# 18-095

# COMMONWEALTH OF VIRGINIA DEPARTMENT OF EDUCATION

**Office of Dispute Resolution and Administrative Services**

In re: XXXXXX XXXXXXX }

} Hearing Officer: Peter B. Vaden

Due Process Hearing Request } (Xxxxxxx County Public Schools) }

# HEARING OFFICER DECISION INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner, xxxxx xxxx (Petitioner or 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 alleges that Respondent Xxxxxxx County Public Schools (XCPS) has denied the student, Xxxxxx xxxxxxx, a free appropriate public education (FAPE) by failing to provide the student an appropriate Individualized Education Program (IEP) at May 2018 IEP team meetings.

Xxxxxxx, a 5-year-old child, is a resident of Xxxxxxx County, Virginia.

Petitioner’s Due Process Complaint, filed on June 5, 2018, named XCPS as respondent. The undersigned hearing officer was appointed on June 11, 2018. XCPS filed its response to the due process complaint on June 15, 2018. On June 18, 2018, I convened a telephone prehearing conference with the parties and their representatives to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before this Impartial Hearing Officer on July 10, 2018 at the XCPS School Administration Building in xxxxxxxxxxx, Virginia. The hearing, which was open to the public, was transcribed by a court reporter. The Petitioner appeared in person, and was assisted by educational advocate, Ms. Kandise Lucas. Respondent XCPS was represented by Administrative Coordinator xxxxxxxxx and by attorney Jason Ballum, Esq.

The Petitioner waived making an opening statement. Mr. Ballum made an opening statement for XCPS. Mother testified and called Marla Crawford, Ph.D. as her only additional witness. XCPS called Special Education Coordinator xxxxxxxx xxxxxx as its only witness. Numerous exhibits offered by the respective parties were received into evidence.1 At the conclusion of the due process hearing, I granted the parties’ joint request to file post-hearing briefs in lieu of making oral closing arguments. The representatives for both parties filed written closings on August 3, 2018. My final decision is due by August 19, 2018.

## JURISDICTION

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

## ISSUES AND RELIEF SOUGHT

The issues for determination, as memorialized in my June 18, 2018 prehearing order, are whether XCPS denied the student a free appropriate public education (FAPE) by:

* Predetermining the content of the May 1, 2018 IEP and not allowing the parent to have meaningful input in the development of the IEP;

1 XCPS labeled its exhibits as SB- . In my prehearing order, I directed that the respondent’s exhibits be labeled as R- . For consistency, in this decision, I cite XCPS’ exhibits by R-[Exhibit number].

* Failure to provide advance disclosure to the parent of all of the school and local education agency (LEA) participants for the May 1, 2018 IEP meeting;
* Failure to conduct a functional behavioral assessment (FBA) of the student to identify the purposes of the student’s specific problem behaviors and to help the IEP team select interventions to directly address the problem behaviors;
* Failure to provide for special education school transportation in the May 1, 2018 IEP and failure to include the parent in that decision;
* Failure to provide for Extended School Year (ESY) services in the May 1, 2018 IEP and failure to include the parent in that decision;
* Predetermining, prior to the May 1, 2018 IEP team meeting, that the student would be placed in the general education classroom at xxxxxxxxx Elementary School and not including the parent in that decision and
* Predetermining, prior to the May 1, 2018 IEP team meeting, that the student would not be placed in a transition program in a private school and prior to being placed in the general education classroom at the public elementary school, and not including the parent in that decision.2

For relief, Petitioner requested, as follows:

That XCPS be ordered to collaborate with a qualified independent evaluator, of the parent’s choice, funded by XCPS, to evaluate and assess the student for the appropriate transitional services that he requires, and to develop an appropriate transition plan for him to return to the public school, if appropriate; that XCPS be ordered to convene an IEP team meeting that appropriately considers the student’s needs for Extended School Year Services, based on an objective tool and data collection; that XCPS be ordered to fund and collaborate with a qualified independent evaluator, of the parent’s choice, to evaluate and assess the student with a Functional Behavior Assessment in order to develop a Behavior Intervention Plan, that meets the student’s needs within the school and community settings and that XCPS be ordered to add special education school transportation as an amendment to the present IEP.

2 An additional issue, alleged failure by XCPS to reimburse the parent for school transportation since September 2018, was resolved and withdrawn by the Petitioner.

## FINDINGS OF FACT

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

1. The student, a 5-year-old child, resides with Mother in Xxxxxxx County, Virginia. Testimony of Mother.
2. Xxxxxxx is eligible for special education under the IDEA disability classification, Autism and Speech/language Impairment. Exhibit R-2.
3. In an Early Childhood Multidisciplinary Assessment conducted by XCPS in November 2016, the assessment team reported that Xxxxxxx’s adaptive functioning rating indicated Average functioning across all domains. Cognitively, the student was functioning within the High range of cognitive ability. Results of the Childhood Autism Rating Scale, 2nd Edition (CARS-2) indicated that Xxxxxxx displayed minimal symptoms of Autism Spectrum Disorder (ASD) during testing and during a YMCA observation, but Xxxxxxx was determined to be on the border between minimal and mild symptoms of ASD. Results of formal and informal assessments of Xxxxxxx’s communication skills showed a significant gap between the child’s receptive language skills and expressive language skills. Social language skills were the area of most significant concern overall. Formal assessments indicated that Xxxxxxx’s receptive language skills appeared to be within age expectations but with identified skill gaps that fell below expectations. Expressive language skills were below expectations based on results of standardized testing and analysis of a spontaneous language sample. Xxxxxxx’s articulation skills also fell below age expectations. Medically, Xxxxxxx was reported to have significant gastrointestinal (GI) issues, which were controlled with a very restricted diet. Exhibit R-

1.

