**#20-053**

**COMMONWEALTH OF VIRGINIA**

**DEPARTMENT OF EDUCATION**

**Office of Dispute Resolution and Administrative Services**

In re: XXXXXXXXX XXXXXX }

Hearing Officer: Peter B. Vaden

Due Process Hearing Request

(XXXXXXXX Public Schools)

VDOE Case No. 20-053

# HEARING OFFICER DECISION

KEY TO PERSONAL IDENTIFICATION INFORMATION

|  |  |
| --- | --- |
| Student | XXXXXXXXX XXXXXX |
| Age | XX years old |
| Birthday | XXXXXXXXX |
| Grade (2018-2019 school year) | XXX Grade |
| Petitioner/Mother | XXXXXX XXXXXX |
| Director of Special Education | XXXXXXXXX |
| Former Complaint Specialist | Henry Millward |
| VDOE Coordinator | Kathryn Jones |
| Private Placement Specialist | XXXXXXXX |
| Director of Admissions | XXXXXXXXXX |
| English Teacher | XXXXXXXX |
| Alternative Placement Specialist | XXXXXXXX |
| Placement Services Manager | XXXXXXXXXXX |
| Case Manager | XXXXXXX |
| LEA Representative | XXXXXXXX |
| Family Supporter | XXXXXXXXX |
| Nonpublic School 1 | XXXXXXXXXXXXXXXX |
| Nonpublic School 2 | XXXXXXXXXXXXXXXXXX |
| Nonpublic School 3 | XXXXXXXXXXXXXXXXXXXX |
| Nonpublic School 4 | XXXXXXXXXXXXXXXXXXXXXXXXXXX |
| Nonpublic School 5 | XXXXXXXXXXXXXXXXXXXXXXXXXXX |
| Home-Based Instructor 1 | XXXXXXXXXXXX |
| Home-Based Instructor 2 | XXXXXXX |
| Advocate | Marla Faith Crawford |
| XPS’ Counsel | Nicole Thompson, 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 Public Schools) } VDOE Case No. 20-053

**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), Guardian for Student, 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 (XXXX) Public Schools (XPS) for the school division’s alleged denials of a free appropriate public education (FAPE) to Student since February 2017.

Student, an AGE adult, is a resident of XXXXXXXX, Virginia. Petitioner’s Due Process Complaint and Request for an Expedited Hearing, filed on February 5, 2020, named XPS as respondent. The undersigned hearing officer was appointed on February 6, 2020. The original final decision due date was April 20, 2020.

On February 9, 2020, XPS, by counsel, filed responsive pleadings to the due process complaint, including XPS’ Response to the Complaint, Motion to Dismiss, Notice

of Insufficiency and Challenge to the Request for Expedited Hearing. On February 11, 2020, I convened an on-the-record telephone prehearing conference with the parties, Petitioner’s lay advocate (ADVOCATE) and XPS’ COUNSEL to set the due process hearing date and discuss issues to be determined and other matters. In my Prehearing Order issued on February 11, 2020 (the Prehearing Order), I dismissed with prejudice the discipline issues alleged in the complaint, as barred by the principles of *res judicata*, and ordered that the administrative proceedings would be conducted on the regular, non-expedited, calendar. On February 12, 2020, I overruled XPS’ Notice of Insufficiency. By order issued February 20, 2020, I granted in part and denied in part XPS’ Motion to Dismiss.

On February 24, 2020, 19 days after receiving notice of the due process complaint, XPS convened a resolution meeting with Mother, Student and Advocate to discuss the due process complaint, and the facts that formed the basis of the complaint. The resolution meeting was not held within 15 days of the complaint’s filing as provided in 34 C.F.R. § 300.510(a). XPS did not resolve the due process complaint to the satisfaction of the parent. The 30-day resolution period was not adjusted.

On September 2, 2020, XPS filed a motion to dismiss the issue of deprivation of rights from the proceedings. I denied this motion by order issued September 12, 2020. On September 22, 2020, XPS filed a motion to dismiss the Petitioner’s due process complaint for alleged failure by Advocate to comply with a subpoena *duces tecum*, issued by the hearing officer. I denied this motion by order issued September 24, 2020.

The due process hearing in this case was originally scheduled to be convened on March 17, 18 and 19, 2020. Due to complications arising from the March 2020 Coronavirus emergency, the hearing date was continued to July 14-15, 2020. Because of the illness of Advocate, the hearing date had to be continued again until September 28-29, 2020. Due to the continuances of the hearing date, with agreement of the parties, the hearing officer twice extended the final decision due date in the best interest of Student. My final decision is currently due by October 23, 2020.

The due process hearing was held before this Impartial Hearing Officer on September 28 and 29, 2020 in the auditorium of XXXXXXXXX High School in XXXXXXXX, Virginia. The hearing, which was open to the public, was transcribed by a court reporter. The Petitioner appeared in person and was assisted by Advocate. Respondent XPS was represented at the hearing by LEA REPRESENTATIVE and by XPS’ Counsel. At the request of XPS, I ordered that prospective witnesses be excluded so that they could not hear other witnesses’ testimony. Advocate and XPS’ Counsel made opening statements. Petitioner testified and called as additional witnesses DIRECTOR OF SPECIAL EDUCATION, FORMER COMPLAINT SPECIALIST, VDOE COORDINATOR, PRIVATE PLACEMENT SPECIALIST, DIRECTOR OF ADMISSIONS, ENGLISH TEACHER, ALTERNATIVE PLACEMENT SPECIALIST, PLACEMENT SERVICES MANAGER, CASE MANAGER, LEA Representative and FAMILY SUPPORTER. XPS did not call any additional witnesses. Petitioner’s Exhibits P-1, P-4 through P-24, and PD-1 were admitted into evidence, including Exhibits P-9 and PD-1 admitted over XPS’ objections. I sustained XPS’ objections to Exhibits P-2, P-3, PA-1 through PA-5 and PC-1 through PC-13. XPS’ Exhibits R-1 through R-72 were all admitted without objection. At the conclusion of the evidence phase, Advocate and XPS’ Counsel made oral closing arguments.

