

VIRGINIA DEPARTMENT OF EDUCATION

DUE PROCESS HEARING

IN RE: [REDACTED]

VDOE NO: 23-023

DECISION

I. INTRODUCTION:

This request for Due Process Hearing was initiated against the [REDACTED] School Board (“School Board” or “[REDACTED]PS”) under the Individuals with Disabilities Education Act, 20 U.S.C. Sec. 1400, et seq. (“IDEA”) by counsel on behalf of [REDACTED] and [REDACTED] (“Parents) regarding [REDACTED] (“[REDACTED].” 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 [REDACTED]PS, and [REDACTED], via its agent, denied FAPE by not providing [REDACTED] 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 [REDACTED] resulting from the denial of in-person services during the 2020-2021 school year. The services required to remedy the regression and to put [REDACTED] in the position that [REDACTED] 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 [REDACTED]. 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 [REDACTED]’s demonstrated and ongoing needs. Parents further ask that the Hearing Officer direct [REDACTED] to deposit \$135,460.00 into an escrow account for [REDACTED].’s benefit to pay for such services and that such account be maintained until the earlier of: (a) all funds are utilized (b) [REDACTED]. turns age 21. This 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 [REDACTED]PS, and [REDACTED], 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 [REDACTED]PS, and [REDACTED], 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 [REDACTED]'s IEPs were not appropriate or that [REDACTED] was unable to make appropriate progress during the 2020-2021 and 2021-2022 school years. The Hearing Officer noted the overwhelming testimony from the [REDACTED]PS employees (many of who qualified as expert witnesses) regarding the appropriateness of [REDACTED]'s IEPs and regarding the appropriate progress [REDACTED] made during the 2020-2021 and 2021-2022 school years. The evidence also showed that while the Parents unilaterally elected to hire private special education service providers during the 2020-2021 school year though [REDACTED]PS continued to make FAPE available to [REDACTED].¹

II. PROCEDURAL HISTORY

On September 7, 2022, [REDACTED]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, [REDACTED]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 [REDACTED]PS; on September 19, 2022, [REDACTED]PS 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, [REDACTED]PS filed remarks on the Petition to Disqualify; on September 22, 2022, [REDACTED]PS filed objections to the Parents' requested subpoena duces tecum to [REDACTED]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 [REDACTED]PS' Insufficiency Request and required that the Parents amend and refile the matter by October 10, 2022, the Hearing Officer having requested

¹ Per The School Services Agreement dated August 10, 1978, the [REDACTED] of [REDACTED] is a separate political entity from [REDACTED]PS. The [REDACTED] School Board owns the buildings and operates the school buildings. Thus the [REDACTED] of [REDACTED] 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 ■■■PS; on 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 ■■■PS 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 ■■■PS; 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

████████████████████ School in █████ PS as a Developmentally Delayed student in the 20████-20████ school year. Tr. Day 1, pp. 60, lines 3-5.

At the age of [REDACTED] years, [REDACTED] was diagnosed with [REDACTED] syndrome, a rare genetic anomaly. As a result of [REDACTED] genetic syndrome, [REDACTED] has experienced numerous learning deficits, behavioral difficulties and socialization issues. In addition to [REDACTED]'s rare genetic syndrome, [REDACTED]'s neuro-psychologist, Dr. [REDACTED], diagnosed [REDACTED] to also have the following deficits: an intellectual disability (intellectual development disorder moderate), Attention Deficit Hyperactive Disorder (combined presentation), and Autism Spectrum Disorder, with an accompanying intellectual impairment, associated with [REDACTED]. As a result of the above genetic and intellectual issues, [REDACTED] also experiences sensory processing problems (under responsiveness), motor planning problems, speech and language problems, and bilateral coordination problems. SB 69; PE 19; SB 44.

1. [REDACTED] Has Experienced Behavioral Issues Since Kindergarten.

During the 20[REDACTED]-20[REDACTED] school year, [REDACTED] began kindergarten at [REDACTED] School located in [REDACTED], Virginia and educators placed [REDACTED] in an Enhanced Autism class with [REDACTED] ([REDACTED]). In kindergarten, Ms. [REDACTED] delivered [REDACTED]'s special education services to [REDACTED] in two 40 minute sessions daily for reading and math respectively but she was not [REDACTED]'s special education case manager. PE 11; Tr. Day 2, pp. 332, line 1.

Subsequently, the IEP team met on [REDACTED] 20[REDACTED] to confer about [REDACTED]'s first grade IEP. They decided on direct special education support services for 6.5 hours weekly representing [REDACTED]'s entire school day. In kindergarten, [REDACTED] teachers noted [REDACTED]'s resistant behavior. Tr. Day 1, pp. 66, lines 1-4). Citing [REDACTED] behavioral issues, the IEP team noted that [REDACTED] had difficulty following [REDACTED] teacher's instructions and that [REDACTED] yelled, screamed, stomped and cried when [REDACTED] was denied a positive reward. [REDACTED] instructors noted that [REDACTED] refused to transition to other areas during the school day. Tr. Day 1, pp. 66, lines 1-4. For example, when [REDACTED] was asked to depart the school bus, [REDACTED] pushed staff members, ran away or refused to move.

██████████ testified that in kindergarten, ██████ had “demonstrated progress.” Tr. Day 2, pp. 339, lines 10-15. But overall, ██████ recalled that ██████ had made “inconsistent progress.” Tr. Day 2, pp. 339, lines 10-15. ██████ explained that although ██████ made progress toward ██████ behavioral goals, ██████ defined ██████’s developing behavior as “new difficulties” during ██████ testimony. Tr. Day 2, pp. 342, lines 1-2.

