

Special Education Teacher 5
Special Education Teacher 6
General Education Teacher 11
School Counselor
Support Coordinator
School Administrator
Special Education Teacher 7
[REDACTED] School 2
[REDACTED] School 1
Initial Grade
Educational Advocate
Petitioner's Counsel 1
Petitioner's Counsel 2
[REDACTED] Counsel 1
[REDACTED] Counsel 2

[REDACTED]

Grade

[REDACTED]
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**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION**

Office of Dispute Resolution and Administrative Services

In re:

STUDENT¹

Hearing Officer: Peter B. Vaden
Due Process Hearing Request
(██████████ Public Schools)
VDOE Case No. 23-068

HEARING OFFICER DECISION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner (MOTHER) under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and the *Regulations Governing Special Education Programs for Children with Disabilities in Virginia*, 8 VAC 20-81-10, *et seq.* (Virginia Regulations). In her due process complaint, the parent seeks an award of compensatory education for Student from Respondent ██████████ Public Schools (████S) on the alleged grounds that █████S failed to conduct a comprehensive special education reevaluation of Student in spring 2021 and █████S denied Student a free appropriate public education (FAPE) in the 2021-2022 and 2022-2023 school years. In this decision, I conclude that Petitioner established that █████S failed to fully implement Student's Individualized Education Program (IEP) in the 2021-2022 school year. The parent, otherwise, did not meet her burden of persuasion that

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

█S denied the student a FAPE.

Student, an AGE young adult, is a resident of █ █, Virginia. The petitioner is Student's mother. On March 27, 2023, Student executed a Durable Specific Power of Attorney for Educational Decisions, empowering Mother to make all educational decisions on Student's behalf, including, *inter alia*, to request legal due process proceedings. Mother is acting as Student's attorney-in-fact in this due process proceeding.

Petitioner's Due Process Complaint was filed on April 7, 2023 and named █S as respondent. The undersigned hearing officer was appointed on April 11, 2023. On April 13, 2023, I convened a telephone prehearing conference with Mother, PETITIONER'S COUNSEL 1, █S' COUNSEL 1, █S COUNSEL 2 and representatives from the █S Office of Special Education to set the due process hearing dates and discuss the issues to be determined and other matters. On April 17, 2023, █S, by counsel, filed its Answer to the due process complaint. On April 19, 2023, █S convened a virtual resolution session meeting with the parent and counsel to discuss the due process complaint and the alleged facts that formed the basis of the complaint. The resolution meeting was held within 15 days of the complaint's filing as provided in 34 C.F.R. § 300.510(a). █S did not resolve the due process complaint to the satisfaction of the parent. The 30-day resolution period was not adjusted. *See* 34 C.F.R. § 300.510(b)(1).

At the April 13, 2023, prehearing conference, the due process hearing was scheduled for July 17 through 21, 2023. To accommodate those hearing dates, on April 17, 2023, Petitioner, by counsel, filed an unopposed motion to continue the final decision due date from June 21, 2023 to August 18, 2023. By order issued May 19, 2023, I granted the motion. One of Petitioner's witnesses was not available on the

scheduled hearing dates and an additional hearing day was set for August 8, 2023, to take her testimony. In order to hold the additional hearing day and to allow time for the hearing officer to review the evidence and prepare the written decision, on August 16, 2023, I granted the parties' joint motion to further extend the final decision due date to September 1, 2023.

On April 17, 2023, ■■■S, by counsel, filed a motion to dismiss the parent's claims herein. The motion was opposed by Petitioner. By order issued April 26, 2023, I granted in part, and denied in part, ■■■S' motion. Specifically, I dismissed the parent's claims under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 for failure to state a claim upon which relief may be granted.

Following a telephone conference hearing, I issued an order on June 14, 2023, addressing ■■■S' objections to Petitioner's requested subpoena *duces tecum* to the school division. On June 27, 2023, I issued an agreed protective order covering certain documents pertaining to standardized tests administered to Student, asserted to be protected by the respective publishers' intellectual property rights (the "Confidential Protocol Documents").

The due process hearing was held before this Impartial Hearing Officer over 6 days, from July 17 through July 21, 2023, and on August 8, 2023. By agreement of both parties, the entire hearing was convened by videoconference on the Zoom One

platform, hosted by ■■■S' counsel. The hearing, which the parent elected to open to the public, was transcribed by court reporters. Mother appeared for the virtual hearing and was represented by Petitioner's Counsel 1 and Petitioner's Counsel 2. Respondent ■■■S was represented at the hearing by Division Representative and by ■■■S' Counsel 1 and ■■■S' Counsel 2. Petitioner's Counsel 2 and ■■■S' Counsel 1 made opening statements.

Mother testified and called as additional witnesses District Representative, SPECIAL EDUCATION TEACHER 1, LEA REPRESENTATIVE, SCHOOL PSYCHOLOGIST, GENERAL EDUCATION TEACHER 1, GENERAL EDUCATION TEACHER 2, PRIVATE SPEECH THERAPIST, ASSISTANT PRINCIPAL, GENERAL EDUCATION TEACHER 3, GENERAL EDUCATION TEACHER 4, SPECIAL EDUCATION TEACHER 2, SPECIAL EDUCATION TEACHER 3, SPECIAL EDUCATION TEACHER 4, GENERAL EDUCATION TEACHER 5, GENERAL EDUCATION TEACHER 6, GENERAL EDUCATION TEACHER 7, GENERAL EDUCATION TEACHER 8, GENERAL EDUCATION TEACHER 9, PRIVATE PSYCHOLOGIST, SPECIAL EDUCATION TEACHER 5, SPECIAL EDUCATION TEACHER 6, GENERAL EDUCATION TEACHER 10, GENERAL EDUCATION TEACHER 11 and SPECIAL EDUCATION TEACHER 7. ■■■S called as additional witnesses SCHOOL COUNSELOR, SUPPORT COORDINATOR and ADMINISTRATOR. Numerous exhibits offered by Petitioner and by Respondent were

admitted into evidence. I sustained Petitioners' objections to ■■■S' proposed Exhibit R-100.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The issues for determination in this case, as certified in the April 26, 2023

Revised Prehearing Order, are:

- a.) Whether ■■■S denied the student a free appropriate public education (FAPE) by failing to comprehensively assess him/her in all areas of suspected disability when ■■■S conducted its reevaluation of him/her on April 7, 2021;
- b.) Whether ■■■S denied the student a FAPE by significantly impeding the parent's ability to fully participate in the IEP process by denying her December 15, 2022, request that the student be reevaluated;
- c.) Whether ■■■S denied the student a FAPE by significantly impeding the parent's ability to fully participate in the IEP process by failing to provide an IEE at public expense when requested by the parent in January 2023 and
- d.) Whether ■■■S denied the student a FAPE for the 2021-2022 and 2022-2023 school years by failing to meet the student's individual needs, in that the IEP teams continued to rely on outdated assessments to develop the IEP, failed to provide the special education and related services necessary to prepare the student for future education, reduced specially designed instruction services year after year with no objective data to support this reduction in service, and provided no reading, writing, or math remediation to the student during the service minutes identified in his/her IEPs despite documented evidence of his/her deficits in these areas.

The hearing officer previously granted ■■■S' motion to dismiss Petitioner's claims under

Section 504 of the Rehabilitation Act of 1973 (Issue “f”) and the Americans with Disabilities Act (Issue “g”). At the due process hearing on August 8, 2023, Petitioner, by counsel, withdrew Issue “e” (Whether [REDACTED]S denied the student a FAPE when it failed to provide him/her with an appropriate IEP transition plan).

For relief, the parent requests that the hearing officer order [REDACTED]S to fund compensatory education to compensate Student for the alleged denials of FAPE.

