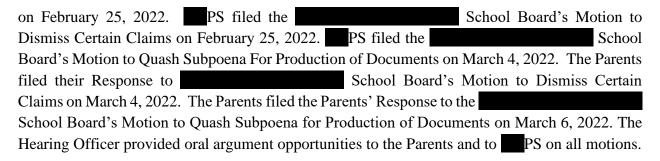
## 22-084

# COMMONWEALTH OF VIRGINIA

# **DUE PROCESS HEARING**

In Re:, by and the AND	rough Parents,	
V.		
PU	BLIC SCHOOLS, Respondent.	
<b>Counsel for Petitioners:</b>	Counsel for Respondent:	
Sarah Ratner, Esq.	LaRana Owens, Esq.	
Todd Ratner, Esq.	Patrick Andriano, Esq.	
	Anne Mickey, Esq.	
AMENDED DECISION		
This matter came to be heard before the hearing officer (the "Hearing Officer") upon a Due Process Request Hearing (the "Complaint") filed by and (hereinafter referred to as the "Parents") on behalf of their (hereinafter referred to as " pursuant to the Individuals with Disabilities Education Act (the "Act"), 20 U.S.C. Sec. 1400, et seq., and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 8 VAC 20-81. As the moving party, the Parents assume the burden of proof in the Complaint. Schaffer v. Weast, 546 U.S. 49 (2005). The Parents' standard of proof is "upon a preponderance of the evidence." 8 VAC 20-81.O.13.		
1. Procedural History		
Complaint on February 1, 2022. The Adfiled a Response to the Parents on February 1 are resolution meeting on February 1.	Schools ("PS" or the "School District") received the ct's 75-day timeline began on February 2, 2022. PS abruary 11, 2022. Thereafter, PS and the Parents ebruary 17, 2022. The Parents filed a Motion for Default	
Judgment or Alternative, Appropriate Remedy for School Board's Deficient Response to the Request for Due Process on February 21, 2022.		
	s Response to the Parents' Motion for Default Judgment	

<sup>&</sup>lt;sup>1</sup> See also Schaffer, "The burden of persuasion in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." Id. at pp. 6-12.



The Hearing Officer conducted pre-hearing conferences with the Parents and PS on February 10, 2022, February 25, 2022, March 10, 2022, and March 17, 2022. The hearing date was set on February 10, 2022.<sup>2</sup> The Hearing Officer issued the following rulings and orders with respect to the parties' motions:

- 1. Ruling on \_\_\_\_\_\_ 's Motion to Quash Subpoena for the Production of Documents on March 11, 2022;
- 2. Ruling on the Parents' Motion for Default Judgment on March 11, 2022;
- 3. Ruling on School Board's Motion to Dismiss Certain Claims on March 11, 2022; and
- 4. Order on April 11, 2022 denying admissibility of the Parents' exhibit containing a portion of the February 19, 2021 IEP meeting audio recording between the Parents and PS.

Both the Parents and PS provided witness lists and exhibit copies to the Hearing Officer on March 14, 2022. On the same date, the Parents filed a Motion to Permit Public Access to the Due Process Hearing by Live Streaming. On March 15, 2022, the Parents filed a Motion for Permission to Allow Expert Witness to Testify Remotely. The Parents were provided with an opportunity for oral argument on both motions.

The due process hearing began on March 21, 2022, and concluded on March 30, 2022. Counsel for both parties submitted closing briefs on April 11, 2022. The Hearing Officer submitted a decision with respect to the due process hearing on April 15, 2022.

### 2. Issues Presented

- (1) Did PS properly provide with a free appropriate public education through the development of IEPs from February 2019 through February of 2020?
- (2) Did PS properly provide with a free appropriate public education from February 2020 through February 2021?

<sup>&</sup>lt;sup>2</sup> Parents' counsel and the School District's counsel conferred and agreed to the first conference date and to the due process hearing dates.

