COVER PAGE FOR HEARING DECISION, NOT TO BE PUBLISHED

VIRGINIA:

## SPECIAL EDUCATION DUE PROCESS HEARING

 **, by and through his Parent,**

 **,** Complainants

v.

 **COUNTY SCHOOL BOARD**, Respondent

**Student & Parent:** **Administrative Hearing Officer:**

 John V. Robinson, Esq.

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 Richmond, Virginia 23226

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## DECISION OF THE HEARING OFFICER

## INTRODUCTION

The Parent, by counsel, requested an administrative due process hearing in her Special Education Due Process Hearing Request dated August 21, 2018 (the "Request") under the *Individuals with Disabilities Education Improvement Act of 2004* (“IDEA”). The Request was received by the School Board on August 22, 2018.

On October 2, 2018, the Hearing Officer identified the issues to be considered at the due process hearing as follows: (1) whether the School Board failed to identify the Student as eligible under the IDEA on August 22, 2016; (2) whether the School Board failed to refer the Student for evaluation for IDEA eligibility as requested by the Parent on August 25, 2017; and (3) whether the School Board failed to provide the Student with a free appropriate public education (“FAPE”) by not providing him with an individualized education program (“IEP”) for the 2016-2017 and 2017-2018 school years. The six-day hearing began on October 16, 2018. The Parent called nine witnesses and introduced approximately 160 exhibits into evidence, but did not meet her burden of proof in this matter.

# FINDINGS OF FACT

1. The Student is a fifth-grade student who formerly attended County Public Schools (“ CPS”).
2. The Student’s parents unilaterally removed The Student from CPS and enrolled him in a private school called School on September 25, 2017.
3. While attending CPS, the Student made significant educational progress.
4. The Student earned all As on his report cards during the 2015-2016 and 2016-2017 school years. SB 15 and 34
5. The Student met and often exceeded grade level requirements, earned passing scores on all grade level assessments, and was reading above-grade level.
6. During the hearings, numerous individuals provided credible testimony that the Student was performing at or above grade level while attending CPS. See, e.g., 504 Tr. 738; and Tr. 508-509, 533-535, 542, 546, 1130-1131, 1174, 1177. 1181, 1267, 1270-1, 1273, 1276-7, 1280, 1299, 1301, 1331, 1335-6, 1387-8, 1393, 1815-16, 1857, 1900, 1927-8, 1935 and 1959[[1]](#footnote-1).
7. The Student passed all of his SOLs, participated in an art honors program, swam on a swim team, and participated in student government. 504 Tr. 263, 269, and 1542.
8. Despite the Student’s strong academic progress, the Parent approached the Student’s second-grade teacher, Ms. , regarding her concerns during the Student’s second grade year. Tr. 459-60.
9. Ms. left CPS to teach in a different school system in the Commonwealth in July, 2016. Tr. 397.
10. On motion of the Parent, Ms. was qualified and testified for the Parent, in both the Section 504 hearing and the present IDEA hearing, as an expert witness in elementary education. 504 Tr. 464-5; Tr. 394-5.
11. Ms. noted that the Parent, a former teacher herself, who also qualified as an expert in elementary education, presented with “a lot of knowledge,” and “knew her rights.” Tr. 460.
12. Ms. did not think that the Student would be found eligible for special education under the IDEA because his grades were not impacted and he was not reading below grade level. Tr. 456-7. Accordingly, Ms. did not make a referral for special education based on the Student’s performance and presentation in her classroom. Tr. 456-7.
13. Instead, the Parent obtained a private report from Ms. in March 2016, which indicated a medical diagnosis of dyslexia.[[2]](#footnote-2)
14. In light of the new diagnosis which the School Board readily accepted (504 Tr. 153), on April 13, 2016, the School Board provided the Parent with a meeting notice informing the Parent that a Child Study Team Meeting would be held on April 19, 2016. After considering information from a variety of sources, the Child Study Team did not suspect that The Student was a student with a qualifying disability. See SB 19.
15. Nonetheless, the school division agreed to provide the Student with Orton-Gillingham or Barton-based tutoring in order to address the Parent’s concerns. See SB 8, 9, 12, 13 and 48.
16. The Student began receiving Orton-Gillingham tutoring in the Spring of 2016. Id. The Orton-Gillingham program was not offered due to any concerns with his reading by school staff, but solely to address the Parent’s concerns.
17. On May 13, 2016, the Parent requested that the Student be evaluated for eligibility under the IDEA so that his receipt of Orton-Gillingham-based tutoring would be reflected in a legally- binding document. 504 Tr. 146-149; Tr. 1174-5, 1281 & 1677-8.
18. The School Board convened a Child Study Team Meeting on May 25, 2016 and the team referred the Student for evaluation under the IDEA. See 504 Tr. 147; SB 12.
19. The Parent significantly limited the amount of testing conducted by the School Board as part of the School Board’s IDEA evaluation. The Parent wished to limit the amount of testing on the Student “at all costs.” SB 12 at 3; SB 13; Tr. 762.
20. The IDEA eligibility team, which convened on August 22, 2016, reached consensus with both parents that the Student was not eligible under the IDEA. SB 19 at 5; PE 63 at 582.
21. The eligibility team considered information from a variety of sources, including Ms. ’s evaluation and the School Board’s own evaluations of the Student, which consisted of a psychological evaluation, educational evaluation, classroom observation, and hearing screening.
22. The team also considered the Student’s academic performance on classroom work and grade-level assessments, input from school staff, and input from the Parent. SB 19, 20, and 21.
23. The eligibility meeting was collaborative and civil. 1177-1178.
24. The Parent was afforded opportunities to ask questions. Tr. 1182
25. During the eligibility meeting, the team reviewed the school division’s specific learning disability (“SLD”) eligibility criteria sheet, which is derived directly from criteria sheets developed by the Virginia Department of Education (“VDOE”). SB 19[[3]](#footnote-3).
26. Both Mr. and Mrs. were in agreement with every aspect of the meeting’s consensus, as reflected clearly and unequivocally in the written documents concerning the meeting. SB 19 and PE 63 & 64; Tr. 1174,-5, 1178, 1277, 1280-1.
27. Ultimately, the team, which included both of the Student’s parents, determined that: (1) the Student was meeting age-appropriate and Virginia-approved grade level standards; (2) the Student’s impairment did not cause an adverse educational impact; and (3) the Student did not require specially-designed instruction. SB 19 and PE 64 and 64.
28. As a result, the team determined that the Student was not eligible for special education under the IDEA.
29. Both parents provided written consent for the team’s determination that the Student was ineligible. SB 19 at 5 and PE 63 at 582.
30. No appeal of this consensus decision was made by the parents until the filing of this due process complaint, exactly two years later.
31. Although the Student had been meeting or exceeding grade-level academic standards and making straight “As”, CPS agreed that The Student should continue to receive Orton-Gillingham reading remediation. 504 Tr. 162-163; SB 20 & 21.
32. The reading remediation was not offered because school staff believed that it was required for the Student, but to address the Parent’s concerns.
33. After Dr. was “helpful” to the Parent in recommending to the Parent that the LEA at least needed to consider 504 eligibility for the Student in the fall of the Student’s third-grade year, the Parent requested that the Student be evaluated for eligibility under Section 504. 504 Tr. 169.
34. In response, the School Board convened a Section 504 eligibility meeting on November 29, 2016. 504 Tr. 169.
35. While the team readily acknowledged that the Student had a medical diagnosis of dyslexia, the CPS members of the team, in good faith, did not find that the Student’s dyslexia substantially limited any major life of activity. 504 Tr. 176.
36. The Student was, therefore, not found eligible under Section 504. 504 Tr. 176.
37. The team, however, agreed to continue to implement the Student’s child study plan which had been requested by the Parent. 504 Tr. 180.
38. On August 16, 2017, Principal informed the Parent that the Student’s child study plan had expired and that the Child Study team would need to reconvene to consider the Student’s need, if any, for continued Orton-Gillingham remediation. 504 Tr. 205-6. Accordingly, the Child Study Team convened on August 25, 2017. 504 Tr. 206; SB 36.
39. The team reviewed objective data from a variety of sources, including previous CPS evaluation reports, Ms. ’s outside report, input from the Student’s teachers, input from administrators and reading specialist , and input from the parents and their attorney. SB 39. The available data demonstrated that the Student was meeting or exceeding grade level expectations, earning all As and successfully passing his SOL tests. SB 48 and 49.
40. The Parent requested that CPS refer the Student for additional evaluations under Section 504 and IDEA and additional testing. 504 Tr. 226-227; SB 39.
41. The CPS members of the team, in good faith, reasonably declined the Parent’s requests.
42. The Parent presented no compelling new data for the team to consider. See e.g. 504 Tr. 226-8 and 1571-7.
43. Despite the fact that while previously, the Parent wished to avoid unnecessary testing “at all costs,” the Parent requested additional testing because she disagreed with the School Board’s interpretation of the existing data. 504 Tr. 290-1.
44. Based on the data, which demonstrated the Student’s strong educational performance, the team reasonably determined that it was no longer necessary for the Student to receive Orton-Gillingham-based tutoring and that additional testing was also unnecessary as he was succeeding in the general curriculum.
45. Following the August 25, 2017 Child Study Team Meeting, the Parent unilaterally withdrew The Student from CPS and enrolled him in School.
46. On November 21, 2017, the Parent filed a 23-page request for a Section 504 Impartial Hearing.
47. Because the Parent failed to submit her proposed exhibits in a timely manner, this Hearing Officer excluded the Parent’s exhibits. Nevertheless, the Parent put on numerous hours of testimony spanning five days. The Parent called 16 witnesses.
48. This Hearing Officer found that the Student was not eligible under Section 504. Specifically, this Hearing Officer found that, “[w]hile the team readily acknowledged that [the Student] had a medical diagnosis of dyslexia, the CPS members of the team, in good faith, did not find that the Student’s dyslexia substantially limited any major life activity,” and “[the Student] was, therefore, not found eligible under Section 504.” SB 48.
49. As a result, on motion from the School Board, this Hearing Officer struck the Parent’s evidence and found that the Parent failed to meet her burden of proof during her case-in-chief.
50. This Hearing Officer’s ruling was upheld on appeal by Impartial Review Officer Lorin Costanzo.
51. On August 22, 2018, the Parent filed the instant due process complaint, exactly two years after the date of the IDEA eligibility meeting, attempting to claim that the eligibility team’s determination of ineligibility under the IDEA, with which she had clearly and unequivocally agreed in writing, was incorrect. The Parent’s contention that she was somehow hoodwinked or misled by the School Board is without merit.
52. The Student had earned all As on his report card, had passed his Standards of Learning assessments, was reading above grade-level and writing on grade level.
53. The team, in good faith, reasonably determined that the Student would be exited from remediation, that the Student would not be evaluated for eligibility under the IDEA or Section 504 as no qualifying disability was suspected, and that no further testing was necessary.
54. The hearing officer found the testimony of the School Board personnel credible.

