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Dispute Resolution &
Administrative Services

VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES

CLOSE REPORT

Public Schools **School Division**	**Name of Parents**
Dr. **Division Superintendent**	**Name of Child**
Nicole M. Thompson, Esquire **Counsel Representing LEA**	L. Wendell Allen, Esq. **Counsel Representing the Parent/Child**
Robert J. Hartsoe, Esquire **Hearing Officer**	Parent /Child **Party Initiating Hearing**

HEARING OFFICER'S ORDERS AND OUTCOME OF HEARING:

1. Issue: Whether the LEA followed the current IEP regarding the implementation of the "gait trainer" and, if not, what is the remedy?

   Determination: The Parents Lacked Sufficient Probative Evidence to Prevail on this Issue.

2. Issue: Whether the LEA has provided competent staff to utilize the "gait trainer" in accordance with the IEP and, if not, what is the remedy?

   Determination: The Parents Lacked Sufficient Probative Evidence to Prevail on this Issue.

3. The LEA is the prevailing Party.

ORDERED that this matter be dismissed with prejudice.

This certifies that I have completed the hearing in accordance with regulations and have advised the parties of their rights in writing. Because of the nature of the Agreement, no written decision from this hearing is attached and the LEA is advised of its responsibility regarding submission of an implementation plan to the parties, the hearing officer and the SEA within forty-five (45) days.

Hearing Officer

March 1, 2016
Date

CERTIFICATE OF SERVICE

I certify that on this 1st day of March, 2016, a true and accurate copy of this pleading was mailed, *via* email & First-class, postage prepaid mail, to:

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VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES

DECISION

Public Schools **School Division**	**Name of Parents**
Division Superintendent	**Name of Child**
Nicole M. Thompson, Esquire **Counsel Representing LEA**	L. Wendell Allen, Esquire **Counsel Representing the Parent/Child**
Robert J. Hartsoe, Esquire **Hearing Officer**	Parent /Child **Party Initiating Hearing**

LEGEND

Mother

Child

Parent Mother/Child

PS Public Schools

Dr.

Parties and Public Schools

DECISION

INTRODUCTION

This was a uncomplicated case involving a seven-year-old young man, enrolled in the second grade in his local public school. The law is straight forward. Material facts are not in dispute. The Parties and their counsel presented an excellent case in a professional manner. For the reasons stated herein, PS is the prevailing party.

PROCEDURAL BACKGROUND:

Pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"), this matter came upon the Parent/Child's Request for Due Process Hearing, filed on December 17, 2015, regarding the Child's current Individual Education Program ("IEP"), dated October 8, 2015 (LEA Exhibit No. 1, Parent's Exhibit No. 7; Hearing Transcript Volume I ("HT" at page 40) ("Current IEP"). Several issues were raised and addressed, as referenced in the PreHearing Reports which are filed herein.

ISSUES DEFINED:

I. **Whether the LEA followed the current IEP regarding the implementation of the "gait trainer" and, if not, what is the remedy?**

II. **Whether the LEA has provided competent staff to utilize the "gait trainer" in accordance with the IEP and, if not, what is the remedy?**

PERTINENT TESTIMONY REVIEW:

With the burden of proof, the Parent called seven witnesses: Mother, , Dr. , , , and .

The Mother testified as a factual witness. Although the Mother was not qualified as an expert, the child's diagnosis was undisputed. According to the Mother, the Child suffers from

"periventricular leukomalicia" which was described as "enlarged ventricles of the brain, which, where his white mater, which is the leukomalicai, has spots in it which causes him to be spastic in his extremities. So he has hypertonia of the extremities, meaning that they're rigid, and hypotonia of his trunk, which means its floppy." (HT at Page 39.)

