# VIRGINIA DEPARTMENT OF EDUCATION

# DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES

# OFFICE DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES

Xxxxxxxx County Public Schools Mr. xxxxxx and Mrs. xxxxxxxxxxxxxxxxx

School Division Parents

Mr. Jason H. Ballum, Esq. xxxxxxxxxxxx

Ms. Anne Mickey Esq. Child

Counsel Representing the LEA

Ms. , Advocate

Morgan Brooke-Devlin, Esq. Parents initiated Hearing

Hearing Officer

Evaluator: Mr. Reginald Frazier, Esq.

# HEARING OFFICER DECISION

A Due Process hearing was held on March 8 and 11, 2019 in the xxxxxxxxxx County Administrative Building, xxxxxxxxxxxxxx County, Virginia. The hearing was open to the public and transcribed by a court reporter.

Mr. xxxxxxxxxxxxxx and Mrs. xxxxxxxxxxxxxx (“Parents”) were present throughout the hearing as well as Counsel for the xxxxxxxxx County Public Schools (“xCPS” or “the School Board”), Ms. Anne Mickey, Esquire. The parents were represented by their Advocate, Ms. . Also present were Ms. xxxxxxxxxxx, Special Education Supervisor for Procedural Support for xxxxxxxx County Public Schools and Mr. Reginald Frazier, Esquire, who was appointed by the Virginia Department of Education to monitor the hearing.

The record includes the Parent’s Due Process Request, the School Board’s Response, written Motions and Orders, Pre-Hearing Reports, the School Board exhibits; the Parent’s written closing argument; School Board’s written closing argument and the transcript.

INTRODUCTION

The central issues in this case are whether the Xxxxxxxxxx County Public School System correctly determined on July 17, 2018 that Xxxxxxxxxx Xxxxxxxxxx did not require an independent educational plan (IEP); whether the 504 Plan enacted by the School Board on July 17, 2018 was appropriate; whether the eligibility committee considered the independent neuropsychological evaluation prepared for the Parents by Dr. Xxxxxxxxxx in reaching its decisions; and, whether the Parents were given an opportunity to participate in the meeting and have their input considered. Finally, did Xxxxxxxxxx County Public Schools provide Xxxxxxxxxx with a free and appropriate public education (FAPE).

STATEMENT OF THE CASE

The student, Xxxxxxxxxx Xxxxxxxxxx, is nine years old and attends Xxxxxxxxxx Elementary School in Xxxxxxxxxx County Virginia. He lives at home with his Parents and a ten year old sibling.

Mrs. Xxxxxxxxxx contacted the School Board in April of 2018 and advised it that Xxxxxxxxxx had received an Attention Deficit Hyperactivity Disorder (ADHD) diagnosis from his pediatrician, Dr. xxx. The Mother subsequently asked that Xxxxxxxxxx be evaluated and referred for a special education evaluation. Tr. p. 470.

In accordance with the Parent’s request an eligibility committee meeting was convened on July 17, 2018 to determine whether Xxxxxxxxxx met the criteria for qualification as a student with a disability under the IDEA.

Present at the meeting were: Mr. and Mrs. Xxxxxxxxxx; Ms. xxxxxxxx who is the Assistant Principal and Special Education Designee for Xxxxxxxxxx’s school; Ms. xxxxxxxxxx who is the eligibility coordinator and a special education teacher; Ms. xxxxxxxxxxxx who is a general education teacher who worked with Xxxxxxxxxx during the 2017-2018 school year.; Ms. xxxxxxxxxx who is a psychologist with the xxxxxxxx County School System who had conducted a psychological evaluation of Xxxxxxxxxx and Ms. xxxxx a special education teacher and educational diagnostician who had performed an educational evaluation of Xxxxxxxxxx dated 5/21/18. Tr. p. 514. The Parents had Ms. xxxxxxxxx, a private speech therapist, accompany them to the meeting. Tr. p. 473, 19-25; p.474, 1-2; p. 491, 2-13.