 Their demeanor was open, frank and forthright.

## ADDITIONAL FINDINGS & CONCLUSIONS OF LAW

As the complaining party, the Parent bears the burden of proof in this matter. The United States Supreme Court has held that the party initiating a hearing bears the burden of production and persuasion to the evidentiary standard of a preponderance of the evidence. Schaffer v. Weast, 126 S.Ct. 528 (2005).

The testimony of School Board employees plainly demonstrated that the School Board provided the Student with an appropriate education. Several school staff members, including Assistant Superintendent Dr. , Special Education Supervisor , Principal , Principal , School Psychologist , and General Education Teacher , testified regarding the Student’s meetings, educational programming, and evaluations. These individuals provided or oversaw the instruction provided to The Student, reviewed The Student’s cumulative education file, and participated in meetings regarding The Student.

The Supreme Court of the United States has recently confirmed that deference must be given to the professional judgments of educators. It held in a decision last year that a court or hearing officer is required to give deference to the opinions of school board witnesses who are professional educators “based on the application of expertise and the exercise of judgment by school authorities.” Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, No. 15-827, 137 S.Ct. 988 (2017); see also Rowley, 458 U.S. at 206-208; M.M., 303 F.3d at 533.

Like *Rowley, Endrew F.* is also careful to recognize the importance of leaving the business of running schools to the considered judgment of local educators. This Circuit has always recognized this mandate:

In *Hartmann v. Loudoun County*, the Court stated:

Although section 1415(e)(2) provides district courts with authority to grant ‘appropriate’ relief based on a preponderance of the evidence, 20 U.S.C. 1415(e)(2), that section ‘is by no means an invitation to courts to substitute their own notions of sound educational policy for those of the school authorities which they review.’ (citations omitted)… [t]hese principles reflect the IDEA’s recognition that federal courts cannot run local schools. Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment.

118 F.3d 996, 1000-1001 (4th Cir. 1997).

 *See also Springer v. Fairfax County*, 134 F.3d 659, 663 (4th Cir. 1998) (holding that “[a]bsent some statutory infraction, the task of education belongs to the educators who have been charged by society with that critical task”); *Barnett v. Fairfax County School Board*, 927 F.2d 146, 151-52 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991) (recognizing Congressional intent to leave education decisions to local school officials and recognizing the importance of giving school officials flexibility in designing educational programs for students); and *Tice v. Botetourt County,* 908 F. 2d1200 at 1207 (4th Cir. 1990)(once a “procedurally proper IEP has been formulated, a reviewing court should be reluctant . . . to second-guess the judgment of education professionals” – rather, the court should “defer to educators’ decisions as long as an IEP provided the basic floor of opportunity that access to special education and related services provides”).

 Accordingly, hearing officers must not succumb to the temptation to substitute their judgment for that of local school authorities in IEP or educational matters. *Arlington County Sch. Bd. v. Smith*, 230 F.Supp. 2d 704, 715 (E.D. Va. 2002).

Educators exercising their considered professional judgments to implement a procedurally correct IEP should be afforded significant academic autonomy and should not be easily second-guessed by reviewing persons. *Hartmann v. Loudoun County Bd. of Educ.,* 118 F.3d 996, 1000-1001 (4th Cir. 1997); *Johnson v. Cuyahoga County Comm. College*, 29 Ohio Misc.2d 33, 498 N.E.2d 1088 (1985).

Professional educators in the school division, who are the ones most familiar with the Student, the child study process, the special education eligibility process, and the educational programming available within the school division, have testified regarding the appropriateness of the educational decisions rendered regarding the Student.

The School Board’s witnesses who testified regarding the Student have substantial training, expertise and experience in working with children both with and without disabilities, in educational programming in the public school setting, and with the Student.

By contrast, none of the Parent’s experts had the same familiarity. To support her case, the Parent relied on the expert testimony of Dr. , Ms. , and the Parent herself.

Dr. only evaluated the Student after the Parent unilaterally withdrew the Student from the school division, and the Parent first provided the School Board with Dr. ’s evaluation report months after the withdrawal and as an exhibit to her Section 504 Impartial Hearing Request. Tr. 800-801. Both Ms. and Dr. readily admitted that they have no knowledge of the programming available to the Student at CPS. Neither Dr. nor Ms. could offer any testimony about the appropriateness of the education provided by the School Board to the Student nor could they testify about the appropriateness of the educational programming of the School, the private school that the Student currently attends. Tr. 693-95; 914-917.

