**VIRGINIA DEPARTMENT OF EDUCATION**

**DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES**

**OFFICE DISPUTE RESOLUTION AND ADMINISTRATION SERVICES**

**VDOE CASE NUMBER: 21-035**

# DUE PROCESS DECISION

XXXXX XXXxx Public Schools Mr. & Mrs. XXXXX & XXXXXXXX XXXXXXXX

**School Division Name of Parents**

Dr. XXXXXXXXXXX XXXXXXX XXXXXXXX

***Interim* Division Superintendent Name of Child**

Anne E. Mickey, Esquire Sa'ad El‑Amin, M.A., J.D.

Sands Anderson, PC Strategic and Litigation Consultants

**Counsel Representing LEA Advocates for the Parent/Child**

Robert J. Hartsoe, Esquire Parents/Child

**Hearing Officer Party Initiating Hearing**

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**LEGEND**

Parents XXXXX & XXXXXXXX XXXXXXXX

Mother XXXXXXXX XXXXXXXX

Father XXXXX XXXXXXXX

Child XXXXXXX XXXXXXXX

LEA XXXXXXXXXXXXXX Public Schools

Prior Advocate Kandise Lucas/Strategic and Litigation Consultants

Current Advocate Sa'ad El‑Amin/Strategic and Litigation Consultants

Consultant XXXXXXXXXX

AP XXXXXXXXXX

Teacher XXXXXXXX

XXXXXX‑Grade Teacher XXXXXXXXXXX

Doctor XXXXXXXXXXx, PSY.D.

Doctor’s Report Parent/Child Exhibit 28-58

**DECISION**

**INTRODUCTION**

This matter was extremely difficult under the shadow of the Covid-19 virus, which greatly affected deadlines. Further, this matter was an extremely controversial matter as described in past Reports for reasons not related to IDEA. At times, the Parent/Child’s efforts, *via* the Prior Advocate and otherwise, appeared to focus on derailing this IDEA proceeding as opposed to addressing the issues raised by the Due Process Request or IDEA, without reasonable cause or excuse. The Prior Advocate’s efforts (as the agent for the Parent/Child) were extremely negative, both before and after the filing of the Due Process Request, with an effort to promote a “social agenda” as opposed to effectuating IDEA goals and consistent with her sanctionable efforts in Matthews X. The Prior Advocate was replaced on the very brink of an adjudication of an LEA motion to dismiss with prejudice based on the improper prior conduct of the Advocate (as agent for the Parent/Child) consistent with the sanctionable conduct described in Matthews. Based on the substitution, the matter was allowed to proceed. Factual and legal issues were greatly disputed throughout this matter.[[1]](#footnote-1) The Hearing was conducted for four days, March 23-26, 2021. For the reasons stated herein, the LEA is the prevailing party.

**PROCEDURAL BACKGROUND**:

Pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”), this matter came upon the Parent/Child’s Request for Due Process Hearing, filed on X. Currently, the Child is not subject to an IEP but receives Section 504 services. By prior Report, the Parties agreed that the Section 504 claims will not be adjudicated, but evidence on this subject may be heard as relevant to the issues raised. (The prior Reports filed herein are incorporated by reference as if set forth in full.)[[2]](#footnote-2) In re: XXXXXXXXXXXXXXXX, XXX LRP XXXXX (VA SEA XXX. 1, 20XX), the Hearing Officer determined that the School Board correctly concluded that: 1) XXXXXXX did not qualify as a student with a disability under the IDEA; 2) XXXXXXX “made consistent and meaningful educational progress during the 2017‑2018 and 2018 to 2019 school years”; and; 3) the School Board “provided XXXXXXX XXXXXXXX with a free and appropriate public education (FAPE)” during this time period. Id., pages 22‑23. In July of 2019, the Parents appealed the hearing officer’s decision to federal court. After reviewing the administrative record, reviewing written briefs from both parties, and receiving oral arguments, Judge Ellis of the Eastern District of Virginia issued a decision upholding the hearing officer’s decision. XXXXXXXX *ex rel*. X.X. v. XXXXXXX XXXXXX Sch. Bd., XX IDELR XX, X:XX‑cv‑XXX (E.D.Va. XXX. XX, XXXX).

**ISSUES DEFINED**:

**I. Whether the LEA committed procedural violations of the IDEA in the Fall of 2020 in its actions to effectuate an eligibility determination? If so, did such violations deny the Child FAPE?**

**II. Whether the LEA denied the Child FAPE by denying XXX eligibility for the school year 2019-2020?**

**III. Whether the LEA denied the Child FAPE by denying XXX eligibility for the school year 2020-2021.**

**IV. If the Child is found to have been denied FAPE by denying XXX eligibility for the school year 2019-2020, whether the LEA should reimburse the Parents/Child for the costs associated with private assessments and tutoring for school year 2019-2020? If so, what are the amount and reason for the costs?**

**V. If the Child is found to have been denied FAPE by denying XXX eligibility for the school year 2020-2021, whether the LEA should reimburse the Parents/Child for the costs associated with private assessments and tutoring for school year 2020-2021? If so, what are the amount and reason for the costs?**

**VI. If the Child is found to have been denied FAPE by denying XXX eligibility for the school year 2019-2020, whether the LEA should provide compensatory services for the school year 2019-2020?**

**VII. If the Child is found to have been denied FAPE by denying XXX eligibility for the school year 2020-2021, whether the LEA should provide compensatory services for the school year 2020-2021?**

**Psychologist**

**PERTINENT/RELEVANT TESTIMONY REVIEW**:

The Parent/Child called six witnesses: the Consultant, Teacher, Father, Mother, the Doctor and AP.

