**#21-012**

COMMONWEALTH OF VIRGINIA

DEPARTMENT OF EDUCATION

DUE PROCESS HEARING

In Re: XXXXXXXX Case No. 21-012

XXXXXXXX XXXXXXXXX Public Schools

Represented by Grace Kim & James Atkinson Represented by John Cafferky & Melissa Little

DECISION

# Procedural History

Parent filed this request for a due process reach on August 24, 2020 and an amended request on October 23, 2020. The parties met on September 9, 2020 for a Resolution meeting and efforts continued until October 14, 2020. Video hearings were held on November 16, 17, 18, 19, and 30, 2020. With exception of Parent's Exhibit 22, all exhibits were admitted without objection. Due to the length of this hearing, the anticipated time to prepare closing briefs, and the required time to digest this information, the parties agreed, in the best interest of the Student, to extend the decision date to January 22, 2021. After the Parent filed her closing brief, the LEA submitted an objection to documents not in evidence and the Parent filed a response. Consideration of the documents in question does not affect the outcome of this decision. Therefore, the controversy is moot.

The following people attended the hearing:

XXXXXX, parent.

James Atkinson, counsel for Student.

Grace Kim, counsel for Student.

John Cafferky, counsel for LEA.

Melissa Little, counsel for LEA.

XXXXXXXXX, LEA representative.

Brian Miller, evaluator.

The following witnesses testified:

XXXXXXX, as an expert in speech language pathology.

XXXXXX, parent.

Dr. XXXXXXX, as an expert clinical psychologist.

XXXXXXXXXXXXXX, as an expert in special education.

XXXXXXXXXXXXXXXX, as an expert in special education.

XXXXXXXX, as an expert in special education.

Dr. XXXXXXXX, as an expert in speech language pathology and audiology.

Dr. XXXXXXX, as an expert in special education.

XXXXXXX, as an expert in special education.

XXXXXXXXXXX, as an expert in special education.

XXXXXXXX, as an expert in speech language pathology.

XXXXXXX, as an expert in school psychology.

XXXXXXXXX, as an expert in dyslexia.

Dr. XXXXXXXXX, as an expert in educational leadership as it relates to special education.

## Issues

1. Whether the IEPs proposed during 2018-20 were not reasonably calculated to offer the Student a FAPE and whether private day school placement at the XXXXXXXXXX was/is the appropriate IEP placement for the Student during the 2018-19, 2019-20 and 2020-21 school years.
2. Whether the October, 2020 IEP did not contain adequate and/or appropriate IEP Transition Services, Goals, Accommodations, Services, and Placement to address the Student's needs according to XX disabilities and whether a new IEP should be developed that incorporates the recommendations made by Dr. XXXX and Dr. XXX, to include placement at the XXXXXXXXXX.
3. Whether the Parents should be reimbursed the full fees and expenses incurred by them to effectuate the Student's enrollment and SPED services during the 2018-19 and 2019-20 school years at the XXXXXXXXXX, to include 1:1 services, speech, OT, education, etc.
4. Whether the Parents should be reimbursed for any fees and expenses incurred for Dr. XXXX's Auditory Processing Independent Educational Evaluation and Speech Language Independent Educational Evaluation and for Dr. XXX's Psychoeducational Independent Educational Evaluation.

### Findings of Fact

1. The Student is an XXXX year old student at the XXXXXXXXXX in XXXXXXXXXX The Student has the following diagnoses: Language Disorder, Dyslexia, Dysgraphia, Phonological Disorder, Attention Deficit Hyperactivity Disorder (“ADHD”), Developmental Coordination Disorder, Auditory Processing Disorder, and Anxiety Disorder.
2. The Student is currently eligible for Special Education and Related Services (SPED) and related services under the categories of Specific Learning Disability (SLD), Other Health Impairment (OHI), and Speech Language Impairment (SLI) pursuant to IDEA 20 U.S.C. §1412, et. seq.
3. Dissatisfied with the Student's progress and unpersuaded as to the expertise of the LEA instructors, the Parent withdrew the Student from XXXXXXXXXX Elementary School and unilaterally enrolled XX at the XXXXXXXXXX for the 2018-19 school year. XX continued at the XXXXXXXXXX for the 2019-2020 school year. XX is currently enrolled at the XXXXXXXXXX.