 Accordingly, the School Board’s expert witnesses are entitled to deference in their considered professional judgments that the School Board’s decisions regarding the Student were correct.

Though the School Board bore no burden of proof in this matter, the School Board demonstrated that CPS provided the Student with Orton-Gillingham tutoring in an attempt to address the Parent’s concerns, despite no suspicion of a disability qualifying under IDEA and despite the Student’s impressive educational progress. SB 48. On the other hand, the Parent has failed to meet her burden of proof.

Under the IDEA, local school divisions must identify, locate, and evaluate children with disabilities. 34 C.F.R. § 300.311. In determining eligibility for special education and related services under the IDEA, children suspected of having disabilities must undergo an initial evaluation. 34 C.F.R. §300.301(a). An initial evaluation must consist of procedures to determine if the child is a “child with a disability” under the IDEA and to determine the educational needs of the child. 34 C.F.R. § 300.301(c)(2).

Upon the completion of an initial evaluation, a group of qualified professionals and the parent of the child determine whether or not the child is a child with a disability under the IDEA and determine the educational needs of the child. 34 C.F.R. § 300.306(a). In interpreting evaluation data for the purpose of determining IDEA eligibility, a local school division must draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child’s physical condition, social or cultural background, and adaptive behavior. The school division must also ensure that information from all of these sources is documented and carefully considered. 34 C.F.R. § 300.306(c).

There are multiple classifications under the IDEA for which a child may be eligible as a “child with a disability” for special education. 34 C.F.R. § 300.8. The IDEA defines the parameters of each disability classification. “Specific Learning Disability” means:

[A] disorder in one or more of the basic psychological processes involved in understanding or using language, spoken or written, that **may** manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia…Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of intellectual disability, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

34 C.F.R. § 300.8(c)(10). (Emphasis supplied)

Though the IDEA provides numerous different categories under which a student may be found eligible for special education, it is important to note that the services and placement needed by each child with a disability to receive FAPE “*shall* be based on the child’s unique needs and not on the child’s disability.” 8 VAC 20-81-100(A)(1)(b) (emphasis added). Though diagnoses or reports issued by licensed medical professionals must be considered by an eligibility team, such diagnoses are not sufficient to make an eligibility determination. VDOE Guidance Document. The VDOE states, “Students may meet criteria for educational identification as a child with a disability under one of the federal disability categories without having a medical diagnosis. It is also possible for a student to have a medical diagnosis but not meet the criteria for an educational identification as a child with a disability.” VDOE Guidance Document.

 The VDOE promulgates guidance to school divisions within the Commonwealth pertaining to the identification of students under the disability categorizations set forth by the IDEA. CPS developed a “Specific Learning Disability Worksheet” substantially identical to the criteria worksheet for specific learning disability (“SLD”) developed by the VDOE. Pursuant to the VDOE’s and the School Board’s SLD criteria, a student with an SLD “does not achieve adequately for the Student’s age or to meet Virginia-approved grade-level standards” in one or more enumerated areas “when provided with learning experiences and instruction appropriate for the Student’s age or Virginia-approved grade level standards.” See SB 19 & VDOE Guidance Document. A student with a SLD has a disorder in one or more basic psychological processes involved in understanding or in using spoken or written language, and the processing disorder impacts the Student in one or more enumerated areas. Most notably, a school division must have “documentation of an adverse effect on educational performance due to one or more characteristics of a specific learning disability,” and the Student must need “specially designed instruction.” Id. The Parent failed to prove by a preponderance of the evidence that the Student was eligible as a student with an SLD under the IDEA.

 While the Parent appropriately points out that the definition of SLD does not contain within its express terms, like most of the other disability categories, the phrase “that adversely affects a child’s education performance” or words of like import, the hearing officer decides that the School Board (and the VDOE in its Guidance Document) appropriately consider this factor in its analysis of whether an impairment constitutes a “SLD” for the following reasons: The definition of SLD itself states that the disorder “may” manifest itself in the imperfect ability to listen, think, speak, read, write, spell, etc., necessarily implying that the possibility exists that there may be no adverse educational impact. If even though an impairment exists, there is no adverse effect on the individual child’s educational performance in light of his unique needs, there is correspondingly no need for special education in light of his unique circumstances.

Accordingly, the hearing officer also considers the factor of adverse effect on the Student’s educational performance in his analysis.

The School Board correctly found the Student to be ineligible under the IDEA because the Student achieved adequately for his age and consistently met Virginia-approved grade-level standards while in a general education setting and without the need for special education.

 See In re: Student with a Disability, 106 LRP 11977 (SEA VA Jul 12, 2004):

But we cannot lose sight of the forest for the trees: perhaps the most relevant comment that can be made vis-à-vis the import of the extensive testing results that were presented during the course of the hearing is that the question that must be answered is not whether a learning disability has an adverse impact on a child’s performance on standardized tests, but whether there is an adverse impact on the child’s educational performance. What do we see if we put aside all the test results in this case and just look at the Student’s educational performance as measured by his passing grades, his advancement from grade to grade, progress v. regression, actual progress in class (demonstrable academic benefit as testified to by the Student’s teachers), and grade equivalent test scores? See Houston Independent School District v. Bobby R., 200 F.3d 341 (5th Cir. 2000). In re: Student with a Disability, 106 LRP 11977 (SEA VA Jul. 12, 2004).

It is a student’s ability to access the general curriculum, pass grade-level assessments, and perform well on SOL tests that is relevant for this analysis. Tr. 1927-8. See also, *Council Rock School District*. 60 IDELR (Pa. SEA 2012); *Austin Independence School District,* 53 IDELR 310 (TX. SEA 2009); *Pencader Charter School.,* 50 IDELR 299, (DC SEA 2008); *Hood v. Encinitas Union School,* 482 F.3d 1175 (9th Cir. 2007); *Janet G. v. Hawaii Department of Education*, 410 F, Supp. 2d 958 (HI. 2005).

The commentary to the IDEA’s implementing regulations provides that, “The **first element** in identifying a child with SLD should be a child’s mastery of grade-level content appropriate for the child’s age or in relation to State-approved grade-level standards, not abilities” (emphasis added). 71 Fed. Reg. 46,652.

During the Section 504 Impartial Hearing, the Parent testified under oath that she agreed with the Student’s IDEA eligibility team that the Student was achieving grade-level standards:

Q: Now, what did the team decide, though, about his achievement in the academic setting?

A: Well, they said that he was achieving to meet grade-level standards.

Q: All right. And did you agree with the consensus of the team on that?

A: *I did agree*. I mean, he was making A’s. But I said, ‘He would not have been achieving if we hadn’t been supporting him along this way and also if he hadn’t been highly intelligent and compensating.’

Q: Okay. And did the team come to consensus about an adverse impact on his educational performance?

A: *This is where we disagreed. We sort of were in agreement all the way down the form*. And then when we came to the question of, was there an adverse impact or adverse – what is it? *Adverse impact. This is where we completely divided*.

Section 504 Impartial Hearing, Tr. 155-156, (emphasis added).

The Parent unequivocally testified that, as the team moved linearly down the criteria on the criteria worksheet, she agreed that The Student was meeting grade-level standards. The Parent testified more than once during the Section 504 Impartial Hearing that The Student was meeting grade-level standards, stating that The Student’s success on county benchmarks and straight-As were not “up for debate.” 504 Tr. 196-197.

 The Parent changed her position during the present IDEA proceeding. During the present case, the Parent testified as follows:

Q: All right. And so looking at the first criteria check box for ‘Achievement,’ what was checked there was no. Did you agree with that?

A: I did not agree with that. Tr. 163.

