**#21-052**

**COMMONWEALTH OF VIRGINIA**

**DEPARTMENT OF EDUCATION**

**OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES**

In re: XXXXXXXXXXXXXXX

 Hearing Officer: Peter B. Vaden

 Due Process Hearing Request

 (XXXXXXXX Public Schools) VDOE Case No. 21-052

# HEARING OFFICER DECISION

KEY TO PERSONAL IDENTIFICATION INFORMATION

 Student XXXXXXXXXXXXXXX

 Age X years old

 Birthday XXXXXXX X, XXXX

 Petitioner/Mother XXXXXXXXXXXX

 LEA Representative XXXXXXXXXXXX

 XXXX School XXXXXXXXXXXXXXXXXXXXXX School

 Speech-Language Pathologist (SLP) XXXXXXXXXXXXXXX

 Parent’s Counsel Nicholas Ostrem, Esq.

 XXPS’ Counsel 1 John Cafferky, Esq.

 XXPS’ Counsel 2 Melissa Little, Esq.

In re: STUDENT1 }

} Hearing Officer: Peter B. Vaden

Due Process Hearing Request }

(XXXXXXXX Public Schools) } VDOE Case No. 21-052

## **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) 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 this proceeding, Mother seeks relief against Respondent XXXXXXXX Public Schools (XPS) for the school division’s alleged failure to provide the parent copies of STUDENT’s complete education records and its alleged failure to comply with a subpoena *duces tecum* issued by this hearing officer.

Student, an AGE child, is a resident of XXXXXXXX XXXX, Virginia. Petitioner’s original Due Process Complaint Notice was filed on February 16, 2021 and named XPS as respondent. The undersigned hearing officer was appointed on February 17, 2021. On February 24, 2021, I convened a telephone prehearing conference with the parties and their counsel to set the due process hearing date and discuss issues to be

1 Personal identification information is provided in attached Key to Personal Identification Information.

determined and other prehearing matters. On February 26, 2021, XPS, by counsel, filed its Motion to Dismiss and Answer to the Due Process Complaint. The parties met on line for a resolution session meeting on March 3, 2021 and did not resolve the issues in dispute.

On March 23, 2021, the hearing officer issued a subpoena *duces tecum* to Mother requested by XPS, to which Mother filed objections. By order issued March 26, 2021, I sustained in part and overruled in part Mother’s objections.

On March 26, 2021, the hearing officer issued a subpoena *duces tecum* to XPS requested by Mother, to which XPS responded on April 6, 2021. Mother considered XPS’ response to be incomplete. On April 7, 2021, Mother filed a motion to enforce her subpoena *duces tecum* and for a continuance of the scheduled April 14-15, 2021 due process hearing dates. By order issued April 7, 2021, I denied Mother’s motion to enforce her subpoena and denied the request to continue the hearing date.

On April 13, 2021, the hearing officer granted Mother’s unopposed request for leave to file an amended due process complaint, which she had submitted on April 12, 2021. As a result, the timelines for XPS to respond to the amended complaint, for the resolution period and for the due date for the final decision were restarted, retroactive to April 12, 2021. The due process hearing date was continued to June 3, 2021 and the final decision due date was extended to June 26, 2021.

On April 27, 2021, the parties convened on-line for a second resolution session meeting. The parties were not successful in resolving the issues in dispute.

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On April 22, 2021, XPS filed its answer to the amended complaint and motion to dismiss. By order issued May 5, 2021, I denied XPS’ motion to dismiss. On May 22, 2021, I granted Mother’s unopposed request to continue the due process hearing dates to June 17 and 18, 2021.

On or about May 19, 2021, Mother filed a motion in XXXXXXXX XXXX Circuit Court to enforce her March 26, 2021 subpoena *duces tecum* served on XPS. On June 8, 2021, the Honorable Judith Wheat, Judge, issued a decision denying Mother’s motion for want of authority in the Court to enforce the subpoena. On June 9, 2021, Mother, by counsel, requested the hearing office to continue the due process hearing to allow Mother time to renew her motion with the hearing officer to enforce her subpoena *duces tecum*. By email sent June 9, 2021, the hearing officer denied her request.

