VIRGINIA DEPARTMENT OF EDUCATION

DUE PROCESS HEARING

IN RE:

VDOE NO: 23-023

DECISION

I. INTRODUCTION:

This request for Due Process Hearing was initiated against the School Board ("School Board" or "PS") under the Individuals with Disabilities Education Act, 20 U.S.C. Sec. 1400, et seq. ("IDEA") by counsel on behalf of ("Parents) regarding (" ." or "Student"). Counsel for the Parents identified the following issues to be determined from the Amended Due Process Hearing Request ("Amended Request") filed on October 10, 2022: (1) Parents request that the Hearing Officer declare them the prevailing party in this matter; and (2) Parents request that the Hearing Officer award compensatory education and/or compensatory services for the period when PS, and via its agent, denied FAPE by not providing with in-person services which they determine to be 405.55 hours of special education services during the 2020-2021 school year and should receive the same number of hours as compensatory education; and (3) Parents request that the Hearing Officer award compensatory education and/or compensatory services to remedy the regression suffered by resulting from the denial of in-person services during the 2020-2021 school year. The services required to remedy the regression and to put in the position that would have been in but for the denial of FAPE is not known to Parents at this time. To the extent known and available to Parents, they currently determine that . is owed at least 949.05 hours for compensatory services to remedy the regression resulting from the denial of FAPE; and (4) Parents ask that the Hearing Officer order that the compensatory services be delivered by qualified private providers in a nature and frequency based on 's demonstrated' and ongoing needs. Parents further ask that the Hearing Officer direct amount is calculated by using an estimated fair market rate of \$100.00 per hour. Parents reserve the right to modify the rate at the due process hearing. The imposition of a trust fund for prospective compensation education is within the Hearing Officer's equitable powers to award compensatory education. It is appropriate to require that funds be placed in escrow to ensure that the Parents are not required to personally fund the required compensatory education and seek reimbursement; and (5) Parents ask that the Hearing Officer require that PS, and reimburse Parents for the transportation costs reasonably incurred to obtain the compensatory education services from private providers; and (6) Parents request that the Hearing Officer require impose the IRS mileage rate if the Hearing Officer orders PS, and to reimburse the

Parents for transportation costs; and (7) Parents request that the Hearing officer award them \$53,197.00 as reimbursement for private occupational therapy, speech language therapy, and behavioral services, and/or other private educational support services incurred expenses resulting from or relating to the denial of FAPE during the 2020-2021 school year; and (8) Parents request that the Hearing Officer award any additional relief that she deems appropriate and equitable. A five day hearing began on January 17, 2023. At the hearing the Parents called 8 witnesses and introduced 148 exhibits but the Parents did not meet their burden of proof in this matter. The expert witnesses testified credibly, but the Parents were unable to present any expert testimony in support of their case. The Parents were unable to show that the second in the suppopriate or that was unable to make appropriate progress during the 2020-2021 and 2021-2022 school years. The Hearing Officer noted the overwhelming testimony from the semployees (many of who qualified as expert witnesses) regarding the appropriateness of special education service also showed that while the Parents unilaterally elected to hire private special education service providers during the 2020-2021 school year though special education service providers during the 2020-2021 school year though special education service providers during the 2020-2021 school year though special education service providers during the 2020-2021 school year though special education service providers during the 2020-2021 school year though special education service providers during the 2020-2021 school year though special education service providers during the 2020-2021 school year though special education service providers during the 2020-2021 school year though special education service providers during the 2020-2021 school year though special education service providers during the 2020-2021 school year though special education service providers during the 2020-2021 school year though special

II. PROCEDURAL HISTORY

On September 7, 2022, PS received the Parents' due process request; on September 8, 2022, the Hearing Officer and Evaluator were assigned to the request; on September 8, 2022, the resolution period began; on September 12, 2022, the Hearing Officer received the due process request from the school division and notified the Parents of the Hearing Officer's appointment; also, on this date, the Hearing Officer notified the parties of the date, time and location of the due process hearing; on September 18, 2022, PS filed an Objection to Sufficiency Motion and Answer to the Request; on September 19, 2022, Parents filed the Petition to Disqualify the Hearing Officer which she rejected and denied that the Parents had any grounds upon which to seek her disqualification, the Hearing Officer having denied harboring any bias, preconception of the outcome or conflicting relationship giving rise to the Parents' disqualification motion which the Parents did not pursue; on September 19, 2022, the First Conference occurred; on September 19, 2022, Parents requested a subpoena duces tecum to PS; on September 19, 2022, requested subpoenas duces tecum to the Parents, the Student's medical provider and psychological therapy provider; on September 21, 2022, the Parents filed objections to three subpoenas duces tecum issued to the Parents, to the Student's medical provider and to two psychological therapy providers; on September 21, 2022, PS filed remarks on the Petition to Disqualify; on September 22, 2022, PS filed objections to the Parents' requested subpoena duces tecum to PS; on September 22, 2022, a resolution meeting between the parties and the school occurred; on September 22, 2022, the Hearing Officer again responded to the Petition to Disqualify which she again denied and the Hearing Officer did not recuse in this matter; on September 23, 2022, the Hearing Officer responded affirmatively to PS' Insufficiency Request and required that the Parents amend and refile the matter by October 10, 2022, the Hearing Officer having requested

Per The School Services Agreement dated August 10, 1978, the of services as separate political entity from PS. The services School Board owns the buildings and operates the school buildings. Thus the services is not a party to this due process request per the IDEA. SB 73.

