V I R G I N I A:

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

In the matter of
MARISA NORMAN, an infant,
by her Parents, Michelle Norman and Cassidy Norman, Petitioners

and

VIRGINIA BEACH CITY PUBLIC SCHOOLS, Respondent.

HEARING OFFICER DECISION

Present for Hearing September 12, 2016:

Rhonda J. S. Mitchell, Hearing Officer
Grace E. Kim, Counsel for the Complainants
Danielle Hall-McIvor, Counsel for Virginia Beach City Public Schools (VBCPS)
Cassidy and Michelle Norman, Petitioners / Parents
James Atkinson, Law Clerk, Law Office of Grace E. Kim
Christen Cohoon, Office of Programs for Exceptional Children, VBCPS
Tania Sotomayor, Director of Compliance in Special Education Services, VBCPS

Present for Hearing September 13, 2016:

Rhonda J. S. Mitchell, Hearing Officer
Grace E. Kim, Counsel for the Complainants
Danielle Hall-McIvor, Counsel for VBCPS
Marisa Norman, Child of Cassidy and Michelle Norman
Cassidy and Michelle Norman, Petitioners / Parents
James Atkinson, Law Clerk, Law Office of Grace E. Kim
Christen Cohoon, Office of Programs for Exceptional Children, VBCPS
Tania Sotomayor, Director of Compliance in Special Education Services, VBCPS

Present for Hearing September 14, 2016:

Rhonda J. S. Mitchell, Hearing Officer
Grace E. Kim, Counsel for the Complainants
Danielle Hall-McIvor, Counsel for VBCPS
Cassidy and Michelle Norman, Petitioners / Parents
James Atkinson, Law Clerk, Law Office of Grace E. Kim
Christen Cohoon, Office of Programs for Exceptional Children, VBCPS
Tania Sotomayor, Director of Compliance in Special Education Services, VBCPS

Introduction and Procedural History:

This due process proceeding was initiated on July 11, 2016 by Cassidy and Michelle Norman (petitioners or parents) on behalf of their child, Marisa Norman (Marisa or student). The Hearing Officer, Rhonda J. S. Mitchell, was informally notified of her appointment on July 11, 2016 and formally appointed on July 13, 2016 via letter from Veleka Gatling, Executive Director, Office of Programs for Exceptional Children, Virginia Beach City Public Schools (VBCPS), Virginia Beach, Virginia. The hearing officer formally accepted the appointment by letter to Valeka Gatling. Danielle Hall-McIvor from the Virginia Beach City Attorney's Office represented VBCPS. The parents were represented by Grace E. Kim of the Law Office of Grace E. Kim.

The first pre-hearing telephone conference convened on July 15, 2016 followed by four conference calls that were held on July 20, August 8, August 25, and September 8, 2016. The hearing officer provided proper notice of the pre-hearing conference calls to all parties; prepared the pre-hearing report for consideration by the parties; discussed the issues set forth therein; amended the initial pre-hearing report per attorney discussion; issued appropriate pre-hearing orders; addressed pre-hearing motions; established the hearing agenda; discussed administrative and substantive concerns; reviewed and properly addressed appropriate documents before each call; and set the matter for hearing. All parties were represented during the pre-hearing conference calls.

Pursuant to discussions during the first pre-hearing conference, the hearing officer entered a pre-hearing order dated July 16, 2016. Therein, this matter was initially set for hearing on August 22-24, 2016. However, on July 25, 2016, due to Cassidy Norman's active duty military obligations, petitioners filed a motion for delay pursuant to the Servicemembers Civil Relief Act (SCRA). VBCPS made no objection to the motion and agreed to the delay. Accordingly, on August 10, 2016 the hearing officer granted the motion and entered an order delaying the hearing pursuant to applicable provisions of the SCRA. The hearing was rescheduled for September 12-14, 2016 with September 15th set aside as an extension day, if required. The decision date was reset from the original September 24, 2016 date to October 31st. The parties were directed to exchange exhibits and witness lists no later than September 6, 2016.

A second pre-hearing order was entered on July 21, 2016. It was noted therein that the parties attempted resolution on July 19, 2016 but that no resolution was reached. The parties opted not to pursue mediation.

The parties further agreed during conference calls to the following matters that were set forth in the hearing officer's pre-hearing orders:

- There were no objections to the appointed hearing officer.
- The parents opted for the hearing to be private.
- The parents are represented by counsel.
- The student may be present for the hearing, if deemed appropriate.
- There was no need for a foreign language interpreter.
- The parties did not object to decisions or other pertinent information being transmitted electronically or by facsimile.
- The parties were directed to notify the hearing officer of any pre-hearing disputes between them beyond the issues of the case.
- Motions, objections or other problems would be addressed via conference call or written decision.
- Communications from the hearing officer would be sent to both counsel.

As a matter of procedure, the hearing officer put the parties on notice of the following matters in the pre-hearing order:

- that the petitioner would proceed first at the hearing;
- that the petitioner would carry the burden of proof;
- that the parties should be prepared to present oral opening and closing arguments;
- that the parties would be provided with a written decision by October 31, 2016; and
- that the parties would be required to provide the hearing officer with written closing statements or briefs.

On August 9, 2016, petitioners, by counsel, filed a *Motion in Limine* and a Motion to compel VBCPS to submit a Bill of Particulars. VBCPS, by counsel, objected to the motions via letter response dated August 11, 2016. The hearing officer also heard oral arguments regarding the motions from both parties during the telephone conference conducted on August 25, 2016.

The *Motion in Limine* prayed for the hearing officer to exclude evidence regarding the "misleading, irrelevant, prejudicial, and inaccurate" representation by the VBCPS that it complied with all of the procedural mandates of the Individuals with Disabilities Education Act (IDEA). VBCPS summarily objected to the motion arguing

that to grant the motion would allow petitioners to present their case unchallenged. VBCPS further argued that such an evidentiary exclusion was inappropriate for an education due process hearing.

Petitioner's second motion asked that VBCPS be ordered to submit a Bill of Particulars. Therein, petitioners moved that Respondents be made to answer the pleadings prior to the hearing. VBCPS again objected to the motion as inappropriate. After careful consideration of both motions, the hearing officer denied the relief sought by petitioners.

In regard to the *Motion in Limine*, the hearing officer found such a motion to be inappropriate for this due process proceeding reasoning that since the evidence had not yet been reviewed, to prevent VBCPS from presenting their evidence at this juncture, without examination by the hearing officer, would be premature. The motion was therefore denied.

In regard to the Motion for a Bill of Particulars, the hearing officer found such a legal mechanism inappropriate in this case and noted that a Bill of Particulars is often used as a tool for discovery, and although it appeared that petitioner may have intended to use the Bill of Particulars for that purpose, the exchange of exhibits required prior to commencement of the actual due process hearing should suffice for that purpose. Accordingly, the motion was denied. A copy of the order will be filed with this decision.