(3)	Does require placement at private day school? ("""), a	
3. Factual Findings		
Learn advan Gener imagi: excep subject progre	is a part of the special education category under the Act, Specific ing Disability (SLD). It is highly intelligent. It creative mind is evidenced by ced essays providing impressions of the pandemic, historical figures or animals rally, writes essays about places, people and animals which are descriptive and native. It is advanced beyond pears and appropriately defined as "twice tional." Tr. Day 4, pp. 1099, 13-17. When pears is fully engaged, the scapable of learning tests to people and animals which are descriptive and is fullest capacity as pears and appropriately defined as "twice tional." Tr. Day 4, pp. 1099, 13-17. When pears are fullest capacity as pears and has made meaningful academic tests. Per pears are grade teacher, pears helped her teach young spellers how to read to decode words and how to phonetically figure out words did not yet know.	
12 person educa end or	's grade reports show that excelled academically during the beginning of grade year in 2019-2020. However, on March 23, 2019, at the beginning of the COVID-19 mic (the "Pandemic"), all schools in the State of Virginia closed for grades Karr orders from the Governor. When the Pandemic resulted in PS's cancellation of infinitruction, virtual instruction became s's reality. Segmental education and special tion teachers testified that made meaningful progress toward IEP goals by the State of Virginia closed for grades Karr orders from the Governor. When the Pandemic resulted in PS's cancellation of infinitruction, virtual instruction became s's reality. Segmental education and special tion teachers testified that made meaningful progress toward School ("S"). But the State of Virginia closed for grades Karr orders from the Governor. When the Pandemic resulted in PS's cancellation of infinitruction, virtual instruction became s's general education and special tion teachers testified that made meaningful progress toward School ("S"). But the State of Virginia closed for grades Karr orders from the Governor. When the Pandemic resulted in PS's cancellation of infinitruction, virtual instruction became s's general education and special tion teachers testified that segmental progress toward segmental progres	
earned With Acade 2020 a progre	At the end of the 2020-2021 school year, signal spaces were as follows: Science – A; Math Social Studies – A; Writing – A; and Reading – A. passed both of SOL's and scores of 421 in reading and a score of 435 in math. Both tests have passing grades of 400 respect to academic assessments, showed dramatic progress on the Measure of emic Progress ("MAP") educational assessment. earned a score of 171 in the winter of and improved to a score of 212 in the spring of 2021. also earned higher scores in math essing from a winter, 2020 score of 208 to a spring, 2021 score of 226. But on May 19, 2021 spaces are proposed to remove spaces of 175 and 175 are passed both of solling passed both o	
disorde	pecific Learning Disability" per the Act and the Virginia Regulation at 8VAC – 20-81-10 is defined as: "A er in one or more of the basic psychological processes involved in understanding or in using language, spoker ten, that may manifest itself in an imperfect ability to listen, think, speak, write, spell, or do mathematica tions."	

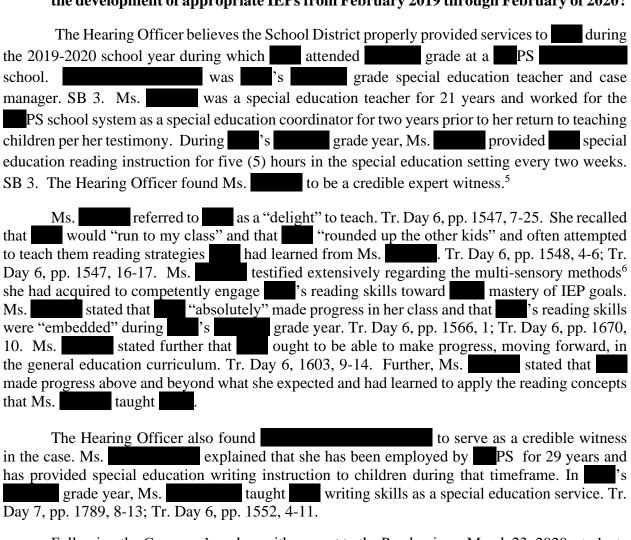
and

, PS expert witnesses.

and enroll at a private college preparatory day school which is not an approved school for children with disabilities by the Virginia Department of Education ("VDOE").