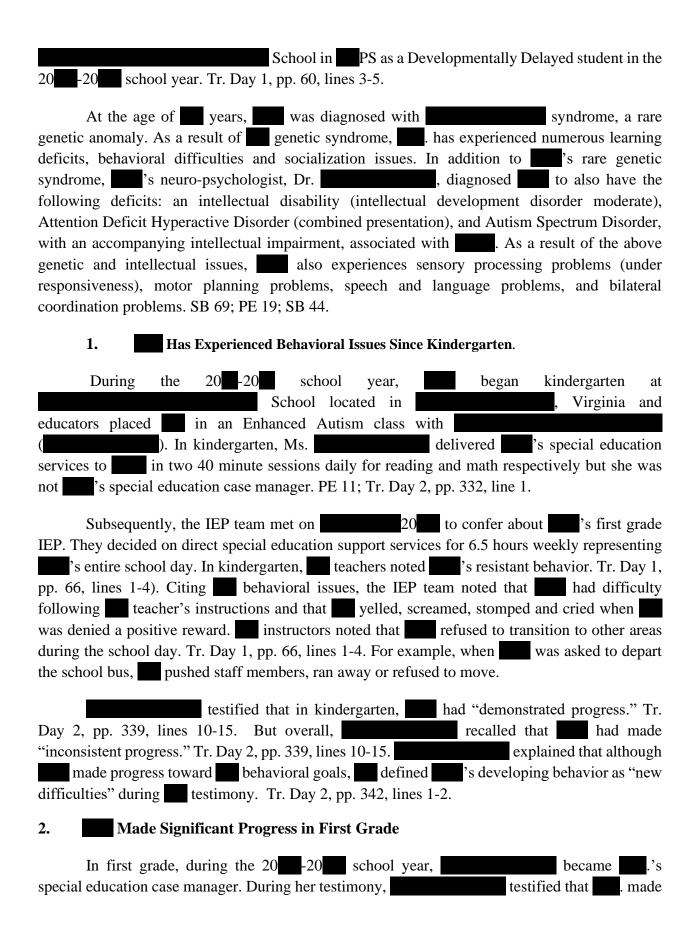
that the Parents amend the request; the Hearing Officer reset the IDEA mandatory timeline when the Parents amended the request; on October 10, 2022, the Parents also requested that the Hearing Officer Reconsider the prior Insufficiency Ruling but the Hearing Officer did not change the prior Order; on October 10, 2022, the Parents filed an amended request and restarted the IDEA timeline and the resolution period recommenced, both counsel having conferred regarding an agreeable resolution date; on October 20, 2022, PS filed the Objection to Sufficiency Of, Motion to Dismiss and Answer to the Amended Due Process Request; on October 24, 2022, the Parents responded to PS' Second Objection to Sufficiency; on October 26, 2022, the Hearing Officer responded affirmatively to PS' Second Objection to Sufficiency but the IDEA timeline was uninterrupted; on October 27, 2022, the Hearing Officer filed the Second Report and Scheduling Order; on October 28, 2022, the Second Conference occurred; counsel for both parties argued for and against PS's Motion to Dismiss; the Hearing Officer elected to reserve ruling upon the School Division's Motion for Dismissal until after the Hearing Officer has heard the evidence which would be fully presented at the due process hearing; also on this date, the Hearing Officer granted PS's motion to limit the scope of the Parents' subpoena duces tecum to November 16, 2022, the Parents requested, and were granted, an amendment permitting a time extension, in the child's best interest, and permitted the parents to receive and review documents returned pursuant to the Parents' subpoena duces tecum; the parties agreed earlier that on November 21, 2022, the parties were to exchange their Witness Lists and Exhibits electronically but this date was cancelled at the Parents' request; the parties agreed earlier that on November 29th & 30th, 2022 and on December 1 & 2, 2022, the Due Process Hearing was set to occur virtually but the Due Process Hearing was cancelled and a continuance was granted to the Parents on the Parents' motion made on November 16, 2022 in the Student's best interest; on November 22, 2022, the Third Conference occurred to discuss the Parents' subpoena duces tecum to the Hearing Officer limited the subpoena duces tecum; the parties agreed at an earlier date to conclude this case on December 24, 2022 but the Hearing Officer extended the case conclusion date on the Parents' motion and the case conclusion date was extended to permit the above time extension for the Parents to review documents sought by the Parents' subpoena duces tecum; on January 17, 18, 19 & 20, 26 & 30, 2023, the Hearing Officer virtually conducted the Due Process Hearing; the parties had formerly agreed at an earlier date to complete this case on February 3, 2023 which was the deadline for the written decision to be submitted to the parties but both parties jointly requested, and were granted, by separate order entered on January 31, 2023, a time extension for the preparation and delivery of the transcripts, for the Hearing Officer's transcript review, and for the Hearing Officer to draft and deliver the final decision in this case; and on February 21, 2023, the Hearing Officer emailed the written decision, including appeal rights, to the parties which will be followed by a hard copy delivery of the written decision to each party, and the Hearing Officer's return of the exhibit books, containing Parents' Exhibits, PE 1-148 and School Board Exhibits, SB 1-151, to PS.

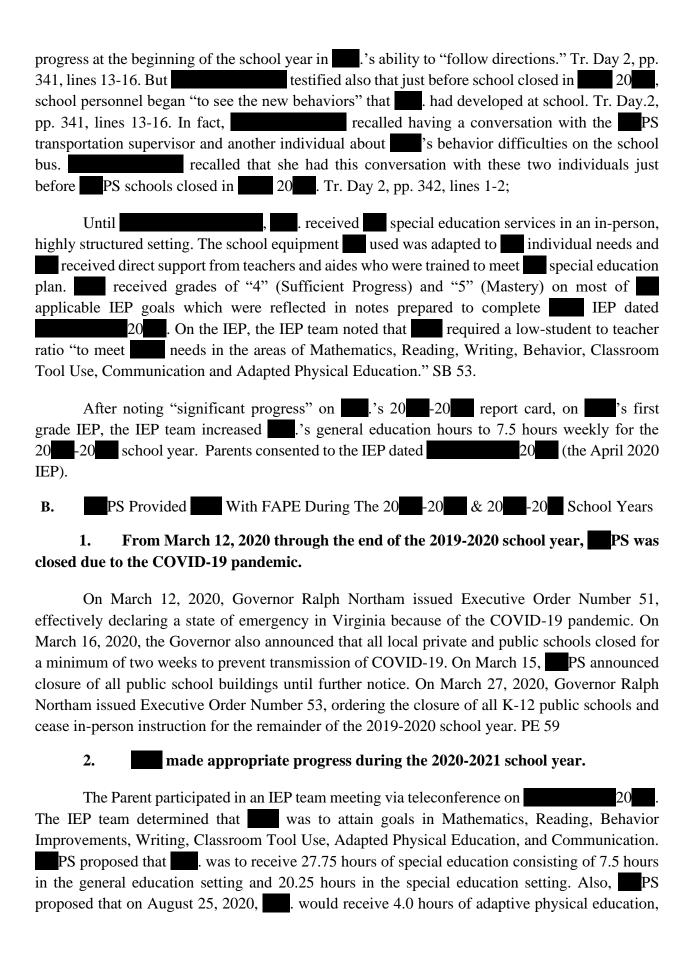
III. STATEMENT OF FACT

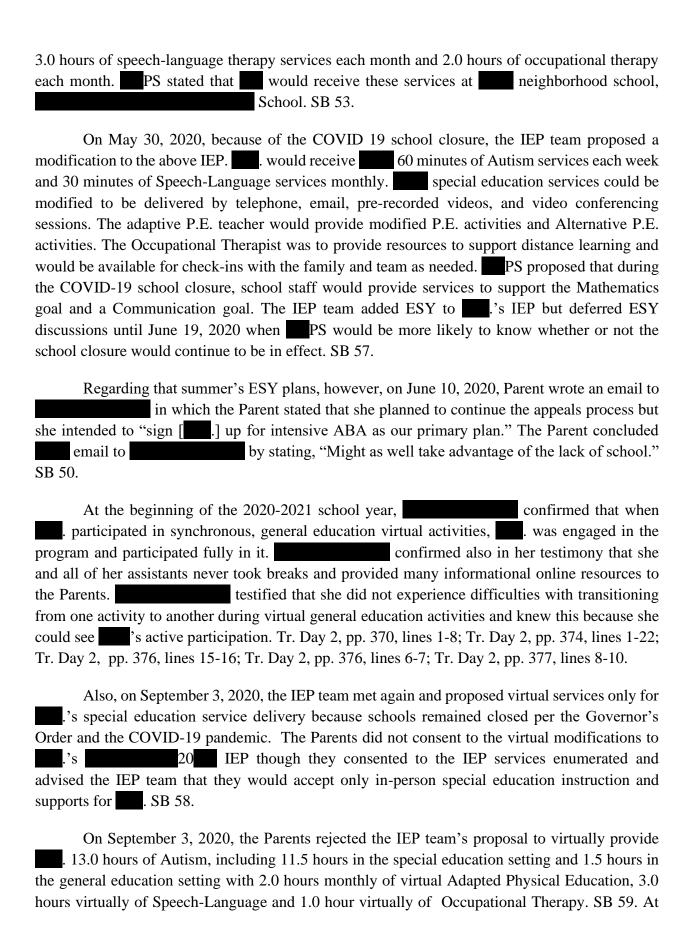
A. PS Provided the Student With a FAPE During The 2020-2021 School Year.