In final preparation for the hearing, exhibits were properly exchanged; subpoenas were entered and served; and the hearing agenda was set by the hearing officer. During the final pre-hearing conference, stipulations were agreed upon regarding expert witness credentials and the use of joint exhibit books during the hearing.

The hearing commenced on September 12, 2016 with oral opening arguments by counsel for both parties. Counsel for the parents went first. She alleged that Marisa had not received a free appropriate public education (FAPE) while attending Red Mill Elementary and that VBCPS could not provide Marisa with a FAPE. She alleged that VBCPS' refusal to provide appropriate goals, accommodations and services in areas of Marisa's documented weaknesses, and its failure to conduct necessary evaluations in a timely manner, resulted in the loss of educational time, a lack of progress, educational and social regression, and a decline in areas of academic functioning. Counsel claimed

that VBCPS minimized Marisa's very serious disabilities and needs. She alleged that VBCPS was not implementing the accommodations set forth in the "stay-put" Individualized Education Program (IEP). Counsel for the petitioners further claimed that the Chesapeake Bay Academy (CBA), which is a special-education-certified private day school, could provide Marisa with a FAPE. She argued that unlike VBCPS, CBA had the ability to build an educational program around Marisa's numerous needs that included occupational therapy, physical therapy, speech/language, social skills, and more, as well as address her learning disabilities and processing deficits.

As relief, counsel asked that the petitioners be reimbursed for costs associated with providing Marisa educational private tutoring and social skills training that VBCPS failed to provide during the 2014-2015 school year. They further asked for tuition reimbursement due to Marisa's independent placement at CBA during the 2015-2016 school year as well as for the current 2016-2017 school year. Petitioners also want an award of attorney fees and for Marisa to be placed with CBA at public expense.

Counsel for VBCPS argued next. She acknowledged Marisa's exceptionalities contending that the VBCPS was fully capable of providing Marisa with a FAPE through an appropriately crafted IEP. She argued that VBCPS could educate Marisa by providing her with adequate evaluations, goals, educational accommodations and assistance so that she could receive an appropriate education through a well crafted IEP. As relief, VBCPS asks that Marisa attend Princess Anne Middle School for the 6th grade and that VBCPS be permitted to educate her.

Stipulations were accepted for the record and the joint exhibit books were admitted. Witnesses to testify as experts were stipulated as such by both parties.

The hearing then commenced. The following witnesses were sworn and provided testimony on behalf of petitioners:

Day 1:		**Transcript I, Page #:**
William Ling	Licensed Clinical Psychologist	15
Judy T. Jankowski	Educational Administrator	84
Meghan Francis	Speech/Language Pathologist	112
Margaret S. Meyers	Director, CBA Middle School	125
Mark A. Schmidt	Teacher, Red Mill Elementary	157
Jay R. Lucker (via phone)	Audiologist	172

Day 2:		**Transcript II, Page #:**
Jacqueline S. Cotton	Pediatrician	239
Laura Hoover	Occupational Therapist	275
Christine Accettella	Physical Therapist	296
Michelle D. Norman	Mother/Petitioner	308
Cassidy C. Norman	Father/Petitioner	400
Marisa Norman	Subject Child	447

The following witnesses were sworn and provided testimony on behalf of VBCPS:

Nikki Moore	Program Compliance Support Teacher, VBCPS	458

Day 3:		**Transcript III, Page #:**
Deanne Vaseley	Occupational Therapist, VBCPS	530
Michelle Galvin	Speech/Language Pathologist, VBCPS	583
Joey H. Phillips	Asst. Principal, Princess Anne Middle, VBCPS	632
Merrie Gray	Physical Therapist, VBCPS	681
Monica Cullen	Audiologist, VBCPS	715
Tania Sotomayor	Director of Compliance, Sp. Ed., VBCPS	759

Once dismissed, the hearing officer admonished all witnesses not to discuss their testimony.

Following the testimony, the hearing officer asked each party to provide closing statements. Counsel for both sides reiterated their positions as set forth in opening arguments, reiterating the relief sought.

On October 13, 2016, the hearing officer convened a post-hearing conference call with both counsel to clarify some issues and to request another copy of the recording exhibit since hers was no longer working.

Marisa Norman:

Marisa Norman was born prematurely on September 1, 2003. She weighed 2 pounds, 3 ounces at birth, was intubated and placed on a ventilator. She was given a tracheotomy that she maintained for about a year. She then underwent reconstructive surgery to repair her airway and close the tracheotomy. Marisa remained hospitalized for several months when she contracted MRSA staph infection. She was also presented with several other health concerns.

Marisa has grown to be a charming 13 year old sixth grader who enjoys computer games, shows an interest in boys, and who is fond of the colors pink and green. Marisa has just entered puberty and has recently been promoted to middle school. Despite the written appearance of normal age progression, Marisa suffers from a myriad of disabilities and medical conditions that affect her learning, processing and mobility. There is no issue regarding her eligibility to receive special education services under the Individuals with Disabilities Education Act (IDEA).

Marisa is very fortunate to have loving parents who are concerned and involved in her educational curriculum. Since Marisa's 2014 reenrollment in VBCPS, they have fully and actively participated in numerous Individual Education Program (IEP) team meetings.

Marisa was initially found eligible by VBCPS for special education services in 2005 at the age of 2 years with the designation of *developmentally delayed*. In 2009, her eligibility designation changed to *orthopedically impaired* and in 2012, her eligibility designation was again changed to *other health impairment* and *orthopedically impaired* and that remains her eligibility designation. Marisa's current disabilities, medical issues and identified deficits include (with summary descriptions added):

* *Right Hemiplegia* (paralysis of the right side of the body that is a symptom of an attack on the left side of the brain);

* *Cerebral Palsy* (causes impaired movement and possibly chronic fatigue and slow performance);

* *Neurodevelopmental disorders* (including deficits in executive functioning, visual figure-ground, sensory processing secondary to brain hemorrhaging);

* *Visual tracking problems* (causes eye movements to be slow and/or inaccurate);

* *Language disorder* (trouble understanding others or sharing thoughts, ideas and feelings);

* *Inattentive type of attention deficit hyperactivity disorder (ADHD)* (a brain disorder marked by an ongoing pattern of inattention and/or hyperactivity that interferes with functioning or development);

* *Developmental coordination disorder* (a chronic neurological disorder that can affect planning of movements and coordination as a result of brain messages not being accurately transmitted to the body);

* *Learning disorder (LD)* (problems that affect the brain's ability to receive, process, analyze, or store information making it more difficult to learn);

* *Deficits in higher order reading comprehension* (deficits in word reading accuracy and/or reading comprehension);

* *Voice projection disorder or Dysphonia* (usually characterized by hoarseness, vocal fatigue, raspiness, periodic loss of voice, or inappropriate pitch);

* *Deficits in written expression* (generally a combination of difficulties in the individual's ability to compose written texts evidenced by grammatical or punctuation errors within sentences, poor paragraph organization, multiple spelling errors, and/or poor handwriting skills);

* *Deficits in arithmetic calculation* (unable to memorize many basic math facts and/or exhibits weak verbal skills for monitoring the steps of complex calculations);

* *Generalized anxiety disorder* (characterized by excessive, exaggerated anxiety and worry about everyday life events with no obvious reasons for worry);

* *Obsessive compulsive disorder (OCD)* (uncontrollable, reoccurring thoughts 'obsessions' and behaviors 'compulsions' that create the urge to repeat actions over and over); and

* *Brain Injury* (In Marisa's case, a loss of volume on the left side of her brain that increases her risk for seizures).

