### **COMMONWEALTH OF VIRGINIA**

### **VIRGINIA DEPARTMENT OF EDUCATION**

### **Office of Special Education and Student Services**

### **Division of Special Education and Student Services**

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| In re: Xxxxxxxxxxxx Due Process Hearing(Xxxxxxxxxxxxxxxxxxx Public Schools) | Administrative Hearing Officer: Frederick R. Gerson, Esq.VDOE Case No. 24-049 |

# HEARING OFFICER DECISION

# KEY TO PERSONAL IDENTIFICATION INFORMATION

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| Student XxxxxxxxxxxxStudent’s Age (“AGE”)XX years old Student’s Birthday (“BIRTHDAY”)XxxxxxxxxxxxxxxxxParentsXxxxxxxxxxxxxxx, Mother, and Xxxxxxxxxxxx, StepfatherParent and/or MotherXxxxxxxxxxxxxxxLEAXxxxxxxxxxxxxxxxxxx Public Schools (“XXPS”)XXPS Representative Dr. Xxxxxxxxxxxxxxxxxxxxx, Assistant Superintendent, Special Education, Equity and Diversity, Xxxxxxxxxxxxxxxxxxxxxxxx SchoolXXPS Counsel Jessica Berdichevsky, Esq.XXPS Associate Counsel LaRana J. Owens, Esq.Student’s Advocate Dr. Kandise Lucas |
| School Placement (“School”)Xxxxxxxxxxxxxxxxxx School School Location (“LOCATION”)Xxxxxxxxxxx, Virginia |

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| --- | --- |
| Xxxxxxxx School Assistant Principal | Xxxxxxxxxxxx, Assistant Principal, Xxxxxxxxxxxxxxxxxx School |
| Xxxxxxxx School Lead Teacher | Xxxxxxxxxxxxxxxx, Special Education Lead Teacher and Instructional Coach, Xxxxxxxxxxxxxxxxxx School, Xxxxxxxxxxxxxxxxxxxxxxxx School |
| Xxxxxxxx School Special Education Teacher | Xxxxxxxxxxxxx, Special Education Teacher, Xxxxxxxxxxxxxxxxxx School, Xxxxxxxxxxxxxxxxxxxxxxxx School |
| Xxxxxxxx School PE Teacher | Xxxxxxxxxxxxxxxxxxxx, Physical Education (“PE”) Teacher, Xxxxxxxxxxxxxxxxxx School, Xxxxxxxxxxxxxxxxxxxxxxxx School |
| Xxxxxxxxxxxx School Teacher | Xxxxxxxxxxxxxx, Special Education Teacher, Xxxxxxxxxxxxxxxxxxxxxxxx School, Xxxxxxxxxxxxxxxxxxx Public Schools |
| Xxxxxxxxxxxx School Lead Teacher | Xxxxxxxxxxxxxxx, Special Education Teacher, Xxxxxxxxxxxxxxxxxxxxxxxx School, Xxxxxxxxxxxxxxxxxxx Public Schools |
| Parent’s Support Person | Xxxxxxxxxxxxxxxxx, Parent Support |

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| **LEA Representative:**Dr. XxxxxxxxxxxxxxxxxxxxxAssistant SuperintendentSpecial Education, Equity and DiversityXxxxxxxxxxxxxxxxxxx Public Schoolsxxxxxxxxxxxxxxxxxxxx Xxxxxxxxxxx, Virginia xxxxxPhone: xxxxxxxxxxxxxEmail: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx | **Counsel Representing LEA:**Patrick T. Andriano, Esq.LaRana J. Owens, Esq.Jessica Berdichevsky, Esq.Sands Anderson PC1111 East Main Street, Suite 2400P.O. Box 1998 Richmond, Virginia 23218-1998, Phone:(804) 783-7281Fax: (804) 783-7291 Emails: pandriano@sandsanderson.com, LOwens@sandsanderson.com, jberdichevsky@sandsanderson.com  |
| **Parents:**XxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxXxxxxxxxxxx, Virginia xxxxxxxxxxxxxxxxx, VA xxxxxEmails: xxxxxxxxxxxxxxxxxxxxxxxx and xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxHome:xxxxxxxxxxxxxxxxxxxx\*Number as provided in DP Complaint | **Parent’s Advocate:**Kandise Lucas10906 Sassafras DriveN. Prince George, Virginia 23860Email: clucasklucas@yahoo.comDirect: (804) 248-8656 |
| **Hearing Officer:**Frederick R. Gerson, Esq.Durrette Arkema Gerson & Gill, PCBank of America Center1111 East Main StreetRichmond, Virginia 23219Direct: (804) 482-1121Email: fgerson@dagglaw.comAssistant: Tammy LyonsAssistant Direct: (804) 916-6550 Assistant Email: tlyons@dagglaw.com | **Virginia Department of Education Representative:**Kathryn D. Jones, Esq., CoordinatorSheila Gray, SecretaryVirginia Department of Education,Dispute Resolution & Adm. Services James Monroe Building101 N. 14th Street, 20th FloorPost Office Box 2120Richmond, VA 23218-2120Telephone: (804) 643-8747E-mail: Kathryn.jones@doe.virginia.gov E-mail: sheila.gray@doe.virginia.gov  |
| **SEA Evaluator:**Reginald B. Frazier, Sr., Esq.1998 Angora DriveChesapeake, Virginia 23325-4502Direct: (757) 424-4979Email: pinetta146@gmail.com  |  |

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# HEARING OFFICER DECISION

**INTRODUCTION**[[1]](#footnote-2)

This matter came to be heard upon the Administrative Due Process Complaint Notice, dated January 8, 2024 (the “Complaint”), by Student through Parent’s Advocate, pursuant to 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.* (the “Virginia Regulations”)[[2]](#footnote-3) Student, an AGE child, is a resident of Xxxxxxxxxxxxxxxxxxx, Virginia. Commencing August 2023 and throughout this due process hearing, Student attended School as a XXPS student. School is a public day school. XXPS is responsible for the provision of special education services to Student because Student resides in Xxxxxxxxxxxxxxxxxxx.

The LEA timely filed a challenge to the sufficiency of the Complaint. The hearing officer timely issued a decision in-part sustaining and in-part denying the LEA’s sufficiency challenge concluding the Complaint was sufficient as a matter of law on two issues, summarized below. Other than these two issues, the hearing officer concluded that Complaint was insufficient as a matter of law on any other issues and *dismissed without prejudice* these other claims while providing Parent the opportunity to amend the Complaint within one week of this decision. Parent, through Advocate, chose not to amend the Complaint and the hearing proceeded on the two issues as delineated below.

Following the hearing officer’s decision concerning sufficiency, the hearing proceeded on two following two issues, summarized as follows. Whether the LEA denied Student a free appropriate education (“FAPE”) when it failed (1) to develop and/or offer Student an appropriate IEP reasonably calculated to enable Student to make progress appropriate in light of Student’s circumstances, because of Student’s alleged regression in the area of reading and because he was allegedly bullied; and (2) to offer Student an appropriate placement in his IEP, because of Student’s alleged regression in the area of reading and because he was allegedly bullied. Parent alleges that Student’s reading has regressed since commencing xxxxx grade at School and further alleges that he was bullied on December 12, 2023, during Student’s PE class. Student’s IEP that is at issue is his IEP, dated December 2, 2022. Parent consented to this IEP. This IEP was then amended by IEP Amendments, dated March 8, 2023, and April 24, 2023. Parent consented to the foregoing amendments. Parent did not consent to a further IEP amendment, dated October 2o, 2023, proposed by the LEA that included further reading supports and services for Student and maintained Student’s placement at School, a public day school.

As set forth on detail below, during the hearing, the LEA presented two professional educators and experts who testified on behalf of the LEA and who each served on Student’s IEP team commencing August 2023, Student’s first year at School. The hearing officer recognized, Xxxxxxxx School Lead Teacher as an expert in IEP development, special educational programing, and special educational placement, and recognized Xxxxxxxx School Xxxxxxxx School Assistant Principal as an expert in School Administration.[[3]](#footnote-4) In short, Xxxxxxxx School Lead Teacher, testified that in her expert opinion Student’s IEPs, as amended and proposed, was appropriate in light of Student’s unique circumstances, Student is making progress in light of his unique circumstances, and that with the special education supports as set forth in his IEP, as amended and proposed, public day school is Student’s least restrictive environment. Xxxxxxxx School Assistant Principal agreed with Xxxxxxxx School Lead Teacher, testifying that with the special education supports as set forth in his IEP, as amended, public day school is Student’s least restrictive environment. Xxxxxxxx School Assistant Principal also testified, about the alleged bullying incident, stating he immediately investigated this allegation when he learned of it, and determined that while “peer conflict” did occur, the incident was *not* bullying. While Parent and Parent’s Support Person testified, Parent did not call an expert witness to counter either of the LEA’s experts and professional educators.[[4]](#footnote-5) Based on the findings of fact and conclusions of law set forth below, Parent has failed to satisfy her burden of proof when challenging the adequacy of the Student’s IEP, as amended and proposed, when she failed to produce any expert testimony that Student’s IEP, as amended and proposed, was inadequate. Further, Parent failed to satisfy her burden that the LEA committed a procedural violation of the IDEA. Accordingly, Parent’s requests for relief are denied.

## **PROCEDURAL HISTORY**

Parent, through Advocate, filed the Complaint with the LEA and the Virginia Department of Education (“VDOE”), on January 8, 2024. The undersigned hearing officer was appointed on, January 16, 2024, and on January 17, 2024, the hearing officer sent the parties an Introductory Letter, providing the parties with Hearing Process Guidelines and generally reviewing other procedural matters relevant to the hearing all as stated therein. As set forth in the First Prehearing Report and Order, dated January 26, 2024, the hearing officer convened the first prehearing conference call with the parties to include the Parent, Advocate, XXPS Counsel, XXPS Representative, and Brian Miller, Esq., the substitute SEA Evaluator (present on behalf of Reggie Frazier, the assigned SEA Evaluator for this proceeding, (the “SEA Evaluator”)), and the hearing officer, on January 22, 2024. Adam Kane, Esq., Assistant Attorney General and Counsel to the VDOE also participated during part of the first prehearing conference call, leaving the call when Advocate consented to the dismissal of the Complaint against VDOE to extent VDOE was a party to the Complaint.[[5]](#footnote-6) Contemporaneously with this First Prehearing Report and Order, the hearing officer issued a Dismissal Order Dismissing VDOE as a party to the Complaint. As stated in the First Prehearing Report and Order, neither party objected to the appointment of the hearing officer. During the first prehearing conference call, by agreement, the parties set the hearing dates and the parties also discussed the issues to be determined and other prehearing matters such as filing deadlines. Regarding all deadlines, the parties agreed that such deadlines shall be at 11:59 p.m. on the agreed date of such deadline, with the filing or exchange occurring electronically, e.g., by email.[[6]](#footnote-7)

On January 22, 2024, the LEA timely filed a challenge to the sufficiency of the Complaint, and contemporaneously with the First Prehearing Report and Order, the hearing officer issued a Decision of the hearing officer Concerning the LEA’s Objection to the Sufficiency of the Due Process Complaint and Order, dated January 26, 2024 (“Hearing Officer Decision Concerning Sufficiency”). As set forth above, the hearing officer sustained in-part and denied in-part the LEA’s sufficiency challenge concluding the Complaint sufficiently stated two issues as a matter of law.