FINDINGS OF FACT

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

1. At all times concerned in this proceeding, Student has been a resident of [REDACTED] [REDACTED], Virginia where he/she lives with Mother. Testimony of Mother.
2. Student was originally determined eligible for special education and related services by [REDACTED]S on May 30, 2018 under the Other Health Impairment (OHI) area of disability, due to Attention-Deficit Hyperactivity Disorder (ADHD). At the time, Student attended [REDACTED] SCHOOL 1 and was in INITIAL GRADE. Prior to May 2018, Student had received in-school accommodations under a Section 504 Plan (Section 504 of the Rehabilitation Act of 1973), based upon his/her ADHD diagnosis. Exhibit R-52.
3. Following a psychological evaluation of Student in late May 2018, the [REDACTED]S psychologist reported, *inter alia*, that results of cognitive testing reflected Student’s

continued cognitive strengths, with overall cognitive skills within the High Average range. Lower performance was reported on sequential memory. When asked to remember verbal sequential information, Student performed within the Average range, but when asked to remember visual sequential information, he/she struggled, performing within the “impaired” range. In terms of behaviors, the results of behavior protocols completed by Mother and three teachers reflected Very Elevated levels of attentional needs and executive functioning deficits at home and in at least two classrooms (Science and English). Results of the *Behavior Rating Inventory of Executive Function, Second Edition (BRIEF-2)* reflected Student’s needs related to executive functioning, especially in terms of his/her difficulties with cognitive regulation (which includes areas such as initiation of tasks, working memory, planning/organizing, task-monitoring, and organizing his/her materials). Exhibit R-50.

4. In May 2018, Special Education Teacher 1 conducted an educational evaluation of Student as part of his/her eligibility evaluation. She reported that in general, Student’s overall academic skills were stronger than oral language skills. Student’s reading and reading fluency were strengths, indicating that he/she was able to accurately decode grade-level words and read fluently with expression. Passage

Comprehension skills fell within the Low range. Broad Written Language was a relative strength. Student’s writing samples were within the Average range. Spelling and

writing fluency skills were personal strengths. Math Calculation Skills fell within the Low Average range due to Student's Calculation score failing within the Low range. Student's Math Facts Fluency skills fell within the Average range. Oral Language skills fell within the Low Average range due to deficits in oral comprehension and listening skills. Overall, discrepancies existed between achievement skills in reading, written language, and broad mathematics, which were generally within the Average range, and achievement skills in reading decoding, spelling, and math calculation. Student's math calculation skills and passage comprehension were weak. Within the Oral Language domain, listening comprehension and oral comprehension were weak, which could impact his/her ability to learn through oral language activities. Exhibit R-44.

5. ■■■S did not conduct a formal speech and language evaluation of Student as part of the 2018 initial evaluation. Testimony of Private Speech Therapist.

6. Student's initial IEP, developed on June 12, 2018, stated that Student's difficulties/deficits with Attention, Behavior, Organization, Cognitive Functioning, Math Calculation, Reading Comprehension, Receptive Language, and Self-Determination impacted his/her ability to access the general curriculum without special education support. The IEP team noted that for Passage Comprehension, Student's score on the

Woodcock-Johnson IV Tests of Achievement (WJ-IV) test of Oral Language was Low. In the Receptive Language area, Student's attained Low Average scores for Listening

Comprehension, Understanding Directions and Oral Comprehension. The IEP team reported that Student's expressive language skills were not an area of concern. Exhibit R-54.

7. The June 12, 2018, IEP identified Student's specific needs in Math Calculation, Reading Comprehension, Self-Determination (Self-Advocacy) and Attention/Organization and provided annual goals for each area. The IEP provided for 15 hours per week of "Specially Designed Instruction," all in the general education setting, divided equally between Reading, Self-Advocacy, Mathematics and Organization. The IEP team decided that Student did not need related services. Exhibit R-54.

8. The June 12, 2018, IEP team reported that Student was a candidate for a standard high school diploma. Exhibit R-54.

9. Mother attended the June 12, 2018, IEP meeting and signed the IEP to indicate that she agreed to the proposed placement in special education. Exhibit R-54.

10. By an IEP Amendment dated September 8, 2018, Student's Specially Designed Instruction in Reading Content Area was reduced from 3.75 hours of direct services per week to .5 hours per month on a Consult/Monitor basis. Exhibit R-58.

11. At the end of the 2018-2019 school year, Student had mastered or shown sufficient progress on all of his/her June 12, 2018, IEP goals, except for arriving in class

on time. Exhibit R-56. Student's grades for the school year were A's and B's except for a D+ in Pre-Algebra and a C in English. Student was reported to have accrued 66 Tardies for the school year. Exhibit R-57.

12. The [REDACTED] School 1 IEP team met for Student's annual IEP review on May 10, 2019. The May 10, 2019, IEP team reported that Expressive Language was not a concern for Student. For Receptive Language, the IEP team reported that on the WJ-IV Test of Oral Language administered in May 2018, Student's scores were Low Average for Listening Comprehension, Understanding Directions and Oral Comprehension. The May 10, 2019, IEP included updated annual goals in Math Calculation, Reading Comprehension, Self-Determination (Self-Advocacy) and Attention/Organization. The May 10, 2019, IEP provided for 15 hours per week of "Specially Designed Instruction," all in the general education setting, divided equally between Reading, Self-Advocacy, Mathematics and Organization. The IEP team decided that Student did not need related services. The May 10, 2019, IEP team reported that Student was a candidate for a standard or advanced high school diploma. Mother attended the May 10, 2019, IEP meeting and signed the IEP to indicate that she agreed to Student's proposed placement in special education. Exhibit R-60.

13. Several IEP team members, but not Mother, signed a "Partial IEP Amendment" on June 20, 2019, purporting to reduce Student's Specially Designed

Instruction in Reading Content Area from 3.75 hours of direct services per week to .5 hours per month on a Consult/Monitor basis. Exhibit R-63.

14. Beginning with the start of the 2019-2020 school year, Student attended [REDACTED] School 2. On November 18, 2019, the [REDACTED] School 2 IEP team met to review Student's IEP, after receiving a request to increase special education service hours to 3.75 hours per week for "Organization." The November 18, 2019, IEP team determined that Student needed support in Attention/Organization, Math Reasoning, Reading Comprehension and Self-Determination (Self-Advocacy). The IEP team reported that Student's Expressive Language and Receptive Language abilities were age appropriate. The November 18, 2019, IEP included annual goals in Math Reasoning, Reading Comprehension, Self-Determination (Self-Advocacy) and Attention/Organization. The November 18, 2019, IEP provided for 3.75 hours per week of "Specially Designed Instruction" in the special education setting for Organization and 12 hours per week, in the general education setting, divided equally between Reading Content Area, Self-Advocacy, Mathematics and Organization. An accommodation for Student's use of a calculator in math was added. The IEP team decided that Student did not need related services. The November 18, 2019, IEP team reported that Student was

a candidate for a standard or advanced high school diploma. Mother attended the

November 18, 2019, IEP meeting and signed the IEP to indicate that she agreed to the proposed placement in special education. Exhibit R-65.

15. At [REDACTED] School 2, Special education service in the general education setting means co-taught classes. A “co-taught class” means that there are special education students with general education students and that special education hours are supplied within a general education setting; and there are two adults, a general education teacher and a special education teacher, in that class. Testimony of School Administrator.

16. Student’s grades for the 2019-2020 school year were A’s and B’s in all courses, except for C in math. Student had 1 tardy reported for the school year. Exhibit R-64.

17. On November 16, 2020, the [REDACTED] School 2 IEP team met via Microsoft Teams for the annual review of Student’s IEP. The November 16, 2020, IEP team determined that Student needed support in Attention/Organization, Math Reasoning, Reading Comprehension and Self-Determination (Self-Advocacy). The IEP team reported that Student’s Expressive and Receptive Language abilities were age appropriate. The November 16, 2020, IEP included annual goals in Reading

Comprehension, Self-Determination (Self-Advocacy), Attention/Organization and Math Reasoning. The November 16, 2020, IEP provided for 3.75 hours per week of Specially

Designed Instruction in the special education setting for Organization and 12 hours per week, in the general education setting, divided equally between Reading Content Area, Self-Advocacy, Mathematics and Organization. The IEP team decided that Student did not need related services. The November 16, 2020, IEP team reported that Student was a candidate for a standard or advanced high school diploma. The IEP team determined that Student required specially designed instruction and would not participate with non-disabled peers in his/her Instructional Studies class. Student would participate with non-disabled peers in the general education setting with support during academic classes: Econ/Social Science/Business, Science, Math, and English. Exhibit R-73.

18. Mother attended the November 16, 2020, virtual IEP team meeting. By an email to ██████████ School 2 sent December 1, 2020, Mother gave consent to implement the IEP, indicating her agreement with the IEP. Exhibit R-75.

