

**VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
OFFICE DISPUTE RESOLUTION AND ADMINISTRATION SERVICES
VDOE CASE NO: 23-016**

DECISION

[REDACTED] Public Schools

School Division

Dr. [REDACTED]
Division Superintendent

Jason H. Ballum, Esquire
Anne E. Mickey, Esquire
Sands Anderson PC
Counsel Representing LEA

Robert J. Hartsoe, Esquire
Hearing Officer

[REDACTED] and

Name of Parent

[REDACTED]
Name of Child

Grace E. Kim, Esquire
James Atkinson, Esquire
Law Office of Grace E. Kim, P.C.
Advocate for the Parent/Child

Parents/Child
Party Initiating Hearing

INTRODUCTION

This was a complex IDEA matter involving COVID, multiple IEPs (actual and proposed) and private placement. The weight of all experts required careful adjudication regarding areas of expertise--contact with the Child and information, data, *etc.* The effort required judicial evaluation and adjudication. To complicate matters, the unusual circumstances created by COVID and virtual learning required attention. The Parties and Counsel participated professionally and effectively--very appreciated. This professionalism allowed this Hearing Officer to focus on real IDEA issues. For reasons stated herein and the matters stated in the "Complainant's Findings of Fact and Conclusions of Law" (incorporated herein by reference as if set forth in full and not inconsistent with findings of fact or law contained herein), the Parent/Child is deemed the prevailing party. A court reporter was always present.

PROCEDURAL BACKGROUND

Pursuant to the Individuals with Disabilities Education Improvement Act of 2004 as amended (“IDEA”), this matter came upon the Parent/Child’s Request for Due Process Hearing. The Child is subject to an IEP and does not receive Section 504 services. The prior Reports are incorporated herein by reference as if set forth in full. Testimony from witnesses were quoted at length because the instant matter was a battle regarding the credibility of all witnesses, especially expert witnesses. For reasons stated herein, the remedies requested by the Due Process Request are granted.¹

ISSUES DEFINED

- 1. Whether the LEA failed to identify the Child’s Special Education Needs in accordance with IDEA for school year 2020-2021?**
- 2. Whether the LEA failed to identify the Child’s Special Education Needs in accordance with IDEA for school year 2021-2022?**
- 3. Whether the LEA failed to identify the Child’s Special Education Needs in accordance with IDEA for school year 2022-2023?**
- 4. Whether the LEA provided FAPE during school year 2020-2021?**
- 5. Whether the LEA provided FAPE during school year 2021-2022?**
- 6. Whether the LEA provided FAPE during school year 2022-2023?**
- 7. Whether the LEA provided the Child with an appropriate placement in accordance with IDEA for school year 2020-2021?**
- 8. Whether the LEA provided the Child with an appropriate placement in accordance with IDEA for school year 2021-2022?**
- 9. Whether the LEA provided the Child with an appropriate placement in accordance with IDEA for school year 2022-2023?**
- 10. For 2021-2022 school year, whether the Parent Child should be reimbursed for costs arising from private placement?**
- 11. Whether the Parent/Child should be reimbursed for costs for private evaluations described in the Due Process Request?**
- 12. Whether the issues raised by the Due Process Request are barred, in whole or in part, by the statute of limitations?**
- 13. Whether the IEP team, assembled for the IEP meeting conducted on June 6, 2022, was consistent with IDEA and, if not, was the Child denied FAPE as a result?**
- 14. Whether the IEP team, assembled for the IEP meeting conducted on August 18, 2022, was consistent with IDEA and, if not, was the Child denied FAPE as a result?**

PERTINENT/RELEVANT TESTIMONY REVIEW:

¹The individuals referenced herein are identified in the Confidential Appendix A: Legend. Pronouns (he, she, etc.) as stated herein are generic and not an attempt to designate gender of any party or witness.

The Parent/Child called seven witnesses: Mother, IEE Expert, [REDACTED] Behavior Program Specialist, [REDACTED] Administrator, ABA Specialist, Speech Pathologist and Father.

The Mother was a fact witness. Although her testimony provided opinions, such testimony was received as concerns and not as an expert. As a professional, she works in “HR,” and does [REDACTED] as a government contractor dealing with “a lot of employee issues and contract agreements, things like that.” (Hearing Transcript (HT) at pages 5-6.) She was very familiar with the LEA. (HT at 6.) She has another Child who attends [REDACTED] S. (*Id.*) She performed volunteer work for the local community. (*Id.*) She works with the [REDACTED] [REDACTED] which advises the LEA per the Virginia Code on specific issues including identifying areas that need improvement. (HT at 20-21.) With a vast contact with the Child, she had concerns regarding the Child’s complicated profile. (HT at 22.) Evidential implication is that the Mother had “hands-on” knowledge of IDEA and its implementation. (Mother’s testimony overall). In August of 2020-2021 (implying ESY services) school calendar year, the Child exhibited negative behaviors. (HT at 22-23.)

The Mother’s testimony described:

He had aggression. He had -- he went into fight or flight mode, you know, leaving the house. He had anxiety. He had a multitude of sensory issues that we later identified due to sensory processing disorder. But he was chewing on things and he was screaming. He was biting, he was pushing, knocking over chairs. And at that time he had broken our personal laptop during ESY [Extended School Year Services]. So during that time, it was a very difficult time in our household.” (HT 22-23.)

He did not do well. It was not -- it was not beneficial for him. And like I said, **he had regressed in a lot of areas during that time. He had aggression. He broke our laptop. He was very -- he went into full meltdown mode many times during that time and he wasn't attending. Previously what was reported to us, that he would sit and attend for 20 minutes, and he wasn't doing that.** He was just running, screaming, throw his laptop. And so I can only describe that time as him going through an almost mental crisis. And as time went on during the 2020/2021 school year he was deteriorating before our eyes. So these were important topics I thought [REDACTED] should be aware of. When we identified his regression, identified he wasn't gripping a pen, he wasn't writing a lot of the things that they taught him, he wasn't writing on Blackboard, and he wasn't even doing that. It's almost as if he lost how to write on things. Which was previously reported to us, he was writing up to three sentences within the space limits and things like that. He was doing that well. But he wasn't doing it with us. We even provided paper. We provided the white boards. We bought all the supplies. We really tried to make it as successful as possible for him. [Emphasis added.] (HT at 28-29.)

And I could say that it's really hard to talk about a child's struggles. But especially coming to a new team, he was in a full mental health crisis at the time. And he loves me. I'm one of his favorite people. I'm his person. But he was at the time pushing and hitting. He was fighting. He was knocking over chairs. He was kicking. He broke property. And then he wouldn't leave the house without tantrumming and melting down and flopping to the ground. It was impossible during that time. So during that time it was like I had another child. (HT at 40-41.)

And then during virtual learning he would scream, he would cry, he would turn off the computer. He would take over their slides, the teacher's slides. He was very destructive. He would delete the teacher's work. And that was when he wasn't pushing the screen and trying to break the screen. (HT at 41.)

He did not log himself in, I logged him in. And I helped him navigate. However, there's many, many, many times where he turned it off or said school is bad. I go bye-bye. And he had echo speech at that time and he would start scripting about things he was upset about that didn't apply. (HT at 51.)

I had to make sure that, especially when he was in gen-ed time, that he wasn't in full meltdown, pushing the chairs, pushing the screen, pushing me in front of the class. I had to turn the screen off because I had to preserve his dignity. (HT at 52.)

It would get physical. And he loved -- he loves me. He absolutely loves me. And he didn't want -- he doesn't want to hurt people, but he would push and kick and fight me. And those were things that manifested during that time, those behaviors manifested at that time. And for the entire school year and we thought they were there to stay. (HT at 53.)

[In regard to attending physically ██████S], [h]e did tantrum. He had a meltdown. He was aggressive towards me. We were required to put masks on at the time. And [the Child] was biting through his. It frequently did not govern his face. And when we did arrive in the school he had anxiety. And during the testing he was quite -- you could see it. He was very busy moving about the room. And so it was very difficult to -- and I had to be there with him because he wouldn't let me leave his side. But it was very difficult for the testing on him. (HT at 55-56.)

[When Child displayed such symptoms of anxiety], [h]e's not regulated. He's not calm and still, like he can be. He moves around a lot. He's a busy body. He can also get extremely agitated very easily. He can take that out on people that he loves, like me. He screams. He tries to escape and elope the area, which is something that's well-documented in his history with [the LEA]. So there's quite a few behaviors that come up when he's escalated like that. (HT at 56.)

The Child has autism. (HT at 23.) He has been diagnosed with mixed receptive speech delay.

(*Id.*) He has now been diagnosed with auditory processing disorders, sensory processing disorders, language disorder.” (*Id.*) The Child has extensive contact with LEA schools and its different programs including ELSE (early childhood special education and early childhood special edition autism program. (HT at 24.) By implication, the LEA possessed extensive information on this Child. (Overall testimony.) Parents were excited that the Child was accepted at ██████S. (HT at 27.) ██████S was an inclusive program which would remove potential challenges such as bullying. (*Id.*) The LEA declined “one-on-one” service, implying during the COVID lock down. (HT at 29.) The LEA declined evaluations. (HT at 30.) The Parents declined hybrid learning based on the Child’s condition, *e.g.*, “[h]e couldn't keep on a mask. He had what I would call agoraphobia. **Every time he left the house he went into fight or flight mode.** [Emphasis added.]” (HT at 38; 52-53.) He required “pressure hugs” to stabilize. (HT at 38-39.) The Parents were sincere concerns regarding the Child’s accepting medication, if such were necessary, by implication, by COVID. (HT at 61.) Similarly, new foods were a sincere concern. (*Id.*) From VDOE training, she became aware that the LEA could provide “one-on-one” tutoring, implying at home. (HT at 37.) This information was provided to the LEA. (HT at 39-40.) During ESY services, the LEA provided ABA services virtually. (HT at

41.) Such efforts were unsuccessful bordering, by implication, worthless. (*Id.*) In December 2020, there was an eligibility meeting. (HT at 57.) She testified:

I had concerns because the testing that they had done first didn't show us standard scores, like the data for [the Child], and we requested for it during that time. And their answer to us was no, that's something that they would consider but they said no ultimately. (HT at 57.)

The Mother disagreed with the LEA evaluations and findings contained in LEA Exhibits 25, 26, 27, 28 and 29. (HT at 57-58.) She felt that the Child's classification of "autism" under IDEA was insufficient and should include other areas, *e.g.*, areas regarding speech impairment. (*Id.*) She requested an Independent Educational Evaluation (IEE) as a result in December 2020. (*Id.*) An IEE professional declined the opportunity to evaluate on the basis that the Child resisted necessary protocols required by this professional regarding COVID, *etc.* (HT at 59-60.) Another IEE professional was located. (HT at 62.) In January 2021, there were at least three meetings regarding eligibility. (HT at 62-63.) At that time, the Child was found eligible for speech area, speech or language impairment areas with implication that these areas were in addition to autism. (HT at 64.) The LEA declined "one-on-one" teaching. (HT at 67.) In regard to LEA Exhibit 38, "Prior Written Notice," Mother (by implication a member of the IEP team) disagreed with its goals:

They tried to reduce -- they tried to take a number of goals from our previously agreed upon meeting from a different IEP team and they tried to take those out and these -- and this IEP. And we didn't feel like that was appropriate because he hasn't -- he hadn't showed mastery of those goals. And in addition, they really hadn't allowed us to work on them for a very long period of time. So when we're talking about, you know, data and that's what kind of drives the school and eligibility -- I'm sorry, that's what kind of drives the IEP and new eligibility categories certainly drives the goals and services too, we didn't feel it was -- we didn't feel comfortable with them removing goals that [REDACTED] had not showed mastery on at that point. (HT at 68.)

The Mother disagreed with LEA regarding the Child's being placed on VAAP tract as opposed to the SOL tract. (HT at 70-78.) She testified as to this LEA decision:

I was surprised. Because we had gone through this before and normally when they identify like your child's really struggling and escalating and having behaviors and he's aggressive towards you, normally you would put a child on BIP because that's not like acceptable behavior in a classroom or anywhere, especially whenever you're getting your education.... I was confused by that because we changed the parameters a little bit. And I'm not sure, maybe that's normal. I don't know, just my own lack of knowledge. But she changed the meeting and she said it was an IEP meeting and that we were going to discuss SOL accommodations. So we had initially asked for a paper and pencil SOL. This was after the BFA discussion in January 21, 2021. So they brought it up in this meeting and they said let's discuss it. This is an IEP meeting. And we said okay. So they said -- [LEA professional] said you cannot have an SOL accommodation. And I said I don't know who [LEA professional] and can you give me more information. They said it's based off VDOE guidelines. And I said, is there any way, since we're in an IEP meeting, that you could provide me the guidelines. And they said no. So I -- they said you can get in contact with [this LEA professional] and ask him why. And then I thought that was a little bit strange because somebody who -- I don't know if [this LEA professional] had knowledge of my child's disabilities and his full academic profile, I didn't know. And I did look to see if there was any communications that [this LEA professional] knew [the Child] or had worked with [him], but I couldn't find it. So they decided no on the SOL accommodation. (HT 76-77.)

A previous FBA (Functional Behavioral Analysis) was on file. (HT at 74.) No BIP (Behavior Intervention Plan) was created. (HT at 75.)

The LEA arranged for an IEP meeting in February, 2021. (HT at 78.) The Special Education Supervisor called the meeting. (*Id.*) She indicated that the Parent/Child should agree to the January IEP or, otherwise, the previous IEP would remain in place. (HT at 78-79.) Because of the amount of work involved in creation of the January IEP, the Mother provided “partial consent.” (HT at 79.) She disagreed with the removal of the “transportation” component on the basis that the Child demonstrated a “phobia” as to buses, by implication, a sincere concern. (HT at 79-80.) In the past, the Child demonstrated disruptive behavior when subjected to bus transportation. (HT at 80-81). Further, she expressed concern that the Child’s services required in person involvement and that the January IEP reflected the mastery of goals which were in accurate. (*Id.*) The Child did not have the opportunity to master such goals. (*Id.*) The January IEP reflects the hand-written notation from the Mother of “partially agreed.” The March meeting was, by implication, unproductive. The Mother felt that the Child was “over his head” regarding math sessions. (HT 81-82.) He was not improving. (HT at 82-83.) The IEE expert recommended that the child be evaluated for audio/speech issues, *i.e.*, the Audio/Speech Expert. (HT at 87.) During the September Meeting, the Parent/Child had requested the need for an audio/speech evaluation. (HT at 87-88.) The LEA deflected this request by volunteering to conduct a hearing evaluation and, by implication, not seeking the participation of an audio/speech evaluation with its opportunity to evaluate the Child’s capacity to comprehend as opposed to LEA’s discrete design regarding the Child’s hearing. (HT at 87-89.)

The Child continued to have issues regarding the wearing of a mask per COVID requirements when evaluated by the IEE Expert in February, 2021. (HT at 95; and, Parent Child Exhibit 9.)

At the June 2021 IEP meeting, the Mother felt the LEA had sufficient evaluations, information, etc., to place the Child in a private placement. (HT at 99-102.) She requested a more restrictive environment, *i.e.*, private placement at [REDACTED]. (HT at 101-102.) The LEA rejected this request. (HT at 101.) [REDACTED] was recommended by the experts. (HT at 102.) She felt that [REDACTED] would address the Child's specific educational needs. (HT at 102-103.)

The January IEP was a draft or proposed IEP. (HT at 212.) The Mother felt the January 6, 2022, IEP meeting was "the school's way of extending potential, maybe a brand-new program or services or goals for an IEP." (HT at 213.) She felt "blind-sided" insofar as the LEA inquiries were to [REDACTED]'s program and she was unprepared. (HT at 212-216.) This condition was due to her having signed a release for the LEA to contact [REDACTED] directly. (*Id.*) By implication, she felt that [REDACTED] information was available directly from [REDACTED] and, therefore, a part of the information the LEA would consider at this IEP meeting. (*Id.*) During the IEP meeting, the LEA disclosed that it lacked the data to establish the accommodations contemplated by the Parent/Child. (HT at 216.) The Mother was disappointed. (*Id.*) On the date of this IEP meeting, she felt that the IEP Team, implying the LEA, possessed sufficient information to render a favorable decision from all evaluations including the Occupational Therapy Evaluation, Independent Education Evaluation, Neuropsychological Report and Speech/Audio Evaluation as well as to [REDACTED] and its information implying current, daily interactions with the Child by [REDACTED]. (HT at 216-221 and 223.) Based on this disappointment, the Mother concluded that [REDACTED]S was not appropriate for the Child. (HT at 223- 224.)

On cross-examination, the Mother verified:

- 0 At the August 27, 2020 IEP meeting, the LEA declined to perform IDEA evaluations of the Child. (HT at 225.)
- 0 A the September 14, 2020 and September 17, 2020, IEP meetings, the LEA agreed to perform IDEA evaluations of the Child. (*Id.*)
- 0 During flights to vacations, the Child was required to wear a mask per COVID protocols. (HT at 226-228.)
- 0 The Mother elected to allow the Child to access curriculum for ESY (Extend School Year) services for 2020. (HT at 228-229.)
- 0 Per July Prior Written Notice, the Child was eligible for in-person services, implying IDEA services at school. (HT at 229-230.)
- 0 In regard to the choice of in-person services at a LEA location and at home (hybrid) and virtual access to curriculum, the Mother requested “one-on-one services at home to effectuate the IEP. (HT at 231.)
- 0 At all times relevant, the Mother elected the Child to access curriculum virtually. (HT at 232-233.)
- 0 The Mother is not a teacher or a special education teacher. (HT at 233.)
- 0 Her request for “one-on-one” home implementation of IDEA services was based on information gained from her participation in a VDOE training. (HT at 233.)
- 0 From the VDOE training, the Mother’s understanding was that “one-on-one” IDEA services, implying at home, were conducted in Virginia. (HT at 235.) She testified:

My understanding was some parents – or it was being given as an option due to the pandemic. And then also my understanding was that they were still required to teach kids and extend related services and those platforms as well, that they would be receiving Covid-relief funds and federal funding still, but it was still a requirement to educate the kids at that time. And to my knowledge, IDEA had not been waived. Like the Board of Education was very clear at that point that they were still required to provide our kids an education. (HT at 238.)

