COVER PAGE FOR HEARING DECISION, NOT TO BE PUBLISHED

VIRGINIA:

**SPECIAL EDUCATION DUE PROCESS HEARING**

**xxxx., by and through his Parents,**

**xxxxxxxxxxxxxxxxxxxxxxxxx**

**AND xxxxxxxxxxxxxxxxxx,** Complainants

v.

**xxxxxxxxxxxxxxxxxxx SCHOOL BOARD**, Respondent

**Student & Parents:** **Administrative Hearing Officer:**

xxxxxxxxxxxxxxxxxx John V. Robinson, Esq.

xxxxxxxxxxxxxxxxxxxxxxxx 7102 Three Chopt Road

Richmond, Virginia 23226

**Child's Advocates:** (804) 282-2987 (Telephone)

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**LEA's Attorney:**

Kathleen S. Mehfoud, Esq.

LaRana J. Owens, Esq.

## **DECISION OF THE HEARING OFFICER**

I. **Findings of Fact**[[1]](#footnote-1)

1. The requirements of notice to the Parents were satisfied[[2]](#footnote-2). The Student's date of birth is August 16, 2002. SB 2[[3]](#footnote-3). The Student suffers from autism, and is eligible to receive special education and related services.

2. The determinative issues decided by the hearing officer in this proceeding concern whether the Student's December 8, 2016 and April 22, 2016 Individualized Education Plans ("IEPS") were appropriate and provided a free appropriate public education ("FAPE") to the Student for the 2016-17 and 2015-16 school years.

3. The hearing officer finds that any claims of the Parents for the June 14, 2017 IEP

are barred because xxPS proposed to conduct evaluations, including an FBA, on May 10, 2017, but the Parents refused to provide consent to the evaluations. The Parents cannot impede the School Board's efforts to address their concerns by refusing to allow evaluations, only to later argue a denial of FAPE because the evaluations were not conducted. The Parents should not be permitted to benefit from their lack of cooperation.

4. The Student is a ninth grade 15 year-old student who attended xxxxxxxxxxxx High School during the 2016-2017 school year through December 14, 2016. The Student is identified under the IDEA as a student with autism who is extremely low functioning intellectually and is non-verbal. SB 6.

5. The Student's cognitive deficits place him at the lowest functioning level which makes his rate of expected progress to be very limited and slow. Indeed, private testing conducted on August 10, 2014, indicates that the Student has a Full Scale Intellectual Quotient (FSIQ) of 40. SB 28 at p. 3.

6. According to xxxxxxxxxx, an xxPS School Psychologist, his “overall thinking and reasoning abilities exceed those of only approximately <0.1% of individuals his age. . .” Id. His “verbal reasoning abilities as measured by the Verbal Comprehension Index (VCI) are in the Extremely Low range and above those of only <0.1% of his peers…” Id. at p. 4. His “nonverbal reasoning abilities as measured by the Perceptual Reasoning Index … are in the Extremely Low range and above those of only <0.1% of his peers…” Id.

7. The Student's ability to “sustain attention, concentrate, and exert mental control is in the Extremely Low range,” as well as his ability “in processing simple or routine visual material without making errors.” Id.

8. A student with this low level of functioning requires significant repetition, will make progress at the slowest rate and will require teaching of functional skills.

9. The Student attended xxxxx Middle School ("xxxxx"), during the 2015-16 school year as an 8th grade student.

10. The Student received academic, behavioral, and social skills services in the Integrated Services Program.

11. The Integrated Services Program is a cross-categorical setting and includes both students with Autism, as well as students with cognitive deficits who require a functional curriculum.

12. The Student received specially designed instruction in reading, math, written expression, and social skills.

13. The Student received speech and language services as a related service.

14. The Student participated in Community Based Instruction (CBI) to assist him with generalizing social, communication, and functional academic skills.

15. The Student also interacted with his typically-developing peers during school activities, which afforded him the opportunity to model age-appropriate social and communication skills.

