VIRGINIA

**#20-068**

SPECIAL EDUCATION DUE PROCESS HEARING

XXXXXXXXXXXX PUBLIC SCHOOLS XXXXXXXXXXXXXXX &

School Division XXXXXXXXXXXXXXXX

Parents

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In Re: XXXXXXXXX, Student

# FINAL DECISION AND ORDER

**Issues**

1. **Are the Parents estopped from arguing the LEA did not offer FAPE for the 2018-19 school year**?
2. **Did the LEA fail to offer FAPE for the 2019-20 school year?**
3. **Does the LEA proposed STEP program offer FAPE and, if not, does the XXXXXX School offer FAPE for the 2020-21 school year?**

**Procedural History**

Hearings were held on August 10, 11, 12, 13 and 14, 2020. Following the hearing, the parties submitted briefs on September 9, 2020 and, subsequently, reply briefs. Due to the length of this hearing, the anticipated time to prepare briefs, and the required time to digest this information, the parties agreed to extend the decision date to October 10, 2020.

The following people attended the hearing:

XXXXXXXXXXX, parent.

Grace Kim and James Atkinson, attorneys for the parents/student.

John F. Cafferky and Emily K Haslebacher, attorneys for the LEA

XXXXXXXX, Due Process and Eligibility coordinator for the LEA

The following witnesses testified on behalf of the Parents:

XXXXXXXXXXX, parent of the student.

XXXXXXXXXXXX, offered as an expert in special education.

XXXXXXXX, offered as an expert in special education.

XXXXXXXX, offered as an expert in speech-language pathology.

XXXXXXXX, offered as an expert in clinical social work.

Dr. XXXXXXXX, offered as an expert in speech-language pathology and audiology of children with special needs.

Dr. XXXXXXX, as an expert in clinical psychology.

The following witnesses testified on behalf of the LEA:

XXXXXXXXXXX, offered as an expert in special education and educational administration within the scope of multi-agency services.

XXXXXXXXXXX, as an expert in special education.

XXXXXXXX, as an expert in special education.

XXXXXXXXX, as an expert in special education and school counselor.

XXXXXXXXXXX, as an expert in the field of behavior intervention services as it relates to special education.

XXXXXXXX, as an expert in special education.

XXXXXXX, as an expert in school psychology.

XXXXXXXX, as an expert in the field of speech-language pathology.

XXXXXXXXXX, as an expert in special education.

XXXXXXX, as an expert in the field of speech-language pathology.

XXXXXXX, as an expert in the field of career and transitional services for students with disabilities.

XXXXXXX, as an expert in special education.

XXXXXXXX, as the coordinator for due process and eligibility for the LEA.

Parent exhibits P-2 through P-55, P104I, P105 and LEA exhibits S-1 through S-82 were admitted without objection at the commencement of the hearing. Proffered exhibits P108, P109, P110, P111, P112, P113 and P115 were not admitted due to the Parents' failure to exchange them within the five-day rule.

## Findings of fact

After considering all the evidence submitted by the Parties, including documentary evidence and testimony of witnesses, I find the following:

1. The Student is XX years old. XX is enrolled at XXXXXXXX School. The Student has participated in, and successfully completed, the regular academic high school curriculum (LEA Ex. 58, 84) XX has passed all XX Virginia Standards of Learning (SOL) examinations required for a standard diploma. (LEA Ex. 54, pg 10; LEA Ex. 64, pg 2) XX is only one academic course (Economics & Personal Finance) away from receiving a standard diploma. (Tr. 245-247; LEA Ex. 56; 58) But for the Parent withdrawing the Student from this course during the latter part of the 2019-2020 school year, XX would have been eligible to graduate this past 2019-20 school year. (Tr. 1235-37) At the time the Student was withdrawn, XX was passing the course with an A grade. (LEA Ex. 148, pg 9)
2. The Student has the following diagnoses: Autism Spectrum Disorder; Attention Deficit Hyperactivity Disorder (ADHD); Other Specific Neurodevelopmental Disorder; Language Disorder; Auditory Processing Disorder; Disruptive Mood Dysregulation Disorder; Depression; General Anxiety Disorder; Bi-Polar Disorder; Feeding Difficulties; Dysphagia-Oral Phase; Anklogossia-Posterior Tongue Tie; and Other XXXXXX Anomalies (Tr. 188-95; 170: 5-10;) Manifestations of XX disabilities include punching holes in walls, throwing chairs, other property destruction, hitting other students, eloping, work refusal, cursing, yelling, crying, biting XXself and threats of harm to others and XXself. (Tr. 146:6-21)
3. These manifestations were the driving force in forming the parental decision to have the Student attend private day or residential programs in XX early school career. By December 2015, the Parents were in discussion with the LEA in formulating an IEP. Armed with the recommendations from the Student's earlier private schools, the Parents argued that the Student should attend the XXXXXXXX School (XXS), a private residential school at public expense. The LEA recommended that the Student attend the XXXXXXXX School (XXS), a separate public day school which offers a small school learning environment to accommodate the needs of students with disabilities, including those with autism and emotional disabilities.
4. The statute of limitation governing this hearing covers the period from March 11, 2018 to the present. Prior to this period, the Student attended the XXS. The parties negotiated an IEP for the Student wherein the LEA agreed to pay certain educational cost under the theory the Student was attending the XXS for both educational and medical purposes. A letter dated February16, 2018 informed the XXS of the arrangement. (LEA Ex 45)
5. In the beginning year of XX stay at XXS, the Student exhibited many of the acts described as manifestations of XX disabilities. XX conduct, on many occasions, necessitated the employment of one-to-one academic support. However, once the Student entered within the time frame of this Hearing, XX extreme conduct occurred less frequently. The need for one-to-one attention was, for the most part, unnecessary. The Student does have a tendency to revert back to extreme conduct whenever XX environment is changed.
6. The Parents were granted Guardianship of an Incapacitated Adult over the Student by Court order on November 30, 2018

**CONCLUSIONS OF LAW AND DISCUSSION**

**Are the Parents estopped from arguing the LEA did not offer FAPE for the 2018-2019 school year?**

Even prior to the 2018-19 school year, the parties were at loggerheads over whether the Student needed private, residential placement with one-to-one attention. A compromise of sorts was reached wherein the parties stipulated that his placement at XXS was for both medical and educational purposes. The LEA would never have agreed to placement at XXS for educational purposes only because the LEA believed it could offer FAPE at XXS. In exchange for offering educational financing at a homebound instruction rate, the LEA required a “physician's certification” that XXS attendance was required for medical treatment. The Parents provided a certification to the LEA's satisfaction. I should point out, however, that the LEA argues in their closing briefs that the certifications came from a physician but, in fact, did not. The failure to obtain a physician's certification seems to indicate the LEA was more interested in obtaining documented proof the Parents understood the limits of the compromise they had reached. That is, the LEA would pay only the proposed amount and justify it as the LEA's contribution to educational costs.

Proof that the Parents agreed to this compromise can be found in Parents Ex. 8 wherein the mother wrote: “We continue to believe that [the Student] requires placement in a therapeutic, residential program for both medical and educational purposes and appreciate your continued support.”

Had this issue been brought before a Hearing Officer, the hearing officer might have decided the LEA did offer FAPE and, therefore, the Parents were not entitled to reimbursement for the unilateral placement at XXS. In the alternative, the Hearing Officer might have decided that the Student's propensity for extreme behavior mandated XX placement at XXS at public expense.

In their closing briefs, the Parents now argue that the Student was placed at XXS solely for educational purposes and that XXS is solely an educational institution. That may be true. But if it is true, the Parents and the LEA engaged in the fiction that XXS also provided medical services so as to avoid having the issue decided by a hearing office.