# 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 for determination in this case, as certified in the February 11, 2020

Prehearing Order, are:

– Whether XPS denied Student a free appropriate public education (FAPE) by placing Student in an overly restrictive home-services environment since December 2018;

– Whether in August 2019, XPS denied Student a FAPE by seeking to impede the parent’s right to file a request for a due process hearing;

– Whether XPS denied Student a FAPE since December 2018 by not placing Student in a suitable education placement, such as XXXXXXXXXXXXXXXXXXXX, appropriate for a student with severe dyslexia needing intensive reading support and, as this student, diagnosed with XXXXXXXXXXXXXXXXXX (XXX);

– Whether from December 2017 through July 2019, XPS denied Student a FAPE by failing to provide intensive reading intervention, counseling services and parent counseling and training;

– Whether since September 2019, XPS has denied Student a FAPE by failing to develop an appropriate Individualized Education Program for Student with an appropriate, research based, intensive reading program;

– Whether XPS has denied Student a FAPE by failing to conduct a functional behavioral assessment (FBA) requested by the parent.

Prior to the due process hearing, Petitioner and XPS agreed that XPS would fund Student’s enrollment at Nonpublic School 5, a private day school in XXXXXXXX, Virginia. The relief requested by the Petitioner at the due process hearing is an order for

XPS to fund housing for Student and Mother in close proximity to Nonpublic School 5; that XPS be ordered to convene Student’s IEP team to revise Student’s IEP as appropriate and that Student be awarded compensatory education for the denials of FAPE alleged in the complaint.

# FINDINGS OF FACT

After considering all of the evidence, as well as the argument of the parties’ representatives, this hearing officer’s findings of fact are as follows:

1. Student, an adult student, resides in XXXXXXXX, Virginia with Mother. Mother is Student’s legal guardian. Testimony of Mother.
2. Student was diagnosed with XXXXXXXXXXXXXXXXXXXX (XXX) (XXXXXXXXXXXXXXX) at XX years of age. XXX is a rare disease which attacks children of all ages, causing them to suffer from painful joints and muscles. There is fatigue associated with XXX which is related to poor sleep. Anxiety is a trigger for Student’s pain syndrome. Stress/Anxiety control is essential in management of this condition. Exhibit P-4.
3. Results of a psychological assessment completed on May 12, 2015 indicated that Student’s intellectual functioning was within the Low Average to Average range. Student’s educational achievement results indicated significant discrepancies from the cognitive results in the areas of Basic Reading, Written Expression and Mathematics. A clinical interview and emotional measures indicated concerns with worries, anxiety and somatization. Exhibit R-18.
4. Student is a student with a disability as defined by the IDEA. Student’s identified disabilities are Other Health Impairment resulting from XXX and a Specific Learning Disability (SLD). Student was reevaluated by XPS in July 2015 and Student’s eligibility for special education services was confirmed on July 14, 2015. Exhibit R-48.
5. On April 23, 2019, Student was referred by Mother and XPS to the Virginia Center for Autism and Related Developmental Disorders (VCA) for a comprehensive psychoeducational evaluation. Student’s overall intellectual ability, as measured by the Woodcock-Johnson IV General Intellectual Ability (GIA) standard score was 94, in the Average range. On the WJ-IV achievement measures, Student’s performance was significantly lower than predicted in the areas of Basic Reading Skills, Reading Fluency, Reading Rate and Mathematics, and showed a significant standard score point spread, which indicated the presence of a learning disability. The VCA examiner reported that Student was struggling with dyslexia. The examiner recommended that Student required a private special education school placement. Exhibit R-37.
6. On August 14, 2019, an XPS school psychologist conducted an evaluation of Student, which included an evaluation of Student’s cognitive functioning. On the Wechsler Adult Intelligence Scale - Fourth Edition (WAIS-IV), Student’s overall intellectual functioning tested in the high average range (FSIQ = 116) with significant variability among the subtests. Exhibit R-39.
7. Student began the 2015-2016 school year receiving instruction in an inclusion classroom setting at an XPS school. At an IEP team annual review meeting on March 24, 2016, the IEP team determined that Student’s least restrictive environment (LRE) was homebound instruction, based on a medical certificate of need. The team decided that Student would receive instruction in a private day setting on a trial basis once Student was released from homebound instruction. Over Mother’s dissent, the IEP team agreed that Student’s “stay-put placement” would be a public day school per the last agreed upon IEP dated April 28, 2015. On April 22, 2016, Mother gave permission, in writing, to implement the March 24, 2016 IEP and the placement decision. Exhibit R-18.
8. Mother requested that Student be placed at NONPUBLIC SCHOOL 3, a private school in XXXXXXXX. On September 6, 2016, the Head of School of Nonpublic School 3 wrote Mother that while Student would be a “good fit” for the private school, Nonpublic School 3 would not sign a placement contract for Student with XPS because its insurance advisor considered that XPS’ insurance requirements would have unduly exposed the private school. Exhibit P-9. In communications with XPS and at IEP meetings in subsequent years, Mother continued to press for Student to be placed at Nonpublic School 3. Testimony of Private Placement Specialist.
9. On May 9, 2016, Student was admitted to NONPUBLIC SCHOOL 1, a private day school, where Student completed the 2015-2016 school year. Exhibits R-2, R-4. Student remained enrolled at Nonpublic School 1 for the 2016-2017 school year. Student earned solid grades at Nonpublic School 1 both years, but frequent absences after the 2017 spring break impeded Student’s progress. Exhibit R-4. For the 2016-2017 school year, Student had 54 reported absences and 21 reported tardies. Exhibit R-7.
10. On January 18, 2017, Student’s IEP team met at Nonpublic School 1 to discuss Student’s Assistive Technology (AT) evaluation and educational placement. The team felt that Student’s LRE would be a private separate school. Mother did not give permission to implement this IEP. Exhibit R-21.
11. At the end of the 2016-2017 school year, Nonpublic School 1 unilaterally withdrew as the private placement for Student because the private school officials believed that their ability to work with Mother, the family and XPS had been compromised. Nonpublic School 1 noted that Mother had indicated several times that she desired a different placement for Student because she felt that Nonpublic School 1 was not a good fit for Student. Exhibit R-8.
12. Beginning in September 2017, Student was placed by XPS in NONPUBLIC SCHOOL 2. Student received generally strong reports for academics for the 2017-2018 school year, but Student’s spotty attendance was noted to be a problem. Exhibit R-10.
13. Student returned to Nonpublic School 2 for the 2018-2019 school year. Student was doing well academically through November 2018, but spotty attendance and not completing assignments in math were noted as a problem. Exhibit R-10.
14. On September 25, 2018, an IEP review meeting was convened for Student at a XPS school. Mother and Nonpublic School 2 representatives attended. The IEP review was not completed. Exhibit R-25.
15. On October 9, 2018, XPS reconvened the IEP review meeting for Student. At this meeting, Mother requested that Student be placed at another private school, possibly Nonpublic School 3. Mother did not agree to the proposed IEP. Exhibit R-26.
16. Nonpublic School 2 unilaterally discharged Student as of November 30, 2018 and Student was no longer permitted to attend the private school. Exhibit R-14. Student continued to attend Nonpublic School 2 until December 2, 2018. Exhibit R-48. Based on the testimony of English Teacher, I find that it is more likely than not that Student was discharged from Nonpublic School 2 because Mother would not sign consent to implement the updated IEP proposed for Student in fall 2018.
17. On January 4, 2019, XPS convened an IEP team meeting for Student. This was a very contentious meeting. Mother informed the team that Student had been at home since December 2018 and asked why Student was not receiving homebound services from XPS. Alternative Placement Specialist informed Mother that Student’s IEP, which did not provide for homebound services, needed to be reviewed. The review of Student’s IEP was not completed at the meeting. Exhibit R-27.
18. On January 29, 2019, Student’s IEP team meeting was reconvened. At this meeting, the IEP team decided that home-based instruction for 10 hours per week was Student’s LRE until Student could be placed in another private day school or through the next IEP meeting. Mother initialed the IEP to give permission to implement the IEP but stated that she was only providing consent for home-based instruction and the learning strategies services in the IEP. The team agreed to continue to develop the other components of the IEP and the next IEP team meeting was scheduled for February 25, 2019. Exhibit R-28.
19. On February 25, 2019, XPS convened an IEP continuation meeting for Student. The meeting was ended when a fight broke out in the hallway. Exhibit R-71.
20. On February 13, 2019, HOME-BASED INSTRUCTOR 1 was able to meet with Student and Mother at a local library. Mother refused any home-based instruction at that time. From that date until the end of the 2018-2019 school year, Student and/or Mother were not open to Student’s receiving home-based services from Home Based Instructor 1. Testimony of Case Manager. Until April 11, 2019, Mother did not respond to email communications from Home Based Instructor 1 to attempt to provide home based instruction for Student. Exhibit R-48.
21. On June 18, 2019, XPS reconvened Student’s IEP team to continue the February 25, 2019 meeting. Mother requested that Student be placed at Nonpublic School 3. The XPS team responded that Nonpublic School 3 was not an option because it would no longer be accredited by the Virginia Department of Education (VDOE). The IEP team reviewed the April 2019 independent psychoeducational evaluation of Student done by VCA. The review of Student’s IEP was not completed at the meeting. Exhibit R-30.
22. On July 10, 2019, XPS reconvened Student’s IEP team to continue the February 25, 2019 and June 18, 2019 meetings. The meeting became heated and the team took a short break to de-escalate. The review of Student’s IEP was not completed at the meeting. Exhibit R-31.
23. From July of 2019 through July of 2020, there were no private schools in the XXXXXXXX area that would have met Student’s needs. Nonpublic School 3 did not have any slots in Student’s grade level. XPS looked outside the XXXXXXXX area, but that was not an option that the family wished to pursue. The closest suitable schools were some two hours away. One of these schools was XXXXXXXXXXXXX in XXXXXXXX XXXX. Student remained on home-based instruction while XPS continued to look for a suitable private school placement. As part of a proposed resolution with the parent, XPS also looked at alternative public schools for Student in the XXXXXXXX area, but the parent did not accept placing Student at a public school. Testimony of Director of Special Education.
24. On August 14, 2019, XPS reconvened Student’s IEP team to continue the February 25, 2019, June 18, 2019 and July 10, 2019 meetings. There was discussion of a proposed “resolution agreement” between XPS and Mother, wherein XPS would agree to fund Student’s placement at Nonpublic School 3 and Mother would agree that she would not file for due process or any other complaint for the period during the 2018-2019 school year that Student was receiving home based instruction after Student’s discharge removal from Nonpublic School 2. Mother informed the team that she would have her attorney review the proposed agreement, but she was not going to let anyone hold her hostage when it came to Student and she felt she was being blackmailed. There was no evidence at the hearing that Mother executed the agreement. Exhibits R-32, P-8.
25. The August 14, 2019 IEP team decided that Student’s LRE was a private day school and that Student would receive services for Reading Comprehension for 180 minutes per day and for Math for 90 minutes per day, that Student would participate in an intensive reading program and would receive assistive technology supports. Mother stated that she agreed to everything in the IEP except the Present Levels of Performance. The IEP was not finalized at the meeting. Exhibit R-32.
26. By letter of August 21, 2019, Nonpublic School 3 advised Mother that the school did not have space available in Student’s grade level to consider Student for admission for the 2019-2020 school year. Exhibit P-10. Student was reportedly diagnosed with Autism Spectrum Disorder (ASD) in 2019. Representation of Counsel. Nonpublic School 3 did not serve students on the Autism Spectrum. Testimony of Director of Admissions.
27. After Nonpublic School 3 could not accept Student, XPS reached back to Nonpublic School 1 and Nonpublic School 2, where Student had previously attended, to determine if they would readmit Student, because these were the only two private schools in the immediate XXXXXXXX area that had a specific focus on supporting students with dyslexia. Neither school accepted Student back. Testimony of Director of Special Education.
28. Beginning around the fall of 2019, XPS provided Student approximately 6 to 10 hours per week of supplemental reading enrichment instruction at a third-party reading learning center. Testimony of Director of Special Education.
29. In January 2019, XPS assigned HOME-BASED INSTRUCTOR 1 as Student’s home-based services teacher. Mother and/or Student refused services from Home-Based Instructor 1. Student did not receive home-based services from January 2019 through the end of the 2018-2019 school year. Testimony of Case Manager, Testimony of Mother.
30. By email of September 9, 2019, Placement Services Manager wrote Mother that he had assigned HOME-BASED INSTRUCTOR 2 as Student’s home-based teacher for the 2019-2020 school year. Exhibit R-49. Home-Based Instructor 2 provided home-based services to Student until January 2020. Student was frequently unavailable for Home-Based Instructor 2's services. Exhibit R-62. In January 2020, Mother unilaterally ended Home-Based Instructor 2's home-based services out of Mother’s concern about whether Student would be required to sign a services contract with Home-Based Instructor 2. XPS did not tell Mother that Student needed to sign a contract. After January 2020, Student did not receive home-based services. Testimony of Mother.
31. In December 2019, Student was admitted to NONPUBLIC SCHOOL 4, a private day school in XXXXXXXX, XXXXXXX. Exhibit P-14. Nonpublic School 4 is located some 2 ½ hours by highway from XXXXXXXX. Hearing Officer Notice. At the time Nonpublic School 4 was proposed, XPS did not know anything about the school and there needed to be research to see if the school was capable of serving Student’s needs. Student remained on home-based instruction. Testimony of Alternative Placement Specialist.
32. Home-based services were discontinued for Student in March 2020 due to the Coronavirus emergency. Testimony of Pupil Placement Manager.
33. XPS has convened IEP meetings for Student, among other dates, on January 15, 2016, February 3, 2016, March 2, 2016, March 24, 2016, January 18, 2017, March 31, 2017, October 25, 2017, December 4, 2017, September 25, 2018, October 9, 2018, January 4, 2019, January 29, 2019, February 25, 2019, June 18, 2019, July 10, 2019 and August 14, 2019. Exhibits R-16, R-15, R-17, R-18, R-19, R-21, R-22, R-23, R-24, R-25, %-26, R-27, R-28, R-71, R-30, R-31, R-32.
34. Prior to the due process hearing in this case, Petitioner and XPS agreed that XPS would fund Student’s enrollment at Nonpublic School 5, a day school in XXXXXXXX, Virginia. This placement was made at the parent’s request. Testimony of LEA Representative. Nonpublic School 5 is located approximately 100 miles from Student’s home in XXXXXXXX. Hearing Officer Notice. XPS has agreed to provide daily transportation for Student from Student’s home to Nonpublic School 5 and return. Testimony of LEA Representative. Petitioner does not object to Student’s going to Nonpublic School 5, but seeks an order for XPS to pay for lodging expenses for Student and Mother near Nonpublic School 5, as an IEP related service. Representation of Counsel.
35. In the 2019-2020 school year, Mother filed requests for due process hearings on behalf of Student on September 25, 2019, October 23, 2019, December 26, 2019 and, in the present matter, on February 5, 2020. In each complaint, Petitioner alleged that XPS denied Student a FAPE by providing only home-based instruction after January 2019. Exhibit R-54.