The Consultant was designated as an expert in the area of special education with the subsets of eligibility, adequacy of 504 services, and FAPE regarding services. To the extent that she has referenced psychological evaluations, her opinions thereof will not be taken as someone who has expertise in psychology, but in the designated areas. (Hearing Transcript March 23, 2021 (HT23) at 79.) She reviewed the Child’s academic records and her only source of information was from documents. (HT23 at 90 and Hearing Transcript March 24, 2021 (HT24) at 101.) She reviewed the report from the Doctor, Parent/Child’s Exhibit X. (HT23 at 116.) She provided guidance to the Parents regarding the academic services required by the Child based on her observations of the Child’s strengths and weaknesses. (HT23 at 90.) From April 2019 to present, the Child exhibit academic problems. (HT23 at 102.) The Child presented “with a mild dyslexic disorder and that is being exacerbated to the point of frustration at this time.” (HT23 at 116.) XXX “writing is significantly below grade level.” (HT23 at page 117.) Further, areas of weakness are written expression, specifically grammar, punctuation and xxx spelling. (HT23 at page 118, and 122-124.) The Child presents with difficulties with the auditory and visual areas of weaknesses and deficits. (HT23 at 155.) The Child requires “specialized instruction.” (HT23 at 124.) The Child’s academic future will be negatively affected if without such instruction. (HT23 at 125.) The Child requires a “functional behavioral assessment” which would “allow more of a deeper, in-depth understanding as to what are the triggers behind the behavior of the child, and so you would look at their function in the classroom,” a benefit to the teachers. (HT23 at 126-127.) This assessment would create “de-escalation strategies” to allow the Child to “calm xxxself and work through a problem without a responsive negative behavior.” (HT23 at 127.) A review of the Child’s record reflects that no such assessment was conducted. (HT23 at 128.) The file also does not have a “behavioral intervention plan.” (HT23 at page 128.) The assessment "is a plan that is then built upon from the data and observational notation from a functional behavior assessment." (HT23 at 128.) The goal, with its data-driven basis, would create an intervention strategy that would help the Child overcome some of those behavioral areas that are impacting XXX from accessing the general education curriculum and other areas, socially and functionally. (*Id*.) A teacher requires special educational training to allow the Child access to the curriculum. (HT23 at 131.) The Child would benefit from a “collaborative co‑taught classroom” which consists of general education teacher as well as an endorsed special education teacher.” (HT23 at 133.) Both teachers would provide supports to the Child, help with instruction, but the special education teacher would bring the specialized instruction as well as the delivery model with her of that specialized instruction to the general education teacher to collaborate on general education standards that they are going to instruct on. (*Id.*) They would look at that model of instruction and be able to implement it with fidelity to meet the student's learning‑based needs in the classroom as well as the general education students. (*Id*.) No special education teacher was provided to the Child. (*Id*.) Failure to provide such effort undermines the Child’s academic progress. (HT23 at 134 and 142.) Further, the failure to progress academically will negatively affect the Child’s relationship with XXX peers. (HT23 at 135.) The Child’s failure to progress, with its accompanying lack of self-esteem, puts XXX “at risk” to incarceration in “prison” as an adult. (HT23 at 137.) The Child demonstrates a “shut down” reaction to scenarios wherein XX is frustrated by XXX inability to access the curriculum. (HT23 at page 137.) The need for academic intervention is “time sensitive,” implying immediate. (HT23 at 138.) The Child’s current teacher, without a special education designation, would not be able to fully have the understanding to screen, monitor, design and implement specialized instruction that would meet XXX unique disability‑based needs. (HT23 at 142.) Without the referenced interventions, the Child would be denied FAPE. (*Id*. and HT23 at 165-166.) The use of virtual learning as a result of COVID negatively affects the Child’s access to the curriculum. (HT23 at 147-150.) Communication between the LEA and the Child’s tutor would be beneficial to the Child’s academic progress. (HT23 at 150-151.) Although not an issue, the Consultant opined as to the implementation of Section 504 plan, not IDEA eligibility. (HT23 at 159-161 and 192-195.) The Child’s grades are inconsistent with XXX academic reality. (HT23 at 177-190.) On cross-examination, the Consultant described minimal contact with the Child. (HT24 at 95.) She never taught the Child. (*Id*.) She never provided educational services to the Child. (*Id*.) She never observed the Child in the classroom setting, virtual or otherwise. (*Id*.) No request was made to observe the Child in the classroom setting, virtual or otherwise. (*Id*.) She never contacted the Child’s teachers. (HT24 at 99.) She never attended a Section 504 meeting. (*Id*.) She never visited the Child’s school to inspect the Child’s records. (HT24 at 101.) She relied on the records provided by the Parent/Child. (*Id*.) She opined that the records provided were complete. (HT24 at 102, 118 and 120.) The LEA did not provide the Child’s records virtually. (HT24 at 117.) As a rebuttal witness, the Parent/Child recalled the Consultant. Her review of the Child's work reflected that XXX progress was inconsistent with these grades. (Hearing Transcript March 26, 2021 (HT26) at 306.) Certain available strategies are available to address alleged issues regarding the Child's writing. (HT26 308‑313.) The witness had special knowledge on the areas of the expert designation and provided some insightful opinions. However, her testimony was discounted on the basis that: she never taught the Child or provided the Child educational services; there was no evidence that she spoke with the Child’s private tutor; she never attended a Section 504 meeting; she never saw the Child in a classroom, virtual or otherwise; she never spoke with the Child’s teachers; she is not currently licensed in Virginia (HT23 at 71); she has not taught special education since 2014 (HT23 at 72); her opinions were based only upon a review of the Child’s academic records, the Doctor’s Report (three-years old) and another report (evidently in the Child’s academic record) and six discussions with the Parents (HT23 at 142). The Consultant’s testimony focused on alleged negative aspects of the Child’s current education including alleged deficiencies of the Section 504 plan and its implementation including her opinion that the Child was denied FAPE. Such testimony of “grade inflation” was found unpersuasive. To the extent the Consultant’s testimony addressed potential areas regarding the need for IDEA services, it was found, at times, general and, overall, unpersuasive. Similarly, her testimony regarding the need for a functional behavior assessment or a dyslexic intervention plan was general and unpersuasive--all students would “benefit” from such efforts, socially as well as functionally. Overall, there was no persuasive testimony to allow a finding that the Child requires IDEA services.[[3]](#footnote-3)

The Teacher was called as a fact witness. She is a general educational teacher. (HT24 at 182.) She is the Child’s current XXXX-grade teacher. (HT24 at 184 and 280.) As such, she constantly collected data every day through the Child’s work, through conversations, through assessments. (HT24 at 195.) She shared information with the 504 team. (HT24 at 197.) She did not see the Child act hyperactively consistent with ADHD. (HT24 at 199.) Sometimes the Child did not complete xxx assignments. (HT24 at 205.) She had no concerns regarding the Child’s capacity to write letters or grammar. (HT24 at 216.) Despite the Child’s diagnosis of ADHD and the virtual classroom, she observed that the Child has accessed xxx curriculum. (HT24 at 239.) The Child was completing “a lot of the work” on the weekly basis. (HT24 at 269.) When XX did not complete the work within the week, then the Teacher would let XXX and xxx parents know once a week of the outstanding things for XXX to work upon. (*Id*.) The Child’s handwriting is not part of what is considered a report card. (HT24 at 243.) The effects of ADHD on the Child in the classroom are that XX tends “to rush through work at times,” and XX may not fully complete an assignment or put the effort as needed, and sometimes it is the lack of attention. (HT24 at 250.) The Child earned xxx grades. (HT24 at 251.) “The Child is a respectful student. XXX gets along with other students, you know, in our new way of learning with this environment this year. XX’s friendly. XX has shared with the class sometimes about, you know, a pet or sports that XX's been enjoying or something like that. So XX's just a nice XXX.”[[4]](#footnote-4) (HT24 at 281.) She observed that the Child’s report card accurately described XXX academic achievements and showed improvement. (HT24 at 281-284.) The Teacher was found to be a credible witness based on her daily contact with the Child; her interaction with the Child; her daily review of the Child’s academic work; and, her demeanor.