1. Xxxxxxx has been provided XCPS IEP since at least January 13, 2017.

Exhibit R-3. The student’s IEP was amended on September 1, 2017. In the Description of Disability section of the September 1, 2017 IEP, the IEP team noted, *inter alia*, that Xxxxxxx has been diagnosed with Duodenitis (inflammation of the small intestine), Gastritis and Autism Spectrum Disorder; that Xxxxxxx’s significant GI issues had been improving with careful monitoring of a very strict diet and nutritional supplements; that Xxxxxxx demonstrated autistic traits that fell within the Minimal Symptoms range and that three areas – relating to people, verbal communication and nonverbal communication – were rated to be within the mild to moderate range; and that Xxxxxxx was identified with a Speech and Language impairment due to weaknesses in speech intelligibility and language skills. Exhibit R-3.

1. The September 1, 2017 IEP Amendment identified Social/Communication Skills, Speech/Language and Life Skills as areas of concern. This IEP provided for XCPS to provide Xxxxxxx with special education services for 3 hours per two weeks in the community/home (preschool) setting that may include typically developing peers; Occupational therapy (OT) for 1 hour per month in the community/home (preschool); The September 1, 2017 IEP provided for Xxxxxxx to have a private “preschool experience,” up to five mornings a week according to the private preschool’s calendar, and 2 hours per month of Speech/language services in the home school to address communication goals. One of the accommodations in the IEP was for an “Environmental change [for Xxxxxxx] during eating time while remaining in this classroom,” as deemed appropriate by the special education teacher and Occupational Therapist. Mother signed this IEP to give permission to implement the program. Exhibit R-3.
2. In September 2017, Xxxxxxx was enrolled, at XCPS expense, for half-days at xxxxxxxxxxxxxxx School (xxxxxxxxxxx School), a nonpublic general education preschool. A XCPS Early Childhood Special Education teacher (ECSE), xxxxxxxxx xxxxxxxxx, provided Xxxxxxx with the special education services (3 hours per two weeks) specified in the IEP. Xxxxxxx continued at the Xxxxxx School for the rest of the 2017- 2018 school year. The general education classroom at Xxxxxx School had a maximum of 12 children staffed by two teachers. Testimony of Mother. Xxxxxxx also received speech-language therapy at Xxxxxx xxx Elementary School, one time per week throughout the 2017-2018 school year. Testimony of xxxxxxxxxx.
3. On the student’s November 3, 2017 IEP progress report. Xxxxxxx was reported to be doing “really well” in the preschool environment, doing well academically and making progress socially. With regard to eating and drinking, Xxxxxxx was reported to have progressed every week and no longer needed continual prompts to scoop food and take bites, and continual progress was observed with how Xxxxxxx was chewing and handling food. Xxxxxxx was reported to be making sufficient progress on all of his IEP goals. Exhibit R-4.
4. At an academic conference in November 2017, Xxxxxxx’s classroom teacher reported that he was academically on target, attended and did well at journal time; that his grasp had improved and he could write his name; that he could recognize two-digit numbers, count to 30+, and recognize letters; that he was using glue and cutting out shapes on the lines and that he was beginning to read and understood a variety of prepositional concepts. Exhibit R-5.
5. Xxxxxxx’s IEP team met on January 3, 2018 to review his IEP. Mother attended the meeting. For present levels of performance, the January 3, 2018 IEP team

reported, *inter alia*, that Xxxxxxx was demonstrating age-appropriate articulation skills and according to the ECSE teacher, there were no concerns regarding Xxxxxxx’s speech intelligibility; that Xxxxxxx had achieved steady progress in his ability to answer “wh-” questions; that Xxxxxxx had been receiving consultative Occupational Therapy services focused on improving self-feeding challenges through a combination of direct interaction, observation, data collection, and information sharing with teachers and staff; that with eating, Xxxxxxx had progressed so that individual teacher assistance was no longer required and Xxxxxxx joined his classmates at the main table with the lead teacher and other peers; that Xxxxxxx had made continuous and steady progress feeding himself with progressively fewer adult prompts needed and that as of December 2017, Xxxxxxx completed 72.7% [feeding] independently with prompts and that Xxxxxxx was able to independently eat approximately one-half of the total amount of food and drink sent from home within 30 minutes, which was comparable to the average amount of food consumed by the peers at his table. The IEP team reported that Xxxxxxx’s feeding concerns had been addressed largely through behavioral techniques within the structure of the school day, and there had been no other issues or concerns requiring the intervention or expertise of an Occupational Therapist during the school year. Mother reported at the IEP meeting that Xxxxxxx’s crying and emotional behavior had decreased and Xxxxxxx seemed more stable and was not getting as frustrated and upset; that Xxxxxxx wasn’t able to use direct eye contact, but did look toward a speaker and respond/listen to what they were saying to him; that Xxxxxxx continued to have a hard time processing/ knowing how to play with friends and that he often preferred to play with the teacher/ talk to adults during recess time. Exhibit R-5.