# CONCLUSIONS OF LAW

Based upon the above findings of fact, and argument of counsel and party representatives, 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 February 5, 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

A. – Did XPS deny Student a FAPE by placing Student in an overly restrictive home-services environment since December 2018?

– Did XPS deny Student a FAPE since December 2018 by not placing Student in a suitable educational placement, such as Nonpublic School 3, appropriate for students with severe dyslexia needing intensive reading support and, as this student, diagnosed with XXXXXXXXXXXXXXXX (XXX)?

At an XPS IEP team annual review meeting on March 24, 2016, Student’s IEP team determined that Student’s Least Restrictive Environment (LRE) was homebound instruction, based on Student’s then-current medical needs, and determined that Student would receive instruction in a private day setting on a trial basis once Student was released from homebound instruction. Mother consented to this IEP and requested that Student be placed at Nonpublic School 3, a private school in XXXXXXXX.

On September 6, 2016, the Head of School of Nonpublic School 3 wrote Mother that while Student would be a “good fit” for the private school, the private school would not sign a placement contract with XPS because the school’s insurance advisor considered that XPS’ insurance requirements would unduly expose the private school. In communications with XPS and at IEP meetings in subsequent years, Mother continued to press for Student to be placed at Nonpublic School 3.

XPS funded Student’s placement at other private day schools in XXXXXXXX, first at Nonpublic School 1 through the 2016-2017 school year and next at Nonpublic School 2. At the end of the 2016-2017 school year, Nonpublic School 1 unilaterally withdrew as the private placement for Student because the private school officials believed that their ability to work with Mother, the family and XPS had been compromised. Beginning in September 2017, XPS placed Student at Nonpublic School 2. Student returned to Nonpublic School 2 for the first term of the 2018-2019 school year. On November 30, 2019, Nonpublic School 2 unilaterally discharged Student from the private school. According to a teacher at Nonpublic School 2, the school took this action because Mother would not consent to the annual IEP developed for Student in fall 2019.