The Mother was found to be a **very credible witness** based on her demeanor, her professional standing and participation with LEA efforts. Her testimony appeared to be candid as opposed to advocating a position. Her testimony was consistent, for most part, with the exhibits and she provided insight regarding the Child’s accessing curriculum at home. Overall, the Mother evidenced a design to cooperate with IDEA efforts until such efforts required her to review private placement. With that stated, any opinions were discounted as concerns as she was

a fact witness. Further, her love for the Child was demonstrated and, therefore, her testimony was taken with that relationship in mind but not to a point of incredibility. Her testimony was given great weight.

The IEE Expert qualified as an expert in the area of clinical psychology.²

(HT at 111.) He drafted the Independent Education Evaluation and Neuropsychological Evaluation. (HT at 114.) The Child's testing required an extended time and the need of the ABA specialist, due to his specific difficulties. (HT at 121-123.) He testified consistent with the Independent Education Evaluation and the Neuropsychological Evaluation. (HT at 120-139.) He recommended the Child to be evaluated by an occupational therapist as well as the auditor processing specialist. (HT at 140.) In addition, he recommended a private placement:

[H]e suggested that [the Child evidenced] **a complicated and atypical child on the autistic spectrum**. Because he has that specific area of non-verbal functioning, which is functioning is appropriate. Under that circumstance there are a limited number of programs in this area that are particularly -- that show expertise in working with this type of child. Certainly there are places like ██████ School, which works with kids who are on the autistic spectrum. But their population are kids who are much more severely impaired. There are programs like ██████ School whose stock and trade really is more for kids, and particularly boys who are hiring functioning, so that they don't have the kind of language deficits that ██████ has. So in talking with his parents it seems to me that the only two schools that I know of that have a potential to be able to do this would be ... ██████ and ██████ And that opinion was shared with the parents. [Emphasis added.] (HT at 136-139.)

In his area of expertise, he opined in regard to the April IEP:

My difficulty with this particular IEP is that there was not an identification of specific goals or interventions that were identified to address the sensory processing issues of [the Child]. There were also not specific identifications to address interventions that were necessary to address the -- what I saw as auditor and language processing issues for [the Child]. Despite the fact that within the IEP there was certainly goals that are written in the areas of, for example, receptive language and expressive language. But the way that the goals were written did not appear to me to be specific for the needs of [the Child]. There was also, as I recall, not an identification of an incorporation of an ABA-based therapy and interventions within the protocol. And so although the IEP seems to be at a global level addressing some of the needs of [the Child], it did not seem to me that they were -- they had sufficient breadth nor specificity to be able to address the specific needs of [the Child]. And as noted it caused me concern, because again [the Child] has very specific needs and he's responsive to very specific protocols in order to be able to address those needs so that he can make academic progress. (HT at 144-145.)

In addition, the IEE Expert further opined:

So in the specific case of [the Child] you have a child who when I tested him was ██████ years of age. And what that suggested, given his age, is that his therapeutic window is closing. And that under that circumstance then if you're going to intervene with him it was necessary, it would -- in order to best facilitate this progress and in his improvement, it was necessary at that point in time that any interventions that were provided to him were specific, intense and consistent. Because in the absence of that it would suggest that his progress would be slowed or impeded. And would raise concerns that he would not be able to realize his appropriate learning capacity within, say, a year, two years. A specific unit of time. (HT at 147-148.)

The IEE Expert had reviewed the August IEP. (HT at 148.) The IEE Expert opined:

²The IEE's expert opinions were considered only in this area and, to the extent his testimony touched on the validity of IEPs, such opinions were not considered as an expert in special education. (HT at 141-143; and 147.) In his capacity as a clinical psychologist, he has made recommendations regarding IEPs and performed IEE's and related matters. (HT at 143-144.) No opinion was considered outside the designated area of expertise--clinical psychology.

The opinion regarding this document was essentially similar to what was stated previously. There were changes that were made within the text, which are some of the issues that were clearly a concern to me with regard to the April 2022 evaluation. IEP, I'm sorry. But again, there was a difficulty for me in reviewing the IEP to understand if the detail, the intensity and the consistency of interventions that were identified within there, whether they were -- whether they were identified consistently and whether or not they would be implemented. And with specific regard to the language processing issues and auditory processing issues and with regard to the sensory processing issues. (HT at 149-150.)

He recommended [REDACTED] on the basis of his working with [REDACTED] since 1996:

And in my initial place -- or the second place that I was in, which was a clinic in [REDACTED], we worked with kids with neuro[-]developmental disorders and internationally adopted kids. So these are kids who have really high needs from an academic, from a behavioral, from a [REDACTED]-cognitive perspective. And it was through that work that I first became familiar with [REDACTED]... and so on. And that since that time I have intermittently observed kids at [REDACTED].... I participated with them in discussions regarding the academic and interventional programming. (HT at 151.)

The IEE Expert reviewed the Diagnostic Prescriptive Goals and Annotations, dated November 3, 2021, *i.e.*, the November DPGA. (HT at 151.) He conducted, by implication an official, observation of the Child at [REDACTED] on October 3, 2022, and testified with following observations and opinions:

The placement for [the Child] was in a really small placement. There were three students. At the initiation of observation there were -- was a teacher and a behavioral aide, with the behavioral aide providing really more dedicated support for one particular student. That from a staffing perspective as the observation continued, which was about an hour, there would be various professionals who were coming in, occupational therapists, speech and language therapists, and they would be providing specific support for [the Child] at times as well as the other student in the classroom. At the time of the observation the teacher was providing intervention in reading. So they were working on phonemic analysis and identification of initial letter sounds. Each of the children was cued so that once, if they gave a response and the response was correct, they would get an immediate reinforcer. During the course of the hour what was most remarkable is about [the Child]'s adjustment under the circumstances. Again, my experience with [the Child] in March of 2021 was that [the Child] was very avoided, that he was demonstrating significant limitations in his ability to engage for more than 30 minutes at a time and that engagement required a persistent application of sensory processing strategies to orient him to the task and for him to sustain his engagement. By and large, [the Child] appeared to be -- sustain his effort throughout the course of the 60 minutes of the intervention -- of the observation. He certainly showed some fatigue toward the end, in particular with him wanting a break, but he was far more consistent. His attention was far more consistent and sustained than was presented during the time of the March 2021 evaluation. The second thing is that he also appeared to be more interactive. And I think that's important because this reading intervention was given to a verbal need. So for example if the teacher provided the word pie, she would say what's the first sound, and so it was a very language-loaded task. And [the Child] again showed credibility to sustain his attention in the task and was able to intermittently provide appropriate responses. He was more spontaneous in his engagement. If there was something that needed to be done, as directed by the teacher, he was much quicker to be able to do that and to complete it successfully. So. I came away from the observation actually impressed with the [REDACTED]s that [the Child] had made as compared to the presentation in March of 2021. (HT at 154-157.)

The portion of the Neuropsychological Report entitled "Summary," "Diagnostic Impressions" and "Recommendations" are incorporated herein by reference as if set forth in full.

On cross examination, the IEE verified:

- 0 He is not a licensed special education teacher. (HT at 158.)
- 0 He is not a certified behavioral analyst. (*Id.*)
- 0 He is not an ABA therapist. (HT at 159.)
- 0 He has never been a teacher for the LEA. (*Id.*)

- 0 He evaluated the Child over three sessions: February 17, March 8 and March 24 of 2021? (HT at 159-160.)
- 0 The Child had not been in a public school or any school receiving in-person instruction for close to a year at the time of these evaluations. (HT at 160.)
- 0 Evaluation Background was from the Mother. (*Id.*)
- 0 He has virtually observed, evidently official observations, of children at ■■■S on two to three occasions in the last five years. (HT at 161-164.)
- 0 He did not attend the April 1, 2022, IEP meeting. (HT at 165.)

- 0 He did not attend the June 15, 2021, IEP meeting. (*Id.*)
- 0 He did not attend the August 18, 2022, IEP meeting. (*Id.*)
- 0 The participation of the ABA Therapist was necessary to conduct the evaluations based on the Child's behavior and limitations and was consistent with test protocols. (HT at 166-171.)
- 0 The participation of the ABA Therapist in the evaluations did not improve the Child's test scores. (HT at 168-170.)
- 0 The testing data that was generated was "basically similar to the testing data that was generated by [the LEA] in the fall of 2020, that there was no indication that, in the areas of cognitive function nor in academic achievement that there was any significant difference between the two." (*Id.*)
- 0 His observation at [REDACTED] on October 3, 2022, was requested in the Spring, 2022, and by implication, as a potential expert. (HT at 173.)

The IEE Expert was **found to be an extremely credible witness, unbiased** and with professional insights on specific areas regarding the Child's needs the validity of the referenced IEPs and placement at [REDACTED]. His participation included the generation of the Independent Education Evaluation and the Neuropsychological Report. He conducted an observation at [REDACTED] which reflected the Child's significant progress from his evaluations of approximately March 2021 to October 3, 2022. He has made formal observations at [REDACTED]S in the past and not of the Child and by implication, his specific program. In his practice since 1996, he has made professional recommendations regarding IEPs to LEAs. **His participation identified, for the first time, the actual and specific needs of this Child to access curriculum including the need for another evaluation from the Audio/Speech Expert.** His testimony was given great weight.

The [REDACTED] Behavior Program Specialist was qualified as an expert in the areas of special education and behavior analysis. (HT at 185.) She has worked with the Child since the beginning of 2021/2022 school year as a behavioral specialist. (HT at 186.) The Child was placed in [REDACTED]'s [REDACTED] Program. (*Id.*) "So I worked with him incidentally, during times when he is having more challenges and doing more scheduled times when I'm collaborating with the social

worker and other staff that needs support.” (HT at 186-187.) During the 2021/2022 school year, she saw the Child every day and his classroom containing seven students. (HT at 187.) For the 2021/2022 school year and regard to Child’s behavior needs, she opined from the beginning and thereafter:

Not too distinctly from the rest of the year, but I would not say there was too much significant fluctuation between the year. So I believe that he kind of knew -- had the classic honeymoon period of being successful at the beginning of the year, but then we quite quickly saw when **frustration was present that his behavior would escalate....** [The Child displayed behaviors such as] [p]ushing staff, attempting to elope out of the building, attempting to pull fire alarms, pushing over furniture, ripping up materials. Those were the main. [Emphasis added.] [HT at 186-187.]

█████ took actions to address the Child’s behaviors. [HT at 188-189; and 204-206.] Such actions were very successful. [HT at 189-194.] █████ committed the necessary resources to ensure the Child received the necessary efforts to provide the Child FAPE, addressing his needs regarding access to curriculum. [188-194.] Such efforts were successful. (HT at 194.)

The November DPGA (and other similar DPGA documents) were █████’s version of an IEP. (HT at 194.) Upon the Child’s arrival in 2021-2022 school year, █████ collected data. (HT at 196-197.) By implication, such data was collected daily to create the equivalent of an IDEA Behavioral Intervention Plan (BIP) and otherwise, to allow █████ professionals to formulate an effort to allow the Child access to curriculum, *i.e.*, provide FAPE. (HT at 196-199.) The Child’s records contained a “BIP” like document but was not concrete. (HT at 196.) Like a BIP, █████ uses a “Positive Thinking, Intervention and Support.” (HT at 197.) The findings are used throughout █████’ daily system. (*Id.*) The █████ has “built in,” by implication appropriate, interventions in its environment to allow the Child to receive FAPE. (HT at 197-198.)

On November 1, 2021, █████ Behavior Program Specialist testified she had concerns regarding emails from █████ employees. (HT at 200-204.)

As an expert, the █████ Behavior Program Specialist opined:

So for like looking at the plan that we were considering making, the main form that we used was ABC data, which is anticipate behavior and consequence. So it's kind of a brief anecdotal portion what's happened right before we see the behavior, what is the behavior exactly looking like, and what are the consequences of the environment that are happening while in the behavior, not necessarily the ones the teachers are intentionally making, but are the other students kind of getting upset. How is the environment changing after the behavior and then using that to try and determine the function of the behavior to help inform what kind of proactive strategies are needed, what kinds of reactive strategies are needed and

pairing that with the behavioral referrals, which would be --so I was collecting a lot of the ABC data **myself in the classroom, with behavioral referrals being an opportunity for the classroom staff**, when I was not in there, to report anecdotally incidents that occurred that I could not review afterwards. So an anecdotal picture of the environment before and after and during the behavior. [Emphasis added.] (HT at 208-209.)

The [REDACTED] Behavior Program Specialist further opined that lack of failure to observe the Child in an educational environment, similar to her daily, detailed, effort, would rob such expert of the capacity to provide meaningful opinions regarding the Child's needs including, by implication, access to the curriculum. (HT at 209-210.)

The [REDACTED] Behavior Program Specialist was found to be an extremely credible witness, unbiased and with professional insights on specific areas regarding the Child's academic needs, all IEP deficiencies (applied or proposed) and his success created by the [REDACTED] environment. Her participation was "hands on" daily (with the Child and related professionals) to ensure that the Child was provided FAPE and better, *i.e.*, significant improvement at [REDACTED] and his quality access to curriculum. Her testimony was given great weight.

The [REDACTED] Administrator was designated in the areas of special education, school administration and IEP development. (HT at 250-251). She testified:

[The [REDACTED] Administrator oversaw] the lower and middle school programs at [REDACTED]. We are a full-time special education day school, and we serve students with a variety of abilities and needs to develop ability, categories and strengths in our school program. Our students are at the [REDACTED], kindergarten through grade 12 or through age 21. We serve students who have autism spectrum disorders, Specific learning disabilities, other health impairment, multiple disabilities, intellectual disabilities. Vision impairment. Hearing impairment. I think I might have missed one. Developmental delay. All of our students require full-time special education services outside of general education. We have a multi-disciplinary team approach with presenting the state standards in the state, basically the state the student is from and the IEP goals for students every day through our instruction and activities that happen in the classroom. Our school has a team approach that includes teachers and paraprofessionals and speech-language pathologists, occupational therapists, social workers, behavior interventionists, so BCBAs. Also social workers, SA, occupational PT. We have a vision teacher. We have orientation mobility. So we have a full-service approach to addressing students' needs. The majority of our students have autism spectrum disorders and some kind of special need in the area of social and pragmatic language, also executive functioning and their academics are also impacted as a result of that. Depending on the student's area of specific need or how impacted they are, as a result of their disability, they would be a student in one of our programs. So our most -- our most supportive program is our [REDACTED] program. That is a two-to-one student-to-staff ratio. (HT at 251-253.)

The Child is enrolled in [REDACTED]'s [REDACTED] Program. (HT at 254.)

She testified:

The [REDACTED] program is an intensive support program for students. Most of the students in our [REDACTED] program are elementary school. And this year we have a small group of students in middle school who are also in [REDACTED]. But general speaking it is a program for students in elementary school who have intensive support needs in pragmatic language or social language. Also they have a need for intensive support and executive functioning skills, increased support with regards to academic support and interaction skills. And the class -- the program is months. And so students are in school starting at the beginning of September or the very end of August through mid-June, and then they have their full program of classes in the month of July also. So there's a four-week in July full-day program. (HT at 255.) The program is 9:00 until 3:30 each day, including the month of July. The [REDACTED] program also provides support to students through integrated support, whether they have an IEP or our version of the IEP for students who are not placed by their local jurisdiction, it's called the Diagnostic Prescriptive Goals Program. And so we implement that program, whether it's the IEP or the [November] DPGA, throughout those 11 months. And we include support based on what's

on the IEP or DPGA, and we provide an additional amount of support through integrated speech language OT [occupational therapist] and social work over and above what's on the DPGA or IEP. Because we see that students in our [REDACTED] program require very intensive support in all of those areas and so we make a pretty good heavy support program for them at that point. (HT at 255-256.)

As to the November DPGA and similar documents, she testified:

The DPGA guides our instruction for students and gives us information that we may need -- that we need to know about the students' present levels of performance, about goals that were determined by the multi-disciplinary team at [REDACTED]. So that would be teachers and any related service providers that work with the students, myself as an administrator, our IEP coordinator or-- and DPGA coordinator, parents and then anyone else that the parents sees as an important stakeholder in determining the goals for the student. It also includes information on their disability category. It also includes information on their progress that's recorded each quarter. Our collecting data. All of the -- really most of the areas that are on the IEP are on the DPGA. It doesn't include transportation. It doesn't include ESY. And it doesn't include placement because we're not a public school program. But all of the other areas that would be on a typical IEP would be on a DPGA. It's laid out a little bit differently, but the goal is the same and that's to identify the student's functioning to create goals and to address them. (HT at 257-258.)

The components of the [REDACTED] Program that are not included on the November DPGA. (HT at 259; and 270-271.) The components of the [REDACTED] Program may not be contained in an IEP. (HT at 260-261.) Such [REDACTED] Program components should be included in an IEP. (HT at 262.)

The [REDACTED] Administrator observes the Child daily in an academic setting. (262-263.) [REDACTED] has the [REDACTED] Program which is less restrictive than the [REDACTED] Program. (HT at 265-266.) The Child's needs dictate which program should be utilized. (HT at 266-267; and 276.) The [REDACTED] Program has a two-to-one ratio of professionals to student including daily "push-in" professionals speech pathology team; *i.e.*, "OT [occupational therapist], PT [physical therapist] team and social work team." (HT at 268-270; and 278-280.)

