**17-058**

# DECISION OF THE HEARING OFFICER

1. Findings of Fact[[1]](#footnote-1)
2. The requirements of notice to the Parents were satisfied.[[2]](#footnote-2) The Student’s date of birth is xxxxxxx , . PE 1[[3]](#footnote-3) The Student suffers from multiple disabilities, and is eligible to receive special education and related services.
3. The issue for decision by the hearing officer in this proceeding is whether the Student’s most recent Individualized Education Plan (“IEP”) was appropriate and provided a free appropriate public education (“FAPE”) to the Student for the 2016-17 school year.
4. The hearing officer finds that any claims of the Parents for tuition reimbursement or other relief for school years preceding the 2016-2017 school year would be barred both by IDEA’s two-year limitations period, 20 U.S.C. § 1415(b)(6)(B), and/or by its notice provision for tuition reimbursement claims, 20 U.S.C. § 1412(a)(10)(C)(ii).
5. The Student is a tenth grade student at School (“ School “ or “ “) whose base school is High School (“ “) in Public Schools (“ PS: or the “LEA”). The Student was originally found eligible for special education and related services (“SPED”) on December 12, 2006, under the category of Speech/Language Impairment. H most recent re-evaluation was conducted on February 11, 2015, in which was found SPED eligible under the categories of multiple disabilities, emotional disability (“ED”), specific learning disability (“SLD”), and other health impairment (“OHI”). PS Ex. 36. PS conducted updated Psychological, Educational, Speech Language and Occupational Evaluations in July-August 2016. H most recent IEP was proposed on September 1, 2016.
6. The Student has diagnoses of Anxiety, Major Depression, Language Disorder, Auditory Processing Disorder, Specific Learning Disability, and Attention Deficit Hyperactivity Disorder.
7. While at School (“ “), the Student consistently received grades in the “A” to “B” range in nearly all subject areas. ( PS Exs. 63-69).
8. However, the Student’s Parents contacted the school in early October 2014 due to growing concerns regarding the Student’s perceived withdrawal at school and behavior at home. (Compl. Ex. 6 pg. 2). On October 21, 2014, the student was flagged by the depression screening. In an email on October 22, 2014, notified the Student’s teachers that had been flagged as a student at-risk. (Id). In addition, the Student would regularly go or be brought to Ms. ‘s office by teachers, due to anxiety/depression-related issues throughout the 2013-2014 and 2014-2015 school years. ( Test Tr. at 889¶13 – p. 890¶10).
9. The Student’s parents, when notified about the screening, became increasingly concerned for the Student’s mental health.
10. In response to heightened concerns with social-emotional functioning and questions of whether grades were a true reflection of academic progress, the Student’s therapist, Dr. , recommended that the Student’s Parents hire a private educational consultant, of , to perform a classroom observation of the Student. ( Test. Tr. 170¶¶10-22, p. 171 ¶¶1-16). The Parents’ stated purpose at this stage was to rule out private day school as a need for the Student. However, following the observation, Ms. recommended that the Student be placed into a private school due to a perceived lack of educational support for the Student in classroom. ( Test. Tr. 1328 ¶¶3-19).
11. On January 23, 2015, PS held an IEP meeting, which included the Parents. The team proposed to continue the Student’s program including 20 hours per week of special educational services, and 3.0 hours per month of speech and language therapy, along with the SOL accommodations that had been agreed to the previous November. ( PS Ex. 31). In the meeting, the Parents did not object to the proposed IEP or the placement by PS. Instead, the Parents signed as agreeing to the IEP, including continuation of the Student’s placement at for the remainder of 8th grade.
12. However, even before agreeing to the January 23, 2015 IEP, on January 12, 2015 – just short of med-way through 8th grade year – the Parents withdrew the Student from and placed at . The Student has continued to attend ever since.
13. The school was founded years ago by and , former special education teachers at in Virginia. ( Test, p. 81 ¶¶17-22; PS Ex. 57 p. 1). The school’s mission statement includes establishing an environment for “authentic learning” that does not focus on rote memorization but instead provides a safe environment that is tailored to each student’s individual needs. ( PS Ex. 57 p. 1). The school is accredited by Advanced Ed and the Southern Association of Colleges and Schools Counsel on Accreditation and School Improvement. Approximately 85% of their student body is diagnosed with some form of educationally impacting disability. ( Test. P.86 ¶¶10-15; p. 88¶21-22; p. 92¶¶3-15 Compl’s Ex. 37; PS Ex. 57).