After Student was discharged from Nonpublic School 2, XPS convened Student’s IEP team on January 4, 2019 to consider temporary home-based instruction for Student. The meeting ended without a resolution. On January 29, 2019, Student’s IEP team met again. At this meeting, the IEP team decided that Student’s educational placement would be home-based instruction for 10 hours per week, until Student could be placed in another private day school or through the next IEP meeting. Mother, who had not consented to any of the IEPs proposed by XPS since March 2016, initialed the January 29, 2019 IEP to give XPS permission to implement the plan, but stated at the meeting that she was only providing consent for home-based instruction and the learning strategies services in the IEP.

Student was not placed in another private day school until the 2020-2021 school year, when XPS and Mother agreed that Student would be enrolled in Nonpublic School 5. Mother claims that XPS denied Student a FAPE by leaving Student in the home-based services environment from December 2018 to fall 2020, because the home setting was overly restrictive. I view this as a mixed claim of inappropriate IEPs and failure to implement the January 29, 2019 IEP.

# Appropriateness of IEPs

With regard to the appropriateness of Student’s January 29, 2019 IEP and subsequent IEPs proposed by XPS for Student, the U.S. Supreme Court explained in *Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) that a court’s assessment of an IEP involves two inquiries:

The court must determine, first, whether the State complied with IDEA procedures, and, second, whether the IEP developed through proper procedures is “reasonably calculated to enable the child to receive educational benefits.” *Id.*

*R.F. v. Cecil Cty. Pub. Sch.*, No. CV ADC-17-2203, 2018 WL 3079700, at 8 (D. Md. June 21, 2018), *aff’d sub nom. R.F. by & through E.F. v. Cecil Cty. Pub. Sch.*, 919 F.3d 237 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 156, 205 L. Ed. 2d 46 (2019). Here, the Petitioner has not alleged that XPS did not comply with proper procedures to develop Student’s IEPs. Therefore, I turn to the second, substantive, prong of the *Rowley* inquiry: Were XPS’ January 29, 2019 IEP and subsequent proposed IEPs appropriate for Student?

In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*,, ––– U.S. –––, 137 S.Ct. 988, 197 L.Ed.2d 335 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated in *Rowley*, *supra*, for what constitutes an appropriate IEP under the IDEA:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. *Endrew F.*, 137 S.Ct. at 999. . . . The ‘reasonably calculated’ qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.* *. . .* Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.* (emphasis in original.) . . . The IEP must aim to enable the child to make progress. . . . [T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement. *Id.*  . . . A focus on the particular child is at the core of the IDEA. . . . *Id.,* 137 S.Ct.at 1002.

*See, also, T.B., Jr. by & through T.B., Sr. v. Prince George’s Cty. Bd. of Educ.*, 897 F.3d 566, 571 (4th Cir. 2018), *cert. denied sub nom. T.B., Jr. ex rel. T.B., Sr. v. Prince George’s Cty. Bd. of Educ.*, 139 S. Ct. 1307, 203 L. Ed. 2d 415 (2019)*.*

The IDEA contemplates a continuum of educational placements to meet the needs of students with disabilities. Depending on the nature and severity of the disability, a student may be instructed in regular classes, special classes, special schools, at the home, or in hospitals and institutions. *See* 20 U.S.C. § 1412(a)(5), 34 C.F.R. § 300.115. FAPE must be “provided to a disabled child in the least restrictive and appropriate environment, with the child participating, to the extent possible, in the same activities as non-disabled children.” *MM ex rel. DM v. Sch. Dist. of Greenville Cty*., 303 F.3d 523, 526 (4th Cir. 2002) (citing 20 U.S.C. § 1412(a)(5)(A).)

In the present case, all of the IEPs proposed by XPS for Student since January 2019 have provided that Student’s LRE is a private day school, that is, the “special school” setting on the continuum of placements. However, after Nonpublic School 2 discharged Student in December 2018, Student’s IEP team agreed that Student would receive home-based instruction until Student would be placed in another private day school. Student’s January 29, 2019 IEP, provided, with Mother’s consent, that Student would be served with home-based instruction until Student could be placed in another private day school or through the next IEP meeting, whichever came first. There were numerous subsequent IEP team meetings for Student, including on February 25, 2019, June 18, 2019, July 10, 2019 and August 14, 2019, but after the January 29, 2019 meeting, XPS was unable to secure Mother’s consent for Student’s IEP to be revised. (Mother’s consent was required because, under the Virginia Regulations, informed parental consent is required before any change to a child’s IEP. *See* 8 VAC 20-81-170(E)(1)(d).) As a result, Student’s IEP placement has remained, per the January 29, 2019 IEP, home-based instruction until Student could be placed in another private day school.

Unfortunately, following Student’s discharge from Nonpublic School 2 in December 2018, there was no other suitable private day school available for Student in the XXXXXXXX area. At the time, Mother would not consent to Student’s commuting to an out-of-town day school or to Student’s attending an alternative public school. The home-based instruction, intended as an interim setting by Mother and the January 29, 2019 IEP team, turned out to be Student’s *de facto* educational placement until the 2020-2021 school year.

