**#21-009**

***V I R G I N I A:***

# DEPARTMENT OF EDUCATION

# DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES

***OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES***

**In the matter of**

**XXXXXXXXXXX, a minor,**

**by XXX parent, XXXXXXXXXXXX, Petitioner**

**and VDOE Case #: 21-009**

**XXXXXXXXXX PUBLIC SCHOOLS, Respondent.**

**HEARING OFFICER DECISION**

**Present for Hearing, September 30, 2020:**

**Rhonda J. S. Mitchell, Hearing Officer**

**XXXXXXXXXXXX, Parent, Petitioner**

**John Cafferky & Wesley Allen, Counsel for XXXXXXXXXX Public Schools (XXPS)**

**XXXXXXXXXX, Coordinator, Due Process and Eligibility, XXPS**

**Brian Miller, Case Monitor, Virginia Department of Education (VDOE)**

**Present for Hearing, October 1, 2020:**

**Rhonda J. S. Mitchell, Hearing Officer**

**XXXXXXXXXXXX, Parent, Petitioner**

**John Cafferky & Wesley Allen, Counsel for XXPS**

**XXXXXXXXXX, Coordinator, Due Process and Eligibility, XXPS**

**Brian Miller, Case Monitor, VDOE**

**Present for Hearing, October 2, 2020:**

**Rhonda J. S. Mitchell, Hearing Officer**

**XXXXXXXXXXXX, Parent, Petitioner**

**John Cafferky & Wesley Allen, Counsel for XXPS**

**XXXXXXXXXX, Coordinator, Due Process and Eligibility, XXPS**

**Present for Hearing, October 13, 2020:**

**Rhonda J. S. Mitchell, Hearing Officer**

**XXXXXXXXXXXX, Parent, Petitioner**

**John Cafferky & Wesley Allen, Counsel for XXPS**

**XXXXXXXXXX, Coordinator, Due Process and Eligibility, XXPS**

**Present for Hearing, October 14, 2020:**

**Rhonda J. S. Mitchell, Hearing Officer**

**XXXXXXXXXXXX, Parent, Petitioner**

**John Cafferky & Wesley Allen, Counsel for XXPS**

**XXXXXXXXXX, Coordinator, Due Process and Eligibility, XXPS**

**Brian Miller, Case Monitor, VDOE**

**Present for Hearing, October 15, 2020:**

**Rhonda J. S. Mitchell, Hearing Officer**

**XXXXXXXXXXXX, Parent, Petitioner**

**John Cafferky & Wesley Allen, Counsel for XXPS**

**XXXXXXXXXX, Coordinator, Due Process and Eligibility, XXPS**

**Brian Miller, Case Monitor, VDOE**

**Present for Hearing, October 19, 2020:**

**Rhonda J. S. Mitchell, Hearing Officer**

**XXXXXXXXXXXX, Parent, Petitioner**

**John Cafferky & Wesley Allen, Counsel for XXPS**

**XXXXXXXXXX, Coordinator, Due Process and Eligibility, XXPS**

**Brian Miller, Case Monitor, VDOE**

**Hearing Location:**

**Conducted Virtually - Blackboard Platform**

**Court Reporter:**

**Veritext**

# INTRODUCTION and PROCEDURAL HISTORY

***Introduction***

This matter came to be heard upon the filing of a *pro se* request for due process hearing (complaint) by XXXXXXXXXXXX (parent or petitioner) against XXXXXXXXXX Public Schools (XXPS), on behalf of her minor XXX, XXXXXXXXXXX (XXX, student or child), pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415(c)(2)(B). The complaint was filed on August 26, 2020. XXXXXXXXXX Public Schools was represented by Attorneys John Cafferky and Wesley Allen from the Law Firm of Blankingship and Keith, Fairfax, Virginia.

The Hearing Officer (HO) was formally appointed by letter dated August 31, 2020 from XXXXXXXXXX, Coordinator, Due Process and Eligibility, XXPS, XXXX, Virginia. The HO formally accepted the appointment by letter dated August 31, 2020. Brian Miller was appointed by the Virginia Department of Education as case monitor on August 31, 2020 and attended five days of the hearing.

The seven day hearing was conducted virtually on September 30, October 1 and 2, 2020. Although scheduled to proceed on October 5 and 7, 2020, the hearing was delayed until October 13 and 14, 2020 due to an unexpected illness of the petitioner. Due to the exchange of seven lengthy exhibit binders and lengthy witness examinations, the hearing was extended to include October 15, 2020. On this date, petitioner's internet connection was lost during the hearing and the hearing was again extended to October 19, 2020.

During the course of this due process proceeding, the HO has:

* issued a timely prehearing report;
* rendered timely notices for six prehearing conferences and one mid-hearing conference;
* provided timely notice of the originally scheduled hearing and amended dates;
* provided the hearing agenda;
* conducted six prehearing conference calls and one mid-hearing call;
* entered two decisions on motions
* entered five prehearing orders
* entered a transcript distribution order
* entered a protective order
* entered one post hearing order
* issued one post-hearing decision letter and
* issued a timely case closure report

These documents are incorporated herein by reference, have been placed on record and are filed with the proceedings in this case. A summary of the orders and decisions has been provided in this decision.

***Prehearing Matters***

From the beginning of this due process procedure, the HO and counsel for XXPS received an overwhelming number of electronic messages (emails or messages) from petitioner expressing various concerns. Throughout the hearing process, a barrage of emails was received from petitioner on almost a daily basis. Among other topics, petitioner expressed concerns about the following matters:

* fairness of the process
* credibility and integrity of potential witness testimony
* integrity of XXPS counsel
* integrity of the hearing moderator
* potential breaches of confidentiality and privacy
* perceived conflicts of interest by counsel for XXPS and the moderator and
* the alleged incomplete delivery of her XXX's educational records

This continuous stream of emails distracted from the true issues of the case. Nevertheless, the HO made every effort to address petitioner's numerous concerns and to be responsive. Most of petitioner's concerns were addressed by the HO through orders or decisions.

From the outset of this proceeding, petitioner informed the HO that she had previously filed over 30 complaints against XXPS through the Virginia Department of Education (VDOE) complaint process. She claimed to have had success with her complaints and alleged that XXPS was a "habitual offender."

## The Hearing

During the hearing, petitioner often questioned the truthfulness of her own witnesses. She also questioned the truthfulness of XXPS witnesses. There were some witnesses that she wanted the HO to designate as hostile. Petitioner would often testify instead of asking a question of the witness. Petitioner would often rephrase the same question over and over in an effort to elicit a different response from the witness. Petitioner was often aggressive and belligerent with witnesses. On one occasion when the HO confronted petitioner's antagonistic behavior towards her own witnesses in an effort to deescalate her questioning techniques, petitioner claimed she was zealously advocating for her XXX and insinuated that the HO was being unfair.

The hearing was originally scheduled to be conducted on September 29, 30, and October 1, 2020. Notice for these dates was sent by the HO on September 2, 2020. Petitioner was granted a one day delay to submit her exhibits. Considering the 5-day requirement to submit exhibits, this pushed the date to start the hearing to September 30, 2020. October 2, 2020 was also added. Due to the volume of documents involved, the hearing dates were extended to five days. As rescheduled, the hearing commenced on September 30, 2020 and proceeded on October 1 and 2, 2020. The hearing was scheduled to proceed on October 5 and 7, 2020, however, due to petitioner's on-going eye problems that adversely affected her ability to proceed, the hearing was continued until October 13, 14, and 15, 2020.

Around noon on October 15, 2020, petitioner had internet connection problems and could not reconnect to the site. Around 3:00 PM, it became clear that petitioner was not returning, so the parties informally discussed rescheduling. It was decided that Monday, October 19, 2020 would be scheduled as the last day for the hearing. Notice of this date was sent to all parties.

On the final day of the hearing, October 19, 2020, petitioner was unable to fully connect to the site. Petitioner was able to hear and see the proceedings but her audio connection did not work. Consequently, Kandise Lucas, an experienced advocate, was asked by petitioner to substitute. Ms. Lucas, who it was revealed had been assisting petitioner behind the scenes throughout this proceeding, took over and served as petitioner's representative. Ultimately, petitioner was able to personally deliver her closing argument by telephone connection.

