

COMMONWEALTH OF VIRGINIA

DUE PROCESS HEARING

In Re: [REDACTED], by and through [REDACTED] Parents,  
[REDACTED] AND [REDACTED],  
Petitioners

v.

[REDACTED] PUBLIC SCHOOLS, Respondent.

**Counsel for Petitioners:**

Sarah Ratner, Esq.  
Todd Ratner, Esq.

**Counsel for Respondent:**

LaRana Owens, Esq.  
Patrick Andriano, Esq.  
Anne Mickey, Esq.

**AMENDED DECISION**

This matter came to be heard before the hearing officer (the “Hearing Officer”) upon a Due Process Request Hearing (the “Complaint”) filed by [REDACTED] and [REDACTED] [REDACTED] (hereinafter referred to as the “Parents”) on behalf of their [REDACTED], [REDACTED] (hereinafter referred to as “[REDACTED]”) pursuant to the Individuals with Disabilities Education Act (the “Act”), 20 U.S.C. Sec. 1400, *et seq.*, and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 8 VAC 20-81. As the moving party, the Parents assume the burden of proof in the Complaint. *Schaffer v. Weast*, 546 U.S. 49 (2005).<sup>1</sup> The Parents’ standard of proof is “upon a preponderance of the evidence.” 8 VAC 20-81.O.13.

**1. Procedural History**

[REDACTED] Public Schools (“[REDACTED] PS” or the “School District”) received the Complaint on February 1, 2022. The Act’s 75-day timeline began on February 2, 2022. [REDACTED] PS filed a Response to the Parents on February 11, 2022. Thereafter, [REDACTED] PS and the Parents participated in a resolution meeting on February 17, 2022. The Parents filed a Motion for Default Judgment or Alternative, Appropriate Remedy for [REDACTED] School Board’s Deficient Response to the Request for Due Process on February 21, 2022. [REDACTED] PS filed the [REDACTED] School Board’s Response to the Parents’ Motion for Default Judgment

<sup>1</sup> See also *Schaffer*, “The burden of persuasion in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.” *Id.* at pp. 6-12.

on February 25, 2022. ■■■ PS filed the ■■■ School Board's Motion to Dismiss Certain Claims on February 25, 2022. ■■■ PS filed the ■■■ School Board's Motion to Quash Subpoena For Production of Documents on March 4, 2022. The Parents filed their Response to ■■■ School Board's Motion to Dismiss Certain Claims on March 4, 2022. The Parents filed the Parents' Response to the ■■■ School Board's Motion to Quash Subpoena for Production of Documents on March 6, 2022. The Hearing Officer provided oral argument opportunities to the Parents and to ■■■ PS on all motions.

The Hearing Officer conducted pre-hearing conferences with the Parents and ■■■ PS on February 10, 2022, February 25, 2022, March 10, 2022, and March 17, 2022. The hearing date was set on February 10, 2022.<sup>2</sup> The Hearing Officer issued the following rulings and orders with respect to the parties' motions:

1. Ruling on ■■■'s Motion to Quash Subpoena for the Production of Documents on March 11, 2022;
2. Ruling on the Parents' Motion for Default Judgment on March 11, 2022;
3. Ruling on ■■■ School Board's Motion to Dismiss Certain Claims on March 11, 2022; and
4. Order on April 11, 2022 denying admissibility of the Parents' exhibit containing a portion of the February 19, 2021 IEP meeting audio recording between the Parents and ■■■ PS.

Both the Parents and ■■■ PS provided witness lists and exhibit copies to the Hearing Officer on March 14, 2022. On the same date, the Parents filed a Motion to Permit Public Access to the Due Process Hearing by Live Streaming. On March 15, 2022, the Parents filed a Motion for Permission to Allow Expert Witness to Testify Remotely. The Parents were provided with an opportunity for oral argument on both motions.

The due process hearing began on March 21, 2022, and concluded on March 30, 2022. Counsel for both parties submitted closing briefs on April 11, 2022. The Hearing Officer submitted a decision with respect to the due process hearing on April 15, 2022.

## **2. Issues Presented**

- (1) Did ■■■ PS properly provide ■■■ with a free appropriate public education through the development of IEPs from February 2019 through February of 2020?
- (2) Did ■■■ PS properly provide ■■■ with a free appropriate public education from February 2020 through February 2021?

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<sup>2</sup> Parents' counsel and the School District's counsel conferred and agreed to the first conference date and to the due process hearing dates.

- (3) Does [REDACTED] require placement at [REDACTED] (“[REDACTED]”), a private day school?

### 3. Factual Findings

[REDACTED] is a [REDACTED] ([REDACTED]) year old [REDACTED] grade student who qualified for special education services on April 10, 2019 under the special education category under the Act, Specific Learning Disability (SLD).<sup>3</sup> [REDACTED] is highly intelligent. [REDACTED] creative mind is evidenced by [REDACTED] advanced essays providing [REDACTED] impressions of the pandemic, historical figures or [REDACTED] animals. Generally, [REDACTED] writes essays about places, people and animals which are descriptive and imaginative. [REDACTED] is advanced beyond [REDACTED] years and appropriately defined as “twice-exceptional.” Tr. Day 4, pp. 1099, 13-17. When [REDACTED] is fully engaged, [REDACTED] is capable of learning subjects to [REDACTED] fullest capacity as [REDACTED] has repeatedly shown and has made meaningful academic progress. Per [REDACTED] [REDACTED] grade teacher, [REDACTED] helped her teach young spellers how to read, how to decode words and how to phonetically figure out words [REDACTED] did not yet know.