Due process review of IEPs under the IDEA is meant to be largely prospective and to focus on the student’s needs looking forward. A hearing officer thus asks whether an IEP was appropriate at the time an IEP was created. *See, e.g.,* *Schaffer ex rel. Schaffer v. Weast*, 554 F.3d 470, 477 (4th Cir. 2009). In the absence of suitable less restrictive options for Student, I conclude that interim home-based instruction until Student would be placed in another private day school, as provided in Student’s January 29, 2019 IEP, was reasonable and constituted Student’s least restrictive and appropriate environment in January 2019 and thereafter. *See* *Endrew F., supra;* *MM, supra.* I find, therefore, that Petitioner has not met her burden of persuasion that the educational placement for Student in the January 29, 2019 IEP and subsequent proposed XPS IEPs was not reasonably calculated to enable Student to make progress appropriate in light of Student’s circumstances. *See Endrew F., supra.*

# Failure to Implement

Petitioner’s claim that XPS denied Student a FAPE by keeping Student in an overly restrictive home-services environment after December 2018 may also be viewed as a claim that XPS failed to implement the provision in Student’s January 29, 2019 IEP that Student would only be in home-based instruction until Student could be placed in another private day school.

“[A] material failure to implement an IEP, or, put another way, a failure to implement a material portion of an IEP, violates the IDEA.” *Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478, 484 (4th Cir. 2011). However, as the Eleventh Circuit Court of Appeals recognized in *L.J. by N.N.J. v. Sch. Bd. of Broward Cty.*, 927 F.3d 1203 (11th Cir. 2019), in some cases a child’s IEP may be impossible to fully implement in a new setting. The Court explained, “[i]n those cases, it would be odd—and again, often impossible—for the IDEA to demand blind compliance with an out-of-date IEP in an educational context that it was not designed for and in which it cannot be carried out in its entirety.” *L.J.*, 927 F.3d at 1213.

Until Student was discharged from Nonpublic School 2 in November 2018, XPS had implemented the provision in Student’s March 24, 2016 IEP for Student’s placement in private day schools. XPS placed Student at Nonpublic School 1 from spring 2016 to the end of the 2016-2017 school year and at Nonpublic School 2 for the 2017-2018 school year and the first term of the 2018-2019 school year. The hearing evidence establishes that these were the only suitable private schools in the XXXXXXXX area able to meet Student’s needs and until the 2020-2021 school year, Mother would not consent to Student’s attending a private school in another locality.

Although Mother had requested XPS to place Student at Nonpublic School 3, in fall 2016, Nonpublic School 3 would not sign a placement contract for Student with XPS because of the city’s insurance coverage demands. When XPS did agree to place Student at Nonpublic School 3 in August 2019, there was no space available in Student’s grade. Also, Student was reportedly diagnosed with autism in 2019 and Nonpublic School 3 does not serve students on the autism spectrum.

In December 2019, Student was offered admission to Nonpublic School 4, a private day school in XXXXXX, XXXXXX. Mother presented the Nonpublic School 4 admission letter to Student’s IEP team for consideration. Aside from the XXXXXX school’s not being a Virginia licensed school for children with disabilities, the Virginia Regulations mandate, *inter alia*, that the placement by a student’s IEP team is based on the student’s IEP and is as close as possible to the student’s home. *See* 8 VAC § 20-81-130(C)(1)(b)(3). At the time Nonpublic School 4 was proposed, XPS did not know anything about the school and there needed to be research to see if the school was capable of servicing the student’s needs. Assuming that Nonpublic School 4 were capable of implementing Student’s IEP, there were closer Virginia schools to Student’s home. For example, XXXXXXXXXXXXXXX in XXXXXXXXXX was closer, but Mother had already declined to consider this private school because she considered the commute to be too long.

In the recent decision in *Alvarez v. Swanton Local Sch. Dist.*, No. 3:18CV1768, 2020 WL 4462876, at 8 (N.D. Ohio Apr. 28, 2020), the U.S. District Court for the Northern District of Ohio found that the school division was not liable for implementing home instruction in lieu of regular school, even though home instruction was not the child’s LRE. The Court found that by steadfastly, unreasonably, refusing to bring their daughter to school, the parents caused the district to implement the more restrictive option of home instruction. In its decision, the Court held that, based on “the totality of the circumstances,” the child received a free and appropriate public education that was reasonably calculated to enable her to make progress in light of her circumstances. *See Alvarez, supra.*

Unlike the parents in *Alvarez,* Mother did not refuse to send Student to Nonpublic School 1 or to Nonpublic School 2. However, both schools ended up unilaterally discharging Student because of their challenging relationships with Mother, not because of XPS’ nonfeasance. Further, the record establishes that after Nonpublic School 2 discharged Student in December 2018, XPS made continuous, diligent, efforts to place Student in a private day school. But there was no other suitable private school in the XXXXXXXX area and Mother was unwilling for Student to make the commute to a suitable out-of-town school. These circumstances made it impossible “to demand blind compliance” with the private day school placement provision in Student’s XPS IEP. *See* *L.J.*, *supra.*

Mother had consented in January 2019 for Student to receive home-based services until Student could be placed at a suitable private school. XPS made home-based services available. Unfortunately, for much of the period from January 2019 until fall 2020, Mother or Student refused the home-based services. Aside from home instruction not being the least restrictive option for Student, there was no evidence that home-based instruction was not appropriate for Student. In this unusual situation, I find that, based on the totality of the circumstances, Petitioner has not established that XPS denied Student a FAPE by failing to implement Student’s IEP private day school placement or by placing Student in the overly restrictive home-services environment.

# Expenses for Housing in XXXXXXX

After the due process complaint was filed in this case, Mother and XPS agreed to place Student at Nonpublic School 5, a private day school in XXXXXX, Virginia, some 100 miles from Student’s home in XXXXXXXX. In a new claim, Petitioner argues that now that Student has been placed at Nonpublic School 5, XPS is denying Student a FAPE by not funding lodging for Student and Mother closer to Nonpublic School 5. Mother

contends that as an IEP related service, XPS should pay to house Student near the XXXXXXX school so that Student does not have to commute such a long distance to the day school.

