#20-042

**COMMONWEALTH OF VIRGINIA**

**DEPARTMENT OF EDUCATION**

**Office of Dispute Resolution and Administrative Services**

In re: XXXXXXXX XXXXXXXXXX }

} Hearing Officer: Peter B. Vaden

Due Process Hearing Request }

(XXXXXXXX XXXXXXXXXX Public Schools) } VDOE Case No. 20-042

# HEARING OFFICER DECISION

# KEY TO PERSONAL IDENTIFICATION INFORMATION

|  |  |
| --- | --- |
| Student | XXXXXXXX XXXXXXXXXX |
| Age | x years old |
| Birthday | Xxxxxxxxxxxx |
| Grade (2019-2020 school year) | Kindergarten |
| Petitioner/Mother | Xxxxxxxxxxxx |
| Grandmother | Xxxxxxxxxxxx |
| Xxxxx School | Xxxxxxxxxxx Elementary School |
| Educational Consultant | Xxxxxxxxxxx |
| Guidance Counselor | Xxxxxxxxxxxxxx |
| Director of Pupil Personnel | Xxxxxxxxxxxxxx |
|  |  |
| Advocate | Ms. Kandise Lucas |
| Counsel 1 | Katherine Ballou, Esq. |
| Counsel 2 | Patrick Andriano, Esq. |

**COMMONWEALTH OF VIRGINIA**

**DEPARTMENT OF EDUCATION**

**Office of Dispute Resolution and Administrative Services**

In re: STUDENT[[1]](#footnote-1) }

} Hearing Officer: Peter B. Vaden

Due Process Hearing Request }

(XXXXXXXX XXXXXXXXXX Public Schools) } VDOE Case No. 20-042

# HEARING OFFICER DECISION

# INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner (MOTHER) and GRANDMOTHER, under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. 1400, *et seq*., and the *Regulations Governing Special Education Programs for Children with Disabilities in Virginia*, 8 VAC 20‑81‑10, *et seq*. (Virginia Regulations). In her due process complaint, Mother seeks relief against Respondent XXXXXXXX XXXXXXXXXX Public Schools (XXXXXXXXXXX) for the school division’s alleged failure to timely identify Student as a child with a disability and for other alleged failures in the 2019-2020 school year to provide Student a free appropriate public education (FAPE).

Student, an AGE child, is a resident of XXXXXXXX XXXXXXXXXX, Virginia. Petitioner’s Due Process Complaint, filed on January 6, 2020, named Xxxxxxxxxxx as respondent. The undersigned hearing officer was appointed on January 9, 2020. Xxxxxxxxxxx filed its response to the due process complaint on January 16, 2020. On January 15, 2020, I convened a telephone prehearing conference with the parties, Petitioner’s lay advocate (ADVOCATE) and Xxxxxxxxxxx’s counsel to set the due process hearing date and discuss issues to be determined and other matters.

On January 23, 2019, I granted Petitioner’s unopposed request to withdraw, without prejudice, a discipline issue[[2]](#footnote-2) asserted in the January 6, 2020, due process complaint.

On February 5, 2020, Xxxxxxxxxxx filed a motion to dismiss Petitioner’s due process complaint, which motion I granted in part and denied in part by order issued February 20, 2020. (I inadvertently failed to email the February 20, 2020 order to the parties until February 26, 2020.) In my order, I denied Xxxxxxxxxxx’s motion to dismiss the complaint in its entirety, but granted those parts of the motion to dismiss Petitioner’s claims against Xxxxxxxxxxx for the school division’s allegedly concealing Student’s actual class and school removals in attendance records and for the school principal’s alleged wrongfully making a truancy referral.

The due process hearing was held before this Impartial Hearing Officer on March 3 and 4, 2020 at the XXXXXXXX XXXXXXXXXX School Administration Building in xxxxxxx, Virginia. The hearing, which was open to the public, was transcribed by a court reporter. The Petitioner and Grandmother appeared in person and were assisted by Advocate. (Over Xxxxxxxxxxx’s objection, I granted Mother leave not to remain for the remainder of the hearing after giving her testimony.) Respondent Xxxxxxxxxxx was represented at the hearing by DIRECTOR OF PUPIL PERSONNEL (DIRECTOR) and by COUNSEL 1. COUNSEL 2 appeared for Xxxxxxxxxxx on brief.