## 4. Discussion and Decisions

(1) Did PS properly provide with a free appropriate public education through the development of appropriate IEPs from February 2019 through February of 2020?

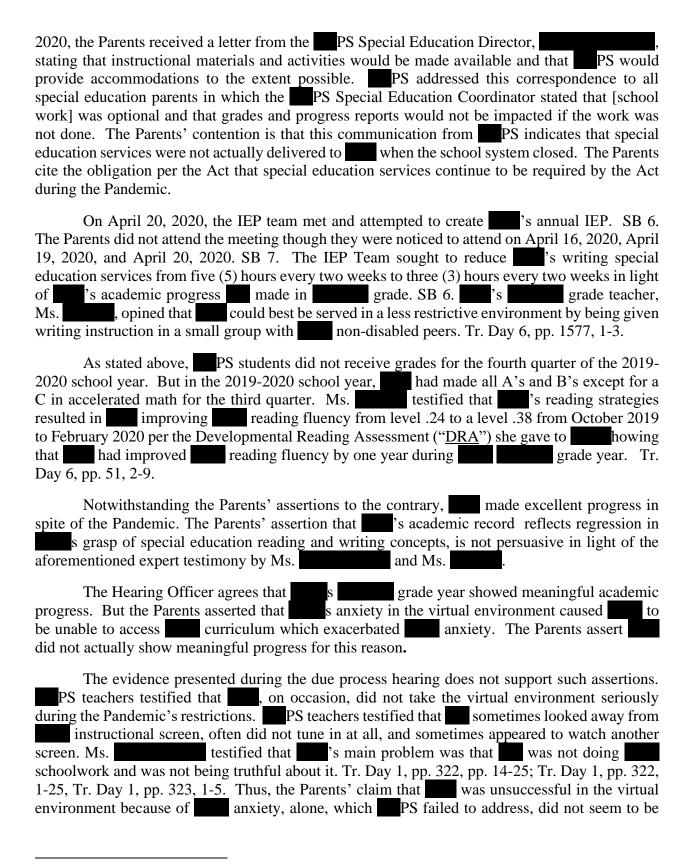


Following the Governor's orders with respect to the Pandemic on March 23, 2020, students who received special education services and general education services in the School District received learning materials asynchronously<sup>7</sup> in each student's personal environment. On April 14,

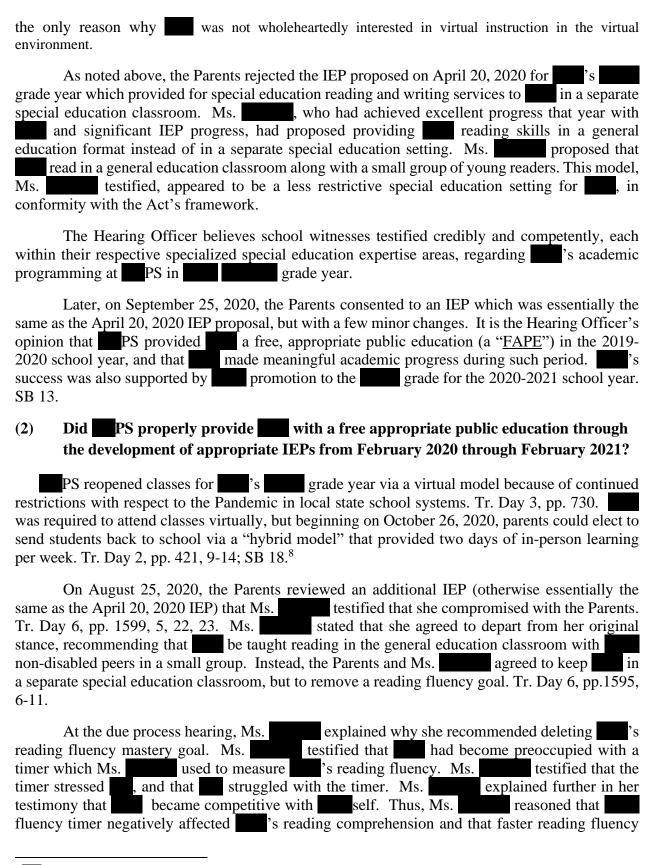
<sup>&</sup>lt;sup>5</sup> Ms. testified that she had been a PS special education teacher for 21 years and a PS Special Education Coordinator for two years. Tr. Day 6, pp. 1555-1556, 1-7.