On June 11, 2021, the hearing officer granted Mother’s unopposed request to withdraw all but two issues asserted in the April 12, 2021 amended due process complaint. The issues remaining for determination are (i) Failure to provide access to complete educational records and (ii) Failure to comply with an administrative order.

The due process hearing was held on line before this Impartial Hearing Officer on June 17, 2021. Due to the restrictions on public gatherings arising from the Coronavirus pandemic, by agreement of both parties, XPS hosted the virtual hearing on the Microsoft Teams videoconferencing platform. The hearing, which the parent elected to open to the public, was transcribed by a court reporter. Mother appeared on line for the hearing and was represented by PETITIONER’S COUNSEL. Respondent XPS was represented by LEA REPRESENTATIVE and by XPS’ COUNSEL 1 and XPS’ COUNSEL 2.

Petitioner waived making an opening statement. XPS’ Counsel 1 made an opening statement for XPS. Mother was the only witness for Petitioner. XPS called LEA Representative at its sole witness. Mother was re-called as a rebuttal witness.

Petitioner’s Exhibits P-1 through P-41 were admitted into evidence without objection. XPS’ Exhibits R-49, R-59, R-61 through R-65, R-68 through R-78, R-80, R-83 Part P, R-85, R-87, and R-88 were admitted into evidence without objection. I sustained

Petitioner’s objection to Exhibit R-79. In addition, I admit for background information, as hearing officer exhibits, Exhibit R-12 (Exhibit Hearing Officer 1), Exhibit R-47 (Exhibit Hearing Officer 2) and Exhibit R-23 (Exhibit Hearing Officer Exhibit 3). After the taking of the evidence was completed, Petitioner’s Counsel and XPS’ Counsel 1 made oral closing arguments.

In a written order issued June 22, 2021, in order to allow sufficient time for the court reporter to prepare the hearing transcript and for the hearing officer to review the evidence and prepare the final decision, by agreement of counsel, I extended the final decision due date in this case from June 26, 2021 to July 30, 2021.

## **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 in this case, as stated in my June 11, 2021 email to the parties, are:

1. Whether XPS denied Student a FAPE by failing to provide the parent access to

Student’s complete educational records and

1. Whether XPS denied Student a FAPE by failing to comply with the hearing officer’s March 26, 2021 subpoena *duces tecum* issued on behalf of the parent.

For relief, Mother requests that the hearing officer issue an order requiring XPS to promptly provide the parent copies of all documents maintained in Student’s education record and all documents concerning Student responsive to the March 26, 2021 subpoena *duces tecum* to XPS*.*

## **FINDINGS OF FACT**

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

1. At all times concerned in this proceeding, Student has been a resident of XXXXXXXX XXXXX, Virginia. Student attends XXXXX SCHOOL. Testimony of LEA Representative.
2. On April 26, 2018, Student was determined eligible for special education and related services under the disability classification Speech or Language Impairment (SLI). Exhibit Hearing Officer 1. Student’s continued special education eligibility under the SLI classification was determined on December 10, 2019. Exhibit Hearing Officer 2.
3. Student’s June 13, 2019 XPS Individualized Education Program (IEP) provided for Student to receive 2 hours per month of Speech-Language Pathology services. No other special education or related services were provided in the IEP. Exhibit Hearing Officer 3. The hearing record does not establish whether Student’s Speech-Language Pathology services were subsequently modified. At an IEP team

meeting on January 19, 2021, which Mother did not attend, the XPS IEP team proposed an IEP which would discontinue Student’s special education and related services, except for 1 hour per month of Speech-Language Consult-Monitor services. Exhibit R-62. (The appropriateness of the January 19, 2021 IEP is not at issue in this proceeding.)