Following the commencement of the meeting the Parents advised the committee that they had had an independent neuropsychological evaluation prepared by Dr. Xxxxxxxxxx and presented the evaluation to the committee. Ms. Xxxxxxxxxx’s offer to read the 34 page report to the committee was declined in favor of making individual copies of the evaluation for each committee member. Tr. 529. Once the copies were made and distributed the committee recessed to allow the team members time to review the evaluation. Tr. at p. 248, 8-11, and 21-25; p. 249, 1-5; p. 267, 19-23; TR. at p. 268, 2-9; Tr. at p. 398, 8-15 and 21-25; p. 399, 1-16; Tr. at p. 441, 4-25, 1-3; Tr. at p. 537, 4-24; p.; 538, 1-22; p. 541, 4-8; p545, 2-3; p. 549, 7-11; p. 563, 4-25;p. 564, 1-6.

Following their review of Dr. Xxxxxxxxxx’s report and the one from Xxxxxxxxxx’s pediatrician, Dr. Xxxx, which diagnosed him with ADHJD, the eligibility team turned to a review of the evaluations completed by the Xxxxxxxxxx County Public Schools. These included a hearing/vision screening test. SB. Ex. 5; an educational evaluation by Ms. xxxxxxxx, SB. Ex. 6; a teacher evaluation report SB. Ex. 8; a classroom observation report SB. Ex. 9; a psychological evaluation performed by Ms. xxxxxxxxx, a Xxxxxxxxxx County nationally certified school psychologist SB. Ex. 10 and a sociocultural assessment SB. Ex. 11.

Ms. Xxxx testified that after reviewing Dr. Xxxxxxxxxx’s report Ms. Xxxx Xxxx, school psychologist, presented her information and then she, Ms. Xxxx, presented hers. Following these presentations they moved on to the teacher’s reports. Following the presentation of the teacher’s report the team prepared to begin consideration of the disability categories. Ms. Xxxx specifically noted that the parents were asked whether they had any questions before the team moved on to looking at the fourteen different IDEA disability categories. Tr. p. 529-530,

Ms. Xxxxxxxxxx testified that she did not provide the July 17, 2018 eligibility team with any information regarding Xxxxxxxxxx and did not express any of her concerns to the team. When asked if anyone told her that she was not permitted to speak during the meeting she responded “No” and when asked “ So, did you not speak at all during the meeting” she responded “not much” Tr. p. 491-492.

After going through and discussing the Xxxxxxxxxx County evaluations and those of Dr. Xxxx and Dr. Xxxxxxxxxx the team members and Parents reviewed and considered all fourteen possible disability classifications and criterion pages associated with each category, under the IDEA, to see if Xxxxxxxxxx qualified under one or more classifications. Tr. p. l 268, 13-22; Tr. p. 400-406;,1-7; Tr. 491,24-25, p. 492.

Following a review of the fourteen possible disability classifications it was determined that the team would focus on and review the eligibility criteria for the disability classification “Other Health Impairment” SB. Ex. 12,; Tr. at p. 540-541. The Parents did not note any disagreement with this decision nor did they request that the team consider any other disability classification. Tr. p. 541.

After the team completed its review of the eligibility criteria for the OHI classification the eligibility team members concluded that Xxxxxxxxxx did not qualify as a student with a disability under the OHI classification; thus ruling out the need to proceed to develop an Individual Educational Plan (IEP). SB Ex. 12-14.

For a finding of eligibility as a student with a disability under IDEA, regardless of the suspected disability classification, there must be documented evidence that, by reason of the disability, the child needs special education and related services. 8 VAC 20-81-80(H)(2); see also 34 CFR 300, 306 ( c)(2).

Xxxxxxxxxx had received a diagnosis of ADHD from Doctors Xxxx and Xxxxxxxxxx, as well as from Ms. Xxxx, the school psychologist. The eligibility team, having determined that Xxxxxxxxxx did not need specially designed instruction as a result of this diagnosis, moved on to discuss his ADHD diagnoses.. SB Ed. 12; Tr. at 372-273; Tr. 545-546. Following deliberation the team determined that a 504 Education Plan was the most appropriate choice.

The prixxxxy basis for this decision was that during the 2017-2018 school year Xxxxxxxxxx showed significant growth in his academic performance without any special education services or supports in place. Additionally, the team noted that his attention to tasks in the classroom setting had also improved.

Ms. Xxxx Xxxx, Assistant Principal, did a classroom observation of Xxxxxxxxxx in June of 2018 and reported that he “was on task and attentive to instruction” and that he “participated in the class discussion and offered the correct answers throughout the lesson.” SB Ex. 9.

