10-016

CASE CLOSURE SUMMARY REPORT

(This summary sheet must be used as a cover sheet for the hearing officer's decision at the end of the special education hearing and submitted to the Department of Education before billing.)

County Public Schools
School Division

(for)
Division Superintendent

Kathleen S. Mehfoud, Esq.
Counsel Representing LEA

Parents
Party Initiating Hearing

Name of Parent(s)

Name of Child

Pro Se
Counsel Representing Parent/Child

Parents
Prevailing Party

Hearing Officer's Determination of Issue(s):

Whether the Child was denied Free Appropriate Public Education at private residential placements in 2008-09 at Cumberland Hospital and at AdvoServ (Delaware) and whether Parents entitled to reimbursement for expenses.

Hearing Officer's Orders and Outcome of Hearing:

Finding that Child denied FAPE at Cumberland Hospital, No denial of FAPE at AdvoServe. Child awarded 12 weeks of compensatory education; Parents not entitled to reimbursement for expenses.

This certifies that I have advised the parties of their right of appeal.

This certifies that I have advised the LEA of its responsibility to submit an implementation plan to the parties, the hearing officer, and the SEA within 45 calendar days.

Peter B. Vaden
Printed Name of Hearing Officer

Signature

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION

In Re: CHILD	}	**Findings of Fact**
Due Process Hearing	}	**and**
	}	**Decision**

Parents:

Parents, *Pro se*

Counsel for County Public Schools:

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This matter came to be heard upon the complaint for due process filed by the Parents, ("the Parents") against County Public Schools (the "LEA") under the Individuals with Disabilities Education Act (the "IDEA"), 20 U.S.C. §1400 et seq., and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia ("Virginia Regulations"). The due process hearing was held before the undersigned Hearing Officer[1] over

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[1] In their Closing Memorandum, the Parents renew their Motion for this Hearing Officer to recuse himself. In Virginia, hearing officers are appointed by the local school division after obtaining the name of the qualified special education hearing officer, next in rotation, on the list of hearing officers maintained by the Office of the Executive Secretary of the Supreme Court of Virginia. Neither the school division nor the parent has any discretion in the selection of the hearing officer. *See* 8 VAC 20-81-210.A; 8 VAC 20-81-210.H (2009). For the reasons set forth in the Hearing Officer's Letter Opinion dated November 5, 2009, the Parent's motion for recusal is denied.

five days, on November 12, 13, 17, 23 and 24, 2009, at the in , Virginia. The hearing, which was closed to the public, was transcribed by a court reporter. The Parents appeared at the hearing *pro se*. The LEA was represented by Special Education Director, and by counsel.

This present complaint follows a 2008 due process complaint brought by the Parents arising out of the Child's discharge from Private Virginia Day School ("PVDS") a private non-residential school for children on the autism spectrum in central Virginia. The LEA was the prevailing party in the prior due process decision which is on appeal for judicial review in the United States District Court for the Western District of Virginia.

In their present complaint, the Parents allege that the LEA failed to provide a free appropriate public education to the Child during the time period March 25, 2008 until June 23, 2009. During most of this period, the Child was placed in private, residential educational facilities in Virginia and out-of-state.

BURDEN OF PROOF

The substance of the Parents' claim in this case is that the Child was denied a Free Appropriate Public Education ("FAPE") in his residential placements prior to July 2009. In *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of proof in an administrative hearing challenging an Individualized Education Program ("IEP") is properly placed upon the party seeking relief. *Id.*, 546 U.S. at 62, 126 S.Ct. at 537. Here the Parents are not challenging an IEP, but seek relief for the LEA's alleged denial of FAPE. In the Fourth Circuit Court of Appeals' decision affirmed by the U.S. Supreme Court in *Schaffer*, the Fourth Circuit endorsed "the normal rule of allocating

the burden to the party seeking relief" in IDEA due process hearings. *See Weast v. Schaffer ex rel. Schaffer*, 377 F.3d 449, 453-456 (4th Cir. 2004), *aff'd*, 546 U.S. 49, 126 S.Ct. 528 (2005). Here the Parents are the parties seeking relief. Accordingly, I find that in this case, the burden of proof is upon the Parents.