Despite the clearly inconsistent sworn testimony of the Parent on this issue, numerous educational experts testified clearly, consistently, and emphatically that the Student was achieving adequately for his age and meeting Virginia-approved grade-level standards. See, e.g., Tr. 1163-4, 1167-8, 1332-4, 1387-8, 1935.

In her March 2016 psychological report, the Parent’s expert, Ms. , used age equivalencies to describe The Student’s scores on the assessments that she administered. However, school psychologist credibly and convincingly testified at length regarding the unreliability and misleading nature of age and grade equivalencies. Ms. explained that age-equivalent scores are problematic because they do not express equal units between one score and the next. As a result, these scores allow for inappropriate comparisons, exaggerate small differences between skills and scores, and assume that growth is constant across a child’s academic career. Therefore, these scores cannot be compared from subtest to subtest and from test to test. Tr. 1369 et seq. Assistant Superintendent Dr. testified that the VDOE cautions against using age and grade-equivalent scores to compare students or to make diagnostic or placement decisions, given their limited reliability and validity. The VDOE specifically states, “These scores are derived in a way that seriously limits their reliability and validity and should not be used for making diagnostic or placement decisions.” VDOE Guidance Document.

When using standard scores uniformly, one compares “apples to apples”; when using age and grade equivalencies, one compares “apples to oranges.” Tr.- 1472-4. Thus, the Parent’s reliance on the age-equivalent scores used by Ms. is suspect.

Educators who either taught the Student within CPS or who were familiar with his performance while attending school in CPS, uniformly testified that the Student was performing at or above grade level.

Ms. **,** the Student’s third-grade math teacher, convincingly testified that during the November 29, 2016 Section 504 Eligibility Meeting, “the teachers were saying that in the classroom [they] were not seeing that there was a problem with any of what he was doing…If he had As, then I don’t know how you’re going to get better than As.” 504 Tr. 439-440.

Ms. , a special education teacher who worked with the Student when

he was in the third grade, testified that the reason the Student left her support group of third and fourth graders with real or perceived reading difficulties, was “… the Student said that he didn’t feel like he had any issues with reading. It wasn’t bothering him, as opposed to some of the other kids. He seemed to be happy and liked art, and he liked sharing his big thick dragon book that he was reading.” 504 Tr. 394-5.

The Student’s third grade teacher, Ms. , testified that the Student was reading on grade level, was a strong reader, “read well,” and “enjoyed reading.” Tr. 1333. Further, Ms. testified that, based on the Student’s scores on formative assessments, he was “where we would want [him] to be.” Tr. 1334. Overall, Ms. testified that the Student “was able to access the curriculum” and was “meeting grade-level standards.” Tr. 1335-6.

Dr. credibly testified that in her expert opinion, the Student was not just meeting, but mastering Virginia-approved grade-level standards, stating, “Every time he took an SOL test, yes, he did. Every time he took a formative benchmark test that we give to all kids. He never has done poorly on that. And they are cumulative.” Tr. 1935.

Principal , the former Principal of Elementary School, testified that the Student “knock[ed] it out of the ballpark” on his first grade PALS assessment and was “above grade level.” Tr. 1161. Ms. noted that on the Student’s second grade PALS assessment, the Student scored 8 out of 20 on a fourth-grade word list, stating, “Honestly, if they scored anything on a fourth-grade word list, I’d be tickled. And the same thing with third grade. I mean, I’m really looking at if they’d finished second grade, the 20 out of 20 is ideal, but the 15 is the cut score. So he certainly met that for second grade instruction.” Tr. 1167-8. Ms. also attended the Student’s August 22, 2016 IDEA eligibility meeting. Ms. stated that “[f]rom the school’s standpoint, he is performing on grade level,” and that “there was no disagreeing about anything,” at the eligibility meeting. Tr. 1176-78.

Ms. , a school psychologist who reviewed the Student’s assessment data and educational records and participated in his child study meeting, convincingly testified that she had no concerns about the Student’s ability to meet grade level expectations. Tr. 1388.

The Parent’s own expert witnesses acknowledged that the Student was achieving to meet grade-level standards, even in spelling, a particular area of concern for the Parent. Ms. , who provided Orton-Gillingham-based spelling tutoring to the Student at the end of second grade and throughout third grade, tracked the Student’s progress by reviewing classroom assessments. Ms. testified that Student was on grade-level in the classroom and was meeting grade-level expectations when she began working with him in spring of 2016. Tr. 1130-1, 1090-2. Ms. also explained that “spelling stages” do not correlate exactly to grade levels, stating that such stages are not “black and white” but more of a “range.” Tr. 1091.

 Ms. , another one of the Parent’s expert witnesses, testified to the same, stating that there are inconsistencies in spelling normally with both typically-developing children and children that have, as Ms. put it, “learning differences.” Tr. 431-2. Ms. also testified that The Student’s score of “5” on a developmental spelling assessment (“DSA”) administered in the Fall of second grade, though labeled “frustration level of within word,” was not significant; rather, she testified that this was “typical.” Tr. 447-8. Ms. , who taught the Student in second grade, hesitated to refer the Student for child study because he “wasn’t technically functioning below grade level based on our assessments,” “wasn’t falling below benchmark at the time,” and was not reading below grade level. Tr. 455-7. Though Ms. stated that the Student has “some difficulty applying taught phonics to help with decoding and spelling unfamiliar words,” this difficulty was comparable to the Student’s peers in the general population. Tr. 484-86.

Ms. previously testified that the Student was meeting grade-level expectations in spelling on both standardized assessments and in the classroom. 504 Tr. 515, 517-8, 525, 538. Importantly, during this time period, the Student had not yet begun receiving Orton-Gillingham-based spelling tutoring and was instead receiving the same general curriculum received by all students in Ms. ’s class. See SB 8; see also Tr. 544-5.

 Most significantly, the Student performed at a “superior” level in the classroom and at a “proficient” level on the Virginia Standards of Learning (“SOLs”), demonstrating that the Student was meeting Virginia-approved grade-level standards. Ms. testified that the SOLs are “the backbone of our instruction,” determining the curriculum in grades K through 5. As a result, a student’s ability to master SOLs is measured in multiple ways, such as formal and informal assessments in the classroom, grades on the curriculum, and SOL tests. Tr. 1792, 1795-97. Though SOL tests are not administered until the third grade, first and second grade teachers still design their curriculum based on the SOLs and students are taught with a “spiraled” approach, meaning that SOL skills build on themselves and are continually taught, monitored, and assessed. Tr. 1792 & 1797.

 In third grade, the Student earned a “pass proficient” score on his reading SOL, earning 481 out of 600 and demonstrating his mastery of the standards of learning. See SB 25; Tr. 1789.

The SOL test is a computer-adaptive test, or “CAT”, meaning that as the test records a student’s answers, the test adjusts the difficulty of the questions based on how the Student is performing. Tr. 1799. The Student missed only four questions on his reading SOL test: one “low” difficulty question, two “medium” difficulty questions, and one “hard” question. Tr. 1802. The Student’s reading SOL tested comprehension and all of the skills covered within reading as a subject. The skills that the Student learned throughout first, second, and third grade informed how he performed on his reading SOL test. Tr. 1804-1805.

 Not just SOL scores, but a student’s grades can demonstrate mastery of the SOLs. Ms. stated that “their report card is a *direct reflection of the SOLs*. I mean, our report card and our curriculum is set up and based – this is the backbone of what we teach. This is the expectation. This is what the teachers do.” Tr. 1812 (emphasis added).

