**COMMONWEALTH OF VIRGINIA**

**DEPARTMENT OF EDUCATION**

**Office of Dispute Resolution and Administrative Services**

# **Due Process Decision 21-046**

In re: XXXXXXXXXXXXXXXXXXXXX

Hearing Officer: Peter B. Vaden

Due Process Hearing Request

(XXXXXXXXXXXXX Public Schools) VDOE Case No. 21-046

HEARING OFFICER DECISION

KEY TO PERSONAL IDENTIFICATION INFORMATION

Student

* XXXXXXXXXXXXXXXXXXXXX

Age

* XX years old

Birthday

* XXXXXXXXXXXXX

Grade (2020-2021 school year)

* XXX Grade

Petitioner/Mother

* XXXXXXXXXXXXXXXXXXXXX

Petitioner/Father

* XXXXXXXXXXXXXXX

LEA Representative 1

* XXXXXXXXXXXXX

Academic Supervisor

* XXXXXXXXXXX

Clinical Psychologist

* XXXXXXXXXXXXXX

School S-L Pathologist

* XXXXXXXXXX

Head of School

* XXXXXXXXXXXXXXXXX

Special Education Teacher 1

* XXXXXXXXXXXXX

Independent S-L Pathologist

* XXXXXXXXXXXXXXXXXX

Department Chair

* XXXXXXXXXXXXX

School Psychologist 1

* XXXXXXXXXXXXXXXXXXXXX

Special Education Teacher 2

* XXXXXXXXXXXXXXXX

Assistant Principal

* XXXXXXXX

School Psychologist 3

* XXXXXXXXXXXXXX

Special Education Teacher 3

* XXXXXXXXXXXXXX

LEA Representative 2

* XXXXXXXXXXX

XXXXX School 1

* XXXXXXXXXXXXXXX

Grade X

* XXXXXXXXXXXXXX

Private School

* XXXX School, XXXX, Virginia

XXXXX School 2

* XXXXXXXXXXXXXXXX

Grade Y

* XX Grade

Neuropsychologist

* XXXXXXXXXXXX

Nonpublic School 1

* XXXXXX School, XXXXXXXXXX, Virginia

Grade Z

* XX Grade

Grade A

* XX Grade

Nonpublic School 2

* XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

XXXXXX School 3

* XXXXXX Middle School

XXXXXX School 4

* XXXXXXXXXXX High School

Educational Advocate

* XXXXXXXXXXXXXXX

School Psychologist 2

* XXXXXXXXXXXX

Parents’ Counsel

* Harold Belkowitz

XXPS’ Counsel 1

* John Cafferky

XXPS’ Counsel 2

* Ian McElhaney

**COMMONWEALTH OF VIRGINIA**

**DEPARTMENT OF EDUCATION**

**Office of Dispute Resolution and Administrative Services**

In re: STUDENT

Hearing Officer: Peter B. Vaden

Due Process Hearing Request

(XXXXXXXXXXXXX Public Schools) VDOE Case No. 21-046

**HEARING OFFICER DECISION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioners (the parents) under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. 1400, *et seq*., and the *Regulations Governing Special Education Programs for Children with Disabilities in Virginia*, 8 VAC 20‑81‑10, *et seq*. (Virginia Regulations). In their due process complaint, the parents seek private school tuition reimbursement and other relief against Respondent XXXXXXXXXXXXX Public Schools (XXPS) for the school division’s alleged denials of a free appropriate public education (FAPE) to Student.

Student, an AGE youth, is a resident of XXXXXXXXXXXXX, Virginia. Petitioners’ Due Process Complaint was filed on January 5, 2021 and named XXPS as respondent. The undersigned hearing officer was appointed on January 7, 2021. On January 13, 2021, I convened a telephone prehearing conference with the parents, PETITIONERS’ COUNSEL, LEA REPRESENTATIVE 1, XXPS’ COUNSEL 1 and XXPS’ COUNSEL 2 to set the due process hearing dates and discuss issues to be determined and other matters. On January 15, 2021, XXPS, by counsel, filed responsive pleadings to the due process complaint, including XXPS’ Motion to Dismiss and Answer. By a Letter-Order issued January 27, 2021, I denied XXPS’ motion to dismiss.