1. On November 30, 2020, SPEECH-LANGUAGE PATHOLOGIST (SLP) at XXXXX School wrote Mother by email regarding scheduling an annual IEP review meeting for Student in January 2021. Mother responded by email that she was available on January 12, 2021. Mother copied the email to Petitioner’s Counsel. On December 1, 2021, Petitioner’s Counsel confirmed the on-line IEP team meeting for January 12, 2021 at 3:00 p.m. On January 5, 2021, Petitioner’s Counsel, by email to XPS’ Student Support Coordinator, requested to change the IEP meeting date to January 19, 2021, to which XPS agreed. Exhibit P-2.
2. In the January 5, 2021 email, Petitioner’s Counsel wrote that “we look forward to receiving the draft IEP and any other documents that the school plans to reference/review prior to the meeting.” On January 15, 2021, Petitioner’s Counsel wrote XPS “to see how the student records and draft IEP are coming” and to request that they be provided as soon as possible. On January 15, 2021, SLP sent Petitioner’s Counsel a draft IEP by email. She wrote that she had a conflict on January 15, 2021 and another XPS staff person, who was familiar with Student and the family, would present the IEP. Petitioner’s Counsel responded the same day and requested that the IEP meeting be rescheduled for when SLP would be available. Petitioner’s Counsel also thanked SLP for providing the draft IEP and requested a “copy of the student’s records so far this year.”

XPS responded by email on January 15, 2021 recalling that the IEP team meeting had already been rescheduled at Mother’s request and they were required to meet by the IEP annual due date of January 21, 2021. Mother requested, by email, to move the meeting to January 21, 2021, but XPS was not available on that day. XPS wrote Petitioner’s Counsel that it would need to hold the meeting on January 19, 2021, as scheduled. On January 19, 2021, XPS wrote by email that it would move the meeting time to 1:30 p.m., when SLP was available. Petitioner’s Counsel responded by again requesting Student’s records before the meeting “as required by law.” SLP responded by email the same day, providing “all the records she had” for Student, comprising 2020-2021 session notes from speech therapy sessions, and a write-up of a class observation and teacher interview. Petitioner’s Counsel responded with a request for Student’s report cards, IEP progress reports and the “whole” draft IEP document. SLP responded that she did not have access to Student’s report cards, but that the parent should be able to view them on line, that IEP progress reports had not yet been completed for the school year and that she had provided so much of the draft IEP as had been completed in advance of the IEP team meeting. Exhibits P-1, P-2.

1. XPS convened the IEP annual review meeting for Student on January 19, 2021. Mother and her representative did not attend or participate. The IEP team completed a proposed IEP for Student and XPS sent a copy to Mother. Testimony of Mother. The hearing record does not establish if the January 19, 2021 IEP was implemented or whether Student continued to receive Speech-Language Pathology services under a prior IEP.
2. On February 16, 2021, Mother, by counsel, filed her initial request for a due process hearing in this case. In the due process complaint, Mother requested, *inter alia*, that XPS be ordered to immediately provide a copy of Student’s complete educational records, via email to Petitioner’s Counsel. Exhibits P-3.
3. On March 3, 2021, LEA Representative sent Mother, by email, copies of all records maintained at XXXXX School for Student since 2016. Testimony of LEA Representative, Exhibit R-71. These records did not include emails because XPS has a policy that it does not maintain emails as part of the student record. Testimony of LEA Representative.
4. Since March 3, 2021, XPS has repeatedly written Mother and Petitioner’s Counsel to offer dates to reconvene Student’s IEP team. As of the due process hearing date, Mother had not provided any dates that she would be willing to attend an IEP team meeting. Testimony of LEA Representative, Testimony of Mother, Exhibits R-68, R-69, R-75, R-77, R-78. Mother told XPS that she would want more documents before she decided on IEP meeting dates. Testimony of Mother.
5. On March 26, 2021, the hearing officer issued a subpoena *duces tecum* to XPS upon the request of Mother, requiring production, generally, of all documents pertaining to Student. Exhibit P-12.
6. Upon receipt of the subpoena *duces tecum*, LEA Representative arranged with XPS’ information technology staff to search and pull responsive documents pertaining to Student in XPS’ electronic database. For electronic search terms, XPS used staff names identified in the subpoena, Student’s first and last names and XPS

identification number, Student’s initials, Mother’s name and Petitioner’s Counsel’s name. Testimony of LEA Representative. In emails sent April 5 and 6, 2021, XPS, by counsel, provided Petitioner’s Counsel the documents located in the search, attaching over 700 pages of documents. Exhibits P-17, P-19.