FINDINGS OF FACT

Both Parents testified in support of their complaint, and they called as additional witnesses the LEA's Special Education Director and the Parents' Expert in Autism Behavior. The LEA called as witnesses its Special Education Director; the Mid-Atlantic Regional School ("MID-AT") Admissions Director, the MID-AT Education Director and the MID-AT Clinical Director; the Regional Autism Specialist; and the In-state Medical Residential School ("IMRS") Director of Program Services and the IMRS Behavior Specialist. Numerous documents were offered by the parties and received into evidence. In addition, audio recordings of school meetings and IEP Team meetings in CD-R format were admitted by agreement of the parties. I make the following findings of fact based upon the preponderance of the evidence adduced at the hearing:

1. The Child was born on Date of Birth. At the present time, he is a student at School (' .S") under an LEA IEP. It is not disputed that he is a child with a disability in need of special education services. His medical diagnoses in March 2008 included Autism and Organic Affective Disorder with aggression and self abuse.

2. Through much of the period concerned in the Parent's complaint, the Child was served under an LEA IEP dated August 28, 2007 ("PVDS IEP"). That IEP provided for the Child's day placement at Private Virginia Day School ("PVDS').

3. The Child had attended PVDS since April 2006. When the PVDS IEP was developed, the IEP Team reported that in the previous year the Child had excelled in many areas of academic learning. He was able to function in a one-to-one staff to student ratio and engage in activities with other students. In the fall of 2007, the Child's autism-related behavior problems increased dramatically both in frequency and in intensity. By January 2008, the Child's behavior had escalated to the point that he required a four-to-one staffing ratio, and was contained in a small padded room where he did all of his school work. The Child was totally isolated from all of the other students because his behaviors had become so aggressive and dangerous.

4. In November 2007, reacting to the increase in the intensity of the Child's aggressive and self injurious behaviors, the directors of PVDS decided to discharge the Child and to discontinue all services to him, including in-home services, effective December 4, 2007. The Parents filed a due process complaint on December 26, 2007 and the hearing officer issued a stay-put order under 20 U.S.C. § 1415(j). On January 28, 2008, the stay-put order notwithstanding, PVDS refused to provide any further services to the Child. The Child's last day at PVDS was on January 24, 2008.[2]

5. The Child's PVDS IEP specified that for Special Education and Related Services, the Child would receive primary services of 1,785 minutes weekly of direct educational/functional services and related services of 120 minutes weekly of direct Speech/Language services, and 60 minutes weekly of Occupational Therapy ("OT") services.

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[2] The history of the Child's placement and discharge from PVDS and the related due process proceedings are set forth in Findings of Fact and Decision, *In Re: (Child),* March 25, 2008, Peter B. Vaden, Hearing Officer (Exh. S-90).

6. On March 25, 2008, pursuant to an IEP Addendum, the Child was placed in an "evaluative setting" at IMRS. IMRS is a residential treatment facility and also operates a school for its residents. At the time, IMRS was the only placement immediately available for the Child. The goal of the IMRS placement was to provide information for the Child's setting and programming upon his release from IMRS. The Parents consented to this placement.

7. The Special Education Director for the LEA believed that the PVDS IEP, written for a day treatment program, was not appropriate for the placement at IMRS and that the speech services specified in the IEP could not be delivered to the Child in his state at that time. The Special Education Director made numerous attempts to try to resolve this concern with the Parents. The Parents insisted that the PVDS IEP be followed as it was written.

8. At IMRS, the Child initially seemed distracted and was non communicative. He was behaviorally acute from the perspective that he emitted high-rate physical aggression and self-injurious behavior, including tantrums, screaming, destruction of property, sexual inappropriateness, physical aggression toward staff and peers, throwing objects, and head-butting.

9. After the Child's admission, IMRS determined that due to an increase in the Child's behaviors, he required a one-on-one aide during educational time. An IEP Addendum was approved on April 2, 2008 providing for a one-on-one aide, five days per week for 5.5 hours per day. The Parents gave their permission to implement the addendum. Otherwise the PVDS IEP was not altered.

10. When the Child was first placed at IMRS, the staff attempted to teach him with other children in a classroom. Due to the Child's increased aggressions toward others and his

self-injurious behaviors, IMRS decided to educate the Child on his residential unit.

11. At IMRS, the Child was initially placed on Unit 8, a neurobehavior unit housing 15-16 students. The Child's aggressive and self-injurious behaviors worsened and the Parents observed a "severe regression" overall. The IMRS Medical Director decided to move the Child to Unit 2, an acute medical unit with half as many residents.

12. After moving the Child to Unit 2 on May 3, 2008, the IMRS staff observed a very marked decrease in the frequency and intensity of the Child's aggressions and self-injurious behaviors. With the decrease in his aggressions and self-injurious behaviors after April 2008, the Child was more successful at working on his IEP program activities with the one-on-one aide.

13. Despite the relative improvement in the Child's behaviors, he made only *de minimis* educational progress under the PVDS IEP. The Child's November 7, 2008 IMRS "Report Card" reported dismal progress toward most of the PVDS IEP Objectives and a failure to attain any educational Annual Goals.