On April 7, 2021, the ██████████ School 2 eligibility team, including the parent, met for Student's three-year special education reevaluation. Since in-person special education IEP meetings were unable to occur due to COVID-19 restrictions, the meeting was held via a videoconferencing platform. Teacher narratives, IEP progress updates and the 2018 ██████S special education eligibility evaluation of Student were

Reviewed to make the triennial eligibility determination. Based on a review of the testing that was on file as well as Student's current performance and team input, School

Psychologist suggested to the team that there was sufficient data to look at a specific learning disability (SLD) for Student. The eligibility team determined that additional data were not needed to make an eligibility determination for Student. After reviewing the data, the April 7, 2021, eligibility team recommended that Student continued to meet eligibility criteria for special education under the OHI classification. The team determined that Student met eligibility criteria also for SLD in the areas of reading comprehension and math calculation. Exhibits R-78, R-79, P-94, Testimony of School Psychologist. Mother does not disagree with those April 2021 eligibility decisions.

Testimony of Mother.

19. Following the April 7, 2021, eligibility determination, Student's IEP team met on April 23, 2021. The April 23, 2021, IEP team relied upon the data from the April 7, 2021, eligibility determination, including standardized test scores from 2018, Student's current classroom performance, teacher narratives and input from the IEP team members. Testimony of School Psychologist, Testimony of Support Coordinator.

20. The April 23, 2021, IEP team identified Student's specific support needs in Attention/Organization, Math Reasoning, Reading Comprehension and Self-Determination (Self-Advocacy) and provided annual goals in each area. The IEP team

reported that Student's Expressive and Receptive Language abilities were age

appropriate. Since Student's prior annual IEP already had goals to address the weaknesses indicated when the SLD disability classification was added, current services were updated to indicate which goals would address OHI and which would address SLD. The April 23, 2021, IEP provided for 3.75 hours per week of Specially Designed Instruction for Organization in the special education setting and 9 hours per week, in the general education setting, divided between Reading Content Area (3 hours), Self-Advocacy (1 hour), Mathematics (3 Hours) and Organization (2 hours). The IEP team decided that Student did not need related services. The April 23, 2021, IEP team reported that Student was a candidate for a standard or advanced high school diploma. The IEP team determined that Student required specially designed instruction and would not participate with non-disabled peers in his/her Instructional Studies class. Student would participate with non-disabled peers in the general education setting with support during academic classes: Social Science/Business, Science, Math, and English. Exhibits R-80, R-81.

21. By a July 2, 2021, email to [REDACTED] School 2, Mother gave written consent to confirm that she was in agreement with the April 23, 2021, IEP and to consent to implement the IEP as written. Exhibit P-19.

22. By May 20, 2021, Student was reported to be making satisfactory progress on all of his/her November 16, 2020, IEP goals. Exhibit R-76. Student's grades for the

2020-2021 school year were A's and B's in all courses, except for C+ grades in English and American Sign Language. Student had two tardies reported for the school year.

Exhibit R-71.

23. Student's [REDACTED] School 2 IEP team met on March 17, 2022, for the annual review of Student's IEP. It was reported that Student had not passed the state W!SE Financial Literacy Certification Test. The teachers discussed Student's progress in his/her classes and Standards of Learning testing. Mother stated that she was not confident that Student would graduate with a Standard Diploma or that he/she would be ready to graduate on time on an academic, mental, and emotional level. Mother inquired about classes for the 2022-2023 school year and was concerned about Student's math class. Mother wanted Student to come out of his/her 2021-2022 math class and take it again the following school year. The March 17, 2022, IEP team determined that Student needed support in Attention/Organization, Mathematics, Reading and Self-Determination (Self-Advocacy). The IEP team reported that Student's Expressive/Receptive Language abilities were age appropriate. Exhibits P-97, R-85.

Testimony of Mother.

24. The March 17, 2022, IEP included annual goals for Student in Self-

Advocacy, Mathematics, Reading and Attention/Organization. The March 17, 2022, IEP provided for 4 hours per week of Specially Designed Instruction in the special education

setting and 5 hours per week in the general education setting. Mother was told at the IEP meeting that the special education hours in general education would be focused on SLD (2 hours) and OHI (3 hours). The IEP team decided that Student did not need related services. The March 17, 2022, IEP team reported that Student was a candidate for a standard or advanced high school diploma. The IEP team determined that Student required specially designed instruction and would not participate with non-disabled peers in his/her Instructional Studies class. Student would participate with non-disabled peers in the general education setting with support during academic classes. Exhibits P-97, R-84, R-85.

25. At the March 17, 2022, IEP team meeting, specially designed instruction in the general education setting was reduced in the IEP to 5 hours per week because the previous 9 hours per week was considered by the school team to be very high and five hours would be a more appropriate number in terms of the number of classes Student had. Testimony of Special Education Teacher 3.

26. Mother signed the March 17, 2022, IEP indicating that she agreed to and gave permission for the proposed IEP placement. Exhibit R-84.

27. Co-taught classes at [REDACTED] School 2 are staffed by both a general

Education teacher and a special education teacher, who is in the classroom at all times.

[REDACTED] School 2 operates on a block schedule. Class periods average 3.75 hours per

week. Testimony of Special Education Teacher 3.

28. For the 2021-2022 school year, Student was placed in co-taught general education classes for Algebra II (1st quarter only), Algebra Functions and Data Analysis (AFDA) (2nd quarter through end of year) and English. Testimony of Special Education Teacher 2, Testimony of Special Education Teacher 3.

29. Student's grades for the 2021-2022 declined from the prior school year. For academic classes, Student received a B in Chemistry, C's in English, AP History and American Sign Language and a failing grade in Mathematics. Student had 26 tardies reported for the school year. Exhibit R-82. "E" is a failing grade in ■■■S. Testimony of General Education Teacher 4.

30. Student's IEP was amended on August 29, 2022, to change his/her service hours in the special education setting to 3.75 hours per week, from 4.0 hours, which was a clerical error on the IEP. Exhibit R-87, Testimony of Special Education Teacher 3. Mother signed the amended IEP to indicate her consent to implement the IEP. Exhibit R-87.

31. For the 2022-2023 school year, Student was placed in co-taught general education classes for Principles of Physics, English and Senior Project. Testimony of

Support Coordinator. Student's class-time in these co-taught classes was at least 8 hours per week. Representation of Petitioner's Counsel.

32. In the co-taught English class in the 2022-2023 school year, Special Education Teacher 6 worked on Reading annual goals, among other goals, for Student. Testimony of Special Education Teacher 6.

33. In the co-taught Physics class in the 2022-2023 school year, the regular education Physics teacher worked with Student on math issues. Special Education Teacher 6 supported Student in the class by re-explaining directions before every assignment, checking on whether he/she had problems and breaking down instructions into chunks to help Student understand them. Testimony of Special Education Teacher 6.

34. For the 2022-2023 school year, Student's final grades in academic classes were C+ in Physics, A's in English and journalism, D+ in Government and B+ in mathematics. Exhibit R-90.

35. At an IEP team meeting on December 15, 2022, Educational Advocate voiced concern with the April 7, 2021 eligibility determination for Student because SLD was added as a disability category without updated testing. On behalf of the parent, Educational Advocate requested updated evaluations of Student. Exhibit R-93.

36. In a PWN to the parent dated January 13, 2023, ■■■S acknowledged that

the parent had requested a reevaluations of Student and gave notice that the school district had no evidence that additional evaluations were required to review Student's

annual IEP. Exhibit R-95. Until April 2023, ■■■S did not agree to reevaluate Student.
Testimony of District Representative.

37. By letter of January 20, 2023, Petitioner's Counsel wrote ■■■S to give notice that the parent disagreed with the reevaluation of Student performed by ■■■S on April 7, 2021, and to request an Independent Educational Evaluation ("IEE") at public expense, to include Psychological, Educational, and Speech Language evaluations. Exhibit P-27. By email of January 24, 2023, District Representative responded that the parent's request for IEEs was not related to recent evaluations conducted by ■■■S. Exhibit P-28. Following the April 13, 2023, prehearing conference in this proceeding, ■■■S agreed to fund IEE psychoeducational and speech and language evaluations requested by the parent. Hearing Officer Notice. The IEE evaluation reports were completed on May 8, 2023, (Psychoeducational) and June 5, 2023, (Speech and Language). Exhibits 62, 60.

38. Student's ■■■■■ School 2 IEP team met on March 21, 2023, for the annual review of Student's IEP. The teachers discussed Student's progress in his/her classes and Standards of Learning testing. The March 21, 2023, IEP team determined that Student needed support in Attention/Organization, Mathematics, Reading and

Self-Advocacy. The IEP team reported that Student's Expressive/Receptive Language abilities were age appropriate. Exhibits P-97, R-85, Testimony of Mother.