***Post Hearing Matters***

Post hearing, petitioner began to again send numerous email messages to express concerns. Her concerns included the following matters:

* Petitioner expressed concern about non-substantive inaccuracies in the transcripts (for example, wrong date that her XXX attended the hearing). She was instructed by the HO to submit an errata sheet.
* Petitioner expressed concern about an *ex parte* communication between the HO and XXPS counsel (referring to an off-the-record logistical conversation conducted on October 15th to discuss how to proceed after petitioner did not return to the hearing due to technical issues.) Petitioner insinuated that this conversation was somehow improper and questioned the integrity of both the HO and counsel for XXPS as a result of this off the record conversation.
* Petitioner insinuated that the moderator intentionally muted her audio during the October 19th hearing.
* Petitioner claimed she was prejudiced because she was unable to testify on the last day of the hearing, despite the fact that she was not scheduled to testify and her name did not appear on either parties' witness list.
* Petitioner continued her demand for an audio of the transcript, claiming that she was entitled to it.
* Petitioner alleged a lack of professionalism by counsel for XXPS on October 19th (The allegation is unclear but the assumption is that petitioner did not like counsel's closing argument.)
* Petitioner complained about the HO's decision to declassify one of her witnesses as an expert. (This decision was made based on petitioner's representation during the hearing that she had previously sent the witness' resume'. However, neither counsel for XXPS nor the HO received the resume'. Petitioner was unable to later forward the message she claimed to have already sent but instead sent a suspicious scanned copy of a message that included the resume'.)
* Petitioner maintained the on-going allegation that XXPS unfairly received the hearing transcript before her or the HO.

Although it is presumed that petitioner was able to hear the hearing on October 19th, petitioner complained to VDOE that neither the case monitor, Brian Miller, nor the virtual moderator, XXXXXXXXXX, did anything to assist her with her audio connection. As mentioned above, petitioner unsubstantially insinuated that her microphone had been intentionally muted by the hearing moderator, XXXXXXXXXX.

Ultimately, petitioner was able to proceed with the assistance of an experienced advocate, Kandise Lucas, who, without notice, appeared in her stead. Both petitioner and the advocate represented that Ms. Lucas had been helping petitioner throughout the due process proceeding and was therefore familiar with the case. Petitioner was also able to connect via telephone to personally deliver her closing argument.

Despite having addressed this issue at close of the hearing on October 19, 2020, emails were received from petitioner by Veritext, VDOE, the HO and counsel for XXPS requesting an audio recording of the hearing to accommodate her sight problems. Petitioner further complained to VDOE that she was unable to testify at the hearing on October 19, 2020 and claimed they needed to exert oversight regarding these issues as well as the off-record scheduling conversation between the HO and counsel for XXPS as mentioned above.

In regard to the message(s) sent to VDOE, Patricia Haymes, Director of Dispute Resolution, responded by reminding petitioner that the HO remained in charge of the due process proceeding until a final decision was rendered. This would seemingly leave petitioner no choice but to appropriately defer to the HO.

However, petitioner did not accept VDOE's response but instead wrote back alleging that VDOE was responsible for oversight and shifted the topic to transcript delivery. Petitioner alleged that VDOE should be concerned about alleged early transcript distribution to counsel for XXPS and XXXXXXXXXX. This alleged infraction had already been addressed by the HO through a transcript distribution order entered on October 9, 2020. It is here noted that petitioner unusually took it upon herself to personally contact several employees of Veritext, the transcription service, to ascertain information about transcript delivery.

In reference to petitioner's request for an audio version of the hearing, this issue was addressed at close of the hearing on October 19th. Both counsel for XXPS and the HO agreed that they had no objection to petitioner receiving audio of the proceedings due to her eye condition, but that the final decision whether to release the audio or not would depend on the policy of the transcription service, Veritext.

After that, petitioner directly contacted the court reporter for the audio and the resulting message indicated variance on this issue between petitioner and the court reporter. The court reporter deferred to Veritext. Petitioner did not agree with the court reporter's position on the issue. After receipt of a message from petitioner on October 24, 2020 that was also sent to Veritext employees plus the overall commotion associated with this issue, the HO ultimately issued a decision on October 24th denying petitioner's request for an audio of the hearing. Moreover, petitioner was already scheduled to receive a hard copy and electronic copy of the transcript to be paid for by XXPS.

Post hearing, petitioner suggested that she might require a delay in the submission of her closing brief. The request was denied. Petitioner did in fact timely submit a 146-page closing brief.

On October 24, 2020, the HO issued a post hearing decision addressing the requested delay as well as the audio issue. The decision also addressed exhibit objections and a witness objection as noted by counsel for XXPS during the hearing. The decision is summarized below under the subtopic post hearing decision dated October 24, 2020.

Also post hearing, petitioner sent several messages with complaints and concerns about various topics. At the HO's request, counsel for XXPS (referred to below as B&K by petitioner) responded to these messages. On or about November 6, 2020, counsel for XXPS summarily responded to petitioner's concerns as follows: that XXPS had already provided XXX's educational records to petitioner; that there was no inappropriate *ex parte* communication between the HO and counsel for XXPS on October 15, 2020; that petitioner had already received the hearing transcript, both electronic and hard copy, and was not entitled to an audio version; suggested that petitioner should submit an errata sheet if she found errors in the hearing transcript; reported that petitioner had contacted XXX's school requesting that XX case manager be removed for allegedly lying at the hearing; and objected to petitioner's current posting on her internet site of a “series” entitled “Due Process Diaries,” wherein she alleges that the hearing has involved perjury, and denial of her rights and full access to the hearing process. See XXXXXXXXXXXXXXXXXXXXXXXXXX.  Counsel for XXPS objected to the blog.

On November 6, 2020, in response to XXPS' answer to her concerns, petitioner contacted VDOE personnel, Samantha Hollins, Assistant Superintendent, Department of Special Education and Student Services, VDOE, and Kathryn Jones, Coordinator of Due Process Services, VDOE. Petitioner sent VDOE the following message:

*Sam and Kathryn,*

*Per your request, I provided you the audio and the transcript related to the ex parte conversation, earlier this week and again today.*

*However, B&K counsel Wesley Allen maintains that no ex parte conversation took place.*

*However, he does say logistics were discussed.*

*Logistical or not, I should have been made aware of the full conversation. And, if there was nothing amiss with the conversation, why is it that when the court reporter asked if they wanted to conversation off the record, why did Ms. Mitchell say yes?*

*This is similar to Mr. Allen maintaining that neither he nor XXPS received an early copy of a portion of the transcript, when in fact they both did. This information was provided by the general counsel of Veritext.*

*As far as me contacting Veritext, did I make the general counsel aware that my work information was added, which makes it look like it was my company – and not me – in a hearing, and that it listed me as a lawyer?*

*Yes, I did.*

*I thought the general counsel would want to know that her company misrepresented the hearing, as a private corporation against a law firm and school division. That is simply not true – and the carelessness of attributing the title “esquire” to me tells me that fact-checking isn’t this company’s forte. That’s a problem when it is supposed to provide transcripts for legal hearings. I thought she might want to know about questionable actions by her employees, to include Wesley Allen stating that his Veritext sales rep would confirm that he and XXPS did not receive transcripts, though that proved untrue.*

*Per my request for an audio, if you take a look at the two attached invoices, audio is 100% an option – and I had the right to request it per both state and fed regulation. The attached state “hearing tapes or stenographer”.*

*My request for the hearing audio remains the same.*

*I am at a disadvantage because XXPS and counsel were provided a portion of the transcript early – and the fact that Wesley Allen maintained he didn’t receive it leads me to question whether he actually deleted it.*

*Ahh, and then there are “MY” technical difficulties. I’m not the one who said we all needed to log off and log back in. That was XXXXXXXXXX.*

*Nor am I the one who has the moderator in control of Blackboard, which includes the ability to delete and mute participants. Odd, isn’t is, that, although I emailed XXXXXXXXXX over and over about the issues with access – and my mike and camera not working - she not once emailed me.*

*I didn’t have the opportunity to testify because of this. It wasn’t until Ms. Mitchell asked about closing arguments that XXXXXXXXXX said that I could call in.*

*And on the earlier occasion, I emailed XXX, but she NEVER emailed me directly or responded to my email. She could have had a mi-fi couriered to my home, but she didn’t do that – nor did she try to trouble-shoot the issues with me as she did with others. Didn’t even make an attempt.*

*Wesley claims that B&K’s files are protected by attorney client privilege.*

*And yet . . .*

*I heard that Wesley Allen called himself a “school official” as recently as last night, when he was called out for being bcc’d on the emails between a teacher and a student. Nefarious actions – a weaponization of education – if you ask me. About three dozen such emails, over a period of a year have been uncovered. You can find a few that I posted here, with permission of the family: XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX Not exactly a good use of taxpayer funding.*

*And, if he’s a school official, his documents are fair play when it comes to FOIA and FERPA requests.*

*And, no, neither XXPS nor VDOE provided all of my XXX’s documents. To do so, they would have had to provide everything listed here:*

*XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX*

*I was not aware that XXPS “repeatedly” asked for a native copy of an email from me. Yet, for some reason – even though there were many issues with B&K – my email was determined to be submitted late and my expert stripped of her expert title.*

*Yet, I do recall repeatedly asking XXPS and B&K for 1) all of my XXX’s documents; 2) asking that I receive the transcripts at the same time as XXPS and B&K; 3) asking for an audio version and an extension due to the issues with my vision; 4) asking that B&K stop misleading us about ordering transcripts early for itself; 5) and requesting that documentation proving perjury be included as evidence.*

*As far as XXX goes, she was someone I contacted a bit ago – just like I contacted XXX. But, people are busy, and sometimes their answers don’t come when one would like.*