On January 19, 2021, XXPS convened a resolution meeting with the parents and Petitioners’ Counsel to discuss the due process complaint, and the facts that formed the basis of the complaint. The resolution meeting was held within 15 days of the complaint’s filing as provided in 34 C.F.R. 300.510(a). XXPS did not resolve the due process complaint to the satisfaction of the parents. The 30-day resolution period was not adjusted.

Prior to the due process hearing, I issued subpoenas *duces tecum* requested by the respective parties. In a letter-order issued on January 23, 2021, I addressed the Petitioners’ objections to a document subpoena issued to the parents. On February 16, 2021, I issued a letter-order addressing XXPS’ objections to a document subpoena issued to the school division. By a February 27, 2021 letter-order, I denied Petitioners’ request that the hearing officer petition the XXXXXXXXXXXXX Circuit Court to enforce the subpoena *duces tecum* issued to XXPS and I ordered XXPS to tender to the Hearing Officer, for review *in camera*, certain subpoenaed documents which XXPS claimed were entitled to copyright and trade secret protection.

The due process hearing was held before this Impartial Hearing Officer on March 2 through 5 and March 12, 2021. Due to the restrictions on public gatherings arising from the Coronavirus pandemic, by agreement of both parties, the hearing officer hosted a virtual hearing by video conference on the Microsoft Teams platform. The hearing, which the parents elected to open to the public, was transcribed by court reporters. Both parents appeared for the virtual hearing and were represented by Petitioners’ Counsel and EDUCATIONAL ADVOCATE. Respondent XXPS was represented at the hearing by LEA Representative 1[[1]](#footnote-1) and by XXPS’ Counsel 1 and XXPS’ Counsel 2. At the request of counsel, I ordered that witnesses be excluded so that they could not hear other witnesses’ testimony. Petitioners’ Counsel and XXPS’ Counsel 1 made opening statements. Petitioners called as witnesses MOTHER, ACADEMIC SUPERVISOR, CLINICAL PSYCHOLOGIST, SCHOOL S‑L PATHOLOGIST, HEAD OF SCHOOL, SPECIAL EDUCATION TEACHER 1 and INDEPENDENT S‑L PATHOLOGIST. XXPS called as witnesses DEPARTMENT CHAIR, SCHOOL PSYCHOLOGIST 1, SPECIAL EDUCATION TEACHER 2, ASSISTANT PRINCIPAL, SCHOOL PSYCHOLOGIST 1, LEA Representative 1, SPECIAL EDUCATION TEACHER 2, SCHOOL PSYCHOLOGIST 3 and SPECIAL EDUCATION TEACHER 3. Petitioners’ Exhibits P-1 through P-131 were admitted into evidence without objection, except for Exhibits P-10, P-98 and P-113 through P-123 which were not offered. XXPS’ Exhibits R-1 through R-174 and R-176 through R-182 were admitted into evidence without objection, except Exhibits R-19, R-20, R-31, R-34, R-53 and Parts A through F, H, I, K, M, and R through Z of Exhibit R-175, which were not offered. I sustained Petitioners’ objections to Parts J and N of Exhibit R-175.

In the course of the due process hearing, Petitioners sought admission of certain records, characterized as “test protocols” for nationally‑normed psychological and educational tests administered to Student by XXPS. Specifically, Petitioners requested that the following pages from the test protocols be admitted:

R CONFIDENTIAL 0001 and 0012

R CONFIDENTIAL 0055‑0095

R CONFIDENTIAL 0096‑0124

R CONFIDENTIAL 0125‑0133

R CONFIDENTIAL 0167‑0209

R CONFIDENTIAL 0155-0160

R CONFIDENTIAL 0160-0166

R CONFIDENTIAL 0167-0209

R CONFIDENTIAL 0210-0252

R CONFIDENTIAL 0290-0320

(together, the Confidential Documents). XXPS, by counsel, objected to admission of these documents based on XXPS’ alleged copyright/trade secrets obligations. At the hearing, I took Petitioners’ requests to admit these documents under advisement. By written order issued March 12, 2021, over XXPS’ objection, I admitted the Confidential Documents into evidence and placed those documents under seal.

