**DUE PROCESS EDUCATIONAL APPEAL**

PARENT )

Appellant )

)

)

) In re: STUDENT

)

COUNTY PUBLIC SCHOOLS )

Respondent )

# **DECISION**

## **I. INTRODUCTION AND PROCEDURAL HISTORY**

The school district received a request for a due process hearing (Request) from one of the special education advocates for the parent on April 28, 2017. They claimed, *inter alia,* that the school system violated the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §1400 *et seq.* (2005), which amended the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* (1997) (IDEA), by denying the student a free appropriate public education (FAPE) in the least restrictive environment (LRE) by (i); failing to comply with his Individualized Education Program (IEP); (ii) violating the requirements of child find provisions; (iii) improperly training its staff; (iv) failing to implement appropriate behavioral supports; (v) failing to provide related or appropriate services; failing to establish appropriate IEP goals (see Request, pp. 2-3).

As relief, the parent’s proposed resolutions included convening an IEP team to modify the objectives and goals in her son’s IEP, completing an independent behavioral assessment designed to develop a behavioral intervention plan, conducting an independent comprehensive evaluation with a sensory assessment, granting compensatory and extended school year services, assigning a behavior aide, and initiating staff training on a range of issues (see Request, pp. 3-4).

Two advocates represented the parent*;* two attorneys from a private law firm represented the district[[1]](#footnote-1). I was appointed as the hearing officer from a list supplied by the Supreme Court of the Commonwealth of Virginia and certified by the Virginia Department of Education.

On May 8, 2017, a pre-hearing teleconference was conducted. The order of witnesses, issues in the appeal, exploration of settlement, and procedures for the conduct of the hearing were among the matters discussed. The parties estimated that the hearing could be completed in two days and agreed to schedule witnesses into the evening if necessary (see letter of May 10, 2017).

The school district submitted its Reply to the Request, denying each of the allegations. The school district also filed a Notice of Insufficiency under 20 U.S.C. §1415(b)(7)(A) (ii), contending, *inter alia,* that the Request was legally insufficient under because it contained allegations that were vague and generic which did not describe the nature of the student’s problems or include sufficient facts related to his claims. I granted the motion, finding that one could not determine what the maltreatment was, whether the IEP was adequate, and what provisions in the IEP were not implemented. I also concluded it lacked notice of specific facts so that the district could not avoid guessing at what the substance of the claims were (see email of second teleconference, May 16, 2017).

The parent was granted the right to file an Amended Request for a Due Process Hearing (Amended Request) and did so on May 22, 2017; Counsel for the school district filed another Notice of Insufficiency, maintaining that it did not cure the deficiencies found in the initial Request. I noted that it contained ten pages of thirteen separate paragraphs providing far more detail than the initial Request and was replete with description of incidents and specific allegations of inappropriate conduct by school officials. I calculated that over forty claims were contained in the paragraphs. I therefore found the Amended Request sufficient and recognized that the student’s problems had been described and that facts were alleged in support of the allegations. The district was therefore on sufficient notice of the parent’s concerns at least to the extent necessary to meet the statutory requirements.

We mutually agreed to change the starting date of the hearing from June 12, 2017 to July 19, 2017. I rejected the request from the advocates that I order the school district to permit them to record the resolution session, having found no legal authority to support their argument (see emails of the second and third teleconferences, May 31, 2017 and June 6, 2017).

The attorneys for the school system filed a motion to dismiss. Their first contention was that the Amended Request was deficient because it was not signed by the parent and the advocates were prohibited from filing in her name under 8 VAC 20-81-210(F)(2). The advocates replied that they were allowed to represent the parent under §22.1-214(C) of the Code of Virginia and should be able to file electronically as attorneys may under the Virginia Uniform Electronics Transaction Act, §59.1-485 of the Code of Virginia. I determined that a denial of the right to allow a representative to send by email an electronic signature of the parent where she has been represented throughout these proceedings by those advocates would be a narrow and irrational interpretation of the Virginia regulation. This position was supported by a recent decision from another Virginia hearing officer; no special education cases were cited to the contrary (see Decision on Motion to Dismiss, p. 2).

Counsel also sought dismissal based on the parent’s alleged failure to raise matters which had not been brought before the IEP team and over which there was no jurisdiction. The parent asserted that these issues had been raised and referred to nineteen emails and sixteen meetings. I concluded that given the factual dispute, dismissal could not be considered without an evidentiary hearing (see Decision, p. 3).

The final argument of the school system was that there was no jurisdiction for matters unrelated to the identification, evaluation, placement or the provision of FAPE under 20 U.S.C. §1415(b)(6)(A). Counsel set forth thirteen allegations which they maintained which were outside the scope of IDEA or did not implicate the provision of FAPE to the student. The advocates in their written response stated they would offer evidence at the hearing on those matters.

I had already observed that the complaint contained overlapping claims and claims of questionable relationship to the IDEA[[2]](#footnote-2) (see email of June 6, 2017). Under the Virginia regulations government my appointment, I have the authority to clarify and narrow the issues and determine the scope of the hearing with the assistance of the participants. 8 VAC 20-81-210.M, O. Accordingly, I ordered the parent to review the thirteen items identified by counsel that they sought to dismiss and withdraw those claims of minor relevance or outside the IDEA. For those not withdrawn, I ordered them to identify in the IEP the provisions violated or not carried out, and/or the federal or state regulations or law implicated (see Decision on second Motion to Dismiss, p. 4).

The advocates submitted a letter on June 28, 2017 in which none of the claims was withdrawn. Nor did they address the thirteen items cited by counsel or provide relevant legal authority. The school system asked that the appeal be dismissed in its entirety since new claims were made or, alternately, dismiss the thirteen items. I concluded that the entire appeal should not be dismissed but that the thirteen items would be dismissed on the grounds that the parent had not established any jurisdictional basis for those claims as either violating the student’s right to FAPE or otherwise violating IDEA. Thus, most or all of the claims within each of paragraphs one, two, four, five, six, nine, ten, twelve, and thirteen were dismissed. However, I wrote that evidence on the claims might be admissible at the hearing to support claims not dismissed since many of the assertions did not raise independent issues (see Report of Sixth Teleconference and Related Rulings, July 7, 2017).

Most of the rulings during the final weeks before the hearing concerned the efforts of the parties to engage in discovery. The hearing officer has substantial leeway in granting or denying such discovery (see discussion in email of June 25, 2017). In general, IDEA has set up its own procedures for discovery though exchange of documents, review of school records and subpoenas to third parties. Additional discovery adds substantial burdens on the parties given the short time frame between filing and hearing and should not be granted liberally.

The school system sought the issuance of six subpoenas. I granted two of the subpoenas which were directed to third parties over objections based on relevancy and undue burden. I decided that the subpoenas were limited in scope and likely relevant to the hearing. Counsel also requested production of documents from the advocates themselves. The advocates contended that the principles of attorney- client privilege and the work product doctrine barred production. Counsel maintained the bar did not apply because the advocates were not licensed attorneys. I disagreed and denied the request for subpoenas to the advocates. I concluded that since Virginia had decided that non-attorneys may represent parents in due process proceedings, it made sense to allow them the same right to oppose discovery as attorneys have. I also recognized that production would impose a substantial and unburden undue on them.

The final two subpoenas sought were for the mother of the student who filed the Amended Request and for his father. I rejected those requests based on the burden of requiring their review of 26 boxes of material, the mother’s health issues and the limited time frame (see Report, p. 4).

The parent requested the execution of three subpoenas from senior school officials. The matter was argued on July 6, 2017, six days before the exhibits were due and thirteen days before the hearing was scheduled to begin. I did not reach the question of the burden on the school system at such a late date since I refused to grant the subpoenas on the basis of timeliness.

The seventh and final prehearing teleconference took place on July 13, 2017 to consider the six draft subpoenas sought by the advocates to compel the attendance of six witnesses at the hearing. The documents were submitted two days before the argument and eight days before the hearing. The request for a seventh subpoena, which was to an attorney in the law firm representing the school system, was withdrawn. Counsel objected to all the subpoenas on the grounds of timeliness and observed that the advocates had ignored the process to obtain their voluntary presence to which they agreed in early June. I decided against automatically denying the requests but agreed to take lateness into consideration with regard to certain of the subpoenas.

Five of the six subpoenas were directed to school officials. I did not execute the subpoena to the director since I concluded that she would likely be present at the hearing and a subpoena would not appear to be necessary. Nor did I sign subpoenas to two school system employees whose testimony did not appear relevant and whose appearance in light of the short time frame would likely be burdensome and oppressive.

With regard to the other two officials who were on both witness lists and whose testimony would be clearly relevant, I issued the subpoenas. The final witness was an expert witness for the parent who resided in another state and intended to testify telephonically. The witness informed the advocates that she wanted a subpoena. Although not representing her, counsel objected on the basis of timeliness and enforceability. They also objected to testimony by telephone. I was inclined to deny their objections; I informed them that I had always allowed such testimony, usually at the bequest of the school system. I recognized that there is split in legal authority regarding the admissibility of the evidence but I had generally concluded that the focus should be directed to the weight of the evidence, not its admissibility. I granted counsel’s request to argue the matter at the hearing and submit a memorandum in support of his position. (See email of July 14, 2017). The matter was argued at the beginning of the hearing. At that time, the advocate stated that he would no longer call that witness and the matter became moot[[3]](#footnote-3) (Tr. I, pp. 16-19).