1. Mother considered the April 5-6, 2021 subpoena *duces tecum* response from XPS to be incomplete. On April 7, 2021, Mother, by counsel, filed with the hearing officer a motion to enforce the subpoena *duces tecum* and also requested a continuance of the scheduled April 14-15, 2021 due process hearing. In her motion, Mother alleged that review of the documents provided by XPS in response to Mother’s subpoena “revealed that almost all of them had already been provided to [Mother] previously” and it did not appear that XPS provided any new documents in response to most of the enumerated categories in the subpoena. XPS’ Counsel 2 responded by email that XPS had provided documents responsive to Mother’s subpoena, including email correspondence; that it was unclear from Mother’s motion what documents she believed were missing. By order issued April 7, 2021, the hearing officer denied Mother’s motion to enforce the subpoena, holding,

In light of the April 7, 2021 [due process hearing] exhibit disclosure deadline and the April 14-15, 2021 hearing dates, Petitioner has provided no justification for not filing her subpoena *duces tecum* request until March 22, 2021 and setting April 5, 2021 as the date for XPS to respond to the subpoena request. Nor has Petitioner identified any documents or class of documents, responsive [to] the subpoena *duces tecum*, which XPS has allegedly failed to produce. Moreover, Virginia Code § 22.1-214.1 and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia provide that in case of refusal or neglect to comply with the hearing officer’s subpoena *duces tecum*, the remedy is to seek an order of enforcement from the circuit court of the jurisdiction in which the

hearing is to be held, that is, in this case, the XXXXXXXX XXXXX Circuit Court – not from the Hearing Officer.

Exhibits P-23, P-25, P-27.

1. On April 12, 2021, Mother filed her amended due process complaint in this matter and requested that the due process hearing scheduled for April 14-15, 2021 be “vacated.” XPS did not oppose Mother’s request to amend. On April 13, 2021, the hearing officer granted Mother’s request to amend her complaint and cancelled the April 14-15, 2021 due process hearing. The due process hearing was eventually rescheduled for June 17, 2021. Hearing Officer Notice.
2. On or about May 19, 2021, Mother filed a motion in XXXXXXXX XXXXX Circuit Court to enforce her March 26, 2021 subpoena *duces tecum* served on XPS. On June 8, 2021, the Honorable Judith Wheat, Judge, issued a decision denying Mother’s motion to compel for want of authority in the Court to enforce the subpoena. Exhibit P- 40.
3. On June 9, 2021, Mother, by counsel, requested the hearing officer to continue the due process hearing to allow Petitioner time to renew her motion to enforce her subpoena *duces tecum* to XPS. By email sent June 9, 2021, the hearing officer denied her request, stating that Petitioner had not specified what, if any, subpoenaed documents XPS had allegedly failed to produce or the relevance to this case of the documents allegedly not produced and stating that there was not enough information for the hearing officer to analyze or adjudicate Petitioner’s motion to enforce compliance with the subpoena. The hearing officer also denied, without

prejudice, Mother’s continuance request. In the email, the hearing officer stated that he assumed that Mother’s May 19, 2021 motion to enforce the subpoena *duces tecum*, prepared for XXXXXXXX XXXXX Circuit Court, could be adapted for the administrative proceeding. Exhibit P-41.

## **CONCLUSIONS OF LAW**

Based upon the above findings of fact and argument 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**

Mother, as the party who filed the April 12, 2021 amended due process hearing request, must bear 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 proof 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 XPS deny Student a free appropriate public education (FAPE) by failing to provide the parent access to Student’s complete educational records?

In the April 12, 2021 Amended Due Process Complaint Notice (the Amended Complaint), Mother alleges that XPS has failed to provide the parent access to Student’s complete educational records. XPS responds that it has provided the parent Student’s complete education records. Mother has the burden of persuasion for this claim.