2. [REDACTED] Made Significant Progress in First Grade

In first grade, during the 20[REDACTED]-20[REDACTED] school year, [REDACTED] became [REDACTED].’s special education case manager. During her testimony, [REDACTED] testified that [REDACTED]. made

progress at the beginning of the school year in [REDACTED]'s ability to "follow directions." Tr. Day 2, pp. 341, lines 13-16. But [REDACTED] testified also that just before school closed in [REDACTED] 20[REDACTED], school personnel began "to see the new behaviors" that [REDACTED] had developed at school. Tr. Day.2, pp. 341, lines 13-16. In fact, [REDACTED] recalled having a conversation with the [REDACTED]PS transportation supervisor and another individual about [REDACTED]'s behavior difficulties on the school bus. [REDACTED] recalled that she had this conversation with these two individuals just before [REDACTED]PS schools closed in [REDACTED] 20[REDACTED]. Tr. Day 2, pp. 342, lines 1-2;

Until [REDACTED], [REDACTED] received [REDACTED] special education services in an in-person, highly structured setting. The school equipment [REDACTED] used was adapted to [REDACTED] individual needs and [REDACTED] received direct support from teachers and aides who were trained to meet [REDACTED] special education plan. [REDACTED] received grades of "4" (Sufficient Progress) and "5" (Mastery) on most of [REDACTED] applicable IEP goals which were reflected in notes prepared to complete [REDACTED] IEP dated [REDACTED] 20[REDACTED]. On the IEP, the IEP team noted that [REDACTED] required a low-student to teacher ratio "to meet [REDACTED] needs in the areas of Mathematics, Reading, Writing, Behavior, Classroom Tool Use, Communication and Adapted Physical Education." SB 53.

After noting "significant progress" on [REDACTED]'s 20[REDACTED]-20[REDACTED] report card, on [REDACTED]'s first grade IEP, the IEP team increased [REDACTED]'s general education hours to 7.5 hours weekly for the 20[REDACTED]-20[REDACTED] school year. Parents consented to the IEP dated [REDACTED] 20[REDACTED] (the April 2020 IEP).

B. [REDACTED]PS Provided [REDACTED] With FAPE During The 20[REDACTED]-20[REDACTED] & 20[REDACTED]-20[REDACTED] School Years

1. From March 12, 2020 through the end of the 2019-2020 school year, [REDACTED]PS was closed due to the COVID-19 pandemic.

On March 12, 2020, Governor Ralph Northam issued Executive Order Number 51, effectively declaring a state of emergency in Virginia because of the COVID-19 pandemic. On March 16, 2020, the Governor also announced that all local private and public schools closed for a minimum of two weeks to prevent transmission of COVID-19. On March 15, [REDACTED]PS announced closure of all public school buildings until further notice. On March 27, 2020, Governor Ralph Northam issued Executive Order Number 53, ordering the closure of all K-12 public schools and cease in-person instruction for the remainder of the 2019-2020 school year. PE 59

2. [REDACTED] made appropriate progress during the 2020-2021 school year.

The Parent participated in an IEP team meeting via teleconference on [REDACTED] 20[REDACTED]. The IEP team determined that [REDACTED] was to attain goals in Mathematics, Reading, Behavior Improvements, Writing, Classroom Tool Use, Adapted Physical Education, and Communication. [REDACTED]PS proposed that [REDACTED] was to receive 27.75 hours of special education consisting of 7.5 hours in the general education setting and 20.25 hours in the special education setting. Also, [REDACTED]PS proposed that on August 25, 2020, [REDACTED] would receive 4.0 hours of adaptive physical education,

3.0 hours of speech-language therapy services each month and 2.0 hours of occupational therapy each month. [REDACTED] PS stated that [REDACTED] would receive these services at [REDACTED] neighborhood school, [REDACTED] School. SB 53.

On May 30, 2020, because of the COVID 19 school closure, the IEP team proposed a modification to the above IEP. [REDACTED] would receive [REDACTED] 60 minutes of Autism services each week and 30 minutes of Speech-Language services monthly. [REDACTED] special education services could be modified to be delivered by telephone, email, pre-recorded videos, and video conferencing sessions. The adaptive P.E. teacher would provide modified P.E. activities and Alternative P.E. activities. The Occupational Therapist was to provide resources to support distance learning and would be available for check-ins with the family and team as needed. [REDACTED] PS proposed that during the COVID-19 school closure, school staff would provide services to support the Mathematics goal and a Communication goal. The IEP team added ESY to [REDACTED]'s IEP but deferred ESY discussions until June 19, 2020 when [REDACTED] PS would be more likely to know whether or not the school closure would continue to be in effect. SB 57.

Regarding that summer's ESY plans, however, on June 10, 2020, Parent wrote an email to [REDACTED] in which the Parent stated that she planned to continue the appeals process but she intended to "sign [REDACTED] up for intensive ABA as our primary plan." The Parent concluded [REDACTED] email to [REDACTED] by stating, "Might as well take advantage of the lack of school." SB 50.

At the beginning of the 2020-2021 school year, [REDACTED] confirmed that when [REDACTED] participated in synchronous, general education virtual activities, [REDACTED] was engaged in the program and participated fully in it. [REDACTED] confirmed also in her testimony that she and all of her assistants never took breaks and provided many informational online resources to the Parents. [REDACTED] testified that she did not experience difficulties with transitioning from one activity to another during virtual general education activities and knew this because she could see [REDACTED]'s active participation. Tr. Day 2, pp. 370, lines 1-8; Tr. Day 2, pp. 374, lines 1-22; Tr. Day 2, pp. 376, lines 15-16; Tr. Day 2, pp. 376, lines 6-7; Tr. Day 2, pp. 377, lines 8-10.

Also, on September 3, 2020, the IEP team met again and proposed virtual services only for [REDACTED]'s special education service delivery because schools remained closed per the Governor's Order and the COVID-19 pandemic. The Parents did not consent to the virtual modifications to [REDACTED]'s [REDACTED] 20 [REDACTED] IEP though they consented to the IEP services enumerated and advised the IEP team that they would accept only in-person special education instruction and supports for [REDACTED]. SB 58.

On September 3, 2020, the Parents rejected the IEP team's proposal to virtually provide [REDACTED] 13.0 hours of Autism, including 11.5 hours in the special education setting and 1.5 hours in the general education setting with 2.0 hours monthly of virtual Adapted Physical Education, 3.0 hours virtually of Speech-Language and 1.0 hour virtually of Occupational Therapy. SB 59. At

this meeting, the Parents requested a pilot program for [REDACTED] and [REDACTED] classmates to come inside the school building. The Parents stated again to the IEP team that [REDACTED] had documentation from [REDACTED] medical doctors that [REDACTED] could not be educated in any setting other than in-person. SB 59.

