**#21-034**

***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**

**XXXXXXXXXXXXXXX,**

**by XX parent, XXXXXXXXXXXX, Petitioner**

**v. VDOE Case #: 21-034**

**XXXXXXXXXXXXX PUBLIC SCHOOLS, Respondent.**

# HEARING OFFICER DECISION

**Present for Hearing January 11, 2021:**

Rhonda J. S. Mitchell, Hearing Officer

Kandise Lucas, Advocate for Petitioner / Student

XXXXXXXXXXXX, Mother (Petitioner, Complainant, Parent)

XXXXXXXXXXXXXXX, Student

Mary Hart, Counsel for XXXXXXXXXXXXX Public Schools (XXPS or LEA)

Rachael Jewell, Assistant Counsel for XXXXXXXXXXXXX Public Schools

XXXXXXXXXXXX, Assistant Director, Exceptional Education, Compliance and Engagement, XXPS

XXXXXXXXX, Paralegal for XXPS

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

**Present for Hearing January 12, 2021:**

Rhonda J. S. Mitchell, Hearing Officer

Kandise Lucas, Advocate for Petitioner / Student

XXXXXXXXXXXX, Mother

XXXXXXXXXXXXXXX, Student

Mary Hart, Counsel for XXXXXXXXXXXXX Public Schools

Rachael Jewell, Assistant Counsel for XXXXXXXXXXXXX Public Schools

XXXXXXXXXXXX, Assistant Director, Exceptional Education, Compliance and Engagement, XXPS

XXXXXXXXX, Paralegal for XXPS

Brian Miller, Case Monitor, VDOE

**Present for Hearing January 26, 2021**:

Rhonda J. S. Mitchell, Hearing Officer

Kandise Lucas, Advocate for Petitioner / Student

XXXXXXXXXXXX, Mother

XXXXXXXXXXXXXXX, Student

Mary Hart, Counsel for XXXXXXXXXXXXX Public Schools

Rachael Jewell, Assistant Counsel for XXXXXXXXXXXXX Public Schools

XXXXXXXXX, Paralegal for XXPS

XXXXXXXXXXXX, Assistant Director, Exceptional Education, Compliance and Engagement, XXPS

**Present for Hearing January 27, 2021**:

Rhonda J. S. Mitchell, Hearing Officer

Kandise Lucas, Advocate for Petitioner / Student

XXXXXXXXXXXX, Mother

XXXXXXXXXXXXXXX, Student

Mary Hart, Counsel for XXXXXXXXXXXXX Public Schools

Rachael Jewell, Assistant Counsel for XXXXXXXXXXXXX Public Schools

XXXXXXXXX, Paralegal for XXPS

XXXXXXXXXXXX, Assistant Director, Exceptional Education, Compliance and Engagement, XXPS

**Present for Hearing January 28, 2021**:

Rhonda J. S. Mitchell, Hearing Officer

Kandise Lucas, Advocate for Petitioner / Student

XXXXXXXXXXXX, Mother

XXXXXXXXXXXXXXX, Student

Mary Hart, Counsel for XXXXXXXXXXXXX Public Schools

Rachael Jewell, Assistant Counsel for XXXXXXXXXXXXX Public Schools

XXXXXXXXX, Paralegal for XXPS

XXXXXXXXXXXX, Assistant Director, Exceptional Education, Compliance and Engagement, XXPS

**Present for Hearing January 29, 2021**:

Rhonda J. S. Mitchell, Hearing Officer

Kandise Lucas, Advocate for Petitioner / Student

XXXXXXXXXXXX, Mother

XXXXXXXXXXXXXXX, Student

Mary Hart, Counsel for XXXXXXXXXXXXX Public Schools

Rachael Jewell, Assistant Counsel for XXXXXXXXXXXXX Public Schools

XXXXXXXXX, Paralegal for XXPS

XXXXXXXXXXXX, Assistant Director, Exceptional Education, Compliance and Engagement, XXPS

**Present for Hearing February 1, 2021**:

Rhonda J. S. Mitchell, Hearing Officer

Kandise Lucas, Advocate for Petitioner / Student

XXXXXXXXXXXX, Mother

XXXXXXXXXXXXXXX, Student

Mary Hart, Counsel for XXXXXXXXXXXXX Public Schools

Rachael Jewell, Assistant Counsel for XXXXXXXXXXXXX Public Schools

XXXXXXXXX, Paralegal for XXPS

XXXXXXXXXXXX, Assistant Director, Exceptional Education, Compliance and Engagement, XXPS

Brian Miller, Case Monitor, VDOE

**Present for Hearing February 2, 2021**:

Rhonda J. S. Mitchell, Hearing Officer

Kandise Lucas, Advocate for Petitioner / Student

XXXXXXXXXXXX, Mother

XXXXXXXXXXXXXXX, Student

Mary Hart, Counsel for XXXXXXXXXXXXX Public Schools

Rachael Jewell, Assistant Counsel for XXXXXXXXXXXXX Public Schools

XXXXXXXXX, Paralegal for XXPS

XXXXXXXXXXXX, Assistant Director, Exceptional Education, Compliance and Engagement, XXPS

**Present for Hearing February 3, 2021**:

Rhonda J. S. Mitchell, Hearing Officer

Kandise Lucas, Advocate for Petitioner / Student

XXXXXXXXXXXX, Mother

XXXXXXXXXXXXXXX, Student

Mary Hart, Counsel for XXXXXXXXXXXXX Public Schools

Rachael Jewell, Assistant Counsel for XXXXXXXXXXXXX Public Schools

XXXXXXXXX, Paralegal for XXPS

XXXXXXXXXXXX, Assistant Director, Exceptional Education, Compliance and Engagement, XXPS

**Present for Hearing February 4, 2021**:

Rhonda J. S. Mitchell, Hearing Officer

Kandise Lucas, Advocate for Petitioner / Student

XXXXXXXXXXXX, Mother

XXXXXXXXXXXXXXX, Student

Mary Hart, Counsel for XXXXXXXXXXXXX Public Schools

Rachael Jewell, Assistant Counsel for XXXXXXXXXXXXX Public Schools

XXXXXXXXX, Paralegal for XXPS

XXXXXXXXXXXX, Assistant Director, Exceptional Education, Compliance and Engagement, XXPS

**Present for Hearing February 5, 2021**:

Rhonda J. S. Mitchell, Hearing Officer

Kandise Lucas, Advocate for Petitioner / Student

XXXXXXXXXXXX, Mother

XXXXXXXXXXXXXXX, Student

Mary Hart, Counsel for XXXXXXXXXXXXX Public Schools

Rachael Jewell, Assistant Counsel for XXXXXXXXXXXXX Public Schools

XXXXXXXXX, Paralegal for XXPS

XXXXXXXXXXXX, Assistant Director, Exceptional Education, Compliance and Engagement, XXPS

**Hearing Location:**

**Conducted Virtually via Zoom**

**Court Reporter:**

**Cavalier Reporting and Videography**

Introduction and Procedural History***:***

This eleven-day due process proceeding was initiated on November 18, 2020 by XXXXXXXXXXXX (mother, petitioner or parent) on behalf of her XXX, XXXXXXXXXXXXXXXXXX (XXXX or student). Petitioner filed a request for due process hearing (complaint) against XXXXXXXXXXXXX Public Schools pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et. seq*. XXXXXXXXXXXXX Public Schools timely responded to the complaint on November 28, 2020.

The hearing officer, Rhonda J. S. Mitchell, was formally appointed on November 24, 2020 by letter from XXXXXXXXXXXX, Assistant Director, Exceptional Education, Compliance and Engagement, XXXXXXXXXXXXX Public Schools (XXPS or school district), XXXXX, Virginia. The hearing officer formally accepted the appointment by letter dated November 25, 2020. Mary Hart, from the XXXXXXXXXXXXX Attorney’s Office represented XXPS. She was assisted by Rachael Jewell, also with the XXXXXXXXXXXXX Attorney's Office, XXXXXX, Virginia. Petitioner was represented by Advocate Kandise Lucas of Advocates for Equity in Schools, Richmond, Virginia.

Three pre-hearing telephone conferences were conducted on November 30, December 4, 2020 and January 6, 2021. The hearing officer:

* provided proper notice of the pre-hearing conference calls;
* prepared a draft pre-hearing report for consideration by the parties;
* discussed the issues set forth therein and finalized the report;
* set the matter for hearing;
* issued three pre-hearing orders;
* addressed pre-hearing motions and preliminary matters;
* issued subpoenas;
* established the hearing agenda;
* discussed administrative and substantive concerns;
* reviewed and properly addressed appropriate documents;
* issued two mid-hearing orders;
* issued a post-hearing timeline;
* prepared one post-hearing decision letter;
* and completed the case closure report.

All parties were represented during the pre-hearing conference calls and during the hearing. At close of the hearing, the parties waived oral closing arguments, instead opting to provide only written closing briefs. All prehearing orders, decisions and ancillary documents for this case have been filed herewith and are hereby fully incorporated herein by reference. The orders and decisions in this case are summarized below:

## First Prehearing Order (December 2, 2020)

Pursuant to discussions during the first pre-hearing conference, the hearing officer entered a prehearing order dated December 2, 2020. Therein, this matter was set for hearing on January 11, 12, 13, 14 and 15, 2021 with January 18th tentatively set aside as an extension day. Due to school closing for the holiday season, resulting in the unavailability of witnesses and a delay in starting the hearing, the parties agreed that it was in the best interest of the student to reset the decision date from the original February 1, 2021 date to February 15, 2021. It was decided that the hearing would be conducted virtually due to the Covid-19 pandemic. XXPS was charged with contracting the court reporter, providing technical support and moderation services for the virtual hearing. As directed, the parties exchanged exhibits and witness lists on January 4, 2021. This information was also timely provided to the hearing officer.

The following administrative matters were memorialized in the first prehearing order dated December 2, 2020:

* There were no objections to the appointed hearing officer.
* The parent opted for the hearing to be open. This option did not open the hearing to include media coverage coverage or permit recording (audio or visual) devices other than those needed by the court reporter. Cell phones were to be turned off during the hearing and the hearing was not be live-streamed.
* The parent was represented by an advocate.
* The student may be present for the hearing, if deemed appropriate.
* There was no need for a foreign language interpreter.
* The parties did not object to decisions or other pertinent information being transmitted electronically or by facsimile.
* Motions, objections or other documents or issues were to be addressed via conference call and/or written decision.

As a matter of procedure:

* The petitioner was to proceed first at the hearing.
* The petitioner carried the burden of proof.
* The parties elected to be provided a written decision.
* The parties elected to provide oral opening arguments; oral and written closing arguments.

## Decisions on Notice of Insufficiency and Motion to Dismiss

On December 3, 2020, counsel for XXPS filed a notice of insufficiency and motion to dismiss. The hearing officer found the request for a due process hearing to be legally sufficient by decision dated December 6, 2020. The parent's advocate responded to the motion to dismiss on December 7, 2020. The hearing officer denied the motion to dismiss by decision dated December 9, 2020.

*Second Prehearing Order (December 15, 2020)*

A second prehearing conference call was held on December 14, 2020 resulting in a second pre-hearing order entered on December 15, 2020. It was noted therein that the parties were scheduled to conduct their first resolution session on December 18, 2020, with this date also representing the last day of the resolution period. The parties agreed to delay the resolution session until petitioner and her advocate had an opportunity to review the student's cumulative records which were to be delivered to petitioner on or about December 11, 2020. As scheduled, the resolution session convened on December 18, 2020 but no resolution was reached. Petitioner opted not to pursue mediation.

In the second prehearing order, the hearing officer directed that there would be no third-party communications during the course of this proceeding. It was noted that any third-party communications regarding this hearing that occurred during the course of this proceeding would be in violation of this order. Dr. XXXXXXXXXXXX was acknowledged as XXPS' representative, thereby eliminating any need to directly contact school board members as had previously occurred.

*Third Prehearing Order (January 6, 2021)*

A third prehearing conference call was conducted on January 6, 2021 resulting in a third prehearing order also dated January 6, 2021. Therein, optimistic case dismissal plans were discussed based on a projected representation of resolution made by the parent's advocate, however, resolution ultimately failed and this case proceeded to hearing.

The advocate informed the hearing officer that a resolution session was conducted on the morning of January 6, 2021 involving a second request for due process hearing (complaint) filed by the parent, XXXXXXXXXXXX, regarding her XXX, XXXXXXXXXXXXXXX. Logistics on the handling of this second filing were discussed in the order, however, the matter was ultimately withdrawn.

The third prehearing order reset the hearing officer's decision date. The parties confirmed the extended decision date from February 1, 2021 to February 15, 2021 due to the projected length of the hearing, the anticipated volume of evidence to be presented during the proceeding and the holiday season that interrupted the availability of witnesses. The parties agreed that the decision delay was in the best interest of the student and would not otherwise adversely affect the student.

*Mid-Hearing Order (January 13, 2021)*

The hearing commenced on January 11, 2021 with oral opening arguments from both parties. The parent's advocate proceeded first followed by argument from counsel for XXPS. The exhibit books from both parties were accepted into evidence subject to individual exhibit objections that might arise during the course of the hearing.