Under the IDEA and the Family Educational Rights and Privacy Act (FERPA), 20

U.S.C. § 1232(g), local education agencies (LEAs) must permit parents to inspect and review any education records relating to their child with a disability that are collected, maintained, or used by the agency. *See* 34 CFR §§ 300.613(a), 300.501(a); *See, also,* 8 Va. Admin. Code 20-81-170(A)(1)(a)(i) (Parent of a child with a disability shall be afforded an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the child.) The term “education records” means, with specified exceptions, those records, files, documents, and other materials which— (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 USC § 1232g(a)(4). An LEA must comply with a records inspection request without unnecessary delay and before any meeting regarding an IEP, and in no case more than 45 days after the request has been made. 34 C.F.R. § 300.613(a).

In this case, the parties disagree about when Mother requested copies of Student’s complete education records. In oral argument, Petitioner’s Counsel suggested that the parent requested copies of Student’s complete records from XPS in an email Petitioner’s Counsel sent to XPS on January 5, 2021. XPS contends that the parent did not request copies of Student’s complete education records until she filed her initial due process complaint in this case. I find that XPS is correct.

In his January 5, 2021 email to XPS’ Student Support Coordinator, Petitioner’s Counsel requested, specifically, XPS’ draft IEP for Student and “any other documents that the school plan[ned] to reference/review prior to the meeting” which had been scheduled for January 19, 2021. In that email, Petitioner’s Counsel did not request Student’s complete education record. In an email sent January 15, 2021, Petitioner’s Counsel requested a “copy of the student’s records so far this year” but no evidence was introduced that prior to February 16, 2021, the parent or her representative requested copies of Student’s entire education record. In Petitioner’s February 16, 2021 original due process complaint in this case, for relief, Petitioner requested, *inter alia*, that the hearing officer order XPS to immediately provide a copy of Student’s “complete educational records” to counsel. Some 15 days later, on March 3, 2021, LEA Representative sent Mother by email what were said to be copies of all records maintained at XXXXX School for Student since 2016. I find by the preponderance of the evidence that the parent did not request copies of Student’s complete education record before February 16, 2021 and I conclude that XPS’ March 3, 2021 response to the February 16, 2021 request was timely.

Mother also contends that XPS’ March 3, 2021 education records production was incomplete because it did not include emails concerning Student. LEA Representative testified that XPS has a policy that it does not maintain emails as part of a child’s education record, unless a parent requests that an email be added to the child’s file. In oral argument, Petitioner’s Counsel cited a Virginia special education regulation which appears to require that emails be part of a child’s educational record. The Virginia Regulations provide that each LEA “shall ensure that electronic communications via emails or facsimiles regarding any matter associated with the child, including matters related to IEP meetings, disciplinary actions, or service delivery, be part of the child’s educational record.” *See* 8 VAC 20-81-170(G)(11)(b). This regulation notwithstanding, Mother has not shown that there were any education records relating to Student, actually collected, maintained, or used by XPS, which XPS failed to timely provide to the parent, following her request for Student’s complete educational records in the February 16, 2021 due process complaint. (Whether XPS’ policy not to retain emails as part of students’ education records violates 8 VAC 20-81-170(G)(11)(b) is not an issue before me in this proceeding.2)

II.

Did XPS deny Student a FAPE by failing to comply with the hearing

2 The Virginia Regulations provide that to challenge information in education records, allegedly in violation of the privacy or other rights of the child, a parent may request a hearing to be conducted in accordance with the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232(g). The LEA may develop local procedures for such a hearing process or obtain a hearing officer from the Supreme Court of Virginia’s special education hearing officer list. *See* 8 VAC 20-81-170(G)(7), (G)(9).

officer’s March 26, 2021 subpoena *duces tecum* issued on behalf of the parent?

In special education due process proceedings in Virginia, there is no provision for prehearing discovery. Virginia law does empower special education hearing officers to issue subpoenas requiring testimony or the production of books, papers, and physical or other evidence. *See* Va. Code Ann. § 22.1-214.1. On March 26, 2021, this hearing officer issued a subpoena *duces tecum*, requested by the Petitioner, which required XPS to produce, generally, all documents pertaining to Student. XPS did not object to the subpoena request. Mother claims that XPS denied Student a FAPE by failing to provide her all documents concerning Student that were responsive to the subpoena *duces tecum.* XPS maintains that it made a diligent search of its electronic records and that it provided Mother all responsive documents concerning Student that could be located.