The agreement to enroll Student in Nonpublic School 5 came after the due process complaint was filed and the issue of whether XPS should provide housing for Student in XXXXXXX was not included in the February 11, 2020 Prehearing Order. Assuming, without deciding, that the issue is properly before me, for the following reasons, I conclude that the parent has not shown that XPS is required to provide housing for Student closer to the XXXXXXX private school.

The IDEA mandates that if the IEP placement is a residential program, the program, including non-medical care and room and board, must be at no cost to the parents or the student. *See* 34 C.F.R. § 300.104. The school division must also pay for transportation when required to assist a student with a disability to benefit from special education. *Id.,* § 300.34(a). However, the IDEA and its regulations do not address whether a school division must pay for housing when it places a student in an out-of-town special day school.

Existing case law is mixed on whether it is appropriate for a school district to place a child in a day school with a lengthy commute. In *K.M. by & through Markham v. Tehachapi Unified Sch. Dist.*, No. 115CV001835LJOJLT, 2017 WL 1348807 (E.D. Cal. Apr. 5, 2017), the U.S. District Court upheld the administrative law judge’s (ALJ) determination that, based on the student’s individual needs, an 80 minute bus ride was not unreasonable so as to deprive the student of a FAPE in the least restrictive environment. The ALJ found no evidence that the student would not be able to tolerate the trip for physical, mental, emotional, or behavioral reasons or that the commute would be unsafe. She found that the school district had adequately considered harm to the student and offered individual transportation to minimize harm. *Id.* at 21 (citing *Poolaw v. Bishop*, 67 F.3d 830, 836 (9th Cir. 1995) (holding that a residential placement 280 miles from a student’s home, where no closer adequate services were available, was appropriate); *Tammy S. v. Reedsburg Sch. Dist.*, 302 F. Supp. 2d 959, 977-80 (W.D. Wis. 2003) (a placement requiring a two hour and ten minute daily commute did not deprive a student of an education in the LRE because it was necessary to meet the student’s educational needs.)) *See, also, Choruby ex rel. D.C. v. NW. Reg’l Educ. Serv. Dist.*, No. CIV.01-54-JE, 2002 WL 32784016, at 9–10 (D. Or. Jan. 14, 2002) (Private school, located at least a thirty minute commute from the student’s home, was appropriate because it was the closest school equipped to provide the services the autistic student required.)

In *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467 (9th Cir. 1993), the Ninth Circuit Court of Appeals upheld the hearing officer’s decision that the school division had to pay rent and caretaker fees to the grandparents, so that the student could live with them and attend a nearby residential school’s day program. The student’s IEP provided for a residential placement. The hearing officer had found that the out-of-town school was the only appropriate educational placement for the student, but that there were no vacancies in its residential program. The school was located approximately eighty-five miles from the student’s home and the hearing officer found that a daily commute to the facility was impossible in light of the student’s “fragile health.” *Id.* at 1478–79.

In the present case, Student’s IEP provides for a private day school placement, not a residential program as described in the *Jackson* decision. At the time of the due process hearing, Student was only taking online classes and no evidence was offered as to when Student would start commuting to classes in XXXXXXX or how frequently Student would commute. Like the school district in *K.M., supra*, XPS has agreed to provide personal special education transportation for Student when Student does start attending class in person. Moreover, the hearing officer notes that Student is an adult and no competent evidence from a medical expert was offered that long car rides pose a risk to Student’s well-being. On this record, I conclude that Petitioner has not met her burden of persuasion that the commute from XXXXXXXX to Nonpublic School 5 is incompatible with Student’s needs, *See Jackson*, *supra*, 4 F.3d at 1480, or that the IDEA requires XPS to provide housing for Student near Nonpublic School 5 as a related service.

B. From December 2017 through July 2019, did XPS deny Student a FAPE by failing to provide intensive reading intervention, counseling services and parent counseling and training?

Since September 2019, has XPS denied Student a FAPE by failing to develop an appropriate Individualized Education Program for Student with an appropriate, research based, intensive reading program?

As discussed above in this decision, the U.S. Supreme Court decided in *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, *supra*, that to meet its substantive obligation under the IDEA, a school must offer an “IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S.Ct. at 999. In an impartial due process hearing, the parent bears the burden of proving her child was denied a free appropriate public education. *Weast v. Schaffer ex rel. Schaffer*, *supra*, 377 F.3d at 456, and “will have to offer expert testimony to show that the proposed IEP is inadequate.” *Id.*

In this decision, I have construed Petitioner’s claim that XPS denied Student a FAPE by not placing Student in a suitable education placement after December 2018 as, in part, an inappropriate IEP claim and found that Petitioner did not meet her burden of proof that Student’s IEPs were inappropriate on account of the IEP teams’ placement decisions.

At the due process hearing in this case, the Petitioner did not call an expert witness or offer qualified expert testimony that Student’s IEPs were inadequate for want of appropriate reading interventions, counseling services, parent counseling or training. Petitioner did not establish a *prima facie* case that Student’s XPS IEPs were inappropriate on those bases.

C. Did XPS deny Student a FAPE by failing to conduct a functional behavioral assessment (FBA) requested by the parent?

In 2019, Mother requested a functional behavioral assessment (FBA) of Student. At the time, Student was receiving home-based services. XPS did not conduct the FBA because Director of Special Education thought the FBA should be conducted after Student returned to the school setting, so that teachers, a school psychologist and a social worker could be involved and Student could be observed in the school setting. Director believed that an FBA in the home would not be a valid depiction of needs to support Student at school. After XPS had to close its schools in March 2020 due to the Coronavirus outbreak, XPS agreed to conduct an FBA of Student at the home.

