**DUE PROCESS EDUCATIONAL APPEAL**

PARENTS )

Appellants )

)

)

) In re: STUDENT

)

CITY PUBLIC SCHOOLS )

Respondent )

# **DECISION**

## I. **INTRODUCTION AND PROCEDURAL HISTORY**

The two special education advocates for the parents submitted a request for a due process hearing (Request) on July 10, 2017. The representatives maintainedthat the school system violated the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §1400 *et seq.* (2005), which amended the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* (1997) (IDEA), by denying the son of their clients a free appropriate public education (FAPE).

They alleged in their Request that the school district denied FAPE by (i) failing to provide supports and services to address all areas of the student’s disabilities; (ii) failing to hold an Individualized Education Program (IEP) meeting at the beginning of the 2016-2017 school year to add information from the psychological observation prepared by the school district and discuss adding its recommendation to the IEP; (iii) failing to consider, review and/or revise the IEP once the parents presented them with their private evaluation on how the student’s disabling condition impacted him socially, emotionally and academically for the 2016-2017 school year; (iv) ignoring the request to provide research based intervention to address his reading disability of dyslexia for the 2015-2016 and 2016-2017 school years; (v) engaging in retaliatory behavior toward the parents once they began initiating protected activity of advocating for their child’s educational needs; and (vi) failing to adequately address acts of disability harassment and bullying by not properly investigating reports of bullying and disability harassment provided by the parents and their son for the 2015-2016 and 2016-2017 school years (see Request, p. 2).[[1]](#footnote-1)

In their Request, the parents set forth relief to be granted for the school system’s denial of FAPE. The parent’s proposed resolutions included reimbursement for expenses associated with hiring a private dyslexia tutor for the prior two school years, compensatory education in a number of areas, attorneys fees if they elect to retain an attorney, expenses related to the filing of two due process complaints, development of an anti-bullying and disability harassment protection plan to protect the student’s safety, training of the principal with regard to protection of black male students with disabilities, and preparation of an IEP to meet the student’s needs (see Request, pp. 10-11). They also added to their request for relief that the student be transferred to another middle school (see emails of July 19, 2017 and July 23, 2017).

Two advocates represented the parents*;* the associate city attorney represented the district and was assisted by the Director, Compliance and Special Education Services (director) I was designated as the hearing officer by letter dated July 12, 2017 from the Executive Director, Office of Programs for Exceptional Children by the school system. The school district received my name from the Supreme Court of the Commonwealth of Virginia, which maintains a list of attorneys certified by the Virginia Department of Education (VDOE).

The first pre-hearing teleconference was held on July 18, 2017. The order of witnesses, issues in the appeal, exploration of settlement, and procedures for the conduct of the hearing were among the matters discussed. The parties stated that they estimated that the hearing should be completed within three days, but agreed to schedule a fourth day should the parties need an additional day to finish the hearing (see letter of July 18, 2017; TR.IV p. 937). In fact, the hearing lasted for five consecutive days.

The school district issued a Prior Written Notice (PWN) on July 18, 2017, denying the allegations and asserting that it had provided a FAPE (S.D. p. 1052)

The second prehearing teleconference occurred on August 15, 2017. The advocates sought the issuance of a subpoena for the videotape of an incident that occurred in February of 2017, which related to the bullying and retaliation issues. The parties reached an agreement that it would be produced at the hearing but that the inspection would be *in camera*. Thus, no order or subpoena was deemed necessary.[[2]](#footnote-2)

I expressed concern about the variety and length of the claims contained in the Request, particularly since there had been no real exploration of the issues at the prehearing stage. The advocates volunteered to review the claims and clarify and/or narrow them, but this never occurred. They explained that the cover letter provided background and a summary of the issues in the Request (see email of August 16, 2017).

The advocates indicated that they intended to record the hearing. They argued that a recording would not be disruptive and would be helpful in their training of other advocates. I stated that I thought there was a risk that there would be adverse impact on a witness or that the orderliness of the hearing would be compromised. I said I would prepare a draft order regarding cameras, recording equipment, and cell phones, the scope of which could be argued at the hearing (see email of August 16, 2017). After argument at the beginning of the hearing, I prohibited any recordings (TR.I pp. 20-26).

The school system timely filed their exhibits and stated that they would produce an itemized exhibit list and witness list prior to the hearing. They said in their cover letter to the exhibit book of August 10, 2017 that they would supplement this production with an itemized exhibit and witness list by August 21, 2017, the first day of the hearing. Their witness list of August 10, 2017 identified the student’s treating health care providers, relevant school division employees, and any witness identified by the parents or their advocates. I also complained that the parents did not submit an exhibit list; I sent an email to the parties on August 14, 2017 stating that the submission was unsatisfactory and needed to be corrected. The school district finally provided the names of their witnesses late on August 18, 2017 (see email of August 18, 2017); they never provided a table of contents.

The parties filed over 2,400 pages of exhibits. The advocates initiated the proceedings by submitting sixteen single spaced pages consisting of a cover letter and the Request. Under the Virginia regulations governing my appointment, I have the authority to clarify and narrow the issues and determine the scope of the hearing with the assistance of the participants. 8 VAC §20-81-210.M,O. Accordingly, I noted that the parents’ claims covered a wide range of issues and asked that the parties identify which matters were most relevant and which documents I should focus on in my preparation for the hearing. I suggested that the parents might wish to dismiss or narrow some of their claims of dubious relevance, as they had promised to do at the second prehearing teleconference. Neither party did so.

No procedural objections were raised at the beginning of the hearing (TR.I p. 10-13). Twelve witnesses testified at the hearing, six for each side. The parties initially elected to submit post hearing and reply briefs in lieu of closing arguments at the hearing, but the advocates for the parents decided to make an oral argument at the close of the case. The school district elected not to do so. The parties submitted briefs after the hearing and the parents submitted a reply brief.

References in this Decision refer to the five transcripts consisting of 1,501 pages from the proceedings (TR.I-V.). The district did not prepare a table of contents but did number every page of each exhibit, inserting them in sections separated by year, although not necessarily the years in which the exhibits were created. The parents submitted a table of contents of documents divided into nine sections with the exhibits identified in each section. References to those exhibits are identified as either from the school district (S.D.) or the parents (Tab, P-). All exhibits were admitted into evidence, subject to possible objections when used (TR.I pp. 10-13).

II. **FINDINGS OF FACT**

The following represents findings of fact based upon a preponderance of evidence derived from the testimony of the witnesses and the documents admitted into evidence. Additional findings will be found in other portions of this decision.

A. **Factual Background Through the Annual IEP of April 10, 2014**.

1. The student is fifteen years old and is now an eighth grader at a public middle school in the city school system. The student has always been a student at the city school system. He lives with his parents and two siblings, one a sister who attends the same school as the student and the other a brother who attends a public elementary school. The sister is a cancer survivor who is in remission and the brother has autism and is nonverbal (TR.IV pp. 870-871).
2. The mother requested a comprehensive assessment from the school system because of her concern about speech and developmental delays when the student was 26 months old. The student was referred to the Preschool Assessment Center which administered psychological tests on July 7, 2005 showing that his overall cognitive skills fell in the 16 to 19 month level. The licensed clinical psychologist concluded that his overall development indicated significant delays when compared to other students his age (S.D. pp. 1-2, 13-14, 45). The developmental specialist assessed the student at the same time and found that he appeared to be experiencing low average skill development in the adaptive domain and average skills in the motor domain (S.D. p. 3). The speech-language pathologist determined that he showed significantly delayed receptive language skills and mildly delayed expressive language skills with delayed articulation skills (TR.II p. 291).
3. The student was found eligible for special education services by the Special Education Committee (SEC) under the category of development delay on August 3, 2005 (S.D. p. 16). As a result, an IEP meeting was held on August 5, 2005 where short term objectives, goals, and services were developed (S.D. pp. 20-39). The child began in an early childhood special education class in 2005 (S.D. p. 133). On February 7, 2008 he was re-evaluated and again found eligible for special education services under the disability designation of developmentally disabled (TR.I p. 266).
4. On March 1, 2007, Children’s Hospital of the King’s Daughter (CHKD) conducted communication and speech-language skills testing. They determined there was a continued delay in receptive and expressive language skills with the child having difficulty forming age appropriate sentences with correct grammar, difficulty comprehending concepts used in directions, and had an inability to respond to questions (TR.I p. 133). His annual IEP developed on March 28, 2007 provided for 180 minutes of early childhood special education five times a week and 20 minutes of speech therapy twice a week (TR.I p. 146).
5. The mother requested occupational therapy (OT) for the student and an OT evaluation was completed on October 10, 2008 (TR.I p. 154). The occupational therapist concluded that the student could be helped by directed OT (TR.I p. 168) and the student was found eligible to receive direct OT services 30 minutes a weekly pursuant to an IEP modification meeting on October 30, 2008 (TR.I p. 183). The March 9, 2009 IEP provided special education services for the student, which consisted of 30 minutes a week of occupational therapy, 20 minutes twice a week of speech therapy, and extensive special educational services (S.D. p. 241). Subsequent evaluations were conducted in 2011 and 2014 at which times the child continued to be eligible under the categories of intellectual disability (ID) and SLI (P.1, p. 74).
6. Another eligibility meeting was held on March 21, 2010 during his first grade year. The student required a reevaluation because under state guidelines, he could no longer receive services under the category of developmentally delayed because he was seven years of age (S.D. pp. 381, 405). In connection with the re-evaluation, the school psychologist noted that he had been diagnosed as having an Attention Deficit Hyperactivity Disorder (ADHD). Additionally, under the Wechsler Intelligence Scale for Children (Wisc-IV), his verbal comprehension score was 55, which was extremely low, while his perceptual reasoning index (PRI) score was 106, which was average. This revealed a significant intra-cognitive split with the PRI, which measures nonverbal ability, a better indicator of the student’s true cognitive potential (S.D. p. 381). The school psychologist opined that the student was not achieving on a level commensurate to his nonverbal potential with overall reading, writing, math calculation, and math reasoning well below the average range (S.D. p. 381). She made a number of recommendations in light of his language based language weakness and significant receptive and expressive language processing weaknesses (S.D. p. 382).
7. The speech-language pathologist also determined during evaluations on March 12, 2010 and March 23, 2010 that the student had significant delays in articulation and expressive/receptive language (S.D. pp. 400-404).
8. The school psychologist testified regarding the psychological and educational report prepared on March 15, 201o and March 20, 2010. She noted that the verbal comprehension score was a 55, perceptual reasoning was 106, and processing speed was 75. That meant that there was a great discrepancy between verbal comprehension and perceptual reasoning and to the extent that a summative score or full-scale IQ would not have provided an average expectation for the student, any full scale IQ score would have been misleading. Moreover, from the WISC-IV, the basic reading skills fell in the low average range (TR.III p. 627). The reason why this report was done was because the student could no longer be classified as developmentally delayed since he had turned seven years of age. The school system suspected he had a learning disability so they gave him a battery of tests measuring his verbal and nonverbal ability to compare with his achievement (S.D. pp. 377-378; TR.III pp. 624-631).
9. The IEP team proposed an IEP on May 12 2011. They were assisted by a private psychological evaluation from Christian Psychological Services conducted earlier in 2011. The psychologist’s eight recommendations included individual therapy to alleviate behavioral problems and emotional difficulties and promote social interaction, medication management for ADHD, implementation of behavior management approaches, and a number of accommodations. (Tab 1, P-3d-3e). The team established short term objectives, goals, and services (S.D. pp. 464-519).
10. On April 27, 2012, the IEP team met for another annual meeting. The IEP provided that the student continues to receive speech, language, and OT services and that he participate in an inclusion classroom for math and language arts instruction (S.D. p. 521).
11. The SEC met on January 9, 2013 when the student was in third grade, but were unable to determine whether the student was eligible for special education under IDEA’s new category of autism. Therefore, they decided to administer several assessments (S.D. pp. 548-549). After their review of those assessments, the team concluded that the student met the Virginia definition of autism because he needed specially designed instruction due the adverse impact his disability had on his progressing in the general education curriculum (S.D. pp. 602-603). They also considered the additional categories of specific learning disability (SLD) and emotional disability (ED), but determined that he did not meet the criteria of either (S.D. pp. 584, 597-598, 599-601).
12. The IEP team reviewed the IEP proposed on April 19, 2013 at the annual meeting. It provided for support in math problem solving skills, social skills, written expression for 30 minutes daily, written expression for 20 minutes daily in the general education setting, and support for reading skills for 20 minutes daily in the special education setting. In addition, the team provided for related services consisting of both OT consultation and speech therapy twice monthly. (S.D. p. 610). The IEP team met on April 14, 2014 to prepare another annual IEP (S.D. p. 646). They considered the March 27, 2014 OT addendum to the April 2013 assessment in which the occupational therapist recommended that the IEP team consider deleting OT services as the student had made excellent progress in writing with adequate pencil grip and consistent legibility, was independent with management of school supplies, and met his own school day needs of self-care. The team decided to eliminate OT as well as reduce speech services from 20 minutes twice weekly to once a week (S.D. pp. 626-627, 642).
13. In each of the IEPs and amendments to IEPs from August 5, 2005 to the IEP on April 10, 2014, the parents provided written consent and agreed to placement in special education.

