# #22-027

COVER PAGE FOR HEARING DECISION, NOT TO BE PUBLISHED

VIRGINIA:

SPECIAL EDUCATION DUE PROCESS HEARING

**XX, by and through his Parent,**

**XXXXXXXXXXXXXX,**  Complainant

v.

**XXXXXXXXXXXXXXXXXXXXXXXXXXX**, Respondent.

**Student & Parent:** **Administrative Hearing Officer:**

XXXXXXXXXXXXX John V. Robinson, Esq.

XXXXXXXXXXXXXX 7102 Three Chopt Road

Richmond, Virginia 23226

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

None (804) 282-2989 (Facsimile)

 jvr@jvrlawpc.com (E-mail)

**LEA's Attorney:**

Jason H. Ballum, Esq.

Megan Watkins, 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).
2. The Student's date of birth is XXXXXXXXXXX. PE 3[[3]](#footnote-3).

3. The Student is eligible to receive special education and related services under the *Individuals with Disabilities Education Improvement Act of 2004 (*as amended, the “IDEA”*)* as a student with autism. SB 10.

4. The parent requested an administrative due process hearing under the *Individuals with Disabilities Education Improvement Act of 2004* (as amended, the “IDEA”), as specified in the request for due process hearing dated August 15, 2021(the “Request”), which is incorporated herein by this reference. The Request was filed with the LEA and the SEA on August 16, 2021.

 5. The 15-calendar day resolution period meeting due date was August 31, 2021. The resolution meeting was held on August 26, 2021.

 6. The 30-day resolution period ended on September 15, 2021, and the due date for the hearing officer’s decision is October 30, 2021.

 7. In the Hearing Officer’s September 22, 2021, *Decisions, Status Report & Second Amended Scheduling Order*, the hearing officer identified that the Parent raised the following issues to be addressed in the hearing:

1. The Student was denied a free appropriate education (“FAPE”) when the School Board failed to provide extended school year services in the Summer of 2021.
2. The September 16, 2020 IEP provided that extended school year services would be addressed before June 17, 2021 and the School Board failed to comply with this provision resulting in a denial of FAPE.
3. The following procedural violations which the Parent contends caused a denial of FAPE:
	1. The School Board permitted the September 16, 2020 IEP to lapse.
	2. “A single member of the IEP team, Ms. XXXXXX, made the decision to remove the Student from XXXXX to XXXXXXX Elementary School’s special education program. The individual did not allow the parent to finish expressing her concerns and thus did not consider them. The team did not consider the student’s academic needs or medical needs.”
	3. The LEA failed to issue a prior written notice for the June 15, 2021 IEP team meeting.
	4. “The LEA falsified and altered the June 15, 2021 IEP.”
4. The IEP formulated by the School Board on June 15, 2021 and July 15, 2021 is not reasonably calculated to provide FAPE.

8. On January 31, 2020, at the Parent’s request, the School Board placed the Student in a private day school and assigned him to the XXXXXXX School at the XXXXX Center (the “XXXXXXX School” or “XXXXX”) in XXXXXXXXXXX, Virginia through June 18, 2021. SB 2.

9. This placement was facilitated through a confidential settlement agreement reached between the Parent and the School Board. Under the terms of this Agreement, the School Board agreed to place the Student in a private day school through June 18, 20214 with the condition that the Student’s “stay-put” placement remain a special education classroom in the public day school setting. SB 2.

10. On June 15, 2021, the Student’s IEP team convened to review and develop the Student’s annual IEP. SB 9.

11. The Parent participated in in the meeting that began on June 15, 2021. Tr. Day 2, 280: 19.

12. In addition, staff from XXXXX participated in the IEP meeting, including XXXXXXXXXXXXX, XXXXXXXXXX, XXXXXXXXXXXXX, and XXXXXXXXXXX. Tr. Day 2, 280: 22-24.

13. From the XXXXXXXXXXXXXXXXXXXXXXXXXXX (“XXXX” or the “LEA”), XXXXXXXXX, XXXXXXXXXXXXX, XXXXXXXXXXX, and Ms. XXXXXX also participated in the IEP meeting. Tr. Day 2, 280: 24-25.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

4 Although the Agreement only required the School Board to fund the XXXXXXX School through June 18, 2021, because the School Board paid per month, the Student’s services at the XXXXXXX School were paid by the School Board through June 30, 2021.