The Parents provided the IEP team a letter from two medical providers, Dr. [REDACTED], Psy.D. and from Dr. [REDACTED], M.D. who was [REDACTED]'s pediatrician. Both medical providers strongly recommended in-person learning rather than virtual learning. Dr. [REDACTED], who testified at the due process hearing, supported her medical opinion that [REDACTED] could not meaningfully benefit from a virtual education. Instead, Dr. [REDACTED] recommended a special education learning environment comprised of an "in-person small group setting where [REDACTED] is able to practice appropriate social behavior and emotional control in the presence of [REDACTED] peers." Dr. [REDACTED] testified, however, that she was not familiar with the educational program [REDACTED]PS offered to [REDACTED] and that she had no educational background in special education. Dr. [REDACTED] did not testify at the hearing. PE 37; PE 39.

On [REDACTED] 20[REDACTED], the Parents filed a complaint with the Virginia Department of Education (the VDOE) requesting that the VDOE consider their request for [REDACTED]PS to provide in-person special education services to [REDACTED]. Originally, the VDOE did not find that [REDACTED]PS had made an error. The VDOE State Review Officer, however, remanded the Parents' complaint back to the VDOE for further consideration of the Parents' assertion that the IEP team had not fully considered the Parents' medical documentation that [REDACTED] required in-person learning. After remand to the VDOE, [REDACTED]PS was required to provide 51.5 hours of OT virtual instruction. Ultimately, the complaint was remanded to the VDOE for additional consideration of the Parents' medical documentation for [REDACTED] but the later VDOE finding was not amended. PE 59; PE 60; PE 61; PE 64; PE 65.

In the VDOE Letter of Findings (LOF) dated December 3, 2020, the VDOE cited, and the Parent acknowledged, that [REDACTED], by Parent's choice, did not consistently access virtual learning during scheduled sessions due to [REDACTED]'s participation in private therapy sessions. The VDOE declined to "penalize" [REDACTED]PS for any information lacking toward the school division's inability to fully assess [REDACTED]'s progress toward [REDACTED] annual IEP goals. The VDOE concluded the original LOF as follows:

"Finally, we cannot parse which aspects of [REDACTED]'s] progress may be attributed to private tutoring/therapy or to student's irregular participation in distance learning – supplemented by the Special Education Teacher's voluntary efforts to assist [REDACTED.] during scheduled breaks." PE 59.

In the LOF, the VDOE also highlighted the fact that [REDACTED]'s report card for this timeframe reflected only one absence. The VDOE cautioned [REDACTED]PS to keep better records regarding [REDACTED]'s absences from school. SB 59. But the LOF noted also that although [REDACTED]PS had indicated that [REDACTED] had regularly accessed virtual learning through Friday, October 23, 2020, this was not the case. The LOF documented that the Parent had stated otherwise to a VDOE representative during a telephone call on November 17, 2020.

During the call, the Parent indicated to the VDOE representative that [REDACTED]PS required [REDACTED]'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 to the VDOE that [REDACTED] had inconsistently attended the school division's virtual learning program. During weekly virtual instruction time, the Parent stated that [REDACTED] 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 Tuesdays and Wednesdays. Thus, the VDOE apparently surmised that [REDACTED] was not available to access some, if not all, of the special education services proffered by [REDACTED]PS] distance learning. PE 59.

The Parents hired not only an ABA therapist who regularly provided instruction to [REDACTED], the Parents also employed a litany of private providers to instruct [REDACTED] from September 9, 2020 to June 1, 2021. In addition to ABA, the private providers provided speech therapy and tutoring to [REDACTED]. But the 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 [REDACTED]PS, and they now request the Hearing Officer to order [REDACTED]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 [REDACTED] and \$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 [REDACTED]'s regression. The Parents also request additional compensation to transport [REDACTED] to the private providers, if relief is ordered, and any other relief the Hearing Officer deems necessary to compensate [REDACTED]. 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, [REDACTED]PS held an additional IEP Addendum meeting to describe how in-person instruction would be delivered to [REDACTED]. [REDACTED]PS agreed to provide [REDACTED]'s recovery OT services to [REDACTED] by providing [REDACTED] 2.0 hours OT monthly. [REDACTED]PS agreed to also provide [REDACTED] in-person special education services four days weekly with Mondays to remain as an asynchronous virtual day. [REDACTED]PS also agreed to provide [REDACTED] 3.0 hours per month of Speech-Language services during [REDACTED] in-person school hours. But [REDACTED]'s general education services were to remain virtually provided. SB 60.

In addition to providing [REDACTED] the above compensatory and in-person services, the IEP team meeting on October 23, 2020 shared that [REDACTED] was able to sit and engage for 30 minutes at a time. The Parent related that [REDACTED]'s private service provider had been able to have [REDACTED] sit for upwards of one hour. Also at this meeting, the Parents admitted to the IEP team that [REDACTED] had been pulled 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.

Also on October 23, 2020, the IEP team proposed realistic goals for [REDACTED] that were tied to [REDACTED] IEP in Mathematics, Reading, Communication and Articulation Strategies. In the latter category, [REDACTED] was to learn how to decrease [REDACTED] rate of speech, to use appropriate volume, and how to clarify [REDACTED] message when [REDACTED] is misunderstood. [REDACTED] 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 [REDACTED] through telephone contact, emails pre-recorded videos and/or video conferencing sessions. [REDACTED]PS was to provide these educational services in-person to [REDACTED]. 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, [REDACTED]PS was able to provide virtual instruction only to special education students. Until February 12, 2021, [REDACTED]PS provided [REDACTED] only virtual instruction. PE 59.