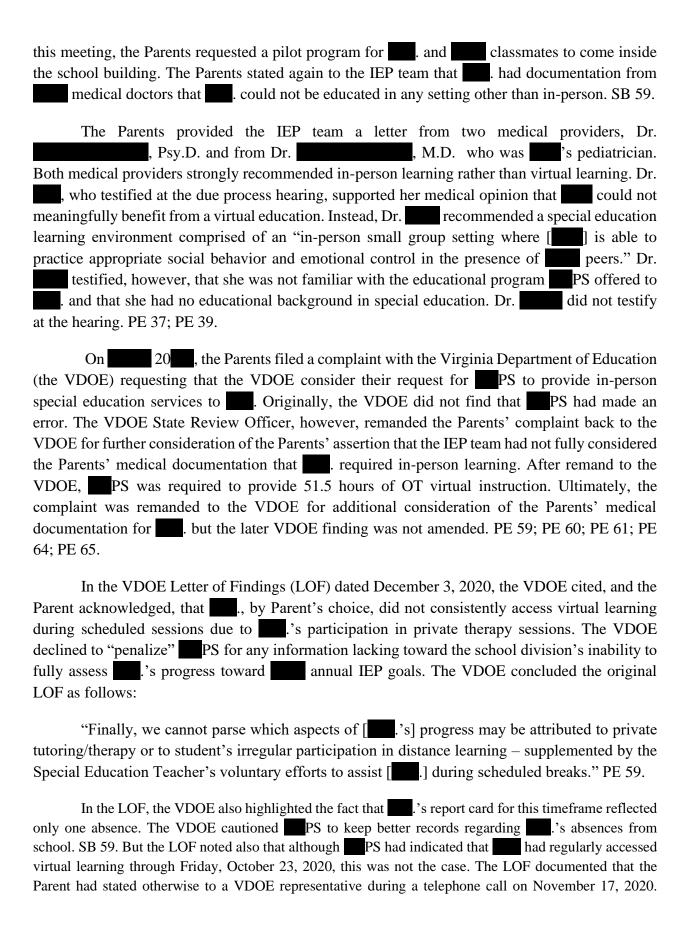
is a student who was found eligible for special education services under the IDEA as a student who is Other Health Impaired (OHI). Currently attends

Center (C). began pre-school at









During the call, the Parent indicated to the VDOE representative that PS required 's virtual participation in a regular school day from 8:20 A.M. to 3:20 P.M. But during the call, the Parent indicated weekly virtual instruction time, the Parent stated that . attended private Applied Behavioral Analysis (ABA) therapy from noon to 3:00 P.M. on Mondays and Thursdays and from 10:00 A.M. to 1:00 P.M. on some, if not all, of the special education services proffered by [PS] distance learning. PE 59. The Parents hired not only an ABA therapist who regularly provided instruction to ..., the Parents also employed a litany of private providers to instruct from September 9, 2020 to June 1, private providers did not testify at the hearing. Though the file documentation related to the private providers reflects some credentialing information, the Hearing Officer was unable to inquire regarding the expertise of the private providers, question their experience or inquire regarding their licensure status. But the Parents submitted extensive billing information requesting reimbursement from **PS**, and they now request the Hearing Officer to order **PS** to provide extensive reimbursement funds and compensatory educational hours to them. In sum, they request \$135,460 to be paid into an escrow account for \$53,197 for OT, speech-language services and behavioral therapy. The Parents request 405.55 special education compensatory hours and 949.05 hours for compensatory educational hours due to ...'s regression. The Parents also request additional compensation to transport. to the private providers, if relief is ordered, and any other relief the Hearing Officer deems necessary to compensate PE 110; PE 111; PE 112; PE 113; PE 114; PE 115; PE 116; PE 117; PE 118; PE 119; PE 120; PE 121. On October 23, 2020, PS held an additional IEP Addendum meeting to describe how in-person instruction would be delivered to PS agreed to provide .'s recovery OT by providing 2.0 hours OT monthly. PS agreed to also provide services to in-person special education services four days weekly with Mondays to remain as an asynchronous virtual day. PS also agreed to provide . 3.0 hours per month of Speech-Language services during in-person school hours. But .'s general education services were to remain virtually provided. SB 60. The Parent related that .'s private service provider had been able to have . sit for upwards out regularly for virtual instruction for medically necessary private ABA services rather than accessing the virtual services offered at the Parent's discretion. SB 60. IEP in Mathematics, Reading, Communication and Articulation Strategies. In the latter category, was to learn how to decrease rate of speech, to use appropriate volume, and how to clarify message when is misunderstood. was to receive Autism services for

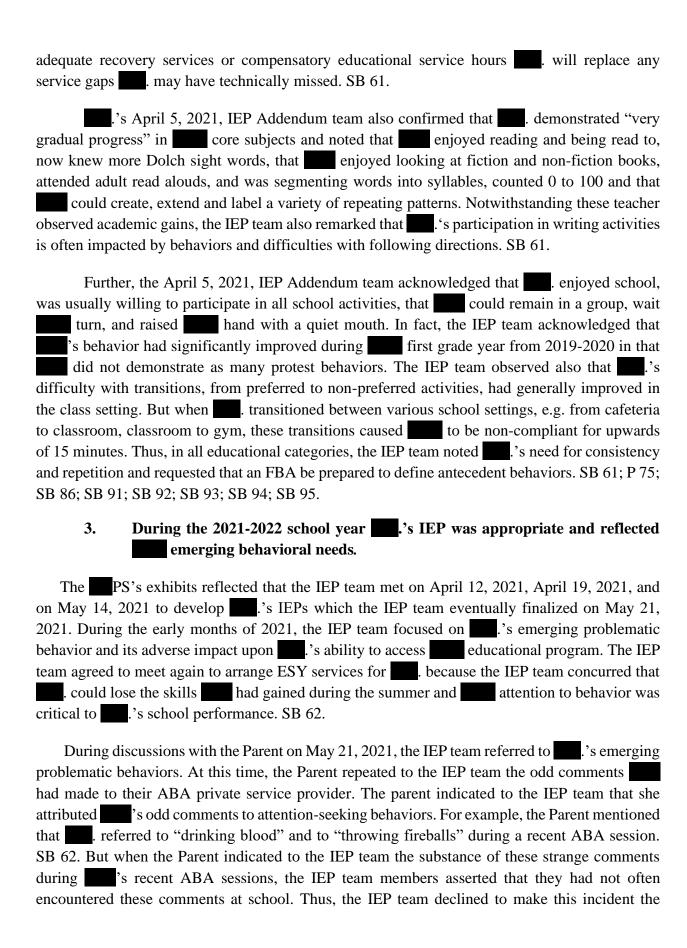
60 minutes weekly, Speech - Language services 30 minutes monthly, and an OT specialist was to

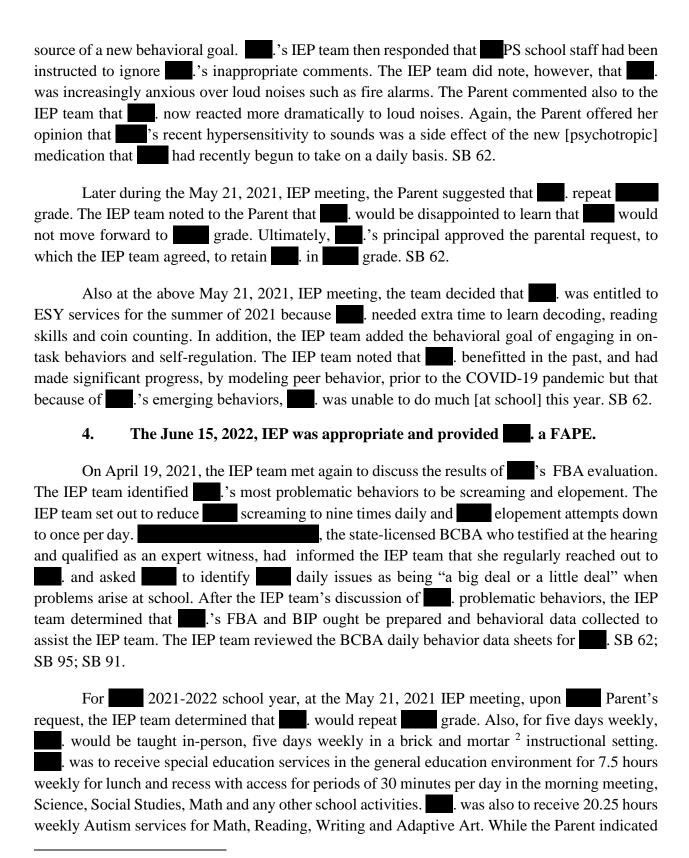
be available for consult to modify or adapt educational activities. The IEP team enumerated these services which were to be provided to through telephone contact, emails pre-recorded videos and/or video conferencing sessions. PS was to provide these educational services in-person to SB 60.