As a result of some of the above listed issues, Marisa uses the following assistive devices to help her with daily activities:

* WalkAide as a functional electrical stimulation;
* Chipmunk shoe inserts;
* Ultraflex night brace; and
* Eyeglasses.

Marisa has also been prescribed and takes the following daily medications:

* Prozac for anxiety and OCD, plus
* Focalin for ADHD.

Marisa currently attends Chesapeake Bay Academy, a state certified private day school, via unilateral parental placement. Her base school is Princess Anne Middle School, VBCPS.

Facts:

Marisa began her educational experience with VBCPS where she was initially determined eligible for special education services. She started school at about two and a half years old in the developmentally delayed preschool program at Red Mill Elementary where she remained for about two years. Mr. Norman's military duties then moved the family to Rhode Island where Marisa attended school in Newport County for about two years. The family moved back to Virginia Beach where Marisa completed pre-kindergarten, kindergarten, first and second grades. The family later relocated to Fairfax County, Virginia, where Marisa was educated by Fairfax County Public Schools (FCPS) for her third and fourth grades.

In 2014, the family returned to Virginia Beach where Marisa was enrolled in the fifth grade at Red Mill Elementary School. The Individual Education Program (IEP) developed by FCPS followed Marisa to VBCPS and served as a "stay-put" until the VBCPS' IEP team could develop its own IEP.

When the VBCPS IEP team met on October 1, 2014, Marisa's IEP from FCPS was adopted but modified by addendum to add 35 minutes of resource time in lieu of Social Studies. Occupational therapy and physical therapy services were changed to accommodations. Also, between November and December 2014, a calculator accommodation was added allowing Marisa to use a calculator when taking her Standards of Learning (SOL) tests.

With these modifications, Marisa continued her educational experience with VBCPS according to "stay-put" in hopes that a more suitable IEP could later be produced. However, despite 16 IEP meetings, the modified FCPS IEP remains in place and no other IEP has been agreed upon. (Jt. ex. B007-025)

Initially the parents were asking for a 1:1 aide for Marisa and continued for some time to repeat this request at many of the IEP meetings. VBCPS did not agree to provide the 1:1 aide contending that Marisa did not need one.

Overall, the IEP team meetings resulted in an impasse because the parents disagreed with the IEPs that were proposed by VBCPS, and, VBCPS would not include many of the provisions that were proposed by the parents. Additionally, during the IEP meeting process, the parents requested evaluations some of which VBCPS first disputed as being necessary but eventually agreed to conduct as a means of compromise with the parents.

In the interim, the parents alleged that Marisa's teacher had not been implementing many of the "stay-put" IEP provisions. Of concern is the fact that Marisa's teacher, Julie Harrison, was placed on a performance improvement plan and later removed from her teaching position. It is unclear from the record exactly why Ms. Harrison was removed from her job but the parents allege that her failure to fully implement the IEP caused Marisa serious harm. They claim that her failure to implement the modified "stay-put" IEP resulted in the lack of a free appropriate public education thereby leaving Marisa struggling both academically and socially. Throughout, the parents asked that Marisa be provided various tests and evaluations to help the team draft an appropriate IEP.

On January 22, 2015, the IEP team met but the proposed IEP contained some inaccuracies. Once corrected, a partial consent was reached. This IEP included additional time for reading and written expression but there was no mention of social skills needs as was written in the "stay-put" IEP. At some point during her education, VBCPS concluded that Marisa had mastered the social skills goal. The parents disagreed and wanted the goal reinserted.

At another IEP meeting, the parents learned that Marisa's teachers and administrators were unaware of some of Marisa's accommodations resulting in them not being provided. According to the parents, this lack of support and assistance caused Marisa to avoid going to the bathroom during school to prevent missing time in the classroom and contributed to her academic regression.

By March of 2015, Marisa was tested by Dr. Jacqueline Cotton, Pediatrician (Tr. pg. 239; exs. B516, C519) and Dr. Amy Newmeyer, Developmental Pediatrician, (ex. C162) who both wrote letters to VBCPS identifying Marisa with issues in language processing, memory, vision, fine and gross motor skills. Dr. Cotton's tests identified

Marisa with a brain injury (loss of volume on the left side of the brain) and recommended that Marisa receive individualized assistance. Dr. Newmeyer agreed and recommended that Marisa be provided a 1:1 aide. In accordance with these recommendations, the parents renewed their request for a 1:1 aide at an IEP meeting held on March 30, 2015. VBCPS did not agree that Marisa needed a 1:1 aide and rejected the proposal.

Yet another IEP meeting was conducted on April 2, 2015 at which the team appeared to reach agreement. However, the agreed modifications were not included in the IEP until May and even then, not all of the agreed to modifications were incorporated.

On May 17, 2015, the parents presented a detailed statement of disagreement to VBCPS regarding the proposed January 2015 IEP and all subsequently discussed proposed modifications or changes. (ex. 12.001) The statement discussed numerous issues including the 1:1 aide, the unilateral elimination of goals, and the failure of VBCPS to include the agreed to modifications in the revised IEP.

When Marisa received her final grades for the 5th grade from VBCPS, she passed and was promoted to the sixth grade where she would attend Princess Anne Middle School. However, Marisa failed all of her Standards of Learning (SOL) tests and the parents believed that Marisa was regressing both academically and socially. Given Marisa's educational deficits, the parents believed Marisa's promotion to the sixth grade was a "social" rather than an academic promotion.

In June and July of 2015 at the parents' request, Marisa was evaluated by Chesapeake Bay Academy (CBA). CBA recommended that Marisa repeat the fifth grade because she lacked both the social and academic skills to succeed at the sixth grade level.

A special education committee meeting was held on August 3, 2015 to discuss the parents' on-going requests for testing. At this meeting, VBCPS agreed to conduct evaluations on Marisa in the areas of occupational therapy and physical therapy but not speech language. VBCPS further agreed to conduct an individual educational evaluation, socio-cultural update and teacher observations.

On August 10, 2015, the parents gave notice to VBCPS of their intent to unilaterally enroll Marisa at CBA at public expense for school year 2015-2016. On August 25, 2015, yet another IEP team meeting was convened. The proposed IEP placed Marisa at Princess Anne Middle School, a public day school within VBCPS. To no avail,

subsequent IEP meetings were conducted. In total, 16 IEP team meetings were conducted, all to no avail. No agreement could be reached between the parents and the other IEP team members that would produce an IEP that all could agree would provide Marisa with a FAPE. Therefore, Marisa's current IEP remains the modified "stay-put" IEP from Fairfax County Public Schools.