On February 16, 2021, [REDACTED]PS began again to provide [REDACTED] 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 [REDACTED]PS called the meeting to discuss the March 15, 2021, VDOE finding that [REDACTED] was entitled to 51.5 hours of compensatory service hours which included 3.0 hours of Speech-Language services. [REDACTED]PS proposed additional compensatory services hours to be provided to [REDACTED] 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 [REDACTED] was provided between the dates of September 8, 2020 and October 2, 2020. The IEP team calculated that [REDACTED] had been provided virtually 23.75 hours. But the team reasoned that [REDACTED] was entitled to 4.0 more hours weekly than the May 30, 2020, IEP. Thus, the IEP team decided that recovery of these hours, totaling 12.0 compensatory service hours monthly, were owed to [REDACTED]. Also, the IEP team considered the adverse impact of [REDACTED]'s behavior on [REDACTED] ability to access [REDACTED] virtual classes, without [REDACTED] accommodations, and proposed also to add 2.0 hours per day in language arts instruction, 1.5 hours for [REDACTED] participation in FLES, and 3.0 hours for speech and language services. Finally, the IEP team proposed the preparation of an FBA because of [REDACTED]'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 be included in the proposed IEP because the Parent stated that [REDACTED] does not access virtual services at all. The Parent requested also that the IEP team reimburse [REDACTED] for all 23.75 virtual hours provided to [REDACTED] during the 17 days between September 8, 2020 and October 2, 2020. Kathleen Harris, [REDACTED]PS Procedural Support Liaison, who qualified as an expert for [REDACTED]PS, testified credibly that she believed that 13 compensatory services are owed to [REDACTED] from the State Complaint LOF which the [REDACTED]PS attempted to have a teacher complete for [REDACTED]. 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 [REDACTED]PS and the Parents consented to [REDACTED]'s private day school placement at [REDACTED].C. Overwhelmingly, the private day placement will provide

adequate recovery services or compensatory educational service hours [REDACTED]. will replace any service gaps [REDACTED]. may have technically missed. SB 61.

[REDACTED].’s April 5, 2021, IEP Addendum team also confirmed that [REDACTED]. demonstrated “very gradual progress” in [REDACTED] core subjects and noted that [REDACTED] enjoyed reading and being read to, now knew more Dolch sight words, that [REDACTED] enjoyed looking at fiction and non-fiction books, attended adult read alouds, and was segmenting words into syllables, counted 0 to 100 and that [REDACTED] could create, extend and label a variety of repeating patterns. Notwithstanding these teacher observed academic gains, the IEP team also remarked that [REDACTED].’s participation in writing activities is often impacted by behaviors and difficulties with following directions. SB 61.

Further, the April 5, 2021, IEP Addendum team acknowledged that [REDACTED]. enjoyed school, was usually willing to participate in all school activities, that [REDACTED] could remain in a group, wait [REDACTED] turn, and raised [REDACTED] hand with a quiet mouth. In fact, the IEP team acknowledged that [REDACTED].’s behavior had significantly improved during [REDACTED] first grade year from 2019-2020 in that [REDACTED] did not demonstrate as many protest behaviors. The IEP team observed also that [REDACTED].’s difficulty with transitions, from preferred to non-preferred activities, had generally improved in the class setting. But when [REDACTED]. transitioned between various school settings, e.g. from cafeteria to classroom, classroom to gym, these transitions caused [REDACTED] to be non-compliant for upwards of 15 minutes. Thus, in all educational categories, the IEP team noted [REDACTED].’s need for consistency and repetition and requested that an FBA be prepared to define antecedent behaviors. SB 61; P 75; SB 86; SB 91; SB 92; SB 93; SB 94; SB 95.

3. During the 2021-2022 school year [REDACTED].’s IEP was appropriate and reflected [REDACTED] emerging behavioral needs.

The [REDACTED]PS’s exhibits reflected that the IEP team met on April 12, 2021, April 19, 2021, and on May 14, 2021 to develop [REDACTED].’s IEPs which the IEP team eventually finalized on May 21, 2021. During the early months of 2021, the IEP team focused on [REDACTED].’s emerging problematic behavior and its adverse impact upon [REDACTED].’s ability to access [REDACTED] educational program. The IEP team agreed to meet again to arrange ESY services for [REDACTED]. because the IEP team concurred that [REDACTED]. could lose the skills [REDACTED] had gained during the summer and [REDACTED] attention to behavior was critical to [REDACTED].’s school performance. SB 62.

During discussions with the Parent on May 21, 2021, the IEP team referred to [REDACTED].’s emerging problematic behaviors. At this time, the Parent repeated to the IEP team the odd comments [REDACTED] had made to their ABA private service provider. The parent indicated to the IEP team that she attributed [REDACTED].’s odd comments to attention-seeking behaviors. For example, the Parent mentioned that [REDACTED]. referred to “drinking blood” and to “throwing fireballs” during a recent ABA session. SB 62. But when the Parent indicated to the IEP team the substance of these strange comments during [REDACTED].’s recent ABA sessions, the IEP team members asserted that they had not often encountered these comments at school. Thus, the IEP team declined to make this incident the

source of a new behavioral goal. [REDACTED]'s IEP team then responded that [REDACTED] PS school staff had been instructed to ignore [REDACTED]'s inappropriate comments. The IEP team did note, however, that [REDACTED] was increasingly anxious over loud noises such as fire alarms. The Parent commented also to the IEP team that [REDACTED] now reacted more dramatically to loud noises. Again, the Parent offered her opinion that [REDACTED]'s recent hypersensitivity to sounds was a side effect of the new [psychotropic] medication that [REDACTED] had recently begun to take on a daily basis. SB 62.

Later during the May 21, 2021, IEP meeting, the Parent suggested that [REDACTED] repeat [REDACTED] grade. The IEP team noted to the Parent that [REDACTED] would be disappointed to learn that [REDACTED] would not move forward to [REDACTED] grade. Ultimately, [REDACTED]'s principal approved the parental request, to which the IEP team agreed, to retain [REDACTED] in [REDACTED] grade. SB 62.

Also at the above May 21, 2021, IEP meeting, the team decided that [REDACTED] was entitled to ESY services for the summer of 2021 because [REDACTED] needed extra time to learn decoding, reading skills and coin counting. In addition, the IEP team added the behavioral goal of engaging in on-task behaviors and self-regulation. The IEP team noted that [REDACTED] benefitted in the past, and had made significant progress, by modeling peer behavior, prior to the COVID-19 pandemic but that because of [REDACTED]'s emerging behaviors, [REDACTED] was unable to do much [at school] this year. SB 62.