The Child has attend the same school for five years. (HT at page 40 and 449.) He is in the second grade. (*Id.*) The Mother has participated in all IEP's. (HT at page 41.) He has been the subject of an IEP for six years. (*Id.*) The Child uses a gait trainer for mobility and independence. (HT at page 42.) Further, the gait trainer was used "to do what every other child does that is able to walk on their own" *e.g.*, move throughout the building, move during physical education, *etc.* (*Id.* and HT at page 59.) The use of the stroller was introduced in the 2013 IEP, over the objection of the Mother. (HT 44-45.) Its use was restricted to emergencies. (*Id.*) She described pages 1 and 2 of Exhibit No. 11, showing the stroller being used by PS in a nonemergency situation in February 2016. (HT at page 46.) She further described page 3 of the Exhibit No. 11, instructions regarding use of the stroller strictly during emergency situations. (HT at page 48-49.)

The Assistant Principal of the Child's school stated that, evidently in October, 2015, it was her understanding that the Child would be placed back in the gait trainer and did not understand why the Child was placed in the stroller, for purposes of transportation (HT at page 50.) The Mother's responsibility was for artificial foot orthotics (AFOs), his shoes, his diapers, his wipes, change of clothes, snacks and medications. (HT at page 51-52.) PS provides all other equipment. (HT at page 52.) For the sense of continuity, PS attempts to use at school the same equipment used by the Child at home. (HT at page 52.) The following positioning and

mobility equipment available for the Child's use at school for mobility: the gait trainer with trunk support, pelvic support, ankle guides and tray. (HT at page 54.) The following equipment is used when the Child is at the cafeteria or in the classroom for stability: the Rifton activity chair with supportive seating and high/low base. (*Id.*) As an alternative positioning device, the Child can use the EasyStand stander. (*Id.*) For emergency evacuation, the stroller is used. (*Id.*)

The Mother reviewed references to "gait trainer" in the Occupational Therapy Evaluation, Evaluation Date December 18, 2014 (Parent's Exhibit No. 5). (HT at pages 60-62.) The direct implication was that PS's occupational therapist contemplated the routine use of the gait trainer.

The Mother reviewed references to "gait trainer" in the Physical Therapy Evaluation, Evaluation Date November 12, 2014 (Parent's Exhibit No. 4). (HT at pages 65-66.) The direct implication was that PS's physical therapist contemplated the routine use of the gait trainer.

Parent's Exhibit Nos. 2 and 3 are communication logbooks between the Mother and the Child's school therapists. The logbook's purpose is to allow the Parties to discuss daily events, improvements, problems, etc. (HT at pages 67-68.) They contain, in pertinent part, discussions which reflect the Mother's intention (and PS's response) that the gait trainer be used and that the stroller be used only for emergency evacuations. The Mother described the meeting referenced on page 10 of Parent's Exhibit No. 2, the logbook. For example, in October 2015, the Parties held a "assistive technology" meeting to discuss the gait trainer. (HT at pages 72-76.) PS contended that a larger gait trainer was necessary to accommodate the child's growth. (HT page at 74.) The Mother asserted to PS that it was required to use the gait trainer for the Child's routine relocation, not the stroller. (HT at pages 76-77 and 168.) Reviewing Parent's

Exhibit Nos. 2 and 3, the Mother described physical therapy sessions which were logged in, but did not occur, implying that the school's physical therapist made false entries into the logbook. (HT at pages 97-100 and 146-155.)

Although not qualified as an expert, the Mother described the Child's need for support in his equipment. (HT at page 69-70.) As a rebuttal witness, she testified that in IEP meetings, including the IEP meeting which generated the Current IEP, there was no discussion regarding a change in the use of the gait trainer. (HT at page 450.) The use of the gait trainer changed in October, 2015. (*Id.*)

There was a period time when the Child was hospitalized. (HT at pages 124-125.) PS required a doctor's note to return the Child to the gait trainer. (HT at page 101; Parent's Exhibit No. 8.) While implied, there was no direct evidence linking the Child's hospitalization with his use of the gait trainer. Prior to January 8, 2016, but during the current school year, the Mother attempted to convince PS personnel to allow the Child to remain in the medium gait trainer. (HT at pages 100-101.) PS was provided a copy of the Children's Hospital of the King's Daughters Physical Therapy Letter of Medical Necessity, dated September 25, 2015 (Parent's Exhibit No. 9), on or near that date. This document states, in pertinent part:

> [The Child] currently uses a medium [gait trainer] at school.... He still has room to grow with his current [gait trainer], the pelvic harness does not provide sufficient support and stability at the pelvis for [the Child's] posture. He rests heavily on the harness for gait activities secondary to decreased strength and impaired lower extremity position and increased tone. This has caused significant discomfort and irritation in his groin areas because of the lack of padding on the pelvic harness. He has trialed the [gait trainer] with a Rifton Pacer Hip positioner with pad and increased comfort and tolerance for longer periods of standing and gait activities.... The improved comfort with the hip positioner and pad versus his current pelvic harness will allow [the Child] to work more frequently on standing and ambulation activities to improve his strength, endurance, range of motion, and community involvement and interactions with peers. The aforementioned benefits will help progress toward his overall mobility and functional activity goals with physical therapy.

Although Doctor did not testify or qualify as an expert, the Parties did not dispute the strength of his opinions as a treating doctor. On September 24, 2015, the Child was in the medium trainer.

The Mother testified about a letter dated December 2, 2015, from , RN, BSN, Ambulatory Care Clinic Coordinator, Nurse Case Manger, Children's Hospital of Richmond (Parent's Exhibit No. 10.) This letter states, in pertinent part:

> [The Child] was seen on December 2, 2015, by [Dr.] .... [T]he [M]other explained that the patient's school was no longer using the gait trainer to help him transition from one room to the next and instead placed him in [the stroller] which was designated for use in emergency evacuations only, per IEP. [The Child] received an equipment evaluation in August 2015 and per the therapist recommendation, sh would remain in the same size [medium] gait trainer.... Dr. noted that the patient was in need for an equipment evaluation as he has outgrown the majority of his equipment including his activity chair.
>
> The...stroller is equipment that should be used to help with long distance transfers but not use for transportation all day. He will not get the appropriate support he needs if kept in this stroller for long periods.

Although Ms. did not testify or qualify as an expert witness and although this letter contained opinions of Dr. , the document and its contents were undisputed. The Mother provided a copy of the letter to PS on January 4, 2016. Upon receipt, the Mother and PS personnel held an informal meeting discuss the conflict between Dr. 's letter and the Current IEP.

The Mother testified that the PS was using the stroller instead of the medium gait trainer for the majority of the time between September 15, 2015, to present. (HT at pages 56, 114 and 118.)

Parent's Exhibit No. 1 provides a commercial description of the gait trainer along with a picture.

The Mother disagrees with Dr. 's opinion, as expressed in PS's Exhibit No. 22, that the Child requires a wheelchair. (HT at page 138.)

The Mother's love for her Child was apparent. The Mother's testimony was undisputed with the exception of her testimony regarding allegations of false entries in the log books (Parent's Exhibit Nos. 2 and 3) and her observations that the gait trainer was not used for most of time by RPS between September 15, 2015 and the present. In regard to these two exceptions, her testimony was discounted on the basis that she lacked first-hand knowledge of the facts upon which she testified.

was qualified as an expert in the area of physical therapy. (HT at page 27.) She demonstrated the technique used to measure the Child for a gait trainer. (HT at pages 83- 84.) She opined that the Child should be in a medium gait trainer. (HT at page 84.) Reviewing Parent's Exhibit No. 11, she opined that the use of the stroller put pressure on different points of the Child's body that should not be subject to such pressure. (HT at page 90.) The stroller should not be used for long periods of time. (HT at page 91.) had never witnessed the Child in a school setting. (HT at page 86.) Further, she did not base her opinion on discussions with school personnel. (*Id.*) Her testimony was also discounted insofar as she provided the manufacturer's specifications as opposed to her own opinion. Further, she did no rebut the testimony of PS experts who provided clear opinions on the issue of which size the Child should use. In addition, she testified from seeing Parent's Exhibit No. 11, a picture of the Child in the stroller, and failed to establish a foundation that her opinions were based on actually seeing the Child in the stroller.