In Ms. ’s experience as an administrator and an educator, report cards are an opportunity for teachers to inform parents about a student’s difficulty, if any, in the classroom. Tr. 1812-3. The Student earned As in every single subject in every single marking period in both the second and third grades. See SB 15 and 34. Regarding the Student’s third grade report card, Ms. testified that “Everything looks like [the Student] is a successful student and has done well with the curriculum and content.” Tr. 1815. The Student passed all of his formative assessments with flying colors and performed exceedingly well on scholastic reading inventories and developmental spelling assessments. See SB 3, 4, 10, 11, 15, 22, and 25-34; see also Tr. 1163-7 and 1331. In Ms. ’s expert opinion, the Student was exceeding Virginia-approved grade-level standards. Tr. 1815.

The Parent failed to prove by a preponderance of the evidence that the Student was not meeting age-appropriate or Virginia-approved grade-level standards. Though the Parent’s testimony on this issue evolved markedly between the Section 504 Impartial Hearing and the present proceeding, the testimony of the educators who provided instruction to the Student is resoundingly clear and consistent: the Student was not just meeting, but often exceeding, Virginia-approved grade- level standards as evidenced by his performance in the classroom and on SOL tests. Based on this factor alone, the Parent’s argument that the Student was improperly found ineligible must fail. Nonetheless, the Parent also failed to prove that there was an adverse impact on the Student’s educational performance.

In order for a student to be eligible for special education under the IDEA as a student with an SLD, there must be documentation of an adverse impact on the Student’s educational performance due to the characteristics of an SLD. See SB 19 and VDOE Guidance Document. An adverse impact on educational performance is primarily measured by the Student’s performance and presentation in the classroom, not on scores and sub scores of various standardized assessments.

The Parent failed to prove by a preponderance of the evidence that there is documentation of an adverse impact, or any impact, on the Student’s educational performance. The Parent has attempted to argue that, despite the fact that there is no evidence of an adverse impact on the Student’s reading fluency as measured by SOL tests and reading inventory assessments, that such an impact would be “masked” by the Student’s ability to locate answers within a text. This argument is without merit. Several educational experts testified that the ability to look back to a passage to locate information is a positive strategy that teachers encourage. For instance, Ms. testified that the school division “encourage[s] all of our children to go back and look in the passage for the answer to their question,” because it is a “life skill,” to look to a passage to find textual support for an articulated answer to a question. Tr. 1839-1840. Further, Ms. , the Parent’s expert, testified during the Section 504 proceeding that the Student’s reading comprehension was not impacted, stating, “he always understood what he read.” Section 504 Impartial Hearing, Tr. 490.

The Parent has also attempted to argue that the Student’s spelling is so adversely impacted as to necessitate specially designed instruction. One of the Parent’s own exhibits undermines this argument. In Parent’s Exhibit 77 at 637, an e-mail sent to the Student’s fourth-grade teachers at Elementary School prior to the August 25, 2017 Child Study Team meeting, the Parent stated that, “There will be a time when [the Student] graduates from needing the systematic Orton-Gillingham intervention,” and that while “elements of his dyslexia will persist his entire life,” and “spelling will likely continue to be a weaker area for the Student,” “thank goodness for spellcheck and autocorrect!”. Tr. 813. Though the Parent has consistently lamented the School Board’s alleged downplaying of spelling as an important skill, the Parent herself, in an e-mail to school staff, seems to refer to spellcheck and autocorrect as tools that the Student may use to compensate for the Parent’s perceived weakness in the Student’s spelling.

The evidence demonstrates that the Student’s weaknesses in spelling, if any, do not cause an adverse impact on the Student’s educational performance. The Parent attempted to question multiple witnesses regarding spelling errors contained in a story that the Student wrote about Komodo dragons and in other writing samples. Both Principal , a former reading specialist, and Ms. , the Parent’s own expert, testified that the errors present in the Student’s writing sample were “normal” and “typical” for fourth grade students; specifically, Ms. stated, “I mean, they’re still in elementary school, so they’re not going to be perfect spellers.” Tr. 253-263 and 432-3.

Regarding the Student’s spelling, Ms. , a 4th grade teacher at the School, downplayed any issues concerning the Student’s spelling and testified that “some students have spelling such that it is hard to read or even know what their spelling is. That was not the case with [the Student]. I always knew what he was trying to say[.]” Tr. 369.

 The Parent has also attempted to argue that the Student is academically gifted and that this alleged giftedness “masks” the impact of his dyslexia. This argument is without merit. The Student was formally evaluated for the school division’s gifted program in October 2015 and was found ineligible. See SB 6-8. The Parent counters by arguing that The Student was accepted into the division’s “gifted arts” program. However, the Parent acknowledged that artistic giftedness would not mask the impacts of a disability. Tr. 750. Though the Student is a bright student with a strong work ethic, his alleged “giftedness” does not “mask” an adverse impact on his educational performance.

 The Parent did not provide the school division a copy of Dr. ’s psychological evaluation report concerning the Student until November 21, 2017, months after the Student was unilaterally withdrawn from the school division, thus making it irrelevant to many of the considerations in this case. As such, the school division was not able to consider Dr. ’s report when making educational decisions regarding the Student.

 The Parent relies heavily on the psychological report of Ms. to support her argument that the Student should have been found eligible under the IDEA. As a preliminary matter, the Student’s scores on the assessments administered by Ms. , similar to those administered by school psychologist , fell mostly in the average range. Tr. 682-3, SB 17. Therefore, even if “low average” scores or sub-scores or “relative weaknesses” on standardized assessments constitute an adverse impact on educational performance, which they do not, the Student’s scores were not “adversely” impacted. Further, weaknesses in Ms. ’s report abound. First, Ms. tailored the testing assessments that she utilized in order to highlight The Student’s weaknesses. On March 20, 2016, Ms. e-mailed the Parent and stated:

I just returned from vacation and I have been working on the Student’s test results and report today. I am struggling a little bit with his test results. While I could physically see some of his struggles when completing reading during the assessment, his actual test results in reading mostly fell in the average range. I would like to complete some more testing on the Student (not charge) to get a better understanding of his skills and any deficit areas…I would feel more comfortable completing more testing on The Student to make sure I haven’t missed anything…My plans are to purchase another test that would look at orthographic patterns in reading/spelling. PE 10.

However, even after completing additional testing, most of the Student’s scores still fell within the average range.

 Much of Ms. ’s report was not actually written by her, but was automatically generated by a computer program designed by the publishers of certain assessments. Tr. 588-9. School psychologist credibly explained why such reliance on computer-generated analysis is problematic: rather than being individualized according to the unique properties of the child, as IDEA contemplates, children who scored the same numerical score but who had different strengths, weaknesses, personalities, or even disabilities could be described by the same automatically-generated narrative. According to Ms. , this approach “doesn’t require any level of skill or knowledge base or expertise ”. As Ms. aptly stated, “kids are more than just scores.” Tr. 1842-3.

 Ms. , despite being a school psychologist, did not consult with school personnel regarding the Student’s educational history. Tr. 704. Ms. did not observe the Student in the classroom either prior to her evaluation or after. Tr. 625. Ms. is not, and has never been, an educator. Tr. 627. Ms. has no knowledge of the curriculum at Elementary School. Tr. 691.

Ms. administered the Kaufman Brief Intelligence Test, or “KBIT,” despite the fact that CPS had administered the same assessment only several months before. Tr. 595-96. Ms. did so despite knowing the risks of “practice effect.” Tr. 685-86.

 Finally, Ms. rendered her diagnosis of “specific learning disability,” based on the DSM-V. Tr. 697. However, Ms. did not include in her report several pieces of information that psychologists are directed to include when rendering diagnoses under the DSM-V. Specifically, Ms. used incorrect terminology in rendering her diagnosis (specific learning “disability” instead of “disorder”), failed to “specify all academic domains and subskills impaired,” failed to specify the severity of the Student’s disorder, and failed to include four diagnostic criteria, including a comprehensive educational history. Tr. 698-700. While it is important to note that eligibility for a specific learning disability is determined by the IDEA’s eligibility criteria and not the DSM-V, Ms. ’s undisputed failure to adhere to the guidelines promulgated by the manual under which she rendered her diagnosis diminishes her credibility as an expert witness.