14. During the meeting, the Parent requested that the IEP team consider continuing the Student’s placement in a private day school setting, specifically XXXXX. SB 9, 255 - 256. 15. The IEP team considered the Parent’s request but determined that the public day school is the Student’s least restrictive environment and that the public day school program proposed by the team can appropriately address the student’s needs. SB-9, SB-10.

16. The School Board staff considered the information contained in a PowerPoint presentation that the Parent provided prior to the June 15, 2021 meeting and that the Parent presented for about 50 minutes during the IEP meeting. Tr. Day 2, 284 - 285.

17. Before the IEP team could finalize the development of the entire IEP, the school staff from the XXXXXXX School had to leave the meeting and the meeting concluded for that day. Tr. Day 2, 285: 19-22.

18. The June 15, 2021 IEP meeting was continued on July 15, 2021. SB 10; *see also* Tr. Day 2, 280: 11-12.

19. Although by an e- mail letter dated July 10, 2021, the Parent confirmed to School Board staff that she would attend the July 15, 2021 IEP team meeting, the Parent subsequently elected not to attend or participate. Tr. 286 – 289.

20. The Parent testified that she “was not interested in IEP meetings” (Tr. Day 1, 238:2) and refused to participate in the IEP meeting because she was unhappy with the outcome of a mediation session and because she had filed for a due process hearing two days before the IEP meeting. Tr. Day 1, 230 – 238.

21. The School Board staff and the staff from the XXXXXXX School participated in the July 15, 2021 IEP meeting, during which the IEP was reviewed and finalized.

22. The School Board proposed an annual IEP for the Student well in advance of the 2021- 2022 school year, but the Parent did not consent to the implementation of the IEP dated July 15, 2021. SB 10.

23. On September 14, 2021, the School Board received a *Homebound Instruction Medical Certification of Need* indicating the Student was confined at home or in a health care facility and could not attend school if accommodations were not made by the school. SB 17.

24. During this proceeding, the Parent and the School Board resolved the extended school year services issues. Tr. Day 1, 101: 3, *see also* Tr. Day 1, 103: 18-20.

25. At the conclusion of the due process hearing, the Parent asked to revise her relief requested as she stated she no longer wanted her son to go to XXXXX. Tr. Day 2, 374: 24 – 25.

26. Subsequently, on October 13, 2021, in her *Due Process Briefs Supplement IEP by XXXX 10\_13\_2021,* the Parent informed the hearing officer that she “decided that currently, [the Student] can get his exceptional educational and medical needs met only at home” and that she “withdrew [the Student] from the XXXX on 10/07/2021 and will keep him at home while continuing educating him until Public School Educational System will change.”

**II. Additional Findings, Conclusions of Law and Decision**

ELIMINATION OF ESY ISSUES & RECENT REQUEST FOR RELIEF:

The Parent agreed on the record that the issues related to extended school year services were resolved. Tr. Day 1, 101: 3, *see also* Tr. Day 1, 103: 18-20. Accordingly, these issues are no longer before the hearing officer.

 Additionally, of note, as stated in Finding paragraph 26 above, the Parent has decided to homeschool the Student and has requested certain monetary relief, which is unavailable under the IDEA.

8 VAC 20-81-210(A) provides:

“A. The Virginia Department of Education provides for an impartial special education due process hearing system to resolve disputes between parents andlocal educational agencies with respect to any matter relating to the: (§ 22.1-214 of the Code of Virginia; 34 CFR 300.121 and 34 CFR 300.507 through 34 CFR 300.518)

1. Identification of a child with a disability, including initial eligibility, any change in categorical identification, any partial or complete termination of special education and related services;

2. Evaluation of a child with a disability (including disagreements regarding payment for an independent educational evaluation);

 3. Educational placement and services of the child; and

 4. Provision of a free appropriate public education to the child.”

Hearing officers are limited in subject matter jurisdiction or power in the types of disputes they can hear and decide to those enumerated above and to certain school disciplinary matters. Hearing officers do not have even close to the plenary jurisdiction of state or federal judges. Accordingly, any allegations raised by the Parent that do not relate to one of those issues must be dismissed and related requests for relief are denied.