Counsel sought an order prohibiting the recording of the hearing. The advocates argued that a recording would not be disruptive and would be helpful in their training of advocates. I stated that I would prepare a draft order regarding cameras, recording equipment, and cell phones, the scope of which could be argued at the hearing (see email of July 14, 2017). The matter was argued at the beginning of the hearing. During the hearing, the advocate argued that recording from the iPhone of the parent should be allowed because she had sustained a traumatic brain injury in 2016 and needed it to discuss the testimony with her advocates to help prepare for the hearing later than day or on the second day . The brain injury would not allow her to process the information without having a record, he maintained. This justification differed from their prior rationale that a recording was necessary for training. The advocate explained that he just learned of the injury. Over the school system’s strenuous objection, I granted the motion and allowed the parent to record the first day only so it could be used for consultation and further preparation with her advocates but for no other purpose at any time such as training or publication through social media (TR.I, pp. 40-54). At the beginning of the second day of the hearing when the justification for a recording was no longer applicable, I prohibited any recording by the parent (Tr. III, pp. 357-358).

The parties timely filed their exhibits and list of witnesses prior to the hearing. The hearing began on July 19, 2017 and concluded in the evening on July 20, 2017. No procedural objections were raised at the beginning of the hearing (TR.I, p. 27). Six witnesses testified at the hearing: two called by the parent and four by the school district. The parties elected to submit post hearing and reply briefs in lieu of closing arguments at the hearing (TR.IV, pp. 720-725).

References in this Decision refer to the four transcripts for the proceedings (TR.I-IV.). The district listed thirty-four numbered exhibits and the parents submitted nineteen numbered exhibits. However, the parent’s exhibits contained over sixty separate documents under the numbered exhibits. References to those exhibits are identified as either from the school district (S.D.) or the Parent (P.). All exhibits were admitted into evidence, subject to possible objections when used (TR.I, p. 163).

**II. FINDINGS OF FACT**

The following represents findings of fact based upon a preponderance of evidence derived from the testimony of the witnesses and the documents admitted into evidence. Additional findings will be found in other portions of this decision.

**A. Factual Background Prior to the November 2014 IEP**

1. The student is fifteen years old and is now a rising eleventh grader at a public high school in the county school system. The student has always been a student at the county school system (TR.I, 211-212).
2. The mother emigrated from xxxxx in 1990. Her native languages are xxxx and xxxxx, but she is fluent in three or four languages. Approximately 80% of the time xxxx rather than English is spoken at home. The student answers some of the basic questions in xxxx, watches xxxxx movies, and sings xxxx songs. He understands conversations at home in xxxx. (TR.I, pp. 206-208).
3. The student received occupational therapy and physical therapy services from approximately three months of age until fifteen months of age from the xxxxxxxx Center. He then received early intervention services from Infant and Toddler Connection of Virginia from November 18, 2002 until 2003 when he first entered the early childhood exceptional education program (PEDD) (P.1, p. 75). He has a medical diagnosis of Down syndrome, which the family found out when he was approximately nine or ten weeks old (Tr.I, p. 211; P.1, pp. 69-70).
4. The student was found eligible for special education services under the category of developmental delayed on September 16, 2003 (P.1, pp. 1, 74). He was re-evaluated in January 2009 and found eligible for special education services under the disability designation of Intellectual Delayed and Speech-Language Disability (SLI) (P.1, pp. 25, 74). Subsequent evaluations were conducted in 2011 and 2014 at which times he continued to be eligible under the categories of intellectual disability (ID) and SLI (P.1, p. 74).
5. When the student was in the fourth grade the parent requested an updated psychological evaluation, which was conducted on December 14, 2010. The school psychologist concluded that the student had delayed cognitive abilities which were consistent with students who present with intellectual delays. He was administered the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV). The student’s verbal and nonverbal reasoning abilities were measured to be above those of approximately .1% of his peers with a full scale IQ of 40 (P.1, pp. 26-28).
6. While the student was in middle school, the parent had sent emails and had discussions with school personnel regarding the student obtaining a standard diploma. The administrators prohibited the student from attending classes in the last quarter of eighth grade and limit his interaction with school personnel. When the parent disagreed with the student’s placement in a self-contained classroom, she was told that they were still moving toward a standard diploma and that was the correct process (TR.I, pp. 221-224).

**B. November 12, 2014 IEP**

1. The 2014 annual IEP was held with the mother and her advocate participating. In the Present Levels of Academic and Functional Performance (PLOP) section, the team noted that the student functioned in the low to very low levels in all core areas when compared to other students his age according to the Woodcock-Johnson III test (S.B. 1, p.5). Considering the evaluations from February of 2014 and classroom performance, the team found he needed academic instruction in the functional skills classroom where he could be given repeated directions and visual aides in small group, or one-on-one settings. He also needed periods when he could interact with larger groups of students to witness, practice and model age appropriate social and communications skills in settings such as physical education (PE) and electives (S.B. 1, pp. 5, 12-18). Short term objectives were established (S.B. 1, pp. 8-11, 15, 18-20).
2. Seven accommodations were listed as part of the instructional and assessments process to enable the student an equal opportunity to access curriculum and demonstrate his achievement (S.B. 20). On the Factors for IEP Team Consideration Page, the document noted that English was the primary language employed by the student (S.B. 1, p. 3). The parent stated that the choice was that of the school system and would not have been her designation (TR. III, p. 447).
3. For the period of November 12, 2014 to November 11, 2015, the team established for the student 225 minutes every two weeks each in reading and written expression, 450 minutes for mathematics, 180 minutes for social skills, and 630 minutes for attention/organization skills for support in content areas to be provided by the special education teacher and the instructional assistant. The speech-language pathologist, special education teacher and instructional assistant were to give 120 minutes of direct instruction and support in speech- language (S.B.1, p. 22). The student would also receive 450 minutes of reading support in content areas and 450 minutes of behavioral skills from the special education teacher and instructional assistant in addition to 450 minutes each from the general education teacher and the instructional assistant, respectively (S.B.1, p. 22).
4. The IEP team concluded that the placement would provide FAPE given that the student required academic instruction and speech services for functional skills in a special education classroom where he could receive repeated directions, visual aides, and small group or periods of one-on-one instruction. Under the IEP, the student would participate with his peers without disabilities in regular physical education, an elective class, lunch and school assemblies. The mother signed the IEP and gave permission for its implementation (S.B.1, p. 30).
5. The mother recounted that one of the teachers said the student had vision and could work toward a life after school and attend college with two or four year degree courses. She stated that the student was doing eighth grade work (TR.III, p. 486).