39. The March 21, 2023, IEP included annual goals for Student in Reading, Self-Advocacy, Attention/Organization and Mathematics. The March 21, 2023, IEP provided for 3.75 hours per week of “Specially Designed Instruction” in the special education setting and 5 hours per week in the general education setting. The IEP team decided that Student did not need related services. The March 21, 2023, IEP team reported that Student was a candidate for a standard high school diploma. The IEP team determined that Student required specially designed instruction and would not participate with non-disabled peers in his/her Instructional Studies class. Student would participate with non-disabled peers in the general education setting with support for English, Senior Project and Science. Exhibits R-96, R-97. Following the meeting, Mother took the proposed IEP home with her to review. Mother did not give her consent to implement the March 21, 2023, IEP. Testimony of School Administrator.

40. Student graduated from high school in June 2023 with a standard diploma, not an advanced diploma, since he/she did not pass his/her junior year math class and chose not to attend summer school to make up the credit. Testimony of School Counselor. Testimony of Mother.

41. Student has been admitted to a regional community college for the 2023-

2024 school year. Testimony of School Administrator.

42. Beginning in 2013, ■■■S periodically provided Mother the *Virginia*

Procedural Safeguard Notice for parents of children with disabilities. Mother is a lawyer by trade. Mother understood that if she had a disagreement with special education related decisions that the school system makes, she had some recourse.

Testimony of Mother.

CONCLUSIONS OF LAW

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

BURDEN OF PROOF

The petitioner parent, as the party who filed the April 7, 2023, request for a due process hearing, must bear the burden of proof in this proceeding. *See, e.g., N.P. by S.P. v. Maxwell*, 711 F. App'x 713 (4th Cir. 2017) (At impartial due process hearing, the parents bear the burden of proving their child was denied a free appropriate public education. *Id.* at 716, citing *Weast v. Schaffer ex rel. Schaffer*, 377 F.3d 449, 456 (4th Cir. 2004), *aff'd*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). The burden of proof shall be met by a preponderance of the evidence. *See, e.g., Cty. Sch. Bd. of Henrico Cty., Va. v. R.T.*, 433 F. Supp. 2d 657, 671 (E.D. Va. 2006) (Hearing Officer's

factual conclusions supported by the preponderance of the record evidence.)

ANALYSIS

I.

Whether ■■■S denied the student a FAPE by failing to comprehensively assess him/her in all areas of suspected disability when ■■■S conducted its reevaluation on April 7, 2021.

The parent's first claim in this proceeding is that ■■■S denied Student a FAPE by failing to conduct a sufficiently comprehensive triennial reevaluation in April 2021.

Specifically, the parent alleges that for the April 7, 2021 special education reevaluation, the ■■■ School 2 IEP team erroneously relied on assessments from Student's 2018 initial eligibility evaluation, a single virtual classroom observation and teacher reports.

■■■S responds that the 2021 eligibility committee appropriately reviewed teacher narratives, IEP progress reports, previous testing and other information to reach its eligibility determination and that the triennial reevaluation was appropriate. ■■■S also argues that the parent is estopped from challenging the April 2021 reevaluation because when the IEP team decided not to conduct new formal assessments of Student, Mother did not disagree with that decision.

In *XXXXXX by Smith v. Arlington Cnty. Sch. Bd.*, No. 120CV817LMBTCB, 2021 WL 2324164, (E.D. Va. June 7, 2021), U.S. District Judge Leonie M. Brinkema upheld

the hearing officer's decision that where the parents did not request updated evaluations of their child, did not challenge the school district's decision not to retest the child and

agreed with all eligibility determinations, the parents were estopped to argue the incorrectness of eligibility decisions two years later, which they could have prevented by asserting them earlier. *Id.* at *11.

In the present case, two years after Student's April 7, 2021 triennial reevaluation, the parent is challenging the IEP team's decision not to conduct new formal assessments of Student – even though there was no evidence that Mother requested additional assessments at the time, or that she ever disagreed with the IEP team's decisions. Following Judge Brinkema's reasoning in *Smith*, Mother is estopped from claiming, in April 2023, that the April 7, 2021, reevaluation was not sufficiently comprehensive when Mother could have requested additional assessments earlier.

Even if the parent were not estopped from challenging the scope of the April 2021 triennial assessments, for the reasons explained below, I find that Petitioner has not met her burden of persuasion that ■■■'s April 2021 reevaluation of Student was not sufficiently comprehensive. For special education evaluations, including triennial reevaluations, the U.S. Department of Education IDEA regulations provide, that the school division must:

- (1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—
 - (i) Whether the child is a child with a disability under 34 C.F.R. § 300.8; and
 - (ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum;
- (2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an

appropriate educational program for the child; and
(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

The LEA must also ensure, *inter alia*, that the child is assessed in all areas related to the suspected disability, the assessments are administered by trained and knowledgeable personnel and that the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs. See 34 C.F.R. § 300.304(b), (c).

For triennial reevaluations, the IDEA does not require that the school division must, in every case, conduct formal assessments, such as psychological or educational reevaluations. In a guidance letter issued in 2007, *Letter to Anonymous*, 48 IDELR 136, 107 LRP 45732 (OSEP Feb. 6, 2007), the U.S. Department of Education's Office of Special Education Programs, pronounced that a review of extant data alone, with the finding that no additional data are needed, may constitute a reevaluation *in toto*:

Based on the review of existing evaluation data, and input from the child's parents, the IEP Team and other qualified professionals, as appropriate, must determine whether additional data are needed to determine whether the child continues to be a child with a disability, and the educational needs of the child; the present levels of academic achievement and related

developmental needs of the child; whether the child continues to need special education; and whether any additions or modifications to the

special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum. 34 C.F.R. § 300.305(a)(2). If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability, and to determine the child's educational needs, the public agency must notify the child's parents of: (i) that determination and the reasons for the determination; and (ii) the right of the parents to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child's educational needs. 34 C.F.R. § 300.305(d)(1). Under these circumstances, the public agency is not required to conduct an assessment unless requested to do so by the child's parents. 34 C.F.R. § 300.305(d)(2). *If the parents do not request an assessment, then the review of existing data may constitute the reevaluation.*

Id. (Emphasis supplied).

Due to COVID-19 restrictions, the [REDACTED] School 2 IEP team, including the

parent, met by videoconference for Student's April 7, 2021, triennial reevaluation. The team reviewed teacher narratives, IEP progress updates, the 2018 [REDACTED]S initial special

education eligibility evaluation of Student, testing that was on file, Student's then-current performance and team input. The IEP team determined that additional data were not needed to make an eligibility determination for Student. After reviewing the data, the team recommended that Student continued to meet eligibility criteria for special education under the OHI classification and that Student also met eligibility criteria for SLD in the areas of reading comprehension and math calculation. At the time, the parent did not request additional assessments, formal or otherwise.

By written notice to the parent dated April 7, 2021, ■■■S confirmed the updated eligibility determination for Student. The parent had previously been provided the *Virginia Procedural Safeguard Notice*, which included the requirement for parental consent before any changes in the identification of her child's disability and for any changes to the child's IEP. Over the ensuing 20 months, Mother did not disagree with the April 7, 2021, IEP team's eligibility decisions. But at an IEP team meeting on December 15, 2022, although there was no disagreement that Student met the criteria for SLD, Educational Advocate expressed concern, on behalf of the parent, that the April 7, 2021, eligibility team added SLD as a disability category for Student without updated testing. The advocate requested a new assessment of Student.

At the due process hearing in this case, Petitioner called School Psychologist and Private Psychologist as expert witnesses to testify about the appropriateness of the April

7, 2021, triennial reevaluation of Student. School Psychologist, an ■■■S employee who, on Petitioner's proffer, was qualified as an expert in psychological and educational assessments, opined that when the April 7, 2021, IEP team looked at Student's standardized test scores from 2018, his/her current classroom performance and input from the IEP team, there was no question regarding Student's eligibility and therefore, no need for additional data. School Psychologist explained that at the reevaluation planning meeting and eligibility meeting, the IEP team heard from Student's current classroom teachers, the parent, the school counselor and Student and the team reviewed current classroom performance, which included progress monitoring data, anecdotal and historical testing as well as the standardized test scores from 2018.