4. The June 15, 2022, IEP was appropriate and provided [REDACTED] a FAPE.

On April 19, 2021, the IEP team met again to discuss the results of [REDACTED]'s FBA evaluation. The IEP team identified [REDACTED]'s most problematic behaviors to be screaming and elopement. The IEP team set out to reduce [REDACTED] screaming to nine times daily and [REDACTED] elopement attempts down to once per day. [REDACTED], the state-licensed BCBA who testified at the hearing and qualified as an expert witness, had informed the IEP team that she regularly reached out to [REDACTED] and asked [REDACTED] to identify [REDACTED] daily issues as being “a big deal or a little deal” when problems arise at school. After the IEP team’s discussion of [REDACTED] problematic behaviors, the IEP team determined that [REDACTED]'s FBA and BIP ought be prepared and behavioral data collected to assist the IEP team. The IEP team reviewed the BCBA daily behavior data sheets for [REDACTED]. SB 62; SB 95; SB 91.

For [REDACTED] 2021-2022 school year, at the May 21, 2021 IEP meeting, upon [REDACTED] Parent’s request, the IEP team determined that [REDACTED] would repeat [REDACTED] grade. Also, for five days weekly, [REDACTED] would be taught in-person, five days weekly in a brick and mortar² instructional setting. [REDACTED] was to receive special education services in the general education environment for 7.5 hours weekly for lunch and recess with access for periods of 30 minutes per day in the morning meeting, Science, Social Studies, Math and any other school activities. [REDACTED] was also to receive 20.25 hours weekly Autism services for Math, Reading, Writing and Adaptive Art. While the Parent indicated

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.

that she wanted █. to be included in a summer enrichment program with typical children, the IEP team emphasized that █. required specialized instruction in behavior. █. was to receive OT services monthly for two hours and 4.0 hours of services monthly. SB 62.

A July 20, 2021, IEP Addendum documented that █. received ESY services during the summer months of 2021. The IEP team commented positively on the behavioral improvement █. had demonstrated and urged █.'s "behavioral momentum" to increase during the summer. SB 63. █.'s IEP team recommended that █ continue in the second week of ESY and that afterward █. was to attend a private summer camp through █ private respite care facility, █, from July 26, 2021 to August 6, 2021. Further, the IEP team stated that █ outstanding compensatory hours could resume in the fall, 2021, whether it be with █ private provider or with an █PS staff member. SB 63.

Following the consistent progress the ESY school staff reported in the July 20, 2021, IEP Addendum, █. began the 2021-2022 school year again at █ in the Enhanced Autism Class. The IEP Addendum, dated September 23, 2021, acknowledged █.'s mathematical abilities in that █ could compare three digit numbers and could solve single-step math problems. █ was learning how to balance equations. █ could write certain letters with consistency about 75% of the time, could write █ name 3 out of 5 times. █ had learned how to use a 3-finger grasp for various writing tools. But at the same time the school staff noted █ work accompanying work avoidance behaviors. For example, █ would comply when asked to write █ name, but then █ would rip up the paper, scribble with █ pencil, leave the work area, or throw instructional materials aside instead of completing █ name. SB 64.

Regarding the behavioral goals that were added to the May 21, 2021, IEP, under the category of task avoidance, the IEP team noted that baseline data collected between April 6, 2021 and April 16, 2021, indicated that █ engaged in on-task behavior 69.67% of 5 minute intervals during the school day. The IEP team noted also that █ completed many transitions outside the classroom without demonstrating maladaptive behaviors. █. sometimes actively participated in academic instruction and participated in activities for over 30 minutes at a time. In sum, the IEP team noted that it was important for █. to replace █ off-task, maladaptive behaviors (screaming and eloping) with on-task behavior. SB 64.

And with regard to the behavioral goal of self-regulation, the IEP team acknowledged that █. had demonstrated increased difficulties in using coping strategies from a high of 65% before COVID-19 to a later baseline of 52.6% of documented opportunities. But concurrently, the IEP team saw behavioral improvement in █.'s ability to manage a "crisis cycle." SB 65. Also, the IEP team reported that █. could verbally explain the strategies █ could use when █ becomes upset or mad such as taking a deep breath or telling an adult what is wrong. And in the escalation phase of a behavior crisis, █. could independently express how █ felt and could follow adult prompts to use a coping strategy. SB 64.

Throughout the 20[REDACTED]-20[REDACTED] school year, [REDACTED]PS delivered [REDACTED].’s special education services to [REDACTED]. On October 14, 2021, the IEP team reviewed the BIP summary. The IEP team noted that [REDACTED]. was more able to request a break at a conversational level and that [REDACTED] was able to sustain attention to a work task longer and had not recently eloped to escape a task. The IEP team observed that [REDACTED]. was able to sustain attention longer. The IEP team noted that [REDACTED]. had recently started a new medication and wasn’t sleeping quite so much on the floor. [REDACTED]. did not scream as much at school. And at this point, [REDACTED]. had 39.5 hours of compensatory education hours left from the earlier award of compensatory education hours. SB 65.

The IEP team continued to observe [REDACTED].’s above positive behavioral trend and on November 18, 2021, the IEP team noted [REDACTED].’s behavioral progress on [REDACTED] BIP summary unfortunately though, the IEP team also noted [REDACTED].’s inconsistent progress on other BIP goals. The IEP team deemed that certain positive trends reflected in the prior month’s BIP data revealed other troublesome trends toward elopement and screaming which had increased. SB 66.

Specifically, as is recited in the January 14, 2022, IEP Addendum, [REDACTED]PS determined that [REDACTED]. had made inconsistent progress towards achieving [REDACTED] BIP goals. Regarding requests above conversational level, [REDACTED]. made loud requests more than 5 times daily on 4 out of 20 days. [REDACTED]. eloped more than once daily on 8 out of 20 days. SB 67. On [REDACTED] next IEP Addendum dated March 3, 2022, the IEP team again noted inconsistent progress on [REDACTED].’s BIP goals. For example, [REDACTED].’s loud vocalizations increased to 3 times per day on 15 out of 24 days. [REDACTED]. eloped more than 2 times per day on 15 out of 24 days. At this time, teachers then noted that [REDACTED]. slept more in class because [REDACTED] had started a new medication. Regarding compensatory hours, the IEP team provided that [REDACTED]. would have to stay after school to complete some of [REDACTED] compensatory hours and had to arrive earlier to school for about an hour earlier or stay later to make up compensatory hours. SB 68.