Taking of the evidence was completed on March 5, 2021. Counsel requested to make oral closing argument in lieu of filing post-hearing briefs. I reconvened the hearing on March 12, 2021 and Petitioners’ Counsel and XXPS’ Counsel 1 made closing arguments for their respective clients.

By a written order issued March 13, 2021, by agreement of counsel, in order to allow sufficient time for the court reporters to prepare the hearing transcript and for the hearing officer to review the evidence and prepare the final decision, I extended the final decision due date from March 21, 2021 to April 23, 2021.

**JURISDICTION**

The hearing officer has jurisdiction under 20 U.S.C. 1415(f) and 8 VAC 20-81-210(A).

**ISSUES AND RELIEF SOUGHT**

The issues for determination in this case, as certified in the January 13, 2021

Prehearing Order, are:

Whether XXPS denied the student a free appropriate public education (FAPE) by not continuing its child-find obligations and providing equitable services to the student, when the student was placed by the parents in private schools, for more than five years prior to March 5, 2020;

Whether XXPS denied Student a FAPE, beginning May 2020, by not identifying Specific Learning Disability as a disability classification;

Whether XXPS denied Student a FAPE by not ensuring that its Individualized Education Programs (IEPs) developed for Student beginning May 2020 were appropriate in that the IEPs,

Did not include annual goals in the areas of social skills, social engagement, vocabulary, life skills, typing, self‑advocacy, handwriting, and communication/rigidity;

Did not provide an appropriate statement of Student’s present levels of educational performance (PLOPs);

Did not include accommodations that Student required, such as teacher provided notes, small group testing to minimize distractions and sensory issues, reduced assignments to emphasize quality over quantity, modeling of steps for multi‑step tasks, word banks, use of a pencil grip and fidgets, and available space for sensory break in a non-instructional space;

Did not provide detailed discussion of the appropriate least restrictive environment (LRE) for Student or of the data the IEP team used to reach its LRE determination;

Did not provide for Student’s educational placement in a self‑contained setting for all classes;

Lacked an appropriate post-secondary transition plan.

Whether XXPS denied Student a FAPE by proposing an unsuitable location of services for Student at XXXXXX SCHOOL 4 for the 2020-2021 school year;

Whether XXPS denied Student a FAPE by not offering Student special education services or a special education placement at the last part of 2019‑2020 school year or any extended school year services during the summer of 2020.

For relief, Petitioners requested the hearing officer issue an order:

A. Requiring XXPS to ensure that an appropriate IEP is developed to meet Student’s unique educational and behavioral needs for the 2020‑2021 and 2021‑2022 school years;

B. Requiring XXPS to place Student in an appropriate nonpublic special education day school, in particular, NONPUBLIC SCHOOL 2;

C. For XXPS to provide Student appropriate compensatory education services to compensate Student for the denials of FAPE alleged in the complaint;[[2]](#footnote-2)

D. For XXPS to reimburse the parents for tuition, fees, and costs incurred for Student at NONPUBLIC SCHOOL 1 during the 2018-2019 school year and at Nonpublic School 2 during the 2019‑2020 and 2020‑2021 school years, including transportation costs;

E. For XXPS to reimburse the parents for tutoring and other private educational support services they incurred on behalf of Student (such as Lindamood Bellprogram, occupational therapy, speech therapy, etc.)

F. Requiring XXPS to fund Student’s ongoing enrollment atNonpublic School 2, to include tuition, fees and expenses to attend the private day school as well as transportation and the provision of related and supplemental services.