On January 22, 2024, parties also met for the first and only resolution meeting and Parent’s Advocate did not attend this meeting. Parent requested a second resolution session that the LEA declined. At this same time, the LEA offered to participate in mediation that Parent declined.

On February 1, 2o24, in accordance with the First Prehearing Report and Order, Parent timely filed requests for the issuance of witness subpoenas and a document subpoena directed to the LEA, and on February 2, 2024, the LEA timely filed objections to Parent’s requests. As set forth in the Second Prehearing Report and Decision of Hearing Officer Concerning the LEA’s Objections to Parent’s Requests for Witness and Document Subpoenas, dated February 13, 2024 (the “Second Prehearing Report and Order”), the hearing officer convened the second prehearing conference call to hear argument concerning the LEA’s objections for February 5, 2024, that reconvened on February 6, 2024. [[7]](#footnote-8) Participating both days of the second prehearing conference were Advocate, XXPS Counsel, XXPS Representative, the SEA Evaluator, and the hearing officer. Parent did not participate. As set forth in detail in the Second Prehearing Report and Order, the hearing officer, sustained the LEA’s objections to the issuance of certain witness subpoenas, overruled the LEA’s objections to the issuance of other witness subpoenas issuing these witness subpoenas on February 8, 2024, and declined to issue other witness subpoenas to which the LEA had not objected, all for the reasons as stated therein. Additionally, as set forth in detail in the Second Prehearing Report and Decision, the hearing officer sustained in part, and denied in part, the LEA’s objections to Parent’s request for the issuance of a document subpoena to the LEA, issuing the document subpoena on February 8, 2024, and correcting and reissuing this subpoena on February 9, 2024, after LEA’s further email notice and Parent’s email consent, by Advocate, again, all for the reasons as stated in the Second Prehearing Report and Order.

The hearing officer issued an Agenda for the Third Prehearing Conference Call, dated February 10, 2024, which is incorporated by this reference. By agreement of the parties, the third prehearing conference call[[8]](#footnote-9) was held as scheduled for February 13, 2024. As set forth in detail in the Third Prehearing Report and Order, dated February 16, 2024, issues arose by and between the parties arose concerning (i) Parent’s prior request for a copy of Student’s educational record, (ii) Parent’s failure to serve the LEA with its document subpoena directed to the LEA, and (iii) with LEA’s document subpoena directed to Parent. The foregoing issues were resolved by the agreement of the parties, and accordance with this agreement, the hearing officer ordered that on or by 11: 59 p.m. on the same day of the third prehearing conference call that (i) the parties produce responsive documents to other party’s document subpoena, and (ii) the LEA produce and provide Parent a copy of Student’s educational record.

As set forth in detail in the Fourth Prehearing Report and Order, dated February 20, 2024, a dispute arose by and between the parties, concerning Parent’s compliance, with the foregoing order of the hearing officer concerning Parent’s production of documents to the LEA. There was *no* dispute concerning the LEA’s compliance with the above order of the hearing officer concerning its response to Parent’s document subpoena and its production of Student’s educational record. After numerous emails concerning the dispute by and between the hearing officer and the parties, and the LEA filing a Motion to Dismiss, dated February 16, 2024 (the “LEA Motion to Dismiss”), in part, based on Parent’s alleged non-compliance with the above order of the hearing officer. The fourth prehearing conference call occurred as scheduled on February 16, 2024. For the reasons set forth in the Fourth Prehearing Report and Order, the hearing officer determined that at best Advocate had made available for download documents responsive to the LEA’s document subpoena for less than twenty-four (24) hours. The hearing officer then ordered that Advocate to make available for download documents responsive to the LEA’s document subpoena on or by 11:59 p.m. on February 14, 2024, and denied the LEA’s Motion to Dismiss while further stating:

The LEA’s request to exclude Parent’s exhibits that should have been produced in response to the LEA’s document subpoena, is taken under advisement to be reconsidered upon the LEA’s objection during the hearing, should Parent seek to enter into evidence any such exhibit, and only to the extent such exhibit was not already possessed by the LEA and/or was included as an LEA exhibit.[[9]](#footnote-10)

During the first day or the three day hearing, LEA Counsel represented that Advocate failed to comply with the hearing officer’s order that Advocate make available for download documents responsive to the LEA’s document subpoena on or by 11:59 p.m. on February 14, 2024. Tr. Day 1 at 181-182. Advocate denied that it had failed to comply with the hearing officer’s order. *Id.* Further, during the third day of the trial, a dispute arose during Advocate’s cross examination of Xxxxxxxx School Assistant Principal wherein Advocate wished to play Advocate’s recording of an IEP team meeting that occurred on December 12, 2023. Before permitting the Advocate to play the recording, the hearing officer ordered Advocate to share the file with LEA Counsel and the hearing officer. Advocate shared the recording file via a link using Google Drive, the same system Advocate used to share Parent’s document production. When the hearing officer and LEA Counsel attempted to access the recording file, access was denied with a message stating access must be requested. *See* Tr. Day 3 at 232 (hearing officer stating, “I am just going to note for the record that when I hit the link I received a notification that I need to request access”).

Prior to the hearing, on February 14, 2024, the parties exchanged their exhibits and witness lists in a timely manner.[[10]](#footnote-11) As agreed by the parties, the 3-day hearing was held on in-person on February 21, 22 and 23, 2024. Further as stated by the hearing officer during the first prehearing conference call, confirmed in the First Prehearing Report and Order, and restated during the hearing, Parent was allocated a little more than half of the total hearing time as Parent bears the burden of proof. Tr. Day 1 at 6; Tr. Day 3 at 83-85. The parties had ample opportunity to present their case.

During the hearing, the hearing officer admitted the following documentary evidence:[[11]](#footnote-12)

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| P. Exh. 28 | XXPS Psychological Evaluation, dated October 27, 2023. Tr. Day 1 at 231.[[12]](#footnote-13)  |
| P. Exh. 30 | Parent’s Psychological Evaluation, dated November 30, 2023. Tr. Day 2 at 16. |
|  |  |
| XXPS Exh. 1 | IEP, dated December 2, 2022. Tr. Day 1 at 70. |
| XXPS Exh. 3 | IEP Amendment, dated October 20, 2023. Tr. Day 1 at 145.  |
| XXPS Exh. 4 | IEP Progress Report, dated October 26, 2023. Tr. Day 1 at 223. |
| XXPS Exh. 5 | XXPS Psychological Evaluation. Tr. Day 1 at 231. |
| XXPS Exh. 6 | XXPS Educational Evaluation, dated November 10, 2023. Tr. Day 2 at 227. |
| XXPS Exh. 7 | Incident Report, dated December 18, 2023. Tr. Day 1 at 284. |
| XXPS Exh. 8 | Harassment Allegations Log, undated. Tr. Day 1 at 284. |
| XXPS Exh. 9 | IEP Progress Report, dated January 8, 2024. Tr. Day 1 at 284. |
| XXPS Exh. 10 | Reading Growth Assessment, January 9, 2024. Tr. Day 1 at 295. |
| XXPS Exh. 11 | Reading Fluency Data, dated January 12, 2024. Tr. Day 1 at 305. |
| XXPS Exh. 12 | XXPS Letter to Parent re: Meeting, dated January 23, 2024. Tr. Day 1 at 320. |
| XXPS Exh. 13 | XXx Grade Report Card, dated February 8, 2024. Tr. Day 1 at 320. |
| XXPS Exh. 14 | XXx Grade Schedule, undated. Tr. Day 1 at 324. |
| XXPS Exh. 18 | Resume, Xxxxxxxx School Assistant Principal, undated. Tr. Day 3 at 168. |
| XXPS Exh. 19 | Resume, Xxxxxxxx School Lead Teacher, undated. Tr. Day 2 at 213. |
| XXPS Exh. 20 | IEP Amendment, dated April 24, 2023. Tr. Day 1 at 397.[[13]](#footnote-14) |
| XXPS Exh. 21 | IEP Signature Page with Parent Signature, dated May 1, 2023. Tr. Day 2 at 347.[[14]](#footnote-15)  |

After the conclusion of the hearing, the transcripts were completed and circulated timely in accordance with the Hearing Officer’s order, and the parties timely exchanged their post-hearing opening and response briefs on March 8 and 14, 2024, respectively.

Parent called Xxxxxxxx School Special Education Teacher as her first witness, but Xxxxxxxx School Special Education Teacher did not appear because she was not served. Tr. Day 1 at 27. At this time, LEA Counsel advised the hearing officer that no LEA employee included on Parent’s witness list was served. A long discussion then ensued about why Parent failed to have any LEA employee served that included Advocate making accusations against the LEA. Tr. Day 1 at 27-48. During this discussion and at no time, did Parent provide an affidavit of service. Tr. Day 1 at 27-48, 223-227. Further, during the afternoon on the first day of the hearing, Advocate represented that no LEA employee was served and did not produce any document to support Advocate’s accusations against the LEA concerning this failure. *Id*.[[15]](#footnote-16)

Advocate called the following individuals to testify on behalf of Parent, listed in the order they testified: (1) Parent, (2) Parent’s Support Person,[[16]](#footnote-17) and (3) XXPS Representative. XXPS called on the following individuals to testify, listed in the order they testified: (1) Xxxxxxxx School Lead Teacher, and (2) Xxxxxxxx School Assistant Principal. Finally, Advocate called Parent as a rebuttal witness.

## **JURISDICTION**

The hearing officer has jurisdiction pursuant to the Individuals with Disabilities Education Act (the “IDEA”)[[17]](#footnote-18) 20 U.S.C. § 1400 *et seq*., and its implementing regulations, 34 CFR § 300 *et seq*., and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 8 VAC § 20-81 *et seq*. (the “VA Special Education Regulations”).

## **ISSUES AND RELIEF SOUGHT**

Following the Hearing Officer’s Decision Concerning Sufficiency this hearing proceeded on the following two issues as set forth in the foregoing decision:

**Issue 1**: Whether the LEA denied Student a free appropriate education (“FAPE”) when it failed to develop and/or offer Student an appropriate IEP reasonably calculated to enable Student to make progress appropriate in light of Student’s circumstances, because of Student’s regression in the area of reading and because he was bullied.

**Issue 2**: Whether the LEA denied Student FAPE when it failed to offer Student an appropriate placement in his IEP, because of Student’s regression in the area of reading and because he was bullied.