The Father was called as a fact witness. Although he expressed opinions, he was not qualified as an expert and, therefore, such opinions were not considered except in the context of a factual witness, *e.g.*, concerns. The Parents sought the Doctor in 2018. (Hearing Transcript Day Three (Hearing Transcript March 25, 2021/Volume Two (HT25/Volume 2) at 330.) He examined the Child in May and June, 2018. (*Id*.) The description contained in the Report is consistent with the Child’s behavior at home. (HT25/Volume2 at 331.) He expressed concerns as referenced in the Report to the LEA in 2019 and before. (HT25/Volume2 at 340-334.) He had concerns regarding the Child’s completing assignments. (HT25/Volume2 at 345.) The Father did not recall receiving LEA Exhibit 35. (HT25/Volume2 at 359.) The Father’s concern is that the LEA failed to consider the Child’s existing evaluations as contained in the LEA’s file. (HT25/Volume2 at 361.) He felt that additional tests would be illegitimate without explanation, a cause of frustration. (HT25/Volume2 at 364-365.) He felt that additional evaluations would be harmful. (*Id*.) He had concerns regarding the LEA’s addressing the Child’s vision. (HT25/Volume2 at 366.) He had concerns that the inability of the Child to receive services would negatively affect XXX academic and social progress. (HT25/Volume2 at 370-373.) He had concerns regarding the Child’s handwriting. (HT25/Volume2 at 374-381.) He had concerns regarding the communications between the LEA and the Child regarding assignments and, to his credit, got involved. (HT25/Volume2 at 382-385.) He arranged with the LEA to obtain weekly reports. (HT25/Volume2 at 382-383.) On cross-examination, he confessed that he was not a teacher. He did not recollect receiving LEA Exhibit 35, a letter dated X. (HT25/Volume2 at 418.) The Teacher communicates with the Child every day. (HT25/Volume2 at 481.) He testified that he never refused to sign “interventions” from the LEA regarding his concern which, by implication, was LEA Exhibit 34. (HT25/Volume2 at 437-438.) The Parent/Child recently refused to meet with the Teacher. (Parent page 105-106; HT25/Volume2 at 425-427.) While his love for the Child was evident, his testimony was discounted on the basis of bias towards his perception of the Child’s academic needs, his negative perception of the LEA as well as his credibility especially regarding the receipt of correspondence with the LEA, especially LEA Exhibit 35 which was included as Exhibit X to the Due Process Complaint.) Overall, the Father evidenced a sincere commitment to forwarding his Child’s educational opportunity; however, the Father splintered his credibility for reasons stated herein.

The Mother testified as a fact witness. Although she expressed opinions, she was not qualified as an expert and, therefore, such opinions were not considered except in the context of a factual witness, *e.g*., concerns. The Child is a rising XXXX grader. (HT24 at 132.) She took the Child to be evaluated by X on May 14, and June 20, 2018. She took the Doctor’s Report to the LEA in 2018. (HT24 at 145 and 158.) The Mother did not confirm receiving any letters from the LEA. (Hearing Transcript Day (HT26) at 12.) The only eligibility (implying IDEA eligibility) meeting the Parent/Child would participate in would be based on the Child’s existing evaluations. (HT26 at 18.) The Mother did not decline meetings with the Teacher. (HT26 at 18.) However, she admitted that she declined to meet with the Teacher because she only had fifteen minutes. (HT26 at 19.) The Mother did not remember receiving Exhibit 35 despite its being an Exhibit to the Due Process Complaint. (HT26 at 8-9.) The Doctor’s Report was distributed to the LEA, date unspecified. (HT26 at 23-24.) The LEA conducted no discussions regarding the Child’s IDEA eligibility. (HT26 at 27.) The Parent/Child was unwilling to meet with the LEA regarding 504 issues because they felt it was a disability, implying IDEA, issue. (HT26 at 21.) The Parent/Child was never offered an IEP based on the Doctor’s Report. (HT26 at 26.) The Mother did not recognize the Due Process Complaint despite her signature thereto. (HT26 at 8-9.) She saw the LEA’s request to evaluate the Child in September 2020 (LEA 35) to be for service under Section 504, not for IDEA. (HT26 at 10.) In regard to the drafting of the Due Process Complaint, the Mother stated “I didn't write this. So I don't ‑‑ If that's what it says. I did not write this.” (HT26 at 10.) She disavowed knowledge of communications between the Prior Advocate and the LEA. (HT26 at 11.) The Mother deflected questions regarding notice of the LEA’s request for evaluations with “I never **confirmed** that I received any of these letters. [Emphasis added.]” (HT26 at 12.) In response to a simple question requesting her to confirm that the email address on LEA Exhibit 34 was hers, she evaded a specific response with “[t]hat's what it states.” (HT26 at 15.) The Mother admitted that “[t]he only meeting [she was] willing to have [was] an eligibility meeting to review the existing evaluation reports already in [the Child’s].” (HT26 at 18.) She felt that communications with the Teacher were useless insofar as the Teacher “hung up” on her on several occasions. (HT26 at 30.) When the Child is medicated with Ritalin, XX acts appropriately or more in control. (Hearing Transcript March 25, 2021 Volume One (HT25Volume 1) at 11 and 14-15.) She felt that the LEA was ignoring her inquiries including concerns regarding the Child’s vision. (HT25Volume1 at 30-53.) A tutor was hired. (*Id*.) The Mother discussed her concerns regarding reading with the XXXXXX-grade Teacher. (HT25Volume1 at 68.) She expressed her concerns that the Child’s grades were inflated. (HT25Volume1 at 85-86 and 97-98.) She had concerns regarding the Child’s completing assignments. (HT25Volume1 at 97-98.) On cross-examination, she admitted that she was not a schoolteacher. (HT25Volume1 at 102.) She asserted that the LEA failed to communicate with the Parent/Child for school years 2019-2020 and 2020-2021. (HT25Volume1 at 199-120.) By implication, the Mother asserted that communications with the Prior Advocate were unknown to her. (HT25Volume1 at 130-170.) They had no recollection regarding correspondence with the LEA. (HT25Volume1 at 160-180 and throughout her testimony.) The Mother recalled participating in an eligibility meeting in the fall, 2020. (HT25Volume1 at 181-182.) The LEA never offered to evaluate the Child. (HT25Volume1 at 193-194.) The LEA offered to evaluate the Child in 2018. (HT25Volume1 at 202.) In regard to conducting current evaluations, the Mother asserted that the LEA “never listened to the data that you collected” implying that the evaluations in the Child’s files were sufficient despite the prior judicial decisions regarding such evaluations and the age of such evaluations. (HT25Volume1at 205.) While her love for the Child was extremely evident, her testimony was discounted: her pronounced agenda to advocate for what she perceived to be the Child’s academic needs; her credibility especially regarding the receipt of documents; her pronounced negative perception of the LEA; her suggesting that documents received by her agent, the Prior Advocate were not received; her evasive and, at times, inconsistent, responses even to basic questions as, *e.g.,* confirmation of her email address; and her belligerent demeanor.) Overall, she appeared to be focused on forwarding an unknown agenda, undermining her credibility to a point her testimony was unbelievable except to such testimony as may be inconsistent with her position such as, *e.g.*, the Child acts appropriately when medicated.