14. The school offers their students both standard and advanced high school diplomas and all curricula are based off of the Virginia Department of Education (“VDOE”) guidelines for each subject matter, but students are not required to pass SOL assessments in order to receive a diploma. ( Test. Pp. 83¶¶ - 85¶¶8). As of today, 100% of students attending the School have graduated with a standard or advanced high school diploma and 100% of those graduates are on their way to a two or four year college program. ( Test. P.87¶4-11).
15. According to testimony by , the Student’s advisor and teacher, and Ms. , the School provides a number of special education supports for their students including: small class sizes (approximately 7 students per class), graphic organizers, chunking of materials, preferential seating, preferential group work, options to visit a trusted adult (the dean), meeting daily with an academic advisor, regular meeting between staff members to personally tailor each student’s academic programming, authentic learning experiences, and many other academic supports. The Student also has a personal accommodation plan which all teachers implement, and go “above and beyond.” ( Test. P. 49 ¶¶22-p. 51¶¶13; Compl. Ex. 25).
16. The Student continued to attend the School at parental expense during the following 2015-2016 school year. When first started attending in January 2015, the Student was significantly more reserved and apprehensive. Ms. stated that when she first interviewed the Student for admittance to the school, she was hesitant because the Student appeared fairly immature for an 8th grader. One such example is that the Student wears cat ears and a cat-tail to school and makes “purring” sounds. Additionally, Ms. also noticed that the Student needed “to be treated with kid gloves” and was very fragile. ( Test. P. 96¶¶3-15; p. 97¶¶4-17; p. 106 ¶¶9-12). At first, the Student typically did not engage with fellow students and had a tendency to shut down and/or cry and required additional time to understand any type of re-direction required in a social interaction. When the Student would become anxious, Ms. stated that would internalize that anxiety and shut down and be unavailable to either teachers or peers. At these times, staff was able to provide the Student the support to work through these issues and teach how to process and appropriately respond. ( Test. P. 39¶17-22; p. 40 ¶¶1; Test. P. 336 ¶19-22; p. 337 ¶¶1-19; Test. P. 175 ¶¶6-16; Test. P. 98 ¶¶10-21).
17. The Student began to open up more in school with peers and appeared significantly more comfortable in school by the end of the 2014-2015 school year. By the 2015-2016 school year, the Student even started an anime club in school that has garnered, at least at one point, participation from 12 students out of the approximately 50-person student body. also occasionally leads fellow students in tai chi during gym class. ( Test. P. 40¶4-17; Test. P237¶¶5-15, p. 237¶5-p. 238¶22; Test. P. 176¶1-8; Test. P. 102¶¶11-22; p. 103 ¶¶1-7).
18. On May 24, 2016, the Parents, by and through counsel, presented PS with a letter requesting: 1.) tuition reimbursement for the 2015-2016 school year at the School; 2.) and that an appropriate IEP be drafted for the Student, to include private placement through the IEP for the 2016-2017 school year, and; 3.) updated testing be performed by the school district as requested in January 2015. (Compl. Ex. 15). In response to the Parents’ letter, PS agreed to conduct updated Psychological, Sociocultural, Educational, Speech and Language, and Occupational Therapy evaluations in July 2016. ( PS Exs. 45-48).
19. PS Completed the Educational Evaluation on July 20, 2016 and a Speech and Language Evaluation on August 3, 2016. ( PS Exs. 45, 48). The Educational Evaluation was completed by . According to Ms. ‘ results, the Student tested in the 3rd percentile in the math composite. In addition to weaknesses in math, the Student also scored in the 10th percentile overall in reading as compared to same age peers.
20. A Sociocultural assessment was also completed by PS on July 20, 2016. The evaluator noted that, the Student’s teachers from pose that is “insightful, hard-working and sweet” and academic and behavior challenges are well managed by the small class sizes and individual attention receives at . ( PS Ex. 46 pp 3-4).
21. On August 2, 2016, of PS conducted a psychological evaluation of the Student. The evaluation stated that the Student’s emotional state interfered with ability to access and meet the demand of the educational environment. It was also noted that the Student shows deficits with organization of thoughts in writing, oral responses and maintaining a topic, and uneven working memory skills. ( PS Ex. 47 P. 1). Due to the variability in sub-test scores, the evaluator determined the full scale score was “of limited usefulness” when determining the Student’s overall cognitive abilities. ( PS Ex. 47 p. 3).
