**VIRGINIA DEPARTMENT OF EDUCATION**

**DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES**

**OFFICE DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES**

# Decision of hearing officer

SCHOOL BOARD AND

**School Division (“LEA”) Name of Parents**

**Name of Child**

DEREK A. MUNGO, ESQ. GRACE E. KIM, ESQ.

**Counsel Representing LEA Counsel Representing Parents/Child**

LORIN A. COSTANZO AND

**Hearing Officer Party Initiating Hearing**

# PRELIMINARY MATTERS:

Undersigned was appointed Hearing Officer by letter dated June 6, 2018 regarding a Request for Due Process Hearing (“Request”) received by the City Public Schools (“LEA”) May 30, 2018.

Pre-hearing telephone conferences were held on June 11, 2018 and June 25, 2018. At the 6/25/18 telephone conference, Hearing Officer raised concerns as to jurisdiction to hear issues related to the Americans with Disabilities Act (“ADA”). Upon further discussion of jurisdiction of the Hearing Officer to hear issues related to Section 504 of the Rehabilitation Act of 1973 (“Section 504”) and counsel for the LEA raised objection to hearing issues at related to Section 504. After discussion, the parties were afforded until 5:00 p.m. on 7/2/18 to present their position and authority as to hearing Section 504 and ADA issues at the hearing.

Hearing Officer determined he did not have jurisdiction to hear ADA matters and further determined, pursuant to 8 VAC 20-81-210 (O.)(5.)(b.), as the IDEA due process notice also indicated a Section 504 dispute, he would hear both disputes in order to promote efficiency in the hearing process and avoid confusion about the status of the Section 504 dispute.

Subpoenas duces tecum were requested by counsel for Parents and issued.

The 45 day period for a decision to be rendered was extended on motion of counsel for good cause and it was found not to be extended for personal attorney convenience.[[1]](#footnote-1)

Due Process Hearing**:**

A due process hearing concerning Parents’ May 30, 2018 Request for Due Process Hearing was held July 23, July 24, and July 25, 2018. The hearing was “open” to the public as requested by Parents. At hearing the exhibits were admitted by the parties, by agreement, *en masse*.

# ISSUES FOR DETERMINATION AT HEARING:

The issues for determination at hearing are summarized as follows:

A. Whether, since at least May 2016, LEA has failed to provide a FAPE in violation of the IDEA in:

1. Fai to develop and/or implement an IEP with appropriate

goals, services, accommodations, and placement according to

her specific needs, a substantive violation of the IDEA.

2. Fai to adhere to procedural regulations of the IDEA, which

had a substantive impact to , contributing to her

regression and lack of progress by:

Fai to accurately collect or share IEP progress data.

Causing unnecessary delay in responding to Parents’

request for IEEs.

Unlawfully challenging the sufficiency of Parents’ partial

consent to the March 28, 2018 IEP.

B. Whether the LEA has discriminated against and denied her equal access to academic and non-academic activities with her non-disabled peers, solely due to her disability, in violation of Section 504 of the Rehabilitation Act of 1973.

# BURDEN OF PROOF

Parents filed a Request for Due Process Hearing and, as the party seeking relief, the burden of proof is on Parents to establish, by a preponderance of the evidence, that the LEA has failed to provide FAPE and has discriminated against in violation of Section 504.[[2]](#footnote-2)

# FINDINGS OF FACT

01. is twelve years of age and was born in February of 2006. [[3]](#footnote-3) At about the age of 5 she

was diagnosed as having ADHD.[[4]](#footnote-4)

02. attended Elementary School during the 2016-2017 and 2017-2018 school years. [[5]](#footnote-5)

03. has auditory and sensory issues. She has had anxiety and since 8 or 9 years of age (3rd grade) and has been prescribed medication for her anxiety.[[6]](#footnote-6)

04. entered the Public Schools in 2010 transferring there from Maine.

05. As of the date of the due process hearing, is enrolled in Public Schools and Parent has filled out documentation to transition her to Middle School. However, in May of 2018 Parents applied for to be admitted at Academy. She has been accepted there but not enrolled as of the date of the due process hearing. [[7]](#footnote-7)

06. interacted with her special ed. teacher in the general education setting/classroom. In the 2017-2018 school year she was observed to generally be paying attention and seemed to be kee up well with the pace of the class. Anxious behaviors were observed but not often.[[8]](#footnote-8)

07. has been held back and repeated one school year, kindergarten. While was in kindergarten the LEA suggested she stay back and repeat kindergarten. Parents agreed and repeated kindergarten.[[9]](#footnote-9)

08. The LEA has discussed with Parents retaining/holding back in a grade several times over the years. [[10]](#footnote-10)

09. At the end of ’s third grade retention was raised by her teacher and discussed at an IEP meeting.[[11]](#footnote-11)

10. The LEA raised retaining in 4th Grade. On April 17, 2017 Parents were given a “Promotion Concern Memorandum” stating it was still possible that she may not meet the standards required for promotion. The memorandum noted she was fai or could fail:

Communications skills for the year - reading and writing

Mathematics for the year

History/Social Science for the year

Science for the year.[[12]](#footnote-12)

11. Parents discussed the April 17, 2017 *Promotion Concern Memorandum* with the LEA indicating they did not want to be retained.[[13]](#footnote-13)

12. An IEP meeting was held on 3/10/16 (Grade 3) for . The IEP was signed by a parent indicating agreeing to the proposed placement in Special Education and permission for placement on 3/18/16.

13. The 3/10/16 IEP noted ’s working memory deficits and auditory processing difficulties are impacting her in all academic areas and she is performing below grade level in reading, writing, and math. The IEP stated has been making progress on her IEP goals and she is currently reading at a PALS Preprimer C which is 2 levels higher than a year ago. The IEP stated her comprehension on direct questions is between 65 and 70% and has mastered her current math goal and therefore a new goal will be created.[[14]](#footnote-14)

14. On June 16, 2016 CHKD performed an assessment regarding Speech-Language Literacy-Text. The assessment noted to be 10 years old with a known history of auditory processing disorder. This assessment was provided to the LEA who accepted it and utilized it as a working IEP speech and language evaluation. The assessment, presented at the June 16, 2016 IEP meeting, stated:

earned scores that indicate a severe reading disorder secondary to a significant auditory processing disorder. She is not able to read words anywhere close to her grade level. She struggles when trying to read 3rd grade material and make any sense of it. She is “print disabled” at this time and cannot decipher print close enough to her grade level in order to be able to process the concepts taught in the content areas.

demonstrates moderate-severe deficits in auditory processing and language processing. The main goal of therapy is to first improve auditory functioning by using ’s strength to minimize auditory weaknesses and teach compensatory strategies as needed. Once auditory processing has improved, language processing and academics can be more appropriately addressed.

It is recommended receive weekly ST (1-2x/week) to improve auditory and language processing skills. [[15]](#footnote-15)

15. On June 22, 2016, the Special Education Committee conducted a re-evaluation and, among other matters, took into consideration Dr. ’s *Auditory Processing Evaluation* completed in March of 2016. was found eligible under Specific Learning Disability, Other Health Impaired, and Speech/Language Impairment.[[16]](#footnote-16)

16. On July 7, 2016 an IEP meeting was held and an IEP proposed. However, Parents did not provide consent to this IEP.[[17]](#footnote-17)

17. On September 29, 2016 an IEP meeting was held and an IEP proposed. However, Parents did not provide consent to this IEP.[[18]](#footnote-18)

18. On October 25, 2016 an IEP meeting was held. Parents signed indicating consent to this IEP on 10/25/16.[[19]](#footnote-19)

19. On January 5, 2017 an IEP meeting regarding an IEP Amendment was held. The IEP Amendment was signed by Parents indicating their consent. The October 25, 2016 IEP with the January 5, 2017 IEP Amendment is the current IEP.[[20]](#footnote-20)

20. On 10/18/17 The IEP team met to propose the annual review IEP draft. Some other goals were proposed and the team didn’t have appropriate baseline data. The team agreed to meet on 11/14/17 to conclude the development of the annual IEP after baseline data is collected and the draft is updated.