*Per Wesley’s disclosure comment: At the outset, I raised a concern about XXPS breaching my XXX’s privacy.*

*A protective order was put in place. And, wouldn’t you know it, B&K had to recall the thumb drives with my XXX’s info. on it because they supposedly had unredacted information on it.*

*And then XXPS sent me, B&K and Ms. Mitchell the transcript for another family.*

*There is nothing in the protective order saying I can’t say that XXPS and B&K are at fault for another breach. Also: If there is breach, XXPS is required to make the family aware. If it doesn’t, it is at fault – which is a complaint it can submit to VDOE.*

*I am not the one at fault here. Indeed, I’m the one who raised the alarm, just as I always do.*

*In addition, I heard, too, that another B&K lawyer recently submitted a subpoena with the wrong student’s name attached to it. Not exactly a good track record for B&K.*

*Per Ms. XXXXXX and Mr. XXXXXXX, I have been asking for Ms. XXXXXX’s removal since last year.*

*This has nothing to do with me not liking her responses or XXX’s responses. It has to do with me finding both to be case managers who should be stripped of that responsibility.*

*However, if you want to talk about their testimonies, they didn’t tell the truth and I have the documentation to support this. And, I won’t sit back and say nothing. In addition, XXHS is already at fault for noncompliance of XXX’s IEP this year, and XXXXXXXX plays a roll in this, too.*

*In sum, ALL of Mr. Allen’s wordsmithing protesting and blustering are not focused on XXX who is—and should remain—the focus of this case. Indeed, they are focused on me and my actions as an advocate for XXX.*

*For the reasons stated above, Mr. Allen’s requests should all be denied and every exception that Mr. Allen takes dismissed.*

*Anyone have questions?*

*Please let me know.*

*Thanks,*

*XXXX*

The full content of petitioner's message is quoted above to illustrate the style, type and tone of messages sent from petitioner to the HO, counsel for XXPS and others, on almost a daily basis from the beginning of this due process proceeding. Despite VDOE's previous position that this case remains under the purview of the HO, it is here emphasized that petitioner did not respond directly to the HO, as procedural norms dictate, but instead sent the above cited message to VDOE personnel, simply copying the HO and counsel for XXPS.

Counsel for XXPS also reported in its response that after the hearing concluded, petitioner was in frequent contact with employees of Veritext, the transcription service. As mentioned above, counsel for XXPS reported that post-hearing, petitioner contacted the principal and assistant principal of XXX's school, XXXXXX High, claiming that XXX's case manager, XXXXXXXXX, lied during the hearing and wanted her removed as case manager. The hearing officer addressed these post hearing issues in a decision letter dated November 11, 2020. A copy of that decision has been placed on the record, is incorporated herein by reference and is summarized below.

### Prehearing Orders and Decision Summaries

The Hearing Officer entered five prehearing orders dated September 2, September 13 (with addendum dated September 14), September 16, September 23 and September 26, 2020. On September 4, 2020, the HO issued a decision letter. On September 14, 2020, the HO issued a protective order and on October 9, 2020, the HO issued a transcript distribution order. On October 24, 2020, the HO entered a post hearing order and on November 11, 2020 issued a post hearing decision letter. These decisions and orders are fully incorporated herein by reference, have been summarized below, and have been filed with the record of this proceeding.

***September 2, 2020 Prehearing Order***: The HO provided administrative information, memorialized discussions conducted during the first prehearing conference call, set deadlines, noted the burden of proof, set the order of hearing, identified the case issues, and provided timelines. It was noted that petitioner chose for the hearing to be open to the public. Petitioner waived mediation.

***September 4, 2020 Decision Letter***: The HO decided issues involving the issuance of *subpoenas duces tacum* (subpoenas).The HO denied petitioner's motion to preclude participation in the hearing by both Wesley Allen, counsel for XXPS, and XXXXXXXXXX, Coordinator for Due Process and Eligibility, XXPS, due to alleged and unsubstantiated conflicts of interest. This decision letter further addressed due process decorum. Petitioner began this hearing process by inappropriately referring to the HO and other hearing participants by first name. In keeping with proper due process decorum, the HO directed all parties to refer to hearing participants by last name only and also provided guidance on how to properly refer to the HO. At this time no resolution session had been scheduled. The HO directed the scheduling of a resolution session and provided the applicable resolution timelines. XXXXXXXXXX was directed to provide the student's educational record to petitioner by September 18, 2020 per a previous request from petitioner.

***September 13, 2020 Decision***: The HO issued a decision on XXPS' motion to dismiss time-barred claims and notice of insufficiency. The two-year statute of limitations was affirmed and the motion was granted. The HO found petitioner's request for due process hearing to be legally sufficient pursuant to IDEA requirements.

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***September 13, 2020 Prehearing Order***: The parties reported that they conducted a resolution session on September 9, 2020 and that negotiations were on-going. Petitioner again waived mediation. Timelines for witness lists and exhibit books were memorialized. On-going subpoena issues were decided. Based on petitioner's on-going privacy concerns regarding the security of her XXX's records based on previously discussed privacy breaches by XXPS, the HO ordered counsel for XXPS to prepare a protective order. One subpoena request from petitioner remained open pending a response from XXPS. This issue was later decided by an addendum to this order dated September 14, 2020 as summarized below.

***September 14, 2020 Addendum***: Petitioner submitted a subpoena request on September 11, 2020 requesting that Blankingship and Keith Law Firm provide research materials from four companies. Counsel for XXPS responded to the subpoena with a Motion to Quash therein representing that the four companies did not provide research to the firm. The response further explained exactly what services were provided to the firm by the companies. The Motion to Quash was granted.

***September 14, 2020 Protective Order***: On this date, the HO entered a protective order designed to protect the confidential educational records of the student and to insure privacy of those records along with any other XXPS student records that might be compromised. This order was entered in response to petitioner's repeated claims that XXPS has breached confidentiality in the past.

***September 16, 2020 Prehearing Order***: This order memorialized discussions from a September 16, 2020 conference call. Based on representations made by petitioner that some of the evidence involving the student's last disputed IEP dates back to December 2016, the HO amended her previous decision limiting evidence from two years prior to filing to permit this limited evidence. The two limitation on claims remained.

***September 23, 2020 Prehearing Order***: This order memorialized two conference calls conducted on September 21, 2020 and an emergency call conducted on September 22, 2020. The parties reported that resolution had failed. Petitioner acknowledged that she had received her XXX's educational records from XXPS but alleged that some of the information was missing. On the September 21st call, counsel for XXPS reported a privacy breach. He reported that information from another student's records had been inadvertently sent to petitioner during discovery. Pursuant to the terms of the protective order entered on September 14, 2020, it was ordered that the files be immediately exchanged. Petitioner claimed to not have viewed the compromised information. Counsel for XXPS was admonished for the privacy breach and the thumb drives containing the privacy breach were immediately exchanged for the correct thumb drives.

Also during this call, both counsel for XXPS and the HO expressed concerns about petitioner's numerous and daily electronic email communications. At one point, petitioner expressed concern about the cost of this proceeding to XXPS. In this vein, the HO discussed the fiscal consequences to XXPS of she and counsel reviewing so many emails (often with attached links) and having to respond. Petitioner seemed to understand but nonetheless continued her almost daily email communications. Counsel for XXPS also reported that XXPS would not prequalify any witnesses as experts without *voir dire*. In an effort to save hearing time, the HO previously proffered such prequalification, if possible.

The September 22, 2020 conference call was convened by the HO based on petitioner's representation that yet another privacy breach had been found in her XXX's file as provided to her by XXPS on September 18, 2020. Remaining concerned about this issue, the HO convened the call on an emergency basis. However, once the information was reviewed by XXPS counsel and explained, it was decided that petitioner's concerns were unfounded and that the privacy breach she cited was actually a responsive pleading.

The call was also convened to discuss petitioner's on-going demands for XXX's Sea Stars sign-in records. The HO ordered that XXPS provide this information if possible. Also, in light of the thumb drive privacy breach discussed above, petitioner requested a 24-hour delay to submit her exhibits and witness list. The delay was granted which also delayed the hearing start date by one day.

***September 26, 2020 Prehearing Order***: This order memorialized the sixth conference call. On the call, petitioner acknowledged receipt of the Sea Stars sign-in log and was ordered to timely submit her witness list. As both a potential witness and platform moderator for the virtual hearing, XXXXXXXXXX was granted an exception to be present throughout the actual hearing. In response to a *Motion in Limine* filed by XXPS, it was ordered that neither XXX's mental or physical conditions would be addressed during the hearing. This ruling precluded the need for testimony from XXX's pediatrician who was eliminated from petitioner's witness list. The HO reminded the parties of the issues in this case. Considering the large number of witnesses and voluminous exhibits, the HO put the parties on notice of the possibility of overall extensions in the proceedings and decision.