22. In her report, Ms. emphasizes specific areas of executive functioning deficits for the Student. She notes that, based on data provided by the parent, the “variability” in scores underlined executive functioning deficits in the areas of retaining multi-step instructions in functional memory, controlling emotions, performing tasks in the correct order, remaining organized, and managing money. ( PS Ex. 47 p. 6). However, Ms. also states that, “ mother’s ratings of executive functioning did not yield any areas of significant concern or weakness: and the Student scored firmly in the average range of all categories of the parent report with scores ranging from 99 to 109. (Id; PS Ex. 47 p. 12).
23. Ms. also stated in her evaluation that the Student showed deficits in auditory working memory and processing speed in the low average range. Ms. ‘s evaluation also showed that the Student had deficits in phoneme isolation and verbal learning, scoring in the low and below average ranges in each respective category. ( PS Ex. 47 pp. 3-5). During her testimony, Ms. acknowledged that the Student has processing deficits in auditory memory, typically a manifestation of a specific learning disability, such as math. ( Test. P. 1057 ¶¶17-21). Ms. did not recommend that the Student be evaluated for global auditory processing deficits.
24. On August 22, 2016, the Parents provided a timely 10-day notice of unilateral placement at public expense to PS and stated that the Student would enroll in School for the 2016-2017 school year and the Parents would seek tuition reimbursement. (Compl. Ex. 16).
25. An IEP meeting was held on September 1, 2016. During this meeting, the IEP team referenced the evaluations conducted by PS in July and August 2016. (Compl. Ex. 36b at 6:30-28:00). Amongst other things the PS component of the IEP team stated that the Student demonstrated “age appropriate expressive and receptive language.” (Compl. Ex. 36b at 19:20). The Parents objected to the IEP team’s characterization of the Student’s abilities and requested Psychoeducational and Speech Language Independent Educational Evaluations (“IEE”) at public expense. (Comple. Ex. 36b at 15:10-19:15). At the conclusion of the meeting, PS recommended public day school at as the Student’s Least Restrictive Environment (“LRE”). The Parents disagreed with the IEP. ( PS Ex. 50 p. 23).
26. In September 2016, through communications among counsel, PS and the Parents agreed to what they termed a “Resolution Meeting” to discuss the Student’s placement and other SPED-related issues, pending the completion of the IEEs. ( Test. P. 128¶¶1-22). This, of course, is not the same as a resolution meeting under the IDEA’s implementing regulations as no due process proceeding had been begun yet. Tr. 1129-1130. Accordingly, to differentiate between the two, the hearing officer will reserve the term resolution meeting for the mandated meeting pursuant to the regulations while using the term “settlement conference” for the other meeting.
27. Dr. conducted the neuropsychological IEE on September 27, 2016. Dr. stated that the Student experienced a drop in abstract verbal reasoning scores between the 2015 Dr. assessment and the 2016 PS psychological testing. (Compl. Ex. 21 p. 12). Due to this decline, Dr. stated that the Student’s level of functioning in abstract verbal reasoning was in the borderline range as compared to same age peers. (ID). Dr. also noted weaknesses in the areas of phonological processing, to include borderline performance in phonemic analysis, auditory working memory, and list learning, among other weaknesses. (*Id*; Comp. Ex. 21 p. 29).
28. Dr. stated that testing data also showed significant, and persistent, concerns with anxiety and dysphoria. (Compl. Ex. 21 p. 17). Dr. stated that verbal and nonverbal testing data provided by Dr. showed significant issues in the areas of auditory processing and Dr. concluded that the data suggested an underlying Auditory Processing Disorder (“APD”). He also identified acute exacerbations of the impact of the language-based processing difficulties on the Student’s general functioning. (Compl. Ex. 21 p. 18). Dr. states that these processing deficits coupled with ‘s anxiety and compulsive tendencies can result in having a “markedly weaker ability to appropriately ingest, analyze, and respond to verbal information.” (Compl. Ex. 21 p. 24).
29. Based on his document review and testing data, Dr. recommended placement at the School. In addition to remaining at the School, Dr. also recommended that the Student be provided ongoing social supports and accommodations, as well as access to reduced course load, chunking of materials, summaries, extended time, and psychotherapeutic support. (Compl. Ex. 21 pp. 24-25).