**FINDINGS OF FACT**

After considering all of the evidence, as well as the argument of counsel, this hearing officer’s findings of fact are as follows:

1. At all times concerned in this proceeding, Student has been a resident of XXXXXXXXXXXX, Virginia where XX lives with FATHER and MOTHER. Testimony of Mother.
2. Father and Mother both have completed college and hold XXX degrees from the XXXXXXXXXXXXXX. Neither parent is currently working as XXXXXXXX. Testimony of Mother.
3. Student was originally determined eligible for special education and related services in May 2008 under the Autism disability classification. At the time, Student was enrolled in XXPS’ XXXXXX SCHOOL 1 in GRADE X. Exhibit R-5. In May 2011, Student was reevaluated by XXPS and determined to meet special education eligibility criteria for Developmental Delay for communication delays, but to no longer meet eligibility criteria for Autism. Exhibit R-49. On May 24, 2013, Student was reevaluated and determined eligible for special education under the Other Health Impairment classification due to Attention Deficit-Hyperactivity Disorder (OHI-ADHD). Exhibit P-11.Student is currently eligible for special education under the Autism, Other Health Impairment (OHI) and Specific Learning Disability disabilities classification. Exhibit R-142.
4. For the 2011-2012 school year and part of the 2012-2013 school year, the parents unilaterally placed Student at PRIVATE SCHOOL, a regular education day school. Student did not receive special education services while at Private School. Testimony of Mother.
5. In May 2011, Private School referred Student for a private evaluation to assess Student’s intellectual ability and processing abilities. Student’s full-scale IQ tested at 105 (Average). Exhibit 56.
6. In January 2013, the parents obtained a neuropsychological evaluation of Student by Neuropsychologist. Neuropsychologist conducted a battery of cognitive, achievement and behavioral assessments and made a classroom observation at Private School. In his January 31, 2013 report, Neuropsychologist reported, *inter alia,* that significant weaknesses for Student, which needed to be addressed, included weakness for attention and executive functioning, great difficulty with response inhibition, significant weakness in working memory, some weakness in processing speed, and high levels of distractibility and observed restlessness. Neuropsychologist reported that Student exhibited weakness in language processing, which was probably a combination of Student’s severe attention challenges and a weakness for expressive language. Student’s basic reading skills tested at the 4th percentile, indicating significant deficits in all aspects of Student’s literacy abilities. Student’s parents and teachers were concerned about Student’s poor social interactions with other children, which Neuropsychologist believed was due to the impact of Student’s ADHD and language challenges. Finally, Neuropsychologist noted that Student had poor fine motor control which was consistent with Student’s overall learning difficulties. Neuropsychologist identified, as areas of concern for Student, ADHD (Combined), Reading Disorder (Dyslexia) and difficulty in expressive language. Exhibit P-3.
7. On or about February 13, 2013, the parents moved Student from Private School back to XXXXXXXXXXXXX Public Schools, and enrolled Student in XXXXXX SCHOOL 2. At the time, Student was in GRADE Y. Exhibit R-38, Testimony of Mother.
8. On March 1, 2013, XXXXXX School 2 staff determined that Student needed to be reevaluated for special education because Student had aged out of the Developmental Delay disability classification, under which Student had been determined eligible in May 2011. Exhibit R-49.
9. On March 1, 2013, the XXXXX School 2 IEP team developed a new IEP for Student. The March 1, 2013 IEP identified Reading as Student’s area of need and provided for Student to receive 15 hours per week of learning disability special education services, including 10 hours in the general education classroom and 5 hours in the special education setting. XXPS’ March 1, 2013 IEP also provided for Student to receive 1 hour per month of Speech-Language related services. Exhibit R-50.
10. On April 18, 2013, XXXXXX School 2 amended Student’s IEP, without an IEP team meeting, in order to add Extended School Year (ESY) services for summer 2013. Exhibit R-54.