[REDACTED]’s grade reports show that [REDACTED] excelled academically during the beginning of [REDACTED] grade year in 2019-2020. However, on March 23, 2019, at the beginning of the COVID-19 pandemic (the “Pandemic”), all [REDACTED] schools in the State of Virginia closed for grades K-12 per orders from the Governor. When the Pandemic resulted in [REDACTED]PS’s cancellation of in-person instruction, virtual instruction became [REDACTED]’s reality. [REDACTED]’s general education and special education teachers testified<sup>4</sup> that [REDACTED] made meaningful progress toward [REDACTED] IEP goals by the end of the 2019-2020 school year at [REDACTED] School (“[REDACTED]S”). But the [REDACTED]S teachers stated further that they were unable to administer SOL testing at the year’s end. [REDACTED]’s last marks in the [REDACTED] grade were as follows: Reading – B; Writing – A; Social Studies – B; Math – C; and Science – A.

At the end of the 2020-2021 school year, [REDACTED]’s grades were as follows: Science – A; Math – A; Social Studies – A; Writing – A; and Reading – A. [REDACTED] passed both of [REDACTED] SOL’s and earned scores of 421 in reading and a score of 435 in math. Both tests have passing grades of 400. With respect to academic assessments, [REDACTED] showed dramatic progress on the Measure of Academic Progress (“MAP”) educational assessment. [REDACTED] earned a score of 171 in the winter of 2020 and improved to a score of 212 in the spring of 2021. [REDACTED] also earned higher scores in math, progressing from a winter, 2020 score of 208 to a spring, 2021 score of 226. But on May 19, 2021, [REDACTED]’s parents formally notified the public school that they intended to remove [REDACTED] from [REDACTED]PS

<sup>3</sup> A “Specific Learning Disability” per the Act and the Virginia Regulation at 8VAC – 20-81-10 is defined as: “A disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, write, spell, or do mathematical calculations.”

<sup>4</sup>

and enroll [REDACTED] at [REDACTED], a private college preparatory day school which is not an approved school for children with disabilities by the Virginia Department of Education (“VDOE”).

#### 4. Discussion and Decisions

**(1) Did [REDACTED] PS properly provide [REDACTED] with a free appropriate public education through the development of appropriate IEPs from February 2019 through February of 2020?**

The Hearing Officer believes the School District properly provided services to [REDACTED] during the 2019-2020 school year during which [REDACTED] attended [REDACTED] grade at a [REDACTED] PS [REDACTED] school. [REDACTED] was [REDACTED]’s [REDACTED] grade special education teacher and case manager. SB 3. Ms. [REDACTED] was a special education teacher for 21 years and worked for the [REDACTED] PS school system as a special education coordinator for two years prior to her return to teaching children per her testimony. During [REDACTED]’s [REDACTED] grade year, Ms. [REDACTED] provided [REDACTED] special education reading instruction for five (5) hours in the special education setting every two weeks. SB 3. The Hearing Officer found Ms. [REDACTED] to be a credible expert witness.<sup>5</sup>

Ms. [REDACTED] referred to [REDACTED] as a “delight” to teach. Tr. Day 6, pp. 1547, 7-25. She recalled that [REDACTED] would “run to my class” and that [REDACTED] “rounded up the other kids” and often attempted to teach them reading strategies [REDACTED] had learned from Ms. [REDACTED]. Tr. Day 6, pp. 1548, 4-6; Tr. Day 6, pp. 1547, 16-17. Ms. [REDACTED] testified extensively regarding the multi-sensory methods<sup>6</sup> she had acquired to competently engage [REDACTED]’s reading skills toward [REDACTED] mastery of IEP goals. Ms. [REDACTED] stated that [REDACTED] “absolutely” made progress in her class and that [REDACTED]’s reading skills were “embedded” during [REDACTED]’s [REDACTED] grade year. Tr. Day 6, pp. 1566, 1; Tr. Day 6, pp. 1670, 10. Ms. [REDACTED] stated further that [REDACTED] ought to be able to make progress, moving forward, in the general education curriculum. Tr. Day 6, 1603, 9-14. Further, Ms. [REDACTED] stated that [REDACTED] made progress above and beyond what she expected and had learned to apply the reading concepts that Ms. [REDACTED] taught [REDACTED].

The Hearing Officer also found [REDACTED] to serve as a credible witness in the case. Ms. [REDACTED] explained that she has been employed by [REDACTED] PS for 29 years and has provided special education writing instruction to children during that timeframe. In [REDACTED]’s [REDACTED] grade year, Ms. [REDACTED] taught [REDACTED] writing skills as a special education service. Tr. Day 7, pp. 1789, 8-13; Tr. Day 6, pp. 1552, 4-11.

Following the Governor’s orders with respect to the Pandemic on March 23, 2020, students who received special education services and general education services in the School District received learning materials asynchronously<sup>7</sup> in each student’s personal environment. On April 14,

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<sup>5</sup> Ms. [REDACTED] testified that she had been a [REDACTED] PS special education teacher for 21 years and a [REDACTED] PS Special Education Coordinator for two years. Tr. Day 6, pp. 1555-1556, 1-7.

<sup>6</sup> Ms. [REDACTED] explained that “multisensory learning” is now the norm for teaching children who have trouble decoding words. Instead of using only sight to decipher a word, the multisensory approach elicits all mental faculties to learn to imprint decoding into an early learner’s long term memory. Tr. Day 6, pp. 1556, 1-7.