Though Ms. included several educational recommendations in her report, at no point does Ms. state that the Student requires specially designed instruction. Instead, Ms. made recommendations “*if* [the Student] begins to struggle academically.” (emphasis added). PE 11 at 60. By this, Ms. meant “that *if in the future* [the Student] began to have difficulty academically, like with grades, with tests, that his parents meet with the school to have a child study meeting to see if he could get accommodations, modifications, or specialized instruction through special education.” (emphasis added). Tr. 629. Due to the numerous procedural and technical deficiencies in Ms. ’s report, the hearing officer decides that the opinions of the LEA educators are deserving of much more weight and the decisions of these educators concerning the educational programming provided and offered to the Student in a carefully coordinated and collaborative manor are well deserving of the deference delineated by long established applicable law. The hearing officer was particularly impressed by the expert opinions rendered by Dr. and who had obviously given serious consideration to meeting the unique needs of the Student in light of his particular circumstances and the rationales and bases underlying such opinions.

The educators who provided instruction to the Student testified consistently and convincingly that the Student was not struggling academically, and consistently performed at or above grade-level. The Student’s teachers described him as a strong reader and a bright student who enjoyed school. See SB 48 and 49. The Student earned all As on every report card in first and second grade, earning him the descriptor “Superior” from his classroom teachers. The Student passed his third grade SOL tests with flying colors. See SB 15, 34, and 31. Though the School Board provided him with Orton-Gillingham-based spelling tutoring from in third grade, this tutoring was not provided to address any educational deficits. As this Hearing Officer previously found, “The Orton-Gillingham program was not offered due to any concerns with his reading by school staff, but solely to address the Parent’s concerns.” See SB 48. See also 504 Tr. 1030, 1044-5, 599. Further, when the School Board agreed to continue providing Ms. ’s spelling tutoring to the Student following the August 22, 2016 IDEA eligibility meeting, this Hearing Officer again found that it “was not offered because school staff believed that it was required for the Student, but to address the Parent’s concerns.” See SB 48.

The Parent failed to prove by a preponderance of the evidence that there is documentation of an adverse impact on the Student’s educational performance due to characteristics of an SLD. The Parent’s own expert witness testified that the Student would not be found eligible under the IDEA without a medical diagnosis of dyslexia because there was no academic impact in her classroom at the time. Tr. 545-6.

Not only did the Parent fail to prove that there is documentation of an adverse impact on the Student’s educational performance, but the Parent failed to prove by a preponderance of the evidence that the Student requires specially-designed instruction. The Virginia regulations define “specially designed instruction” as “adapting, as appropriate to the needs of an *eligible* child, the content, methodology, or delivery of instruction: (1) to address the unique needs of the child that result from the child’s disability; and (2) to ensure access of the child to the general curriculum, so that the child can meet the educational standards that apply to all children within the jurisdiction of the local educational agency.” 8 VAC 20-81-10 (emphasis added); see also 34 C.F.R. § 300.39(b)(3). For example, if a child requires specially-designed instruction, they may not be provided grade-level material in class but instead may be provided material at their individual instructional level. Tr. 1929. A Virginia hearing officer has correctly found that accommodations and assistance such as tutoring, preferential seating, behavior intervention plans, and untimed tests do not constitute specially-designed instruction. In re: Student with a Disability, 106 LRP 11977. The Student does not require the adaptation of the content, methodology, or delivery of instruction in order to access the general curriculum.

The Parent has attempted to argue that the Student requires specially-designed instruction because the Student has benefited from PALS intervention for part of the first grade, multisensory instruction, and the Orton-Gillingham-based spelling tutoring provided by Ms. . This argument is without merit. First, the PALS intervention that the Student received did not constitute specially-designed instruction. Specifically, the Student’s solid PALS scores demonstrate that the Student did not require PALS intervention in order to access the general curriculum. During the Section 504 Impartial Hearing, when asked if based on the Student’s PALS scores, he would have been a child who would require PALS remediation, division instructional supervisor for English testified, “Oh, no. He would not – he has to fall below the benchmark for the PALS remediation.” 504 Tr. 1217. The Student passed all of his PALS benchmarks. Because the Student was not offered PALS to access the general curriculum, PALS did not constitute specially designed instruction for the Student:

Q: And was it decided at [the August 22, 2016 eligibility meeting] that the interventions resulted in the Student adequately achieving all grade-level standards for second grade?

A: Well, he had already been achieving grade-level standards even before any intervention, so I don’t know that it was the intervention that helped so much. He already was achieving them from the very beginning.

Q: So he never needed to be in Ms. ’s remediation group?

A: Probably not, except that he’d come from another state and maybe they wanted to see how he would do with the phonics. I don’t know. 504Tr. 615. See also SB 3 and 10.

The Student only received PALS intervention for part of the first grade; this intervention was discontinued because the Student was achieving grade-level standards. 504 Tr. 323-4. The fact that the Student may have benefitted from PALS intervention does not beg the conclusion that the Student required PALS intervention in order to access the general curriculum. When asked to what she attributed the Student’s growth in first grade, the Parent’s expert witness, Ms. , answered, “The curriculum that he was being given.” Tr. 412.

Second, the multisensory instruction that the Student received in second grade in Ms. ’s classroom did not constitute specially-designed instruction. The content, delivery, and methodology of instruction was no different for the Student than it was for any other student. 504 Tr. 470. Ms. was not providing intensive, systematic, or structured Orton-Gillingham in her classroom. She simply utilized parts of the Explode the Code book and used best teaching practices to provide multisensory instruction to all of her students. Ms. testified that she was giving the Student “everything he needed” in the classroom, which was a general education classroom. Tr. 419, 465-6. It is reasonable to infer from Ms. ’s testimony that she does not believe that the Student needed specially designed instruction, nor was he receiving it during the second grade.

Third, the Orton-Gillingham-based spelling tutoring provided by Ms. did not constitute specially designed instruction. Specially designed instruction is provided to students in order to help them access the general curriculum. 8 VAC 20-81-10; see also 34 C.F.R. § 300.39(b)(3). Ms. ’s tutoring was not provided to the Student in order to help the Student access the general curriculum. This Hearing Officer specifically found that, “The Orton-Gillingham program was not offered due to any concerns with his reading by school staff, but solely to address the Parent’s concerns.” See SB 48. Dr. , Ms. , and herself testified that the Student did not require Ms. ’s spelling tutoring in order to access the general curriculum. Tr. 1960, 1011-2, 1124-5. Reiterating that changes to content, delivery, and methodology are what constitute specially designed instruction, Dr. explained that the Student’s content, delivery, and methodology of instruction were never altered during his receipt of spelling tutoring from : “And regardless of the pullout group, the Student was always exposed to grade-level expectations, curriculum, and always performed well.” Tr. 1959. As a result, rather than “specially designed instruction,” Ms. ’s spelling tutoring is more accurately described as “enrichment.” Ms. did not work with the Student on reading, reading fluency, or written expression; she simply provided tutoring on spelling features. Tr. 1104. Tutoring provided by a reading specialist such as is typically a general education, rather than a special education, intervention. 504 Tr. 1207.

The Parent has unsuccessfully attempted to argue that the Parent’s request for, and the Student’s possible receipt of, certain allowances or provisions in the classroom demonstrates that the Student requires specially designed instruction. Specially designed instruction is far more than “just accommodations.” Indeed, the allowances and provisions made for the Student in the classroom constituted good teaching practices available to all general education students. Tr. 1830, 1835-6, 1929, 544.

