

VIRGINIA DEPARTMENT OF EDUCATION

DUE PROCESS HEARING

#23-030

IN RE: [REDACTED], a minor,
by and through [REDACTED] **Guardian,** [REDACTED],

Petitioner,

FINDINGS OF FACT AND DECISION

Date of Decision: 12/14/2022

- against -

Case No. 23-030

[REDACTED] **PUBLIC SCHOOLS,** **Tiziana Ventimiglia, Esq.,**
Hearing Officer
Respondent.

INTRODUCTION

This matter comes before the undersigned Hearing Officer on Petitioners' Notice of Due Process Complaint, filed on September 27, 2022 (hereinafter, "Complaint").^{1 2} I was appointed shortly thereafter.³ Petitioner, with leave of this Hearing Officer, filed an Amended Complaint on October 3, 2022 (hereinafter, "Amended Complaint"). Respondent's Response to the Amended Complaint was filed on October 12, 2022.⁴ A resolution meeting was held on October 17, 2022, however, the Parties, were not able to reach an agreement.⁵ A First Prehearing Conference in the matter was scheduled for, and held on October 3, 2022. The First Prehearing Conference Summary and Order was issued on

¹ The Hearing Officer Exhibits will be referred to as "HO" followed by the exhibit number; Petitioners Exhibits will be referred to as "PE" followed by the exhibit number; and Respondent Exhibits will be referred to as "SD" followed by the exhibit number. References to testimony rendered during the Hearing will be referenced at "T" followed by the page number.

² HO 1 – Notice of Due Process Complaint

³ HO 2 – Letter of Appointment of Hearing Officer.

⁴ HO 3 – Response to the Complaint by Respondent.

⁵ HO 4 – Email from Respondent's counsel notifying outcome of resolution meetings.

October 3, 2022.⁶ A Second Prehearing Conference was scheduled for, and held on October 7, 2022. The Second Prehearing Conference Summary and Order was issued on October 11, 2022.⁷ A Third Prehearing Conference was scheduled and held on October 31, 2022. The Third Prehearing Conference Summary and Order was issued on October 31, 2022.⁸ A Fourth Prehearing Conference was scheduled and held on November 16, 2022. The Fourth Prehearing Conference Summary and Order was issued on November 16, 2022.^{9 10}

The hearing was held on November 17, 2022, and November 18, 2022. It was a closed hearing at the request of Petitioner. The Petitioner was represented by her Advocate, Mr. Sa'ad El Amin. Respondent was represented by Ms. Dannielle Hall-McIvor, Esq. and by Ms. Tania Kamala Lannetti, Esq. At the hearing, only Ms. Hall-McIvor was present. Petitioner and Respondent entered into evidence Joint Exhibits numbered J3-1 through J 27-1, J 29-1 and J 30-1; Petitioner entered into evidence Exhibit numbered P 1-1;¹¹ Respondent entered into evidence Exhibits numbered SD 1-1 through SD 4-1.¹²

Several motions were filed by both parties, as well as a multitude of subpoenas and requests for production of documents, and they are all made part of the record. Notable is Respondent's Plea of Statute of Limitations and Motion to Find Petitioner's Due Process Notice Insufficient filed on October 18, 2022.¹³ In said motion, to summarize, the Respondent asked this Hearing Officer to 1) dismiss allegations which arose prior to October 2020 as being barred by the 2-year statute of limitations; 2) find

⁶ HO 5 – First Prehearing Conference Summary and Order.

⁷ HO 6 – Second Prehearing Conference Summary and Order

⁸ HO 7 - Third Prehearing Conference Summary and Order.

⁹ HO 8 – Fourth Prehearing Conference Summary and Order

¹⁰ All prehearing reports are incorporated herein by reference.

¹¹ HO 9 – Parties' Exhibit Book;

¹² A more detailed list of the exhibits cited herein is attached as Appendix B to this decision.

¹³ HO 10 – Plea of Statute of Limitations and Motion to Find Petitioner's Due Process Notice Insufficient

the Complaint insufficient. This hearing officer, by Order dated October 21, 2022, denied Respondent's motion¹⁴

Another notable motion was the Motion to Quash Witness Subpoena filed by William C. Bischoof, Esq. on November 15, 2022, on behalf of [REDACTED], Ph.D., an expert witness subpoenaed by Petitioner, asking this Hearing Officer to quash the subpoena. After hearing arguments of Counsel and Advocate, this Hearing Officer granted Mr. Bischoof's motion by Order dated November 16, 2022, finding that the Subpoena had not been properly served.¹⁵

JURISDICTION

The due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Act (hereinafter, "IDEA"),¹⁶ 20 U.S.C. § 1400 *et seq.*, and its implementing regulations, 34 C.F.R. § 300 *et seq.*, and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 8 VAC § 20-81 *et seq.*

BACKGROUND

[REDACTED] is the student at the center of this due process hearing. Student is now [REDACTED] years old; at the time of the proposed IEP Student was [REDACTED] years old and an [REDACTED] grader. [REDACTED] is currently homeschooled. Student was found eligible for special education services under the disability category of "Autism".¹⁷ Respondent has drafted and proposed an IEP dated March 17, 2021, but Petitioner has not provided consent.

¹⁴ HO 11 – Order dated October 21, 2022

¹⁵ HO 12 – Ruling on Motion to Quash Witness Subpoena.

¹⁶ In 2004, Congress reauthorized the Individuals with Disabilities Education Act as the Individuals with Disabilities Education Improvement Act. *See* Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), effective July 1, 2005. The amendments provide that the short title of the reauthorized and amended provisions remains the Individuals with Disabilities Education Act. *See* Pub. L. 108-446, § 101, 118 Stat. at 2647; 20 U.S.C. § 1400 (2006) ("This chapter may be cited as the 'Individuals with Disabilities Education Act.'").

¹⁷ J 15-14 and J 15-15

ISSUES AND RELIEF SOUGHT

Issues: The issues pertain and are limited to the March 2021 Draft IEP, and are as follows:

- A) Whether [REDACTED] PS denied the student a FAPE when it refused to provide the student with an IEP designed to provide [REDACTED] with sufficient accommodations, special education, and services that would allow [REDACTED] to access [REDACTED] curriculum.
- B) Whether [REDACTED] PS denied the student a FAPE when it failed to provide the student with Extended School Year services.
- C) Whether [REDACTED] PS denied the student a FAPE when it failed to conduct a Functional Behavioral Assessment
- D) Whether [REDACTED] PS denied the student a FAPE when it failed to investigate previous claims of bullying by other students.
- E) Whether [REDACTED] PS denied the student a FAPE when it failed to have a Behavioral Intervention Plan.¹⁸
- F) Whether [REDACTED] PS denied the student a FAPE when it did not treat the student's parent as an essential attendee at the various meetings.
- G) Whether [REDACTED] PS denied the student a FAPE when it refused private placement for the student.

Relief: The relief sought by Petitioner is as follows:

- A) Placement at [REDACTED].
- B) Compensatory education.
- C) Any such other accommodations and services [REDACTED] is entitled to receive.

FINDINGS OF FACT **(By a Preponderance of the Evidence)**

After considering all of the evidence, as well as the argument of Counsel and Advocate, this

Hearing Officer's findings of fact are as follows:

¹⁸ Petitioner's Amended Complaint listed the following as an issue to be decided by this Hearing Officer: "Whether [REDACTED] PS denied the student a FAPE when it failed to investigate previous claims of bullying by other students, and when it failed to provide a safety plan and accommodations and services that would allow [REDACTED] to access the curriculum." However, Petitioner agreed that, as stated, a portion of this issue would be duplicative, and agreed to restate the issue as it appears herein.

1. At all times concerned in this proceeding, Student, now a [REDACTED] year old, has been a resident of [REDACTED], Virginia, where [REDACTED] lives with Petitioner.¹⁹
2. Petitioner is Student's biological aunt and legal guardian since [REDACTED] was [REDACTED] months old.²⁰
3. Student was withdrawn from [REDACTED] Public Schools by Petitioner; the reason for the withdrawal is that Petitioner believed that Student had been bullied and that Respondent had not adequately investigated the matter or addressed Student's needs at that time.²¹
4. Petitioner enrolled Student at [REDACTED] School in [REDACTED] for the completion of [REDACTED] and [REDACTED] grade.²²
5. Student has been homeschooled for [REDACTED] and [REDACTED] grade.²³
6. Student has not been enrolled in public schools since the 20[REDACTED]-20[REDACTED] school year and continues to be homeschooled.²⁴
7. Student does not want to go back to public schools because [REDACTED] does not have any friends and because the school would not do anything about a person who was mean to [REDACTED].²⁵
8. In July 2020 Petitioner filed a request for a Due Process Hearing seeking private placement, but at that time Student was not identified as a student with a disability.²⁶ Therefore, after Petitioner filed an Amended Request for a Due Process Hearing, [REDACTED] Public Schools

¹⁹ T178-8 Testimony of Petitioner.

²⁰ T178-4 – *Id.*

²¹ Testimony of Petitioner.

²² J 17-3.

²³ *Id.*

²⁴ Stipulation of fact by Parties, T541-9, and testimony of Petitioner.

²⁵ T216-15 – Testimony of Student.