21. The IEP team reconvened on 11/14/17 and updated the baseline data and added to the goals in the document. It was proposed would receive the following services in the general ed. setting: 30 minutes 3x week of reading instruction, 20 min 5x week of writing instructions, 30 minutes 5 x week of math instructions, 15 minutes 5 x week of instructions to support her work habits. In the special ed. setting she would receive, 30 minutes 2 x a week direct reading instructions to address decoding difficulties, 15 minutes 2 x a week for math specific vocabulary deficits, 30 minutes 2 x a week speech therapy and OT indirect or consult service for 15 minutes a month. Parents did not provide consent.[[21]](#footnote-21)

22. There was an early re-evaluation where the independent educational evaluations were reviewed. It was determined there wasn’t really any new information that came about from those and evaluations and there was no change to the eligibility for .[[22]](#footnote-22)

23. An IEP meeting was held on February 2, 2018. Parents updated the medications that was taking. Under summary of assessment the IEE results from Dr. , the diagnoses that he provided in his report and her current grades were added. and there’s a section in present level of performance in regard to the speech and language skills under communication. Parents did not provide consent to the IEP. The IEP team then reconvened on March 12, 2018.[[23]](#footnote-23)

24. On March 12, 2018 an IEP meeting was held to develop the Annual IEP. Parent attended and participated in the IEP meeting of March 12, 2018. On March 27, 2018 Parent gave a partial consent to the proposed IEP. Parent on signing the IEP indicating “(PARTIAL AGREEMENT ONLY, SEE BELOW)” and below her signature typed, “We partially agree ONLY as to the implementation of the Testing Accommodations in the current proposed IEP (pp. 19-24). We are withholding our agreement/disagreement to the remainder of the proposed IEP until we have consulted with ’s team of experts.”

The implementation of testing accommodations Parents thus agreed to (on pages 19-24 of the proposed IEP) address State Wide Assessment accommodations and accommodations regarding participation in Division wide assessments.[[24]](#footnote-24)

25. The October 25, 2016 IEP with the January 5, 2017 IEP Amendment is the IEP in effect for the 2017 to 2018 school year (5th Grade) for .[[25]](#footnote-25)

26. An IEP progress report is provided parents approximately every 4 weeks.[[26]](#footnote-26)

27. The 1/5/17 IEP’s Academic Reading-Decoding Skill Annual Goal was: Given visual tools and chunking strategies, will decode(read) and encode (spell) CVC words using diagraphs, blends, and short vowels with 70% accuracy as shown by teacher data and assessments by the annual review date. Her 9/22/16 pre score was 33% accuracy on encoding CVC words ... .[[27]](#footnote-27)

On her IEP progress report of 10/6/17 it was indicated was at 48% on encoding the CVC words, with 81% CVC Short a, 80% Short e, 75% Short i, 78% Short o, and 94% Short u. She received a Mastery level 3, indicating the student has demonstrated some progress towards achieving a goal, due to her still being behind is some areas and thus wasn’t overall at a 70%.[[28]](#footnote-28) On her IEP Progress Report of 4/13/18 she received a Mastery Level 5, (The student has met the criteria for this goal) with a 85%.[[29]](#footnote-29)

28. The 1/5/17 IEP’s Academic Reading-Decoding Skills Annual Goal stated: Given the Dolch Primer Sight Vocabulary List will immediately recognize 47 out of 52 words on 3 out of 5 trials by the annual review date. Her pre score was 29 out of 52 words. On her IEP Progress Report of 10/6/17 received a Mastery Level 4. On 9/20 she recognized 28 of 52 words and on 10/4 she recognized 40 out of 52 words.[[30]](#footnote-30) On her IEP Progress Report of 4/13/18 she received a Mastery Level 5, (The student has met the criteria for this goal) with a 50/52.[[31]](#footnote-31)

29. The I/5/17 IEP’s Academic Reading-Comprehension Annual Goal stated: Given a story map and fictional text, will use the visual cues on the map to demonstrate comprehension of plot from beginning, middle, and end to include identification of problem and solution on class room activities and assessments from a baseline of 40% to 70% by the Annual review date. On her 10/6/17 IEP Progress Report she was given a Mastery level of 3. She was demonstrating comprehension on her independent reading level, but classroom assessments and assignments were challenging.[[32]](#footnote-32) On her IEP Progress Report of 4/13/18 she received a Mastery Level 4 (indicating the student is making sufficient progress towards achieving this goal within the duration of this IEP) and 64%.[[33]](#footnote-33)

30. The 1/5/17 IEP’s Academic Writing/Compensation **-** Annual Goa stated: Given graphic organizers, and mode, will write to communicate her ideas for a variety of Purposes, write stories and simple explanations, using descriptive vocabulary (location, time date, color, proper nouns, etc.) by formulating five complete sentences on a given topic with 70% accuracy by the Annual Review date. received a Mastery Level 3 on 10/6/17. On her IEP Progress Report of 3/2/18 she received a Mastery Level 3. She was still strugg with grammar and had a 60% with incorrect grammar.[[34]](#footnote-34)

31. The 1/5/17 IEP’s Academic Writing/Compensation - Annual Goal stated: Using word wall and word reference resources, will be able to use correct spel of high frequency words and simple vocabulary words and capitalize and punctuate all sentences scoring at least a 3 in the mechanics domain of the district rubric on independent writing samples in 2/3 collections per quarter by annual review. Her pre score was 40% accuracy. In her 10/6/17 IEP Progress Report she received a Mastery Level 4 and was able to formulate 5 simple sentences on a given topic and scored a 63%.[[35]](#footnote-35) In her 4/13/18 IEP Progress Report she was at Mastery Level 3. She had shown improvement with spel of high frequency words.[[36]](#footnote-36)

32. The 1/5/17 IEP’s Mathematics Annual Goal stated: Given direction instruction, manipulatives and strategies (use diagrams and use pictorial strategies), will improve her mathematical computation skills, from a baseline of 30% to 60% accuracy on assessments by the annual review date. Noting progress she received a Mastery Level 3. On subtraction she was at 68% and double digit factors multiplied by single digit factors at 75%. [[37]](#footnote-37) In her 4/13/18 IEP Progress Report she received a Mastery Level of 3 with a 48%. Multistep problems still tend to be her biggest challenge.[[38]](#footnote-38)

33. Dr. (Ed.D), a Certified/Licensed Audiologist and Certified Licensed Speech-Language Pathologist, conducted a number of evaluations regarding , including auditory processing evaluations and one independent educational evaluation (“IEE”) in speech-language pathology.[[39]](#footnote-39)

34. On 8/22/12 Dr. conducted an Auditory Information Processing Assessment in which he found had deficits in auditory processing. These deficits were in a number of areas with having poor self-regulation and attention noted in spite of her being on ADHD medication the day of the testing. He also found had problems also related to auditory processing in the areas of phonemic awareness, lexical extraction, and temporal extraction.[[40]](#footnote-40)

35. On March 30, 2016 Dr. did a re-assessment of ’s auditory information processing abilities. was on her ADHD medication the day of the 2016 testing. His findings indicated that she still had the same problems. He opined that, as she was having the same problems at the older age and because the demands had increased because of age and other factors that this indicated the magnitude of the problem had gotten worse.[[41]](#footnote-41)