On December 14, 2020, Governor Northam again ordered the school district to close due to an increase in deaths, and other factors, related to the COVID-19 pandemic. As a result of the school closure, PS was able to provide virtual instruction only to special education students. Until February 12, 2021, PS provided . only virtual instruction. PE 59.

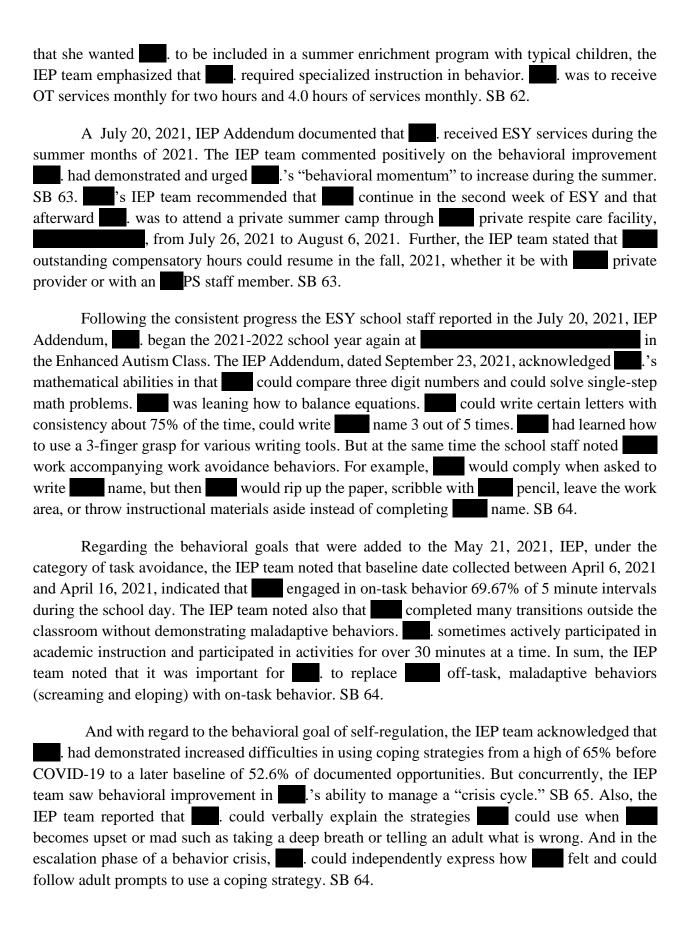
On February 16, 2021, PS began again to provide with in-person instruction for four days weekly and Mondays remained virtually provided. The notes from the April 5, 2021, IEP Addendum meeting state that PS called the meeting to discuss the March 15, 2021, VDOE finding that was entitled to 51.5 hours of compensatory service hours which included 3.0 hours of Speech-Language services. PS proposed additional compensatory services hours to be provided to face-to-face including 2.0 hours of Adapted PE, 2.0 hours of Occupational Therapy, and 24.25 hours per week which included 1.5 hours weekly in the general education setting and 22.75 hours in the special education setting. SB 61.

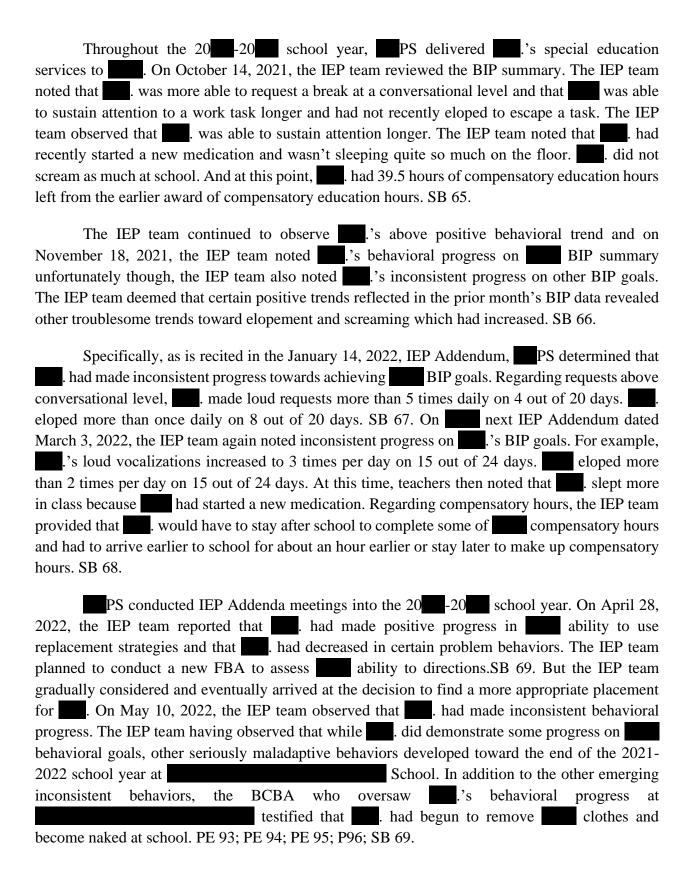
Also during the above April 5, 2021, IEP Addendum meeting, the IEP team reviewed the special education service hours ... was provided between the dates of September 8, 2020 and Thus, the IEP team decided that recovery of these hours, totaling 12.0 compensatory service hours monthly, were owed to . Also, the IEP team considered the adverse impact of . on ability to access virtual classes, without accommodations, and proposed also to add 2.0 hours per day in language arts instruction, 1.5 hours for participation in FLES, and 3.0 hours for speech and language services. Finally, the IEP team proposed the preparation of an FBA because of ...'s increased behavioral difficulties. At the conclusion of the Prior Written Notice (PWN), the IEP team apparently discussed with the Parent that no virtual services were to provided to ... during the 17 days between September 8, 2020 and October 2, 2020. Kathleen Harris, PS Procedural Support Liaison, who qualified as an expert for PS, testified credibly that she believed that 13 compensatory services are owed to from the State Complaint LOF which the PS attempted to have a teacher complete for . But the parties were unable to satisfactorily coordinate summer and after-school schedules. The Hearing Officer believes that Harris' conclusion that 155 additional compensatory education hours, inclusive of the above 13 compensatory educational hours, is flawed. The assessment that 155 additional hours are owed is not warranted by the circumstances because PS and the Parents consented to 's private day school placement at .C. Overwhelmingly, the private day placement will provide

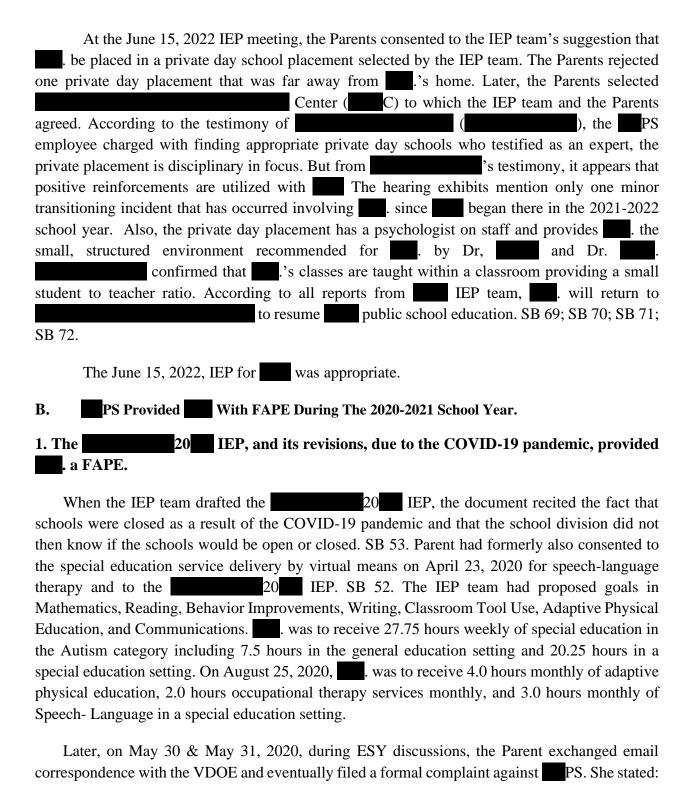




² The VDOE concluded that the Parents had confused the idea of "in-person" special education instruction with the concept that in-person instruction is an educational methodology that can occur only when the services are provided in a school building. PE 59.