AP was called by the Parent/Child as a fact witness. She oversaw all matters of special education from the Child Find process all the way through the eligibility and completing Section 504 matters. (HT23 at 199.) The Father attended several school functions. (HT23 at 201.) The current teacher is not special education endorsed. (HT23 at 202.) She was aware that the Child was found to have “ADHD combined type” under Section 504. (HT23 at 203 and HT24 at 11.) Her review of the record did not reveal a diagnosis of dyslexia. (HT23 at 204 and 207-208, 210.) All teachers are involved in implementing services, implying Section 504 services. (HT23 at 211.) The Child was found ineligible for IDEA services. (HT23 at 212.) Factually, the Child was not provided a special education teacher because XX was not identified as a student eligible for services under the IDEA. (*Id*.) In her position, all of her feedback came from the teachers who work directly with the Child and based on their information and input. (HT23 at 214.) The Child is not in a corroborative (general and special education) classroom (HT23 at 215.) The Parents communicated their understanding to AP and the Section 504 team that the Child was diagnosed with dyslexia. (Hearing Transcript Day Two (HT24) at 6-9.) The LEA requested that the child be evaluated for reading concerns including dyslexia. (HT24 at 13-14.) As found in LEA Exhibit 24, the LEA canceled the meeting regarding the Child’s IDEA eligibility after receiving no response from the Parent/Child. (HT24 at 14-15 and 18.) LEA Exhibit 24, dated September 18, 2020, was emailed to the Parent/Child. (HT24 at 14-15.) The Parent/Child raised concerns including dyslexia. (HT24 at 12.) The LEA agreed to arrange the evaluations requested; i.e., the LEA asked for consent to “do an evaluation based on the concerns ... raised [by the Parent/Child.]” (*Id*.) This included reading in general including dyslexia. (HT24 at 13-14.) The reason for the cancellation was because the LEA agreed with the evaluations requested by the Parent/Child, rendering the need for a meeting moot. (HT24 at 16-17 and 20.) The Parent/Child refused to participate in the process regarding the evaluations, *etc*. (HT24 at 19.) Although the evaluations requested in Exhibit 24 do not use the word “dyslexia” there are general titles. (HT24 at 21.) “But if the parents had more questions about specifically what would be covered in the evaluation, it would just ~~a~~ take a phone call and everything would be explained.” (HT24 at 21-22.) The LEA is always available to respond to questions. (HT24 at 22.) The Parent/Child never returned telephone calls or decide to participate in the process, Section 504 or otherwise including the meeting in October 2020. (HT24 at 18-19 and 41.) LEA Exhibit 24 was delivered to the Parent/Child. (HT24 at 14.) AP was unaware of any vision issues regarding the Child. (HT24 at 26-28.) The alleged vision issue of the Child was not discussed for the last two years. (HT24 at 38.) AP was aware of the Doctor’s Report and it is in the Child’s file. (HT24 at 28.) In 2020, the Child was provided assistive technology as a result of COVID. (HT24 at 43.) Both Parties called AP as a witness and her credibility is stated below.

The Doctor was designated an expert in neuropsychology. (HT25Volume1 at 243.) Overall, he testified consistently with the Doctor’s Report. He evaluated the Child in 2018, three years earlier while the Child was in XXXXXX grade (as opposed to xxx current XXXX grade). (HTVolume1 at 243-244 and 309.) The Doctor opined that “interventions” were required to allow the Child access to this curriculum. (HTVolume1 at 259-280.) On cross-examination, the Doctor did not have the exhibits before him by his own decision. (HTVolume1 at 276-277.) This was because he was contacted to appear as a witness, for the first time, two days before his appearance and was very busy at his work. (HTVolume1 at 281.) All documents with the exception of the Report were irrelevant to him. (HTVolume1 at 285-286.) He never observed the Child in the classroom. (HTVolume1 at 289.) While the Doctor’s opinions were exactly the type of information to allow a Due Process matter be adjudicated, his testimony was extremely discounted: he has not evaluated the Child in 2021 and his three-year old evaluations are, at best, outdated bordering on irrelevant; the Child was not medicated, i.e., medicated with Ritalin, at the time of his evaluations in 2018, as described in the Report; his general opinions regarding “interventions” was not tied to the Child’s current situation, academic or otherwise. He disregarded the Report’s indication that, in terms of reading, the Child did not exhibit a “Dyslexic Disorder.” His demeanor was that of a professional who wanted to help but, given the circumstances, was restrained by his outdated participation. His opinions were given little, if any, weight.

The LEA called two witnesses: the AP and XXXXXX-Grade Teacher

AP was a fact witness and qualified as an expert in special education and school administration. (HT24 at 64.) She has reviewed the Child’s records. (HT24 at 65-66.) She interacts with the Child’s teachers “quite often.” (HT24 at 66.) She has viewed the Child during 2019-2020 school year. (HT24 at 67.) COVID prevented such opportunities in the school year 2020-2021. (*Id*.) She observed that the Child is a “hard worker” and gets along with xxx peers. (HT24 at 67.) The Child is very friendly and acts appropriately in an academic setting. (HT24 at 67-68.) Academically, the Child did not evidence any “red flags” requiring LEA attention. (HT24 at 70.) In contrast, the Child was doing quite well. (HT24 at 71.) The Child’s reports cards accurately reflect is significant and outstanding academic progress. (HT24 at 54 and 76 and HT26 at 190-191.) Such progress is consistent with xxx test scores. (HT24 at 76-89.) She was the Child's Section 504 Administrator and Section 504 caseworker. (HT26 at 42 and HT24 at 65.) She has reviewed the Child's records. (HT26 at 43.) She has observed the Child in the classroom setting. (HT26 at 44.) She communicated with the Parent/Child *via* email or through the U.S. mail, sometimes both. (HT26 at 46.) For the most part, telephone calls to the Parent/Child required messages *via* voice mail. (*Id*.) Such letters were sent to the Parent/Child’s address referenced in the correspondence. (HT26 at 47.) The Parent/Child and the Prior Advocate shut down the Section 504 meeting because of their abusive conduct without excuse. (HT26 at 51-53.) She observed that the Child did quite well in the classroom; XX was a solid student; XX worked hard; XX participated in class; XX got along well with XXX teacher; XX was very interactive with XX peers; and, XX worked well with groups. (HT26 at 54.) The Child does not require IDEA services based on all data available. (HT26 at 55-56 and 100.) In regard to the September 8, 2020, meeting, the Parent/Child and Prior Advocate disrupted the LEA meeting without justification or cause. (HT26 at 62-66.) Despite their disruptive behavior, the Parent/Child requested "a full evaluation due to suspicion of a disability." (HT26 at 64-65.) This request for a full evaluation was so the Child could be found eligible for an IEP. (HT26 at 65.) The LEA agreed with the Parent/Child’s request after reviewing the Child’s file, rendering further meetings moot. (HT26 at 66-75.) Parent/Child’s consent to the requested evaluation is required. (HT26 at 69.) The Child received FAPE in the school year 2020-2021. (HT26 at 100 and 190.) For the recent school year, the Child has access to xxx curriculum. (*Id*.) The LEA required updated data to review the Child’s eligibility for IDEA services. (HT26 at 186-187 and LEA 35.) AP never received any indication such as a “bounce-back” notification from emails sent to the Parent/Child; *i.e*., the Parent/Child received such emails. (HT26 at 196.) Correspondence with the Parent/Child was never returned after duly mailing, *via* First-Class mail. (HT26 at 196-198.) AP was found extremely credible based on her demeanor, credentials, contact with the Child, collected data and her testimony was consistent with the exhibits. She appeared committed to the Child’s education.