²⁶ T51-20 – Testimony of [REDACTED].

proposed to evaluate Student ²⁷ The Referral for an initial evaluation is dated September 11, 2020.²⁸

9. On September 29, 2020 and September 30, 2020, a Psychological Evaluation was performed by [REDACTED], Ph.D., an expert in pediatric neuropsychology, licensed in Virginia since 2004.²⁹ As background, Dr. [REDACTED] noted that Petitioner reported that Student had been bullied in the past in school by [REDACTED] peers.
10. Incidents of bullying were confirmed by Student to Dr. [REDACTED]. Student also related to Dr. [REDACTED] that [REDACTED] was experiencing significant recurrent and distressing memories about these incidents and that in the past [REDACTED] had experienced suicidal ideation secondary to the bullying.
11. Student denied experiencing any current suicidal ideation committing to a verbal safety contract when [REDACTED] was evaluated by Dr. [REDACTED].³⁰
12. Dr. [REDACTED], to address bullying, recommended a plan for the Student to have a person that [REDACTED] knows that [REDACTED] can go and talk to and report anything that might be occurring.³¹
13. Dr. [REDACTED]' report contains six diagnoses: 1) ADHD; 2) Autism Spectrum Disorder; 3)PTSD; 4)Oppositional Defiant Disorder; 5)Unspecified Anxiety; Unspecified Depressive Disorder. Of these diagnoses, three dealt with emotional status, specifically anxiety and depression, as well as PTSD.³² Indirectly, ADHD dealt with emotions because a person with ADHD has difficulty to modulate attention and behavior, but also emotions.³³ Autism can also have those types of difficulties.³⁴

²⁷ T52-2 – *Id.*

²⁸ J 6

²⁹ P 1 – Resume of Dr. [REDACTED], T285-7 – Testimony of Dr. [REDACTED].

³⁰ T301-6 – Testimony of [REDACTED], J 22-2.

³¹ T301-17 – Testimony of Dr. [REDACTED].

³² T293-19 – *Id.*

³³ T293-23 – *Id.*

³⁴ T294-1 – *Id.*

14. Dr. [REDACTED]' report did not identify the student as having an emotional disability because Emotional Disability is an educational term, not a medical term.^{35 36}
15. Dr. [REDACTED] gave 24 recommendations that could be applied in a school setting as well as other settings.
16. One of Dr. [REDACTED]' recommendations is that caregivers look into private schools that specialize in working with teaching children with autism as another avenue.³⁷
17. Dr. [REDACTED] report noted that symptoms profile and diagnostic impressions may change or especially worsen within 3-6 months which would render [REDACTED] evaluation outdated.³⁸
18. Dr. [REDACTED]' report was subsequently shared with the Eligibility Team right before the eligibility meeting³⁹ and was summarized by the School Psychologist.⁴⁰
19. Dr. [REDACTED] was a credible witness.
20. On October 8, 2020, the Special Education Committee met to review existing data and proposed additional assessments: Psychological Evaluation, Sociocultural Report, Speech/language evaluation, Occupational Therapy and Physical Therapy Evaluations in order to assist the eligibility team.⁴¹ Petitioner consented to these evaluations.⁴² Proper Notice of this meeting was provided to Petitioner.⁴³
21. The Special Education Committee worked diligently to allow further evaluations.

³⁵ T528-25 – Testimony of [REDACTED].

³⁶ T529-17 – *Id.*

³⁷ T302-12, T302-18 – Testimony of Dr. [REDACTED].

³⁸ T316-12 *Id.*, J 12-28.

³⁹ T141-4 – Testimony of [REDACTED].

⁴⁰ T74-16 – *Id.*

⁴¹ J 8 – Prior Written Notice dated 10/8/2020.

⁴² T234-8 – Testimony of [REDACTED], J-9, J-10.

⁴³ J 7 Meeting Notice

22. On October 21, 2020, a Developmental-Sociological History report was completed which included the review of two prior social histories from 2016 and 2017.⁴⁴ A diagnosis of PTSD and ADHD was also reported in the course of the October 21, 2020 visit as well as intense home counseling by a trauma specialist and regular counseling.⁴⁵
23. Social Histories from 2016 and 2017 contained: diagnoses of an attachment disorder, oppositional defiant disorder and developmental delays for which Student received speech, occupational and mental health therapies; mood dysregulation and self-harming tendencies escalated by incidents of bullying; 2 hospitalizations; 3 consultations by the [REDACTED] Community Service Board Crisis Team.⁴⁶
24. On November 5, 2020 and November 12, 2020,^{47 48} a psychological evaluation of Student at the request of the SEC Team⁴⁹ was conducted by the School Psychologist, [REDACTED].
25. The School Psychologist is an expert. She has been a school psychologist for [REDACTED] Public Schools since August 2020.⁵⁰ She has had extensive training as outlined in her resume⁵¹, and is a licensed psychologist in Virginia.⁵²
26. The purpose of the Psychological Evaluation was to collect data to determine if Student qualified as student for special education services.⁵³ In preparing for the evaluation, the School Psychologist reviewed information shared by Petitioner and Student's records to include past evaluations, educational history, and social history reports.⁵⁴

⁴⁴ J 17.

⁴⁵ *Id.*

⁴⁶ J 17.

⁴⁷ T115-21 – Testimony of [REDACTED]

⁴⁸ J 18

⁴⁹ T67-15 – Testimony of [REDACTED]

⁵⁰ T62-13, T62-15 – Testimony of [REDACTED]

⁵¹ SD-1-1 [REDACTED]'s Resume

⁵² T63-5 – Testimony of [REDACTED]

⁵³ T67-19 – *Id.*

⁵⁴ T119-2 – *Id.*

27. The School Psychologist used several assessments as instruments for the evaluation: the Woodcock Johnson assessment, which is a cognitive assessment⁵⁵, the BASC 3 which is a social/emotional scale as a behavioral assessment⁵⁶, and the Autism spectrum rating scales⁵⁷ Petitioner completed a rating scale that asked about characteristics of Autism.⁵⁸ The documentation normally would have had portions filled out by teachers, but because the Student was not in school, there was no data from teachers' observations.⁵⁹
28. In the course of the evaluation by the School Psychologist, Student stated that [REDACTED] found school boring and brought up the issue of past bullying.⁶⁰ However, the School Psychologist had no information that Student was still bothered by bullying.⁶¹
29. At the time of Psychological Evaluation, the Student was not enrolled in [REDACTED] Public Schools.⁶² Therefore, for purposes of the evaluation, the School Psychologist intended to collect data pertaining to academics. However, when Student was supposed to be tested, the school was evacuated⁶³ and when the School Psychologist attempted to reschedule, Petitioner raised concerns about the rising COVID cases.⁶⁴
30. The School Psychologist was a credible witness.
31. On November 19, 2020, a Physical Therapy Evaluation was conducted as part of the eligibility process⁶⁵ along with an Occupational Therapy Evaluation.⁶⁶

⁵⁵ T124-7

⁵⁶ T124-11 - *Id.*

⁵⁷ T129-17 - *Id.*

⁵⁸ T74-3 - *Id.*

⁵⁹ T130-9 - *Id.*

⁶⁰ T76-22 - *Id.*

⁶¹ T77-5 - *Id.*

⁶² T116-1 - *Id.*

⁶³ T-98-16 - *Id.*

⁶⁴ T100-1 - *Id.*

⁶⁵ J 20.

⁶⁶ J 21.

32. The Occupational Therapy consultation was also one of the recommendations of Dr. [REDACTED] (No. 15).⁶⁷
33. On December 16, 2020, an Education Summary was completed. The information contained in the Education Summary was provided by Petitioner as the Student's teacher because Student was being homeschooled.⁶⁸
34. On December 21, 2020, the Team met to determine eligibility. Proper notice was provided to Petitioner.⁶⁹
35. The Team included Petitioner, General Education Teacher, Occupational Therapist, Physical Therapist, Principal/Designee, Psychologist, School Counselor, School Social Worker, Special Education Compliance Coordinator, Special Education Teacher, Speech/Language Pathologist.
36. The Team reviewed a multitude of records and considered all available information and input from members of the Team, including attendance and educational history, prior assessments, state and district testing, and input from Petitioner. Because other testing had been proposed and performed, available to the Team were also the psychological evaluation, the occupational and physical therapy evaluations. Speech evaluation was not completed due to Petitioner's concerns about COVID-19 rising number of cases.⁷⁰
37. The Team reviewed the Psychological Evaluation report first, and in particular the Autism Assessment.⁷¹
38. Dr. [REDACTED]' report was also available to the Team⁷² which was summarized by the School Psychologist⁷³.

⁶⁷ J 22-24.

⁶⁸ J 19.

⁶⁹ J 11 – Meeting Notice.

⁷⁰ J 12-7.

⁷¹ T244-1 – Testimony of [REDACTED].

⁷² T246-15 – *Id.*

⁷³ T83-16 – Testimony of [REDACTED].