After reviewing the Child's progress and his report cards, the [REDACTED] Administrator opined that currently:

So [the Child] is performing well in his classroom. He is making consistent growth in all of his academic areas and also in the related services areas that he has on his DPGA and a part of his program. He is participating in the classroom. He is engaging with his peers and teachers with support. He is managing his emotions in a way -- compared to when [the Child] came to us last year, in a way that is much more affective. And he is spending most of his time in the classroom with his peers on task and learning. He does require intensive amounts of support from staff to be able to persist when things are challenging for him or to stay on task. But we are seeing that he is generally not melting down in the classroom. And when I say melting down, I mean refusing or screaming or flipping over a desk or throwing things or saying he's leaving and trying to leave the space, those kinds of things. And those are things that we saw him do when he started at [REDACTED]. But he is participating very well and he's making growth towards his goals. [Emphasis added.] (HT at 276-277.)

Overall, after reviewing data and observations, the Child has made progress at [REDACTED]. (HT at 276-285, and, 303-304.)

The LEA did not contact the [REDACTED] Administrator in January 2022. (HT at 287.) If the LEA had requested, by implication, [REDACTED], for information, she would have been notified. (*Id.*) If a student is placed at [REDACTED] through an IEP, [REDACTED] can, within reason, implement such IEP. (*Id.*) [REDACTED] has Virginia residents as students and can implement Virginia's SOL requirements. (*Id.*)

On cross-examination, the [REDACTED] Administrator verified:

- 0 [REDACTED] is not licensed by the Virginia Department of Education (VDOE). (HT at 288.)
- 0 [REDACTED] is not licensed by VDOE in regard to special education. (*Id.*)
- 0 [REDACTED] is overseen by the [REDACTED] Department of Education and its teachers have licenses. (HT at 290.)

The [REDACTED] Administrator was found to be very credible and unbiased based on her demeanor, her daily contact with the Child, her “hand-on” knowledge of the Child’s academic record, and her interaction with the [REDACTED] professionals. She appeared dedicated to the Child’s education. Her testimony was given great weight.

The ABA Specialist was qualified as an expert in the area of applied behavior analysis. (HT at 324.) She worked with the Child and his family since 2017. (HT at 325.) She “provided direct therapy to [the Child] as a BCBA [board certified behavior analyst]. And I've also provided parent support, parent training to the parents, and have supervised his case when I became a BCBA. So I direct training to the staff, developed his programs, provided his assessments.” (HT at 327.) She has attended IEP meetings for her clients. (HT at 324.) She has conducted observations at the LEA and [REDACTED]. (*Id.*) She has reviewed relevant and applicable documents regarding the Child, *i.e.*, ABA assessments and IEPs. (HT at 328.)

She opined:

So [the Child] is a sweet boy, but he has many significant needs. Some of them include – he has a high level of sensory defensiveness, which means that certain type of stimuli trigger him to have almost a fight or flight response. **It may be one of the worst cases I've actually seen**, in my experience with certain types of sensory stimuli. So making sure the environment is modified to reduce those stimuli is very important, otherwise he will have significant behavioral issues. He's easily distracted. So it's very important to reduce a lot of noise, lots of people, toys, things like that,

in order for him to really focus and learn at his best. He requires skills to be broken down. And he needs many, many opportunities to learn any skill. So, you know, giving him one instruction is probably not going to be sufficient, he needs to be presented with that task multiple times. **He also requires a high level of reinforcement.** He will not work for free. He needs that level of reinforcement to be motivated and to learn. The other thing that I should mention is **he also has a lack of safety awareness.** I believe that he was even wearing an ankle bracelet because he had wondered off. He is liable to try to walk out the door. **He's not aware of danger in his environment.** So it's very important to monitor him out in the community. **He does not learn naturally. He's a kid who really requires a more intensive level of instruction.** So that being said, when we look at other children who are diagnosed with autism who may not necessarily need services, they're kids who can learn naturally in their environment. In an agenda setting, they pick up skills without intensive instruction. **[The Child] is a child who really requires more direct instruction in order to learn.** [Emphasis added.] (HT at 328-330.)

Further, she provided examples:

So a couple things to know. [The Child] does not -- one thing I just wanted to note is he does not learn in a novel environment very well. He really requires a familiar setting with these structures in place. If they're not in place he tends to react in a negative way. **When we had to transition to telehealth during Covid, we actually ended up having to temporarily services because when he was brought to the computer, it was extremely aversive for him. Again, a novel situation. It wasn't something he had been used to. Seeing the computer was very aversive. He would try to manipulate it, he would slam it, he would throw it. He would engage in aggression. Things that we typically would see in all of our sessions. And so at that point we saw that he wasn't learning.** Even when he would come to the computer, even on the days where he wasn't tantrumming,, he would just sit and stare and not respond. He wasn't learning anything. So we suspended services until we could go in-home. We've seen situations like this again, even when he had to attend [IEE Expert]'s evaluation, I believe. His evaluation had to be postponed until his ABA therapist could come in, because he wasn't able to continue the evaluation. He was either engaging in maladaptive behaviors or not responding. So it's very clear that for him naturally occurring novel situations are not going to work for him. He really needs that structure in order to learn. [Emphasis added.] (HT at 330-332.)

The level of support for the Child as described in the Independent Education Evaluation and the Neuropsychological Report is:

Honestly not that often. That is a pretty severe need. Typically, you know, with our clients, while they may struggle with situations like this, they don't necessarily require that level of structure as far as transferring stimulus, control to somebody else. They can still go out into the natural environment and generalize some of those skills. So it's not a common thing that we see all the time. It does happen, not all the time. [Emphasis added.] (HT at 332-333.)

The Child requires ABA (Applied Behavioral Analysis) services due to his condition's being moderate to severe. (HT at 334-335.) As best as possible, the Child should receive ABA services in the educational setting; otherwise, he could not progress. (HT at 335-336.)

She observed the Child at ■■■S at his self-contained autism program:

So from what I recall, the ratio of the students was about eight-to-two. There seemed to be children on various learning needs there. So I observed some children being able to work completely independently and some who had significant and severe behavioral issues. Through the observation, and for a significant portion of the observation a child was brought into the classroom who was screaming, crying, he was eloping, getting into people's personal space, going under the classroom desks. A lot of support had to be focused on his needs. Some children responded negatively to his tantrumming and some were able to work. I think what I saw was more of like a group-led instruction where there was like a projector and the teacher had some kind of a group assignment regarding mountain ranges. And I think the children were supposed to do something with a worksheet, to finish a worksheet on that. Most of the support, the teacher was actually working with another child because they were having some behavioral issues, and then the aide was also assisting the other child who was having the tantrum. There were some direct instructions to [the Child], and I believe it was more like, get your pencils, put your pencils away. I did see the lights engage, and that was like I said the majority of the observation. (HT at 336-337.)

During her observation, she did not see "techs" (implying Registered Behavioral Technicians (RBT) participating in the Child's educational services in accordance with the IEPs for 2019-2020 and 2020-2021 school years. (HT at 339 and 341.) With the exception of, perhaps, the dimming of the lights, the ABA Specialist did not see ABA services applied during her observations. (HT at 340.)

The ABA Specialist has observed the Child in the [REDACTED] Program at [REDACTED]. (*Id.*)

She observed utilization of ABA services:

So just to give some examples. The ratio of students was very low. It was at one point three children to two teachers and then later on it was three children to three teachers. So it was basically a one-on-one. The instruction was really void of like any kind of aversive stimulation. All the kids need to be at the same learning level. No major disruptions. Very clear instruction and very repetitive instruction to the group, but also followed up to [REDACTED]. So it was given as a group instruction and then it was also followed up directly to [REDACTED]. Which is really important for him. The instructions were very clear and to the point. Again, multiple opportunities to learn. All of the instruction was broken down. The children had a group reinforcement system and an individual reinforcement system. They were being reinforced with Dragon dollars, which they could then use to cash in for rewards. One of the really important things to note was they integrated OT and SLP [speech language therapist] services within that learning environment, which is really important for [REDACTED]'s needs because of his SLP and OT-related needs.... And having an OT there to really assist with those needs is really important. So they would come in. And I saw the SLP coming in during like the reading time and while the other teacher and the other aide were working with the other kid, she would approach him directly and help him work out his worksheet, correct him if he made mistakes. And then the OT provided services for breaks. So things like that. So at the end of the learning experience, he was opted to have a break, and I believe it was like with the trampoline, so that he was given that break. The group was also given multiple breaks. Like they were also given like group breaks together. But again, because it was such a low ratio of kids it wasn't difficult to maintain. I did see a child throwing a pencil on the floor, but it wasn't like he was throwing it across the room. He threw it near him, maybe a foot away. He was told to pick it up, he picked it up. So it wasn't like anything escalated beyond that. (HT at 341-343.)

Professionals providing ABA therapy need to have a RBT credential and due to the Child's needs, experienced. (HT at 341-344.) In addition, the [REDACTED] team, implying "push-in" members, includes a social worker, a BCBA, an SLP and OT. (HT at 345.) Each member of the team is required:

And that is because somebody who is on the autism spectrum likely has speech and language needs or sensory regulation needs. They're not all the same. **[The Child] has a pretty severe need for sensory support when it comes to the escalation. When he has tantrums, and again it might not happen every session, but when he has tantrums, it is very difficult for him to de-escalate. It could be up to 45 minutes to an hour. He could be trying to hide. Again, fight or flight response. So his sensory regulation needs are a little more significant than some of my other clients.** [Emphasis added.] (HT at 345-346.)

The ABA Specialist, solely in her designated field of expertise, opined that [REDACTED] was the "best" or appropriate placement for the Child. (HT at 347.)

The ABA Specialist opined the February 2021 FBA, prepared during COVID restrictions, was deficient:

Well, I felt like at the time it wasn't really meeting his needs as far as addressing the behavioral concerns. It seemed like there was some conflicting information. First of all, there was the notion that he was having behavioral concerns, but then it just wasn't quite enough. However, it seemed like it was still significant enough to disrupt his learning time. The other thing I want to note was I noticed that the parents had had a concern of the type of information he was being provided during the learning instruction, which can have a direct influence on him participating. If what he's learning is beyond where he is developmentally, it's going to trigger more behaviors. And what I noticed was there was some concern over him being presented with information on learning division, and he had not yet learned addition and subtraction. And I believe this was an issue because at the time he was eloping and not attending. And they said, you know, hey -- I know at one point math might have been more his strong suits, but he hasn't learned division yet, why is he being taught division. I don't really feel like it's fully addressed. So that was my overall impression of that.

(HT at 347-349.)

She is not aware of the existence of a behavior intervention plan (BIP). (HT at 349.)

The ABA Specialist, solely in her designated area of expertise, opined that the August IEP was deficient:

[O]verall my take on this was it did seem like [the LEA was] trying to add in or replicate some of what [redacted] was doing, but I still don't feel like it's meeting his needs. I felt like there was not as much language surrounding the types of prompting that [the Child] would require compared to the [redacted] document. I also felt like in the area of socio-emotional skills, those weren't being addressed as highly as [redacted]. It looked like they were trying to incorporate a little more SLP and OT time, but it's still not enough. It's still not significant or integrated into the goals. So I feel like, yes, there was some changes. I still don't feel like it would be meeting his needs. [Emphasis added] (HT at 350-351.)

From a socio-emotional stand point, the August IEP was deficient:

Because he requires more support when it comes to socio-emotional skills. And right now it's really important to teach him socio-emotional skills right now. We don't want to wait until he's 16. It's really important to teach them skills now before learning patterns have solidified. He needs to learn how to communicate more effectively when he's upset and learn how to access what he needs to de-escalate at a faster rate. So while that might be an appropriate goal, it's not going to address all of his other needs. [Emphasis added.] (HT at 352-353.)

Further, her review of the August IEP did not reveal the existence of a BIP. (HT at 353.)

The ABA Specialist opined, in her designated area of expertise, that the November DPGA allowed [redacted] to provide FAPE. (HT 354-356.)

On cross-examination, the ABA Specialist verified:

- 0 She is not a VDOE-licensed teacher or special education teacher in Virginia. (HT at 357.)
- 0 She has never served as a teacher. (HT at 357.)
- 0 She has never been employed by a public-school system. (HT at 358.)
- 0 The [redacted]'s approximate one-hour observation occurred in November, 2019, before COVID. (HT at 358-359.)
- 0 The [redacted] observation occurred two weeks before the Hearing, sometime in September, 2022. (HT at 359.)

On redirect, the ABA Specialist verified:

- 0 Her profession, BCBA, routinely works with educators in both public and private settings including dentist offices and, by implication, the administration of the Independent Education Evaluation by the IEE Expert. (HT at 361-362.)

The ABA Specialist was found to be a very credible witness based on her demeanor, her years of contact with the Child, her experience and educational background, her "hands-on" knowledge of the Child's needs and goals, her observations at both [redacted] and [redacted]'s and her positive as well as productive interaction with the Child's professionals. Her testimony was

consistent with the exhibits. Overall, she appeared to dedicated to the Child without exhibiting evidence of bias. Her testimony was given great weight.

The [REDACTED] Special Education Teacher qualified as an expert in special education. (HT at 367.) The Child was her student at [REDACTED]'s [REDACTED] Program for the 2021-2022 school year. (HT at 365-366.) She the Child "core" subjects—reading, science, social studies, writing/ELA and mathematics. (HT at 378.) This Program has a two-to-one, student to educator or staff member ratio; *i.e.*, one teacher and two teaching assistants with a small amount (ten percent) of time introducing new topics. (HT at 368; 371 and 379.) By implication, the [REDACTED] Program was the restrictive program at [REDACTED] as compared to the [REDACTED] Program and the regular program. (HT at 367-368.) The [REDACTED] Program was a self-contained classroom for student for all academic areas. (HT at 369.) Also, the [REDACTED] Program also had a pragmatics class where students would work on social skills. (*Id.*) The Program had related services from various "push-in" professionals such as speech pathology or occupational therapy. (HT at 369-370.) The Child had access to these professionals on a daily basis as his needs required. (HT at 385-386.) The Program specifically works on the Child's listening and speech skills especially with the speech-language pathologist. (HT at 370-371.) The Program utilizes small groups to allow students to concentrate on their respective "curriculum or their specific goals from their IEPs or DPGA." (HT at 371.) Modifications are administered to address a child's specific needs and learning capacity. (HT at 372-373.) The Child's parents were provided routine, personalized, updates regarding the Child's progress and work for example, Parent/Child's Exhibit 15 entitled "[REDACTED] Newsletters and Announcements." (HT at 373-375.) Other quality communications were timely provided to the Child's parents *via* the internet regarding the new school year and timely notifications. (HT at 376-379.) [REDACTED] provides teachers with a variety of programs that consistent with the standards of Virginia and modified as the

Child's learning capacity requires. (HT at 378-379.) The Child required attention after a new topic was introduced to the entire class, a circumstance which occurred approximately ten-percent of the time. (HT at 380-381.) The [REDACTED] Special Education Teacher described the following as typical when teaching the Child a lesson:

[H]e did well with a lot of repetition, a lot of visual expectations or prompts. A lot of times speaking to him, even if it's directly, he requires a visual to go along with that spoken word, if he's not interested in this topic. He did require at times extra support to be able to complete the activity that we were doing. **He required frequent breaks. I would say three to five prompts, either visually, gestural or verbally or a combination of any of those, in a majority, if not all tasks that we were completing in the small-group areas.** [Emphasis added.] (HT at 381.)

So intensive modification for [the Child] would be the multiple prompts in a variety of ways. Also modifying the work that he is given. It could have been chunking the work throughout different times of that class period instead of giving it all to him at once. Shorter pieces of text on a page, more visuals than other students may have needed in the classroom, things like that would fall under the intensive modification. (HT at 382.)

The required additional time necessary to complete a task and, depending on the task, by implication at least up to, twice as long as would other children. (HT at 383-384.)

For the 2021-2022 school year and in regard to the Child's disruptive behaviors, she observed:

His behaviors varied throughout the school year. I would say middle of the school year, maybe around after winter break he showed more challenging behaviors in the classroom. And then they were -- we would see smatterings of that behavior throughout the rest of the school year. So throughout the school year we were consistently seeing behaviors, the degrees varied throughout the school year. (HT at 387.)

This observation was, by review, consistent with Parent/Child Exhibit 34 regarding behavior referrals. (HT at 388-389; and, Parent/Child Exhibit 34).

The Child's rate of progress is measured from all sources: evaluations, tests, classroom observations, review of data from different activities and different tasks and, by implication, other sources derived from school attendance; the Child made progress, implying meaningful progress consistent with the November DPGA during the 2021-2022 school year. (HT at 400; 405; and, 389-405 (reviewing specific sources).) This progress included math and reading. (HT at 406.) She vaguely recollects attending the April 2022 IEP Meeting. (HT at 406.) She did not teach the Child in April, 2022. (*Id.*)

On cross-examination, the [REDACTED] Special Education Teacher verified:

- 0 Although licensed in [REDACTED] as a special education teacher, she is not licensed by Virginia as a teacher or special education teacher. (HT at 408.)
- 0 2021 was the first year she taught a classroom primarily comprised of children with autism. (HT at 409.)
- 0 She did not participate in the August 2022 IEP Meeting. (HT at 412.)
- 0 She has not visited [REDACTED] S. (*Id.*)

The [REDACTED] Special Education Teacher was found to be an extremely credible, unbiased, witness, based on her demeanor and her "hand-on" knowledge of the Child's needs and goals, her daily interaction with the Child and her positive as well as productive interaction with the Child's professionals. Her testimony was consistent with the exhibits. Overall, she appeared dedicated to the Child's education. Her testimony was given great weight.