**C. June 3, 2015 IEPs**

1. The next IEP meeting was convened seven months later in which the mother and her advocate participated. Two IEPs were prepared: an extended school year IEP (ESY) for the summer of 2015 and one for the fall of 2015 (S.B. 2, 3). In the PLOP section, the team repeated the language from the November 2014 IEP, as they did for short term objectives and the seven accommodations (S.B. 3, pp. 8, 11, 12-17).
2. The ESY IEP provided 660 hours direct instruction in mathematics from the special education teacher and instructional assistant and 660 hours from the general education teacher and the instructional assistant (S.B. 3, p. 5). For the Fall IEP, the student was to receive 470 minutes every two weeks in each of the areas of reading, written expression, mathematics, social skills support, and readiness. The speech-language pathologist, special education teacher, and instructional assistant were to provide 120 minutes of direct instruction and support in speech-language (S.B. 3, pp. 2-3).
3. The IEP team repeated the same language from the November IEP with regard to how placement would provide FAPE (S.B. 3, p. 7).
4. The mother signed the ESY IEP and gave permission for its implementation. (S.B. 3, p. 19). With regard to the Fall IEP, she gave permission for its implementation but added the following: “Disclaimer- I am signing this IEP so that my son [can] continue to receive Special Education services. I will be requesting an IEP meeting prior to the beginning of the 2015-2016 School Year to consider possible Amendments. 6/03/2015.” (S.B. 2, p. 9).
5. The mother testified that at the meeting school personnel never told her that SLI, designated as the secondary disability, might have been caused by the fact that 80% of the language spoken at home was in a foreign language. Rather, they said it was because of the student’s intellectual disability and Down syndrome. In the development of the IEP, she stated that they documented that he would be using accommodations in the Virginia standards of learning (SOLs) and they told her that they were preparing him for the SOLs. She stressed that the team knew from prior discussions they would be working toward a standard diploma in order that her son could attend college (TR.II, pp. 214-219).
6. The school system considered the June 3, 2015 IEPs to have amended the last annual IEP of November 12, 2014 for purposes of applying the stay put requirement under IDEA. (TR.II, 348). The last IEPs signed by the parent were the June 3, 2015 IEPs. For the period of June 3, 2015 until the present time, those IEPs governed the provision of special education services to the student.
7. The school system offered the testimony of the student’s special education teacher for the 2016-2017 school year. The special education teacher graduated from Virginia Commonwealth University with a Bachelor of Science in special education and a Master’s degree in special education with an emphasis intellectual disability. She had been a special education teacher for twenty-six years. During her career, she attended approximately ten to sixteen IEPs meetings and three to four eligibility committee meetings. She taught ten to sixteen students a year and had taught approximately 250 students with intellectual disabilities over her career. She was qualified as an expert witness in the area of teaching students with intellectual disabilities and developing and implementing education programs for them (Tr.II, pp. 276-283).
8. The child became a student of the special education teacher in September of 2016. She testified that in his first period he participated in an independent living class, a functional mathematics class in his second period, a vocational emphasis class in his third period, a PE class in his fourth period, a reading class in his fifth period, a language arts class in his sixth period, and a cooperative work education program (CoWEP) class in his seventh period. She explained that CoWEP was designed to provide pre-vocational skills and job experience when the student became sixteen years of age. The CoWEP class along with reading and math were aimed to assist the child in becoming more independent after high school (Tr.II, pp. 284-287, 341).
9. The special education teacher reported that the student was very cooperative and put forth consistent effort in any task assigned. For difficult tasks, he would tell her he was frustrated or needed a break. When there was movement in the classroom, which can distract him, he needed redirection and help to focus on an assignment (TR.I, pp. 284-290). She provided examples of assignments on which he made considerable progress by the end of the 2016-2017 school year. These included real life money skills, vocabulary words, interpreting graphs, and mathematics. The projects were taught at the second grade level in a one-on-one setting or with another student (TR.I, pp. 290-293).
10. The special education teacher also testified that the student had made progress in the vocational emphasis class learning vocabulary words and developing a resume. With regard to his social skills, she reported that he had made progress. He made friends in the general education population and communicated with them on social media. He also made friends in the special education classroom. He was very sociable and communicated well at the level of a second grader. She considered his academic abilities equal to a few of the students in the class and at a higher level than the others.
11. The special education teacher reviewed the record of attendance of the student for the 2016-2017 school year (S.B. p. 23). She noted that of the 176 school days, the student was dismissed early on 149 occasions and absent nineteen times. When picked up early, the student often missed part of the reading class, in addition to the entire language arts and CoWEP classes. She rendered her opinion that his absences adversely impacted his progress in the missed classes (TR.II, pp. 294-298). He received zeros in these classes because he did not complete the work, which was considered an “F” by the school district (TR.II, pp. 326-327, 335; TR.III, pp. 415-416).
12. The mother testified that she took him out of school for the day at lunchtime, beginning on September 7, 2016 (TR.III, pp. 398). She contracted for the services of au pairs from an organization known as xxxxxxx (P., p. 16), who furnished individuals trained to assist special needs students in their academics. She prepared a lesson plan for one au pair to follow in 2015 and for another in 2016. The first au pair was a physical therapist from Germany but not a licensed teacher, and the second was a licensed teacher in Germany but not in special education. Neither au pair spoke xxxx; an au pair from Columbia introduced the student to Spanish prior to their arrival. Others employees who were locally hired and assisted the student at his home in the last two years did not speak xxxx either (Tr.III, pp. 408-412, 461-466, 479, 489; P.16, pp. 1-24).
13. It was the expert opinion of the special education teacher that it was appropriate for the child to receive his core academic educational instruction in a special education, self-contained environment. She testified that because of his intellectual disability, he had a need for a small group setting with frequent repetition to acquire skills. She noted that he was working at a much lower grade level than what would have been required in a high school curriculum. Therefore, given his need for repetition, the student would have had a difficult time keeping up with the pace of a general curriculum class at the eleventh grade level for the upcoming year. She concluded that since the student was working at a second grade level and the class would have been taught at the eleventh grade level, he would not have been able to complete the tasks or curriculum to pass the class (TR.II, pp. 298-303). She also maintained that it would not have been beneficial for the student to be in a SOL class because it would not have prepared him for the skills necessary to be productive in the community and be independent (TR.II, p. 345). On cross-examination, she was asked whether she would have had any problem with the student having been given an opportunity to take all his courses in a collaborative, non-self-contained class. She replied in the affirmative based on her view that his ability was below that necessary for core content areas at the high school level and that he would have become frustrated (TR.II, pp. 312-315).
14. The mother disagreed with the assessment that her son would not have been able to do well in a collaborative class, because the special education teacher had stated at an IEP meeting that she saw him living an independent and successful life and going to college. However, she conceded that the teacher also said he would not have done well in core subjects in a collaborative classroom at a parent/teacher meeting in the fall of 2016 (TR.III, pp. 378-383).
15. The special education teacher stated that the school system did not ask for a behavior intervention plan to address the absences because there had been no reason for one. Nor was such a plan developed based on a functional behavior assessment because, although the mother had asked it to be completed, she never returned the permission slip (TR.I, pp. 336- 339). The mother did not testify regarding this matter.

**D. June 1, 2016 IEP**

1. In the spring of 2016, the IEP meeting for the next school year took place. The mother, a mentor, an assistant, and the student’s father were among those present. In the PLOP section, the team found that the student functioned in the low to very low levels in all skill areas when compared to other students his age. (S.B. 7, p. 5). The team decided he needed academic instruction in an educational setting in which he could be given repeated directions, visual aides, and small group instructions (S.B. 7, p. 6). Short term objectives were set forth (S.B. 7, pp. 8-22). Eleven accommodations were listed as part of the instructional and assessments process in order to enable the student an equal opportunity to access curriculum and demonstrate his achievement (S.B. 7, pp. 28-29).
2. For the period of June 1, 2016 to May 31, 2017, the student would receive 470 minutes every two weeks in each of the areas of reading, written expression, mathematics, and social skills from the special education teacher and instructional assistant. He would also receive 500 minutes of support in reading from the special education teacher and general education teacher. The speech- language pathologist, special education teacher, and instructional assistant would provide 120 minutes of direct instruction and support in speech-language (S.B. 7, p. 32).
3. The IEP team concluded that the placement would provide FAPE on the basis that the student required academic instruction in a small group setting within a comprehensive public school environment. His cognitive and academic weaknesses necessitated a modified curriculum with identified accommodations. Under the IEP, the student would participate with his non-disabled peers in physical education, elective classes, and other scheduled school activities. The checkmark on the Prior Written Notice (PWN) indicated that the mother did not give permission for its implementation (S.B.7, p. 40).
4. The PWN for the IEP meeting reported that the school system refused to increase speech service minutes as requested by the parent because the student was making progress under the current program and the services provided appropriately addressed his needs. The mother also requested an increase in the amount of English as a Second Language (ESL) support. The team observed that ESL services were not provided for in the IEP, but nevertheless found the current provision adequate and appropriate for his needs (P. 5, pp. 4-5).
5. The PWN also indicated that the parent wanted the student to receive instruction in an inclusive setting and earn a standard diploma, which included participation in testing and instruction for the SOLs that could not be modified. The team considered the student’s educational record, including his progress reports and report cards, as well as evaluations and input from the students, teachers and parents. While not explicitly set forth in the PWN, it appears that the team rejected the request for inclusion (P. 5, pp. 4-5).
6. The mother stated that in the Factors for IEP Consideration page the document incorrectly reported that the primary language at home was English (TR.II, pp. 226- 227; P. 2, p. 165). She testified that she did not sign the IEP because they refused to meet with her during the summer and, after believing for a long time that her son was on track for a general education diploma, she recognized that he was missing considerable content-based services and education. She asserted that the IEP contained reduced special education instruction support and did not address LRE (Tr. II, pp. 228-229).
7. The mother referred to the Accommodations page, (P.2, p. 200), which provided for the accommodation of targeted assistance of 2.5 hours per day. The student needed help with balance and coordination issues, application of medicine, help in adjusting to a change in schedule, transitions, and keyboarding but the school system did not provide it (TR. III, pp. 424-439, 473-475). Specifically, she asked the school to provide targeted assistance to the student when he attended a dance in the fall of 2016 and to meet him when he went to a guitar club meeting. However, there were problems and delays in their provision of that assistance. (TR. III, pp. 471-473).
8. The parent offered the testimony of an expert witness who had received a Doctorate of Philosophy from Capella University and two Master’s Degrees from Virginia Commonwealth University in Interdisciplinary Studies and curriculum and instruction. Her dissertation topic was “Individuals with Disabilities Education Improvement Act of 2004: Noncompliance Determination Complaints in Commonwealth States”. The educator possessed substantial experience in special education in a variety of areas and had served on more than one hundred IEP teams (P. 18, pp. 17-20; TR.I, pp. 70-76). She was found qualified as an expert in the area of special education, over the objections from counsel who contended that she had never been a special education teacher or administrator. (TR.I, p. 94).
9. The educator prepared an “Analysis Report” on July 9, 2017. She identified eleven items of non-compliance with IDEA and a twelfth item of non-compliance with IDEA which contained ten additional items constituting denial of FAPE (P.18, pp. 12-13). There was no reference to the allegations in the Amended Request[[4]](#footnote-4).
10. The parent’s expert reviewed the factors for IEP consideration, noting that the mother wanted her son to receive an education in a general education setting, language support, and inclusion within the school to assist him in earning a standard diploma. She opined that those objectives could not have been met in his then current class (S.B. 7, p. 4; TR.I, p. 108). In the PLOP section, the proposed IEP stated that the student could benefit from interaction during the day with larger groups of students in order that he witness, practice, and model age appropriate social and communication skills, such as PE and elective classes, and where he can move around the classroom and take breaks when frustrated. The educator rendered the opinion that those benefits could be realized in a general education setting but not a restricted one (S.B. 7, p. 6; TR.I, pp. 109-111).
11. The parent’s expert further read the PLOP in which the team noted that he received additional weekly support from a teacher for English language learners for direct language, math, and academic vocabulary. The witness testified that she saw nothing in his record prior to June of 2016 to indicate that any assessment was made as to whether the student had a speech-language disability or whether his language issues were caused by the fact that his primary language at home was not English. Moreover, she questioned whether he had any speech and language disability (TR.I, pp. 118-122, 176-177).
12. The expert witness observed that the Diploma and Transition Status page of the IEP indicated that the student was a candidate for an Applied Studies Diploma, which she said was an option for a student who was unable to qualify for a general education diploma. However, on the Secondary Transition page, the team wrote that the course of study was designed for the student to attend a two- or four-year college with support. Since his educational plans showed that he was meeting his goals in his classes approximately 80% to 85% of the time, she determined that the student had the skill set and ability, with support, to achieve successful academic achievement, which she maintained could not have occurred in a self-contained classroom (TR.I, pp. 123-127; S.B. 7, pp. 23-25).
13. The educator testified that a student would have been better able to obtain the skill set to take the SOLs from a collaborative setting than a self-contained classroom. She defined a collaborative setting as one where the general education teacher and special education teacher or certified paraprofessional work together to implement the instructional program. Since the student used a calculator as indicated on the Accommodation Criteria page, it indicated that he had the skill set and ability to learn mathematical skills. (TR.I, pp. 128-130; S.B. 7, p. 30). She found that the IEP inadequate as it did not address his academic needs based on his skills set (TR.I, pp. 130-131).
14. The expert witness disagreed with the following explanation of How Placement Provides FAPE: “The IEP team has determined that [the student] requires direct academic instruction in a small group setting within the comprehensive public school setting. His cognitive and academic weaknesses necessitate a modified curriculum and identified accommodations. [The student] will participate with peers without disabilities in elective classes, PE, and scheduled school activities” (S.B. 7, p. 34). In support of her position, she stated that the educational plan referred to his mimicking of his peers and his ability to adapt his social language and social skills when integrated in a large setting. She contended that when such a student would be in a self-contained environment with non-verbal students, then he would regress and not get the socialization he needed or develop his skill set. In evaluating the student’s progress under the educational plan, she found that he was regressing academically in his reading, writing and speaking. That was apparent from the team’s finding that he needed ESY (TR.I, pp. 131-133, 172-175). She did not believe the regression was due to the mother’s withdrawal of the student from school every day because there was nothing in his schedule supporting academic learning (TR.I, pp. 131-133, 172-175).
15. The expert found other aspects of the IEP which denied FAPE. She maintained that the student did not have access to measures of accountability consistent with his non-disabled peers, which put him in an assessment that was far below his functional ability. She criticized the provision of special education services which established the minutes of instruction per every two weeks for each particular service on the Services and LRE page, which she believed meant every other week that particular service would not have been provided (TR.I, pp. 164-167).