Ms. Xxxx performed an educational evaluation of Xxxxxxxxxx in 2018, prior to the eligibility meeting in July. She noted that Xxxxxxxxxx is a charismatic, confident, and well-mannered young man. She administered the Kaufman Test of Educational Achievement, Third Edition to Xxxxxxxxxx (KTEA-3), which, in her expert opinion, is the “gold standard for assessments, providing sub-tests that require Xxxxxxxxxx to perform similar to what he had to do within the classroom setting” she also provided her expert opinion that it is the most appropriate instrument to assess Xxxxxxxxxx’s educational abilities. “ Tr. p. 518-519.

She testified that during her evaluation “…he reviewed his writing and math and was observed to re-read in order to glean meaning from text”, and that “During test breaks, moving from one test to another, he would fiddle with different objects. But as soon as I then provided direction he would redirect himself back. So, I did not-It was not required of me to give him redirection during the course of this assignment.” Tr. p. 517

Ms. Xxxx testified about the battery of sub-tests that she gave to Xxxxxxxxxx. These included auditory processing; reading, math, and written language. When asked “So, based on Xxxxxxxxxx’s scores on all of these specific sub-tests that we just went over, can you summarize what your overall impression was of Xxxxxxxxxx’s educational achievements?” She responded “Yes, Xxxxxxxxxx’s achievement fell within the normal range across reading, writing, and math domains. “Tr. p. 519-522.

Ms. Xxxx is Xxxxxxxxxx’s 2018-2019 school year third grade teacher. She testified that “Xxxxxxxxxx is a great boy. He has done really well since the beginning of the year” and that “He has shown so much growth in all subject areas.” She also noted that Xxxxxxxxxx had completed all of the SOL’s for third grade up to the present, based on the pacing guide. Tr. p. 81-82; Tr. 23. When questioned, Ms. Xxxx gave specific examples of Xxxxxxxxxx’s academic performance in the 2018-2019 school year. When asked about Xxxxxxxxxx’s reading she responded that the testing done showed that Xxxxxxxxxx “…has made great progress from the beginning of the year until now. “ Tr. p. 92, and “In both the first quarter and the second quarter Xxxxxxxxxx had been reading on grade level. He is able to comprehend what he is reading.” She stated that she has been monitoring his fluency and that he is able to read over one hundred words per minute. And that “… he’s shown growth with that. So, overall in reading he is doing well.” Tr. p. 83.

Ms. Xxxx went on to testify that Xxxxxxxxxx had received outstanding marks for math and social science in the first and second quarter. Tr. p. 85.

She also testified that Xxxxxxxxxx had made great progress from the beginning of the year until present. When asked for specifics she responded:

“Yes, so in reading in the Fall he has-he has shown growth. And then from reading in the Winter going from a 190 to a 191.” [score]. And then in math in the fall he went from an 184 to a 198. And that’s something we celebrate in those meetings.” Tr. p. 92.

Ms. Xxxx testified that she had spoken to the Parents about some behavior issues that she had observed with Xxxxxxxxxx and that “she had sent them e-mails making them aware if he had a day where his behavior seemed to be a little more active or more energized. “ Tr. p. 23.

She gave Xxxxxxxxxx a “needs improvement “grade for self-control on his first and second quarter third grade report cards in the section titled “Characteristics That Affect Learning.” Xxxxxxxxxx was graded as “satisfactory” in all of the other 15 sub-categories under this section. SB. Ex. 16.

Ms. Xxxx explained that she gave this grade because “In times of going from Point A to Point B there have been things where maybe he is not standing where he is supposed to be standing or maybe he is being silly, as third graders are with other friends. Coming in from recess, just more transition things.” She went on to state that none of that behavior impacted his academic performance in any way. Tr. p. 86-87. When asked whether Mr. and Mrs. Xxxxxxxxxx had ever expressed concerns to her about Xxxxxxxxxx’s progress in her class Ms. Xxxx replied “No.” Tr. p. 98.

She confirmed that she knew what the term “interfering behaviors” are but stated that “I don’t feel that his behaviors are interfering with his learning” and she went on to testify that Xxxxxxxxxx had never been removed from the classroom due to behaviors. Tr. p. 23-36. She also testified that she has never seen Xxxxxxxxxx exhibiting any anxiety or depression in her classroom. Tr. p. 34.