<sup>7</sup> Students were to focus on reinforcing concepts learned prior to school closure. Teachers were not to introduce new topics or penalize students. The school district, in conformity with other state public school districts, adopted the “continuity of learning” concept meaning that special education and general education students did not receive

2020, the Parents received a letter from the █PS Special Education Director, █, stating that instructional materials and activities would be made available and that █PS would provide accommodations to the extent possible. █PS addressed this correspondence to all special education parents in which the █PS Special Education Coordinator stated that [school work] was optional and that grades and progress reports would not be impacted if the work was not done. The Parents' contention is that this communication from █PS indicates that special education services were not actually delivered to █ when the school system closed. The Parents cite the obligation per the Act that special education services continue to be required by the Act during the Pandemic.

On April 20, 2020, the IEP team met and attempted to create █'s annual IEP. SB 6. The Parents did not attend the meeting though they were noticed to attend on April 16, 2020, April 19, 2020, and April 20, 2020. SB 7. The IEP Team sought to reduce █'s writing special education services from five (5) hours every two weeks to three (3) hours every two weeks in light of █'s academic progress █ made in █ grade. SB 6. █'s █ grade teacher, Ms. █, opined that █ could best be served in a less restrictive environment by being given writing instruction in a small group with █ non-disabled peers. Tr. Day 6, pp. 1577, 1-3.

As stated above, █PS students did not receive grades for the fourth quarter of the 2019-2020 school year. But in the 2019-2020 school year, █ had made all A's and B's except for a C in accelerated math for the third quarter. Ms. █ testified that █'s reading strategies resulted in █ improving █ reading fluency from level .24 to a level .38 from October 2019 to February 2020 per the Developmental Reading Assessment ("DRA") she gave to █ showing that █ had improved █ reading fluency by one year during █ █ grade year. Tr. Day 6, pp. 51, 2-9.

Notwithstanding the Parents' assertions to the contrary, █ made excellent progress in spite of the Pandemic. The Parents' assertion that █'s academic record reflects regression in █'s grasp of special education reading and writing concepts, is not persuasive in light of the aforementioned expert testimony by Ms. █ and Ms. █.

The Hearing Officer agrees that █'s █ grade year showed meaningful academic progress. But the Parents asserted that █'s anxiety in the virtual environment caused █ to be unable to access █ curriculum which exacerbated █ anxiety. The Parents assert █ did not actually show meaningful progress for this reason.

The evidence presented during the due process hearing does not support such assertions. █PS teachers testified that █, on occasion, did not take the virtual environment seriously during the Pandemic's restrictions. █PS teachers testified that █ sometimes looked away from █ instructional screen, often did not tune in at all, and sometimes appeared to watch another screen. Ms. █ testified that █'s main problem was that █ was not doing █ schoolwork and was not being truthful about it. Tr. Day 1, pp. 322, pp. 14-25; Tr. Day 1, pp. 322, 1-25, Tr. Day 1, pp. 323, 1-5. Thus, the Parents' claim that █ was unsuccessful in the virtual environment because of █ anxiety, alone, which █PS failed to address, did not seem to be

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grades for their work but teachers kept up with students in the state's public school system by virtual and telephonic means. (█PS Closing, at p. 2).

the only reason why [REDACTED] was not wholeheartedly interested in virtual instruction in the virtual environment.

As noted above, the Parents rejected the IEP proposed on April 20, 2020 for [REDACTED]'s [REDACTED] grade year which provided for special education reading and writing services to [REDACTED] in a separate special education classroom. Ms. [REDACTED], who had achieved excellent progress that year with [REDACTED] and significant IEP progress, had proposed providing [REDACTED] reading skills in a general education format instead of in a separate special education setting. Ms. [REDACTED] proposed that [REDACTED] read in a general education classroom along with a small group of young readers. This model, Ms. [REDACTED] testified, appeared to be a less restrictive special education setting for [REDACTED], in conformity with the Act's framework.

The Hearing Officer believes school witnesses testified credibly and competently, each within their respective specialized special education expertise areas, regarding [REDACTED]'s academic programming at [REDACTED] PS in [REDACTED] [REDACTED] grade year.

Later, on September 25, 2020, the Parents consented to an IEP which was essentially the same as the April 20, 2020 IEP proposal, but with a few minor changes. It is the Hearing Officer's opinion that [REDACTED] PS provided [REDACTED] a free, appropriate public education (a "FAPE") in the 2019-2020 school year, and that [REDACTED] made meaningful academic progress during such period. [REDACTED]'s success was also supported by [REDACTED] promotion to the [REDACTED] grade for the 2020-2021 school year. SB 13.

**(2) Did [REDACTED] PS properly provide [REDACTED] with a free appropriate public education through the development of appropriate IEPs from February 2020 through February 2021?**

[REDACTED] PS reopened classes for [REDACTED]'s [REDACTED] grade year via a virtual model because of continued restrictions with respect to the Pandemic in local state school systems. Tr. Day 3, pp. 730. [REDACTED] was required to attend classes virtually, but beginning on October 26, 2020, parents could elect to send students back to school via a "hybrid model" that provided two days of in-person learning per week. Tr. Day 2, pp. 421, 9-14; SB 18.<sup>8</sup>

On August 25, 2020, the Parents reviewed an additional IEP (otherwise essentially the same as the April 20, 2020 IEP) that Ms. [REDACTED] testified that she compromised with the Parents. Tr. Day 6, pp. 1599, 5, 22, 23. Ms. [REDACTED] stated that she agreed to depart from her original stance, recommending that [REDACTED] be taught reading in the general education classroom with [REDACTED] non-disabled peers in a small group. Instead, the Parents and Ms. [REDACTED] agreed to keep [REDACTED] in a separate special education classroom, but to remove a reading fluency goal. Tr. Day 6, pp.1595, 6-11.