<sup>&</sup>lt;sup>6</sup> Ms. explained that "multisensory learning" is now the norm for teaching children who have trouble decoding words. Instead of using only sight to decipher a word, the multisensory approach elicits all mental faculties to learn to imprint decoding into an early learner's long term memory. Tr. Day 6, pp. 1556, 1-7.

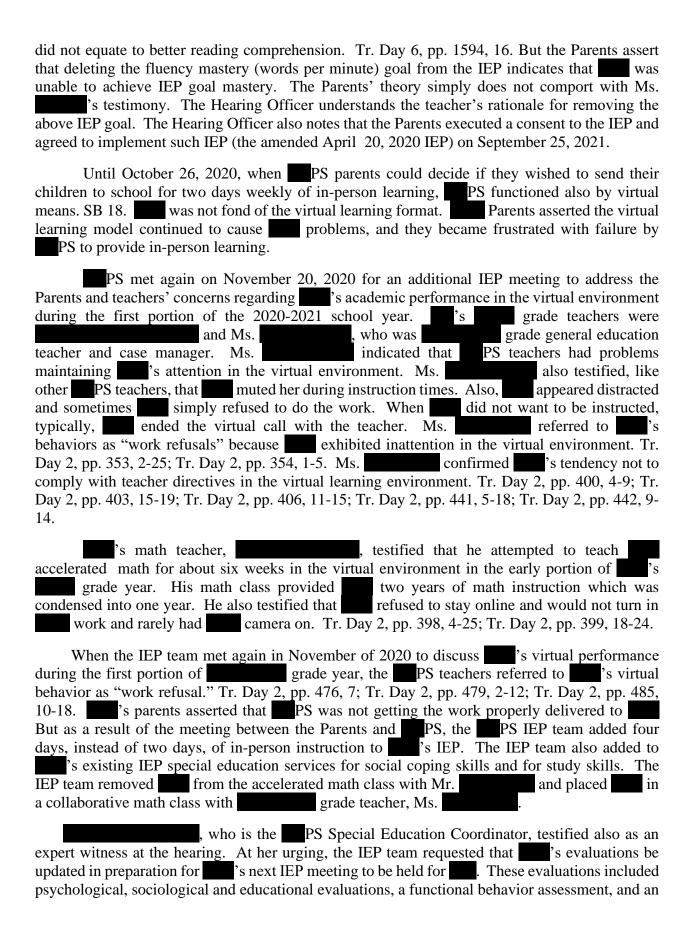
<sup>&</sup>lt;sup>7</sup> Students were to focus on reinforcing concepts learned prior to school closure. Teachers were not to introduce new topics or penalize students. The school district, in conformity with other state public school districts, adopted the "continuity of learning" concept meaning that special education and general education students did not receive