Petitioner's other expert psychology witness, Private Psychologist, was qualified to testify as an expert in clinical psychology. Private Psychologist completed an IEE psychological evaluation of Student in May 2023. In his testimony, Private Psychologist opined that if he had been part of Student's child study team in 2021, he would have recommended that new psychological and educational evaluations be conducted, because "to make good diagnoses and recommendations and develop an intervention program, you absolutely need to see current data, particularly with the education piece." While Private Psychologist would have wanted to see new formal evaluation data, he testified that he agreed with the April 7, 2021, IEP team's conclusion that Student was

eligible as a student with an SLD and ADHD.

█S' Counsel argued in his closing argument that Petitioner was bound by School Psychologist's opinion under the "adverse party witness" rule. That evidentiary rule provides that "when an adverse party is called and examined by an opposing party, the latter is bound by all of the former's testimony that is uncontradicted and is not inherently improbable." *See Colas v. Tyree*, 882 S.E.2d 625 (Va. 2023). █S contends that since Petitioner called the █S School Psychologist as her witness, she is bound by this expert's opinion. I disagree. Assuming that the adverse party witness rule applies to special education due process hearings, as the Virginia Supreme Court explained in *Colas*, the rule applies "only to so much of the adverse witness's testimony as is not contradicted by or in conflict with the calling party's other evidence." *Id.* at 630. In the present case, School Psychologist's opinion, that additional data were not needed by the April 7, 2021, IEP team, was in conflict with the opinion of Private Psychologist that it is best practice not to rely on three year old assessments and that new data were needed. I find that the adverse party witness rule does not apply.

Notwithstanding, I found School Psychologist's opinion, that there was no need for additional data for the April 2021 triennial, more persuasive than Private Psychologist's contrary opinion. First, School Psychologist was qualified by Petitioner's Counsel specifically as an expert in psychological and educational assessments. Special

education eligibility is one of a school psychologist's core responsibilities and School Psychologist testified that she had been involved in thousands of meetings over her career to assess a student's eligibility and whether additional testing was necessary. Private Psychologist, who was qualified as an expert in clinical psychology, lacks that depth of background in school psychology. Second, School Psychologist attended the April 7, 2021, reevaluation planning meeting for Student and heard first-hand from Student's teachers. Private Psychologist testified that he did not look through the process of the 2018 or 2021 eligibility determinations for Student and did not talk to Student's teacher or the prior evaluators. Therefore, while I found both School Psychologist and Private Psychologist to be credible witnesses, I found School Psychologist's opinion that new formal assessments of Student were not needed for the April 7, 2021, triennial reevaluation better grounded than Private Psychologist's contrary opinion.

There was also testimony at the due process hearing about Student's need for a formal speech and language evaluation as part of both the 2018 initial evaluation of Student and the April 2021 triennial reevaluation. Parent's expert, Private Speech Therapist, conducted an IEE speech and language evaluation of Student in June 2023. Private Speech Therapist opined, with regard to the initial evaluation of Student, that there were "red flags" in the 2018 educational testing that would have indicated that the

child's language skills should have been assessed by a speech language pathologist.

According to Private Speech Therapist, these red flags included Student's 2018 WJ-IV scores on passage comprehension, understanding directions, oral comprehension, broad oral language, and listening comprehension, which were either in the Low range or Low Average range. Private Speech Therapist testified that she was not familiar with the considerations made by the April 7, 2021, team members concerning whether additional testing was necessary and she offered no opinion about the appropriateness of Student's April 7, 2021, triennial reevaluation.

For his part, Private Psychologist testified that based on Student's 2018 scores on the WJ-IV oral language cluster, if he had been at the April 7, 2021, reevaluation planning meeting, he would probably have recommended looking at Student's speech and language function. Private Psychologist, of course, did not qualify as an expert in speech and language and he testified that he did not look through the process of the

2018 or 2021 eligibility determinations for Student.

Decisions regarding the areas to be assessed are determined by the suspected needs of the child. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46540 at -643. (August 14, 2006). Deciding what areas needed to be assessed should be based on what was known about the child's needs at the time of the evaluation, not on later developments. *Cf. L.J. by & through*

Hudson v. Pittsburg Unified Sch. Dist., 850 F.3d 996, 1004 (9th Cir. 2017)

(Appropriateness of a student’s eligibility should be assessed in terms of its appropriateness at the time of the child’s evaluation and not from the perspective of a later time with the benefit of hindsight.)

This question here is, based on what was known at the time of the April 2021 triennial reevaluation, should the IEP team have suspected speech or language needs for Student. Going back to the November 18, 2019, annual IEP review, including at the last IEP team meeting before the April 2021 triennial meeting, the IEP teams had reported that Student’s Expressive and Receptive Language abilities were “age appropriate.” School Psychologist testified that at the April 7, 2021, evaluation meeting, she did not recommend the need for speech and language testing because, based on Student’s then-current performance, language concerns were not reported by anyone as a concern for

Student. The April 7, 2021, IEP team did not, of course, have Private Speech Therapist’s June 2023 IEE report on Student.

The decisions of the student’s educators as to what areas to assess are entitled to some deference. *See R.B., ex rel. F.B. v. Napa Valley Unified School Dist.*, 496 F.3d 932, 937 (9th Cir.2007) (Fact-intensive nature of a special education eligibility determination coupled with considerations of judicial economy render more deferential approach appropriate.) Allowing for the deference due to the decisions of the XXXXXX

School 2 educators, I conclude that Petitioner has not established that at the time of the April 2021 triennial reevaluation, Student had suspected speech or language needs that would have triggered a requirement for █S to conduct a speech and language evaluation

In sum, I find that Petitioner has not met her burden of persuasion that when █S conducted its triennial special education reevaluation of Student on April 7, 2021, the school division denied Student a FAPE by failing to comprehensively assess him/her in all areas of suspected disability.

II.

Whether █S denied the student a FAPE for the 2021-2022 and 2022-2023 school years by failing to meet the student's individual needs, in that the IEP teams continued to rely on outdated assessments to develop the IEP, failed to provide the special education and related services necessary to prepare the

student for future education, and reduced specially designed instruction services year after year with no objective data to support this reduction in service.

Petitioner next claims that █S' IEPs for Student for the 2021-2022 and 2022-2023 school years were inappropriate because the IEP teams did not use up-to-date assessment data and because the IEPs provided insufficient special education and related services. The IEPs at issue were developed on April 23, 2021, March 17, 2022, as amended on August 29, 2022, (hereinafter the "March 17, 2022 IEP") and March 21, 2023.

In determining whether the school division has offered a child an appropriate

IEP, the hearing officer's inquiry is two-fold. "First, has the [district] complied with the procedures set forth in the IDEA? And second, is the IEP developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 206–07, 102 S. Ct. 3034, 3051, 73 L. Ed. 2d 690 (1982).

As to procedural compliance, for each of the IEPs at issue, Petitioner contends that the IEPs were procedurally deficient because the respective IEP teams allegedly relied on outdated assessments of Student. Petitioner's Counsel also argued at the due

process hearing that the provisions in the IEPs for specially designed instruction were so vague that Student's teachers would not be able to determine what special education they would be responsible for providing.

For both initial IEPs and annual IEPs, the IDEA requires the IEP Team to consider the academic, developmental, and functional needs of the child. In addition, the IEP Team must review the strengths of the child; the concerns of the parents for enhancing the education of their child; the results of the initial evaluation or most recent evaluation of the child and existing evaluation data on the child, including evaluations provided by the parents of the child; current classroom-based, local, or State

assessments and classroom-based observations and observations by teachers and related services providers. *See* 34 C.F.R. § 300.324(a), (b); *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46540 at -6648.

To the extent Petitioner alleges that the IEP teams relied only on Student's 2018 initial eligibility assessments and did not consider the other data required by the IDEA, that is incorrect. The evidence established that for each of the contested IEPs, in addition to reviewing Student's 2018 formal eligibility assessments, the respective IEP teams considered teacher narratives collected before the meeting, input from the parent, teachers and other professionals who were present at the meetings and Student's scores

on the most recent Virginia Standards of Learning results. I find that Petitioner has not established that the ■■■S IEP teams relied on outdated assessments to develop the IEPs or otherwise failed to review the scope of data required to be considered under the IDEA.