In response to a question about her monitoring Xxxxxxxxxx’s 504 Plan in the classroom Ms. Xxxx responded “I know that in the beginning of the year when we are notified that a child has a 504, and make sure that what is listed on that 504 is being implemented in my classroom. “ Tr. p. 29.

She testified that “I believe that his 504 has been working for him. He is able to, if he needs a break, or if he needs flexible seating, that he will get the flexible seating” Tr. p. 25. She also noted that Xxxxxxxxxx’s behavior in the classroom had never resulted in a [disciplinary] referral. Tr. p. 26. She further noted that Xxxxxxxxxx had only utilized his 504 accommodation of being allowed to leave the room twice during the school year and that she never had to significantly re-teach Xxxxxxxxxx. TR. p. 31.

When asked if she had ever referred Xxxxxxxxxx for a special education evaluation during the 2018-2019 school year she responded that “I have not referred him because from the beginning of the school year he has performed and done well in all areas of the third grade curriculum. “ Tr. p. 100-101.

Ms. Xxxxxxx is the school counselor at Xxxxxxxxxx Elementary School. She testified that she gave classroom guidance lessons to Xxxxxxxxxx’s class for 30 minutes every other week during the 2017-2018 school year and that the lessons were given to all students in the class, not just Xxxxxxxxxx. Tr. p. 151.

Ms. Xxxxxxx was asked by the Parents to write a letter containing information regarding her classroom guidance lessons for Xxxxxxxxxx’s class and her observations of Xxxxxxxxxx made during those lessons. P. Ex. 6-4.

On May 31, 2018 she wrote the letter and in it she observed of Xxxxxxxxxx that:

“He typically raises his hand to be called upon, and appears engaged in the lessons that I teach. Xxxxxxxxxx does occasionally need reminders to stay on task, but his need for reminders do not seem excessive, nor do they inappropriately stand out to me in relation to expected second grade behavior.” Tr. p. 151.

She also noted that: “He is a leader. Other students look up to what he does and they—you know, you can see them mimicking his behavior.” Tr. p. 155.

Ms. Xxxxxxx testified that she is a staff member at the school who is authorized to refer a student for a special education evaluation and that she had never referred Xxxxxxxxxx for an evaluation at any time during the 2017-2018 or 2018-2019 school years. Tr. p. 159.

When asked ‘Why not?” she responded “Xxxxxxxxxx has made a lot of progress, in my opinion. And, you know, I see him in a different way than what others do *per se*, because I’ve seen him in the classroom last year, this year. And while I am not the classroom teacher, it’s fairly regular, you know occurrence that I see him. And he’s made good progress, in my opinion, from what I’ve seen. And I haven’t heard otherwise from our administration, that he’s had behavioral problems this year, to the best of my knowledge, at all. Tr. p. 160-161.

Ms. Xxxxxxx is the Assistant Principal of Xxxxxxxxxx Elementary and Xxxxxxxxxx’s 504 case manager. Tr. p. 192. She describes him as a “wonderful student. He’s a student that we’re proud of, all the progress he’s made and the work that he does. “ Tr. p.217.

Ms. Xxxxxxx testified that as Xxxxxxxxxx’s 504 Case Manager and as a SPED designee she has the authority to refer a student for a special education evaluation. She went on to explain that she had never referred Xxxxxxxxxx “Because, as I said earlier, we feel like he’s such a success story. He’s done great. He’s made great growth. He’s on grade level. His teacher has no concerns about his performance. There’s just no—there are no red flags for us to, there just aren’t.” Tr. p. 221.

Ms. Xxxxxxx is an eligibility coordinator and was the chairman of Xxxxxxxxxx’s July 17, 2018 eligibility meeting. She testified that she has been employed by Xxxxxxxxxx County Public Schools for thirty-two years and has been an eligibility coordinator for eighteen years; has participated in approximately 450-500 eligibility meetings per year; and has attended approximately seven thousand IEP meetings. Tr. p. 262-263; p. 261.. Ms. Xxxxxxx was accepted, without objection, as an expert witness.