The hearing officer agrees with the LEA that the Parent's Request should be dismissed because the Parent seeks certain relief that is not available under the IDEA. Allegations which fail to state a violation of the IDEA are not properly before the hearing officer. For example, to the extent the Parent seeks monetary damages (e.g., in the form of reimbursement for expenses, instructional and related services), such relief is not available. “The IDEA does not authorize courts to grant monetary damages.” *Emery v. Roanoke City School Board*, 432 F.3d 294, 298 (4th Cir. 2005) (citing *Sellers ex rel. Sellers v. Sch. Bd. of Manassas*, 141 F.3d 524, 526-28 (4th Cir. 1998).

While this decision essentially disposes of this case, the hearing officer nevertheless proceeds to address the enumerated issues, which were covered by the parties in detail during the 2-day hearing.

ASSERTED PROCEDURAL VIOLATIONS:

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)*. For each asserted procedural violation, the Parent has not made the requisite showing of a resultant denial of a FAPE to the Student. Nevertheless, the hearing officer also proceeds to address the underlying merits of such assertions.

 If consensus cannot be reach 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 mediation 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.

 **(A) Parent’s Assertion that the September 16, 2020 IEP Lapsed.**

The School Board is required to “ensure that the IEP team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals are being achieved and to revise its provisions, as appropriate, to address: (a) Any lack of expected progress toward the annual goals and in the general curriculum, if appropriate; (b) The results of any reevaluation conducted under this chapter; (c) Information about the child provided to or by the parent(s); (d) The child's anticipated needs; or (e) Other matters.” 8 VAC 20-81-110 (B)(5), citing (34 CFR 300.324(b)).

After developing the Student’s September 16, 2020 IEP, the IEP team met on December 14, 2020, June 15, 2021, and July 15, 2021. Accordingly, the IEP team met multiple times within the year following the development of the September 16, 2020 IEP. The School Board met any statutory requirements to review the Student’s IEP no less than annually. The Parent has not cited any authority for her position that an IEP can “lapse.” Further, while the Parent alleges the IEP “lapsed,” the September 16, 2020 IEP only indicated the IEP would be reviewed no later than June 18, 2021. SB 4.

 Ms. XXXXXX was qualified as an expert in special education and educational programming for students with disabilities. Tr. Day 2, 278: 12-14. Ms. XXXXXX explained during the hearing, “the IEP did not lapse.” Tr. Day 2, 309: 22. She explained, “[w]e held the meeting on June 15th so there was no lapse in the IEP. The previous IEP end date was after June 15th.” Tr. Day 2, 309: 22-24. While the IEP meeting was not completed on June 15, 2021, the School Board began the process of their review in accordance with the date described in the September 16, 2020 IEP, which indicated that the IEP would be reviewed by June 18, 2021. The Parent has not met her burden concerning the issue asserted.

Additionally, the Parent has not proven, upon a preponderance of the evidence, that any asserted procedural violation caused the student a deprivation of a FAPE. There was sufficient time for the Student’s ESY services to be implemented.

Further, the Student received ESY services at the XXXXXXX School through the end of July and was offered ESY services through August 20, 2021. SB 12, SB 13, SB 14, SB 15, SB 19. In addition, the Student’s IEP was fully developed before the start of the 2021-2022 school year.

The 2021-2022 school year began on August 30, 2021. SB 16. The Parent refused to consent to the IEP developed on June 15, 2021 and July 15, 2021 and did not allow the Student to attend school starting August 30, 2021. SB 16.

Although the Parent had not consented to the IEP developed on June 15, 2021 and July 15, 2021, the School Board remained willing and ready to implement the student’s “stay put IEP.” Id. Accordingly, the Student did not suffer from a gap in services due to any action or inaction by the School Board.

# (B) In developing the Student’s annual IEP on June 15, 2021 and July 15, 2021, the IEP team considered the Parent’s concerns and the Student’s academic and medical needs in order to make a final proposal regarding placement as a team.