16. An IEP meeting was held on April 22, 2016 to consider whether the Student was eligible for extended school year services. SB 11. This IEP team determined that the Student met the criteria for extended school year services and afforded him the opportunity to work on his academic, communication, social and behavioral skills. SB 11. The IEP team proposed to provide Community Based Interactions for the Student. The IEP team also proposed that the Student would be served in the public school setting. SB 11 at p. 15.

17. The Student continued to be placed in the Integrated Services Program, but was assigned to xxxxxxxxxxx High School for the 2016-17 school year.

18**.** The Integrated Services classroom is designed to provide a structured and predictive environment to address the Student’s academic, functional, communication, social and self-care needs. The Student received academic instruction in this setting, as well as support with behaviors and social skills.

19. Because the Parents were not satisfied with the student's progress in the LEA and because of his deteriorating behaviors in the home, the Parents in about March 2015, hired a first set of advocates, Mr. xxxxxxxx and his wife (Tr. 735), to help them secure a private placement. Tr. 609.

20. Throughout, the LEA has rebuffed the Parents' request for a private placement as unnecessarily restrictive, contending that the Student "continues to demonstrate progress in the public day school setting." PE 17-4.

21. When it became apparent to Mr. xxxxx that the LEA would not move from its position, Mr. xxxxx told the Parents that they may need to hire an attorney. Tr. 736.

22. Accordingly, ultimately, the Parents hired a second set of advocates, Ms. xxxxx and Mr. xxxxx, to advocate more stridently for their desire for a private placement. Mr. xxxxx is a former attorney.

23. In approximately November 2016, the Parents heard from multiple different sources in the community that an Instructional Assistant assigned to the Student was maltreating the Student. Mr. xxxxxx called the police and after an investigation, the Department of Social Services determined that allegations of abuse were unfounded. PE 14.

24. However, the Instructional Assistant admitted to the Child Protective Services Investigator that he grabbed the student on the face, adding "in a playful manner". PE 14-2.

25. Ms. xxxx, the Principal of xxxxxxxxxxxx High School at the pertinent time, admitted that it would never be appropriate under any circumstances to grab a child by the face, which would of course include the context of any adverse behaviors exhibited by the child. Tr. 1506.

26. In 2008, the LEA conducted a Functional Behavioral Assessment ("FBA") for the Student when he was in First grade. PE 9-1.

27. Amongst other things, the FBA provided:

**Description of target/problem behavior. (Must be observable, using**

**language that is specific and behavioral)**

The Student is hitting and kicking when asked to transition to another activity.

He will protest by crying or hitting. Parents and SLP have reported some

spitting when he protests.

**Level of Seriousness.**

X Distracting (prevents student from benefitting in or participating

in the learning environment)

X Disruptive (disrupts the learning of others)

\_\_ Destructive (causes property damage or endangers self or others)

**Setting.**

**Who is present - (persons involved) when the behavior tends to occur?**

Assistants, Teacher, and classmates as well as parents when he is home

**Who is present when behavior almost never occurs?**

When he is by himself or when he is engaged in his preferred activity

**What is going on - (events) when the behavior occurs?**

Class is transitioning, noise, movements

**. . . .**

**When does behavior - (time ) tend to occur?**

During transition times in the classroom, at home with parents

**When does the behavior almost never occur?**

When he is asked to get his coat for playground time. And when he works

on fine motor skills. When playing in his room at home or watching TV,

playing with Gameboy

**Where does behavior - (physical setting) tend to occur?**

School environment during transition times

**Where does the behavior almost never occur?**

When he is in his room alone playing, during preferred activities at school

**. . . .**

**Hypothesis** (Statement describing the relationship between the behaviors,

events, and circumstances).

The Student has difficulty when asked or told to transition from a preferred

activity to another. The transition appears to be why he becomes agitated

and sometimes he hits and kicks when one activity is over. It is also

occurring when he becomes saturated with an activity.

**. . . .**

**Describe behaviors that could serve as functional alternatives to the**

**target behavior**.

No response would be more acceptable than hitting or kicking. Also, a

smooth transition to the new activity in a quiet manner, the first time he

is told.

PE 9-1.