**E. Eligibility Committee Re-Evaluation of August 29, 2016 and Related Evaluations**

1. The Eligibility Committee met to review the evaluation reports and decide whether the student still had a disability and was IDEA eligible. The committee concluded that his primary category was ID. It recommended that the eligibility category of SLI be discontinued because his communication deficits were an inherent characteristic of his primary disability (S.B.15, p. 3). The parent did not sign the consent to the termination of the SLI classification for the student.
2. An Educational Report was conducted on June 14, 2016. Sections of the Woodcock-Johnson Tests of Achievement-Fourth Edition (WJ-IV ACH) were used to assess the student’s basic academic skills and knowledge in reading, math and writing. The evaluator found that in comparison to other students at his age level, the student’s standard scores were very low in academic skills. His ability to apply academic skills was within the very low range of ability as well (S.B. 10).
3. A Social Evaluation Update was prepared on August 16, 2016. The mother informed the social worker that she did not think that the school system was successfully educating the student. She believed his IEP goals were not being properly implemented or pursued. She felt that the student could have functioned at a higher level than his current educational program allowed. Based on the results from the Teacher Rating Form of the Vineland Adaptive Scales-Second Edition, the social worker concluded that the student’s adaptive behavior skills were low (S.B. 11, pp. 1-2).
4. As part of her evaluation of August 25, 2016, the psychologist administered the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V). She found that the full scale IQ test of 40 suggested that the student’s abilities, when compared to his peers, were significantly lower and within a range consistent with his current education identification of ID and SLI. Moreover, the IQ score could be viewed as a valid estimate of his overall abilities at that time. Consistent with his scores on the WISCV-V, the student earned an extremely low full-scale score of 43 on the Wechsler Nonverbal Scale of Ability (WNV) (S.B. 12, pp. 3-4). According to the psychologist, the student’s cognitive abilities appeared to be consistent and independent of the language requirement since there was no significant difference in his scores when measured on a traditional, language-based abilities assessment or a nonverbal assessment. These scores were consistent with those obtained in 2009 and 2010 (S.B. 12, p. 7). The third instrument used was the Behavior Assessment System for Children-Second Edition (BASC-2) (S.B. 12, p. 5).
5. The psychologist testified that the WNV was selected because it did not use verbal language other than for initial directions and instead used only pictures and pointing. Nonverbal assessments were useful when a student, such as the child in this case, had weak language skills and speech-language impairments. The assessment can also be used, according to the psychologist, when the student had been identified as an ESL student and thus did not need to understand English to complete the tasks. With regard to the WISC-V and WNV scores, the results showed that 99.9% of the students his age had stronger cognitive functioning skills as measured on the assessments (TR.IV, pp. 608-612).
6. The psychologist compared the WJ-IV ACH administered as part of the Educational Report of June 16, 2016 and the WISC-V. The scores in the WJ-IV ACH fell within the very low range. She concluded that they were consistent with the very low scores on the WISC-V and therefore his achievement was relatively commensurate with his cognitive functioning (TR.IV, pp. 615-616).
7. On June 3, 2016 and June 6, 2006, the speech pathologist conducted a speech and language evaluation. In her summary, she reported that he struggled with staying alert during instruction and, as he transitioned between environments, regaining focus once his destination was reached. However, once he established focus, he tried hard and took pride in his efforts. His expressive language was characterized by simple sentences, but when he attempted complicated sentences, his expressions were less coherent and grammatically correct. He could comprehend most simple information. When he spoke there were some sound distortions and syllable repetition in his speech, but his intelligibility was above 90% (S.B, 9).
8. The speech-language pathologist who prepared the report also testified at the hearing. She received a Master’s Degree in English Philology, with areas of expertise in linguistic and teaching English as a second language. In addition, the speech-language pathologist held another Master’s degree in communication disorders, with course work that prepared her for working in a public school setting. Over her thirteen-year career as a speech-language pathologist in public schools she attended approximately fifty IEPs and twenty evaluations annually. She also conducted approximately twenty assessments a year, taught ESL classes, and worked with several multilingual students. I overruled the objection of the parent’s advocate who objected to her providing expert testimony beyond what she did as a speech pathologist and found the witness qualified as an expert in speech-language pathology, assessments of eligibility of students with disabilities, and proper educational programming for students with a disability (TR.IV, pp. 503-513; S.B. 31).
9. The speech pathologist explained that she was assessing the impact of the student’s communication skills, intelligibility, and language ability on his performance at school. She was trying to determine his functioning level and the kind of supports and program he needed. She applied two tests, Listening Comprehensive Scale of the Oral and Written Language Scales-Second Edition, and Expressive One-Word Picture Vocabulary Test-Fourth Edition. The first test assessed his receptive language and the second test assessed his vocabulary knowledge. She found that the student did not demonstrate comprehension of items that were appropriate for those whose age was twelve or above. He was able to understand and use words well in a vocabulary for those typical of children twelve years and younger, but had far less success using a vocabulary typical of older children. She opined that his language skills did not meet the demands expected of middle or high school students (TR.IV, pp. 535-537, 540).
10. The pathologist addressed what impact there would be on acquisition of language skills when a second language was spoken at home. She maintained that the fact a child spoke another language or grew up in a home where another language was spoken in addition to English would never be a reason for him to have a disability in the area of language or English acquisition. If there were a disability and language acquisition was impaired, then it would have impaired all languages the child was acquiring. The ability to acquire language was directly related to a child’s intellectual level and having an intellectual disability carried language impairment within itself. According to the speech pathologist, students with intellectual deficits—IQs in the 40-50 range—typically demonstrate impairment in language development. In the case of this student, she testified that in looking at his file, she discovered he was born in the United States and received English services at a very early age. She said she found nothing in the file that would indicate that his speech-language difficulties were related to his being exposed to xxxx rather than to his intellectual disability (TR.IV, pp. 541-545). She recounted that at the request of the chair of the department of speech-language services, she reviewed the file to determine if there were any basis for conducting an assessment into whether his language acquisition was affected by the second language. In doing so, she found no evidence of such a relationship. The chairperson advised her that an evaluation in English was sufficient given that the student had been provided education services since he was very young in English within a public school setting (TR.IV, pp. 546-547).
11. The pathologist worked with the student for one summer while he was in middle school and had been provided services to him since September of 2015. She usually met him once a week in a small conference room to provide individual direct speech and language service. She also supported him in his special education and regular classrooms, where he appeared happy with his peers in both classrooms. She recalled activities they engaged in to meet his needs as described by his goals and objective in communication areas. With regard to diction, she focused on the articulation of “s”, “z”, and “th” and on correction mispronounced words. As for language, she targeted his ability to answer questions and use grammatically correct sentences (TR.IV, pp. 513-517, 523).
12. During the 2016-2017 school year she worked with the student on a language-based program that stressed the skills needed to understand instruction, ask questions, and compare and contrast ideas. The student required extra time to complete these tasks and considerable support; otherwise, he could not have completed the assignments. She testified that she instructed him at the second to fourth grade level. She observed that he showed improvement in the use of vocabulary, sequencing of events, and answering multiple-choice questions (TR.IV, pp. 518-523).
13. The speech-language pathologist rendered her opinion that the student, with considerable adult support, could complete tasks on a second to fourth grade level. She cautioned that he should not be exposed to material at the tenth grade level in core academic classes, such as English, language arts, and science because it would be beyond his ability to comprehend or respond (TR.IV, pp. 530-534).