36. Dr. never observed in school, and did not know how she responds to verbal instructions in the classroom. He confirmed self-regulation would be more of an issue related to psychology. Dr. is not a psychologist and, as he testified, he does not evaluate self-regulation. Additionally, he had no personal knowledge of how self-regulated in the classroom.[[42]](#footnote-42)

37. Regarding his 2012 and 2016 evaluations, Dr. did not conduct any classroom observations or send any questionnaires or checklists to school officials for background information prior to his assessments. He did not obtain information from school officials concerning ’s behaviors or interactions. [[43]](#footnote-43)

38. Dr did not diagnose as having auditory processing disorder but diagnosed she had auditory processing deficits. He also found these auditory processing deficits need to be dealt with because they interfere with her educationally.[[44]](#footnote-44)

39. Dr. testified he conducted a speech language IEE on on 7/25/17 (P Ex. 7) which addressed speech production, language knowledge, and assessment of language functioning. At the time of his evaluation was 11 years 5 month and would be entering the 5th grade. His conclusions include:

Deficits in speech production relating to articulation of phonemes /s/ and /z/ and words with s-blend.

Deficits with expressive language related to word knowledge/semantics and grammar receptive grammar understanding was deficient.

Language processing was found to be deficient except for social/pragmatic language understanding.

Basic receptive word knowledge was normal but she could not apply this ability to processing uistic material at the higher levels of metauistic understanding and making inferences.

has been found to have significant deficits in auditory lexical process, among other areas of auditory processing.[[45]](#footnote-45)

S Ex. 30i admitted a 8/25/17 a speech an language evaluation of Dr. in which reported his findings in his Speech-Language Independent Educational Evaluation Report. [[46]](#footnote-46) Comparing the two exhibits they appear to be very similar/the same with date and age of Child differences noted.

40. On August 31, 2017 a Psycho-Educational Evaluation of was conducted. Parents had requested an IEE. The LEA sent notice to the parents they would assume the cost of the requested psycho-educational and speech and language independent educational evaluation. Enclosed with the letter was a list of the names of agencies or individuals that have often been used by parents in the past for IEEs The letter also stated to assume the cost the evaluation must have been conducted by a qualified examiner and the individuals and agencies on the enclosed list are considered qualified examiners.[[47]](#footnote-47)

The LEA sent Parents a list of IEE providers. The document stated,” This listing includes only those practices or practitioners whose business address in in and who indicate in their advertisements that they may work with children having educational problems. Inclusion on this list is not an endorsement of their services by Public Schools. This list is not exhaustive and is only meant to be a general guide to parents.”[[48]](#footnote-48) Parents chose to select a provider off this list who conducted the Psycho-Educational Evaluation on August 31, 2017.[[49]](#footnote-49)

41. The Psycho-Educational Evaluation of August 31, 2017 found, “The results of this Psycho-Educational Evaluation indicate, that at this time, [] qualifies for assistance under the DSM-V Diagnostic Code 317(F70); Intellectual Disability (Intellectual Developmental Disorder) Mild Degree of Severity.[[50]](#footnote-50)

42. Parent expressed concerns with the 8/31/17 evaluation and did not agree with the evaluator’s identification and diagnosis of having an intellectual disability (“ID”). Parent filed a complaint with the Virginia Department of Health Professions that the evaluator was not qualified to give some of the cognitive testing and/or interpret the tests and alleged the evaluator was not qualified to diagnose her daughter as ID. [[51]](#footnote-51)

43. Parents addressed their concerns with the 8/31/17 evaluation with the School and the School conducted an investigation into the matter. Upon the LEA psychologist’s input and comparing the contested evaluation with Dr. ’s evaluation, the Psycho-Educational Evaluation of 8/31/17 was not taken into consideration and not given consideration in the IEP.[[52]](#footnote-52)

44. Upon parental referral, Dr. Ph.D. conducted a Neuropsychological Evaluation concerning (Interview date: 9/26/27, evaluation date: 10/6/17). A comprehensive review of ’s functioning was requested to provide recommendations for treatment and interventions as a recent IEE resulted in an identification of as having cognitive capacities that were within the ID Range and this result was seen in contrast with all prior cognitive testing which reportedly indicated was functioning within the Average Range.

45. Dr. ’s October 6, 2017 evaluation determined, among other matters, testing data have suggested prominent difficulties with both sensory processing and language-based processing, with repeated testing in the latter area in 2012 and 2016 suggesting only very limited improvement in functioning in this area over the interval. Additionally, he found current evaluation of indicates an ongoing and significant disorganization in capacities and this disorganization is associated with continuing signs of significant language processing and frontal lobe capacities, as well as continuing general signs of significant disorganization related to sensory processing and regulatory issues.

Diagnostic Impressions presented in the October 6, 2017 evaluation include:

1. Unspecified Neurodevelopmental Disorder (deficits in sensory

processing and frontal lobe functioning)

2. Language Disorder (deficits in auditory overload, auditory extraction,

and auditory organization)

3. Attention Deficit/Hyperactivity Disorder, Combined Type (in partial

remission)

4. Specific Learning Disorder, with Deficits in Reading, Written

Expression, and Arithmetic Calculation (developmental reading

disorder/dyslexia, dyscalculia)[[53]](#footnote-53)

46. On most tests of verbal and nonverbal cognitive functioning, Dr. found was functioning pretty much in the average range. Also, from a developmental perspective, had maintained her level of functioning as compared to age peers between 2016 and 2017.[[54]](#footnote-54)

47. Regarding verbal information processing, there had been a prior identification of auditory processing issues for . Dr. found that the data suggested she had significant and severe issues in these areas particularly the efficiency with which she ingested information from verbal presentations and her ability to spontaneously and effectively organize it and sequence it so that she could be able to retain it in an organized manner. [[55]](#footnote-55)

48. Dr. found had dyslexia but couldn’t substantiate her as having dyscalculia.[[56]](#footnote-56)

49. Dr. did not conduct a classroom observation regarding .[[57]](#footnote-57)

50. took the Star reading assessment and the Star math assessment at the beginning of the 5th grade year to establish a baseline and took subsequent assessments to determine if progress was being made.[[58]](#footnote-58)

51. The STAR testing is a predictive software testing where the student’s response influences whether the next question is easier or harder than the last question.[[59]](#footnote-59)

52. A reading program called “Recipe for Reading “ was provided to ’s Special Ed. teacher towards the end of October 2017 for her to implement with . This is a multisensory program based on phonemic awareness and it addresses decoding and encoding at the same time. [[60]](#footnote-60)

53. The Recipe for Reading program in a special ed setting was for 30 minutes, twice a week.[[61]](#footnote-61)

54. Recipe for Reading was used with from October until the beginning of November and with the program she moved from a DRA 4 at the end of the 4th grade to a DRA Level 10.[[62]](#footnote-62)

55. On 12/17/17 a DRA was given. was on level 4 at end of 4th Grade and on 12/17/17 started with a level 6 and moved to a DRA Level 8 where it was determined the reading engagement was an 8/8, the oral frequency was a 13/16 and the comprehension piece was a 28/28. was moved to a DRA Level 10 where reading engagement was 8/8, Oral fluency was 12/16, and comprehension 16/28. The stopped at due to fluency being 12 out of 16 and she was at the lower end of being independent.[[63]](#footnote-63)

56. took the Virginia Standards of Learning Assessments (“SOL”) in the Spring of 2018 , 5th Grade. A student must attain a scaled score of 400 or higher to pass the test. If a student attains a scaled score of 500 or higher, the student is considered to have performed at an advanced level on the test. A scaled score between 0 and 399 indicates the student did not pass the test. received the following scores on her 5th Grade SOLs:

Reading CAT: 468

Science: 349

Mathematics CAT: 343

Virginia Studies: 317[[64]](#footnote-64)

57. In the 2017-2018 school year Child was in the 5th grade and was in a program called “ Smarty Ants”. [[65]](#footnote-65)

58. In the general ed. 5th grade classroom her teacher knew had an IEP. In the classroom she had a crate with sensory and other items including, fidgets, personal calendar, and her headphone to take out noise if she wanted them and other sensory items.[[66]](#footnote-66)

59. often had a paraprofessional during her reading at time and during her writing time.[[67]](#footnote-67)

60. was anxious with tests/assessments. She expressed some anxiety towards the end of the day when getting ready to go to the YMCA for her after care. She worried she wouldn’t be able to finish her homework at the YMCA and then be able to play there and when she got home.[[68]](#footnote-68)

61. By the end of the school year ’s anxiety didn‘t go away but it diminished.[[69]](#footnote-69)

62. During the 5 week SOL push had individual one-on-one for 20 to 30 minutes three to four times a week.[[70]](#footnote-70)

63. would have reading in the special ed setting and general ed. setting generally back to back.[[71]](#footnote-71)

64. Accommodations listed in the 1/5/17 IEP include:[[72]](#footnote-72)

audio version of test items on other content areas except Reading Test

audio version of test items on Reading Test only

test administered in locations with minimal distractions

group size- one to one/small group of no more than 6 students during assessments

proximity to teacher, preferential seating during instruction

environmental accommodations-noise buffers to reduce auditory distractions

finger spacer, noise cancellation head phones to reduce auditory distractions

math aids (math manipulatives, number lines and 100’s chart

tasks and instruction broken down into smaller steps/chunks, constructive feedback and checking

for understanding of directions

sensory items to assist her with regulations(due to anxiety and attention deficits)

visual schedule

breaks during testing and instruction

use of markers, colored pens and/or pencil

spel aids (spell check, spel dictionary)personal word wall and picture dictionary

visual aids, story maps and writing graphic organizer will be used

oral/tactile strategy of segmenting and blending during reading, writing, and speech

text to speech software to assist in writing assignments

work prediction software and flexible spell check software

portable work processor to use with her text-to-speech software and word prediction/flexible spell

65. School Psychologist conducted an examination of in June of 2016.[[73]](#footnote-73)

66. School Psychologist reviewed Dr. ’s IEE. The IEE did not produce any new information that would impact on ’s eligibility but confirmed the information the school had. There were no material distinctions between his findings, cognitive ability, academic achievement, and the school psychologist’s assessment. Executive functionings and behavior type were commensurate. No new information was added by his IEE for purposes of develo the IEP.[[74]](#footnote-74)

67. The October 2016 IEP team reviewed Dr. ’s recommendations, data provided in his IEE. His information and the school psychologist information were taken into consideration when developing the goals and services.[[75]](#footnote-75)

68. Matters form Dr. ’s report were incorporated into ’s IEP. He recommended a primary focus of her services be reading/decoding and whole words. Interventions and instructions covering both areas were done in the IEP. He indicated how her executive functioning and language skills are going to affect her comprehension skills and there was a goal for comprehension. He found deficits or low scores in writing expression or writing and there is a writing composition goal. He provided a calculator in his evaluation and found she needed more assistance with problem-solving aspect of math and the IEP included use of a calculator.[[76]](#footnote-76)

69. School Psychologist evaluated conducted some observations of having difficulties self-regulating anxious tendencies. has ADHD which makes it hard to tease out which is contributing to which. However, ’s anxiety was decreasing this year.[[77]](#footnote-77)

# ADDITIONAL FINDINGS OF FACTS, CONCLUSIONS OF LAW, AND DECISION

Subject to 34 C.F.R. § 300.513(a)(2), a hearing officer’s determination of whether a child received FAPE must be based on substantive grounds. 34 C.F.R. § 300.51(a)(2) provides, in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies:

(i) Impeded the child’s right to a FAPE;

(ii) Significantly impeded the parents’ opportunity to participate in the

decision-making process regarding the provision of FAPE to the child; or

(iii) Caused a deprivation of educational benefits.[[78]](#footnote-78)

8 VAC 20-81-100 provides a free appropriate public education shall be available to all children with disabilities who need special education and related services, aged two to twenty one 21, inclusive. A Free Appropriate Public Education (“FAPE”) is defined in the *Regulations Governing Special Education Programs for Children With Disabilities In Virginia* as meaning special education and related services that:

1. Are provided at public expense, under public supervision and direction,

and without charge;

1. Meet the standards of the Virginia Board of Education;
2. Include an appropriate preschool, elementary school, mlddle school or

secondary school education in Virginia; and

1. Are provided in conformity with an individualized educational program that

meets the requirements of this chapter.[[79]](#footnote-79)

The IDEA requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." There is no "bright-line rule" determining what “appropriate' progress” means. The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." *Endrew F. ex rel. Joseph F. v. Douglas County Sch. Dist.,* 137 S. Ct. 988, 1000-1001 (2017).

The Court in *Endrew* further determined, "This absence of a bright-line rule, however, should not be mistaken for “an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.'" *Id.(quoting Rowley,* 458 U.S. at 206).

In fashioning an IEP, a school district is not required to provide a specific program or employ a specific methodology requested by the parent. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty v. Rowley,* 458 U.S. 176, 199, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

During the two year period preceding the fi of the request for Due Process Hearing by Parents, ie. from May 30, 2016 to May 30, 2018, the October 25, 2016 IEP and the January 5, 2017 IEP Amendment were developed and were implemented.

Progress:

Star reading and Star math assessments were given concerning at intervals during the 2017 to 2018 school year. Star reading assessment and Star math assessments are a computer based adaptive program assessment which were given to the whole class by their teacher. took the assessments one-on-one.[[80]](#footnote-80)

The Star assessments looked at individual skill-based growth, or lack of growth, in math and reading independent of the curriculum.[[81]](#footnote-81) The tests are given periodically during the school year to determine if the student is making progress in the school year or if there is some regression. The assessments at the beginning of the school year provide a basis for this determination. Additionally, the score from the beginning of the school year allows the teacher to creates goals for each students. ’s goal was to increase one scaled score per week of the school year or a total of 40 points for the school year.[[82]](#footnote-82) While the assessment software makes recommendations as to an appropriate goal for a student, the recommendation can be adjusted by a teacher. ’s teacher deviates from the software recommendation and increased her scaled score per week goal.[[83]](#footnote-83)

The initial Star reading assessment was used to put and other students into reading groups. Initially she was in a group of two students but in January she was in alone her own reading group.