As set forth in the Complaint and Parent’s post-hearing Opening Brief, Parent requested that the hearing officer order the following relief if Parent satisfies its burden and shows that the LEA denied Student FAPE: (1) the assignment of an independent special education case manager selected by Parent and paid for by the LEA; (2) immediate Individualized Education Program (“IEP”) amendment placing Student at XXxxxxxxxxx Academy or similar private placement; (3) immediate development of an IEP transition plan to include an Academic and Career Plan (“ACP”) in accordance with 8 VAC 20-131-140(C)(2); (4) immediate IEP amendment for 90-minutes, five-days weekly, of Orton Gillingham reading instruction by a certified instructor; (5) sanctions, license revocations and criminal referrals to the Attorney General of Virginia; and (6) reimbursement to Parent for all private evaluations completed from 2018 to present.[[18]](#footnote-19)

**FINDINGS OF FACT**[[19]](#footnote-20)

After considering all the evidence, as well as the argument and briefs of XXPS Counsel and Advocate, the hearing officer’s findings of fact are as follows:

1. Student is now AGE years old and is enrolled as a XXPS student at School, a public day Xxxxxxxx school located in LOCATION, pursuant to Student’s last agreed to and consented to IEP, dated December 2, 2022 (“Student’s IEP”). Student’s date of birthday is BIRTHDAY. During these proceedings, Student was age AGE. XXPS Exhs. 1, 2, and 20.
2. Student was most recently found eligible for special education pursuant to the IDEA on November 19, 2021, as a student with Other Health Impairment. *Id.*
3. The IEP team noted in Student’s IEP that Student has difficulty maintaining attention, suffers from anxiety, and requires accommodations and services in both a general education and special education setting. The IEP team also noted in Student’s IEP that Parent and Student’s teachers indicate that Student exhibits characteristics associated with Autism Spectrum Disorder. *Id.*
4. Student’s IEP also states that while Student’s scores on the WISC-V revealed FSIQ scores in the very low range, Student’s performance should be interpreted with caution because of inattentive, off task behaviors, and inconsistent effort. *Id.*
5. Student’s IEP includes assistive technology consultation to monitor his technology needs so he may access the general education curriculum and is also specifically designed to address Student’s reading difficulties.
6. Parent participated in Student’s IEP development and Student’s IEP includes elements that resulted from Parent’s suggestions, e.g.:

NEEDS OF STUDENT: . . . Routines and daily schedule help reduce his anxiety as well as a longer break in the Xxxxxxxx of his day and the opportunity to draw while engaged in discussions.

XXPS Exh. 1 at 5; Tr. Day 1 at 107-108. Parent’s input was also included as part of “#7 Measurable Annual Goal: Social Skills,” and Student’s “Accommodations/Modifications.” XXPS Exh. 1 at 13-16; Tr. Day 1 at 125-126, 128-129.

1. Parent signed and consented to the implemention of Student’s IEP. XXPS Exh. 1 at 23; Tr. Day 1 333-335.[[20]](#footnote-21)
2. The LEA has provided Parent a copy of the Virginia Procedural Safeguards Notice and Parent has a copy, Tr. Day 1 at 393.
3. Student’s IEP, above Parent’s signature states:

Parent and adult student rights are explained in the Procedural Safeguards. If you, the parent(s) and adult student, need another copy of the Procedural Safeguards or need assistance in understanding this information please contact [Xxxxxxxxxxxx School Teacher] at [] or e-mail [] or [Lead Xxxxxxxxxxxx School Teacher] at [] or e-mail []

XXPS Exh. 1 at 23. Further, the Prior Notice and Parent Consent page of Student’s IEP states:

Resources for the parent to contact for help in understanding the Individuals with Disabilities Education Act (IDEA) and the related federal and Virginia Regulations: Parents may contact the Parent Resource Center at prc@Xxxxxxxxxxx.k12.va.us for further assistance.

XXPS Exh. 1 at 24.

1. On March 8, 2023, Student’s IEP team met to discuss Student’s transition from Xxxxxxxxxxxx school to Xxxxxxxx school, Student’s IEP and the services Student would require when he commenced Xxxxxxxx school. XXPS Exh. 2 at 25.
2. Student’s IEP team determined that the Student would be most successful in a self-contained setting for English and Math during the 2023-2024 school year and that Student would receive reading intervention in a self-contained setting. XXPS Exh. 2 at 26.
3. Parent participated in the March 8, 2023, IEP meeting, helped to develop the IEP, and consented to its implementation, signing the IEP Amendment, dated March 8, 2023 (the “March IEP Amendment”). XXPS Exh. 2 at 1, 23-24; Tr. Day 1 at 334-335.
4. Student’s March IEP Amendment includes amended and additional services that were not included in Student’s IEP and that commence August of 2023 at the start of Xxxxxxxx school. *Compare* XXPS Exh. 1 at 21 *with* XXPS Exh. 2 at 20; Tr. Day 2 at 228-233. These amended and additional services included: reading instruction in a special education setting, English/language arts instruction in special education setting, collab science in a general education setting, collab social studies in a general education setting, and mathematics instruction in a special education setting. XXPS Exh. 2 at 20; Tr. Day 2 at 228-233.
5. Student’s March IEP Amendment includes the same notices to Parent concerning Virginia Procedural Safeguards Notice and resources to contact should Parent have questions concerning the Procedural Safeguards or the IDEA and related federal and state regulations, as set forth in Finding of Fact 9, *supra*. XXPS Exh. 2 at 23-24, 26.
6. On April 24, 2023, Student’s IEP team met to consider an additional amendment to Student’s IEP wherein the IEP determined that Student would be most successful with a handheld calculator for tasks, including testing, rather than the online Desmos calculator. XXPS Exh. 20 at 25.
7. Parent participated in the April 24, 2023, IEP meeting, helped to develop the IEP, and consented to its implementation, signing the IEP Amendment on May 1, 2023, that was created April 24, 2023 (the “April IEP Amendment”). XXPS Exh. 20 at 1, 23; XXPS Exh. 21; Tr. Day 1 at 350-351; Tr. Day 2 at 236.[[21]](#footnote-22)
8. Student’s April IEP Amendment includes the same notices to Parent concerning Virginia Procedural Safeguards Notice and resources to contact should Parent have questions concerning the Procedural Safeguards or the IDEA and reflated federal and state regulations, as set forth in Finding of Fact 9 and 14, *supra*. XXPS Exh. 20 at 23, 25.
9. Student’s IEP team met September 22, 2023, to further discuss the Student’s transition to Xxxxxxxx school and to address Parent’s concerns to include Student’s reading. Tr. Day 1 at 86-87; Tr. Day 2 at 250-252; Tr. Day 3 at 122, 290.
10. Following the foregoing September meeting, the IEP team then reconvened on October 3, 2023, and October 20, 2023, to discuss the school based IEP team members’ proposal to increase reading services to include one-to-one instruction using an evidence-based and peer-reviewed multisensory reading program that the LEA would provide to Student. Depending on the day of the week and Student’s schedule, these additional reading services would be provided during Student’s Reading & Writing intervention class or Academic Community Connection Time (“ACCT”) class. XXPS Exh. 3 at 26; Tr. Day 1 at 59-61, 80-82; Day 2 at 250-254, 259-262; Tr. Day 3 at 169-174, 219, 290.
11. During the October 20, 2023, IEP team meeting, the school based IEP team members also proposed to allow the Student to transition between classes ahead of the normal bell schedule due to regulation concerns in large crowds, and that the Student have accommodations when he participates in school sponsored extracurricular activities. *Id.*
12. During the October 20, 2023, the LEA’s proposals were set forth in an IEP Amendment, dated October 20, 2023 (the “Proposed October IEP Amendment”). XXPS Exh. 3. Parent has *not* provided consent for the LEA to implement the Proposed IEP Amendment.[[22]](#footnote-23)
13. During September of 2o23, prior to Parent requesting that LEA have a psychological evaluation performed, Parent reached out to Dr. Xxxxxxxxxxxx, PhD, a clinical and school psychologist to perform a psychological evaluation of student. Tr. Day 1 at 358, 379-381.
14. Parent engaged Dr. Xxxxxxx at Parent’s expense, Tr. Day 1 at 236, 260-261, and Dr. Xxxxxxx performed her psychological assessment over three days, October 31, 2023, and November 7 and 16, 2023, issuing the Psychological Evaluation on November 30, 2023 (“Parent’s Psychological Evaluation”). P. Exh. 30.
15. At Parent’s request sometime during late September or early October, the LEA had a Psychological Evaluation of Student completed during the month of October 2023, with the last evaluation date of October 27, 2023 (“LEA’s Psychological Evaluation”). XXPS Exh. 5; Tr. Day 2 at 215-216. The LEA’s Psychological Evaluation, in part determined Student’s cognitive ability and states:

[Student] is a xxxxx grade student receiving services as a student with an Other Health Impairment due to ADHD. He performed in the Very Low range overall on a measure of cognitive ability. Visual spatial skills were in the Low Average range while verbal comprehension was a relative strength with a score in the Average range. Processing skills involved in reading were in the Significantly Below Average range. Adaptive skills, as rated by [Student]’s case manager and mother, were in the Extremely Low to Low range.

XXPS Exh. 5 at 9.

1. The findings of the LEA’s Psychological Evaluation are consistent with the findings of Parent’s Psychological Evaluation. Concerning Student’s cognitive ability, Parent’s Psychological Evaluation states:

The results of this evaluation show Xxxxxxx is developing skills along his own trajectory, with most of his skills currently falling between the 6 to 8 year- old age range. This level of overall development is at the 1st to 2nd percentile for his chronological age.

P. Exh. 30 at 5.

Although he has a number of strengths, [Student]’s overall neurocognitive skills are developing at a slower pace than his peers. On formal testing, even when tested in a reduced-distraction, one-on-one environment, [Student]’s overall cognitive skills fell at about the 1st percentile for his age (with some skills at the 7th percentile and 10th percentile). Across the cognitive tasks, [Student] slightly demonstrated stronger skills on familiar, highly structured tasks. He had more difficulty with tasks that were novel or more abstract, and auditory only.

P. Exh. 30 at 6.

1. During the hearing, Xxxxxxxx School Lead Teacher was qualified as an expert in the areas of IEP development, special education programming, and special education placement. Tr. Day 2 at 211-212. The testimony of Xxxxxxxx School Special Education Teacher was both credible and consistent on the major issues before the hearing officer, and her demeanor during the hearing was open, candid, and forthright.
2. Pursuant to Parent’s request, Xxxxxxxx School Lead Teacher conducted an educational assessment of Student issuing a report entitled, “Educational Evaluation,” dated November 10, 2023. XXPS Exh. 6. The Educational Evaluation indicates that Student’s academic skills battery composite score that encompasses reading, math, and spelling was in the “very low range” and further that this score indicates that Student will “struggle[] with many of these academic tasks.” Tr. Day 2 at 221.
3. Xxxxxxxx School Lead Teacher’s testimony also accounted for the conclusions of the LEA’s Psychological Evaluation, XXPS Exh. 5, concerning Student’s cognitive ability and Student’s full scale IQ and her own conclusions as set forth in her Educational Evaluation, XXPS Exh. 6. Tr. Day 2 at 224-225.
4. Xxxxxxxx School Lead Teacher testified that Student’s full scale IQ was commensurate with Student’s educational achievement as set forth in her Educational Evaluation. *Id.*
5. Student’s Xxxxxxxx School Special Education Teacher provides direct instruction to Student and is Student’s special education teacher and case manager. Student’s Xxxxxxxx School Special Education Teacher is endorsed by VDOE as a reading specialist and is trained in various reading methodologies, such as Orton-Gillingham and Wilson Reading. Tr. Day 2 at 333-334; Tr. Day 3 at 96-97.
6. Orton-Gillingham and Wilson Reading are evidence-based peer reviewed explicit reading programs/methodologies. Tr. Day 2 at 256-259.
7. Student’s Xxxxxxxx School Special Education Teacher implemented Orton-Gillingham reading strategies when instructing Student and this was observed by Xxxxxxxx School Lead Teacher who stated Xxxxxxxx School Special Education Teacher used “explicit instruction and direct instruction in syllabication rules or the breaking down [of] words to increase decoding and [en]coding abilities. . .,” Tr. Day 3 at 99-100, and “progress monitoring, which included running records of different encoding activities, encoding meaning spelling, with [Student] and the rest of the Students.” *Id.*
8. The LEA provided Student with evidence-based peer-reviewed reading instruction.
9. Pursuant to Student’s IEP, March IEP Amendment, and April IEP Amendment, Student is making appropriate progress in light of his circumstances. Xxxxxxxx School Lead Teacher testified:

In light of his circumstances -- I think that’s one thing that we’re not that needs to be said, again, is that we’re not expecting -- or should not be expecting [Student] to make the same progress as his similar age not disabled peers or even other peers with disabilities. [Student] has a unique cognitive profile and those things need to be taken into consideration for a student who has an IQ -- a full scale IQ that is significantly below the mean. That is going to impact his progress and ability to do things, but I do think in light of that [Student] continues to make progress in reading, in math and especially in behavior. Those things are very evident in the progress that he’s making as noted on [XXPS] Exhibit 11 [“Reading Fluency Date: Words Per Minute and Accuracy], and the fact that he is no longer eloping school. He’s no longer leaving classrooms. Those things were previously happening, but are no longer happening in our setting.

