. Pub. Sch., 156 F. Supp. 3d 767, 776 (W.D. Va. 2016)(*citing* M.Y. ex rel. J.Y. & D.Y. v. Special Sch. Dist. No. 1, 544 F.3d 885, 890 (8th Cir. 2008)); *see also* Greenhill v. Loudoun Cty. Sch. Bd., 2020 BL 61841, 12 (E.D. Va. Feb. 20, 2020). *See* Barnett v. Fairfax County Sch. Bd., 721 F. Supp. 755, 756 (E.D. Va. 1989)(“before damages can be sought for basic education claims such as those under 504, there must be a showing of bad faith or intentional discrimination.”)

The federal regulations implementing the IDEA impose a two‑year statute of limitations on parties who wish to file due process complaints. 34 C.F.R. 300.507(a)(2); 8 VAC 20‑81‑150(E); *see also* Torda v. Fairfax Cnty. Sch. Bd., No. 1:11cv193 (GBL/TRJ), 2012 BL 153450 E.D. Va. 2012) (“administrative complaints brought under IDEA are subject to a two‑year statute of limitations”), *aff’d* Torda v. Fairfax Cnty. Sch. Bd., 517 Fed. Appx. 162 (4th Cir. 2012).

Claims arising under Section 504 are subject to a one‑year statute of limitations period. (See J.S. ex rel. Duck v. Isle of Wight Cnty. Sch. Bd., 402 F.3d 468, 474‑75 (4th Cir. 2005.) Section 504's one‑year statute of limitations begins to run when a plaintiff's cause of action accrues, or when the plaintiff possesses "sufficient facts about the harm done, that reasonable inquiry will reveal his cause of action." Nasim v. Warden, Md. House of Corr., 64 F.3d 951, 955 (4th Cir. 1995), *citing* United States v. Kubrick, 444 U.S. 111, 122‑24 (1979).

Many courts have declined to toll the statute of limitations period of both the IDEA and Section 504 on behalf of a student's minority status because to do so would *inter alia*, be inconsistent with the policy goal of both statutes to resolve disputes promptly. (See Emery v. Roanoke City Sch. Bd., 432 F.3d 294, 300 (4th Cir. 2005)(“In most instances, parents and their disabled child will jointly bring suit under the IDEA in diligent fashion. A disabled child will be able to require a school district to provide him a FAPE when he can still realize its benefits, and parents who incur costs will be able to obtain appropriate reimbursement...We are not free to relax the constitutional requirements of standing or statutory limitations periods in order to keep a school district obligated for events that occurred so many years ago.”); Sellers v. Sch. Bd. of Manassas, 141 F.3d 527‑28 (4th Cir. 1998) (“[Plaintiffs] base their claims on events that occurred as far back as the fourth grade. Yet they did not file their complaint until [the student] was eighteen years old. To entertain [Plaintiffs] claims thus seems inconsistent with a scheme structured to encourage prompt resolution of special education disputes.”) (internal citations omitted); Alexopulos v. S.F. Unified Sch. Dist., 817 F.2d 551, 555‑556 (9th Cir. 1987)("It is reasonable to assume that Congress expected and intended the child’s representative to file actions and apply for hearings on his behalf near the time the contested event occurred. The child may not later come before a court and invoke the tolling provisions of state statutes."); Manning v. Fairfax Cnty. Sch. Bd., 176 F.3d 235, fn1 (4th Cir. 1999) (*upholding* Alexopulos); A.T. v. Dry Creek Joint Elem. Sch. Dist., No. 2:16‑cv‑02925‑MCE‑DB, 2017 BL 211338, \*5 (E.D. Cal. Jun. 16, 2017) (noting that if minor tolling applied, school divisions could be “held hostage” for up to 15 years for a student’s Section 504 claims); Piazza v. Florida Union Free Sch. Dist., 777 F.Supp.2d 669, 691 (S.D. N.Y. 2011) (“Application of [the state’s] minority tolling provision, which would allow claims to be brought years after they accrued and often after any effective remedy could be fashioned that could improve the student’s educational program, is fundamentally inconsistent with [federal policy.]”); Vick v. Hancock Cnty. Bd. of Educ., No. 5:07CV66 (STAMP), 2008 BL 43396, fn5 (N.D. W.Va. Mar. 4, 2008) (“[c]laims pursuant to the IDEA are generally not tolled by a student’s minority status because the Act is designed to assure that representatives of the handicapped children [will] promptly assert the children’s educational rights’ and to permit tolling during a child’s minority would undercut this federal policy.”)