11. In May 2013, a XXPS school psychologist conducted a psychological evaluation of Student to assess Student’s cognitive, visual perception and visual motor skills and to assess Student for behavior and autism-related challenges. The school psychologist reported that at school, Student demonstrated a positive attitude and worked hard when working with support from the teacher; that Student required individual support to complete work, and was very distracted in the large group setting; that Student had great difficulty maintaining the level of attention required to work independently; that Student did not initiate or engage in much social conversation with other children; that in Reading and Writing, Student was performing over one year below grade level; that Student was working on grade level in Math with support, but had difficulty with problem solving and that Student’s difficulty maintaining focus impacted academic performance across subject areas. On cognitive and visual assessments, Student tested in the Average range, except for on the visual motor integration assessment, Student performed within the Below Average range. Teacher responses on the behavior rating scales indicated behavioral difficulties for Student at a level to be monitored in Attention Problems, Learning Problems, Withdrawal, and Functional Communication. Teachers’ responses to the Autism Spectrum Rating Scales indicated that Student had difficulty in the areas of Self‑Regulation (difficulties with attention/impulse control), Peer Socialization (limited success or willingness to engage in activities to develop and maintain peer relationships), Behavioral Rigidity (difficulty tolerating change in XX environment, routines, and activities), and Attention (trouble focusing and may seem unorganized). This pattern of scores indicated to the school psychologist that Student was exhibiting some symptoms directly related to the diagnostic criteria of the Autism Spectrum Disorders. Exhibit R-56.
12. The XXXXXX School 2 eligibility team met on May 24, 2013 to review Student’s eligibility for special education. The team determined that Student met criteria for eligibility under the OHI-ADHD disability and did not meet eligibility criteria for Autism or for a Specific Learning Disability. Exhibit R-60.
13. On June 10, 2013, the XXXXX School 2 IEP team met to review and revise Student’s XXPS IEP. The June 10, 2013 IEP Addendum identified Reading, Communication/Oral Language, Cognitive/Attention and Writing/Written Language as Student’s areas of need. The IEP Addendum provided for Student to receive 17 hours per week of non-categorical special education services, including 8 hours in the general education classroom and 9 hours in the special education setting. The June 10, 2013 IEP Addendum increased Student’s Speech-Language services to 3 hours per month. Exhibit R-63.
14. On September 20, 2013, an addendum to Student’s IEP was adopted without a meeting. The IEP addendum changed 5 hours of Student’s math instruction from the general education setting to the self-contained setting because Student struggled with focusing on instruction in the large group setting. The addendum changed Student’s special education services setting from 8 hours in the general education classroom and 9 hours in the special education setting to 3 hours in the general education classroom and 14 hours in the special education setting. Exhibit R-66.
15. On November 4, 2013, the XXXXXX School 2 IEP team met and developed an addendum to Student’s IEP. The November 4, 2013 IEP addendum identified mathematics as an additional area of need for Student and added a math word problem goal. Exhibit R-68.
16. On February 27, 2014, the XXXXXX School 2 IEP team met for the annual review of Student’s IEP. The February 27, 2014 IEP provided that OHI was Student’s area of eligibility and identified Reading, Writing/Written Language, Mathematics, Communication/Oral Expression, and Cognitive/Attention as Student’s areas of need. The February 27, 2014 IEP continued 17 hours per week of non-categorical special education services, including 3 hours in the general education classroom and 14 hours in the special education setting. This IEP reduced Student’s Speech-Language related services to 2 hours per month. Exhibit R-71. The parents agreed with the February 27, 2014 IEP. Testimony of Mother.
17. On April 1, 2014, with the parents’ agreement, XXXXXX School 2 adopted an addendum, without a meeting, to the February 27, 2014 IEP. Student’s areas of need and the hours of special education and speech-language services were not changed with this addendum. Exhibit R-72, Testimony of Mother.
18. On a June 24, 2014 IEP progress report, Student was reported to be making “sufficient progress” on all of the February 27, 2014 IEP academic and Cognitive/ Attention goals. Student was reported to be making “some progress” on Communication - Oral Expression goals. Exhibit R-74.