B. **2014-2015 IEPs, Related Developments, and the Reading/Dyslexia Teacher’s Opinions Regarding the Student’s Learning Disabilities.**

1. The reading/dyslexia teacher reviewed the evaluation performed by CHKD of April 10, 2014 and noted that his social skills were found to be below average, he had a significant language disorder, low cognitive ability, and ADHD. The evaluator found that the student had significant limitations in speech and language skills with a receptive vocabulary score that was average, a discrepancy that was a warning sign providing a basis for an assessment. She reached a similar conclusion with regard to a prior evaluation from Hampton Roads Behavioral Health (Tab 1, P-1-2a; TR.I. pp. 70, 72-74).
2. On September 11, 2014, she prepared an assessment of the child for decoding and encoding. The teacher defined what decoding and encoding were. In order to read, she said, one needed to know the sounds, the letters, sounds the letters make, and how to blend them to form words. She stated that with dyslexia, a child has difficulty doing this, so it is necessary to pull the words apart. This is known as decoding. In encoding, one needs to learn the concepts of language, the rules, the syllable types, and the letter combination to make sounds. Combining those concepts together to spell is encoding (TR.I p. 76).
3. In the first assessment, the student received low scores on sounds, reading, and spelling. Within the reading category, however, he received a score of 90% in reading sight words. That meant, the dyslexia teacher explained, that he was reading everyday words well but that he could not sound out other words to read them. She stated that although she could not legally diagnose for dyslexia, he had the warning signs of the disorder and needed services for that. She also rendered the opinion that based on reading the various reports and her assessments he had dyslexia (Tab 1, P-7; TR.I pp. 76-82). She maintained that there was a strong correlation between dyslexia and academic progress because reading forms the base of all education. Since the child had great difficulty understanding what he read, his grades were poor (TR.I pp. 110-111).
4. In her report, the dyslexia teacher stated that the Orton-Gillingham (O-G) method could help the child. O-G is a language learning strategy that is research-based, multisensory, and structured. The teacher felt O-G could help the student overcome his frustrations and become a more fluent, accurate, and independent reader and speller. The method would also him with his dysgraphia. The PWN noted in the report of the teacher that she believed the student had many of the signs of dyslexia (S.D. pp. 669-672, 679).
5. The dyslexia teacher testified that the October 27, 2014 IEP meeting—called to discuss her report—produced an IEP that did not consider any specific services for the child’s dyslexia. She found the reading services in the specially designed instruction section of the IEP of 30 minutes five times a week to be inadequate for a dyslexic student. The IEP had no goals for his dyslexia (S.D. p. 683; TR.I pp. 108-109). Instead, the team told her that they had their own reading program, the city word study program. The teacher stated she was very familiar with this program. She said it was a generic program, which was not specially designed for the student and was what all her city students used. She said the program divides words in ways that confuse dyslexics. According to the teacher, she knew the program was inadequate because the student was so far behind. She recommended that the student would greatly benefit from an O-G program to help him overcome his frustrations. If he had just dyslexia, his behavior would not have been such an issue. However, because he had dyslexia, ADHD, and autism, she said the child’s disabilities correlated with each other. The attorney for the school system asserted a continuing objection to all the conclusions the witness made on this subject (TR.I pp. 106-112).
6. Upon review of the standards of learning assessments, she observed that he made significant improvements from 2014 to 2015 in reading and mathematics. She attributed the progress to her six hours a week of instruction (TR.I pp. 112-118).
7. The dyslexia teacher testified that she began her intervention in the fall of 2014, starting from the beginning because he had not been receiving any specialized services for his learning disability (TR.I pp. 112-113).
8. The dyslexia teacher also attended the IEP meeting on January 29, 2015, which was convened to consider the student’s progress and instructional needs (S.D. pp. 704-705). She discussed her progress report of January 14, 2015 showing major improvement in the student’s reading and spelling results, which she attributed to the three hours per week of instruction she gave him. She testified that the scores increased from 31% to 48% in sounds, from 39% to 96% in reading, and from 41% to 89% in spelling. She reflected that this showed remarkable commitment by the student and the parents (S.D. p. 719; TR.I pp. 131-134, 271).
9. On March 23, 2015, the annual IEP meeting took place. The parent provided written consent to its implementation, which provided for daily support in social skills of ten minutes and reading/written expression of forty-five minutes in the special education setting, and math for twenty minutes in the general educational setting. The related service for speech would occur once a week for twenty minutes. Beginning in September 2014, for the student’s sixth grade year, the team modified the schedule as follows: math for twenty minutes daily in the general education classroom, reading/written expression for fifty minutes every two weeks in the general education setting, and academic concepts for fifty minutes daily in the special education setting. Speech service would change to four times monthly for twenty-minute sessions (TR.III p. 755). The amount of time for these services was somewhat altered by an IEP amendment on July 16, 2015 (TR.III p. 723).
10. Upon review of the standards of learning assessments, she observed that he made significant improvements in reading and mathematics from 2014 to 2015. She attributed the progress to her six hours a week of instruction (TR.I pp. 112-118).
11. The teacher also attended a follow up meeting on January 19, 2015. She discussed her progress report from January 14, 2015, which showed major improvement in the student’s reading and spelling results because of the private lessons she gave weekly. She testified that she told the team at the January 19, 2015 IEP meeting that because the student had dyslexia their program was not helping him. When she questioned the program further, the representative of the A.P. grew angry and told her not to question them, and that they had their own system, which they had used for years (Tab 1, P-12L; TR.I pp. 89-91, 108-109). The school system did not provide any services for the decoding/encoding issues. It was also clear to her that the IEP did not provide any services at all for dyslexia (Tab 2, P-12L; TR.I p. 89). The dyslexia teacher offered to visit the school and observe the student but was told this was not allowed. She also asked the teachers if they could communicate with her so that she could let them know what she was working on, but received no communication (TR.I pp. 103-105).
12. The dyslexia teacher noted that the March 23, 2015 IEP had found that the student made minimal progress with many of his goals, which she believed was consistent with his dyslexia (P-14f, 14g; TR.I pp. 122-124). She also testified that upon review of the IEP from June 17, 2015, it had no accommodations, specially designed instruction, or related services related to intervention for reading (TR.I p. 130).
13. While this testimony of the dyslexia teacher referred to the 2014-2015 IEPs, it in effect applied to all subsequent IEPs since the IEP language, related services and instruction did not materially change with regard to the student’s specific language disability. I also find that her comments and recommendations were ignored by the IEP team at this IEP meeting as well as subsequent IEP meeting.
14. The mother testified that she obtained the services of the City Youth and Services Case Manager who began in August of 2015 when the student transitioned to middle school. Her role was to advise her as to additional services available for the student inside and outside of the school. She also served as a crisis manager and provided help during IEP meetings (TR.II pp. 426-427; TR.IV pp. 921-922). According to her resume, she earned a Bachelor of Science with a minor in human services and a Master of Arts in community counseling. (Tab 8, P-82)
15. With regard to employment, she stated she was a mental health counselor with the xxxxxxxx Psychiatric Center where she treated children, adolescents, and adults with emotional disabilities. She was an in-home counselor at xxxxxx Youth and Family Services where she worked with families with autistic children and children with ADHD and was a parent educator with xxxxxx Child Service Center where she helped parents cope with children with autism and ADHD. Since the end of 2014, she had been employed with the city in case management and crisis intervention. In the case of the student, the services are provided under case management. The advocates asked that she be certified as an expert witness in dealing with children with disabilities and their functioning and who have behavioral issues in a school setting. Counsel objected to that part of the qualification pertaining to the school setting (Tab 8, P-82; TR.II pp. 447-455).
16. The case manager testified that she continues to work with the family. Currently she is in contact with the parents at least once a week and sees the student monthly in sessions lasting from thirty minutes to one hour (TR.II pp. 426-427, 475). The case manager testified that it would have been helpful to visit to school but it was made clear to her at an IEP that it was not allowed. She further stated that other schools allowed her to observe her students (TR.II pp. 476-478).
17. An informal speech-language report was prepared by a school speech-language pathologist on November 6, 2015. She reported that the student’s receptive and expressive language skills remained delay in the areas of content, form and use (S.D. pp. 810-811).
18. The SEC met for its triennial review on November 12, 2015. The group decided that the student met the criteria of a child with autism and required specially designed instruction because of the adverse impact his disability had on his progress in the general education curriculum. The team decided that no additional data was required to determine he met the criteria for eligibility. The parents participated in the review and signed the consent form accepting the decision (TR.III p. 777).
19. The mother testified that she obtained the services of an in-home family behavioral therapist upon the recommendation of the youth and services case manager (TR.IV p. 922). The therapist testified that the family had been referred to him through xxxxxx Child and Family Services (xxxxxxx) with whom he has been employed since mid 2015. In 2014, he worked at xxxxxxxxxxx Therapy. During the three-year period he provided services to approximately forty clients. He had received a Bachelor of Arts in psychology and a master’s degree in counseling. He is currently in his clinical residency and engaged in the process of obtaining his licensure. He reported that he had seen a wide range of children, including those who suffered from ADHD, autism, several developmental disorders, and learning disabilities (Tab 8, P.81; TR.I pp. 182-186, 200).
20. The behavioral therapist began seeing the student in November of 2015 and continued until recently (TR.I p. 186). At the time he began, the twelve and a half year old student was exhibiting behavior in social skills like that of a seven-nine year old child. The child experienced significant emotional instability, daily fights with family and peers, lack of self-control, and issues with coping skills. He had problems understanding facial expressions and body language. When they started, he expressed anger during every session regarding things that occurred at both home and school. For example, he had difficulty determining whether someone speaking loudly was angry, happy or excited. He recounted that the student would get over stimulated causing anxiety and stress in which he could not process those stimulators (TR.I pp. 191-194). When they began therapy, the child indicated that he did not want to be at school, disliked people, and felt he did not fit in. (TR.I pp. 191-194)
21. On September 3, 2015, the mother sent a letter of introduction to the student’s teachers. She noted that he was diagnosed with ADHD, high functioning autism and dyslexia. As a result, she wrote that he might need extra patience and help with a number of areas such as organizational skills and writing skills, speaking up in class appropriately, improving his focus and attention, and improving peer socialization. She referred them to his private dyslexia teacher if there were concerns with his reading, writing, and comprehension. (Tab 7, P-33; TR-IV-885)

C. **Relevant Developments in Regards to the Student’s Specific Learning Disability Subsequent to 2015**

1. The parents decided to seek additional support to address the student’s ongoing reading difficulties (TR.1 pp. 69-70). The mother testified that the student had difficulty making friends and social networking. One reason she procured additional support was to help with self-esteem issues and socializations. She also hired the reading/dyslexia teacher to help him because he was ridiculed by other students because he didn’t know how or what to read. TR.IV p. 881). The parents obtained an assessment from a reading/dyslexia teacher who has an undergraduate degree in Education and a master’s degree in special education. She is a Wilson Language certified teacher, which program is concerned with the structure of language and its multisensory, structured, language-based learning strategies and teaching of dyslexics and involves training teachers in how to learn the structure of language and how to teach it. She also took training as a Barton reading system dyslexia screening and became a certified screener, in which she learned the warning signs of dyslexia and how to recognize the signs and perform testing. Tab P-83; TR.I pp. 47-49.
2. The teacher had substantial experience in providing educational management workshops for teachers, individuals, and group reading therapy to students. As an adjunct professor at xxxxx College, she trained and certified graduate students in a master’s degree in special education (Tab P-83; TR.I pp. 46-50, 53). The teacher also testified that she had provided reading, spelling, comprehension, vocabulary, and writing services for children ages five to adult since 1993 and in Virginia for eleven years. She stated she saw six students a day every day of the week, some of whom were students in the school district involved in this case (TR.I pp. 64-67; Tab 8, P-83).
3. During the *voir dire*, the dyslexia teacher stated that the Wilson training consisted of a weeklong course of study and then a full year practicum with students where the trainer observed the witness. Once that requirement was satisfied for level one, she then satisfied the requirements for level two, so the training involved two years for her to be fully certified to be a trainer. She explained that the school system did not offer the training to its teachers. Counsel for the school system objected to her designation as an expert witness insofar as it had not been established that the student had dyslexia, her methods were not universally accepted in the city school systems, and she was not an expert in dyslexia (TR.I pp. 49-56).
4. After extensive argument, the dyslexia teacher was qualified as an expert in the area of screening students for dyslexia, relation of dyslexia to the student, and provision of intervention services for treating dyslexia (TR.I pp. 58-68).
5. The dyslexia teacher testified that the Wilson method from Wilson Reading was based on the Orton-Gillingham program, both of which were recognized and endorsed by the International Dyslexia Association. She explained that trainers, such as herself, traveled throughout North American and Europe training teachers. She taught an accredited college course in the Wilson method (TR.I pp. 55, 169-171).
6. The teacher reviewed the August 2016 psychological evaluation from the Eastern Virginia Medical School Medical Group (EVMS) which, under diagnostic impressions section, stated that the student had a specific learning disorder (SLD) in reading and in mathematics. That conclusion supported a finding of dyslexia, she opined, because SLD in reading was dyslexia and dyslexia was SLD (Tab 1, P-32g; TR.I p. 86).
7. The teacher quoted from the International Dyslexia Association, which labeled it as “a specific learning disability of a neurobiological origin, characterized by difficulties in accurate or fluent word recognition and by poor spelling and decoding abilities” (TR.I p. 145). Typically, these difficulties result in an unexpected deficit in the phonological component of language in relation to other cognitive abilities and difficulty in providing effective classroom instruction (TR.I p. 146).
8. The teacher submitted a report dated January 14, 2016 (Tab 1, P-8H-8J) and another report dated June 16, 2017 (Tab 1, P-8L-8O). In the 2016 report, the student’s scores in sounds rose to 84%, in reading to 95%, and in spelling to 99%. In the 2017 report, the scores rose in sounds to 94%, in reading to 100%, and in spelling to 100%. She wrote that the student had mastered steps one through 9.2 in the Wilson program. She further noted that once he mastered three more steps, he would have mastered all of his syllables, sounds, reading and spelling (TR.I p. 134-137).
9. On cross examination, the dyslexia teacher elaborated on the meaning of dyslexia, the numbers on the Wilson test, and of the steps in her program (TR.I pp. 145-155, 157-160). She was asked whether she had tried to tailor her twelve-step program with the school program and the IEP goals. She said that the teachers would not work with her, so the student was getting no reinforcement at school. She further testified that she was trying to get him to read first, but the goals on the IEP were unrealistic because he could not read. Once she made enough progress with him, she recounted that she would work on his IEP goals (TR.I pp. 157-161).
10. In August of 2016, the clinical psychologist from EVMS prepared a psychological evaluation in which her diagnostic impressions included a specific learning disorder in reading rate and comprehension (P-32g). She found that he continued to have significant difficulties with reading speed and comprehension. She recommended that the student would benefit from continued tutoring with his current reading/dyslexic teacher using the O-G methods for reading (Tab 6, P-32).
11. The school system offered the testimony of its psychologist who had been employed there for more than five years. She received a bachelor’s degree in psychology, an educational specialist degree in school psychology, and a master’s degree in behavioral science. She had twenty-three years of prior experience at other school districts before her present position. She testified that she was assigned to three schools and participated at all IEP meetings that dealt with planning and closing out cases. She also provided individual counseling, sat on preliminary intervention teams, worked individually with students, was responsible for any diagnostic evaluation testing, and performed threat assessments (TR.III pp. 581-594).
12. During the *voir dire*, she stated that she had a school psychology limited license from the Virginia Board of Psychology and had participated in a professional development course provided by the state on the student’s disabilities in the context of IEPs. She also made presentations to faculties. She acknowledged that she had never met the student, never spoken with the parents, never spoken with any members of the IEP team regarding the student, and never reviewed any of the IEPs. She had discussed with the psychologist the 2010 report. She conceded she was going to testify from the historical records (TR.III pp. 601-613).
13. I found her qualified as an expert witness in the area of interpreting testing, assessment of content, and assessment of children with disabilities (TR.III p. 613). The advocate objected on a number of grounds. He argued that since no resume was received and the name of the witness was provided without sufficient time to allow him to research her credentials and prepare a proper cross-examination, I should bar her testimony. I granted him the right to provide case law in support of his position before or during his closing argument at the hearing or brief and would retained the right to decertify the witness as an expert witness. He also maintained that the testimony would be irrelevant and violate best evidence principles as she had not seen the latest psychological report, any of the IEPs, or performed any of the tests (TR.II pp. 272-274; TR.III pp. 584-593, 611-613, 697).
14. The school psychologist reviewed the August 2016 EVMS evaluation in preparation for her testimony (TR.IV p. 947). She concluded that the tests used were valid and agreed with the methodology. The psychological profile did not vary substantially from the prior ones. There was considerable scatter among the scores that many of the scores were discounted, as had taken place with prior evaluations of the student’s ability. His situation was complicated because there had been both attention and autism concerns. The assessment referred to articulation difficulties that indicated that he had substantially more information inside himself than he was able to organize and express (TR.III pp. 640-655).
15. The psychologist also noticed that his reading fluency and passage comprehension had considerably declined across the instruments. It was unclear to her whether that was related to problems with attention or verbal comprehension (TR.III p. 655).
16. The advocate explored dyslexia on cross-examination. The psychologist reported that the school system did not use the word “dyslexia” but used “reading disability,” and looked specifically at basic reading skills (TR.III p. 656). Under the new law, “dyslexia” is now used. She conceded that the student’s reading comprehension scores had declined since 2010, and the regression would raise concerns because the information he receives as he advances in school would be more complicated. She was asked to compare the EVMS evaluation with the psychological and education report of March 13, 2016. She found that passage comprehension had deteriorated from 2013 to 2016, so there would have been a definite concern with reading fluency and comprehension (S.D. 947-956; TR.III pp. 656-670). She said dyslexia could not be determined based on the EVMS report because two subtests, letter-word identification and Word Attack, were excluded (TR.III p. 689).
17. The psychologist testified that in reviewing the recommendations in the EVMS report, she agreed with all of its recommendations except that she was unable to address tutoring with the dyslexia teacher, sleeping hygiene, or medication found in paragraphs three, seven and eight, respectively (S.D. 956; TR.III pp. 690-691). She basically agreed with the recommendations in the March 17, 2013 psycho-educational report from the school’s psychologist (S.D.807-808; TR.III p. 692).
18. On June 3, 2016, the school psychologist observed him at school. She made a number of recommendations regarding his problematic behavior in school. These included student-based intervention with adult-facilitated social skill instruction and social cognitive instruction, conversational skills, instruction on joining peer discussions, good sportsmanship instruction, strategies for handling teasing, teaching age-appropriate social behaviors, and possible additional education supports. (Tab 6, P-31A-B).
19. The director reviewed the stay put IEP of June 9, 2016 (S.D. 960-977). She testified that the IEP noted that the student required positive reinforcement and reminders to stay on task and that social skills were added to address his lack of self esteem and negative attitude and behaviors. She observed that a goal was set that he work cooperatively with a partner in group settings (S.D. 967, TR.V pp. 1343-1344).
20. She noted that in the specially designed instruction section of the IEP there would be fifty minutes daily of special education services, but the document did not address social skills (S.D. 969; TR.V p. 1346).
21. It was her view that in looking at FAPE, they looked at whether the student could access their education and make progress and progress toward his goals. They also looked at his interactions with peers and how he was doing socially. The student was able to work with a large number of staff members with whom he had rapport, she reported. She testified that they looked at all of factors to see if the student was receiving a FAPE with his areas of disability and deficit. They also wanted to ensure that the services, goals, and accommodations were appropriate to meet his needs. 1273-1276.
22. The director testified that the student was making progress on his social skills as shown on the progress reports in the March 21, 2017 proposed IEP (S.D. pp. 1031-1032, 1034-1035; TR.V pp. 1349-1351). She also testified regarding the extensive discussion of the student’s reading difficulties at this meeting where the parents were absent (TR.V pp. 1353-1357).