39. No one, including the School Psychologist, voiced disagreement with Dr. [REDACTED]' report.⁷⁴
40. The team took Dr. [REDACTED]' report into consideration as supplemental data; the report, in addition to the 24 recommendations, also highlighted signs and symptoms that needed support.⁷⁵
41. In the development of the IEP, not every recommendation given by Dr. [REDACTED] or Petitioner was followed, but it was fully considered.⁷⁶
42. Not all of Dr. [REDACTED]' diagnoses are eligibility categories: specifically, posttraumatic stress disorder, oppositional defiant disorder, unspecified anxiety disorder, unspecified depressive disorder, and attention deficit hyperactive disorder are not eligibility categories.⁷⁷
43. Although it is possible that the diagnoses contained in Dr. [REDACTED]' report may impact the Student's ability to access the curriculum, because the Student was homeschooled there was no data that was collected to see which of these diagnoses would impact [REDACTED].⁷⁸
44. During the eligibility meeting, there was a team discussion asking, with Petitioner's input, about how some of Dr. [REDACTED]' diagnoses looked like in the home-school setting, and how they could be addressed if and when the Student came back to public school.⁷⁹
45. The Team reviewed the diagnoses of ADHD and a mood disorder.⁸⁰ The Team looked at the Specific Learning Disability Worksheet, but found that the Student was not eligible under this category.⁸¹

⁷⁴ T84-15 – *Id.*

⁷⁵ T86-18 – *Id.*

⁷⁶ T247-6 – Testimony of [REDACTED].

⁷⁷ T87-4 – Testimony of [REDACTED].

⁷⁸ T91-12 – *Id.*

⁷⁹ T94-15 – *Id.*

⁸⁰ T246-3, – Testimony of [REDACTED], J12-6.

⁸¹ J 12-10.

46. On February 17, 2021, the Team reconvened. This additional meeting was needed to further evaluate Student's eligibility.⁸² This was memorialized in a Prior Written Notice dated December 21, 2020.⁸³ Proper Meeting Notice was provided to Petitioner.⁸⁴
47. [REDACTED], who is a Special Education Compliance Coordinator and one of the compliance coordinators with the City of [REDACTED] participated along with all other members of the Team, in the December 2020 Eligibility meeting and in the February 2021 meeting⁸⁵
48. Mr. [REDACTED] is an expert with respect to special education teaching and instructions as it relates to programming for students in the classroom.⁸⁶
49. The Special Education Compliance Coordinator was a credible witness.
50. A member of the Team was also [REDACTED], the case manager in the February to March 2021 time period to develop the IEP.⁸⁷ She is a special education teacher.⁸⁸ Her skills include the cross category of ED/LD which deals with emotional disabilities and learning disabilities which mostly done in an inclusion setting model.⁸⁹
51. [REDACTED] was a credible witness.
52. Petitioner was a collaborative member of the Team.⁹⁰
53. The Team took into considerations items that they initially did not propose, like the need for special education transportation.⁹¹

⁸² T254-1 – Testimony of [REDACTED].

⁸³ J-16 and T254-12 – *Id.*

⁸⁴ J 14.

⁸⁵ T220-19 – Testimony of [REDACTED].

⁸⁶ T221-11 – Testimony of [REDACTED].

⁸⁷ T470-4 – Testimony of [REDACTED].

⁸⁸ T472-11 – *Id.*

⁸⁹ T473-5 – *Id.*

⁹⁰ T440- 8 – Testimony of [REDACTED]

⁹¹ T441-25 – *Id.*

54. The Team was made aware by Petitioner of social/emotional concerns because of PTSD as well as the diagnoses of ADHD and Mood Disorder.⁹²
55. The Team looked at class-room based performance, such as SOL performance.⁹³ The Team looked at parent input and background information, impact of educational disadvantage and limited English proficiency.
56. Additional evaluations were proposed because of Petitioner's reports.⁹⁴ The Team considered grades; work samples, classroom teacher reports with a combination of data from [REDACTED] and Petitioner; individual achievement tests which are the psychological evaluations.
57. During the February 2021 Eligibility meeting, the Team went through several eligibility category worksheets: Autism, Emotional Disability, Other Health Impairment due to the ADHD.⁹⁵
58. The Team, ultimately, found the Student to be eligible for services under the IDEA only under the category of Autism Spectrum Disorder.^{96 97}
59. The eligibility category of Autism Spectrum Disorder was one of the recommendations of Dr. [REDACTED] (No. 13).⁹⁸
60. The Autism Spectrum Disorder eligibility determination of 2021 was appropriate.
61. In regards to the Emotional Disability Eligibility worksheet, the Student was not found eligible under this category because the Team did not have documentation of an adverse effect on

⁹² T260- 6, T260-11– *Id.*

⁹³ T262-22 – *Id.*

⁹⁴ T264-23 – *Id.*

⁹⁵ T259-18 – *Id.*

⁹⁶ T137-7 – Testimony of [REDACTED], J 12-7

⁹⁷ T270-14 – Testimony of [REDACTED]

⁹⁸ J 22-24.

educational performance. The Team did not have classroom data, observations, or teacher's input.⁹⁹

62. The exclusion of Emotional Disability as an eligibility category was appropriate.
63. The eligibility category of Autism would not have applied if a child's education performance were adversely affected primarily because the child has an emotional disturbance.¹⁰⁰ An autism diagnosis is a disqualifier for an emotional eligibility category because the Team needs to look at what is the issue that primarily affects the child.¹⁰¹
64. The programming for a student who has an emotional disability as primary disability and programming for a student who has Autism as primary disability look different;¹⁰² behaviors might be similar, but the reason for those behaviors may differ.
65. A student with Autism requires a certain level of structure, visual support. Programming revolves around routine, consistency, visual support.¹⁰³
66. The Team had difficulty with the Other Health Impairments worksheet because of the lack of documentation of an adverse effect on educational performance due to the ADHD.¹⁰⁴ The Team felt that symptoms or characteristics of ADHD and Autism could overlap and the Team felt that the concerns about impulsivity could be addressed with structure, supports, routines, reminders, and visual supports.¹⁰⁵
67. The exclusion of Other Health Impairments as an eligibility category was appropriate.
68. The eligibility committee completed correctly the criteria worksheets for Emotional Disability, Other Health Impairment, and Specific Learning Disability.

⁹⁹ T148-6 – Testimony of [REDACTED]

¹⁰⁰ T271-21 – Testimony of [REDACTED]

¹⁰¹ T536-19 – Testimony of [REDACTED]

¹⁰² T273-12 – Testimony of [REDACTED]

¹⁰³ T274-23 – *Id.*

¹⁰⁴ T335-2 – *Id.*

¹⁰⁵ T335-12 – *Id.*

69. In the Essential Findings section of the Special Education Committee (SEC) Report it was noted that Student's disability may impact [REDACTED] in the educational setting with making an inference and drawing conclusions from written and spoken language and understanding the perspective of others. Student may become highly distracted with [REDACTED] thoughts and will require adult prompting to return to task to stop frustrations. Structured visual support would benefit Student in the learning environment. When Student reaches [REDACTED] frustration, [REDACTED] may have difficulty regulating [REDACTED] emotions to complete tasks. Student would benefit from specially designed instruction in the areas of regulating emotions, executive functioning skills, and socialization with peers. The Team, after describing Student's strengths and needs, recommended accommodations which included: structured learning setting, preferential seating, and breaks during lengthy assignments, chunking of assignments, alerting the Student, small groups for testing, and extra time to complete homework.¹⁰⁶
70. Petitioner agreed with the Eligibility determination. The only thing Petitioner did not agree with was the use Medicaid for Student.¹⁰⁷
71. Petitioner was fully aware that Student was not found eligible under the category of Emotional Disability when the Team reconvened for the IEP meeting.¹⁰⁸
72. After the Eligibility Meeting, the Team set out to develop a Present Level of Academic and Functional Performance.¹⁰⁹
73. The Team, which included Petitioner, discussed that the IEP is a fluid document that may need revisions.¹¹⁰

¹⁰⁶ J 15-7, J 15-8

¹⁰⁷ T212-1 – Testimony of Petitioner, T487-3 Testimony of [REDACTED]

¹⁰⁸ T186-22 – Testimony of Petitioner

¹⁰⁹ Testimony of [REDACTED]

¹¹⁰ *Id.*

74. The Team collaboratively agreed to reconvene within 4 weeks to establish a more in-depth present Level of Academic Performance.¹¹¹
75. In the development of the March 17, 2021, IEP, Petitioner provided the Team with extensive input because she was the Student's educator.
76. The Team relied heavily on the information provided by Petitioner¹¹²
77. Petitioner provided information regarding what behavioral challenges ■■■ had, the stressors, and anxieties.¹¹³
78. In the development of the IEP, the Team had a discussion about programming to support ■■■ social/emotional needs based on Petitioner's input. Very important was building a relationship with the Student, building trust.¹¹⁴
79. Petitioner repeatedly relayed to the Team that she felt the Team was not giving sufficient weight to Student's hospitalizations, fear of bullying, and suicidal ideations.¹¹⁵ Petitioner reiterated that Dr. ■■■ found Student suffered from PTSD¹¹⁶ due to the past incidents of bullying and relayed the reasons for Dr. ■■■' findings.¹¹⁷
80. Petitioner asked the Team to consider factors such as seizures, self-harming, cutting, and using anything as a tool to kill ■■■ self.¹¹⁸
81. Petitioner told the Team during the IEP meeting that she did not believe the accommodations to be adequate.¹¹⁹

¹¹¹ T2343-25 – *Id.*

¹¹² T338-23 – *Id.*

¹¹³ T338-14 – *Id.*

¹¹⁴ T339-10 – *Id.*

¹¹⁵ T179-13 — Testimony of Petitioner.