The Speech Pathologist qualified in the area of audiology and speech-language pathology.³ (HT at 422.) This area was defined as:

Audiology is the profession that specializes in hearing and with anything to do with taking in auditory information to process it, either for hearing purposes as well as for the ability to make sense out of what it is that we hear. Speech-language pathology, we can kind of divide it into speech, meaning speech or speech communication in a sense of speaking articulation, speaking voice production, speaking fluency, such as stuttering as a disorder. And then language is the ability to take in and make sense out of language and the meaning of the language, which is called receptive language, as well as the ability to express one's self, expressive language, as well as the ability to use language in communication situations. (HT at 422-423.)

He testified consistent with, and at times, read from his report, the Speech Pathologist Report. By summarization, the following testimony was found relevant:

- 0 Loud sounds cannot be interpreted or filtered by the Child as would be usual. (HT at 427-428.)
- 0 Loud sounds trigger a need for intervention insofar the Child may negatively behave as opposed to covering his ears. (*Id.*)
- 0 The Child demonstrates deficiencies regard interpretation; while he may be able to repeat a word or phrase, such effort does not, in his case, demonstrate his understanding such effort's meaning. (HT at 427-429.)
- 0 The Child's overall language abilities are poor based on his chronological age. (HT at 429.)

³This expert's testimony was considered only in the area of designation and not in any other areas, e.g., special education. (HT at 464.) With that stated, the Speech Pathologist has worked with schools in the development of IEPs and creating IEE's. (HT at 421-422.) Further, in the 1990's, he was licensed as a special education teacher. (HT at 477-478.) Further, the expert is still certified in [REDACTED] as a special education teacher. (HT at 478.)

0 As to the Child, the Speech Pathologist opined:

[The Child's] receptive language, which is the ability to take in and demonstrate you understand the meaning is at his mental age, which is written in my report, which is around four years of age, and is around a preschool to kindergarten level, more than a preschool. Yeah, preschool/ kindergarten level. But his grammatical language understanding is even below the preschool level. So he may understand the meaning of words but his understanding of the grammar of words is not very good. And that will cause problems. This was his just understanding, not yet his expressive ability. But if you can't understand, you'll either misuse or you don't use or you can't figure out how to express yourself appropriately. The other thing is he responded very well when using -- when testing him using what they called applied behavioral analysis, or ABA reward system. And so that was very good. And that is something that would really need to be used when he is learning, when he is learning, you know, listening, taking in and understanding academic material as well as when we're asking him questions or repeating things or teaching him specific skills. In terms of his language -- okay, in terms of his language problems he has a problem, as I said, with the integration and getting the words to put them together. Well, then language would be affected by that. Because if I can't put the words together, I can't understand what you're saying to me, I won't be able to comprehend the lesson or the direction you give me or what it is you say to me in a communication situation. As such he needs interventions. One, accommodations to help him while, B, we are treating the problem, which is through goals and therapy and treatment. (HT at 429-431.)

0 The Child's incapacity or, at least, inability without intervention, to interpret speech causes negative behavior and undermines progress in expressive behavior development. (HT at 431.)

0 The Child has deficiencies in auditory processing. (HT at 432-433.)

0 The Child had deficiencies in neurological integration (*i.e.*, the brain's interpretation of words) which evidences itself, *e.g.*, by his inability to respond to simple questions-his name.

0 He observed the Child at [REDACTED]. (HT at 436.)

0 The Child's needs required that his instructional setting be modified so as to avoid triggering events, *e.g.*, loud noises, distractions, *etc.*; the Child has issues interacting with his environment. (HT at 436-438.)

0 He has participated with the LEA in other IEP matters. (HT at 437.)

0 In regard to the April IEP, the Speech Pathologist opined:

In terms of receptive, first of all the areas that you have asked me to look at the goals that you're looking at are basically areas of receptive language and expressive language, and those are language areas. In both the receptive language area and in the expressive language area, the one thing that is missing, **there are no goals for auditory processing**. The other thing is that in his, for example, expressive language, the goal here says given a story with W-H questions. Answer, who's W-H -- questions and all. But he has problems with grammar. He has problems understanding and using his grammar as well as some of the meaning of words. W-H questions are well beyond that. **So that this goes beyond where he's at**. If he doesn't understand the words in the question, how is he going to answer them. And it doesn't say here that they're going to teach him the meaning of the W-H factors, it just says given questions about a story [REDACTED] will be able to verbally answer the questions utilizing descriptive words with W-H questions. **There's no goal that says or evidence that says he understands the difference between a who, being, you know, the person or the character, or what being a thing, or where being a place or when being a time**. But the goal is we'll use those W-H questions to answer them. That's expressive, not receptive. On the receptive level it says, for example, given three pictures that he will sequence the pictures in order of events such as beginning, middle, end. But does he even understand the meaning of beginning, middle or end. So in other words, I'm going to use the analogy, I hope that this is acceptable, that is I'm going to say to you, now that we're in the airplane I want you to take over and I want you to jettison the airplane down to so many thousand feet. Bring the speed down to, blah, blah, blah. But I have a jet. Can you fly the airplane? Do you know what jet -- I just made up jettison. I know it means something -- jettison mean, and how do you -- do you know how to read and speak. **So there's no goals to just -- in other words, before you can teach someone anything, you've got to teach the foundation. He needed foundation work that year, that school year 21/22 school year. These are not foundation goals. So that's really my major factor in both his receptive and expressive language areas. I do not see any basic identification that he has the foundations to do these things. He first needs to learn those foundation skills.** [Emphasis added.] (HT at 443-445.)

In regard to the June 2021 IEP (Unconsented), the Speech Pathologist opined:

Goal number nine -- oh, that's -- goal number 10 is increased speech intelligibility, which is speech articulation. Goal number 11, the use of pictures to present, again is expressive language. Goal number 12, three prompts [REDACTED] would demonstrate appropriate production of sounds, which is again all expressive language. The next one says communication expressive language. And the thing is that I don't see any goal at all for his understanding or receptive language, and yet his receptive vocabulary was a problem, at least on my testing, which was done a month later. I don't know what their testing is based on. And the thing is that there's nothing for his receptive understanding at all in any of these goals. So therefore I use the example as goal 10. [The Child] will increase his speech intelligibility by using strategies including, but not limited to, slower phrasing and intonation as measured by data collection. I don't know -- I don't see any evidence, if it is somewhere, I don't see any

evidence where it says that he has a problem with his speech intelligibility because he speaks too fast. He responds too slowly. The other thing is that with the use of pictures he will present progressive I-N-G, plurals and descriptive words. But first you have to note, can he understand the meaning of them, that's the receptive, before he can use them. The other one is goal 12. Is that goal 12 Goal 12 is also a production. [The Child] will independently demonstrate the production of sounds in the initial position and single words. And then they talk about what the sounds are. And the thing is that I don't remember him having any kind of serious speech articulation problem with those sounds. And if they are, he needs a lot more work on his language, much more than on his expressive speech production abilities. And then the other one, expressive language, goal 13, he will independently use/learn social cues to have an appropriate verbal and non-verbal response to include, but not limited to, asking for breaks, seeking for help, stuff like that. The first thing I would like to know is will [the Child] know what it means that he needs a break. Will [the Child] know that he has a problem and he needs help. Before you can do you have to understand it. There's absolutely no goals in the speech and language for his understanding based on the ones that you have pointed out to me. HT at 448-450.)

In regard to the August IEP, the Speech Pathologist opined:

I'll start by saying I've looked so far at goal 11, 12, 13 and 14 and they essentially are the exact same goal as in the previous IEP, no change. And then we look at number 15, there were pictures of 10 objects. We use the feature function class of each object with independence and four to five consecutive data collected. To be honest with you, I believe very strongly that an IEP is a living document, that if you are not in the school district but you are somewhere else, let's say the family moves to Hawaii, is that okay, and the thing is that I'm now the person working with [REDACTED] with speech, I have to be honest when I say this, giving pictures of 10 objects that I can do right there, state the feature, function and class of each object. I don't know if he understands what feature, function or class means. [REDACTED]. So in other words, if you show him this picture, does he know what feature it is, what function it is. And this says receptive language, which is you understanding. Given pictures of 10 objects he will state, and I hope you all would agree state doesn't mean state, city, county, right, as he will say, that's an expressive language goal. It does not in any way identify that he understands this and that yet it's under receptive language, which is understanding. (HT at 453-455.)

Receptive language, a good example would be is I will show him -- okay, let's use here function. Because feature, I don't know what they mean by feature. But function, and I show him a picture of a bicycle, thinking of his age, a bicycle. And I show him a picture of a chair. And I show him a picture of a baseball. And I show him -- we'll use those three. And I say show me -- or which one of these can you ride? Now unless you're a weirdo who rides baseballs -- no, I think we all agree that riding would be the bicycle. Then we know that he comprehensively understands the function of the bicycle, or one of its functions is to ride. Now using the same three pictures I could say, well, a bicycle -- I'm sorry. The wheels are round. I was going to say which one is round. Oh, which one do you hit? Well, it's true you can go up to a bicycle and hit it, but that's not its function. The baseball would be -- you know, baseball hitter. Imagine the pictures of a baseball and a baseball bat, even better, that's receptive. Then after he learns this we can play a game. Let's say we do it with 10 objects. I take the 10, deck of cards, and I put it out and say, okay, what do you do with that? What do you do with that? What do you do with that? Because we've got over the receptive. And if he can do it with 100-percent accuracy, I could do it -- if he could do it 80 percent, maybe I'll take out the ones he didn't get, put them aside, those are the ones we need to work on and then go through these others in terms of can he express them. Because the first thing you do is can you understand it, then can you express it and can you relate it. Then the third thing I would do is new pictures. So the bicycle we had was a red bike. Let's make believe it's a little child's bike, like a tricycle. Now it's going to be a fancy bike and you would use it, you know, in a race somewhere. That's the bicycle. We'll make-believe that the baseball is a ball. But now I'm going to bring out a beach ball. And then I can't remember the third thing that I used, but whatever it is, okay, it is. And now I say, which one do you ride? Can he generalize that the bicycle that he saw is not the only thing you ride. That's the same thing. And if he's learned the word bicycle I might even say to him, well, why did you say that. Because it's a bicycle. You ride a bicycle. And which one do you hit. And he goes to the beach ball, not the baseball, right, he generalizes. So first he learns what it is, what its meaning is, then he can identify it by labeling it and then he can generalize it to other -- oh, it was a chair, the other thing. So instead of a chair it would be a desk. (HT at 455-458.)

The Speech Pathologist has provided speech-language treatment to the Child. (HT at 455.) **The Child lacked the capacity to perform the functions described in the Speech Pathologist's testimony** as described in HT at 455-458. (HT at 458.) Moreover, the Child demonstrated the same issues during treatment: “[h]is **basic expressive ability was very, very basic, very low level.** [Emphasis added]” (HT at 455-458.)

In regard to the accommodations contained in the August IEP, the Speech Pathologist opined it was deficient:

Well, the ones that I will focus on are the ones that go with speech-language communication, auditory processing. The first thing is here it says something, accommodation for modification, audio and test. Again, I'm now the speech-language pathologist in Hawaii, and the thing is that this says audio test. The thing that I would interpret that to mean is a hearing test. So just the category or accommodation, I don't know what audio test means. I mean it could mean other things, but it doesn't explain it. When completing math and science history assessments he will get an audio test. I don't know what that is. Another accommodation. A flexible schedule. Yes, that I think would be appropriate because he needs breaks and stuff like that. But that's not speech-language or auditory processing. And then in terms of the noise. Access to a quiet space away from distractions. It could be appropriate if you used the word distractions as visual. So if I work in a corner over here, all of you

are talking, I'm not being distracted visually but I am auditorily. It doesn't say anything about auditory distraction, which would be the sensitivity factor. And then in terms of his understanding of chunking assessments into shorter sections would be appropriate. Chunking assignments into shorter sections would be -- but that's not what chunking is for a person who has auditory extraction and integration problems. It's taking one piece and breaking -- I'll give you an example. Your hands are dirty. I want you to go upstairs and wash your hands. That's the only chunk, right. But chunking from a verbal point of view from auditory processing, auditory extraction and auditory integration is, I want you to do something. Your hands. Are dirty. Notice how I pause that meaning? Your hands. Are dirty. Go upstairs. Wash your hands. Notice how I broke it down into pieces. But it's still the same one unit of what I want him to do. The thing is that's chunking. Chunking assessments could be, instead of giving him 10 questions let's give him two at a time. But each assessment, if they're verbal, could be loaded with a lot of information. That's not appropriate completely. Because it doesn't explain what is specifically meant by it. (HT at 459-461.)

Because it is not addressing -- well, the accommodation for the auditory does not specific -- specify that it's very loud noises, which is what he can't tolerate. The accommodation for getting his attention, you know, because we need to get his attention in order to communicate with him, is important. The chunking is not the way I would describe it. The way I describe it would be just the way I did, taking whatever you're saying, chunking into pieces even every sentence you say and giving breaks. So therefore, it's not following all the things that I described and the things that [the Child] needs. The other thing is what about the vocabulary. Accommodation, before you even teach him something he needs pre-teaching, someone to make sure he knows the vocabulary, the meaning of it relative to the lesson that will presented. I don't see that accommodation. (HT at 462.)

The speech-language accommodation and indirect service accommodations were inadequate. (HT at 464-465.) There is no accommodation for audio processing in regard to the April IEP and the August IEP. (HT at 465.)

The Speech Pathologist is familiar with the [REDACTED] Program and November DPGA. (HT at 466-468.) He has participated at meetings at [REDACTED] regarding the Child. (HT at 467.) He conducted an observation of the Child at [REDACTED]. (HT at 468.) Based on these efforts, he opined that [REDACTED] addresses the Child's needs, implying it provides the Child FAPE because:

First thing is that in looking at the [REDACTED] program itself, I forget what -- [REDACTED] [Program] thing, is that -- a large part of what I've been bringing out is communication, that [the Child] has difficulty just communicating with others, especially with his teacher. That's a large part of the work that they have done, is to work on communication. A large, large part of their work s language. And another part, which was, especially through my observations and pleasantly surprising was they were working on fancy words, auditory phonological extraction and integration at the - not the same level but in the same lesson at different times. So they did the extraction. Finished the lesson. Did the integration. Which was wonderful because they've made it related to its major factor, which is reading and also writing. So eventually over time he'll learn maybe spelling. So it was really great to see that kind of interaction going on.

(HT at 468-469.)

From the date of the Speech Pathologist Report's evaluation on July 2021 (HT at 479; and the Speech Pathologist Report, page 1), and the observation of the Child in September 2022 (HT at 480), the Speech Pathologist testified:

Since you kind of get it with me that I make my jokes with kind of analogies, I think I saw [REDACTED]'s brother, his twin brother. In other words[, the Child] was, **number one, was not functioning in any way, shape or form like a preschooler/kindergartner. He was functioning very much like -- yes, I'm not going to say he's functioning age appropriate**, we know he's got some issues with the autism more than anything else. But a good example is that when I first came on the observation to observe him, it must have been the break from the previous thing, getting ready to go into the reading. And so the thing is that there was a little break time where he must be eating something, whatever. We'll make-believe this is his table. He was sitting like on a rug or on the floor over there. Immediately the teacher-- teacher then said, okay, let's put away -- the break is over. Let's put away, whatever it is, their drinks or throw away your garbage. So the break is over. Throw away your garbage. Go to your desk. Take out -- I'm trying to give you the pause to give you an idea that there were pauses there for time to process. Take out your pad, ... and your marker. And let's get ready for some reading. She used the chunking. The chunking instead of, okay, the break is over, throw out your garbage, go to your desk. Now take your pen and get your marker and -- that's breaking by subject, which is what was in the other document we discussed. Now she was breaking it nicely. He immediately got up, went over to the garbage, whatever it was, to put his garbage there. Went to his seat. Got his ... iPA out, got his marker out and then just stood there -- sat there waiting for her to come. And she did. She stood in front. And there were

three students. He and two other students. And then they did a lesson. It was really nice. She gave him the work. I'll use the example of cat as the word. Here's the word. Does everyone see? Cat. So she's showing it to them. It's C A T. Again C A T. Notice how I'm giving you every single sound, really breaking it down for you. **This is what we're looking for in phonological or phonemic or phonics training, phonemic processing.** And then I think the kids had to write the word. They had to write the word and what it was. And then part of the lesson also was, okay, what's the first sound, what's the last sound. So first sound KA, AT. What's the first sound? And then you're supposed to point to it, and the kid -- well, we'll use [REDACTED]. I think because she called on the children, I think. [The Child], what is it? And he would say CA, the sound word. Very good. You've earned -- their reinforcement, it's called Dragon dollars. And so, you've earned a Dragon dollar. And he went, took it, put it in his pocket. Went right back to his pad and watched while she went through the next child. Then she said, let's take a break after 15 minutes. Nice break. [REDACTED] just put his stuff down, got up, went back to where he was, did whatever. I think they were just taking a break, not for drinking or eating anything at that point. And then after five, ten minutes, whatever the break was, she said, okay, let's continue the lesson. And he just got up. So what I'm saying is he followed through everything that was done in a very good way, interacted perfectly with the teacher, responded to her verbal questions. Also would point to -- you know, like she said, well, show me. Show me the CA. He pointed with his marker to the C of the word -- I'm using that as the example. They had a different word, it wasn't cat. And then later they did another lesson where, still auditory phonological processing, let's take away the first sound. And I don't remember if they erased it or what. Yeah, I think they erased it. She said let's erase or let's take away the first sound, erase it and he did. And now let's put in an BA for another sound. And they had to think it through and then they would write it, whatever the letter was. What word is it now. So they're not only learning the sounds but also how to integrate it into the word bat. And it was beautiful. Then they did some other stuff in terms of the sequencing of a story, by going through the different pages in the book. Here's the receptive, here's the page, let's see what's going on here. What is it. I'm making it up. Climbing the tree. Then he went to the next page. What is that. Picking the apple. Then another one might be coming down the tree. And then maybe learn the sequence. First, likely the story is he climbed the tree. Then he picked the apple. Then he sat down under the tree. Then he ate the apple. So they did it based on what was in the book and also then putting it together as a whole, nicely breaking down the language parts and then putting it together in the whole, starting with do you understand it first; now can you tell. So it was a great lesson. (HT at 468-474.)