Dr. was qualified as an expert in pediatric physical therapy. She evaluated the Child on September 23, 2015, and signed Parent's Exhibit No. 9 on September 24, 2015. (HT at pages 174, Parent's Exhibit No. 9.) At that time, her opinion was that the Child should remain in a medium gait trainer with some, "but not a ton," of room for growth. (HT at pages 176-177.) In February, she had not reassessed the Child for sizing the gait trainer and he was still in the medium gait trainer. (HT at pages 175-176.) She opined that the benefit of using a gait trainer was to provide a place to put the patient in safely so he can do manipulations of the leg and move things around as well as helping with stepping activities. (HT ate page 176.) The gait trainer also provides patients with an independent form of mobility. (*Id.*) She could not opine that a patient would regresss if he stopped using the gait trainer. (*Id.*) She further opined that use of the gait trainer outside of therapy would allow for increased mobility as well as be good for cardiovascular motion and strength, similar to walking. (HT at pages 175-176.) She prefers that patients use the gait trainer regularly to maintain their level of function and promote progress. (HT at page 180.) Overall Dr. 's testimony was undisputed and credible.

was a fact witness. As an employee of PS, she testified that she was the Child's case manager. (HT at page 183.) She read or commented on sections of the Current IEP. (HT at pages 185-190) She stated that the section entitled "Present Levels of Performance" or "PLOPs" in the current IEP was meant to be a description of the student's baselines at the time the IEP was written. (HT at page 192.) Further, the information contained in this section was not a part of the IEP that PS was required to implement. (*Id.*) She was part of the IEP team which drafted the Current IEP. (HT at page 191.) She justified the use of the stroller because the Child got sores and it was not safe for the Child to use the gait trainer. (HT at page 199.) 's opinions

were discounted insofar as she provide was not qualified as an expert to provide opinions. Further, her observations were not first-hand.

was a fact witness. She is the Compliance Coordinator for PS. (HT at page 206.) She described a meeting with the Mother regarding the use of the stroller as opposed to the gait trainer. They discussed the need to use the stroller as opposed to the gait trainer because the Child has developed sores from using the gait trainer. (HT at page 208.) PS received medical clearance to allow the Child to use the stroller (Parent's Exhibit No. 8) towards the end of November, 2015. (HT at page 215.) The use of the gait trainer was not the focus of the IEP meeting which generated the Current IEP. (HT at pages 218-219.) Her testimony was credible, but not helpful.

was a fact witness. He worked for an agency which provided instructional aid to the Child. (HT at page 236.) He works with the Child five days a week during school hours at all times relevant hereto. (*Id.*) The overall implication of 's testimony was that assisted the Child to ensure his transfer to and from locations throughout the school day. The Child used two different sizes of gait trainer during that time. The Child did not use the gait trainer for significant periods of time during this school year. (HT at pages 240-242) He used the stroller. (*Id.*) They used the larger gait trainer. (HT at page 242.) PS used the stroller during school hours, mostly. (HT at page 243.) His understanding was that the stroller was to be used only for emergency situations. (HT at pages 244-245.) His testimony was credible and undisputed.