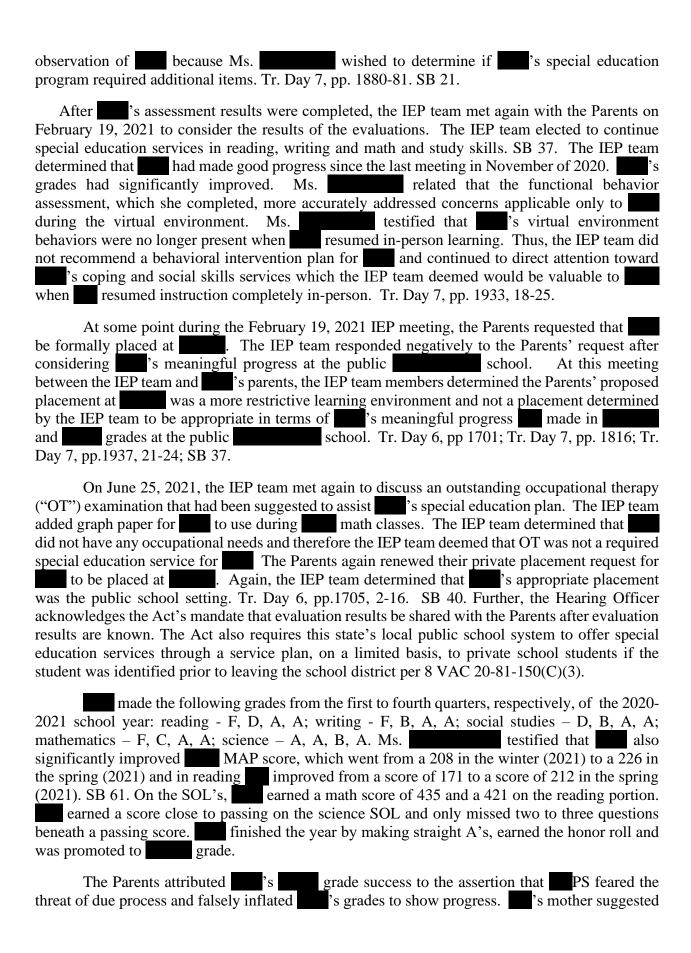


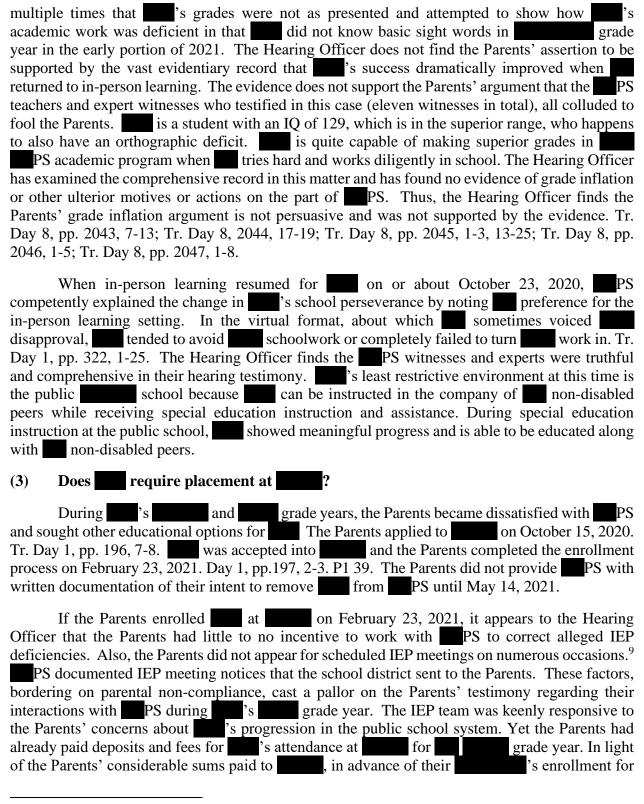
grades for their work but teachers kept up with students in the state's public school system by virtual and telephonic means. (PS Closing, at p. 2).



PS Closing at p. 4.







<sup>&</sup>lt;sup>9</sup> On January 24, 2022, the PS special education personnel met again with the Parents at an IEP meeting to comply with state and federal regulation requiring IEP updated information. At that time, with state and federal regulation requiring IEP updated information. At that time, with restated she would no longer participate in any IEP meetings the PS personnel attempted to arrange. Tr. Day 4, pp. 1224, 3-22; SB 58.