28. The Student is now bigger and stronger than he was in first grade and at home

exhibits material adverse behaviors, such as hitting and punching holes in the wall, beating his head and screaming. Tr. 582-3; 687-90.

29. Transitions at home are still particularly problematic for the Student. Tr. 687-90.

30. In 2008, a Behavioral Intervention Plan (BIP) was developed by the LEA for the Student.

PE 9-4.

31. Amongst other things, the BIP provided:

**Description of problem:** (Summary of FBA; attach form)

The Student has difficulty transiting from desired activities throughout

the day. The Student will kick, hit, cry and sometimes spit when asked to

do something. The Student will also hit or kick when he seeks attention

from a teacher.

**Goal:** (Anticipated behavior changes. May list more than one.)

The goals for the Student are to stop existing physical behaviors. To help

him communicate in a more functional way is a goal to minimize the

negative behaviors due to frustration. Generalization of the pictures at home

and school are a long term goal as to increase communication in non-verbal

ways. Verbal communication is still desired.

**Plan:** (May address more than 1 behavior)

**Preventing Techniques:**

To prevent behaviors, the Student needs 2 minute warnings. He needs

pictures that will help him understand what comes next. He is working on

PECS to allow him to choose what he wants and ask for it through pictures.

**Intervention Strategies:**

When the Student protests or physically reacts to verbal instructions

he needs pictures and rewards to help calm down.

**Teaching Techniques:**

The Student requires time to understand what is expected of him. He

requires tokens to complete tasks. The use of pictures to express his

wants and needs is used to model what is expected of him for future

communication.

**Person Responsible:**

Teacher, speech-language pathologist, assistants, assistant principal

**Positive Reinforcers:**

The Student needs a couple of minutes when changing to another

activity. The Student also needs a visual of where he is going or

what is going to do next. The Student has started to us a

communication notebook where he chooses a PECS card to " I

want \_\_\_\_\_\_\_" space. Having an object of interest for the Student

to work for. He responds better to objects that have tactile

stimulation for him (objects with fur or hair). The Student also

receives positive reinforcement of appropriate behavior.

**Evaluation/Maintenance Schedule** (Dates)

This plan will be reviewed every 4.5 weeks.

PE 9-4.

32. Even though the BIP was to be reviewed every 4.5 weeks, the Parents claim it was never was reviewed at all. The BIP was also provided for the Student in his second and fourth grade years.

PE 7-2, 7-29.

33. The Present Levels of Academic and Functional Performance in the Student's June 14, 2017 IEP state in part:

Student's Areas of Need

The Student requires support to communicate his wants and needs. The

Student is beginning to independently request for the bathroom throughout

the day. The Student struggles to request items, but when presented with

a field of two or more choices he can point to and vocalize his wants.

At times his wants and needs are translated by banging on the wall.

Functionally, it also appears that banging serves several communicative

purposes to include attention seeking behavior, avoidance behavior,

challenge with transitions, and anger at not being able to do what he wants

to do.

The Student struggles with transitions from one activity to the next

even when he is provided lead time to process and a visual schedule.

He appears to transition smoother when the transition occurs naturally

as part of a schedule. For example, the set up process for xxxxxx

xxxxxx prompts him that doing assembly work is coming next in

his schedule. His mother indicates that she has experienced the same

process at home.

SB 24 at 6.

34. After Ms. xxxxx heard about the allegations concerning the Instructional Assistant, Ms. xxxxxx called the Student's Ninth grade teacher, Ms. xxxxxx, to ask whether the Student spent a lot of time with the Instructional Assistant. Tr. 2208.

35. Ms. xxxxx told Ms. xxxxxxx that the Instructional Assistant took the Student "probably daily" to the music room "[b]ecause of his behavior being out of control." Tr. 2210.

36. Many of the measurable annual goals, short term objectives or benchmarks and progress have remained the same or substantially the same in successive IEPs for the Student.

37. For example, the first measurable annual goal in the Student's March 17, 2014 IEP, is, in part:

The Student will increase his language arts skills by writing his name

with 100% accuracy . . . .

PE 7-139.

38. The first measurable annual goal in the Student's January 7, 2016 IEP, is:

The Student will write his first and last name with 100% accuracy.