Following emotional testimony from petitioner on January 11, 2021, on the morning of January 12th, the second day of hearing, petitioner requested a delay in the proceedings to assemble an Individualized Education Program (IEP) team to attempt the development of an appropriate IEP for XXXX. XXPS did not object to the requested delay, offering a willingness to work on an acceptable IEP. The hearing officer entered a mid-hearing order on January 13, 2021, therein granting the parties a two-week hearing delay until January 26, 2021. The mid-hearing order granted the IEP team an opportunity to conduct two IEP team meetings for ninety minutes each. The order also listed the team's composition as requested by the advocate. The two IEP team meetings were convened, however, the team was unsuccessful in developing an IEP. The hearing reconvened for the third day of hearing on January 26, 2021.

*Mid-Hearing Order (February 4, 2021)*

On February 2, 2021, it was revealed that XXXX was enrolled in a course at XXXXXXXXXXXXXXXXXX Community College. XXPS was unaware of this course enrollment and requested information on the course. Counsel for XXPS argued that this information should have been revealed during discovery. The hearing officer agreed, however, petitioner objected to providing information about the course claiming that XXPS had previously interfered with XXXX's outside courses. Petitioner agreed to release the information so long as she was assured that XXPS would not contact XXXXXXXXXXXXXXXXXX Community College about XXXX.

In response to the parent's concerns, the hearing officer entered a mid-hearing order on February 4, 2021 that forbid XXPS personnel from contacting XXXXXXXXXXXXXXXXXX Community College regarding XXXX, for any reason, without the expressed written permission of the parent. In turn, the parent was required to provide counsel for XXPS with a link to the program syllabus, XXXX's acceptance letter into the program and any available progress reports.

*Post-Hearing Timeline Order (February 5, 2021)*

On February 3, 2021, the 9th day of the hearing, the parties agreed to delay the decision date to March 15, 2021 due to the projected 11-day length of the hearing; the two-week delay granted on the second day of the hearing; the large volume of evidence presented during the hearing; and the extra time requested by the parties to prepare and submit their closing briefs to the hearing officer. The hearing ended on February 5, 2021. The parties agreed that the delay would not adversely affect XXXX and was in XX best interest.

Taking into consideration the time projected to receive the transcripts and to absorb the enormous volume of evidence presented during the hearing and to avoid confusion, a post-hearing timeline was prepared and entered by the hearing officer on February 5, 2021. As agreed by the parties, the due date for petitioner's closing brief was extended to February 16, 2021. The closing brief from XXPS was extended to February 22, 2021. The hearing officer's decision due date remained March 15, 2021. Due to an internet and electrical outage resulting from an ice storm on February 13th and 14th, petitioner's advocate requested a delay until February 18th to submit her closing brief. Accordingly, both parties were granted a two-day delay. Petitioner's closing brief was ultimately submitted on February 18, 2021 and XXPS' closing brief was submitted on February 24, 2021.

*Post-Hearing Decision Letter (February 28, 2021)*

Petitioner's advocate sent an emailed message to the hearing officer requesting information and a post-hearing order claiming irregularities in XXXX's psychological test performed by XXXXXXXXXXXXX, the school psychologist, as well as irregularities in XXXX's Vineland assessment. Counsel for XXPS objected to the request. The hearing officer issued a brief decision letter declining the request but agreeing to briefly discuss the matter in this decision.

### The Hearing

**Petitioner's Witnesses:**

*The following witnesses were sworn and called by the* ***petitioner****:*

**Day 1: January 11, 2021, Transcript Page #:**

XXXXXXXX Assistant Principal, XXXXXX High School 52

XXXXXXXXXXXX Petitioner / Mother / Parent 214

**Day 2:** **January 12, 2021, Transcript Page #:**

Petitioner requested a delay in the hearing to conduct IEP team meetings. XXPS agreed to the delay. A two-week delay was granted. Two unsuccessful IEP meetings were conducted during the delay. It was determined that the delay was in the best interest of the student and would not adversely affect the student. 4

**Day 3: January 26, 2021, Transcript Page #:**

XXXXXXXXXXXX Petitioner / Mother / Parent 20

XXXXXXXXXXXXXXXX Special Education Teacher, XXXXXXXXX High School, XXPS 147

**Day 4: January 27, 2021, Transcript Page #:**

XXXXXXXXXXXXXXXX Special Education Teacher, XXXXXXXXX High School, XXPS 6

XXXXXXXXXX Educational Consultant, Expert in Special Education 79

XXXXXXXXX Coordinator, Exceptional Education, Secondary Schools (XXXXX), XXPS 171

**Day 5: January 28, 2021, Transcript Page #:**

XXXXXXXX Principal, XXXXXXXXX High School, XXPS 9

The following witness was called out of order due to her unavailability. The witness was sworn after petitioner's case rested. The witness was called for petitioner's case on Day 8, February 2, 2021. Her testimony is listed here instead of on February 2, 2021, so as to not interfere with the flow of respondent's witnesses as listed below.

XXXXXXXXXX Executive Director, XXXXXXXXXXXXXXXXXXX Center 202

**XXPS Witnesses**:

*The following witnesses were sworn and called by* ***XXPS****:*

XXXXXXXX Counselor, XXXXXXXXX High School , XXPS 140

XXXXXXXX Theater Teacher, XXXXXXXXX High School, XXPS 193

**Day 6: January 29, 2021, Transcript Page #:**

XXXXXXXXX Special Education Transition Teacher, XXXXXXXXX High School, XXPS 20

XXXXXXXX Associate Principal, XXXXX High School, XXPS 172

**Day 7: February 1, 2021, Transcript Page #:**

XXXXXXXX Associate Principal, XXXXXXX High School, XXPS 23

XXXXXXXXXX Department Chair, Special Education, XXXXXXXXX High School, XXPS 155

XXXXXXXX Assistant Principal, XXXXXXXXX High School, XXPS 274

**Day 8: February 2, 2021, Transcript Page #:**

XXXXXXXXX Coordinator, Special Education Services (XXXXXXXXX Zone), XXPS 73

**Day 9: February 3, 2021, Transcript Page #:**

XXXXXXX Coordinator, Assessment and Remediation, XXPS 17

XXXXXXXXXX Instructional Assistant, XXXXXXXXX High School, XXPS 120

**Rebuttal Witnesses**:

*The following witnesses were either sworn or reminded of being sworn previously. The following rebuttal witnesses were called by* ***petitioner****:*

**Day 10: February 4, 2021, Transcript Page #:**

XXXXXXX Community Organizer, XXXXXXXX 27

XXXXXXXXXX Educational Consultant, Expert in Special Education 38

XXXXXXXXXXXX Petitioner / Parent / Mother 106

**Day 11: February 5, 2021, Transcript Page #:**

XXXXXXXXXXXXXXX Student 7

*The following rebuttal witnesses were sworn and called by* ***XXPS****:*

XXXXXXXXXXXX Educational Specialist, Language Instruction Educational Program, XXPS 42

XXXXXXXXXXXXX Director, Psychological Services, XXPS 109

XXXXXXXXXXXX Assistant Director, Exceptional Education, Compliance & Engagement, XXPS 170

Once dismissed, the hearing officer admonished all witnesses not to discuss their testimony. Each witness agreed. Both parties waived oral closing arguments in lieu of submitting written closing briefs.

***XXXXXXXX XXXXXXXXXX:***

XXXXXXXXXXXXXXX (student or XXXX) is a XX-year-old, XXth grade student attending XXXXXXXXX High School, XXXXXXXXXXXXX Public Schools (XXPS). XXX mother, XXXXXXXXXXXX, the petitioner, filed this complaint on behalf of XXXXXX via power of attorney. Her right to file this complaint by power of attorney was not challenged by XXXXXXXXXXXXX Public Schools.

XXXX enjoys music, basketball, photography, computer processing and public speaking. XX testified that XX wanted to go to law school and become an attorney. XXXX is a personable, pleasant, well mannered, confident, charismatic and social young XXX. XXXX enjoys advocating for disabled students and was recently instrumental in the Virginia legislature passing a bill with XXxname attached. XXXX very much enjoys XX extracurricular activities at XXPS and wants to continue those activities. XXXX wants to pursue a standard diploma.

There is no issue regarding XXXX's eligibility to receive special education services and supports pursuant to the Individuals with Disabilities Education Act (IDEA). XXXX was born on XXXXXXXXXXXXXX. XX was medically diagnosed during infancy with Down's Syndrome. Down's Syndrome is a genetic disorder that associates with a distinct facial appearance, mild to moderate intellectual disability, speech and language impairments and developmental delays.

XXXX has attended XXPS for 12 years. XX transferred to XXXXXXXXX High School from XXXXXXXXX High School pursuant to a November 6, 2019 resolution agreement. XXXX has been assigned a one-on-one (1:1) aide. XX eligibility for special education services and supports is primarily categorized as intellectual disability with a secondary categorization of speech language impairment.

Intellectual disability is defined as sub average general intellectual functioning that exists concurrently with deficits in adaptive behavior. Intellectual disabilities manifest during a child's developmental period and adversely affect educational performance. 34 CFR 300.8(c)(6) A speech language impairment means a communication disorder that adversely affects a child's educational performance. Such an impairment might include stuttering, voice impairment, expressive or receptive language impairment and/or impaired articulation. 34 CFR 300.8(c)(11)

XXXX, who speaks both XXXX and English, receives services in English as a Second Language (ESL) and wears eyeglasses for XX vision. XXPS has XXXX on track to receive an applied studies diploma pursuant to XX 2014 stay-put Individualized Education Program (IEP). Both XXXX and XX mother, the petitioner, testified that XXXX should instead be pursuing a standard diploma.

On or about October 23, 2020, the petitioner unilaterally enrolled XXXX in the XXXXXXXXXXXXXXXXXXX XXXX (XXX) Alternative Education Program. At XXX, XXXX is pursuing a standard diploma through the Penn Foster online program. XXX courses include Algebra 1, Science, English and United States History. XXX schedule at XXX is believed to include 25 - 30 hours per week of home tutoring and resource services along with 25 hours of in-school services. The XXX is self described on its website as providing a program  designed to provide services to students who are "XXXX and under credited with a curriculum program to keep them on track academically."  XXX claims to provide students with an opportunity to successfully transition back into their home school district or into another alternate educational setting.

XXX has not been certified by the Virginia Department of Education (VDOE) but has been certified by Penn Foster to administer its diploma program. XXX is not a special education facility. Although currently enrolled at XXX, XXXX continues to sign in for XX online classes with XXPS but does not always stay for the full class.

XXXX has not been comprehensively evaluated or assessed since 2017. When last tested, XXXX was determined to have a full scale IQ of 40. During the hearing, the parties mutually agreed that XXXX requires more current evaluations and assessments. However, petitioner strongly objected to XXPS performing the evaluations, having expressed extreme distrust of XXPS. Petitioner therefore requested independent educational evaluations (IEEs). XXPS contends that they should be allowed to first assess or evaluate XXXX and that independent educational evaluations should be allowed only if the petitioner disagrees with XXPS findings and results.

XXXX is very fortunate to have a loving and devoted mother who is concerned and actively involved in XX educational curriculum. It is clear that the petitioner wants what she believes is best for XXXX. XXXX's mother has actively participated in numerous Individualized Education Program (IEP) team meetings. She believes that XXPS has underestimated XXXX's abilities to learn and has failed to educate XX appropriately. She believes that XXPS has failed to provide XXXX with a free appropriate public education (FAPE) as required by the IDEA.

At personal cost, petitioner insures that XXXX is involved in outside activities and educational opportunities apart from XXPS. In addition to XXX, XXXX is enrolled in a course with XXXXXXXXXXXXXXXXXX Community College. The petitioner expressed fear that since XXXX's enrollment in this program had been revealed during this proceeding, XXPS would interfere with XX continued attendance in the program. The petitioner insinuated that XXPS had previously sabotaged other such opportunities for XXXX. The petitioner's concerns were so great that the hearing officer issued a mid-hearing order on January 13, 2021 that forbid XXPS personnel from contacting XXXXXXXXXXXXXXXXXX Community College regarding XXXX for any reason without parental consent.

Beyond two IEP addendums consented to by the petitioner in 2015 and a resolution agreement signed on November 6, 2019, the 2014 IEP remains XXXX's stay-put IEP. The stay-put IEP has XXXX on track to receive an applied studies diploma upon graduation.

### Issues:

The issues in this case as identified in the pre-hearing report and as agreed to by petitioner and her advocate are as follows:

* *Whether the student has been denied a free appropriate public education (FAPE) by XXXXXXXXXXXXX Public Schools.*
* *Whether the student should be privately placed, at public expense, to receive a FAPE.*
* *Whether the parent has been denied an opportunity to meaningfully participate in the decision-making process regarding the student's education.*
* *Whether the proposed IEP dated October 20, 2020 is reasonably calculated to provide the student with a FAPE.*
* *If privately placed for XX core instruction, whether XXXXXXXXXXXXX Public Schools should afford the student an opportunity to participate in public school extra-curricular activities for XX to receive a FAPE.*
* *If privately placed for XX core instruction, whether XXXXXXXXXXXXX Public Schools should afford the student an opportunity to participate in vocational activities sponsored by XXXXXXXXXXXXX Public Schools for XX to receive a FAPE.*
* *Whether XXXXXXXXXXXXX Public Schools should pay for family counseling for the student's family.*

***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.

### Findings of Fact:

XXXX is currently enrolled as a XXth grade student at XXXXXXXXX High School. XXXX started attending XXXXXXXXX High School in November of 2019. In March 2020, due to the Covid-19 pandemic and school closures, XX began receiving XX instruction virtually. During these virtual times, XXPS offered XXXX the opportunity for in-person education, five days a week at XXXXXXXXX High School, but XXXX has not attended. XXPS is providing XXXX with targeted 1:1 support for XX virtual classes. Recently, although XXXX may log into XX virtual classes for attendance purposes, XX rarely stays the duration of the class.