D. **Disability Discrimination, Harassment, and Retaliation**

1. The mother recounted the meeting on September 30, 2016 with the principal involving the encounter between her son and the second assistant principal (A.P.). At the meeting the mother was accompanied by the reading/dyslexia teacher whom the student first spoke to about the incident. The principal said he would change the student’s assignment to another A.P. He told them he could not force the second assistant A.P. to apologize, that there was no law requiring him to contact the parents, and that it was a moral issue. He further said that it was his job to make sure that it did not happen again, that everyone gets frustrated, and that he was not condoning the action. The principal was unable to tell her, she said, whether or not the A.P. knew that the student was disabled (TR.II pp. 310-311; TR.IV pp. 962-965).
2. The mother testified that at that time she asked again for a behavior intervention plan (BIP). The mother and dyslexia teacher told the principal that the student had an amazing summer and that they were concerned about his behavior because of this trauma. She believed that her son, who had been making improvements in his self-esteem, had regressed after the incident. She reported that the principal then said he would have the A.P. call her. The mother asserted that when the principal and the teacher argued at the meeting in front of her son, he threatened to expel the teacher from the meeting, which was rude and disrespectful, and that the action constituted retaliation (TR.IV pp. 962-969, 1136).
3. The father testified he learned that the second A.P. was banging the table and yelling at his son and another child, whom he assumed was not disabled. He was informed that when his son came home, he was acting wild and distraught. His wife, desperate and irate, called him and he immediately came home. The son told him that he didn’t understand why he was subject to such treatment since he had followed the proper protocol: tell, walk away, ignore. He concluded that his son was traumatized. After the incident, the father noticed he became defiant to his parents and grandparents and disrespectful to his sister. He testified that the family is still dealing with the fallout from the incident (TR.V pp. 1234-1239, 1251-1253).
4. The father, mother and son met with the principal after the incident on September 29, 2016. The principal was not outraged and told the father that school officials had good days and bad days, which he found to be an unacceptable excuse (TR.II pp. 310-311; TR.V pp. 1236, 1246). The A.P. called him, and the father testified he had no remorse. As a result the parents met with him and the student. The A.P. said he did not know the student was autistic or that he had an IEP. When the father explained the disability, the A.P. said that he was sorry and that he did not mean to scare the student. He also apologized and shook his hand. The father did not consider the apology sincere (TR.V pp. 1246-1253).
5. The behavioral therapist testified that the student told him that the other students lied and that he had not been the aggressor. Prior to the incident the student reported to him that he was making more friends, that his grades were improving, and that he had found school personnel whom he trusted and liked. After the incident, he had lost considerable trust in school personnel and saw them as hostile. He told the IEP team at the meeting that the student had regressed, but the school staff believed that the second A.P. acted appropriately (TR.I pp. 249-253). The incident set the student back because he regressed in terms of feeling safe and in his belief that the school had his best interests in mind, particularly since the A.P. was an authority figure (TR.I pp. 249-253; TR.II p. 419).
6. The principal testified that he did not consider the incident bullying because it was not reported as such. He met with the second A.P. and explained the parents’ concerns. He said the A.P. told him he would apologize, but that he also denied the allegations. The A.P. conceded that he was firm with the students, but that did not do what was alleged. The principal did not interview either of the students. The principal considered the conduct, if true, unacceptable. He said that school staff under no circumstances should yell at kids. In the meeting, the parents expressed how pleased they were with his sixth grade year and that they did not want the negative interaction to cause the student to regress. The principal volunteered to immediately assign the student to work with the third A.P. because he did not want the student to feel uncomfortable. He said that, to his knowledge, the student had never complained of bullying because of his disabilities (TR.II pp. 394-399).
7. The case manager from the city testified that she spoke with the student after the confrontation with the A.P. She said the confrontation was a major incident in the student’s life and characterized him as broken after the incident and that it set him back. When she met the student on August 8, 2016, he was excited about going back to school. After the incident, he was completely different. He said he was not like everybody else, he could never be normal, and that he did not want to go back to the school. She believed that if a functional behavioral plan and a BIP were in place the school staff would have known about it and followed the plan (TR.II pp. 436-437, 461-468).

E. **IEPs of 2016**

1. The reading/dyslexic therapist, city case manager, and behavioral therapist assisted the parents as participants at the March 22, 2016 IEP meeting. According to the meeting notice, the purposes of the meeting included developing the annual IEP and discussing the progress the student had made on his annual goals (TR.III pp. 817-819). The mother signed the consent form for his continued placement in special education (TR.III p. 833). The mother discussed with the IEP team that her son lacked focus and that the students distracted him in the classroom and during testing. She stated that the IEP did not address his lack of impulse control, disruptions, appropriate social skills or ADHD issues. She said there was no discussion of a BIP, a term which she was unfamiliar with. She did not learn what an FBA was until late April or early May of 2016 (TR.IV pp. 912-914). She reviewed the IEP and found it inadequate because it did not deal with her son’s dyslexia or behavioral issues (TR.IV pp. 928-935).
2. Another IEP meeting was held on May 26, 2016 in which the mother requested to discuss two specific issues involving the behavior of the student. The first issue concerned the information from a guidance counsel that her son had threatened to kill another student in front of her. The student reported to his mother that he had been ridiculed and that curses were exchanged. He received an in school suspension for most of the day. She was informed that the first and third A.P. did not think his threat was serious. The school system did not provide any interventions or supports and did not conduct a threat assessment. The second issue occurred when the student came home on May 12, 2016 and began looking for a large knife, claiming he wanted to kill another student who objected to his sitting beside him and put him in a choke hold. The mother told the first A.P. who said he would look into it and that they needed to have a meeting to institute behavior interventions. She never heard back from the A.P. or received a report regarding the incident. Although the IEP team was aware of these two incidents, the team did not make any changes in the IEP. Nor did the team make any changes based on the psychologist’s report (TR.V pp. 1188-1203).
3. The behavior therapist attended the IEP meeting in addition to the school representatives and the parents (TR.IV p. 980). The team considered the student’s need for positive behavioral interventions, supports, and strategies to address his behaviors interfering with his learning and decided they were necessary. They noted the student required positive reinforcement and reminders to stay on-task. They added social skills services to help address his lack of self-esteem, negative attitude, and inappropriate behaviors (TR.IV p. 986). The PWN states that the father signed the consent form for his continued placement in special education. The mother testified that she basically “begged” for an FBA. They agreed to have a psychologist, who was at the meeting, do an observation (TR.IV pp. 951, 993).
4. The team decided to take the following actions in response to the behavioral and disciplinary incidents as listed in the PWN of May 26, 2016: development of check-in and check-out sheets for the student to complete to monitor his behavior and allow him to reflect on his emotions throughout the day; use of the sheets by the case manager to collect observational data to determine factors contributing to the behavior; classroom observations by the school psychologist to gather information contributing to the behavior; the completion of classroom observations to gather information about factors contributing to his behavior; and discussion initiated by the A.P. with physical education teachers about structuring the environment for the student and the monitoring of his interactions with peers. The team planned to meet at the end of the year. It decided to implement the plan before doing a formal FBA (TR.IV pp. 976-977). The mother maintained that the items did not constitute a plan, but were just things they might do (TR.IV p. 1143).
5. On cross-examination, the mother agreed that the team generally reviewed the items listed in the PWN, but she recalled that the document lacked any mention of the discussion that took place, what the dyslexia teacher was doing or collaboration. She said she did not recall the team discussing deferral of the FBA, but did remember the team discussed starting the FBA process. She signed the PWN and did not ask for correction, even though it was not accurate, because she thought that was an oversight, and assumed that the school system would do what it promised to do (TR.IV pp. 1140-1144).
6. The team followed up with an IEP meeting on June 9, 2016 during which the parents attended along with the city case manager. In response to the observations of the school psychologist, the members modified the minutes in the special education classroom so that 107 service minutes would be provided (TR.IV pp. 957, 969). The mother signed the consent form for his continued placement in special education (TR.IV p. 974).
7. The mother testified that the team did not implement the psychologist’s recommendations set forth in her June 3, 2016 report because the team said they needed to collect more data. and since the school year would end in a week, they wanted to wait until the fall when the student would have new teachers (TR.IV pp. 955-956). More specifically, in response to questions from the school system’s counsel, she said that they discussed with the psychologist her recommendations, one of which included support for a BIP. She thought that the team would then plan to start the process. According to the mother, the first A.P., the special education teacher, the psychologist and the mother agreed the student needed an FBA and BIP, but said there was insufficient time, classes would change, and data would change, so they proposed waiting until September. When questioned about why the discussion was not noted on the PWN, the mother said it was sent home to her after the meeting as stated on the notice, and she did not want to complain that it was incorrect (TR.IV pp. 1145-1146).
8. This IEP is the last IEP that the parents signed and is considered the stay put IEP (TR.IV pp. 1129-1130). However, it did amend the March 22, 2016 and May 26, 2016 IEPs, so that these three IEPs jointly could also reasonably be considered the stay put IEP (TR.I pp. 29-35).
9. The case manager from the city recalled that at the IEP meeting a school participant from the middle school stated that a BIP was necessary and the matter was discussed by the team. The case manager testified that the psychological report of June 3, 2016 also indicated that a BIP was appropriate and she left the meeting believing that a BIP was necessary. She opined that an FBA would have assisted the student with his behaviors within the classroom on how to respond appropriately to peers, teachers, and staff when adverse events occurred. She asserted that with an FBA, instead of detentions that completely destroy the student’s day, week, and evenings, it would have been more suitable for him (TR.II pp. 430-433).
10. She rendered the opinion that the disciplinary actions against him had an adverse impact on his ability to access the education he received. This is because he internalized the disciplinary actions, saw himself in a negative light because of them, and had his enthusiasm curbed to attend school. A BIP, she continued, would have given him other opportunities to correct his behaviors and better understand what he needed to do. She also found that many of his misbehaviors arose from his disabilities (TR.II pp. 433-435). She recalled that someone from the school system recommended that an FBA be taken because of the reports and misbehaviors (TR.II pp. 431-432).
11. The mother said she signed the IEP based on the promises of the school system that an FBA would be performed when school started in the fall. At the time, she did not believe that the IEP adequately dealt with her son’s behavioral, reading, ADHD or autism issues (TR.IV p. 1129).
12. The mother testified that on September 30, 2016, she left messages for the special education coordinator and the school case manager, inquiring about the status of the request for an FBA and BIP. The school case manager responded that idea sounded great and that they would have another IEP meeting. However, she wanted to wait until after midterms (TR.IV pp. 1157-1159). The PWN confirmed the substance of the conversation (S.D. 1048, item 10; TR.IV pp. 1157-1161). Then the mother emailed the case manager again and the manager responded that she did not see any behaviors that warranted an FBA. Soon after the mother retained advocate two to represent her family (TR.IV pp. 1161-1162).
13. Counsel asked the mother why she requested an FBA and BIP. She explained that she wanted someone who knew about autism to observe her son in school because the private professionals helping her son could not do so at school and that a BIP could help control him and instruct teachers how to manage him. If every teacher had a copy of the BIP, she reasoned, then the misbehaviors would decrease and he could get educated. She acknowledged that a BIP could not prevent all disciplinary actions, but the teachers could better manage his adverse reactions to events that occur. She identified a number of teachers who sent emails to her complaining about her son’s distractibility, fidgeting, talking, and other inappropriate behavior. A BIP would help with these situations. When asked if she thought that the disciplinary referrals were the reason she believed the student did not receive FAPE, she replied that was part of it, as was the bullying, and the need for the private dyslexia teacher (TR.IV pp. 1163-1172).