the 2021-2022 school year, it is unlikely to the Hearing Officer that the Parents had any intent for to remain at PS for the 2021-2022 school year. With respect to the Parents' unilateral private placement of at at 's mother testified glowingly and said the experience has been, "[A]wesome" and that is "doing very well there." Tr. Day 1, pp. 186, 17; Tr. Day 1, pp. 202, 11. But see smoother dismissed commentary she made earlier in reference to alleged bullying experienced at Moreover, on November 11, 2021, s mother referred to as a "toxic environment" and 's mother referred to 's failure to respond to as a "traumatic experience" for 's bullying reports. Tr. Day 1, pp. 221, 8-9; Tr. Day 1, pp. 221, 15-21. At another point in 's mother admitted she had threatened to sue (and PS) for practicing "experimental medical practices because required to be vaccinated before coming to school." Tr. Day 1, pp. 223, 23-25; Tr. Day 1, pp. 224, 1-12. During 's grade year, before PS knew the Parents intended to enroll PS attempted to alleviate the Parents' concerns regarding 's special education school. The Special Education Coordinator, program at the public , from the proposed public and the principal, school, offered to provide a school tour and assured the Parents that would have a multisensory reading program for 5 hours every two weeks. Ms. assured the Parents that would be taught on the Orton-Gillingham reading software program which is a data-driven, widely accepted reading explained that see's reading program would be delivered in a program. Ms. collaborative setting in which special education teacher would come to public testified credibly regarding her discussions with the Parent about also emphasized how would be able to partake in "Focused Reading," which is a course of study at the public school provided for students who have comprehensive reading needs. Tr. Day 4, pp. 1086, 12-19. Ms. also stated that she discussed sanxiety issues with the Parents. In sum, she school provided a comprehensive projection of affirmed that the public curriculum and accommodations for 's grade year from 2021-2022 at the February 19, 2021 IEP meeting. The Parents later consented to the February 19, 2021 IEP. SB 37. The Hearing Officer for the record that the Parents' family attorney and their educational advocate attended the above February 19, 2021 IEP meeting with the Parents. from PS and enroll at But the Parents unilaterally chose to remove The Parents presented , who is the School Director, to testify 's progress at . The Hearing Officer listened to the regarding testimony and her statements regarding the school's mission. purports to assist students who have dyslexia. Tr. Day 5, pp. 1393, 3-13. But the Parents and PS stipulated that not have a medical diagnosis of dyslexia. The Hearing Officer finds it curious, then, that Ms. alluded to formulating 's special educational plan based upon a dyslexia diagnosis. At the public school setting, expert witnesses clearly based their findings on scientifically driven data to support 's deficit in orthographic reasoning, not on a dyslexia diagnosis. Further, the Hearing Officer notes that is no longer licensed to provide disability services to Virginia students who are not placed at by their IEP team. The PS IEP team never at because PS provides an appropriate placement to fully address special education needs. Also, the Director did not indicate a strict attitude toward student

absences. Tr. Day 5, pp. 1427, 3-7. In all, had already missed 14 complete school days and was tardy or had scheduled appointments for 29 days of school. Tr. Day 1, pp. 223, 13-21. Upon cross-examination, some 's mother affirmed that has already experienced major anxiety, a bullying episode, a panic attack and school avoidance at 211, 8-11. During cross-examination, sometimes with the "traumatic" episodes have resolved. Tr. Day 1, pp. 221, 15-21. But the communications logs reflect so mother has often sought emotional support from staff members for occurred on September 17, 2021, when elected to leave math class: "[ not want to come to school this morning and has texted me from iPad saying wants to come home this morning... major anxiety surrounding school." Tr. Day 1, pp. 198, 3-11. On another day, 's mother admitted that refused to go to school, "[s]he's refusing to come to school. Tr. Day 1, pp. 203, 8-11. On another day when mother stated in response to regarding 's decision to stay home, "[m]y heart is to go through this much anxiety again." Tr. Day 1, pp. 205, 16-18. On yet another breaking for day missed partly or wholly, 's mother stated, "I will not force to come to school tomorrow." Tr. Day 1, 207, 17-18. At one point in time, 's mother expressed a desire for to provide an extra credit project so that could make up for two weeks of absences from . Further, on November 16, 2021, logs reflect an incident when waited with in the car to decide if wanted to enter the school because was "riddled with anxiety." chose to stay in the car. It is mother conveyed back to that had a "panic attack" and "could not make self get out of the car." Tr. Day 1, 211, 18-21; Tr. Day 1, 206, 11-14. First of all, the Hearing Officer is at a loss to understand how 's mother justifies permitting to select when, and under which conditions, will attend school. academic record reflects excessive absences and tardiness. Certainly, must be held accountable for school avoidance by Parents and by the school attends. not be excused to leave school, avoid classes, school directives or school work without acquiring medical documentation of ailments, sickness or condition. Also, are 's Parent is not in a position to diagnose a serious mental infirmity such as a panic attack or a major anxiety episode affording the ability to miss school work or school directives. Further, the Parents did not produce any qualified expert testimony to the effect that did not receive a FAPE in the public school curriculum, that does not understand primary wordlists, that so grades are not real "A's" or that academic placement was ever predetermined. Plainly, the evidence did not reflect these facts. In contrast, the eleven school witnesses who testified, some of whom were qualified as expert witnesses, testified credibly based upon their personal experiences with or from their qualified expertise about The Parents' proffered one witness, not qualify as an expert witness upon examination of her credentials. Ms. Virginia special education licensing credentials, had not met until a week prior to the due process hearing, had never observed in class, had not taught in Virginia except for one year in the virtual environment and only participated in one Functional Behavior Assessment ('FBA')