There have been many IEP meetings over the years, however, the last completed and signed IEP, now the stay-put IEP, is dated November 12, 2014. (SB Ex. 1) In 2015, an addendum regarding services (SB Ex. 2), along with a second addendum regarding extended school year (ESY) services (SB Ex. 3) were signed by the parent. A resolution agreement was signed on November 6, 2019 that also affected the stay-put IEP. (SB Ex. 18)

On September 25, 2020, the eligibility team conducted a file review and determined that XXXX remained eligible for special education services and supports. (SB Ex. 67) Prior to the eligibility meeting, XXPS unsuccessfully attempted to gain parental consent to evaluate XXXX. During the hearing, the parties mutually agreed that XXXX needed updated evaluations and assessments.

An IEP meeting was conducted on October 20, 2020 but petitioner did not attend. However, petitioner did provide the team with a written document on the evening of October 19, 2020 titled *XXXX's Required Education Plan*. (P. Ex. 12) Petitioner requested that the team consider this document at the meeting and either incorporate or substitute the content for XXXX's IEP. The IEP team considered the document at the meeting, including information about private day placement. The team denied petitioner's request that XXXX be placed at a private day school, asserting that it was not the least restrictive environment for XXXX. XXPS sent petitioner a prior written notice explaining the denials addressed in the petitioner's written document as well as a copy of the draft IEP generated from the October 20th meeting. (SB Ex. 82) XXPS alleges that the October 20, 2020 proposed IEP will provide XXXX with a FAPE and should be ordered implemented. (SB Ex. 81) The petitioner disagrees.

On November 5, 2020, petitioner sent an electronic message (email) to XXPS requesting that XXXX's IEP be changed to private day placement at the XXXXXXXXXXXXXXXXXXX XXXX (XXX). At the time of this hearing, XXXX was enrolled at XXX pursuing a standard diploma through the Penn Foster online program. XXXX had been unilaterally placed at XXX by petitioner. XXX is not a licensed special education facility but is authorized to administer the Penn Foster online diploma program.

XXPS responded to petitioner's electronic message on November 10, 2020, again rejecting private day placement for XXXX and offering to conduct another IEP meeting. The petitioner filed this request for a due process hearing on November 18, 2020.

In April of 2017, petitioner filed a similar due process complaint against XXPS with many of the same parental concerns that were identified during this current due process hearing. A hearing officer decision was entered on August 7, 2017. (SB Ex. 4) In the 2017 case, petitioner summarily argued that XXPS should provide XXXX with the opportunity to pursue a standard, instead of applied studies diploma. She alleged that XXXX had not received a free appropriate public education (FAPE) from XXPS. She contended that as the parent, she was not properly informed by XXPS about the applied studies diploma. The hearing officer in the 2017 case found in favor of XXPS on all issues. He generally decided that pursuit of an applied studies diploma was appropriate for XXXX and that XXXX had not been denied a FAPE by XXPS.

On December 14, 2020, the Joint Legislative Audit and Review Commission (JLARC) issued a draft report, that among other things, addressed the applied studies diploma and post secondary transition plans for special education students. (P. Ex. 18) In light of this report, petitioner has expressed concerns about the inadequacy of XXXX's transition plans as proposed by XXPS and XXXX's pursuit of an applied studies diploma. She contends that the hearing officer in the 2017 case did not have benefit of the JLARC report that discusses the inadequacies of the applied studies diploma.

As previously mentioned, XXXX has not been evaluated since 2017. Although both parties agree that XXXX needs updated evaluations and assessments, there is disagreement as to who should evaluate or assess XXXX, i.e. XXPS or independent educational evaluators (IEEs). On several occasions, petitioner declined to provide consent for XXPS to conduct evaluations. The results of current and updated evaluations and assessments are vital to construct of XXXX's continued educational experience.

***Arguments:***

Petitioner generally argues the following:

* That XXPS has failed in many ways to provide XXXX with a free appropriate public education (FAPE) while attending XXXXXXXXX High School in XXXXXXX XXXX.
* That XXPS failed to academically challenge XXXX.
* That, with the proper supports, accommodations and services, XXXX is capable of earning a standard diploma through various alternative pathways.
* That petitioner was not properly informed by XXPS about the applied studies diploma when she signed the stay-put Individualized Education Program (IEP) in 2014 as described in the Joint Legislative Audit and Review Commission (JLARC) report.
* That the IEP team was dismissive of petitioner's concerns and educational aspirations for XXXX.
* That petitioner was not permitted to be an equal member of the IEP team.
* That the draft JLARC report dated December 14, 2020 (P Ex. 18) clearly outlines inherent problems with the applied studies diploma.
* That petitioner unilaterally placed XXXX at XXX because they recognize XX potential and are assisting XX with XX pursuit of a standard diploma. That XXX is providing XXXX with a FAPE.
* That XXXX's IEP should be written to privately place XX at XXX for XX day school at public expense.
* That XXXX should be permitted to continue XXX extra-curricular activities and electives at XXXXXXXXX High School while attending XXX for XX day school placement. That XXXX should be provided transportation by XXPS to XXX.
* That XXXX has academically regressed while attending XXXXXXXXX High School.
* That at a minimum, XXXX should be exposed to the Standards of Learning (SOL) through inclusion classes.
* That XXPS failed to provide XXXX with appropriate ESL services.
* That petitioner disagrees with XXXX's eligibility classification for special education services as being intellectually disabled. That petitioner was not afforded the opportunity to participate in XXXX's last eligibility team meeting.
* That the October 20, 2020 IEP proposed by XXPS fails to provide XXXX with a FAPE.
* That the prior written notice (PWN) sent to the petitioner on October 20, 2020 was riddled with mistakes and failed to document petitioner's concerns.
* That XXPS has refused to permit independent educational evaluations.
* That XXXX's IEP meetings have been inappropriately staffed.
* That XXPS should pay for family counseling due to the family trauma caused by XXPS.
* That XXPS should pay petitioner's advocacy fees and damages.

XXPS generally argues the following:

* That the proposed October 20, 2020 IEP provides XXXX with a FAPE in the least restrictive environment and should be implemented.
* That XXPS has offered and provided XXXX with appropriate and adequate accommodations, services, supports and skills training through the course of XX education with XXPS. That XXPS has provided XXXX with a FAPE.
* That XXXX's intellectual disabilities preclude XX from pursuing a standard diploma and that the applied studies diploma is appropriate for XXXX.
* That it has been previously determined by hearing officer decision dated August 7, 2017, that self-contained classes for XXXX's core curriculum is XXXX's least restrictive environment and that XXPS provided XXXX with a FAPE.
* That despite repeated efforts by XXPS to update XXXX's evaluations and assessments, petitioner has refused to provide consent.
* That XXPS should be given the opportunity to first evaluate XXXX before XX is evaluated by an independent educational evaluator (IEE).
* That the legal doctrine of *collateral estoppel* precludes petitioner from raising those same issues that were addressed during the 2017 due process proceeding.
* That the statute of limitations and/or resolution agreement bar claims before November 6, 2019.
* That petitioner has no claim for advocate fees, compensatory or punitive damages.
* That XXPS should not pay for family counseling.

### Witness Summaries:

The following witnesses were sworn. Upon conclusion of their testimony, each witness was advised not to discuss their testimony. Each witness agreed.

***The following witnesses were called by petitioner. The witnesses were credible.***

**XXXXXXXX**: Ms. XXXXXXX currently serves as assistant principal, XXXXXXXXX High School. She has been overseeing special education services at XXXXXXXXX High School since 2018. She has attended six IEP meetings for XXXX and one eligibility meeting. She opines that the applied studies diploma is appropriate for XXXX. She testified that petitioner's concerns were considered by the team.

She testified that she first met XXXX and XX Mom on November 11, 2019 when XX arrived to enroll at XXXX XX. She testified that the nurse checked XXXX daily after lunch to insure XX was okay. XXXX suffered from allergies and skin irritations. She stated that she had not visited XXX. She answered specific questions about the proposed October 2020 IEP, including goals, services, accommodations and transition services. She opined that the proposed October 2020 would provide XXXX with a FAPE.

She testified that she provided the parent with information about the ASOLs and was available to discuss them in person if she wanted. She discussed modifying the curriculum to meet XXXX's needs.

Ms. XXXXXXX testified that the parent's concerns as written and sent to the team on October 19, 2020 were considered. A prior written notice was sent to the parent detailing what parental requests were accepted and which ones were not accepted. Many of the requests were accepted such as: remediate and retake assessments; rubrics; textbooks for home use; supplementary learning materials; and keyboarding skills practice. The IEP team considered but refused some parental requests because of duplicity or believed inappropriateness for the student: speech therapy five days a week (student was already receiving 120 minutes per month); outside third-party counseling; private tutoring; college course enrollment; law office internship; and private day school placement. (Tr. Day 1)

**XXXXXXXXXXXX**: Ms. XXXXXXX is XXXX's mother and the petitioner. She provided emotional testimony in support of her arguments as set forth above. She outlined her concerns regarding XXXX's education as provided at XXXXXXXXX High School. (Tr. Days 1 and 3)

**XXXXXXXXXXXXXXXX**: Ms. XXXXXXXXXX is XXXX's case manager. Testified that XXXX's classes are appropriately modified below SOL standards. She is an on-going member of XXXX's IEP team. She insures that XXXX's IEP is followed and that implementation is in compliance. XXX last consented to IEP is the 2014 IEP. She testified that XXXX's latest eligibility categories were determined using a file review. She testified that she could not really speak to what happened at the October 20th IEP meeting because she was on family medical leave. She stated that as case manager, she would normally have written the proposed IEP but because she was out, XXXXXXXX wrote the IEP.

She discussed the types of training she has had to deal with students with disabilities. She testified that XXXX arrived at XXXXXXXXX due to a resolution agreement with the IEP designation for an applied studies diploma. She testified that XXXX had not yet been at XXXXXXXXX for a year. She explained the locally verified credit system. She opined that XXXX would be a good candidate for the ACE-IT VCU program once XX has earned XX applied studies diploma. She testified that many transition opportunities will now open up for XXXX since XX parent signed the DARS form during the hearing break. She stated that she had shared several types of transition services and postsecondary opportunities available to XXXX with the parent. She sent daily reports or logs to petitioner to keep her apprised of XXXX's daily activities. for these reports, she received input from XXXX's teachers and XX 1:1 assistant. (Tr. Days 3 and 4)

**XXXXXXXXXX**: Qualified as an expert in special education. Has attended three of XXXX's IEP meetings. Testified that she had met with XXXX at least a dozen times. Opined that XXXX is a "high functioning" student with Down's Syndrome and is capable of earning a standard diploma with the proper supports and services.

Ms. XXXXX testified that she observed XXPS IEP team members being dismissive of the parent's suggestions. She opined that the proposed October 20, 2020 IEP is overall deficient and does not provide XXXX with a FAPE. She discussed XXXX's IQ data, the Virginia Alternate Assessment Program (VAAP), the applied studies diploma, the verified credit and Aligned Standards of Learning (ASOL). (Tr. Day 4)

**XXXXXXXX**: She currently serves as exceptional education coordinator with the secondary west schools of XXPS. She supports 11 schools, including XXXXXXXXX High School. Ms. XXX has served as a team member for eight of XXXX's IEP meetings. She testified that the IEP teams were appropriately staffed. She testified that the October 20, 2020 proposed IEP was compliant with IDEA. She testified that the team denied the parent's request for independent educational evaluations (IEEs), instead wanting evaluations of XXXX to first be conducted by XXPS.

She testified that the applied studies diploma program was appropriate for XXXX. She testified that, per the parent's request, XXXX was mainstreamed into some general education classes where XX work was modified to meet XX needs. XX also participated in electives and a special education reading class.

She explained the locally awarded verified credit and the special permission credit. She mentioned that in-person assistance had often been offered to help XXXX with XX online courses during the Covid-19 school closure. She discussed community-based programs and vocational opportunities that could be available for XXXX with parental consent. (Tr. Day 4)

**XXXXXXXXXXX**: Dr. XXXXXXX is the principal of XXXXXXXXX High School. He has served on many of XXXX's IEP teams and has known XXXX since XX was in the sixth grade. XXXX was placed at XXXXXXXXX High School in November of 2019 pursuant to the terms of a resolution agreement. Dr. XXXXXXX testified that he thought the applied studies diploma was appropriate for XXXX based on XX IQ, XX current reading level, XX comprehension and other available data. He testified about XXXX's course schedule and emphasized that the team attempted to incorporate the parent's desires for XXXX. He stated that the IEP meetings were often unproductive and not focused on XXXX. He claimed that there was a lack of cooperation on the part of the parent and her representative(s) during the IEP meetings. He also claimed that the parent and her representatives were extremely argumentative during the meetings and often threatened to file a due process complaint. He also testified that XXXX had been repeatedly offered in-person learning at XXXXXXXXX since the pandemic but that XX has not come in.