1. With regard to how Xxxxxxx’s disability affected his participation in activities, the January 3, 2018 IEP team reported, *inter alia*, that Xxxxxxx had adjusted very well at Xxxxxx School and had made wonderful progress, both academically and socially; that Xxxxxxx had made progress with eating skills and language skills as well; that Xxxxxxx was happy at school and enjoyed being around the other children; that Xxxxxxx was consistently excited to participate in the activities presented and was able to listen and learn in this environment; that during play time, Xxxxxxx was able to play with the same toys as peers and talked to them on shared topics such as superheroes or cousins; that although Xxxxxxx was distractible, which could slow his eating, he had gotten much better eating his food with less sensory cues and less prompting by an adult; that Xxxxxxx did well at school following directions and following along with the daily routine; that Xxxxxxx was doing well with initiating conversations; and that when given prompts to help with social interaction, Xxxxxxx would go ahead and was able to then follow through with the interaction. Exhibit R-5.
2. Xxxxxxx’s January 3, 2018 IEP provided annual goals for Speech/Language, Social/Communication Skills and Functional Skills. As Special Education services, the IEP provided for 3 hours every two weeks of Developmental Curriculum services and 2 hours per month of Speech Language Therapy. The IEP did not continue occupational therapy services for Xxxxxxx. Xxxxxxx was to remain in the general education setting at the private Xxxxxx School for the remainder of the 2017-2018 school year. Mother signed the IEP to indicate her consent to implement the program. Exhibit P-5.
3. On the student’s April 13, 2018 IEP progress report, Xxxxxxx was reported to be making sufficient progress on all IEP goals. The special education teacher reported that Xxxxxxx was smart and increasingly independent; that he had made tremendous

gains over the school year in academic readiness, as well as with successful social growth with regard to fitting in to the general education classroom with same-age peers; that Xxxxxxx had learned to feel comfortable and secure in the school environment; that Xxxxxxx had become a good helper to the teacher and cleaned up when asked; that he was able to sit nicely criss-crossed on the carpet for story and circle times, attending very well to this type of activity and with high interest; that Xxxxxxx liked the other students in his class and was liked by them; that Xxxxxxx was flexible to play with different children each day at centers and at recess; that Xxxxxxx did well participating with motor activities in the classroom such as movements to songs and marching in the room; that Xxxxxxx was able to focus on friends during play and come when called; that Xxxxxxx benefitted from some prompts to remember to answer a peer or from models for what to say in social situations; that Xxxxxxx’s classroom teacher reported that he was generally emotionally and socially fine at school and was no longer impeding others’ personal space; that Xxxxxxx was often bashful when needing to ask for help and that he was not following negative behaviors; that Xxxxxxx was reported to be eating better at school and no longer had an adult by his side when eating; that Xxxxxxx listened to his teachers and wanted to please; that with Physical-Motor development, Xxxxxxx had made gains and was now running, kicking a ball, and shooting a basketball; that Xxxxxxx would still hold railings for stability, but he was not failing and his coordination had improved. Exhibit R-6.

1. On the XCPS kindergarten readiness screening assessment administered in May 2018, Xxxxxxx scored 82 out of a possible 84. Exhibit R-9. On the Pre-K Children’s Progress Academic Assessment (CPAA), conducted by the Xxxxxx School in March 2018, Xxxxxxx’s scores in literacy and math were all at or above expectation.

Exhibit R-7, Testimony of Xxxxxx xxxxxx.

1. XCPS convened an IEP team meeting on May 1, 2018 to revise Xxxxxxx’s IEP. Prior to the IEP meeting, Mother and Xxxxxxx’s XCPS Case Manager, Kristine Xxxxxx , discussed Xxxxxxx’s IEP. A draft partial proposed IEP was provided to Mother before the meeting. Testimony of Mother, Testimony of Xxxxxx xxxxxx. On the draft IEP, the Special Education Services section (Pages 9-10 of the final IEP) and the Least Restrictive Environment section (Page 13 of final IEP) had not been filled-in. Testimony of Xxxxxx xxxxxx.
2. At the IEP team meeting on May 1, 2018, at Mother’s request, numerous changes were made to the IEP proposed by XCPS. Present levels of performance were changed to state that when Xxxxxxx was eating at school, an adult was in close proximity. Changes were made to each IEP goal and two additional IEP accommodations were added. For IEP Functional Skills services, the school representatives had initially proposed to provide Xxxxxxx five hours of special education services per two weeks. When Mother expressed concern about this level, the team increased the Functional Skills services to ten hours per two weeks. Mother also expressed concern about having IEP Social Skills services delivered to Xxxxxxx in a special education classroom as had been proposed by XCPS. In response, the IEP team changed the setting to the “School” location, which could indicate a special education classroom or a general education classroom. Testimony of Xxxxxx xxxxxx, Exhibit R-7.
3. At the May 1, 2018 IEP team meeting, Mother disagreed with the IEP as revised by the IEP team, because the IEP did not provide for a smaller classroom for Xxxxxxx with both a regular education and a special education teacher. Mother had sought a general education classroom for Xxxxxxx, but with few students and a lower

student to teacher ratio. Mother was also concerned that the IEP did not provide for a transition plan to prepare Xxxxxxx for the change from the nonpublic preschool to the regular public elementary school kindergarten and because the IEP did not include supports to assist Xxxxxxx with his feeding challenges. Mother did not sign her consent to implement the May 1, 2018 IEP. Testimony of Mother.