On June 23, 2016, VBCPS sent the parents a prior written notice (PWN) with a proposed IEP. That proposed IEP was revised and resent to the parents on July 7, 2016 with corrections. On July 11, 2016, the parents signed the IEP in disagreement and also, through counsel, filed this due process complaint.

Issues:

The issues in this case as identified in the pre-hearing report and as agreed to by the parties are as follows:

Whether or not the local education agency (LEA) has properly implemented an individual educational program (IEP) for the student.

Whether or not the LEA is providing the student with a free appropriate public education (FAPE).

Whether or not the LEA provided sufficient educational evaluations to formulate an appropriate IEP within a reasonable time.

Whether or not private day placement is required for the student to receive a FAPE.

Discussion and Findings:

Issue: Whether or not the local education agency (LEA) has properly implemented an individual educational program (IEP) for the student.

The Individuals with Disabilities Education Act (IDEA), requires the development and implementation of IEPs that are reasonably calculated to provide an educational benefit to the disabled student. See *Hartmann v. Loudoun County Board of Education*, 118 F 3d 996, 1001 (4th Cir. 1997.) The substance of the IEP must be reasonably calculated to provide the student with educational benefit. See *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 205, 102 S. Ct. 3034, 3050, 73 L.Ed. 2d 690 (1982). In the case of *MS. S. v. Vashon Island School District*, 337 F.3d 116 (9th Cir. 2003), the court held that where possible, the new school district is required

to implement the IEP used by the old school district. If the parents and the new school district should disagree on an interim IEP and placement, *Vashon* states that the old IEP should be implemented to the extent possible until a new IEP is developed and implemented.

Vashon further held that when a dispute arises under the IDEA involving a transfer student, and there is disagreement between the parent and student's new school district about the most appropriate educational placement, the new district will satisfy the IDEA if it implements the student's last agreed-upon IEP. However, if it is not possible for the new district to implement in full the student's last agreed-upon IEP, the new district must adopt a plan that approximates the student's old IEP as closely as possible. The adopted plan will serve the student until the dispute between parent(s) and school district is resolved by agreement or by administrative hearing with due process.

An IEP is a written plan that incorporates the placement decisions made by the child's IEP team of school authorities, the child's parents, and other knowledgeable persons. See 20 U.S.C. §1401(a)(20). Congress devised procedural safeguards and remedial provisions to insure full parental participation and the proper resolution of substantive disagreements. See 20 U.S.C. §1415

IEPs are a necessary component of FAPE. IEPs should include academic and functional goals designed to meet the child's needs resulting from her disabilities. The IEP is also important for the disabled child since it identifies and implements special education and related services as well as supplemental aids to be provided the child that will enable that child to advance appropriately and reach the identified goals. In this case, Marisa's unique and complex needs as a disabled child with varying degrees of complexity and required interventions and accommodations were neglected by VBCPS.

The FCPS IEP remains the "stay-put" IEP in this case. On August 11, 2014, VBCPS accepted the FCPS IEP for implementation. The Prior Written Notice for Transfer Placement prepared by VBCPS accepted the FCPS IEP as compliant with regulations governing programs for children with disabilities in the Commonwealth of Virginia. Most importantly, the acceptance document clearly states that the IEP placement could be transferred and *implemented* by VBCPS. (emphasis added) (exhibit B919)

Mrs. Norman testified that she began having concerns regarding proper implementation of the "stay-put" IEP shortly after Marisa started school in September of 2014. She wrote a series of email messages to Marisa's teacher inquiring about the following accommodations that were included in the "stay-put" IEP: homework enlargement; reduction of assignments; bigger paper; a left-handed table/desk; small group testing; extra time for testing; and front of the classroom preferential seating arrangements. (Tr. pg. 320-323; exs. 1-3, Compl. supple. exhibits)

While being questioned by counsel for VBCPS, Mrs. Norman was asked to specifically identify what accommodations had not been followed as she read through the IEP. Mrs. Norman pinpointed several accommodations that had not been followed. She testified that some of the accommodations were later implemented but only after she brought the omissions to the attention of Marisa's teacher or other VBCPS personnel. She testified that some of the accommodations had never been implemented. (Tr. pg. 384-394)

Specifically, Mrs. Norman testified that the following accommodations had not been consistently or ever implemented: small group testing; frequent breaks; extended time up to one day testing; dictation to scribe; reduced language/reading level readers; positive reinforcement system; highlighted text/materials; peer tutoring; preferential seating; and use of the calculator. Mrs. Norman also testified that at some point VBCPS unilaterally removed the SOL calculator accommodation without notifying her. (Tr. pg, 433-435) A failure to provide these IEP accommodations is very troubling and presents procedural violations.

Mr. Norman testified that Marisa's teachers admitted during an IEP meeting that some of the IEP accommodations were not being implemented. (Tr. pg. 413; recording) This failure to implement any portion of an IEP is a serious infraction, whether the failure is mistaken or not. I find the parents' testimony credible.

Test results show Marisa's regression. Although a fifth grader, Marisa was reading on a third grade level. (Compl. exh. 10.008) Of concern is the fact that Ms. Julie Harrison, Marisa's teacher, was placed on a performance improvement plan (PIP) in October of 2014. The PIP stated that Ms. Harrison "...failed to collect and effectively analyze data to meet the diverse needs of her special education students which has led to

ineffective planning and instructional delivery." (Compl. Supp. Exs. 23.061-23.062). Ms. Harrison was later removed from her teaching position with the VBCPS.

The parents contend that as a result of Ms. Harrison's failure to implement some of the IEP provisions, Marisa was left struggling both academically and socially, pointing to her low language arts and math quarterly assessments. They allege that Marisa was struggling on a daily basis with her class work and her homework assignments despite nightly parental assistance. In response to these concerns, the parents paid for Marisa to receive private social skills and academic tutoring. (Joint Ex. B317-321).

Additionally, the parents and other IEP team members were unable to produce an IEP that was acceptable to all members of the team. After 16 IEP meetings and numerous proposed IEPs, the "stay-put" IEP remains. During the IEP meetings, the parents testified that they felt as though they were not being heard by school officials and that Marisa's numerous disabilities were being minimized. (Transcript page 405) Some of the IEP meetings were contentious. (Recording) While the parents were asking for more goals and accommodations during the meetings, VBCPS proposed IEPs with fewer goals and fewer accommodations. Thus, given the current issue coupled with the team's inability to reach agreement, this hearing officer is left to analyze implementation of the "stay-put" IEP.