He testified that he was unfamiliar with XXX. He acknowledged the JLARC report and explained that he understood the recommendations. He stated that he would follow the current law and any changes that might result from the report. (Tr. Day 5)

**XXXXXXXXXXXXX**: Ms. XXXXXXX is the executive director of the XXXXXXXXXXXXXXXXXXX XXXX (XXX). She described XXX as an alternative education program for students that were getting expelled, dropping out, academically failing, and simply not able to keep up in a regular school setting. She testified that XXX students are referred from school systems, court service units, foster care, social services and word of mouth. The school has three curriculums: Edgenuity, Penn Foster and Keystone. She testified that all three programs were accredited by VDOE.

XXXX is enrolled in the Penn Foster program pursuing a standard diploma. If successful, the diploma would be awarded by Penn Foster and not XXPS. The Penn Foster program allows students to work at their own pace. XXXX started part-time with XXX around October 2020. She obtained XXXX's educational records from the parent. She believes that XXXX is capable of earning a standard diploma with the proper supports.

XXX has postsecondary opportunities such as a workforce program and the XXXXXXX Program where students are assigned internships. XXXX is not involved in postsecondary programs because XX had not been referred by the school system and because XX is not currently a full time student. Once that happens, she testified that she would locate an internship for XXXX that coincided with XX interests in the law.

She testified that XXXX enjoys coming to her facility. XX calls her "Boss Lady" and is not only provided with academics but actual life learning skills. The student-teacher ratio is 1 to 6 with the counselor. There are currently 23 students enrolled with XXX. XXX staff has experience working with students who have cognitive disabilities. The witness agreed to forward subpoenaed information that had not yet been sent. (Tr. Day 8)

***The following witnesses were called by XXPS. The witnesses were credible.***

**XXXXXXXX**: Ms. XX qualified as an expert in school counseling. She is currently a school counselor at XXXXXXXXX High School and has served as a member of XXXX's IEP team. She testified that the IEP meetings were unproductive and could not get past the factors for consideration page because Advocate Lucas would argue.

She outlined the requirements to earn a standard diploma in the Commonwealth of Virginia. She explained how the locally awarded verified credit system operates. She explained that XXXX currently has six elective credits. XX would need another 16 academic credits for a total of 22 credits to earn a standard diploma. (Tr. Day 5)

**XXXXXXXX**: Ms. XXXX teaches English and Theatre at XXXXXXXXX High School. She qualified as an expert in English and theatre arts. Although not a special education teacher, Ms. XXXX has co-taught in collaborative classes. She has been a member of XXXX's IEP team. She taught XXXX theatre arts 1 but did not recommend XX for Theatre Arts 2 because XX had not yet met Theatre Arts 1 standards.

She discussed some of XXXX's class samples. She testified that XXXX appeared to enjoy her class and was an eager participant. XX received support from both the speech therapist and XX 1:1 aide in her class. XX work was modified below standards. XX received extra time to complete assignments and reduced work. She testified that XXXX sometimes required redirection, and that in her opinion, XX could not reach the standards for a regular English class, grades 9, 10, 11 or 12. She observed that XXXX worked well with the other students and enjoyed participating in small group discussions. This year, XXXX has not attended her virtual classes on a regular basis. (Tr. Day 5)

**XXXXXXXXX**: Ms. XXXX is the transition teacher for the western region of XXXXXXXXXXXXX Public Schools. She covers 11 schools to include XXXXXXXXX High School. She qualified as an expert in special education transition services. She has served as a member of XXXX's IEP team and testified that the meetings were unproductive. She stated that the team could not get to the transition goals for discussion.

She listed and explained numerous postsecondary opportunities that are available to XXXX. She stated that she first met petitioner in 2015 or 2016 and they often discussed postsecondary opportunities for XXXX. She discussed the proposed October 2020 IEP transition goals. She explained that some of the transition opportunities listed on the IEP were checked "considered but not appropriate" because of their unavailability due to the pandemic, or, because XXXX was not enrolled in courses that would support the activity. Ms. XXXX discussed the types of courses XXXX had taken or that had been recommended that would increase XX postsecondary opportunities. She testified about the types of programs she believed would be appropriate and inappropriate for XXXX. She discussed XXXX's participation in the All-Star Basketball League. The teams are made up of special education students who primarily play with other special education students throughout the XXXX. (Tr. Day 6)

**XXXXXXXXX**: Ms. XXXX is currently the associate principal at XXXXXXX High School. She qualified as an expert in testing and administration. She previously served as assistant principal at XXXX's former high school, i.e. XXXXXXXXX High School, XXPS. Ms. XXXX has often attended XXXX's IEP team meetings. She testified that the IEP meetings were often productive when the advocate, Ms. Lucas, was not present. She explained a facilitated IEP meeting and explained that although XXXX's team was supposed to have such a meeting, there were logistical problems and the meeting did not occur.

She testified that XXXX was enrolled in a personal finance course while at XXXXXXXXX High School but XX mother withdrew XX because she claimed that the course was too hard for XXXX. The finance course was a verified credit course. Ms. XXXX clarified information contained on XXXX's school transcript. She testified that back in 2014 when the stay-put IEP was signed, the XXPS IEP team believed that the most appropriate diploma type for XXXX was an applied studies diploma. She stated that the team determined that XXXX achieves below the standards of learning, thus XX would not be able to earn a standard diploma.

She testified that XXXX was mistakenly given a diploma at graduation from XXXXXXXXX High School in 2019. XX was allowed to walk with XX class at the ceremony but was supposed to receive only a blank paper, however, XX was mistakenly given a diploma as though XX had graduated. As a result of this mistake, petitioner filed a complaint and a resolution agreement was signed in November 2019 placing XXXX at XXXXXXXXX High School. Ms. XXXX also provided testimony about XXXX's supports.

She discussed XXXX's 2017 VAAP which petitioner's advocate alleged to have been falsified. (Note: Despite extensive questioning of the witness regarding the VAAP, the allegation that the VAAP was falsified has prompted an independent investigation and will not be decided by this decision.)

On day 7 of the hearing, February 1, 2021, Ms. XXXX returned for a second day of testimony. She explained testing and assessment options to include SOLs and ASOLs. She explained the connection between course selections and both the SOLs and the ASOLs. She explained the differences between modifications and accommodations. She addressed some of the accommodations and modifications that were put in place for XXXX. (Tr. Days 6 and 7)

**XXXXXXXXXXXXXX**: Ms. XXXXXXXX is the special education department chair at XXXXXXXXX High School. She substituted as XXXX's case manager when XX actual case manager, Ms. XXXXXXXXXX, was absent. She has attended several of XXXX's IEP meetings. She qualified as an expert in special education. She is a special education teacher who taught XXXX in a co-taught Foundations of Algebra class during the 2019-2020 school year. She testified that XXXX's work was modified below standard and XX did fine with the modified work. She reviewed XXXX's math competencies as outlined in the applied studies curriculum. She testified that XXXX ranked a "1" which is the lowest ranking on the math level indicator.

In her class, XXXX received the following accommodations: small group testing; breaks as needed; tests were read to XX; use of a calculator; targeted assistance; direct instruction; daily log for organization and parent information; chunking assignments; visuals; and extra time to take tests. Ms. XXXXXXXX testified that XXXX was strong in adding and subtracting whole numbers and that XX did fairly well with multiplication and division of whole numbers. XX was weak in algebra skills, math reasoning and word problems. She opined that XXXX would become frustrated in an Algebra 1 class due to the complexity of the work. She testified that XXXX has been offered in-person learning at the school during the pandemic. She also testified that she, with team member input, developed the draft October 2020 IEP. The parent did not attend the meeting but provided input the night before which the team considered during the meeting. The team decisions regarding the proposed IEP were explained to the parent in the prior written notice. She emphasized that parental concerns were considered during the meeting and some of her requests were added to the proposed IEP and others were refused. (Tr. Day 7)

**XXXXXXXXXXX**: This witness was previously called as a witness for the petitioner. She was recalled as a witness for XXPS. She currently serves as assistant principal, XXXXXXXXX High School and oversees the special education department. She has served on XXXX's IEP team. She qualified as an expert in administration.

She testified about an email she sent to the parent on October 1, 2020 in response to the parent's claim that XXXX had not received XX accommodations for a test in PE class. After investigating the matter, she surmised that XXXX had indeed received XX accommodations. She testified that the 1:1 read the test to XXXX; XX received visual aids and a study guide before the test; XX received clarification of directions as needed; and a repeat of questions as needed. She testified that the parent had previously expressed concerns about XXXX's accommodations and that she would follow-up about her concerns. She found that XXXX had been receiving XX accommodations.

She asserted that XXXX's mother was very supportive of XX and was often seen during XX virtual classes. When XXXX stopped attending classes on a regular basis, in-person support, 5 days a week at the school, was offered to XXXX. Although XX classes would remain virtual, XX aide would be there and transportation would be provided.

Per a question from the hearing officer, she explained what would be needed for XXXX to pursue a standard diploma. She supported the proposed October 2020 IEP claiming that it represented XXXX's current needs with updated goals. She opined that the 2014 stay-put IEP no longer reflected XX current needs or goals. She testified that the parent's written in-put and concerns were considered at the October 2020 IEP meeting that resulted in the proposed October 20, 2020 IEP draft. (Tr. Day 7)

**XXXXXXXXX**: She currently serves as exceptional education coordinator with the secondary west schools of XXPS. She supports 11 schools, including XXXXXXXXX High School. Ms. XXX has served as a team member for eight of XXXX's IEP meetings and one eligibility meeting. She was previously called as a witness for the petitioner. She was recalled as a witness for XXPS. She qualified as an expert in special education.

She testified that the IEP team agreed to place XXXX at XXXXXXXXXXXXXXXXXX Center for extended school year (ESY) services because the pandemic precluded such in-person services through XXPS. As part of the November 2019 resolution, the parent signed an IEP for ESY. The parent also agreed to five general education elective classes. However, when the team met in November, the parent requested different classes and the team agreed to change XXXX's schedule. She testified that in September 2019 the parent requested that XXXX be placed in community college courses but the team did not agree that such a placement would be appropriate for XXXX. She went through the eligibility document from August 2019 and explained what data was reviewed. She explained why private day placement for XXXX was denied by the team.

She provided success stories about other students who completed high school with an applied studies diploma and are gainfully employed in the community or went on to other programs. She opined that there were several postsecondary programs she believed were appropriate for XXXX such as: ACE-IT, Project Search, and Woodrow Wilson. She indicated that the parent did not seem interested in such programs.

She testified that the parent would not consent to new evaluations and assessments performed by XXPS for XXXX, but instead wanted IEEs. She stated that she would support XXPS conducting evaluations in tandem with an IEE. She discussed the Vineland II adaptive composite and testified that the team agreed that XXXX's scores indicated significantly impaired adaptive behavior. (Tr. Day 8)

**XXXXXXXX**: Ms. XXXX is the coordinator of assessment and remediation, XXPS. She explained the process used to administer, score and store the VAAP. (Note: The VAAP for XXXX is under separate investigation.) (Tr. Day 9)

**XXXXXX**: Ms. XXXXXX is XXXX's 1:1 instructional assistant at XXXXXXXXX High School. She was hired in January 2020 specifically to work with and provide support to XXXX. Ms. XXXXXX testified that she maintained a daily log of XXXX's activities. The log included class work, assignments that were turned in during class, and homework assignments. The daily log was sent to Ms. XXXXXXXXXX, XXXX's case manager, who in turn sent them to the parent. She testified that XXXX's other teachers also sent information to Ms. XXXXXXXXXX that was also shared with the parent.

She discussed the accommodations for XXXX and testified that XX received XX accommodations. As accommodations, she testified that XXXX received: small group instruction; calculator; instructions repeated; visual aids or cues; movement breaks; the offer of extra help after school; and her as XX 1:1 assistant. As XX aide, Ms. XXXXXX testified that she was with XXXX in every class. She was not with XX when XX went to lunch. That was XX time to socialize with friends. She testified that XXXX's tests and study guides were modified to make them simpler. She stated that XXXX's reading comprehension and math skills were below grade level. She also testified that during the virtual setting, XXXX started attending classes less and less. When XX was in the virtual class, she was there to help XX if XX needed assistance. If XXXX had opted to come into the building during the pandemic, as was offered, she would have been working with XX directly. She testified that she and XXXX worked well together. (Tr. Day 9)

***The following witnesses were called by petitioner in rebuttal. The witnesses were credible.***

**XXXXXXXXX**: Ms. XXX is the director of a community-based volunteer organization called "XXXXXXXXXXX." The organization supports at-risk youth, Latino community, special needs community and the LGBT community. The organization uses nontraditional tools, arts and music to teach participants to be more assertive and confident.