1. Xxxxxxx’s IEP team met again on May 23, 2018. Mother attended the meeting. Educational advocates, Ms. Lucas and Dr. Crawford, participated by telephone. The XCPS representatives continued to propose the IEP developed for Xxxxxxx at the May 1, 2018 IEP team meeting. The May 1, 2018 IEP draft was revised to include a May 17, 2018 update to the IEP “Performance in General Education” section. The update stated that Xxxxxxx’s Xxxxxx School regular education teacher, Mrs. xxxxx, had reported that Xxxxxxx had had a very successful year and was the smartest child in his class. Mrs. xxxxx also reported that harder, multi-step directions might be difficult for Xxxxxxx when given the first time, however she felt that a kindergarten teacher would be able to guide him and answer questions. The IEP reported that in Mrs. xxxx’ opinion, the only thing Xxxxxxx might need assistance with was eating, as he continued to require prompting in order to eat. Mrs. xxxx was reported to be concerned that Xxxxxxx would regress in independent functioning with too much individualized attention and continual prompts. The update also added that the Xxxxxx School director reported that Xxxxxxx had made such great progress in the 2017-2018 school year that they felt he would do fine in kindergarten. Exhibit R-7.
2. Mother’s input at the IEP meeting3 were her concerns that Xxxxxxx

3 The draft IEP developed at the May 1, 2018 IEP team meeting was not introduced at the hearing. It cannot be determined from the hearing exhibits whether Mother

displayed anxiety over eating; that while Xxxxxxx had gotten better at school and had made great improvement, he was highly emotional at home. Mother reported that Xxxxxxx is temperamental and has many obsessive tendencies, such as not liking to be dirty and wanting to hear scientific method and reasoning to rationalize things. Mother was concerned that because of these characteristics, Xxxxxxx may be overwhelmed in a new environment, which will increase anxiety, could increase meltdowns, and increase feelings of not being in control. She stated she would like for Xxxxxxx to be able to express how he feels when he is emotional and to have strategies for what he can say when he is frustrated during cooperative play. She also expressed concerns regarding Xxxxxxx’s attention and focus on work activities, as well as his comprehension/ processing abilities. Exhibit R-7.

1. At the May 23, 2108 IEP team meeting, the IEP goals, special education services, educational setting and accommodations were not changed from what had been offered at the May 1, 2018 meeting. Testimony of Xxxxxx xxxxxx. With the May 23, 2018 IEP for Xxxxxxx, XCPS refused Mother’s request for a separate transition plan (for Xxxxxxx’s transition from nonpublic preschool to kindergarten), refused to conduct a Functional Behavioral Assessment (FBA) and refused to provide Extended School Year (ESY) services. Exhibit R-17. Mother did not sign the IEP after the May 23, 2018 IEP team meeting because she did not think it offered Xxxxxxx a FAPE and she felt that Xxxxxxx required additional services. Testimony of Xxxxxx xxxxxx.
2. XCPS school staff met with the parent to discuss transition strategies for Xxxxxxx, including inviting Mother and Xxxxxxx to eat lunch in the Xxxxxx xxx school

expressed these concerns originally at the May 1, 2018 meeting or subsequently at the May 23, 2018 meeting.

cafeteria before the end of the 2017-2018 school year, and inviting them to kindergarten orientation when Xxxxxxx could tour the school building, meet the kindergarten teacher and other new students and interact with the kindergarten classroom. Testimony of Xxxxxx xxxxxx.

## CONCLUSIONS OF LAW

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

## Burden of Proof

The Petitioner, as the party challenging the May 1, 2018 IEP proposed for Xxxxxxx by XCPS, has the burden of persuasion in this proceeding. *See, e.g., Sch. Bd. of the City of Norfolk v. Brown*, 769 F. Supp. 2d 928, 938 (E.D. Va. 2010) (“The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief,” quoting *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). The burden of persuasion shall be met by a preponderance of the evidence. *See. e.g., Cty. Sch. Bd. of Henrico Cty., Va. v. R.T.*, 433 F. Supp. 2d 657, 671 (E.D. Va. 2006) (Hearing Officer’s factual conclusions supported by the preponderance of the record evidence.)

## Analysis

This principle issue to be decided in this case is whether XCPS denied Xxxxxxx a free appropriate public education (FAPE) by not ensuring that Xxxxxxx was offered an appropriate Individualized Education Program (IEP) for the 2018-2019 school year. The IEP at issue, initially proposed at an IEP meeting on May 1, 2018 and finalized at the meeting on May 23, 2018, is identified in this proceeding as the May 1, 2018 IEP.

Specifically, with respect to the May 1, 2018 IEP, the parent alleges that XCPS denied Xxxxxxx a FAPE by,

* Predetermining the content of the May 1, 2018 IEP and not allowing the parent to have meaningful input in the development of the IEP;
* Failure to provide advance disclosure to the parent of all of the school and local education agency (LEA) participants for the May 1, 2018 IEP meeting;
* Failure to conduct a functional behavioral assessment (FBA) of the student to identify the purposes of the student’s specific problem behaviors and to help the IEP team select interventions to directly address the problem behaviors;
* Failure to provide for special education school transportation in the May 1, 2018 IEP and failure to include the parent in that decision;
* Failure to provide for Extended School Year (ESY) services in the May 1, 2018 IEP and failure to include the parent in that decision;
* Predetermining, prior to the May 1, 2018 IEP team meeting, that Xxxxxxx would be placed in the general education classroom at Xxxxxx xxx Elementary School and not including the parent in that decision and
* Predetermining, prior to the May 1, 2018 IEP team meeting, that Xxxxxxx would not be placed in a transition program in a private school and prior to being placed in the general education classroom at the public elementary school and not including the parent in that decision.