19. Student attended XXPS’ ESY program in the summer of 2014. After that summer, the parents decided to withdraw Student from XXXXXX School 2. On August 27, 2014, the XXXXXX School 2 case manager had written an email to the parents to introduce herself. On August 29, 2014, Mother wrote back to let the case manager know about “a change of plans” - that Student would not be attending XXXXXX School 2 for the fall 2014 semester. On September 7, 2013, the case manager emailed Mother that she had sent her a XXPS withdrawal form. In the email the case manager informed Mother that following the withdrawal, Student could continue to receive up to 2 hours per month of Speech-Language services at XXXXXX School 2. Exhibit R-182.
20. At the beginning of the 2014-2015 school year, the parents unilaterally placed Student at Nonpublic School 1 for GRADE Z. Before placing Student at Nonpublic School 1, the parents did not provide notice to XXPS to that they would be asking XXPS to pay for Student to attend the private school. Testimony of Mother.
21. Nonpublic School 1 is a small private day school in XXXXXXXXXXXX, Virginia. It serves primarily students with learning disabilities and attentional difficulties through GRADE A. At times, a few students at Nonpublic School 1 have high‑functioning autism. Nonpublic School 1 enrolls a maximum of 105 students. Classrooms have a maximum of 13 students with two teachers. Both classroom teachers must be certified in the state of Virginia and one must hold a master’s degree in special education and learning disabilities. Students are divided into smaller groups for reading, math and written language. Nonpublic School 2 also provides small group reading instruction using the Orton‑Gillingham phonics technique. Testimony of Academic Supervisor.
22. In March 2018, the parents engaged Neuropsychologist to conduct an updated neuropsychological evaluation of Student, as an update to XX previous 2013 evaluation, to assist the parents to plan for Student’s transition from Nonpublic School 1 after the 2018-2019 school year. In his March 19, 2018 report, Neuropsychologist noted that Student had made “incredible progress” academically, especially in writing and math, and that stimulant medication had also provided Student some support, especially in sustaining attention and executive functioning. Neuropsychologist reported that Student still had very weak reading comprehension abilities and had ongoing difficulty with some of the basic reading processes, which still indicated the impact on Student of a specific learning disorder with impairment in reading (dyslexia); poor language skills, for both expressive and receptive language, related to Student’s dyslexia and consistent with a Language Disorder; and ongoing challenges in sustaining attention, with variable performance for executive functioning due to the effects of ADHD - Combined Type. Neuropsychologist recommended, *inter alia*, that the parents work with an educational consultant to consider the best educational environment to help Student with reading and language difficulties and to explore the range of specialist educational settings that are geared for children with significant dyslexia and provide specialized interventions to address their needs. Exhibit P-24.
23. Student attended Nonpublic School 1 from the 2014-2015 school year (Grade Z) through the 2018-2019 school year (Grade A). Testimony of Mother. For the 2019-2020 school year, the parents unilaterally placed Student at NONPUBLIC SCHOOL 2, a private day school in XXXXXXXXXXXXXXXXXXXX. Student continues to attend Nonpublic School 2 in the 2020-2021 school year. Testimony of Mother.
24. Nonpublic School 2 is a private, college preparatory, school. It has an overall enrollment of some 450 students, in three divisions, grades kindergarten through 12. Student is in the upper division, which has 173 students taught by some 27 teachers. The upper division is in a separate wing of the school building. The vast majority of Nonpublic School 2 students have a diagnosed learning difference that ranges from dyslexia and other language‑based learning differences to ADHD and anxiety. Typical class sizes are from 10 to 12 students, but may be up to 14 or 15 students. Nonpublic School does not consider itself a special education school and none of the teachers is certified in special education. Testimony of Head of School.
25. By October 29, 2019, the parents had engaged Petitioners’ Counsel with regard to Student’s special education concerns. On December 6, 2019, Petitioners’ Counsel requested XXPS to provide electronic copies of all of Student’s education records maintained by XXPS. Exhibit P-26. On December 12, 2019, LEA Representative 1 responded by email that because Student last attended an XXPS school in 2014, Student’s paper records had been destroyed per the Student Records Management Manual. LEA Representative 1 stated that XXPS was looking for electronic records for Student and would provide what they found. Exhibit P-27. On December 12, 2019, LEA Representative 1 stated that the parents wanted to start the special education eligibility process for Student. Exhibit P-23.