* 1. **The placement proposal was an IEP team decision.**

Both XXXX staff, as well as multiple staff members from the XXXXXXX School, participated in both parts of the IEP meeting held on June 15, 2021 and July 15, 2021. SB 12, Tr. Day 2, 280: 22-24, 280: 24-25. The only IEP team member that expressed any concerns with the proposed placement was the Parent.

Ms. XXXXXX was the member of the IEP team that first proposed that the Student attend a public day school for the upcoming school year on behalf of the IEP team. Tr. Day 2, 254 at 22-23. At the hearing, in response to the Parent’s question “do you remember who made a placement proposal for [the Student],” Ms. XXXX, the Student’s classroom teacher at the XXXXXXX School, responded “[t]he XXXX County School XXXXXX proposed a new placement for [the Student].” Tr. Day 1, 79: 4-7.

Other than the Parent, no other member of the IEP team expressed any disagreement with the proposed placement. Accordingly, while Ms. XXXXXX vocalized the proposed placement, she did not unilaterally decide to remove the Student from the XXXXXXX School, as asserted by the Parent.

Ms. XXXXXX testified that during the second portion of the IEP meeting, on July 15, 2021, when the team again addressed placement, there was not any disagreement among the participants about any section of the IEP. Tr. 291: 2-4. Ms. XXXXXX further testified that during the July 15, 2021 meeting, the IEP team discussed the LRE and placement section and the entire team present for that definitive meeting proposed a public day school placement, and specifically the communication support program. Tr. 290 - 291. As such, the Parent was the only member of the team to voice any disagreement with the proposed placement and, of course, that was during the preceding June 15, 2021 IEP team meeting.

The appendix to the federal regulations stresses, “The IEP team should work toward consensus, but the public agency has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive FAPE…” 34 C.F.R. Part 300, Appendix A, Question 9.

Although the Parent had previously requested a private day placement, the IEP team members who attended the definitive July 15, 2021 meeting unanimously agreed that a public day school is the appropriate placement for the Student and his least restrictive environment.

# The School Board staff member’s recommendation was appropriate.

School staff are permitted and should arrive at IEP meetings prepared to make thoughtful recommendations about a student’s placement. *See*, *J.R. v. Smith*, Civil Action No. DKC 16- 1633, 2017 U.S. Dist. LEXIS 133004, at \*29 (D. Md. Aug. 21, 2017): “School districts are therefore prohibited from predetermining a student's placement prior to an IEP meeting. However, *“*predetermination is not synonymous with preparation,” and the members of the IEP team may, naturally, go into a meeting with some ideas or opinions.”) (internal citations omitted).

Furthermore, draft IEPs are not only permissible, but school staff should give thought to placement in advance of the IEP meeting. *See*, *White v. Sch. Bd. of Henrico Cty*., 36 Va. App. 137, 159, 549 S.E.2d 16, 27 (2001): “The IDEA permits a school board to bring a draft IEP to meetings for the purposes of discussion.” (Citing *Doyle v. Arlington County Sch. Bd.*, 806 F. Supp. 1253, 1262 (E.D. Va. 1992), aff'd 39 F.3d 1176 (1994): "While a school system must not finalize its placement decision before an IEP meeting, it can, and should, have given some thought to that placement.")). Ms. XXXXXX acted well within her rights when she made her placement recommendation at the June 15, 2021 IEP meeting.

# (3) The IEP Team considered information from the Parent.

While the IEP team must consider the concerns of the parent and information provided by the parent as part of the IEP development process, the IEP team is not required under the IDEA to accept all parental requests. *See, Greenhill v. Loudoun Cnty. Sch. Bd.,* 1:19-cv-868 (E.D. Va. Feb. 20, 2020): “That plaintiffs did not get their desired result does not undermine their participation, as the ‘IDEA does not mandate that parental preferences guide educational decisions.’”(citing *M.M. v. Dist. 00001 Lancaster Cnty. Sch.,* 702 F.3d 479, 488 (8th Cir. 2012)).

 Further, while the IEP team has an obligation to maintain an open mind, they are not required to adopt the parent’s view. *See J.R. v. Smith,* *supra*, at \*33-34 (D. Md. Aug. 21, 2017): “Here, the evidence clearly shows that the CIEP team discussed both Ivymount and RTS. That the CIEP team members from the school were not ultimately persuaded by Plaintiffs' arguments does not mean that they were not open- minded.”