With regard to vagueness argument made by Petitioner's Counsel in her closing, the Fourth Circuit has noted that an IEP "must provide, among other things, 'the projected date for the beginning of the services and modifications . . . , and the anticipated frequency, location, and duration of those services and modifications.'" *A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 675 (4th Cir. 2007), citing 20 U.S.C.A. (d)(1)(A)(i)(VII). The offer of special education services in an IEP must be

sufficiently specific for a parent to decide whether to accept or challenge the school district's offer. *See id.* at 681. Courts in this judicial district have looked to the entire IEP development process to determine whether the offerings were sufficiently clear. *See A.P. by L.P. v. Sch. Bd. of Fairfax Cnty.*, No. 121CV504LMBTCB, 2022 WL 1105076, at *9 (E.D. Va. Apr. 13, 2022) (“[E]ven though the IEP document in [*Sauer v. Johnson*, 36 IDELR 266 (E.D. Va. 2002)] was unclear, the court considered the entire process, including communications between school representatives and the family, to determine that the offerings were made sufficiently clear.”)²

█'S' April 23, 2021 IEP identified Student's specific support needs in Attention/Organization, Math Reasoning, Reading Comprehension and Self-Determination (Self-Advocacy) and provided annual goals in each area. The IEP went on to prescribe specific hours of Specially Designed Instruction, in the general education setting, for each area of need, that is, 2 hours for Organization, 3 hours for Mathematics, 1 hour for Self-Advocacy and 3 hours for Reading Content Area. I find that this offer of services in the April 23, 2021, IEP was sufficiently clear on its face.

In the summer of 2022, the software which █S used to complete IEP documents underwent a change in formatting. One consequence was that the services pages on

² Petitioner's focus on whether Student's teachers would be able to determine what special education they would be responsible for providing is misplaced. Teachers can turn to the student's Case Carrier if there are questions about implementation. *See* Testimony of School Administrator. Notwithstanding, the IEP must be sufficiently clear for the parent to evaluate the school's offer.

Student's IEPs no longer broke down special education hours by support needs. Student's March 17, 2022, and later IEPs divided Specially Designed Instruction services only between hours in the general education setting and hours in the special education setting. See Testimony of School Administrator, Transcript Day 5, p. 238. However the March 17, 2022 IEP and subsequent IEPs continued to identify Student's needs for support in specific areas, *i.e.*, Attention/Organization, Mathematics, Reading and Self-Determination (Self-Advocacy), and the respective IEPs included annual goals for each area. Each of the IEPs for the 2021-2022 and 2022-2023 school year also provided the beginning date and duration of special education and related services, anticipated frequency and location (*i.e.*, inside or outside of general education at [REDACTED] School 2). I find that looking at the respective IEPs in their entirety, and not limiting consideration to the Special Education Services pages in isolation, each IEP was sufficiently specific to enable Mother to decide whether to accept or challenge the school district's offer. See *A.K., supra*. I conclude, therefore, that Petitioner has not established that [REDACTED]S failed to comply with the IDEA's procedural requirements in developing the April 23, 2021, March 17, 2022, and March 21, 2023, IEPs.

Turning to the second, substantive, prong of the *Rowley* inquiry, were the April 23, 2021, March 17, 2022, and March 21, 2023, IEPs offered by [REDACTED]S appropriate for Student? Petitioner contends that the three IEPs failed to offer the special education and related services necessary to prepare the student for future education and reduced specially designed instruction services with no objective data to support these

reductions in service. ■■■S responds that the parent agreed to the April 23, 2021, and March 17, 2022, IEPs and that at the hearing, Petitioner offered no competent evidence

that the IEPs were inadequate. I agree with ■■■S that Petitioner failed to meet her burden of proof that the IEPs for the 2021-2022 and 2022-2023 school years were inappropriate.

Citing *Smith, supra*, ■■■S argues that since Mother signed the IEPs at issue, indicating her agreement, Mother is now estopped from challenging the appropriateness of the respective IEPs. In *Smith*, the Court sustained the hearing officer's finding that the parents were precluded from asserting claims as to agreed IEPs, or portions of IEPs with which they did not disagree. *Id.* at 11. To the extent that this decision could be read to hold that a parent is forever barred from seeking relief in a due process proceeding for an allegedly inappropriate IEP to which she initially gave consent, I respectfully disagree. *See, e.g., G ex rel. RG v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 309 (4th Cir. 2003) (“[C]ourts have concluded that ‘failure to object to [a child's] placement does not deprive him of the right to an appropriate education.’ *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 250 (3d Cir.1999) (rejecting the contention that failure to object to an IEP while in force categorically bars relief related to that IEP)).” I find that Mother is not barred from contesting the allegedly inappropriate IEPs in this proceeding.

In *D.H. v. Arlington Cty. Sch. Bd.*, No. CR 1:19-CV-1342, 2021 WL 217098, at *8–

9 (E.D. Va. Jan. 19, 2021), U.S. District Judge T. S. Ellis, III explained the requirements for an appropriate IEP:

At the center of the IDEA’s education delivery system is the IEP. A student’s IEP is a document that is created through collaboration between school staff and parents that “describes the child’s unique needs and the state’s plan for meeting those needs.” *R.F. by & through E.F. v. Cecil Cty. Pub. Sch.*, 919 F.3d 237, 241 (4th Cir.), *cert. denied*, 140 S. Ct. 156 (2019) (quoting *M.S. ex rel. Simchick v. Arlington Cty. Sch. Bd.*, 553 F.3d 315, 323 (4th Cir. 2009)). *R.F.*, 919 F.3d at 241 (citing *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017)). . . . The Supreme Court has made clear that, in order “[t]o meet its substantive obligation under the IDEA [to prove a FAPE], a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 999. In addition to this substantive requirement, the IDEA also requires that “each disabled student receive instruction in the ‘least restrictive environment’ (‘LRE’) possible.” *AW ex rel. Wilson v. Arlington Cty. Sch. Bd.*, 372 F.3d 674, 681 (4th Cir. 2004) (citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 180–82 (1982)). The Fourth Circuit has explained that the LRE requirement “reflects the IDEA’s preference that “[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled.” *AW ex rel. Wilson*, 372 F.3d at 681.

D.H., 2021 WL 217098, at 8–9.

In its *Endrew F.* decision, the Supreme Court distinguished between IEP expectations for most children with disabilities, like Student, who receive education primarily in the regular classroom, and educational programming for other children who are not fully integrated in the regular classroom and not able to achieve on grade

level. The Court explained,

[In *Rowley*], the Court recognized that the IDEA requires that children with disabilities receive education in the regular classroom “whenever possible.” *Ibid.* (citing § 1412(a)(5)). When this preference is met, “the system itself monitors the educational progress of the child.” *Id.*, at 202–203, 102 S.Ct. 3034. “Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material.” *Id.*, at 203, 102 S.Ct. 3034. Progress through this system is what our society generally means by an “education.” And access to an “education” is what the IDEA promises. *Ibid.* Accordingly, for a child fully integrated in the regular classroom, an IEP typically should, as *Rowley* put it, be “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Id.*, at 203–204, 102 S.Ct. 3034.

Andrew F., 580 U.S. at, 400–01 (Emphasis supplied). See, also, *A.B. by L.K. v. Smith*, No. 22-1686, 2023 WL 3533595 (4th Cir. May 18, 2023) (“An IEP need only be ‘reasonable,’ not ‘ideal.’ *Andrew F.*, 580 U.S. at 399. When a child is fully integrated into the regular classroom, appropriate progress is ‘passing marks and advance[ment] from

grade to grade.’ *Id.* at 401.” *A.B.*, 2023 WL 3533595 at *2.)

█S’ April 23, 2021, IEP for Student provided for 3.75 hours per week of “Specially Designed Instruction” in the special education setting for “Organization” and 9 hours per week, in the general education setting. The March 17, 2022, IEP (as amended on August 29, 2022) and the March 21, 2023, proposed IEP continued 3.75 hours per week of Specially Designed Instruction in the special education setting and reduced Specially Designed Instruction in the general education setting to 5 hours per week. None of these IEPs provided for related services. Petitioner, who had the burden of proof under the Supreme Court’s decision in *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57–58 (2005), did not offer expert testimony concerning the alleged inappropriateness of █S’ 2021-2022 or 2022-2023 school year IEPs for Student. Support Coordinator, who qualified as an expert witness for █S in special education, opined that the three IEPs, including the Specially Designed Instruction service hours, were appropriate for Student.