was a fact witness initially. At the start of cross examination by PS, she was qualified as an expert in physical therapy by PS. She is a physical therapist for PS. (HT at pages 264-265.) As a fact witness, she testified that she worked with the Child for four years

until September, 2015. (HT at page 252.) No evidence was introduced as to why she was replaced. In September, 2015, the Child used a medium gait trainer. (HT at page 253.) Prior to the beginning of the school year, arranged for a larger gait trainer with appropriate supporting equipment as well as a larger classroom chair. (HT at page 254.) The Child's medium gait trainer had been adjusted to his fullest height. anticipated a large gait trainer and classroom chair were need to accommodate the Child's growth. (*Id.*) In fitting him with a larger gait trainer, she did not measure his height. (HT at page 256-257.) Instead, she relied on the observation that the Child had outgrown the medium gait trainer. (*Id.* and at pages 268-269 (as testifying as an expert.) She did not participate in the Child's transition from the medium to the large gait trainer. (HT at page 256.) After qualifying as an expert, opined that the purpose of physical therapy services in the school setting was to increase a student's ability to participate in the general education curriculum as the student's educational program. (HT at pages 265-266.)

opined that measuring a patient for a gait trainer was useful initially, but with time, a professional can ascertain when the next size was needed after observing the patient's growth. (HT at page 270.) She was found credible because of her expertise, her contact with the Child in a school setting for approximately four years and her demeanor.

The Parent's rested their case, subject to calling rebuttal witnesses. PS called , and .

was the Assistant Principal at the Child's elementary school. She was a fact witness. She testified as to discussions regarding the gait trainer and the Current IEP. (HT at pages 278-281.) Her testimony was discounted insofar as her recollections were uncertain.

was qualified in the areas of occupational therapy as well as pediatric occupational therapy. (HT at page 292.) In October, 2015, she was assigned to provide occupational therapy

and assistive technology services to the Child. (HT at page 294.) Her function was to assist the Child in accessing his education, his written materials, his writing assignments as well as participating in the school community. (HT at pages 292-293.) She consulted with the prior therapist involved with the Child. (HT at page 295.) She participated in the IEP meeting which generated the Current IEP. (HT at page 296.) Although not qualified in the area of IEP and its process, she opined that the Current IEP's section entitled "Present Level of Academic and Functional Performance," was not part of the IEP to be implemented. (HT at pages 298-299.) The stroller was used to transport the Child in November, 2015, after his return and before the PS acted on the medical note, Parent's Exhibit No. 8. (HT at pages 303-304.) While in the stroller, the Child received the required services under the Current IEP. (HT at page 305.) Similarly, the Child's mobility at school was not impaired. (HT at page 307.) The Mother declined several attempts by PS to convene a meeting to discuss the use and appropriate size of the gait trainer as opposed to other devices. (HT at page 312-313 and 347-348.) At all times, the Child utilized the gait trainer consistent with the mandates of the Current IEP. (HT at pages 315 and 325.) On January 8, 2016, the Child showed signs of fatigue while using the gait trainer. (HT at pages 320-321.) The Child used the stroller as his main device to transport him during the school year especially in December, 2015. (HT at page 328.) shared her opinion regarding mobility and the IEP:

> The goal is to let [the Child] experience independent mobility. ['s] understanding from his physical therapists and his doctor is that he's not going to be an independent walker, and he is going to need transport that is not of his own–I mean, he's not going to be in a gait trainer for all mobility. An in my experience, a wheelchair provides the most independence as well as the best support and positioning for multiple reasons, for his–for protecting his body and his skin, as well as a way of, you know, energy conservation, and safe transport to his destination.

(HT at page 350.) She opined that the Child would achieve the Current IEP's goals timely. (HT at page 357.) She agreed with the statement, contained in the Spasticity Clinic Progress Note–PM&R, dated January 19, 2016 (RPS Exhibit No. 22) that Dr. recommended that the Child "would still require a wheelchair for primary mobility." (HT at pages 356-357.) She explained apparent problems with logbooks. (HT at page 335-337.) Her testimony was credible based on her expertise, her contact with the Child in a school setting and her demeanor. Her testimony regarding the IEP were discounted because the document speaks for itself as to the matters stated therein.