She first met XXXX years ago when XX participated in a modeling show conducted with Dillard's Department Store called Prom Bring It. She praised XXXX's participation in every aspect of the show, including modeling and photography. She testified that Virginia Commonwealth University selected her organization to participate in a program based on XXXX's ideologies. Her organization sponsors a tutoring program in which XXXX participates. She opined that from her observations, XXXX's adaptive behaviors are not significantly delayed. She refers to XXXX as her "XXXXchild." Her organization often uses XXXX as its XXXXXXXX. (Tr. Day 10)

**XXXXXXXXXX**: Ms. XXXXX was recalled by petitioner in rebuttal. She discussed her experiences with VAAP and outlined how the assessment was supposed to work in her experience. She outlined what she considered to be several problems with XXXX's VAAP. She testified that she did not believe XXXX had significantly impaired adaptive behaviors based on her observations of XX in the community setting. Ms. XXXXX expressed concerns about the composition of the September 2020 eligibility team. She questioned why there was no psychologist. She further questioned why no team members were present to address auditory processing, central auditory processing deficit indicators, receptive expressive language and occupational therapy. From her observations of XXXX, she believes XX is capable of earning more than an applied studies diploma. She testified that the IEP team was handicapped because they should have had XXXX's VAAP before them to consider when making decisions. (Tr. Day 10)

**XXXXXXXXXXXX**: She testified as XXXX's mother and legal guardian. She testified that she did not consent for XXPS to give XXXX the XXXXXXX VAAP. When she agreed for XXXX to take the VAAP in the 8th grade, she was not told that it would preclude XX from taking the SOLs and pursuing a standard diploma or she would not have agreed. She said she trusted XXPS at that time and signed the 2014 IEP. She said they gave her no other options. She claimed that some of the pages were missing and/or fabricated. She discussed how XXXX was placed in a special education class in 2016 and had no one to talk to. XX was paired with a student who was deaf and could not speak. She testified that she complained but school officials stopped communicating with her and that it remains that way now. She testified that she was unaware that XXXX had taken the ACCESS test.

She testified that some of the work samples included with the VAAP were the same samples of XXXX's work that she provided to the school from her personal files. She testified that she had provided the school with about 10 boxes of XXXX's work samples from home or other providers to prove XX strengths and to demonstrate XX capabilities. She alleged that XXXX has regressed since middle school. Petitioner explained that she did not at all trust XXPS. Petitioner testified that she wants what XXXX wants. She wants XX to pursue a standard diploma through XXX and enroll in a paralegal technical elective through XXPS.

Petitioner agrees that XXXX should be evaluated and assessed but does not trust XXPS to perform the evaluations. She wants IEEs. She believes that XXPS will traumatize XXXX.

Petitioner also testified that since revealing information about XXXX's enrollment at XXXXXXXXXXXXXXXXXX community College, the college is now emailing XXXX that they want XX to change courses. She testified that XXXX is doing well in the course and wants to know why all of a sudden, since the course information was revealed to XXPS, the college wants XXXX to change courses. Petitioner alleged that she repeatedly asked XXPS about ESL and counseling services for XXXX but was ignored.

She alleged that XXXX was only receiving about 20 minutes per week of ESL and that XX needed more ESL services considering the fact that XXXX is spoken in XX home. She testified that she has often made outside of school arrangements and paid out-of-pocket for XXXX to be enrolled in educational programs because the school failed to provide the appropriate training.

On cross-examination it was pointed out on the November 2014 stay-put IEP that the SOL box was not checked (meaning no SOLs were to be given to XXXX) and that the VAAP box was checked (indicating that petitioner agreed to the ASOLs and VAAP). Petitioner also testified that she was not given a clear understanding of what that meant when she signed the IEP. She also testified that she had an advocate with her at the IEP meeting. (Tr. Day 10)

**XXXXXXXXXXXXXXX (XXXX)**: XXXX is the subject of this due process proceeding. XXXX was questioned by the hearing officer. Both parties were offered the opportunity to provide the hearing officer with questions they might want asked. Counsel for XXPS provided suggested questions. Petitioner's advocate chose not to provide suggested questions.

XXXX testified that XX is not learning at XXXXXXXXX High School but that XX likes the school very much. XX has friends at XXXXXX. XX says that XXXXXXXXX High School has denied XX everything because the school district says XX can't learn. XX stated that XX is learning at XXX and wants to attend both XXXXXXXXX High School and XXX. XX stated that XX no longer has Down's Syndrome and has given it to the school. XXXX testified that XX plays basketball and is a pretty good player. XXXX testified about XX enrollment in the ESL 31 class at XXXXXXXXXXXXXXXXXX Junior College. XX said that XX was doing well in this class.

XXXX discussed XX 2019-2020 classes and XXXXXXXXX High School. XX said XX needed a targeted aide and that Ms. XXXXXX, XX 1:1 aide, did not help XX. XX stated that she just looked at her phone. XX said that Ms. XXXXXXXX and Dr. XXXXXXX helped XX with XX math. XX testified that in XX earth science class, XX was not provided with any accommodations, like read aloud tests or a pacing guide. XX said that Ms. XXXXXX did not help XX but tried to do the work for XX instead of showing XX how to do the work. In XX English class, XXXX testified that the teacher read to all the students and then gave an assignment. XX would go into a private room with Ms. XXXXXX and she would read the test or assignment to XX. XXXX talked about the play XX was in at school and said that the speech language teacher helped XX with XX part. XX enjoys acting and enjoyed being in the play.

XXXX testified that XX is taking the Penn Foster online program at XXX to earn a standard diploma. XX is taking English, Algebra and Science. XX testified that XX is doing well in XX classes at XXX and that XX receives individualized assistance.

XXXX testified that XX liked the XXPS XXX Center and wanted to attend the legal environment program there. XX said that XX recently applied for the program and is waiting to see if XX was accepted. XX stated that XX attended a computer design class there once before but did not complete the program. XX testified that XX previous experience there was traumatizing but that XX nonetheless wanted to return to be in the legal program. (Tr. Day 11)

***The following witnesses were called by XXPS in rebuttal. The witnesses were credible.***

**XXXXXXXXXXXX**: Ms. XXXXXXX is an educational specialist with the Language Instructional Educational Program, XXPS. Contrary to the parent's assertion that she was unaware of the ACCESS test, she identified an email message sent to the parent on September 14, 2020 regarding the test. She explained the test and also the alternate ACCESS test that is designed to test students with cognitive disabilities. The ACCESS for ESL students is a standards-based, criterion referenced English language proficiency test designed to measure English learners' social and academic proficiency in English. She explained that XXXX had received the highest scores in all content areas except writing which indicated that XX needed additional support in that area. She also explained why this did not mean that XXXX was reading on grade level. She explained ESL services and how she had provided information about ESL services to the parent. She explained that if XXXX were to take the ACCESS test instead of the alternate ACCESS test, some of XX accommodations, such as read aloud (for some parts of the test), calculator and visual aids or cues, would not be permitted. She stated that she was sure that XXXX's ACCESS results were mailed to the parent.

In response to the parent's request for lesson plans, Ms. XXXXXXX testified that a Google Doc account was set up for the parent to review what was covered with XXXX that day. She also testified that she referred the parent to Schoology where she could locate information about what the students were working on during the day such as curriculum, targets and goals. Since the parent again requested lesson plans, on September 21st, Ms. XXXXXXX sent her the lesson plans and again referred her to Google Doc where she could see a summary of what was covered. She testified that XXXX usually received one-on-one ESL services for about 20 minutes twice a week. XX stopped attending classes all together on January 12, 2021.

On cross-examination, Ms. XXXXXXX testified that the exchange of emails in September 2020 were an exchange of ideas between she and the parent. She attended the two IEP meetings that were conducted mid-hearing but has not attended any other IEP meetings for XXXX. When asked for an ESL plan, she testified that ESL services are incorporated in the student's courses as a Tier 1 intervention and there is no written plan. (Tr. Day 11)

**XXXXXXXXXXXXX**: Ms. XXXXX is the Director of Psychological Services, Student Support and Wellness, XXPS. She qualified as an expert in school psychology and assessment. She conducted a psychological assessment of XXXX in 2016. Her assessment revealed that XXXX had a full scale IQ of 40. XX overall cognitive profile fell within the extremely low range compared to other students XX age. She testified that the scores from her assessment were very similar to the scores of Dr. XXXX, an independent educational evaluator. She testified that cognitive abilities, IQ and general intellectual ability remain stable once a student has reached age nine. She also discussed achievement scores stating that they do not necessarily change over time because more is expected of the student as he or she grows older, which changes the assessment measure. (Tr. Day 11)

**XXXXXXXXXXXX**: Dr. XXXXX is the Assistant Director of Special Education, XXPS. She has had specific training as it relates to Down's Syndrome. She qualified as an expert in supervision, administration and special education. She discussed the parent wanting XXXX to attend the XXXXXXXXXXXXXX Academy. She stated that the IEP team supported XXXX attending the XXXXXXXXXXXXXX job shadowing program, however, by letter from XXXXXXXXX dated November 26, 2019, she learned that XXXX was not accepted into the program.

Dr. XXXXX discussed the JLARC report as it relates to the applied studies diploma. She emphasized that the report did not indicate that the applied studies diploma should be eliminated. She agreed with the recommendations that specific standards be added to the diploma to make the transition services clearer to parents. She added that she participated in the JLARC study.

Dr. XXXXX testified that the team updated XXXX's transition services based on the parent's concerns and XXXX's expressed interests that have changed over time. She testified that she believes that XXPS has made information about transition services available to the parent and that XXXX has participated in some of the services. She stated that XXPS has been very transparent with the parent about transition services and opportunities available to XXXX as they relate to XX graduating with an applied studies diploma.

Once Dr. XXXXX learned, during the process of this proceeding, that XXXX was enrolled in the Penn Foster standard diploma program at XXX, she began to research the program. She learned that the program is a box program that can be purchased by anyone. She testified that the program is used for students receiving instruction outside of school. She discovered that the Penn Foster program does not align with VDOE standard diploma requirements. If XXXX completes the program, then Penn Foster would award the diploma and not XXPS. For XXPS to award a standard diploma, the student must meet VDOE standard diploma requirements. A Penn Foster diploma is treated as a diploma from a private organization. She explained that XXPS could not pay for XXXX to receive a Penn Foster diploma because it is considered a private school and is not comparable to any VDOE diploma options. She opined that it would be a denial of FAPE for a school division to lead a parent or child to believe the student could earn a standard diploma if the evidence is clear that the student could not.

On cross-examination, Dr. XXXXX was asked about the Penn Foster program being administered at the XXXXXXX Adult Education Center. She testified that she did not know, and even if it were, the student would have to withdraw from XXPS to enroll in the Adult Education Center. She also testified that the program Edgenuity, although available through XXPS, is a credit recovery program and would not be available to XXXX.

When questioned about the competency of IEP team members and the parent's concerns, Dr. XXXXX testified that she was only familiar with a concern about Ms. XXXX. When asked how many XXPS students with Down's Syndrome graduate with an applied studies diploma, Dr. XXXXX did not know. (Tr. Day 11)

### **Discussion and Legal Analysis:**

***Free Appropriate Public Education (FAPE) and the Individualized Education Program (IEP)***

XXXX is currently being educated pursuant to a 2014 stay-put IEP. This IEP has been modified by two 2015 addendums in the areas of services and goals. A 2019 resolution agreement also impacted the 2014 stay-put IEP. In 2017, XXPS was found to have provided FAPE by hearing officer decision. The 2017 decision found the 2014 IEP to be appropriate for XXXX as well as XX pursuit of the applied studies diploma. However, it is now seven years later and it is only reasonable to conclude that the 2014 IEP needs to be updated. It is expected that XXXX's needs and goals have changed over seven years. Unfortunately, over these years and after many IEP meetings, XXXX's IEP remains the 2014 stay-put IEP. To determine whether a school district has provided a free appropriate public education (FAPE), hearing officers and judges must analyze both the substantive and procedural requirements of the IDEA.

In the case of Endrew F. v. Douglas County School District, 137 S. Ct. 988 (2017), the United States Supreme Court held that to meet its substantive obligation under the Individuals with Disabilities Education Act (IDEA), a school must offer an IEP that is reasonably calculated to enable a student to make progress appropriate in light of the student's circumstances. The Court said, "When all is said and done, a student offered an educational program providing merely more than *de minimis* progress from year to year can hardly be said to have been offered an education at all."

The 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 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 XXXX's case, XXPS has implemented the 2014 IEP such that XXXX has educationally benefitted. Pursuant to the November 6, 2019 resolution agreement, XXPS hired a 1:1 instructional assistant specifically for XXXX. XXXX's work has been modified to meet XX needs. XX instruction falls under the aligned standards of learning (ASOLs). Per the 2014 IEP, XX is pursuing an applied studies diploma. XX core instruction in math and reading are conducted in a self-contained classroom as specified in the 2014 IEP.