At the due process hearing, Ms. [REDACTED] explained why she recommended deleting [REDACTED]'s reading fluency mastery goal. Ms. [REDACTED] testified that [REDACTED] had become preoccupied with a timer which Ms. [REDACTED] used to measure [REDACTED]'s reading fluency. Ms. [REDACTED] testified that the timer stressed [REDACTED], and that [REDACTED] struggled with the timer. Ms. [REDACTED] explained further in her testimony that [REDACTED] became competitive with [REDACTED] self. Thus, Ms. [REDACTED] reasoned that [REDACTED] fluency timer negatively affected [REDACTED]'s reading comprehension and that faster reading fluency

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<sup>8</sup> [REDACTED] PS Closing at p. 4.

did not equate to better reading comprehension. Tr. Day 6, pp. 1594, 16. But the Parents assert that deleting the fluency mastery (words per minute) goal from the IEP indicates that [REDACTED] was unable to achieve IEP goal mastery. The Parents' theory simply does not comport with Ms. [REDACTED]'s testimony. The Hearing Officer understands the teacher's rationale for removing the above IEP goal. The Hearing Officer also notes that the Parents executed a consent to the IEP and agreed to implement such IEP (the amended April 20, 2020 IEP) on September 25, 2021.

Until October 26, 2020, when [REDACTED] PS parents could decide if they wished to send their children to school for two days weekly of in-person learning, [REDACTED] PS functioned also by virtual means. SB 18. [REDACTED] was not fond of the virtual learning format. [REDACTED] Parents asserted the virtual learning model continued to cause [REDACTED] problems, and they became frustrated with failure by [REDACTED] PS to provide in-person learning.

[REDACTED] PS met again on November 20, 2020 for an additional IEP meeting to address the Parents and teachers' concerns regarding [REDACTED]'s academic performance in the virtual environment during the first portion of the 2020-2021 school year. [REDACTED]'s [REDACTED] grade teachers were [REDACTED] and Ms. [REDACTED], who was [REDACTED] grade general education teacher and case manager. Ms. [REDACTED] indicated that [REDACTED] PS teachers had problems maintaining [REDACTED]'s attention in the virtual environment. Ms. [REDACTED] also testified, like other [REDACTED] PS teachers, that [REDACTED] muted her during instruction times. Also, [REDACTED] appeared distracted and sometimes [REDACTED] simply refused to do the work. When [REDACTED] did not want to be instructed, typically, [REDACTED] ended the virtual call with the teacher. Ms. [REDACTED] referred to [REDACTED]'s behaviors as "work refusals" because [REDACTED] exhibited inattention in the virtual environment. Tr. Day 2, pp. 353, 2-25; Tr. Day 2, pp. 354, 1-5. Ms. [REDACTED] confirmed [REDACTED]'s tendency not to comply with teacher directives in the virtual learning environment. Tr. Day 2, pp. 400, 4-9; Tr. Day 2, pp. 403, 15-19; Tr. Day 2, pp. 406, 11-15; Tr. Day 2, pp. 441, 5-18; Tr. Day 2, pp. 442, 9-14.

[REDACTED]'s math teacher, [REDACTED], testified that he attempted to teach [REDACTED] accelerated math for about six weeks in the virtual environment in the early portion of [REDACTED]'s [REDACTED] grade year. His math class provided [REDACTED] two years of math instruction which was condensed into one year. He also testified that [REDACTED] refused to stay online and would not turn in [REDACTED] work and rarely had [REDACTED] camera on. Tr. Day 2, pp. 398, 4-25; Tr. Day 2, pp. 399, 18-24.

When the IEP team met again in November of 2020 to discuss [REDACTED]'s virtual performance during the first portion of [REDACTED] grade year, the [REDACTED] PS teachers referred to [REDACTED]'s virtual behavior as "work refusal." Tr. Day 2, pp. 476, 7; Tr. Day 2, pp. 479, 2-12; Tr. Day 2, pp. 485, 10-18. [REDACTED]'s parents asserted that [REDACTED] PS was not getting the work properly delivered to [REDACTED]. But as a result of the meeting between the Parents and [REDACTED] PS, the [REDACTED] PS IEP team added four days, instead of two days, of in-person instruction to [REDACTED]'s IEP. The IEP team also added to [REDACTED]'s existing IEP special education services for social coping skills and for study skills. The IEP team removed [REDACTED] from the accelerated math class with Mr. [REDACTED] and placed [REDACTED] in a collaborative math class with [REDACTED] grade teacher, Ms. [REDACTED].

[REDACTED], who is the [REDACTED] PS Special Education Coordinator, testified also as an expert witness at the hearing. At her urging, the IEP team requested that [REDACTED]'s evaluations be updated in preparation for [REDACTED]'s next IEP meeting to be held for [REDACTED]. These evaluations included psychological, sociological and educational evaluations, a functional behavior assessment, and an

observation of [REDACTED] because Ms. [REDACTED] wished to determine if [REDACTED]'s special education program required additional items. Tr. Day 7, pp. 1880-81. SB 21.