On cross-examination, the Speech Therapist verified:

- 0 He is currently licensed as a speech pathologist and an audiologist. (HT at 477.)
- 0 He is not currently or ever been licensed as a special education teacher by Virginia. (Id.)
- 0 In the 1990's, he was licensed as a special education teacher. (HT at 477-478.)
- 0 He is still certified in [REDACTED] as a special education teacher. (HT at 478.)
- 0 He was aware that the Child had not attended public school in person for fifteen months before June 2021, the date of his evaluation. (HT at 479.)
- 0 He spoke with the Mother and not LEA staff when preparing the Speech Pathologist's Report. (HT at 479-480.)
- 0 He conducted an approximately one-hour observation of the Child at [REDACTED] in September, 2022. (HT at 480-481.)
- 0 He did not conduct observation at, or visit, [REDACTED] S. (HT at 482.)\

On re-direct, he verified:

- 0 He reviewed the Neuropsychological Report in preparation of the Speech Pathologist Report. (HT at 495.)
- 0 He reviewed the speech and language evaluation prepared by the school. (HT at 496.)

- 0 By choice, he avoids talking to LEA staff because it is unnecessary; the LEA provides him the needed information, documents and data to effectuate his effort. (HT at 496-497.)
- 0 He attended the March 28, 2022, IEP meeting. (Stipulation on HT at 499-500.)
- 0 The accommodations contained in the August IEP “absolutely” failed to address the Child’s auditory processing and speech-language processing difficulties. (HT at 500.)

The Speech Pathologist was found to be an extremely credible witness and with professional insights on specific areas regarding the Child’s needs and the validity of the referenced IEPs. His participation included the generation of the Speech Pathologist Report. He conducted an observation at [REDACTED] in September 2022, which reflected the Child’s significant progress from his evaluations of approximately July 2021. His demeanor presented as unbiased and professional with outstanding credentials involving special education, teaching and years of experience. His participation identified, in detail with examples, the actual and specific needs of this Child to access curriculum to allow any educational entity to provide FAPE. His testimony was given great weight.

The Father was called as a fact witness. (HT at 509.) Before the COVID pandemic, the Child was a “sweet, gentle boy—compliant.” (HT at 510.) In regard to anticipation of the 2020-2021 school year, the Father testified:

After witnessing [the Child] during the ESY period, noticing the aggression that was manifesting during that period, I think it's already been said the -- largely there was throwing of chairs, damaging the laptop, fighting, pushing, so on, avoidance, just a different child altogether. We knew there was challenges during that time and we wanted to alert and help the new team, the new school team, these are the challenges and try to get a baseline and try to plan for that upcoming year. (HT at 511.)

The remedy sought the use of ABA services in accordance with his previous use of ABA therapy for a number of years. (HT at 512-514.) LEA provided two options regarding the Child’s attendance remote or a hybrid of remote with two days per week in school. (HT at 512-513.) The Father had concerns regarding both options insofar such options did not address the Child’s actual needs and his negative behavior, *i.e.*, his eloping and failing to wear the COVID mask. (*Id.*) By

implication, the Father was concerned that the Child would be infected due to his inability to wear the mask consistently and that the Child refused to take pills or medication. (HT at 513-514.) During the IEP meeting on August 27, 2020, the Father discussed his concerns regarding the Child's behavior and the limitations of the LEA's options. (HT at 515-516.) These concerns were discussed at all IEP meetings. (HT at 528.)

He believed that one-on-one teaching at home by the LEA was available. (HT at 516.) The Parent/Child requested one-on-one teaching services from the LEA at each IEP meeting, approximately twelve. (HT at 534-535.) The LEA's response was the Child needed to attend school to allow the collection of "data" to support a conclusion for private placement. (HT at 535.) He found that this directive created a catch-22 wherein private placement would only be considered by the LEA after the Child attended [REDACTED] S. (*Id.*) Instead of one-on-one instruction, the LEA suggested an additional computer screen and other efforts which proved unsuccessful. (HT at 535-536.)

On a family vacation to Florida and Disney World, the Child demonstrated difficulties wearing the COVID mask. (HT at 517-519.)

The Child utilized virtual learning for the entire 2020-2021 school year. (HT at 519.) The Father testified that the behaviors disclosed to the LEA during the IEP meeting on August 27, 2020, the Child's behaviors declined: "[h]is behaviors got worse, his tantrums got bigger. A lot of throwing stuff, throwing chairs, hitting the one person that he really – his mother." (HT at 520.) The Mother and Father participated daily with the Child's virtual instruction. (HT at 520-521.) He had concerns because he perceived that the Child was not making progress. (HT at 521 and 528.) The observations of the Mother and Father regarding the Child's accessing his curriculum are contained in Parent/Child Exhibit 4, a daily log. ("Notes" column of Parent/Child Exhibit 4, a document untitled.) As a result, the Parent/Child by letter, dated August 16, 2021,

notified the LEA of the decision to privately place the Child per Regulation. (HT at 537-538; and LEA Exhibit 51.)

He disagreed with the IEP Progress Report, LEA Exhibit 2. (HT at 528-533.) The decision was difficult. (HT at 538.)

April IEP was generated at an IEP meeting in April 2022. (HT at 539.) Services were discussed. (HT at 538-542.)

August IEP was for the 2022-2023 school year. (HT at 543-544.) Services were discussed. (HT at 544.) [REDACTED] and [REDACTED]S were discussed. (*Id.*)

He has toured [REDACTED]S. (HT at 544-546.) No students were present and the Father felt that the effort was undermined insofar as he could not observe the actual activities during a normal school day. (HT 546-547.) By implication, the Child was not present during the tour.

On cross examination, the Father verified:

- 0 He is not a general education or special education teacher. (HT at 548.)
- 0 He is never worked for a school in any capacity. (*Id.*)
- 0 He has never functioned as a professional regarding IEP goals, etc. (*Id.*)
- 0 The Parent/Child agreed to ESY programming, implying virtual learning, for the Child during the summer of 2020.
- 0 The Parent/Child agreed to virtual learning for the 2020-2021 school year with the limitation that the Parent/Child requested one-on-one learning at home. (HT at 549-550.)

The Father was found to be a credible witness based his demeanor. His testimony appeared to be candid as opposed to advocating a position. His testimony was consistent, for most part, with the exhibits and she provided insight regarding the Child's accessing curriculum at home. With that stated, any opinions were discounted as concerns as he was a fact witness. Further, his love for the Child was demonstrated and, therefore, his testimony was somewhat discounted but not to a point of incredibility. His testimony was given weight.

The LEA called three witnesses: the Autism Consulting Teacher, Special Education Supervisor and the LEA BCBA.

The Autism Consulting Teacher qualified as an expert in area of special education programming for students with characteristics of autism. (HT at 586.) As an autism consulting teacher for the LEA, she testified that she:

[S]upport[s] autism and intellectual disability classrooms, self-contained programs. [She helped] teachers develop lesson plans, curriculum adjustments, write IEPs, help[ed] them complete FEAs, help them graph data. Sometimes [She] help[ed] make data sheets. [She would] brainstorm with teachers about difficult behaviors. [She would] model the students on how to complete tasks or get certain things done, like work tasks and things like that. So that's in the classroom. [S]he also provide[d] professional development for teachers, behavior assistants, teaching assistants. I also develop some of those trainings as well. [She also met] with administrators. (HT at 576-577; and 607.)

She was the Child's teacher in a self-contained classroom for kindergarten and first grade at LRES for the 2017-2018 and 2018-2019 school years. (HT at 586-587.) She was the Child's primary instructor for grade-level curriculum. (HT at 587-588.) She also developed IEPs for him. (*Id.*) Over the two years, she was involved in the generation of two functional behavior assessments, two ABA intervention plans and on crisis plan in kindergarten. (*Id.*) She performed progress monitoring for progress reports, report cards as well as participated in IEP meetings and development. (*Id.*)

In regard to her relationship with the Child, she testified:

I love [the Child]. He's super mischievous and adorable. When he came in kindergarten, he was like this little tiny -- he was so little and cute. I found him wonderful to work with. He made a lot of behavioral progress with us while he was with us. And I enjoyed my time with him. (HT at 588.)

She testified that, at the start of kindergarten or the 2017/18 school year, the Child presented with:

Difficulties transitioning. He had a history of elopement from preschool. And so it was really difficult for him to get from the car to the classroom. It would frequently take multiple staff members to assist him. He really liked water fountains and liked the circles on the ground. And so he would frequently try to get to the water fountain or stop and drop on a circle. And so it was difficult to do a transition quickly. It would take him a long time. In the beginning of the year sometimes it would take 30 minutes or so to get him all the way to the classroom, which our room was relatively close to the drop-off area. (HT at 588-589.)

During this year, he made progress. By the end of kindergarten, he demonstrated: "He was able to sit for small-group instruction with use of a token board and visuals and then even one-on-one instruction at the beginning of the year. He had a really hard time sitting, but by the end of the

year he could sit with me and complete activities in a one-on-one and even in small-group times.”
(HT at 590.)

During the second year or first-grade (2018-2019 school year), he continued to make progress, especially in math; further, elopement became a non-issue. (HT at 591-596.) She found that the Child’s exposure to general education students was beneficial to allow modeling. (HT at 602-603.)

For the 2020-2021 school year, the witness acted as the autism consulting teacher for ██████ S. (HT at 603). She observed the Child’s accessing his education virtually. (HT at 604.) The Child accessed in curriculum the entire year. (*Id.*) She visited ██████ S once a week. (HT at 605.) Mask protocols were used. (HT at 610-611.)

The Autism Consulting Teacher opined that “the K through five autism program at [██████ S] that was available during the 2020-2021 school year” would provide FAPE to the Child (HT at 611) on the basis that:

It was a very similar structure to what he'd experienced before and when he made progress with us before the pandemic. So it was a small classroom with multiple staff members. They used prompting and prompt fading. They used visuals for instruction, visuals for behavior support. There were opportunities for sensory. There were opportunities for breaks. There was speech and OT available. It was basically the same structure as before, it just looked a little different because we were spaced out a little different and we had little cubicle thingies to keep germs away and we wore masks. But as much as possible we kept it -- the instruction didn't change.... (HT at 611-612.)

For the 2021-2022 school year and consistent with the LEA documents, Exhibit 50 and June 2021 IEP (Unconsented), placement at ██████ S with its “three through five self contained autism program” would consist of:

There's eight kids. A maximum of eight kids. So last year, actually there were only seven in person because ██████ did not come. He would have been the eighth. And then there was a teacher and two teaching assistants. They do small-group instruction, a teacher and two students. The teacher would frequently do one-on-one instruction for specialized reading or for IEP goal probes, if it needed to be done individually. The TAs would take students to gen ed to provide support and to take data on their goals there. They would also pull kids to do IEP goal work and to work on reviews of different things. Like things that were already introduced in gen ed that needed review. Prepare them for assessments that were coming up, that kind of thing. (HT at 616; and, 621-622.)

The program uses all “... the same methodology that all of our programs do, like discreet trial training, prompt and prompt fading, visual supports, social situation stories.” (HT at 617.)

Moreover, ABA therapies are employed: “[m]ost of [the teaching methods] are related to ABA.

Some of them are also just like good evidence-based teaching practices. So while it falls into

ABA, the basis of it is just good teaching practices.” (*Id.*) Speech, OT and PT professionals are available to provide services. (HT at 617-618.) The program is supported by a BCBA, the witness. (HT at 618.) The ██████S Program collects data three to five times a week, exceeding county guidelines. (HT at 620.) Data consists of a child’s successful or unsuccessful attempts or efforts towards IEP goal realization. (HT at 618-620.)

The Autism Consulting Teacher opined that the June 2021 IEP (Unconsented) would provide the Child FAPE because of the need to allow the Child to participate in activities with general education students as well as:

So based off of the areas of need listed in the IEP there were goals that addressed in every area that he struggled with. There's accommodations that addressed the areas of deficits listed in his eligibility testing. So there are accommodations to make sure that he has access to things that he needs. The services provide him with a significant amount of special education support and instruction, and then also access to general education peers. It also gives him occupational therapy and speech and language therapy to address the areas of need that he has. And in a setting that is small -- a small-group setting, that has a maximum of eight students that is designed for students with autism that employs methodologies of ABA and good teaching practices.

(HT at 621-623.)

The Autism Consulting Teacher had reviewed the Child’s educational record. (HT at 752.) The April IEP proposed services for the 2022-2023 school year. (HT at 753.) The ██████S program would provide a self-contained autism program. (*Id.*) She visits the Program frequently, approximately once per week:

I observe the classroom with the teacher. I provide behavioral support for students if needed, I provided coaching to teacher, assist with IEP development, data collection, analyzing data, drafting FBAs or behavior intervention plans.

(HT at 753-754.)

As to the Child’s placement at the contemplated site at ██████S, she opined:

So it has a maximum of eight students. Currently there are seven students in that classroom. There is a teacher and two paraprofessionals. The teacher uses both the VESOLs, which are the Virginia aligned standards of learning that relate to the VAAP assessment, and the SOLs to guide instruction based off of students' needs and decisions made in their individual IEPs. They provide behavioral instruction based on need, social skills instruction. The teacher does whole group. She does individual instruction, and she also does small group. The last time I was there to observe, which was a week ago, they were -- she was completing grade-level assessment with one student. The one TA was doing IEP goal work with two students, and the other TA was helping students complete some sort of academic task. There was a student accessing their sensory break area. And there was a student accessing reinforcement on the carpet in the front of the room. (HT at 754-755.)

Tools such as a “sensory break area” allow the Child to effectuate self-regulation, to allow children an opportunity to have a rest when over stimulate, an essential tool. (HT at 755-757.)

The placement utilizes other tools. (HT at 758-759.) The Child utilized such tools, but the

Autism Consulting Teacher was unaware has to the extent the Child used them to self-regulate.

(HT at 761.) The placement utilizes a teacher and two “para-professionals” implying teacher assistants. (HT at 763.) Other professionals, the OT and SLP, have access to children. (*Id.*)

At ██████S, by implication, LEA’s proposed IEP placement, data collection consists of:

So in that classroom [the ██████S Principal] makes all of our data sheets based off of the student's IEP goals. And so when we look at the IEP goal we look at all the parts that need to be measured and the accuracy rate that it needs to be -- needs to occur in, and if it needs to be measured over a certain period of time. So some goals are rated 80 percent in four out of five opportunities, which means not only do you need to be accurate 80 percent with this skill, you need to show that over five trials at least four times. And so we look at all those criteria and make a teacher data collection. And then typically each student has a packet or clipboard. [The ██████S Principal] does like weekly sheets. She has all the goals on one page, as much as possible. And then they do -- she keeps them in bins with all the materials needed for those IEP goals so that any point in time if it is not targeted in a whole-group lesson, like let's say there's a goal that it wasn't a part of a whole-group lesson, a TA or herself can grab that bin and the materials for that goal are in there with the data collection and they collect data daily. (HT at 764-765.)

The April IEP addressed the Child’s needs and would provide FAPE to the Child. (HT at 768-770.) In support of this opinion she testified:

So it addressed all of his areas of deficit and need that were outlined from the testing that was completed both from our eligibility and the IEEs that were proposed. It went through that and created goals that address the areas of need that were documented in the present levels. It has accommodations in here that address all of the areas that he would need extra support, like wait time and math aides, things that were kind of documented in his testing that he requires extra support for. There are services that were just outlined that address how to instruct on all the -- like time for instruction on all the IEP goals along with making sure he's getting instruction in areas he's below grade level in. I believe he was found eligible for ESY based off of his level of need. And then a program was suggested for a self-contained autism classroom, which would provide all that instruction and level of support that was documented in his present levels.

In regard to the August IEP, the Child’s placement would remain at ██████S with its autism program. (HT at 770.) The August IEP has changes from the April IEP. (HT at 770.)

Specifically, she testified:

So we had requested that ██████ send us their progress notes from his academic school year. They had sent us the ones from June. I believe ... [LEA employee by implication] had asked for the summer ones but we were not sent those. So we got ones from the end of the typical school year in June. And so we read through the progress notes and updated the present levels to have the data from their -- they don't call them IEP goals, but their goals in their plan at ██████. So we updated the data to include any level of mastery, which I only updated the academic stuff. So I know there was a sentence but mastering CBC words. And then we updated the area of needs to include the data that they reported in their progress notes. From there we updated the IEP goals to have slightly different levels of mastery criteria, because he had made some progress on the goals, according to ██████'s data. And so we updated the goals. And then we also added counseling services into the -- into his services.

The August IEP provides necessary services to provide FAPE to the Child:

So typically the model that we try to follow in ██████ is that related services happen in the self-contained classes, because we have to program for generalization. So if you only practice your skills in isolation in a separate room, it's much more difficult to learn those in your natural environment. And so we program related services to happen in those classrooms unless otherwise specified in the IEP or in discussion with the family. So the occupational therapist and speech therapist typically come in on schedule. They have a schedule for specific students but they will come in the classroom and provide those services. And they will also schedule time to talk to the teacher. So whether they -- if it's a 30-minute session, they might schedule 45 minutes in the classroom. So they do their therapy and then they typically chat with the teacher to be like, this is what we did today, here's what you need to work on, here's how he did with me, this is what we should do, and then do you have any concerns in the classroom. And that would be a time the teacher can share. If there isn't time in the school day for that, I know related service providers send emails and say like I'm available this day after school, let's chat about whatever. But there's a lot of back-and-forth between the teacher and the related services, because as a team you need to provide consistent instruction for those skills. (HT at 773-774.)