Ms. XXXXXXXX, XXXX's algebra teacher, testified that XXXX received the following accommodations in her class: small group testing, breaks as needed, targeted assistance, direct instruction, daily logs for organization and parent information, chunking of assignments, visuals and cues, targeted assistance, direct instruction, use of a calculator when needed, read-aloud testing and extra time to take tests. (Tr. Day 7) Ms. XXXXXXX, the assistant principal testified that the following suggestions from the parent were accepted by the IEP team: remediate and retake assessments, rubrics, textbooks for home use, supplementary learning materials, and keyboarding skills practice. (Tr. Day 1) She also testified that the 1:1 read the test to XXXX; XX received visual aids and a study guide before the test; XX received clarification of directions as needed; and a repeat of questions as needed. (Tr. Day 7)

During the current Covid-19 pandemic, XXXX has been offered the opportunity to attend XXXXXXXXX High School five days a week for in-person learning with accommodations and 1:1 assistance. Petitioner has declined this opportunity for XXXX.

Although petitioner has raised concerns regarding XXXX's transition goals, testimony indicates that XXPS personnel discussed and offered several transition programs for petitioner to consider for XXXX. XXPS witnesses testified about a litany of available programs. One of the biggest transition resources is through the Department of Aging and Rehabilitative Services (DARS). Petitioner did not consent to the use of DARS until this proceeding.

Petitioner alleges that her opinions were dismissed by XXPS personnel during IEP meetings. She contends that this constitutes procedural error that amounts to a denial of FAPE by denying her meaningful participation in the meetings. However, the evidence does not support this position. Petitioner was invited to attend the IEP meetings. Petitioner attended most of the IEP meetings and often with an advocate or representative. During the course of the meetings, some of petitioner's suggestions were accepted by the IEP team and others were rejected. The meetings could not yield development of a consented-to, updated IEP.

Petitioner requested that the October 2020 IEP meeting be postponed because she could not attend. On the night before the scheduled October 2020 IEP team meeting, petitioner presented the IEP team with a lengthy document entitled *XXXX's Required Education Plan*. (P. Ex. 12) It included proposed goals, accommodations, services and private placement for XXXX. According to the team members who testified during the hearing, the IEP team considered the document at the meeting. They testified that based on the data before them and the parent's input, the team developed the October 20, 2020 proposed IEP. (SB Ex.81) There was no evidence presented that substantiates the claim that the team simply dismissed or ignored the parent's document. Although petitioner did not attend that meeting, her views were expressed through the document she submitted and were considered by the IEP team. Subsequently, the team sent the proposed IEP and a prior written notice to petitioner that discussed the parent's document, including the suggested private placement. (SB Ex. 82)

On November 5, 2020, XXPS received an email message from petitioner requesting that XXXX's IEP be changed to place XXXX at the XXXXXXXXXXXXXXXXXXX Center. On November 10, 2020, XXPS responded that the IEP team had considered the parent's request but determined that private placement was not XXXX's least restrictive environment. The IEP team offered to reconvene if petitioner had new information or requests. (SB Ex. 87)

To rule that the LEA violated the IDEA where a procedural violation has been alleged, a hearing officer must find: (1) that the Parent/Child alleged a procedural violation; (2) that the violation “significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of FAPE to the child; and (3) the Child did not receive FAPE as a result. (*R.F. v. Cecil Cnty. Pub. Schs*., 919 F.3d 237, 248 (4th Cir. 2019). In short, unless a procedural violation denies a child FAPE, a hearing officer “may only order compliance with the IDEA’s procedural safeguards and cannot grant other forms of relief, such as private placement or compensatory education.” *Id*. I find no procedural violations in this case. I find that the parent was afforded the opportunity to meaningfully participate in IEP meetings and beyond. The parent was in frequent contact with school officials about XXXX's education and was actively involved in educational decisions. Evidence was presented that XXPS inaccurately annotated some information regarding meeting attendees on the October 2020 IEP, however, this error did not significantly impede the parent's opportunity to participate in the decision making process regarding a FAPE.

An individualized education program (IEP) is a written plan that incorporates the placement decisions made by the student's IEP team of school authorities, the student's parent(s), and other knowledgeable persons. 20 U.S.C. §1401(a)(20). Congress devised procedural safeguards and remedial provisions to insure full parental participation and the proper resolution of substantive disagreements. 20 U.S.C. §1415. IEPs should include academic and functional goals designed to meet the student’s needs resulting from his disabilities. The IEP identifies and implements special education and related services, as well as supplemental aids that will enable the child to advance appropriately and reach identified goals. IEPs are a necessary component of FAPE. The parties in this case have conducted several IEP meetings and there have been several proposed IEPs, however, none have yielded an agreed upon IEP.

It is here noted that parents cannot dictate the terms of an IEP to the school district. Procedurally and in practice, parents may only provide their input as a member of 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). XXPS was not obligated to accept each and every proposal or suggestion made by the petitioner.

The Court in *Endrew* noted, "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. This absence of a bright-line rule should not be mistaken for an 'invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.' *Rowley*, 458 U. S., at 206. At the same time, deference is based on the application of expertise and the exercise of judgment by school authorities. The nature of the IEP process insures that parents and school representatives will fully air their respective opinions on the degree of progress a child’s IEP should pursue; thus, by the time any dispute reaches court, school authorities will have had the chance to bring their expertise and judgment to bear on areas of disagreement. *Rowley*, 458 U. S., at 208–209. At that point, a reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances."

In this case, the IEP team is working with old and outdated data thereby putting the team, including the parent, at a disadvantage. Although XXPS has been able to offer a cogent and responsive explanation for the decisions annotated in the proposed October 20, 2020 IEP, the team would be far better able to develop a more responsive IEP for XXXX with the availability of updated data, evaluations and assessments. With updated information, the IEP team would have a more up-to-date sense and understanding of XXXX's current circumstances, including but not limited to, XX current needs, present level of performance and cognitive abilities. The team would be better able to craft an IEP with more meaningful and useful services, accommodations and goals. The team would be better equipped to develop an IEP that is reasonably calculated to enable XXXX to make progress appropriate in light of XX circumstances. Updated evaluations and assessments for the hearing officer to have reviewed during this proceeding would have also been useful when considering the appropriateness of the proposed October 20, 2020 IEP.

There is clear disagreement between the parent and XXPS regarding XXXX's current needs, capabilities and appropriate educational pursuits. The parent believes that XXXX is capable of pursuing a standard diploma. Based on the outdated data available to XXPS, they have concluded otherwise, and have followed the 2014 IEP that tracks XXXX for the applied studies diploma.

XXXX only attended XXXXXXXXX High School in person from November 2019 until March 2020, at which time schools were closed because of the Covid-19 pandemic. The evidence suggests that XXXX was academically and socially progressing during that time. XXXX's work was modified to account for XX disabilities. XXXX received XX accommodations and continued to work towards unmastered goals. The evidence shows that XXXX was being supported at XXXXXXXXX High School by XX teachers and 1:1 assistant. XXXX testified that XX liked XXXXXXXXX High School and that XX has friends there but XX wanted a standard diploma. Therefore, XXXX wants to attend XXX to pursue the standard diploma and also XXXXXXXXX High School so XX can continue to see XX friends and participate in XX extra-curricular activities.

The evidence supports a finding that XXPS provided XXXX with a FAPE pursuant to the standards set forth in *Rowley* and *Endrew.* XXPS appropriately implemented the 2014 stay-put IEP, 2015 addendums, resolution agreement and XXXX educationally progressed. Based on the available data, the 2014 IEP and the proposed October 20, 2020 IEP were reasonably calculated to provide XXXX with a FAPE under IDEA and were reasonably calculated to confer educational benefit. Both IEPs were calculated to provide XXXX an educational program reasonably calculated to enable XX to make meaningful and appropriate progress in light of XX circumstances.

Petitioner alleges that XXXX has regressed at XXXXXXXXX High School, however, the evidence was insufficient to substantiate this claim. Also, disturbingly, XXXX did not attend school from June 2019 until November 2019. (SB Ex. 15) XXXX began attending XXXXXXXXX High School in November 2019 pursuant to a resolution agreement dated November 6, 2019. (SB Ex. 22) XX attended in-person until March 13, 2020 when schools were closed because of the Covid-19 pandemic. During the closure, XXXX was offered in-person educational opportunities as well as other academic opportunities. (SB Exs. 32 and 109) From September 2020 through mid-October 2020, XXXX was regularly attending classes virtually. (SB Ex. 89) However, on or about November 5, 2020, XXXX stopped fully participating in XX classes. XX would often sign in for attendance purposes only. (SB Exs. 88 and 89)

While attending classes, XXXX was educationally progressing. XX both participated in XX classes and was able to complete XX assignments. The evidence supports the conclusion that XXXX has been provided the services and accommodations set forth in the 2014 IEP as well as the 2015 addendums and 2019 resolution agreement. The evidence supports a finding that XXXX was provided a FAPE.

However, this finding of FAPE does not negate the need for XXXX to be comprehensively evaluated as soon as possible. The IEP team should reconvene to develop an IEP that considers the results of the new evaluations and assessments, along with any other pertinent data. A current evaluation should also provide the team with information regarding XXXX's capacity to be mainstreamed and learn in a general education setting.

XXXX deserves an agreed-upon, updated IEP that is based on current data that will definitively provide XX FAPE by addressing XX present-day needs, provide appropriate accommodations, services and goals. With use of current evaluations and assessments of XXXX, the IEP team will be able to more effectively and accurately develop the proposed October 20, 2020 IEP.

I find that the proposed October 20, 2020 IEP, albeit in need of further development once new evaluations are considered, was overall designed to effectively provide XXXX with meaningful educational benefit and FAPE pursuant to the IDEA. This hearing officer has taken into account that many of the October 20, 2020 IEP options that could be available to XXXX if not for the Covid-19 pandemic may now become available with the reopening of public schools. XXXXXXXXXXX, transition specialist, testified that some of the options checked "inappropriate" on the proposed October 2020 IEP were so checked because some of the options were simply unavailable due to the pandemic. (Tr. Day 6)

***Evaluations and Assessments***

XXXX needs to be comprehensively evaluated and assessed as soon as possible. The parties agree that XXXX needs to be evaluated. The disagreement between the parties involves who should conduct the evaluations. Petitioner wants IEEs because she does not trust XXPS. She has raised questions about the efficacy of past tests administered by XXPS staff, staff competency and test result legitimacy. Questions were raised during the hearing about administration the VAAP. Post-hearing, petitioner questioned administration of the Vineland and the protocols used by Ms. XXXXX, XXPS psychologist, to administer XXXX's 2016 psychological assessment. Petitioner also questions XXXX's special education eligibility category of intellectually disabled.

On the other hand, XXPS argues that they should be offered the opportunity to first evaluate XXXX. Once evaluated, then if the parent objects or disagrees with the evaluation, XXXX should then be evaluated by an independent educational evaluator (IEE).

In support of their positions, in their closing briefs, both parties rely on a September 21, 2020 guidance memorandum to Virginia School Superintendents from the Virginia Department of Education (VDOE) that in part states the following:

...A parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to certain conditions. If a parent requests an IEE at public expense, the public agency must, without unnecessary delay, either:

1. Initiate due process procedures under 34 C.F.R. §§ 300.507 through 300.513 to show its evaluation is appropriate; or

2. Ensure that an IEE is provided at public expense, unless the agency demonstrates in a hearing under 34 C.F.R. §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria. 20 U.S.C. § 1415(b)(1) and 34 C.F.R. § 300.502.

XXPS has offered to conduct evaluations of XXXX. Although consent forms were sent to the parent on six separate occasions, petitioner did not consent to the evaluations. (SB Ex. 41) Petitioner's repeated refusal to consent to evaluations being performed by XXPS made it clear that she did not want XXPS to perform the evaluations. The parent does not trust XXPS to conduct the evaluations fairly and argues that XXXX has been incorrectly categorized by XXPS as intellectually disabled. The parent has questioned the psychological evaluation conducted by the XXPS psychologist, administration of the VAAP and the Vineland assessment. The parent testified that she believes that XXPS will traumatize XXXX if they are allowed to conduct evaluations.

Despite the fact that the parent refused to sign the evaluation consent form on six occasions, XXPS did not initiate due process procedures as the VDOE guidance memo requires, nor did XXPS demonstrate in a hearing that the parent's evaluation did not meet agency criteria. Therefore, using VDOE guidance, I find that XXXX is entitled to an independent educational evaluation (IEE).

In 2017, Dr. XXXXXXXXXXXX conducted a psychoeducational evaluation of XXXX. (SB Ex. 5) Since Dr. XXXXX is already familiar with XXXX, it is suggested that he be contracted to perform the evaluation(s). If Dr. XXXXX is unavailable, evaluator(s) from the XXPS authorized list of IEEs should be contracted. If evaluations are needed beyond Dr. XXXXX's capabilities, IEEs from the XXPS authorized list should be contracted. If the IEE requires information or records from XXPS' previous evaluations, XXPS should provide the information. Hopefully the results of these evaluations and assessments can be integrated into a workable IEP.

***The October 20, 2020 Proposed IEP***

As discussed earlier in this decision, the proposed 2020 IEP provides services, accommodations and goals sufficient to provide XXXX with a FAPE. (SB Ex. 81) The petitioner alleges that the IEP fails to adequately address XXXX's needs as they relate to transition services, ESL services, social, technological and extra-curricular activities. She alleges that the proposed IEP fails to include all of the student's educational needs in the Present Levels of Academic Achievement and Functional Performance (PLAAFP).