30. Dr. conducted a Speech Language IEE and Language Processing Assessment on September 19, 2016. (Compl. Ex. 18). Dr. ‘s evaluation stated that the Student suffered from Language Processing deficits which impacted ability to fully access educational environment. He identifies specific areas of processing deficits in metalinguistic and metacognitive processing, as well as memory skills. Dr. stated that, in order for the Student to full access educational environment, requires remediation for both metalinguistic and metacognitive deficits. (Compl. Ex. 18 pg. 4; Test. P. 480 ¶¶1-4).
31. Following the results of Dr. and Dr. ‘s IEEs, the Parents requested that Dr. Complete an Auditory Information Processing Assessment on the Student. Dr. completed his assessments September – November 2016. Dr. stated that the Student’s major areas of weakness are in short-term auditory working memory and auditory phonological and lexical integration. (Compl. Ex. 19, pp 5-6). Dr. stated that the Student’s short term working memory deficits affect ability to store auditory information and retrieve it from working memory. In order to help build the Student’s auditory processing skills, Dr. recommended a number of potential programs whose goal is to help build skills, particularly in the areas of short term working memory and sound-symbol association, to include The Listening Program, Therapeutic Listening, Integrative Listening System, CogMed, and LiPS (Linda-Mood Bell). (Compl. Ex. 19 p. 6; Test. P. 494 ¶¶8-22; p. 495 ¶¶1-12).
32. Dr. noted that the Student’s deficits with auditory phonological and lexical integration impact ability to organize what hears into a comprehendible whole. (Compl. Ex. 19, p. 6.) In particular, the Student struggles with sound-symbol association, often mistaking or failing to recognize words that have spellings that are different than their final phonemes. (*Id*). Dr. states, “This problem with auditory lexical sound-symbol association integrative processing would affect comprehension and understanding of material [the Student] hears and reads if reading comprehension problems are noted.” (Compl. Ex. 19, p. 5). In particular, he also notes that, due to difficulties with auditory processing, the Student is unusually dependent on the written form of words and as a result struggles significantly with words that are pronounced differently than they are spelled, resulting in anxiety and confusion and significantly impacting educationally. (Compl. Ex. 19, pp. 5-6).
33. Following these evaluations, the Parents, through counsel, then presented PS with a letter on January 6, 2017, requesting, among other things: 1.) development of an appropriate IEP incorporating all of the recommendations made by both Dr. and Dr. during their evaluations and proper consideration of private day placement; 2.) tuition reimbursement for placement at School, and; 3.) reimbursement for the costs of the Language Processing Assessment and Auditory Information Processing Assessment conducted by Dr. . (Compl. Ex. 3).
34. PS counsel and Parents counsel discussed setting a date for another IEP meeting, however PS counsel and personnel instead recommended that the school and parents meet in a settlement conference to address the concerns presented in the January 6, 2017 letter. ( Test. P. 1133 ¶¶5-11l o, 1134 ¶¶10-15). The Parents, Parent counsel, Dr. , and Dr. (by phone) attended a pre-filing settlement conference with PS on February 28, 2017, but no agreement was reached. During this settlement conference, and following up on her written request for an IEP meeting of January 6, 2017, Parent counsel inquired whether another IEP meeting should be held in light of the reports from Dr. and Dr. . PS declined, taking the position that the September 2016 IEP continued to be appropriate, despite the findings and recommendations of Dr. and Dr. . Tr. 1343-1347; 1132-1143.
35. Incomprehensibly, when the Parents inquired about another IEP meeting and the reports of Dr. and Dr. , Mr. stated that the reports, which of course post-dated the IEP meeting, had already been incorporated into the September 1, 2016 IEP. Tr. 1343-1347.
36. On April 10, 2017 parents, by and through counsel, filed for Due Process. (Compl. Ex. 1). Prior to the due process hearing, parents also served PS with a Subpoena *duces tecum* (“SDT”) on May 2, 2017. Parent’s requested, among others documents, “Any and all documents from 2014-present including…IEP documents.” PS responded to parent’s SDT with a single PDF file containing over 700 pages of numerous documents. Among these documents was an unsigned September 2016 IEP. PS did not provide parents with a signed in disagreement copy of the September 2016 IEP.