# DECISION

Predetermination

Parent argues there was predetermination because the members of the IEP team met without the Parent and even held an entirely separate staffing meeting in which they invited members outside the IEP team to develop and determine the proposed supports. (Tr.1399:16-17; Tr1447:11-1448:10). Further, the Parent argues the LEA insisted on proposing self contained reading and math instruction against the Parent's and counsel's staunch objections.

The LEA argues the information from the XXXXXXXXXX, private providers and the Parent were considered and the school team updated the IEP accordingly. Simply because the Parent disagreed with the LEA proposal does not make the process improper or amount to predetermination. Most interestingly, the LEA points out that the Parent is the one who predetermined the August, 2018 IEP outcome, and the two years' that followed. For all three, the Parent was already committed to the full XXXXXXXXXX tuition before she ever sat down at the IEP table. See: *Sanger v. Montgomery County Bd. of Educ.,* 916 F. Supp. 518, 526 (D. Md. 1996) where parents “were wedded to funding at [the private school] and nothing else. It thus would not have mattered in the least when [the public school] was written into the IEP because from the outset the [parents] made it clear that they would not accept it.”

Decision on Predetermination

The Parents have failed to establish predetermination on the part of the LEA. It is standard procedure for school staff to meet prior to IEP meetings and prepare a draft IEP for discussion at the meeting. To not do so would reflect a lack of preparation. An assessment of the child and XX needs is expected in the IEP process and coordination between teachers, administrators and specialists is essential for producing an appropriate program for the child. The mere occurrence of staff meetings prior to an IEP meeting does not prove predetermination.

Least Restrictive Environment

The Parent's obvious position is that the least restrictive environment rule is not applicable if the LEA has failed to propose an IEP reasonably designed to offer FAPE.

The LEA argues that the IDEA requires that placement be in the least restrictive environment. *Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176 (1982) at 202, The least restrictive environment is not just a “laudable goal, but also a requirement of the Act.” *DeVries v. Fairfax County Sch. Bd.,* 882 F.2d 876, 878 (4th Cir. 1989); see also *Doyle v. Arlington County School Board,* 806 F. Supp. 1253, 1260 (E.D. Va. 1992), aff'd 39 F. 3rd 1176 (4th Cir. 1994) (reversing hearing officer who “misunderstood the mandatory nature of the least restrictive environment provisions.”). Among other things, this means that under the IDEA, a student should be educated with non-disabled students to the maximum extent appropriate, and that the student's placement is “as close as possible to the child's home.” 34 C.F.R. §300.116(b)(3). Priority must first be given to the local public day school with non-disabled students, before considering more restrictive placement options that are in another jurisdiction.

The LEA further argues it is no surprise, then, that in case after case over the last three decades, courts and hearing officers in this jurisdiction have found again and again that the XXXXXXXXXX was not the appropriate least restrictive environment for a student.

Decision on Least Restrictive Environment

Assuming the LEA's 2020-21 proposed IEP offers FAPE, then the XXXXXXXXXX is not the appropriate placement for the Student.

Did the LEA propose FAPE for the 2018-19 and 2019-20 School Years?

The Parent argues that from the 2017-18 school year and continuing into the 2018-19 school year, the LEA delayed and failed to identify all of the Student's needs according to XX disabilities. However, the Parent does not deny participating in the IEP meetings and consenting to the IEP for the 2018-19 school year.