Advocate and Counsel 1 made opening statements. Petitioner called as witnesses Mother, Grandmother and EDUCATIONAL CONSULTANT. Xxxxxxxxxxx called as witnesses SCHOOL COUNSELOR and Director. Numerous exhibits offered by the respective parties were received into evidence. At the conclusion of the due process hearing on March 4, 2020, by agreement of the parties’ representatives, I granted the parties leave to file written closing briefs by March 25, 2020 and extended the due date for my final decision from March 21, 2020 to April 10, 2020. On March 6, 2020, I entered a consent interim continuance order extending the final decision due date to April 10, 2020. Counsel for both parties timely filed written closings.

# JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. 1415(f) and 8 VAC 20-81-210(A).

# ISSUES AND RELIEF SOUGHT

The issues remaining for determination, after withdrawal of the discipline claim on January 23, 2020 and upon my February 20, 2020 dismissal of Petitioner’s attendance records and truancy referral claims, are:

1. Whether Xxxxxxxxxxx has denied Student a FAPE by failing to provide behavior and social skills support in the 2019‑2020 school year;

2. Whether Xxxxxxxxxxx denied the Student FAPE by failing to provide the required behavior supports for the Student to provide assistance in self‑regulation, social skill interactions with peers/adults, and acclimatization with school norms;

3. Whether Xxxxxxxxxxx denied the Student FAPE by failing to properly train school staff regarding the severity of the Student's disabilities and interfering behaviors as well as how to implement effective positive behavior supports unique to the Student's needs;

4. Whether Xxxxxxxxxxx denied the Student a FAPE by not determining the Student eligible for special education, as having an Other Health Impairment disability, on November 7, 2019, based on the data, parent input, teacher input, advocate input, and medical diagnosis presented;

5. Whether Xxxxxxxxxxx denied the Student FAPE by failing to provide a Safety Plan in a timely manner for the Student to address physical and verbal aggression, as well as elopement (flight), occurrences.

For relief, Petitioner requested in the January 6, 2020 due process complaint that the Hearing Officer determine that Student is a child with a disability eligible for special education and related services; that Xxxxxxxxxxx be ordered to immediately place Student in a nonpublic program determined to be appropriate by the parent, pending Xxxxxxxxxxx’s completion of the special education evaluation process; that Xxxxxxxxxxx be ordered to retract the allegedly untrue December 17, 2019 and December 20, 2019 truancy referral documents from the Student’s education records; that Xxxxxxxxxxx be ordered to provide compensatory education services, in the amount of 90 hours of tutorial services within the private setting, as compensatory education for the alleged denials of FAPE in this case; that Xxxxxxxxxxx be ordered to reimburse Grandmother for mileage expenses incurred in travel to and from school from September through December, 2019, in order to provide behavior supports for the Student and that Xxxxxxxxxxx be ordered to reimburse the cost of an on-line instructional program Grandmother obtained for Student in the 2019‑2020 school year.

# FINDINGS OF FACT

After considering all of the evidence, as well as the argument and written memoranda of counsel, this hearing officer’s findings of fact are as follows:

1. Student, an Age child, resides in XXXXXXXX XXXXXXXXXX, Virginia with Grandmother, apart from Mother. Student has lived with Grandmother since June 2019. Testimony of Mother.
2. On February 19, 2020, the xxxxx SCHOOL members of Student’s special education eligibility team determined that Student met criteria for the IDEA disability Other Health Impairment, as a result of chronic or acute health problems, namely, Attention Deficit - Hyperactivity Disorder (OHI-ADHD). The team did not complete a determination of whether Student was a child with a disability because Mother withheld consent to the initial eligibility determination.[[3]](#footnote-3) An individualized education program (IEP) for Student was not developed. Testimony of Grandmother, Representations of Counsel and Advocate. As of the date of the due process hearing, Mother had not provided parental consent for Student to be found eligible for special education. Testimony of Educational Consultant.
3. Prior to the 2019-2020 school year, Student attended day care and preschool programs in the XXXXXXXX XXXXXXXXXX area. Mother enrolled Student at xxxxx School at the beginning of the 2019-2020 school year. Exhibit R-24, Testimony of Mother, Exhibit R-42.
4. In spring 2019, in order to enroll Student in xxxxx School, Mother provided Xxxxxxxxxxx a form, completed by Student’s physician on March 28, 2019, which indicated, *inter alia*, that Student’s emotional and social development were within the normal range. On a Virginia state School Entrance Health Form signed by Mother on June 16, 2019, Mother did not check ‘yes’ for any relevant health conditions for the Student including ‘behavioral problems’ or ‘developmental problems.’ Exhibits R-1, R-2, Testimony of Mother.
5. Beginning the first or second week of school in the 2019-2020 school year, Grandmother started receiving telephone calls from school staff about Student’s behavior in school. On October 3, 2019, Grandmother sent an email to School Counselor to request an Individualized Education Program (IEP) for Student. Grandmother’s purpose was to secure a behavioral aide for Student. Grandmother told School Counselor on more than one occasion that she did not believe Student had a disability. At some point in the fall, in a telephone request to the lead special education teacher at xxxxx School, Grandmother sought a psychological evaluation of Student. This teacher told Grandmother that the school would need to do a comprehensive evaluation of Student if they suspected that the child had a disability. Grandmother told this teacher also that she did not believe that Student had a disability. Testimony of Grandmother.
6. When Grandmother emailed School Counselor on October 3, 2019 to request an IEP meeting, School Counselor telephoned Grandmother. In the telephone conversation, Grandmother told School Counselor that she did not believe Student had a disability and that she did not want to move forward with the IEP. School Counselor did not take further action on referring Student for a special education eligibility evaluation prior to a November 7, 2019 meeting with the family. Testimony of School Counselor.
7. From the beginning of the 2019-2020 school year, School Counselor had frequent interactions with Student. If Student didn't want to do xxx work or something to that nature, xxx would just start doing stuff in the classroom, like hide under the table, sitting on top of the table, throwing stuff, and things of that nature. If the classroom teacher or the aide could not get Student to calm down and go back to work they would call someone from the office to come down to the classroom. If Student was unable to be de-escalated and was not showing safe behavior in the classroom, School Counselor would be called to help remove Student from the classroom and go to the counselor’s office. Testimony of School Counselor.
8. xxxxx School started a behavior chart for Student, and if Student earned positive stickers for the day, had completed the assignments and done the things xxx needed to do, Student was able to come to School Counselor for the last five or ten minutes of the school day and choose preferred activities as a reward. Testimony of School Counselor.
9. In response to concerns from Mother that Student’s inappropriate behaviors were happening at home as well as at school, School Counselor referred the family to outside agencies, including an intensive in-home behavior service, a therapeutic day treatment program provided by another agency inside the school building and play therapy. Testimony of School Counselor.
10. Xxxxx School convened a meeting on November 7, 2019 with Mother and Grandmother to discuss functional behavior checklist provided by Student’s teachers and a behavior plan for Student the school was going to put in place. Without informing Xxxxx School in advance, Grandmother had Advocate participate in the meeting by telephone. The tone of the meeting became extremely contentious with yelling. When Advocate raised special education issues at the meeting, the school representatives summoned Xxxxxxxxxxx’s director of special education, Director, to join the meeting. Prior the meeting, Director had not had previous involvement with Student. At this meeting, Grandmother informed the school representatives for the first time that Student had been diagnosed with the intermittent explosive disorder (IED) and oppositional defiant disorder (ODD). Grandmother also stated that Student was scheduled to see a private psychologist and a psychiatrist in December 2019. Testimony of School Counselor, Testimony of Director. When Advocate asserted in the meeting that Student had a mental health disability, Director stated that the meeting could become a special education review team (SERT team) meeting to discuss conducting an eligibility evaluation of Student. Testimony of Director. Discussion of the proposed behavior plan for Student did not go forward. Testimony of School Counselor.
11. At the November 7, 2019 meeting, Mother signed a parental consent form for Xxxxxxxxxxx to conduct a special education evaluation of Student, to include an Educational Assessment, a Psychological Assessment, a Sociocultural Assessment, a Hearing Screening, an Occupational Therapy Assessment, an Observation and a Functional Behavioral Assessment/Behavior Intervention Plan Development. Exhibit R-9. Testimony of Mother.
12. The respective assessments were completed on November 11, 2019 (Educational Assessment), November 26, 2019 (Psychological Assessment), December 20, 2019 (Sociocultural Assessment), November 20, 2019 (Hearing Screening), January 24, 2020 (Occupational Therapy Assessment) and December 4, 2019 (Observation). Exhibits R-12, R-15, R-16, R-17, R-18, R-24. The Functional Assessment Checklist for Teachers and Staff was completed on November 7, 2019. Exhibit R-7.
13. After the November 7, 2019 meeting, Xxxxx School provided one-on-one behavior aides for Student at school. After being provided the aides, Student was doing better at school. Testimony of Director.
14. Student was suspended from school for one day on December 9, 2019. After that, the parent or Grandmother decided not to send Student back to school. Testimony of Director. The parent or Grandmother decided to keep Student at home out of safety concerns for Student and other children at school. Testimony of Grandmother. As of the due process hearing date, Student still had not returned to school. Testimony of Grandmother.
15. At the November 9, 2019 meeting, Advocate stated that Student needed a safety plan at school. Testimony of Director. On December 13, 2019, the Xxxxx School principal reached out to Grandmother by email to request her to meet regarding a draft safety plan developed by Xxxxx School for Student. Exhibit R-22. Neither Mother nor Grandmother responded to the safety plan email. Testimony of Grandmother.
16. On December 20, 2019, the day before Xxxxx School’s winter break, the parent made an oral request to Xxxxx School for homebound services for Student. Xxxxxxxxxxx provided a homebound services request form to the parent on January 10, 2020, following winter break. Grandmother did not provide the completed homebound services request form to Xxxxxxxxxxx until after February 1, 2020. Student is not confined to the home or to a healthcare facility. Xxxxxxxxxxx denied homebound services for Student. Testimony of Grandmother.
17. All staff at Xxxxx School are aware that they can make a “child find” referral if they suspect that a child has a disability. Director has personally trained special education teachers at Xxxxx School regarding special education policies and procedures. Testimony of Director.