***October 9, 2020 Transcript Distribution Order***: A mid-hearing conference call was convened to discuss petitioner's allegation that counsel for XXPS was scheduled to receive advanced copies of the hearing transcript. The HO issued this order to outline transcript distribution requirements. It was ordered that all parties receive the transcript from Veritext at the same time. Later, upon receipt of an email message from Veritext advising that if the transcript were directly sent to petitioner from Veritext, petitioner would receive an invoice, the HO amended the order to permit XXXXXXXXXX to initially receive the transcript from Veritext and to immediately disseminate it to the parties upon receipt.

Each party was provided an opportunity to address any misstatements or omissions in the HO's prehearing orders within five calendar days of the date of the order. No corrections were noted by either party.

#### Post Hearing Order and Decision Letter

***October 24****,* ***2020:*** This post hearing order addressed the following outstanding post hearing issues: petitioner's request for an audio of the hearing was denied; XXPS evidentiary objections to some of petitioner's exhibits were addressed; the witness testimony of XXXXXX, who was conditionally accepted during the hearing as an expert, was decertified and her testimony was instead accepted as a proffer; petitioner's request for an extension to submit her closing brief was denied; and it was emphasized that no further requests for delays or extensions would be considered.

***November 11, 2020 Decision Letter***: This letter addressed petitioner's on-going complaints about transcript irregularities in which she was instructed to submit an errata sheet. Petitioner's third-party communications were declared inappropriate and unacceptable. Petitioner's on-going allegation that XXPS failed to produce all of the student's educational records was declared moot. The October 15, 2020 off-record logistics discussion between the HO and counsel for XXPS was explained. The decision letter also addressed petitioner's technical difficulties that she claimed resulted in her inability to testify on October 19, 2020.

**WITNESS APPEARANCES**

This hearing was virtually conducted on September 30, October 1, 2, 13, 14, 15 and 19, 2020. The hearing commenced with opening statements from both parties. The following witnesses were duly sworn and provided testimony on behalf of the petitioner:

**Day 1, September 30, 2020**:

Transcript I Page #:

XXXXXX, Procedural Support Liaison, XXPS 61

XXXXXX, Independent Educational Consultant 163

**Day 2, October 1, 2020**:

Transcript II Page #:

XXXXXXXXX, Curriculum Specialist (Retired), XXPS 23

XXXXXXX, Social Studies Teacher, XXPS 148

Dr. XXXXXX, Neuropsychologist, Independent Educational Evaluator 197

XXXXXXX, Special Education Teacher, XXPS 252

XXXXXX, Director of Special Education Instruction, XXPS 316

**Day 3, October 2, 2020**:

Transcript III Page #:

XXXXXXXXX, Curriculum Specialist (Retired), XXPS 12

XXXXXX, Procedural Support Liaison, XXPS 227

**Day 4, October 13, 2020**:

Transcript IV Page #:

XXXXXX, Procedural Support Liaison, XXPS 23

XXXXXXXXXX, Coordinator, Due Process and Eligibility, XXPS 236

The following witness was duly sworn and provided testimony on behalf of the respondent:

**Day 5, October 14, 2020**:

Transcript V Page #:

XXXXXX, Special Education Teacher, XXPS 12

The following witnesses were duly sworn and provided testimony on behalf of the petitioner:

Dr. XXXXXX, Former Dyslexia Specialist, XXPS 90

XXXXXXXXX, Program Manager, Office of Special Education Procedural Support, XXX 183

The following witnesses were duly sworn and provided testimony on behalf of the respondent:

XXXXXX, English Teacher, XXPS 313

**Day 6, October 15, 2020**:

Transcript VI Page #:

XXXXXX, Special Education Teacher, XXPS 7

XXXXXXXXX, Special Education Teacher, XXPS 67

XXXXXXXX, Latin Teacher, XXPS 195

**Day 7, October 19, 2020**:

Transcript VII Page #:

XXXXXXX, Latin Teacher, XXPS 7

XXXXXX, High School Counselor, XXPS 38

XXXXXX, Manager, Special Education Curriculum Teams, XXPS 109

XXXXXXXX, Special Education Teacher, XXPS 181 XXXXXX, School Psychologist, XXPS 297

Petitioner presented the following witnesses in rebuttal:

Dr. XXXXX, Audiologist 376 XXXXXX, Friend of Petitioner 395 XXXXXXX, Friend of Petitioner 427

Upon conclusion of their testimony, subject to recall, the witnesses were dismissed. Each witness was instructed by the HO to not discuss their testimony. Each witness agreed to comply.

##### ISSUES

The issues of the case were identified by the Hearing Officer and agreed to by petitioner as follows:

* Whether XXXXXXXXXX Public Schools (XXPS) has provided the student with a free appropriate public education (FAPE).
* Whether the student's current Individualized Education Program (IEP) sufficiently addresses the student's special education needs so as to provide a FAPE.
* Whether the parent is entitled to reimbursement from XXPS for educational expenses unilaterally secured for the student.

**BURDEN OF PROOF**

In *Schaffer v. Weast,* 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), the Supreme Court held that the burden of proof in a special education administrative hearing is properly placed upon the party seeking relief, whether that is the disabled child or the school district. In this case, the burden of proof and persuasion rests with petitioner. The standard of proof is based upon a preponderance of the evidence. 8 VAC 20-81.O.13.

**FACTUAL SYNOPSIS and FINDINGS OF FACT**

The subject of this due process proceeding is XXXXXXXXXXXX (XXX or student) who currently attends XXXXXX High School, XXPS, as an XXth grade student. XXX was born on XXXXXXXXX and is XX years old. Academically, XXX is an above average student with a 3.7 grade point average (GPA). XXX has performed well in school, including in some honors courses. XXX has progressed from grade-to-grade primarily in the general education population. XXX is on track to receive an advanced studies diploma.

Witnesses described XXX as a polite, dedicated, delightful and hard-working XXX. XXX enjoys baseball, music and is an excellent guitar player. XXXXXX, XXX's school counselor, described XXX as brilliant. XXX has expressed interest in being a professional baseball player and wants to attend college at the XXXXXXXXXXXXXXXX.

XXX personally observed and participated for a short time during the hearing. XXX demonstrated self-advocacy by asking one of the witnesses some questions.

XXX was first determined eligible for special education supports and services in May of 2016 pursuant to the Individuals with Disabilities Education Act (IDEA) under the category of Specific Learning Disability (SLD). At that time, XXX was a Xth grader. Upon review by the eligibility team in August of 2019, XXX retained eligibility for special education services and supports under the category of SLD.

XXX has been diagnosed with dyslexia, which is a neurobiological specific learning disability that causes difficulty in reading, resulting in problems identifying speech sounds and learning how they relate to letters and words. Dyslexia is known to affect areas of the brain that process language, thereby causing decoding difficulties. XXX has shown underachievement in the areas of reading fluency, written expression and/or spelling, and basic reading skills. XX has been identified with processing deficits in the following areas:

* + auditory integration
  + auditory processing
  + auditory discrimination
  + auditory memory
  + phonological processing and
  + perceptual motor/processing speed

Throughout high school, XXX has passed and earned good grades with a modest amount of special education services and supports. XX has maintained a demanding regular education curriculum but the evidence shows that XX would benefit from additional special education services, particularly in reading. XXX's stay-put Individualized Education Program (IEP) is dated December 13, 2016 (XXPS Ex. 39). This is XX last fully consented to IEP. XX receives special education services and supports using this IEP and components of the following partially consented to IEPs:

* + - IEP dated August 22, 2017 is used for services (XXS Ex. 60)
    - IEP dated September 27, 2017 is used for transition goals and other IEP goals (XXPS Ex.

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* + - IEP dated December 11, 2018 provides for curriculum modifications and classroom accommodations (XXPS Ex. 89) and
    - IEP dated March 12, 2019 provides for curriculum and classroom accommodations and high school assessments and accommodations (XXPS Ex. 94)

Under XX current IEP situation, XXX has either mastered or made significant progress towards XX current IEP goals. (Tr. IV, pgs. 58-59). The evidence suggests that XXX's overall current IEP situation requires revision and is untenable. The evidence suggests, with both parties seemingly in agreement, that XXX would benefit from enrollment in a reading program. However, there is significant disagreement between the parent and XXPS as to which reading program or methodology would be most appropriate for XXX. As a supplemental service, petitioner unilaterally enrolled XXX in a program with Lindamood Bell for which she has requested reimbursement.

Although not specifically identified in the last proposed IEP, several XXPS employees testified that the "Just Words" reading program would be an appropriate program for XXX. Petitioner is opposed to using this program and produced evidence from the publisher, Wilson Professional Learning, that implies that "Just Words" is inappropriate to use with students who have dyslexia. (Pet. Ex. Vol. 5, #4). Also, petitioner introduced a recent due process decision wherein the hearing officer determined that the use of "Just Words" was inappropriate for students with dyslexia. *VDOE Case #:20-21*.