The LEA argues with unabashed 20/20 hindsight, a significant portion of Parent's Amended Complaint and the testimony of her witnesses, was devoted to criticizing the goals or other provisions of IEPs for the 2016-17, 2017-18, and 2018-19 school years. In addition to being time barred per above, these complaints admittedly were not raised during the IEP meetings themselves, even though Parent admits she fully participated, discussed, and had the opportunity to offer suggestions and requests for inclusion therein. Indeed, all were IEPs with which the Parent expressly consented. All of these IEPs ran their course without any objection or request for a new IEP. The Parent participated in numerous meetings, and expressly consented to all goals, accommodations, services, and placements proposed during that time. Parent cannot now be heard to complain about the provisions of those IEPs.

The LEA further argues it is well settled that a party cannot complain about goals, objectives, services, or other parts of an IEP to which they have consented, or to which they have not objected during the IEP meeting. *Board of Educ. v. Brett Y.,*1998 U.S. App. LEXIS 13702,\*39 (4th Cir. 1998)(parents cannot successfully challenge an IEP as inappropriate when neither they nor their attorney suggested during the IEP meeting “that additional, specific goals were needed to be added.”); *Sauer v. Johnson,* 36 IDELR 266 (E.D. Va. 2002) (IEP was appropriate where parents “did not object to the types of classes proposed for [the student] at the IEP meeting, nor did they ever request [a specific program for the student].”)

In *Schaffer v. Weast,* 554 F. 3rd 470, 475-476 (4th Cir. 2009), the Court said the district Court properly “declined to use that evidence to Monday morning quarterback the school system.” The Court went on to say, “[judicial] review would simply not be fair to school districts, whose decisions would be judged in hindsight based on later assessments of a student's needs at [a] later point in time.” *Id* at 477.

Decision on whether LEA proposed FAPE for the 2018-19 and 2019-20 School Year

The Parent did participate in the IEP meetings for the 2018-19 school year and did consent to the 2018-19 IEP. The Parent cannot successfully challenge the IEP as inappropriate for the 2018-19 school year.

The Parent also participated in the IEP meetings for the 2019-20 school year. She presented data from the XXXXXXXXXX and teacher input from the XXXXXXXXXX. When the LEA presented its proposed IEP the Parent withheld her consent. Instead of then and there, the Parent did not initiate a due process hearing. It is unfair to the LEA to simply let this opportunity to request due process pass and let another school year go by.

The issue is not whether the XXXXXXXXXX offered an appropriate IEP or even whether the XXXXXXXXXX offered a better IEP than the LEA's proposal. The issue is simply whether the LEA's IEP proposal offered FAPE.

Expert testimony from the LEA is that their proposal offers FAPE. Evidence was presented showing the LEA addressed some but not all of the Parent's concerns. Considering the fact that the gap between the Student and XX peers is growing, the LEA's proposal offers a change in direction, which is sorely needed. On the issue of whether the LEA offered FAPE for the 2019-20 school year, the LEA prevails.

Has the LEA proposed FAPE for the 2020-21 School Year?

The Parent argues the Student's disabilities are unique and the cookie cutter provision of educational services proposed by the LEA are not sufficient. The XXXXXXXXXX, she argues, is more effective at identifying and addressing the Student's needs according to XX disabilities. Specifically, though both schools, the XXXXXXXXXX and XXXXXXXXX, follow Orton-Gillingham principles, XXXXXXXXXX sticks with a strict protocol and does not allow for variations from the script. Whereas, the XXXXXXXXXX is more individualized instruction, allowing for better flexibility and one-one instruction.

The Parent also argues that her perception that during the 2017-18 and 2018-19 school years, the LEA was unqualified, not knowledgeable and inexperienced in the Orton-Gillingham methodologies used to teach the Student, combined with her perception the Student was not making progress, supports her argument the proposed 2020-21 IEP does not offer FAPE.

The LEA argues the choice of educational methodology is left to the school staff. The Fourth Circuit has made clear that courts and hearing officers should not dictate decisions of educational methodology. *Barnett v. Fairfax County Sch. Bd.,* 927 F. 2d 146 (4th Cir. 1991). The Court stated, “[W]hile a school system must offer a program which provides educational benefits, the choice of the particular educational methodology employed is left to the school system.” *Id.* at 151; see also *Alexander K . Fairfax County Sch. Bd.,* 30 IDELR 967, \*8 (E.D. Va. 1999) (This Court should not force the school system to adopt one of several competing educational methodologies. This would be impermissible under IDEA.”) In this case, there is not only one reading methodology by which the Student can receive educational benefit, but several.