G. **Incidents of the Student’s Behavior in which Discipline and/or Alleged Bullying Were Implicated**.[[3]](#footnote-3)

1. **Testimony of the Mother**
   1. The mother testified that at the beginning of the 2015-2016 school year when the student was beginning sixth grade, she received a phone call from one of the A.P. in which she was informed that another student had slapped her son and needed to fill out an incident report. The report became part of the school system’s investigation, but she did not receive any information of the outcome of this investigation. She considered her son especially susceptible to bullying because he had special needs and other students sometimes had difficulty relating to him. He can be very rigid, miss social cues, and fail to understand facial expressions as a result of his ADHD (TR.IV pp. 872-879, 881-882).
   2. In October of 2015, the mother received a call from her child’s sixth grade science teacher in which she was told he received a detention for being disruptive (TR.IV pp. 883-885). She also related that another incident occurred in November of 2015 when other students ridiculed him for his shoes and he became embarrassed and had a meltdown. That prompted the security guard to remove him from the cafeteria. She attributed the outburst to his anxiety disorder related to his autism. A diagnosis of adjustment disorder with anxiety had been made when he was in elementary school by xxxxx Psychotherapy Services and furnished to the IEP team. Nevertheless, she recounted it was not in the IEP and he received no related services, accommodations, or specially designed instruction (TR.IV pp. 886-892).
   3. On December 11, 2015, the mother sent an email to the first A.P. in which she told him that her son would be seeing him about an incident where two boys threatened to beat him up and threw a used lollipop at him (Tab 7, P. 34; TR.IV p. 894). The first A.P. said he would look into the matter. She received no further information (TR.IV pp. 894-897). In January of 2016, the student told his mother that there was a fight between him and other students and he was pushed. She reported the incident to the first A.P. and told him it was bullying. He said he would look into it; she heard nothing more from the school system (TR.IV pp. 897-899).
   4. On February 9, 2017, the science teacher sent an email detailing the student’s disruptive behavior, which resulted in a detention. On February 16, 2017 and in March of 2017 the science teacher sent emails again informing the mother of further disruptive behavior (Tab 7, P. 35-37; TR.IV pp. 899-900). Her recollection of the February 16, 2017 incident was that other students were bullying the student, which caused his misbehavior and so informed the teacher (TR.IV pp. 904-914).
   5. On April 27, 2016, the mother emailed the first A.P. about an incident in which the student told her he was harassed in the locker room. She never received a follow up report (Tab 7, P-39; TR.IV pp. 941-942). On April 29, 2016, there was an incident on the bus where the student became disruptive after he told his mother he was bullied by his peers. He ultimately served two detentions because of confusion about the location of the detention room (S.D. p. 1195; TR.IV pp. 942-945). On April 29, 2017, the mother received an email from a guidance counselor that a peer of the student had complained the student threatened to beat him up (Tab 7, P-41; TR.IV pp. 946-948). On May 10, 2016, she received an email from a speech pathologist that her son was bullying another student and was disruptive (Tab 7, P-41). The mother considered some of the disruptions manifestations of his disability (TR.IV pp. 947-948).
   6. There were other disciplinary actions taken on November 29, 2016, December 13, 2016, January, 27, 2017, February 27, 2017 and May 11, 2017, which the mother characterized as concerning the same issues. Counsel for the school district objected based on her lack of qualification as a mother to render an opinion and the alleged differences in the types of misbehaviors (TR.IV pp. 957-962).
   7. The mother testified that the school prohibited the student’s reading/dyslexia teacher, in-home behavioral therapist, and city youth and services case manager from going to the school to observe the student in the class[[4]](#footnote-4). The school officials told her the policy was to preserve the confidentiality of other students, but did not explain why or provide an alternative way for them to obtain the information they needed. She wanted the behavior therapist present in order to observe the triggers that caused the student’s misbehaviors. She recounted that the teachers did not collaborate with them, and specifically did not work with the case manager during instances when he got in trouble or consult with the dyslexia teacher (TR.IV pp. 923-927).
   8. The mother testified that the school psychologist was asked to observe the student by the IEP team at their meeting on May 26, 2016 after she “begged” for an FBA. She reviewed the recommendations listed in the report of the psychologist of June 3, 2016. The mother considered the recommendation that the student “…may benefit from behavioral interventions which involve explicit teaching and reinforcement of age-appropriate social behaviors in the classroom and school setting with opportunities for immediate and daily feedback from staff on progress…” to be a recommendation for a BIP (Tab 6, P.31; TR.IV pp. 951-953). She also stated that the recommendation that the student could benefit from adult-facilitated social skills and social cognitive instruction was not included in subsequent IEPs (TR.IV pp. 954-955).
   9. The mother also considered the recommendation that the student may benefit from peer-based interventions and concluded that was never implemented. According to the mother, the other recommendations were not implemented either. She opined that the recommendations would have helped the student perform better in school. She further stated that although she was told the items would be considered in the fall, but that never occurred (Tab 6, P31; TR.IV pp. 956-959).
   10. The mother also recounted that the EVMS report of August of 2016 was given to the principal at the meeting regarding the A.P. (TR.IV 969, 972). She secured the report because she was displeased with the IEP meeting and thought it might help in getting an FBA completed. The mother concurred with the eight recommendations in the report (Tab 6, p. 32; TR.IV pp. 972-973). One was that the student would benefit from continuing tutoring from the dyslexia teacher (TR.IV p. 974).
   11. The mother testified that before the dyslexia teacher appeared no one at any IEP meetings had said the student had dyslexia. Thereafter, the term dyslexia was never included as one of his disabilities despite receipt of her reports. (TR.IV pp. 973-974).
2. **Testimony of the Behavioral Therapist**
3. The behavioral therapist reviewed several of the student’s behavioral infractions for which he received discipline, including profanity use, defacing school property, rude classroom remarks, threatening statements, and fighting from the spring of 2016 until the end 2016 (Tab5, P25a-25v). The behavioral therapist concluded that the infractions arose out of the student’s lack of impulse control from his ADHD disorder. He opined the student would have benefited from an FBA and BIP. He defined an FBA as an assessment of a student’s behavior, its relationship to his disability, and his functioning in a certain environment. An FBA is a plan to replace negative behaviors with more positive ones through the use of various mental health interventions. The behavioral therapist also maintained that these episodes were reflective of his autism and ADHD (TR.I pp. 210-217, 225). He considered the March 2017 letter from the principal in which he agreed to put in abeyance the suspension for misconduct and wrote that, if the student failed to comply with the Code of Student Conduct and another similar incident occurred, the suspension would be activated (S.D. p. 1187). The therapist concluded this set an unrealistic goal for the student given his disabilities (TR.II pp. 420-423).
4. The behavioral therapist referred to the update of the treatment plan prepared on May 15, 2016. His goals included stabilizing behavior of the student in the home, eliminating aggressive behaviors, increasing family understanding of his disabilities to cope better with them, and increasing his adaptive and social interaction skills (Tab 1, P-11; TR.I p. 226). The therapist stated that he developed the treatment plan based on parental input, observations, and discussions with his clinical supervisor regarding assessments and general treatment goals adapted specifically for the student’s disabilities (TR.II p. 414). He examined the social/emotional behavior skills goal in the March 22, 2016 IEP, which provided that the student would work collaboratively with a partner with 70% accuracy in a group setting (Tab 3, P-19, p. 8). He found that the IEP did not address his goals and did not deal with behavioral issues (TR.I pp. 226-241). With regard to the goals, he opined that the student could have benefited from the school system implementing them based on the treatment plan (Tab 1, p-11a; TR.I pp. 247-248).
5. The behavioral therapist was told that he was not authorized to observe the student at the school. He offered a collaborative relationship but was not contacted until near the end of the 2016-2017 school year after the parents had retained the second advocate. The therapist testified that the third A.P. called and said they would be open to collaborate. That occurred on a few occasions but generally not about the IEP (TR.I pp. 241-242).
6. He recalled that the IEP team had offered service for the student including extra time to finish tests, an isolated space for test taking, and a member of the staff to speak with when the child became agitated or over stimulated (TR.I pp. 253-255).
7. In response to questions on cross-examination, the behavioral therapist elaborated on the in-home counseling sessions he conducted with the student. He said that they varied considerably, but typically focused on current behaviors. The therapist said they would role play, discussing coping skills or interventions the student could utilize to understand their use and employ in the future. He said the child is high functioning on the autism spectrum, but his primary issues related to lack of social skills and an inability to interpret behavioral cues. He stated they would talk about how to recognize what would be appropriate behavior. He said the child suffered from significant social anxiety in school, and his relationship with peers suffered because of his desire to be popular, understood and normal (TR.II pp. 402-405).
8. According to the behavioral therapist, xxxxxx, his employer, advised that in-home services was the correct level of support since outpatient services were not effective. Their services ended in early August of 2017 because they believed that the student had progressed to the point where intensive services were less necessary. He met with the student usually two or three times a week. In response to questions asking him to compare the situation at home with that at school, he replied that from what he heard from the student and from school officials at the IEP meetings, the student’s behavior was much more manageable at home. He pointed out that it is much harder to manage a student with ADHD in a room of twenty students than in a one-on-one situation. The student was also much more relaxed at home. Often the student would become fixated on some occurrence at school and would continue to be agitated and frustrated when he came home. The event, he said, would create major obstacles when the family tried to manage his behavior (TR.II pp. 405-411).
9. In reply to a query on cross-examination as to the current condition of the student, the therapist said that he tended to improve during the summer when his parents were able to get him involved in positive activities without the burden of social anxiety that arises in school. Initially, the student was afraid of being seen with the behavioral therapist in public, but that changed and he was able to expose the student to community settings, which satisfied one of their objectives (TR.II pp. 411-414). According to the behavioral therapist, the student often reported that he was the target of bullying (TR.I pp. 186-195).
10. **Testimony of the City Youth and Services Case Manager**
11. The mother testified that she obtained the services of the city case manager when the student transitioned to middle school. The role of the case manager was to advise the mother as to additional services available for the student inside and outside of the school. She also served as a crisis manager and provided help during IEP meetings (TR.IV pp. 921-922).
12. The case manager earned a Bachelor of Science with a minor in human services and a Master of Arts in community counseling. She stated she had been employed as a mental health counselor with the xxxxxxxxxxx Psychiatric Center where she treated children, adolescents, and adults who had emotional disabilities. She said she was an in-home counselor at xxxxxx Youth and Family Services where she worked with families in which some of the children had autism and ADHD. Additionally, she was a parent educator with xxxxxxx Child Service Center where she helped parents cope with children, some of whom had autism and ADHD. Since the end of 2014, she has been employed with the city in case management and crisis intervention. In the case of this student, the services were provided under case management. The advocates asked that the case manager be certified as an expert witness in dealing with children with disabilities with behavioral issues and their functioning in a public school setting. I found the witness qualified but allowed counsel to raise specific objections for determination should questions be asked which specifically referred to the school setting. (Tab 8, P-82; TR.II pp. 447-455).
13. The case manager testified that she started working with the family in August of 2015 and continued until the present day. Currently she is in contact with the parents at least once a week and sees the student monthly in sessions lasting from thirty minutes to one hour (TR.II pp. 426-475). In reply to questions propounded by the school system’s attorney, she testified that she identified social skills goals for the IEP which included recognizing social cues, interacting with peers, challenges working with peer groups, additional time for testing and at home supports. She recognized that the student had improved since she began. Her additional recommendations, she informed counsel, were initiating an FBA and a BIP. She opined that the student should engage more with peer social activities and the entire family would benefit from outpatient therapy (TR.II pp. 471-475). The case manager testified that it would have been helpful to visit the school, but at an IEP conference she was informed that was not allowed. She stated that other schools allowed her to observe her students (TR.II pp. 476-478).
14. **Testimony of the Third A.P.**
15. The school system offered the testimony of the third A.P. who received a bachelor’s degree in middle school education and a master’s degree in educational leadership. She has been with the city school system for thirteen years, which included four years as a teacher and three years as an A.P. She testified that she was responsible for special education and overseeing different content areas, such as evaluations, observations, parent content, student mentoring and discipline and attended IEP and SEC meetings. She reported that she had been involved with the student since he began at the middle school in sixth grade and had a good, positive relationship with him (TR.II pp. 486-490).
16. The A.P. examined a number of disciplinary actions during the spring of 2016 through the spring of 2017 (S.D. pp. 1156-1214). On April 29, 2016, the student received a detention for an incident where he used profanity on the bus and on May 5, 2016 he received a detention for being defiant and disrupting the class. The A.P. testified that she always took the student’s disability into consideration and would typically have given a suspension for the second incident offense (TR.II pp. 493-498). She said in the seventh grade, he had received a detention for defacing the bathroom wall and for using profanity on November 28, 2016. She counseled the student and spoke with his behavioral therapist and the parents about coordination. She also said she never had problems with the parents and had been able to collaborate and work with them (TR.II pp. 499-504).
17. On January 26, 2017, the student was accused of causing a disruption in the hallway and threatening another student. He was offered the xxxxx Program in lieu of an in school suspension. On February 21, 2017, the A.P. made a referral regarding a fight between the student and another student. He received a one day in school suspension. They took into consideration that he had an IEP and sought to limit the number of days of lost instruction. The parents appealed the suspension to the principal who upheld it, but placed it in abeyance (TR.II pp. 513-522).
18. The A.P. made another disciplinary referral for fighting on May 11, 2017. She did an investigation and counseled the student. He received a three-day out of school suspension. She took his disability into consideration in making her decision (TR.II pp. 304, 522-527; TR.III pp. 785-786). On May 11, 2017, the A.P. sent a letter to the parents detailing another incident where the student was fighting with another student. The students seemed to have been equally participating in the altercation. The suspension was for three days for violation of the Code of Conduct, which was the first time he missed school for disciplinary reasons. This was the final disciplinary matter in the school year (TR.III pp. 755-760).
19. The A.P. testified he had been doing very well overall despite the May 11, 2017 incident and that she had great rapport with the parents and the student and that the school absolutely loved to have him at the school (Tab 7, P-79A; TR.III p. 760). She responded to counsel that the only reason the proposals for the FBA, the assessment, the observation, and two additional social skills goals from the March 21, 2017, were not yet implemented was because the parents had not scheduled a follow-up meeting (TR.III pp. 760-762).
20. The A.P. analyzed the discipline imposed in the two school years. She said there were two referrals in sixth grade and five in seventh grade. She said he missed three instructional days during this period. She deemed the number of his referrals fairly common for a student, whether disabled or not. She believed he had progressed since beginning the sixth grade and that he recognized this himself (TR.III pp. 765-768).
21. The A.P. responded to the advocate’s questions regarding the referral of the student to the xxxxx Program, which occurred prior to any suspensions on January 27, 2017 (S.D. p. 1207). The advocate asked why that had not occurred earlier when he began having disciplinary issues. She explained that during the 2015-2016 school year their policy was to make the recommendation at the third referral and that the student had just two. For the following year, their policy was to make the recommendation at the third or fourth referral and they did it at the student’s third referral (TR.III pp. 795-800).
22. The A.P. replied to the query as to whether she believed an FBA was needed by stating she was open to discussion. With regard to a BIP, she said she did not have data to support a BIP, so she could not reply. She did not believe the student’s conduct was sufficiently repetitive to constitute a pattern (TR.III pp. 819-821).
23. The A.P. responded to the charges contained in the letter from the parents on May 16, 2017 (S.D. p. 1180) in which the advocate complained that the school system had never scheduled a meeting to revise the IEP even though it had new information on how their son’s disabilities impacted his ability to follow the city’s zero tolerance policies. She testified that the principal had received a copy of the EVMS report (S.D. p. 947) at the meeting with them on September 29, 2017. She reported that she talked to the parents in October about scheduling a meeting to discuss the matter with the IEP team and that the meeting was set for December 19, 2016, and then continued to January 5, 2017. She denied the school district had an expectation of zero tolerance policy. (TR.II p. 530).
24. In response to the parents’ claims that the student was being bullied, the A.P. noted that the bullying always involved different students and often the student initiated the conflict. Those factors were important because when bullying is considered, the school system looks to whether there is an imbalance of power during the investigations. Further, the student never said he was being bullied (TR.III pp. 734-742).
25. The third A.P. was asked to examine the anti-bullying policy of the school system, which provided that a written report be issued after an investigation of bullying within fifteen days. She said that the principal asked her to look into the mother’s allegations of bullying, but could not find any evidence of bullying or bullying based on any of the protective categories. She further asserted that all the disciplinary incidents she was involved in did not implicate bullying (TR.III pp. 843-845).
26. **Testimony of the Director, Compliance and Special Education Services**
27. The sixth and final witness for the school system was the director of compliance and special education services. The director oversees the special education programming and ensures compliance with the Department of Education (VDOE) regulations governing special education programs in Virginia. She held the position for three years. She has a bachelor’s degree in political science and economics and master’s degree in secondary social studies and special education, specifically learning and emotional disabilities. She also had an educational specialist degree in administration and supervision.
28. The director began her career as a teacher, which included teaching students with autism and ADHD, became an instructional specialist for one year, and then assumed the position of special education coordinator for eight years (TR.V pp. 1270-1271, 1295-1298). She was found qualified as an expert witness in special education, which included compliance and development of IEPs related to developing goals and accommodations over the objection that she would not be an expert with regard to the interplay between the three disabilities of autism, dyslexia, and ADHD (TR.V pp. 1298-1304). The advocates also objected to her testifying based on the fact that she had remained in the hearing room for the entire five days of testimony and heard all the testimony. I denied the objection, noting that the parents also remained in the room and that they had not made a motion earlier to have her testify before other witnesses. I informed them that I usually grant such motions (TR.III. pp. 861-863).
29. The director testified that she prepared the PWN in response to the second due process request filed by the parents[[5]](#footnote-5). Its purpose was to answer the Request. She maintained that FAPE had been provided. Specifically, she responded to the allegation that the IEP team did not review the private evaluation given to the school system on September 29, 2016 until January 5, 2017 by stating that they were working to set up an IEP meeting but that it did not occur until January 5, 2017. 1275 .
30. The director testified that the school board had a written policy against third parties visiting the school to conduct business and believe it would impede their instructional day. There are times, however, when they allow exceptions, usually when they observe in tandem with school personnel. 1444-1445.
31. The director reviewed a number of misbehaviors of the student, which she conceded impacted his education, but opined that if the student were in distress on a particular day it would impact his ability to receive information that day. However, she said that would not deny FAPE and does not mean he would be unable to access his education. The teachers could have recouped the material and could have continued to work with him (TR.V pp. 1418-1425).
32. The director responded on cross-examination as to whether the team could have initiated an FBA without the parents’ consent. She explained that could not have occurred without a discussion in the January 5, 2017 meeting but they did not reach that agenda item. According to the director, she would not have had to consent if assessment were not to have been conducted by a Board Certified Behavioral Analyst (BCBA). The next opportunity was the March 17, 2017 meeting, which the parents attended for seven minutes. At the March 21, 2017 meeting, the team proposed that an FBA be done, but the parents emailed that they refused an IEP meeting and did not consent to an evaluation. Thus, she said, an FBA could not be conducted because an FBA with a BCBA was requested (S.D. pp. 1014, 1043; TR.V pp. 1408-1412). She agreed that one way a BIP differed from an intervention was that all teachers are given a copy of the BIP. By contrast, an intervention by a teacher would not necessarily be known to have occurred by other teachers although they often meet to discuss what has worked with the student (TR.V pp. 1440-1441).
33. The director testified that bullying was mentioned by the third advocate in the January 5, 2017 IEP conference. However, there was never an opportunity to fully explain that the staff had investigated the incidents and that the alleged bullying did not rise to the level of an investigation. The advocates’ response always was that the student was disciplined which delayed the progress of the discourse (TR.V pp. 1360-1361).
34. The director stated that in an FBA there is an attempt to determine why a student acts the way he does, the function of the action, when it occurs and what the child is trying to obtain. Then they determine if a BIP is necessary. The BIP is designed to implement replacement behavior and to instruct the adults how to work with the child (TR.V pp. 1334-1336). The director elaborated on the difference between an FBA and an FBA with a BCBA. She explained that when they conduct an FBA they use available classroom data, whereas when a BCBA performs an FBA there are discrete trials and more one-on-one work with the student. Thus, use of a BCBA requires more of a statistical analysis with the examination on a higher level (TR.V pp. 1442-1443).
35. The director testified that the school system had taken the student’s disability into consideration with regard to the discipline. She explained that a student with a disability can receive discipline for his actions and that under the disability standards, he could have received a much higher level of discipline for the offenses he committed (TR.V pp. 1287-1292). After her review of the incidents for which the student was disciplined, she rendered the opinion that there was not a substantially similar pattern in either the kind of misbehaviors or in the level of discipline the student received (TR.V pp. 1305-1327).
36. **Testimony of the Principal**
37. The principal of the middle school testified that he had four degrees: a Bachelor of Arts in elementary and middle education, an advanced studies degree in administration, a master’s degree in reading, and a doctorate in leadership and policy attitudes. He said he has been with the city school system for twenty-two years and this has been the second middle school in which he has been the principal. He explained that his job was to help students transition from elementary to middle to high school, during a period where they were going through emotional and social developmental change. He said much of what he did consists of working closely with students and families to ensure the students succeed and are given every opportunity to do so (TR.II pp. 279-284).
38. The principal outlined the process for appeals to him of disciplinary actions. He meets with the parents, determines if due process has occurred, examines whether a proper investigation has taken place, and reviews whether the punishment is within the scope of school board policy. With regard to the incident of February 23, 2017, the principal testified that he decided to hold the three-day suspension in abeyance to show good faith because he believed the student had the ability to learn from his mistakes and because he wanted the student in the classroom. He considered the student a great kid (S.D.II p. 1159; TR.II pp. 302-305, 328-329) and did not believe a bullying incident occurred (TR.II p. 368). With regard to the incident of May 11, 2017, he said he had a positive conversation with the student in which he admitted he was wrong and wanted to learn from his mistakes. The student also said he was being bullied (TR.IV pp. 1168-1169). The meeting with the parents and the dyslexia teacher lasted about ninety minutes and was tense (S.D.II. p. 1168; TRII pp. 306-308, 311).
39. During cross-examination, the principal was asked to review the incidents referred for discipline. He testified that he did not believe they were similar in nature. For all the appeals, he reviewed the student’s records and was aware of his disabilities. During the appeals, when the parents raised disability issues, he always referred them to the IEP team to address (TR.II pp. 322-327). He also said that he took into consideration the student’s disabilities when he decided the appeal (TR.II pp. 329, 385-387).
40. He recalled that the parents mentioned bullying in at least one of the three appeal meetings (TR.II p. 365).
41. **xxxx Program**
42. The student support specialist who had been in the position for twelve years testified that she was recently promoted to a new position in positive behavior intervention and supports. She had many duties, including working with students transitioning back to home schools from alternative programs, and teaching behavior intervention in xxxx Program. For the last two years she had worked exclusively teaching in xxxx and individually with the students referred as well at the student’s middle school and a high school. She had received both a bachelor’s and master’s degree (TR.III p. 699-701).
43. The support specialist said that xxxx was a behavioral intervention program taught in ten sessions, two per week (TR.III p. 701). Topics included empathy, problem solving, communication skills, self-control, anger management, peer influence, conflict resolution, bullying, and classroom cooperation. xxxx Program is available to both special and general education students, with the only difference being the coordination with the case manager. They provide information to the parents and ask for their feedback on what the focus should be for their child. For special education students, often they will teach the topics within the framework of social skills (TR.III pp. 701-704).
44. The student began in the xxxx Program on February 1, 2017 and ended on March 6, 2017 (TR.III p. 704). The student signed contract and referral forms and progress reports were sent home (TR.V pp. 1182-1183, 1210-1211, 1214). Initially the student was shy, but he became a bit more open, more verbal, and interacted more. He also began thinking more about the topics and applying the ways to manage anger. The specialist tried to incorporate at school what the behavioral therapist was doing in terms of self-control. The specialist also talked about taking responsibility, different styles of communication, and common classroom triggers (TR.III pp. 704-713).
45. Once the program ends, she does not actively contact the students, but students are free to see her and perhaps bring a teacher with them. Sometimes a parent or staff person calls to talk to her about a child. She saw the student several times after March 6, 2017 and discussed a variety of issues. She felt that the program was helpful and effective and that the student was comfortable talking to her and expressing his emotions (TR.III pp. 714-718).
46. She was cross-examined regarding the referral process. She had reviewed the student’s disciplinary record and noticed a lot of referrals. She did not know why he was not referred earlier, but she urges administrators to refer students upon initial referrals rather than later when matters may become serious. The student was referred by the third A.P. Neither she nor the first A.P. had discussed the student’s situation prior to the referral.
47. I find that the specialist could have provided greater help to the student with regard to disciplinary matters if she had been able to begin working with him in the xxxx Program earlier than February 1, 2017 and that it would have provided greater benefit for student had she spent more time with him (TR.III pp. 719-732).
48. The director stated that she thought the referral to the Xxxx Program was appropriate at the time and was an excellent alternative discipline option (TR.V p. 1329). The behavioral therapist testified that he was impressed with the xxxx Program. He and the parents were surprised such an intervention had never been previously tried or that it was not in any IEPs. The student indicated to him that he found the program beneficial (TR.I pp. 253-254). According to the third A.P., the student support specialist works with disabled and non-disabled students. She stated that based on feedback from parents, teachers, and the student, topics are developed for discussion, so that the students will make better xxxx (S.D. pp. 1181-1182; TR.II pp. 505-507).