SB 10 at 9.

39. The first measurable annual goal is the Student's April 22, 2016 IEP, is:

The Student will write his first and last name with 100% accuracy.

SB 11 at 9.

40. The first short term objective or benchmark in the Student's March 17, 2014 IEP, is:

The Student will write his name without a model with 100% accuracy.

PE 7-139.

41. The first short term objective or benchmark in the Student's January 7, 2016 IEP, is:

The Student will write his first and last name with 100% accuracy when

provided with a model.

SB 10 at 9.

42. The first short term objective or benchmark in the Student's April 22, 2016 IEP, is:

The Student will write his first and last name with 100% accuracy when

provided with a model.

SB 11 at 9.

43. The second short term objective or benchmark in the Student's January 7, 2016 IEP, is:

The Student will be able to write his first and last name with 100% accuracy

without the use of a model.

SB 10 at 9.

44. The second short term objective or benchmark in the Student's April 22, 2016 IEP, is:

The Student will be able to write his first and last name with 100% accuracy

without the use of a model.

SB 11 at 9.

45. The xxxxxxx School specializes in educational programming for students with autism. xxxxx's approach integrates applied behavior analysis (ABA) throughout the entirety of each student's experience. In practice, this means that the student's reading, writing, social, communicative motor, and self-management "behaviors" are the fundamental units on which xxxxxxx focuses. Instructors recognize that often, performance issues result from the child's previous and current history with the instruction, and it is selected, designed, presented, and reinforced. In addition, student performance is analyzed on a variety of different levels and on a student-by-student basis. Teachers and behavior analysts use data to evaluate performance. xxxxxxx serves a number of individuals that all receive personalized services. If a specific method proves unsuccessful for a given student, it is modified or replaced with another evidence-based approach. xxxxxxx's comprehensive ABA approach also means that the specific procedures used are based on the science of human behavior and learning, drawn from empirically-based research, and carried out in such way that they can be described to parents and other important figures in the student's life.   
xxxxxxx's ABA approach actively and continually focuses on pinpointing student strengths and weaknesses, preferences as well as long term goals.

PE 19-5.

46. Since verified methods are an important part of the educational approach at xxxxxxx, a great deal of emphasis is placed on staying up-to-date on research. The Center is affiliated with the Department of Behavioral Psychology at Kennedy Kriger Institute. Johns Hopkins University, the Applied Behavior Analysis Program, Teachers College. Columbia University and the University of Richmond. These partnerships afford xxxxxx's staff close access to some of the premier professionals in the country. The xxxxxx Center uses this research to review and evaluate xxxxxx's instructional goals and revise xxxxxx's tools when necessary, making sure students take advantage of only the best methods.

PE 19-5.

47. All educational services provided by xxxxxxx are accredited by the CABAS® Board, the Virginia Association of Independent Specialized Education Facilities (VAISEF), and are licensed by the Virginia Department of Education. Clinical and Adult Services are licensed by the Department of Behavioral Health and Departmental Services.

48. The LEA refers children to xxxxxxx. Tr. 113.

49. The Student would benefit from xxxxxxx's Upper School Program. Tr. 120, 133, 134, 140-142.

50. The xxxxxxx program is intense. Tr. 131. For example, xxxxxxx has six, seven or eight staff to roughly eight students in the classroom, depending on the makeup of the class. Tr. 155. xxxxxxx has 3 full-time speech therapists there all day, every day. Tr. 155.

II. **Additional Findings, Conclusions of Law and Decision**[[4]](#footnote-4)

In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017), the Supreme Court reaffirmed and further explained the fundamental standard of appropriateness under the IDEA first set out in its decision 35 years ago in *Hendrick* *Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

In a special education administrative due process proceeding initiated by the parents, the burden of proof is on the parents to establish by a preponderance of the evidence that the LEA has failed to provide the student with FAPE concerning the issues they have raised. *Schaffer, ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

The law retains the previous definition of a “free appropriate public education.” Section 612(a)(1)(A) of the *Individuals with Disabilities Education Improvement Act*, December 3, 2004 (the "IDEA 2004"). See also, *Regulations Governing Special Education Programs for Children with Disabilities in Virginia*, effective July 7, 2009, (the "Virginia Regulations"). Accordingly, any analysis of the standard of FAPE must begin with *Rowley. Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982).