as part of a Virginia IEP team. For these reasons, Ms. \_\_\_\_\_\_'s credentials did not qualify her to provide an expert opinion in the case. Tr. Day 5, 1509, 1-23.

Thus, the Parents were unable to present much, if any, reliable documentation or testimony during the eight (8) day hearing. The Parents' theories about academic regression, missing assessments, testing protocols, grade inflation, pre-determined placement and teacher malfeasance merely asserted parental conjecture regarding the events described herein during 2020 and 2020-2021 school years. The standard of proof that must be met at a due process hearing, per the Act, cannot be met where the proponent lacks credible expert testimony.

Finally, is not a proper placement for because it is too restrictive, thus not the least restrictive environment for who will not be educated along with non-disabled peers in conformity with the Act's mandate. 's comprehensive public school IEP provided with a smooth transition into the public school setting. The school teachers and expert witnesses testified credibly at the hearing. 's current public school program appropriately focuses primarily on reading, writing, and math goals with pragmatic accommodations for together with study skills and social skills added, to assist to transition to school.

The Hearing Officer does not find to be a proper placement for the Hearing Officer notes the Parents are free to place privately anywhere they deem suitable for to

#### **APPLICATION OF LAW**

expenses attributable to private placement, academic regression or otherwise.

attend. Thus, the Parents are not entitled to financial reimbursement for financial reimbursement for missed compensatory special education services, tuition reimbursement or for any other

## A. Provision of a Free, Appropriate Public Education

The Act "ensures that all children with disabilities have available to them a free, appropriate public education ("FAPE") that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. Sec. 1400(d)(1)(A). The Act authorizes federal assistance to states that comply with the Act which, per the Act, means "special education and related services that have been provided at public expense, under public supervision, and direction, and without charge." The IEP is the "educational instruction specially designed to meet the unique needs of the handicapped child...supported by such services as are necessary to meet the unique needs of the handicapped child to benefit from the instruction." See County Sch. Bd. of Henrico v. Z.P. ex Rel. R.P., 399 F.3rd 298 (4th Cir. 2005).

When the IEP team develops an IEP, the team must consider the strengths of the child, parental concerns, and any evaluation results. An IEP is sufficient if it is "reasonably calculated to enable the child to receive educational benefits." *Z.P.*, 399 F.3d 298, at 300, (quoting *Rowley*, 458 U.S. 176, at 207).

In determining whether the School District provided with a FAPE in the IEP, the Hearing Officer adopts a two part assessment. First, the Hearing Officer decides if the state complied with the procedures specified in the Act. Second, the Hearing Officer decides if the IEP is reasonably calculated to enable to receive educational benefits. *Rowley*, at 207.