H. **January 5, 2017 IEP**

1. On November 30, 2016, the second advocate sent an email to school board members and the superintendent of the city schools stating that her organization was representing the parents and requesting that an IEP meeting be scheduled to address a range of issues raised in the email (Tab 7, P. 49). The parents cancelled the IEP meeting set for December 1, 2016 so that the advocate could prepare for the IEP meeting. It was rescheduled for December 19, 2016 but based on a request by the school system eventually took place on January 5, 2017 (Tab 7, P-48, H.O. exhibit 5; TR.IV pp. 1149-1151).
2. The team consisted of the parents, school system representatives, advocates two and three (by telephone), and the parents’ team (TR.IV pp. 930-931, 1047). The PWN stated that the purpose of the meeting was to review the EVMS report, and requests for an occupational therapy (OT) evaluation, additional testing, and a BCBA to conduct an FBA (S.D. pp. 1-47, 1048; TR.IV pp. 930-931, 1047).
3. According to the PWN, the meeting ended before completion of the agenda due to time constraints from the school based representatives and, according to the PWN for the June 21, 2017 IEP, because the representatives focused the discussion on the last two years of discipline (TR.IV p. 1046). The school system reported to the team that it investigated all instances of alleged bullying and rejected the charges based on reciprocal interactions of the students involved. They maintained that the disability was considered in the decisions regarding after school detentions. The report of the EVMS was reviewed. No consensus on the least restrictive environment was reached. The meeting adjourned with the understanding that a follow-up meeting would occur (TR.IV pp. 1047-1048).
4. The mother testified that she went to the meeting believing that it would deal with an OT evaluation, reevaluation of speech, and implementation of the FBA and BIP process. She wanted to obtain an update on her son’s data. There was talk about evaluations but they didn’t make progress because there was so much focus on disciplinary issues. That occurred because of her request for an FBA. There was considerable discussion about her son’s behaviors and bullying. The third advocate, whom the mother did not know, spoke about prison pipelines, bullying, discipline and laws. The mother recalled that the meeting became contentious and they ran out of time. The understanding was that the team would continue the discussion, which became the meeting on March 17, 2017. There was no agreement for updated evaluations or for an FBA and BIP (TR.IV pp. 1102-1104, 1148, 1152-1154).
5. The mother recounted that at the meeting the reading/dyslexia teacher spoke for the first time about the student’s dyslexia. She explained how she was helping the student with regard to his reading challenges, applying the Wilson method. She also sought collaboration with the school system to jointly address his needs. For the period of 2015 until the present time, the mother stated that the school system had never given him any accommodations, instructional services, therapy, or related services for dyslexia. She said the school had never acknowledged that he had dyslexia (TR.IV pp. 1123-1127).
6. The third A.P. testified that the possibility of a BIP was discussed briefly at the meeting but they could not complete the meeting because of time constraints and they agreed to schedule a follow-up meeting. The reasons for the meeting was to modify the IEP, review instructional needs, review the EVMS report, and address any parental concerns (TR.II pp. 551). The meeting lasted approximately two and a half hours, which did not provide enough time to complete review of the report. The meeting was unproductive. They could not reach a consensus and mutually decided to continue the meeting (TR.II pp. 541-543, 551, 825-828). The A.P. further recounted that the director of compliance, special education services tried to stay with the agenda but that the third advocate continued to veer off topic, focusing on discipline and how it was handled (TR.III p. 735).
7. The director testified that the purpose of the meeting was to address the agenda items requested by the parents. They began examining the student’s needs, but the third advocate kept reviewing the disciplinary incidents and bullying charges instead of the agenda despite their efforts to redirect the discourse. They were able to review the EVMS evaluation and stated they would be willing to add social skill goals to the IEP. The team was frustrated because so much time was spent on discipline. The director implicitly blamed the parents and their advocates for failing to reach the agenda items due to their emphasis on talking about discipline (TR.V pp. 1277-1279, 1285).
8. The director said that staff was ready to address an FBA with a BCBA and one was present at the meeting but the team was unable to address the matter and still has not been able to (TR.V pp. 1342-1343). She recalled that what the team learned at the meeting was that the school case manager had not shared information with the parents about the specially designed instruction related to social skills, which was contained in the last consented to IEP of June 9, 2016. Some of the breakdown occurred, according to the director, because there was a feeling that the school system was not providing any level of social skills instruction when they were doing so. The progress on the student’s goals was explained in the IEP of March 21, 2017 (TR.IV pp. 1021, 1032, 1035). The staff wanted to add goals to the IEP but never had the opportunity (TR.V p. 1351). The director testified that she believed it would have taken two hours to discuss discipline and two hours the cover the remainder of the requests. 1447-1449

I. **March 17, 2017 IEP.**

1. The meeting notice stated that the purpose for the March 17, 2017 IEP meeting was to develop the annual IEP and consider an FBA and OT evaluation in addition to five other items (S.D. p. 1020). According to the description contained in the PWN for the March 21, 2017 meeting, the school case manager spoke about the transition plans and the second advocate terminated the meeting since the school system was proposing a new annual IEP rather than amending the current IEP. The meeting adjourned before the school system could fully present the draft and develop a new IEP. They also noted that the then current IEP would expire on March 22, 2017 (TR.IV pp. 1014-1015).
2. The parents did not sign the attendance sheet, but instead wrote that “(t)he parents were not able to participate in a meeting to revise the IEP that did not provide FAPE. The special education coordinator was rude and refused to provide sign sheets when asked” (S.D. pp. 847, 905, 1062; TR.III p. 847; TR.IV p. 1154). It appears they subsequently signed the sheet. (Tab 4, P-24). The father checked the box that he did not agree to the proposed special education placement and further wrote “we reject the IEP because more testing is required and we were given an IEP at the meet[ing] by the [A.P.] which stated May 2016 as annual IEP due date. At the meeting they asked to revise the current IEP that ends in May.” (S.D. p. 1063).
3. The mother conceded on cross-examination that she knew that there would be an annual IEP but was confused because she was given an IEP with a May date. She thought the IEP team would also revise the current IEP and felt that should occur first (TR.IV pp. 1153-1157).
4. The mother testified that when she got to the meeting there was a sign which stated that school system employees need to abide by the rules, that the meeting would not go into overtime, and that the participants were not to talk over each and to show respect. She found the sign insulting and believed it was directed at her. The mother further testified she went to the meeting believing it would deal with an OT evaluation, reevaluation of speech, and proceed with the FBA and BIP process. She wanted to obtain an update on her son’s data. There was talk about evaluations but they did not occur because there was so much focus on disciplinary issues. She noted that the meeting became contentious and they ran out of time. The understanding of the team was that they would continue the discussion, which became the meeting on March 21, 2017. There was no agreement for updated evaluations or for an FBA and BIP. She said her husband did not sign the consent form because additional testing was necessary. Their second advocate asked for the last IEP and was given the May 2016 IEP. She said the school officials wanted to first draft a new IEP, rather than update the current one (TR.IV pp. 1102-1111).
5. The Third A.P. testified that the meeting was for the student’s required annual IEP review. They did not feel they needed to revise the then current IEP because they were there for the annual meeting and concerns could be addressed at that time. Their take was why revise the IEP when they could deal with the concerns in one giant meeting. The A.P. said there was no discussion of the FBA because the third advocate on the telephone focused the conversation on discipline and not necessarily the items on the agenda (TR.II pp. 545-546, 550). The A.P. recollected that the parents and the second advocate said they wanted to revise the IEP and were not interested in an annual meeting. Therefore, they left the meeting. The team agreed to end the meeting because of time constraints and have a follow up meeting to discuss all the agenda items that had not been discussed, including the FBA (TR.II pp. 550-551, 556). The mother acknowledged that there needed to be an annual meeting (Tab 7, P-61; TR.III p. 749). The school system, according to the A.P., took the position that to amend the IEP would have been effective for only three days and so refused to amend the IEP. That is when the negotiations broke down and the parents left the meeting upon advice of the second advocate (TR.III pp. 751, 837-838).
6. The mother testified that they unilaterally scheduled a meeting for four days later, March 21, 2017, which she didn’t attend because of the difficulty from changing commitments to her three children on such short notice and because it would have been considered an annual IEP. She stated that she believed the scheduling was retaliation. Her second advocate sent an email on March 17, 2017 to the superintendent stating that the scheduling and the conduct of the school personnel were harassing and retaliatory behaviors for their exercise of the protected activity of advocacy. The mother testified that the special education coordinator at the March 17, 2017 meeting told her advocate she could not sign the sign-in sheet until the end of the meeting and that she had a negative attitude towards them. The email was sent an hour after they received an email from the third A.P. in which she stated the purpose of the March 17, 2017 meeting was to develop an annual IEP. This had to be done by March 21, 2017 as the prior IEP would expire on March 22, 2017. Thus, the A.P wrote, the IEP team had to meet on March 20, 2017 or March 21, 2017 (Tab 7, pp. 74, 76; TR.IV pp. 1107-1117, 1119-1120).