# CONCLUSIONS OF LAW

Based upon the above findings of fact, and argument and legal memoranda of counsel, as well as this hearing officer’s own legal research, the conclusions of law of this hearing officer are as follows:

# Burden of Proof

The Petitioner, as the party who filed the January 6, 2020 request for a due process hearing, has the burden of proof in this proceeding. *See, e.g., N.P. by S.P. v. Maxwell*, 711 F. App'x 713 (4th Cir. 2017) (At impartial due process hearing, the parents bear the burden of proving their child was denied a free appropriate public education. *Id.* at 716, *citing Weast v. Schaffer ex rel. Schaffer*, 377 F.3d 449, 456 (4th Cir. 2004), *aff’d*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). The burden of persuasion shall be met by a preponderance of the evidence. *See. e.g., Cty. Sch. Bd. of Henrico Cty., Va. v. R.T.*, 433 F. Supp. 2d 657, 671 (E.D. Va. 2006)(Hearing Officer’s factual conclusions supported by the preponderance of the record evidence.)

Analysis

I.

Did Xxxxxxxxxxx deny Student a FAPE by not determining Student eligible for special education as having an Other Health Impairment disability on November 7, 2019, based on the data, parent input, teacher input, advocate input, and medical diagnosis presented?

Mother enrolled Student at Xxxxx School, in the kindergarten class, for the 2019-2020 school year. From the start of the school year, Student exhibited challenging behaviors at school requiring the regular interventions of School Counselor and other educators and staff. School staff regularly called Mother and Grandmother for assistance. On October 3, 2019, concerned by Student’s behaviors, Grandmother made an email request to School Counselor for an Individualized Education Program (IEP) meeting for Student. The same day, Grandmother told School Counselor by telephone that she did want to move forward with the IEP and that she did not believe Student had a disability.