Tr. Day 3 at 149-150.

1. That Student is making appropriate progress in his educational program in light of his unique circumstances is supported by (i) Student’s Reading Growth Assessment wherein his score rose from 1262 during the fall of 2023 to a score of 1381 during the winter of 2023 (XXPS Exh. 10; Tr. Day 3 at 143-145, 289); (ii) Student’s most recent report card, dated February 8, 2024, wherein his grades are all passing and range from As to Cs (XXPS Exh. 13);[[23]](#footnote-24) his Reading Fluency Data (XXPS Exh 11); and his IEP Progress Reports (XXPS Exhs. 4 and 9).
2. Specifically concerning Student’s reading, he is making progress appropriate in light of his unique circumstances: at the commencement of the school year, Student refused to read for Xxxxxxxx School Special Education Teacher, then as Xxxxxxxx School Special Education Teacher established a relationship and rapport[[24]](#footnote-25) with Student he agreed to engage and read level 1 passages during October 2023, progressed to reading level 3 passages during December 2023, and during January of 2024 was reading a level 4 passage. XXPS Exhs. 4, 9, and 11; Tr. Day 2 at 289-290, 306-308.[[25]](#footnote-26)
3. Further, concerning Student’s reading, a comparison of Student’s IEP Progress Report, dated January 8, 2024 (XXPS Exh. 9), and Reading Fluency Data (XXPS Exhibit 11), demonstrate that each reporting period notes an increase in the Student’s fluency, including in the areas of words per minute read by the Student and the accuracy with which he read passages. Tr. Day 2 at 275-290, 306-30; Tr. Day 3 at 139-141.
4. The IEP team considered Parent’s request for a private day placement for Student, to include Parent’s specific request for placement at XXxxxxxxxxx Academy, and this is reflected in Student’s October IEP Amendment. XXPS Exh. 3 at 22, 26-27.
5. The school based members of the IEP did not agree with Parent’s request for a private day placement concluding that with supports as set forth in Student’s IEP, as amended and proposed that public day school is Student’s least restrictive environment. Tr Day 2 at 266-267, 309-310; Tr. Day 3 at 197-198, 212-213.
6. Concerning this conclusion, the school based LEA team members stated in Student’s Proposed October IEP Amendment the following:

[Student] will receive reading instruction services in a special education reading intervention class (currently meeting 3 days a week on a normal 5-day school week). During that class however, he will be pulled for 45 minutes to receive intensive, 1-to-1, reading instruction using an evidence-based, peer-reviewed, multisensory decoding program. [Student] will also be pulled on the remaining two days of the week for 30 minutes each time to receive additional 1-to-1 instruction using the Wilson Reading System. [Student] will also receive support in the science and history classes in the collaborative general education setting. English and math classes will be in the special education setting. [Student] receives support through accommodations in his elective classes. [Student] participates with students without disabilities in the general education setting for history, science, health and PE, World Cultures/Computer Technology classes, lunch, and two ACCT classes per week.

XXPS Exh. 3 at 22.

[Parent] proposed an outside placement for [Student] based on her belief that the school is not meeting his reading and behavioral needs. [Parent] shared that she does not feel that enough progress has been made in the time [Student] has received services in Xxxxxxxxxxxxxxxxxxx Schools. She states that [Student] struggles with peer interactions on the bus and other social situations. The school-based team disagreed. Ms. Xxxxxxx stated that she is pursuing an outside placement, XXxxxxxxxxx Academy, for [Student]. A continuum of services was discussed and the team reviewed available data to discuss the parent's proposal. The IEP team's discussion around LRE included both public day school and a private day placement, but the final proposal was for [Student] to remain in the public day school setting with increased services to meet his needs. At this time, the IEP team determined that an outside placement is not appropriate for [Student]. There is no documentation of behavioral referrals or incidents beyond teacher managed behaviors. The team has proposed increased services to address [Student]'s needs in reading. This service will be delivered in a more restrictive setting to meet [Student]’s learning needs. These services will supplement the instruction currently being provided. The IEP Amendment proposed on October 20, 2023 is reasonably calculated to enable [Student] to make progress appropriate in light of his unique circumstances. The IEP contains annual goals to address weaknesses in the areas of written language, reading, mathematics, written language, study skills, and social skills. Moreover, it contains numerous accommodations to address time, scheduling, setting, presentation and response. To assist [Student] in making appropriate progress on his IEP goals, the IEP Amendment will provide him with the following special education services: reading instruction, behavior support, assistive technology consult, English/language arts instruction, mathematics instruction, and support in science and social studies. [Student] will participate with nondisabled students in the general education setting for his history, science, health and PE, world cultures/computer technology, and ACCT classes.

XXPS Exh. 3 at 26.

1. Student’s Proposed October IEP Amendment and the public school programs that it proposes provides Student with (i) consistent, regular, meaningful interaction with general education peers during each instructional day; and (ii) special education supports reasonably calculated to allow the Student to receive an appropriate education in light of his unique circumstances. Tr. Day 2 at264- 265; Tr. Day 3 at 148-149, 211-212.
2. Each of Student’s IEP, March IEP Amendment, April IEP Amendment, and Proposed October IEP Amendment, were reasonably calculated to address Student’s academic, developmental, and functional needs, to include but not be limited to reading, to enable Student to make progress in light of his circumstances.
3. An IEP team meeting occurred on December 15, 2023, and included as a part of the meeting agenda the review of the recent evaluations of Student to include the LEA’s Psychological Evaluation, Parent’s Psychological Evaluation, and the LEA’s Educational Evaluation. Tr. Day 2 at 269-273.
4. Based on LEA’s Psychological Evaluation and Parent’s Psychological Evaluation this meeting would discuss reconvening the eligibility team to discuss concerns related to Student’s current disability categories, services, and least restrictive environment. Issues concerning Student’s disability categories arose because of the contradictory conclusions concerning Autism Spectrum Disorder as set forth in the LEA’s Psychological Evaluation and Parent’s Psychological Evaluation.
5. The LEA’s Psychological Evaluation diagnosed Student with Autism Spectrum Disorder stating: “Autism Spectrum Disorder, with accompanying intellectual impairment, without accompanying language impairment, Level 1, with associated features of social anxiety.” P. Exh 30 at 1. The LEA’s Psychological Evaluation did *not* diagnose Student with Autism Spectrum Disorder stating:

While teacher and parent ratings reflected some characteristics of Autism Spectrum Disorder, many of the concerns were with self-regulation, peer and adult relations, and attention issues and the results of the Autism Diagnostic Observation Schedule, Second Edition did not yield results with the range of Autism Spectrum Disorder.

XXPS Exh. 5 at 1-2. *See also* Tr. Day 2 at 215-216.

1. During the December 15, 2023, Parent and Advocate informed the IEP team that they believed that Student was bullied during PE class on December 12, 2023, and that another student threated to “cut off [Student’s] xxxxx.” Tr. Day 3 at 126-127.[[26]](#footnote-27)
2. After the allegation of bullying, the school based members of the IEP team attempted to discuss with Parent and Advocate the LEA’s Psychological Evaluation, Parent’s Psychological Evaluation, and the LEA’s Educational Evaluation but Parent and Advocate refused to discuss the foregoing until the allegation of bullying was discussed. The school based members of the IEP team then adjourned this meeting so that the School could investigate the bullying allegation. Tr. Day 2 at 269-273; Tr. Day 3 at 125-134, 239-241, 276.
3. During the hearing Xxxxxxxx School Assistant Principal was qualified as an expert in the area of school administration and included within this designation is expertise with student safety, school safety, and threat assessments. Tr. Day 3 at 167, 191-196, 283. The testimony of Xxxxxxxx School Assistant Principal was both credible and consistent on the major issues before the hearing officer, and his demeanor during the hearing was open, candid, and forthright.
4. Xxxxxxxx School Assistant Principal, knows Student, speaks with Student often in the lunchroom, and sees him often in the School’s hallways as Student transitions between class. Tr. Day 3 at 168-169, 219-221.[[27]](#footnote-28)
5. The IEP team treated this threat seriously and immediately following the December 15, 2023, IEP team meeting, Xxxxxxxx School Assistant Principal commenced his investigation of the alleged event of bullying that occurred during Student’s PE class on December 12, 2023. Tr. Day 3 at 177-183.
6. As part of his investigation, Xxxxxxxx School Assistant Principal spoke with Xxxxxxxx School PE Teacher, reviewed the entire gym footage that included the incident, reviewed this footage with Student, interviewed all students that spoke with Student during this PE class, had Xxxxxxxx School PE Teacher prepare a written statement and provide all email correspondence by and between Parent and Xxxxxxxx School PE Teacher, reviewed procedures with Xxxxxxxx School PE Teacher concerning incident reporting, called Parent on December 15, 2023, to provide and update to Parent on the investigation, and prepared a written incident report on December 18, 2023. Tr. Day 3 at 177-183; XXPS Exhs. 7 and 8. Xxxxxxxx School Assistant Principal provided Parent a copy of his written findings, after winter break, on or about January 3, 2023. Tr. Day 3 at 184-186.
7. Based on the foregoing, Xxxxxxxx School Assistant Principal determined that an incident did occur with Student and another student during small group volleyball instruction, but that this incident was “peer conflict” to include a verbal back and forth and some kicking between the Student and the other student. After the incidence of kicking Xxxxxxxx School Assistant Principal then saw Xxxxxxxx School PE Teacher separate Student and the other student for the remainder of the class. *Id.*
8. Based on the foregoing and Xxxxxxxx School Assistant Principal’s interviews, to include with Student, the student with whom he had a conflict, and other students who saw and heard the incident, Xxxxxxxx School Assistant Principal determined that no one threated to “cut off [Student’s] xxxxx” but that either Student or the other student threated to kick the other in the xxxxx or uppercut the other in the xxxxx. Tr. Day 3 at 177-183, 206, 223-224; XXPS Exhs. 7 and 8.
9. The foregoing incident occurred on December 12, 2023. The last day of school for Student before winter break was December 15, 2o23, the same date on which Xxxxxxxx School Assistant Principal learned of the event. Tr. Day 3 at 261.
10. As a result of the incident recommended a restorative conference but this has not occurred because this requires parental consent and that has not yet been given. Further, Xxxxxxxx School Assistant Principal assisted Xxxxxxxx School PE Teacher develop a plan to split up Student and the student with whom he had conflict during PE class. Tr. Day 3 at 177-183, 256-257; XXPS Exhs. 7 and 8.
11. After Parent filed the Complaint, the parties had a resolution meeting on or about January 22, 2024. The next day Xxxxxxxx School Lead Teacher sent Parent a letter offering to convene an IEP team and eligibility team meeting to review the LEA’s Psychological Evaluation, LEA’s Educational Evaluation, and in particular, Parent’s Psychological Evaluation, to discuss Student’s current eligibility categories, and to use the “most up to date information and data to consider when determining services and LRE” to ensure the IEP team is providing Student “with the best possible educational program.” XXPS Exh. 12.