Implementation of a Rifton chair (with its lap belt), even when not explicitly described in an IEP, cannot demonstrate a violation of Section 504 in at least one jurisdiction. *See* Ricks *ex rel*. M.R. v. State of Hawaii Dep't of Educ., 752 Fed. Appx. 518 (9th Cir. 2019, unpublished). (“The undisputed fact that use of the Rifton chair was not documented in M.R.'s Individualized Education Program or Behavioral Plan, standing alone, is insufficient to render the DOE liable as a matter of law under Section 504.”)

### Specific Issues

##### I. Whether the LEA Denied the Child FAPE by Allegedly Improper Use of mechanical restraints for the 2017‑2018 school year?

The Parents failed to carry the burden of proof on this issue. In fact, there was no evidence, expert or otherwise, that the use of the lap belt negatively affected the Child’s receiving FAPE. Specifically, there was no evidence from an expert supporting the claims raised by the Due Process Request who: observed the Child in a classroom setting sufficiently to form an opinion; reviewed the records (including the potential discrepancies between data collection and charting as may be found in the Consultant’s testimony; reviewed the BIP and its implementation, *etc*. Similarly, there was no evidence, expert or otherwise, on damages arising from a denial of FAPE. In contrast, the Consultant stated, as an expert, that the Child required the lap belt for reasons of both safety and curriculum access and, further, that the Child would learn at a slower pace without the use of the lap belt. Finally, the overwhelming evidence was that the Child progressed academically in the 2017-2018 school year under the Current IEP.

##### II. Whether the LEA denied the Child FAPE by its allegedly failing to create effective behavioral goals in the Child's IEP for the 2017‑2018 school year?

The Parents failed to carry the burden of proof on this issue. There was no credible evidence, expert or otherwise, that the LEA failed to create effective behavior goals in IEP for the 2017-2018 school year. With that stated, the implication of the issue is that the use of the lap belt robbed the IEP of its legitimacy regarding behavior goals. In fact, there was no evidence, expert or otherwise, that the use of the lap belt negatively affected the Child's receiving FAPE. Specifically, there was no evidence from an expert supporting the claims raised by the Due Process Request who: observed the Child in a classroom setting sufficiently to form an opinion; reviewed the records (including the potential discrepancies between data collection and charting as may be found in the Consultant's testimony; reviewed the BIP and its implementation, etc. Similarly, there was no evidence, expert or otherwise, on damages arising from a denial of FAPE. In contrast, the Consultant stated, as an expert, that the Child required the lap belt for reasons of both safety and curriculum access and, further, that the Child would learn at a slower pace without the use of the lap belt. Finally, the overwhelming evidence was that the Child progressed academically in the 2017‑2018 school year under the Current IEP.

##### III. Whether the LEA denied the Child FAPE by allegedly failing to have and/or implement an effective Behavior Implementation Plan to address the Child's dropping and mouthing for the 2017‑2018 school year?

The Parents failed to carry the burden of proof on this issue. There was no credible evidence, expert or otherwise, that the BIP and its implementation failed to address the Child’s target behaviors, *i.e*., dropping and mouthing, for the 2017-2018 school year. With that stated, the implication of the issue is that the use of the lap belt robbed the BIP of its legitimacy. In fact, there was no evidence, expert or otherwise, that the use of the lap belt negatively affected the Child's receiving FAPE. Specifically, there was no evidence from an expert supporting the claims raised by the Due Process Request who: observed the Child in a classroom setting sufficiently to form an opinion; reviewed the records (including the potential discrepancies between data collection and charting as may be found in the Consultant's testimony; reviewed the BIP and its implementation, etc. Similarly, there was no evidence, expert or otherwise, on damages arising from a denial of FAPE. In contrast, the Consultant stated, as an expert, that the Child required the lap belt for reasons of both safety and curriculum access and, further, that the Child would learn at a slower pace without the use of the lap belt. Finally, the overwhelming evidence was that the Child progressed academically in the 2017‑2018 school year under the Current IEP.

##### IV. Whether the LEA denied the Child FAPE by allegedly failing to have and/or implement an effective Behavior Implementation Plan to address the use of restraints for the 2017‑2018 school year?

The Parents failed to carry the burden of proof on this issue. There was no credible evidence, expert or otherwise, that the BIP and its implementation was ineffective for the 2017-2018 school year. With that stated, the implication of the issue is that the use of the lap belt robbed the BIP of its legitimacy. In fact, there was no evidence, expert or otherwise, that the use of the lap belt negatively affected the Child's receiving FAPE. Specifically, there was no evidence from an expert supporting the claims raised by the Due Process Request who: observed the Child in a classroom setting sufficiently to form an opinion; reviewed the records (including the potential discrepancies between data collection and charting as may be found in the Consultant's testimony; reviewed the BIP and its implementation, *etc*. Similarly, there was no evidence, expert or otherwise, on damages arising from a denial of FAPE. In contrast, the Consultant stated, as an expert, that the Child required the lap belt for reasons of both safety and curriculum access and, further, that the Child would learn at a slower pace without the use of the lap belt. Finally, the overwhelming evidence was that the Child progressed academically in the 2017‑2018 school year under the Current IEP.