14. The IMRS Education Director reported that she was not seeing with the prerequisite skills to meet the IEP goals set out in the PVDS IEP. In August 2008, when the LEA offered several changes to the Child's IEP to lessen the rigor of the goals, the Parents withheld their consent.

15. At the August 25, 2008 IEP Team meeting, the IMRS representative proposed to provide the Child's Speech and OT services via a collaborative services approach, where the therapists would work on goals indirectly through the Child's one-one-one aide, who had a better rapport with him. The Parents withheld their consent to this change in the IEP services.

16. The Regional Autism Specialist, on contract with the LEA, visited IMRS in May

2008 and in October 2008 to observe the Child. She observed on her second visit that the Child's behaviors had dramatically improved; that the Child made marked progress in responding to a visual schedule and use of a "first-then" sequence teaching tool; and that his rate of partial or complete completion of school tasks increased from nil to 65 percent.

17. Throughout the Child's stay at IMRS, the Parents were in contact with other potential private placements for the Child including a residential facility in Baltimore, Maryland, a day school in Richmond, Virginia, MID-AT and S.

18. On May 12, 2008, the Parents visited MID-AT. After meeting with the Parents, the MID-AT administrators informed the Parents that if the LEA made a referral, MID-AT would make a evaluative visit to the Child at IMRS. On June 11, 2008 MID-AT's Admissions Director and Education Director traveled to IMRS where they met with staff and observed the Child. The MID-AT administrators determined that the Child would do well in MID-AT's program. MID-AT invited the Parents to return to MID-AT to tour and observe their program. The Parents did not follow up at this time.

19. MRS employs a restrictive procedures behavior protocol, which may involve use of a padded mat device with restraints for wrists and ankles. In October 2008, the Mother telephoned MID-AT's Admissions Director to ask whether MID-AT could program the Child without using its protocol. The Admissions Director advised the Parents that he did not believe MID-AT could provide effective, safe treatment to the Child without the use of MID-AT's restrictive procedures.

20. On November 26, 2008, the Parents requested a pass from IMRS for the Child to visit his family home in County for the Thanksgiving holiday. The pass was approved by

IMRS's Medical Director. The Parents brought Child home on November 27, 2008.

21. On December 2, 2008, the Mother wrote an email to the admissions staff at the Richmond day school stating that the Parents would not allow the Child to return to IMRS.

22. The LEA's Special Education Director advised IMRS in a telephone conversation that it appeared that the Child would not return to IMRS. At an IMRS discharge conference on December 4, 2008, which the Mother attended, the Child was discharged to the Parents' home. The reported reason for discharge was that the Child's "family took him out on pass and chose not to return him to [IMRS]."

23. The Child's Discharge Summary Plan from IMRS reported that the Child's IEP goal of completing 75% of school activities every week was not met.

24. On December 2, 2008, the Parents' former attorney wrote the LEA's attorney that the Parents were not willing to subject the Child to further abuses at IMRS and had been "forced to withdraw him." On December 8, 2008, the Parents' attorney wrote that she had misunderstood the Parents' position and that the Parents were working with IMRS in hopes of planning a sensible and orderly transition for the Child.

25. On December 8, 2008, the Mother telephoned the MID-AT Admissions Director to request an urgent home visit because the Mother felt they were in danger due to the Child's behaviors.

26. MRS's Admissions Director and Clinical Director visited the Parents' home on December 18, 2008. After meeting with the Parents and observing the Child, the MID-AT administrators felt that they could serve the Child at MID-AT. The Child was accepted for admission after MID-AT received his medical reports on December 22, 2008. The Parents

decided to enroll the Child at MID-AT after the Christmas holidays. He was admitted to MID-AT on December 30, 2008.

27. During the December 18, 2008 visit, the Parents stated to the MID-AT Admissions Director that they had decided not to take the Child back to IMRS because they were upset with his physical condition and welfare.

28. When the Parents enrolled the Child at MID-AT, they executed a Letter Agreement regarding the Child's Individual Education Plan. That documents indicates that the Parents and MID-AT, "[i]n the absence of a signed effective Individual Education Plan," agreed as follows:

1. The Child will be served by MID-AT's intensive program with enhanced clinical resources and environmental alterations beyond the normal intake process. This will negate the need for 1:1 staffing.

2. During the first thirty or so days MID-AT will conduct educational testing and develop a Behavior Management Program. In approximately thirty (30) days MID-AT will convene an IEP meeting with the parents, school district and MID-AT staff. At that meeting MID-AT will present a proposed IEP and solicit input from all in attendance. The goal will be to formalize an IEP and an agreed upon Behavior Management Program.