’s Star reading and Star math assessments of the 5th grade indicated:

Star reading: Test Date Scaled Score

09/08/17 97

10/01/17 98

12/07/17 89

03/07/18 108

04/16/18 157 [[84]](#footnote-84)

Star Math: Test Date Scaled Score

09/07/07 470

11/01/17 428

12/15/18 441

06/06/18 538 [[85]](#footnote-85)

’s goal (40 point increase at the end of the year) for Star reading improvement was an end of year score of 137 but she she achieved a scaled score of 157. Her goal for Star Math improvement was an end of year scaled score of 510 and she achieved a 538.

did exceptionally well on the final,4/16/18, administration of the Star reading testing. Her teacher opined this was after the SOLs and all the pushes, plus, at that time of the year she had the confidence in herself.[[86]](#footnote-86) Additionally, she believed that accommodations was receiving with the IEP Amendment from January 5, 2017, and IEP strategies helped her with these testings.[[87]](#footnote-87)

Assessments:

The LEA central office uses Common Formative Assessments (“CFA”) and District Benchmarks Assessments (“DBA”) to provide skill based assessments for students.[[88]](#footnote-88) Both CFA and DBA come from the School District, are not in-school generated, and are utilized to assess a performance in a number of subjects including English Language, Fine and Performing Arts, Mathematics, Reading, and Social Science sand History.[[89]](#footnote-89)

English Language assessed on October 16, 2017. took the 1st Quarter CFA and achieved an overall test score of 61.5%. On December 11, 2017 took the 2nd Quarter CFA and achieved an overall test score of 80%. Her 2nd Quarter CFA was taken with the IEP’s testing accommodations including one-on-one testing and read aloud.[[90]](#footnote-90)

On November 6, 2018 took her 1st Quarter DBA regarding English Language and her cumulative score was 16%. On January 16, 2016 took her 2nd Quarter DBA regarding English Language and her cumulative score was 60%.[[91]](#footnote-91) She received her 1/5/17 IEP provided accommodations in testing.

On May 4, 2018 took a mock SOL regarding Reading Performance and her test score was 91.75%. [[92]](#footnote-92) On May 11, 2018 her mock SOL test score dropped to 53.8%.[[93]](#footnote-93)

’s various assessment for Mathematics indicate:[[94]](#footnote-94)

10/16/17 1st quarter CFA 23.8%

12/11/17 2nd quarter CFA 12.0%

11/06/17 1st quarter DBA 18.7%

01/16/18 2nd quarter DBA 17.3%

03/19/18 mock SOL 29.3%

04/12/18 first push mock sol 38.0%

04/20/18 second push mock sol 42.5%

05/04/18 fourth week mock sol 70.0%

05/11/18 fifth week mock sol 21.3%

The 5/4/18 assessment, 4th week mock SOL, focused on mean, median, mode, and range and all students are allowed to use a calculator. Subject matter being tested and use of a calculator were factors in the increase in score.[[95]](#footnote-95)

DRA, Developmental Reading Assessment, is a reading assessment that allows gauging a child on their reading engagement, fluency with reading, and comprehension with reading. was on level 4 at end of 4th Grade. On 12/17/17, her first DRA the 2017-2018 school year, the assessment was started with level 6 and moved to a DRA level 8 where it was determined the reading engagement was an 8/8, the oral frequency was a 13/16, and the comprehension piece was a 28/28. She was then moved to a DRA level 10 assessment where reading engagement was 8/8, oral fluency was 12/16, and comprehension 16/28. They stopped due to fluency being 12 out of 16 and she was at the lower end of being independence. She was assessed at Level 10.[[96]](#footnote-96) At level 10 her reading engagement scores were 8/8 oral reading fluency was 12/16 and comprehension 26/28.

Her Special Ed teacher had been using *Recipe for Reading* with from October until the beginning of November. This was a leveled system where the student moves up levels as they progress. With the the *Recipe for Reading* program moved from a DRA level 4, her level at the end of the 4th grade, to DRA level 10 on 12/17/18. Additionally, seemed to be a lot more relaxed with reading. [[97]](#footnote-97)

On May 29, 2018, due to her having been reading with on a one-to-one basis, her Special Ed. teacher administered a Developmental Reading Assessment starting at DRA level 14. Her reading engagement was 8 out of 8, oral fluency was 14 out of 16, and comprehension was 28 out of 28. was then moved to a DRA level 16 where she received a score of 8 out of 8 for reading engagement, 14 out of 16 for oral fluency, and 25 out of 28 for comprehension. [[98]](#footnote-98) As she was still at the independent level and didn’t have any frustrations with reading, she was tried at a DRA level 18. However, her pace of reading prevented her from reaching DRA level 18. Pace of reading was the only thing that kept her from reaching DRA level 18.[[99]](#footnote-99)

’s Special Ed. Teacher testified, in the area of reading, had made significant progress, the progress that she was having in the special ed. setting was carrying over to the general education setting, and she was applying strategies regularly in the classroom setting.[[100]](#footnote-100)

took Grade 5 SOLs . A Test Scale of 400 is needed to pass the SOL. received the following results:

Reading CAT Test Scaled Score: 488 Performance Level: Pass/Proficient

Mathematics CAT Test Scaled Score: 343 Performance Level: Fail/Basic.

Science Test Scaled Score: 349 Performance Level: Fail

Virginia Studies Test Scaled Score: 317 Performance Level: Fail[[101]](#footnote-101)

The SOL testing was given without fifth grade teachers in the room where students were tested and at least one examiner and one proctor was assigned to each class or small group or one-on one student being tested. was tested in a room by herself and had an examiner and proctor.[[102]](#footnote-102)

In the Reading SOL ’s teacher believed the Reading SOL performance could be attributed to her gained confidence, accessing the accommodations allotted her, and having the specialized instruction to help her progress.[[103]](#footnote-103)

For her mathematics SOL testing had read aloud, one-on-one, and was allowed to have a 100s chart.[[104]](#footnote-104) was one of 3 students, the other two being regular ed. students, who failed the math SOL.[[105]](#footnote-105)

Science SOL testing was without read aloud accommodation, but she received one-on-one. Virginia Studies was also with accommodation of one-on-one but without the read aloud accommodation.[[106]](#footnote-106)

In light of the performance on the SOLs ’s teacher opined that working with the benefit of her IEP of January 5, 2017, was able to access the general curriculum and obtain educational benefit from the instruction in the general ed. environment.[[107]](#footnote-107)

In *Endrew F. v. Douglas County School District Re-1*, 137 S.Ct. 988, the Supreme Court interpreted the scope of the IDEA’s FAPE requirements. The Court overturned the Tenth Circuit’s decision holding a child with autism was only entitled to an educational program that was calculated to provide merely more than “de minimis” educational benefit. The Court determined, in order for a LEA to meet its substantive obligations under the IDEA it must offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances and reinforced that every child should have the chance to meet challenging objectives.

For the reasons stated above, the totality of the evidence in this cause indicates that received an program reasonably calculated to enable her to make progress in light of her unique circumstances. .

is a speech pathologist with Public Schools who has worked with from September 2016. She reviewed both the 2016 and 2017 evaluation of Dr. and generally is in agreement with his findings.[[108]](#footnote-108) She used Dr. ’s reports in setting certain goals for . She used the 2016 report to come up with receptive language goal to help increase her lexical extraction abilities.[[109]](#footnote-109) His 2017 report addressed difficulties with work knowledge and this is considered in the expressive vocabulary goal.

The October 2016 IEP had new speech-language goals. The expressive language goal was created due to difficulties reported in the speech language report with grammar and vocabulary knowledge. Both the LEA and the CHKD report noted grammar and vocabulary difficulties. increased her abilities from 3 words to getting four to six words in order appropriately by January. made progress on this goal.

Work was done with on her ability to combine two given sentences with a given conjunction and and she increased her abilities on that. She worked on using correct grammar and completing antonyms increasing her vocabulary knowledge and she worked on receptive language to increase her ability to follow multi-step directions and pull out those key words as was addressed in Dr. ’s report. She made progress with that. She ended up from just identifying one key word to two key words in two months.[[110]](#footnote-110)

Expressive language vocabulary was a area of weakness noted in therapy, in conversational speech with , and on Dr. ’s report.[[111]](#footnote-111) As Dr. ’s report did not tell exactly where the difficulties were within grammar, Ms. gave probes which indicated difficulty with irregular plurals, irregular past tense verbs and noun derivation.[[112]](#footnote-112)

had difficulty with understanding whether a matters was correct grammar or incorrect grammar as per ’s report. A goal was set for her identify whether the sentence was correct or was using correct or incorrect grammar.

