**#20-083**

COMMONWEALTH OF VIRGINIA DUE PROCESS HEARING

In Re: XXXXXXXXXXXXXX Case No. 20-083

XXXXXXXXXXXXXX XXXXXXXXXXXXX Public Schools Represented by Grace E. Kim, Esq. Represented by John F. Cafferky, Esq.

# DECISION

This matter came to be heard upon the Request For A Due Process Hearing (complaint) filed by XXXXXXXXXXXXXX’s (XX) parents, XXXXXX and XXXXXXX XXXXXX (Parents), pursuant to the Individuals with Disabilities Education Act, 20 USC § 1400 et seq. (IDEA) and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 8 VAC 20-81. As the moving party the Parents assume the burden of proof in this matter. Schaffer v. Weast, 546 US 49 (2005). The standard of proof is upon a preponderance of the evidence. 8 VAC 20- 81.O.13.

## Procedural History

The Request for a Due Process Hearing was received by XXXXXXXXXXXXX Public Schools (XXPS) on June 29, 2020. A resolution meeting was held on July 24, 2020. The forty-five day time line began on July 30, 2020. A pre-hearing was conducted on July 23, 2020. The Hearing Officer received the case on July 6, 2020. A hearing date was set on July 10, 2020. The hearing was conducted on August 25, 26, 27, 2020. Closing briefs were submitted on September 4, 2020. The due date for a decision is September 14, 2020.

## Issues Presented

1) Did XXPS fail to provide meaningful participation to XX’s parents in the Individualized Education Program (IEP) process?

2) Did XXPS fail to implement XX’s 2019-20 school year IEP?

3) Did XXPS fail to propose an appropriate IEP for XX?

4) Did XXPS fail to provide a free appropriate public education to XX?

## Findings of Fact

XX is an XXX year old XXX with severe physical disabilities and severe intellectual disabilities. XX has a diagnosis of cerebral palsy which XX has had since birth. XX’s condition limits XX ability to function independently. XX needs assistance in virtually all aspects of personal care including feeding. XX has very limited physical ability to move and is not independently mobile. XX uses a wheelchair for mobility. XX has had multiple surgeries for XX physical condition. XX is non-verbal. While it is difficult to determine XX’s level of cognitive functioning because of the severity of XX disabilities, XX psychological assessments consistently reveal severe deficits. XX is unable to be evaluated through standardized testing because XX is unable to perform the standard protocols for the tests. XX is easily distracted and has a short attention span.

On the positive side of the ledger, XX is self aware, has a radiant smile and a sense of humor. XX exhibits a strong desire to communicate. XX is able to communicate non-verbally with XX eyes, gestures, noises and is developing communication skills with a Tobii-Dynavox I12 (dynavox), a speech generating device, which operates by eye gaze. XX often appears happy, playful and at times mischievous. XX is popular with XX peers and willfully engages with them.

XX was found eligible for special education services under IDEA by XXPS. XX was determined to have continuing eligibility under IDEA in 2017 and most recently in January, 2020. XX and XX family moved to XXXXXX in the autumn of 2017. XX attended school in XXXXXX for two school years until XX family returned to Virginia in the summer of 2019. XX was enrolled in XXPS for the 2019-20 school year. XX’s parents notified the school district and presented documentation regarding XX’s health and education. XX’s parents agreed to an IEP in XXXXX on April 4, 2019. On August 19, 2019, XXPS generated a Transfer Student Documentation form (transfer IEP) acknowledging XX had been under an IEP in another jurisdiction which was signed by XX’s father then marked through. Under the signature line XX’s father stated his objections to the transfer IEP in a hand written note on the document. On September 24, 2019, an IEP meeting was held but was not concluded. On September 27, 2019, XX’s father requested a comprehensive evaluation of XX. The IEP team reconvened on December 9, 2019. An IEP proposal was made by XXPS and rejected by XX’s parents. In early 2020, XXPS staff conducted a series of evaluations for XX. The IEP team met on February 19, 2020, and proposed an IEP for XX. The proposal was rejected by XX’s parents. XXPS issued Prior Written Notices to XX’s parents on issues in dispute in the IEPs. On March 13, 2020, The Governor of Virginia ordered Virginia public schools to close for two weeks and on March 23, 2020, he ordered Virginia public schools to close for the remainder of the school year. A Temporary Learning Plan was created for XX by XXPS during the forced school closure but was not utilized by XX. It is planned that XXPS students will attend school via virtual means for the first quarter of the 2020-21 school year.