The team considered the Parent’s concerns at both the June 15, 2021 IEP meeting and the July 15, 2021 IEP meeting. The IEP team received and considered written feedback from the Parent prior to both the June 15, 2021 and July 15, 2021 IEP meetings.

Ms. XXXXXX testified that in advance of the June 25, 2021 IEP meeting, the Parent “emailed saying that [she] received the draft, [she] had reviewed the draft, and [she] had a concern related to nursing services and related to ESY” (Tr. Day 2, 310: 16-20) and regarding a personal care assistant. PE 50 at 11; Tr. Day 2, 311: 5-7. The Parent also provided a copy of a PowerPoint Presentation to several members of the IEP team in advance of the IEP meeting. Tr. Day 2, 316: 14-17. Ms. XXXXXX testified that the team had reviewed the slides and that she had done so “in detail.” Tr. Day 2, 316: 17-25.

At the June 15, 2021 IEP meeting, the Parent presented a PowerPoint presentation to the IEP team and, according to Ms. XXXXXX, the Parent proceeded uninterrupted for approximately 50 minutes. Tr. Day 2, 284 - 285. Mr. XXXXXX also testified that he believed the Parent presented her PowerPoint for approximately 45 to 60 minutes. Tr. Day 2, 266: 21-22. During her presentation, the Parent expressed her concerns regarding the Student’s annual IEP, including her specific concerns regarding his LRE. The PowerPoint presentation was projected for the team members to review and consider contemporaneously with the Parent’s delivery of the presentation. Tr. Day 2, 284: 19-21.

During her presentation, the IEP team members engaged in conversation regarding the PowerPoint and considered the information presented by the Parent in the PowerPoint. Tr. Day 2, 285: 5-11. Specifically, Ms. XXXXXX testified that the IEP team definitely considered and acknowledged verbally that the team considered the information in the PowerPoint. Tr. Day 2, 285: 8-11. The IEP team remained open minded, actively listened to and considered the Parent’s comparison between the private day placement and the public day setting.

As the XXXXX IEP team members had previously informed Ms. XXXXXX that they had to leave by 4:30 pm, Ms. XXXXXX concluded the meeting shortly after 4:30 pm despite the IEP team not having finished all discussions. Tr. Day 2, 285: 18-25. Ms. XXXXXX explained to Ms. XXXXXX that the team would need to continue the discussion. Tr. Day 2, 285 – 286.

XXXX staff attempted to reschedule a second IEP meeting to finish developing the Student’s annual IEP, but the Parent was not cooperative with scheduling and did not initially respond to the calls from the school to schedule the second meeting. Tr. Day 2, 261: 12-17. Ms. XXXXXX testified that during the second part of the IEP meeting, on July 15, 2021, the team reconsidered information that Ms. XXXXXX had provided to the team in the previous meeting and there was discussion related to the concerns the Parent had previously articulated. Tr. 291 - 292.

Accordingly, while by choice the Parent was not present at the July 15, 2021 IEP meeting, in developing the Student’s annual IEP, the IEP team considered the Parent’s concerns and proposed an IEP designed to help the Student make progress that is appropriate in light of his unique circumstances. *See Endrew F. v. Douglas Co. Sch. Dist. Re-1,* 137 S. Ct. 988 (2017).

# (4) The IEP team considered the student’s academic needs and medical needs.

During the June 15, 2021 IEP meeting, the IEP team specifically considered the student’s academic needs when the team discussed and updated the Student’s Present Level of Academic Achievement and Functional Performance and related goals. Tr. Day 1, 78 - 79. Ms. XXXXXXXXXXX, the Student’s classroom teacher at XXXXX, testified that she and the XXXXX team, “proposed the present levels of performance for behavior, academics, and communication and goals related to those skill areas.” Tr. Day 1, 79: 20-22. The IEP team also identified updated goals based on the Student’s academic needs.

The Parent was specifically asked if she had any objections regarding the IEP’s present level of performance or goals and she replied that she did not. Tr. Day 2, 283: 2-8.

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).