The XXXXXX-Grade Teacher was called as a factual and expert witness in the area of identification and eligibility of students with disabilities under the IDEA. (HT26 at 225.) She was the Child’s XXXXXX-grade teacher for 2019-2020. (HT26 at 226.) She opined and observed that the Child was “very outgoing student, very social. XX gets along well with xxx peers. XX enjoys sports. XX is always quick to volunteer. Just a very kind‑hearted XXX.” (HT26 at 226-227-228.) The Child earned xxx grades. (HT26 at 232-233.) XX demonstrated academic progress in the XXXXXX grade. (HT26 at 234-235.) XX received FAPE based on xxx progress and test scores and her observations. (HT26 at 244.) The Child exhibited some signs consistent with ADHD. (HT26 250-254.) The Child did not require IDEA services in the XXXXXX grade. (HT26 at 300-301.) The XXXXXX-Grade Teacher was found extremely credible based on her demeanor, credentials, daily contact with the Child, collected data and her testimony were consistent with the exhibits. She appeared committed to the Child’s education.

**EXHIBITS**

From the Parent/Child’s Exhibit Binder, the following Exhibits were introduced into evidence by page number: 19-27, 28-59, 105-106, 112-115, 117, 119-126, 165-176, 177, 180, 181 and 199-202.

From the LEA Exhibit Binder, the following Exhibits were introduced into evidence: 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16 (pages 3-5), 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 30, 31, 34, 35, 36, 37, 39, 40

**FACTUAL FINDINGS (By a Preponderance of the Evidence)**

After reviewing the testimony and exhibits, the following factual findings are made:

1. The IEP for the 2017-2018 school.

**ANALYSIS:**

**Legal Analysis**

While the Child was not subject to an IEP, xxx eligibility for IDEA services was at issue. By agreement, the Child’s Section 504 plan and its implementation were not adjudicated except the Parties may introduce such evidence as may be relevant to adjudicate the issues raised pertaining to IDEA issues.

The burden of proof in this proceeding is on the Party who initiated the hearing. *See* Schaffer v. Weast, 546 U.S. 49, 62 (2005). The burden of proof encompasses both the – “burden of persuasion, - *i.e*., which party loses if the evidence is closely balanced, and the - burden of production, - *i.e*., which party bears the obligation to come forward with the evidence at different points in the proceeding.” *Id*. at 56. In the instant case, the Parents carry the burden to prove that during the 2019‑2020 and the 2020‑2021 school years that the School Board failed to provide the Student with a free and appropriate education when it did not identify the Student as a student with a disability under the IDEA. To satisfy their burden of proof, the Parents must offer expert testimony in support of their position. Weast v. Schaffer, 377 F.3d 449, 456 (4th Cir. 2004). The standard of proof is a preponderance of the evidence. County Schl. Bd. of Henrico County v. Z.P., 399 F.3d 298, 304 (4th Cir. 2005).

In Arlington County School Board v. Smith, 230 F.Supp.2d 704, 715 (E.D. Va. 2002), the Court reversed the decision of the Hearing Officer on the basis that he made factual findings that were not supported by expert testimony:

In summary, the preponderance of the record evidence points persuasively to the conclusion that APS's proposed placement of Jane in the Interlude program would provide her with a FAPE because it was “reasonably calculated to enable [her] to receive educational benefit.” *See* Rowley, 458 U.S. at 206-07, 102 S. Ct. 3034. The hearing officer's contrary conclusion that Jane would not benefit from the Interlude program finds no support in the record, **as no expert testified to this effect**, and Jane had not yet fully experienced the program. It is apparent that the hearing officer succumbed to the temptation, which exists for judges and hearing officers alike in IDEA cases, to make his own independent judgment as to the best placement for Jane, instead of relying on the record evidence presented in the hearing. This temptation stems from the fact that judges and hearing officers are typically parents who are in the habit of making such judgments. Yet, the Supreme Court and County Circuit have admonished hearing officers and reviewing courts alike when they substitute personal opinions or judgments as to proper educational policy, and best placements for the disabled student, in the place of the local educators' expert judgments. *See* Rowley, 458 U.S. at 206, 102 S. Ct. 3034; Hartmann v. Loudoun County Bd. Of Educ., 118 F.3d 996, 1000-1001. These courts have also reminded hearing officers and reviewing courts that school districts are not required to provide a disabled child with the best possible education. *See* Rowley, 458 U.S. at 192, 102 S. Ct. 3034. The result reached here is properly deferential to Jane's educators' unanimous determination that the Interlude placement was appropriate. *See also* Hartmann, 118 F.3d at 1001 (holding that “local educators deserve latitude in determining the [IEP] most appropriate for a disabled child”) [Emphasis added.]

A review of Smith is important to emphasize the restrictions, constraints or limitations placed on hearing officers when deciding IDEA cases in Virginia. Although a child is involved, current law prevents a hearing officer’s reviewing evidence as a Virginia juvenile district court judge must review in a custody matter with the “best interests of the child” standard as described in 20-124.3 of the Virginia Code.[[5]](#footnote-5) Instead, hearing officers must respect the limitations that evidence, **especially expert testimony**, determine the outcome in IDEA cases as well as respect the Federal directive that IEPs and IDEA eligibility are reviewed with the standard established by Rowley and its progeny. The difference between the standard established by the “best interests of the child” and the standard established by Rowley (and its progeny) can never be reconciled. Quite frankly, this difference causes a great deal of litigation, cost and heartache.

Educational determinations by LEA experts involved in the Child's education are entitled to deference. A.B. v. Lawson, 354 F. 3rd 315 at 328 (4th Cir 2004); Hartmann v. Loudoun County Board of Education, 118 F.3rd 996, 1001 (4th Cir. 1997). In E. L. v. Chapel Hill‑Carrboro Bd. of Educ., 773 F.3d 509, 517 (4th Cir. 2014), the Court confirmed that it afforded “**great deference to the judgment of education professionals in implementing the IDEA.”** As long as an individualized education program provides the basic floor of opportunity for a special needs child, **a court should not attempt to resolve disagreements over methodology**. [Emphasis added.] *In accord,* O.S. v. Fairfax County Sch. Bd., 804 F.3d 354, 360 (4th Cir. 2015). Reviews of Heffernan and E.L. are important to show that a hearing officer or a parent cannot micro-manage the implementation of a Child’s education, deferring to the expertise of LEA professionals.[[6]](#footnote-6)

In R.F. v. Cecil County Pub. Sch., 919 F.3d 237 (4th Cir. 2019), *cert. denied* 140 S. Ct. 157 (Oct. 7, 2019), the Court found that “...an ALL must answer each of the following in the affirmative to find that a procedural violation of the parental rights provisions of the IDEA constitutes a violation of the IDEA: (1) whether the plaintiffs - alleged a procedural violation, (2) whether that violation significantly impeded the parents’ opportunity to participate in the decision‑making process regarding the provision of a FAPE to the parents’ child, and (3) whether the child did not receive a FAPE as a result.”