# 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);

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 VAC 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 September 1, 2016 IEP is based on insufficient testing that ignored areas of suspected disability, resulting in a substantive failure to provide a FAPE. The Parents provided all private reports to PS soon after they were made available to the Parents. IEEs at public expense were paid for by PS and provided directly to them.

Dr. and Dr. both clearly expressed concerns that they were able to identify signs of potential Language and Auditory Processing disorders through testing instruments that are typically used in their respective fields of expertise, but that PS erroneously attributed the Student’s struggles over the years to other disabilities such as Autism, Executive Functioning Disorder, etc., rather than Language and Auditory Processing, and failed to conduct the necessary tests to identify these disabilities since at least 2015. ( Test. Pp.213¶2-219¶1, pp223¶2-226¶1, pp. 222¶18-233¶10; Test pp. 466¶17-267¶21, pp. 468¶15-469¶8, pp. 470¶8-471¶13; Test. P. 154¶¶5-13; Compl. Ex. 17 pp. 1-4, Ex. 18, pp. 1-2, Ex. 21, pp. 2-5, 7-14, PS Ex. 6, p. 8). Dr. addresses this issue specifically in his reports in which he states that despite PS test results that indicated underlying Language and Auditory Processing problems, the PS Speech and Language evaluation was insufficient to obtain an appropriate understanding of the Student’s present level of functioning, and the “normal” language findings in the PS Speech Language evaluator’s administration of the CELF-V do no support the conclusion that the Student has normal language abilities. ( Test. P. 467¶¶18-21; pp. 468¶15-469¶8; pp. 470¶8-471¶20, p. 473¶¶12-16; pp. 479¶1-480¶4; pp. 482¶16-483¶5; Compl. Ex. 17, pp. 1-4, Ex. 18, pp. 1-2, Ex. 19, p. 1, Ex. 22, pp. 81-82; PS Ex 45, p. 5, Ex. 25, p. 4). Dr. stated that PS failed to do a formal assessment of social/pragmatic language, which he “. . . found to be the main language problem for [the Student], based on basic language testing; replicating what was done by the person, but using a formal measure of pragmatic language, social language communication understanding.” ( Test. P. 471 ¶¶14-20).

By contrast, the LEA’s 2015 Reevaluation and 2016 testing identified and aligned the Student’s needs with executive functioning or attentional deficits and not the underlying Language and Auditory Processing Disorders posited by the Parents’ experts ( Test. P. 213 ¶¶2-8, pp. 214 ¶12-217¶¶4; Test. P. 1058¶¶7-19, p. 1100¶14 – p. 1102¶16, p. 1104¶¶13-21, Compl. Ex. 17 pp 1-4; Compl. Ex. 36b, PS Ex. 36, Ex. 37, Ex. 47, p. 9), PS members of the IEP team concluded during the September 1, 2016 IEP meeting, that it was the impact of attentional/executive functioning weakness that were interfering with the Student’s access to education. ( Test, p. 1061¶18 - 1063¶18; Compl. Ex. 2, p 10-11; Compl. Ex. 36b at 21:30; Compl. Ex. 36b at 1:27:23; Compl. Ex 36b at 1:30-1:32:00; Compl. Ex. 36b at 1:43:25), , the PS School psychologist who conducted the August 2, 2016 psychological testing, strongly endorsed during the September 1, 2016 IEP meeting and in her testimony that the Student’s executive functioning was a major area of weakness. ( Test, pp. 1074¶15-1075¶12, pp. 1104¶13 - 1106¶11; Compl. Ex. 36b at 21:30; PS Ex. 47, pp. 9, 12).