 In response to the Parent’s questions and concerns about the Student’s feeding needs, the team discussed how the Student’s feeding needs could be addressed in the public day setting. SB 12. As indicated on the Prior Written Notice for the IEP developed on June 15, 2021 and July 15, 2021, the IEP team proposed that the occupational therapy services that the occupational therapist was providing while the Student attended XXXXX could also be implemented in the public day setting. SB 12.

The IEP proposal was a team decision and the IEP team considered the Parent’s concerns and the Student’s academic and medical needs.

# (C) The School Board provided a Prior Written Notice for the June 15, 2021 IEP meeting, while such a PWN was not required under the circumstances of this case.

 **(1) The Parent’s assertion fails to state a violation of the IDEA against the LEA.**

The hearing officer agrees with the School Board that the Parent’s allegation fails to state a violation of the IDEA and its implementing regulations. A prior written notice must be sent at a reasonable time before the public agency *proposes or refuses* to initiate or change the identification, evaluation, educational placement, or the provision of a FAPE*. See* 34 C.F.R. 300.503 (a) (emphasis added). The Virginia Department of Education*’s Guidance on Prior Written Notice in the Special Education Process* states:

LEA’s often find themselves having to convene more than one, and often several, IEP meetings in order to fully develop, review, and/or revise the IEP of a child with a disability. The development of a child’s IEP certainly falls to the heart of the provision of a free appropriate public education (FAPE) and triggers an LEA’s obligation to provide prior written notice to the parent in accordance with 34 C.F.R. §300.503(a) and 8 VAC 20-81-170.C.1. However, the regulations do not require that prior written notice be provided after every IEP meeting in a series of meetings while the IEP is still under development, no final IEP is being proposed and parental consent is not being sought. Providing prior written notice in such a piecemeal fashion to simply document the discussions, agreements, disagreements, proposed and refused actions that occurred during each of the meetings is not required by state and/or federal special education laws and regulations. The IEP development process is a fluid process, wherein previously discussed and seemingly agreed upon items may be revisited and altered. Therefore, imposing a requirement that an LEA provide prior written notice any time an IEP team meeting concludes without a proposed IEP and where subsequent meetings are anticipated and/or scheduled, would be premature and plainly unworkable. (page 3, available at [https://www.doe.virginia.gov/special\_ed/regulations/state/procedural\_safeguards/](https://www.doe.virginia.gov/special_ed/regulations/state/procedural_safeguards/guidance_prior_written_notice_special_educ_process.pdf) [guidance\_prior\_written\_notice\_special\_educ\_process.pdf](https://www.doe.virginia.gov/special_ed/regulations/state/procedural_safeguards/guidance_prior_written_notice_special_educ_process.pdf)).

On June 15, 2021, the IEP team began to discuss the Student’s annual IEP but did not finish developing and proposing an annual IEP. Since the IEP team had not completed the development of the proposed IEP, a PWN was not required. The IEP team reconvened on July 15, 2021 and completed the development of the IEP. The Student’s annual IEP was the result of two meetings. Tr. 288: 19-21. Therefore, XXXX was only required to develop one PWN after the July 15, 2021 meeting.

Although XXXX was not required to issue a PWN after the June 15, 2021 IEP meeting, upon the Parent’s request, the division issued a PWN based on the unfinished IEP meeting. The Office of Special Education Program (“OSEP”) has stated, “[t]here is no requirement in the Individuals with Disabilities Education Act (IDEA) regarding the point at which the written notice must be provided as long as it is provided a reasonable time before the LEA actually implements the action. This provides parents, in the case of a proposal or refusal to take action, a reasonable time to fully consider the change and respond to any action before it is implemented.” Letter to Chandler, 59 IDELR 110 (OSEP 2012).

In this case, the Parent had a reasonable time to fully consider the proposed change and to respond to the action before it was implemented. Because the team intended to reconvene to complete the development of the Student’s annual IEP, XXXX had no intention of proposing or implementing the annual IEP until after the conclusion of the July 15, 2021 IEP meeting. After the second meeting, XXXX staff sent the parents a copy of the proposed IEP and the accompanying prior written notice, fully complying with any applicable legal mandates.