The IEP team(s) reviewed XXX's classroom and functional performance, evaluations and assessments in an attempt to update XXX's IEP including goals, services and accommodations. To this end, at least 25 IEP meetings were held to discuss XXX's high school education. (Tr. Vol. IV, pgs. 44-45). Proposed IEPs were presented on August 15, 2018 (XXPS Ex. 78); December 9, 2019 (XXPS Ex. 119); March 9, 2020 (XXPS Ex. 122); and September 2, 2020 (XXPS Ex. 132). These IEP proposals were rejected by petitioner.

Several of the IEP team members testified that the IEP meetings were not productive and unduly lengthy, primarily because of petitioner's obstructive, unreasonable and abusive conduct during the meetings. Witnesses testified that attempting to work with petitioner during the IEP meetings was challenging and that her conduct derailed the purpose of the IEP meetings. Petitioner's conduct was described by various witnesses who attended IEP meetings as problematic, fixated, aggressive, overboard, interfering, and bogged down in minutia. (Tr. IV, pgs.126-133; Tr. V, pgs. 359, 378; Tr. VI, pgs. 62, 110, 114 and 120; and Tr. VII, pgs. 217-220)

The evidence revealed that petitioner sent emails to XXPS board members, the XXPS superintendent and the U.S. Department of Education, therein mounting personal attacks against IEP team members and XPS. Petitioner called for IEP team members to be removed from the team and even fired. In one email petitioner referred to IEP team members as "idiots and assholes." Several of the witnesses, including XXXXXXX, XXXXXX and XXXXXXXX, articulated how petitioner's unreasonable behavior during IEP meetings obstructed the IEP team's progress toward developing appropriate educational programming for XXX.

Of particular note was the testimony of XXXXXXXX. Mr. XXXXXX is a special education teacher at XXXXXX High School. He taught XXX biology and often served as a member of XXX's IEP team. Until the end of March 2019, Mr. XXXXXX was XXX's case manager, an assignment that lasted about one year. He testified that petitioner became aggressive and violent during IEP meetings. He testified that petitioner would slam her hands on the desk, yell and "get in peoples' faces." On occasion, he testified that meetings had to be stopped and security alerted due to petitioner's aggressive behavior. He indicated that much of petitioner's aggression at the meetings appeared to be directed towards XXXXXX, XXPS procedural support liaison, and, other than petitioner, the longest running member of XXX's IEP team. (Tr. VII, pgs. 218-219).

Mr. XXXXXX further testified that he had a very positive relationship with XXX for about a year. He testified that over time, probably because of the increased tension with petitioner and XXPS staff, his relationship with XXX began to deteriorate. He testified that he asked to be removed as case manager because the situation had become unhealthy. He testified that he had received many emails from petitioner filled with vitriol about him and his character. He testified that similar mean-spirited messages were also sent from petitioner to other teachers. Mr. XXXXXXXX testified that over the course of time, XXX became more distant towards him, more reclusive and withdrawn. (Tr. VII, pgs. 218-220).

Despite these obstacles, Mr. XXXXXXXX testified that XXX received a FAPE and had access to XX accommodations. XXX excelled in XX biology class earning the second highest grade across all of his biology classes for that year. He testified that XXX made meaningful academic progress. (Tr. VII, pgs. 221-222).

Witnesses working for XXPS, even those witnesses called by petitioner, testified that XXX received a FAPE. The evidence suggests that XXPS worked within the confines of the stay-put IEP and the other partially consented-to IEPs to provide XXX with a FAPE. XXXXXX, XXXXXXX, XXXXXX, XXXXXXXXXXX, XXXXXXX, XXXXXXXXXXXX, XXXXXXXXX and XXXXXXXXXX, all experts in the field of special education, testified that XXPS appropriately addressed XXX's educational needs and provided XX with a FAPE. They testified that XXX received meaningful educational benefit from the appropriate implementation of XX combination of IEPs. They further testified that the proposed IEPs presented by the IEP team meaningfully and accurately addressed XXX's goals, services, accommodations and supports.

Although XXX is educated in the general education setting, XX receives 45 hours per month of learning disabilities services in a team-taught English class with a regular teacher and special education teacher in addition to special education services in XX general education social studies and science classes. XXX's accommodations include: noise-cancelling headphones, test to completion, small group testing, frequent breaks, chunking of long-term assignments, clear expectations, teacher notes, written directions for assignments, graphic organizer as a visual aid and read-aloud upon request. (XXPS Ex. 94-017).

XXPS has proposed 4 hours a week for XXX as a special education elective to support automaticity with reading and to support XX reading deficits. (XXPS Ex. 133). These 4 hours of services would be conducted in a special education only setting. (XXPS Ex. 78-036). However, the IEP team cannot seem to agree on scheduling. Petitioner does not want XXX's other electives disturbed to execute the proposed reading elective since XXX very much enjoys XX current electives in auto tech and music.

**WITNESSES**

The witnesses were duly sworn by the Hearing Officer. At the conclusion of their testimony the witnesses were dismissed subject to recall. Each witness was advised not to discuss their testimony. Each witness agreed.

***Witnesses for Petitioner:***

*XXXXXXXX:* Procedural Support Liaison for the XXXXXXXX pyramid, XXXX Alternative Programs and XXXXX XXX School, XXPS. Longest serving XXPS employee to serve on XXX's IEP team. Her testimony was credible.

*XXXXXXXXX*: Independent Educational Consultant and *ad junct* professor at Johns Hopkins University. Her testimony was accepted as a proffer. Her testimony was credible.

*XXXXXXXXXX*: Retired Curriculum Specialist, Office of Special Education Instruction, XXPS. IEP team member. Her testimony was credible.

*XXXXXXXXXXX*: Social Studies Teacher, XXXXXXX High School, XXPS. Taught XXX in Honors World History and Geography II. His testimony was credible.

*Dr. XXXXXXXX*: Neuropsychologist. Performed an Individual Educational Evaluation on XXX. (XXPS Ex. 128). His testimony was credible.

*XXXXXXXXXX*: Special Education Teacher, XXXXXXX Elementary School, XXPS. Administered Kaufman Test of Educational Achievement (KTEA) on XXX. (Pet. Ex, Vol. 1, Ex. 18). Her testimony was credible.

*XXXXXXXXXX*: Director of Special Education Instruction, XXPS. His testimony was credible.

*XXXXXXXXXX*: Coordinator, Due Process and Eligibility, XXPS. Her testimony was credible.

*Dr. XXXXXXXX*: Former Dyslexia Specialist, Office of Special Education Instruction, XXPS. Currently, Education Specialist, XXPS. Her testimony was credible.

*XXXXXXXXXXXX*: Program Manager, Office of Special Education, Procedural Support, XXPS. Her testimony was credible.

***Witnesses for Respondent:***

*XXXXXXX*: Special Education Teacher and Course Instructor for the KTEA, Office of Special Instruction, XXPS. Administered KTEA to XXX. (XXPS Ex. 104). Her testimony was credible.

*XXXXXXXXXX*: English and Exceptional Education Teacher, XXPS. Taught XXX in 10th grade team-taught English class. Her testimony was credible.

*XXXXXXXX*: Special Education Teacher, XXPS. Taught XXX in 9th grade team-taught English class. Her testimony was credible.

*XXXXXXXXXXXXX*: Special Education Teacher, XXPS. XXX's case manager from the summer of 2019 to present. Her testimony was credible.

*XXXXXXXXXXX*: Latin Teacher, XXPS. Taught XXX Latin in 10th grade. His testimony was credible.

*XXXXXXXX*: School Counselor, XXPS. Has served as XXX's counselor since 9th grade. Her testimony was credible.

*XXXXXXXXXX*: Manager, Office of Special Education Curriculum Teams, XXPS. Her testimony was credible.

*XXX XXXXXXXX*: Special Education Teacher, XXPS. Taught XXX biology and served as XX case manager for about one year. His testimony was credible.

*XXXXXX*: School Psychologist, XXPS. Conducted a psychological assessment of XXX in 2019. (XXPS Ex. 106). Her testimony was credible.

***Rebuttal Witnesses for Petitioner:***

*Dr. XXXXXXX*: Independent Audiologist and Speech Language Pathologist. Did not testify.

*XXXXXX*: Petitioner's friend with personal familiarity with XXPS special education services. Has 2 sons with dyslexia. Her testimony was credible.

*XXXXXXXXXX*: Independent Clinical Psychologist and Developmental Neuropsychologist. Her testimony was credible.

**ARGUMENTS**

***Petitioner's Argument***

Petitioner argues that XXPS has failed to provide XXX with a FAPE. She contends that the IEPs proposed by XXPS failed to sufficiently address XXX's special education needs. She claims that she should be entitled to reimbursement for the expenses she incurred for XXX's educational expenses resulting from XXPS' continued failures to provide XXX with a FAPE.

Petitioner claims that XXPS has a history of ineffectively providing XXX with special education services. She alleges that XXPS repeatedly failed to timely identify XXX's areas of need. Petitioner alleges that XXPS repeatedly failed to match XXX with appropriate educational programs and plans that address XX unique special education needs. She claims that despite the publisher's warning about the inappropriateness of the "Just Words" program for students with dyslexia, XXPS kept pushing the use of this reading program for XXX.