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 Educa., 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 PS to reconvene the IEP team to consider the testing and reports of Dr. and Dr. in the formulation of the Student’s IEP 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 in and of itself. This is especially so in the wake of the written request of the Parents’ counsel of January 6, 2017 (Compl. Ex. 3) and the Parents’ inquiry at the settlement conference.

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 of the resulting IEP against a substantive

standard.

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

PS 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 Educa.* 720 F.3d 1038, 1043 (9th Cir. 2013) (citations omitted).

While Dr. and Dr. participated in the settlement conference, such a conference is hardly an IEP meeting and has an entirely different focus of avoiding due process and possible attendant litigation.

The two attorneys alone could have attended the settlement conference.

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 B. v. Beasley*, 238 Va. 44, 52, 380 S.E. 2d 884, 889 (1989).

By way of contrast to a settlement conference, 8 VAC 20-81-110 (C)(4) provides that the LEA shall ensure that the IEP Team includes:

1. The parents.
2. At least one regular education teacher of the child (if the child is participating in regular education).

If the child has more than one regular education teacher responsible for implementing the IEP, the LEA may designate which teacher or teachers will serve as Team members taking into account the best interests of the child.

1. At least one special education teacher of the child. For a child whose only disability is speech language impairment, the special education provider shall be the speech-language pathologist.

The special education teacher or service provider should be the person who is or will be responsible for implementing the IEP.

1. A representative of the LEA who is
2. Qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
3. Knowledgeable about the general curriculum; and
4. Knowledgeable about the availability of resources of the LEA.

The LEA representative must have the authority to commit the LEA to implement the IEP resulting from the meeting.

1. An individual who can interpret the instructional implications of evaluation results – can be one of the above members;
2. At the discretion of the parent or the LEA, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate. The party who invited the other individual to be a member of the team determines whether the invitee has the necessary knowledge or special expertise.
3. Whenever appropriate, the child

If transition or postsecondary goals are being discussed, the student shall be invited to participate at the IEP meeting.

1. If transition services are being discussed, representatives of other agencies who are likely to be responsible for paying for or providing transition services must be invited.
2. If the public agency is considering a private school placement, it shall ensure that a representative of the private school attends the meeting or participates through other means.
3. If the child was previously served under Part C, the parent has the right to request that the Part C Coordinator or representative be invited to the initial IEP meeting.

An IEP Team member may be excused from attending the IEP Team meeting if the parents and LEA agree in writing and the member submits, in writing, to the Parent and the IEP Team input into the development of the IEP prior to the meeting.

The IEP may be amended between the annual IEP meetings without the necessity of calling a new IEP meeting if agreed to by the parents and the LEA. The amendment or modifications to the IEP shall be in writing. The parent shall be provided a revised copy of the IEP with the amendments incorporated. The LEA shall ensure that the child’s IEP team is informed of the changes.

If consensus cannot be reached regarding IEP decisions, the LEA has the ultimate responsibility to ensure FAPE and make the decision. In such a case, the LEA must provide the parents prior written notice. Every effort should be made to resolve differences through medication or other informal steps.

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.

The IDEA and its accompanying regulations do not require the School Board to accede to a parent’s demands at the IEP meeting. While the IDEA and the IEP process are designed to ensure parental participation in decisions concerning the educational programming for their child, the IDEA does not permit parents to usurp or otherwise hinder a LEA’s authority and duty to provide FAPE to the student.

Such an interpretation could result, in the language of *Fitzgerald*, in delays, stalemates and impasses that would leave educators hamstrung.

Pursuant to 8 VAC 20-81-110 (F), the IEP Team shall consider:

1. Strengths of the child.
2. Concerns of the parent.
3. Evaluation results.
4. Academic, developmental and functional needs of the child. If behavior impedes learning of self or others, positive behavioral interventions, strategies and supports.
5. Language needs of a child with limited English proficiency.
6. Instruction in Braille for students who are blind or visually impaired.
7. Communication needs of students and for students who are deaf or hard of hearing, the child’s language and communications needs and the opportunities to directly communicate with peers and professional personnel.
8. Assistive Technology needs.