The LEA has argued that the Parents not be permitted to complain that the Student was at XXS for educational purposes, and not for medical reasons, after years of providing documentation to the contrary and as a result of receiving financial benefit. (Tr 1683-1684) If the Parents believed the Student required residential placement for educational reasons, the Parents had the opportunity, prior to receiving over $200,000.00 from the LEA to file a due process hearing request. The mother testified she knew she had the right to appeal the LEA proposal. (Tr.1670) In fact, the Prior Written Notice provided to Parents contained a section with information as to the Procedural Safeguards and contact information for further assistance. (Tr. 1670) In addition, the Parents were represented by counsel or an advocate at many of the IEP meetings. (Tr.1680)

On the issue of estoppel, I find the LEA argument more persuasive. See *Ian H v. Fairfax County Sch. Rd.,* No. 97-168-A, slip. op. at 1-2 (E.D Va. 1997) (parents who failed promptly to utilize administrative remedies were estopped to argue the incorrectness of decisions which they could have prevented by asserting them earlier.)

### Did the LEA fail to offer FAPE for the 2019-20 school year?

For the 2019-20 school year, the Student returned to the Parents' home and attended XXS.

The crux of Parents' complaint about the 2019-20 school year is their belief the LEA minimizes the Student's needs according to XX disabilities. They believe these issues were not adequately addressed in the IEP and that the implementation of the IEP was insufficient. The Parents believe that all the aggressive behaviors exhibited during the Student's 2016-17 school year had largely been extinguished only to return during the 2019-20 school year. Specifically, where the Student had busted holes in the wall while at XXS, in 2019, XX resumed busting a hole in the wall at home. It is the parents' position that a residential, one-to-one education is the key to the Student's appropriate education.

The Parents are asking that I determine the 2019-20 IEP did not contain adequate and/or appropriate IEP Transition Services, Goals, Accommodations, Services and Placement to address the Student's needs according to XX disabilities. Other than this determination, the Parents are not asking for any kind of compensatory relief.

My impression of the five days of testimony was that the provision of services the Student received at XXS was fundamentally similar to that received at XXS. Within XX classes at the LEA school, XX had the equivalent of one-to-one attention when needed. Accommodations, such as relaxation of work requirements and toleration of mild disorderly conduct, such as cursing, crying and eloping occurred at both schools.

It appears this Student is adamant about ending XX studies once XX loses interest. If XX doesn't want to proceed, he won't. This applies to testing and such things as articulation therapy. See: Tr. 759:21-22 and Tr.760:1.

I believe the LEA offered FAPE during the 2019-20 school year.

**Does the LEA proposed STEP program offer FAPE and, if not, does the XXXXXXXXX School offer FAPE for the 2020-21 school year?**

The LEA proposed IEP calls for the Student's enrollment in the STEP program with the goal of preparing the Student for gainful employment. As envisioned by the LEA, the Student would be trained in using the local transportation systems, maintaining checking accounts and paying bills, etc. Local job opportunities would be proposed and the Student would be exposed to the rigors associated with those jobs. The Student would have whatever one-to-one assistance XX required. The proposed IEP also allows for the Student to complete a personal finance class so XX can graduate.

The Parents have proposed enrolling the Student in the XXXXXXXXX School located in XXXXXXX where XX can complete XX academic studies and address functioning skills, life skills, and social communication skills.

The Parents have presented the testimony of Dr. XXXXXXX, an expert in clinical psychology, who opined upon the needs of the Student. He also discussed his opinion of both the STEP program and the XXXXXXXXX School.

In discussing the appropriateness of the XXXXXXXXX School, Dr. XXX stated:

This is – – what I understand from the XXXXXXXXX School is that the XXXXXXXXX School has two different programs in it. There is one that is really structured toward the academic curriculum and the completion of the academic curriculum, the second

part is really geared toward individuals making a transition to post-secondary

education; meaning either that – – and that could mean job opportunity, job experience

or it could mean actually participation (sic) in classes at the post-secondary level.