The *Rowley* Court held that by passing the Act, Congress sought primarily to provide disabled children meaningful access to public education.

The *Rowley* analysis provides that the disabled child is deprived of a free appropriate public education under either of two sets of circumstances: first, if the LEA has violated IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon the disabled child’s right to a free appropriate public education or, second, if the IEP that was developed by the LEA is not reasonably calculated to enable the disabled child to receive educational benefit. *Rowley*, *supra*, 206-7 (1982).

In order to meet the second prong of the Rowley test regarding a school district’s substantive obligation under the IDEA, “. . . a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew v. Douglas Cty. Sch. Dist. RE-1, 2017 WL 1066260 (2017)*. The Court also stated that “. . . the essential function of an IEP is to set out a plan for pursuing academic and functional advancement.” *Id.*

With regard to the first part of the *Rowley* Test, the IDEA states that the hearing officer may find that the student was denied a FAPE for procedural inadequacies only if they: (1) impeded the student’s right to a FAPE, (2) significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a FAPE to the parents' child, or (3) caused a deprivation of educational benefits. *34 CFR 300.513*; *8 VAC 20-81-210(O)(17)*.

Before an appropriate IEP addressing a student’s needs according to their disability can be developed, the school district’s evaluations must first identify all the areas of deficit that are impacting the student’s access to education. The IDEA states that an evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not linked to the disability category in which the child has been identified.” *34 C.F.R. 300.304(c)(4) and (6); 8 V.A.C. 20-81-70(C)(9) and (14)*. This applies to initial evaluations as well as reevaluations. *Letter to Feehley*, 211 IDELR 415 (OSEP 1986).

According to the IDEA’s procedural requirements, **students must be tested in all areas of suspected disability**.This includes, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, motor abilities, and adaptive behavior. *34 CFR 300.304(c)(4) and (6); 80 VAC 20-81-70(C)(14*)(emphasis added). Courts have found that this procedural requirement is the first step to providing a student with a FAPE. *Millburn Twp. Bd. of Educ. v. A.C.S.O*, 64 IDELR 229 (D.N.J. 2014).

In the Student's case, the Parents contend that the April 22, 2016 IEP and the December 8, 2016 IEP are based on insufficient testing that ignored areas of suspected disability, namely adaptive behavior, resulting in a substantive failure to provide a FAPE.

The hearing officer agrees. The LEA conducted a FBA and developed and implemented a BIP for the Student in the first grade but did not review this BIP every 4.5 weeks as required by the BIP. PE 9-5.

Inexplicably, despite this review requirement, numerous behavioral episodes which impeded the Student's ability to access his educational programming and despite the Parents concerns reported to the LEA by the Parents concerning his behaviors at home and at school, the school did not conduct any FBA or evaluation or testing.

The School Board is correct that a FBA is referenced in the Regulations especially and specifically in the context of discipline. See, e.g. 8 VAC 20-81-160 quoted below. However, the law is also clear that a FBA and testing can be necessary to address FAPE concerns outside of the discipline context and, after all, the Student was not subject to any discipline in the first grade when the LEA conducted his FBA and implemented his BIP.

**8 VAC 20-81-160 (2) provides**:

In the event that the child's behavior impedes the child's learning or that of

others, the IEP team shall consider the use of positive behavioral interventions,

strategies, and supports to address the behavior. The IEP team shall consider

either:

a. Developing goals and services specific to the child's behavioral needs; or

b. Conducting a functional behavioral assessment and determining the need

for a behavioral intervention plan to address the child's behavioral needs.