As for transition services, the testimony of Ms. XXXXXXX (Day 1), Ms. XXXXXXXXXX (Days 3 and 4), Ms. XXXX (Day 6) and Dr. XXXXX (Day 11), negate any allegation that transition service information was not shared with the parent. DARS can provide substantial resources for XXXX but the petitioner did not provide consent for DARS services until this proceeding. Now services from DARS can be included in the IEP. Many of the transition services on the proposed IEP were marked "considered, but not appropriate at this time." It was explained that many of the transition services and postsecondary training goals that are prelisted on the proposed IEP were simply unavailable during the school closure due to the pandemic. Now that schools have reopened, these services should be revisited and provided to XXXX, as appropriate.

XXXX receives ESL services. XXXX received one-on-one ESL services for about 20 minutes twice a week. The proposed IEP addresses ESL services and the parent's concerns.

XXXX is a social student who enjoys socializing with XX peers. XXXX's social needs are addressed in the proposed IEP. Prior to the pandemic, XXXX participated in intramural sports activities and lunch gatherings with friends. XXXX also actively participated in Theatre class serving as co-moderator for a play. Such activities can resume once school reopens.

The petitioner further alleges that the IEP contains procedural violations by naming persons as being present for the IEP meeting who were not present and by not checking appropriate service boxes. These administrative errors can be easily corrected and are not fatal to the substance of the IEP.

Although the proposed IEP will have to be revisited and perhaps revised once current evaluations are received, now that more options are available to XXXX with the reopening of schools and now that the parent has consented to DARS services, the proposed IEP nonetheless provided XXXX with meaningful educational benefit and the opportunity to educationally progress. The proposed IEP met the standards set forth in *Rowley* and *Endrew*. *Id*. I find the proposed October 2020 IEP sufficient to confer educational benefit to XXXX.

The proposed October 2020 IEP and the stay-put 2014 IEP track XXXX for an applied studies diploma. The petitioner wants XXXX to be put on track for a standard diploma. She cites the December 2020 JLARC report that expresses concerns about the applied studies diploma and the lack of informed parental consent by parents as her situation when she signed the stay-put IEP. (P. Ex. 18) Petitioner claims that she was not properly informed as to the meaning and implications of the applied studies diploma. The JLARC report, although critical of the handling of the applied studies diploma by school districts did not recommend the elimination of the applied studies diploma. This fact was pointed out during the testimony of Dr. XXXXX who participated in the JLARC study. (Tr. Day 11) The JLARC report is not dispositive in this case.

Once evaluations have been completed and the October 2020 proposed IEP is revisited, the parties should be mindful 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). Local educators should be given deference when educating a handicapped student.

***Private Placement***

IDEA encourages disabled children to be educated in the regular classroom. However, the law permits disabled children to also be privately placed where appropriate. Least Restrictive Environment (LRE) requires that students with disabilities receive their education, to the maximum extent appropriate, with nondisabled peers and encourages special education students to not be removed from regular classes unless, even with supplemental aids and services, education in regular classes cannot be achieved satisfactorily. [20 United States Code (U.S.C.) Sec. 1412(a)(5)(A); 34 Code of Federal Regulations (C.F.R.) Sec. 300.114.]

However, IDEA does not mandate that every child with a disability be placed in the regular classroom regardless of individual abilities and needs. This recognition that placement in the regular class may not be appropriate for every disabled child is reflected in the requirement that school districts make available a range of placement options to meet the unique educational needs of children with disabilities. These required placement options are known as a continuum of alternative placements. This requirement for the continuum recognizes the importance of an individualized analysis, not a "one-size-fits-all" approach, when determining what placement is the LRE for each child with a disability. The options on this continuum must include alternative placements. These alternative placements include the availability of instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions." 34 CFR 300.551(b)(1). These options must be available to the extent necessary to implement the IEP of each disabled child. Petitioner alleges that XXPS has failed to provide the continuum to XXXX.

A placement or IEP team must select the option on the continuum from which the child's IEP can best be implemented. Any alternative placement selected for a disabled child outside of the regular educational environment must maximize opportunities for the child to interact with nondisabled peers, to the extent appropriate to the needs of the student.

The general rule in placement is that each disabled child's placement must be individually determined based on that individual child's abilities and needs. In determining if a placement is appropriate under IDEA, the following factors are relevant:

* the educational benefits available to the disabled student in a traditional classroom, supplemented with appropriate aids and services, in comparison to the educational benefits to the disabled student from a special education classroom;
* the non-academic benefits to the disabled student from interacting with nondisabled students; and
* the degree of disruption of the education of other students, resulting in the inability to meet the unique needs of the disabled student.

When considering these factors, I find that the educational benefits available to XXXX in a traditional, special or inclusion classroom, supplemented with appropriate aids and services would better benefit XXXX in a public school setting. XXXX is a social student who enjoys socializing with XX nondisabled peers. XXXX has friends at XXXXXXXXX High School and testified that XX liked being with XX friends. This socialization serves as a non-academic benefit to XXXX. Reference factor three above, there is no evidence that XXXX is a disruptive student. XX works well with other students and is well-mannered.

It has already been determined that XXXX received a FAPE while attending XXPS. XXXX was unilaterally placed at XXX by petitioner without timely notice given to XXPS. XXX is not a state certified private day school nor does it specialize in educating disabled children. XXX is certified by Penn Foster to administer its on-line diploma program. Both petitioner and XXXX testified that XXXX should be pursuing a standard diploma which can be obtained through the Penn Foster program. XXPS has taken the position that XXXX should pursue the applied studies diploma and is educating XXXX according to that track.

The law is clear that school districts need not cater to a parent’s preference and place the student in what the parent considers the "better" placement. *Z.W. v. Smith,*[47 IDELR 4](http://www.specialedconnection.com/LrpSecStoryTool/servlet/GetCase?cite=47+IDELR+4)(4th Cir. 2006, *unpublished*);  *Bradley v. Arkansas Dep't of Educ.*, [106 LRP 21288](http://www.specialedconnection.com/LrpSecStoryTool/servlet/GetCase?cite=106+LRP+21288) , 443 F.3d 965 (8th Cir. 2006); and *A.S. v. New York City Dep't of Educ.*, [63 IDELR 246](http://www.specialedconnection.com/LrpSecStoryTool/servlet/GetCase?cite=63+IDELR+246) (2d Cir. 2014), *unpublished*). XXXX is attending XXX so that XX can pursue a standard diploma. Once XXXX is educationally and psychologically evaluated, the results should provide the IEP team with sufficient information to decide which diploma track is appropriate for XXXX in the public school setting.

If the evaluations should prove XXXX capable of pursuing a standard diploma, XXPS is capable of placing XXXX in the appropriate classes with the appropriate supports to put XXX on that track. During the hearing, XXPS personnel very knowledgably testified about the requirements needed for XXXX to pursue a standard diploma. However, if the evaluations show that XXXX cannot cognitively achieve the requirements for a standard diploma, the parent should accept the evaluation results and allow XXXX to pursue an applied studies diploma from XXPS.

In either case and regardless of the evaluation results, I find XXX to be an inappropriate educational setting for XXXX. XXX is not XXXX's least restrictive environment. I also accept the argument made by XXPS that XXXX cannot attend XXX at public expense because XX would receive a Penn Foster diploma and not a diploma issued by XXPS.

***Reimbursements***

With regard to whether petitioner is entitled to reimbursement for a parentally selected private school placement, the three-step test set forth in *Burlington Sch. Committee v. Dep't of Educ. of Massachusetts,* [471 U.S. 359](https://casetext.com/case/school-committee-of-town-of-burlington-massachusetts-v-department-of-education-of-massachusetts) (1985) and *Florence County Sch. Dist. v. Carter,* [510 U.S. 7](https://casetext.com/case/florence-county-school-dist-four-v-carter) (1993) should be applied. “The first step is to determine whether the program and placement offered by the school district is appropriate for the child, and only if that issue is resolved against the school district are the second and third steps considered, i.e., is the program proposed by the parents appropriate for the child and, if so, whether there are equitable considerations that counsel against reimbursement or affect the amount of relief." "A decision against the parents at any step of the process results in a denial of reimbursement." *Id.*

The IDEA does not require a school district to pay for the cost of education, including special education and related services, of a student with a disability at a private school or facility if that agency made FAPE available to the student and the parent elected to place the student in a private school or facility. The availability of reimbursement to the parent is left to due process proceedings. Sec. 300.504 through 300.520.

If the parent of a student with a disability, who previously received special education and related services through the local school district subsequently enrolls their child in a private school without the consent of, or without a referral from the school district, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment only if the school district failed to provide the student with a FAPE. Under such a circumstance, the court or hearing officer must find that the school district had not made FAPE available to the student in a timely manner prior to the unilateral private placement. Such is not the case here. In the case of *Burlington, MA v. Department of Education et al*., 105 S. Ct. 1996, IDELR 556:389 (United States Supreme Court (1985), the Court held that parents may be awarded reimbursement of costs associated with a unilateral placement if it is found that: the school district's IEP is not appropriate; the parent's placement is appropriate; and equitable factors can be considered.

As stated previously, I find that XXPS provided XXXX with a FAPE pursuant to the IDEA and in accordance with standards set forth in *Rowley* and *Endrew (Id.)* Both the 2014 and 2020 IEPs were calculated to provide XXXX with an educational program reasonably calculated to enable XX to make meaningful progress in light of XX circumstances.

In the case of *Florence County School District Four et al. v. Carter*, 114 S. Ct. 361, 20 IDELR 532 United States Supreme Court (1993), the Court held that parental placement at a school that is not state approved or does not meet the standards of the state does not itself bar public reimbursement if the placement is proper. In this case, I find that the parent's placement of XXXX at XXX was improper leaving no need for further analysis. XXPS provided FAPE.

Therefore, tuition reimbursement for XXXX's unilateral parental placement at XXX, a private facility, is expressly precluded because XXPS made FAPE available in a timely manner prior to the placement. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R.§ 300. 148. *S.H. v. Fairfax County Bd. of Educ.,* 875 F. Supp. 2d. 633,657 (E.D. Va. 2012).

***The Virginia Alternate Assessment Program (VAAP)***

Petitioner alleges that she was not aware that XXXX had taken the VAAP and that she did not give consent. She alleges that the VAAP information was not included with the student's cumulative education record as it should have been. She also alleges irregularities and falsifications involving the VAAP. The hearing officer ordered the VAAP to be produced during the hearing. As ordered, XXPS provided a copy of the VAAP. Petitioner's allegations prompted an investigation into XXXX's VAAP. Consequently, this matter is currently under separate investigation and will not be addressed further in this decision.

***Composition of IEP Teams***

The petitioner alleges that the IEP team members were untrained and inappropriate to conduct meetings for XXXX. The record does not show any evidence of team members being untrained. In fact, some of the team members were found to be experts in their fields. The team members' resumes that were presented during the hearing showed them to be accomplished educators.

Among other deficits, petitioner alleges that there was no representative trained in Down's Syndrome. As a general rule, the IEP team is composed of the following persons: the student, where appropriate; the student's parent(s); at least one of the student's special education teachers or providers; at least one of the student's regular education teachers; a representative of the school system; an individual who can interpret the evaluation results; representatives of any other agencies that may be responsible for paying for or providing transition services (if the student is 16 years or, if appropriate, younger); and other individuals who have knowledge or special expertise about the child. 34 CFR 300.321 (a), (c) and (d) XXPS met this standard for each IEP meeting. There is no requirement that the IEP team have a member trained in the student's specific disability.

***Eligibility Reevaluation***

XXXX's last eligibility was conducted by record or file review on September 25, 2020. Ms. XXXXXXXXXX, XXXX's case manager, conducted the review. This was a reevaluation of eligibility conducted at the parent's request. The parent was provided notice of the meeting and was invited to attend on September 9, 2020. (SB Ex. 59) Neither the petitioner or XXXX attended this meeting.

Having completed the records review, Ms. XXXXXXXXXX concluded that XXXX remained eligible for special education services under the categories of intellectual disability and speech language impairment. (SB Ex. 70) The petitioner disagrees with the finding that XXXX is intellectually disabled. She contends that the eligibility review was conducted improperly and without all of the available data, including ESL data regarding XXXX's language needs.

There were no names listed on the meeting notice except for XXXXXXXXXXXXXXXX, XXXX's case manager, although there was space on the form for names to be added. (SB Ex. 59) Nor were there any names of attendees listed on the record review except the case manager's name.

In this case, this was a reevaluation performed at the parent's request but the parent did not provide parental consent for a full reevaluation. (SB Ex. 70) Therefore, the case manager performed a records review.