The Hearing Officer is convinced that the School District fully complied with the Act's procedural requirements and the February 19, 2021 IEP is reasonably calculated to enable receive educational benefit. The School District's witnesses proved academic growth and progress which was considerable and not *de minimis*. All indications were that would have been successful at the public School. **B.** Least Restrictive Environment The state must demonstrate that its disabled children have been placed in the least restrictive environment ("LRE") to accommodate the special education student's disabilities. 34 C.F.R. Sec. 300, 552(d). The Act also requires that a student's special education needs be served by preparation of "an IEP which must be prepared at meetings between school representatives and the child's parents. 20 U.S.C. Sec. 1401(a)(19), 1414(a)(5). 's LRE at this time is the public school because can be instructed in the company of non-disabled children while receives special education instruction and assistance. showed substantial progress in the public school environment. The evidence showed that did not often pay attention in the virtual program, turned head away, referred to the virtual program as "stupid" and often disregarded responsibility to pay attention to the teacher in the virtual learning environment. When school environment preferred, academic success soared again along with high IQ. 3. Reimbursement Reimbursement of special education expenses under the Act is appropriate when it is determined that (1) the public school placement was not providing the child with a FAPE; and (2) the parents' placement was proper under the Act. See Sch. Comm. of Town of Burlington v. Mass. Department of Education, 471 U.S. 359 (1985). The School District offered a FAPE to during the Pandemic and for the requisite two years prior to filing the complaint on February 1, 2022. The Parents unilaterally placed was not placed at by IEP team. The public school continues to offer a FAPE in the LRE. Notwithstanding the fact that size is IEP team did not place at , the administrators provided credible testimony about the program. But 's IEP team never placed at and and series at the public school. It has experienced similar incidents and the same school avoidance issues at as described by the public school teachers. In order to provide a FAPE in the IEP, the document "must contain statements concerning a disabled child's level of function, set measurable goals, describe the services to be provided, and establish objective criteria for evaluating the Child's progress." M.M. ex rel. D.M. v. Sch. District of Greenville County, 303 F.3d 523, 527 (4th Cir. 2002); see also Doyle v. Arlington County School Bd., 953 F. 2d. 100, 106 (4th Cir. 1991); see also 20 U.S.C. Sec. 1414 (d)(1)(A). In light of the above considerations regarding FAPE in the IEP, in this case,

academic record shows stable growth and meaningful progress in SLD deficit. The Hearing

<sup>&</sup>lt;sup>10</sup> Per s mother's report. Tr. Day 1, pp. 230, 10-16.

Officer gives deference to the educators in that the School District provided a FAPE to From February 1, 2020 to February 1, 2022. *See County Sch. Bd. of Henrico v. Z.P. ex Rel. R.P.*, 399 F. 3d 298, 304 (4<sup>th</sup> Cir. 2005); *M.M. v. Sch. Dist. of Greenville County*, 303 F. 3d 523, 532 (4<sup>th</sup> Cir. 2002) (Actual educational progress is a factor to be considered in determining the appropriateness of an IEP under the Act.).

The Hearing Officer finds the IEP satisfies the *Rowley* standard in that the IEP provides "more than a basic floor of opportunity that access to special education and related services provides." *See Tice by and Through Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1207 (4<sup>th</sup> Cir. 1990) (quoting *Rowley*, 458 U.S. at 201). And the School District provides an IEP which is evidenced-based and offers the Child much more than a minimal amount of opportunity (*See Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (1982).

### **CONCLUSION**

For the above reasons, it is found that the Parents, have failed to meet their burden of proof establishing that Public Schools denied a free appropriate public education.

### **ORDER**

IT IS HEREBY ORDERED that the above styled matter is dismissed with prejudice.

## RIGHT OF APPEAL NOTICE

This decision shall be final and binding unless either party appeals in 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.

Signature page to follow -

Decision Date: April 15, 2022 Nunc Pro Tunc

Sarah Smith Freeman, Hearing Officer

# **CERTIFICATE OF MAILING**

I have emailed/mailed the above V	Written Decision to the Advocate and to School Counsel
on this 20th day of May, 2022.	
	Sarah Smith Freeman, Hearing Officer

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