XPS argues that where an LEA allegedly fails to comply with a parent’s prehearing subpoena *duces tecum,* the parent must bring the issue to the hearing officer in a *pendente lite* motion to compel production and that failure to comply with a parent’s subpoena may not be deemed a denial of FAPE.3 Neither party has cited controlling authority on this question. By analogy, an LEA’s failure to afford a parent access to her child’s education records may be a procedural violation of the IDEA and

3 In this administrative proceeding, Petitioner did file a motion to enforce her subpoena *duces tecum* on April 7, 2021, which this hearing officer denied. The parent then filed a motion for enforcement of the subpoena in XXXXXXXX XXXXX Circuit Court. After the Court held that it lacked authority to enforce the subpoena, the hearing officer informed Petitioner’s Counsel that counsel could adapt the parent’s Circuit Court motion for the administrative proceeding. Counsel elected not to do so.)

may be deemed a denial of FAPE. *See, e.g., Matthews v. Douglas Cty. Sch. Dist. RE 1*, No. 16-CV-0717-MSK, 2018 WL 4790715, at \*9 (D. Colo. Oct. 4, 2018); *L.M.H. v.*

*Arizona Dep’t of Educ.*, No. CV-14-02212-PHX-JJT, 2016 WL 3910940, at \*6 (D. Ariz. July 19, 2016).4 Assuming without deciding, that an LEA’s failure to comply with a parent’s pre-hearing subpoena *duces tecum* may be deemed a denial of FAPE, I find that Petitioner has not established that XPS failed to comply with the March 26, 2021 subpoena *duces tecum.*

Under the Federal Rules of Civil Procedure, parties are permitted to “obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” Fed. R. Civ. P. 26(b)(1).5 Since XPS is a party to this administrative proceeding, I conclude that XPS’ duty to respond to the parent’s subpoena *duces tecum* was analogous to a party’s obligation to respond to a document discovery request under Fed. R. Civ. P. 34. That is, the responding party

4 In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies—

* + 1. Impeded the child's right to a FAPE;
		2. 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

* + 1. Caused a deprivation of educational benefit.

34 C.F.R. § 300.513(a)(2).

5 The Federal Rules of Civil Procedure are not applicable to special education due process proceedings. They are cited here only by analogy.

must make a reasonable inquiry and exercise due diligence to locate and provide the requested documents. *See, e.g.*, *Lopez v. Don Herring Ltd.*, 327 F.R.D. 567, 578 (N.D. Tex. 2018).

Upon receipt of Mother’s March 26, 2021 subpoena *duces tecum*, LEA Representative arranged with XPS’ information technology staff to search and pull responsive documents stored electronically by XPS. As data search terms, XPS used Student’s first and last names and XPS identification number, Student’s initials, Mother’s and Petitioner’s Counsel’s names and XPS staff names identified in the subpoena. In emails sent April 5 and 6, 2021, XPS’ Counsel 2 provided Petitioner’s Counsel the search results product, producing over 700 pages of documents.

Petitioner offered no probative evidence that the electronic data search process used by XPS to search for documents responsive to the subpoena *duces tecum* was not appropriate or that XPS did not make reasonable inquiry or exercise due diligence in responding to the subpoena. Petitioner’s Counsel argued in his closing that it “just defies common sense” that XPS did not possess more email chains concerning Student than it produced but Petitioner was not specific about any additional documents in XPS’ possession, custody or control, responsive to the subpoena *duces tecum,* which XPS failed to produce. LEA Representative, who coordinated XPS’ response to the subpoena *duces tecum*, testified credibly, that using the criteria contained within the subpoena, everything that was listed in the document request was searched for electronically and, to the extent it existed, was provided to Petitioner. I conclude, therefore, that Mother did not meet her burden of persuasion that XPS failed to comply with the March 26,

2021 subpoena *duces tecum.*

## **ORDER**

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

All relief requested by the Petitioner herein is denied. The Petitioner’s April 12, 2021 Amended Due Process Complaint Notice is dismissed.

Date: July 14, 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.