8 VAC 20-81-170 (B)(3) provides;

If the parent obtains an independent educational evaluation at public expense or shares with the local educational agency an evaluation obtained at private expense, the results of the evaluation: (34 CFR 300.502(c))

1. Shall be considered by the local educational agency, if it meets local educational agency criteria, in any decision regarding the provision of a free appropriate public education to the child; and
2. May be presented by any party as evidence at a hearing under 8 VAC 20-81-210.

The hearing officer decides that while the LEA could, of course, disagree with the positions of the Parents and their experts, the LEA was required to consider the IEEs and related reports in the context of an IEP meeting and the failure to do so under the facts and circumstances of this case, resulted in a denial of FAPE to the Student.

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 public 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 IEP proposed by PS is inappropriate. By contrast, has provided an educational program in an appropriate environment that is endorsed by various experts involved in the Student’s educational and psychological progress. ( Test. P. 237¶¶5-15, p. 237¶5 – p. 238¶22, p. 273¶8 - 274¶19, Test. P. 174¶6 – p. 175¶12; Compl.’s Ex. 21 p. 24, Ex. 35, p. 3).

was originally founded by special educators for the purpose of providing a learning environment conducive to special education students capable of learning high academic content. ( Test. Tr. at 81 ¶¶17-22; p. 82 ¶¶1-9 PS; PS Ex. 57 p. 1). Currently, approximately 85% of the student population are diagnosed with a disability that affects their ability to learn in the classroom. Of those 85% in the senior class, 100% of the class have graduated and are pursuing higher education in either a two or four year program. ( Test. P.86¶¶10-15; p. 88¶**21-22; p. 92**¶¶3-15 Compl.’s Ex. 37; PS Ex. 57). They provide their students with access to individual based accommodations and services and their small class sizes and teacher involvement provides them with the flexibility to alter their curriculum’s to meet the individual needs of each student. ( Test. P. 49¶¶22 – p. 51¶¶13; Compl. Ex. 25)

However, in order to meet the two prong test in *Burlington*, the parents must show not merely that the is an appropriate placement for special education students, but that it is an appropriate placement for the Student. Much testimony was provided that the Student has shown marked improvement not only emotionally, but academically, since attending . ( Test. P. 40¶4-17; Test. P. 237¶¶5-15, p. 237 ¶5 – p. 238¶22; Test, p. 176¶1-8; Test. P. 102¶¶11-22; p. 103¶¶1-7). Per own testimony, the School is appropriate. (The Student Test. Tr. 354-362).

provides the Student with the necessary support for to succeed. Among those supports, one of the most crucial is an environment that is tailor made to create an aura of safety for a student with the Student’s emotional fragility and to work on improving that fragility. For example, Dr. states, “Placement at School is supported as a means of reducing the challenges for the Student such that is able to maintain appropriate academic functioning. Further, the current placement is felt to provide a foundation from which the Student can work to improve coping capacities and to facilitate a future transfer back to the public school program.” ( Test. P. 237¶¶5-15, p. 237¶5 – p. 238¶22; p. 273¶8 - 274¶19; Compl.’s Ex. 21, p. 24). In addition to Dr. ‘s observations, the marked improvement in the Student’s functioning has been recognized by the Student , Parents, therapist, Dr. , and psychiatrist, Dr. , all of whom have been working together since at least 2012 towards this improvement. ( Test, p. 340¶8 – p. 342¶14; Test, p. 174¶6 – p. 175¶12; Compl.’s Exs. 30, 35).

Accordingly, the hearing officer finds that the private placement for the Student was appropriate and requires PS to reimburse the Parents for the cost of the Student’s enrollment for the 2016-2017 school year.

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: 7 / 27 / 2017

John V. Robinson, Hearing Officer

cc: Persons on the Attached Distribution List (by U.S. Mail, facsimile and/or email, 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 “FCPS 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. Ex. <Exhibit Number> <page reference, if any>”. References to the verbatim transcript of the hearing held on May 23-26, 2017 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 are cited in the following format “SOB<page number>. [↑](#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)