J. **Post March 17, 2017 IEP Developments**

1. The meeting notice stated that the purpose of the March 21, 2017 IEP meeting was to develop the annual IEP, consider an FBA and OT evaluation in addition to five other items, and continue discussing the request for private placement (S.D. p. 1018). According to the PWN, the school system proposed to conduct an FBA, update the speech-language assessment, and conduct an observation to obtain data on whether an OT evaluation was needed (S.D. pp. 1014, 1050). The parents did not participate. The case manager stated that the student had mastered his IEP goals for math and small group participation and the speech-language therapist reported that the student was making progress in their therapy sessions (S.D. p. 1015).
2. The school system offered 107 minutes for five times every two weeks of reading/written expression, 50 minutes for five times every two weeks of special education services in the special education classroom, 20 minutes for five times every two weeks of math problem solving in the general education classroom, and 40 minutes every two weeks of reading/written expression in the general education classroom. The related service of speech/language therapy 20 minutes for four times every month was offered as well (S.D. pp. 1036-1037).
3. Neither the parents nor their advocates attended the March 21, 2017 IEP meeting but the mother testified regarding its contents. She stated that there was no reference to updating evaluations, accommodations, related services or instruction for dyslexia (TR.IV pp. 1125-1127).
4. The third A.P. testified that the team proposed to conduct an FBA, update language assessments, do an observation, and add two new social skills goals. The team talked about this proposal. Although the student had not missed any days of instruction, they were willing to look into his behavior, collect data and see if they could do better to assist him (S.D. p. 1051; TR.II pp. 535-536, 558).
5. The A.P. testified that she sent an email to the parents after the March 17, 2016 IEP meeting offering to meet on March 20th or 21st for the annual meeting. The parents’ response was an email from its second advocate to the superintendent on March 19, 2017 stating that if a meeting were held over the parents’ objection, it would have been considered harassing and retaliatory behaviors against the family (Tab 7, P-74; TR.III pp. 753-755).
6. The director testified that the student really struggled with reading comprehension, which the proposed IEP dealt with in the development of goals and accommodations offered (S.D. p. 1034, 1036; TR.V pp. 1352-1357).
7. The school system sent a PWN on June 21, 2017 in which it contended it offered FAPE but nevertheless set forth terms for settlement (S.D. pp. 1045-1046).
8. The school system sent a PWN on July 18, 2017 in response to this re-filed request in which it contended it offered FAPE but nevertheless set forth terms for settlement (S.D. pp. 1053-1054, 1058).
9. The consent for the evaluations the parents requested was sent to the parents on August 1, 2017. The mother testified that she did not have to be present at an IEP meeting to sign the consent, but did so, and it was signed on August 10, 2017. The Third A.P. testified that they have not begun the FBA yet and that they needed to conduct observations, which could not occur until the 2017-2018 school year began (Tab P. 80-b-h; TR.III pp. 850-851; TR.V pp. 1205-1206).

K. **Student Statement at the Hearing**

1. The parties reached an agreement that the student could read a statement that his mother had prepared. It would not be subject to cross-examination. It would be accepted as a statement of feeling and not as a statement of fact. Should any remarks be arguably construed as facts, they will be disregarded for the purposes of this decision (TR.V pp. 1185-1186). The statement is H.O. Exhibit 9.
2. The student began by thanking his parents and the three professionals who had already testified in the hearing for all their help. He said he was bullied a lot in sixth grade and didn’t read as well as the other students. Because of the dyslexia teacher’s work he reported that he reads better and does much better in school. He said he just wanted to be like everyone else and not get picked on because of his autism or ADHD or poor reading skills.
3. He stated that he hated being called names, feeling different from others, and attending school where there were bullies. He did not like it when he was told his friends were bullies when he felt they were not, when he was forgotten in an in-school suspension, when he was yelled at by the second A.P., when his advocate was yelled at by the principal during the out of school suspension meeting, and when he was kicked off the track team which was an out of school suspension.
4. He wanted to have an amazing eighth grade year. He wanted to make the football team, which was NFL, return to the track team, make good friends, and see old friends. He wanted to make the honor roll and pick an academy for high school. He said he wanted what he was supposed to get and be better in school. He said he learned a lot about dyslexia, autism, and ADHD since he had been involved in the due process proceedings (TR.V pp. 1224-1226).

III. **GENERAL LEGAL FRAMEWORK**

The Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §1400 *et seq.* (2005) amended the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* (1997) (IDEA). IDEA requires states, as a condition of acceptance of federal financial assistance, to ensure a “free appropriate public education” (FAPE) to all children with disabilities. 20 U.S.C. §1400(d), §1412(a)(1). Virginia has elected to participate in the program and has required its public schools, which include this school district, to provide FAPE to all children with disabilities residing within its jurisdiction. Va. Code Ann., §22.1-214-215.

The Act establishes significant procedural requirements to safeguard the rights of the student to receive a FAPE. 20 U.S.C. §1415. *Board of Education v.* *Rowley,* 458 U.S. 176 (1982). These safeguards guarantee, “… parents an opportunity for meaningful input into all decision affecting their child’s education.” *Honig v. Doe, 484 U.S. 311,* 311-312 (U.S. 1988). “Congress placed every bit as much emphasis on compliance with procedures giving parents…a large measure of participation at every stage of the administrative process…as it did up the measurement of the resulting IEP against a substantive standard.” *Board of Education* v. *Rowley, 458 U.S. 176,* 205-206 (1982).

An IEP shall include “A statement of the child’s present levels of academic achievement and functional performance…”, and “(a) statement of measurable annual goals, including academic and functional goals designed to” enable him to make progress in the general curriculum. 34 C.F.R. §300.320(a)(1), §300.320(2)(i)(A).

The applicable Virginia regulations provide that the present level of performance should be written in objective measurable terms, to the extent possible. Test scores, if appropriate, should be self-explanatory or an explanation should be included. 8 VAC §20-81-110 G.1.

Under 20 U.S.C. §1412(a) (3), the school district is required to evaluate and identify all areas of suspected disability. If the school district has knowledge that the student is not making adequate and expected progress in achieving his annual goals, the IEP should be revised. 34 C.F.R. §300.324. The IEP is also required to set forth the specific services the student will receive to progress toward his goals, 34 C.F.R. §300.320 (a) (4), and to prepare measurable goals. 34 C.F.R. §300.320 (a) (2). The IEP shall also include” a statement of the special education and related services and supplementary aids and services…to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child” to advance toward his goals and progress in the curriculum. 34 C.F.R. §300.320(a)(4).

“Congress did not intend that a school system could discharge its duty under the [ACT] by providing a program that produces some minimal academic advancement, no matter how trivial.” *Hall ex rel. Hall v. Vance County Board of Education,* 774 F.2d 629, 636 (4th Cir. 1985). The SupremeCourt has held that an IEP meets the requirements of IDEA if it is “reasonably calculated to enable the child to receive educational benefits.” *Rowley, supra,* at 207. The Fourth Circuit has determined that educational benefits meant “some form of meaningful education”. *Conklin v. Anne Arundel Board of Education*, 946 F.2d 306, 308 (4th Cir. 1991).

The Supreme Court recently clarified the *Rowley* standard as follows: “[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F. V. Douglas County School District,* 137 S. Ct. 988, 197 L. Ed. 2d 335, 349 (2017). “[W]ith respect to a child who is not fully integrated in the regular classroom[,]…[a] child’s educational program must be appropriately ambitious in light of his circumstances. …This standard is more demanding than…de minimis progress….” *Id* at 342.

The primary safeguard to protect the child’s rights is the IEP. The educational program offered by the state must be tailored to the unique needs of the disabled child by means of the IEP. 20 U.S.C. §1414. IDEA directs that local school districts, in consultation with parents, the child, and teachers, develop an IEP for each disabled child. 20 U.S.C. §1414(d)(1)(B). Should there be any complaints regarding the content of a child’s IEP, the parents have the right to an “impartial due process hearing” 20 U.S.C. §1415(f); See also *Barnett v. Fairfax County School Board,* 927 F.2d 146, 150 (4th Cir. 1991). The safeguards guarantee “...both parents an opportunity for meaningful input into all decisions affecting their child’s education and the right to seek review of any decision they think inappropriate.” *Honig v. Doe,* 484 U.S., *supra*, at 311-312.

Parents are required to be members of the group that makes the decision on educational placement. 20 U.S.C. §1414(e). Under 34 C.F.R., §300.345, (2006), the school district is required to ensure that parents are present or have had an opportunity to participate at each IEP meeting. See also §8 VAC 20-81-110.E. The written notice for an IEP meeting must indicate the individuals who will be present. 8 VAC §20-81-110.E.2. However, the right to participate does not give parents the power to dictate the outcome of the IEP team or veto educational decisions for their child without congressional mandate. *See, e.g., A.W. v. Fairfax County School Board*, 372 F.3d 674, 683, n.10 (4th Cir. 2004).

The federal regulations promulgated under IDEA provide that the school district shall take steps to ensure that a parent is present at IEP meetings and given the opportunity to participate with regard to the identification, evaluation and educational placement of the child and the provision of FAPE. 34 C.F.R. §300.322. If the parents do not attend despite having received notice and an opportunity to participate, the school district may proceed with the meeting. 8 VAC §20-81-170 A.

Hearing officers are to give appropriate deference to local educators. *Hartmann v. Loudoun County School Board*, 118 F.3d 996, 1000-1001 (4th Cir. 1997, *cert. denied*, 522 U.S. 1046 (1998). They are entitled latitude in the development of an IEP appropriate for the student. *A.B. v. Lawson,* 354 F.3d 315, 328 (4th Cir. 2004). However, that does not relieve the hearing officer of the responsibility to determine as a factual matter whether the IEP is appropriate. *County School Board of Henrico v. Z.P. ex rel. R.P.,* 399 F.3d 298, 307 (4th Cir. 2005).

The United States Department of Education’s Office of Special Education and Rehabilitative Services (OSERS) issued a letter with its definition of bullying. It defines bullying as being “…characterized by aggression used within a relationship where the aggressor has more real or perceived power than the target, and the aggression is repeated or has the potential to be repeated, over time. Bullying can involve overt physical behavior or verbal, emotional, or social behaviors… and can range from blatant aggression to far more subtle and covert behaviors….” OSERS further advised that bullying resulting in the student not receiving meaningful educational benefit could result in a denial of FAPE. *Dear Colleague Letter,* 61 IDELR 263 (2013). Virginia defines bullying as “any aggressive behavior and unwanted behavior that is intended to harm, intimidate or humiliate the victim; involve a real or perceived power imbalance between the aggressor or aggressors and victim, and is repeated over time or causes severe emotional trauma.” It excludes ordinary horseplay or peer conflict. Va. Code Ann., §22.1-276.01.

Although considered in the context of Americans with Disabilities Act and §504 claims[[6]](#footnote-6), the courts have defined the elements of peer-on-peer harassment or bullying: (1) the student is an individual with a disability; (2) he or she has been harassed based on that disability; (3) harassment or bullying was sufficiently severe or pervasive that it altered the condition of his or her educational environment so that the student did not receive meaningful educational benefit; (4) the school district knew about the harassment or bullying; and (5) the school system was deliberately indifferent to the harassment or bullying. *See Nevills v. Mart Independent School District, 608 F. App’x (5th Cir. 2015); Visnovits v. White Pine County School District* 2015 WL 1806299 (D. Nevada); and *K.R.S. v. Bedford Community School District,* 109 F. Supp.3d 1060, 1074 (S.D. Iowa 2015).

In *S.B. by A.L. v. Board of Education of Harford County*, 818 F.3d 69 (4th Cir. 2016), the Fourth Circuit applied the deliberate indifference standard from *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999) in a §504 harassment claim. Based on the *Davis* standard, a district is not liable for disability-based discrimination bullying unless its response is clearly unreasonable. Thus, the parent must show that the student had a disability, was harassed by his peers for that reason, that the harassment was sufficiently “severe, pervasive, and objectively offensive” that it effectively deprived him of “access to educational benefits and opportunities at school,” *Davis v. Monroe Count Board of Education, supra,* at 650; and that the school knew about the harassment and was deliberately indifferent to it.

Policy 5-7 of the school system’s policies and regulations sets forth its non-discrimination and non-harassment procedures. H.O. Exhibit 3. Once notified of discrimination, harassment, or bullying under several factors including disability, the principal or designee shall investigate the allegations, the complainant shall receive a notice of who is assigned to do the investigation, and a report should be prepared within fifteen days. Persons who use this procedure in good faith may not be retaliated against. The principal or designee will take appropriate action, which the victim may appeal to the superintendent.

The general legal principles applicable to bullying cases also apply to disability harassment cases as well. In a recent decision from the Office of Civil Rights on a §504 complaint, where the teacher subjected a student to disability harassment, the administrative judge stated that in responding to harassment, a school must take prompt and appropriate action to investigate or otherwise determine what occurred. In all cases, the inquiry should be prompt, thorough and impartial. Appropriate steps to end the harassment may include separating the accused harasser from the target, providing counseling, or taking disciplinary action against the harasser. If the student is receiving FAPE, the school system should address any FAPE-related concerns. *Clarksville-Montgomery County (TN) School District,* 54 NDLR 84, 116 LRP 50343, August 12, 2016. No. 10 55-10.