The Parent failed to prove by a preponderance of the evidence that the Student requires specially designed instruction. The content, delivery, and methodology of the Student’s instruction was never adapted in order for the Student to access the general curriculum. Tr. 1856-7, 1931-3. Because the Parent failed to prove that the Student requires specially designed instruction in order to access the general curriculum, the Parent’s argument that the Student should have been found eligible for special education under the IDEA must fail.

The Parent failed to demonstrate that the Parent provided anything other than written, informed consent to the team’s determination that the Student is not eligible for special education and related services. As Ms. , Ms. , and Ms. testified regarding the Student’s August 22, 2016 IDEA eligibility meeting, the team agreed that the Student was not eligible for special education as a student with an SLD. Neither Dr. nor Mrs. raised any objections or concerns regarding the team’s decision, and Dr. and Mrs. both provided written consent to that decision. See SB 19 at 5. “A parent may ‘naturally’ not ‘*use the fact that the District complied with their wishes as a sword* in their IDEA action.’” See M.M., 303 F.3d 523, 533, n. 14 (4th Cir. 2002) (emphasis added).

The Parent now argues that she only signed consent for the determination that the Student is not eligible under the IDEA because she was somehow “misled” by the school-based members of the Student’s eligibility committee at the August 22, 2016 IDEA eligibility meeting. Specifically, the Parent testified that the school staff advised that The Student would have to be performing “two years below grade level” in order to be eligible. Tr. 24 and 28.**[[4]](#footnote-4)**  The Parent did not testify as to who specifically informed her of the alleged “two year requirement” until the Hearing Officer asked her on the fifth day of the present proceeding. At that time, the Parent stated that Ms. was the person who expressed the “two year requirement” at the August 22, 2016 IDEA eligibility meeting.

The LEA personnel at the meeting uniformly testified if asked that they did not recall any mention at the meeting of such a 2 year requirement. Tr. 1817, 1906. The Parent’s own expert, Ms. , testified that, the school wouldn’t have found the Student eligible under IDEA law. Tr. 456-7.

The Parent also attempts to argue that she was somehow confused regarding her right to withhold consent for the eligibility committee’s determination. Despite the fact that this Hearing Officer qualified the Parent as an expert in elementary education, the Parent claims that she somehow did not realize that if she disagreed with any aspect of the eligibility determination, she could note her disagreement and withhold consent. Tr. 37 & 186.

The Parent testified that during, not after, the August 22, 2016 eligibility meeting, she disagreed with the team’s determination that there was no adverse impact on the Student’s educational performance and that the Student did not require specially designed instruction. Tr. 776-8. **[[5]](#footnote-5)**

Despite this alleged disagreement, the Parent did not utilize the spaces on the eligibility forms obviously designed for such disagreement:

Q: Now, there’s a space right below that space, right? And it says, ‘Parental refusal of consent for eligibility or change is indicated by parental signature below.’

A: Correct.

Q: So there’s a space on this document for parents to sign if they don’t consent?

A: Correct.

Q: Now, there’s also a space that says, ‘List names and roles whose conclusion differs from other members’ determination,’ and then, ‘Attach written statement.’

A: Correct.

Q: No one signed there.

A: Correct.

Q: No one attached a written statement.

A: Correct. Tr. 777-8.

Neither Mrs. nor Dr. made use of the designated areas on the eligibility forms to express any alleged disagreement with determinations made by the committee. Both Dr. and Mrs. are educated English speakers. The Parent was qualified as an expert in elementary education. Ms. , the Parent’s own expert witness, testified that the Parent came to her in the 2015-2016 school year with “a lot of knowledge.”

Ultimately, the Parent cannot escape the fact that she provided informed, written consent to the determination that the Student is not eligible as a student with a qualifying disability under the IDEA. Tr. 777. See also 504 Tr. at 637. (“She did agree that he did not meet the criteria for IDEA”). The Parent failed to prove that it is more likely than not that the Student was improperly found eligible. Rather, the evidence demonstrates that the Student was meeting or exceeding grade-level standards, that the Student’s educational performance was not adversely impacted, and that the Student did not require specially designed instruction in order to access the general curriculum. The Parent agreed with and provided written consent to the determination that The Student is not eligible under the IDEA.

The IDEA imposes a “child find” obligation on local school divisions. Child find must include children who are suspected of being children with disabilities pursuant to the IDEA’s implementing regulations and in need of special education. 34 C.F.R. § 300.111(C). If a school division does not suspect a child has a disability, it may deny a request for an initial evaluation. See Memorandum to State Directors of Special Education, Preschool/619 State Coordinators, Head Start Directors, 116 LRP 21359 (OSEP Apr. 29, 2016). The Parent alleges that the School Board improperly refused a request for evaluation under the IDEA. The Parent requested an evaluation in two different formats: via a request for additional testing and via a review of existing records. The Parent has failed to prove by a preponderance of the evidence that the School Board improperly denied the Parent’s requests for evaluation under the IDEA.

The Parent failed to prove that the School Board improperly rejected the Parent’s request for additional testing. The Parent did not request a full assessment, such as a psychological assessment or an educational assessment, but rather, specific tests and subtests such as the “CTOPP,” “Rapid Naming,” “WRAT-4,” and TOWRE. During the August 25, 2017 Child Study Team Meeting, the School Board explained to the Parent that The Student had already participated in testing that provided the same or similar assessment information. See SB 39. Though the Parent may assert that the existing testing was a little over one year old, this did not diminish the validity of the existing data. 504 Tr. 905-906.

In addition, contrary to the Parent’s argument, the Parent did not present “new data” in support of her request for additional testing. Dr. testified that “data” is objective and pertains to information such as a student’s grades, reading levels, informal and formal assessments, reading inventories, and SOL testing. Tr. 1923. Contrary to the Parent’s assertions, though input from parents and attorneys is considered at meetings, an argument submitted by a parent’s attorney in the form of a complaint to the U.S. Department of Education’s Office for Civil Rights does not constitute “data” regarding a student. Tr. 1924.

Most importantly, based on the Student’s data, the team did not suspect a disability. Tr. 1391-2. Because the team did not suspect a disability, no further testing was necessary. The Parent herself acknowledged that by the time of the meeting, the Student had exhibited great improvement. The Parent expressed in an August 22, 2017 e-mail to staff that the Student’s reading fluency had increased exponentially and that he’s capable of reading higher and higher level text. Tr. 993.

Dr. testified, “Every data point we could look at indicated the Student not only met benchmarks but far exceeded every benchmark that we could look at.” Tr. 1926.

As stated above, the Student earned all As on his third grade report card, earning him the designation “Superior.” The Student presented as a student who enjoyed school, often writing his own stories after he completed his work before his peers. The Student performed exceedingly well on standardized assessments such as the reading inventory and passed his SOLs with “proficient” status. See SB 11, 15, 25, 26, 27, 28, 30-34; see also Tr. 1456-7.

The Parent also failed to prove that the School Board improperly refused to conduct an evaluation of the Student under the IDEA via a review of existing data. In response to this request, the team explained that the team had already completed a review of the existing data during the meeting and that based on that data, the team did not suspect a disability that warranted further evaluation. The School Board properly documented these requests and the reasons for their refusals in a prior written notice. See SB 39.

The Parent’s August 25, 2017 requests for an IDEA evaluation either via a file review or additional testing are rendered disingenuous and moot by the Parent’s refusal to provide consent for the School Board’s pending request to evaluate the Student. On November 21, 2017, two months after the Parent unilaterally withdrew the Student from the school division, the School Board received a psychological evaluation report completed by Dr. in late October 2017. The report was not provided along with a letter informing the School Board that the report provided new information or with a request to reconsider conducting an evaluation or additional testing. Rather, the Parent attached Dr. ’s report to a Section 504 complaint. This report was provided to the School Board close to the Thanksgiving holiday, three months after the August 25, 2017 Child Study Team Meeting and two months after the Student was withdrawn from the school division. Tr. 803-4. As a result, the School Board was not able to consider the information in Dr. ’s report when making educational decisions regarding the Student, despite the fact that the Parent considered Dr. ’s report “essential.” Tr. 25.