**F. September 28, 2016 IEP**

1. On September 28, 2016, the annual IEP meeting was held. In the PLOP section, the team found that the student presented with extremely low abilities overall on the WISC-V and WNV tests and that there was no significant difference in scores from 2009 and 2010. They concluded that he needed an educational setting where he could be provided repeated directions, visual aids, and small group instruction (S.B. 13, p. 4-5). Short-term objectives were developed (S.B.13, pp 8-20). Eleven accommodations were listed as part of the instructional and assessments process to enable the student an equal opportunity to access curriculum and show achievement (S.B. 13, pp. 26-27).
2. For the period of September 28, 2016 to September 27, 2017, the student was to receive 470 minutes each of reading, written expression, mathematics, and job readiness from the special education teacher and the instructional assistant every two weeks. He would also receive 120 minutes from the speech-language pathologist, special education teacher, and instructional assistant for speech- language direct instruction and support (S.B. 13, p. 30). The team concluded that the placement would provide FAPE given that the student’s significant cognitive and academic weakness required a modified curriculum delivered by a special education teacher in a small group setting. Under the IEP, the student was to participate with peers without disabilities in PE and scheduled school activities (S.B.13, p. 32). It does not appear that the parent attended this meeting.

**G. October 25, 2016 IEP**

1. On October 25, 2016, a mediator assigned by the Virginia Department of Education conducted a facilitated IEP meeting (TR.III, pp. 451-452). In the PLOP section, the team found that the student presented with extremely low abilities overall on the WISC-V and WNV tests and that there was no significant difference in scores from 2009 and 2010 (S.B.16, p. 5). They concluded that he needed an educational setting where he could be provided repeated directions, visual aids, and small group instruction (S.B. 16, pp. 4-5). Short-term objectives were developed (S.B. 16, pp. 9-21). Eleven accommodations were set forth as part of the instructional and assessments process to enable the student an equal opportunity to access curriculum and show achievement (S.B. 16, pp. 27-28).
2. For the period of October 25, 2016 to October 24, 2017, the student was to receive 470 minutes each of reading, written expression, mathematics, and job readiness taught by the special education teacher every two weeks. He would also receive 120 minutes from the speech-language pathologist, special education teacher and instructional assistant for speech-language direct instruction and support. The team concluded that the placement would provide FAPE given that the student’s significant cognitive and academic weakness required a modified curriculum delivered by a special education teacher in a small group setting. Under the IEP, the student would participate with peers without disabilities in PE, elective classes, and scheduled school activities (S.B. 16, pp. 31, 33). The speech pathologist attending the meeting testified that the placement was appropriate in terms of the student’s language abilities. She said his ability was at a level such that she would recommend that any instruction occur within a small setting with significant support from staff within the classroom (TR.IV, p. 553).
3. The PWN from the school district noted that the parent wanted the student to receive instruction in a fully inclusive setting and to earn a regular diploma. The team rejected that request and believed that his needs could not have been met in a fully inclusive program since he required intensive support services to learn, could not master the content of general education classes, and would have additional difficulty due to the pace of instruction (S.B. 17, p. 1).
4. The PWN described other factors relevant to its proposed implementation of the IEP. According to the school officials, the parent had mentioned bullying and abuse, but the school staff was unaware of any such actions. The school rejected the parent’s claim that targeted assistance was not provided in the elective class. The team noted that the parent removed the student every day from class at 12:30 p.m., which resulted in the student missing reading, language arts, and CoWEP. The school system also noted that without providing consent to the proposed IEP with additional time in general education, the proposed IEP could not have been implemented. Until consent had been received, the school system wrote, the student would be given the services in the stay put IEP of June 3, 2015 (S.B. 17, p.2).
5. The parent testified that she sent an email on November 2, 2016 to the Director of Special Education, stating that signing the IEP would do more damage to the relationship built during the six hours in the IEP meeting, where no review of the IEP took place. She reported that the team refused to change anything and refused to address the standard diploma matter or the multi-lingual background (Tr.II, pp. 240-242; P.9, p. 37). Her expectation prior to the meeting was that general education placement, curriculum, and SOL preparation would be discussed (TR, III. p. 452). Instead, she recounted, the school officials stated they would be willing to add a ceramics class—which the student wanted—but that it would result in less special education support and services. She asked that the IEP include participation in extracurricular activities, proper support, and core content similar to what a child without disabilities would receive. She also wanted him out of the self-contained classroom and placed in a regular classroom (Tr.II, pp. 240-244; TR.III, pp. 453-456).
6. A psychologist who is also an educational specialist in the Department of Exceptional Education testified on behalf of the school district. She has a Master’s degree in the School of Psychology at Appalachian State University and a Bachelor of Science from Lynchburg College. The advocate stipulated that she was qualified as an expert witness in school psychology, assessing the eligibility of students with disabilities, and educational programming for students with disabilities (TR. IV, pp. 603-605; S.B. 33).
7. The psychologist testified that upon review of the services and LRE page, which explained how placement provided FAPE, she agreed with the rationale for the placement decision and found that was appropriate given the student’s cognitive weaknesses and commensurate academic skills. Therefore, she continued, he would have needed significant accommodations and modifications that could only be provided within small group, individualized instruction, which would allow for repetition and opportunities for enhanced and extended practice (TR.IV, p. 618).
8. The fourth and final witness for the school system was a special education coordinator, who by stipulation was found to be qualified as an expert in the eligibility of students with disabilities and their educational programming. She earned a Bachelor degree in special education from Slippery Rock State College and a Master’s of Education from Virginia Commonwealth University (TR. IV, p. 657; S.B. 30). She stated she was employed as a special education coordinator at the middle school and high school level in the school system. She testified that she provided assistance and support to school teams in a variety of matters related to special education, such as process, policy, technical assistance, instructional strategy, support and problem solving (TR.IV, p. 659).
9. The special education coordinator testified that she participated in the IEP meeting. She explained that the team was trying to develop goals for the student during the 2016-2017 school year as set forth in the IEP (pages nine though twenty-one), so that the student could make progress in specific skill areas. In doing so, the team looked at previous goals and progress made to create goals based on the student’s needs. They reviewed the aligned SOLs, which reflected modified content. Those aligned SOLs, according to the coordinator, would have enabled a student with more significant disabilities to access the content that same age peers access, but at a different level. The goals would be assessed through alternative assessments, known as the Virginia Alternate Assessment Program (VAAP) (TR.IV, pp. 664-667). For the student, the IEP team determined that the Applied Studies Diploma would be appropriate. The IEP also looked at post secondary options upon high school graduation. In the IEP, the team wrote “attend a two- or four-year College/University with support.” (S.B. 16, pp. 24-25). The coordinator recalled that the team was not looking toward a four-year traditional college, but thinking of a college/university program designed for students with ID, recognizing that some students with an Applied Studies Diploma go to college (TR.IV, pp. 664-668; S.B. 16, p. 22). In response to counsel’s questions, the mother conceded that her son had never taken an SOL assessment but had worked on SOL preparations. He did participate in VAAP (TR.III, pp. 450-451).
10. The coordinator clarified the confusing language on the Services and LRE page (S.B. 16, p. 31) that the time allotted for a specific service as “minutes per every 2 weeks for each disability” to mean there would not be a week where a student would not receive instruction, but that it was accounting for different school schedules depending on the block schedule of the school (TR.IV, pp. 669-670). Since she had first hand knowledge of how the time was calculated, I credited her testimony over that of the parent’s expert witness.
11. The coordinator reviewed the explanation of how placement provided FAPE on the Services and LRE page (S.B. 16, p. 33). The coordinator concluded that the placement was appropriate since the IEP provided the instruction, extended period of time, and repetition needed, through accommodations and a teacher trained and experienced in working with students with ID. She further testified that the student received an appropriate education because the team looked at the student’s current profile, cognitive profile, educational testing, past IEPs, and progress made (TR.IV, pp. 670-671).