Vashon, as mentioned above, emphasizes the importance of “stay-put” in maintaining the status quo as much as practicable for a disabled child as (s)he transitions from one school environment to another. In this case, I FIND that VBCPS failed to provide Marisa with “stay-put” protections by failing to implement crucial components of the FCPS IEP. This failure compromised Marisa's ability to receive a FAPE. Mrs. Norman testified that Marisa was frustrated and struggling with her homework. She further stated that Marisa was not progressing in her studies. Given Marisa's overall test results, I FIND her testimony credible. She stated that Marisa felt frustrated with school. This could be in large part a result of the lack of accommodations she grew accustomed to while attending FCPS thereby hindering her educational transition.

Absent full implementation of the "stay-put" IEP, it became more likely that Marisa would fall short in her academic studies. Given the complex array of Marisa's

physical and mental deficits, the complete implementation of the IEP provisions were crucial to Marisa's academic success and school transition.

Reference the team's failure to craft an agreeable IEP, Ms. Tania Sotomayor testified that the VBCPS IEP team members worked hard to draft an IEP to the satisfaction of the parents and that would provide the supports, aids and accommodations to appropriately educate Marisa -- but to no avail. (Transcript page 769) (Recording) This hearing officer has no doubt that the parents attempted to work with the VBCPS IEP team. Nor does this hearing officer doubt that VBCPS made sincere efforts to work with the parents and to educate Marisa. However, this "good will" effort does not excuse VBCPS' failure to wholly implement the "stay-put" IEP that resulted in academic and social harm to Marisa. Accordingly, I FIND that VBCPS did not appropriately implement the "stay-put" IEP. Therefore, the parents have met their burden on this issue.

Issue: Whether or not the LEA is providing the student with a free appropriate public education (FAPE).

Although VBCPS is under no obligation to provide Marisa with *maximum* educational benefit, both the IDEA and Virginia law require more than just *minimal* educational benefit to a disabled child. See *Martin v. School Board of Prince George County*, 3 Va. App. 197 (1986). Given the comprehensive and specialized nature of Marisa's disabilities, coupled with her testimony, the testimony from her parents and of several expert witnesses, it is clear that Marisa, as a severely disabled child, is in need of extensive and comprehensive educational services, accommodations and interventions if she is to receive more than just a *minimum* educational benefit.

It is clear that Marisa's multiple disabilities require "hands on" adult direction, guidance and assistance throughout the school day with few or limited distractions. VBCPS advocates that it is perfectly capable of addressing Marisa's educational needs through specially designed instruction. This type of instruction is tailored to meet the individual needs of a particular student based on their individual deficits. The delivery of educational materials can be modified or formatted to help the student learn in different ways. VBCPS contends that despite the average classroom size at Princess Anne Middle School being about 29 students, it could still offer Marisa the small classroom setting if needed and the individualized adult in-class instructional assistance she needs to learn.

They offer inclusion classes as one means of educating Marisa in the least restrictive environment. VBCPS proposed that it could offer Marisa a multisensory approach to education, thereby addressing each of her individual needs through varying educational approaches.

The IDEA was enacted to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their *unique* needs. (*Emphasis added*) 20 U.S.C. §1400(d)(1)-(4); 34 CFR §300.1(a). IEPs are a necessary component of FAPE. IEPs should include academic and functional goals designed to meet the child's needs resulting from her disabilities. The IEP is also important for the disabled child since it identifies and implements special education and related services as well as supplemental aids to be provided the child that will enable that child to advance appropriately and reach the identified goals. In this case, Marisa's needs are both unique and extensive.

In response to the last proposed IEP from VBCPS, Mr. Norman drafted a twenty page document titled "Concerns with Draft IEP for Marisa Norman" that extensively listed legitimate concerns with the proposed IEP. (Ex. 12.001, Ex. 20) In addition to making basic information corrections, this document clearly outlined the concerns of the parents and provided a detailed compilation of proposed IEP changes. However, the parents testified that they did not believe their concerns were taken seriously and that they had lost confidence and trust in VBCPS. (Tr. page 398)

When reviewing an IEP for FAPE, the following legal analysis should be considered:

> "Insofar as a State is required to provide a handicapped child with a 'free appropriate public education,' we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, *and must comport with the child's IEP*. (emphasis added) In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the IDEA, and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." See *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 205, 102 S. Ct. 3034, 3050, 73 L.Ed. 2d 690 (1982).

With an appropriate IEP in place, Marisa's educational and academic goals might have been identified and appropriate special education and related services could have been tailored to help Marisa reach her educational and transitional goals. Her strengths and weaknesses could have been addressed in an IEP, and she would have been tracked accordingly and received personalized instruction. Unfortunately, this did not occur.

It is important to mention that local educators should be afforded latitude when determining the IEP most appropriate for a disabled child. The IDEA was not designed to deprive local educators of the right to apply their professional judgment. Instead, it should establish a "basic floor of opportunity" for every handicapped child. *See Rowley ,* 458 U.S. at 201. States must provide specialized instruction and related services "sufficient to confer some educational benefit upon the handicapped child," id. at 200, but the Act does not require "the furnishing of every special service necessary to maximize each handicapped child's potential," id. at 199. Local educators should be given deference when educating a handicapped child.

In this case, however, parental concerns seemingly went unheard by the educators regardless of evaluation reports that presented the same concerns, all while Marissa continued to academically regress. The parents had to prompt the educators to provide them with progress reports. Marisa's final grades for the 2014-2015 school year that passed her to the sixth grade as an honor roll student are suspect and could not have been an accurate reflection of her progress since she received a "fail" on her SOLs in mathematics, English, reading and science, in conjunction with failing her quarterly math and language assessments. (Compl. Ex, 10.001 - 10.012; joint ex. B414)

To add to the parents' concerns, as discussed above, the "stay-put" IEP was not followed. Therefore, the instruction and services provided Marisa by VBCPS did not comport with her IEP. The LEA should not implement unilateral changes to an IEP without parental consent. The parents are not obligated to sign a proposed IEP with which they disagree. The IEPs proposed by VBCPS dropped eight goals and sixteen accommodations that the parents' contend Marisa continued to need. (Tr. pg. 405) As previously mentioned, the IEP moved occupational therapy and physical therapy from the

services category to accommodations. (Tr. pg. 396) When confronted, VBCPS justified the OT and PT changes by claiming that is the way it is routinely done in VBCPS.

Ms. Deanne Vasely, an occupational therapist for VBCPS, testified that she performed a functional baseline assessment on Marisa between September 2014, when Marisa returned to the VBCPS, and January 2015. (Tr. pg. 531 – 579) Her assessment included a summarization of Marisa's strengths and difficulties. She stated that through her observations, she looked for ways to make Marisa a wholly functional and independent person. (Ex. C127) She made several recommendations towards this end. Among her many observations, Ms. Vasely observed that Marisa benefited from small group activities.