To a certain extent, the Parent/Child’s request for the Student to be identified as a student with a disability under the IDEA based on the information and evaluations already contained in the Student’s educational record is barred by the IDEA’s two‑year statute of limitations. The federal regulations implementing the IDEA impose a two‑year statute of limitations on parties who wish to file due process complaints. 34 C.F.R. 300.507(a)(2); 8 VAC 20‑81‑150(E); see also Torda v. Fairfax Cnty. Sch. Bd., No. 1:11cv193 (GBL/TRJ), 2012 BL 153450 E.D. Va. 2012) (“…administrative complaints brought under IDEA are subject to a two‑year statute of limitations”), *aff’d* Torda v. Fairfax Cnty. Sch. Bd., 517 Fed. Appx. 162 (4th Cir. 2012). The Parents filed their due process hearing request on November 20, 2020. As a result, any allegations pertaining to alleged acts or omissions that purportedly took place prior to November 20, 2018, are time‑barred.

To a certain extent, the Parent/Child’s request for the Student to be identified as a student with a disability under the IDEA based on the evaluations already contained within the Student’s educational record is barred by the doctrines of *res judicata* and collateral *estoppel*. As stated by the U.S. Supreme Court: Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral *estoppel*, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude re‑litigation of the issue in a suit on a different cause of action involving a party to the first case.” As this Court and other courts have often recognized, *res judicata* and collateral *estoppel* relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. *See* Capuano *ex rel*. Torda v. Fairfax County Pub. Bd., 62 IDELR 81, 113 LRP 43987, 1:13‑cv‑00568‑GBL‑TRJ (E.D. Va. 2013) (*quoting* Allen v. McCurry, 449 U.S. 90, 94 (1980) (citations omitted)). In the context of IDEA litigation: “the Court holds that issue preclusion (collateral *estoppel*) does apply in the context of IDEA cases regarding eligibility and services provided in different school years if an issue has been fully litigated and decided on the merits and no new evidence of a material change in circumstances has been presented.” *Id*. (ruling that claims are barred by collateral *estoppel* where a parent relied on the same evidence submitted in earlier years to show son had autism and an auditory processing disorder). A valid *res judicata*/collateral *estoppel* defense claim has three basic elements: (1) a final judgment issued on the merits of a prior claim or issue; (2) identity of parties between the prior and present suits; and (3) the claim or issue was brought in the prior proceeding or arose out of the conduct, transaction, or occurrence as the subject of the prior proceeding. Davison v. Rose, No. 1:16cv0540 (AJT/IDD), 2017 BL 265005 (E.D. Va. July 28, 2017), citing Lee v. Spoden, 290 Va. 23, 804‑06 (2015). All three elements are present in the current proceeding. As described above, the Parents previously filed litigation against the School Board on behalf of XXXXXXX under the IDEA in XXXXX of 20XX. Following a multi‑day administrative due process hearing, in XXXXX of 20XX, an IDEA due process hearing officer found in favor of the LEA on all issues. In re: XXXXXXXX XXXXXXXXX, XXX LRP XXXXX (VA SEA XXX. X, XXXXX). In XXXXX of 20XX, Judge Ellis upheld the hearing officer’s decision. *See* XXXXXXXX v. XXXXXXXX. Sch. Bd., X:XX‑XX‑XXX (E.D. Va. 20XX). The Parents did not appeal this decision. As a result, there can be no dispute that the Parents have received a final judg~~e~~ment on the merits of a prior claim or issue filed against the LEA. The doctrines of *res judicata* and collateral *estoppel* bar the Hearing Officer from making a contrary decision in this case as to matters contained therein. This includes factual findings. With that said, the evaluations in the Child’s file may be a basis to review XXX FAPE requirements in the instant matter relevant to the issues raised under Torda. Such subsequent review of such evaluations allows the IDEA Eligibility Team and/or a Hearing Officer to place weight, if any, on such evaluations; *e.g*., such evaluations may be deemed stale. All involved are limited by the evaluations in the Child’s file regardless of judicial decisions, time, *etc*. As obvious in the instant matter, stale evaluations require updated evaluations.

**Specific Issues**

I. **Whether the LEA committed procedural violations of the IDEA in the fall of 2020 in its actions to effectuate an eligibility determination? If so, did such violations deny the Child FAPE?**

The Parents also assert that the School Board committed a procedural violation under 8 VAC 20‑81‑170(C)(1)(b) when it did not provide the Parents with prior written notice “with regard to requiring the Parents to consent to additional evaluations as the quid pro quo for the LEA to conduct an eligibility determination,” See Parents’ Closing Argument, page 10. As a preliminary matter, the Parents did not present any testimony, expert or otherwise, suggesting that the Parents failed to receive ~~a~~ prior written notice in conjunction with the School Board’s proposal to evaluate the Student. Notwithstanding, the Parents did receive prior written notice regarding the School Board’s proposal to evaluate the Student. Under 8 VAC 20‑81‑170(C)(2), a prior written notice must include the following components: (a) A description of the action proposed or refused by the local educational agency; (b) An explanation of why the local educational agency proposes or refuses to take the action; A description of any other options the IEP team considered and the reasons for the rejection of those options; (d) A description of each evaluation procedure, assessment, record, or report the local educational agency used as a basis for the proposed or refused action; (e) A description of any other factors that are relevant to the local educational agency’s proposal or refusal; (f) A statement that the parent(s) of a child with a disability have protection under the procedural safeguards of this chapter and, if the notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and (g) Sources for the parent(s) to contact in order to obtain assistance in understanding the provisions of this section. AP’s September 18, 2020, communication to the Parents (LEA Exhibit 24) incorporated all of the above‑listed components: (a) a statement that the School Board was proposing to complete new evaluations of the Student (including a specific list and description of each evaluation component proposed); (b) a statement that the purpose of completing these evaluations was to “determine if [XXXXXXX] may qualify as a student with a disability under the IDEA”; a statement that XXPS was proposing “to conduct these evaluations without convening a child study meeting in order to expedite this process”; (d) a statement that Ms. XXXXX “polled the school‑based members of XXXXXXX’s team” in order to make this determination; (e) a statement that the School Board “would be happy to discuss these evaluations with you at our next 504 meeting”; (f) a copy of the IDEA procedural safeguards; and (g) a statement that if the Parents had any questions they could contact AP. There is nothing within the IDEA or its implementing regulations that requires that a “prior written notice” be submitted on a particular form in order to satisfy the requirements of 8 VAC 20‑81‑170(C)(1). See 34 CFR 300.503(a); and 71 Fed. Reg. 46,691 (2006)(Giving example that an IEP can serve as a prior written notice if it contains all required components.) In addition to this letter, the school staff sent several additional letters to the parents with similar information. See LEA Exhibits 25‑27, 31, 34‑35.[[7]](#footnote-7)