¹¹⁶ T188-7 – *Id.*

¹¹⁷ T190-2 – *Id.*

¹¹⁸ T190-12 – *Id.*

¹¹⁹ T195-4 – *Id.*

82. The IEP Team's role is not to investigate bullying, rather to discuss how to ensure that the student continues to have access to their education despite what has occurred.¹²⁰
83. Investigation of bullying is not in the purview of the IEP Team, rather it would be done through building-level administration, adhering to policies and practices in place.^{121 122}
84. The IEP Team programmed for goals and accommodations to encourage the Student to report any bullying incidents through check-in with a trusted adult. This directly correlates to Dr. [REDACTED] report.¹²³
85. The Draft IEP contained accommodations to improve [REDACTED] attention and executive functioning weaknesses.¹²⁴
86. The Draft IEP contained accommodations and goals to address social/emotional issues.¹²⁵
87. Petitioner participated in the meeting and presented information on how the Student can look when [REDACTED] feels frustrated.¹²⁶
88. Accommodations and recommendations following the eligibility determination encompassed information from Dr. [REDACTED]' report, the team's as well as Petitioner's input.¹²⁷
89. The Team had an in-depth discussion about gifted programs, but the Team did not recommend it primarily because the most important thing that the Team could do is initiate services and reconvene in four weeks.¹²⁸

¹²⁰ T520-22 – Testimony of [REDACTED].

¹²¹ T521-3 – *Id.*

¹²² T443-20 – Testimony of [REDACTED]

¹²³ T524-12 – Testimony of [REDACTED]

¹²⁴ T100-6 – Testimony of [REDACTED]

¹²⁵ T100-15 – Testimony of [REDACTED]

¹²⁶ T139-7 – *Id.*

¹²⁷ T139-12 – *Id.*

¹²⁸ T343-8, T343-23 – Testimony of [REDACTED]

90. The Team decided to reconvene in four weeks because four-and-a-half-week mark is when progress reports are done halfway before report cards are done at the nine-week-mark.¹²⁹
91. The Team developed goals looking at patterns or consistency through any evaluation it had, such as Dr. [REDACTED]'s evaluation, the school evaluation, and Petitioner's report.
92. The Team proposed a goal that when frustrated [REDACTED]'ll use coping strategies such as deep breathing or asking to take a break.¹³⁰
93. For social skills, the goal was that Student would choose appropriate responses to peers in order to engage in peer interaction.¹³¹ The Team's goal was to see 75 percent of data collection opportunities be able to identify appropriate responses.¹³²
94. Goals proposed in the IEP relating to social/emotional/behavioral skills follow Dr. [REDACTED]' report, to help the Student choose the appropriate response to peers as an opportunity to work with the Student to understand how to start interacting with peers when [REDACTED]'s not been in a school setting.¹³³
95. The proposed goals in the March 17, 2021, IEP are appropriate to meet the Student's needs.
96. The Draft IEP provided several accommodations.¹³⁴
- a. Break - this was to allow the Student an opportunity to remove [REDACTED]self from the setting or trigger that was frustrating.¹³⁵ This is also an accommodation recommended by Dr. [REDACTED] (No. 17(d)).¹³⁶

¹²⁹ T356-4 – *Id.*

¹³⁰ T345-17 – *Id.*

¹³¹ T347-8 – *Id.*

¹³² T347-15 – *Id.*

¹³³ T526-22– Testimony of [REDACTED].

¹³⁴ J 3-9

¹³⁵ T352-16 – Testimony of [REDACTED].

¹³⁶ J 22-25

- b. Chunk directions and assignments - this is also from Dr. [REDACTED]' report (No.(1)).¹³⁷ Also from the school report as well as what Petitioner shared, the Student had a lot of inability to take in large quantities of information, that being oral directions, written directions, assignments.¹³⁸
- c. Alert of schedule changes - [REDACTED] report, school report and Petitioner report, all stated the Student did not adapt well to changes. Therefore, as an accommodation the Student would be forewarned and have an opportunity to talk through the change so that [REDACTED] could be as prepared as possible.¹³⁹ This speaks to the emotional regulation as well as autism.¹⁴⁰ This accommodation was also recommended by Dr. [REDACTED] (No. 17(f)).¹⁴¹
- d. Extra time to complete assignments (not to exceed one class period) - This accommodation was proposed because of reports that the Student may not complete work due to [REDACTED] being frustrated or navigating the emotionality there. This accommodation gives the Student ample opportunity to want to work through that giving [REDACTED] additional time to complete assignments.¹⁴² This accommodation was also included in Dr. [REDACTED]' report (No. 17 (j)).¹⁴³
- e. Redirection to stay on task - This accommodation was proposed based on Petitioner's description of what instruction looked like when she was providing instruction.¹⁴⁴
- f. Check in with a trusted adult - This accommodation was proposed because of Petitioner's concern that the student was not emotionally prepared to come back to school.¹⁴⁵ Initially the

¹³⁷ T352-24 – Testimony of [REDACTED], J 22-25.

¹³⁸ T353-1 – *Id.*

¹³⁹ T353-10 – *Id.*

¹⁴⁰ T354-2 – *Id.*

¹⁴¹ J 22-25

¹⁴² T354-10 – Testimony of [REDACTED].

¹⁴³ J 22-25

¹⁴⁴ T356-23 – Testimony of [REDACTED].

¹⁴⁵ T357-12– *Id.*

Team had talked about the counselor or any trusted adult and then when Petitioner mentioned that the Student may not know the counselor, the Team decided that the special education case manager would be that person.¹⁴⁶ This accommodation was also recommended by Dr.

██████████ (No. 12).¹⁴⁷

- g. Small group testing - The purpose of this recommendation is to provide a distraction-free environment and there is an emotional component as well.¹⁴⁸ Distraction-free work area at school (and home) was also recommended by Dr. ██████████ (No.17(c)).¹⁴⁹
- h. Preferential Seating, meaning preferential to the Student. Petitioner suggested that sitting in front of the class would be the best place for ██████████ because it minimizes distraction and ██████████ would have close access to the teacher.¹⁵⁰ This was also a recommendation by Dr. ██████████ (No. 17(b)).¹⁵¹
- i. Visual Support and Strategies. The visual non-verbal support would allow for nonverbal cue that indicates to the teacher and staff that a break is needed.¹⁵² The strategy component is adjusted as needed. For example if there is going to be an assembly, the Student during check-in would be presented with a script and a model of what an assembly is going to look like.¹⁵³

97. The accommodations in the March 17, 2021, IEP are appropriate to meet the Student's needs.

98. The proposed IEP provided Services. Specifically, the Student was to have 200 minutes per week in a special education setting.¹⁵⁴

¹⁴⁶ T358-12 – *Id.*

¹⁴⁷ J 22-24

¹⁴⁸ T360-12 – Testimony of ██████████.

¹⁴⁹ J22-25

¹⁵⁰ T361-1 – Testimony of ██████████.

¹⁵¹ J 22-25

¹⁵² T362-1 – Testimony of ██████████.

¹⁵³ T362-15 – *Id.*

¹⁵⁴ J 3-9.

99. The Student is a very intelligent young [REDACTED], fully capable of participating in the general curriculum with 200 minutes per week in a special education setting to teach the two area goals.¹⁵⁵ This is only Level 1 Services, which is less than 50 percent of the day with special education services as a direct service.¹⁵⁶
100. The proposed Services are appropriate to meet the Student's needs.
101. Related Services are services that support an existing goal helping the student such as speech/language therapy, physical therapy, and psychological services. The Team talked about psychological services as something the Team would come back and consider, but at the time the Team did not have sufficient information to say that this related service was required.¹⁵⁷
102. Important in that determination as to whether Related Services were needed, would have been the data from the check-in and check-out.¹⁵⁸
103. The Team determined that special education Transportation would be made available for the Student based on Petitioner's concerns regarding the ability of the Student to cope with difficult situations especially coming back to school after a long time¹⁵⁹ and the concern that a general education bus might be too overstimulating.¹⁶⁰
104. Special Education Transportation in the March 17, 2021, IEP is appropriate to meet the Student's needs.
105. The Team discussed Extended School Year services with Petitioner; the Team did not provide ESY services because, being that this is an initial IEP, additional data would be required in order to answer "yes" to the all the prongs that would support ESY services.