3. If there is need for related services, MID-AT will arrange for specific evaluations and will follow those recommendations.

4. MRS will send progress reports quarterly to the parents and school district.

29. At MID-AT , the Child never had one-to-one supervision, but was always part of an enhanced supervision group.

30. MID-AT convened an IEP Team Meeting on February 12, 2009 which was attended by the Mother (in person) and by the Father (by telephone). At this meeting, MID-AT

presented a proposed IEP (the "MID-AT IEP") for the Child. The MID-AT IEP shows that the Parents signed the IEP, indicating their agreement with the program on February 12, 2009. The Father faxed in another IEP signature page to LEA counsel on April 7, 2009 as well as a signature page consenting to MID-AT's Behavioral Program. The faxed documents were signed by the Father on April 7, 2009.

31. The MID-AT IEP provided for 120 minutes weekly of Speech/Language services and 60 minutes weekly of OT services. The IEP does not specify the format for the services, *i.e.*, 1:1, direct, small groups or otherwise.

32. At MID-AT, the Child received reported speech services from a Speech and Language Therapist on the following dates:

February 7, 2009	1.5 Hours
February 14, 2009	.5 Hours
February 22, 2009	2.0 Hours
March 7, 2009	1.0 Hours
March 14, 2009	1.0 Hours
May 2, 2009	1.0 Hours
May 16, 2009	1.0 Hours
May 23, 2009	1.0 Hours
June 6, 2009	1.0 Hours
June 13, 2009	1.0 Hours

33. In an OT Initial Evaluation dated April 13, 2008, a pediatric occupational therapist reported to MID-AT that she did not recommend that the Child receive direct OT services. MID-AT did not provide direct OT services to the Child.

34. Effective July 1, 2009, at the request of the Parents, the IEP Team transferred the Child's placement to S. The Parents assert no claims related to placement or services provided at S.

DECISION

The Parents claim in this proceeding that the Child was denied a Free Appropriate Public Education (FAPE) at his placements at IMRS (March 25, 2008 to December 3, 2008) and at MID-AT (December 30, 2008 to June 23, 2009). For the reasons explained below, I find that the Child was denied FAPE at IMRS, but there was no denial of FAPE at MID-AT.

1. LEA'S FAILURE TO DEVELOP A REVISED IEP FOR CHILD'S PLACEMENT AT IMRS WAS DENIAL OF FAPE.

Prior to the Child's admission to IMRS, the Child's last IEP was approved at an August 28, 2007 IEP Meeting for his 2007-08 school year at PVDS (the "PVDS IEP"). The Parents contend that the Child was denied FAPE because the PVDS IEP was not implemented at IMRS. The LEA responds that it attempted to furnish the services specified in the PVDS IEP at IMRS and that the Child made some educational progress there. I find that the Child was denied FAPE at IMRS because the IEP Team failed to develop an IEP appropriate for this residential placement and that there was a resulting deprivation of educational benefit.

In deciding whether the Child received a FAPE at IMRS, I am guided by the principles set forth by the U.S. Supreme Court in *Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley,* 458 U.S. 176, 102 S.Ct. 3034 (1982): First, has the LEA complied with the procedures set forth in the IDEA and the Virginia Regulations to review and revise the Child's IEP? And, if so, is the IEP developed through procedures set forth in the IDEA and the Virginia Regulations reasonably calculated to enable the Child to receive educational benefits? *See Rowley,* 458 U.S. at 206-207; *See, also, e.g., Tice by and through Tice v. Botetourt County School Bd.,* 908 F.2d 1200, 1206 (4th Cir.1990). Because the answer to the first part is "No" in this case, there is not need to reach the second part of the *Rowley* inquiry.

An IEP is not a static document. The IDEA requires the LEA to assure that the IEP Team reviews a child's IEP at least annually, and importantly for this case, revises the IEP at other times as needed. The Act provides:

> The local educational agency shall ensure that, subject to subparagraph (B), the IEP Team--
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> (i) reviews the child's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved; and
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> (ii) revises the IEP as appropriate to address–
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> (I) any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate;
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> (II) the results of any reevaluation conducted under this section;
>
> (III) information about the child provided to, or by, the parents, as described in subsection (c)(1)(B);
>
> (IV) the child's anticipated needs; or
>
> (V) other matters.