Since enrolling in XXXXXX School 2 for the 2019-2020 school year, Student was placed in the regular classroom, except for 3.75 hours per week for Instructional Studies in a special education setting. It follows under the *Rowley* decision that an appropriate IEP for Student would have been a program reasonably calculated to enable Student to

achieve passing marks and advance from grade to grade. *See Endrew F.*, 580 U.S. at, 401. ■■■S' Counsel argued correctly that under the 2021-2022 and 2022-2023 school year IEPs, Student "did a lot better than achieving passing grades," and was able to advance from grade to grade. Throughout Student's years at ■■■■■ School 2, Student achieved passing grades in all courses, except a failing grade in algebra classes for the 2021-2022 school year. Most of Student's grades were A's and B's. Student advanced from grade to grade with his/her classmates and graduated on schedule in 2023 with a standard diploma. At the time of the due process hearing, Student was expected to enroll in a community college in the fall of 2023.

I conclude that Petitioner has not met her burden of persuasion that the IEPs developed by ■■■S on April 23, 2021, March 17, 2022, and March 21, 2023, were not appropriate for Student – that is, that the respective IEP programs were not reasonably calculated to enable Student to achieve passing marks and advance from grade to grade. *See Endrew F.*, 580 U.S. at, 401.

III.

Whether ■■■S denied Student a FAPE for the 2021-2022 and 2022-2023 school years by failing to fully implement the service minutes specified in Student's IEPs.

Petitioner alleges that during the 2021-2022 and 2022-2023, ■■■S did not fully

implement the Specially Designed Instruction service hours specified in

Student's IEPs. Specifically, Petitioner contends that ██████ School 2 did not provide the reading, writing, or math remediation services, *in the general education setting*, purportedly required by the IEPs.

In her closing argument, Petitioner's Counsel clarified that the parent's failure to implement claim is that in the 2021-2022 and 2022-2023 school years, ██████S failed to provide Student Specially Designed Instruction or related services necessary to remediate his/her deficits in reading, writing and math, and that there was no evidence that ██████S provided any reading, writing, or math remediation during the service minutes identified in Student's IEPs. ██████S countered that what the IEPs required was not "remediation," but rather support and special education in support of the Student's IEP goals. ██████S argues that Student received that special education support.

A material failure to implement an IEP, or a failure to implement a material portion of an IEP, violates the IDEA. *Sumter Cnty. Sch. Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478, 484 (4th Cir. 2011). "[A] party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP." *Id.*, quoting *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir.2000).

Analytically, Petitioner's failure to implement claims in this case are best considered in two parts. First, did ██████ School 2 fail to provide Student 9 hours

per week of Specially Designed Instruction in the General Education Setting from the start of the 2021-2022 school year until Student's IEP was updated on March 17, 2022, or fail to provide 5 hours per week thereafter? Second, did [REDACTED] School 2 fail to provide special education to Student in the general education setting calculated to enable Student to advance appropriately toward attaining his/her annual IEP goals?

Student's April 23, 2021 IEP provided for 9 hours per week of Specially Designed Instruction in the general education setting. According to the unrebutted testimony of [REDACTED]'s witness, School Administrator, the provisions in Student's IEPs for Specially Designed Instruction in the General Education Setting meant Student would be served in co-taught classes, within a general education setting, taught by both a general education teacher and a special education teacher.³ The hearing evidence established that during the 2021-2022 school year, Student was placed in co-taught classes – math and English, for, on average, 7.5 hours per week. Therefore, for a period of about 23 school weeks, until the service hours in Student's IEP were reduced in March 2022, Student was “shorted” about 1.5 hours per week, or approximately 35 hours total, of the

³ APS' counsel argued at the hearing that Specially Designed Instruction could be provided by a regular education teacher. That may be true, but the intent of the IEP teams was that Student would receive his/her general education setting Specially Designed Instruction only in co-taught classrooms. Questioned by the hearing officer, School Administrator confirmed that if the hearing officer were trying to determine whether or not Student had been provided five hours per week of special education service in the general education setting, the classes the hearing officer should be looking at are the co-taught classes. See Testimony of School Administrator, Transcript Day 5, 287-88.

Specially Designed Instruction required by his/her IEP. I find that this was a failure to implement a substantial provision of Student's IEP and a denial of FAPE.

After the March 17, 2022, IEP revision, City School was responsible for providing Student 5 hours per week of Specially Designed Instruction in the general education, co-taught, setting. The hearing evidence establishes that ■■■S fulfilled the Student's IEP requirements to provide him/her specially designed instruction in the general education setting for at least 5 hours per week from March 17, 2022 through the end of the 2022-2023 school year.

An aspect of Petitioner's failure to implement claim is that ■■■S did not provide special education reading, writing, or math remediation services allegedly required by Student's IEPs. Student's April 23, 2021, IEP included academic annual goals for Reading Comprehension and Math Reasoning. The March 17, 2022 and March 21, 2023 IEPs provided academic annual goals for Mathematics and Reading. Neither IEP included annual goals for writing. In both the 2021-2022 and 2022-2023 school years, Student received Specially Designed Instruction in co-taught English classes, which

necessarily included Reading support. In the 2021-2022 school year, Student's mathematics classes were co-taught by a special education teacher. In the 2022-2023 school year, Student was in a co-taught Physics class, with a regular education Physics teacher and a special education teacher. The Physics teacher worked on math with

Student while the special education teacher provided other instructional support. I find that Petitioner offered no credible evidence that [REDACTED] School 2 did not provide appropriate special education services to Student in Reading and Mathematics during the 2021-2022 and 2022-2023 school years.

IV.

Whether [REDACTED]S denied the student a FAPE by significantly impeding the parent's ability to fully participate in the IEP process by denying her December 15, 2022, request that the student be reevaluated.

At an April 7, 2021, eligibility team meeting, Student's IEP team determined that Student continued to be eligible for special education and met eligibility criteria for OHI-ADHD as well as SLD. At an IEP team meeting on December 15, 2022, Mother's representative, Educational Advocate, expressed concern with the April 7, 2021 eligibility determination because SLD had been added as a disability category for Student, allegedly without updated testing. The advocate requested that Student be reevaluated. [REDACTED]S did not agree to reevaluate Student until April 2023. Mother

contends that [REDACTED]S' initial refusal of her request to reevaluate Student was a procedural violation of the IDEA.

The IDEA requires that a reevaluation of each child with a disability must occur at least once every three years, or sooner if the child's parent or teacher requests a reevaluation. A reevaluation may occur not more than once a year, unless the parent

and the school division agree otherwise. *See* 34 C.F.R. § 300.303. The IDEA does not set a time frame within which an LEA must conduct a reevaluation after receiving a request from a student’s parent. *See Herbin ex rel. Herbin v. District of Columbia*, 362 F.Supp.2d 254, 259 (D.D.C.2005). However, the Virginia Regulations require that reevaluations shall be completed in 65 business days of the receipt of the parent’s referral. *See Regulations Governing Special Education Programs for Children with Disabilities in Virginia* (2010), 8 VAC 20-81-70(h)(2). On this timeline, ■■■S should have completed the requested reevaluation of Student by around March 9, 2023. I find that ■■■S’ failure to initiate a reevaluation of Student upon Mother’s December 15, 2022 request was a procedural violation of the IDEA. *See, e.g., I.T. ex rel. Renee T. v. Department of Educ.*, 2012 WL 3985686, 16 (D.Haw., Sept. 11, 2012). *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012).

In matters alleging a procedural violation of the IDEA, the hearing officer may

find that the child did not receive a FAPE 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.

8 VAC 20-81-210(O)(17). “[A]bsent a finding that the procedural violation led to the

substantive denial of FAPE, then the remedy for the violation is limited to rectifying the error.” *J.P. v. McKnight*, No. 8:21-CV-02427-PX, 2022 WL 4548463, at *8 (D. Md. Sept. 29, 2022, citing *R.F. ex rel. E.F. v. Cecil Cnty. Pub. Sch.*, 919 F.3d 237, 248 (4th Cir. 2019).

In the present case, Student graduated from ██████ School 2 on June 14, 2023. If ██████S had completed Student’s reevaluation within 65 days of the parent’s December 15, 2022 request, by March 9, 2023, as required by the Virginia Regulations, and then scheduled follow-up IEP team meetings to reconsider Student’s special education eligibility and to revise his/her IEP as appropriate, there would only have been a few weeks of school left, before Student graduated. On these facts, I find ██████S’ procedural violation of initially refusing Mother’s December 15, 2022 request to reevaluate Student did not impede Student’s right to a FAPE, cause a deprivation of educational benefits or

significantly impede Mother’s right to participate in the decision making process. This procedural violation did not rise to a substantive denial of FAPE.