After [REDACTED]'s assessment results were completed, the IEP team met again with the Parents on February 19, 2021 to consider the results of the evaluations. The IEP team elected to continue special education services in reading, writing and math and study skills. SB 37. The IEP team determined that [REDACTED] had made good progress since the last meeting in November of 2020. [REDACTED]'s grades had significantly improved. Ms. [REDACTED] related that the functional behavior assessment, which she completed, more accurately addressed concerns applicable only to [REDACTED] during the virtual environment. Ms. [REDACTED] testified that [REDACTED]'s virtual environment behaviors were no longer present when [REDACTED] resumed in-person learning. Thus, the IEP team did not recommend a behavioral intervention plan for [REDACTED] and continued to direct attention toward [REDACTED]'s coping and social skills services which the IEP team deemed would be valuable to [REDACTED] when [REDACTED] resumed instruction completely in-person. Tr. Day 7, pp. 1933, 18-25.

At some point during the February 19, 2021 IEP meeting, the Parents requested that [REDACTED] be formally placed at [REDACTED]. The IEP team responded negatively to the Parents' request after considering [REDACTED]'s meaningful progress at the public [REDACTED] school. At this meeting between the IEP team and [REDACTED]'s parents, the IEP team members determined the Parents' proposed placement at [REDACTED] was a more restrictive learning environment and not a placement determined by the IEP team to be appropriate in terms of [REDACTED]'s meaningful progress [REDACTED] made in [REDACTED] and [REDACTED] grades at the public [REDACTED] school. Tr. Day 6, pp 1701; Tr. Day 7, pp. 1816; Tr. Day 7, pp.1937, 21-24; SB 37.

On June 25, 2021, the IEP team met again to discuss an outstanding occupational therapy ("OT") examination that had been suggested to assist [REDACTED]'s special education plan. The IEP team added graph paper for [REDACTED] to use during [REDACTED] math classes. The IEP team determined that [REDACTED] did not have any occupational needs and therefore the IEP team deemed that OT was not a required special education service for [REDACTED]. The Parents again renewed their private placement request for [REDACTED] to be placed at [REDACTED]. Again, the IEP team determined that [REDACTED]'s appropriate placement was the public school setting. Tr. Day 6, pp.1705, 2-16. SB 40. Further, the Hearing Officer acknowledges the Act's mandate that evaluation results be shared with the Parents after evaluation results are known. The Act also requires this state's local public school system to offer special education services through a service plan, on a limited basis, to private school students if the student was identified prior to leaving the school district per 8 VAC 20-81-150(C)(3).

[REDACTED] made the following grades from the first to fourth quarters, respectively, of the 2020-2021 school year: reading - F, D, A, A; writing - F, B, A, A; social studies - D, B, A, A; mathematics - F, C, A, A; science - A, A, B, A. Ms. [REDACTED] testified that [REDACTED] also significantly improved [REDACTED] MAP score, which went from a 208 in the winter (2021) to a 226 in the spring (2021) and in reading [REDACTED] improved from a score of 171 to a score of 212 in the spring (2021). SB 61. On the SOL's, [REDACTED] earned a math score of 435 and a 421 on the reading portion. [REDACTED] earned a score close to passing on the science SOL and only missed two to three questions beneath a passing score. [REDACTED] finished the year by making straight A's, earned the honor roll and was promoted to [REDACTED] grade.

The Parents attributed [REDACTED]'s [REDACTED] grade success to the assertion that [REDACTED]PS feared the threat of due process and falsely inflated [REDACTED]'s grades to show progress. [REDACTED]'s mother suggested



multiple times that ■■■'s grades were not as presented and attempted to show how ■■■'s academic work was deficient in that ■■■ did not know basic sight words in ■■■ grade year in the early portion of 2021. The Hearing Officer does not find the Parents' assertion to be supported by the vast evidentiary record that ■■■'s success dramatically improved when ■■■ returned to in-person learning. The evidence does not support the Parents' argument that the ■■■ PS teachers and expert witnesses who testified in this case (eleven witnesses in total), all colluded to fool the Parents. ■■■ is a student with an IQ of 129, which is in the superior range, who happens to also have an orthographic deficit. ■■■ is quite capable of making superior grades in ■■■ PS academic program when ■■■ tries hard and works diligently in school. The Hearing Officer has examined the comprehensive record in this matter and has found no evidence of grade inflation or other ulterior motives or actions on the part of ■■■ PS. Thus, the Hearing Officer finds the Parents' grade inflation argument is not persuasive and was not supported by the evidence. Tr. Day 8, pp. 2043, 7-13; Tr. Day 8, 2044, 17-19; Tr. Day 8, pp. 2045, 1-3, 13-25; Tr. Day 8, pp. 2046, 1-5; Tr. Day 8, pp. 2047, 1-8.

When in-person learning resumed for ■■■ on or about October 23, 2020, ■■■ PS competently explained the change in ■■■'s school perseverance by noting ■■■ preference for the in-person learning setting. In the virtual format, about which ■■■ sometimes voiced ■■■ disapproval, ■■■ tended to avoid ■■■ schoolwork or completely failed to turn ■■■ work in. Tr. Day 1, pp. 322, 1-25. The Hearing Officer finds the ■■■ PS witnesses and experts were truthful and comprehensive in their hearing testimony. ■■■'s least restrictive environment at this time is the public ■■■ school because ■■■ can be instructed in the company of ■■■ non-disabled peers while receiving special education instruction and assistance. During special education instruction at the public school, ■■■ showed meaningful progress and is able to be educated along with ■■■ non-disabled peers.

**(3) Does ■■■ require placement at ■■■?**

During ■■■'s ■■■ and ■■■ grade years, the Parents became dissatisfied with ■■■ PS and sought other educational options for ■■■. The Parents applied to ■■■ on October 15, 2020. Tr. Day 1, pp. 196, 7-8. ■■■ was accepted into ■■■ and the Parents completed the enrollment process on February 23, 2021. Day 1, pp.197, 2-3. P1 39. The Parents did not provide ■■■ PS with written documentation of their intent to remove ■■■ from ■■■ PS until May 14, 2021.