Assuming, *arguendo*, that the Parent/Child presented evidence at the hearing demonstrating that the School Board committed an IDEA procedural violation during the 2020‑2021 school year, the Parents did not meet their burden of demonstrating that these alleged procedural violations impacted the Student’s access to an appropriate education. 8 VAC 20‑81‑210(O)(16) (“[T]he decision made by a special education hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.”); R.F. v. Cecil County Pub. Sch., 919 F.3d 237 (4th Cir. 2019), cert. denied 140 S. Ct. 157 (Oct. 7, 2019)(“[A]n ALJ must answer each of the following in the affirmative to find that a procedural violation of the parental rights provisions of the IDEA constitutes a violation of the IDEA: (1) whether the plaintiffs - alleged a procedural violation, (2) whether that violation significantly impeded the parents’ opportunity to participate in the decision‑making process regarding the provision of a FAPE to the parents’ child, and (3) whether the child did not receive a FAPE as a result.”) The Parents presented no evidence during the due process hearing that the School Board’s actions during the 2020‑2021 school year impeded XXXXXXX’s access to FAPE. The evidence is overwhelming that the Child met or exceeded all grade level expectations during the 2020‑2021 school year and the Child had access to XXX curriculum. More importantly, the overwhelming evidence was that the LEA agreed to provide the evaluations necessary to allow the IEP to review the Child’s eligibility for services under IDEA. For reason unclear, the Parents simply refused to consent to such evaluations. A student can only be identified as a “child with a disability” under the IDEA after the student has been evaluated in accordance with the IDEA’s evaluation procedures. 34 CFR 300.8(a)(1) (“Child with a disability means a child evaluated in accordance with 300.304 through 300.311 ...”). A local educational agency (“LEA”) cannot initiate an evaluation of any student without the written consent of a parent. 34 CFR 300.300(a),. If a student’s parent(s) refuses to provide consent to the proposed evaluations, the LEA may, but is not required, to utilize the IDEA’s due process hearing system to override the parent’s lack of consent. Id. The School Board does not violate its child find obligations under the IDEA if it declines to purse a due process hearing for this purpose. 34 CFR 300.300(a)(3)(ii). Multiple circuit courts have also affirmed that parents cannot demand that a student be found eligible under the IDEA solely based on private evaluations obtained by the parents, and held the school must be permitted to conduct its own evaluations. See M.T.V. v. Dekalb Cty. Sch. Dist., 446 F.3d 1153 (11th Cir. 2006)(“Every court to consider the IDEA's reevaluation requirements has concluded **if a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation**.” (emphasis added); see also Andress v. Cleveland Indep. Sch. Dist., 64 F.3d 176, 178‑79 (5th Cir. 1995); Johnson by Johnson v. Duneland Sch. Corp., 92 F.3d 554, 558 (7th Cir. 1996) ("Because the school is required to provide the child with an education, it ought to have the right to conduct its own evaluation."); Gregory K. v. Longview Sch. Dist., 811 F.2d 1307, 1315 (9th Cir. 1987) (holding parents must permit mandatory reassessments under the Education of the Handicapped Act, the IDEA's predecessor, if they want their child to receive special education services); DuBois v. Conn. State Bd. of Ed., 727 F.2d 44, 48 (2d Cir 1984) (same).”) Both Parents testified during the due process hearing that they are unwilling to allow the School Board to do any new evaluations of the Student and are seeking to have an eligibility meeting based on existing information.

**II. Whether the LEA denied the Child FAPE by denying XXX eligibility for the school year 2019‑2020?**

The Parent/Child failed to carry the burden of proof on this issue. In fact, there was no persuasive evidence, expert or otherwise, that the LEA denied the Child FAPE by denying XXX eligibility.

The Parents incorrectly assert that the Student did not receive an appropriate education during the 2019‑2020 or the 2020‑2021 school years because XX was not identified as a student with a disability under the IDEA. To be found eligible as a student with a disability under the IDEA, a student must be found to have a qualifying disability under the IDEA and “by reason thereof, needs special education and related services.” 34 CFR 300.8(a)(1). Special education is defined under the IDEA as “specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability.” 34 CFR 300.39(a)(1). Specially designed instruction “means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction (I) to address the unique needs of the child that result from the child’s disability; and (ii) to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.” 34 CFR 300.39(a)(3). Multiple circuit courts have held that a student who is meeting grade‑level standards and is making progress in the general education setting is unlikely to meet the criteria to be identified as a student with a disability under the IDEA. See XXXXXXXX v. XXXXX XXX. Sch. Bd., X:XX‑XX‑XXX(E.D. Va. 20XX)(Upholding hearing officer’s determination that student received FAPE without receiving specialized instruction because XXXXXXX “…has continued to make progress in the general education setting; (ii) …is meeting grade‑level benchmarks in math and reading and has received all satisfactory and outstanding marks on all by [sic] one of xxx report cards; and (iii) has been behaving appropriately and commensurate with his third‑grade peers.”); G.M. v. Martirano, *et al.*, 121 LRP 5500, JKB‑20‑0791 (D. Md. Feb. 4, 2021)(Finding that a student with dyslexia and ADHD did not meet the criteria to be identified as a student with a disability under the IDEA because the Student was “making progress comparable to same age peers and meeting the State‑approved grade‑level standards...”); Dubrow v. Cobb County Sch. Dist., 887 F.3d 1182, 1193‑1194 (11th Cir. 2018)(Found that a student is “unlikely to need special education if, inter alia: (1) the student meets academic standards; (2) teachers do not recommend special education for the student; (3) the student does not exhibit unusual or alarming conduct warranting special education; and (4) the student demonstrates the capacity to comprehend course material.”) ; D.K. v. Abington Sch. Dist., 696 F.3d 233, 251 (3rd Cir. 2012)(School did not have reason to suspect that a student who demonstrated hyperactivity required special education because “hyperactivity, difficulty following instructions, and tantrums are not atypical during early primary school years” and the student demonstrated progress and academic success in several areas); William V. *ex rel*. W.V. v. Copperas Cove Indep Sch. Dist., 774 F. App’x 253 (5th Cir. 2019)(“Where a child is being educated in the regular classrooms of a public school with only minor accommodations and is making educational progress, the child does not ‘need’ special education within the meaning of the IDEA.”); Alvin Independent Sch. Dist. v. AD, 503 F.3d 378 (5th Cir. 2007)(Finding that a student with a diagnosis of ADHD did not require special education because he demonstrated satisfactory educational performance and social skills in the school setting).

A student may also not require specially designed instruction when their needs can be addressed through accommodations provided through Section 504 of the Rehabilitation Act. *See* Brado v. Weast, Civil No. PJM 07‑02696., 2010 BL 16436, \*5 (D. Md. Jan. 22, 2010)(“The Act also requires that each child be placed in the "least restrictive environment." 20 U.S.C. 1412(5). The "least restrictive environment" for Molly in this case was in school, where her needs could be met pursuant to the Rehabilitation Act: Consequently, the Court finds [the Student] ineligible for special education and related services under the IDEA.”)

The LEA experts were found to persuasive and, on this issue, overwhelmingly of the opinion that the Child was not eligible for IDEA services. As fact witnesses, AP, the Teacher and XXXXXX Grade Teacher provided insightful, persuasive factual evidence to support these expert opinions. This overwhelming evidence is that the Child is thriving in xxx academic environment including xxx significant academic progress, xxx social progress and xxx proper access to the curriculum. While the Parent/Child introduced evidence regarding the Child’s hand writing and alleged grade inflation, such evidence was unpersuasive and, at best, appeared to be “cherry picking” concerns as opposed to real evidence of the Child’s eligibility for IDEA services. Similarly, the Doctor’s testimony and the Doctor’s Report were found unpersuasive on the basis that this evidence was three years old and the Child was unmedicated at the time of the evaluation. Further, the LEA’s decision not to find the Child eligible for IDEA Services, after reviewing the Doctor’s Report has already been found proper by a previous Hearing Officer. ) In re: XXXXXXXXXXXXXX, XXX LRP XXXXX (VA XXX XXX. X, 20XX). Finally, the Consultant’s testimony was unpersuasive insofar as, *inter alia*, she only reviewed the Child’s records and did not observe the Child in a classroom setting. She did not talk to the teachers. Further, she was unlicensed and has not taught in seven years.