So again I looked at all the testing information that was documented in the present levels. We asked for and got information from the school that he's currently going to, to make sure that we had the most up-to-date data that reflected his level of progress in his current educational setting. We included that in here and then adapted the goals to best meet the level that he's performing at right now. We even separated a goal because the data from ██████ was a little unclear about addition or subtraction on what was the -- they said subtraction was a greater need, but it just was a little unclear to me. And so we separated it so we can keep better track of that. Also the parents had indicated he was much better in addition, and we wanted that to be reflected in the goals. We still had services that meet all of the needs documented in the IEP. We added counseling as an

additional service to give additional social skills and support with typical or general education peers, is what I would assume would happen with that with the counselor. Because social skills instruction is happening in an autism classroom very frequently and he has social skills services, so that is occurring. And the -- I already documented that he would be in a self-contained program. (HT at 775-776.)

The Autism Consulting Teacher conducted an observation of a classroom setting (without the Child) which was different from the classroom or teacher proposed by the August IEP. (HT at 778-789.)

On cross-examination, the Autism Consulting Teacher verified, in pertinent part:

- 0 The Child's inability to participate in IEP sessions is problematic; *i.e.*, the Child's lack of attendance undermines his progress. (HT at 794-796.)

The Autism Consulting Teacher was found to be a credible witness and with professional insights and participation in the Child's educational for kindergarten and first grade. Her demeanor presented as, for the most part, unbiased and professional with outstanding credentials involving special education, teaching and years of experience. Her testimony was discounted insofar as her opinions were, at times, general and, when specific, was not based on actual current interaction with the Child or his current academic environment such as, *e.g.*, a [REDACTED] teacher with daily interaction. What was missing was a meaningful description of the impact, apparently negative, of the virtual services on the Child and his resulting academic needs afterward and current. Her testimony was some given some weight but discounted for reasons stated herein.

The Special Education Supervisor was called as an expert in speech-language pathology and special education programming for students with communication language deficits. (HT at 636.) Her position with the LEA is special education supervisor for related services. (HT at 630).

In this position, she performed:

So I now supervise the speech-language pathologists, the physical therapists and occupational therapists for the division, as well as specialized music instruction, assistive technology and the Medicaid program. Within that I'm responsible for hiring, retention of staff, placement in the schools, ensuring that therapists are doing their job and any assistance they might need with IEP writing or interventions, again I assist with that. Overall just programming and guidance to the related services staff. (HT at 630-631; and 646.)

She has also participated in IEP development and meetings on hundreds of occasions. (HT at 631-633.) She is familiar with the Child's record and attended the Child's IEP meetings. (HT at 636-637.) She also worked with the Child's previous speech pathologist. (HT at 637-638.) She

has observed the Child at his current placement, [REDACTED] on February 25, 2022. (HT at 638.) She also has observed the Child at his LEA placement at [REDACTED] S. (HT at 638; and 662-663.) She also reviewed the DPGA at [REDACTED] implying the November DPGA and perhaps other DPGA's. (HT at 639.) She reviewed the June 2021 IEP (Unconsented). (*Id.*) She opined, based on her efforts, that this IEPs accommodations would be appropriate in order to address the Child's speech and language-based needs on the basis of:

I would say visual supports. Chunking assignments into shorter sections. Chunking assessments into shorter sections. Social stories. Pairing visual supports with vocabulary. And there's two of them. Pairing visual supports with vocabulary, both instructional and testing purposes. Sitting in a quiet space away from distractions. Gaining attention prior to asking a question. Giving directions in short sequences. Providing opportunities for hands-on practice. Visual support service is listed again for instructional purposes. Wait time to respond for both testing and instruction. (HT at 643-645.)

She opined that such accommodations would assist the Child:

So students with auditory processing or language deficits have difficulty when there's too much language load. When there's too many words, too much language coming at them. And so we need to accommodate them by providing simple vocabulary, chunking. Those visuals are a good support. The quiet space so they can have that opportunity to process the information. And wait time is extremely important, to allow a student to process the information before giving a response. (HT at 644.)

Overall, she found that the June 2021 IEP (Unconsented) would provide FAPE to the Child because "the team considered the data. They developed goals, services and accommodations to provide [the Child] the success in the classroom." (HT at 646-647.) The Parent/Child did not consent to the April IEP. (HT at 647.) The April IEP would cover the 2022-2023 school year. (HT at 648; and, LEA Exhibit 59.) The April IEP provides quality services to the Child. (HT at 648-655.)

The Special Education Supervisor reviewed the August IEP which covers the 2022-2023 school year. (HT at 655-656.) She participated in the IEP meeting. (HT at 655.) The April IEP and August IEP have similar goals. (HT at 656-661.) The August IEP would provide FAPE to the Child because "the IEP teams review the data, they developed goals, accommodations and services to provide [REDACTED] with an appropriate education to make progress towards those goals." (HT at 661-662.) She opined that the Child did not require a restrictive environment,

implying an educational environment without contact to general education students and providing the Child with examples to achieve FAPE. (HT at 663.)

On cross-examination, the Special Education Supervisor verified:

- 0 She has not been certified as a special education teacher or licensed as a teacher. (HT at 664.)
- 0 She has never functioned as a teacher. (*Id.*)
- 0 She services all the LEA ninety-four schools. (HT at 665.)
- 0 She supervises approximately 116 professionals, implying professionals involved in special education for the LEA. (HT at 665-666.)
- 0 She has never provided services directly to the Child or met the Child. (HT at 666-667.)

The LEA BCBA was designated as an expert witness in special education and educational programming for students with characteristics of autism. (HT at 694-695.) She joined the IEP team in June, 2021 and participated in five meetings as well as had reviewed the Child's educational records. (HT at 695-696.) She had spoken with the LEA teachers and service providers for the Child. (HT at 696.) She has observed the Child at his current placement, [REDACTED] on three occasions with each visit lasting between sixty and ninety minutes. (HT at 696-698; and, 701.) She did not observe "data collection" by [REDACTED] staff during her observations. (HT at 701.) During her observations, she saw only two professionals visit and, in addition, did not see the Child interact with his peers. (HT at 703-706.) She has reviewed the Child's academic records from the LEA and [REDACTED]. (HT at 695 and 698.) She spoke with [REDACTED] professionals. (HT at 711.) She has attend five IEP meetings. (HT at 695.) She is familiar with the proposed program for the Child at [REDACTED]S. (HT at 698.) While [REDACTED] provided "Permanent Product data" by *subpoena duces tecum* and otherwise, such data was not consistent with data usually relied upon by the LEA such as "types of data would include like frequency duration, latency data interval recording,

things like that, prompting data.” (HT at 699-700.) [REDACTED] program is similar to such services available to children by the LEA. (HT at 700.) The use of “Dragon Dollars (implying a method per ABA practices) was not formally performed undermining accountability, the essence of ABA practices; *e.g.*, [REDACTED] “over prompts.” (HT at 701-702; and, 709.) “Overprompting leads to learned helplessness. And so if a student like [REDACTED], who is smart, I believe he can determine that if he waits long enough he's going to get the answer. And so a response is not necessarily required.” (HT at 703.) Unlike [REDACTED], the LEA’s IEPs would allow the Child access to student engaged in general education. (HT at 711-712.) This is important because:

Nondisabled peers can often act as models, and it provides him the opportunity to generalize the skills that he is taught through the specialized instruction in the program setting or special education setting into that larger public school setting. (HT at 712.)

[REDACTED] S is less than a mile from the home of the Child, his neighborhood home. (HT at 712-713.) [REDACTED] is located fifty to eighty-five minutes from the Child’s home. (*Id.*) In regard to student to teacher ratio, she testified: “...[LEA program at [REDACTED] S, the LEA], would have a maximum of eight students to two teaching assistants and one teacher. At [REDACTED], it would] have a maximum of seven students to two teaching assistants and one teacher.” (HT at 713.) Each school had a school day consisting of six to six-and- and-half hours. (HT at 714.) Each school allowed for an extend school year; *i.e.*, the [REDACTED]’s eleven month school vs. the LEA’s opportunity to utilize ESY for the Summer. (HT at 714.) [REDACTED]’s Summer staff may be different than the staff utilized during the traditional school year. (HT at 714-715.) The proposed LEA IEPs may not include ESY services. (HT at 717-718; *but see* August IEP which does not reference ESY services.) The LEA’s IEPs and the [REDACTED] equivalent document, *e.g.*, (by implication) the November DPGA, contained the same goals and services. (HT at 721-724.) She opined that the LEA’s proposed IEPs would provide FAPE to the Child. (HT at 722-724; and 749.)

On cross examination, the LEA BCBA verified:

- 0 For the June 2021 IEP meeting she served as the supervisor position. (HT at 729-730.)
- 0 She serves as a supervisor for autism, intellectual disabilities and multiple disabilities programs in approximate 175 programs for the LEA. (HT at 730.)
- 0 She has never taught the Child. (HT at 731.)
- 0 The LEA's program, implying the programs referenced in LEA proposed IEPs, would provide a better education to the Child than provided by [REDACTED]. (HT at 734.)
- 0 After reviewing [REDACTED] documents, she was unaware of what services were provided by [REDACTED] to the Child. (HT at 736.)
- 0 The Child's current educational needs require small group or individualized service. (HT at 740.)
- 0 She is not a audiologist or occupational therapist. (*Id.*)
- 0 She did not believe a BCBA evaluation of the Child was required. (HT at 746.)
- 0 She opined that ABA services were not required to allow the Child to receive FAPE but testified: "[d]oes [the Child] require discreet trial instruction, no. Does he require the principles of ABA, yes. He requires reinforcement, he requires modeling, he requires time delay and things like that. So does he require the principles of ABA, yes. Does he require specific methodology under the umbrella of ABA, no." (HT at 746-747.)

On redirect, the LEA BCBA verified:

- 0 The proposed LEA's IEPs and as utilized by [REDACTED]S, the principles of ABA are implemented: "[REDACTED]S uses] "positive reinforcement, differential reinforcement as necessary, depending on the students needs. They use modeling for prompting hierarchy. If a student does require discreet trial, they would implement that. It really depends on the student's needs. But yes, the principles of ABA are in the classroom." (HT at 748-749.)

From a question from the Hearing Officer, the LEA BCBA defined discreet trial training:

Discreet trial training is a method of ABA where you are working on discreet skills. We often see it in a setting where it is one-to-one with the student, where the instructor sits across from the student and you are working on labeling, which is -- or tacking, which is labeling. Or you may be working on a one-to-one correspondence. But it is often errorless training to help a student acquire a skill. Working on -- you know, if you're working on math you may be working on a one-to-one correspondence. But it is often errorless training to help a student acquire a skill.

The LEA BCBA was found to be a credible witness and with professional insights on specific areas regarding the Child's needs and the access to the referenced IEPs, participation in

IEP meetings, observations at each school and her review of the educational record. Her demeanor presented as, for the most part, unbiased and professional with outstanding credentials involving special education, teaching and years of experience. Unfortunately, her testimony was discounted insofar as her opinions were, at times, general and, when specific, was not based on actual interaction with the Child or his current academic environment such as, *e.g.*, a teacher with daily interaction.⁴ Further, her testimony regarding her three observation appeared to be “cherry-picking” problems with opinions based on limited contact with the Child in an academic setting. To accept her opinions, a leap of faith would be required insofar as the programs referenced in the LEA’s IEPs are based on limited contact with [REDACTED] as well as limited “data” usually provided in the usual scenario where the LEA is actually providing services to the Child on a daily basis. (Such “data” usually consists of prompts and related interaction with a child to measure such child’s daily progress to IEP goals.) Her rejection of ABA “discreet trial training” presented as an attempt to explain the failure of the LEA to IDEA services during periods of time when the Child was accessing his curriculum remotely. Her testimony was some weight but discounted for reasons stated herein.

EXHIBITS

From the Parent/Child’s Exhibit Binder, the following Exhibits were introduced into evidence: 3; 4; 5 (as provided to the IEP team for consideration as such but limited insofar as the opinions contained there were not considered insofar the author was not called as an expert witness); 6 (as provided to the IEP team for consideration as such but limited insofar as the opinions contained there were not considered because the author was not called as an expert

⁴In past IDEA matters, the experts for the LEA (teachers, special educational providers, *etc.*, have been in the “trenches” daily, allowing such professionals superior interaction with the Child, insight, information and data that have elevated participation by such professionals’ credibility. In the instant matter, such was not the case regarding the Child’s placement at [REDACTED].

witness); 8 (as provided to the IEP team for consideration as such but limited insofar as the opinions contained there were not considered because the author was not called as an expert witness); 9; 10; 11; 14; 15; 18; 20; 21; 23; 25 (pages 1 and 2); 26; 28; 29; 30; 31; 32; 34; 36; 38; 39 (tape with book as guidance only); and, 40 (tape with transcripts as guidance only). The entire LEA Exhibit Binder was introduced into evidence by agreement. The proceeding was recorded by a court reporter. All introduced exhibits were considered but what, if any weight, were the subject of adjudication.

FACTUAL FINDINGS (By a Preponderance of the Evidence)

- 1 Due to his IDEA disability, the Child could not access curriculum for ESY services.
- 2 Due to his IDEA disability, the Child could not access curriculum for the school year 2020-2021.
- 3 The LEA's use of virtual learning denied the Child FAPE due to his IDEA disability.
- 4 The LEA failed to deliver IDEA services for the school year 2020-2021.
- 5 The Parent/Child's decision to use virtual services curriculum is not a basis for the LEA to not provide IDEA services.
- 6 The Parent/Child's decision to use virtual services was reasonably necessary, given the circumstances including the Child's negative behavior, IDEA disability designation, diagnosis and COVID issues.
- 7 The IEP team declined, without reasonable justification under IDEA, "one-on-one" service, during the COVID lock down, *i.e.*, during virtual IDEA service opportunity.
- 8 The Child's inability to access curriculum when delivered virtually was based on this IDEA disability and not otherwise, *i.e.*, parental negative or ineffectual involvement.
- 9 The Child lacked the capacity to wear a mask in a school setting, consistent with COVID protocols.
- 10 The Child was subject to infection by COVID in a school setting due to his inability to wear a mask.
- 11 Medicating the Child in the event of infection from COVID was a legitimate concern.

- 12 At all times, the Parent/Child worked in good faith with the LEA.
- 13 At all times, the Parent/Child worked in good faith to allow the Child to have access to his curriculum virtually.
- 14 The Parent/Child provided the necessary information, tests, expert opinions and cooperation, *etc.*, to the LEA and/or all IEP teams in a timely manner.
- 15 The LEA and/or IEP team were provided sufficient information (expert reports and data, *etc.*), to allow an IEP Team to allow IDEA decisions regarding th the necessity to implement “one-on-one” services at his home in violation of IDEA.
- 16 The LEA and/or IEP team disregarded sufficient information, expert reports and data, *etc.*, to provide “one-on-one” services at home for the Child in violation of IDEA.
- 17 The Child was diagnosed as described under the portion of the Neuropsychological Report entitled “Diagnostic Impressions” which is incorporated herein by reference as if set forth in full.
- 18 The Parent/Child correctly sought and obtained Independent Educational Evaluations in accordance with IDEA.
- 19 The Child did not master the goals as described by the January IEP.
- 20 The LEA denied effectuation of IDEA evaluations in violation of IDEA requirements, until the appearance of a lawyer for the Parent/Child.
- 21 The Parent/Child’s request for private placement was timely under IDEA.
- 22 Placement at █████S, by proposed IEPs or otherwise, would not have provided the Child FAPE.
- 23 Because of the COVID need for virtual learning and because the Child’s IDEA disability robbed him of the capacity to access his curriculum virtually in a manner consistent with IDEA requirements, the LEA should have provided one-on-one implementation of IEP goals at home during times when the Child received virtual access to curriculum by the LEA.
- 24 The Child evidenced “**a complicated and atypical child on the autistic spectrum**” supporting that this particular Child required LEA special attention beyond the scope of all IEPs (applied or proposed).
- 25 The Child is subject to an IEP and does not receive Section 504 services.

- 26 The Child requires ABA (Applied Behavioral Analysis) services in an academic setting due to his condition's being moderate to severe.
- 27 The LEA refrained from conducting evaluations timely in violation of IDEA requirements.
- 28 The LEA refrained from exploring and/or implementing one-on-one homebound services in violation of IDEA requirements.
- 29 The April IEP failed to identify the Child's specific needs to allow implementation of FAPE.
- 30 All referenced IEPs (applied or proposed) do not provide the Child FAPE.

- 31 The April IEP fails to provide FAPE to the Child.
- 32 The August IEP failed to identify the Child's specific needs to allow implementation of FAPE.
- 33 The Child, as referenced by IDEA, thrives at [REDACTED].
- 34 LEA witnesses' observations at [REDACTED] were found to be unpersuasive and, quite frankly, superficial; *i.e.*, cherry picking negative issues.
- 35 The August IEP failed to provide FAPE to the Child.
- 36 By implication, all LEA consented or proposed IEPs failed to identify the Child's specific needs to allow implementation of FAPE during the application of ESY services and thereafter.
- 37 [REDACTED] provides the Child FAPE.
- 38 The [REDACTED] environment does not allow the Child to interact with general education students.
- 39 [REDACTED] is found to be the least restrictive environment to the Child to receive FAPE.
- 40 The participation of the ABA Therapist in the evaluations did not improve or otherwise affect the Child's test scores.
- 41 The LEA's providing educational and ABA services per the IEP during ESY were unsuccessful, bordering on worthless.
- 42 The Parent/Child disagreed with the LEA evaluations and findings contained in LEA Exhibits 25, 26, 27, 28 and 29.
- 43 The LEA evaluations and findings contained in LEA Exhibits 25, 26, 27, 28 and 29 were not found to be pervasive.
- 44 The Parent/Child provided "partial consent" to the January IEP.
- 45 The January IEP does not provide the Child FAPE.
- 46 The June 2021 IEP (Unconsented) does not provide FAPE to the Child.
- 47 The election of the Parent/Child to decide that the Child attend ESY services in August 2020 was not a basis for the LEA to, in any way, deny the Child FAPE per his IEP.