¹⁵⁵ T364-1 – Testimony of [REDACTED]

¹⁵⁶ T384-20 – *Id.*

¹⁵⁷ T365-21 – *Id.*

¹⁵⁸ T366-2 – *Id.*

¹⁵⁹ T367-11 – *Id.*

¹⁶⁰ T367-20 – *Id.*

106. The Team did not have information on Regression/Recoupment because the school had not provided any services. Similarly, the Team did not have sufficient data for Degree of Progress, Emerging Skills or Breakthrough Opportunities.^{161 162}
107. The Team correctly excluded the provision of Extended School Year services.
108. Petitioner stated that she felt the Student's unique needs could not be met in public school at all, she did not believe that even coming to a school would be feasible, that the Student would not have the emotional stability to do that.¹⁶³
109. The school response Petitioner's concerns about emotional stability to idea of coming back to school, was the check-in/ check-out, special education transportation, and providing programming.¹⁶⁴
110. Respondent educates students with autism on a regular basis.¹⁶⁵
111. If Team did not see progress, then the Team would have to entertain the issue of Least Restrictive Environment to discuss what that might look like.¹⁶⁶
112. In the IEP meeting Private Placement was never discussed. Had it been discussed, most likely the Team would have still answered that the Team wants to see an initial provision of services and gauge from there.¹⁶⁷
113. The discussion about [REDACTED] only occurred at the end, while the Team was reviewing their work.¹⁶⁸

¹⁶¹ T373-10 – *Id.*

¹⁶² T508-1 – *Id.*

¹⁶³ T380-1 – *Id.*

¹⁶⁴ T380-5 – *Id.*

¹⁶⁵ Testimony of [REDACTED].

¹⁶⁶ T380-15 – Testimony of [REDACTED].

¹⁶⁷ T384-3 – *Id.*

¹⁶⁸ T391-20 – *Id.*

114. Prior Written Notice for the March 17, 2021, meeting.¹⁶⁹ This notice captured the Team proposal and the reasons, including the discussion regarding ESY.¹⁷⁰ The Team revised the prior written notice based on information provided by Petitioner.
115. Petitioner did not provide consent to the IEP because she felt that Student's diagnoses were being ignored by only accepting the diagnosis of Autism.¹⁷¹
116. A Functional Behavioral Assessment was not done because Student was not enrolled in school.¹⁷² The School did not know whether the Student would have had behaviors that needed to be addressed because ■■■ had not been in an education setting.¹⁷³
117. Specific behaviors from the Student, such as dressing up a box like a robot would not warrant an FBA unless that behavior impacts the Student's ability to learn or the learning of others.¹⁷⁴
118. A Functional Behavioral Assessment was not required.
119. Behavioral Intervention Plan serves to identify ways to prevent the behaviors and also do teach replacement behaviors.¹⁷⁵ One needs data in order to develop the BIP otherwise one runs the risk of creating a BIP that addressed the wrong reason which would not be effective for that child.¹⁷⁶
120. For the Student there wasn't any data to support that there would be any behaviors associated with ■■■ disability within the school setting, and if there were going to be, the school would not have known what they would have looked like.¹⁷⁷
121. A Behavioral Interventional Plan was not required.

¹⁶⁹ J 5.

¹⁷⁰ T389-3 – Testimony of ■■■.

¹⁷¹ T178-18 - – Testimony of Petitioner.

¹⁷² T 47 -12 through 20 – Testimony of ■■■.

¹⁷³ T510-2 – *Id.*

¹⁷⁴ T518-23 – *Id.*

¹⁷⁵ T512-20 – *Id.*

¹⁷⁶ T513-7 – *Id.*

¹⁷⁷ T514-7 – *Id.*

122. [REDACTED] is the Director of Compliance and Special Education Services with [REDACTED] Public Schools.¹⁷⁸ Ms. [REDACTED] has a teaching endorsement for special education in emotional disabilities.¹⁷⁹ She is an expert in Special Education.
123. The Director of Compliance and Special Education Services drafted the Prior Written Notice in response to Petitioner's Due Process Complaint.
124. There is an alignment between what was discussed during the Eligibility meeting and the goals and accommodations and services that were developed within the IEP.¹⁸⁰
125. [REDACTED] does not accept students who fall under the eligibility criteria of Emotional Disability.¹⁸¹
126. [REDACTED], the private school requested by Petitioner, is not the Least Restrictive Environment.
127. Private placement was not required.
128. All required Notices (to include notices of meetings and Prior Written Notices) were timely and compliant.
129. The proposed March 17, 2021, IEP, as drafted, afford the Student a FAPE

CONCLUSIONS OF LAW AND DISCUSSION

Based upon the above Findings of Fact, the arguments of counsel and advocate, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

- a. The Respondent is the prevailing party.

¹⁷⁸ T502-16 – *Id.*

¹⁷⁹ T504-4 – *Id.*

¹⁸⁰ T507-7 – *Id.*

¹⁸¹ T551-8 – *Id.*

- b. The Petitioner failed to introduce evidence to carry the burden of proof and persuasion to grant the relief requested by the Due Process Request.

Burden of Proof

In this administrative due process proceeding initiated by the Petitioner, the burden of proof and persuasion is on the Petitioner. *Schaffer, ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). The standard of proof shall be met by a preponderance of the evidence, pursuant to 8VAC20-81.O.13. See, e.g., *Cty. Sch. Bd. of Henrico Cty., Va. v. R.T.*, 433 F. Supp. 2d 657, 671 (E.D. Va. 2006) (Hearing Officer's factual conclusions supported by the preponderance of the record evidence.)

Analysis

Issue 1: Whether [REDACTED] PS denied the student a FAPE when it refused to provide the student with an IEP designed to provide [REDACTED] with sufficient accommodations, special education, and services that would allow [REDACTED] to access her curriculum.

Under the IDEA, all students are entitled to a free and appropriate public education (FAPE) (34 C.F.R. 300.101(a)). In Virginia, children with disabilities between the ages of 2 and 21 are entitled to a FAPE (8VAC20-81-100). The IDEA requirements of a FAPE is satisfied when the LEA provides personalized instruction with sufficient support services to permit a child with a disability to benefit educationally from the instruction. Under *Endrew F. v. Douglas County School District RE -1*, 137 S.Ct. 988, 69 IDELR 174 (2017), an IEP must be reasonably calculated to enable the student to make progress appropriate in the light of his/her circumstances. In the present case, the March 17, 2021, IEP is the first IEP ever developed for the Student. It is the initial IEP. The Student was found eligible for special education services under the disability category of Autism after the Special Education Committee met on February 17, 2021. The proposed IEP's goals in the category of Social/Emotional/Behavior Skills are as follows:

- When frustrated, the Student will use coping strategies (deep breathing or ask to take a break) to calm [REDACTED] self in order to remain/return to task and ask questions to teachers on 10 data collection opportunities in a semester as measured by teacher data collection sheets.
- In a contrived setting, the Student will choose appropriate responses to peers in order to engage in peer interaction (discussion face to face or in the virtual setting) on 75% of data collection opportunities in a semester as measured by teacher data collection sheets.

The Special Education Compliance Coordinator, the School Psychologist, and the Special Education Teacher all testified that this IEP would have allowed Student to make progress and access the curriculum based on the available information. They all testified that the Team discussed how this initial IEP would provide a basic floor of opportunity to educationally succeed and progress, recognizing the challenge that the lack of data in the school setting, in general, presented, from the gathering, reviewing, and consideration of information for purposes of the Eligibility Determination, to the development of the Present Level of Academic Performance. The Special Education Compliance Coordinator, for example testified, that the Team's intention was to reconvene in four weeks in order to develop a better or more in-depth present Level of Academic Performance. This intention is also stated on page 8 of the proposed IEP in the notations for the "pre-score".

The proposed IEP includes Special Education Services in the form of 200 minutes per week in a Special Education Classroom. The proposed IEP includes accommodations as follows:

- Break
- Chunk direction and assignments
- Alert of schedule changes
- Extra time to complete assignments (not to exceed 1 class period)
- Redirection to stay on task
- Check-in with a trusted adult
- Small Group Testing for classroom testing
- Small Group Testing for State and Division-wide assessments
- Preferential Seating: seating in the front of the class
- Visual Supports and Strategies

Petitioner contends that the Team should have found the Student eligible under the category of Emotional Disability. However, testimony by the Special Education Compliance Coordinator as well as the Director of Compliance and Special Education Services, explained that a student may not be found eligible under the category of Autism and under the category of Emotional Disability at the same time. Specifically, the Special Education Compliance Coordinator testified that when the Team went through the worksheet for Autism, the Team had to consider whether the Student's educational performance was adversely affected primarily because the Student had an emotional disturbance. If the answer had been "yes", then the Student could not have been found eligible under the category of Autism. So the Team had to work through the Emotional Disability worksheet before returning to the Autism one. Similarly, the Director of Compliance and Special Education Services testified that an autism diagnosis is a disqualifier for an emotional eligibility category because the Team needs to look at what is the issue that primarily affects the child.

Petitioner contends that the Emotional Disability Worksheet was improperly completed because the Team was aware of the Student's diagnoses of Anxiety, Depression, PTSD, and ADHD included in Dr. [REDACTED]' report, which all dealt with an emotional status. Therefore, the Team should have checked off the box "There is documentation of an Emotional Disability" on the worksheet. However, the Director of Compliance and Special Education Services testified that Dr. [REDACTED] never stated that the Student has an "Emotional Disability" because this is an educational term, not a medical one. The definition of Emotional Disability, as outlined in the worksheet, is a condition 1) exhibiting one or more of the following characteristics 2) over a long period of time and to a marked degree 3) that adversely affects a child's educational performance. In addition to documentation of an emotional disability and displayed characteristics, the worksheet requires both documentation of an adverse effect on educational performance and a need for specially designed instruction. When the Team looked at the Emotional

Disability worksheet, it had the limitation that the Student has not been in the school setting, and there was no data to show emotional disability characteristics over a long period of time or to a marked degree.