But the Parent had no authority or expertise to assert that _____. could not be successful in a virtual environment. From the outset, the Parents summarily rejected the provision of special education services to their daughter through virtual service delivery. But classes were not open, system-wide changes had been made during the system-wide change due to the COVID-19 pandemic which were applicable to all ____PS school children, and to special education students included in the ____PS school district.

Regarding the Parents' assertion that _______. required in-person services to acquire FAPE, the Parents' argument was essentially mooted by the U.S. Department of Education (USDOE) guidance on this issue. Essentially, the USDOE supported school districts in their provision of virtual learning to students of the methodology proposed was used system wide for disabled and non-disabled children alike. Thus, the Parent was not entitled to demand that a pilot program be effectuated for ______, or for any other children in the Enhanced Autism class at ______. Further, the USDOE did not interpret the IDEA, or any other federal statute related to educable special education students, requiring in-person learning if schools are closed because of the COVID-19 pandemic . Federal law requires only that "distance instruction be accessible to all students with disabilities," but does not "mandate specific methodologies." During the COVID-19 school closures, the USDOE focused instead on the health, safety and welfare of students, noting that school officials" have discretion to make educational decisions based on local health needs and concern." Id.; See also J.T., et al v. de Blasio, et al., 500 F. Supp. 3d 137 (S.D.N.Y. 2020).

"Neither we ['s] parents, nor ['s] doctors, or [s] s] private care team believe that virtual school represents the appropriate education for [s], and we request that [s] be provide in-person services in the classroom as reasonable accommodations for [s] s] disability." SB 128.

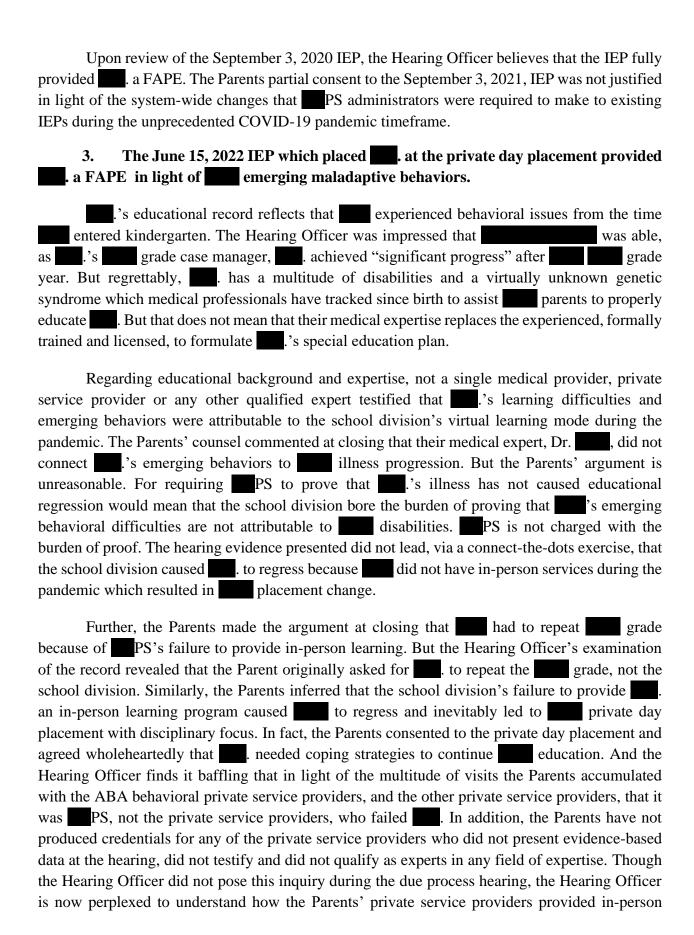
On September 3, 2020, PS convened a video conference meeting with the Parents to address the Parents' concerns regarding distance learning to which the Parent responded:

The Parent then asked PS to open a single classroom for [... 's class] at a pilot program. The Parent also requested mediation but PS rejected mediation because the Parents' remedy was unavailable.

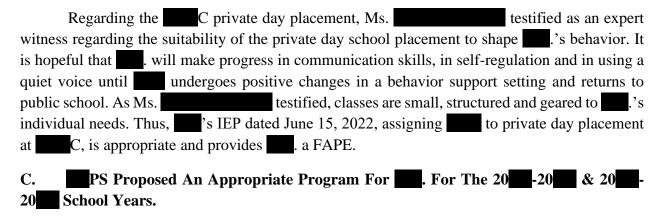
Regarding the Parents' assertion that PS had effectively changed only virtual instruction, the Parent's argument was without merit. In N.D. v. State of Hawaii Dept. of Educ., 600 F. 3d 1104, 1108 (9th Cir. 2010). (the elimination of 17 days from the school calendar for budgetary issues did not effect a change in placement). In the foregoing case, the Court deemed certain school closures entirely appropriate when system-wide school closings occur as in the Hawaii case, 600 F.3d 1104, for school closures related to financial reasons only as the basis for the school closure and not for health and safety concerns as in the instant case. The Hawaii rationale, that general applicability of a system-wide change does not effectuate an individual student's change of placement, continues to be applied to cases challenging COVID-19 school closures. See also Carmona v. New Jersey Dept. of Educ., No. CV 21-18746, 2022 WL 3646629, at *5 (D.N.J. Aug. 23, 2022) (citing to N.D.).

Upon review of the September 3, 2020, IEP, the Hearing Officer believes that the IEP fully provided as FAPE. The Parents' partial consent to the September 3, 2021, IEP was not justified in light of the system-wide changes that the PS administrators were required to make to existing IEPs during the unprecedented COVID-19 emergency timeframe.

USDOE guidance "expressly endorsed 'special education and related services to be provided virtually, online, or telephonically." And also the USDOE advised that "school districts would not be required to amend IEP's as online or virtual learning would be considered an alternate mode of communication." J.T., et al. v. de Blasio, et al., 500 F. Supp. 3d 137 (S.D.N.Y. 2020). See also Bills v. Virginia Department of Education, 2021 WL 1811383, at *5 (W.D. Va. June 2, 2022). (system-wide change to remote learning as a result of COVID-19, affecting both disabled and non-disabled children alike, was not a change of placement); Roe v. Baker, D. Mass. No. CV 21-11751-RGS, 2022 WL 391 6035, at *4 (D. Mass. Aug. 31, 2022) ("It follows that the defendants' decision to close schools physically and resort to remote education were contemplated and permitted by the USDOE in fulfilling the schools' duty to provide a FAPE.").