Petitioner contends that XPS’ initial unwillingness to conduct an FBA of Student was a denial of FAPE. I disagree. The IDEA only explicitly mandates that an FBA be conducted in the discipline context, when a child with a disability has violated the code of student conduct and that conduct has been determined to be a manifestation of the child’s disability. *See* 34 C.F.R. § 300.530(f)(1)(i). A local education agency (LEA) is not required to conduct every assessment requested by a parent. Generally, the IEP team and other qualified professionals, as appropriate, must review existing evaluation data, and on the basis of that review, and input from the parent, identify what additional data, if any, such as an FBA are needed to determine the educational needs of the student. *See* 35 C.F.R. 300.305(a)(2). Decisions regarding the areas to be assessed are determined by the suspected needs of the child. *See* U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46540, 46643 (August 14, 2006). The exercise of professional judgment by the child’s educators as to areas to be assessed is entitled to a reasonable degree of deference. *See, e.g., D.M. v. Seattle Sch. Dist.*, No. C15-1390-MAT, 2016 WL 4721802, at 8 (W.D. Wash. Sept. 9, 2016) (Upholding hearing officer’s finding that it was reasonable for LEA to not conduct new assessments in all areas requested by parent.)

The evidence at the due process hearing showed that Student’s did not exhibit behavior problems at school. *See, e.g.,* Testimony of Special Education Director, Testimony of English Teacher. Nor was there evidence that Student’s IEP team determined that an FBA of Student was needed.

Although a parent does not have the right to require an LEA to conduct specific assessments of her child, under the IDEA, subject to certain conditions, a parent has the right to an independent educational evaluation (IEE) at public expense if the parent disagrees with an evaluation obtained by the public agency and if the parent requests an IEE. *See* 34 CFR § 300.502. At the due process hearing in this case there was no evidence that Mother notified XPS of any disagreement with an evaluation conducted by the school division or that she requested XPS to fund an IEE of Student in 2019 or at any time before filing her complaint in this case.

Lastly, there is persuasive case law that an FBA is not an IDEA evaluation in its own right —at least not with respect to a parent’s entitlement to an IEE at public expense. In its very recent decision in *D.S. By & Through M.S. v. Trumbull Bd. of Educ.*, No. 19-644, 2020 WL 5552035 (2d Cir. Sept. 17, 2020), the Second Circuit Court of Appeals pronounced,

[A] FBA is best considered as an “assessment tool” or “evaluation material” that a school can use in conducting an evaluation. *See* 20 U.S.C. § 1414(b)(2)(A), (b)(3)(A). Assessment tools are employed in the evaluation process to “yield accurate information on what the child knows and can do academically, developmentally, and functionally.” *Id.* § 1414(b)(3)(A)(ii). But an assessment tool is not an “evaluation” in its own right —at least not with respect to a parent’s entitlement to an IEE at public expense.

*Id.* at 9. The Second Circuit held that because the FBA conducted by the LEA was not an evaluation as that term is employed in the IDEA, the parents did not have a right to an IEE at public expense based on their disagreement with that assessment. *Id.* *But see, Letter to Christianson*, 48 IDELR 161 (OSEP Feb. 9, 2007) (If FBA is conducted to help determine whether a child has a qualifying disability or to determine the extent of service the child requires, the FBA qualifies as an evaluation.) For all of these reasons, I conclude that Petitioner has not met her burden of persuasion that XPS denied Student a FAPE by not conducting an FBA when requested by the parent in 2019.

D. In August 2019, did XPS deny Student a FAPE by seeking to impede the parent’s right to file a request for a due process hearing?

After Student’s December 2018 discharge from Nonpublic School 2, at IEP team meetings in January 2019, XPS offered Student home-based services, until another suitable private day school for Student could be identified. Although the parent consented to interim home-based services for Student, she refused services from Home-Based Instructor 1 and Student did not receive home-based services from January 2019 through the end of the 2018-2019 school year.

At an August 14, 2019 IEP team meeting, XPS proposed a resolution agreement between XPS and Mother, wherein XPS would agree to fund Student’s placement at Nonpublic School 3 and Mother would agree that she would not file a due process complaint or other complaint for the period in the 2018-2019 school year that Student was receiving home-based instruction. Mother did not accept the offer. XPS sought Student’s admission to Nonpublic School 3 anyway, but the private school did not have an opening in Student’s grade.

In her due process complaint, Mother contends that by conditioning funding for Student’s placement at Nonpublic School 3 on Mother’s waiving the right to file a due process complaint, XPS denied Student a FAPE. XPS responds that its proposal was made in a settlement offer to the parent and was proper. Under the IDEA, a parent has the right to file a due process complaint on matters relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child. *See* 34 C.F.R. § 300.507(a)(1). Petitioner has not cited, and the hearing officer is unaware of, any authority barring a school division from entering into a settlement agreement with a parent to waive the parent’s right to file a due process complaint concerning past events – subject to the school division’s absolute obligation to ensure that a FAPE is made available to the child. *See* 34 C.F.R. § 300.101(a).

In the present case, XPS’ proposed agreement became moot because Mother did not agree to waive her due process hearing rights. Moreover, XPS and Mother learned shortly after the August 14, 2019 IEP team meeting that Nonpublic School 3 did not have space available for Student. Nor was there evidence that XPS did impede Mother’s right to file a request for a due process hearing. Mother, in fact, filed due process complaints against XPS on September 25, 2019, October 23, 2019, December 26, 2019 and, in the present matter, on February 5, 2020. In each complaint Petitioner alleged that XPS denied Student a FAPE by providing only home-based instruction after January 2019. I conclude, therefore, that Mother has not met her burden of persuasion that XPS denied Student a FAPE by seeking to impede the parent’s right to file a request for a due process hearing at the August 2019 IEP team meeting.

# ORDER

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

Petitioner’s February 4, 2020 Administrative Due Process Complaint Notice is dismissed. All relief requested by the Petitioner herein is denied.

Date: October 19, 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)