However, of greatest concern is Marisa's academic regression. Despite receiving passing grades from VBCPS, Marisa failed all of her Standards of Learning tests and quarterly math and language assessments. (Compl. ex. 10.001, 10.012; joint ex. B 414) This failure alone is not conclusive. Still, most persuasively, as a sign of academic regression, when Marisa was tested by CBA, they recommended that she repeat the fifth grade. Marisa scored at the early fourth grade level in math with serious weaknesses in many of the subcategories. In reading vocabulary, Marisa scored a 2.8 grade equivalent. She scored a 2.7 grade equivalent in reading comprehension. (Compl. Supp. Exs. 29.004 – 20.006) These scores represent an academic regression or at best, a stagnation. Consequently, when entering CBA via unilateral parental placement, Marisa had to repeat the fifth grade.

Marisa's quarterly assessments from VBCPS revealed the following:

Language Arts Quarterly Assessment	January 2015	53%
Mathematics Quarterly Assessment	September 2014	40%
	January 2015	45%
	June 2015	30%
Language Arts Quarterly Assessment	January 2015	53%

These scores represent problems and should have red flagged a need for immediate intervention. Even if VBCPS' assertion that Marisa should be promoted to the sixth grade is believed, the mere fact that Marisa received grades sufficient for promotion does not in and of itself mean that Marisa received a FAPE. I reject VBCPS' argument

that Marisa received sufficient educational benefit and find regression despite her receipt of passing grades from VBCPS.

In fact, on January 7, 2015, contrary to VBCPS' assertion that Marisa was fairing well in her work, the parents received summative assessment data from VBCPS that revealed that Marisa had fallen behind. (Compl. Suppl. Exs. 04.006, 10.001) At best, this hearing officer has concluded that Marisa received only *minimum* educational benefit while attending Red Mill Elementary.

Also of note, Marisa's developmental reading assessment (DRA) score was 38 when she attended FCPS. In September 2014 it dropped to 30 while attending Red Mill Elementary in VBCPS and 34 in January 2015. (Tr. pg. 353) If a child, such as Marisa, is performing below grade level, that child needs to receive specialized instruction. It is the responsibility of the IEP team to develop annual goals to close the gap. This did not occur.

Accordingly, I FIND that Marisa was denied the educational benefits to which she was entitled pursuant to IDEA. She was denied full use of the FCPS IEP as a "stay-put" mechanism with no other IEP having been put in place. I FIND that Marisa was provided only *minimum* educational benefit by virtue of the accommodations she received and was therefore denied a FAPE. IEPs should include academic and functional goals designed to meet the child's needs. I FIND that the VBCPS' last proposed IEP failed to meet Marisa's complex academic and functional needs by rejecting parental concerns, minimizing the severity of Marisa's disabilities, providing only cursory review of the results of independent evaluations; and by failing to include agreed-upon revisions to the IEP drafts. Thus, considering the cumulative evidence in this case, the parents have met their burden on this issue.

Issue: Whether or not the LEA provided sufficient educational evaluations to formulate an appropriate IEP within a reasonable time.

This issue involves parental requests for evaluations and assessments intended to obtain data to support additional accommodations, interventions and goals for Marisa. Initially, VBCPS declined many of the tests but eventually conducted the evaluations.

The parents contend that although VBCPS may have conducted the evaluations, they were untimely and unreasonably delayed. In some instances, the parents paid for

Marisa to be independently evaluated and are attempting reimbursement through this proceeding. The record shows that VBCPS reviewed the independent evaluations but often rejected suggestions for services as stated therein. On one occasion, Dr. Christen Cohoon, summarized that VBCPS would no more go into their offices and tell them what to do than they should come into an educator's office and tell them what to do. (Recording) Such a dismissive attitude towards the independent evaluations and the parents' requests for a 1:1 aide is concerning, but in this case, not dispositive.

At an IEP meeting held December 8, 2014, the parents requested that Marisa be provided updated testing, including but not limited to, a neuropsychological evaluation and an assistive technology evaluation. On January 7, 2015, VBCPS conducted an informal snapshot physical therapy assessment on Marisa, and on January 14, 2015 they conducted an occupational therapy snapshot assessment.

On February 6, 2015 an assistive technology communication checklist was completed. On January 26, 2016, VBCPS conducted a neuropsychological evaluation. In July the parents requested formal evaluations in the areas of occupational and physical therapy instead of the snapshot assessments. They also requested that Marisa be formally evaluated in the areas of speech language and social skills. On August 3, 2015, VBCPS agreed to conduct formal evaluations in the areas of occupational and physical therapy but denied the speech language evaluation. VBCPS further agreed to conduct a socio-cultural update, an educational evaluation and teacher observations. Ultimately, on January 11, 2016, VBCPS conducted the speech language evaluation.

As a general rule, IDEA requires that a LEA conduct initial evaluations of a child to determine eligibility for special education services. Marisa was reevaluated in October of 2015 when her eligibility for special education services was continued. The IDEA states that other student reevaluations can be conducted at the request of the parent or LEA. They are usually conducted if the LEA determines that the overall educational or service needs of the child, including improved academic achievement and functional performance, warrant reevaluation. The IDEA states that a reevaluation should not occur more frequently than once per year unless the parent and LEA agree otherwise, and, at least once every three years unless the parent and LEA agree that reevaluation is unnecessary.

In this case, VBCPS conducted numerous evaluations subsequent to Marisa's eligibility determination. Although the evaluations were not conducted as timely as the parents would have liked, VBCPS did not act unreasonably. VBCPS was not obligated to automatically nor immediately agree with every one of the parents' evaluation requests. In fact, once the parties agreed to the evaluations, via compromise or otherwise, VBCPS acted reasonably fast to complete the testing, particularly considering the school district's very large student population.

Accordingly, I FIND that VBCPS provided sufficient educational evaluations to formulate an appropriate IEP within a reasonable time. Unfortunately, the results of these evaluations and assessments could not be integrated into a workable IEP. Despite this unfortunate result, once the parents paid for independent evaluations, they assumed the risk that they would not be reimbursed. Thus, the parents will not be reimbursed for the independent evaluations.

In regard to the parents' prayer for reimbursement for tutoring and social skills training, these tools served to benefit Marisa with or without any actions on the part of VBCPS. The parents sought these tools to support Marisa and to help her excel, regardless of the actions of VBCPS. There will be no reimbursement for tutoring or social skills training. I FIND that the parents did not meet their burden on this issue, therefore relief is denied.

Issue: Whether or not private day placement is required for the student to receive a FAPE.

If ordered to attend CBA, of concern is the issue of Marisa being educated in the least restrictive environment (LRE). IDEA encourages disabled children to be educated in the regular classroom. However, the law permits disabled children to also be privately placed where appropriate. LRE requires that students with disabilities receive their education, to the maximum extent appropriate, with nondisabled peers and encourages special education students to not be removed from regular classes unless, even with supplemental aids and services, education in regular classes cannot be achieved satisfactorily. [20 United States Code (U.S.C.) Sec. 1412(a)(5)(A); 34 Code of Federal Regulations (C.F.R.) Sec. 300.114.]

