**Case #21-065**

 VIRGINIA DEPARTMENT OF EDUCATION

 A DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES

 OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES

 DUE PROCESS HEARING

 IN RE: XXXXXXXXXXXXXX

# **DECISION**

**Introduction:**

 This case involves the application of the Individuals with the Disabilities Education Act,

(“IDEA”) issue and the determination of whether a free and appropriate education (‘FAPE”) has

been provided to the student by XXXXXXXXXXXX Public Schools. The attending issue is the

determination of whether the legally required degree of progress was had by the student.

 The case involved eight days (8) of testimony and presentation of documented exhibits. The

hearing was held virtually because of the Coronavirus pandemic. The violation of IDEA or not,

was decided on relevance and credibility. As the case was presented virtually, the examination

and determination of credibility was rendered far more difficult than it would have occurred in

an “in person hearing”.

 The student and her parents have the burden of proof. The standard applied to make that

determination is by a preponderance of the evidence. The term “preponderance of the evidence”

does not necessary mean the greater number of witnesses but means the greater weight of the

evidence. It is that evidence which is most convincing and satisfactory to the trier of fact. The

testimony of one witness, and in whom I have confidence may constitute a preponderance. As

the Hearing Officer, I am the sole judge of the weight of the evidence and the credibility of the

witnesses. I have the right to discard or accept the testimony of any part of the evidence from

any witness which I regard proper to discard or accept, when considered in connection with the

whole evidence in the case. In ascertaining the preponderance and the credibility of witnesses, I

have taken consideration the demeanor of the witnesses on the virtual witness stand, their

apparent candor or fairness; bias, if any; their intelligence; their interest or lack of it, in the

outcome of the case and the opportunity for knowing the truth and having observed the fact to

which the witness may testify. Taking in consideration all of the facts and circumstances of the

case, I am charged to determine the credibility of the witnesses and the preponderance of the

evidence.

 **Decision:**

The evidence from the student and the parents are hereby determined to be the most credible

and the burden of proof has been satisfied. The student and her parents are the prevailing party. I

am convinced and therefore find that XXXXXXXXXXXX Public Schools have not complied

with the requirements of IDEA in regard to providing a Free and Appropriate Education

(“FAPE”) to this student.

 Both sides of this case presented exhaustive and credible evidence. The most credible in my

determination was from the student’s mother and her primary witness, Ms. XXXXX. A short

illustration and summary follows: The county’s evidence and its determination of being less

credible than the student’s, I find showed a lack of will on the county’s part to determine and

access properly the student’s special education needs. In judging the county’s witnesses

credibility as being less than of the student’s, it appeared often to be what I am describing now as

wishy- washy. I have examined and re-examined all of the evidence and throughout that review,

find again numerous examples of questions of credibility about XXXXXXXXXXXX’s evidence.

 Therefore, the ruling is in favor of the student.

## **Decision Based on Further Issues:**

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I deny and dismiss each and all other requests by the student in this case. I find based upon

the student’s failure to produce a preponderance of the evidence, that none of the requests for

reimbursement or payment to a private school or other payments have been met by the Parents

and such relief is not available under the law. In addition, IDEA does not authorize courts to

grant momentary damages. See “*Emery v. Roanoke City School* *Board*, 432 F.3d294, 298 (4th

Cir.2005)(citing *Sellers ex rel. Sellers v. Sch.Bd of Manassas,* 141 F3d 524, 526-28(4th

Cir.1998). There was no evidence to show that the private school program for this student was

appropriate. Without that evidence, there can be no Decision or Order requiring private school

tuition to be paid by XXXXXXXXXXXX Public Schools.

SO ORDERED.

Nunc Pro Tunc the 23rd  of October, 2021.

Signed this 25rd day of October, 2021

\_William S. Francis, Jr (es)

William S. Francis, Jr.

Hearing Officer

**8VAC20-80-76(0) Right of Appeal**

 1. A decision by the hearing officer in any hearing shall be final and binding unless the decision is appealed by a party in a state circuit court within one year of the issuance of the decision or in a federal court without regard to controversy…

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