If the Parents enrolled ■■■ at ■■■ on February 23, 2021, it appears to the Hearing Officer that the Parents had little to no incentive to work with ■■■ PS to correct alleged IEP deficiencies. Also, the Parents did not appear for scheduled IEP meetings on numerous occasions.<sup>9</sup> ■■■ PS documented IEP meeting notices that the school district sent to the Parents. These factors, bordering on parental non-compliance, cast a pallor on the Parents' testimony regarding their interactions with ■■■ PS during ■■■'s ■■■ grade year. The IEP team was keenly responsive to the Parents' concerns about ■■■'s progression in the public school system. Yet the Parents had already paid deposits and fees for ■■■'s attendance at ■■■ for ■■■ grade year. In light of the Parents' considerable sums paid to ■■■, in advance of their ■■■'s enrollment for

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<sup>9</sup> On January 24, 2022, the ■■■ PS special education personnel met again with the Parents at an IEP meeting to comply with state and federal regulation requiring IEP updated information. At that time, ■■■'s mother stated she would no longer participate in any IEP meetings the ■■■ PS personnel attempted to arrange. Tr. Day 4, pp. 1224, 3-22; SB 58.

the 2021-2022 school year, it is unlikely to the Hearing Officer that the Parents had any intent for ██████ to remain at ██████ PS for the 2021-2022 school year.

With respect to the Parents' unilateral private placement of ██████ at ██████, ██████'s mother testified glowingly and said the ██████ experience has been, "[A]wesome" and that ██████ is "doing very well there." Tr. Day 1, pp. 186, 17; Tr. Day 1, pp. 202, 11. But ██████'s mother dismissed commentary she made earlier in reference to alleged bullying ██████ experienced at ██████. Moreover, on November 11, 2021, ██████'s mother referred to ██████ as a "toxic environment" and as a "traumatic experience" for ██████. ██████'s mother referred to ██████'s failure to respond to ██████'s bullying reports. Tr. Day 1, pp. 221, 8-9; Tr. Day 1, pp. 221, 15-21. At another point in time, ██████'s mother admitted she had threatened to sue ██████ (and ██████ PS) for practicing "experimental medical practices because ██████ required ██████ to be vaccinated before coming to school." Tr. Day 1, pp. 223, 23-25; Tr. Day 1, pp. 224, 1-12.

During ██████'s ██████ grade year, before ██████ PS knew the Parents intended to enroll ██████ at ██████, ██████ PS attempted to alleviate the Parents' concerns regarding ██████'s special education program at the public ██████ school. The Special Education Coordinator, ██████, and the principal, ██████, from the proposed public ██████ school, offered to provide a school tour and assured the Parents that ██████ would have a multisensory reading program for 5 hours every two weeks. Ms. ██████ assured the Parents that ██████ would be taught on the Orton-Gillingham reading software program which is a data-driven, widely accepted reading program. Ms. ██████ explained that ██████'s reading program would be delivered in a collaborative setting in which ██████ special education teacher would come to ██████ public ██████ school class. Ms. ██████ testified credibly regarding her discussions with the Parent about ██████'s reading, decoding and spelling needs. Ms. ██████ also emphasized how ██████ would be able to partake in "Focused Reading," which is a course of study at the public ██████ school provided for students who have comprehensive reading needs. Tr. Day 4, pp. 1086, 12-19. Ms. ██████ also stated that she discussed ██████'s anxiety issues with the Parents. In sum, she affirmed that the public ██████ school provided a comprehensive projection of ██████'s curriculum and accommodations for ██████'s ██████ grade year from 2021-2022 at the February 19, 2021 IEP meeting. The Parents later consented to the February 19, 2021 IEP. SB 37. The Hearing Officer for the record that the Parents' family attorney and their educational advocate attended the above February 19, 2021 IEP meeting with the Parents.

But the Parents unilaterally chose to remove ██████ from ██████ PS and enroll ██████ at ██████. The Parents presented ██████, who is the ██████ School Director, to testify regarding ██████'s progress at ██████. The Hearing Officer listened to the ██████ Director's testimony and her statements regarding the school's mission. ██████ purports to assist students who have dyslexia. Tr. Day 5, pp. 1393, 3-13. But the Parents and ██████ PS stipulated that ██████ does not have a medical diagnosis of dyslexia. The Hearing Officer finds it curious, then, that Ms. ██████ alluded to formulating ██████'s special educational plan based upon a dyslexia diagnosis.

At the public school setting, expert witnesses clearly based their findings on scientifically driven data to support ██████'s deficit in orthographic reasoning, not on a dyslexia diagnosis. Further, the Hearing Officer notes that ██████ is no longer licensed to provide disability services to Virginia students who are not placed at ██████ by their IEP team. The ██████ PS IEP team never placed ██████ at ██████ because ██████ PS provides an appropriate placement to fully address ██████'s special education needs. Also, the ██████ Director did not indicate a strict attitude toward student

absences. Tr. Day 5, pp. 1427, 3-7. In all, ██████ had already missed 14 complete school days and was tardy or had scheduled appointments for 29 days of school. Tr. Day 1, pp. 223, 13-21.

Upon cross-examination, ██████'s mother affirmed that ██████ has already experienced major anxiety, a bullying episode, a panic attack and school avoidance at ██████ to the extent that ██████'s mother considered homeschooling "...if [██████] can make it to the end of the year." Tr. Day 1, pp. 211, 8-11. During cross-examination, ██████'s mother explained that the "traumatic" episodes have resolved. Tr. Day 1, pp. 221, 15-21.