She explained in detail the procedures followed in eligibility meetings and when asked what role of the Parents play in the eligibility meeting she stated that:

”The parents, we encourage input from them at the beginning, after I go through the procedures to ensure that they understand the procedures for today and the agenda to see if they have any questions. After each of the evaluators present their evaluations they ask the parents if they have any questions or if they can clarify for them. After that we again encourage input as to the ---any information that the parents would like to share with us. “Tr. p. 230-232.

Ms. Xxxxxxx was asked specifically about the Parent’s participation at the July 17, 2018 eligibility meeting. When asked “Were the parents permitted to give input at the eligibility meeting? She responded “Yes, we always encourage input from Parents,” and went on to testify that at this meeting in July the Parents did share information with the team. She replied “Absolutely not” when asked if at any point during the eligibility meeting anyone told the Parents that they could not share information with the team. Tr. p. 268.

Ms. Xxxxxxx was directed to SB Ex. 12, Xxxxxxxxxx County Public Schools Basis for Eligibility Determination form dated July 17, 2018.

She explained in detail how the form was used by the committee during Xxxxxxxxxx’s eligibility meeting and how the committee reached its decision that Xxxxxxxxxx did not need specially designed instruction or special education and was not eligible under the IDEA.

“When we looked at the current data that we had, the assessments and the teacher’s evaluation report, we looked at his DRA. We determined that at the end of second grade he was progressing in the general education curriculum, He was making progress, and that he was able to follow teacher redirection. That he was able to ---the teacher needed to redirect him, and he was responding well to teacher redirection. So we decided that he was not in need of specially designed instruction.“ Tr. p. 273.

The committee determined that although Xxxxxxxxxx did not meet the criteria for eligibility under IDEA he did meet the “much broader and …wider eligibility criteria of Section 504 of the Rehabilitation Act.” Tr. p. 274.

In order to be found eligible under Section 504, a student does not have to demonstrate a need for specially designed instruction. Instead, a student must have a “physical or mental impairment” that causes a “substantial limitation to a major life activity or major bodily function.” Tr. p. 274. The eligibility team determined that Xxxxxxxxxx has a mental impairment of ADHD as diagnosed by Doctors Xxxx and Xxxxxxxxxx as well as by Ms. Xxxx, the Xxxxxxxxxx Public Schools psychologist.

Ms. Xxxxxxx noted that the team established that Xxxxxxxxxx’s impairment was determined to be ADHD. She testified that:

“In Xxxxxxxxxx’s case it was ADHD from not only the private evaluations, those were talked about as well, but the psychologist had given rating scales to both the parents and the teachers and that information came from the rating scales as well.” Tr. p. 270.

Ms. Xxxxxxx confirmed that it was her expert opinion that the committee had reached the correct decision and that she was in agreement with the decision. She testified that:

“…Because when we looked at the data the data did indicate that he was working on grade level, he was progressing, and that, he was progressing within the general education curriculum with general education modifications, instructions, however you want to put it, he was progressing in his current setting. “ Tr. p. 273.

In response to questions whether the July 17, 2018 eligibility committee considered the report from Dr. Xxxxxxxxxx Ms. Xxxxxxx pointed to the response to question #4 on the Xxxxxxxxxx County Public Schools Basis for Eligibility Determination form “Medical Findings” that: “The medical exam documented and the medical diagnosis from and also the medical findings from Dr. Xxxxxxxxxx, “and she stated that Dr. Xxxxxxxxxx’s report had been discussed during the meeting. Tr. p. 270-271. The Medical Findings section # 4 specifically states “Medical diagnosis of ADHD, combined type-April 2018-Dr. Xxxx and June 2018 Dr. Xxxxxxxxxx” SB EX. 12 p. 2.

Ms. Xxxxxxxxx is the Xxxxxxxxxx County Public Schools special education supervisor for procedural support. Ms. Xxxxxxxxx testified that one of her primary roles regarding eligibility determinations is to respond to parental disagreements regarding the decisions of the committee:

“… if a parent is in disagreement with the eligibility they can request an administrative review. An administrative review is where we reconvene another eligibility team to review the same information to determine—so they can revisit the eligibility” and that “This has to be requested within ten business days of the initial eligibility.” Tr. p. 300.