While in XXXXX, XX was placed in a private special education school after a brief time in a public school. XX spent four days per week in the private school and one day per week in a public school setting to get access to mainstream peers. The XXXXXX administrators determined that a nurse was needed for XX and it was appropriate to provide services in the private school setting. XX’s physical condition deteriorated during XX time in XXXXXX and surgery was performed. XX’s parents were advised that XX needed physical therapy (PT) to help prevent further deterioration. Also while in XXXXX trials were conducted to determine if XX would benefit from an augmentative and alternative communication device. Ultimately, the dynavox was selected as an appropriate device but XX moved back to Virginia before training on the device began.

When XX returned to XXPS in 2019, XX was placed in the IDS program (intellectually disabled- severe) via the transfer IEP. The IDS program setting was a public school facility, XXXXXXXXXX Elementary School. XXPS staff considered available placements and concluded that the IDS program at XXXXXXXXXX could provide the services needed for XX. Nursing services were also provided. A review and recommendation by a Medical Services Review Team (MSRT) approved the nurse services for XX. The MSRT process in Virginia is different than the process for medical services in XXXXXX. A private nurse service provides medical services in coordination with Virginia School Health Services. On three occasions during the 2019-20 school year the nurse had an emergency and was unable to provide services for XX. A “float nurse” back up plan was put in place, however, the back up plan failed because the school was notified too late by XX’s parents to schedule the float nurse. The XXXXX back up plan was to allow XX to go to school without a nurse. This was unacceptable to XXPS because it had been determined XX needed the nurse on duty at all times while XX was in school. XX missed the three days of school when no nurse was available. Transportation services were arranged for XX but created an issue which put XXPS and XX’s parents in conflict. XX’s parents wanted XX transported home in the middle of the day two days per week XX XX could attend private PT. XXPS wanted to provide transportation services at the beginning of the day and the end of the school day. The conflict was resolved by XXPS providing transportation two days per week in the middle of the day for XX. XXPS miscalculated the time in the XXXXXX IEP for PT services which was placed in the transfer IEP. The error was corrected in the December 9, 2019, IEP proposal and compensatory services were provided to XX.

XX’s parents have requested placement at XXXXXXXXX of XXXXXXXXXXXX (XXXXXXXXX), a private day school that provides special education services. XXXXXXXXX is in XXXXXXXXX, approximately a one hour drive from XX’s home. XXXXXXXXX exclusively services special education students, many with severe disabilities. XXXXXXXXX students will attend school via virtual means for the first quarter of the 2020-21 school year.

### Application of Law

The standard for providing FAPE is that a child found eligible under IDEA must be provided with an educational program which provides some educational benefit. Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 US 176 (1982). The standard of “Some educational benefit” has been further defined as requiring a school system to offer an IEP which is reasonably calculated to enable a child to make educational progress in light of the child’s individual circumstances. Endrew F. v. Douglas Co. School District, 137 S.Ct. 988 (2017). In developing a student’s IEP, a school system is obligated to consider and place the student in the least restrictive environment needed for educating the student. 8VAC20-81-130.

## **Did XXPS fail to provide meaningful participation to XX’s parents in the Individualized Education Program process?**

Pursuant to 8VAC20-81-110 E, the parents of a child eligible for services under IDEA must be afforded an opportunity to participate in the IEP process. XX’s parents contend that they were denied this opportunity by XXPS. XX’s parents argue that they were denied meaningful participation in the IEP process because XXPS pre-determined XX’s placement, performed no new evaluations prior to the placement decision and did not hold an IEP meeting prior to the placement decision. The parents also contend that XXPS used outdated information to make its determination of an appropriate placement thus invalidating its decision. The parents cite as evidence statements made by XXPS staff which referred to XX’s prior placement in the IDS program when XX was enrolled in XXPS prior to moving to XXXXX. This Hearing Officer finds that this claim lacks merit.

While statements were made by XXPS staff which indicated they had prior knowledge of XX and may not have fully known all of the changes XX went through during XX two school years in XXXXXX, the evidence shows that the transfer IEP was not developed solely based upon old information and opinions. XX’s parents helped develop and agreed to the IEP from XXXXXX, dated, April 4, 2019. XX’s parents clearly participated in the IEP process at this point and do not raise any objection to this IEP or the process by which it was developed. This IEP formed the basis for the transfer IEP which XX’s parents object to and claim they were denied an opportunity to participate in the process. The information which is contained in the April 2019 IEP was current at the time of XX’s transfer from the XXXXXX school district to the Virginia school district. Additionally, XXPS staff contacted the XXXXXX school staff, reviewed records and received input from XX’s parents. Thus the transfer IEP was not developed solely on out-dated information and the parents did get to have input.