With regard to the claim of retaliation, S.B. applies the burden-shifting approach taken in *McDonnell Douglas Corporation v. Green,* 411 U.S. 792, 802 (1973). Without direct evidence of retaliation, the parents must show that they engaged in protected activity, the school system took an adverse action, and that action was causally connect to their protected activity. If that burden is met, then the school system must articulate a legitimate nonretaliatory reason for its actions. Then the burden to demonstrate the proffered reason is a pretext for the forbidden retaliation shifts to parents. Once again, although S.B. is a §504 case, the same standards can be reasonably applied to the IDEA claim here.

A failure to address behavioral issues appropriately can amount to a denial of FAPE. *Neosho R-V School District v. Clark*, 315 F.3d 1022 (8th Cir. 2003). IDEA is silent on the time frame for completing an FBA, so the standard would be one of reasonableness. If there has been a request for an FBA and the district has chosen a course of action, then they must initiate it within a reasonable period of time. *See Brandywine Heights Area School District v. B.M,.* 69 IDELR 212 (D.C. Pa. 2017).

Hearing officers have the authority to grant relief as deemed appropriate based on their findings. Equity practices are considered in fashioning a remedy, with broad discretion permitted. *Florence County School District Four v. Carter ex rel Carter,* 510 U.S. 7, 17 (1993).

The burden of proof on the issues of whether the IEP is deficient and whether any procedural violations deprived the student of a FAPE rests upon the party challenging the IEP. *Schaffer v. Weast,* 546 U.S. 49 (2005). For this hearing, that is the parents.

Under the SLD definition in the Virginia regulations, dyslexia is defined as a SLD that is …“neurobiological in origin. It is characterized by difficulties with accurate and/fluent word recognition and by poor spelling and decoding abilities.” It is the most prevalent of the disorder under the subtypes of SLD.” 8 VAC §20-81-10. In its SLD Supplemental Guide-Dyslexia: Frequently Asked Questions, 13-14, issued in February of 2017, VDOE answered the question about recommended approaches by referring to structured literacy, including Orton- Gillingham (O-G) based instructional approaches or programs, as recommended by the International Dyslexia Association and other organizations involved with dyslexia awareness. H.O. Exhibit 4.

The reauthorized IDEA does not mandate that a district use a particular methodology. But if the chosen methodology does not work, then there may be a denial of FAPE if the student fails to progress. *See Miller v. Board of Education of the Albuquerque Public Sch0ols,* 455 F.2d 1286, 1307-1309, *aff’d.* *on other grounds*, *Miller v. Board of Education of the Albuquerque Public Schools,* 565 F.3d 1232 (10th Cir. 2009), in which the student’s parents were entitled to reimbursement for costs of funding their own program when the student stopped receiving appropriate instruction from the district and then ceased progressing.

Hearing officers have the authority to grant relief as deemed appropriate based on their findings. Equity practices are considered in fashioning a remedy, with broad discretion permitted. *Florence County School District Four v. Carter ex rel Carter,* 510 U.S. 7, 17 (1993). However, IDEA does not provide for compensatory or punitive damages. *Sellers v. School Board of the City of Manassas*, 141 F.3d 524 (4th Cir. 1998), *cert. denied*, 525 U.S. 871 (1998). The hearing officer should grant compensatory education if appropriate with an inquiry that is “qualitative, fact-intensive and above all, tailored to the unique needs of the disabled student.” *Branham v. District of Columbia*, 427 F.3d 7, 9 (D.C. Cir. 2005). Where a court finds a deprivation of FAPE it should return the student to the educational path that would have been traveled had the educational agency provided that child with an appropriate education in the first place. *G.L. v. Ligonier Valley School District Authority,* 802 F.3d 601, 620 (3d. Cir. 2015).

Parents may be entitled to reimbursement for the cost of placement or services they obtained when the school district failed to provide FAPE, the private unilateral placement or services were appropriate under IDEA and not provided by the school system, and no statutory or equitable reasons bar reimbursement. 20 U.S.C. §1412(a)(10)(C); *Burlington School Committee v. Massachusetts Department of Education,* 471 U.S. 359, 369-371 (1885).

Hearing officers may award “educational services…to be provided prospectively to compensate for a past deficient program.” *Reid ex rel Reid v. District of Columbia*, 402 F.3d 516, 522 (D.C. Cir. 2005). Compensatory education under §1415(i)(2)(C)(iii) is usually prospective, but that is not always the case. *Department of Education v. Zachary B. ex rel. Jennifer B, Civ* No 08-00499 JMS/LEK, 2009 WL 3985686 (D. Hawaii 2009); *G. ex rel Sgt. RG v. Fort Bragg Dependent Schools*, 324 F.3d 240, 253 (4th Cir. 2003).

IV. **LEGAL ANALYSIS**

A. The school system failed to provide FAPE by delaying the scheduling of an IEP until seven months after the parents’ requested for an FBA and BIP in the spring of 2016.

The parents sought an IEP meeting in the spring of 2016 to deal with the increasingly serious behavior problems of their son. I find that based on the testimony of the mother and the case manager from the city, who was assigned to provide assistance to the student, that they left the June 9, 2016 IEP meeting believing that they had reached agreement that an FBA was necessary and that the only reason an FBA was not scheduled at that time was because they wanted to wait until the fall when additional data would be available as the student resumed his studies. The parents reasonably expected that an IEP would be scheduled soon after school began. I further find that when the mother inquired about the status of the IEP in late September, she was asked to wait until after the mid-term examinations. Eventually an IEP was scheduled for December 1, 2016, despite the school’s case manager sending an email to the mother on November 20, 2016, stating that she did not see behavior justifying an FBA, thereby effectively contradicting the agreement of the IEP team on June 9, 2016.

In November of 2016, the mother, exasperated at the delay in obtaining an FBA and BIP, the delay in scheduling an IEP meeting, and the attitude of the case manager, secured an advocate to represent her. The advocate wrote a letter on November 30, 2016 notifying the school system of her representation. The IEP meeting was reset to December 19, 2016 at the request of the parents in order for the advocate to prepare for the IEP meeting, and then continued again at the instance of the school system until January 5, 2017.

By the time of the January 5, 2017 meeting, the parents had waited for an FBA for over seven months. Both parties share blame for the breakdown that occurred at the meeting. The advocate sent the school system an incendiary and accusatory letter that also raised a number of issues of limited relevance. The parents did not know one of their advocates who participated by phone. That advocate was apparently able to steer the meeting to focus primarily on the maladaptive behavior of the student and the discipline he received rather than ensure that an FBA process immediately begin. Nevertheless, I find that by far the greater responsibility lies with the school district, which should have been able to control the agenda and allocate more time for other issues raised in the November 30, 2016 letter. The district apparently did not allocate enough time for the meeting and knew (or should have known) that two hours was insufficient. They acknowledged that it would have taken four hours to cover all the relevant topics in the letter. It also appears that posting an intimidating sign regarding decorum, time frames and rules for the meeting did not create a cordial atmosphere in the meeting room. Most importantly, the school system was responsible for the unreasonable seven-month delay in scheduling the meeting which was reflected in the acrimony at the meeting.

There was agreement among the witnesses that the parties ran out of time and that the meeting was continued. The next meeting was scheduled for March 17, 2017 and the parents reasonably believed that the focus would be on the issues raised in the November 30, 2016 letter. Instead, they learned that the team wanted to deal with the development of a new annual IEP and then consider the FBA. Now the delay had reached over nine months and they reasonably concluded that if the team would not consider the FBA first, it no doubt would run out time again. The parents and their advocate left at the beginning of the conference. Finally, at the March 21, 2017 IEP meeting, in the absence of the parents, the IEP team met and offered to conduct an FBA.

I conclude that the delay in setting a follow-up IEP meeting after the June 9, 2016 meeting was due to neglect on the part of the school district. None of the district’s witnesses could credibly explain the seven-month interval in scheduling the IEP meeting between June of 2016 and January of 2017. In their post-hearing closing brief (S.D. brief), the school system did not address the lapse. Rather, it shifted blame for the unproductive IEP meeting to the parents and their advocates (S.D. Brief, p. 2). The district argues that they attempted to meet in early December when the parents inquired about an FBA (S.D. Brief, p. 2). In fact, the parents inquired in the spring of 2016 and an FBA was discussed and agreed to at the June 2016 IEO conference.

Even assuming, *arguendo*, the parents were at fault because the meeting was unproductive, there still remains the seven-month delay in scheduling the meeting, thereby depriving the student of educational benefit. The family and her team[[7]](#footnote-7) testified forcibly and credibly about the adverse impact the confrontation with the second principal had on his progress and stated that he regressed substantially. If there had been an FBA and BIP in place, a BIP could have included an intervention protocol, including specifically how the school system could address the escalation of maladaptive behaviors. It also could have provided for collaboration between school staff and the home professionals, where the evidence shows that the school did not collaborate with them because of its policy, one that was not produced in the hearing and was flexible in implementation.

The advocates maintain in their post hearing opening brief (P. op. brief) that the IEP team did not implement any of the recommendations from its own psychologist in her June 3, 2016 report. These recommendations related to the student’s behavior and reading disability issues, thereby failing to revise the IEP appropriately as required by 34 C.F.R. 300.324(b)(1)(ii)(A) (op. brief pp. 5-7). The report was discussed at the June 5, 2016 meeting but the team deferred action pending receipt of data in the fall. No action was taken at the January meeting. For the reasons set forth above with regard to the FBA request, the delay deprived the student of FAPE. Similarly, the delay in scheduling an IEP meeting until January of 2017 also deprived the student of FAPE with regard to the EVMS report, although the delay was for only a little more than three months, from September 30, 2016 until January 5, 2017. The school division did not offer credible evidence that the delay did not deny the student of education benefit.

B. **The school district failed to offer the student FAPE because the IEPs were not reasonably calculated to enable the student to make educational progress in reading appropriately ambitious in light of his circumstances under Endrew**.

The first four claims in the Request refer generally to the alleged failure of the school system to address, in a timely fashion, the need for specific and different supports and services to address the student’s dyslexia/reading disability/specific learning disability as a result of the deficiencies in the city program. The evidence presented particularly pertained to the period the reading/dyslexia teacher began working with the student in the spring of 2014 until the present time and included the EVMS report of August in 2016, the school psychologist’s report of June 3, 2016, and the dyslexia teacher’s yearly reports. It was necessary also to examine what took place in the IEP meetings.

The mother hired the dyslexia teacher because her son could not read. The dyslexia teacher assessed the student, determined he had the warning signs of dyslexia, could not sound out words, and had great difficulty understanding what he read. At the October 2014 IEP conference, she told the team that the reading services were inadequate for a dyslexic student and the IEP had no goals for his dyslexia. She recommended use of the O-G program. The school staff said they had their own reading program, the city word study program. The teacher testified that she knew the program well, that it was a generic program used for all their students which confused those with dyslexia because of the way it divided words. She said she knew the city word study program was inadequate because its students were so far behind. She told the IEP team in the January 2015 meeting that the reason the student was improving was because of her private lessons and that their program was not helping him and lacked any services for coding and decoding. The representative of the A.P. became angry and told her not to question them further because they had their own system, which they had used for years. Her offer to visit the school and collaborate with them was rejected.

After reviewing the June 17, 2015 IEP she found that there were no accommodations, specially designed instruction, or services related to intervention for reading. While much of her testimony pertained to the 2014-2015 period, I find it was applicable to all subsequent IEPs since the IEP language, related services and instruction never materially changed with regard to the student’s dyslexia/specific learning disability. I also conclude that the IEP teams ignored her comments and recommendations at all the IEP sessions she attended through the present time.

The dyslexia teacher is a certified Wilson language teacher and a Barton reading system dyslexia screener. The Wilson method is based on the O-G program, both of which are recognized and endorsed by the International Dyslexia Association. Her reports showed his progress on the twelve-step program the method employs.

The school system objected to the qualifications of the dyslexia teacher to render expert opinions, but presented no evidence rebutting these assertions. There was neither response to the dyslexia teacher’s withering criticism of the city word study program in general or for this student in particular, nor was there questioning of the effectiveness of the Wilson program in general or with regard to the student in particular. There was no testimony challenging the teacher’s testimony about what occurred in the IEP meetings. Based on the record, I find that since the spring of 2014, the IEPs from that time until the present were not reasonably calculated to enable the student to make progress appropriately ambitious in light of his circumstances under *Endrew* and consequently did not provide FAPE to the student.

The school system maintained that there had been no diagnosis of dyslexia from the school system, and therefore, the parents’ contention that the failure to include the term in the IEPs denied FAPE is without merit(S.D. brief, p. 2). I believe that simplifies their position. There is substantial evidence that the child has dyslexia, that he has a specific learning disability, and that he has a reading disability. The confusing debate over terminology, in which the terms have often been used interchangeably, obscures the real issue of whether, whatever his disorder is called, services, accommodations and related services were appropriate to address his reading disability. I have found that not to be the case.

I have already found that the seven-month delay in scheduling of the January 2017 IEP deprived the student of FAPE. That meant that the IEP team did not have an opportunity to add information from its psychologist’s report of June 3, 2016, as alleged by the parents in their Request (p. 5) and, at least until the first meeting in March of 2017, had not completed review of the material. Nor did it have an opportunity to review the EVMS report of August of 2016, which included, among other recommendations, that the student continue receiving Wilson services from the dyslexia teacher. Without having an opportunity to review that information for the period of June of 2016, to January of 2017 as an IEP team, it was unable to modify the IEP to make changes in the word study program to address the student’s dyslexia which is his specific learning disability. I find that the city program, used to implement the IEP, was simply not structured to address the student’s reading difficulties in a manner that would comport with the mandate of *Endrew.*

C. **The parents failed to satisfy their burden of proof that the school system failed to investigate their allegations of bullying or otherwise properly address the claims**.

The parents alleged that the LEA failed to investigate the bullying charges given to their staff during the 2015-2016 and 2016-2017 school years and never advised the parents of the results of their inquiries (Request, 2, 8-10). Counsel for the school system argued that they investigated each bullying claim and that none of the claims approached the definition of bullying under Virginia law (S.D. Brief, p. 6).

The Fourth Circuit set forth in *S.B*. the requirements the parents needed to meet to establish a bullying claim. Under those standards, I find that the evidence failed to show that the school system was deliberately indifferent to the claims or that its response was not clearly unreasonable. I further find that the harassment was insufficiently severe and pervasive and did not deprive the student of access to educational benefits.

Upon examination of the events recounted by the parents and their team, I find that collectively the incidents did not constitute a perceived or real power imbalance between the student and the aggressor except perhaps in a few instances where there was more than one aggressor. Often the student himself was the aggressor or it was unclear who the aggressor was. The allegations were often of inarticulate conduct. Different students were alleged to be the aggressors. I found the testimony of the director to be persuasive—that the confrontations may have impacted the student’s education for a short period, but that the loss could have been made up easily in subsequent classes and the episodes were not significant enough to deny FAPE.

Many of the reports included ordinary teasing, argument, or peer conflict, which did not constitute bullying under the Virginia statute. The assistant principal testified that she investigated the allegations promptly and found them without merit. A formal investigation, as required by city policy, was considered unnecessary since she believed the charges did not fit the definition of bullying.