##### V. Whether the LEA denied the Child FAPE by allegedly failing to provide physical therapy as a direct service in the 2017‑2018 school year and thereafter?

Withdrawn by the Parents.

##### VI. Whether the LEA committed procedural errors under the IDEA regarding the May 7, 2018, IEP meeting where the Parent/Child alleges, under Issue No. 4 of the Due Process Complaint and, if so, did such errors deny the Child FAPE?

The overwhelming evidence was that no procedural errors were committed by the LEA regarding the IEP meeting held on May 7, 2018. There is no basis for a parent to demand data or classroom observations to avoid participation in the IEP process, *i.e.*, hold the process hostage, because a parent’s consent is necessary to complete the process (in the absence of a Due Process Request filed by a LEA). The essence of the IEP process is cooperation and communication. There is no evidence that the LEA members of the IEP acted improperly. Further, the irregularities alleged by the Parents had no effect on the Child’s receiving FAPE.

##### VII. If the LEA committed violations or procedural errors regarding the IEP or its implementation of FAPE under the IDEA, are any such violations barred by the statute of limitations?

With the Due Process Request being filed on February 12, 2020, all claims against the LEA arising from alleged IDEA violations before February 12, 2018, are barred by the statute of limitations in addition to the rulings made herein.

##### VIII. Whether the LEA violated the Child's rights under Section 504 of the Rehabilitation Act by its use of mechanical restraints and/or its failure to document such use during the 2017‑18 school year and, if so, what are the remedies required?

Assuming without deciding the issue of whether the use of the lap belt violated Section 504, the claim is barred by the statute of limitations as stated below. Notwithstanding this finding and in addition, there was no persuasive evidence introduced that the LEA acted in bad faith or exercised gross misjudgment in the use of the lap belt. In contrast, the overwhelming evidence, both fact and expert, was the use of the lap belt was required for safety and to allow the Child to access XX curriculum.

##### IX. If the LEA is found to have violated Section of 504 of the Rehabilitation Act of 1973, are any such violations barred by the statute of limitations?

Assuming without deciding the issue of whether the use of the lap belt violated Section 504, the claim is barred by the statute of limitations. The Parents had actual knowledge of the use of the lap belt before February 12, 2018. The statute of limitations for a Section 504 claim is one year. The Due Process Request was filed over two years later on February 12, 2020. The claim is therefore barred.

#### RELIEF GRANTED:

None.

#### CONCLUSION

The Parents failed to introduce sufficient evidence to carry the burden of proof to grant the relief requested in their Due Process Request. In addition, as to IDEA claims existing before February 12, 2018, such claims are barred by the statute of limitations. Similarly, as to all Section 504 issues, such claims are barred by the statute of limitations. Finally, the Parents failed to introduce persuasive evidence to support the damages requested.

### APPEAL, IMPLEMENTATION AND PREVAILING PARTY NOTIFICATIONS

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

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

3. **Prevailing Party**. The LEA is deemed the prevailing party.

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Hearing Officer Date

## **CERTIFICATE OF SERVICE**

I certify that on this 21ST day of September, 2020, a true and accurate copy of this pleading delivered, *via* First-class, postage prepaid mail, to:

Mr. & Mrs. XXXXXXXXXX

XXXXXXXXXXXXXX

XXXXX, Virginia XXXX

Parents/Child

Harold G. Belkowitz, Esquire

Belkowitz Law, PLLC

10427 North Street, Suite 200

Fairfax, Virginia 22030

Counsel for Parents/Child

Anne Mickey, Esquire

Jason H. Ballum, Esquire

Reed Smith, LLP

Riverfront PlazaWest Tower

901 East Byrd Street, Suite 1900

Richmond, Virginia 23219

Counsel for LEA

Kathryn D. Jones, Esquire

Coordinator for Due Process Services

ODRAS/VDE

PO Box 2120

Richmond, Virginia 23218-2120

Reginald B. Frazier, Sr., Esquire

1998 Angora Drive

Chesapeake, Virginia 23325

VDOE Evaluator

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Robert J. Hartsoe

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1. The Findings of Fact are based on the evidence presented. This is an unique case wherein the Parents have requested relief for an IEP which has been amended several times and replaced twice by parental consent. As a result, the evidence presented may be different from the Child’s subsequent and current academic reality, achievements, limitations, *etc*., all of which were not introduced into evidence directly or by expert opinion. [↑](#footnote-ref-1)