**III. Whether the LEA denied the Child FAPE by denying xxx eligibility for the school year 2020‑2021.**

The Parent/Child failed to carry the burden of proof on this issue. In fact, there was no persuasive evidence, expert or otherwise, that the LEA denied the Child FAPE by denying XXX eligibility for reasons stated under Issue II.

**IV. If the Child is found to have been denied FAPE by denying XXX eligibility for the school year 2019‑2020, whether the LEA should reimburse the Parents/Child for the costs associated with private assessments and tutoring for school year 2019‑2020? If so, what are the amount and reason for the costs?**

The issue is moot given the prior rulings. In addition, there was no evidence of “costs associated” introduced by the Parent/Child.

**V. If the Child is found to have been denied FAPE by denying XXX eligibility for the school year 2020‑2021, whether the LEA should reimburse the Parents/Child for the costs associated with private assessments and tutoring for school year 2020‑2021? If so, what are the amount and reason for the costs?**

The issue is moot given the prior rulings. In addition, there was no evidence of “costs associated” introduced by the Parent/Child.

**VI. If the Child is found to have been denied FAPE by denying XXX eligibility for the school year 2019‑2020, whether the LEA should provide compensatory services for the school year 2019‑2020?**

The issue is moot given the prior rulings. In addition, there was no evidence of “compensatory services” introduced by the Parent/Child.

**VII. If the Child is found to have been denied FAPE by denying XXX eligibility for the school year 2020‑2021, whether the LEA should provide compensatory services for the school year 2020‑2021?**

The issue is moot given the prior rulings. In addition, there was no evidence of “compensatory services” introduced by the Parent/Child.

**RELIEF GRANTED:**

None.

**CONCLUSION**

The Parents failed to introduce sufficient evidence to carry the burden of proof to grant the relief requested in their Due Process Request.

**APPEAL, IMPLEMENTATION AND PREVAILING PARTY NOTIFICATIONS**

1. **Appeal**. Pursuant to 8 VAC 21-81-T and 22.214 D of the Virginia Code, this decision is final and binding unless either party appeals in a federal district court within 90 days of the date of this decision, or in a state court within 180 days of the date of this decision.

2. **Implementation**. The LEA shall develop and submit an implementation plan within 45 calendar days of the rendering of a decision.

3. **Prevailing Party**. The LEA is deemed the prevailing party.

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Hearing Officer Date

**CERTIFICATE OF SERVICE**

I certify that on this 23rd day of April, 2021, a true and accurate copy of this pleading was delivered *via* email and First-Class mail, to:

Mr. & Mrs. XXXXX & XXXXXXXX XXXXXXXX

XXXXXXXXXXXXXX

XXXXXX, Virginia XXXXX

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Robert J. Hartsoe

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1. With all due respect to the LEA and its outstanding efforts, the reality of witnesses appearing virtually was, at times and due to transmission, difficult as found throughout the record; such difficulties were overcome with the grateful patience from all involved. With that stated, the presentation of the Parent/Child’s case (with its needless objections, double questions, leading and speaking objections, the delay of at least ninety-minutes late on the first day because of the current Advocate’s late arrival, the Parent/Child’s failure to have adequate exhibits requiring further delay, the failure to coordinate witnesses timely) made the presentation of evidence difficult, but not impossible, to follow. Nevertheless, the Hearing was conducted objectively and fairly. [↑](#footnote-ref-1)
2. On the first day of the Hearing, the Parent/Child requested that, in addition to the Hearing's being open to the public consistent with the Regulations, that additional members of the public be allowed to appear virtually. For reasons stated on the record (including the arguments of the LEA on this issue), the motion was denied. At all times, the Hearing was open to the public in accordance with the Regulations and the mandates of IDEA. In addition, the Parent/Child's motion to continue the matter to allow for a circuit court address this issue was denied on the basis that no good cause or persuasive evidence were provided to allow such a remedy. Members of the public did attend the Hearing. [↑](#footnote-ref-2)
3. At HT23 at page 142, the Consultant opined that “[w]ithout the appropriate specialized instruction, which would also include the FBA and the BIP, XX wouldn't be able to have access to ‑‑ or to have a FAPE.” This conclusion was found unpersuasive for reasons stated herein. [↑](#footnote-ref-3)
4. In the past, the term “XXX” has been used as a derogatory, racial slur, especially if used when referring to an adult. In the context of the testimony, no such negative connotation was found insofar as the Child is in the XXXX grade, not an adult. To the extent such term may have been perceived as a derogatory, racial slur, the Parent/Child had, but did not take, the opportunity to question the witness regarding bias. Under no circumstances would racial slurs be tolerated in this proceeding. [↑](#footnote-ref-4)
5. This improper standard was argued by the Parent/Child during the Hearing. [↑](#footnote-ref-5)
6. A court or hearing officer is required to give deference to the judgment of school board witnesses who are professional educators. Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE‑1, No. 15‑827, 137 S. Ct. 988 (2017); Springer by Springer v. Fairfax Cnty. Sch. Bd., 134 F.3d 659, 663 (4th Cir. 1998) ("[C]ourts are required to give deference to the state and local education authorities whose primary duty is to administer the IDEA."); M.M. by DM and EM v. Sch. Dist. of Greenville Cnty., 303 F.3d 523, 531 (4th Cir. 2002) ("The court is not, however, to substitute its own notions of sound educational policy for those of local school authorities." *Citing* Hartmann v. Loudoun County Bd. Of Educ., 118 F.3d 996, 999(4th Cir. 1997)) The IDEA requires "great deference to the views of the school system rather than those of even the most well‑meaning parent." A.B. v. Lawson, 354 F.3d 315 (4th Cir. 2004). [↑](#footnote-ref-6)
7. The Parents' testimony that they did not receive AP’s communications offering to evaluate the Child or hold a meeting to discuss the proposed evaluations is belied by their own Due Process hearing request, which references at least one of these communications. (LEA Exhibit 33, page 10 (referencing AP’s September 18, 2020 letter). AP also testified that the Prior Advocate often directly responded to the communications she sent to the Parents, demonstrating the Parents would have received these communications. In addition, the testimony of AP regarding the delivery of correspondence, *via* email and First‑Class Mail, was found credible and, therefore, such correspondence was actually received by the Parent/Child in absence of their failure to deny such receipt. *See* Hartford Fire Ins. Co. v. Mutual Savings and Loan Co., 193 Va. 269, 68 S.E.2d 541 (1952). Overall, the evidence describes a scenario wherein the Parent/Child received such communications and, to their disadvantage, relayed them to the Prior Advocate for response, without further action. [↑](#footnote-ref-7)