Petitioner alleges that XXPS failed to implement programs with fidelity as defined by the publisher and the research on which the publisher developed the programs. She further alleges that XXPS refused to admit error and listen to her as the parent. Petitioner acknowledges that she has filed numerous complaints against XXPS with the Virginia Department of Education (VDOE) and provided evidence that some on the complaints were meritorious, thereby requiring XXPS to develop and implement corrective actions. Petitioner claims that some of the relief she was awarded has not yet been adhered to by XXPS.

Petitioner contends that XXPS covered up mistakes, chose to fight her and to mislead XXPS staff about her. She contends that XXPS has negatively mischaracterized her advocacy for her XXX and has afforded more deference to its staff than to her, proclaiming that she, petitioner, has been right all along about XXX's educational needs. Petitioner claims that XXX requires speech-language pathology services to receive a FAPE but that XXPS has denied XX these services.

Petitioner argues that XXPS has so mishandled her XXX's education that they should not be afforded deference. For this and other reasons, petitioner adamantly distrusts XXPS generally and particularly with her XXX's education.

***Respondent's Argument*:**

XXPS argues that they have appropriately assessed and addressed XXX's educational needs. They contend that XXX has had a successful educational experience with XXPS and has made meaningful educational progress. They contend that XXX has benefited from XX educational experience with XXPS. XXX has successfully progressed from grade to grade and maintains a 3.7 grade point average.

XXPS contends that it has offered XXX an appropriate educational benefit in the least restrictive environment throughout the years and that they continue to do so. They claim that XXPS at all times provided XXX with a FAPE, including the two years relevant to this proceeding. XXPS claims to have considered the petitioner's concerns and in-put, conducted appropriate evaluations and assessments, considered any independent educational evaluations and reviewed XXX's educational record before proposing IEPs. XXPS contends that petitioner meaningfully participated in all IEP meetings. Nonetheless, petitioner has unjustifiably and unreasonably refused to accept or consent to the proposed IEPs. XXPS argues that they have worked diligently to provide XXX with a FAPE using the stay-put IEP and parts of other partially consented-to IEPs.

XXPS supports implementation of the last proposed IEP dated September 2, 2020. They contend that this IEP will provide XXX with a FAPE and should be adopted.

While many of XXPS witnesses testified that the "Just Words" reading program would be an appropriate fit for XXX, XXPS argues that "Just Words" is not the only reading program available. Several other programs or methodologies were cited as available options. For example, Orton-Gillingham could be considered for XXX.

XXPS argues that deference should be afforded to the expertise of the educators. They argue that educators deserve latitude in determining the IEP most appropriate for a disabled child. XXPS denies that XXX needs speech-language pathology services and contends that no evidence was presented to substantiate the provision of these services.

In regard to the many complaints filed by petitioner with the VDOE, respondent argues that any citations from VDOE have already been corrected and that these pre high-school issues are now moot. XXPS argues that petitioner is attempting to use this due process proceeding as an inappropriate means of state complaint enforcement.

XXPS further argues that petitioner's unruly conduct was obstructive to the IEP process. They argue that the IEP team met at least 25 times to discuss and finalize XXX's IEP. XXPS argues that petitioner has refused to find common ground. They argue that, among other egregious acts, petitioner has sent emails assassinating the character of XXPS staff and others. XXPS argues that petitioner's abusive and unreasonable conduct alone warrants a denial of relief and constitutes grounds for dismissal, with prejudice, of all claims.

**LEGAL ANALYSIS and FINDINGS**

***Just Words***

The Wilson Language Training website describes the "Just Words" program as follows:

"Just Words is a highly explicit, multisensory decoding and spelling program for students in grades 4–12 and adults who have mild to moderate gaps in their decoding and spelling proficiency but do not require intensive intervention. The program is designed for students with below-average decoding and spelling scores and should be combined with other literature-rich programs.... It is designed for students who can benefit from the targeted word study focus without requiring the more comprehensive intervention of the Wilson Reading System."

The evidence clearly indicates that XXX needs assistance with reading fluency and decoding. XX requires special education services designed to support automaticity with reading and to support XX overall reading deficits. During the hearing, several alternative methodologies and programs were mentioned that address learning disabilities associated with dyslexia. Several XXPS special education experts testified that "Just Words" would be the best program for XXX.

Petitioner strongly objects to the use of "Just Words" and produced an article in which the publisher of "Just Words," the Wilson Reading System, asserted that "Just Words" should not be used for students with dyslexia. Petitioner also introduced a recent hearing officer's decision, *VDOE Case #: 20-21*, in which the hearing officer found that the use of "Just Words" for a student with dyslexia was inappropriate.

Under this circumstance, deference is given to the publisher of the program, Wilson Reading System. Deference is also given to the logic used in the hearing officer's decision. Petitioner has adequately shown that "Just Words" should not be used to address the educational deficits or conditions associated with XXX's dyslexia.

When considering petitioner's strong opposition to the use of "Just Words," the publisher's assertions against the use of "Just Words" for students with dyslexia, and the hearing officer's reasoning in *VDOE Case #:20-21*, reasonable alternatives to "Just Words" should be pursued by the IEP team that address XXX's learning disabilities associated with dyslexia, including XX reading and decoding deficiencies.

Accordingly, I FIND "Just Words" inappropriate for XXX.

***IEP Meetings and Petitioner's Conduct***

Without a positive result, the IEP team held approximately 25 IEP meetings in an effort to develop XXX's high school IEP. Several XXPS witnesses testified that petitioner's obstructive and unreasonable conduct precluded the IEP team from effectively proceeding with the primary purpose of the meetings.

A FAPE "consists of educational instruction specially designed to meet the unique needs of the handicapped child . . . supported by such services as are necessary to permit the child to benefit from the instruction." *Board of Education v. Rowley*, 458 U.S. at 176 (1982). A FAPE is implemented through an IEP, which is designed by a team consisting of school district educators and administrators, education experts, and, ***of vital importance, the child's parents***. (emphasis added). IEPs "must contain statements concerning a disabled child's level of functioning, set forth measurable annual achievement goals, describe the services to be provided, and establish objective criteria for evaluating the child's progress." *M.M. ex rel. D.M. v. Sch. Dist. of Greenville County*, [303 F.3d 523, 527](https://casetext.com/case/mm-ex-rel-dm-v-school-dist-of-greenville-county#p527) (4th Cir. 2002); *see also* [20 U.S.C. § 1414(d)(1)(A)](https://casetext.com/statute/united-states-code/title-20-education/chapter-33-education-of-individuals-with-disabilities/subchapter-ii-assistance-for-education-of-all-children-with-disabilities/section-1414-evaluations-eligibility-determinations-individualized-education-programs-and-educational-placements).

Parental cooperation and corroboration are essential to the IEP process. In this case, witnesses credibly and independently described petitioner's overall conduct during IEP meetings as: violent, challenging, abusive, unreasonable, obstructive, problematic, fixated, aggressive, vitriolic, overboard and interfering. Petitioner was described to have hit the desk with her hand and aggressively approach team members during meeting(s). This unacceptable conduct is neither cooperative nor corroborative.

The evidence also included a series of disparaging email messages that were sent by petitioner to various agencies and people about IEP team members and other XXPS staff. Many of the messages included personal attacks. Disturbingly, in one message, petitioner referred to some XXPS staff members as "assholes and idiots." Some messages called for staff to be fired. Some messages were demanding and included attempts to influence or dictate the IEP team composition. (XXPS Ex. 142-001 thru 142-151).

Petitioner justifies her conduct as zealous representation of her XXX's interest. The HO disagrees. Such conduct has no place in IEP meetings or in messages to or about IEP team members. Petitioner is herein reminded that the IEP team must work together for XXX's best interest. Attempted intimidation and caustic behavior towards members of the IEP team is not a productive means to that end.

There was no evidence presented during the hearing to suggest that any member of XXX's IEP team meant to do XX harm or did not have XXX's educational best interest in mind. In fact, members of XXX's IEP team that testified spoke highly of XXX as did XX teachers. However, the testimony of Mr. XXXXXXXX that XXX appears to be withdrawing and becoming reclusive due to this inexplicable hostility between petitioner and XXPS staff is disturbing, should be monitored and put in check before permanent damage is done to XXX.

Petitioner further justifies her conduct with claims that the IEP team would not listen to her or agree to provide XXX with what XX needed to receive a FAPE. She expressed a deep-seated distrust of XXPS, including the XXPS IEP team members. Petitioner is here again admonished that the IEP team must work together for XXX's best interest. Petitioner attended all of the IEP meetings and there was no evidence that team members ignored her or her in-put. Petitioner, as one member of the IEP team, has no authority to dictate to the rest of the team. Petitioner is not entitled to have everything she wants in the IEP.