**(D) Allegation that the School Board altered or falsified the June 15, 2021 IEP.**

This allegation appears to have arisen primarily from the Parent’s misconception that the

School Board was obligated to incorporate verbatim certain information provided by the private school. However, no law or regulation requires that the local school division take information verbatim from a private school and insert that information into a student’s IEP. Tr. Day 2, 281: 20-23.

By contrast, the regulations only require that the local school division “ensure that a representative of the private school or facility attends the IEP meeting. If the representative cannot attend, the local school division shall use other methods to ensure participation by the private school or facility, including individual or conference telephone calls.” 8VAC20-81-150 (A)(3), 34 CFR 300.325(a)(2).

The School Board appropriately received, considered and incorporated information into the IEP from XXXXX. Tr. Day 2, 327: 23 - 328:2.

**(E) The IEP developed by the School Board on June 15, 2021 and July 15, 2021 is reasonably calculated to provide the child with FAPE.**

**The School Board’s proposed IEP is reasonably calculated to afford the Student the opportunity to receive the educational benefit required by the IDEA.**

In 2017, the United States Supreme Court refined the FAPE test, defining “some educational benefit” as requiring a school division to offer an IEP which is reasonably calculated to enable a child to make educational progress in light of the child’s individual circumstances. *Endrew F. v. Douglas Co. School District*, 137 S.Ct. 988 (2017).

The United States Court of Appeals for the Fourth Circuit in *R.F. v. Cecil County Public Schools, et al*., 919 F.3d 237 (4th Cir. 2019) stated that "this standard is framed in terms of each child's unique circumstances because “a focus on the particular child is at the core of the IDEA.”"(citing Endrew F., 137 S. Ct. at 999). R.F., 919 F.3d at 247. The Fourth Circuit verified that “crafting an appropriate program of education requires a prospective judgment by school officials.” Id., (again citing Endrew F., 137 S. Ct. at 999). The Fourth Circuit held that where the school division developed an IEP with reasonably ambitious goals that were focused on the eligible student's particular circumstances and that were pursued through the careful and attentive instruction of specialized professionals, the student received FAPE. Id. at 252.

The Parent has not challenged many elements of the School Board’s offer of a FAPE in the July 15, 2021 IEP (the “Proposed IEP”), including the appropriateness of the measurable annual goals, including academic and functional goals, the description of how the Student’s progress towards meeting those goals will be measured, and the special education services (specifically designed instruction).

The IEP addressed each of the disability-based needs of the Student, including those rooted in his autism.

The educators acted in a professional, collaborative, balanced and expert way in designing for the Student the individualized IEP, which is reasonably calculated to enable the Student to make progress in view of the Student’s unique individual circumstances.

The PLAAFP of the Proposed IEP contained all necessary information about the Student to accurately identify his disability-based needs. The information in the PLAAFP served as the basis for developing the other parts of the Proposed IEP. Accordingly, the Student’s disability-based needs were identified properly.

The provisions of the Proposed IEP addressed the Student’s disability-based needs identified in the PLAAFP.

The annual goals, specially designed instruction, accommodations, related services and educational placement (LRE) of the Proposed IEP are derived directly from the Student’s disability-based needs identified in the PLAAFP.

 A review of the Proposed IEP reveals that the annual goals are related directly to the documented unique needs of the Student. Accordingly, the annual goals were reasonably calculated to address the Student’s unique needs and to enable progress in the general education curriculum, appropriate in light of his unique individual circumstances.

The Parent offered no evidence to prove that the special education services (i.e. specially designed instruction) provided in the Proposed IEP were not reasonably calculated to address the Student’s needs and to enable him to progress appropriately in the general education curriculum in light of his unique individual circumstances. A review of the Services pages of the Proposed IEP reveals that the special education services aligned directly with the academic and behavioral goals of the IEP. There was no probative testimony from the Parent that challenged the proposed special education services as inappropriate.

The testimony of School Board employees and the proposed IEP plainly demonstrated that the School Board offered the Student an appropriate education. XXXXXX XXXXXX and XXX XXXXXX testified regarding the Student’s meetings, educational programming, and evaluations. These individuals were familiar with the Student, reviewed the Student’s cumulative education file, and participated in meetings regarding the Student.