One of the main themes of the evolvement of the IDEA and its implementing regulations appears to be strengthening parental participation in the educational process. The notice provisions and other procedural protections contained in IDEA are designed to make the parents an integral part of the educational process concerning their disabled children. Honig v. Doe, 484 U.S. 305, 311-312 (1988). Courts, including the Fourth Circuit Court of Appeals, have long recognized how important the procedural requirements of IDEA are to protecting the rights of disabled children to a free appropriate public education, “We have previously held that the failure to comply with IDEA’s procedural requirements, such as the notice provision, can be a sufficient basis for holding that a government entity has failed to provide a free appropriate public education.” Hall v. Vance County Bd. of Educ., 774 F.2d 629, 635 (4th Cir. 1985). See also, *A K v. Alexandria Sch. Bd*., 484 F. 3d 672 (4th Cir. 2007).

The hearing officer finds that the failure ("the Failure") of the LEA to conduct the FBA and to consider its results in the formulation of the Student's IEPs was not merely de minimis or technical but that the nature of the procedural violation by the LEA was sufficiently serious and severe as to constitute a denial of FAPE to the Student in and of itself. This is especially so in the wake of the fact that the Student is nonverbal and the Parents' concerns after the Instructional Assistant grabbed the Student by the face.

**As the Supreme Court has stated**:

[W]e think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement ofthe resulting IEP against a substantive standard.

Board of Educ. v. Rowley, 458 U.S. 176, 205-206 (1982).

The LEA by not conducting a FBA, when one was clearly warranted by the background and circumstances, significantly impeded the decision making process regarding the provision of a FAPE to the Student and infringed on the Parents' opportunity to participate in the IEP formation, thus denying the Student a FAPE. "Parental participation in the IEP and educational placement process is critical to the organization of the IDEA." *Doug C. v. Hawaii Dept. of Educ.,* 720 F.3d 1038, 1043 (9th Cir. 2013) (citations omitted).

The IDEA defines FAPE as special education and related services that (i) have been provided at public expense and under public supervision and direction; (ii) meet the standards of the state educational agency; (iii) include an appropriate preschool, elementary or secondary school education in the state involved; and (iv) are provided in conformity with an IEP. 20 U.S.C. § 1401(8).

The IEP is the backbone of a student's special education program. To that end, the Supreme Court of Virginia has recognized that an appropriate set of IEP goals is in and of itself is a significant factor in determining whether a school district has offered an appropriate program. *See School Bd. v. Beasley*, 238 Va. 44, 52, 380 S.E.2d 884, 889 (1989).

The reasoning of the Court in *Fitzgerald v. Fairfax County Sch. Bd.,*, 556 F.Supp.2d 543 (E.D.Va. 2008) is instructive. The legal obligation to provide FAPE to the student is squarely imposed on the LEA.

**8 VAC 20-81-150 provides in part**:

B. **Placement of children by parents if a free appropriate public education is at issue**.

...

3. If the parent(s) of a child with a disability, who previously received special education and related services under the authority of a local school division, enrolls the child in a private preschool, elementary, middle, or secondary school without the consent of or referral by the local school division, a court or a special education hearing officer may require the local school division to reimburse the parent(s) for the cost of that enrollment if the court or the special education hearing officer finds that the local school division had not made a free appropriate public education available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a special education hearing officer or a court even if it does not meet the standards of the Virginia Department of Education that apply to education provided by the Virginia Department of Education and provided by the local school division. (34 CFR 300.148(c)).

4. The cost of reimbursement described in this section may be reduced or denied. (34 CFR 300.148(d))

a. **If**:

(1) At the most recent IEP meeting that the parent(s) attended prior to removal of the child

from the public school, the parent(s) did not inform the IEP team that they were rejecting the placement proposed by the local school division to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(2) At least 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parent(s) did not give written notice to the local school division of the information described above;

b. If, prior to the parent's (s') removal of the child from the pubic school, the local school division informed the parent(s), through proper notice of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parent(s) did not make the child available for the evaluation; or

c. Upon a judicial finding of unreasonableness with respect to actions taken by the parent(s).