was qualified as an expert in the area of physical therapy and pediatric physical therapy. (HT at page 363.) She started providing services to the Child at school on September 21, 2015. (HT at pages 370-371.) She transitioned the child from the medium gait trainer to the large gait trainer because the smaller device was ineffective. (HT at page 373-374 and 378.) Further, she wanted to avoid injury to the Child. (*Id.*) The Child's use of a wheelchair would benefit him. (HT at page 382.) The Child was placed in the larger gait trainer on October 16, 2015. (HT at 383.) The Child was out of school from the end of October to the middle of November, 2015. (HT at 384.) Although not qualified in the area of IEP and its process, she opined that the Current IEP's section entitled "Present Level of Academic and Functional Performance," was not part of the IEP to be implemented. (HT at pages 386-387 and 397.) While the Child used the stroller at school for relocation, he received the required services under the Current IEP. (HT at page 388.) The Child's use of the gait trainer is necessary in certain circumstances, but not during the several relocations during a typical school day. (HT at pages 392-394.) The overuse of the gait trainer is exhausting to the Child. (HT at page 394.) The

Child's use of the gait trainer is inefficient, robbing him of class time and instructional time. (*Id.*) received a notation from the logbook, dated November 23, 2015, from the Mother (Parent's Exhibit No. 3, page 2) "why are you still working with my son, I [*i.e.*, the Mother] had asked you not to." (HT at page 426.) Her testimony was credible based on her expertise, her contact with the Child and her demeanor. Her testimony regarding the Current IEP was ignored insofar as the document speaks for itself as to matters stated therein.

The Current IEP provides in pertinent part and as referenced to RPS's Exhibit No. 1:

Page 12 of 32:	#3 Measurable Annual Goal: Attention. By 10/06/ 2016, [the Child] will increase his ability to attend to structured activities, tasks and small group activities with the classroom setting during 4 out of 5 opportunities daily.
Page 12 of 32:	Objective/Benchmark # 1 Attending/structured activities. By 10/06/2016, [the Child] will demonstrate attending skills during a structured activity for up to fifteen (15) minutes by focusing on the specific activity in order to correctly complete a teacher/therapist directed activity with minimal verbal/physical prompts to do so.
Page 13 of 32:	#4 Measurable Annual Goal: Communication. By 10/06/2016, [the Child] will demonstrate an ability to interact with his peers and adults appropriately by increasing verbal and language skills....
Page 18 of 32:	#6 Measurable Annual Goal: Mobility. By 10/06/2016, [the Child] will move to school destinations (on the same floor) in 2 minutes or less using a supportive gait trainer....
Page 18 of 32:	Objective/Benchmark #1. By 10/06/2016, [the Child] will move to school destinations (on the same floor) in 4 minutes or less using a supportive gait trainer....
Page 19 of 32:	#7 Measurable Annual Goal: Sitting and Standing. By 10/06/2016, [the Child] will help with daily activities and transfers by sitting or standing with support for balance.
Page 25 of 32:	Accommodation/Modification(s). Use of stroller during emergency evacuations, available daily for use during emergency evacuations.
Page 25 of 32:	Accommodation/Modification(s). Positioning and mobility supports (i.e., adaptive seating, supportive gait trainer/stander, daily in the educational environment.

Page 25 of 32: The use of adult support from arrival to departure to provide additional support in areas to include: learning strategies, mobility, feeding, personal care and communicate with related service providers.

FACTUAL FINDINGS (By a Preponderance of the Evidence)

After reviewing the testimony and exhibits, the following factual findings are made:

1. PS personnel satisfied the mandates of the Current IEP.

2. PS personnel involved in implementing the Current IEP were duly qualified.

3. While PS's use of the stroller was not contemplated by the Current IEP, its use was a direct result of PS's attempt to address the reality that routine use of the gait trainer (as in the past) was causing injury and fatigue to the Child, and, to complicate matters, Mother avoided meetings to discuss alternative devices (including a wheelchair) to relocate the Child while at school.

4. PS was required by the Current IEP to explore devices other than the gait trainer to ensure the Child the opportunity to "mainstream" as contemplated by the IEP by avoiding fatigue and reducing time between relocations.