COVID-19 pandemic. Thus, the Hearing Officer gleaned from ...'s educational file that the Parents unilaterally, without notice to PS, embarked upon their individual learning plan to employ private service providers as their primary educational resource during the pandemic. In so doing, they often rejected virtual learning or accepted some, but not all, virtual learning for Parents, who are extremely intelligent and resourceful individuals, substituted their own notions record reflects that ... was sometimes tardy, arrived late or missed online sessions when was removed from the virtual program before, during and after the pandemic occurred. It would be inequitable for the Hearing Officer not to retrospectively review the Parents' parallel programming in their request for PS to provide compensatory hours for Further, 's educational record shows that 's behavioral and learning difficulties developed, along with the gradual academic progression achieved, notwithstanding emerging maladaptive behaviors that later began to adversely affect or obliterate learning capacity. To the contrary, 's educational record reflects that ... was provided continual core academic and special education coursework, behavioral expertise by state-licensed behavior specialists, multi-faceted teaching expertise, psychological interventions and eventually, an evidence-based private school experience at .C. In this Hearing Officer's opinion, the school's private day school placement fulfills any minute deficiencies in .'s IEP which would require one to make tedious, unproductive hours-to-hours mathematical calculations. The fact of the matter is that the private day placement is the most likely scenario to fulfill the IDEA, in principle, by providing with an intense disciplinary regimen in a good faith attempt to place ., as closely as possible, to the position where was before the pandemic. Thus, aside from the fact that Hearing Officers do not provide monetary damages as the Parents requested, the Hearing Officer does not order compensatory educational service hours, recovery service hours, private ABA behavior therapy, damages placed in trust or financial reimbursement. As stated above, compensatory education and reimbursement is not ordered because the result of the PS failure to provide an appropriate learning environment inside the school building. And it follows that the Hearing Officer did not arrive at the conclusion that regressed. The Parents assertion, that . suffered regression because educational environment changed, is merely conjecture. PS's detailed educational records, together with competent expert testimony indicating otherwise, reflect that... receives a FAPE in private day placement at .C.



III. ARGUMENT

The Parents Failed To Meet Their Burden of Proof.

The Parents as the filing parties and the parties seeking relief, bear the burden of proof in this administrative hearing. Schaffer v. Weast, 546 U.S. 49, 51 (2005). The burden of proof includes the "burden of persuasion," effectively stating which party loses if the evidence is closely balanced, and also points to the party who bears the "burden of persuasion," and identifies which party bears the obligation to come forward with the evidence during the administrative proceeding. Id. at 56. Also, the Parents must offer expert testimony in support their position. Weast v. Schaffer, 377 F.3d. 449, 456 (4th Cir. 2004). ("For regardless of which side has the burden of proof in an administrative hearing, parents will have to offer expert testimony to show that the proposed IEP is inadequate."). The Hearing Officer can only rule in the Parents' favor if she finds that the Parents have established by a preponderance of the evidence supported by expert testimony that PS substantively denied. a FAPE. See 8 VAC 20-81-210(O)(16) ("[T]he decision made by a special education hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.")

The Parents did not meet their burden of proof in this case. The Parents presented their case over five days, but did not produce expert testimony in support of their position. Though the Parents produced the serious control of their position. Though the Parents produced the serious case. She stated that she had no knowledge of special education matters, was unfamiliar with serious. She stated that she had no knowledge of special education matters, was unfamiliar with serious. She stated that she had no knowledge of special education matters, was unfamiliar with serious. She stated that she had no knowledge of special education and the Parents shared many school witnesses, many of whom qualified as expert witnesses in various fields of study, who testified, but none of these witnesses supported the Parents' position that the School Division had not provided FAPE. The School Division's testified credibly that the IEPs and intervening progress reports developed for were appropriate for seducational needs, that special PS properly implemented seducation and set after COVID but that seducation worsened and affected seducational progress during and after COVID but that seducation worsened and affected seducational progress during and after covid and school where the school division and seducation parents agreed to place seducation is now necessary for to make educational progress. The Parents also presented testimony from seducation.'s mother, Dr.

She is not a special education expert. Neither Dr. or Dr. 's testimony enabled the Parents to prove that the school division has not provided a FAPE to ...

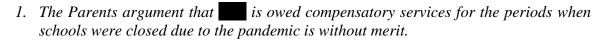
A. The PS educators who testified as experts in this case are entitled to deference.

Local educators are entitled deference in their role of developing the IEP. Hartmann v. Loudoun Cnty. Bd. of Educ., 118 F.3d 996, 1001 (4th Cir. 1997); see also Springer by Springer v. Fairfax Cnty. School Bd., 134 F. 3d 659, 663 (4th Cir. 1998) ("...the task of education belongs to the educators who have been charged by society with that critical task..."); M.M. by DM and EM v. Sch. District 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.") The Supreme Court of the United State has further held that ("...courts (and hearing officers) are required to give deference to the opinions of school board witnesses who are professional educators.") Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, No. 15-827, 137 S.Ct. 988 (2017); see also Board of Educ. v. Rowley, 458 U.S. 176, 208 (1982). PS educators in are most familiar with see also Board decisions made for the appropriateness of the educational decisions made for the special education were correctly made for the presumption that their educational decisions regarding see special education were correctly made for the court is not, however, and the presumption that their educational decisions regarding the special education were correctly made for the presumption that their educational decisions regarding the special education were correctly made for the presumption that their educational decisions regarding the special education were correctly made for the presumption that their educational decisions regarding the special education were correctly made for the presumption that their educational decisions regarding the special education were correctly made for the presumption that their educational decisions regarding the presumption that their educati

B. PS Proposed Appropriate IEPs For

Under the IDEA, PS is required to guarantee that a FAPE is available to students with disabilities who reside within the public school division jurisdiction. See 20 U.S.C. Sec. 1401; see also Va. Code Ann. Sec. 22-1-215; 8 VAC 20-81-10; Rowley, 458 U.S. at 195. Because individual students with disabilities have unique educational needs, "FAPE" is determined through the IEP process. M.M., 303 F.sd at 527. Educators review IEPs periodically to measure its appropriateness to decide if it was developed in accordance with the IDEA and whether or not the IEP is reasonably calculated to confer some educational benefit. Rowley, 458 U.S. at 206-07. "To 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. ex rel. Joseph F. v. Douglas Cnty. Sch. Distr. RE-1, 137 S.Ct. 988 (2017).

The evidence and testimony showed that the many IEPs proposed to the Parents for April 2020 to June 15, 2021 through the present were "reasonably calculated to enable progress appropriate in light of [] circumstances." See Endrew F., supra; School Bd. of Campbell Cnty. v. Beasley, 238 Va. 44 (1989); Henrico Cnty. Sch. Bd. v. Compton, 14 Va. Cir. 200, 204 (1988); The evidence shows that PS educators monitored progress on a daily basis, participated in modifying the IEPs when behavioral issues began to interfere with progress, properly crafted a BIP for so that the educators could best monitor behavior escalation and found the least restrictive placement for when behavioral needs adversely affected school performance.



On PS closed the schools because of the Covid pandemic and all PS instruction became virtual. PS educators began to provide system-wide virtual instruction to all of its students. Parents assertion that was entitled to be treated differently than other children by providing virtual instruction was patently impossible. The Governor's edict meant that it would be impossible for PS to deliver 's IEP services to in the same number and manner as agreed in last agreed IEP, dated April 15, 2020. Parents' evidence tended to consider, in a retrospective manner, at the actions taken by the PS educators in response to the pandemic.

Regarding the Parents claims for compensatory education on the ground that offering virtual instruction denied a FAPE, the Hearing Officer notes that "system wide changes in public schools that affect disabled children and non-disabled children alike ... are not changes to educational placement." N.D. v. State of Hawaii Dept. of Educ., 600 F.3d 1104, 1108 (9th Cir. 2010) ("the elimination of 17 days from the school calendar due to budgetary issues did not effect a change in placement"). In the foregoing case, the school system attempted to intermittently reduce the number of schooldays to four by deleting Fridays from required school days. The Ninth Circuit held that the "furlough Fridays" did not trigger the [IDEA] "stay-put" provision because the furloughs did not amount to a change in educational placement. Id. at 116. Therein the Court noted, "Congress did not intend for the IDEA to apply to system wide administrative decisions," and was not applicable where the change in question "affect all public schools and students, disabled and non-disabled alike...Congress['s] of protecting disabled children from being singled out." Id.at116. Federal courts tend to view school system-wide changes, with regard to the 2020-2021 pandemic, in terms of worldwide urgency that transforms the provision of FAPE to children. The courts speak in terms of flexibility, permitting schools nationwide, to be creative and resourceful, in FAPE provision to special education students during the pandemic of 2020-2021. In Carmona v. New Jersey Sept. of Educ., No. CV 21-18746, 2022 WL 3646629, at *5 (D.N.J. Aug. 23, 2022) (citing to N.D.). In this case, was offered virtual instruction to all children in PS, disabled and non-disabled alike, as in the <u>Hawaii</u> case noted above which was also cited in the Fourth Circuit, in Bills v. Va. Dept. of Educ., 6:21-CV-51 (W.D. Virginia June 2, 2022).