In *Florence Cnty. Sch. Bd. v. Carter,* a 1993 decision in the United States Supreme Court, the court held that in cases where a school district has failed to provide FAPE to a disabled child and the parent has unilaterally sought private special educational services/placement for the child, the parent is entitled to “reimbursement of tuition and other costs,” so long as the services obtained are “appropriate” with regard to the needs of the child. *Florence Cnty. Sch. Bd. v. Carter,* 510 U.S. 7 (1993); codified at 34 CFR § 300.148(c) and 8 VAC 20-81-150 above.

The hearing officer has found a denial of FAPE and accordingly, the only requirement left to be met by the parents when choosing private educational services are that those services confer educational benefit on the child.

In *Sch. Comm. of Burlington v. Dept. of Ed. of Massachusetts*, 471 U.S. 359 (1985), the Supreme Court of the United States determined that it was possible for the LEA to be responsible for the reimbursement of costs associated with unilateral private parental placement of a student with disabilities in cases where: (1) The school’s IEP is found to be inappropriate, and; (2) The private program is found to be appropriate under the IDEA. *Id.* In this case, as stated above, the IEPs proposed by the LEA were inappropriate. xxxxxxx offers an intensive educational program in an appropriate environment from which the Student can receive educational benefit.

Accordingly, the hearing officer finds that the xxxxxxx private placement for the Student is appropriate and warranted.

Compensatory educational services are, “an award of education services that are offered prospectively to compensate for a previously inadequate program.” *Reid v. District of Columbia*, 43 IDELR 32 (D.C. Cir. 2005). In fact, courts have held that the purpose of compensatory educational services as a remedy under the IDEA is to deliver an eligible student with services designed to place that student in the same position they would have been had they always been receiving FAPE. *Id.*

According to the Supreme Court’s holding in *Endrew*, inappropriate goals in light of the unique circumstances of a student’s disabilities, or identical to goals from prior IEPs are an indication that the student has not been provided a FAPE. *Endrew v. Douglas Cty. Sch. Dist. RE-1,* 2017 WL 1066260 (2017). In this case, as described above, xxPS has failed provide the Student FAPE as illustrated by the failure to identify and conduct testing in key areas of need, resulting in IEPs that did not adequately address the Student's adaptive behavior.

Additionally, the continuation of the same IEP goals from the March 17, 2014 IEP, January 17, 2016 IEP, and the April 22, 2016 IEP indicate that the Student had not made sufficient progress in those areas. Therefore, xxPS’s record contradicts itself and brings into question its assertions of academic progress.

In addition to the Student’s current needs according to his disabilities, he should be awarded private day placement as a compensatory service, in light of the need of early intervention concerning his autism, the failure of xxPS to sufficiently identify all of his areas of need and to provide him with proper goals, service, and accommodations.

In *Florence Cnty. Sch. Bd. v. Carter,* a 1993 decision in the United States Supreme Court, the court held that in cases where a school district has failed to provide FAPE to a disabled child and the parent has unilaterally sought private special educational services/placement for the child, the parent is entitled to “reimbursement of tuition and other costs,” so long as the services obtained are “appropriate” with regard to the needs of the child. *Florence Cnty. Sch. Bd. v. Carter,* 510 U.S. 7 (1993). As stated above, the two-part *Rowley* test states, the school district must (1) comply with the procedures set forth in the IDEA, as well as (2) develop an IEP that is reasonably calculated to enable the child to receive educational benefits. *Rowley, 553 IDELR 656 (U.S. 1982).* However the court in *Florence* stated that when a parent is unilaterally choosing services for their child after a school district’s failure to propose FAPE, part one of the *Rowley* test does not apply. *Florence Cnty. Sch. Bd. v. Carter,* 510 U.S. 7 (1993). The court states, “the § 1401(a)(18) requirements--including the requirement that the school meet the standards of the state educational agency, § 1401(a)(18)(B)--do not apply to private parental placements.” *Id.*

As such, the only requirement left to be met by the parents when choosing private educational services are that those services confer educational benefit on the child. The Supreme Court of the United States of America recently held in *Endrew v. Douglas Cty. Sch. Dist. RE-1*, that in order to meet the second prong of the two-part Rowley test regarding a school district’s substantive obligation under the IDEA, “. . . a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew v. Douglas Cty. Sch. Dist. RE-1,* 2017 WL 1066260 (2017). The Court also stated that “. . . the essential function of an IEP is to set out a plan for pursuing academic and functional advancement.” *Id.*