The services, coupled with the various accommodations, are designed to address the Student's needs by focusing on the specific goals listed in the IEP. As highlighted in Letter to *Anonymous*, 48 IDELR 16 (OSEP 2006) "it is the child's identified needs, not the child's disability category, to determine the services that must be provided to the child." Therefore, the focus needs to be on the needs and the services, not on the disabilities.

The Student is described as an intelligent young lady, fully capable of participating in the general curriculum with 200 minutes per week in a special education setting to teach the two area goals. This is only Level 1 Services, which is less than 50 percent of the day with special education services as a direct service. Petitioner maintains that the proposed accommodations are insufficient and would not allow the Student to access the curriculum; and that the recommendations of Dr. [REDACTED] have not been adopted by the Team. This hearing officer is not persuaded. The evidence overwhelmingly showed the recommendations of Dr. [REDACTED] that addressed the Student's social, emotional, and behavioral skills in the school setting, have been considered and adopted by the Team. Also it is to be noted that although Dr. [REDACTED] gave 24 recommendations, not all of them were intended to be applied in the school setting. Out of the ten accommodations in the proposed IEP, eight were directly taken (at times word for word) from Dr. [REDACTED]' report. Specifically:

- Break - this was to allow the Student an opportunity to remove [REDACTED] self from the setting or trigger that was frustrating. This accommodation correlates to Dr. [REDACTED]' recommendation No. 17(d).
- Chunk directions and assignments - This accommodation correlates to Dr. [REDACTED]' recommendation No. 1.

- Alert of schedule changes - This accommodation correlates to Dr. [REDACTED]' recommendation No. 17(f).
- Extra time to complete assignments (not to exceed one class period) - This accommodation correlates to Dr. [REDACTED]' recommendation No. 17 (j).
- Check in with a trusted adult - This accommodation correlates to Dr. [REDACTED]' recommendation No. 12.
- Small group testing for classroom testing - The purpose of this recommendation is to provide a distraction-free environment and there is an emotional component as well. This accommodation correlates to Dr. [REDACTED]' recommendation No.17(c).
- Small group testing for State or Division-wide Testing - This accommodation also correlates to Dr. [REDACTED]' recommendation No.17(c).
- Preferential Seating. This accommodation correlates to Dr. [REDACTED]' recommendation No. 17(b).

Petitioner contends that Respondent ignored or dismissed the severity of the Student's diagnoses, hospitalizations, suicidal ideations, all linked to reported anxiety caused by prior incidents of bullying in school as a fourth grader. This Hearing Officer disagrees. The evidence showed that the Team, at every step of the way, considered all available documentation, including: Dr. [REDACTED]' report, the Psychological Evaluation conducted by the School Psychologist, and three sociocultural reports, as well Petitioner's own observations. All of the reports contained detailed background information which highlighted the Student's current medical issues, past hospitalizations, past suicidal ideations, and anxieties created by past incidents of bullying. However, as the Special Education Compliance Coordinator testified, Respondent believes that, if given the opportunity to educate the Student, through this IEP, it would be successful in addressing the Student's needs. The proposed IEP contained enough accommodations and goals to ensure Student's needs would be met. More importantly, the evidence shows that the Team fully intended to reconvene after having had the opportunity to collect data and observe Student in the school setting given that the Student had not been in a formal school setting for many years.

■■■■PS did not denied the student a FAPE as it provided the student with an IEP designed to provide ■■■■ with sufficient accommodations, special education, and services that would allow ■■■■ to access ■■■■ curriculum.

The IDEA requires that an IEP provide a statement of supplementary aids and services, based on peer reviewed research to the extent practicable, and individual accommodation for testing that will be provided to enable the student to advance appropriately toward attaining the annual IEP goals and to make progress in the general education curriculum. See 34 C.F.R. ' 300.320(a)(4), (6).

Both the Special Education Compliance Coordinator and the Director of Compliance and Special Education Services opined that the proposed IEP accommodations and services were appropriate. I found them to be credible. More importantly, Petitioner did not rebut their opinion nor provided evidence of what other accommodations or services the IEP should have contained. Petitioner's expert, Dr. ■■■■, testified that her recommendations were not all applicable to the school setting and she did not provide any opinion regarding the accommodations that were contained in the proposed IEP. I find that Petitioners have not established that the accommodations, special education, and services were not appropriate or adequate for Student.

Issue 2: Whether ■■■■PS denied the student a FAPE when it failed to provide the student with Extended School Year services.

In general, Extended School Year services refer to special education and/or services provided beyond the normal school year to ensure that a disabled student is provided a FAPE.

In *MM v. School District of Greenville County, South Carolina Board of Education*, 303 F.3d 523 (4th Cir. 2002), the Court stated that ESY services are only necessary to a FAPE when the benefits a disabled child gains during the regular school year will be significantly jeopardized if the child is not provided with an educational program during the summer months.

The Special Education Compliance Coordinator testified that when Extended School Year services were discussed by the Team, the Team lacked the data necessary to opine on the factors the Team is required to consider in the ESY analysis. This was due to the fact the Student had not been in the school setting since the 2016-2017 school year. More specifically he testified that the Team did not have any information on regression/recoupment, degree of progress, emerging skills/breakthrough opportunities, interfering behaviors, the nature and severity of the disability in terms of what her disability would have looked like in the school setting. I note, however, that the Team could not have simply postponed the decision regarding ESY services until after the summer to gather data and see, for example, if any gains made by the Student had been lost. The decision regarding ESY services needs to be made early enough to prevent the skills and benefits the child has gained during the regular school year from being significantly jeopardized. Given the information available at the time of the proposed IEP, the Team correctly determined that Extended School Year Services were not necessary for the provision of a FAPE pursuant to 8 VAC 20-80-60 I.

Therefore, I conclude that Petitioner has not met her burden of persuasion that Respondent denial of Extended School Year services was a denial of a FAPE.

Issue 3: Whether [REDACTED] PS denied the student a FAPE when it failed to conduct a Functional Behavioral Assessment

Petitioner contends that an FBA should have been conducted before reintroducing the Student in the public school system. A Functional Behavioral Assessment (FBA) is a process to determine the underlying cause or functions of a Student's behavior that impede the learning of a student with a disability or the learning of a student's peers. Typically, the process involves looking closely at a wide range of child-specific factors (e.g., social, affective, environmental). Knowing why a child misbehaves is directly helpful to the IEP Team in developing a BIP that will reduce or eliminate the misbehavior.

(Questions and Answers on Discipline Procedures, U.S. Department of Education, Office of Special Education and Rehabilitative Services (OSERS; USED, 2009). OSEP has also added the clarification that “an FBA may include both observation and formal assessments.” (Letter to Glenna Gallo, personal communication, April 2, 2013, U.S. Department of Education, OSEP.) What is key in this definition is that the student’s behavior must impede the student’s learning or the learning of others. Petitioner did not introduce any evidence that Student displayed any behaviors in the school setting that would impede her learning or the learning of others. The Director of Compliance and Special Education testified that for an FBA to be developed it is necessary to have data and/or observations of specific behaviors on the part of a student in order to figure out the reason behind that behavior. The Student had not been enrolled in public schools for years, and Petitioner did not provide sufficient evidence to show specific behaviors that impeded the Student’s learning or the learning of others.

Therefore, Petitioner did not meet her burden to show that Respondent should have conducted a Functional Behavioral Assessment.

Issue 4: Whether [REDACTED] PS denied the student a FAPE when it failed to investigate previous claims of bullying by other students.

Petitioner contends that in the context of the development of the IEP for Student, the Team should have investigated previous claims of bullying by other students when Student was enrolled in [REDACTED] Public Schools in [REDACTED] grade. The Parties agreed that, due to the statute of limitations, this Hearing Officer would not hear evidence related to actual incidents of bullying prior to October 2020, and that Petitioner would only discuss bullying as background information. There were no allegations of incidents of bullying within the two years prior to the filing of the Due Process Complaint; therefore, the Petitioner did not offer any evidence of current incidents of bullying.

Furthermore, Petitioner, in the Due Process Complaint, did not ask for any relief pertaining to bullying. With this stated, this Hearing Officer did hear testimony pertaining to the Student's and Petitioner's current state of mind and how prior incidents of bullying affected the Student and [REDACTED] diagnoses, which were in turn considered by the IEP Team in the development of the IEP.