20 U.S.C. § 1414(d)(4)(A). The Virginia Regulations in effect in 2007-08 established similar requirements. *See* Regulations Governing Special Education Programs for Children with Disabilities in Virginia (Effective March 27, 2002) ("2002 Va. Regs."), 8 VAC 20-80-62 .B.6.[3] The Virginia Regulations further required that when a child with a disability is placed in a private residential school or facility, the LEA must ensure that the child's IEP Team develops an IEP appropriate for the child's needs while the child is in the residential placement. 2002 Va.Regs., 8 VAC 20-80-66.A.1. Responsibility for compliance with these requirements rests squarely with the LEA. *See* 2002 Va.Regs., 8 VAC 20-80-66.A.6.

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[3] The Virginia Special Education Regulations were revised effective July 7, 2009.

The evidence in this case establishes that it was appropriate and necessary for the IEP Team to revise the Child's PVDS IEP, at least by the time he was placed at IMRS in March 2008. When the PVDS IEP was prepared at the beginning of the 2007-08 school year, the Child was at a relative high point in his level of performance. The IEP Team reported that in the past year, the Child "has made amazing progress academically, socially, and with communication." The IEP described the Child as very socially interactive and able to communicate with staff and peers using the DynaVox voice output device. Under the IEP's Present Level of Performance ("PLOP"), the Team reported that the Child excelled in many areas of academic learning including math, reading and typing. He could correspond via email, put together 50 piece puzzles, spell 45 new words by typing them on a computer, and use sign language to express some needs. Based upon the Child's August 2007 PLOP, the IEP Team established a relatively challenging set of goals and objectives for the Child at PVDS, such as communicate at a high level through the DynaVox device, read aloud level one beginner books, correspond by email with family member, use a calendar, tell time, count money up to $2.00, make liquid and linear measurements, and many other academic, social, self-help and physical education objectives.

Unforeseen by IEP Team, the Child's behaviors and performance declined dramatically during the fall of 2007. By January 2008, the Child's problem behaviors at PVDS had escalated to the point where he regularly presented severe aggression, self-injurious behavior and tantruming. He required a 4:1 staffing ratio for his own safety and the safety of PVDS personnel. He was restricted to a small, padded classroom, and had almost no contact with his peers. Ultimately PVDS decided to discharge the Child. The weeks following PVDS' discharge decision were a period of extreme turmoil for the Child, the Parents and the LEA. The Parents

initiated due process proceedings against PVDS and the LEA demanding continuance of the Child's placement at PVDS, and for some time, the Parents refused to consent to any change in IEP placement from PVDS. Because PVDS refused to comply with a stay-put order, the Child was receiving only in-home instruction and there were serious concerns over the safety of the Child in that setting. The evidence establishes that by January 2008, the Child's PVDS IEP could not be implemented as drafted.

The IEP Team concluded that because of the escalation in the Child's behaviors, he needed a residential placement. In March 2008, IMRS was the only residential placement then available for the Child. The IEP Team, with the Parents' consent, determined on March 17, 2008 that "a re-evaluation of [the Child] at [IMRS] should occur to inform the IEP Team regarding future placement and educational programming." I find that under the IDEA and the Virginia Regulations, the IEP Team's decision to make the residential placement triggered a requirement for the IEP Team to review the Child's IEP to address the important changes that had occurred since the IEP had been issued in August 2007 and to develop a revised IEP appropriate for the Child's residential placement at IMRS. The IEP Team adopted an addendum which placed the Child at IMRS. Otherwise, the Team did not revise the PVDS IEP even though the Special Education Director testified that he did not believe that the Child would meet his PVDS IEP goals at IMRS and that the IEP was too demanding for the Child in his current state. The LEA's failure to ensure that the IEP Team reviewed and revised the Child's IEP at that time was a procedural violation of the IDEA and of the Virginia Regulations. *See, e.g., Board of Educ. of Cabell County v. Dienelt,* 843 F.2d 813, 815 (4th Cir.1988) (Failure to determine the special educational needs of Child or to provide him with an adequate IEP.)

A procedural violation of the IDEA must actually interfere with the provision of a FAPE before the child and/or his parents will be entitled to relief. *See DiBuo ex rel. DiBuo v. Board of Educ. of Worcester County,* 309 F.3d 184, 190-191 (4th Cir.2002). In this case, the Parents' expert, pediatrician and child psychiatrist CTG, M.D., visited IMRS, reviewed the Child's records, interviewed staff and interacted with the Child. In a September 6, 2008 report, Dr. CTG opined that the Child needed a highly structured program which encompassed all of his waking hours with a detailed behavior plan.[4] Dr. CTG opined that none of the treatment plans he reviewed at IMRS suggested that the Child had appropriate behavior supports for him to receive an appropriate education there. Dr. CTG's opinion was supported by IMRS's records. IMRS's Education Director testified at the hearing that as of the August 2008 IEP Team meeting, there had not been any progress toward the objectives set in the PVDS IEP.