**CONCLUSIONS OF LAW**[[28]](#footnote-29)

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

## **The IDEA**

The purpose of the IDEA is “to ensure that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs.” *Bd. Of Educ. v. Rowley*, 458 U.S. 176, 179-91 (1982); *Hinson v. Merritt Educ. Ctr.*, 579 F. Supp. 2d 89, 98 (D.D.C. 2008)(citing 20 U.S.C. § 1400(1)(A)). Implicit in the congressional purpose of providing access to a FAPE is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the disabled child. *Rowley*, 458 U.S. at 200; *Hinson*, 527 F. Supp. 2d at 98 (citing *Rowley*, 458 U.S. at 200). FAPE is defined as:

[S]pecial education and related services that –

(a) Are provided at public expense, under public supervision and direction, and without charge;

(b) Meet the standards of the SEA [i.e., State Educational Authority] . . .

(c) Include an appropriate preschool, Xxxxxxxxxxxx school, or secondary school education in this State involved; and

(d) are provided in conformity with the individualized education plan (IEP).

34 C.F.R. § 300.17, *accord*, 20 U.S.C. § 1401(9). The VA Special Education Regulations also set forth the foregoing definition of FAPE in 8 VAC 20-81-10.

Further, the VA Special Education Regulations defines “special education” as follows:

“Special education” means specially designed instruction, at no cost to the parent(s), to meet the unique needs of a child with a disability, including instruction conducted in a classroom, in the home, in hospitals, in institutions, and in other settings and instruction in physical education. The term includes each of the following if it meets the requirements of the definition of special education: (§ 22.1-213 of the Code of Virginia; 34 CFR 300.39)

1. Speech-language pathology services or any other related service, if the service is considered special education rather than a related service under state standards;

2. Vocational education; and

3. Travel training.

8 VAC 20-81-10.

In deciding whether the LEA provided a student FAPE, the inquiry is limited to (a) whether LEA complied with the procedures set forth in IDEA; and (b) whether the student’s IEP is reasonably calculated to enable the student to receive educational benefit. *Rowley*, 458 U.S. at 206-07. Under this second “substantive” prong, a LEA need not maximize the potential of children with disabilities, but the door of public education must be opened in a meaningful way, and the IEP must provide the opportunity for more than only “trivial advancement.” *P. v. Newington Bd. of Ed.*, 546 F.3d 111, 119 (2d Cir. 2008)(citations omitted). As stated more recently by the United States Supreme Court “[i]t requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 403 (2017). Further, *Endrew F.* reaffirms a related core notion in *Rowley* – that while a student’s IEP must be “reasonable”, it need not be “ideal.” *Id*. The cornerstone of an appropriate education is an appropriate IEP, one that describes a student’s unique needs and sets forth a plan for meeting those needs. *R.F. v. Cecil County Public Schools*, 919 F.3d 237, 241 (4th Cir. 2019)(“The mechanism by which a state provides a FAPE is an IEP – a document that describes the child’s unique needs and the state’s plan for meeting those needs.”).

In matters alleging a procedural violation, a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child’s right to FAPE, significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of FAPE, or caused the child a deprivation of educational benefits. 34 C.F.R. § 300.513(a)(2). The foregoing standard is set forth in the VA Special Education Regulation at 8 VAC 20-81-210(O)(17):

In matters alleging a procedural violation, a special education hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies:

a. Impeded the child’s right to a free appropriate public education;

b. Significantly impeded the parent’s(s’) opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or

c. Caused a deprivation of educational benefits.

Accordingly, in instances of an alleged IDEA procedural violation claim, such a claim is viable only if the procedural violations affected the student’s substantive rights. *T.B., Jr. v. Prince George's Cnty. Bd. of Educ.*, 897 F.3d 566, 574 (4th Cir. 2018)(citing *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006); other citations omitted). The LEA’s failure “to perfectly execute an IEP does not necessarily amount to the denial of [FAPE]” rather only “a failure to implement a material portion of an IEP, violated the IDEA” and is a denial of FAPE. *Sumter Cnty. Sch. Dist. 17 v. Heffernan*, 642 F.3d 478, 484 (4th Cir. 2011). Compensatory education is not an appropriate remedy for purely procedural violations of the IDEA. *Maine Sch. Admin. Dist. No. 35 v. Mr. R.*, 321 F.3d 9, 19 (1st Cir. 2003).

## **Burden of Proof**

Parent, as the party who filed the Complaint bears the burden of proof. *See e.g.*, *N.P. by S.P. v. Maxwell, 711 F. App’x* 713, 716 (4th Cir. 2017) (the parents bear the burden of proving their child was denied a free appropriate public education), *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 party that bears the burden of proof may satisfy such burden 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) (stating the hearing officer’s factual conclusions are supported by the preponderance of the record evidence.). The burden of proof encompasses both the “‘burden of persuasion,’ i.e., which party loses if the evidence is closely balanced, and the ‘burden of production,’ i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding.” *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Here, Parent’s burden is to produce evidence that proves that Student’s IEP, and March and April IEP Amendments, and Proposed October IEP Amendment were not reasonably calculated to provide Student with a FAPE. *R.F. v. Cecil County Public Schools*, 919 F.3d at 245 (citing *Endrew F.*, 580 U.S. at 399-400). Further, for Parent to satisfy her burden of proof, she must offer expert testimony in support of her positions. *Weast v. Schaffer ex rel. Schaffer*, 377 F.3d at 456 (“For regardless of which side has the burden of proof in an administrative hearing, parents will have to offer expert testimony to show that the proposed IEP is inadequate.”).

## **Standard of Review**

While the IDEA sets standards for the education of children with disabilities, the IDEA does not displace the traditional notion that the primary responsibility for education belongs to educators. *MM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 533 (4th Cir. 2002)(“The courts should, to the extent possible, defer to the considered rulings of the administrative officers, who also must give appropriate deference to the decisions of professional educators”). Virginia special education hearing officers “are themselves expected to ‘give appropriate deference to the decisions of professional educators.’” *T.B., Jr.*, 897 F.3d at 572 (quoting *M.M.*, 303 F.3d at 533 (4th Cir. 2002)). A special education hearing officer should not “’second guess’ the educational decisions of professionals with first-hand experience not only with the student in this case, but with a wide variety of other students.” *T.B., Jr.*, 897 F.3d at 576-77 (quoting *M.M.*, 303 F.3d at 532); *see also Cty. Sch. Bd. of Henrico Cty. v. Z.P.*, 399 F.3d 298, 307 (4th Cir. 2005) (“[A]t all levels of an IDEA proceeding, the opinions of the professional educators are entitled to respect.”); *accord*, *Endrew F.*, 580 U.S. at 404 (2017) (“courts [should not] substitute their own notions of sound educational policy for those of the school authorities which they review,” *quoting*, Rowley, 458 U.S. at 206). The IDEA requires “great deference to the views of the school system rather those of even the most well-meaning parent.” *A.B. v. Lawson*, 354 F.3d 315 (4th Cir. 2004).

In this case, the school based members of Student’s IEP team, and others, who were involved in preparing and implementing Student’s IEPs, and the two school based members of Student’s IEP team who testified in the due process hearing, consisted of educators and special educators with years of experience working with students with disabilities such as Student, and who were intimately familiar with how Student’s special education instruction and services were delivered to him. Of two who testified, one, Xxxxxxxx School Lead Teacher was qualified as an expert in the areas of IEP development, special education programming, and special education placement without objection. Tr. Day 2 at 211-212. The other, Xxxxxxxx School Assistant Principal, was qualified as an expert in the area of school administration and included within this designation is expertise with student safety, school safety, and threat assessments. Tr. Day 3 at 167, 191-196, 283. The well-founded opinions of these experienced educators, who appropriately considered Student’s needs, and the supports and services he required, are entitled to great deference. Accordingly, while weighing the evidence, the hearing officer, has given great deference to the opinions and expertise of these educators. *A.B. v. Lawson*, 354 F.3d at 328 (“The ALJ [i.e., hearing officer] correctly recognized that while [the LEA] and [Parent’s] experts disagreed, IDEA requires great deference to the views of the school system rather than those of even the most well-meaning parent.”); *Hartmann v. Loudoun Cnty. Sch. Bd.*, 118 F. 3d 996, 1001 (4th Cir. 1997) (“[l]ocal educators deserve latitude in determining the individualized education program most appropriate for a disabled child.”).

## **Conclusions of Law**

1. Parent Has Failed To Satisfy Her Burden, Produce Evidence and Prove That The LEA Did Not Develop Or Failed To Offer Student An IEP Reasonably Calculated To Enable Him To Make Progress In Light Of His Circumstances.

In this case, Parent called no professional educator and expert to contradict the testimony of Xxxxxxxx School Lead Teacher, an expert on IEP development, special education programming, and special education placement. Parent’s Advocate called three witness on Parent’s behalf: in order, Parent, Parent’s Support Person, and XXPS Representative. During the hearing none of these individuals were qualified as an expert in special education, although XXPS Representative likely could have been. Concerning Parent’s Support Person, while she did attend IEP team meetings relating to the Proposed October IEP Amendment, this individual is not a special education teacher, not a reading specialist, has never been employed by the division in any capacity, was not a part of the Student’s IEP team, never met the Student, and like Parent never observed the Student in a classroom setting. Tr. Day 1 at 197-200. Concerning XXPS Representative, she did not testify as an expert, did not offer opinion testimony, was not a member of Student’s IEP team, never made any decisions concerning Student’s IEP, and never provided direct instruction to Student. Tr. Day 2 at 142-144. Although Parent testified that she never observed Student at school, Tr. Day 1 at 207, Parent’s testimony concerning Student remains highly relevant, as is her testimony concerning her experience as a member of the IEP team to include her desire to have Student placed at a private day school. Although Parent’s testimony is relevant, the IDEA and implementing regulations do not require the LEA to accede to parent’s demands concerning the provision of services or placement so long as it considers suitable alternatives, as occurred here and as determined by the hearing officer in the finding of facts. As set forth in the findings of fact, Parent’s input was included in Student’s IEP to which Parent consented. Likewise, Parent participated in the IEP meetings that led to and resulted in Student’s March IEP Amendment and April IEP Amendment and Parent consented to both. Although Parent did not consent to Student’s Proposed October IEP Amendment, and the school based members of the IEP team did not accede to Parent’s desire to have Student placed at a private day school, again as determined in the findings of fact, Parent participated in the IEP meeting and her input was considered.