XXPS did not predetermine XX’s placement. Once notified that XX would be attending XXPS, the staff began the process of transfer. When a student transfers from one school district to another an initial placement must be established. This placement is an interim placement until a formal IEP meeting can be held. In determining XX’s interim placement, XXPS considered what they already knew about XX and the records that were presented to XXPS, including the documentation provided by XX’s parents. XXPS considered a multitude placement options. XXPS considered private schools and several other XXPS facilities. After consideration of the options XXPS made the decision that XXXXXXXXXX could provide the services that XX needed. This decision was subject to review in the IEP meetings which followed and were attended by the Parents. XXPS has simply never changed its opinion that XXXXXXXXXX is the appropriate placement for XX.

Timing must also be considered. XX’s parents notified XXPS that XX would be attending school for the 2019-20 school year in the summer immediately prior to the commencement of the school year. It would be impractical, if not impossible, to conduct a full battery of assessments in the time period between being notified and the start of school. Many school personnel are not available during the summer and the time period was short for detailed assessments. This is supported by the parent’s own witness, Dr. XXX, who was unable to complete his assessment of XX prior to the hearing, describing the difficulties encountered in the process of evaluating XX. Under the circumstances it was reasonable for XXPS to rely on existing records to make its initial assessment and placement decision.

No IEP meeting was held prior to the creation of the transfer IEP. This is typical as the purpose of the transfer IEP is to acknowledge the existing IEP from the prior school district and outline the basic requirements of the IEP. The transfer IEP specifically calls for an IEP meeting to be held within thirty days and specifically notes that the placement in the transfer IEP is an “interim placement.” An IEP meeting was held, by agreement, and in consideration of the parties schedules, on September 24, 2019. XX’s parents were given notice, appeared and participated in this IEP meeting. XX’s parents raised their concerns at this meeting and discussion was XX extensive the meeting could not produce a final IEP proposal in the time allotted. A second IEP meeting was held on December 9, 2019, providing a further opportunity to participate in the IEP process. Thus the evidence shows that not only did XX’s parents have an opportunity to participate in the IEP process they were given an extensive opportunity to voice their concerns. Participation in the IEP process does not equate to the parents getting all of their demands met. It is actually the duty of the school to use their expertise to determine what is best for the student even in the face of opposition by parents. In this matter, the parents were given an opportunity to participate in the IEP process as required by regulation.

**Did XXPS fail to implement XX’s 2019-20 School Year IEP?**

XX’s parents contend that XXPS failed to implement XX’s IEP for the 2019-20 school year thus denying XX a free appropriate public education (FAPE) as required by IDEA. When XX moved to Virginia in 2019 XX had an IEP from XX XXXXXX school district. XX’s parents argue that XXPS failed to replicate this IEP in the transfer IEP and failed to provide all of the services in the XXXXX IEP during the school year. Of primary concern was XXPS placed XX in a public school setting instead of making a private school placement. XX’s parents also cite nursing services, speech and language services, transportation services, PT services and goals as deficient. XX’s parents argue XXPS is obligated to provide, “services comparable to those described in the child’s IEP from the previous local educational agency” and cite 8 VAC 20-81- 120. A. 2. as authority in this case for their argument. A substantial portion of the complainant’s evidence was directed at this issue.

The complainant’s argument necessarily fails as the cited regulation is inapplicable to this case. 8 VAC 20-81-120. A. is applicable only to students who transfer “within the same school year.” The evidence in this matter was absolute that XX did not transfer during a school year but rather transfer between school years in the summer of 2019. XXPS had no obligation to follow the procedures outlined in section A of the regulation.

XXPS was potentially subject to 8 VAC 20-81-120. B., C., and D which also apply to transfer students. Section B. requires a local educational agency (LEA) to provide parents with proper notice of its actions taken to provide a child with FAPE. XXPS met this obligation when it provided XX’s parents with the transfer IEP and notified them of the IEP meetings. XXPS provided XX’s parents with a proposed IEP detailing the actions it would take to provide FAPE to XX. Additionally, Prior Written Notices were issued to the parents when there were IEP disagreements between the parents and XXPS further detailing XXPS’s actions to provide FAPE.