- 48 The election of the of the Parent/Child to decide that the Child attend virtually for 2020-2021 school year was not a basis for the LEA to, in any way, deny the Child FAPE per his IEP.
- 49 The IEE Expert drafted the Independent Education Evaluation and Neuropsychological Evaluation.
- 50 The portion of the Neuropsychological Report entitled "Summary," "Diagnostic Impressions" and "Recommendations" are incorporated herein by reference as if set forth in full and found to true, accurate and very persuasive.
- 51 The LEA directed the IEE Expert not to include recommendations regarding IDEA services in the Independent Education Evaluation and, thereby, limited the scope of the scope of the effort regarding the process and conclusions of the Independent Education Evaluation in violation of IDEA requirements.
- 52 The November DPGA provides FAPE to the Child.
- 53 At [REDACTED], the Child was stabilized and made significant progress.
- 54 Any LEA experts' inability to observe the Child, meaningfully and daily, in an educational environment at [REDACTED] daily robbed such LEA expert of the capacity to provide meaningful opinions regarding the Child's IDEA current needs including, *inter alia*, access to the curriculum and IDEA requirements.
- 55 The Child is enrolled in [REDACTED]'s [REDACTED] Program.
- 56 The current placement at [REDACTED] provides FAPE to the Child including its reference to least restrictive placement.
- 57 The components of the [REDACTED] Program that are not included on the DPGA.
- 58 The [REDACTED] Program has a two-to-one ratio of professionals to student including daily "push-in" professionals speech pathology team; *i.e.*, "OT [occupational therapist], PT [physical therapist] team and social work team."
- 59 The LEA did not contact the [REDACTED] Administrator in January 2022.
- 60 [REDACTED] has Virginia students and can implement Virginia's SOL requirements including the Child.
- 61 [REDACTED] is the proper placement for the Child despite its lack of exposing the Child to general education students.

- 62 The Child's IDEA disability and given his circumstances since implementation of ESY services in August 2020, is severe requiring placement without exposure to general education students.
- 63 The travel time to [REDACTED] for the student is required to allow the Child access to services which are not available, at this time, from the LEA.
- 64 The portion of the Speech/Audio Evaluation entitled "Conclusions and Recommendations" is incorporated herein by reference as if set forth in full and found to be true, accurate and persuasive.
- 65 The Child's basic expressive ability is very basic--very low level.
- 66 The Child is not functioning currently, in anyway, like a preschool or kindergarten student when evaluated by the Speech Therapist.
- 67 The Child is functioning, currently, lower than grade level when evaluated by the Speech Therapist.
- 68 The LEA failed to provide persuasive evidence that placement at [REDACTED] S, per several IEPs and testimony, would provide FAPE to the Child.
- 69 The Parent/Child requested one-on-one teaching services from the LEA at each IEP meeting, approximately twelve meetings.⁵
- 70 The Child's age and current academic development require intensive IDEA services to allow IDEA success in the future.
- 71 The Child's age and current academic development require ABA therapy be used in the educational setting, to allow IDEA access and success in the future.
- 72 At this time, the LEA is not in a position to provide the Child FAPE.

⁵This finding is based on the undisputed and credible evidence of testimony, especially the Father's testimony and not on the review of Parent/Child's Exhibits 39 and 40--recordings of dozens of hours of IEP meeting. With one exception, Exhibit 39 and 40 was reviewed but **no weight** was given to these exhibits on the basis that the **evidential foundation was not introduced** to allow authentication of voices, times, dates, etc. Moreover, IEP meetings are a part of the IDEA process. These meetings are a "committee" meeting which requires candidness and cooperation. These efforts allow all participants to evolve a respective position regarding the issues discussed. Further, individual members of any IEP team may express opinions or even make statements which are important to further the effort of any IEP team. However, such statements (and even admissions) cannot be, in isolation, a subject to be reviewed under a judicial microscope without the introduction of further evidence. For example, a participant may make a bold or even provocative statement, to refocus the effort or draw attention to an issue, with such effort to redirect the members attention--candid participation. With the underlining necessity that IEP meetings require candidness and cooperation, any isolated statements cannot be a basis allow factual conclusions as implied or requested by both parties. (Note: in extreme circumstances and not related to the instant matter, a review of IEP meeting, with evidential groundwork introduced, may allow a hearing officer to address scenarios wherein a party shuts down the meeting for arguably illegitimate reasons as has been found in the past.) Review of such meetings was not productive because: no foundation introduced; no extreme circumstance was evident; and, stated above, the nature of IEP meetings. With that stated, and as to the exception, Exhibit 40 confirmed that IEP meetings were actually held consistent with testimony from both Parties.

- 73 No persuasive evidence was introduced to allow a finding that the LEA provided FAPE, *via* virtual services, for the Child for school year 2020-2021, beginning with the ESY service.
- 74 No persuasive evidence was introduced to allow a finding that the LEA provided FAPE, *via* virtual services, for the ESY services in August 2020.
- 75 No persuasive evidence was introduced to dispute the expert testimony of the IEE Expert.
- 76 No persuasive evidence was introduced to dispute the findings, *etc.*, of the Independent Education Evaluation.
- 77 No persuasive evidence was introduced regarding the that [REDACTED] did not provide FAPE to the Child.
- 78 No persuasive evidence was introduced the [REDACTED] did not provide the Child the least restrictive environment in accordance with IDEA.
- 79 No persuasive evidence was introduced to dispute the expert testimony of the Speech Pathologist.
- 80 No persuasive evidence was introduced to dispute the findings, *etc.*, of the Neuropsychological Report.
- 81 No persuasive evidence was introduced to dispute the findings, *etc.*, of the Speech/Audio Evaluation.
- 82 No evidence was introduced that the travel to and from [REDACTED] would be detrimental to the Child.
- 83 The Child has a negative reaction to LEA bus transportation.
- 84 The Parent/Child provided the LEA proper notice regarding private placement in accordance with the Regulations.
- 85 No IEP (proposed or applied) directed home bound services for the Child as referenced in 8VAC20-81013C2.
- 86 No evidence was introduced from a licensed physician or clinical psychologist regarding the necessity of home-bound services as referenced in 8VAC20-81013C3.

LEGAL ANALYSIS

Introduction

The is an extremely difficult matter. Unlike past IDEA matters, the daily interaction by LEAs with, *e.g.*, the collection of IDEA data, *etc.*, was not generated by LEA employees, but by the Child's private placement—[REDACTED]. As a result, the Child's current placement, with its experts, allow such data collection and support the Child's current placement. The information from [REDACTED] was undisputed. In other words, the LEA was "on the outside looking in" regarding current implementation of applicable IDEA services. (This is in contrast to previous IDEA matters before this Hearing Officer.) Based on the overwhelming evidence (including the expert testimony of the IEE Expert, the Neuro-psychological Report, the Independent Education Evaluation, the Occupational Therapy Evaluation, the testimony of the Speech Pathologist and the Speech Pathologist Report, evidence from [REDACTED] experts), all IEPs (applied or proposed) were found not to provide FAPE to the Child. (No persuasive evidence was introduced to refute the experts.) The Child's IDEA needs were simply not addressed by the LEA in violation of IDEA. Further, this effort failed to provide the Child access to his curriculum in violation of IDEA. As a result, the placement at [REDACTED] was an IDEA necessity. The efforts at [REDACTED] have provided the Child FAPE despite its not allowing the Child access to general education students. From all the evidence, COVID has undermined the LEA's efforts to provide FAPE to this Child with his unique IDEA needs; such efforts were unsuccessfully. Despite complete cooperation and candid participation from the Parents, the overwhelming evidence is that private place was required; indeed, by the overwhelming evidence, mandated. In short, the IEPs (actual or proposed) and LEA IDEA efforts to implement services virtually simply failed to address the actual IDEA needs of the Child and were inconsistent with FAPE.

Legal Overview

Major areas of the law are undisputed.

In Board of Education v. Rowley, 458 U.S. 176, 207, 102 S.Ct. 3034 (1982), the Supreme Court found that a disabled child is deprived of FAPE under either of two sets of circumstances: (1) 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 FAPE; or (2) if the IEP that was developed by the LEA is not reasonably calculated to enable the disabled child to receive an educational benefit. Further, the Supreme Court opined "[i]nsofar as a State is required to provide a handicapped child with [FAPE], we hold that this satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction." (Rowley, 458 U.S. at 200.)

In Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist., 580 U.S. ____ 15827, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated in Rowley, supra, for what constitutes an appropriate IEP under the IDEA: "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Endrew F., 137 S.Ct. at 999.... "The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.* "...Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. *Id.* . . . The IEP must aim to enable the child to make progress. . . . [T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement. *Id.* . . . A focus on the particular child is at the core of the IDEA. [Emphasis added.].... *Id.*, 137 S.Ct. at 1002. *See, also*, T.B., Jr. by & through T.B., Sr. v. Prince George's Cty. Bd. of Educ., 897 F.3d 566, 571 (4th Cir. 2018), *cert. denied sub nom.*, T.B., Jr. ex rel. T.B., Sr. v. Prince George's Cty. Bd. of Educ., 139 S. Ct. 1307, 203 L. Ed. 2d 415 (2019).

In this administrative due-process proceeding initiated by the Parent/Child, they have the burden of proof in this formal hearing. Schaffer, ex rel. Schaffer v. Weast, 126 S.Ct. 528 (2005). The standard of proof is a preponderance of the evidence. County Schl. Bd. of Henrico County v. Z.P., 399 F.3d 298, 304 (4th Cir. 2005).

In DeVries v. Fairfax County School Bd., 882 F.2d 876, 878 (4th Cir. 1989), the Court recognized the importance of mainstreaming when it opined that "[m]ainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with non-handicapped children is not only a laudable goal but is also a requirement of the Act." *In accord* Barnett v. Fairfax County School Bd., 927 F.2d 146, 153 (4th Cir. 1991).

In Arlington County School Board v. Smith, 230 F.Supp.2d 704, 715 (E.D. Va. 2002), the Court reversed the decision of the Hearing Officer on the basis that he made factual findings that were not supported by expert testimony:

In summary, the preponderance of the record evidence points persuasively to the conclusion that APS's proposed placement of Jane in the Interlude program would provide her with a FAPE because it was "reasonably calculated to enable [her] to receive educational benefit." See Rowley, 458 U.S. at 206-07, 102 S. Ct. 3034. The hearing officer's contrary conclusion that Jane would not benefit from the Interlude program finds no support in the record, as no expert testified to this effect, and Jane had not yet fully experienced the program. It is apparent that the hearing officer succumbed to the temptation, which exists for judges and hearing officers alike in IDEA cases, to make his own independent judgment as to the best placement for Jane, instead of relying on the record evidence presented in the hearing. This temptation stems from the fact that judges and hearing officers are typically parents who are in the habit of making such judgments. Yet, the Supreme Court and Fourth Circuit have admonished hearing officers and reviewing courts alike when they substitute personal opinions or judgments as to proper educational policy, and best placements for the disabled student, in the place of the local educators' expert judgments. See Rowley, 458 U.S. at 206, 102 S. Ct. 3034; Hartmann v. Loudoun County Bd. Of Educ., 118 F.3d 996, 1000-1001. These courts have also reminded hearing officers and reviewing courts that school districts are not required to provide a disabled child with the best possible education. See Rowley, 458 U.S. at 192, 102 S. Ct. 3034. The result reached here is properly deferential to Jane's educators' unanimous determination that the Interlude placement was appropriate. See also Hartmann, 118 F.3d at 1001 (holding that "local educators deserve latitude in determining the [IEP] most appropriate for a disabled child") [Emphasis added.]

A review of Smith is important to emphasize the restrictions, constraints or limitations placed on hearing officers when deciding IDEA cases in Virginia. Although a child is involved, current law prevents a hearing officer's reviewing evidence as a Virginia juvenile district court judge must review in a custody matter with the "in the best interests of the child" standard as described in §20-124.3 of the Virginia Code. Instead, hearing officers must respect the limitations that evidence, especially expert testimony, determine the outcome in IDEA cases as well as respect the

Federal directive that IEPs are reviewed with the standard established by Rowley and its progeny. The difference between the standard established by the "best interests of the child" and the standard established by Rowley (and its progeny) can never be reconciled. Quite frankly, this difference causes a great deal of litigation, cost and heartache. Educational determinations by LEA experts involved in the Child's education are entitled to deference. A.B. v. Lawson, 354 F.3d 315 at 328 (4th Cir 2004); Hartmann v. Loudoun County Board of Education, 118 F.3d 996, 1001 (4th Cir. 1997). As a result, a review of the need of expert testimony is required. In the instant matter, the Parent/Child provided very persuasive expert testimony—the IEE Expert and Audio/Speech Expert provided persuasive expert opinion. Although not designated as experts in "special education," these outstanding experts provided necessary opinions which have, in the past, been utilized by IEP teams. Their respective opinions provides insights which, quite frankly, cannot be ignored in regard to the Child's IDEA needs, LEA IEPs and [REDACTED]' equivalent to an IEP (DPGA's) and services rendered. Moreover, the LEA's evaluations after placement at [REDACTED] was found unpersuasive as opposed to the testimony of employees from [REDACTED] regarding daily interaction, environment, *etc.* Adopting such LEA testimony would require a "leap of faith" not warranted. See Reyes v. New York City Dep't of Educ., 63 IDELR 244 (2d Cir. 2014).

In Sumter County Sch. Dist. 17 v. Heffernan, 642 F.3d 478, 484 (4th Cir. 2011), the Court addressed situations where a local school board failed to implement, in material part, an IEP by opining:

Given the relatively limited scope of a state's obligations under the IDEA, we agree with the District that the failure to perfectly execute an IEP does not necessarily amount to the denial of a free, appropriate public education. However, as other courts have recognized, the failure to implement a material or significant portion of the IEP can amount to a denial of FAPE. See Van Duyn ex rel. Van Duyn v. Baker Sch. Dist., 5J, 502 F.3d 811, 822 (9th Cir. 2007) ("[A] material failure to implement an IEP violates the IDEA."); Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 (8th Cir. 2003) ("[W]e cannot conclude that an IEP is reasonably calculated to provide a free appropriate public education if there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit."); Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000) ("[A] party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP."). Accordingly, we conclude that a material failure to implement an IEP, or, put another way, a failure to implement a material portion of an IEP, violates the IDEA. [Emphasis added.]

Similarly, in E. L. v. Chapel Hill-Carrboro Bd. of Educ., 773 F.3d 509, 517 (4th Cir. 2014), the Court confirmed that it afforded "great deference to the judgment of education professionals in

implementing the IDEA." As long as an individualized education program provides the basic floor of opportunity for a special needs child, a court should not attempt to resolve disagreements over methodology. In accord, O.S. v. Fairfax County Sch. Bd., 804 F.3d 354, 360 (4th Cir. 2015). Reviews of Heffernan and E.L. are important to show that the Parent was required to prove, by a preponderance of the evidence, that the LEA denied the Child FAPE by failing to implement material portions of the IEP as amended. In other words, a court, a hearing officer or a parent cannot micro-manage the implementation of an IEP, deferring to the expertise of LEA professionals. In addition, a court or hearing officer is required to give deference to the judgment of school board witnesses who are professional educators. Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, No. 15-827, 137 S. Ct. 988 (2017); Springer by Springer v. Fairfax Cnty. Sch. Bd., 134 F.3d 659, 663 (4th Cir. 1998) ("[C]ourts are required to give deference to the state and local education authorities whose primary duty is to administer the IDEA."); M.M. by DM and EM v. Sch. Dist. of Greenville Cnty., 303 F.3d 523, 531 (4th Cir. 2002) ("The court is not, however, to substitute its own notions of sound educational policy for those of local school authorities." *Citing Hartmann v. Loudoun County Bd. Of Educ.*, 118 F.3d 996, 999 (4th Cir. 1997)). The IDEA requires "great deference to the views of the school system rather than those of even the most well-meaning parent." A.B. v. Lawson, 354 F.3d 315 (4th Cir. 2004). This "great deference" is absolutely required in most cases. However, the instant matter is different from the cited cases. All involved are professional educators as referenced by the IDEA. After enrollment with [REDACTED], the LEA experts did not provide daily IDEA services to the Child with its necessary data collection, input, *etc.* Instead, the Parent/Child *via* [REDACTED]'s involvement, have this insight or opportunity and, as a result, the deference is neutralized, rebutted or, perhaps, belongs to the Parent/Child and [REDACTED]. Daily involvement with its interaction is the difference. Otherwise, LEA experts would always be given such judicial deference without such daily

involvement including data collection. The testimony provided by the experts for the Parent/Child was found very persuasive.

In R.F. v. Cecil County Pub. Sch., 919 F.3d 237 (4th Cir. 2019), *cert. denied* 140 S. Ct. 157 (Oct. 7, 2019), the Court found that "...and all must answer each of the following in the affirmative to find that a procedural violation of the parental rights provisions of the IDEA constitutes a violation of the IDEA: (1) whether the plaintiffs 'alleged a procedural violation, (2) whether that violation significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child, and (3) whether the child did not receive a FAPE as a result."