V.

Whether ██████S denied the student a FAPE by significantly impeding the parent’s ability to fully participate in the IEP process by failing to provide an Independent Educational Evaluation (IEE) at public expense when requested by the parent in January 2023.

By email letter of January 20, 2023, Petitioner’s Counsel wrote ██████S to express

the parent's disagreement with the April 7, 2021 triennial reevaluation and to request an Independent Educational Evaluation ("IEE") of Student at public expense, to include Psychological, Educational, and Speech-Language evaluations. ■■■S did not initially approve the IEE request, but, following the April 13, 2023, prehearing conference in this proceeding, ■■■S agreed to fund the IEE psychoeducational and speech and language evaluations requested by the parent. Student was assessed by the independent evaluators and the IEE evaluation reports were completed on May 8, 2023, (Psychoeducational) and June 5, 2023 (Speech and Language). Petitioner contends that ■■■S' failure to agree sooner to fund the requested IEEs was a procedural violation of the IDEA. ■■■S responds that the parent's IEE claim is moot because the school division did approve the parent's request and funded the IEEs. I agree with ■■■S that Petitioner's IEE claim is now moot.

The Fourth Circuit discussed the doctrine of mootness in *Johnson v. Charlotte-Mecklenburg Sch. Bd. of Educ.*, 20 F.4th 835 (4th Cir. 2021):

"The doctrine of mootness constitutes a part of the constitutional limits of federal court jurisdiction, which extends only to actual cases or controversies." *Porter v. Clarke*, 852 F.3d 358, 363 (4th Cir. 2017) (citations, internal quotation marks, and alteration omitted). . . . Thus, federal courts lack jurisdiction when "the issues presented are no longer

‘live’ or the parties lack a legally cognizable interest in the outcome.”

Leaders of a Beautiful Struggle v. Balt. Police Dep’t, 2 F.4th 330, 336 (4th Cir. 2021) (en banc) (citation omitted).

Johnson at 842.

The IDEA regulations provide parents with a limited right to obtain an IEE at public expense. The limited right arises only after the LEA has procured an evaluation with which the parent “disagrees.” 34 C.F.R. § 300.502(b). Once the parent expresses her disagreement, she may request an independent reevaluation at public expense, which the agency must, “without unnecessary delay,” either provide – or file a due process complaint to establish that its evaluation is “appropriate.” *See* 34 C.F.R. § 300.502(b)(2).

In the present case, Petitioner’s claim regarding the IEE evaluations is now moot because, although ■■■S did not file a due process complaint to establish the appropriateness of its 2021 reevaluation of Student, it did approve the parent’s IEE request in April 2023. The IEE psychoeducational and speech and language evaluation reports were completed on May 8, 2023 (Psychoeducational) and June 5, 2023 (Speech and Language, a short time before Student graduated from high school. Because ■■■S funded the IEEs for Student and the testing has now been completed, the parent’s IEE claim is moot. *See, e.g., Sch. Bd. of the City of Norfolk v. Brown*, 769 F. Supp. 2d 928,

953 (E.D. Va. 2010) (IEE and ADHD testing which the School Board contests have already been completed. Thus, there is no present controversy which exists for the Court to adjudicate.)

Remedy

In this decision, I have concluded that ■■■S denied Student a FAPE by failing to fully implement Student's April 23, 2021, IEP. Specifically, for around 23 weeks in the 2021-2022 school year, ■■■S failed to provide Student some 1.5 hours per week, out of the required 9 hours per week, or approximately 35 hours total, of Specially Designed Instruction, in the co-taught general education setting, required by his/her IEP.

Since Student has already graduated from high school, compensatory education is the only remedy available in this case. As the Fourth Circuit has explained, "[C]ompensatory education involves discretionary, prospective, injunctive relief crafted by a [hearing officer] to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student." *G ex rel. RG v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 309 (4th Cir. 2003). Hearing Officers "in the exercise of their broad discretion, may award [compensatory education] to whatever extent necessary to make up for the child's lost progress and to restore the child to the educational path he or she would have traveled but for the deprivation." *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 625 (3d Cir. 2015).

A hearing officer may order adult compensatory education if necessary to cure a past violation. *Fort Bragg Dependent Sch.* at 309.

The Petitioner must bear the burden of proving that compensatory education is an appropriate equitable remedy that the Hearing Officer should award in the particular circumstances of this case. *Hogan v. Fairfax Cnty. Sch. Bd.*, 645 F. Supp. 2d 554, 573 (E.D. Va. 2009). *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); *M.N. v. Jefferson Cnty. Bd. of Educ.*, 421 F. Supp. 3d 1288, 1300 (N.D. Ala. 2019), *aff'd sub nom. J.N. next friend of M.N. v. Jefferson Cnty. Bd. of Educ.*, 12 F.4th 1355 (11th Cir. 2021) (Parent has the burden of proof with respect

to request for relief.) I find that Mother has proved that compensatory education is an appropriate equitable remedy for ■■■S' failure to fully implement Student's IEP in the 2021-2022 school year. During the period of the implementation shortfall in the 2021-2022 school year, Student failed his/her Algebra class. Mathematics was a recognized IEP area of need for Student. Student continues to have deficits relating to his/her IDEA disabilities. Petitioner's expert, Private Psychologist, opined in his 2023 psychological evaluation report, that as a student with learning disabilities and ADHD, Student will require direct instruction and skill building to address continuing areas of deficit.

In her closing argument, Petitioner's Counsel sought 441 hours of compensatory

education for Student “for reduced general education services from April 2021 to June 2023.” However, at the hearing Petitioner offered no evidence as to how such an award would appropriately remedy the deficit created by ■■■S’ failure to fully implement Student’s IEP in the 2021-2022 school year. Moreover, in this decision, I have found that the Parent established that the period of the denial of FAPE ran from the start of the 2021-2022 school year until Student’s IEP was revised on March 17, 2022 – not through June 2023. I find, therefore, that Petitioner’s proposed compensatory education award is not supported by the evidence.

Notwithstanding the gap in Petitioner’s compensatory relief evidence, I find that Student is entitled to appropriate compensatory education. *See Hogan, supra* (“[T]he Court finds that the Student is entitled to some level of compensatory education. First, . . . [the District] bears a significant amount of the responsibility for the Student’s failure to receive a FAPE during the 2005–2006 school year. Second, the loss of a FAPE created an ‘educational deficit.’” *Id.*, 645 F.Supp. 2d at 575.) In the present case, I likewise find that ■■■S bears responsibility for the denial of FAPE to Student in the 2021-2022 school year and Student has continuing deficits, which can be reasonably attributed, in part, to ■■■■■ School 2’s failure to fully implement the special education hours required by Student’s April 23, 2021 IEP.

■■■S’ witness, School Counselor, stated that a tutoring program is necessary for

Student (and all students transitioning to college) because the change from high school to college can be very different. I conclude that the hearing evidence establishes compensatory education, in the form of tutoring, is warranted to make up the educational deficit attributable to ■■■S' failure, to fully implement the hours of Specially Designed Instruction in the general education setting required by Student's April 23, 2021, IEP.

In my equitable discretion as the hearing officer, I will award Student 35 hours of compensatory education tutoring to compensate for missed Specially Designed Instruction in the 2021-2022 school year. Although an hour-for-hour compensatory education award for missed IEP services is disfavored, in this case it is appropriate, recognizing the unavoidable uncertainty in attempting to calculate harm to Student from ■■■S' providing 1.5 hours per week less of Specially Designed Instruction than required by Student's IEP. *See Maple Heights City Sch. Bd. of Educ. v. A.C. Individually & on behalf of A.W.*, No. 1:14CV1033, 2016 WL 3475020, at *12 (N.D. Ohio June 27, 2016) (While award of compensatory education based on a mechanical formula is not *per se* inappropriate, an hour-by-hour mechanical approach is disfavored and the appropriate way to determine an award for compensatory education is through a more flexible approach.)

ORDER

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

ORDERED:

1. As compensatory education for the denial of FAPE found in this decision, [REDACTED] Public Schools, shall within 21 business days of the date of this decision, arrange authorization for Student to receive up to 35 hours publicly funded individual academic tutoring from a qualified educator who is experienced in working with students with ADHD and learning disabilities and
2. All other relief requested by the Petitioner herein is denied.

Date: August 31, 2023

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

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