I find that the LEA's failure to ensure that the IEP Team reviewed and revised the Child's IEP when it made the residential placement at IMRS resulted in the deprivation of educational benefits for the Child and therefore was a denial of FAPE. *See M.M., supra* at 533. *Cf., Burke County Bd. of Educ. v. Denton By and Through Denton,* 895 F.2d 973, 982 (4th Cir.1990) (LEA's procedural failure did not deprive child of educational benefits.)

The LEA's evidence did establish that the Child's behaviors improved while he was at IMRS, though certainly not approaching the level of the PLOP in the PVDS IEP. In this case the fact that the Child may have made some behavioral progress at IMRS is irrelevant to whether he was denied FAPE. My finding that the LEA denied FAPE to the Child is based upon procedural

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[4] Dr. CTG's opinion was validated by the LEA's evidence which showed that, when the Child was placed in a very structured program at MID-AT in December 2008, the Child did show significant educational progress. *See infra.*

violations of IDEA and the Virginia Regulations, and the resulting loss of educational benefits, not on the appropriateness *per se* of the Child's program at IMRS. A determination of whether the school's program is "appropriate" is only necessary when the claim is that the IEP was not reasonably calculated to enable the child to receive education benefits. *See Jaynes ex rel. Jaynes v. Newport News School Bd.,* 13 Fed.Appx. 166, 173 (4th Cir. 2001). There is no claim in this case that the PVDS IEP, when originally developed, was not reasonably calculated to enable the Child to receive educational benefit.

2. CHILD WAS NOT DENIED FAPE AT MID-AT.

Subsequent to the Parents' removing the Child from IMRS on November 27, 2008, the LEA and Parents agreed to place the Child at MID-AT effective December 30, 2008. On that date, the Parents executed an agreement with MID-AT that MID-AT would convene an IEP meeting in approximately 30 days, after conducting educational testing of the Child and developing a Behavioral Management Program.[5] The IEP Team meeting, delayed because the Parents were unavailable, was convened on February 17, 2009 at MID-AT. The IEP Team developed an IEP (the "MRS IEP") which was implemented at MID-AT. Both Parents executed the MID-AT IEP to indicate their agreement with the IEP placement and program.

I find that the Child was not denied FAPE at MID-AT. In contrast to when the Child

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[5] The LEA's placement of the Child at MID-AT on December 30, 2008 was a procedural violation of the federal and state regulations, which require the LEA to convene the IEP Team to develop an IEP for the child before placing a child in a private school. *See* 34 C.F.R. § 300.325(a); 2002 Va.Regs., 8 VAC 20-80-66.A.2. But in this case, the Parents agreed that the Child's IEP Team meeting would be deferred and the delay did not result in any loss of educational opportunity for the Child. For this reason this procedural violation did not constitute a denial of FAPE. *See DiBuo v. Bd. of Educ.*, 309 F.3d 184, 190 (4th Cir.2002).

was placed at IMRS, at MID-AT the IEP Team did meet and determined the Child's special educational needs. The Parents had a full opportunity to participate in the development of the MID-AT IEP and gave their consent to its implementation. *See MM, supra* at 534 (Parents had a full opportunity to participate in the development of the IEP). That the MID-AT IEP program was reasonably calculated to enable the Child to receive educational benefits was shown by the actual educational progress made by the Child at MID-AT. *See Id.* at 532 (Important measure of an IEP's success is whether the disabled child has made progress.) The evidence in this case establishes that the Child made substantial educational progress at MID-AT. MID-AT's Education Director testified that the Child had made actual education progress on his IEP education goals including, as examples, typing on the computer, completion of addition and subtraction problems, use of a calendar, counting coins, and using different modes of communicating. There was also evidence from the Special Education Director who opined that the Child made substantial progress at MID-AT in that the Child was in a classroom with peers for up to six hours a day and was working on schoolwork from his IEP goals for that entire time.

The Parents dispute that the Child received FAPE at MID-AT not on the basis of lack of educational progress, but on the basis of alleged procedural violations. These allegations include,

– that the LEA did not oversee implementation of the IEP;

– that the MID-AT IEP did not contain speech/language and OT goals;

– that MID-AT did not comply with IEP written reporting requirements; and

– that MID-AT's physical restraint protocols are not permitted to be used in Virginia schools.