I conclude that the school investigated promptly the alleged altercations and events, punished students involved, and counseled or talked to the students where disciplinary actions were unnecessary. I think the school system could have better communicated with the parents about their understanding of what Virginia law considered to be bullying and what the results of their inquiries were, but I cannot conclude that the school system’s response was clearly unreasonable or they acted with deliberate indifference.

D. **The parents failed to satisfy their burden of proof that the school system failed to investigate their allegations of disability harassment or otherwise properly address the claims**

In their Request, the parents asserted that the student was subject to disability harassment in connection with an incident involving the second A.P. on September 29, 2016, which, they contended, the school division did not properly address (Request, pp. 2, 8-10).

The child reported that during an interrogation with another student and him, the A.P. had yelled at him and banged the table. The parents met with the principal the next day and complained about harassment.

I find that the principal responded promptly to the complaint, met with the parents immediately, engaged in an inquiry which was prompt, reasonably thorough—although he might have spoken with both students who were present at the incident—and impartial. Given the A.P.’s denial that the incident took place as alleged, the principal was unable to determine whether the claim was true. However, he proceeded to some extent as if it were when he took immediate action to separate the alleged harasser from the student and assigned the third A.P. to the student. The second A.P. informed the father and the principal that he was unaware of the student’s disability at the time of the incident, which calls into question whether even the disability discrimination principles apply at all. When the parents met with the A.P. soon after the incident he apologized and shook the student’s hand.

Under this set of circumstances, I cannot conclude that the parents have met their burden of proving by a preponderance of evidence that the school system failed to properly investigate the charges. I believe that the allegations were serious and specific enough that the principal should have initiated the procedures in the written city policy, but his failure to do so did not violate IDEA because a formal investigation is not required.

I also find that the incident, as perceived by the student, had a significant impact on his ability to access the educational program and impeded his progress at school. The parents and their team testified convincingly regarding the student’s regression at school, fear for his safety, disrespect for his family, and low self-esteem. This conclusion is relevant to the need to have conducted an FBA before or soon after the incident and then put a BIP in place, as explained in Section A of this Legal Analysis.

E. **The parents failed to meet their burden of proof that the school district retaliated against them because of their advocacy for the student in pursuing his rights under IDEA.**

The parents contend in their Request that the school district engaged in retaliatory behavior once they engaged in the protected activity of advocating for their child’s educational needs (Request, p. 2). In support of their contention, they refer to the confrontation between the student and the A.P. on September 29, 2016 and the meeting with the principal on September 30, 2016. The parents became “frustrated, fearful and distrustful” as a result of these two meetings and hired the second advocate. They appear to allege that the school system retaliated against them by giving a detention and an in-school suspension to their son for defacing school property when he wrote an obscenity and a threatening remark on the bathroom wall. They may also be alleging that the school system did not convene an IEP meeting to deal with the student’s misbehaviors because of the advocacy (Request, p. 8).

The parent also maintained during the hearing that retaliation occurred when she and the dyslexia teacher met with the principal on September 30, 2016 during which they argued and he became angry. When he threatened to expel the teacher, she considered it retaliation. She also believed the scheduling of the IEP for March 21, 2017 on short notice and without consultation was retaliation.

The advocates raise still another claim of retaliation in their post-hearing submission, which is beyond the scope of their Request. They allege that the school system retaliated against them once they became involved in representing the parents and advocated for a revision of the current IEP. In support thereof, they argue, *inter alia*, that the testimony of two of the school officials indicated that they were offended by their suggestion that the district was engaging in the school to prison tactics against this African-American student with disabilities. Having heard their testimony, I find that recollection was not what I heard at the hearing. I find that the retaliation claim is unsupported by any credible evidence.

It is indisputable that the parents advocated for their son, a disabled student, which constituted a protected activity, and took an adverse action. But as for the fourth prong that is required to be met by the *S.L*. decision—a causal connection between any of the adverse actions and the activity—there is no credible evidence of a link between the events. With regard to the incident involving the A.P, the dyslexia teacher was not removed from the meeting. I find that simply a threat to do so in an emotional and stressful meeting in and of itself cannot be considered retaliatory. As for the punishment for defacing the wall, the student did not deny the vandalism and the punishment appeared reasonable and consistent with the level of severity of prior adverse actions. I find that there was a legitimate nonretaliatory reason for the punishment. With regard for the failure to convene an IEP meeting in a timely fashion in the fall of 2016, there is no evidence that the school system decided to delay the meeting for retaliatory reasons. Rather, other nonretaliatory explanations have been offered (see Section A of Legal Analysis). In none of these instances did the parents meet their burden by showing that the reasons were a pretext for the retaliation.

F. **Consideration of additional claims raised by the parents in their post-hearing briefs**

The advocates argued several other claims in their briefs. They contend that the scheduling of the March 21, 2017 IEP without consulting them or providing sufficient notice deprived them of their right to participate under 34 C.F.R. 503(a) & (b). (p. brief, p. 5. This is no doubt a technical violation of the regulation, but the parents and advocate arrived despite the late notice and departed almost immediately. The meeting had been scheduled on short notice because the student’s IEP would expire on March 22, 2017 according to the PWN and the testimony of the school system’s witnesses. Regardless, the stay-put IEP would have remained operative. I find that would not be an acceptable excuse for failing to provide adequate notice. The advocates did not propose any remedy and I do not see what remedy would be appropriate at this time. As such, I am denying relief on this claim[[8]](#footnote-8).

The advocates also claim that the failure of the LEA to collaborate with parents’ team and permit them to observe the student at school denied FAPE. (P’s op. Brief, p. 4). This claim also appears to be outside the scope of the Request. While it is lamentable that such collaboration did not occur for what can arguably be considered flimsy reasons, I can neither find anything in IDEA nor from any case law that would support the assertion. Nor did the advocates provide any legal support. Therefore, I find that the lack of collaboration does not constitute a denial of FAPE.

Another claim that appears to be outside the scope of the Request was the contention that the student should have begun the Xxxx Program at an earlier date than February 1, 2017, and therefore, he was denied FAPE. There was universal agreement that Xxxx was generally an excellent alternative disciplinary program that helped the student with his behavioral issues. I found that it also would have helped him further had the sessions lasted for a longer time or began at an earlier date. However, it was not discussed before his participation at any of the IEPs or included in any of the IEPs. And, once again, I found nothing in IDEA or from legal research that gave me a basis for finding a denial of FAPE. Nor did the advocates provide any legal support for their position.

The parents allege that the failure of the principal and second principal to consider whether the student’s maladaptive behavior grew out of his disability denied him FAPE (P. Rebuttal Brief, p. 2). In fact, their testimony made it clear that they considered the student disabled in determining the appropriate discipline. In some instances, he received a lesser penalty than if he had not been disabled. Therefore, there was no denial of FAPE.

G. **Determination of The Appropriate Remedies for the failure of the school system to provide FAPE with regard to its failure to schedule an IEP within a reasonable period of time to consider the parents’ request for an FBA and BIP, and with regard to the provision of inadequate reading services for the student for his dyslexia/specific learning disability**

Under the analysis in *Burlington* and IDEA, the parents are entitled to reimbursement for the costs of their son’s unilateral placement if the school district denied him FAPE, if the parents’ placement was appropriate, and if there were no statutory or equitable reasons to bar reimbursement.

The school system did not question that the three hours per week of therapy and the charges were reasonable. They did not proffer evidence that the dyslexia teacher’s curriculum was somehow inadequate. I find that the evidence is overwhelming that the student made educational progress while in his unilateral placement with the reading therapy sessions provided by the dyslexia teacher.

Counsel raised the objection that the state regulations governing special education programs prohibit reimbursement of private tutoring fees, citing 8VAC-81-210.S.3 (S.D. Brief, p. 3). However, that provision pertains to attorneys’ fees and the cost of individual evaluations only. Her reliance on the *P.L*. case is also inapposite: The Court there held that IDEA did not require an educational agency to pay for the cost of education where FAPE was offered (S.D. brief, p. 3). In the instant case, FAPE was not offered.

The parents submitted bills from the dyslexia teacher that were not objected to on the basis of authenticity or reasonableness. The $750 monthly bills for reading therapy services for the two-year period from July 1, 2015 to July 1, 2017 were admitted and the parents are entitled to reimbursement. (H.O. group exhibit 10). The $750 monthly bills for the therapy for the period prior to July l, 2015 are rejected as are two bills of $350 each for two assessments and two bills of $350 each for attendance at two IEP meetings based on the two-year statute of limitation contained in 8VAC-§20-81-210. E.1. The parents also seek reimbursement for two bills of $350 each for IEP meetings and one for $400 for a prehearing conference. I was unable to find a legal basis for reimbursement and the advocates did not provide any. Therefore, I deny reimbursement for those items.

The parents in their two briefs did not address the appropriate relief for the two claims in which they were the prevailing party. In their Request, they sought reimbursement for the tutoring services that have been granted. They were allowed until September 10, 2017 to submit any additional bills, but did not do so (TR.V pp. 1255-1256). Since they did not prevail on the disability harassment, retaliation or bullying claims, they are not entitled to the relief sought in their Request or for any relief for those claims.

The parents did not identify any specific remedy for the delay in scheduling an IEP or for an FBA either in the Request or in the post hearing briefs. The parents signed the consent forms for evaluations and presumably that will soon commence. Terms for settlement included an FBA supported by a BCBA, but all the other terms for settlement were not agreed to and the negotiations ended. An FBA would appear to satisfy the parents with regard to this issue and will be ordered.

V. **MAJOR ISSUES**

1. Whether the LEA failed to provide FAPE by its delay in scheduling an IEP until seven months after the parents requested an FBA and a BIP.
2. Whether the LEA failed to offer the student with a dyslexia/specific learning disability FAPE because his IEPs were not reasonably calculated to enable him to make meaningful educational progress in reading to meet his unique needs based on the standards set forth in *Rowley* and *Endrew*.
3. Whether the parents satisfied their burden of proof that the LEA failed to investigate their allegations of bullying or otherwise failed to properly address their claims.
4. Whether the parents satisfied their burden of proof that the LEA failed to investigate their allegations of disability harassment or otherwise failed to properly address their claims.
5. Whether the parents satisfied their burden of proof that the school district retaliated against them because of their advocacy for the student while pursuing his rights under IDEA.
6. What remedies, if any, should be ordered should the parents prevail on any of their claims.

VI. **CONCLUSIONS OF LAW**

1. The student has been diagnosed under the disability category of autism, and thereby qualifies for services under IDEA.
2. The parents were afforded all procedural and notice protections required by IDEA.
3. The LEA failed to provide FAPE by its delay in scheduling of an IEP until seven months after the parents requested an FBA and a BIP.
4. The LEA failed to offer the student FAPE because his IEPs were not reasonably calculated to enable him to make meaningful educational progress in reading to meet his unique needs based on the standards set forth in *Rowley* and *Endrew*.
5. The parents did not meet their burden of proof that the LEA failed to investigate their allegations of bullying or otherwise failed to properly address their claims.
6. The parents did not meet their burden of proof that the LEA failed to investigate their allegations of disability harassment or otherwise failed to properly address their claims.
7. The parents did not meet their burden of proof that the school district retaliated against them because of their advocacy for the student in pursuing his rights under IDEA.
8. The parents are the prevailing parties with regard to the denial of FAPE based on the failure to schedule an IEP meeting after the June 2016 meeting in a timely fashion and because the IEPs were not reasonably calculated to enable the student to make meaningful educational progress in reading to meet his unique needs. The LEA is the prevailing party on the remainder of the issues.

VII. **FINAL ORDER**

1. Within twenty days of the entry of this Order, after proper notice to the parents, the school system will convene an IEP team meeting for the purposes of ordering an FBA with data collection and analysis supported by a BCBA which shall be required to commence promptly.
2. Within thirty days of the entry of this Decision, the LEA shall reimburse the parents of the student the total amount of $18,000 for the costs for replaced services in reading therapy, which the district failed to provide, and which services the reading/dyslexia teacher did provide during the twenty-four month period between July 1, 2015 and June 30, 2017. Documents submitted during the hearing constituted proof that the parents made such payments.
3. The LEA is ordered to pay the reading/dyslexia teacher the sum of $750 a month, effective retroactively as of July 1, 2017, for her to continue to provide the same reading therapy services to the student as she has been currently providing until such time as the student has completed the twelve-step Wilson program or until the next annual IEP meeting in the spring of 2018, whichever occurs first. Once that condition has been met, the school district will convene an IEP team meeting for the purposes of modifying the IEP so that the student will continue to receive reading services specially designed to address his dyslexia/specific learning disability. The team is directed to consider seriously using the Orton-Gillingham program, the Wilson method from Wilson Reading or a similar program endorsed by the International Dyslexia Association to provide those services.
4. The LEA is ordered to develop and submit an implementation plan, with a copy to the parents, within forty-five days of this decision in accordance with 8 VAC §20-81-210.N.16.
5. All other relief requested by the parents is denied.
6. This decision is final and binding unless either party appeals to a federal District Court within ninety calendar days of the date of this decision, or to a state Circuit Court of local jurisdiction within one hundred eighty calendar days of the date of this decision.

Date: 9/25/17 \_\_\_\_\_\_\_/S/\_\_\_\_\_\_\_\_

Alan Dockterman

Hearing Officer

**CERTIFICATE OF SERVICE**

I hereby certify that I have, this 25th day of September, 2017, caused this Decision to be sent via first-class mail, postage prepaid, and by e-mail to the parents, advocates for the parents, counsel for the LEA and to Patricia V. Haymes, Esq., Director, Dispute Resolution/Administrative Services Department of Education, Commonwealth of Virginia, P.O. Box 2120, Richmond, VA 23218-2120.

\_\_\_\_\_\_\_\_/S/\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Alan Dockterman

1. The Request purports to identify six issues, but in the section “facts relating to the problem,” far more issues are also raised. Request, pp. 2-10. The issues have been combined, reorganized and rephrased for clarity. The hearing officer has the right to redefine a party’s issues, so long as no substantive changes are made. *See J.W, v. Fresno Unified School District,,* 626 F.3d 431, 442-443 (9th Cir. 2010). [↑](#footnote-ref-1)
2. The videotape was not used in the hearing. [↑](#footnote-ref-2)
3. The allegations of bullying and the consideration of behaviors by the student which precipitated disciplinary actions are grouped together in this subsection because, in many instances, they arise from the same incident. [↑](#footnote-ref-3)
4. The mother referred frequently in the hearing to these three individuals who also testified as her people, her service providers or her team. [↑](#footnote-ref-4)
5. The first Request was dismissed without prejudice on June 28, 2017 (S.D. brief, p.1). [↑](#footnote-ref-5)
6. Section 504 of the Rehabilitation Act provides that “no otherwise qualified individual with a disability...shall, solely by reason of her or his disability be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a). [↑](#footnote-ref-6)
7. The usual complaint that expert witnesses are “hired guns” who are paid by a party to support his or her position regardless of its validity, does not apply here. Of her three expert witnesses, two were paid through Medicaid, while the other witness, the reading/dyslexia teacher, was paid by the parents but often provided her therapy without charge. In my view, that enhanced their credibility. [↑](#footnote-ref-7)
8. This is another claim of the parents that appears to fall beyond the scope of the Request, but the school system did not object. Many of the other claims of the parents have been abandoned, *e.g.*, transfer to another school as relief; no evidence introduced to support the claim, *e.g.*, extended school year services, and beyond the two-year statute of limitations, *e.g.*, challenges to discipline in early 2015. [↑](#footnote-ref-8)