[REDACTED]PS conducted IEP Addenda meetings into the 20[REDACTED]-20[REDACTED] school year. On April 28, 2022, the IEP team reported that [REDACTED]. had made positive progress in [REDACTED] ability to use replacement strategies and that [REDACTED]. had decreased in certain problem behaviors. The IEP team planned to conduct a new FBA to assess [REDACTED] ability to directions.SB 69. But the IEP team gradually considered and eventually arrived at the decision to find a more appropriate placement for [REDACTED]. On May 10, 2022, the IEP team observed that [REDACTED]. had made inconsistent behavioral progress. The IEP team having observed that while [REDACTED]. did demonstrate some progress on [REDACTED] behavioral goals, other seriously maladaptive behaviors developed toward the end of the 2021-2022 school year at [REDACTED] School. In addition to the other emerging inconsistent behaviors, the BCBA who oversaw [REDACTED].’s behavioral progress at [REDACTED] testified that [REDACTED]. had begun to remove [REDACTED] clothes and become naked at school. PE 93; PE 94; PE 95; P96; SB 69.

At the June 15, 2022 IEP meeting, the Parents consented to the IEP team's suggestion that [REDACTED] be placed in a private day school placement selected by the IEP team. The Parents rejected one private day placement that was far away from [REDACTED]'s home. Later, the Parents selected [REDACTED] Center ([REDACTED]C) to which the IEP team and the Parents agreed. According to the testimony of [REDACTED] ([REDACTED]), the [REDACTED]PS employee charged with finding appropriate private day schools who testified as an expert, the private placement is disciplinary in focus. But from [REDACTED]'s testimony, it appears that positive reinforcements are utilized with [REDACTED]. The hearing exhibits mention only one minor transitioning incident that has occurred involving [REDACTED] since [REDACTED] began there in the 2021-2022 school year. Also, the private day placement has a psychologist on staff and provides [REDACTED], the small, structured environment recommended for [REDACTED] by Dr. [REDACTED] and Dr. [REDACTED]. [REDACTED] confirmed that [REDACTED]'s classes are taught within a classroom providing a small student to teacher ratio. According to all reports from [REDACTED] IEP team, [REDACTED] will return to [REDACTED] to resume [REDACTED] public school education. SB 69; SB 70; SB 71; SB 72.

The June 15, 2022, IEP for [REDACTED] was appropriate.

B. [REDACTED]PS Provided [REDACTED] With FAPE During The 2020-2021 School Year.

1. The [REDACTED]20 [REDACTED] IEP, and its revisions, due to the COVID-19 pandemic, provided [REDACTED] a FAPE.

When the IEP team drafted the [REDACTED]20 [REDACTED] IEP, the document recited the fact that schools were closed as a result of the COVID-19 pandemic and that the school division did not then know if the schools would be open or closed. SB 53. Parent had formerly also consented to the special education service delivery by virtual means on April 23, 2020 for speech-language therapy and to the [REDACTED]20 [REDACTED] IEP. SB 52. The IEP team had proposed goals in Mathematics, Reading, Behavior Improvements, Writing, Classroom Tool Use, Adaptive Physical Education, and Communications. [REDACTED] was to receive 27.75 hours weekly of special education in the Autism category including 7.5 hours in the general education setting and 20.25 hours in a special education setting. On August 25, 2020, [REDACTED] was to receive 4.0 hours monthly of adaptive physical education, 2.0 hours occupational therapy services monthly, and 3.0 hours monthly of Speech- Language in a special education setting.

Later, on May 30 & May 31, 2020, during ESY discussions, the Parent exchanged email correspondence with the VDOE and eventually filed a formal complaint against [REDACTED]PS. She stated:

"I agree to the ESY goal but not to the level of services ... two hours per week of remote interaction does not constitute a free, appropriate education for [REDACTED]. If distance learning is not appropriate for [REDACTED]'s individual needs (as I believe to be the case), the LEA must provide sufficient, appropriate services in person .."

But the Parent had no authority or expertise to assert that [REDACTED] 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 [REDACTED] PS school children, and to special education students included in the [REDACTED] PS school district.

Regarding the Parents' assertion that [REDACTED] 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 [REDACTED], or for any other children in the Enhanced Autism class at [REDACTED]. 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).

Upon review of the revised IEP Addendum dated May 30, 2020, in which [REDACTED] PS describes providing ESY virtual services to [REDACTED], the Hearing Officer reviewed the IEP and deems appropriate the changes made for [REDACTED]'s virtual IEP which fully provided [REDACTED] a FAPE.

1. The September 3, 2021, IEP provided [REDACTED] a FAPE.

Later, on August 28, 2020, via email to the VDOE, Complaints Division, after receiving the draft of the [REDACTED]'s proposed September 3, 2020 IEP, the Parent further stated:

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

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

"I expressly do not consent to any changes in [REDACTED]'s] IEP at this time. I do not consent to the change of placement from school settings to virtual. I do not consent to any changes in the number of service hours [REDACTED] is receiving." SB 128.

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

Regarding the Parents' assertion that [REDACTED] PS had effectively changed [REDACTED]'s placement by offering [REDACTED] 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 [REDACTED] a FAPE. The Parents' partial consent to the September 3, 2021, IEP was not justified in light of the system-wide changes that the [REDACTED] PS administrators were required to make to existing IEPs during the unprecedented COVID-19 emergency timeframe.

Regarding the September 3, 2020, IEP, the Parents filed a complaint with the VDOE and a Letter of Findings was provided to the Parents. Ultimately, the Parents were to receive compensatory education service hours for the 17 days when [REDACTED] was without a computer. Soon, [REDACTED] returned to the enhanced autism program for four days weekly with one day provided asynchronously for teachers to organize their work. The Parent objected to the one day for teachers to organize their work. Again, Parents' objections to the school not organizing a pilot program for [REDACTED] or for teachers to organize their work, is not a parental right, per the IDEA. And on October 27, 2020, [REDACTED] returned to in-person instruction. The 51.5 hours the VDOE allotted for compensatory educational services is reasonable.

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.").