Section C. does not apply to this case. The procedures outlined in section C. are contingent upon a determination by the LEA that an evaluation of the child is necessary. This was a contested issue in this matter and the evidence received was clear that XXPS did not find that an evaluation of XX was necessary. XX’s parents highlighted this issue through evidence and argument that they had requested evaluations and contend that XXPS’s failure to perform evaluations caused a failure to provide FAPE. XXPS determined that evaluations were not needed because the nature and severity of XX’s disabilities made it clear that XX was eligible for special education services under IDEA and that XXPS would provide special education services uncontested. Thus XXPS had no obligation to follow the procedures of section C.

Section D. does not apply to this case. The procedures in section D. apply only when a transfer student is placed in a “private residential school” under the Comprehensive Services Act (CSA). The evidence in this matter showed definitively that XX was placed in a private day school while in XXXXXX and no evidence was submitted that this placement was made pursuant to the CSA.

8 VAC 20-81-210. J. does not apply to this case either. The “stay put” provisions of that section only apply “during the pendency of any administrative or judicial proceeding.” The parents of XX could have filed a Request for Due Process Hearing upon receipt of the notifications issued by XXPS pursuant to 8 VAC 20-81-120. B. cited above and contested the IEPs proposed by XXPS but they did not. XX’s parents filed the Request for Due Process Hearing on June 29, 2020, nearly a year after being placed on notice of the actions XXPS planned to take to provide FAPE to XX. Thus there was no pending proceeding during the 2019-20 school year that would require XXPS to follow the “stay put” provisions of the regulation.

**Did XXPS fail to propose an appropriate IEP for XX?**

As with the issue above the complainant’s evidence and argument largely drew a comparison with the services and IEP provided to XX while XX was in XXXXXX and what was offered by XXPS. XXPS was never obligated to replicate the XXXXXX IEP XX the comparison is irrelevant. XXPS was not obligated to provide identical levels of related services or set the same goals. Just because XXXXXX sent XX to a private school does not mean XXPS was obligated to do so. This is appropriate because every school district is different and offers the programs and services it has the resources to establish and the will to provide. XXPS is a very large school district with significant resources allocated to special education. Many other school districts prefer to contract out special education services to private providers rather than establish their own. Thus it is very difficult to compare school districts.

XX’s parents argue that XXPS failed to evaluate XX and used out-dated information to develop the IEPs rendering them inadequate. This Hearing Officer finds this argument unpersuasive. XXPS developed the IEPs with a wealth of information. XXPS had previous knowledge of XX, including an awareness of the severity of XX intellectual disability. The parents argue XX became more disabled while in XXXXXX but this only relates to XX physical disability. XX academic needs were not effected by this change. XXPS had records from the parents and the last IEP to review. XXPS also made contact with the XXXXXX school system to investigate their programs. XXPS assessed XX’s needs and established the program its experts felt was appropriate. These experts are entitled to deference in their opinions of XX’s educational needs.

The XXPS transfer IEP and proposed IEP must be looked at independently. The standard under which they are judged is that set forth in Rowley and Endrew. A review of the interim IEP and the proposed IEP for XX show that XXPS have followed the standards for IEPs. The programs set forth in the IEPs provide an educational program which is designed to provide XX with educational benefit in light of XX circumstances. XX’s disabilities are XX severe that XX goals and objectives are far different from mainstream children. The IEPs provide instruction at XX’s level allowing XX to work on basic communication skills like learning to recognize letters and numbers. The IEP provides for instruction in how to use XX dynavox. This may be the most important skill XX can learn as it may give XX the ability to communicate with non-disabled people. The IEP contains support services to allow XX to learn in the school environment. The IEP provides nurse services to maintain XX’s physical health while at school. The IEP also considers the provision of these services in the least restrictive environment (LRE) as required by IDEA. Thus the program designed for XX meets the criteria for an appropriate IEP.

**Did XXPS fail to provide a free appropriate public education to XX?**

XXPS was obligated to provide FAPE when it accepted XX as a transfer student eligible for special education services under IDEA. Thus the ultimate question in this case is did XXPS provide XX with FAPE? XX’s parents’ primary argument is that XXPS denied XX FAPE by failing to place XX in a special education private school. XX’s parents argue that a private school setting is necessary because XX’s medical needs and educational needs are XX intertwined that a private school is necessary for XX to receive the benefit of XX educational program and is the LRE for XX. XX’s parents also argue that XXPS failed to guarantee and provide nursing services to XX thus denying XX FAPE. XX’s parents, additionally, argue that XXPS failed to provide sufficient related services including speech and language services, PT and occupational therapy (OT).