School staff, notably School Counselor, attempted in-school behavior interventions, such as a behavior chart with rewards for desired behaviors, and also referred Grandmother to outside agencies for counseling and therapy services. School Counselor collected input from teachers on the function of Student’s behaviors. On November 7, 2019, Xxxxx School convened a meeting with the parent and Grandmother to go over the teacher input and to develop a behavior intervention plan.

Advocate participated by telephone in the meeting, which became contentious. When Advocate voiced her opinion that Student has a mental health disability, school staff summoned to the meeting Xxxxxxxxxxx’s director of special education services, Director, who previously had no involvement with Student. Director ‘re-purposed’ the meeting to initiating an eligibility evaluation to determine whether Student needed special education services as a child with an IDEA disability. Mother provided written consent and Xxxxxxxxxxx proceeded to conduct a full initial evaluation to determine if Student was a child with a disability.

On February 19, 2020, the school members of a special education eligibility team found that Student met criteria for the IDEA disability classification Other Health Impairment (OHI), as a result of chronic or acute health problems, namely, Attention Deficit - Hyperactivity Disorder (ADHD). Mother withheld parental consent for the February 19, 2020 eligibility determination and Xxxxxxxxxxx did not proceed with developing an initial IEP for Student.[[4]](#footnote-4)

Petitioner alleges that Xxxxxxxxxxx denied Student a free appropriate public education (FAPE) by not determining Student eligible for special education at the November 7, 2019 behavior intervention plan meeting at Xxxxx School. The Virginia Regulations require that before an initial special education eligibility determination is made, a child suspected of having a qualifying disability must be assessed by a qualified professional in all areas relating to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, motor abilities, and adaptive behavior. *See* 8 VAC 20‑81‑70(E)(14). Upon completion of the assessments, a group of qualified professionals and the parent of the child meet to determine whether the child is a child with an IDEA disability and the educational needs of the child. *See* 34 CFR 300.306(a)(1). The eligibility determination must be made by a group, which includes at minimum, Xxxxxxxxxxx personnel representing the disciplines providing assessments; the special education administrator or designee; the parent; a special education teacher; the child’s general education teacher and at least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech‑language pathologist, or remedial reading teacher. *See* 8 VAC 20‑81‑80(C)(2)(b).

At the time the November 7, 2019 behavior intervention meeting was convened, Student had not been assessed by Xxxxxxxxxxx in any of the required areas for an initial eligibility evaluation. Nor were all of the team members required for an eligibility determination present at the meeting. For Xxxxxxxxxxx to have proceeded to determine Student’s special education eligibility at the November 7, 2019 meeting would have violated the aforesaid IDEA and the Virginia Regulations for making eligibility determinations. I conclude that Xxxxxxxxxxx did not deny Student a FAPE by not determining Student eligible for special education on November 7, 2019.

Viewing this claim more broadly, Petitioner’s allegation may fairly be read to assert a child find violation, that is that Xxxxxxxxxxx was remiss in not identifying Student as a child with a suspected disability and initiating xxx special education evaluation before November 7, 2019. *Cf*. Fed. R. Civ. P. Rule 8(e) (Pleadings must be construed so as to do justice.)[[5]](#footnote-5)

As U.S. District Judge Raymond Jackson explained in *Sch. Bd. of the City of Norfolk v. Brown*, 769 F. Supp. 2d 928 (E.D. Va. 2010),

The IDEA ‘imposes an affirmative obligation [the “child find” obligation] on any state receiving federal assistance to identify and evaluate all children suffering from disabilities who may be in need of special education and related services. 20 U.S.C. 1412(a)(3). Specifically, the IDEA requires that [a]ll children with disabilities residing in the State, . . . regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated.’ 1412(a)(3)(A). . . . The “child find” duty extends even to [c]hildren who are suspected of being a child with a disability . . . even though they are advancing from grade to grade.’ 34 C.F.R. 300.111(c)(1).’