As stated courts have not ruled that the temporary use of virtual instruction results in a deprivation of an appropriate education. The IDEA does not specifically address school closure for a pandemic. The USDOE has not mandated that education must include in-person instruction if schools are closed due to exceptional circumstances such as a pandemic. Similarly, in <u>J.T., et. al. v. DeBlasio, et.al.</u>, 500 F. Supp. 3d 137 (S.D.N.Y. 2020) the Court cited that the USDOE had also 'issued guidance indicating that the provision of remote services does not constitute a change in placement." (Respondent's Closing, pp. 6, 9/18/2022, citing the deBlasio Court.).

 a FAPE tailored to the specific needs of their children," the court denied relief to the plaintiffs and stated therein, the Governor and school officials closed schools in response to a new and alarming pandemic. Further, the Court denied the plaintiffs' allegation that virtual learning violated the IDEA's "stay put" provision. The Court rejected the plaintiff's argument and stated, "[T]he stay-put" provision [of the IDEA] in the unusual and unprecedented circumstances of this case." Id at 8. Further, the court reasoned, "It follows that the defendant's decisions to close schools physically and resort to remote education were contemplated and permitted by the USDOE 3 in fulfilling the school's duty to provide a FAPE." Id. at 10. "[The Governor and school officials] made these decisions without the hindsight that we now have, two and one/half years later." While the Court is sympathetic to the plaintiffs that the lengthy period of remote schooling was difficult for plaintiffs, and their children, the Complaint has not identified any legal basis to lay the blame at defendant's door." Id. at 17.

Having established that virtual instruction was a permissible means to deliver FAPE to the Hearing Officer notes that so a Parents rejected all the PS IEPs that utilized virtual, asynchronous learning, to Instead, they set up their own course of study with various private service providers whose credentials, and methodologies, were largely unverifiable special education, and related services to The Parents should not be reimbursed for a plan to they unilaterally chose to provide

2. The Parents' reimbursement request for compensatory education is flawed because the Parents utilize an hour for hour calculation.

The Parents have requested that the Hearing Officer find that the School Division did not provide a FAPE to during the 2020-2021 pandemic because the School Division did not provide in-person instruction, per then current IEP, during the COVID-19 pandemic. In order to calculate the number of educational services that did not receive during virtual instruction period from 2020-2021, during closing argument, the Parents showed the Hearing Officer various demonstrative exhibits purporting to calculate mechanically, the compensatory education hours on an hour-to-hour basis.

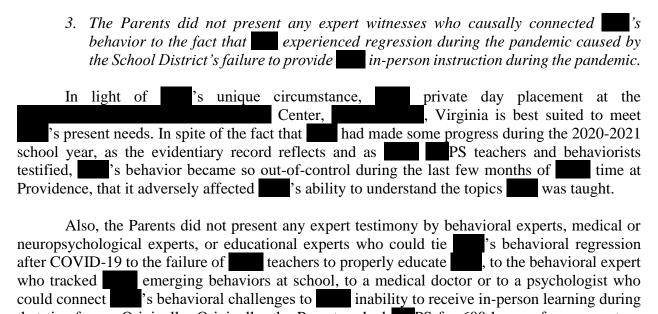
In the case of Reid ex Rel. Reid v. District of Columbia, 401 F.3d 516 (D.C. Cir. 2005), a hearing officer awarded 810 hours compensatory education to a sixteen year old male who had severe learning difficulties and had missed about four and a half years of special education hours. The hearing officer counted one hour for each hour the school division had denied the student appropriate instruction. The Court pointed out "a mechanical calculation" of hours owed as compensatory education is not supported by "reasoning" or "evidence." Id at 518. Further, the Court states that a hearing officer's assessment of compensatory hours owed, made on a mechanical, hour for hour basis, of compensatory education hours "will not be afforded deference if the case is appealed." Id. at 518. The Reid court clarified a student is not entitled to a "cookie cutter formula" but to an informed and reasonable exercise of discretion regarding what

³ United States Department of Education. USDOE guidance instruction (USDOE Fact Sheet of March 21, 2020) which was provided to all schools nationwide during the pandemic and asserted that "the provision of FAPE may include, as appropriate, special education and related services, provided through distance instruction, provided online, or telephonically." <u>Id</u>. at 9.

[educational] services he needs to elevate him to the position he would have occupied absent the school district's failures. Id. at 527.

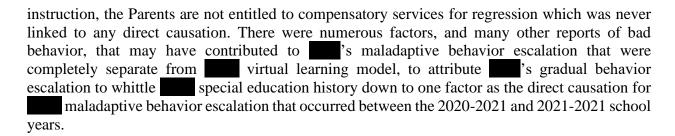
Regarding the allocation of a compensatory education award, the Fourth Circuit has adopted the "qualitative standard" rather than the above mechanical hour for hour standard as set forth in <u>G ex rel RG v. Ft. Bragg Dependent Sch.</u>, 343 F.3d 295, 309 (4th Cir. 2003). ("Compensatory education involves discretionary, prospective injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student."). <u>Id. Further, in Hogan v. Fairfax Cnty. Sch. Bd.</u>, 645 F. Supp. 2d 554, 573 (E.D. Va. 2009) the court again rejected a hearing officer's mathematical calculation which was based upon the number of school weeks the student had missed. ("Rotely awarding a block of compensatory education equal to the amount of lost instructional time is an inappropriate method for awarding the equitable remedy of compensatory education.").

Thus, in consideration of the above case law relevant to the equitable nature of compensatory education remedy, the Hearing Officer notes that the above demonstrative exhibits the Parents proffered during his closing remarks, do not assist the Parents to prove their case. The mathematical charts serve only as a mechanical tabulation of "partial hours" tied to hours the Parents allege to be deficient mainly because these partial timeframes were not provided to as originally set forth as "in-person" hours in the last agreed IEP. If the Hearing Officer is inclined to provide a compensatory education remedy, the Hearing Officer must ground the compensatory hours proposed to be equitably considered and causally connected to the evidence if is entitled to compensatory education hours.



that timeframe. Originally. Originally, the Parents asked PS for 600 hours of compensatory education which they later amended to 457 compensatory education hours and 275 compensatory education hours. But at the hearing, the Parents did not provide any expert witness testimony or exhibits to support the figure they provide. In <u>Fairfax County School Board v. Knight</u>, 107 LRP 2101 (2006), the District Court found the Parents' experts to be unpersuasive when compared to