I find that the Parents' arguments are not persuasive here. First the LEA's Special Education Director testified that he spoke to the MID-AT Admissions Director and other MID-AT staff about the Child's progress at least weekly. There was no lack of oversight. I find that the MID-AT IEP did contain speech/language goals and OT goals.[6] With regard to Occupational Therapy, MID-AT followed the recommendation of the Child's evaluator in not providing direct OT Services. If MID-AT or the LEA did not furnish timely written reports to the Parents, the evidence was uncontested that MID-AT made regular telephone reports to the Parents. Moreover, to the extent the evidence established that the MID-AT IEP lacked adequate Speech/Language and OT goals or that MID-AT failed to furnish written reports to the Parents, I find these omissions to be in the in the nature of procedural violations that did not result in the loss of educational opportunity for the Child. There was therefore no denial of FAPE at MID-AT. *See DiBuo, supra,* 309 F.3d at 190 (Procedural violation did not actually interfere with the provision of a FAPE to the child.) Lastly the Parents contend that the physical restraint protocol in use at MID-AT is not permitted to be followed by schools in Virginia. That allegation was not proven, but whether or not MID-AT's restraint protocol may be used in Virginia is not relevant to whether the Child received a FAPE.

3. REMEDY FOR DENIAL OF FAPE AT IMRS

I have found in this case that the LEA's failure to ensure that the IEP Team developed an appropriate revised IEP for the Child's placement was a denial of FAPE. Since the Child is

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[6] *See,* for example, Goal 1 (Identify sight words), Goal 2 (Produce sounds associated with letters of the alphabet), Goal 3 (Read sentences), Goal 5 (Shopping tasks), Goal 8 (Verbalize calendar), Goal 10 (Money identification), Goal 11 (Personal hygiene),Goal 12 (Pre-vocational activities), Goal 13 (Household chores), Goals 15, 16 and 17 (Total communication approach), Goal 18 (Prepare snacks, wash dishes). Exh. S-65.

already receiving year-round services at S, the Parents request that I award the Child a period of compensatory education, after he ages out of IDEA eligibility[7], to cure the LEA's past failure to provide the Child with a FAPE.

Compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student. See *G ex rel. RG v. Fort Bragg Dependent Schools,* 343 F.3d 295, 309 (4th Cir.2003). "We agree with every circuit to have addressed the question that the IDEA permits an award of such relief in some circumstances." *Id.* The LEA argues that it is not clear that the IDEA permits an award of compensatory education after the student is no longer age eligible for special education services. However in at least two of the decisions cited by the Fourth Circuit in *Fort Bragg Dependent Schools,* the courts expressly approved such an award. *See Pihl v. Massachusetts Dept. of Educ.*, 9 F.3d 184, 188 (1st Cir.1993) (Otherwise, school districts simply could stop providing required services to older teenagers, relying on the Act's time-consuming review process to protect them from further obligations); *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853, 857-58 (11th Cir.1988). I am persuaded that if the Fourth Circuit were to conclude that an award of compensatory education were warranted, the Court would agree that, in appropriate circumstances, the equitable remedy must be made available beyond a student's special education eligibility age cut-off.

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[7] In Virginia, eligible children with disabilities, who have not reached their 22nd birthday on or before September 30, are entitled to receive special education services. *See* 8 VAC 20-81-10 (2009). If the regulation is not changed, the Child should remain age eligible through the 2017-18 school year.

The LEA further argues that because compensatory education is an equitable remedy, it should not be awarded in this case because the Parents wanted the Child to remain at IMRS. The evidence was that the Parents wanted the Child transferred to a different school such as the Baltimore school or S -- not to remain at IMRS. However, whether or not the Parents wanted the Child to remain at IMRS, the LEA still had a duty to ensure that an appropriate IEP was in place. That said, the LEA is correct that compensatory education is an equitable remedy and it is appropriate to consider conduct of the Parents which may have contributed to the LEA's failure to revise the Child's IEP for IMRS. In a recent decision, the U.S. District Court for the Eastern District of Virginia addressed this issue:[

> [T]he equitable nature of compensatory education demands a close look at the actions of all parties involved in the denial of a FAPE. The benefit of compensatory education inures to the child; the burden-the cost of providing the compensatory education-is borne solely by the school district. But the child and the school district are not the only active agents in an IDEA case, and a refusal to recognize the effect that parents may have on the IEP process could unfairly burden the school district. Stated differently, placing the entire burden for compensatory education on the school district when it was only partially at fault would not result in a "windfall" to the student, who is, after all, the passive victim. It could, however, unfairly penalize a school district that was only partially responsible for the denial of a FAPE. A school district should not be presumptively responsible for compensating lost education directly attributable to the actions of parents.