But the ██████ communications logs reflect ██████'s mother has often sought emotional support from ██████ staff members for ██████. ██████'s mother testified regarding an incident that occurred on September 17, 2021, when ██████ elected to leave ██████ math class: "[██████] did not want to come to school this morning and has texted me from ██████ iPad saying ██████ wants to come home this morning... major anxiety surrounding school." Tr. Day 1, pp. 198, 3-11. On another day, ██████'s mother admitted that ██████ refused to go to school, "[s]he's refusing to come to school. Tr. Day 1, pp. 203, 8-11. On another day when ██████ elected not to attend school, ██████'s mother stated in response to ██████ regarding ██████'s decision to stay home, "[m]y heart is breaking for ██████ to go through this much anxiety again." Tr. Day 1, pp. 205, 16-18. On yet another day missed partly or wholly, ██████'s mother stated, "I will not force ██████ to come to school tomorrow." Tr. Day 1, 207, 17-18. At one point in time, ██████'s mother expressed a desire for ██████ to provide an extra credit project so that ██████ could make up for two weeks of absences from ██████. Further, on November 16, 2021, ██████ logs reflect an incident when ██████'s mother waited with ██████ in the car to decide if ██████ wanted to enter the school because ██████ was "riddled with anxiety." ██████ chose to stay in the car. ██████'s mother conveyed back to ██████ that ██████ had a "panic attack" and "could not make ██████ self get out of the car." Tr. Day 1, 211, 18-21; Tr. Day 1, 206, 11-14.

First of all, the Hearing Officer is at a loss to understand how ██████'s mother justifies permitting ██████ to select when, and under which conditions, ██████ will attend school. ██████'s ██████ academic record reflects excessive absences and tardiness. Certainly, ██████ must be held accountable for ██████ school avoidance by ██████ Parents and by the school ██████ attends. ██████ should not be excused to leave school, avoid classes, school directives or school work without acquiring medical documentation of ██████ ailments, sickness or condition. Also, ██████'s Parent is not in a position to diagnose a serious mental infirmity such as a panic attack or a major anxiety episode affording ██████ the ability to miss school work or school directives.

Further, the Parents did not produce any qualified expert testimony to the effect that ██████ did not receive a FAPE in the public school curriculum, that ██████ does not understand primary wordlists, that ██████'s grades are not real "A's" or that ██████ academic placement was ever predetermined. Plainly, the evidence did not reflect these facts. In contrast, the eleven ██████ PS school witnesses who testified, some of whom were qualified as expert witnesses, testified credibly based upon their personal experiences with ██████ or from their qualified expertise about ██████

The Parents' proffered one witness, ██████ ██████, as an expert although she did not qualify as an expert witness upon examination of her credentials. Ms. ██████ did not have Virginia special education licensing credentials, had not met ██████ until a week prior to the due process hearing, had never observed ██████ in class, had not taught in Virginia except for one year in the virtual environment and only participated in one Functional Behavior Assessment ('FBA')

as part of a Virginia IEP team. For these reasons, Ms. [REDACTED]'s credentials did not qualify her to provide an expert opinion in the case. Tr. Day 5, 1509, 1-23.

Thus, the Parents were unable to present much, if any, reliable documentation or testimony during the eight (8) day hearing. The Parents' theories about academic regression, missing assessments, testing protocols, grade inflation, pre-determined placement and teacher malfeasance merely asserted parental conjecture regarding the events described herein during [REDACTED]'s 2019-2020 and 2020-2021 school years. The standard of proof that must be met at a due process hearing, per the Act, cannot be met where the proponent lacks credible expert testimony.

Finally, [REDACTED] is not a proper placement for [REDACTED] because it is too restrictive, thus not the least restrictive environment for [REDACTED] who will not be educated along with [REDACTED] non-disabled peers in conformity with the Act's mandate. [REDACTED]'s comprehensive public [REDACTED] school IEP provided [REDACTED] with a smooth transition into the public [REDACTED] school setting. The [REDACTED] school teachers and expert witnesses testified credibly at the hearing. [REDACTED]'s current public school program appropriately focuses primarily on [REDACTED] reading, writing, and math goals with pragmatic accommodations for [REDACTED], together with study skills and social skills added, to assist [REDACTED] to transition to [REDACTED] school.

The Hearing Officer does not find [REDACTED] to be a proper placement for [REDACTED], the Hearing Officer notes the Parents are free to place [REDACTED] privately anywhere they deem suitable for [REDACTED] to attend. Thus, the Parents are not entitled to financial reimbursement for financial reimbursement for missed compensatory special education services, tuition reimbursement or for any other expenses attributable to private placement, academic regression or otherwise.

## APPLICATION OF LAW

### A. Provision of a Free, Appropriate Public Education

The Act "ensures that all children with disabilities have available to them a free, appropriate public education ("FAPE") that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. Sec. 1400(d)(1)(A). The Act authorizes federal assistance to states that comply with the Act which, per the Act, means "special education and related services that have been provided at public expense, under public supervision, and direction, and without charge." The IEP is the "educational instruction specially designed to meet the unique needs of the handicapped child...supported by such services as are necessary to meet the unique needs of the handicapped child to benefit from the instruction." *See County Sch. Bd. of Henrico v. Z.P. ex Rel. R.P.*, 399 F.3<sup>rd</sup> 298 (4<sup>th</sup> Cir. 2005).