5. PS's use of the stroller during the school year was not forbidden by the Current IEP.

6. The section of the Current IEP entitled "Present Levels of Academic and Functional Performance" does not contain implementation directives.

7. PS personnel attempted to address the Child's growth by using the larger gait trainer.

8. The stroller is not "adaptive seating" as referenced in the Current IEP; such seating is the Rifton activity chair.

9. The opinions contained in the evaluations, Parent's Exhibit Nos. 4 and 5, do not substitute for the objectives and mandates of the Current IEP. (Although there was no

evidence on point, it can be assumed that the IEP team had these evaluations availabe when generating the Current IEP.)

10. The Mother participated as a team member in the IEP process which generated the Current IEP and consented to it.

11. The use of devices other than the gait trainer is allowed under the Current IEP, including the stroller.

12. The Current IEP does not require daily use of the gait trainer by the Child.

13. PS did not fabricate entries in the logbooks, Parent's Exhibit Nos. 2 and 3.

ANALYSIS:

Legal Analysis

Major areas of the law are undisputed.

In Board of Education v. Rowley, 458 U.S. 176, 207, 102 S.Ct. 3034 (1982), the Supreme Court found that a disabled child is deprived of FAPE under either of two sets of circumstances: (1) if the LEA has violated IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon the disabled child's right to FAPE; or (2) if the IEP that was developed by the LEA is not reasonably calculated to enable the disabled child to receive an educational benefit. Further, the Supreme Court opined "[i]nsofar as a State is required to provide a handicapped child with [FAPE], we hold that this satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction. (Rowley, 458 U.S. at 200.) In Hall v. Vance County Board of Education, 774 F.2d 629, 636 (4th Cir. 1985), the Court opined that no single substantive standard can describe how much educational benefit is sufficient to satisfy IDEA and

that educational services must be reasonably calculated to produce more than some minimal academic achievement. (*See* Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988), where the Court stated that IDEA "calls for more than a trivial educational benefit," but requires that the child receive a meaningful benefit and an opportunity to receive significant learning.)

In this administrative due-process proceeding initiated by the Parent/Child, they have the burden of proof. Schaffer, *ex rel.* Schaffer v. Weast, 126 S.Ct. 528 (2005).

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

The standard of proof is a preponderance of the evidence. County Schl. Bd. of Henrico County v. Z.P., 399 F.3d 298, 304 (4th Cir. 2005).

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

> In summary, the preponderance of the record evidence points persuasively to the conclusion that APS's proposed placement of Jane in the Interlude program would provide her with a FAPE because it was "reasonably calculated to enable [her] to receive educational benefit." *See* Rowley, 458 U.S. at 206-07, 102 S. Ct. 3034. The hearing officer's contrary conclusion that Jane would not benefit from the Interlude program finds no support in the record, **as no expert testified to this effect**, and Jane had not yet fully experienced the program. It is apparent that the

> hearing officer succumbed to the temptation, which exists for judges and hearing officers alike in IDEA cases, to make his own independent judgment as to the best placement for Jane, instead of relying on the record evidence presented in the hearing. This temptation stems from the fact that judges and hearing officers are typically parents who are in the habit of making such judgments. Yet, the Supreme Court and Fourth Circuit have admonished hearing officers and reviewing courts alike when they substitute personal opinions or judgments as to proper educational policy, and best placements for the disabled student, in the place of the local educators' expert judgments. *See* Rowley, 458 U.S. at 206, 102 S. Ct. 3034; Hartmann v. Loundon County Bd. Of Educ., 118 F.3d 996, 1000-1001. These courts have also reminded hearing officers and reviewing courts that school districts are not required to provide a disabled child with the best possible education. *See* Rowley, 458 U.S. at 192, 102 S. Ct. 3034. The result reached here is properly deferential to Jane's educators' unanimous determination that the Interlude placement was appropriate. *See also* Hartmann, 118 F.3d at 1001 (holding that "local educators deserve latitude in determining the [IEP] most appropriate for a disabled child") [Emphasis added.]