Ms. took what was working on the previous IEP and increased the difficulty, broke down the goals so ’s expressive language goal wasn’t clumped together. The goals address directly the known speech-language impairment or the specifics of her speech-language impairment.[[113]](#footnote-113)

3/12/17

An IEP Meeting was held on 3/12/18 and a proposed IEP was presented. This IEP addressed the IEE conducted by Dr. and the following diagnoses:

Unspecified Neurodevelopmental Disorder(deficits in sensory processing and frontal lobe functioning)

Language Disorder (deficits in auditory overloading, auditory extraction, and auditory organization)

Attention Deficit Hyperactivity disorder, Combined Type (partial remission)

SLD with deficits in reading, written expression, and arithmetic calculation (developmental reading

disorder/dyslexia, dyscalculia)

Goals include provided for in the 3/12/18 proposed IEP include, but are not limited to:

Given a reading passage containing two-syllable works on a third grade reading level comprised of digraphs and blends, will independently decode (read with 75% accuracy on 2/3 trial by the annual review date. Her 2/1/18 pre-score baseline data and source was 48% (2 paragraph passage on second grade level without supports)

Given a list of words will decode one-syllable words containing digraphs and blends (current baseline data is 66% on CVC words) by 6/14/18.

Given the Dolch Sight Vocabulary List, will recognize all 220 words on 4 out of 5 trials by the annual review date. Pre-scord baseline date of 1/31/18 provided 171/200 (77%) dolch word list.

Given a text at third grade reading level, will demonstrate comprehension by answering wh-questions independently with 70% accuracy on 3/5 trials by the annual review date. Pre-score date of 1/26/18 had baseline 50% without accommodations at a second grade reading level

Given a reading passage on the 3rd grade level containing two-syllable words comprising of digraphs and blends, will increase fluency to 90% accuracy on 2/3 trials by the annual review date. The pre-score baseline (1/26/18) was 88% (2 paragraph passage on second grade level without supports.

Given a written assignment, will independently use correct spelling of high frequency words and CVC words with blends and digraphs with 90% accuracy on 3/4 trials by annual review date. 1/25/18 pre-score baseline was 50% (4/8) CVC words ...

Given a writing prompt or topic, will use a graphic organizer and word prediction software to write a 3 paragraph composition maintaining the topic, with descriptive vocabulary with 70 % accuracy on 2/3 writing assignments by the annual review date. 12/14/17 pre-score baseline was 2 paragraph with support...

Given subtraction, multiplication and division problems that require multiple steps, will solve with 80% accuracy without support of a calculator by the annual review date. 1/31/18 pre-score baseline was 40%.[[114]](#footnote-114)

On 3/27/18 parents provided a only a partial consent to the 3/12/18 proposed IEP only consenting to the testing accommodations within the proposed IEP. No other provisions of the IEP have been consented to. Also, Parents stated they are not indicating they agree or disagree with the remaining provisions of the proposed IEP but merely state, “We are withholding our agreement/disagreement to the remainder of the proposed IEP until we have consulted with ’s team of experts.”

8 VAC 20-81-170(E)(1)(d) provides Informed parental consent is required before any revision to the child’s IEP services. 8 VAC 20-81-110 B.(2)(d) mandates a school division ensure an IEP is implemented as soon as possible following parental consent to the IEP. However, this regulation does not explicitly require the LEA to implement portions of a child’s IEP in those instances where the parent has not consented to the entire document. The law does not prohibit the LEA from implementing those parts of the IEP that are consented to by the parent, as it is important the child’s receipt of a FAPE is not interrupted.[[115]](#footnote-115) VDOE has held that in such instances, the school division must implement those provisions on which the parties agree. However, in this cause the School expressed concern implementing only the parent’s partial consent would act to actually impede the provision of a FAPE to .

**504**

Parents allege the LEA has discriminated against and denied her equal access to academic and non-academic activities with her non-disabled peers, solely due to her disability, in violation of Section 504 of the Rehabilitation Act of 1973.

Section 504 of the Rehabilitation Act of 1973,(“Section 504”) prohibits discrimination against individuals with disabilities in programs or activities that receive federal financial assistance. [29 U.S.C. 794](https://www.gpo.gov/fdsys/pkg/USCODE-2010-title29/pdf/USCODE-2010-title29-chap16-subchapV-sec794.pdf) provides, “No otherwise qualified individual with a disability in the United States, as defined in [section 705(20)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&originatingContext=document&transitionType=DocumentItem&pubNum=1000546&refType=RB&originatingDoc=I0d2368e0f2f211e5ad29c0953603e3e2&cite=29USCAS705) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ....”

The Virginia Regulations, 8 VAC 20-81-210 (O)(5)(b), allow special education hearing officers to determine, when an IDEA due process notice also indicates a Section 504 dispute whether to hear both disputes in order to promote efficiency in the hearing process and avoid confusion about the status of the Section 504 dispute. Hearing Officer exercised such discretion and heard Parents’ Section 504 dispute.

Parents allege a general education teacher repeatedly reprimanded the Student for asking questions in class due to material missed as a result of her disability and alleged forcing her to run laps during recess and other times she should have been interacting with non disabled peers.

The Courts have held the standard of proving a § 504 claim to be very high. Parents must prove either had been subjected to discrimination or excluded from a program or denied benefits `solely by reason of' her disability. If the alleged discrimination was motivated by factors other than the disability, even if the disability was, in part, a motivating factor, no claim under § 504 lies. Additionally, Parents must establish that the School Board's educational decisions relating to were so inappropriate as to constitute "either bad faith or gross misjudgment." As noted by the Court below, the “bad faith or gross misjudgment” standard is extremely difficult to meet, especially given the great deference to which local school officials’ educational judgments are entitled.

*Doe v. Arton County School Board*, 41 F. Supp. 2d 599. 608-609 (E.D.Va. 1999) addresses the standard of proving a § 504 discrimination claim stating:

In the special education context, the standard of proving a § 504 claim is extraordinarily high. The plaintiffs must first demonstrate that "they have either been `subjected to discrimination' or excluded from a program or denied benefits `solely by reason of' their disability." *Sellers v. School Bd. of City of Manassas, Va.,* 141 F.3d 524, 528 (4th Cir.), *cert. denied,* [525] U.S. [871], 119 S. Ct. 168, 142 L. Ed. 2d 137 (1998). Thus, if the alleged discrimination was motivated by factors other than the disability, even if the disability was, in part, a motivating factor, no claim under § 504 lies. *E.g., Johnson v. Thompson,* 971 F.2d 1487, 1493 (10th Cir. 1992), *cert. denied,* 507 U.S. 910, 113 S. Ct. 1255, 122 L. Ed. 2d 654 (1993) ("The word solely provides the key: the discrimination must result from the handicap and the handicap alone.").

Second, they must establish that the School Board's educational decisions relating to the student were so inappropriate as to constitute "either bad faith or gross misjudgment." *Sellers* 141 F.3d at 529. This follows from this Court's prior holding that "§ 504 does not create any general tort of educational malpractice." *Barnett v. Fairfax County Sch. Bd.,* [721 F. Supp. 755](https://law.justia.com/cases/federal/district-courts/FSupp/721/755/1419823/), [757](https://law.justia.com/cases/federal/district-courts/FSupp/721/757/1420121/) (E.D.Va.1989), *aff'd,* 927 F.2d 146 (4th Cir.), *cert. denied,* 502 U.S. 859, 112 S. Ct. 175, 116 L. Ed. 2d 138 (1991).

The "bad faith or gross misjudgment" standard is extremely difficult to meet, especially given the great deference to which local school officials' educational judgments are entitled. Something far more than a mere denial of free appropriate education is required. ...