(Tr. 722: 1-11)

So my impression of the program with regard to [the Student] is [the Student] – –

[the Student's] needs are in between these two programs, in that – again, I think that what

XX needs is a high level of support in order to be able to meet the daily needs and the

daily demand. And that's consistent with the program for those who are geared towards

those who are in high school. (Tr. 723: 16-22)

It may be that in the big picture where XX needs to be is moving toward the

job experience. So XX ends up being somewhere astray both programs. XX's astray the

high school program because of XX needs for intervention and support, but XX may be

astray the other program just in terms of the goals of that program. (Tr. 724: 1-8)

Though Dr. XXX stated that the Student should be in a setting similar to the XXS, (Tr. 724: 12-19) he did not state that the Student should attend the XXXXXXXXX School. His recommendation was:

In this case, I made a recommendation that XX be referred to the

Community Services Board to do that. I suggested a referral to

Department of Rehabilitative Services. It's my belief that [the Student],

given XX age, would probably do better with an occupationally base

protocol for improving XX job skills so that XX could independently

work or work in a structured setting, gradually increasing XX

independent (sic) in skills and move toward independent (sic) from therapeutic

perspective of finances. (Tr. 690:1-11)

… In my estimation what I think [the Student] needs is XX needs focused

intervention which is directed – – the goal of this – – if the system was to

decide that the goal for XX is to move for job training, then I think that XX

needs to be in a structured intensive program that leads XX in that direction

in a consistent manner. (Tr. 726: 4-11)

Dr. XXX recognizes the wisdom of preparing the Student for adulthood through job training but emphasizes that the Student needs one-to-one support both academically and also within XX residence. Dr. XXX suggested the Parents seek assistance outside the school system through the community services board and that this assistance be coordinated with the LEA. (Tr. 752: 12-22; 753: 1-14)

Dr. XXX believes that without this one-to-one support within the home or a group home setting, the proposed IEP (the STEP program) will fail.

Dr. XXX gave several caveats in his testimony:

The concerns that I have from moving from post-secondary education or a job

has to do with the independent judgment and decision making on XX part, XX ability

to sustain XX effort. I mean, could XX – – XX could probably transition to a job, or at

least a program which would given (sic) access to training and skills in a job, as long

as that program was well structured and as long as there was directed intervention

to be able to help XX in the process of learning the skills. (Tr. 715:2-12)

Q: And so what would an appropriate placement for [the Student] entail in your

opinion?

A: Wow. Chances are it would have to end up being a very individualized

program for XX. It would have to have individuals who are skilled in working with

individuals who are on the autistic spectrum. (Tr. 719:14-20)

… Chances are that the individuals would have to carefully assess XX and

point XX in a direction that was consistent with what XX specific desires are.

(Tr. 720:4-7)

In explaining his suggestion about seeking help from the Community Services Board, Dr. XXX stated:

… I thought it was necessary to identify a community-based provider of

services to address the adaptive and independent living skills needs for [the Student].

(Tr. 752:17-20)

… It usually includes some level of engagement within, let's say, if they're

staying at home, engagement with them in the home to try to achieve these whatever

the ends of the independent living and adaptive functioning is.

There are – – because a lot of individuals who typically get referred to these

types of programs are lower functioning, they may be living in group homes in which

that intervention is done on a more continuous basis (Tr. 753:4-14)

With the exception of providing the at home interventions described by Dr. XXX, the proposed 2020-21 IEP matches Dr. XXX's recommendations. I believe the LEA has offered FAPE for the 2020-21 school year.

However, as a manifestation of XX disabilities, the Student has a certain predilection towards extreme conduct when confronted with changes which should be expected when the LEA initiates the proposed IEP. For example, the Parent has testified to such conduct (punching holes in the wall) when the Student transitioned from XXS to XXS. If an increase in extreme conduct arises within the Student's residence when the IEP is implemented, the LEA should modify the IEP to address this problem.

**Final Decision and Order**

For the foregoing reasons, the Parent's request for relief is denied. The contributions of Dr. XXXX and Dr. XXX were very helpful and should provide insight to the LEA. The Parents should be reimbursed for the reasonable cost of their evaluations.

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

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Richard M. Alvey, Hearing Officer

Dated: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**SERVICE**

By signature above, I certify a true copy was mailed, postage prepaid on \_\_\_\_\_\_\_\_ to:

Grace E. Kim and James Atkinson John Cafferky and Melissa A. Little

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