 In Endrew F, the Supreme Court of the United States confirmed that deference must be given to the professional judgments of educators. A court or hearing officer is required to give deference to the opinions of school board witnesses who are professional educators “based on the application of expertise and the exercise of judgment by school authorities.” Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, No. 15-827, 137 S.Ct. 988 (2017); see also Rowley, 458 U.S. at 206-208; M.M., 303 F.3d at 533.

 Like Rowley, Endrew F. is also careful to recognize the importance of leaving the business of running schools to the considered judgment of local educators. This Circuit has always recognized this mandate:

In *Hartmann v. Loudoun County*, the Court stated: 

 *See also Springer v. Fairfax County*, 134 F.3d 659, 663 (4th Cir. 1998) (holding that “[a]bsent some statutory infraction, the task of education belongs to the educators who have been charged by society with that critical task”); *Barnett v. Fairfax County School Board*, 927 F.2d 146, 151-52 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991) (recognizing Congressional intent to leave education decisions to local school officials and recognizing the importance of giving school officials flexibility in designing educational programs for students); and *Tice v. Botetourt County,* 908 F. 2d1200 at 1207 (4th Cir. 1990)(once a “procedurally proper IEP has been formulated, a reviewing court should be reluctant . . . to second-guess the judgment of education professionals” – rather, the court should “defer to educators’ decisions as long as an IEP provided the basic floor of opportunity that access to special education and related services provides”).

Accordingly, hearing officers must not succumb to the temptation to substitute their judgment for that of local school authorities in IEP or educational matters. *Arlington County Sch. Bd. v. Smith*, 230 F.Supp. 2d 704, 715 (E.D. Va. 2002).

Educators exercising their considered professional judgments to implement a procedurally correct IEP should be afforded significant academic autonomy and should not be easily second-guessed by reviewing persons. *Hartmann v. Loudoun County Bd. of Educ.,* 118 F.3d 996, 1000-1001 (4th Cir. 1997); *Johnson v. Cuyahoga County Comm. College*, 29 Ohio Misc.2d 33, 498 N.E.2d 1088 (1985).

Professional educators in the school division, who are the ones most familiar with the Student, the child study process, the special education eligibility process, and the educational programming available within the school division, have testified regarding the appropriateness of the educational decisions rendered regarding the Student.

Ms. XXXXXX, in particular, who testified regarding the Student has substantial training, expertise and experience in working with children with disabilities, in educational programming in the Virginia public school setting and the hearing officer agrees with counsel for the School Board that her testimony warrants deference.

Ms. XXXXXX testified that in her expert opinion, she agreed with the proposed placement of the Student in the communication support program at XXXXXXX Elementary School. Tr. Day 2, 306: 10-14.

Specifically, she explained that in her expert opinion the Proposed IEP was reasonably calculated to provide the child with an appropriate education because the communication support program at XXXXXXX is excellent. Tr. Day 2, 306: 5-20. Ms. XXXXXX explained that the communication support program at XXXXXXX is “a self-contained classroom that has a max of eight students.” Tr. Day 2, 292: 19-20. Although the maximum number of students for the program is eight, currently there are only five students in the program and three staff members. Tr. Day 2, 293: 12-19. Specifically, Ms. XXXXXX testified that “there are two PARAs assigned to that classroom and also a teacher.” Tr. Day 2, 292: 20-21.

Ms. XXXXXX stressed the LRE component of the proposed placement:

We have access to typically developing peers, and I think that is – that is very important for [the Student]. When I talked to Ms. XXXX, when I visited the school, she showed me his data binder with – and yes, [the Student] had made a lot of progress at XXXXXXX School. However, Ms. XXXX said the goal he had not mastered was a social skills goal. He was having a difficult time interacting with his peers, sharing toys. Being in communication support would provide him that access to typically developing peers and he’d have those peer models for social skills. Tr. Day 2, 306 – 307.

Accordingly, while not bearing such burden, the School Board has shown that the Proposed IEP is reasonably calculated to provide a FAPE.

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: 10 / 29 / 2021

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

John V. Robinson, Hearing Officer

cc: Persons on the Attached Distribution List (by U.S. Mail, facsimile 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 Parent 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 "SB <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 "PE<Exhibit Number> <page reference, if any>". References to the verbatim transcript of the hearing held on September 28-29, 2021, 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)