The U.S. Supreme Court has explained that the inquiry as to whether an IEP proposed by the school district is appropriate to provide a free appropriate public education has two parts.

A [hearing officer] must determine first whether the state has “complied with the procedures set forth in the Act,” and second, whether the IEP is [appropriate] *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206–07, 102 S.Ct.

3034, 73 L.Ed.2d 690 (1982). Courts are reluctant to second-guess the judgment of educational professionals once a procedurally proper IEP has been formulated. *See id.*

*Avjian v. Weast*, 242 F. App’x 77, 81 (4th Cir. 2007). In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*,––– U.S. ––––, 137 S.Ct. 988, 197 L.Ed.2d 335 (2017), the

Supreme Court elaborated on the standard, first enunciated *Rowley*, *supra,* for what

constitutes an appropriate IEP. As explained by the Fourth Circuit in *M.L. by Leiman v. Smith*, 867 F.3d 487 (4th Cir. 2017), *cert. denied sub nom. M.L. v. Smith*, 138 S. Ct. 752, 199 L. Ed. 2d 609 (2018),

The [Supreme] Court [in *Endrew F.*] went on to hold that, “[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.,* 137 S.Ct. at 999. This is a “fact-intensive exercise.” *Id.* When a child is unable to “fully integrate[ ] in[to] the regular classroom,” . . . the “educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom.” *Id.* at 1000. In sum, the Court found that “[t]he IDEA demands more” than “an educational program providing ‘merely more than *de minimis*’ progress from year to year.” *Id.* at 1001.

*M.L.,* 867 F.3d at 495–96. The Fourth Circuit noted that the Supreme Court “rejected Endrew F.’s argument that ‘a FAPE is an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities.’” *M.L.,* 867 F.3d at 486, quoting *Endrew F.,* 137 S.Ct. at 1001. The Fourth Circuit further pronounced that “the IDEA does not require a public school to account for every deficiency a disabled student might possess, just like a school does not have to exhaust its resources to enable a nondisabled student to achieve his ultimate potential. *See Rowley*, 458 U.S. at 199, 102 S.Ct. 3034 (concluding that the IDEA does not require ‘the furnishing of every special service necessary to maximize each handicapped child’s potential’).” *M.L.*, 867 F.3d at 499.

Before reaching the issue of the substantive appropriateness of the May 1, 2018 IEP, I consider Petitioner’s claim that XCPS violated IDEA procedures by pre- determining the content of the IEP and by not predisclosing to the parent all of the XCPS representatives who would participate in the IEP team meetings. With regard to

predetermination, the parent alleges that XCPS predetermined the content of the May 1, 2018 IEP, specifically that Xxxxxxx would be placed in the general education classroom at his neighborhood school and that Xxxxxxx would not be placed in a transition program to ease the child’s move from the half-day private preschool to the public elementary kindergarten. The IDEA requires that school officials come to the IEP meeting with an open mind. In *Spielberg v. Henrico County Public Schools*, 853 F.2d 256 (4th Cir.1988), the Fourth Circuit invalidated a proposed IEP because the school division unilaterally decided to change drastically a student’s placement which it had funded for eight years. This district’s decision was made over eight months before the IEP conference with the student’s parents. The Fourth Circuit found that the school system’s unilateral decision had deprived that student’s parents of any opportunity to participate, and held that this action alone invalidated consideration of the school system’s proposed program. *Id.* at 258-59.

As the U.S. District Court for the Eastern District of Virginia explained in *Doyle*

*v. Arlington Cty. Sch. Bd.*, 806 F. Supp. 1253 (E.D.Va. 1992), *aff’d*, 39 F.3d 1176 (4th Cir. 1994), the *Spielberg* holding does not mean that school officials may not come to the IEP table without prior consideration of a proposed placement for the child.

*Spielberg* makes clear that school officials must come to the IEP table with an open mind. But this does not mean they should come to the IEP table with a blank mind. [I]n considering placement options, the IEP team

does not write on a completely clean slate. Rather, the law requires that a school system’s offer of placement be “as close as possible to the child’s home.” [former] 34 C.F.R. § 300.552. Finally, the regulations make clear that the school system may come to an IEP meeting with the draft IEP for discussion. [former] 34 C.F.R. part 300, appendix C, Q.55. Thus, while a school system must not finalize its placement decision before an IEP meeting, it can, and should, have given some thought to that placement.

*Doyle,* 806 F. Supp. at 1262. Thus, it is permissible for a school district to develop a

draft IEP prior to the IEP team meeting, and if so, the district should provide the parent with a copy of its draft proposal. It is not permissible for a school district to have the final IEP completed before an IEP team meeting begins. The school district should make it clear to the parent at the outset of the meeting that the services proposed by the district are preliminary recommendations for review and discussion with the parent.

*See* U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46540, 46678 (August 14, 2006).

In the present case, XCPS provided to Mother a draft of a partial proposed IEP for Xxxxxxx before the May 1, 2018 IEP meeting. In the draft IEP, the Special Education Services and Least Restrictive Environment sections were not yet filled in. When the IEP team met on May 1, 2008, numerous changes to the draft IEP were made at Mother’s request, including, *inter alia*, changes to all of the IEP goals and the doubling of the proposed Functional Skills services from five hours to 10 hours every two weeks. Although Mother was not able to persuade the school representatives not to place Xxxxxxx in the neighborhood school general education classroom or to provide for a formal transition program, I conclude that Mother meaningfully participated in the IEP team’s decisions. The fact that Mother disagreed with the final IEP and declined to sign consent to implement the proposed program does not show that this was a case of unlawful predetermination. *See AW ex rel. Wilson v. Fairfax Cty. Sch.* Bd., 372 F.3d 674, 683 (4th Cir. 2004). (Although parents indicated their dissatisfaction with AW’s April IEP by declining to sign it, 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.)