XXPS argues that petitioner's due process claims for relief should be summarily denied due to her obstructive, abusive and unreasonable conduct that totally interfered with IEP team progress. This HO does not condone nor consider petitioner's overall reported conduct during IEP meetings to be at all appropriate and I FIND that petitioner's adverse conduct did indeed significantly hinder the IEP process. However, for the sake of XXX, the HO will not summarily dismiss this matter solely due to petitioner's conduct. XXX's current IEP situation is untenable and needs correction for XXX to continue to receive educational benefit, reach updated goals and to effectively progress. Therefore, an order will be entered that addresses this issue.

***Reimbursement for Lindamood-Bell***

Petitioner has requested reimbursement for educational services received from Lindamood-Bell. Petitioner unilaterally enrolled XXX in this reading program over two years ago as a reading intervention. This claim reaches beyond the statute of limitations and is time-barred. Even if the claim was not time-barred, petitioner failed to provide sufficient evidence during the hearing as to why she should be reimbursed or how much she is seeking as reimbursement.

XXPS witnesses testified that Lindamood-Bell was an unnecessary intervention. XXXXXXXXXX and XXXXXXXX, both testified that Lindamood-Bell was not an appropriate program for XXX. (Tr. Vol. III, at pgs. 157-158 and 170-172). Petitioner failed to sufficiently rebut this premise.

I therefore FIND that petitioner failed to meet her burden of proof regarding this issue. Accordingly, petitioner's claim for reimbursement is denied.

***Request for Speech and Language Pathology Services***

On the last day of the hearing, petitioner declared that XXX needed speech and language pathology services. The evidence does not support this contention. In fact, due to earlier concerns expressed by petitioner, XXPS conducted a speech and language evaluation. The report of that evaluation dated November 1, 2019 clearly indicates that XXX demonstrated age-appropriate speech and oral language skills. (XXPS Ex. 114) Petitioner presented insufficient evidence to the contrary.

Nonetheless, XXX's proposed IEP contains a reading comprehension goal that targets answering inferential questions designed to bolster XX speech and language skills. I FIND that XXX does not require independent speech and language pathology services. The requested relief is denied.

***Free Appropriate Pubic Education (FAPE) and***

***the Individualized Education Program (IEP)***

The Individuals with Disabilities Education Act (IDEA), requires the development and implementation of IEPs that are reasonably calculated to provide an educational benefit to the disabled student. See *Hartmann v. Loudoun County Board of Education*, 118 F 3d 996, 1001 (4th Cir. 1997.) The substance of the IEP must be reasonably calculated to provide the student with some educational benefit. See *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 205, 102 S. Ct. 3034, 3050, 73 L. Ed. 2d 690 (1982). In the case of *Endrew F. v. Douglas County School District*, 137 S. Ct. 988 (2017), the U. S. Supreme Court further defined the standard of *some* educational benefit by requiring school systems to offer an IEP that is reasonably calculated to enable a child to make educational progress in light of the child's individual circumstances. The purpose of the IDEA is "to ensure that children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. § 1400 (d)(1)(A). To this end, the IDEA extends federal funding to states to provide disabled students with a FAPE. The disabled student should be educated in the least restrictive environment.

The FAPE requirement is satisfied when a State provides the handicapped child with "personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction." *Doyle v. Arlington County Sch. Bd.*, [953 F.2d 100, 106](https://casetext.com/case/doyle-v-arlington-county-school-bd#p106) (4th Cir. 1991) (citing *Rowley*, 458 U.S. at 203). To provide an "appropriate" education within the meaning of the IDEA, the school district does not have to provide the child with the best possible education. *M.M.*, [303 F.3d at 526](https://casetext.com/case/mm-ex-rel-dm-v-school-dist-of-greenville-county#p526). Once a FAPE is offered, the school district need not offer additional educational services. *Id.* That is, while a state must provide specialized instruction and related services sufficient to confer some educational benefit upon the handicapped child, the Act does not require the furnishing of every special service necessary to maximize each handicapped child's potential. *Id.* at 526-27. However, "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 Bd. of Educ.*, [774 F.2d 629, 636](https://casetext.com/case/hall-by-hall-v-vance-cty-bd-of-educ#p636) (4th Cir. 1985).

Actual educational progress is a factor to be considered in determining the appropriateness of an educational program under the IDEA. *M.M. v. Sch. Dist. of Greenville County*, [303 F.3d 523, 532](https://casetext.com/case/mm-ex-rel-dm-v-school-dist-of-greenville-county#p532) (4th Cir. 2002); *see also Rowley*, 458 U.S. at 207 ("achievement of passing marks and advancement from grade to grade . . . [are an] important factor in determining educational benefit"). While the standard for evaluating the appropriateness of a private placement under the IDEA is generally prospective, objective factors such as actual educational progress are relevant in making the final determination of appropriateness under the IDEA. *See County Sch. Bd. of Henrico County, Va. v. R.T.*, [433 F. Supp. 2d 657, 675](https://casetext.com/case/county-school-bd-of-henrico-county-2#p675) (E.D. Va. 2006); *compare Adams v. Oregon*, [195 F.3d 1141, 1149](https://casetext.com/case/adams-v-state-of-oregon#p1149) (9th Cir. 1999) *w. M.M.*, [303 F.3d at 532](https://casetext.com/case/mm-ex-rel-dm-v-school-dist-of-greenville-county#p532).

XXX has undoubtedly received educational benefit by implementing a combination of XX stay-put IEP and partially consented to IEPs. XX performed well in XX honors and general education academic programs. XX has made meaningful educational progress and has benefitted from XX educational experiences and instruction from XXPS. XX is on track to receive an advanced studies diploma.

Although there is some evidence that XXPS may have failed to implement a few accommodations, these infractions were corrected by findings from the VDOE or through XXPS staff correction. There is insufficient evidence to support the claim that XXPS failed to implement XXX's IEPs for the past two years.

Despite petitioner's numerous VDOE complaints, the evidence shows that XXPS has in the past, and currently, offered XXX appropriate educational benefit in the least restrictive environment. XXPS has appropriately implemented XXX's currently active IEPs and XXX has made meaningful educational progress. XXPS has provided XXX with a FAPE.

A FAPE "consists of educational instruction specifically designed to meet the unique needs of the handicapped child...supported by such services as are necessary to permit the child to benefit from the instruction." *Rowley,* id*.* A FAPE is implemented through an IEP that is designed by a team consisting of school district educators and administrators, education experts and the student's parent(s).

IEPs are a necessary component of FAPE. IEPs should include academic and functional goals designed to meet the student’s needs resulting from his disabilities. The IEP is also important for the disabled student since it identifies and implements special education and related services as well as supplemental aids to be provided the student that will enable him to advance appropriately and reach the identified goals.

The IEP shall 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). In accordance with IDEA’s objectives, related services must be provided when necessary to provide a disabled child FAPE as described in his IEP.

Petitioner made clear that she was not completely satisfied with any of the proposed IEPs presented by XXPS, however, petitioner cannot dictate the terms of an IEP to the school district by withholding consent. Nor should petitioner, or any parent, be permitted to force an endless number of IEP meetings by withholding consent. Petitioner may only provide input to the team. *County School Bd. of Henrico v. RT*, 433 F. Supp 2d 657 (ED VA 2006); 8 VAC 20-81-110F.6. *Tice v. Botetourt Co. School Board*, 908 F.2d 1200 (CA4 VA 1990). The evidence shows that XXPS considered the petitioner's input, adopted some of the changes she requested, but also rejected others based on data and other information available to the team. XXPS was not obligated to accept each and every IEP suggestion, demand, change or modification made by petitioner.

When reviewing an IEP for FAPE, the following legal analysis should be considered:

“Insofar as a State is required to provide a handicapped child with a ‘free appropriate public education,’ we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the IDEA, and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” See *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 205, 102 S. Ct. 3034, 3050, 73 L.Ed. 2d 690 (1982).

In XXX's case, XX has received passing marks. XXX has passed the Commonwealth of Virginia's Standards of Learning examinations (XXPS Ex. 137-12). XXPS provided personalized instruction with sufficient support services and accommodations for XXX to educationally benefit from the instruction XX received. XXX has progressed from grade-to-grade in the general education curriculum with a relatively small amount of special education assistance, earning a 3.7 grade point average. XXX has clearly made overall progress. XXPS not only satisfied the requirements of *Rowley* but also the standard set forth in *Endrew* by providing XXX the opportunity to make educational progress in light of XX individual circumstances.

However, there is no doubt that XXX's current IEP situation requires revision. After about 25 IEP meetings the parties have reached an impasse regarding what is appropriate content for XXX's IEPs. For example, the parties agree that XXX would benefit from a reading program, however, they cannot agree on which reading program or methodology is appropriate. It is unreasonable for XXX to continue to receive services, accommodations and have XX goals defined by separate IEPs. XX requires one IEP that appropriately addresses XX current needs, services, supports, accommodations, goals and specific learning disabilities.