*Id.* at 941. The child find duty does not impose a specific deadline, but evaluation should take place within a ‘reasonable time’ after school officials are put on notice that a child’s behavior is likely to indicate a disability. *Id.* at 942. But (a) school’s failure to diagnose a disability at the earliest possible moment is not *per se* actionable “as a denial of FAPE.” *D.J.D. by & through Driver v. Madison City Bd. of Educ.*, No. 5:17‑CV‑00096, 2018 WL 4283058 (N.D. Ala. Sept. 7, 2018), *citing* *A.P. ex rel. Powers v. Woodstock Bd. of Educ.*, 572 F. Supp. 2d 221, 226 (D. Conn. 2008). In order to establish a violation of the child find requirement, the parent “must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate.” *Norfolk v. Brown, supra* at 942-43. (Citations and internal quotations omitted.)

Petitioner’s expert, Educational Consultant, who was qualified as an expert in the field of special education, opined that based on Student’s history and the records background, Xxxxxxxxxxx should have convened a child study team to decide whether Student needed to be evaluated for special education. Educational Consultant opined that this should have happened within the first two weeks of Student’s starting school. Educational Consultant did not cite any specific history or education records of Student that would have warranted convening a child study team meeting so early in the school year and I did not find this opinion persuasive.

Xxxxxxxxxxx argues that it showed a rational justification for not deciding to evaluate Student before November 7, 2019. Notably, that in spring 2019, in order to enroll Student in Xxxxx School, Mother provided the school a form completed by Student’s physician, which indicated, *inter alia*, that Student’s emotional and social development were within the normal range. Also on a School Entrance Health Form completed on June 16, 2019, Mother did not check ‘yes’ for any relevant conditions for the Student ( including “behavioral problems” or “developmental problems”). Until the November 7, 2019 meeting, the family did not inform Xxxxxxxxxxx that Student had been diagnosed by outside professionals with intermittent explosive disorder (IED) and oppositional defiant disorder (ODD). Moreover, after requesting an IEP meeting for Student on October 3, 2019, Grandmother told School Counselor that she did not want to move forward with the IEP, and in conversations with School Counselor and the Xxxxx School head special education teacher, Grandmother stated that she did not believe that Student had a disability.

The Virginia Regulations anticipate that in the normal course, educators will make an effort to address a child’s behavior concerns before a referral is made for special education evaluation. *See* 8 VAC 20‑81‑60(A)(2) (The referring party shall inform the special education administrator or designee of why an evaluation is requested and efforts that have been made to address the concerns.) *See, also, Bd. of Educ. of Fayette Cty., Ky. v. L.M.*, 478 F.3d 307 (6th Cir. 2007) (quoting with approval the lower court’s reasoning that “[i]t is difficult to assess whether a very young child is disabled or merely developing at a rate different from his peers, and the educational experts involved all seem to indicate that a hasty referral for special education can be damaging to a child.” *Id.* at 313-14.)

School Counselor, who was qualified at the due process hearing as an expert in school counseling and behavior management, testified that even though Student had exhibited challenging behaviors in school, she did not suspect that Student had an IDEA disability before the November 7, 2019 meeting when the family provided Student’s mental health diagnoses. School Counselor opined, credibly, that before the November 7, 2019 meeting, Xxxxx School addressed Student’s behaviors appropriately, as it would ‘normally’ do, using all of the school’s support systems.

On this evidence, I find that Petitioner has not met her burden of proof that prior to November 7, 2019, Xxxxxxxxxxx school officials overlooked clear signs that Student had an IDEA disability, were negligent in failing to order testing, or that there was no rational justification for Xxxxxxxxxxx’s not deciding to evaluate the child earlier in the school year. *See City of Norfolk v. Brown, supra* at 942-43. Therefore, I conclude that Petitioner has not established that Xxxxxxxxxxx violated the IDEA/Virginia Regulations’ child find requirement.