Mother also claims that XCPS violated IDEA procedures by not providing

advance disclosure to her of all of the school and local education agency (LEA) participants for the May 2018 IEP meetings. The grounds for this claim appear to be that during the May 23, 2018 IEP team meeting, Special Education Coordinator Xxxxxx left the meeting room to call the XCPS central office for guidance. When Ms. Xxxxxx returned to the meeting, she allegedly stated that the parties were at an impasse and she ended the meeting. Assuming this all happened as Mother alleged, Ms. Xxxxxx ’s conferring with central office personnel would not have violated IDEA procedural requirements. The IDEA specifies who must attend an IEP meeting. *See, e.g.,* 34 CFR § 300.321(a). Moreover, if the school district wishes to invite officials from another agency to attend, the district must obtain parental consent for the individual to participate, out of concern that confidential information about the child would be shared at the meeting. *See Assistance to States for the Education of Children with Disabilities*, *supra,* 71 Fed. Reg. at 46669. However, Petitioner has not cited and I have not found any requirement in the IDEA or the Virginia Regulations that the school division must provide advance disclosure to the parent of all of the LEA representatives who will participate in an IEP meeting. This claim must be dismissed.

Having found no procedural violations of the IDEA, I turn next to the substantive prong of the *Rowley* inquiry: Was XCPS’ May 1, 2018 IEP reasonably calculated to enable Xxxxxxx to make progress appropriate in light of the child’s circumstances? The parent’s principle objections to the May 1, 2018 IEP are that Xxxxxxx would be placed in the general education classroom at Xxxxxx xxx Elementary School and that the student would not be offered a transition program in a private school prior to being placed in the full-time public school general education classroom.

Petitioner’s expert, Dr. Marla Crawford, opined that for a child with a disability,

like Xxxxxxx, who is transitioning from a preschool setting into a kindergarten or comprehensive school setting, there should be a transition over the course of a school year, not just in a week or two. The witness cited as authority, Part C of the IDEA, which requires, *inter alia*, that states must ensure that there is a transition plan in place for toddlers with disabilities, younger than three years of age, to ensures a smooth transition from Early Intervention services under Part C to preschool, kindergarten or elementary school. *See* 34 CFR § 303.209(d) 12 VAC 35-225-190(F). At all times concerned in this case, Xxxxxxx has been over 5 years old. He is no longer receiving Part C Early Intervention services, but has been receiving IDEA Part B services, as a child with a disability, at least since January 2017. The requirements of Part C of the IDEA and the Virginia Early Intervention System regulations do not apply to Xxxxxxx’s transfer from Xxxxxx School to his neighborhood school kindergarten.

Nor does Part B of the IDEA require that an IEP include a transition plan in a case, such as this, where a child is moving from preschool to kindergarten. *See, e.g. Park Hill Sch. Dist. v. Dass*, 655 F.3d 762, 766–67 (8th Cir. 2011) (Absence of IEP provisions addressing transition issues does not, standing alone, violate the IDEA or deprive the disabled child of a FAPE.); *E. Z.-L. ex rel. R.L. v. New York City Dep’t of Educ.*, 763 F. Supp. 2d 584, 598 (S.D.N.Y. 2011), *aff’d sub nom. R.E. v. New York City Dep’t of Educ.*, 694 F.3d 167 (2d Cir. 2012) (No requirement in the IDEA for a “transition plan” when a student moves from one school to another. Rather, the IDEA requires such a plan where a student will be transitioning from school to post-school (*i.e.*, adult) activities); *Robert B. ex rel. Bruce B. v. W. Chester Area Sch. Dist.*, No.

CIV.A. 04-CV-2069, 2005 WL 2396968 (E.D. Pa. Sept. 27, 2005) (IDEA only requires a

“transition plan” for an impending transition from school to post-school activities, not

for transfers between schools.)

Although XCPS did not include provisions in Xxxxxxx’s IEP to facilitate his transition from the preschool at the Xxxxxx School to kindergarten at Xxxxxx xxx Elementary School, Ms. Xxxxxx testified credibly that XCPS kindergarten teachers are charged with transitioning all new kindergarten children and the first nine weeks of school are designed to transition them to the school environment. Specific to this student, XCPS school staff met with the parent to discuss transition strategies for Xxxxxxx, including inviting Mother and the student to eat lunch in the school cafeteria before the end of the 2017-2018 school year, and inviting them to kindergarten orientation when Xxxxxxx could tour the school building, meet the kindergarten teacher and other new students and interact with the kindergarten classroom. In addition, the student was already familiar with the Xxxxxx xxx school building and playground from attending 35 to 40 weekly speech therapy sessions in the building since the beginning of the 2017- 2018 school year.

After the May 1, 2018 IEP team meeting, Special Education Coordinator spoke with Xxxxxxx’s XCPS case manager as well as his classroom teacher at The Xxxxxx School. She also observed Xxxxxxx in the preschool classroom. She observed that Xxxxxxx was doing a great job and acting appropriately at Xxxxxx. Based on her observation and the information collected from Xxxxxxx’s general education and special education teachers as well as the director of Xxxxxx School, Special Education Coordinator opined, credibly that no additional transition plan was required for Xxxxxxx’s transfer from the Xxxxxx School to Xxxxxx xxx Elementary School.