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

3. The June 15, 2022 IEP which placed [REDACTED] at the private day placement provided [REDACTED] a FAPE in light of [REDACTED] emerging maladaptive behaviors.

[REDACTED]'s educational record reflects that [REDACTED] experienced behavioral issues from the time [REDACTED] entered kindergarten. The Hearing Officer was impressed that [REDACTED] was able, as [REDACTED]'s [REDACTED] grade case manager, [REDACTED] achieved "significant progress" after [REDACTED] [REDACTED] grade year. But regrettably, [REDACTED] has a multitude of disabilities and a virtually unknown genetic syndrome which medical professionals have tracked since birth to assist [REDACTED] parents to properly educate [REDACTED]. But that does not mean that their medical expertise replaces the experienced, formally trained and licensed, to formulate [REDACTED]'s special education plan.

Regarding educational background and expertise, not a single medical provider, private service provider or any other qualified expert testified that [REDACTED]'s learning difficulties and emerging behaviors were attributable to the school division's virtual learning mode during the pandemic. The Parents' counsel commented at closing that their medical expert, Dr. [REDACTED], did not connect [REDACTED]'s emerging behaviors to [REDACTED] illness progression. But the Parents' argument is unreasonable. For requiring [REDACTED] PS to prove that [REDACTED]'s illness has not caused educational regression would mean that the school division bore the burden of proving that [REDACTED]'s emerging behavioral difficulties are not attributable to [REDACTED] disabilities. [REDACTED] PS is not charged with the burden of proof. The hearing evidence presented did not lead, via a connect-the-dots exercise, that the school division caused [REDACTED] to regress because [REDACTED] did not have in-person services during the pandemic which resulted in [REDACTED] placement change.

Further, the Parents made the argument at closing that [REDACTED] had to repeat [REDACTED] grade because of [REDACTED] PS's failure to provide in-person learning. But the Hearing Officer's examination of the record revealed that the Parent originally asked for [REDACTED] to repeat the [REDACTED] grade, not the school division. Similarly, the Parents inferred that the school division's failure to provide [REDACTED] an in-person learning program caused [REDACTED] to regress and inevitably led to [REDACTED] private day placement with disciplinary focus. In fact, the Parents consented to the private day placement and agreed wholeheartedly that [REDACTED] needed coping strategies to continue [REDACTED] education. And the Hearing Officer finds it baffling that in light of the multitude of visits the Parents accumulated with the ABA behavioral private service providers, and the other private service providers, that it was [REDACTED] PS, not the private service providers, who failed [REDACTED]. In addition, the Parents have not produced credentials for any of the private service providers who did not present evidence-based data at the hearing, did not testify and did not qualify as experts in any field of expertise. Though the Hearing Officer did not pose this inquiry during the due process hearing, the Hearing Officer is now perplexed to understand how the Parents' private service providers provided in-person

instruction, not virtual instruction, to [REDACTED]. when the state school systems were closed during the COVID-19 pandemic.

Thus, the Hearing Officer gleaned from [REDACTED].’s educational file that the Parents unilaterally, without notice to [REDACTED]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 [REDACTED]. Instead, the Parents, who are extremely intelligent and resourceful individuals, substituted their own notions of education and set up an intense, individual learning plan for [REDACTED]. during the pandemic. The record reflects that [REDACTED]. was sometimes tardy, arrived late or missed online sessions when [REDACTED] 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 [REDACTED]PS to provide compensatory hours for [REDACTED].

Further, [REDACTED].’s educational record shows that [REDACTED].’s behavioral and learning difficulties developed, along with the gradual academic progression [REDACTED] achieved, notwithstanding emerging maladaptive behaviors that later began to adversely affect or obliterate [REDACTED] learning capacity. To the contrary, [REDACTED].’s educational record reflects that [REDACTED]. 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 [REDACTED].C.

In this Hearing Officer’s opinion, the school’s private day school placement fulfills any minute deficiencies in [REDACTED].’s [REDACTED]20[REDACTED] IEP which would require one to make tedious, unproductive hours-to-hours mathematical calculations. The fact of the matter is that the [REDACTED].C. private day placement is the most likely scenario to fulfill the IDEA, in principle, by providing [REDACTED]. with an intense disciplinary regimen in a good faith attempt to place [REDACTED]., as closely as possible, to the position where [REDACTED] 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 Hearing Officer does not support the Parents’ primary claim that [REDACTED]. suffered regression as a result of the [REDACTED]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 [REDACTED]. regressed. The Parents assertion, that [REDACTED]. suffered regression because [REDACTED] educational environment changed, is merely conjecture. [REDACTED]PS’s detailed educational records, together with competent expert testimony indicating otherwise, reflect that [REDACTED]. receives a FAPE in [REDACTED] private day placement at [REDACTED].C.

Regarding the [REDACTED]C private day placement, Ms. [REDACTED] testified as an expert witness regarding the suitability of the private day school placement to shape [REDACTED]'s behavior. It is hopeful that [REDACTED] will make progress in communication skills, in self-regulation and in using a quiet voice until [REDACTED] undergoes positive changes in a behavior support setting and returns to public school. As Ms. [REDACTED] testified, classes are small, structured and geared to [REDACTED]'s individual needs. Thus, [REDACTED]'s IEP dated June 15, 2022, assigning [REDACTED] to private day placement at [REDACTED]C, is appropriate and provides [REDACTED] a FAPE.

C. [REDACTED]PS Proposed An Appropriate Program For [REDACTED]. For The 20[REDACTED]-20[REDACTED] & 20[REDACTED]-20[REDACTED] School Years.

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 [REDACTED]PS substantively denied [REDACTED] 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 [REDACTED]'s medical doctor, Dr. [REDACTED]. She stated that she had no knowledge of special education matters, was unfamiliar with [REDACTED]'s IEPs and had never observed [REDACTED] in a school setting. The School Division 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 [REDACTED] were appropriate for [REDACTED] educational needs, that [REDACTED]PS properly implemented [REDACTED]'s IEPs; that [REDACTED] made significant progress before Covid, and made some educational progress during and after COVID but that [REDACTED] behavior worsened and affected [REDACTED]'s ability to receive a FAPE; that the private day school where the school division and [REDACTED] parents agreed to place [REDACTED] is [REDACTED] least restrictive environment at this time and that the private day school is now necessary for [REDACTED] to make educational progress. The Parents also presented testimony from [REDACTED]'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 ██████████'s abilities in the special education setting all of whom testified regarding the appropriateness of the educational decisions made for ██████████. Thus, the ██████████ PS educators who testified are entitled to the presumption that their educational decisions regarding ██████████'s special education were correctly made for ██████████.