Moreover, even if Xxxxxxxxxxx had not established it had a rational justification for not deciding to evaluate Student earlier in the fall of 2019, the delay in conducting the initial evaluation would have been a procedural violation of the IDEA. *See id.* at 942. (A school division’s failure to comply with the child find mandate may constitute a procedural violation of the IDEA.) A procedural violation results in a denial of FAPE only if the procedural inadequacies

(i) Impeded the child's right to a FAPE;

(ii) Significantly impeded the parent's opportunity to participate in the decision‑making process regarding the provision of a FAPE to the parent's child; or

(iii) Caused a deprivation of educational benefit.

*See* 34 CFR 300.513(a); 20 U.S.C.A. 1415(f)(3)(E) (Supp.2008). Unless the hearing officer determines that a given procedural violation denied the child a FAPE, he may only order compliance with the IDEA’s procedural requirements and cannot grant other forms of relief. *See R.F. by & through E.F. v. Cecil Cty. Pub. Sch.*, 919 F.3d 237, 24849 (4th Cir.), *cert. denied*, 140 S. Ct. 156, 205 L. Ed. 2d 46 (2019).

The earliest date established for the family’s seeking special education for Student was Grandmother’s October 3, 2019 email request to School Counselor for an IEP meeting. Grandmother withdrew that request the same day and stated she did not believe Student had a disability. But assuming, *arguendo*, that the October 3, 2019 request for an IEP meeting triggered a duty to initiate the process of determining eligibility, there was no showing that Xxxxxxxxxxx’s starting the assessment process at the November 7, 2019 meeting was not within a reasonable time, or that the lapse in time impeded Student’s right to a FAPE, significantly impeded Mother’s participation in the decision making process or otherwise resulted in deprivation of educational benefit.[[6]](#footnote-6)

II.

a. Did Xxxxxxxxxxx deny Student a FAPE by failing to provide behavior and social skills support in the 2019‑2020 school year?

b. Did Xxxxxxxxxxx deny Student a FAPE by failing to provide the required behavior supports for the Student to provide assistance in self‑regulation, social skill interactions with peers/adults, and acclimatization with school norms?

c. Did Xxxxxxxxxxx deny Student FAPE by failing to properly train school staff regarding the severity of the Student's disabilities and interfering behaviors as well as how to implement effective positive behavior supports unique to the Student's needs?

d. Did Xxxxxxxxxxx deny Student FAPE by failing to provide a Safety Plan in a timely manner for the Student to address physical and verbal aggression, as well as elopement (flight), occurrences?

Petitioner’s remaining claims in this case all pertain to alleged denials of a free appropriate public education (FAPE) to Student by Xxxxxxxxxxx between the start of the 2019-2020 school year and December 10, 2019, when the family stopped sending Student to school. Petitioner alleges that Xxxxxxxxxxx denied Student a FAPE by failing to provide Student behavior and social skills and supports and a safety plan. Petitioner also alleges that Xxxxxxxxxxx denied Student a FAPE by not properly training school staff regarding Student’s disabilities.

The IDEA requires that in exchange for federal funding, states must provide a FAPE to all disabled students residing in the state. *See M.N. by & through Norman v. Sch. Bd. of City of Virginia Beach*, No. 2:17CV65, 2018 WL 717005 (E.D. Va. Feb. 5, 2018) (*citing* 20 U.S.C. 1411). Under the Virginia Regulations, each local school division must ensure that all children with disabilities aged two to 21, inclusive, residing in that school division have a right to a FAPE. 8 VAC 20‑81‑30(B). Determination of eligibility for special education services begins with the initial evaluation of the child. *See J.V. v. Stafford Cty. Sch. Bd.*, 67 Va. App. 21, 27, 792 S.E.2d 286, 289 (Va. App. 2016). A school division is not obliged to provide a FAPE to a child not yet determined to have a qualifying disability.[[7]](#footnote-7)