Under this circumstance, if the eligibility group determines that there is not a change to the child's eligibility for special education, related services and educational needs, the IEP team is not required to convene, unless the parent requests that the IEP team meets. Although the parent in this case requested the reevaluation, she did not provide consent. Therefore, the team did not meet and the records review did not yield a change in XXXX's eligibility. Parental consent is not required for the review of existing data as part of a reevaluation. 8 VAC 20-81-80(D)(11)

***Collateral Estoppel***

XXPS argues that the issues of this case are barred by the legal doctrine of *collateral estoppel* as well as the statute of limitations. The doctrine of c*ollateral estoppel* applies when the following five elements are satisfied: “(1) the identical issues were presented in a prior proceeding; (2) there was a full and fair opportunity to litigate the issues in the prior proceeding; (3) the issues in the prior litigation were a critical and necessary part of the prior determination; (4) the parties in the two proceedings were identical; and (5) the issues were actually litigated in the prior proceeding.”  *Pearce v. Sandler*, 219 So.3d 961, 965 (Fla. 3d DCA 2017) *quoting Topps v. State*, 865 So.2d 1253, 1255 (Fla. 2004).   When these elements are satisfied, “*collateral estoppel* precludes re-litigating an issue where the same issue has been fully litigated by the parties and a final decision has been rendered by a court.”  *Mtge. Elec. Registration Sys., Inc. v. Badra*, 991 So.2d 1037, 1039 (Fla. 4th DCA 2008).

Listed below are the issues in the 2017 case and in parenthesis, with italics, how the 2017 issues differ from this current proceeding.

(1) Whether the school system failed to properly identify and evaluate XXXX's speech language disability. *(This was not identified as an issue in the current case. Instead the issue of ESL was raised.)*

(2) Whether the IEP teams met the least restrictive environment requirement by placing the student in a small group setting in a special education classroom with modified curriculum and identified accommodations and with general education classes for non-core classes. *(In this case, a similar analysis was considered when determining whether XXPS provided FAPE and whether the 2014 and 2020 IEPs were appropriate. However, the issue of private placement and its ancillary issues were not considered during the 2017 decision. In 2017, XXXX was attending public school and had not been unilaterally placed at a private facility as is the case in this current proceeding. The proposed October 2020 IEP is also new to this case.)*

(3) Whether the stay-put IEPs that provided a program designed to enable the student to work for an applied studies diploma rather than a standard diploma was appropriate or denied the student a FAPE. *(This issue is duplicative regarding the 2014 stay-put IEP but in 2017, the case involved other proposed IEPs and a 2016 eligibility meeting that are not relevant to this case.)*

(4) Whether the IEPs offered by the school system were reasonably calculated to offer the student meaningful educational benefit to meet XX unique needs based on the standards set forth in *Rowley* and *Endrew*. *Id.* *(The 2017 decision did address the 2014 IEP but it also reviewed other IEPs that are not relevant to this case. In this current proceeding, the proposed 2020 IEP is also at issue.)*

Although some of the evidence presented during this proceeding appeared to be duplicative, appropriate weight was given to dated information and arguments. Nonetheless, the issues of this current proceeding, as identified earlier herein, are not identical to the issues identified in the 2017 proceeding as shown by the above analysis. This case involves private placement at XXX, the 2017 case did not. The issues in this case are quite different than those set forth in the 2017 case. Therefore, the first step needed to apply the doctrine of *collateral estoppel*, i.e. identical issues, does not apply to this proceeding. Accordingly, application of *collateral estoppel* argument is inapplicable.

XXPS further argues that the statute of limitations and/or resolution agreement bar claims before November 6, 2019 due to the language in the agreement. (SB Ex. 18) Since no claims will be granted by this decision such as reimbursement, damages or advocacy fees, this issue is moot.

***Advocacy Fees***

A court, in its discretion, may award reasonable attorneys' fees as part of the costs to the prevailing party. This hearing officer lacks the authority to award attorney fees. Logically, this hearing officer also lacks the authority to award advocacy fees.

***Family Counseling***

Petitioner requested in her complaint that XXPS pay for family counseling, however, insufficient evidence was presented during the hearing regarding this issue.

***English as a Second Language (ESL)***

Petitioner alleges that XXPS failed to provide XXXX with sufficient ESL services which impacted XX ability to learn, thereby precluding XXXX from receiving a FAPE. XXXX speaks both English and XXXX. Ms. XXXXXXX, an educational specialist with the Language Instructional Educational Program, testified that XXXX received one-on-one ESL services for about 20 minutes twice a week. She also testified that XXXX stopped attending classes all together on January 12, 2021. (Tr. Day 11)

Petitioner completed a language identification form wherein she identified English as XXXX's primary language (SB Ex. 134) ESL services are not required under the IDEA for a student to receive FAPE. ESL is a related service that should be addressed by the IEP team if the need presents. In XXXX's case, XX disability classification is not based on whether XX is an English Learner but primarily on intellectual disability.

In the case of *Irving Independent School District v. Tenn*., 104 S. Ct. 3371 (1984), the United States Supreme Court established a three-prong test for determining whether a particular service is considered a related service under the IDEA. To be entitled to a related service:

* + A child must have a disability so as to require special education under the IDEA;
  + The service must be necessary to aid a child with a disability to benefit from special education; and
  + The service must be able to be performed by a non-physician.

ESL services for XXXX fit into the parameters of this three-prong test. A student’s status as an English Learner is not, in and of itself, a basis for determining whether the student has a disability. XXXX is not a student with a disability solely because XX is an English Learner. The source of XXXX's disabilities is Down's Syndrome.

"A child with a disability shall be found eligible for special education in order to receive related services. Once a child is found eligible for special education, decisions about the need for related services shall be made by the IEP team. An evaluation may be conducted as determined by the IEP team." 34 CFR 300.34 and 34 CFR 300.306(c)(2)

XXXX receives instruction at school in English. During XX testimony, XXXX appeared to have a strong grasp of the English language. I find that XXXX's ability to learn was not impeded because XX did not receive sufficient ESL services.

***IEP Meetings***

This hearing officer was afforded the opportunity to hear an audio recording from the two mid-hearing IEP meetings and was disturbed by the tone and tenor of those meetings. The IEP team will have to meet again and is reminded that the focus of the meetings should be XXXX's education and the development of an appropriate IEP. The parties are admonished to work together as a team, building on the October 20, 2020 IEP. Now that schools have reopened, additional opportunities be available to XXXX.

***Findings***

* ***Issue:*** *Whether the student has been denied a free appropriate public education (FAPE) by XXXXXXXXXXXXX Public Schools.* ***I FIND that XXPS did not deny the student a FAPE. Petitioner did not meet her burden of proof on this issue. XXPS prevails on this issue.***
* ***Issue****: Whether the student should be privately placed, at public expense, to receive a FAPE.* ***I FIND that XXX is not an appropriate placement for the student. Petitioner did not meet her burden of proof on this issue. XXPS prevails on this issue.***
* ***Issue****: Whether the parent has been denied an opportunity to meaningfully participate in the decision-making process regarding the student's education.* ***I FIND that petitioner was not denied an opportunity to meaningfully participate in the decision-making process regarding the student's education. Petitioner did not meet her burden of proof on this issue. XXPS prevails on this issue.***
* ***Issue****: Whether the proposed IEP dated October 20, 2020 is reasonably calculated to provide the student with a FAPE.* ***Given the available data, I FIND that the October 20, 2020 IEP is reasonably calculated to provide the student with a FAPE. However, this IEP should be revisited and appropriately adjusted once current evaluation and assessment results are received by the IEP team and when school reopens which will provide additional opportunities for the student.*** ***Petitioner did not meet her burden of proof on this issue. XXPS prevails on this issue.***
* ***Issue:*** *If privately placed for XX core instruction, whether XXXXXXXXXXXXX Public Schools should afford the student an opportunity to participate in public school extra-curricular activities for XXX to receive a FAPE.* ***Based on the finding that this student should not be privately placed at XXX, this issue is moot.***
* ***Issue****: If privately placed for XXX core instruction, whether XXXXXXXXXXXXX Public Schools should afford the student an opportunity to participate in vocational activities sponsored by XXXXXXXXXXXXX Public Schools for XX to receive a FAPE.* ***Based on the finding that the student should not be privately placed at XXX, this issue is moot.***
* ***Issue****: Whether XXXXXXXXXXXXX Public Schools should pay for family counseling for the student's family.* ***Insufficient evidence was presented to decide this issue.******Petitioner did not meet her burden of proof on this issue.***

Note: Any additional or incidental matters raised by petitioners 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 XXXX will continue XX education with XXPS. XXXX will be comprehensively evaluated as soon as possible by an independent educational evaluator. At minimum, XXXX will receive a psychoeducational evaluation. Additional evaluations are authorized as the parties can agree. These evaluations will be at public expense. XXPS will schedule the evaluations with availability input from the petitioner. Petitioner will make XXXX available for the evaluations as scheduled. Once evaluated, XXXX's IEP team will reconvene to consider the evaluation results and adjust the October 20, 2020 IEP accordingly.

Since schools have reopened and in-person learning is again permitted, the October 20, 2020 IEP should be revisited. Any educational opportunities, accommodations and services, including but not limited to transition services, that were unavailable during the Covid-19 pandemic school closure should be reconsidered by the IEP team.

***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: March 15, 2021

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

RHONDA J. S. MITCHELL, Hearing Officer

Copy furnished to:

Mary Hart, Counsel for XXXXXXXXXXXXX Public Schools

Kandise Lucas, Advocate for XXXX and XXXXXXXXXXXX

Kathryn Jones, Coordinator of Due Process Services, Virginia Department of Education

Brian Miller, Case Monitor, Virginia Department of Education

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

**CASE CLOSURE SUMMARY REPORT**

VDOE Case #: 21-034

***(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.)***

**XXXXXXXXXXXXX PUBLIC SCHOOLS XXXXXXXXXXXX**

**School Division Name of Parent**

**XXXXXXXXXXXXXX NON-EXPEDITED**

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

MARY HART KANDISE LUCAS

Counsel Representing LEA Representing Parent / Child

XXXXXXXXXX March 15, 2021

Party Initiating Hearing Decision Date

XXXXXXXXX Public Schools

Prevailing Party

**Timeline:**

*Filing date*: November 18, 2020

*Date of resolution session(s):* December 18, 2020, January 6, 2021

*15 day resolution meeting due date*: December 3, 2020 (The parties agreed to delay the 1st resolution session until the student's cumulative file was delivered to the advocate on or before December 11, 2020.)

*Original 30 day resolution period end date*: December 18, 2020

*First day of the 45-day decision period*: December 19, 2020

*Dismissal date*: Not Applicable

*Hearing dates*: January 11, 12, 26, 27, 28, 29, February 1,2, 3, 4 and 5, 2021

*Original Decision Due Date*: February 1, 2021

*Reason for continuance*: The holiday season interrupted school and the availability of witnesses. The parties initially agreed to extend the decision date from February 1, 2021 to February 15, 2021 because of the holiday interruption and due to the anticipated length of the hearing and volume of information to be presented during the proceeding.

The parties later agreed to a March 1, 2021 decision delay due to a two-week pause in the hearing requested by the petitioner. The delay was granted. Petitioner requested the delay in hopes that the IEP team could meet, draft an agreeable IEP, and resolve the issues. The IEP team met twice during the two-week delay but the case was not resolved. The parties agreed that the decision date delays were in the best interest of the student. Given the volume of documents submitted during the hearing and the fact that the hearing lasted 11 days, instead of the initially projected 5 or 6 days, the parties requested additional time to submit closing arguments. The parties also agreed to extend the decision date to March 15, 2021. The parties agreed that the delays did not adversely affect the student and were in XX best interest.

*Final decision due date*: March 15, 2021 per agreement of the parties.

*Decision rendered*: March 15, 2021

**Hearing Officer’s Identification of Issues:**

* Whether the student has been denied a free appropriate public education (FAPE) by XXXXXXXXX Public Schools.
* Whether the student should be privately placed, at public expense, to receive a FAPE.
* Whether the parent has been denied an opportunity to meaningfully participate in the decision- making process regarding the student's education.
* Whether the proposed IEP dated October 20, 2020 is reasonably calculated to provide the student with a FAPE.
* If privately placed for XX core instruction, whether XXXXXXXXX Public Schools should afford the student an opportunity to participate in public school extra-curricular activities for XX to receive a FAPE.
* If privately placed for XX core instruction, whether XXXXXXXXX Public Schools should afford the student an opportunity to participate in vocational activities sponsored by XXXXXXXXX Public Schools for XX to receive a FAPE.
* Whether XXXXXXXXX Public Schools should pay for family counseling for the student's family.

**FINDINGS**

* ***Issue:*** *Whether the student has been denied a free appropriate public education (FAPE) by XXXXXXXXX Public Schools.* ***I FIND that XXPS did not deny the student a FAPE. Petitioner did not meet her burden of proof on this issue. XXPS prevails on this issue.***
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Note: 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 XXXX will continue XX education with XXPS. XXXX will be comprehensively evaluated as soon as possible by an independent educational evaluator. At minimum, XXXX will receive a psychoeducational evaluation. Additional evaluations are authorized as the parties can agree. These evaluations will be at public expense. XXPS will schedule the evaluations with availability input from the petitioner. Petitioner will make XXXX available for the evaluations as scheduled. Once evaluated, XXXX's IEP team will reconvene to consider the evaluation results and adjust the October 20, 2020 IEP accordingly.

Since schools have reopened and in-person learning is again permitted, the October 20, 2020, IEP should be revisited. Any educational opportunities, accommodations and services, including but not limited to transition services, that were unavailable during the Covid-19 pandemic school closure should be reconsidered by the IEP team.

*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.

March 15, 2021 /s/

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

Printed Name of Hearing Officer Signature

Copy furnished to:

VDOE

Case Monitor

Advocate for Parent

Counsel for XXPS

XXPS Representative