IDEA does not mandate that every child with a disability be placed in the regular classroom regardless of individual abilities and needs. This recognition that placement in the regular class may not be appropriate for every disabled child is reflected in the requirement that school districts make available a range of placement options to meet the unique educational needs of children with disabilities. These required placement options are known as a continuum of alternative placements. This requirement for the continuum recognizes the importance of an individualized analysis, not a "one-size-fits-all" approach, when determining what placement is the LRE for each child with a disability. The options on this continuum must include alternative placements. These alternative placements include the availability of instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions." 34 CFR 300.551(b)(1). These options must be available to the extent necessary to implement the IEP of each disabled child.

A placement or IEP team must select the option on the continuum from which the child's IEP can best be implemented. Any alternative placement selected for a disabled child outside of the regular educational environment must maximize opportunities for the child to interact with nondisabled peers, to the extent appropriate to the needs of the student.

The general rule in placement is that each disabled child's placement must be individually determined based on that individual child's abilities and needs. In determining if a placement is appropriate under IDEA, the following factors are relevant:

* the educational benefits available to the disabled student in a traditional classroom, supplemented with appropriate aids and services, in comparison to the educational benefits to the disabled student from a special education classroom;

* the non-academic benefits to the disabled student from interacting with nondisabled students; and

* the degree of disruption of the education of other students, resulting in the inability to meet the unique needs of the disabled student.

In the case of *Hartmann v. Loudoun County Board of Education*, 26 IDELR 167 (4th Cir. 1997), the court agreed with the hearing officer that Loudoun personnel were "enthusiastic" about including the student at the school. The principal deliberately

reduced the size of the student's class and ensured that it was composed of students who were more independent and had higher level skills. The teacher was selected because of her excellent teaching abilities, and the county hired a full-time, one-on-one aide for the student. He received a full hour of speech and language instruction daily. The supervisor of the county's program for autistic children provided assistance in behavior management throughout the year. Halfway through the year, the school's efforts increased when the student began receiving direct special education services. This instructor also began advising the student's teacher and aide. Inclusion specialists consulted with the school during the fall, and the student's teacher sought advice from other experts whose names were provided to her by the school or the parents. The teacher testified that she met constantly with the student's aide, his speech therapist, the IEP team, and others to work on the student's daily programming at the beginning of the year and at least twice a week throughout.

Ultimately, the court decided in *Hartmann*, that the student should be educated in a more restrictive environment. This case held that if a more restrictive environment will provide the child with FAPE, the child should be placed in the more restrictive environment. Such is the case with Marisa.

In the case of Marisa, it has already been determined that she did not receive FAPE while attending VBCPS. Marisa was unilaterally placed at CBA by her parents with timely notice given to VBCPS. CBA is a state certified private day school that specializes in educating disabled children. The student population is approximately 100 with 3 to 8 students in each classroom.

The parents testified that CBA's small classrooms and overall flexible educational structure inherently accommodates Marisa's complex processing and cognitive deficits, neurological and physical disabilities. They contend that Marisa is progressing educationally and socially at CBA. They allege that the smaller classrooms, smaller facility and smaller class sizes provide the flexibility and individualized attention required for Marisa to receive educational benefit and a FAPE. They state that Marisa is thriving at CBA and that the smaller environment, specialized instruction, and individualized programming help Marisa to focus, better control her anxiety, and learn.

Marisa testified that she liked CBA and was learning in that environment. She also indicated that she did not learn at Red Mill Elementary School.

Drs. Ling (Tr. pg. 15) Cotton (Tr. pg. 239) and Lucker (Tr. pg. 172) summarily testified that Marisa is more suited to learn in a small environment due to the way in which her many disabilities and medical conditions interact with one another. At this stage in her life, Marisa requires constant individualized instruction to keep focused and to learn. Dr. Ling, a neurologist who tested Marisa in September of 2015, testified that Marisa experiences disorganization, processing weaknesses and difficulties with physical stamina. (Jt. Ex. C172-197)

Ms. Nikki Moore became Marisa's case manager in January of 2015. She is employed with VBCPS as a program compliance support teacher. Ms. Moore stated that she observed Marisa almost daily. She testified that Marisa mastered many of her IEP goals while attending Red Mill Elementary. She stated that Marisa was weakest in Math. (Tr. pg. 508-509) When asked why new goals had not been generated, Ms. Nikki Moore testified that the team could not get to the subject during IEP meetings because the subject of evaluations seemed to consume the meetings. One of Marisa's hand writing samples was used as an example of mastering a handwriting goal. (Compl. supp. ex. 11.014) Ms. Moore was responsible for documenting Marisa's progress.

Ms. Moore appeared annoyed to be at the hearing and a bit adversarial. She was asked why the word "transcription" was written next to "pre score" on Marisa's IEP progress reports. (Jt. ex. E173, 176) She stated that was from another school division. (Tr. pg. 508) When pressed as to why that mattered, there was no adequate response.

Dr. Joey Phillips, Assistant Principal at Princess Anne Middle School, testified that he and his staff were fully prepared to receive and educate Marisa. He participated in several IEP meetings to help with Marisa's transition to middle school. He testified that Marisa's IEPs should be generated from data that is collected from her evaluations and assessments. He mentioned that the current data showed that Marisa had met the social goal and therefore it was removed from the IEP. He seemed to know that Marisa' parents remained concerned about this aspect of her education and offered suggestions to help. He mentioned a grant that the school used for tutoring and other after-school programs that could assist Marisa with her social skills. Dr. Phillips discussed the

extended school year option. He discussed self-contained classes that ran between four and eight students and the inclusion class option with between twenty-two and twenty-eight students. He also stated that Princess Anne Middle School had a total student population of about 1,470 students. (Tr. pg. 632 - 678)

Further, Dr. Phillips testified that the lunch bunches program available for social skills advancement would be made available to Marisa if it was observed that she needed such an intervention. However, he stated that such an intervention would not be placed on her IEP as the parents had been requesting since the data from Red Mill showed that Marisa had already reached that goal and mastered that skill. The parents disagree that Marisa has mastered that skill and went so far as to get paid assistance for social skills training.

Although knowledgeable in his field and clearly well-intended, Dr. Phillips relied on the information, proposed IEP, and data he received from Red Mill Elementary, some of which the parents rightfully dispute. For example, Dr. Phillips testified that from the documents and data he received, Marisa could communicate and be heard in the classroom. However, this is troubling since from this hearing officer's personal observation of Marisa, it is unlikely that she could be heard in a classroom full of students without a direct intervention or accommodation each time she spoke.

Marisa's voice projection is very low, her speech is intelligibly reduced, and she can barely be heard when speaking. It was observed that her voice lacks volume and projection. During the hearing, Marisa had to be seated squarely between the court reporter and the hearing officer for her testimony to be captured. Even then, she was difficult to hear and understand.

CBA has adopted a class rule that requires everyone to be quiet while Marisa speaks so she can be heard. It is important for a student to be heard. Most importantly, with 1,470 students at Princess Anne Middle School, Marisa's inability to be heard could pose a safety problem for her in moments of distress.