M.s Xxxxxxxxx stated that the information regarding the request for an administrative review is given to the parents by the eligibility coordinator during the eligibility meeting and is also included in the Prior Written Notice sent to the parents following the meeting. SB Ex. 14. She read the relevant section of the Prior Written Notice which appears at the end of first page:

“Whenever there’s a disagreement between parents and the school there are several options available depending on the meeting. If the disagreement involves the decision to refer for an initial evaluation, or if the disagreement involves the eligibility determination, you have the right to appeal the decision through the administrative review process. You may request a review by submitting your written request within ten business days to the supervisor of special education procedural support, Xxxxxxxxxx County Public Schools” SB. Ex. 14; Tr. p. 300-301.

She further testified that the Parents did not contact her expressing any disagreement with the outcome of the July 17, 2018 eligibility meeting nor did they request an administrative appeal of the eligibility determination. Tr. p. 301-302.

During the 2018-2019 school year Xxxxxxxxxx has continued to make progress in the general education setting. He is meeting grade-level benchmarks in math and reading and has received all satisfactory and outstanding marks on all but one of his third quarter 1 and quarter 2 report cards.[[1]](#footnote-1) His behavior has been appropriate and commensurate with his third grade peers. SB. Ex. 16; see *infra* Section IV (B) (1)(a) and (c). Other than the accommodations listed in his Section 504 plan, Xxxxxxxxxx is not currently receiving any interventions or specialized instruction in the general education setting. Tr. p. 61.

These factors all support a finding that the July 17, 2018, eligibility team appropriately reached the correct decision that Xxxxxxxxxx did not qualify for special education services and that he did qualify for a 504 Plan.

BURDEN OF PROOF:

In *Schaffer v. Weast,* 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d

387 (2005), the United States Supreme Court held that the burden of proof, in an administrative hearing challenging the IEP, is properly placed upon the party seeking relief, whether that is the disabled child or the school district. *Id.,* at 537.

In this case the Parents have claimed that the Xxxxxxxxxx County Public Schools July 2018, eligibility determination was incorrect because the eligibility committee team members failed to consider the independently obtained neuropsychological evaluation prepared by Dr. Xxxxxxxxxx and because the Parents were not permitted to participate in the meeting or have their input considered. . The Parents filed this Due Process hearing request. Accordingly, the Parents have the burden of proof and persuasion.

Dr. Xxxxxxxxxx’s evaluation:

It should be noted that Dr. Xxxxxxxxxx’s evaluation was performed on May 14 and June 20, 2018. The Parents waited until the beginning of the eligibility meeting on July 17, 2018, to provide the School Board with the evaluation. The Parents have asserted that the committee did not comprehensively review Dr. Xxxxxxxxxx’s evaluation at the eligibility meeting yet, even if this were proven to be true, they were responsible for not providing the evaluation in advance of the meeting.

Contrary to the Parent’s claim that the eligibility meeting team failed to consider Dr. Xxxxxxxxxx’s evaluation, Ms. Xxxx, and other team members present at the July 17, 2018 eligibility meeting, testified that they had reviewed and considered the evaluation. When asked “So then, in addition to the Xxxxxxxxxx County reports that we just reviewed, did the team consider the results of any other reports at the meeting, the July 17, 2018 meeting? Ms. Xxxx replied “Yes, Dr. Xxxxxxxxxx’s report was considered. “ Tr. p. 537.

Ms. Xxxxxxxxxx first testified that Dr. Xxxxxxxxxx’s report was not reviewed during the meeting but later testified that she “thought that [the eligibility team] had read [the report] and everybody took it into consideration…” Tr. p. 472.

Also of note is that the Parents requested that Dr. Xxxxxxxxxx be permitted to testify electronically rather in person at the Due Process hearing. Over the objection of the School Counsel the Parents were given permission by the Hearing Officer to have Dr. Xxxxxxxxxx testify electronically. However, the Parents did not produce Dr. Xxxxxxxxxx as their witness electronically or in person at the hearing. They also failed to seek introduction of Dr. Xxxxxxxxxx’s evaluation as an exhibit in their case. [[2]](#footnote-2)

The Parents failed to present any expert testimony to support their claim that the July 17, 2018, eligibility committee determination which found that Xxxxxxxxxx was not eligible under IDEA for an Individualized Educational Plan (IEP) was incorrect and that the decision to enact a 504 Plan was inappropriate and that, therefore, Xxxxxxxxxx was denied a Free and Appropriate Public Education (FAPE).