In this decision, I have held that Petitioner has not established that Xxxxxxxxxxx violated its child find obligation by not starting Student’s initial eligibility evaluation before the November 7, 2019 behavior plan meeting. Xxxxxxxxxxx determined Student met criteria for a child with an OHI-ADHD disability at an eligibility meeting on February 19, 2020. Mother denied consent to the eligibility determination. The handling of Student’s eligibility evaluation after November 7, 2019 is not at issue before me. However, Petitioner does not contend that Xxxxxxxxxxx’s initial evaluation was not timely completed following the meeting.[[8]](#footnote-8) I find, therefore, that Student’s right to a FAPE from Xxxxxxxxxxx accrued on February 19, 2020, when the Xxxxxxxxxxx eligibility team determined that Student met criteria as a child with a disability under the OHI-ADHD disability classification.[[9]](#footnote-9) I conclude that Petitioner’s claims that Xxxxxxxxxxx denied Student a FAPE from the start of the 2019-2020 school year to December 10, 2019, before Student was determined to have a qualifying disability, are not actionable. Those claims must be dismissed.

# ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:

Petitioner’s January 6, 2020 Administrative Due Process Complaint Notice is dismissed. All relief requested by the Petitioner herein is denied.

Date: April 3, 2020 s/ Peter B. Vaden

Peter B. Vaden, Hearing Officer

# NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. A decision by the special education hearing officer in any hearing is final and binding unless the decision is appealed by a party in a state circuit court within 180 days of the issuance of the decision, or in a federal district court within 90 days of the issuance of the decision. The appeal may be filed in either a state circuit court or a federal district court without regard to the amount in controversy.

1. Personal identification information is provided in attached Key to Personal Identification Information. [↑](#footnote-ref-1)
2. The discipline claim withdrawn by the Petitioner was,

   Whether xxxxxxxxxxxx xxxxxx Public Schools (xxxxxxxxxx) has denied Student a free appropriate public education (FAPE) by refusing to conduct an MDR determination when Student has been subjected to a series of disciplinary removals for over 10 school days in the current school year, where the child’s behaviors were substantially similar in the incidents resulting in the removals. [↑](#footnote-ref-2)
3. *See* 8 VAC 20‑81‑170(E)(1)(b):

   Informed parental consent is required before . . . An initial eligibility determination or any change in categorical identification . . . . [↑](#footnote-ref-3)
4. The adequacy of xxxxxxxxxx’s initial eligibility evaluation process, the correctness of the February 19, 2020 eligibility decisions and xxxxxxxxxx’s decision not to proceed with IEP development are not at issue in this proceeding. [↑](#footnote-ref-4)
5. The Federal Rules of Civil Procedure do not govern impartial due process proceedings and are cited here only by analogy. [↑](#footnote-ref-5)
6. The parent does not contend that xxxxxxxxx did not timely complete the evaluation following the November 7, 2019 meeting. The hearing officer also notes that even after Student was determined to meet criteria for an OHI-ADHD disability on February 19, 2020, the parent withheld her consent to the eligibility determination, as is permitted by the Virginia Regulations. [↑](#footnote-ref-6)
7. For children, not yet determined eligible for special education, the IDEA and the Virginia Regulations do provide for the possibility of FAPE protections in the discipline context. *See* 34 CFR 300.534(a). *See, also, e.g., T.B. ex rel. Debbra B. v. Bryan Indep. Sch. Dist.*, 628 F.3d 240 (5th Cir. 2010) (“[J]ust because Congress has specifically extended some protections to children not yet determined to meet the definition of child with a disability’ does not mean that it has extended all protections.” *Id.* at 245.) [↑](#footnote-ref-7)
8. See Transcript of Due Process Hearing - Day 1, March 3, 2020:

   ADVOCATE: “The question that we posed to the hearing officer was not how long it took to complete the evaluation. How long it took for the school division to engage in Child Find. There's a difference. Not how long it took to complete the evaluation. How long it took them to propose evaluations.”

   *Id*, page 95. [↑](#footnote-ref-8)
9. Even though Mother denied parental consent for the initial eligibility determination, as was her right under the Virginia Regulations, 8 VAC 20-81-170(E)(4)(b)(3), Student’s entitlement to FAPE, after the February 19, 2020 determination, is not contingent on parental consent to the determination. *See J.V., supra*, 67 Va. App. 21 at 37. [↑](#footnote-ref-9)