*Sellers v. School Bd. of City of Manassas, Va.,* 141 F.3d 524, 528 (4th Cir.), *cert. denied,* [525] U.S. [871], 119 S. Ct. 168, 142 L. Ed. 2d 137 (1998) stated:

To prove discrimination in the education context, "something more than a mere failure to provide the 'free appropriate education' required by [IDEA] must be shown." Monahan v. Nebraska, [687 F.2d 1164](https://openjurist.org/687/f2d/1164), 1170 (8th Cir.1982); see also Lunceford v. District of Columbia Bd. of Educ., [745 F.2d 1577](https://openjurist.org/745/f2d/1577), 1580 (D.C.Cir.1984). We agree with those courts that hold "that either bad faith or gross misjudgment should be shown before a § 504 violation can be made out, at least in the context of education of handicapped children." Monahan, 687 F.2d at 1171; see also Hoekstra v. Independent Sch. Dist. No. 283, [103 F.3d 624](https://openjurist.org/103/f3d/624), 626-27 (8th Cir.1996), cert. denied, --- U.S. ----, 117 S.Ct. 1852, 137 L.Ed.2d 1054 (1997); Wenger v. Canastota Cent. Sch. Dist., 979 F.Supp. 147, 152 (N.D.N.Y.1997).

Parents raise that in the 5th grade said she was made to run laps at least twice in the whole school year. This was addressed in an IEP meeting.[[116]](#footnote-116) This was also discussed with ’s parent.[[117]](#footnote-117)

’s gen ed. 5th grade teacher used recess time-out as a classroom management tool applicable to all students in her class, non-disabled and disabled. The recess time-out for homework was based upon the homework not being completed at all and not based on the quality of the homework. She had established class rules, consequences, and rewards for good behavior. For behavior issues, she would give verbal warnings and, if matters continued, she would ask the student to write their name on the board and she would enter a check in her clipboard so she knew to give the time-out during recess.[[118]](#footnote-118) There was also a system where a student might be able to earn the check mark back by correcting their behavior and their check record would be expunged.[[119]](#footnote-119)

The recess period for students is 20 minutes. One check equated to about a one minute recess time-out. The student would select the option for recess-time-out activity. The student could chose to sit, stand, read a book, walk around the playground, run around the playground (not run on but around the playground) during the one minute time-out. Once the minute is up the student could go play for the remainder of the recess period.[[120]](#footnote-120)

had five check marks for the 5th grade school year, 9/6/17, 11/28/17, 11/29/17, 3/19/18, 5/9/18. Additionally, two checks were given to the whole class on Oct. 17, 2018 but, as was out of the room for reading, for at least one she was not included in that whole class.[[121]](#footnote-121) Thus for 5 or 6 separate one minute periods throughout the whole school year she be on recess time-out where she would have to choose whether to sit, stand, read a book, walk around or run around the playground. After the one minute period she would be able to play on the playground.

was not totally excluded from her non-disabled peers during these one minute recess time-outs. The recess timeouts did not constitute a denial of access to academic and none-academic activities based solely upon her disability. There is insufficient evidence to find of bad faith or gross misjudgment on the part of the School. Additionally, there is insufficient evidence to find there was discrimination solely based upon ’s disability.

# DECISION:

For the reasons stated above, the Hearing Officer finds that Parents have not met their burden.

1. There is insufficient evidence to find that since at least May 2016, LEA has failed to provide a FAPE in violation of the IDEA.

2. There is insufficient evidence to find the LEA has, in violation of the IDEA, failed to develop and/or implement an IEP with appropriate goals, services, accommodations, and placement according to ’s specific needs.

3. There is insufficient evidence to find the LEA failed to adhere to procedural regulations of the IDEA.

4. There is insufficient evidence to find that the LEA, in violation of the IDEA, failed to accurately collect or share IEP progress data, delayed in responding to Parent’s request for IEEs, or unlawfully challenged the sufficiency of Parent’s partial consent to the March 28, 2018 IEP.

5. There is insufficient evidence to find the LEA has discriminated against and denied her equal access to academic and non-academic activities with her non-disabled peers, solely due to her disability, in violation of Section 504 of the Rehabilitation Act of 1973.

# APPEAL AND IMPLEMENTATION:

**I. Appeal Rights:** The Hearing officers decision is final and binding unless either party appeals in a federal District Court within 90 calendar days of the date of the decision, or in a state circuit court within 180 days of the date of the decision.

**II. Implementation Plan:** *Regulations Governing Special Education Programs for Children with Disabilities in Virginia*, effective January 25, 2010, provides at 8 VAC 20-81-210 N 16 that the local educational agency shall:

"Develop and submit to the Virginia Department of Education an implementation plan, with a copy to the parent(s), within 45 calendar days of the Hearing Officer's decision in hearings that have been fully adjudicated.

a. If the decision is appealed or the school division is considering an appeal and the decision is not an agreement by the hearing officer with the parent(s) that a change in placement is appropriate, then the decision and submission of implementation plan is held in abeyance pursuant to the appeal proceedings.

b. In cases where the decision is an agreement by the hearing officer with the parent(s) that a change in placement is appropriate, the hearing officer's decision must be implemented while the case is appealed and an implementation plan must be submitted by the local educational agency.

September 10, 2018 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Lorin A. Costanzo, Hearing Officer

Copies e-mailed to:

1. Parents’ Attorney

2. LEA’s counsel

3. SEA evaluator

4. SEA

1. Tr.1 pg. 6.; Tr. 3 pg 373. [↑](#footnote-ref-1)
2. Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528 (2005). [↑](#footnote-ref-2)
3. P Ex. 8. [↑](#footnote-ref-3)
4. Tr. 2 pg. 2 and Tr. 2 pg 158. [↑](#footnote-ref-4)
5. P. Ex. 1 pg 3. [↑](#footnote-ref-5)
6. Tr. 2 pg. 159. [↑](#footnote-ref-6)
7. Tr. 47-48; P. Ex. 70. [↑](#footnote-ref-7)
8. Tr. 3 pg. 11. [↑](#footnote-ref-8)
9. Tr. 2 pg.7. [↑](#footnote-ref-9)
10. Tr. 2 pg. 7. [↑](#footnote-ref-10)
11. Tr. 2 pg 7-9. [↑](#footnote-ref-11)
12. P. Ex. 29; Tr. 2 pg 9-11. [↑](#footnote-ref-12)
13. Tr. 2 pg. 10. [↑](#footnote-ref-13)
14. S. Ex 2. [↑](#footnote-ref-14)
15. P Ex. 4; Tr.2 pg. 20-24. [↑](#footnote-ref-15)
16. S. Ex. 6 [↑](#footnote-ref-16)
17. S. Ex. 8. [↑](#footnote-ref-17)
18. S. Ex. 9. [↑](#footnote-ref-18)
19. S. Ex. 12. [↑](#footnote-ref-19)
20. S. Ex. 15. [↑](#footnote-ref-20)
21. Tr 3 pg. 329-330: S. Ex. 22. [↑](#footnote-ref-21)
22. Tr. 3. pg. 331. [↑](#footnote-ref-22)
23. P Ex. 64; Tr. 3 pg. 331-332. [↑](#footnote-ref-23)
24. S. Ex. 25 pg. 26 of 27. [↑](#footnote-ref-24)
25. Tr. 2 pg. 199-200, S.Ex. 15. [↑](#footnote-ref-25)
26. Tr. 3. pg 34. [↑](#footnote-ref-26)
27. S. Ex. 18b; Tr.3 pg. 35-36. [↑](#footnote-ref-27)
28. S. Ex. 18b; Tr. 3 pg. 36. [↑](#footnote-ref-28)
29. S. Ex. 27; Tr. 3 pg. 42. [↑](#footnote-ref-29)
30. S. Ex. 18b; Tr. 3 pg 36-37. [↑](#footnote-ref-30)
31. S. Ex. 27; Tr. 3 pg. 42. [↑](#footnote-ref-31)
32. S. Ex. 18b; Tr. 3 pg. 37-38 [↑](#footnote-ref-32)
33. S. Ex. 27; Tr. 3 pg. 43. [↑](#footnote-ref-33)
34. S. Ex. 27; Tr. 3 pg. 43. [↑](#footnote-ref-34)
35. S. Ex. 18b; Tr. 3 pg. 40. [↑](#footnote-ref-35)
36. S. Ex. 27; Tr. 3 pg. 44. [↑](#footnote-ref-36)
37. S. Ex. 18b; Tr. 3 pg. 41. [↑](#footnote-ref-37)
38. S. Ex. 27; Tr.3 pg. 45. [↑](#footnote-ref-38)
39. Tr. 1 pg. 31. [↑](#footnote-ref-39)
40. P. Ex. 2; Tr. 1 pg 32-33. [↑](#footnote-ref-40)
41. P. Ex. 3; Tr.1 pg. 37-39 [↑](#footnote-ref-41)
42. Tr. 1 pg. 82-86. [↑](#footnote-ref-42)
43. Tr. 1 pg. 77-79. [↑](#footnote-ref-43)
44. Tr. 1 pg. 95 and Tr. 1 pg. 110. [↑](#footnote-ref-44)
45. Tr. 1 pg. 55-58; P Ex.7. [↑](#footnote-ref-45)
46. S Ex. 30i; P Ex. 7. [↑](#footnote-ref-46)
47. P Ex. 30 pg. 007. [↑](#footnote-ref-47)
48. P. Ex. 30 pg. 008. [↑](#footnote-ref-48)
49. P. Ex. 8; Tr.2 pg. 41. [↑](#footnote-ref-49)
50. P. Ex. 8 pg.7. [↑](#footnote-ref-50)
51. P. Ex. 8 pg.10-14; Tr. 2 pg. 440-42. [↑](#footnote-ref-51)
52. Tr. 2 pg. 41-43. [↑](#footnote-ref-52)
53. P. Ex. 9. [↑](#footnote-ref-53)
54. Tr. 1 pg. 202. [↑](#footnote-ref-54)
55. Tr. 1 pg. 205-206. [↑](#footnote-ref-55)
56. Tr. 1 pg. 210. [↑](#footnote-ref-56)
57. Tr. 1 pg.198-199. [↑](#footnote-ref-57)
58. Tr. 3 pg 12. [↑](#footnote-ref-58)
59. Tr. 3 pg. 12. [↑](#footnote-ref-59)
60. Tr. 3 pg. 14-15. [↑](#footnote-ref-60)
61. Tr. 3 pg. 15. [↑](#footnote-ref-61)
62. Tr. 3 pg. 32. [↑](#footnote-ref-62)
63. Tr. 3 pg. 20-26; S. Ex. 32a. [↑](#footnote-ref-63)
64. P. Ex. 15. [↑](#footnote-ref-64)
65. Tr. 2 pg. 31. [↑](#footnote-ref-65)
66. Tr. 2 pg. 202-203 [↑](#footnote-ref-66)
67. Tr. 2 pg. 205. [↑](#footnote-ref-67)
68. Tr. 2 pg. 214. [↑](#footnote-ref-68)
69. Tr. 2 pg. 211. [↑](#footnote-ref-69)
70. Tr. 2 pg. 222 [↑](#footnote-ref-70)
71. Tr. 2 pg. 223. [↑](#footnote-ref-71)
72. S. Ex. 15. [↑](#footnote-ref-72)
73. S. Ex. 30b. [↑](#footnote-ref-73)
74. Tr. 3 pg. 240-246. [↑](#footnote-ref-74)
75. Tr. 3 pg. 241 [↑](#footnote-ref-75)
76. Tr. 3 pg. 242-245. [↑](#footnote-ref-76)
77. Tr. 3 pg. 247-248. [↑](#footnote-ref-77)
78. 34 C.F.R. §300.513; 8VAC20-81-210 (O)(17). [↑](#footnote-ref-78)
79. 8 VAC 20-81-10 [↑](#footnote-ref-79)
80. Tr. 2 pg. 232-233. [↑](#footnote-ref-80)
81. Tr. 2 pg. 242. [↑](#footnote-ref-81)
82. Tr. 2 pg. 231-233 and pg 240. [↑](#footnote-ref-82)
83. Tr. 2 pg. 234-235. [↑](#footnote-ref-83)
84. S. Ex. 32f. [↑](#footnote-ref-84)
85. S. Ex. 32e. [↑](#footnote-ref-85)
86. Tr. 2 pg. 240. [↑](#footnote-ref-86)
87. Tr. 2 pg. 243. [↑](#footnote-ref-87)
88. Tr. 2 pg. 248-249. [↑](#footnote-ref-88)
89. S. Ex. 32e. [↑](#footnote-ref-89)
90. Tr. 2 pg. 253-254. [↑](#footnote-ref-90)
91. Tr. 2 pg. 254. [↑](#footnote-ref-91)
92. S. Ex. 32e. [↑](#footnote-ref-92)
93. Tr. 2. pg. 265: S. Ex. 32e. [↑](#footnote-ref-93)
94. S. Ex. 32d; Tr. 2 pg. 272-280. [↑](#footnote-ref-94)
95. Tr. 2 pg. 280. [↑](#footnote-ref-95)
96. Tr. 3 pg. 20-26; S. Ex. 32a. [↑](#footnote-ref-96)
97. Tr. 3 pg. 32. [↑](#footnote-ref-97)
98. Tr. 3 pg. 48-51. [↑](#footnote-ref-98)
99. Tr. 3 pg. 55. [↑](#footnote-ref-99)
100. Tr. 3 pg. 67. [↑](#footnote-ref-100)
101. S. Ex. 32h. [↑](#footnote-ref-101)
102. Tr. 2 pg. 268-270. [↑](#footnote-ref-102)
103. Tr. 2 pg. 271. [↑](#footnote-ref-103)
104. Tr. 2 pg. 282. [↑](#footnote-ref-104)
105. Tr. 2 pg 284. [↑](#footnote-ref-105)
106. Tr. 285-287. [↑](#footnote-ref-106)
107. Tr. 287. [↑](#footnote-ref-107)
108. Tr. 3 pg.168-171. [↑](#footnote-ref-108)
109. Tr. 3 pg. 178. [↑](#footnote-ref-109)
110. Tr. 3 pg. 154. [↑](#footnote-ref-110)
111. Tr. 3 pg.162. [↑](#footnote-ref-111)
112. Tr. 3 pg. 163. [↑](#footnote-ref-112)
113. tr. 3 pg. 165-166. [↑](#footnote-ref-113)
114. S. Ex. 25. [↑](#footnote-ref-114)
115. 8 VAC 20-81-170 E.(1)(.d). and 34 CFR § 300.300 (d)(2) [↑](#footnote-ref-115)
116. Tr. 2 pg. 39-40 and pg. 314. [↑](#footnote-ref-116)
117. Tr. 2. pg.315 [↑](#footnote-ref-117)
118. Tr. 2 pg 311-313. [↑](#footnote-ref-118)
119. Tr. 2 pg. 318. [↑](#footnote-ref-119)
120. Tr. 2 pg. 312-313. [↑](#footnote-ref-120)
121. S. Ex. 32i Tr. 2 pg. 323-324. [↑](#footnote-ref-121)