The parent’s expert, Dr. Crawford, opined to the contrary that Xxxxxxx needed a transition plan to ensure that he can access the public school without incident, because

he has never been in a full-day school and he needs supports with his behavior. I did not find Dr. Crawford’s opinion persuasive. She apparently holds that all special education student’s require a transition plan when moving from preschool to kindergarten, but that is not a requirement of the IDEA. Dr. Crawford has not evaluated Xxxxxxx or even met him. Nor has she observed Xxxxxxx in the classroom or spoken with his teachers. I conclude that Petitioner has not met her burden of persuasion that XCPS’s denial of her request for a transition program for Xxxxxxx, prior to his being placed in the general education kindergarten classroom at Xxxxxx xxx, was a denial of a FAPE.

The parent also contends that the IEP team’s decision to place Xxxxxxx in the general education kindergarten classroom Xxxxxx xxx was an inappropriate educational placement. The parent’s expert, Dr. Crawford, testified that it would not be appropriate for Xxxxxxx to be placed at Xxxxxx xxx Elementary School, because the child has not had the experience of a full school day or adapted to the whole-day scheduling or to a comprehensive school setting. She opined that Xxxxxxx does not have the capacity at this time to maintain school for a whole day.

XCPS’ expert, Special Education Coordinator Xxxxxx, opined to the contrary that Xxxxxxx had demonstrated that he is academically and socially ready for kindergarten.

Ms. Xxxxxx formed this opinion based on written documentation as well as her own classroom observation and the reports of the child’s teachers. On the XCPS kindergarten readiness screening assessment administered in May 2018, Xxxxxxx scored 82 out of a possible 84. On the Pre-K Children’s Progress Academic Assessment (CPAA), conducted by the Xxxxxx School in March 2018, Xxxxxxx’s scores in literacy and math were all at or above expectation. Ms. Xxxxxx also spoke with Ms. Xxxxxx , XCPS’ special education teacher, who provided special education services to Xxxxxxx for 3 hours every two weeks at the Xxxxxx School and to Mrs. Xxxxxx , Xxxxxxx’s general education teacher at The Xxxxxx School. I found Ms. Xxxxxx ’s opinion on Xxxxxxx’s readiness for kindergarten in the regular classroom setting more credible that the opinion of Dr. Crawford, who never met Xxxxxxx, did not assess the child and never conducted a classroom observation.

Moreover, the IEP team did not propose to throw Xxxxxxx into a full-time general education kindergarten program without special education supports. Under the May 1, 2018 IEP, Xxxxxxx would be provided 12 hours every two weeks of special education services for Functional Skills and Social Skills, as well as 2 hours per month of Speech Language Therapy. I conclude that the parent has not met her burden of persuasion that Xxxxxxx’s educational placement in the general education setting, as provided in the May 1, 2018 IEP, was not reasonably calculated to enable Xxxxxxx to make progress appropriate in light of the child’s circumstances. *See M.L., supra.*

The parent also contends that the May 1, 2018 IEP is inadequate because it does not provide for special school transportation with accommodations. The IDEA requires that if a child with a disability requires transportation as a related service in order to receive FAPE, or requires supports to participate in integrated transportation with nondisabled children, the child must receive the necessary transportation or supports at no cost to the parents. *See* 34 CFR § 300.34(c)(16). Mother testified that although Xxxxxx xxx is Xxxxxxx’s neighborhood school, it is about a 20-minute drive each way.

Special Education Coordinator Xxxxxx testified that at the May 2018 IEP team meeting, Mother stated that she would like to see Xxxxxxx ride the regular education school bus.

However, the audio recording of the May 1, 2018 IEP team meeting, Exhibit R-114, shows that Mother expressed safety concerns about the regular school bus, but was apparently reassured by the school representatives that the regular school bus would be safe for Xxxxxx . Since Mother apparently agreed at the May 1, 2018 IEP team meeting that Xxxxxxx would ride the regular school bus, and there was no competent evidence that XCPS officials had information at the May 2018 IEP team meetings that Xxxxxxx required special transportation as an IEP service, I conclude that XCPS did not deny Xxxxxx a FAPE by not providing for special transportation as a related service for the child. *See, e.g., Z. B. v. District of Columbia*, 888 F.3d 515, 524 (D.C. Cir. 2018) (*Endrew F.* standard calls for evaluating an IEP as of the time the IEP was created.) However, the parent shall not be precluded hereafter from requesting special transportation for Xxxxxxx, should she feel that Xxxxxxx requires that service.

Lastly, with regard to the appropriateness of the May 1, 2018 IEP, Mother contends that IEP should have provided for Extended School Year (ESY) services for Xxxxxxx. “ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.” *MM ex rel. DM v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 537–38 (4th Cir. 2002). XCPS’ expert, Ms. Xxxxxx , testified that the May 1, 2018 IEP team discussed at length Xxxxxxx’s possible need for ESY services. She explained that the IEP team felt that the student had made great academic and social progress throughout the school year at Xxxxxx and that no regression had been noted after the Christmas vacation or spring break.