The IEP proposed by XXPS dated September 2, 2020 has considered petitioner's concerns, XXX's current level of performance, assessments and evaluations. (XXPS Ex. 132). This proposed IEP clearly identifies XXX as a student with a specific learning disability. It acknowledges that XXX has dyslexia by providing accommodations and supports designed to assist XXX with the deficits that are reflexive of dyslexia. The IEP comports with the requirements of 34 C.F.R. §300.320(a)(4). The September 2, 2020 IEP is appropriate, and with proper implementation, will provide XXX with a FAPE. XXPS educators will be charged with selecting an appropriate reading methodology or program for XXX. However, "Just Words" will not be considered.

Although petitioner disagreed in her closing brief that XXPS should be afforded deference, case law dictates that local educators should be afforded latitude when determining the IEP most appropriate for a disabled child. The IDEA was not designed to deprive local educators of the right to apply their professional judgment. Instead, it should establish a "basic floor of opportunity" for every handicapped child. *See Rowley,* [458 U.S. at 201](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=458&page=201). States must provide specialized instruction and related services "sufficient to confer some educational benefit upon the handicapped child," id. at 200, but the Act does not require "the furnishing of every special service necessary to maximize each handicapped child's potential," id. at 199. Local educators should be given deference when educating a disabled child. *T.B., Jr. by and through his Parents, T.B., Sr. and F.B. v. Prince George's County Board of Education*, et al., 897 F.3d 566 (4th Cir., 2018). Such is the case here.

XXPS clearly provided XXX with a basic floor of opportunity to educationally succeed and progress. XXPS personnel, as educational professionals, should be given deference. As mentioned above, the parties must work together for the best interest of XXX. This does not mean that petitioner must accept whatever XXPS recommends without input, however, it is a necessity that petitioner work with the school officials, and to sometimes compromise, so long as XXX's educational needs are met. In this case, petitioner's intense distrust of XXPS appears to have hindered her ability to compromise as well as inflame her reluctance to afford XXPS educators the deference they deserve.

I FIND that the IEP last proposed by XXPS on or about September 2, 2020, meets the standards set forth by the IDEA for FAPE. The IEP provides XXX with academic and functional goals designed to meet XX current needs. It identifies and implements special education and related services as well as supplemental aids to be provided to XXX that will enable XX to advance appropriately and reach the identified goals. It contains statements concerning XXX's level of functioning, sets forth measurable annual achievement goals, transition goals, describes the services, accommodations and supports to be provided, and establishes objective criteria for evaluating XXX's progress. The IEP sufficiently addresses XXX's special education needs so as to provide a FAPE.

###### SUMMARY OF FINDINGS

* *Whether XXXXXXXXXX Public Schools (XXPS) has provided the student with a free appropriate public education (FAPE).* Petitioner has failed to meet her burden of proof on this issue. I FIND that XXPS has provided XXX with a FAPE.
* *Whether the student's current Individualized Education Program (IEP) sufficiently addresses the student's special education needs so as to provide a FAPE*. Petitioner has failed to meet her burden of proof on this issue. I FIND that the combination of XXX's stay-put IEP and the partially consented to IEPs were appropriately implemented for XXX to receive a FAPE, however, the implementation and continued use of multiple and sometimes outdated IEPs is untenable. XXX deserves one updated IEP as well as an appropriate reading program. The proposed September 2, 2020 IEP should be implemented.
* *Whether the parent is entitled to reimbursement from XXPS for educational expenses unilaterally secured for the student*. Petitioner failed to meet her burden of proof on this issue. I FIND that petitioner should not be reimbursed for educational expenses that were unilaterally secured for XXX from Lindamood-Bell.

Any additional or incidental matters raised by petitioner or respondent during the course of this proceeding that were not directly addressed herein were considered but found to be either outside the scope of the HO's authority or extraneous to the identified issues.

**ORDERS**

It is hereby **ORDERED** that the proposed September 2, 2020 IEP for XXX be immediately implemented, with or without parental consent. The evidence shows that XXX is in need of a reading program or methodology. It is therefore **ORDERED** that XXPS select a reading methodology or program appropriate for XXX by December 9, 2020, with or without parental consent. Selection of an appropriate methodology or reading program is hereby deferred to the educators. However, in accordance with the findings of this decision, "Just Words" will not be considered as an appropriate methodology or reading program.

The methodology or reading program will be implemented as soon after selection as possible. When scheduling implementation of the selected program or methodology, XXPS should consider extended school days, after school implementation, extended school year, Saturdays, before the start of school hours, during school hours or during summer school. XXPS will also select a reasonable location for implementation. When considering scheduling, XXPS should avoid disturbing XXX's current school schedule, including XX current electives and XX after-school baseball activities.

Once the implementation schedule has been decided, it will be strictly adhered to. There will be no scheduling deviations.

An IEP team will conduct an annual review of XXX's IEP as required by law. Until such time as the annual IEP review is required, any discrepancies, disagreements or parental concerns resulting from implementation of the September 2, 2020 IEP will be managed by XXX's case manager and will not require full assembly of the IEP team unless the case manager deems such a team meeting necessary.

**RIGHTS OF APPEAL**

Pursuant to 8 VAC 21-81-T and §22.214 D of the Code of Virginia, 1950, as amended, a decision by the hearing officer in any hearing, including an expedited hearing, shall be final and binding unless either party appeals in a Federal District Court within 90 days of the date of the decision, or in a state Circuit Court within 180 days of the date of this decision.

It is so Ordered.

ENTERED: November 30, 2020

/s/ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Rhonda J. S. Mitchell

Hearing Officer

Copy Furnished:

Petitioner

Counsel for XXPS

XXPS Due Process Coordinator

VDOE

VDOE Case Monitor

Local Hearing \_\_\_\_x\_\_\_\_\_ State Level Hearing \_\_\_\_\_\_\_\_\_\_

# CASE CLOSURE SUMMARY REPORT

VDOE Case #: 21-009

***(This summary sheet must be used as a cover sheet for the hearing officer’s decision at the end of the special education hearing and submitted to the Department of Education before billing.)***

**XXXXXXXXXX PUBLIC SCHOOLS XXXXXXXXXXXX**

**School Division Name of Parent**

**XXXXXXXXXXX NON-EXPEDITED**

**Name of Child Expedited or Non-expedited**

JOHN CAFFERKY and WESLEY ALLEN *PRO SE*

Counsel Representing LEA Representing Parent / Child

XXXXXXXXXXXX November 30, 2020

Party Initiating Hearing Decision Date

XXXXXXXXXX PUBLIC SCHOOLS

Prevailing Party

**Timeline:**

*Filing date*: August 26, 2020

*Date of resolution session(s):* September 9, 2020

*15 day resolution meeting due date*: September 10, 2020

*Original 30 day resolution period end date*: September 25, 2020

*First day of the 45-day decision period*: September 26, 2020

*Dismissal date*: Not Applicable

*Hearing dates*: This seven day hearing was conducted virtually on September 30, October 1 and 2, 2020. Although scheduled to proceed on October 5 and 7, 2020, the hearing was delayed until October 13 and 14, 2020 due to an unexpected illness of the petitioner. Due to lengthy witness examinations and a voluminous amount of exhibits, the hearing was extended to include October 15, 2020. On this date, petitioner's internet connection was lost during the hearing and the hearing was again extended to October 19, 2020.

*Original Decision Due Date*: November 9, 2020

*Reason for continuance*: Petitioner's unexpected illness and her internet connection problems also contributed the continuance. There was good cause for the continuance. The continuance was in the best interest of the student.

*Final decision due date*: December 9, 2020 per agreement of the parties.

*Decision rendered*: November 30, 2020

**Hearing Officer’s Identification of Issues and Summary of Findings:**

* *Whether XXXXXXXXXX Public Schools (XXPS) has provided the student with a free appropriate public education (FAPE).* Petitioner has failed to meet her burden of proof on this issue. I FIND that XXPS has provided XXX with a FAPE.
* *Whether the student's current Individualized Education Program (IEP) sufficiently addresses the student's special education needs so as to provide a FAPE*. Petitioner has failed to meet her burden of proof on this issue. I FIND that the combination of XXX's stay-put IEP and the partially consented to IEPs were appropriately implemented for XXX to receive a FAPE, however, the implementation and continued use of multiple and sometimes outdated IEPs is untenable. XXX deserves one updated IEP as well as an appropriate reading program. The proposed September 2, 2020 IEP should be implemented.
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*This certifies that I have completed this hearing in accordance with applicable regulations. This case was fully adjudicated. The decision in this case was timely rendered. Either party may appeal in a federal district court within 90 days of the date of this decision, or in a state circuit court within 180 calendar days of the date of this decision.*

The LEA is reminded of its responsibility to submit an implementation plan to the parties, the Hearing Officer, and the State Education Agency within 45 calendar days.

November 30, 2020 /s/

Rhonda J. S. Mitchell \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Printed Name of Hearing Officer Signature

Copy furnished to:

VDOE

Case Monitor

Parent

Counsel for XXPS

XXPS Representative