 Although the School Board received Dr. ’s report in connection with litigation, on December 26, 2017, the School Board offered to re-evaluate the Student in light of the new information contained in the report, such as diagnoses of attention deficit hyperactivity disorder (“ADHD”) and anxiety. Tr. 804-5. Despite the fact that, as the Parent testified, she had been “begging” for an evaluation, the Parent refused consent for a re-evaluation on the advice of her counsel. Tr. 804; SB 44. To date, the School Board has not received any consent for evaluation from the Parent. Tr. 1471.

 Though the School Board was unable to consider Dr. ’s report while the Student was still a student within the division, the Parent relies heavily on Dr. ’s findings to support her position. However, the credibility of Dr. ’s report has been greatly diminished. The Parent influenced the content of Dr. ’s report both before and after it was written. The Parent e-mailed Dr. on October 28, 2017, stating, “I’m sure this will be in the report without even asking, but could you make sure to address the following issues we discussed during the follow-up phone discussion. Tr. 791.

The Parent specifically requested that Dr. address the following in his report: (1) “OG has clearly been working but there is [sic] still areas to address as he continues to progress through the intervention”; (2) “Classroom accommodations are needed”; and (3) “Clear indications of his gifted abilities.” Tr. 791-2.

In a November 1, 2017 e-mail to Dr. with the subject line “Edits,” the Parent stated that “corrections needed to be made about the district’s classification of the Student as dyslexic” and that she “marked some areas where we could possibly add the words, ‘and school.’” Tr. 796-7. While Dr. attempted to characterize incorporating such statements from a parent as a routine practice of gathering “history,” it is important to note that the statements which the Parent requested that Dr. include in his report do not constitute mere background information, but rather, make up the exact arguments that the Parent has made throughout this litigation

 Despite the fact that Dr. ’s report includes educational recommendations, Dr. ’s understanding of the Student’s educational history is limited to the information provided to him by the Parent. Tr. 849. Dr. , who has never been a K-12 public school teacher, did not attend any meetings regarding the Student, review The Student’s full educational record, observe the Student in class, or speak to any of the Student’s teachers. Dr. also did not review the results of the Student’s curriculum based assessments.

 Ultimately, much like Ms. ’s evaluation, Dr. ’s evaluation of the Student yielded scores that were mostly in the average range. Dr. acknowledged that the Student’s IQ was average. Dr. also acknowledged that the average scores listed throughout this report were better characterized as “relative weaknesses,” rather than simply “weaknesses.” Tr. 926-7. Dr. ’s evaluation alone does not demonstrate that the School Board should have granted the Parent’s request for additional testing or a second evaluation under the IDEA. Additionally, his report was not even available at the August 25, 2017 Child Study Team Meeting.

 The Parent failed to prove by a preponderance of the evidence that the School Board improperly refused the Parent’s request for an evaluation via a file review or additional testing. As such, the Hearing Officer should find in favor of the School Board on this claim.

 The IDEA’s federal implementing regulations define FAPE as special education and related services that “are provided at public expense, under public supervision and direction, and without charge,” “meet the standards of the [state educational agency[,]” “include an appropriate preschool, elementary school, or secondary school education in the state involved,” and “are provided in conformity with an individualized education program that meets the requirements of 34 C.F.R. § 300.320 through 34 C.F.R. § 300.324.” 34 C.F.R. § 300.17. By definition, students entitled to FAPE are students who are eligible under the IDEA as students with disabilities. As explained above, The Student is not a student with a disability under the IDEA and thus is not eligible for special education and related services. The Student is not entitled to FAPE under the IDEA. The Parent’s claim that The Student has been denied FAPE is dismissed on this basis alone.

Assuming, arguendo, that the Student is entitled to FAPE, which he is not, the School Board provided the Student with an appropriate education that met The Student’s unique needs during the time that The Student attended Elementary School.

Finally, the hearing officer deals with the School Board’s assertion that the Parent’s claims were brought for an improper purpose. While the hearing officer is sympathetic to the School Board’s frustration at the time, resources, and energy it has had to expend in opposing the Section 504 and this IDEA proceeding, the hearing officer decides he lacks subject matter jurisdiction concerning any claim for attorneys’ fees. 8 VAC 20-81-210(A). The plain language of the applicable law vests the discretion to award attorneys’ fees in the Court not a hearing officer.

Accordingly, the hearing officer decides that a **Court** may order a parent or parent’s attorney to pay attorney’s fees to a school division that prevails in an IDEA action if the **Court** finds that the action was presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation. 34 C.F.R. § 300.517(a)(1)(ii). Accordingly, the “improper purpose” analysis is properly within the province of the Court and the exercise of its discretion concerning any award of attorneys’ fees.

# CONCLUSION AND DECISION

Despite the numerous witnesses questioned, days of testimony elicited, and hundreds of exhibits admitted, the Parent has failed to meet her burden of proof in this matter. The Parent failed to demonstrate that the School Board failed to identify the Student under the IDEA, failed to properly refer the Student for further IDEA evaluation, or denied the Student FAPE. Rather, the evidence demonstrates that the Parent, not the School Board, acted unreasonably with respect to the Student’s educational programming: the Parent fully participated in and consented to the August 22, 2016 eligibility determination; the Parent unilaterally withdrew the Student from the public school; and the Parent has refused consent for the school division to evaluate the Student. As a result, the Parent’s claims must be dismissed and the Hearing Officer enters a decision in favor of the School Board on all issues brought by the Parent.

ENTER: 12 / 13 / 2018

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John V. Robinson, Hearing Officer

cc: Persons on the Attached Distribution List (By Email)

12-13-18 Decision

1. References to the verbatim transcript of the previous Section 504 proceeding admitted into evidence in this proceeding on September 19, 2018,are cited in the following format "504 Tr. <page number>." References to the verbatim transcript of the IDEA hearing held on October 16-18, October 22 and November 5 and November 8, 2018 are cited as “Tr. <page number>.”References to the Parent's post-hearing Opening Brief are cited in the following format: "POB<page number>". References to the LEA's post-hearing Opening Brief are cited in the following format "SOB<page number>". References to the parties exhibits are to the designations at the hearing e.g., “SB <Exhibit Number>” and “PE <Exhibit Number>”. [↑](#footnote-ref-1)
2. The Student was found ineligible for the School division’s gifted programming a few months prior. See SB 7. [↑](#footnote-ref-2)
3. See also, “Evaluation and Eligibility for Special Education and Related Services: Guidance Document, “Virginia Department of Education, Division of Special Education and Student Services (2018), available at [http://www.doe.virginia.gov/special\_ed/disabilities](http://www.doe.virginia.gov/special_ed/disabilities/)/ (the “VDOE Guidance Document”). [↑](#footnote-ref-3)
4. During the Section 504 Impartial Hearing, the Parent testified that the School Board influenced her to believe that the Student had to have been “failing,” not two years behind as is now claimed. 504 Tr. 255. Procedural safeguards and prior written notice were provided to the parents following the meeting. These documents mention nothing about a “two year” requirement. See SB 21 and Tr. 1183. [↑](#footnote-ref-4)
5. The majority of those witnesses present at the August 22, 2016 IDEA eligibility meeting testified that there was no disagreement among the team members, including the parents, about any aspect of the eligibility determination. [↑](#footnote-ref-5)