A review of Smith is important to emphasize the restrictions, constraints or limitations placed on hearing officers when deciding IDEA cases in Virginia. Although a child is involved, current law prevents a hearing officer's reviewing evidence as a Virginia juvenile district court judge must review in a custody matter with the "best interests of the child" standard as described in §20-124.1 of the Virginia Code. Instead, hearing officers must respect the limitations that evidence, especially expert testimony, determine the outcome in IDEA cases as well as respect the Federal directive that IEPs are reviewed with the standard established by Rowley and its progeny. The difference between the standard established by the "best interests of the child" and the standard established by Rowley (and its progeny) can never be reconciled. Quite frankly, this difference causes a great deal of litigation, cost and heartache.

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

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

Similarly, in E. L. v. Chapel Hill-Carrboro Bd. of Educ., 773 F.3d 509, 517 (4th Cir. 2014), the Court confirmed that it afforded "**great deference to the judgment of education professionals in implementing the IDEA.**" As long as an individualized education program provides the basic floor of opportunity for a special needs child, **a court should not attempt to resolve disagreements over methodology**. [Emphasis added.] *In accord,* O.S. v. Fairfax County Sch. Bd., 804 F.3d 354, 360 (4th Cir. 2015). Reviews of Hefferman and E.L. are important to show that the Parent was required to prove, by a preponderance of the evidence, that PS denied the Child FAPE by failing to implement material portions of the Current IEP. In other words, a court, a hearing officer or a parent cannot micromanage the implementation of an IEP, deferring to the expertise of LEA professionals.

Specific Issues

I. Whether the LEA followed the current IEP regarding the implementation of the "gait trainer" and, if not, what is the remedy?

The Parent failed to carry the burden on this issue. The overwhelming evidence is that PS followed the Current IEP. Assuming, *arguendo*, that PS' use of the stroller was inconsistent with the Current IEP, such use was *de minimus* as contemplated by Heffernan and E.L. The IEP does not require daily use of the gait trainer. PS is committed to satisfying the goals of the Current IEP.

II. Whether the LEA has provided competent staff to utilize the "gait trainer" in accordance with the IEP and, if not, what is the remedy?

The Parent failed to carry the burden on this issue. The overwhelming evidence was that PS provided competent staff to implement the Current IEP including the use and sizing of the gait trainer. provided the Child physical therapy services under the Current IEP. PS' Exhibit No. 14 is her Resume. She was qualified as an expert in physical therapy and pediatric physical therapy. Similarly, provided the Child occupational and assistive technology services to the Child under the IEP. She qualified in the areas of occupational therapy as well as pediatric occupational therapy. PS's Exhibit No. 13 is her Resume. While the Mother may disagree with their professional decisions, these professionals have the requisite experience, education and expertise to provide quality service to the Child under the Current IEP.

RELIEF GRANTED:

None.

CONCLUSION

The Parents failed to introduce sufficient evidence to carry the burden of proof to grant the relief requested in their Due Process Request.

APPEAL, IMPLEMENTATION AND PREVAILING PARTY NOTIFICATIONS

1. **Appeal.** Pursuant to 8 VAC 21-81-T and §22.214 D of the Virginia Code, this decision is final and binding unless either party appeals in a federal district court within 90 days of the date of this decision, or in a state court within 180 days of the date of this decision.

2. **Implementation.** The LEA shall develop and submit an implementation plan within 45 calendar days of the rendering of a decision.

3. **Prevailing Party.** The LEA is deemed the prevailing party.

Hearing Officer

March 1, 2016
Date

CERTIFICATE OF SERVICE

I certify that on this 1st day of March, 2016, a true and accurate copy of this pleading was mailed, *via* email & First-class, postage prepaid mail, to:

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