Throughout the hearing, ample testimony was given by all witnesses that Respondent was aware of the allegations of bullying when the Student was in [REDACTED] grade. Dr. [REDACTED]' report provides detailed background information regarding past incidents of bullying, recurrent and distressing memories, suicidal ideations, as well as various hospitalizations. The School Psychologist testified that a new Developmental-Sociological History report was completed in October 2020 and two prior social histories from 2016 and 2017 were reviewed. These reports clearly stated that the Student continued to struggle with mood dysregulation and self-harming tendencies escalated when Student experienced incidents of bullying at school as reported by Petitioner. Student was hospitalized twice and was seen three times by the [REDACTED] Community Service Board Crisis Team. A diagnosis of PTSD and ADHD was also reported in the course of the October 21, 2020, visit as well as intense home counseling by a trauma specialist and regular counseling. Also, the School Psychologist testified that when she evaluated the Student, Student herself mentioned past incidents of bullying. Petitioner testified that the reason why she did not provide consent to the proposed IEP is because she felt that Respondent ignored or did not give sufficient weight to Student's hospitalizations, fear of bullying, suicidal ideations, or Dr. [REDACTED]' diagnosis of PTSD due to the past incidents of bullying. Petitioner also testified that the reason why she withdrew the Student from [REDACTED] PS is that Petitioner believed that Student had been bullied and that Respondent had not adequately investigated the matter or addressed Student's needs at that time. Lastly, the Student herself testified that [REDACTED] does not want to go back to public schools because the school would not do anything about a person who was mean to [REDACTED].

Therefore, it is well established that Respondent was aware of these allegations. The Director testified that the IEP Team's role is not to investigate bullying as this is something Administration would handle for current incidents. I agree with the Team's role in regards to investigating claims of bullying. The question is then whether Respondent adequately addressed the Student's needs to ensure ■■■ continued to have access to the curriculum despite ■■■ emotional issues associated with past incidents of bullying. The Director of Compliance and Special Education confirmed that the Respondent's role is to discuss how to ensure that the student continues to have access to ■■■ education despite what has occurred. She added that the IEP Team is not an investigative body.

Dr. ■■■ evaluated the Student in September 2020. Incidents of bullying were confirmed by Student who relayed significant recurrent and distressing memories about these incidents, and past suicidal ideations secondary to the bullying. However, Dr. ■■■ testified that the Student denied experiencing any current suicidal ideation committing to a verbal safety contract. Similarly, the School Psychologist testified that when she evaluated the Student, she had no indication or information that the Student continued being bothered by the past incidents of bullying. With this stated, Dr. ■■■, to address bullying, recommended a plan for the Student to have a person that ■■■ knows that she can go and talk to and report anything that might be occurring. The Team incorporated Dr. ■■■' recommendation in the IEP: The Special Education Compliance Coordinator and the Director of Compliance and Special Education both testified that, as an accommodation, the Team had "Check-in with a Trusted Adult" to encourage the Student to report and discuss any bullying incidents. Also, the evidence showed that the Team took into consideration all documentation and information relating to the Student's emotional needs and provided goals and accommodations to address those anxieties in general which could have been also associated with past incidents of bullying. The Special Education Compliance Coordinator testified the first IEP goal focused on Social/Emotional/Behavior Skills: 1)

When frustrated, the Student will use coping strategies (deep breathing or ask to take a break) to calm [REDACTED] self in order to remain/return to task and ask questions to teachers [...]. He testified that this is a behavior associated with anxiety. Also, to address the Student's feeling of anxiety, the Team took into consideration and offered Special Education Transportation to address the concern in coping with difficult situations.

For these reasons, I find that, as it pertains to the proposed IEP of March 2021, Petitioner did not meet her burden and I conclude that Respondent did not deny the Student a FAPE, rather Respondent adequately provided accommodations to encourage Student to report incidents of bullying.

Issue 5: Whether [REDACTED] PS denied the student a FAPE when it failed to have a Behavioral Intervention Plan

Petitioner contends that Respondent should have developed a Behavioral Intervention Plan (BIP) for the Student because Student had suicidal ideations.

A BIP is a plan that utilizes positive behavioral interventions and supports to address behaviors that interfere with the learning of students with disabilities or with the learning of others or behaviors that require disciplinary action (Virginia Regulations, 2010). The Director of Compliance and Special Education testified that a Behavioral Intervention Plan serves to identify ways to prevent the behaviors and also to teach replacement behaviors. She explained that data is needed in order to develop the BIP otherwise one runs the risk of creating a BIP that addressed the wrong reason which would not be effective for that child. She testified that for the Student there wasn't any data to support that there would be any behaviors associated with [REDACTED] disability within the school setting, and if there were going to be, the school would not have known what they would have looked like.

The analysis pertaining to a BIP is, therefore, directly related to analysis for a Functional Behavior Assessment. Following the same logic in the analysis of Issue No. 3, because the Student had not been enrolled in public schools for years and because Petitioner did not provide sufficient evidence to show specific behaviors that would have impeded the Student's learning or the learning of others, Respondent did not have any data or observations that would have required a Behavioral Intervention Plan.

For these reasons, I conclude that Petitioner did not meet her burden of persuasion that Respondent should have developed a Behavioral Intervention Plan to afford the Student a FAPE.

Issue 6: Whether [REDACTED] PS denied the student a FAPE when it did not treat the student's parent as an essential attendee at the various meetings.

Petitioner contends that Respondent did not treat Petitioner as an essential attendee at the various meetings that lead to the proposed IEP. This Hearing Officer is not persuaded. The evidence overwhelmingly showed that Petitioner was an integral part of the Team. All school personnel testified that Petitioner attended meetings, corresponded with school personnel via email; furthermore, because Petitioner was also the Student's teacher while being homeschooled, the Team heavily relied on the information she provided in order to collaboratively draft the IEP. Overall, Petitioner was considered a collaborative member of the Team, as testified by the Special Education Compliance Coordinator.

For these reasons, I conclude that Petitioner did not meet her burden of persuasion that Respondent did not treat the Student's parent as an essential attendee at the various meetings.

Issue 7: Whether [REDACTED] PS denied the student a FAPE when it refused private placement for the student.

Petitioner contends that Respondent refused private placement for the Student. The testimony regarding whether Petitioner formally requested private placement is lacking. The Special Education

Compliance Coordinator testified that the Team, which included Petitioner, never had a robust discussion, if any, regarding private placement. Specifically, he testified that if a formal request for private placement had been made, the Team would have offered a list of private day placements. There is no doubt that Petitioner questioned over and over again whether Respondent would have been able to meet the Student's needs due to ■■■■ anxieties, and ultimately, this is the reason why Petitioner did not provide consent. Petitioner testified that she did not believe Respondent could meet the Student's needs. But this evidence is not a substitute for a formal request, verbal or written, for private placement.

The IDEA requires that placement be in the least restrictive environment. *Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982) at 202, the least restrictive environment is not just a “laudable goal, but also a requirement of the Act.” *DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989); see also *Doyle v. Arlington County School Board*, 806 F. Supp. 1253, 1260 (E.D. Va. 1992), *aff'd* 39 F. 3rd 1176 (4th Cir. 1994) (reversing hearing officer who “misunderstood the mandatory nature of the least restrictive environment provisions.”). Among other things, this means that under the IDEA, a student should be educated with non-disabled students to the maximum extent appropriate, and that the student's placement is “as close as possible to the child's home.” 34 C.F.R. §300.116(b)(3). Priority must first be given to the local public day school with non-disabled students, before considering more restrictive placement options that are in another jurisdiction. To provide a FAPE, an LEA must simply “provide personalized instruction with sufficient support services to enable the handicapped child to benefit educationally from that instruction.” *Hessler ex rel. Britt v. State Bd. of Educ.*, 700 F.2d 134, 139 (4th Cir. 1983). Only if an LEA cannot provide a FAPE to a child with a disability does the IDEA provide for placement in private school at public expense. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369 (1985). See also *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d 1003, 1014-1015 (5th Cir. 2010) (“If it appears that the district is not in a position to provide

[FAPE] in the public school setting, then (and only then) must it place the child (at public expense) in a provide school that can provide those services.” (quoting *W.S. ex rel. C.S. v. Rye City Sch. Dist.*, 454 F. Supp. 2d 134, 148 (S.D.N.Y. 2006). Also, pursuant to 34 CFR 300.148(a) and 8VAC20-81-150(B)(3) local school divisions are not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if the local school division made a free appropriate public education available to the child.

In the Student’s case, Dr. [REDACTED] did recommend that the Student be placed in a school that specializes in working with children with Autism, However, when questioned about her recommendation, Dr. [REDACTED] testified that placement in private schools was another avenue; she did not state that private schools were the only avenue for the Student in the light of [REDACTED] diagnoses.

Furthermore, the Director of Compliance and Special Education testified that

[REDACTED] would have been a more restrictive setting because

[REDACTED] is a private day school for students with disabilities. She further

testified that schools have to look first at the least restrictive environment and provide support in a

student’s neighborhood school alongside non-disabled peers. Lastly, the Director of Compliance and

Special Education testified that she is very familiar with the categories of student educated at

[REDACTED] and that students eligible under the category of Emotional Disability,

which Petitioner contends should have been added as an additional category of eligibility, are not served by [REDACTED].

Respondent proposed limited hours (200) per week in a special education setting which were reasonably calculated to address the Student’s identified needs, in [REDACTED] neighborhood schools alongside non-disabled peers. On the one hand, Petitioner claims that Respondent failed to address and support the Student’s disability, but on the other hand, denied Respondent’s proposed goals, services, and

accommodations, not even allowing Respondent to begin to educate the Student after many years of the Student being away from a public school setting. Evidence showed that Petitioner did not trust Respondent and the educators, to provide the assistance it deemed appropriate for the Student in the least restrictive environment. Petitioner did not afford Respondent deference when the Team collaboratively proposed goals, accommodations, and services that the Team considered reasonable and appropriately designed to address the Student's needs and Petitioner's concerns.