In *Weast v. Schaffer* 377 F. 3d. 449, 456, (4th Cir. 2004) the Court held that “For regardless of which side has the burden of proof in an administrative hearing parents will have to offer expert testimony to shown the proposed IEP is inadequate.”

I find that this burden of proof also applies to a claim that a 504 Plan is inappropriate or inadequate.

The School Board qualified Ms. Xxxxxxx and Ms. Xxxx as educational experts. Both witnesses testified that in their expert opinions the July 17, 2018 eligibility determination was correctly decided and that the eligibility committee appropriately considered the input of the Parents and the independent neuropsychological evaluation from Dr. Xxxxxxxxxx prior to making their determination in favor of the 504 Plan.

LEGAL DISCUSSION:

Courts have found that a student is “unlikely to need special education if, *inter alia*: 1. The student meets academic standards; 2. Teachers do not recommend special education for the student; 3. The student does not exhibit unusual or alarming conduct warranting special education; and 4. The student demonstrates the capacity to comprehend course material.” *Dubrow c. Cobb County Sch.. Dist..* 887 F.3d 1182, 1193-1104 (11th Cir 2018). In *Alvin Independent Sch. Dist. V. AD,* 503 F/3d 378 (5th Cir. 2007) the Court found that a student with a diagnosis of ADHD did not require special education because he demonstrated satisfactory educational performance and social skills in the school setting.

In this case before the Hearing Officer, the July 17, 2018 eligibility team correctly determined that Xxxxxxxxxx did not meet the criteria necessary for special instruction and IEP because 1. He is meeting academic standards; 2. He demonstrates the capacity to comprehend course material; 3 he does not exhibit unusual or alarming conduct warranting special education; and 5. His teachers do not recommend special education for him.

A student may also not require specially designed instruction when their needs can be addressed through accommodations provided through Section 504 of the Rehabilitation Act. See *Brado v. Weast*, Civil NO. PJM 07-02696,\*(JD. Md. Jan. 22, 2010). The Act also requires that the child be placed in the” least restrictive environment.”20 U.S. C. § 1412(5).

The Parents’ argument that they were unable to provide “informed consent” during the July 17, 2018 eligibility meeting is without merit. The School Board is correct when they assert that they were not required to obtain the Parent’s consent at the meeting. When a child is not found eligible as a student with a disability under the IDEA, parental consent is not required in order for the team to make its determination. Parental consent is only required at an eligibility meeting when the team determines that a student is eligible under the IDEA, when a child’s disability classification changes under the IDEA, or when the team recommends that a child who is currently eligible under the IDEA be exited from special education services. See 8 VAC 20-81-80(D)(8).[[3]](#footnote-3)

The Parents place great emphasis on the argument that the edibility team did not review Dr. Xxxxxxxxxx’s report. The basis of this claim appears to be that if the team had reviewed Dr. Xxxxxxxxxx’s report they would have found Xxxxxxxxxx eligible for special education services. This claim is not supported by the evidence or testimony presented at the hearing.

Courts have held that the requirement that an eligibility team consider an evaluation obtained by the parents “does not require the school to ‘adopt the conclusions of such an evaluation.” *Michael P. v. Dep’t of Educ*., 656 F.3d 1057,1066 (9th Cir. 2011).

In this case, the eligibility team reviewed Dr. Xxxxxxxxxx’s evaluation and adopted his ADHD diagnosis but had reservations regarding the remaining balance of his report. Ms. Xxxx testified that Dr. Xxxxxxxxxx appeared to use outdated assessments, inconsistently tested Xxxxxxxxxx utilizing both second and third grade criteria, and that several of Dr. Xxxxxxxxxx’s diagnoses did not appear to align with Xxxxxxxxxx’s performance on Dr. Xxxxxxxxxx’s own achievement testing. Tr. p. 554; p. 557-559.

Ms. Xxxx also expressed concerns that Dr. Xxxxxxxxxx’s evaluation did not include any information from Xxxxxxxxxx’s teachers and that much of the information used was obtained in a clinical environment or from his Parents. Tr. p. 445.