XX’s medical and educational needs are intertwined. XX’s physical disabilities are XX severe that XX requires assistance performing basic life functions. XX cannot feed XXself. XX cannot move on XX own. XX cannot clean XXself and maintain proper hygiene. XX is physically fragile and vulnerable. To function in an educational setting XX needs assistance. XX has medical needs which are separate from XX educational needs as well. XX has needed surgery, recovery from surgery, preventative therapies, supervision and assistance outside of school. These medical needs are distinct and separate from XX’s medical needs which interfere with XX ability to access XX educational program. XXPS is not responsible for providing medical services which do not relate to his educational needs. XX’s medical needs which effect XX ability to access XX educational program are addressed in XX’s IEP. XX is provided with an individual skilled nurse, PT and OT services as well as special education teachers and assistants by XXPS. These are the same services which would be provided in a private school setting. No evidence was presented that showed there was any service XXPS could not provide that the private school could.

While XX does need extensive services to access XX education the distinction can be made between the medical services XX needs for education and those which are purely for medical needs. This became an issue when XX’s parents pulled XX out of school for private PT services. These services were purely medical because they were performed for the purpose of preventing physical degeneration of XX’s hip. XX’s parents made the decision to pull XX from school voluntarily to maintain a positive relationship with their insurance company. This did not convert these services into an educational need. If XX had received these services outside of school hours XX would have been able to access XX school program with the services which were in place for the purpose of accessing XX school program and provided by XXPS.

XX has demonstrated that XX can function in a public school setting with the supports that have been provided to XX by XXPS. XX spent the 2019-20 school year in XXXXXXXXXX. XX made progress towards XX educational goals during this time. Many of the XXPS witnesses had worked directly with XX and noted XX progress including being able to recognize letters, numbers and making progress using XX dynavox, a new skill for XX. XX also performed well in adaptive physical education class even with XX limited physical abilities. XX’s parents’ witnesses had no experience with XX in school and provided opinions based upon extremely limited time with XX. Their testimony did not demonstrate that the XXPS program was inadequate. The parents wanted more related services but no evidence demonstrated that the services provided were inadequate for XX to make progress on XX IEP goals.

XX missed three days of school because of the unavailability of XX nurse and the failure of the back up system of a float nurse to fill in. XX’s parents argue this is a denial of FAPE. This argument is unpersuasive. No evidence was presented which showed XX was denied the benefit of XX educational program because XX missed three days of school. The lost educational opportunity is deminimis at most. Additionally, the parents contributed to the failure of the back up system by calling for a float nurse one hour before school started placing the request after the float nurse had already been assign to another job.

XX’s parents argue that the private school is the LRE for XX’s school placement. This is possibly the most significant difference between the placement XX’s parents seek and what has been provided by XXPS. XXXXXXXXXX offers XX the opportunity to interact with non-disabled peers. In XX program XX was able to attend morning meeting, lunch, recess and music class in a mainstream setting. XX is very social despite XX limitations and benefitted from the opportunity to interact with peers. XX found acceptance from the non-disabled peers and the value of learning to communicate with non-disabled peers cannot be over emphasized. These are opportunities which would be lost in the private school in which all the students are disabled. XX demonstrated XX ability to interact with non-disabled peers successfully. Additionally, the requested private school is significantly further away from XX’s home than the public school placement. Thus the public school placement provided by XXPS satisfies the requirements of FAPE. IDEA not only favors placement in the LRE, it mandates it. Under the mandates of IDEA the public school setting is the preferred setting for XX over the more restrictive setting of a private school.

XXPS has proposed an appropriate IEP for XX. XXPS provided the services and instruction contained in the IEP. XXPS continues to propose this IEP to XX. Thus XXPS has met its obligation under IDEA to provide XX with FAPE.

## Conclusion

For the above stated reasons it is found that the Complainants, Parents, have failed to meet their burden of proof to establish that XXXXXXXXXXXXX Public Schools denied XX a free appropriate public education. It is further found that XXPS is the prevailing party.

# ORDER

IT IS HEREBY ORDERED that the above styled matter is dismissed.

## Right of Appeal Notice

This decision is final and binding unless either party appeals in a federal district court within 90 calendar 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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Date Frank G. Aschmann, Hearing Officer