Decision on whether the LEA has offered FAPE for the 2020-21 School Year

The argument between the parties is the Parent's belief that though Orton-Gillingham principles should be followed, no specific methodology should be prescribed and the LEA wants to use a methodology called Corrective Reading. The legal principle granting the LEA the right to make that decision is well established. It is important to point out that if the Parent is dissatisfied with the progress made by the Student while following the 2020-21 proposed IEP or if the LEA detects the Student is not making reasonable progress, either party can revisit the IEP or request a due process hearing. Other methodologies are available.

The XXXXXXXXXX claims the Student was/is making progress while enrolled there. The LEA claims the Student was making progress while enrolled at XXXXXXXXXX. However, every expert has opined that the Student, while enrolled at the XXXXXXXXXX, lagged and is lagging further and further behind that of XX peers.

On page 997 of the Transcript, lines 19-22 and page 998, lines 1-2 the testimony of the LEA's expert witness, Dr. XXXXXXX, went as follows:

Q Doctor, based upon this data, since the time [the Student] has

gone to the XXXXXXXXXX, in the area of reading, has XX closed the gap

or is she falling behind?

A I would say based on this data, the gap is not being closed and

XX has fallen further behind.

On page 450 of the Transcript, lines 14-21, the testimony of the Parent's expert witness, Dr. XXXXXXXX, went as follows:

Q If you look at - - these numbers though, they suggest that as

compared to XX age peers, XX's not closing the gap. But XX's

falling further behind. Isn't that what they - - isn't that what at

least these numbers show?

A I think it points out that the discrepancy - - yes, that XX is

having greater - - that XX peers are advancing at a faster rate than

XX is.

On page 28 of the Transcript, lines 17-22 and page 29, lines 1-8, the testimony of the Parent's expert witness, the Student's XXXXXXXXXX teacher, XXXXXXXX, went as follows:

Q Well, did [the Student] make progress in those areas during

the time you worked with XX?

A Yes, XX definitely made progress, relative to XXself - - as,

you know, you can see in the progress reports that I've written. But

relative to XX peers, relative to grade-level standards, XX was

still very behind.

Q And what is the significance of XX being still very behind?

A I mean - - my, my worry is that there's a big gap between

XX and XX peers. And, you know, in order to close the gap, XX's

going to have to make even faster progress than everyone else - -

or else the gap is just going to keep on widening.

Assuming the Parent's perceptions about the Student's XXXX grade year at XXXXXXXXX are correct, the past does not necessarily predict the future. The proposed 2020-21 IEP utilizes different Orton Gillingham methodologies and different instructors. The Student has matured since XX was taught at XXXXXXXXX. The proposed 2020-21 IEP complies with the least restrictive environment rule and will provide the Student with the benefits of associating with non-disabled children. The proposal incorporates some of Dr. XXX's recommendations. The Parent always retains the right to initiate new IEP meetings to address her concerns and the LEA is flexible in finding new/other Orton-Gillingham methodologies should the proposed one prove to be inadequate. Most importantly, the goal of the proposed IEP is aimed at closing the gap between the Student and XX peers. Expert testimony from the LEA witnesses proves the LEA offered FAPE for the 2020-21 school year.

The Student's Anxiety Disorder

The Parent argues that among the disabilities that make the Student unique is anxiety disorder. The Student must remain at the XXXXXXXXXX because the Student suffers from anxiety disorder and a move to a public school would exacerbate XX disorder.

The LEA argues that when the Student was at XXXXXXXXX, XX was happy, had friends, and exhibited no sign of anxiety. The LEA points out that when the Student was attending XXXXXXXX XXXXXX, anxiety was not raised as an IEP issue. The LEA also argues to support the Student's needs in the area of anxiety and XX transition back to XXXXXXXXX, the IEP team increased the number of counseling services to 2 hours per month in a 1:1 setting.