**H. February 13, 2017 IEP**

1. Another IEP meeting was held in early 2017. In the PLOP section, the team repeated the language from the October 25, 2016 IEP regarding the student’s areas of need and effect of disability (S.B.21, pp. 4-5). Short-term objectives were established (S.B. 21, pp. 8-20), and eleven accommodations were listed as part of the instructional and assessments process in order to enable the student an equal opportunity to access curriculum and show achievement (S.B. 21, pp. 26-27).
2. For the period of February 13, 2017 to February 12, 2018, the student was to receive 470 minutes in each of the categories of reading, written expression, mathematics, and job readiness taught by the special education teacher every two weeks. He would also receive 120 minutes from the speech-language pathologist, special education teacher and instructional assistant for speech-language direct instruction and support. The team concluded that the placement would provide FAPE given that the student’s significant cognitive and academic weakness required a modified curriculum delivered by a special education teacher in a small group setting. Under the IEP, the student would participate with peers without disabilities in physical education, elective classes, and scheduled school activities (S.B. 21, pp. 30, 32).
3. The PWN from the school district noted that the parent wanted the student to receive instruction in a fully inclusive setting and earn a regular diploma. The team informed the parent that a standard diploma was based on SOL content and required verified credits earned by passing related SOL tests. The student’s IEP contained goals based in part on aligned SOLs and identified modified content as a needed accommodation. The team observed that the IEP provided opportunities for inclusion through elective classes, physical education, and school activities and functions. The school system refused to consider the parent request for placement in all general education classes without first fully developing and discussing the contents of the IEP (S.B. 22, p. 1).
4. The parent and advocate, the team wrote, refused to allow the school system team to review the IEP despite numerous requests. As in the PWN for the October 2016 IEP meeting, the team noted that the parent removed the student every day from class at 12:30 p.m., resulting in the student missing reading, language arts, and COWEP. Without consent, they maintained, the proposed IEP with additional time in general education could not have been implemented. Until consent had been received, the school system wrote, the student would receive the services set forth in the stay put IEP of June 3, 2015 (S.B. 21, p. 2).
5. The parent testified she never approved of the check inserted next to the Applied Studies Diploma designation on the Diploma and Transition page (P.2, p. 255). She complained that had occurred on other IEPs without parental permission and objected since it would not have qualified the student for college acceptance (TR.I, pp. 232-233).
6. The parent’s expert witness reported on what took place at the meeting. There had been a discussion regarding the student’s academic placement. Concern was expressed about the student not being integrated into the general classroom for core subjects after the school had agreed to give him the chance to see how he would function with his peers. The school system had not produced any assessments to address his social needs and behavior. The school team members said that no behavior intervention plan was in place. At that point, the officials walked out without properly closing down the meeting (TR.I, pp. 97-99). She reported that the atmosphere deteriorated as they talked about why the student had not been given the opportunity to work with his peers outside a self-contained classroom. She concluded from a review of the record that he had never been given a chance for a LRE in a regular classroom for core subjects and outside a self-contained classroom. In her opinion, under IDEA, a student should be given an opportunity to be in a LRE to access with the same level of rigor the same general education curriculum as non-disabled peers (TR.I, pp. 100-104).
7. On cross examination, the educator testified that she was currently a science teacher in a public school in Maryland and that she had never been employed as a special education teacher, administrator, school psychologist, or a speech-language pathologist. She had first met the student in January of 2017 and had never taught, provided special education services, administered any educational testing, observed him in the classroom, or discussed him with any of the teachers except in the IEP meeting of February 13, 2017 (TR.I, pp. 189-194).
8. The speech pathologist who attended the IEP meeting opined that the placement was appropriate. According to her, the student needed an environment with a small number of students and extensive time to learn with the special education teacher being the best staff member to provide his instruction (TR.IV, pp. 554-559). In response to questions of the advocate, she stated that she did not believe that a regular education setting or a collaborative setting would have been appropriate for the student because a paraprofessional could not have made the student understand instructions. Moreover, the amount of information to learn and the speed at which the class advanced would have had to have been modified to such a degree that it would have no longer resembled a regular education classroom. However, the speech pathologist acknowledged that she had never seen the student in a collaborative setting (TR.IV, pp. 571-572).
9. The school psychologist reviewed the explanation of how placement provided FAPE on the Services and LRE page of the IEP (S.B. 21, p. 32). She concluded that the placement would have been appropriate for the student, given his significant cognitive and academic skill deficits as shown in the psychological and educational evaluations, as well as the data included in the PLOP, which supported academic weaknesses. Therefore, she continued, he would have required a small group setting to be taught at his level in order for him to have received the support he needed (TR.IV, pp. 621-623).
10. She also gave her expert opinion based on observing the student and reviewing his records. Her conclusion was that the student would not have benefited from being mainstreamed in the general education classroom. She stated that the goals in the IEP and skills he needed would not have been those taught in a general mainstream classroom. She conceded on cross-examination that although she believed that mainstreaming would have been a disaster, she could not say so definitely. But she believed that in a regular education class he would not have been able to do independent work, stay engaged to complete his assignments, or articulate anything if called upon in class. She said she would have worried about the emotional impact of isolation due to removal from class often and his inability to keep up with the other students (TR.IV, pp. 623, 636-637).
11. The coordinator also attended the IEP meeting. She compared the IEP with the October 25, 2016 IEP and determined that the goals, services, diplomas, and provisions were quite similar. After reviewing the explanation of how placement provided FAPE on the Services and LRE page (S.B. 21, p. 32) she concluded that the placement proposed would be appropriate for the student and reasonably calculated to provide FAPE. She based her opinion on the belief that the IEP took into consideration the student’s current level of functioning, progress and performance in class, the need for considerable repetition of material, and the extended time required to learn concepts. Those objectives could have been met in a self-contained setting (TR.IV, pp. 672-674, 701-703).
12. The coordinator also provided her views on whether it would be appropriate for the student to be placed into a mainstream collaborative class for core academic subjects. She contended it would not because the student could not have kept up with the level of complexity of the content and the pace it would have been delivered. In her view, he lacked the higher-level thinking skills necessary for those courses and the content at the secondary level. She said that assessment through the SOLs at the end of the course would not have been appropriate for him given his level of functioning (TR.IV, pp. 674-675, 694).

**III. GENERAL LEGAL FRAMEWORK**

The student is an individual having a disability, thereby coming within the purview of The Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §1400 *et seq.* (2005), which amended the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* (1997) (IDEA). Under IDEA, the states, as a requirement to accept federal financial assistance, must ensure a “free appropriate public education” (FAPE) to all children with disabilities. 20 U.S.C. §1400(d), §1412(a)(1). Virginia decided to participate in the program and required its public schools to provide FAPE to all children with disabilities residing within its jurisdiction. Va. Code Ann., §22.1-214-215.

IDEA establishes extensive substantive and procedural requirements to ensure that children receive a FAPE. 20 U.S.C. §1415. See also *Board of Education v. Rowley*, 458 U.S. 176 (1982). The safeguards guarantee “... both parents an opportunity for meaningful input into all decisions affecting their child’s education and the right to seek review of any decision they think inappropriate.” *Honig v. Doe,* 484 U.S. 305, 311-312 (1987).

The primary safeguard protecting the child’s rights is the IEP. The educational program offered by the state must be tailored to the unique needs of the handicapped child by means of the IEP. 20 U.S.C. §1414. IDEA directs that local school districts, in consultation with parents, the child, and teachers, develop an IEP for each disabled child. 20 U.S.C. §1414(d)(1)(B). Should there be any complaints regarding the implementation of a child’s IEP, the parents have the right to an “impartial due process hearing” 20 U.S.C. §1415 (B), (F); *Barnett v. Fairfax County School Board,* 927 F.2d 146, 150 (4th Cir. 1991).

The safeguards guarantee “... parents an opportunity for meaningful input into all decisions affecting their child’s education and the right to seek review of any decision they think inappropriate.” *Honig v. Doe,* 484 U.S. 311-312 (1987).

Each year the IEP sets out a curriculum to address the child’s disabilities, with appropriate objective criteria, evaluating procedures and schedules for determining whether the instructional objectives are being achieved. 20 U.S.C. §1414(d). “Congress did not intend that a school system could discharge its duty under the [ACT] by providing a program that produces some minimal academic advancement, no matter how trivial.” *Hall ex rel. Hall v. Vance County Board of Education,* 774 F.2d 629, 636 (4th Cir. 1985). The Fourth Circuit determined that educational benefits meant “some form of meaningful education”. *Conklin v. Anne Arundel Board of Education*, 946 F.2d 306, 308 (4th Cir. 1991).

This year the Supreme Court unanimously clarified the FAPE standard set forth in *Rowley.* In *Endrew F. v. Douglas County School District RE-1,* 117 LRP 9767, 69 IDELR 174, 580 U.S. \_\_ (2017), the Court held that the school district must offer an IEP “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” The Court did not seek to elaborate on what “appropriate” meant, but said that the adequacy of an IEP turned on the unique circumstances of the student. It stressed that the IEP is a collaborative effort between school officials and the family to devise a plan designed for academic and functional advancement. If challenged, the school system should be able to offer a “cogent and responsive explanation for their decision” to show that the IEP proposed for the child provided FAPE. *Endrew f*, *supra*, at \_\_ .

The IEP shall also include “a statement of the special education and related services and supplementary aids and services…to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child” to advance toward his goals and progress in the curriculum. 34 C.F.R. §300.320(a)(4). In accordance with IDEA’s objectives, related services must be provided when necessary to provide a disabled child FAPE as described in his IEP.

Parents are required to be members of the group that makes the decision on educational placement. 20 U.S.C. §1414(e). Under 34 C.F.R., §300.345,(2006), the school district is required to ensure that parents are present or have had an opportunity to participate at each IEP meeting. See also 8 VAC 20-81-110.E. The written notice for an IEP meeting must indicate the individuals who will be present. 8 VAC 20-81-110.E.2. However, the right to participate does not give parents the power to dictate the outcome of the IEP team or veto educational decisions for their child without congressional mandate. *See, e.g., A.W. v. Fairfax County School Board*, 372 F.3d 674, 683, n.10 (4th Cir. 2004).

An IEP shall include “A statement of the child’s present levels of academic achievement and functional performance…”, and “[a] statement of measurable annual goals, including academic and functional goals designed to” enable him to make progress in the general curriculum. 34 C.F.R. §300.320(a)(1), §300.320(2)(i)(A). The IEP must identify the frequency and duration of services, stated in exact minutes 20 U.S.C. §1414(d)(1)(A)(i)(VII).

The applicable Virginia regulations provide that the present level of performance shall be written in objective measurable terms, to the extent possible. Test scores, if appropriate, should be self-explanatory or an explanation should be included. 8 VAC 20-81-110.G.1. The IEP should also include a statement of measurable annual goals, including academic and functional goals, relating to meeting the child’s needs that result from the disability to enable him to progress in the curriculum. 8 VAC 20-81-110 G.2.

Under 20 U.S.C. §1412(a) (3), the school district is required to evaluate and identify all areas of suspected disability. If the school district has knowledge that the student is not making adequate and expected progress in achieving his annual goals, the IEP should be revised. 34 C.F.R. §300.324. The assessments and other evaluation tools need to comprehensively evaluate all his needs. See, generally, 34 C.F.R. §300.304 (c) (1) (ii), (3), (4), and (7). The hearing officer must decide whether school officials should have ordered an assessment as part of their evaluation to determine whether the student had a speech-language disability or his speech-language difficulties were caused by communicating in two languages.

The IEP is also required to set forth the specific services the student will receive to progress toward his goals, 34 C.F.R. §300.320 (a) (4), and to prepare measurable goals. 34 C.F.R. §300.320 (a) (2).The IEP shall also include a statement of the special education and related services and supplementary aids and services…to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child to advance toward his goals and progress in the curriculum. 34 C.F.R. §300.320(a)(4).