4 The sound quality of the audio CD, Exhibit R-11, is poor, especially with picking up the Mother’s statements.

The parent’s expert, Dr. Crawford, testified that there was no set standard for ESY and it is based on the needs of the individual child. She opined that in the case of a child like Xxxxxxx, “because we’re dealing with things dealing with feeding goals and sensory, when you create a break in their support services, you do risk regression.” Dr. Crawford’s opinion was vague and speculative. As previously noted, she has never met or assessed Xxxxxxx. I found Ms. Xxxxxx ’s opinion more persuasive on this issue.

Therefore, I conclude that the parent did not meet her burden of proof that without IEP ESY services, the benefits that Xxxxxxx would gain during the regular school year would be significantly jeopardized without special education services during the summer months.

The parent also testified that the May 1, 2018 IEP is inappropriate because it did not include provision for assisting Xxxxxxx with his feeding challenges. Mother explained that Xxxxxxx had been receiving feeding therapy for several years, most recently at the University of Virginia’s feeding clinic in Charlottesville. The May 1, 2018 IEP’s statement of present levels of performance, with which Mother did not disagree, note that Xxxxxxx was eating better at The Xxxxxx School, but that an adult would be in close proximity when Xxxxxxx was eating.

For the 2018-2019 school year, the May 1, 2018 IEP provides for Xxxxxxx to be supervised and monitored in the cafeteria so that he can eat his lunch safely and productively. Whether the IEP’s accommodations for lunchtime feeding were adequate was not asserted as an issue in the parent’s due process complaint or certified as an issue in the June 18, 2018 prehearing order in this case. The prehearing order required

the parties to advise the hearing officer or any omission or misstatement.5 By failing to request to supplement or correct the issues identified in the Prehearing Order, the parent failed to place XCPS on notice that the appropriateness of the lunchtime accommodation would be an issue to be litigated in this proceeding. I, therefore, decline to reach that issue in this decision.

## Functional Behavioral Assessment

Petitioner contends that XCPS denied Xxxxxxx a FAPE by failing to conduct a functional behavioral assessment (FBA). At the May 23, 2018 IEP team meeting, Dr. Crawford, who participated by telephone, recommended that XCPS conduct an FBA of Xxxxxxx and develop a Behavior Intervention Plan (BIP). The XCPS representatives denied the request because they believed that Xxxxxxx’s behaviors did not interfere with his learning or that of his classmates.

The IDEA requires, in the case of a student whose behavior impedes the student’s learning or that of others, that the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 34 CFR § 300.324(a)(2)(i). The Virginia Regulations provide that,

In the event that the child’s behavior impedes the child’s learning or that of others, the IEP team shall consider the use of positive behavioral interventions, strategies, and supports to address the behavior. The IEP

5 *See Prehearing Order*, June 18, 2018:

The parties and their counsel will be held to the matters agreed upon, ordered, or otherwise set forth in this Order. If either party believes this hearing officer has overlooked or misstated any item, the party is directed to advise this hearing officer of the omission or misstatement within three (3) business days of the date of this Order (and provide a copy to the opposing party’s representative). The hearing officer will address the party’s concern promptly.

*Id.*, ¶ 10.

team shall consider either: a. Developing goals and services specific to the child’s behavioral needs; or b. Conducting a functional behavioral assessment and determining the need for a behavioral intervention plan to address the child’s behavioral needs.

8 VAC 20-81-160(A)(2). The failure to conduct an FBA is a procedural violation, that does not rise to the level of a denial of a FAPE if the IEP adequately identifies the problem behavior and prescribes ways to manage it. *See R.E. v. New York City Dep’t of Educ.*, 694 F.3d 167, 190 (2d Cir. 2012).

In her hearing testimony, the Petitioner’s expert, Dr. Crawford, opined that Xxxxxxx needed an FBA because he has social behavior deficits and sensory issues. XCPS’ expert, Ms. Xxxxxx, opined to the contrary that Xxxxxxx did not require an FBA or a BIP, because he does not exhibit behavioral issues that interfere with his learning or that of others and because he can be appropriately served with functional skills and social skills goals. Again, I found Ms. Xxxxxx to be the more credible witness. In her testimony, Dr. Crawford, who never observed or assessed Xxxxxxx, cited no behaviors that had impeded Xxxxxxx’s learning. Moreover, the May 1, 2018 IEP provides special education services to address Xxxxxxx’s functional and social skill deficits. That is, the IEP team elected to develop goals and services specific to Xxxxxxx’s behavioral needs rather than conduct an FBA. That option is expressly permitted by the Virginia regulations. *See* 8 VAC 20-81- 160(A)(2), *supra,* and I conclude that as to this IEP team decision, I should defer to the judgment and experience of the school officials. *See, e.g., T.B., Jr. by & through T.B., Sr. v. Prince George’s Cty. Bd. of Educ.*, No. 17-1877, 2018 WL 3579681 (4th Cir. July 26, 2018) (Hearing officers expected to give appropriate deference to the decisions of professional educators.)

In summary, I find that the parent did not meet her burden of persuasion that the

May 1, 2018 IEP and educational placement proposed for Xxxxxxx by XCPS were not reasonably calculated to enable Xxxxxxx to make progress appropriate in light of the child’s circumstances or that XCPS denied Xxxxxxx a FAPE by failing to conduct a functional behavioral assessment, as requested by the parent’s representatives at the May 23, 2018 IEP team meeting. Therefore, the parent’s requests for relief in this proceeding must be denied.

# ORDER

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

All relief requested by the Petitioner herein is denied, without prejudice to the parent’s right to renew her request for special school transportation or extended school year services, if warranted by the student’s future requirements.

Date: August 18, 2018 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.