A court or hearing officer is required to give deference to the judgment of school board witnesses who are professional educators. *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch.* Dist. RE-1, No. 15-827, 137 S. Ct. 988 (2017); *Springer by Springer. Fairfax Cnty. Sch. Bd., 134F.* 3d 659,663 (4th Cir. 1998).

“Courts are required to give deference to the state and local education authorities whose primary duty is to administer the IDEA.”M.M. by DM and EM v. Sch. Dist. Of Greenville Cnty., 303 F. 3d 523, 531 (4th Cir. 2002).

The IDEA requires that “great deference to the views of the school system rather than those of even the most well-meaning parent.” A.B. v. Lawson, 354 F.3d 315 (4th Cir. 2004)

All but one of the witnesses called by the Parents were professional educators employed by Xxxxxxxxxx County Public Schools. Ms. Xxxxxxx and Ms. Xxxx were qualified as experts in their field. Mrs. Xxxxxxxxxx, the Parent’s only other witness and the only non-School Board employee readily admitted that she has never been a teacher and that she does not have any degree or licensures in education. Tr. p. 487.

Therefore, deference is given to the testimony of the Xxxxxxxxxx County School Board educators. Their professional judgments and opinions are accepted and found to be highly credible; and their decisions are found to be appropriate and supported by the testimony and evidence presented.

# FINDINGS OF FACT

1. The Parents have failed to meet their burden of proof and their burden of persuasion.

2. The Xxxxxxxxxx County Public School System correctly determined on July 17, 2018 that Xxxxxxxxxx Xxxxxxxxxx did not require specialized instruction or an independent educational plan (IEP).

3. The 504 Plan enacted by the eligibility committee of the Xxxxxxxxxx County School Board on July 17, 2018 was consistent with the data presented and considered by the eligibility committee and its decision is found, beyond question, to be correct and appropriate.

4 The Xxxxxxxxxx County Public School Board’s July 17, 2018 eligibility committee appropriately considered the independent neuropsychological evaluation prepared for the Parents by Dr. Xxxxxxxxxx as well as the independent report prepared for the Parents by Dr. Xxxx.

5. The Parents were given an opportunity to participate in the July 17, 2018 meeting and have their input considered; and, the Parents participated in the meeting

6. The testimony and expert opinions of the Xxxxxxxxxx County Public School employees who testified at the Due Process hearing are found to be highly credible. Mrs. Xxxxxxxxxx is found to be less credible primarily because she is not a teacher or conversant with special education law or its procedures.

7. Xxxxxxxxxx Xxxxxxxxxx has made consistent and meaningful educational progress during the 2017-2018 and 2018 to 2019 school years.

8. Xxxxxxxxxx County Public Schools has provided Xxxxxxxxxx Xxxxxxxxxx with a free and appropriate public education (FAPE).

ENTERED: April 1, 2019.

RELIEF GRANTED: None.

# APPEAL AND PREVAILING PARTY NOTIFICATIONS:

1. Appeal: Pursuant to 8 VAC 21-81-T and §22.214 D of the Virginia Code, this

Decision is final and binding unless either party appeals in a federal district court

within 90 days of the date of this decision, or in a state court within 180 days of

the date of this decision.

2. Prevailing Party: Xxxxxxxxxx County Public School Board is deemed the prevailing party.

Morgan Brooke-Devlin

Morgan Brooke-Devlin, Esq.

Hearing Officer

# CERTIFICATE

I certify that I have e-mailed the above Hearing Officer Decision to all parties on this, the 1st day of April, 2019. Copies of the Decision have been provided to:

Ms. Kandise Lucas

Ms. Anne Mickey, Esq.

Mr. Jason H. Ballum, Esq.

Ms.

Mr. Reginald Frazier, Esq.

Morgan Brooke-Devlin

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1. With the exception of his grade “needs improvement” for self-control: see p. 8-9 herein. [↑](#footnote-ref-1)
2. The Parents did not introduce any exhibits or expert witness testimony at the hearing. The School Board entered Parent’s Exhibit 6-4 and 6-5. The Hearing Officer reminded the Parties several times during the hearing that exhibits had not been introduced. Tr. p. 16 & 80. [↑](#footnote-ref-2)
3. The Parent’s did not object to the 504 Plan determination at the July 17, 2018 eligibility meeting. [↑](#footnote-ref-3)