Hearing officers ordinarily engage in a two step inquiry to decide whether FAPE has been provided under IDEA. First, they determine whether school officials have complied with the procedures contained in the Act and, secondly, whether the IEP is reasonably calculated to enable the child to receive educational benefits. *Rowley, supra,* at 181.

Technical violations that do not obstruct the student's participation in the process do not make a proposed program inadequate. *Burke County Board of Education v. Denton,* 895 F.2d 973, 982 (4th Cir. 1990). Procedural deficiencies alone are insufficient to set aside an IEP unless there is a rational basis to conclude that the defects hampered the parent’s opportunity to participate in the decision making process, thereby compromising the child’s ability to receive an appropriate education and depriving him of educational benefits. *O’Toole v. Olathe District School Unified School District,* 144 F.3d 692, 707 (10th Cir. 1998); *See also Roland M. v. Concord School Committee,* 910 F.2d 983, 994 (1st Cir. 1990).

A child is denied FAPE where the procedural defects cause a material and inherently harmful impact on the IEP committee’s ability to develop a plan reasonably calculated to enable the child to receive meaningful educational benefits under the *Rowley* standard. *M.L. v. Federal Ways School District,* 394 F.3d 634 (9th Cir. 2005); *Amanda J. v. Clark School District*, 267 F.3d 877 (9th Cir. 2001); *Deal v. Hamilton County Board of Education*, 392 F.3d 840 (6th Cir. 2004). The procedural violation must therefore *actually* interfere with the provision of FAPE. *DiBuo v. Board of Education of Worcester* County, 309 F.3d 184, 190 (4th Cir. 2002) (emphasis in original).

Procedural flaws do not automatically require a finding of denial of FAPE. However, procedural inadequacies that result in a loss of educational support, or which seriously infringe on the parent opportunity to participate in the IEP, result in a denial of FAPE. *Hall ex rel Hall, supra,* at 635; *Burke County Board of Education V. Denton*, 895 F.2d 973, 982 (4th Cir. 1990).

The federal regulations promulgated under IDEA provide that the school district shall take steps to ensure that a parent is present at IEP meetings and given the opportunity to participate with regard to the identification, evaluation and educational placement of the child and the provision of FAPE. 34 C.F.R. §300.322. If the parents do not attend despite having received notice and an opportunity to participate, the school district may proceed with the meeting. 8 VAC 20-81-170A (c) (4).

Under the stay-put provision of IDEA, 20 U.S.C §1415(j), the student is required to remain in his then current placement during the proceedings. That preserves the status quo until the dispute over the IEP is resolved.

The Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party who seeks relief bears the burden of proof. Thus, the parent has the obligation to establish the violations and deficiencies as identified in his Amended Request. In this case, the parent has the burden of persuasion that that IEP is deficient, that it was not implemented, or that any procedural violations deprived the student of a FAPE. *Schaffer v. Weast,* 546 U.S. 49 (2005).

Hearing officers are to give appropriate deference to local educators. *Hartmann v. Loudoun County School Board*, 118 F.3d 996, 1000-1001 (4th Cir. 1997, *cert. denied*, 522 U.S. 1046 (1998). They are entitled to latitude in the development of an IEP appropriate for the student. *A.B. v. Lawson,* 354 F.3d 315, 328 (4th Cir. 2004). However, that does not relieve the hearing officer of the responsibility to determine as a factual matter whether the IEP is appropriate. *County School Board of Henrico v. Z.P. ex rel. R.P.,* 399 F.3d 298, 307 (4th Cir. 2005).

An IEP which lacks relevant goals, ignores the unique needs of the child, or fails to establish any baseline for determining the goals or for monitoring progress may well deny FAPE to the child. However, momentary lapses in implementation or insufficient details on the present levels of academic achievement and functional performance, where the failure does not substantially impair the provision of services to the child, may not result in a defective program. The procedural deficiencies must be material.

In order to prevail in a claim under IDEA, the parent must show that the failure of the district to implement all the aspects of an IEP is material, that there was a failure to carry out substantial or significant provisions of the IEP. Such an approach enables school systems to exercise flexibility in implementing IEPs but holds them accountable for material failures and for providing the child a meaningful educational benefit.

States must ensure that the child has access to education in the LRE, which means that he should be educated with non-disabled children, i.e. “mainstreamed,” to the extent appropriate. §1412(a)(5)(A). Hartman v. Loudoun County Board of Education, *supra*, at 1000 (4th Cir. 1997). A special education student may be removed from the regular classroom “when the nature or severity of his disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. §1412(a)(5)(A); *Daniel R.R. v/ State Board of Education*, 874 F.2d 1036, 1044-45 (1989). See also *Briggs v. Board of Education*, 882 F.2d 688, 692 (2d Cir. 1989). This requires consideration of the extent the school system has attempted to accommodate the child in a regular classroom and a comparison of the likely educational benefits to the child from a regular classroom as opposed to those from a special education program. *Oberti v. Board of Education,* 995 F.2d 1204, 1215-1217 (3d Cir. 1993). IDEA recognizes that since a satisfactory education in regular classes may not be achieved by all students, an education of some disabled children should take place in separate classes. See *Board of Education v. Illinois State Board of Education*, 41 F.3d 1162, 1168 (7th Cir. 1994).

Hearing officers need to review how the student would benefit from a regular education program compared to the special education program. *Oberti* at 1216. Hearing officers must balance the competing interest of mainstreaming with the substantive educational improvement of the student. *Roland M. v. Concord School Community*, 910 F.2d 983, 992-993 (1st cir. 1990).

If the student requires placement outside the regular classroom, the school district must still mainstream the child to the maximum extent appropriate. *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 390-391, (3rd Cir. 2oo6) quoting *Oberti v. Board of Education*, *supra*, at 1215. The preference for educating the student with non-disabled students can be satisfied in other ways than full inclusion on the regular classroom. The student can be mainstreamed in lunch, recess, and some non-special education classes. See also *A.M. v. Monrovia Unified School District*, 627 F.3d 773, 781 (9th Cir. 2010); Beth B. v. Van Clay, 282 F.3d 493, 499 (7th cir. 2002).

**IV. LEGAL ANALYSIS**

**A. The school system did not fail to properly evaluate and identify the student’s speech-language disability**

The parent contends that the school system failed to order an assessment to determine whether the student’s speech and languages difficulties were caused by a speech and language disability or because of his exposure to two languages at home. Parent’s Closing Brief, p. 8, 11. Therefore, the school district did not properly evaluate and identify all areas of the student’s disability as required under 20 U.S.C. §1412(a)(3). This claim may arguably be considered within the broad scope of paragraph three of the Amended Request.[[5]](#footnote-5)

I am not at all convinced that the student’s primary language was xxxx. From the mother’s testimony, it appears that he communicated in English with greater fluency. The IEP documents identify English as his primary language. There is no evidence that apart from family members, he communicated with others in xxxx. All his instruction in school has always been given in English.

Even assuming, *arguendo,* that xxxx is his primary language, the parent has not shown that an assessment was necessary in order to determine that her son had a speech-language disability. The parent’s expert, who was not a speech pathologist, challenged the speech-language disability designation but without any support or data. She referred to a researched based evidence assessment but without any elaboration of what she meant or how it would function. (Parent’s Closing Argument, p.6). According to the school system’s speech-language pathologist, the fact that a child speaks two languages would never cause a speech-language disability and if there were impairment, it would have appeared in all languages. I find that the parent did not show that the IEP team failed to conduct a comprehensive evaluation of SLI where it lacked sufficient data or a basis to justify ordering a speech-language assessment of the impact of the student’s exposure to two languages in the home. I conclude that even if such an assessment was feasible, there is no evidence in the record that would lead the team to believe that it would have been a proper tool to identify the student’s speech-language needs and would have yielded useful information. 20 U.S.C. §1414; 34 C.F.R. 300.304. IDEA does not obligate a school system to use a particular methodology to evaluate the student’s needs.

I also find the parent did not show that the lack of a speech-language assessment deprived her son a loss of educational opportunity, seriously infringed on her participation in the IEP process, or caused a deprivation of educational benefits. The school system appropriately identified and evaluated the student’s speech-language disability and did so in a timely fashion.

**B. The parent failed to show the IEP team did not meet the least restrictive environment requirement by placing the student in a small group setting in a special education classroom with modified curriculum and identified accommodations, and with general education classes for non-core classes**

The parent contended that the school system failed to educate the student in the LRE and repeatedly denied the parent’s proposals for a LRE placement (see Amended Request, ¶1). The LRE inquiry is necessarily individualized and quite dependant on specific facts. I conclude that the student cannot make effective progress in a co-taught regular education classroom. The evidence is overwhelming that he would show signs of frustration with his difficulty in comprehending and meeting classroom expectations given his academic ability. I believe no accommodations would cure the fundamental deficiencies in such a placement model. The testimony of the four expert witnesses from the school district make clear that a fast-paced, large classroom would be highly distracting and not allow the in-depth reinforcement and repetition throughout the day that the student requires.

Those four witnesses contended that placing the student in a collaborative general education environment would not be appropriate. Neither the parent nor her expert witness produced any credible evidence to the contrary. Rather, her advocate maintained that an attempt should be made, but produced no legal authority that imposed an obligation on the part of the school district to do so, particularly as its witnesses testified persuasively that such a course of action would be detrimental to the student and prove futile.

In their rebuttal brief, the advocates argued that the school system’s expert witnesses could not say as a “matter of factual impossibility” that the student would not have achieved an educational benefit in a collaborative classroom. (Parent’s Rebuttal Closing Argument. pp.1-2) They cite *Devries v. Fairfax County School Board,* 882 F.2d 876, 878-879 (4th Cir. 1989)*,* in which the court observed that even if the segregated setting were superior, the court should determine whether the services that make the segregated placement superior could be feasibly provided in a non-segregated setting.I do not believe that all the witnesses quite reached the conclusion regarding factual impossibility in their testimony, but, in any event, their testimony strongly buttresses the school system’s position that the educational services could, in fact, not have been feasibly provided in a regular classroom.