In regard to private placement matters, in A.B. ex rel. D.B. v. Lawson, 354 F.3d 315, 326-27 (4th Cir. 2004), a child's parent argued that her son required private placement because he "was not fulfilling his potential" in the public school system. The court rejected that argument, holding that "nowhere does IDEA require that a school system 'maximize' a student's potential." (*Id.* at 327 (*quoting* Rowley, 458 U.S. at 189)). To provide FAPE, an LEA must simply "provide personalized instruction with sufficient support services to enable the handicapped child to benefit educationally from that instruction." Hessler ex rel. Britt v. State Bd. of Educ., 700 F.2d 134, 139 (4th Cir. 1983). Only if an LEA cannot provide FAPE to a child with a disability does the IDEA provide for placement in private school at public expense. Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985). *See also* R.H. v. Plano Indep. Sch. Dist., 607 F.3d 1003, 1014-15 (5th Cir. 2010) ("If it appears that the district is not in a position to provide [FAPE] in the public school setting, then (and only then) must it place the child (at public expense) in a private school that can provide those services." (*quoting* W.S. ex rel. C.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 148 (S.D.N.Y. 2006))). *See also* Lawson, 354 F.3d at 320 wherein the Court found that "[t]he parent may recover if (1) the proposed IEP was inadequate to offer the child a FAPE

and (2) the private education services [...] were appropriate to the child's needs." In addition, Virginia Regulation 8VAC20-81-150B3 describes the analysis regarding private placement. In summary, (1) did the IEP provide FAPE and, if not, (2) does the specific private placement provide FAPE with consideration to the least restrictive environment. FTS is, at least, appropriate for the Child's needs given consideration to the limitations regarding least restrictive environment, and provides FAPE to the Child.

Legal Conclusion

Overall, the LEA failed to provide FAPE. Specifically, the IEPs applied or proposed did not provide FAPE. (*See* the expert testimony from the IEE Expert and Audio/Speech Expert, the Neuropsychological Report and Speech/Audio Report.) To complicate matters, the use Child's access to curriculum was undermined by the need for virtual learning due to COVID. [REDACTED] provides, at least, FAPE to the Child. Moreover, in regard to least restrictive access, the Child's severe IDEA needs, negative reaction to bus transportation, and his diagnosis, testimony from Parent/Child's experts and current circumstances support, indeed requires, that [REDACTED], without its access to general education students, remain the Child's placement as the least restrictive placement consistent with IDEA.

Specific Issues

1. Whether the LEA failed to identify the Child's Special Education Needs in Accordance with IDEA for School Year 2020-2021?

For reasons stated herein, the overwhelming evidence is that the LEA failed to identify the Child's IDEA needs to generate a viable IDEA regarding all IEPs referenced herein. With the burden of proof, the Parent/Child established that the opinions and recommendations from multiple Parent/Child experts that the LEA failed to recognize, utilize and/or implement necessary IDEA requirements to allow the Child to receive FAPE. With that stated, the Mother testified that the IEP team did not correctly identify the Child's IDEA disability or disabilities. This argument is flawed insofar as the IEP team did classify the Child with an IDEA disability and eligible for IDEA services. No further IDEA designation is required. *See, e.g., Letter to Anonymous*, 48 IDELR 16 (OSEP 2006) (Child's identified needs, not the child's disability category, determine the services that must be provided to her); *Heather S. v. State of Wis.*, 125 F.3d 1045, 1055 (7th Cir. 1997) (IDEA not concerned with labels, but with whether a student is receiving a FAPE); *Lauren C. by & through Tracey K. v. Lewisville Indep. Sch. Dist.*, 904 F.3d 363, 377 (5th Cir. 2018) (IDEA promises: a FAPE: regardless of child's diagnosis.) The Virginia

Regulations explicitly provide that children are not required to be identified by their disabilities on IEPs or on communications to parents. *See* 8 VAC 20-81-80(E). Regardless of the disability classification for special education eligibility relied upon by the LEA, the LEA must ensure that IEP special education and related services are tailored to the unique needs of each child. Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE 1, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017). To be clear, the experts from the Parent/Child provided credible and very persuasive evidence to allow this conclusion. In contrast, the LEA appeared to be focused on issues outside of the Child's IDEA requirements as opposed to effectuating his IDEA needs of the Child, a consequence of the COVID reality.

2. Whether the LEA failed to identify the Child's Special Education Needs in accordance with IDEA for school year 2021-2022?

See Response to Issue 1 above. To be clear, the experts from the Parent/Child provided credible and persuasive evidence to allow this conclusion. In contrast, the LEA appeared to be focused on issues outside of the Child's IDEA requirements as opposed to effectuating his IDEA needs of the Child, a consequence of the COVID reality. To be clear, the experts from the Parent/Child provided credible and persuasive evidence to allow this conclusion. In contrast, the LEA appeared to be focused on issues outside of the Child's IDEA requirements as opposed to effectuating his IDEA needs of the Child, a consequence of the COVID reality.

3. Whether the LEA failed to identify the Child's Special Education Needs in accordance with IDEA for school year 2022-2023?

See Response to Issue 1 above. To be clear, the experts from the Parent/Child provided credible and persuasive evidence to allow this conclusion. In contrast, the LEA appeared to be focused on issues outside of the Child's IDEA requirements as opposed to effectuating his IDEA needs of the Child, a consequence of the COVID reality. To be clear, the experts from the Parent/Child provided credible and persuasive evidence to allow this conclusion. In contrast, the LEA appeared to be focused on issues outside of the Child's IDEA requirements as opposed to effectuating his IDEA needs of the Child, a consequence of the COVID reality.

4. Whether the LEA provided FAPE during school year 2020-2021?

See Response to Issue 1 above. In addition and for reasons stated herein, the referenced applicable IEP was found deficient under IDEA. As a result, implementation of such IEP's mandates were deficient under IDEA requirements. To complicate matters, the effort by the LEA to provide the Child IDEA services virtually violated IDEA requirements. Overall, the evidence revealed that the Child was denied FAPE. To be clear, the experts from the Parent/Child provided credible and persuasive evidence to allow this conclusion. In contrast, the LEA appeared to be focused on issues outside of the Child's IDEA requirements as opposed to effectuating his IDEA needs of the Child, a consequence of the COVID reality.

5. Whether the LEA provided FAPE during school year 2021-2022?

See Response to Issue 1 above. In addition and for reasons stated herein, the referenced applicable IEP (or proposed) were found deficient under IDEA. As a result, implementation of such IEP's mandates were deficient under IDEA requirements. To complicate matters, the effort

by the LEA to provide the Child IDEA services virtually violated IDEA requirements. Overall, the evidence revealed that the Child was denied FAPE before enrollment at FTS.

6. Whether the LEA provided FAPE during school year 2022-2023?

See Response to Issue 1 above. In addition and for reasons stated herein, the referenced applicable IEP was found deficient under IDEA. As a result, implementation of such IEP's mandates were deficient under IDEA requirements. Overall, the evidence revealed that the Child was denied FAPE before enrollment at FTS. To be clear, the experts from the Parent/Child provided credible and very persuasive evidence to allow this conclusion. In contrast, the LEA appeared to be focused on issues outside of the Child's IDEA requirements as opposed to effectuating his IDEA needs of the Child, a consequence of the COVID reality.

7. Whether the LEA provided the Child with an appropriate placement in accordance with IDEA for school year 2020-2021?

See Response to Issue 1 above. In addition and for reasons stated herein, the referenced applicable (or proposed) IEP was found deficient under IDEA. As a result, implementation of such IEP's mandates were deficient under IDEA requirements. To complicate matters, the effort by the LEA to provide the Child IDEA services virtually violated IDEA requirements. Overall, the evidence revealed that the Child was denied FAPE before enrollment at [REDACTED]. To be clear, the experts from the Parent/Child provided credible and very persuasive evidence to allow this conclusion. In contrast, the LEA appeared to be focused on issues outside of the Child's IDEA requirements as opposed to effectuating his IDEA needs of the Child, a consequence of the COVID reality.

8. Whether the LEA provided the Child with an appropriate placement in accordance with IDEA for school year 2021-2022?

See Response to Issue 1 above. In addition and for reasons stated herein, the referenced applicable or proposed IEPs were found deficient under IDEA. As a result, implementation of

such IEP's mandates were deficient under IDEA requirements. To complicate matters, the effort by the LEA to provide the Child IDEA services virtually violated IDEA requirements. Overall, the evidence revealed that the Child was denied FAPE before enrollment at [REDACTED]. To be clear, the experts from the Parent/Child provided credible and very persuasive evidence to allow this conclusion. In contrast, the LEA appeared to be focused on issues outside of the Child's IDEA requirements as opposed to effectuating his IDEA needs of the Child, a consequence of the COVID reality.

9. Whether the LEA provided the Child with an appropriate placement in accordance with IDEA for school year 2022-2023?

See Response to Issue 1 above. In addition and for reasons stated herein, the referenced applicable or proposed IEPs were found deficient under IDEA. As a result, implementation of such IEP's mandates were deficient under IDEA requirements. To complicate matters, the effort by the LEA to provide the Child IDEA services virtually violated IDEA requirements. Overall, the evidence revealed that the Child was denied FAPE before enrollment at [REDACTED]. To be clear, the experts from the Parent/Child provided credible and persuasive evidence to allow this conclusion. In contrast, the LEA appeared to be focused on issues outside of the Child's IDEA requirements as opposed to effectuating his IDEA needs of the Child, a consequence of the COVID reality.

10. For 2021-2022 school year, whether the Parent Child should be reimbursed for costs arising from private placement?

See Response to Issue 1 above. In addition and for reasons stated herein, the referenced applicable IEP was found deficient under IDEA. As a result, implementation of such IEP's mandates were deficient under IDEA requirements. Similarly, all proposed IEPs are deficient under IDEA. To complicate matters, the effort by the LEA to provide the Child IDEA services virtually violated IDEA requirements. Overall, the evidence revealed that the Child was denied

FAPE before enrollment at [REDACTED]. [REDACTED] is found to be an IDEA appropriate placement for reasons stated herein. Moreover, given the Child's IDEA needs and limitations, [REDACTED] if found to be the least restrictive environment to all the Child to receive FAPE. To be clear, the experts from the Parent/Child provided credible and persuasive evidence to allow this conclusion. In contrast, the LEA appeared to be focused on issues outside of the Child's IDEA requirements as opposed to effectuating his IDEA needs of the Child, a consequence of the COVID reality.

11. Whether the Parent/Child should be reimbursed for costs for private evaluations described in the Due Process Request?

For reasons stated herein, the cost for private evaluations should be reimbursed. The overwhelming evidence is that the LEA lacked the necessary information (expert, daily data, *etc.*) to allow the applicable (consented or proposed) IEPs to address and allow implementation of IDEA services. With the burden of proof, the Parent/Child established that the opinions and recommendations from multiple Parent/Child experts (including [REDACTED] experts) that the LEA failed to recognize, utilize and/or implement necessary IDEA requirements to allow the Child to receive FAPE. In addition, the LEA rejected IDEA evaluations until the Parent/Child retained counsel without justification or excuse. This circumstance implied, given the Child's IDEA extreme needs, that the LEA was overwhelmed by the COVID reality and, perhaps, simply want to avoid controversy until the crisis ended; *i.e.*, the LEA did not want to "open the flood gates" to allow all IDEA recipients to necessary evaluations, services, *etc.* The resulting IEEs revealed flaws which, in regard to IEP formulation, revealed fundamental flaws with IEPs and implementation. This was confirmed by the evaluations and Parent/Child experts. As a result, the Parent/Child should be reimbursed for expenses for the Neuropsychological Report and Speech/Audio Evaluation. To be clear, the experts from the Parent/Child provided credible and persuasive evidence to allow this conclusion. In contrast, the LEA appeared to be focused on

issues outside of the Child's IDEA requirements as opposed to effectuating his IDEA needs of the Child, a consequence of the COVID reality.

12. Whether the issues raised by the Due Process Request are barred, in whole or in part, by the statute of limitations?

No argument or evidence was introduced or decided on this issue and, therefore, the claims discussed herein are not barred by the statute of limitations.

13. Whether the IEP team, assembled for the IEP meeting conducted on June 6, 2022, was consistent with IDEA and, if not, was the Child denied FAPE as a result?

On this issue, the Parent/Child introduced evidence and argument that [REDACTED] personnel should have attended the IEP meetings after the Child's enrollment at [REDACTED]. The implication was that the burden to arrange for [REDACTED] participation was on the LEA. Under 8VAC20-81-110C1f, either party may arrange, in their respective "discretion" to allow "other individuals who have knowledge or special expertise regarding the child." All parties may, in discretion, allow relevant persons to attend any IEP meeting. Consequently, based on the evidence, the assembled IEP team was sufficient and in accordance with IDEA.

14. Whether the IEP team, assembled for the IEP meeting conducted on August 18, 2022, was consistent with IDEA and, if not, was the Child denied FAPE as a result?

On this issue, the Parent/Child introduced evidence and argument that [REDACTED] personnel should have attended the IEP meetings after the Child's enrollment at [REDACTED]. The implication was that the burden to arrange for [REDACTED] participation was on the LEA. Under 8VAC20-81-110C1f, either party may arrange, in their respective "discretion" to allow "other individuals who have knowledge or special expertise regarding the child." All parties may, in discretion, allow relevant persons to attend any IEP meeting. With that stated, [REDACTED] did provide some information. Consequently, based on the evidence, the assembled IEP team was sufficient and in accordance with IDEA.

RELIEF GRANTED:

The following relief is granted to the Parent/Child:

1. Reimbursement for enrollment at [REDACTED].
2. Reimbursement for all private evaluations: Neuropsychological Report and Speech/Audio Evaluation.

CONCLUSION

For reasons stated herein, the Parent/Child is the prevailing party. All involved are commended for their respective professional conduct and effort. Overall, the persuasive evidence was that the applicable or proposed IEPs failed to provide the Child FAPE for reasons stated herein. In addition, the LEA, during COVID appeared overwhelmed with IDEA requirements for all IDEA students and, in the instant matter, presented with a “hold the line” response regarding the Child, with all due respect. For example, allowing the cost for at home, one-on-one services, for the Child, may have been perceived by the LEA to “open the flood gates” to all IDEA students under COVID restrictions, as referenced in the testimony. Although all IDEA students “are on the same boat” (as referenced in the transcript), such justification does not allow denial of IDEA services in the instant matter. With all due respect to the LEA, this instant matter involves a particular child with severe IDEA issues which required the LEA to make an appropriate, indeed timely, IDEA response to provide FAPE. Such was absolutely denied. As a result, private placement at [REDACTED] was mandated to stabilize and to allow the Child to receive FAPE.

APPEAL, IMPLEMENTATION AND PREVAILING PARTY NOTIFICATIONS

1. **Appeal.** Pursuant to 8VAC 21-81-T and §22.214 D of the Virginia Code, this decision is final and binding unless either party appeals in a federal district court within 90 days of the date of this decision, or in a state court within 180 days of the date of this decision.
2. **Implementation.** The LEA shall develop and submit an implementation plan within 45 calendar days of the rendering of a decision.
3. **Prevailing Party.** The Parent/Child is deemed the prevailing party.

Hearing Officer

Date

TIMELINES:

Filing Date:	August 23, 2022
Date Hearing Officer Appointed:	August 29, 2022
Resolution Meeting Scheduled:	September 6, 2022
Date Resolution actually conducted:	September 6, 2022
Administrative Hearing:	September 2, 2022
Prehearing:	September 27, 2022
Last day of 30-day Resolution Period:	September 22, 2022
First day of 45-day period for hearing:	September 23, 2022
Due Process Hearing:	October 11-14, 2022
Decision date:	December 9, 2022

CERTIFICATE OF SERVICE

I certify that on this 9th of December 2022, a true and accurate copy of this pleading was delivered *via* First-Class mail, to:

[REDACTED] and [REDACTED]
[REDACTED], Virginia [REDACTED]
Parent/Child

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CONFIDENTIAL APPENDIX A: LEGEND
(In Order of Appearance)

<u>Name</u>	<u>Reference</u>
[REDACTED] and [REDACTED]	Parents
[REDACTED]	Mother
[REDACTED]	Father
[REDACTED]	Child
LEA	[REDACTED] Public
[REDACTED] School	Schools
Special Education Supervisor	[REDACTED] S
January IEP	LEA Exhibit 40
Occupational Therapy Evaluation	Parent/Child Exhibit 8
Independent Education Evaluation	Parent/Child Exhibit 9
Neuropsychological Report	Parent/Child Exhibit 10
Speech/Audio Evaluation	Parent/Child Exhibit 11
Audio/Speech Expert	Dr. [REDACTED]
IEE Expert	Dr. [REDACTED]
[REDACTED] School	[REDACTED]
April IEP	LEA Exhibit 59
August IEP	LEA Exhibit 70
November DPGA	Parent/Child Exhibit 18
[REDACTED] Behavior Program Specialist	[REDACTED]
July Prior Written Notice	LEA Exhibit 10
[REDACTED] Administrator	[REDACTED]
ABA Specialist	[REDACTED]
[REDACTED] School	[REDACTED] S
February 2021 FBA	LEA Exhibit 36
[REDACTED] Special Education Teacher	[REDACTED]
April 2022 IEP Meeting	IEP Meeting on April 22, 2022
August 2022 IEP Meeting	IEP Meeting on August 18, 2022
Speech Pathologist	Dr. [REDACTED]
Speech Pathologist Report	Parent/Child Exhibit 11
June 2021 IEP (Unconsented)	LEA Exhibit 48
[REDACTED]	Autism Consulting Teacher
[REDACTED]	Special Education Supervisor
[REDACTED]	LEA BCBA