Decision on Student's Anxiety Disorder

Parent's closing brief argues that the rigidity of the Corrective Reading program does not address the Student's “emotional fragility.” But when asked about what the XXXXXXXXXX offered, XXXXXXX, the head of the elementary division of the XXXXXXXXXX, testified on page 1046, lines 9-22 and page 1047, lines 1-2 of the Transcript as follows:

Q Do you serve students who have primarily emotional disabilities?

A We do not.

Q Do you accept students who have a history of behavioral concerns?

A We do not.

Anxiety Disorder, though presently not presenting any problems at the XXXXXXXXXX, can become acute at any time. A change in teacher or student relationships or even curriculum, can trigger anxiety. The conclusion to be reached is the LEA is better situated to handle the Student's anxiety disorder.

Is the Parent entitled to reimbursement for XXXXXXXXXX expenses

The LEA argument against reimbursement for XXXXXXXXXX expenses is the LEA offered FAPE for every school year the Student attended the XXXXXXXXXX. Further, the LEA argues that where the unilateral parental placement is not appropriate, recovery should be denied on that basis alone. See: *Florence County Sch. Dist. Four v. Carter,* 510 U.S. 7, 15 (1993). *M.S. v. Yonkers Bd. of Educ.,*231 F. 3d. 96, 104, 105 (2nd Cir. 2000) (reversing district court order providing reimbursement for private placement even though public school IEP was inappropriate, because private placement was not appropriate under IDEA).

Decision on whether Parent is entitled to reimbursement for XXXXXXXXXX expenses

As stated earlier when discussing whether the LEA offered FAPE for the 2017-18, 2018-19 school years, the LEA was deemed to have done so since the Parent consented to the IEPs. *Sauer v. Johnson,* 36 IDELR 266 (E.D. Va. 2002) (IEP was appropriate where parents “did not object to the types of classes proposed for [the student] at the IEP meeting, nor did they ever request [a specific program for the student].”) Therefore, Parent is not entitled to reimbursement for XXXXXXXXXX expenses for the 2018-19 school. As for the 2019-20 and 2020-21 school years, the LEA offered FAPE for the reasons discussed above. Therefore, the Parent is not entitled to reimbursement for the 2019-20 and 2020-21 school years.

Is the Parent entitled to reimbursement for evaluation expenses

The LEA argues that, with respect to reimbursement for private tutoring, the Parent failed to produce any documented evidence about the work product, or progress or any other aspect of the tutoring, even though such information was request by subpoena. There was no testimony from the tutor. In short, there is a complete failure of proof which simply cannot be adequate to carry the Parent's burden that such services were educationally helpful.

With respect to reimbursement for the cost of Dr. XXXX's evaluation, the LEA argues that the LEA had previously recognized the Student's auditory processing deficits prior to receiving Dr. XXXX's report. The Student's auditory processing deficits were identified in the April 2017 psychological evaluation and was part of the basis for specific learning disability. (LEA Ex. 21, p. 5, LEA Ex. 75, LEA Ex. 19).

The LEA makes no argument against reimbursement for the expense of the Dr. XXX Evaluation.

Decision on whether Parent is entitled to reimbursement for evaluation expenses

Since the LEA reviewed and adopted suggestions from Dr. XXX's report, the LEA should reimburse the Parent for the reasonable cost of Dr. XXX's evaluation.

CONCLUSION

For the above stated reasons, it is found that the Parent has failed to meet her burden of proof to establish the LEA has failed to offer or propose FAPE. It is further found that the LEA is the prevailing party.

ORDER

IT IS HEREBY ORDERED that the above styled matter be dismissed.

RIGHT OF APPEAL NOTICE

This decision is final and binding unless either party appeals in a federal district court within 90 days of the date of this decision, or in a state circuit court within 180 calendar days of the date of this decision.

Date: January 2021 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Richard M. Alvey, Hearing Officer