The parent’s expert witness testified that the student had the ability to succeed with sufficient support in a collaborative setting in a regular classroom. However, she had met the student relatively recently and had never taught, evaluated, or even observed him in a classroom. She referred to his progress in working toward his goals in his self-contained classes, but that instruction had been taught at the second to fourth grade levels.

Based on their frequent interactions with the student, their review of the data, and their range of experience in special education, I find that the members of the IEP team’s determination that the student could not receive a meaningful education in a full-inclusion general education environment, supported by the testimony of the school district’s witnesses, to be far more credible and persuasive than the testimony of the parent’s witness.

IDEA’s preference for the education of disabled with non-disabled children can be met in other ways than full inclusion. The IEP accomplished that objective by apportioning the student’s day between regular classroom settings and a self-contained classroom. The stay put IEPs included mainstreaming opportunities at lunch, PE, and one elective in a regular class. In that way, they developed an acceptable position along the continuum of services between full inclusion and a totally self-contained setting. I conclude that the child has been mainstreamed to the maximum extent appropriate.

**C. The parent failed to show that the stay put IEPs that provided for a program designed to enable the student to work for an Applied Studies Diploma rather than a Standard Diploma were inappropriate or denied the student FAPE.**

The parent alleged that the school system refused to modify the curriculum so that the student could have accessed the general curriculum in order prepare him to take the SOLs with the objective of obtaining a standard diploma. She argued that school district had failed “to develop, implement, and monitor” the goals to ensure that the student progressed toward a Standard Diploma (Amended Request, ¶4).

The IEP team had determined in the student’s IEPs that he was not able to participate in the SOLs and needed instruction based on the Aligned SOLs. As the special education coordinator explained, the modified content would allow a student with ID to access the same material as those of the same age, but at a less challenging level. Then the student would be given an alternative assessment, known as VAAP.

Much of the testimony of the four school system experts which supported their position that LRE requirements had been met is applicable here (see Section IV-B above). The student was working at the second to fourth grade levels, his cognitive deficits required classes far different in complexity and pace than those in the general curriculum, and he could not be successful in a general education environment even with accommodations which included SOL content. The advocates contended that because the student was progressing in electives taken in a regular classroom, the educational plan for core classes to be taught in the self contained was inappropriate (Parent’s Closing Argument, pp. 6-8). Yet the evidence is overwhelming that he would not succeed in the core classes in a regular classroom because of the complexity of the material and his significant cognitive deficits. Clearly the class material in electives, such as independent living, and in PE, are far less demanding and intellectually challenging than in core subjects such as math or reading.

The parent maintained that the fact the student had achieved academic goals of up to 100% proficiency in self-contained classes was indicative of his ability to do so in regular classes. (Parent’s Closing Argument, pp.9-10). That ignores the evidence that instruction had been provided in the self-contained class at the second to forth grade levels, not at the tenth grade level of his peers in the regular classes. The student’s cognitive functioning, according to the psychologist, was at a level in the lowest 0.1% of the population. The advocates presented no credible evidence that the student could be successfully mainstreamed in a regular classroom. The testimony of the school system’s witnesses, that the student was appropriately placed in a self-contained classroom for his core courses and that he should receive instruction within an ASOL curriculum with the objective of obtaining an Applied Studies Diploma, is compelling.

**D. The IEPs offered by the school system was reasonably calculated to offer the student meaningful educational benefits to meet his unique needs based on the standards set forth in Rowley and Endrew.**

The educational progress of the student under his stay put IEPs, despite the significant impact of his absences from school, establishes the appropriateness of the program. The actual progress made is a factor to be considered in determining the appropriateness of an educational program under IDEA. *M.M. v. School District of Greenville County*, 303 F.2d 523, 532 (4th Cir. 2002). The student made progress on some of his goals in the IEP and mastered others.

The coordinator for special education testified that the placement provided FAPE because the IEP included instruction, extended time, and repetition, with accommodations and classes taught by a special education teacher who had training and experience in special education. The IEP team reviewed the student’s current profile, cognitive evaluations, educational testing, prior IEPs, and progress reports to develop an appropriate education.

The special education coordinator rendered the opinion that the proposed placement would be appropriate and reasonably calculated to provide FAPE based on the student’s current level of functioning progress, performance in class, need for considerable repetition of material, and extended time required to learn concepts. Neither the parent nor her expert testified that the IEP was not reasonably calculated to provide educational benefit to the student.

The student’s special education teacher during the 2016-2017 school year testified about the considerable progress he had made by the end of the school year in social skills, mathematics, vocabulary words, and real life money skills. She considered him at the same academic level as a few of the students and at a higher level than the others.

Neither the parent nor her expert testified that the student did not receive the number of minutes of direct instruction in special education taught by a licensed special education teacher, or the minutes in speech-language or speech- language supports set forth in the stay put IEP.

I recognize that the mother has demonstrated extraordinary love and devotion to her son and has sought to act in his best interests to achieve the best possible education for him. She has shown a strong commitment to public education. I sympathize with her frustration in trying to navigate through the cumbersome and confusing process that she has confronted in the school system. It is evident that there is a fundamental difference between her view of her son’s educational abilities and potential and that of school personnel. I am hopeful that divergence will shrink as she continues to work with the dedicated and competent school personnel at her son’s school who participated in this hearing.

**V. ISSUES**

1. Whether the school system failed to properly identify and evaluate the student’s speech-language disability.
2. Whether the IEP teams met the least restrictive environment requirement by placing the student in a small group setting in a special education classroom with modified curriculum and identified accommodations and with general education classes for non-core classes.
3. Whether the stay put IEPs that provided a program designed to enable the student to work for an Applied Studies Diploma rather than a Standard Diploma was appropriate or denied the student FAPE.
4. Whether the IEPs offered by the school system were reasonably calculated to offer the student meaningful educational benefits to meet his unique needs based on the standards set forth in *Rowley* and *Endrew.*

**VI. CONCLUSIONS OF LAW AND FINAL ORDER**

1. The student has the primary disability of intellectual disability and a secondary disability of speech-language impairment, and thereby qualifies for services under IDEA.
2. The parent was afforded all procedural and notice protections required by IDEA.
3. The school system did not fail to properly evaluate and identify the student’s speech-language disability.
4. IEP teams met the least restrictive environment requirement by placing the student in a small group setting in a special education classroom with modified curriculum and identified accommodations, and with general education classes for non-core classes.
5. The stay put IEPs which provided a program designed to enable the student to work for an Applied Studies Diploma rather than a Standard Diploma were appropriate and did not deny the student FAPE.
6. The IEPs offered by the school system were reasonably calculated to offer the student meaningful educational benefits to meet his unique needs based on the standards set forth in *Rowley* and *Endrew*.
7. The school system did not deprive the student of any loss of educational opportunity or deny him FAPE.
8. The LEA is the prevailing party on all issues[[6]](#footnote-6).
9. This decision is final and binding unless either party appeals to a federal District Court within ninety calendar days of the date of this decision, or to a state Circuit Court of local jurisdiction within one hundred eighty calendar days of the date of this decision.

Date: 8/7/17 \_\_\_\_\_\_\_ /S/\_\_\_\_\_\_\_\_\_\_\_\_\_

Alan Dockterman

Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that I have, this 7th day of August, 2017, caused this Decision to be sent via first-class mail, postage prepaid, and by e-mail to the parent, advocates for the parents, counsel for the LEA and to Patricia V. Haymes, Esq., Director, Dispute Resolution/Administrative Services Department of Education, Commonwealth of Virginia, P.O. Box 2120, Richmond, VA 23218-2120.

\_\_\_\_\_\_\_\_\_\_/S/\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Alan Dockterman

1. At the hearing, only one of the attorneys appeared; the Director of Special Education assisted the attorney. [↑](#footnote-ref-1)
2. I roughly calculated over forty claims and allegations in the Amended Request. [↑](#footnote-ref-2)
3. The expert prepared a report, “IEP & Educational Program Recommendations.” (P.9, pp. 15-33). Although the weight to be given to the report was discussed at the time the witness was withdrawn (Tr.I, pp. 19-22), there were no further references to it during the testimony at the hearing. [↑](#footnote-ref-3)
4. Without analyzing all twenty-one alleged violations, it is apparent that some were outside the Amended Request, others were specifically rebutted by the testimony, many were already dismissed, and still others were claims for which the parent introduced no evidence. [↑](#footnote-ref-4)
5. As noted on page four in the Introduction and Procedural History section, many of the claims and issues were stricken before the hearing. On page two of his closing argument, counsel argued that the advocate withdrew all but two issues on the first day of the hearing. That is not clear at all. Regardless, the issues remaining have been combined, reorganized, and rephrased for clarity. The hearing officer has the right to redefine a party’s issues, so long as no substantive changes are made, see *J.W. Fresno Unified School District*, 626 F.3d pp. 431, 442-443 (9th cir. 2010). To the extent that the Parent’s Closing and Rebuttal Arguments addressed claims and issues not pled in the Amended Request or dismissed prior to the hearing, they are often not addressed in this Decision. [↑](#footnote-ref-5)
6. The parent also seeks reimbursement for numerous expenses incurred during the last two years when she alleged her son was denied FAPE (Amended Request, ¶7). Since the parent is not the prevailing party, it is unnecessary to consider whether she is entitled to reimbursement given that she would not be entitled to any relief. [↑](#footnote-ref-6)