“[T]he IDEA is designed to ensure parental participation in decisions regarding their disabled child, but it does not ordinarily require parental consent such that parents may usurp or otherwise hinder an LEA's authority to educate . . . disabled children.” *Fitzgerald v. Fairfax Cnty. Sch. Bd.*, 556 F. Supp. 2d 543, 551 (E.D. Va. 2008). In other words, the IDEA’s focus on parental participation does not give a parent as a member of the IEP team the power to control or veto educational decisions concerning parent’s child. *A.W. ex rel. Wilson v. Fairfax County Sch. Bd.*, 372 F.3d 674, 683 n. 10 (4th Cir.2004) (stating that “the right conferred by the IDEA on parents to participate in the formulation of their child's IEP does not constitute a veto power over the IEP Team's decisions”) (citing *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir.2003)); *Blackmon v. Springfield R-XII School Dist.*, 198 F.3d 648, 656-57 (1999)(“the IDEA does not require school districts simply to accede to parents’ demands without considering any suitable alternatives . . . . The School District's adherence to [its] decision does not constitute a procedural violation of the IDEA simply because it did not grant [] parents’ request”); *Student with a Disability*, 115 LRP 6183 (SEA VA 07/131/14)( the IDEA does “not require the [LEA] to accede to a parents’ demands concerning the initial provision of services”).

Here, Student’s IEP, as amended, was properly implemented, and Student made educational progress. The LEA, through the testimony of Xxxxxxxx School Lead Teacher, again, an expert on IEP development, special education programming, and special education placement, and through its documentary evidence as explained by Xxxxxxxx School Lead Teacher, demonstrated the appropriateness of Student’s IEP, as amended, and the educational progress that Student is making, all as set forth in the findings of fact. Summarized as follows, Student’s reading progress is shown on his Reading Growth Assessment (XXPS Exh. 10; Tr. Day 3 at 143-145, 289), Student’s most recent report card, dated February 8, 2024, wherein his grades are all passing and range from As to Cs (XXPS Exh. 13), his Reading Fluency Data (XXPS Exh 11), and his IEP Progress Reports (XXPS Exhs. 4 and 9). Further, concerning reading, at the commencement of the school year at School, Student refused to read for Xxxxxxxx School Special Education Teacher, then as Xxxxxxxx School Special Education Teacher established a relationship and rapport with Student, he agreed to engage and read level 1 passages during October 2023, progressed to reading level 3 passages during December 2023, and during January of 2024 was reading a level 4 passage. A comparison of Student’s IEP Progress Report dated January 8, 2024 (XXPS Exh. 9), and Reading Fluency Data (XXPS Exhibit 11), also demonstrate that during each reporting period there is an increase in the Student’s fluency, including in the areas of words per minute read by the Student and the accuracy with which he read passages. XXPS Exhs. 4, 9, and 11; Tr. Day 2 at 275-290, 306-30; Tr. Day 3 at 139-141.[[29]](#footnote-30)

Student Xxxxxxxx School Special Education Teacher provided direct instruction to Student, implementing his IEP as amended. As set forth in the findings of fact, Student’s Xxxxxxxx School Special Education Teacher, who is also Student’s case manager, is endorsed by VDOE as a reading specialist and is trained in various reading methodologies, such as Orton-Gillingham and Wilson Reading. Tr. Day 2 at 333-334; Tr. Day 3 at 96-97. Orton-Gillingham and Wilson Reading are evidence-based peer reviewed explicit reading programs/methodologies. Tr. Day 2 at 256-259. Student’s Xxxxxxxx School Special Education Teacher implemented Orton-Gillingham reading strategies when instructing Student and this was observed by Xxxxxxxx School Lead Teacher who stated Xxxxxxxx School Special Education Teacher used “explicit instruction and direct instruction in syllabication rules or the breaking down [of] words to increase decoding and [en]coding abilities. . .,” Tr. Day 3 at 99-100, and “progress monitoring, which included running records of different encoding activities, encoding meaning spelling, with [Student] and the rest of the Students.” *Id.*[[30]](#footnote-31)

Student has made educational progress in light of his unique circumstances. As set forth in the findings of fact, Student has a unique cognitive profile and it should not be expected that he makes the same progress as is non-disabled peers, or even the same as his disabled peers. Tr. Day 3 at 149-150. As found in Student’s Educational Evaluation, Student’s academic skills battery composite score that encompasses reading, math, and spelling was in the “very low range” and further that this score indicates that Student will “struggle[] with many of these academic tasks.” Tr. Day 2 at 221. Student’s full scale IQ, as determined in the LEA’s Psychological Evaluation, was commensurate with Student’s educational achievement as set forth in Student’s Educational Evaluation. Tr. Day 2 at 224-225.

Further, Student’s Proposed October IEP Amendment was appropriate to meet Student’s educational needs. The Proposed October IEP Amendment offered to increase reading services to Student to include one-to-one services using an evidence based, peer reviewed, multisensory reading program and one-to-one instruction using the Wilson Reading System. XXPS Exh. 3 at 22. Student’s Proposed October IEP Amendment and the public school programs that it proposed provides Student with special education supports reasonably calculated to allow the Student to receive an appropriate education in light of his unique circumstances. Tr. Day 2- 265; Tr. Day 3 at 148-149211-212.

1. Parent Has Failed To Satisfy Her Burden And Prove That The LEA Did Not Offer Student An Appropriate Placement In His Proposed October IEP Amendment.

As set forth above, while the IEP team must consider the concerns of the parent and information provided by the parent as part of the IEP development process, the IEP team is not required under the IDEA to accept all parent requests. *See* Greenhill *v. Loudoun County School Board*, No. 1:19-CV-868, 2020 WL 855962, at \*9 (E.D. Va. Feb. 20, 2020)(“That plaintiffs did not get their desired result does not undermine their participation, as the ‘IDEA does not mandate that parental preferences guide educational decisions,’” quoting *MM v. Dist. 00001 Lancaster Cnty. Sch.*, 702 F.3d 479, 488 (8th Cir. 2012)). Further, while the IEP team has an obligation to maintain an open mind, they are not required to adopt the parent’s view. *J.R. v. Smith*, No. CV DKC 16-1633, 2017 WL 3592453, at \*11 (D. Md. Aug. 21, 2017)(“Here, the evidence clearly shows that the []IEP team discussed both Ivymount and RTS. That the []IEP team members from the school were not ultimately persuaded by Plaintiffs' arguments does not mean that they were not open-minded”). As set forth in the comments and question section of the applicable federal regulations, “[t]he IEP team should work toward consensus, but the public agency has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive FAP.” 34 C.F.R. Part 300, Appendix A, Question 9. The IDEA does not require the LEA and the parents to reach a consensus regarding the education of a disabled child. Instead, if a consensus cannot be reached, the LEA must make a determination, and parent may appeal that determination.

Further, the IDEA requires the LEA to educate Student in the least restrictive environment. 20 U.S.C. § 1412(a)(5)(A).

To the maximum extent appropriate, children with disabilities, . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

*Id.*; *see also*, 34 C.F.R. § 300.114. A student is to be educated in the school that student would attend if not disabled unless it can be shown the student cannot learn in that environment. 34 C.F.R. § 300.116; *see also*, *Barnett v. Fairfax Cnty. Sch. Bd.*, 927 at 146, 153 (4th Cir. 1991). Parent has failed to produce evidence to satisfy this burden. The evidence during the hearing was that Student’s needs can be met within public school, with additional supports, and where he can be educated with non-disabled peers. [[31]](#footnote-32)

Here, as set forth in the finding of facts, the school based team considered Parent’s request for private day school placement at XXxxxxxxxxx Academy. XXPS Exh. 3 at 22, 26-27. The LEA based members of the IEP did not agree with Parent’s request for a private day placement concluding that with supports as set forth in Student’s IEP, as amended, and with the additional supports in Student’s Proposed October IEP Amendment that public day school is Student’s least restrictive environment. Tr Day 2 at 266-267, 309-310; Tr. Day 3 at 197-198, 212-213. The LEA met its procedural obligations to consider Parent’s input and the school based IEP team members disagreement with Parent’s request alone does not demonstrate a violation of the IDEA. Placement in the public-school setting is appropriate for the Student and meets his educational needs in the least restrictive environment. The Parent failed to produce any evidence in support of the assertion that the Student requires a private day school placement, such as XXxxxxxxxxx Academy. Further, as set forth in the Proposed October IEP Amendment, and as testified to at the hearing, (i) the LEA proposed increased services to address Student’s needs in reading while in a public day placement, (ii) Student’s emotional needs can be met with a public day placement, and (iii) that Student will participate with nondisabled students in the general education setting for his history, science, health and PE, world cultures/computer technology, and ACCT classes. Tr. Day 2 at 264- 265; Tr. Day 3 at 148-149, 211-212. Placement at XXxxxxxxxxx Academy, or similar private day school, was not appropriate for Student because he would be exposed to significant behaviors that were not necessary for him and because he is able to make adequate progress in the public school day setting. TR. Day 3 at 148-149, 212. [[32]](#footnote-33)

1. Parent Has Failed To Satisfy Her Burden And Prove That The LEA Denied Student FAPE Based On Parent’s Allegation That Student Was Bullied.

The Virginia Code defines bullying as follows:

“Bullying” means any aggressive and unwanted behavior that is intended to harm, intimidate, or humiliate the victim; involves a real or perceived power imbalance between the aggressor or aggressors and victim; and is repeated over time or causes severe emotional trauma. “Bullying” includes cyber bullying. *“Bullying” does not include ordinary teasing, horseplay, argument, or peer conflict.*

Va. Code Ann. § 22.1-276.01 (emphasis added). A key element as set forth in the statutory definition of bullying is the existence of a power imbalance between the aggressor and the victim. However, as specifically stated in the statutory definition, bullying does not include peer conflict.

Here, and as set forth in the findings of fact, the LEA took Parents allegation of bullying seriously immediately investigating the incident when presented with Parent’s allegation during the IEP team meeting that occurred on December 15, 2023. Parent’s alleged that during PE class one of Student’s classmates threatened to “cut off [Student’s] xxxxx” on December 12, 2023. This allegation was investigated by Xxxxxxxx School Assistant Principal, who was qualified as an expert in the area of school administration. Included as part of this designation is expertise with student safety, school safety, and threat assessments. Tr. Day 3 at 167, 191-196, 283. The alleged incident occurred on December 12, 2023. The last day of school for Student before winter break was December 15, 2o23, which is the same day on which Xxxxxxxx School Assistant Principal learned of the alleged event and commenced his investigation. Tr. Day 3 at 261

As part of his investigation, Xxxxxxxx School Assistant Principal spoke with Xxxxxxxx School PE Teacher, reviewed the entire gym footage that included the incident, reviewed this footage with Student, interviewed all students that spoke with Student during this PE class, had Xxxxxxxx School PE Teacher prepare a written statement and provide all email correspondence by and between Parent and Xxxxxxxx School PE Teacher, reviewed procedures with Xxxxxxxx School PE Teacher concerning incident reporting, called Parent on December 15, 2023, to provide and update to Parent on the investigation, and prepared a written incident report on December 18, 2023. Tr. Day 3 at 177-183; XXPS Exhs. 7 and 8. Xxxxxxxx School Assistant Principal provided Parent a copy of his written findings, after winter break, on or about January 3, 2023. Tr. Day 3 at 184-186.