the PS experts who had extensive special education experience and post baccalaureate degrees. And the Parents must support the evidence if they intend to be successful in seeking an award compensatory education. In their most recent request for compensatory education, the Parents cited 475 hours and 275 hours but the Parents have offered little to no evidence in support of their claim that received did not receive FAPE during 2020-2022 years at PS and in placement. In O.S. v. Fairfax County Public Schools, 804 F.3d. 354, 357 (4th. Cir. 2015), in an appeal from a hearing officer's ruling, the court noted that ten school witnesses had testified in the due process hearing, some of whom qualified as experts. But the court noted that the parents had only two witnesses testify – the parent and her friend. In upholding the hearing officer's ruling, the court stated, "While acknowledging that the IDEA does not require parents to present expert testimony, the [hearing] officer noted that the parents offered virtually no witnesses other than the parent to support their position." In this case, 's parent testified, and was given great latitude to freely express her thoughts regarding her stance that the PS committed procedural violations and the lapses in FAPE by not providing adequate in-person instruction during the pandemic of 2020-2021 which the Parents link to a series sion. Also, are semical doctor, and pediatrician of pediatrician of many years, testified truthfully at the hearing. But neither the parent or the medical doctor were competent to provide opinions on the ultimate FAPE questions posed here. 4. The Parents' assertion that a suffered a regression which was caused by the PS failure to provide in-person instruction during the 2020-2021 school closure is without merit. The Parents remarked in their closing that Dr. did not mention progression of sillnesses as a causative factor for sillnessed maladaptive behaviors but the Hearing Officer is struck by the seriousness and unpredictability of "s genetic disorder," co-existing with other major disorders, which, again, is extremely rare. It is apparent that a child who has this number of special education conditions may not experience a single day without some an outburst, a shout of a flop on the floor. And there was no expert medical, educational or psychological testimony presented in the 's increases in maladaptive behaviors in second grade to the School Division's inability to provide to provide in-person instruction. Again, the Parents have the burden of proof in this case. The Hearing Officer would characterize sincreased maladaptive behaviors to be characterized as an "escalation" of maladaptive behaviors, but not as regression. Regression implies that the maladaptive behaviors exhibited were entirely extinguished, never to return. But that scenario simply does not reflect the educators' testified at the hearing. Even toward the end of first grade year after made significant progress on behavioral goals, testified that showed inconsistent behavior. In fact, spoke to the school's transportation department when she learned that pushed and shoved teachers and students who rode on the bus. The Hearing Officer does not find regression directly caused by PS failure to provide virtual



5. The Parents' complaint provided no notice to PS of the reimbursement amounts they requested.

During the Parents' closing, they presented demonstrative exhibits in which the Parents attempted to calculate state time missed during virtual instruction and calculating the total funds owed to the Parents for their out-of-pocket expenses in payments to private providers. PS asserts that the School Division never saw these calculations and itemized expenses. When she testified, the Parent indicated she had not tabulated any figures when PS's counsel inquired about a former request for 600 hours compensatory education hours she requested at an earlier IEP meeting. But the School Division has asked the Parents repeatedly to clarify and quantify the figures requested yet the calculated sums, offered as demonstrative exhibits during the Parents' closing remarks appear, to present the first time that all the figures, Parents request to be reimbursed, have been tabulated to correspond to specific dates and times when they request reimbursement by compensatory hours requested corresponding to private providers' services since began to seek the private educational and related services.

The statutory regulation at 20 U.S.C. 1412(A)(10)(C)(iii)(1) specifically requires that the school division be provided notice of parental claims before the School Division is required to respond. Generally, reimbursement claims are denied under the IDEA when parents stay silent during the earlier discussion stages with the IEP team when it is much easier to remedy compensatory education and monetary claims for financial reimbursement. The statute is clear in stating that the courts have the discretionary authority to order reimbursement to parents in certain circumstances but that courts generally deny or limit reimbursement when the parents do not provide notice to the school that they request reimbursement. (See also Schoenbach v. District of Columbia, 309 F.Supp.2d 71, 85 (2004); Hogan v. Fairfax County Sch. Board, 645 F.Supp.2d 71 (2004); Jennings v. Fairfax County Sch. Bd., 39 F.App'x 921 (2002); S.H. v. Fairfax County Board of Education, 875 F.Supp.2d 633 (2012).

In reimbursement issues under the IDEA, the courts (and hearing officers) refer generally to the inherently discretionary nature of reimbursement. When Parents have failed to notify the IEP team of the specific amounts they seek for reimbursement, the court (or a hearing officer) will assess the underlying facts to discover if the Parents have unfairly failed to inform the IEP team of their alternate placement requests, specific compensatory educational hour requests or any other parental requests. But the Parents may not simply withhold facts that might promptly resolve their child's special education issue. In this matter, it does not appear to the Hearing Officer that the Parents ever properly tabulated the reimbursement amounts they sought which was unreasonable.

6. Private day school placement at C. fully addresses 's special education needs thus the Hearing Officer denies the Parents' request for additional compensatory education services.

The Hearing Officer heard testimony taken over five days. The educational experts, including a state-licensed BCBA, testified credibly regarding state-licensed BCBA, testified credibly regarding state-licensed BCBA, testified credibly regarding state-licensed BCBA, testified reactions in the 2021-2022 school year notwithstanding the fact that all a BIP in place since the spring, during 2020-2021 school year. Also, the BCBA testified

competently as an expert in her field that she accurately documented both with emerging maladaptive behaviors.

The Hearing Officer fully considered the Parents' reimbursement request for compensatory education hours upwards of 949.25 hours. But the Hearing Officer believes it would be inequitable for her not to fully consider F.C.P.S.'s aggressive approach to return to be the educable student was in April, 2021 by financially supporting enrollment at C. For reimbursement to be fair to both parties, and as stated earlier, compensatory education as a remedial concept, is not an hours to hours prospect. Compensatory education must be flexible and fully adhere to the concept of returning the student to the correct mindset in which he or she is educable. And as the Parents widely noted, it's impossible to teach a child who is, quite literally, "screaming on the floor."

And the Hearing Officer was impressed by the positive reinforcement system P.S.'s personnel has utilized to eradicate is a specific shadow which, as the Hearing Officer is aware, can become elusive with a child who has not only an autism history but unknown behavioral consequences with genetic abnormality. See BCBA testified regarding a green light-red light technique which appeared to be beneficial because responded well. And at consequences with genetic consequences with genetic abnormality. See BCBA testified regarding a green light-red light technique which appeared to be beneficial because responded well. And at consequences only one minor disciplinary incident which almost immediately corrected. Further, Ms. See testified credibly and reported that the program closely mirrors see elementary school special education class in that it is a small, structured class with only 8-10 students. Current placement at C. aligns also with Dr. and Dr. see recommendations for optimal learning environment.

Caselaw also appears to encourage the private day placement option as replacement for the compensatory education that the Parents assert that missed during the pandemic. For example, in New York City Department of Ed., 122 LRP 46379 (NY SEA 2022) in a case quite similar to the instant one, the parents were denied compensatory education for two previous years during the 2019-20 and 2020-2021 school years when schools were closed during the COVID-19 pandemic. The New York City court found the hearing officer reasonable in denying the parents additional reimbursement because the school division had prospectively placed the student in a private day placement in which she was "flourishing" by all accounts. And the court reiterated the holding in Reid, 401 F.3d at 518. (compensatory education is a replacement of educational services the child should have received in the first place); (See also Phillips v. Dist. of Columbia, 932 F.Supp. 2d 42, 50 (D.D.C. 2013) (even if there is a denial of FAPE, it may be that no compensatory education is required for the denial, either because it would not help or because the student has flourished in the student's current placement); Demarcus L. v. Bd. of Educ. of the City of Chicago, 2014 WL 3646629, at *5 (D.N.J. Ill. Mar. 11, 2014) (compensation education partially denied because of IEP revisions).

ORDER

For the foregoing reasons, the Hearing Officer **denies** any of the remedies sought by the Parents and finds that: (1) the IEPs developed for were appropriate and reasonably calculated to provide a free, appropriate public education in the least restrictive environment; (2) made appropriate progress in light of circumstances which was not de minimis; and (3) that private day school placement at circumstances where is doing well and behavioral needs are being met.

And nothing further in this matter to de done, this due process hearing is **dismissed**, with **prejudice**.

Sarah Smith Freeman, Hearing Officer Sarah Smith Freeman, Hearing Officer

CERTIFICATE OF SERVICE

I certify on this 21st day of February, 2023, a copy of the foregoing Written Decision was emailed to:

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John F. Cafferky, Esquire Daniel S. Williams, Esquire Blankingship & Keith 4020 University Drive, Suite 300 Fairfax, Virginia 22030 jcafferky@bklawva.com

RIGHT OF APPEAL NOTICE

This decision shall be final and binding unless either party appeals in a federal district court within 90 calendar days of the date of this decision, or in a state circuit court within 180 calendar days of the date of this decision.

Decision Date: February 21, 2023

By:

Sarah Smith Freeman, Hearing Officer

Sarah Smith Freeman, Hearing Officer

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