When the IEP team develops an IEP, the team must consider the strengths of the child, parental concerns, and any evaluation results. An IEP is sufficient if it is "reasonably calculated to enable the child to receive educational benefits." *Z.P.*, 399 F.3d 298, at 300, (quoting *Rowley*, 458 U.S. 176, at 207).

In determining whether the School District provided [REDACTED] with a FAPE in the IEP, the Hearing Officer adopts a two part assessment. First, the Hearing Officer decides if the state complied with the procedures specified in the Act. Second, the Hearing Officer decides if the IEP is reasonably calculated to enable [REDACTED] to receive educational benefits. *Rowley*, at 207.

The Hearing Officer is convinced that the School District fully complied with the Act's procedural requirements and the February 19, 2021 IEP is reasonably calculated to enable [REDACTED] to receive educational benefit. The School District's witnesses proved [REDACTED] achieved academic growth and progress which was considerable and not *de minimis*. All indications were that [REDACTED] would have been successful at the public [REDACTED] School.

### **B. Least Restrictive Environment**

The state must demonstrate that its disabled children have been placed in the least restrictive environment ("LRE") to accommodate the special education student's disabilities. 34 C.F.R. Sec. 300, 552(d). The Act also requires that a student's special education needs be served by preparation of "an IEP which must be prepared at meetings between school representatives and the child's parents. 20 U.S.C. Sec. 1401(a)(19), 1414(a)(5).

[REDACTED]'s LRE at this time is the public [REDACTED] school because [REDACTED] can be instructed in the company of non-disabled children while [REDACTED] receives special education instruction and assistance. [REDACTED] showed substantial progress in the public [REDACTED] school environment. The evidence showed that [REDACTED] did not often pay attention in the virtual program, turned [REDACTED] head away, referred to the virtual program as "stupid"<sup>10</sup> and often disregarded [REDACTED] responsibility to pay attention to the teacher in the virtual learning environment. When [REDACTED] re-entered the in-person school environment [REDACTED] preferred, [REDACTED] academic success soared again along with [REDACTED] high IQ.

### **3. Reimbursement**

Reimbursement of special education expenses under the Act is appropriate when it is determined that (1) the public school placement was not providing the child with a FAPE; and (2) the parents' placement was proper under the Act. *See Sch. Comm. of Town of Burlington v. Mass. Department of Education*, 471 U.S. 359 (1985).

The School District offered a FAPE to [REDACTED] during the Pandemic and for the requisite two years prior to filing the complaint on February 1, 2022. The Parents unilaterally placed [REDACTED] at [REDACTED]. [REDACTED] was not placed at [REDACTED] by [REDACTED] IEP team. The public [REDACTED] school continues to offer [REDACTED] a FAPE in the LRE.

Notwithstanding the fact that [REDACTED]'s IEP team did not place [REDACTED] at [REDACTED], the [REDACTED] administrators provided credible testimony about the [REDACTED] program. But [REDACTED]'s IEP team never placed [REDACTED] at [REDACTED] and [REDACTED]'s LRE is at the public [REDACTED] school. [REDACTED] has experienced similar incidents and the same school avoidance issues at [REDACTED] as described by the public [REDACTED] school teachers.

In order to provide a FAPE in the IEP, the document "must contain statements concerning a disabled child's level of function, set measurable goals, describe the services to be provided, and establish objective criteria for evaluating the Child's progress." *M.M. ex rel. D.M. v. Sch. District of Greenville County*, 303 F.3d 523, 527 (4<sup>th</sup> Cir. 2002); *see also Doyle v. Arlington County School Bd.*, 953 F. 2d. 100, 106 (4<sup>th</sup> Cir. 1991); *see also* 20 U.S.C. Sec. 1414 (d)(1)(A).

In light of the above considerations regarding FAPE in the IEP, in this case, [REDACTED]'s academic record shows stable growth and meaningful progress in [REDACTED] SLD deficit. The Hearing

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<sup>10</sup> Per [REDACTED]'s mother's report. Tr. Day 1, pp. 230, 10-16.

Officer gives deference to the educators in that the School District provided a FAPE to [REDACTED] from February 1, 2020 to February 1, 2022. *See County Sch. Bd. of Henrico v. Z.P. ex Rel. R.P.*, 399 F. 3d 298, 304 (4<sup>th</sup> Cir. 2005); *M.M. v. Sch. Dist. of Greenville County*, 303 F. 3d 523, 532 (4<sup>th</sup> Cir. 2002) (Actual educational progress is a factor to be considered in determining the appropriateness of an IEP under the Act.).

The Hearing Officer finds the IEP satisfies the *Rowley* standard in that the IEP provides “more than a basic floor of opportunity that access to special education and related services provides.” *See Tice by and Through Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1207 (4<sup>th</sup> Cir. 1990) (quoting *Rowley*, 458 U.S. at 201). And the School District provides an IEP which is evidenced-based and offers the Child much more than a minimal amount of opportunity (*See Andrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (1982)).

### CONCLUSION

For the above reasons, it is found that the Parents, have failed to meet their burden of proof establishing that [REDACTED] Public Schools denied [REDACTED] a free appropriate public education.

### ORDER

IT IS HEREBY ORDERED that the above styled matter is dismissed with prejudice.

### RIGHT OF APPEAL NOTICE

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

- Signature page to follow -

**Decision Date: April 15, 2022**  
**Nunc Pro Tunc**

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Sarah Smith Freeman, Hearing Officer

## **CERTIFICATE OF MAILING**

I have emailed/mailed the above Written Decision to the Advocate and to School Counsel  
on this 20th day of May, 2022.

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Sarah Smith Freeman, Hearing Officer

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