In *Sch. Comm. of Burlington v. Dept. of Ed. of Massachusetts*, the Supreme Court of the United States determined that it was possible for the LEA to be responsible for the reimbursement of costs associated with unilateral private parental placement of a student with disabilities in cases where: (1) The school’s IEP is found to be inappropriate, and; (2) The private program is found to be appropriate under the IDEA. *Sch. Comm. of Burlington v. Dept. of Ed. of Massachusetts*, 471 U.S. 359 (1985). In this case, as stated above, the IEPs proposed by xxPS are inappropriate. By contrast, the xxxxxxx School has proposed an intensive educational program geared to the Student's autism in an appropriate environment from which the Student can reasonably expect to receive educational benefits.

The LEA has renewed its various motions to dismiss the proceeding. The hearing officer denies such motions. The hearing officer addresses the meritorious motions. The hearing officer decides that the LEA's motion to dismiss concerning the Parents' alleged failure to participate in the resolution meeting is moot and, in any event**s**, decides that the Parents did "participate" to the extent required under applicable law.

The hearing officer agrees with the Parents (POB at 13-14) that because the Parents do not seek tuition reimbursement, having not paid any tuition, the notice provision asserted by the LEA does not apply. Additionally, the hearing officer decides that even if it did apply, it would not bar the Parents because the notice provision does not require reduction or denial of reimbursement and there has been no harm to the LEA from the delay. In this regard, the hearing officer finds helpful and instructive the reasoning in the following unpublished opinion from the U.S. District Court in the District of New Jersey:

*H.L. and J.L. v. Marlboro Twp. Bd. of Educ*., 117 LRP 47923 (D.N.J. 11/14/17, *unpublished*).

Concerning the LEA's assertion that the Parents are barred from relief for equitable reasons, such as refusing to send the student to school despite being advised that the instructional aide would not have contact with the Student, that the Student could have a placement in another high school, that the instructional assistant had retired, that Child Protective Services had found no evidence of abuse and for other unreasonable actions, the Hearing Officer agrees with the Parents' reasons in their Closing Argument as to why there should be no such bar. POB 15-16.

As the LEA points out, the advocates are not bound by the same ethical constraints as attorneys. The hearing officer agrees with the LEA that, in an appropriate case, the actions of advocates could undermine or negate a Parent's case.

This is not the hearing officer's decision under the facts and circumstances of this proceeding. The School Board witnesses testified freely and any witness questioned appeared unaware of or unaffected by social media postings of an advocate. SB 32.

The LEA is reminded of its obligations concerning 8 VAC 20-81-210(N)(16) to develop and submit an implementation plan to the parents and the SEA within 45 days of the rendering of this decision.

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

ENTER: 12 / 14 / 2017

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John V. Robinson, Hearing Officer

cc: Persons on the Attached Distribution List (by U.S. Mail and/or e-mail, where possible)

1. To the extent the other section entitled, “Additional Findings, Conclusions of Law and Decision” includes findings of fact, these findings are incorporated into this section. [↑](#footnote-ref-1)
2. The Parents and the Student are referred to generically herein to preserve privacy. [↑](#footnote-ref-2)
3. Exhibits submitted by the LEA and admitted into evidence in this proceeding are cited as "xxPS or SB Ex. <Exhibit Number> <page reference, if any>". Exhibits submitted by or on behalf of the Student and admitted into evidence in this proceeding are cited as "Compl. or P Ex.<Exhibit Number> <page reference, if any>". References to the verbatim transcript of the hearing are cited in the following format "Tr.<page number>." References to the Parents' post-hearing Opening Brief are cited in the following format: "POB<page number>". References to the LEA's post-hearing Opening Brief and Reply Brief are cited in the following format "SOB<page number>" and "SRB <page number>", respectively. [↑](#footnote-ref-3)
4. To the extent the above section entitled, “Findings of Fact” includes conclusions of law, these conclusions are incorporated into this section. [↑](#footnote-ref-4)