Hogan v. Fairfax County School Bd., 645 F.Supp.2d 554, 572-573 (E.D.Va.2009)

Among the equitable considerations in this case are the following: First, for weeks before the IEP Team placed the Child at IMRS, the Parents adamantly rejected any change from the Child's placement at PVDS, even after it was clear that PVDS would not allow the Child's return and the Parents had filed a due process complaint against both the LEA and PVDS. In that atmosphere, convening the IEP Team to develop an IEP to place the child at IMRS would have been problematical. Further the IEP Team's stated purpose for sending the Child to IMRS

was for re-evaluation regarding future placement and educational programming – not to make what turned out to be an extended educational placement. When the LEA did finally propose a new IEP in August 2008, the Parents would not consent to what they termed a "dumbing down" of the PVDS IEP. Finally, the Parents caused the Child's transfer to MID-AT, an appropriate residential placement, to be delayed for months because they had reservations over MID-AT's restraint protocol and because they were hoping to secure placement of the Child at the Baltimore school or at S. The evidence established that but for the Parents' reticence, the Child could have been placed at MID-AT by approximately July 1, 2008.

The Parents seek an award of compensatory education equivalent to the number of weeks the Child was denied a FAPE. Courts have rejected "rotely awarding a block of compensatory education" equal to the amount of lost instructional time as an inappropriate method for awarding the equitable remedy. *See, e.g., Hogan, supra* at 573. Considering all of the circumstances in this case, I finds that an award of twelve weeks of additional special education services is an appropriate equitable compensation for the Child's loss of a FAPE during his placement at IMRS. The award takes into account the period of the loss of educational opportunity at IMRS, the LEA's continuing good faith efforts to find a new placement after PVDS discharged the Child, the fact that the Child was sent to IMRS initially for evaluation – not as an educational placement, the availability of MID-AT as a suitable IEP placement beginning approximately July 1, 2008, and the conduct generally of the parties.

4. OTHER RELIEF SOUGHT BY PARENTS

The Parents seek reimbursement for their expenses of retaining a Pediatrician/ Psychiatrist and a Board Certified Behavior Analyst to evaluate the Child's placement at IMRS.

Under the IDEA, parents may under certain circumstances obtain reimbursement for obtaining an Independent Educational Evaluation ("IEE"). *See* 34 C.F.R. 300.502(b).[8] There was no evidence in this case that the Parents requested an IEE or that the Parents' expenses were incurred for an IEE within the meaning of 34 C.F.R. 300.502(b). To the extent the Parent's expenses were incurred for other reasons, those expenses are not recoverable under the IDEA or the Virginia Regulations. The Parents also seek reimbursement for their mileage costs for transporting the Child from their home to MID-AT, from MID-AT to S, and from their home to S. Under the Virginia Regulations, a child with a disability is entitled to transportation to and from his residential placement at no cost to the Parents. *See* 2002 Va.Regs., 8 VAC 20-80-60.F. In this case there was no evidence that the LEA refused to provide such transportation to the Child. Therefore the Parents are not entitled to reimbursement for the Child's transportation expenses.

ORDER

For the reasons set forth above, it is hereby ordered as follows:

1. The Child is awarded an additional twelve weeks of full-time compensatory education, to be provided by the LEA at an appropriate placement at such time as the Child

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[8] The parents of a child with a disability have the right to request an IEE at public expense if they disagree with the evaluation obtained by the public agency. *See* 34 C.F.R. 300.502(b)(1). If a parent requests an IEE at public expense, the public agency must either provide the IEE or request a due process hearing to determine if its evaluation is appropriate. 34 C.F.R. 300 .502(b)(2). Where it is determined that the public agency's evaluation was appropriate, the parents may still obtain an IEE at their own expense. 34 C.F.R. 300.502(b)(3). Additionally, where a parent does obtain an IEE at their own expense, the public agency is required to considered the evaluation, "if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child." 34 C.F.R. 300.502(c). *Kirby v. Cabell County Bd. of Educ.*, 2006 WL 2691435, 7 (S.D.W.Va. 2006)

reaches the end of his Age of Eligibility as defined in 8 VAC 20-81-10 (2009);

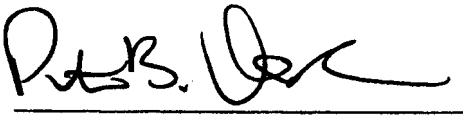
2. All other relief requested by the Parents herein is denied; and

3. The LEA shall develop an implementation plan within 45 calendar days of the date of this decision which must state how and when this decision will be put into operation. The implementation plan shall include the name and position of a case manager charged with implementing the decision. Copies of the plan shall be forwarded to the parties to the hearing, the hearing officer and the Virginia Department of Education.

The Parents are the prevailing party in this due process hearing.

Right of Appeal Notice

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



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Date of Decision: December 5, 2009