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.3d 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 ██████████, from April 2020 to June 15, 2021 through the present were “reasonably calculated to enable ██████████.] to make 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 ██████████'s 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.

1. The Parents argument that [REDACTED] is owed compensatory services for the periods when schools were closed due to the pandemic is without merit.

On [REDACTED] 20[REDACTED] when [REDACTED] PS closed the schools because of the Covid pandemic and all [REDACTED] PS instruction became virtual. [REDACTED] PS educators began to provide system-wide virtual instruction to all of its students. Parents assertion that [REDACTED] was entitled to be treated differently than other children by providing [REDACTED] virtual instruction was patently impossible. The Governor's edict meant that it would be impossible for [REDACTED] PS to deliver [REDACTED]'s IEP services to [REDACTED] in the same number and manner as agreed in [REDACTED] last agreed IEP, dated April 15, 2020. Parents' evidence tended to consider, in a retrospective manner, at the actions taken by the [REDACTED] PS educators in response to the pandemic.

Regarding the Parents claims for compensatory education on the ground that offering [REDACTED] virtual instruction denied [REDACTED] 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. at 116. 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, [REDACTED] was offered virtual instruction to all children in [REDACTED] PS, disabled and non-disabled alike, as in the Hawaii 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 J.T., et. al. v. DeBlasio, et.al., 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.).

Further, in the Sixth Circuit, in Roe v. Baker, D.Mass. No. CV 21-11751-RGS, 2022 WL 3916035, at *4 (D.Mass. Aug. 31, 2022) in a suit involving multiple plaintiffs against the defendant Governor of Massachusetts, in a class action involving children who had special education issues similar to [REDACTED]'s, the court upheld system-wide school closure due to COVID-19 in 2020 and 2021. In response to the plaintiff's claims that "the remote schooling experience did not provide

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 USDOE³ 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 ■■■■■’s 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.” *Id.* 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 G ex rel RG v. Ft. Bragg Dependent Sch. , 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."). Id. Further, in Hogan v. Fairfax Cnty. Sch. Bd. , 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 [REDACTED] 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 [REDACTED] is entitled to compensatory education hours.

3. *The Parents did not present any expert witnesses who causally connected [REDACTED]'s behavior to the fact that [REDACTED] experienced regression during the pandemic caused by the School District's failure to provide [REDACTED] in-person instruction during the pandemic.*

In light of [REDACTED]'s unique circumstance, [REDACTED] private day placement at the [REDACTED] Center, [REDACTED], Virginia is best suited to meet [REDACTED]'s present needs. In spite of the fact that [REDACTED] had made some progress during the 2020-2021 school year, as the evidentiary record reflects and as [REDACTED] PS teachers and behaviorists testified, [REDACTED]'s behavior became so out-of-control during the last few months of [REDACTED] time at Providence, that it adversely affected [REDACTED]'s ability to understand the topics [REDACTED] was taught.

Also, the Parents did not present any expert testimony by behavioral experts, medical or neuropsychological experts, or educational experts who could tie [REDACTED]'s behavioral regression after COVID-19 to the failure of [REDACTED] teachers to properly educate [REDACTED], to the behavioral expert who tracked [REDACTED] emerging behaviors at school, to a medical doctor or to a psychologist who could connect [REDACTED]'s behavioral challenges to [REDACTED] inability to receive in-person learning during that timeframe. Originally, the Parents asked [REDACTED] 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 Fairfax County School Board v. Knight, 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 █ current placement. In O.S. v. Fairfax County Public Schools, 804 F.3d. 354, 357 (4th. Cir. 2015), in █ C 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 █'s regression. Also, █'s medical doctor, █ 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 █'s 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 █'s illnesses as a causative factor for █'s increased 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 case tying █'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 █'s increased 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

instruction, the Parents are not entitled to compensatory services for regression which was never linked to any direct causation. There were numerous factors, and many other reports of bad behavior, that may have contributed to ■■■'s maladaptive behavior escalation that were completely separate from ■■■ virtual learning model, to attribute ■■■'s gradual behavior escalation to whittle ■■■ special education history down to one factor as the direct causation for ■■■ maladaptive behavior escalation that occurred between the 2020-2021 and 2021-2022 school years.

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 ■■■'s total 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 ■■■'s emerging troublesome behavior that adversely impacted ■■■'s ability to learn academics in the 2021-2022 school year notwithstanding the fact that ■■■ had 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 [REDACTED]'s academic progress, along with [REDACTED] 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 [REDACTED] to be the educable student [REDACTED] was in April, 2021 by financially supporting [REDACTED] enrollment at [REDACTED] 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 [REDACTED] P.S.'s personnel has utilized to eradicate [REDACTED]'s behavior 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 [REDACTED] genetic abnormality. [REDACTED]'s BCBA testified regarding a green light-red light technique which appeared to be beneficial because [REDACTED] responded well. And at [REDACTED] C., the record reflects only one minor disciplinary incident which [REDACTED] almost immediately corrected. Further, Ms. [REDACTED] testified credibly and reported that the program closely mirrors [REDACTED] elementary school special education class in that it is a small, structured class with only 8-10 students. [REDACTED] current placement at [REDACTED] C. aligns also with Dr. [REDACTED] and Dr. [REDACTED]'s recommendations for [REDACTED] optimal learning environment.

Caselaw also appears to encourage the private day placement option as replacement for the compensatory education that the Parents assert that [REDACTED] 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 [REDACTED] were appropriate and reasonably calculated to provide [REDACTED] a free, appropriate public education in the least restrictive environment; (2) [REDACTED] made appropriate progress in light of [REDACTED] circumstances which was not de minimis; and (3) that private day school placement at [REDACTED] C. is [REDACTED] proper placement where [REDACTED] is doing well and [REDACTED] behavioral needs are being met.

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

Entered on this 21st day of February, 2023

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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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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