For these reasons, I conclude that the Student's educators developed an initial IEP that afforded the Student a FAPE in the least restrictive environment when considering the Student's disabilities, including her diagnoses. Furthermore, it is unclear how Petitioner on the one hand contends that Respondent developed an IEP based only on the eligibility category of Autism, rejecting the category of Emotional Disability, and on the other hand contends that Respondent should have agreed to Private Placement at a private school that does not serve students eligible under the category of Emotional Disability.

For these reasons, I find that Respondent did not deny the Student a FAPE when it did not consider private placement for the Student.

Overall, I find that the School Psychologist, the Special Education Teacher, the Special Education Compliance Coordinator, and the Director of Compliance and Special Education were credible witnesses. I find Student's and Petitioner's testimony to be genuine, in that they believed what they said. However, local educators should be given deference when educating a disabled child. *T.B., Jr. by and through his Parents, T.B., Sr. and F.B. v. Prince George's County Board of Education, et al.*, 897 F.3d 566 (4th Cir., 2018). The purpose of the IDEA is "to ensure that children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living."

20 U.S.C. § 1400 (d)(1)(A). To this end, the IDEA extends federal funding to states to provide disabled students with a FAPE. The disabled student should be educated in the least restrictive environment.

The FAPE requirement is satisfied when a State provides the handicapped child with "personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction." *Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 106 (4th Cir. 1991) (citing *Rowley*, 458 U.S. at 203). To provide an "appropriate" education within the meaning of the IDEA, the school district does not have to provide the child with the best possible education. *M.M.*, 303 F.3d at 526. Once a FAPE is offered, the school district need not offer additional educational services. *Id.* That is, while a state must provide specialized instruction and related services sufficient to confer some educational benefit upon the handicapped child, the Act does not require the furnishing of every special service necessary to maximize each handicapped child's potential. *Id.* at 526-27. In the case of *Endrew F. v. Douglas County School District*, 137 S. Ct. 988 (2017), the U. S. Supreme Court further defined the standard of *some* educational benefit by requiring school systems to offer an IEP that is reasonably calculated to enable a child to make educational progress in light of the child's individual circumstances.

In this case, Respondent developed an initial IEP, designed to provide the Student with a basic floor of opportunity to educationally succeed and progress. Respondent's personnel, as educational professionals, should be given deference. The parties must work together, and the evidence showed that the Team worked collaboratively to develop the IEP. The Student had been away from the public school setting for many years. There were many unanswered questions as to how the Student would act in the school setting; however, based on the information and data available at the time the IEP team convened, the proposed IEP was designed to provide a FAPE. In this case, it appears that Petitioner's deep distrust of Respondent, may have hindered her ability to compromise as well as afford Respondent's educators the deference they deserve.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered that the Respondent is the prevailing party in this hearing and that no relief is awarded to the Petitioners.

SO ORDERED.

DATED: December 14, 2022

HEARING OFFICER

Hearing Officer:
Tiziana Ventimiglia, Esq
4084 University Drive, Suite 100
Fairfax, Virginia 22030
(703)591-3100
tventimiglia@hartsoemorgan.com

NOTICE OF RIGHT TO APPEAL

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

Certificate

I hereby certify that a true copy of the foregoing Decision was sent by e-mail and via First Class Mail on December 14, 2022, to:


Student's Parent/Guardian

Sa'ad El Amin
Litigation Support Services
Advocate for Parent/Student


Director, Office of Program for Exceptional
Children

Kamala Lannetti, Esq.

Counsel for the School Board

Dannielle Hall-McIvor, Esq. Senior School Board
Attorney

cc (via email only)

Kathryn Jones, Coordinator of Due Process Services
Office of Dispute Resolution and Administrative Services
Division of Special Education and Student Services
Virginia Department of Education
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Reggie Frazier, Case Evaluator
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APPENDIX A – PERSONALLY IDENTIFIABLE INFORMATION

[REDACTED] v. [REDACTED] SCHOOL BOARD
Case No. 23-030

Student's Name	[REDACTED]
Date of Birth	[REDACTED]
Student's I.D. Number	[REDACTED]
Attending School	N/A – homeschooled / Home School: [REDACTED] School
Recommended School	N/A
Parent / Legal Guardian	[REDACTED]
Lea Representative / Director of Compliance and Special Education Services	[REDACTED], Ed.S.
Witness: Director of Compliance and Special Education Services School	[REDACTED], Ed.S.
Witness: Psychologist, [REDACTED] Public Schools	[REDACTED], ED.S.
Witness: Legal Guardian / Aunt	[REDACTED]
Witness: Student	[REDACTED]
Witness: Special Education Compliance Coordinator	[REDACTED], Ed.S., B.C.S.E.
Witness: Cross Category ED/LD Teacher and Case Manager	[REDACTED], M.S.Ed.
Witness: Pediatric Neuropsychologist	[REDACTED]

Advocate for Petitioner: Saa'd El-Amin
Counsel for Respondent: Dannielle Hall-McIvor, Esq.
Hearing Officer: Tiziana Ventimiglia, Esq.
Case Evaluator: Reggie Frazier, Esq.

APPENDIX B – LIST OF EXHIBITS CITED

[REDACTED] v. [REDACTED] SCHOOL BOARD
Case No. 22-030

List of Exhibits In the Record and Decision

Hearing Officer's Exhibits

- HO-1 Notice of Due Process Complaint
- HO-2 Letter of Appointment of Hearing Officer
- HO-3 Response to the Complaint by Respondent
- HO-4 Email from Respondent's counsel notifying outcome of resolution meetings
- HO-5 First Prehearing Conference Summary and Order
- HO-6 Second Prehearing Conference Summary and Order
- HO-7 Third Prehearing Conference Summary and Order
- HO-8 Fourth Prehearing Conference Summary and Order
- HO-9 Parties' Exhibit Book
- HO-10 Plea of Statute of Limitations and Motion to Find Petitioner's Due Process Notice Insufficient
- HO-11 Order dated October 21, 2022
- HO-12 Ruling on Motion to Quash Witness Subpoena

Joint Exhibits

- J 3-1 IEP dated March 17, 2021
- J 4-1 Meeting Notice for 3/17/2021
- J 5-1 Prior Written Notice dated 3/17/2021
- J 6-1 Referral
- J 7-1 Meeting Notice for 10/8/2020
- J 8-1 Prior Written Notice for 10/8/2020 meeting
- J 9-1 Consent for evaluation 10/8/2020
- J 10-1 Parent Consent for Evaluation email dated 10/19/2020
- J 11-1 Meeting Notice for 12/21/2020
- J 12-1 Special Education Committee Report 12/21/2020
- J 13-1 Parent Email agreeing to the extension of timeline 1/6/2021
- J 14-1 Meeting Notice for 2/17/2021
- J 15-1 Special Education Committee Report dated 2/17/2021
- J 16-1 Prior Written Notice for 12/21/2020 and 2/17/2021
- J 17-1 2020 [REDACTED] PS Sociological History
- J 18-1 2020 [REDACTED] PS Psychological Report
- J 19-1 2020 Educational Summary
- J 20-1 2020 Physical Therapy Evaluation
- J 21-1 2020 [REDACTED] PS Occupational Therapy Evaluation
- J 22-1 2020 Private Psychological Evaluation
- J 23-1 9/29/2020 Email from [REDACTED] to Parent regarding SEC Meeting
- J 24-1 10/26/2020 Email from [REDACTED] to Parent regarding meeting
- J 25-1 12/16/2020 Email from [REDACTED] to Parent regarding meeting

J 26-1 12/16/2020 Email from Parent to [REDACTED] regarding re-evaluation
J 27-1 2/16/2021 Email from [REDACTED] to Parent regarding Notification of Advocate
J 29-1 3/16/2021 Email from [REDACTED] to Saa'd El-Amin regarding IEP Meeting
J 30-1 3/16/2021 Email from [REDACTED] to Parent regarding Draft IEP
J 32-1 8/31/2022 Email from [REDACTED] to Parent regarding follow-up Private Placement
J 33-1 8/14/2020 Homeschool Curriculum
J 34-1 8/17/2020 email from [REDACTED] to [REDACTED] regarding requested document
J 35-1 8/14/2021 Homeschool Curriculum Letter
J 36-1 8/5/2019 – 8/30/2020 Progress Reports
J 37-1 8/3/2020 – 6/30/2021 Progress Reports
J 38-1 11/10/2021 Non-Compliance Letter
J 39-1 12/8/2021 2nd Non-Compliance Letter
J 40-1 1/13/2022 Non-Compliance Letter
J 41-1 9/1/2022 Homeschool Curriculum Letter
J 42-1 10/28/2022 Non-Compliance Letter

Petitioner's Exhibits

P -1-1 [REDACTED], Ph.D. Resume

Respondent's Exhibits

SD 1-1 [REDACTED] Resume
SD 2-1 [REDACTED] Resume
SD 3-1 [REDACTED] Resume
SD 4-1 [REDACTED] Resume