Pursuant to his investigation, Xxxxxxxx School Assistant Principal concluded that an incident did occur with Student and another student during small group volleyball instruction, but that this incident was “peer conflict” to include a verbal back and forth and some kicking between the Student and the other student. After the incidence of kicking Xxxxxxxx School Assistant Principal then saw Xxxxxxxx School PE Teacher separate Student and the other student for the remainder of the class. *Id*. Further, based on the interviews Xxxxxxxx School Assistant Principal conducted to include with Student, the student with whom he had a conflict, and other students who saw and heard the incident, Xxxxxxxx School Assistant Principal determined that no one threated to “cut off [Student’s] xxxxx” but that either Student or the other student threated to kick the other in the xxxxx or uppercut the other in the xxxxx. Tr. Day 3 at 177-183, 206, 223-224; XXPS Exhs. 7 and 8. As a result of the incident, Xxxxxxxx School Assistant Principal recommended a restorative conference, but this has not occurred because this requires parental consent and that has not yet been given. Further, Xxxxxxxx School Assistant Principal assisted Xxxxxxxx School PE Teacher develop a plan to split up Student and the student with whom he had conflict during PE class. Tr. Day 3 at 177-183, 256-257; XXPS Exhs. 7 and 8.

The evidence at the hearing fails to show that Student was bullied and supports Xxxxxxxx School Assistant Principal conclusion that what occurred was peer conflict which by definition, pursuant to the Virginia Code, is not bullying. *See also*, Jackson *County Sch. Bd.*, 113 LRP 22741 (SEA FL 12/27/12), *aff'd on other ground*, *A.L. v. Jackson County Sch. Bd.*, 64 IDELR 173 (N.D. Fla. 2014), *aff'd in part*, 66 IDELR 271 (11th Cir. 2015, unpublished) (holding that an isolated instance of students engaging in rough play did not constitute bullying); and *District of Columbia Pub. Schs.*, 111 LRP 24663 (SEA DC 01/15/11) (holding that one fight between two highschoolers over a girl did not qualify as bullying). [[33]](#footnote-34)

1. Parent Has Failed to Satisfy Her Burden, Produce Evidence And Prove That The LEA Denied Student FAPE.

A purpose of the IDEA is “principally to provide handicapped children with ‘a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.’” *Sch. Comm. of Town of Burlington, Mass. v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 369–70, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985). Parent has failed to meet its burden of proof on the two issues as delineated for decision in this hearing and has failed produce evidence and to prove that Student was denied FAPE. Accordingly, Parent is not entitled to any award or relief. *Z.W. by & through Warner v. Horry Cnty. Sch. Dist.*, 68 F.4th 915, 921 (4th Cir. 2023) (“[t]he only substantive right created by the IDEA is to a ‘*free* appropriate public education,’ § 1401(9) (emphasis added), and the only relief available during the IDEA’s administrative process are measures designed to vindicate that right”).

1. Parent’s Request For Reimbursement Of All Private Evaluations Completed For Student From 2018 To the Present Is Denied.

During the course of the hearing Parent presented evidence that she had a single private evaluation done at Parent’s expense: Parent’s Psychological Evaluation. Parent testified that during September 2023 she contacted Dr. Xxxxxxxxxxxx, PhD, a clinical and school psychologist to perform a psychological evaluation of Student. Tr. Day 1 at 358, 379-381. Parent did this before requesting that the LEA have a psychological evaluation performed. *Id.* At Parent’s request sometime during late September or early October, the LEA had a Psychological Evaluation of Student completed during the month of October 2023, with the last evaluation date of October 27, 2023 (“LEA’s Psychological Evaluation”). XXPS Exh. 5; Tr. Day 2 at 215-216. Parent’s Psychological Evaluation of Student was completed on November 30, 2023. P. Exh. 30. Pursuant to 8 VAC 20-81-170(B) the Parent must first request “an independent educational evaluation at public expense” and further “[t]he parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the local educational agency.” Here, the Parent failed to produce any evidence that she requested that the LEA provide an independent educational evaluation at public expense before she engaged Dr. Xxxxxxx. Accordingly, Parent’s request for reimbursement is denied.

1. The LEA’s Request To Override Parent’s Lack Of Consent To The Proposed October IEP Amendment Is Denied.

During the LEA’s opening statement at the hearing and for the first time during these proceedings, the LEA requested that the hearing officer override Parent’s lack of consent to the Proposed October IEP Amendment. Tr. Day 1 at 25-26. At no point prior to this did the LEA give notice to Parent that it would seek to override Parent’s lack of consent to the Proposed October IEP Amendment. Further, in the LEA’s post-hearing Opening and Reply Briefs, it cited no authority to support its request to override Parent’s lack of consent. 8 VAC 20-81-170(E)(1)(d) explicitly requires parental consent prior to LEA’s provision of IEP services to a student and accordingly the LEA’s request to override Parent’s lack of consent to the Proposed October IEP Amendment is denied. *See also* 8 VAC 20-81-210 (N)(8)(responsibility of the LEA to assist in clarifying the issues for the hearing).

## **ORDER**

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

1. Parent’s request for any and all relief is DENIED.
2. XXPS request to override Parent’s lack of consent to the Proposed October IEP Amendment is DENIED.

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| --- | --- | --- | --- |
| ENTER: |  |  |  |
|  |  |  | Frederick R. Gerson, Hearing Officer |

cc: Persons on the Attached Distribution List, by hand or e-mail as indicated (Attachment 1)

## **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. Throughout this decision, the following reference designations shall be used: for Parent’s Exhibits, “P. Exh. <Exhibit #> at <Page #>”; for LEA Exhibits, “XXPS Exh. <Exhibit #> at <Page #>”; for the verbatim transcript of the 3-day hearing “<Tr. Day #> at< Page #>”; for Parent’s post-hearing Opening and Reply Briefs, “P. Op. at <page number>” and “P. Reply at <page number>,” respectively; and for the LEA’s post-hearing Opening and Reply Briefs, “XXPS Op. at <page number>” and “XXPS Reply at <page number>,” respectively. [↑](#footnote-ref-2)
2. Parent was present was throughout the due process hearing, attending in-person the first and third days and virtually the second day. Parent also attended the first and third prehearing conference calls but did not attend the second and fourth prehearing conference calls. At all times Parent was represented by the Advocate. *See* Va. Sup. Ct. R. Section 1, Annotation (F) (serving as a lay advocate in IDEA cases). [↑](#footnote-ref-3)
3. Tr. Day 2 at 212 (XXxxxxx School Lead Teacher); *see also* Tr. Day 2 at 202-212 (XXxxxxx School Lead Teacher); Tr. Day 3 at 167 (XXxxxxx School Assistant Principal); *see also* Tr. Day 2 at 159-168 (XXxxxxx School Assistant Principal). [↑](#footnote-ref-4)
4. Parent did call the XXPS Representative, but never offered her as an expert, and she was never designated as an expert by either party. [↑](#footnote-ref-5)
5. The first prehearing conference and the second day of the second prehearing call were recorded by the hearing officer with the consent of the parties. [↑](#footnote-ref-6)
6. The one exception to the 11:59 p.m. filing deadline, is that the hearing officer ordered the LEA to arrange for a court reporter to produce, a verbatim and expedited written record of the hearing, on or by February 29, 2024, *on or by 5:00 p.m.*

 [↑](#footnote-ref-7)
7. The conference call that was scheduled during the First Prehearing Conference call for February 13, 2024, and called the “second prehearing conference call” in the First Prehearing Report and Order, was thereinafter referred to as the Third Prehearing Conference Call. [↑](#footnote-ref-8)
8. As set forth in the First Prehearing Report and Order, the parties agreed to the date of another prehearing conference call that is referred to therein as the “second prehearing conference call” and which, as stated in this Decision, is the third prehearing conference call. *See* n.7, *supra*. [↑](#footnote-ref-9)
9. In support of this conclusion the hearing officer stated in the Fourth Prehearing Report and Order the following:

Assuming without deciding that a sanction is appropriate, any such sanction should “no more severe than required to satisfy a legitimate purpose.” *Ingram Indep. Sch. Dist.* 43 IDELR 124 (SEA Tex. 2004); *see also*, *Nicholas W. v. NW. Indep. Sch. Dist.*, 2009 WL 2744150, at \*6, 53 IDELR 43 (E.D. Tex. Aug. 25, 2009)(“For a court to dismiss a case with prejudice . . . there must be a clear record of delay or contumacious conduct by the Plaintiffs and lesser sanctions would not serve the best interests of justice.”). Dismissal of the Complaint with prejudice and excluding Advocate from this proceeding would be too severe a sanction even assuming the LEA’s allegations are correct, and therefore these requests are DENIED. Rather, assuming without deciding that a sanction is appropriate, if a sanction is to be imposed, it would be to exclude Parent’s exhibits that should have been produced in response to the LEA’s document subpoena, and only to the extent such exhibit was not already possessed by the LEA and/or were included as an LEA exhibit. 8 VAC 20-81-210 (O)(9); 8 VAC 20-81-210 (P)(1). [↑](#footnote-ref-10)
10. On February 19, 2024, by email LEA Counsel requested that it be permitted to reference Student’s IEP Amendment, dated April 24, 2023, during the hearing. Parent, by email this same day objected as this IEP amendment was not included as a part of the LEA’s exhibits. The hearing officer by email, again on this same day, notified the parties that Parent’s objection is taken under advisement to be reconsidered should the LEA seek to introduce this this IEP amendment into evidence during the hearing. Further, the hearing officer noted that LEA Counsel had emailed a copy of IEP amendment, dated April 24, 2023, to all parties in response to an email of the hearing officer, sent February 14, 2024. The IEP Amendment, dated April 24, 2023, was admitted into evidence during the hearing as XXPS Exhibit 20 because it was included as a part of Parent’s Exhibit 17. Tr. Day 1 at 342-356, 396-397. In part, for this same reason, the parental consent signature page signed and dated May 1, 2923, to the IEP Amendment, dated April 24, 2023, was entered into evidence as XXPS Exhibit 21. Tr. Day 2 at 234-247. [↑](#footnote-ref-11)
11. In rendering this decision, the hearing officer did not consider any exhibit other than those exhibits entered into evidence. [↑](#footnote-ref-12)
12. This exhibit is the same as XXPS Exhibit 5. Tr. Day 1 at 231. Some of the exhibits designated by the parties were the same, however, whenever this was the case the parties referenced and used the LEA’s exhibits during their examination of the witnesses and the hearing officer does the same in this decision. [↑](#footnote-ref-13)
13. *See also* n.12, *supra*. [↑](#footnote-ref-14)
14. *See also* n.12, *supra*. [↑](#footnote-ref-15)
15. The hearing officer advised Advocate that the hearing officer would entertain an extension request, but Parent and Advocate did not make such a request, and none was therefore considered. Tr. Day 1 at 48, 223-225. [↑](#footnote-ref-16)
16. Over the objection of the LEA, the hearing officer permitted Parent to call Parent’s Support Person in the XXxxxxx of Parent’s testimony because Advocate represented that Parent’s testimony was going to take significantly more time, the testimony of Parent’s Support Person’s testimony would be brief, and to take account of Parent Support Person’s need to pick up her child from school. Tr. Day 1 at 135-141. [↑](#footnote-ref-17)
17. During 2004, the United States Congress reauthorized the IDEA as the Individuals with Disabilities Education Improvement Act. See Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), effective July 1, 2005. The amendments provide that the short title of the reauthorized and amended provisions remains the Individuals with Disabilities Education Act. See Pub. L. 108-446, § 101, 118 Stat. at 2647; 20 U.S.C. § 1400 (2006) (“This chapter may be cited as the ‘Individuals with Disabilities Education Act.’”). [↑](#footnote-ref-18)
18. In Parent’s Complaint and Opening Brief, the requests for relief are the same, are a total of six, and have the same typo, skipping relief request number four. [↑](#footnote-ref-19)
19. To the extent the other sections entitled, “Introduction,” “Procedural History,” “Jurisdiction,” “Issues and Relief Sought,” and “Conclusions of Law” include findings of fact, those findings are incorporated into this section. 0 [↑](#footnote-ref-20)
20. Throughout Parent’s testimony, Parent indicated she had second thoughts about her consent to Student’s IEP, Student’s March IEP Amendment (defined in Finding of Fact 12), and Student’s April IEP Amendment (defined in Finding of Fact 16). [↑](#footnote-ref-21)
21. During the hearing there was a dispute concerning the “Date of Creation” stamps on the April IEP Amendment, XXPS Exh. 20, a 25-page document, and the Parent’s signature page to April IEP Amendment, XXPS Exh. 21, that is a 1-page document. The full 25-page April IEP Amendment document includes a Date of Creation stamp that states “05/01/2023,” XXPS Exh. 20, and the 1-page signature document includes a Date of Creation stamp that states “05/08/2023.” XXxxxxx School Lead Teacher, designated and accepted as expert whose expertise includes IEP development, Tr. Day 2 at 192, 199-202, 209-212, credibly explained that (i) the stamp on 1-page signature document of 05/01/2023 represents the date this page was “created” for Parent to sign, (ii) Parent signed on this same day based on Parent’s dated signature, (iii) the 25-page April IEP Amendment document, consistent with the foregoing sets forth the day of Parental consent as 05/01/2023, and (iv) the 25-page April IEP Amendment document is stamped 05/08/2023 and this is the date when the case manager or teacher entered the date of parental consent. Tr. Day 2 at 242-247. [↑](#footnote-ref-22)
22. Parent stated that her “major reservation” with the Proposed October IEP Amendment concerned Student’s ACCT (study) period – time that Student needs to “reset.” The school based members of the IEP team had proposed to use the ACCT period on some days for one to one reading instruction. Tr. Day 1 at 59-60. During the October 20, 2023, IEP team meeting, Parent stated that her preference is that Student receive after school tutoring for one to one reading instruction, *id.*, but during the same meeting Parent also raised concerns about the length of Student’s school day. Tr. Day 1 at 194 (testimony of Parent’s Support Person). [↑](#footnote-ref-23)
23. Parent testified that she does not trust Student’s grades because his history teacher had allegedly inflated a grade for an assignment from an F to a D based on a note Parent saw. Parent testified “the teacher has the ability to write a note underneath the grade . . . [a]nd underneath the one grading question it stated that they had changed the grade and raised it up.” Tr. 271; *see also* Tr. 213, 267-271. The hearing officer does not find this allegation credible. Parent did not produce the note to support this allegation even though Parent’s exhibits included screenshots of Student’s grades about which Parent testified but never had entered into evidence. Tr. Day 1 at 263-271. Further, Parent did not call Student’s history teacher as a witness. [↑](#footnote-ref-24)
24. That Student’s teachers need to establish a rapport with Student, so that Student will trust his teachers, and will engage with his teachers is recognized throughout Student’ IEP. *See e.g.,* XXPS Exh. 1 at 4 (“This is most successful by developing a trust with him and helping him work though the problem when he's able to talk (this often is not immediate”)), at 5 (“He is motivated by goals but has to buy in himself and a positive relationship is key to supporting [Student]”), at 6 (“[Student] has improved his overall relationship with teachers and trust of them has increased. When [Student] feels overwhelmed or upset, his first instinct is to escape . . . . Seeing teachers help him work through his problems helps him develop more trust”). [↑](#footnote-ref-25)
25. Parent contested this evidence, but also admitted that Student refuses to read for Parent at home and that the last time that Student read for Parent at home was at the end of his prior school year, at the end of xxxxx grade. Tr. Day 1 at 298, 301-302. Further Parent argues that Student’s IEP Progress Reports, XXPS Exhs. 4 and 9, do not support a factual finding that Student is making progress because certain goals, and particularly reading, show a status of “Sufficient Progress” at the end on June 2, 2023, the end of xxxx grade, and then revert to “Emerging Skill” during on or about October 19, 2023, during xxxx grade. As XXxxxxx School Lead Teacher explained this is in part results from Student’s refusal to engage with his teacher, then as that teacher establishes a relationship with Student through the school year, Student then engages with teacher progressing from reading lower level reading passages, e.g., level 1, to eventually reading a level 4 passage. Tr. Day 2 at 283-284, 289-294, 306-307, 328-331; Tr. Day 3 at 128. [↑](#footnote-ref-26)
26. Parent testified that during the fall and winter of 2023 she reported other non-specific incidents of “bullying” to certain of Student’s teachers to include XXxxxxx School Special Education Teacher. Tr. Day 1 at 55-56. Other than this general statement, Parent did not provide any details, did not testify that she raised this issue at an IEP team meeting, and further stated that when she raised the issue with Student’s teachers, the teachers discussed the incident with her using the term “altercation.” Tr. Day 1 at 55-56. [↑](#footnote-ref-27)
27. During Parent’s cross examination of XXxxxxx School Assistant Principal, he was asked whether he sees Student escorted by his xxxxxx, who also attends School, between classes and in the school hallways. XXxxxxx School Assistant Principal again stated he sees Student often in the School hallways and has not seen Student escorted by his xxxxxx. His responses to these questions were both credible and consistent, and his demeanor in response to these questions was open, candid, and forthright. Tr. Day 3 at 219-221. [↑](#footnote-ref-28)
28. To the extent the other sections entitled, “Introduction.” “Procedural History,” “Jurisdiction,” “Issues and Relief Sought,” and “Findings of Fact” include conclusions of law, those conclusions are incorporated into this section. [↑](#footnote-ref-29)
29. *See also* n. 25, *supra*. [↑](#footnote-ref-30)
30. Further, even if a parent were dissatisfied with a certain educational methodology, the Fourth Circuit has made clear that a reviewing court may not “reject an otherwise appropriate IEP because of dissatisfaction with the educational methodology proposed in the IEP.” *M.B. v. Fairfax Cnty. Sch. Bd.*, 660 F. Supp. 3d 508, 523 (E.D. Va. 2023). [↑](#footnote-ref-31)
31. Parent cites *Ringwood Bd. Of Educ. v. K.H.J.*, 258 F. Appx’x 399 (3rd Cir. 2007) in support of her position that the hearing officer should order Student be privately placed. However, this case does not support Parent’s position because in *Ringwood* the parents presented the expert testimony of special education professionals to contradict the testimony of the LEA professional educators. Likewise, in *T.K. v. N.Y.C. Dep’t of Educ.*, 810 F.3d 869 (2nd Cir. 2016), also cited by Parent, the parents produced expert testimony of professional educators contradicting the testimony of the LEA’s experts concerning the placement. Parent produced no such expert testimony here. Parent also cites *Brown v. District of Columbia*, 179 F. Supp. 3d. 15 (D.D.C. 2016) and again, this case is distinguished, from Student’s case, as Students IEPs, as amended and proposed, all include a discussion of LRE and what was considered by the IEP team when making its placement decision, wherein *Brown* this discussion was completely lacking. [↑](#footnote-ref-32)
32. As set forth in the findings of fact, Parent’s Psychological Evaluation was completed November 3o, 2023, well after the LEA offered to Parent the Proposed October IEP Amendment. Shortly after Parent’s Psychological Evaluation completion, Parent shared this Psychological Evaluation with the IEP team. Importantly, this evaluation diagnosed Student with Autism Spectrum Disorder stating: “Autism Spectrum Disorder, with accompanying intellectual impairment, without accompanying language impairment, Level 1, with associated features of social anxiety.” P. Exh 30 at 1. The LEA’s Psychological Evaluation, completed on or about October 27, 2023, *did not* diagnose Student with Autism Spectrum Disorder. XXPS Exh. 5 at 1-2. *See also* Tr. Day 2 at 215-216. The LEA scheduled an IEP team meeting for December 15, 2023, to discuss at least in part, Student’s disability categories because of the contradictory conclusions concerning Autism Spectrum Disorder as set forth in the LEA’s Psychological Evaluation and Parent’s Psychological Evaluation. These evaluations were not discussed at the December 15, 2023, IEP team meeting because of Parent’s allegation that Student was bullied. After Parent filed the Complaint, a resolution meeting occurred on or about January 22, 2024. After this resolution meeting, by letter, XXxxxxx School Lead Teacher offering to convene an IEP team and eligibility team meeting to review the LEA’s Psychological Evaluation, LEA’s Educational Evaluation, and in particular, Parent’s Psychological Evaluation, to discuss Student’s current eligibility categories, and to use the “most up to date information and data to consider when determining services and LRE” to ensure the IEP team is providing Student “with the best possible educational program.” XXPS Exh. 12. The hearing officer has not considered the substance of Parent’s Psychological Evaluation when reviewing Student’s IEPs, as amended and the proposed IEP amendment, because the review of an “IEP[] under the IDEA is [meant] to be largely prospective and to focus on a child's needs looking forward; courts thus ask whether, at the time an IEP was created, it was reasonably calculated to enable the child to receive educational benefits. But this prospective review would be undercut if significant weight were always given to evidence that arose only after an IEP was created.” *Greenhill*,No. 1:19-CV-868, 2020 WL 855962, at n.10, quoting *Schaffer*, 554 F.3d at 477 (internal citations omitted). The hearing officer only considered Parent’s Psychological Evaluation in the context of a procedural IDEA violation and concludes no such violation occurred because upon receipt of this evaluation, and through the filing of this evaluation, the LEA has offered to reconvene the IEP team to consider this evaluation, the services provided to Student and his least restrictive environment. [↑](#footnote-ref-33)
33. Parent cites *Shore Reg’l High Sch. Bd. Of Educ. v. P.S.*, 381 F.3d 194 (3rd Cir. 2004) in support of her position that LEA did not offer FAPE to Student because he was bullied. However, this case does not support Parent’s position because in *Shore Reg’l High Sch. Bd. Of Educ.* the parents there presented expert testimony by special education professionals to contradict the testimony of the LEA professional educators and there, the ALJ credited the experts presented by parent and not the LEA. Likewise, in *T.K. v. N.Y.C. Dep’t of Educ.*, 810 F.3d 869 (2nd Cir. 2016), also cited by Parent, the parents in *T.K.* produced expert testimony of professional educators contradicting the testimony of the LEA’s experts and further, in *T.K.* the LEA ignored the allegations of bullying and parent’s request to discuss. Here, once XXPS was informed of the allegation it immediately investigated the allegation determining no bulling occurred. [↑](#footnote-ref-34)