CBA re-tested Marisa in May of 2016 to measure her progress while a student at CBA during school year 2015-2016. Ms. Judy Jankowski, Educational Administrator at CBA, testified that Marisa showed the following grade equivalency improvements (Tr. pg. 99; Compl. Supp. ex. 29-012):

* Word Reading improvement from 4.5 to 6.1;
* Spelling Improvement from 4.7 to 5.5;
* Math Computation Improvement from 3.2 to 4.6;
* Sentence Comprehension Improvement from 3.9 to 4.1; and
* Reading Composite Score from 91 to 94.

These scores show considerable across-the-board improvements. It could be argued that these scores may have been skewed in an effort to support the CBA unilateral placement, however, I find no evidence to support this argument. These scores indicate that CBA has, and can, offer Marisa meaningful educational benefit as opposed to minimum or nominal educational benefit. I FIND that CBA can offer Marisa FAPE.

CBA can provide the services that Marisa requires. They provide Marisa with the flexibility to rearrange her scheduling and programs as she progresses. She is able to be heard and her social skills are improving. Through the direct services provided at CBA, Marisa's full array of disabilities are addressed. The small classroom and small school size provide her the individualized attention she requires to receive educational benefit.

I have already found that Marisa was denied FAPE by VBCPS. The "stay-put" IEP was violated; progress reports were not provided without prompting; after 16 meetings, the IEP team could not reach agreement; the final proposed IEP from VBCPS was insufficient to meet Marisa's complex needs; the data to be used to craft her Middle School IEP is in dispute; independent evaluation recommendations were given only a cursory review; all accommodations were not implemented from the "stay-put" IEP; and Marisa was regressing both educationally and socially. In light of the foregoing, this hearing officer is not convinced that Marisa would receive FAPE at Princess Anne Middle School.

In this case, Marisa’s placement must be determined based on her individual disabilities and complex needs. I FIND that the educational benefits available to Marisa in a traditional, inclusive or special education classroom at Princess Anne Middle School, even if supplemented with appropriate aids and services, in comparison to the educational benefits she will receive from CBA, are negligible. I FIND that Marisa would receive educational benefit from continued attendance at CBA. While attending CBA, the Individualized Instruction Plans (IIPs) formulated by CBA will be used as a guide to

educate Marisa as is their practice and serve as a substitute for any VBCPS generated IEP. CBA shall be required to provide VBCPS with Marisa's quarterly progress reports.

Testimony from Marisa's doctors, including the evaluations from Dr. Ling and Dr. Lucker, clearly indicate that Marisa needs continuous specialized and individual attention in a smaller environment to receive educational benefit. Princess Anne Middle School with its 1,470 student population would not educationally benefit Marisa regardless of how well-intended VBCPS may be. In her case, with her multiple neurological, mental, processing, cognitive and physical disabilities, at this stage in her life, Marisa requires the small school environment offered at CBA to effectively learn both academically and socially. CBA, however, is admonished to educate Marisa towards independence with the ultimate goal of returning her to public school. With no medical or cognitive setbacks, Marisa should be more mature and more prepared to handle the rigors of public school life after leaving CBA. Hopefully, via the educational benefits and the FAPE she receives from CBA, Marisa will learn how best to deal with her multiple disabilities and will have educationally and socially progressed and matured enough to attend a VBCPS public school.

Once Marisa has completed her 2016-2017 school year at CBA, VBCPS personnel and the parents should meet to discuss her social and educational readiness and maturity to return to VBCPS. Input from CBA staff that have worked with Marisa should be sought. Evaluations and assessments from CBA should be considered as well as progress reports and her IIPs. VBCPS should also evaluate Marisa. If it is determined that Marisa is ready to return to public school, VBCPS will be required to formulate an appropriate IEP with input from the parents and CBA. The parties are admonished to earnestly attempt agreement, but, if the parties cannot agree on whether Marisa should return to the VBCPS following her 2016-2017 school year, it may become necessary for this matter to be sent to mediation, arbitration, due process or to use other alternative dispute resolution mechanisms for settlement.

Accordingly, I FIND that Marisa should be educated at CBA for her 2016-2017 school year and that the parents have met their burden.

Reimbursement

Sec. 300.148 does not require an LEA 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 that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. However, the public agency must include that child in the population whose needs are addressed consistent with Sec. Sec. 300.131 through 300.144. As in this case, disagreements between the parents and the LEA regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures. Sec. 300.504 through 300.520.

If the parents of a child with a disability, who previously received special education and related services through the LEA should subsequently enroll their child in a private school without the consent of or referral by the LEA, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment. In such a case, the court or hearing officer must find that the LEA had not made FAPE available to the child in a timely manner prior to the unilateral private placement.

For reasons set forth in this decision, I FIND that VBCPS failed to provide Marisa with a FAPE in a timely manner prior to her unilateral parental placement at CBA. I therefore FIND VBCPS responsible for Marisa's enrollment costs at CBA for school year 2015-2016. I also FIND that Marisa should be educated at CBA for school year 2016-2017, at public expense.

Attorneys' Fees:

A court, in its discretion, may award reasonable attorneys' fees as part of the costs to the prevailing party. This hearing officer lacks the authority to award attorneys' fees.

Orders:

Pursuant to the above, the following is hereby **ORDERED:**

* Marisa will continue her education at Chesapeake Bay Academy, at public expense, for the 2016-2017 school year.

***** Chesapeake Bay Academy is required to provide quarterly progress reports for Marisa to VBCPS.

* Marisa will be educated in accordance with the IIPs crafted by CBA. While attending CBA, Marisa will be evaluated, assessed and tested in accordance with CBA protocol.

* VBCPS will draft an IEP for Marisa with placement at CBA for the 2016-2017 school year.

* The parents will be reimbursed for costs of enrollment associated with Marisa's attendance at CBA for the 2015-2016 school year and for the 2016-2017 school year if the parents have already made payment. The parents are required to provide receipts to VBCPS prior to reimbursement. Reimbursement will be made to the parents within 60 days of receipt delivery to VBCPS.

* There will be no reimbursement to the parents for tutoring, social skills training or evaluations.

VBCPS is reminded of its responsibility to submit an implementation plan to the parties, the hearing officer, and the State Education Agency within 45 calendar days.

Rights of Appeal:

Pursuant to 8 VAC 21-81-T and §22.214 D of the Code of Virginia, 1950, as amended, a decision by the hearing officer in any hearing, including an expedited hearing, shall be final and binding unless either party appeals in a Federal District Court within 90 days of the date of the decision, or in a state Circuit Court within 180 days of the date of this decision.

ENTERED: October 30, 2016

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RHONDA J. S. MITCHELL, Hearing Officer

Copy furnished to:

Danielle Hall-McIvor, Counsel for VBCPS
Grace Kim, Counsel for Petitioners
Valeka Gatling, Executive Director, Office of Programs for Exceptional Children, VBCPS
Ronald P. Geiersbach, Coordinator, Due Process Services, Office of Dispute Resolution and Administrative Services (via email only)