26. On December 18, 2019, XXPS wrote the parents that it was necessary to conduct a reevaluation to determine whether Student continued to be a child with a disability in need of special education services and scheduled an IEP Reevaluation Committee meeting for December 19, 2019. The Revaluation Committee met on December 19, 2019 at XXXXXX SCHOOL 3. Both parents and Petitioners’ Counsel attended. The parents gave written consent for XXPS to conduct Psychological, Sociocultural, Educational and Speech and Language assessments of Student, an Occupational Therapy consult and an observation. Exhibits R-85, R-86.
27. On January 7, 2020, Department Chair spoke with Father by telephone and reviewed the process about the eligibility meeting and the timeframe. Department Chair informed Father that if he would like to enroll Student in XXXXX School 4, she would set up a meeting to register and enroll Student. Testimony of Department Chair.
28. If the parents had enrolled Student in XXXXX School 4 before the reevaluation had been completed, XXPS would have provided Student interim special education and related services comparable to XX last, April 1, 2014, XXPS IEP. Testimony of Department Chair.
29. On January 23, 2020, a XXPS Occupational Therapist conducted an Occupational Therapy (OT) consultation. She recommended that Student continue to receive the accommodations from Student’s last, April 1, 2014, XXPS IEP, namely extended time, frequent breaks, graphic organizers, read in English of directions/ assignments/word problems, opportunity to respond orally, mark in assignment document, reduced language/reading level, clearly defined limits/expectations, positive reinforcement system, reduced pencil/paper tasks, assignment notebook, group size, and supp0rt from Assistive Technology Services (ATS). Exhibit R-89.
30. On February 26, 2020, School S-L Pathologist conducted a Speech and Language Evaluation of Student. School S-L Pathologist did not record scores from norm-based assessments because she had a XXXXX English interpreter present for the test, although Student’s primary language is English. Testimony of School S-L Pathologist. School S-L Pathologist concluded that based on informal assessment results, it appeared that Student exhibited an oral language deficit characterized by difficulty with understanding and using oral language. She noted that such problems may have a direct impact on Student’s performance in the classroom, especially with understanding and processing new information and communicating learned knowledge. Exhibit R-90.
31. On January 29, 2020, Special Education Teacher 1 administered the Kaufman Test of Educational Achievement, Third Edition (KTEA‑3), as a standardized measure of Student’s academic functioning. Student’s scores were in the Average range on the Math Composite, Oral Fluency Composite, Orthographic Processing Composite, and Academic Fluency Composite. Student scored in the Below Average range on the following Composites: Reading, Writing, Sound‑Symbol, Decoding, Reading Fluency, Reading Understanding and Comprehension. Exhibit R-92.
32. School Psychologist 1 conducted a psychological reevaluation, with a classroom observation of Student, over January and February 2020. She administered to Student the Wechsler Intelligence Scale for Children, Fifth Edition (WISC‑V), the Comprehensive Test of Phonological Processing, Second Edition (CTOPP‑2) ‑ selected subtests and the Beery‑Buktenica Developmental Test of Visual‑Motor Integration, Sixth Edition (Beery VMI‑6). She also had Mother and a teacher respond to behavior rating scales from the Behavior Assessment System for Children, Third Edition (BASC‑3), Conners, Third Edition (Conners‑3) and the Autism Spectrum Rating Scales (ASRS). In her February 26, 2020 evaluation report, School Psychologist 1 reported that Student’s cognitive and information processing abilities fell entirely within the Average range on the current assessments, with the exception of Very Low verbal abilities; that Student demonstrated some difficulty with verbal reasoning and significantly lower vocabulary than expected for Student’s age; that Student’s overall working memory was also Average, but Student had slight difficulty with auditory short‑term memory. The teacher and parent responses to the social/emotional assessments suggested that Student displayed some characteristics of autism at school and many characteristics at home; that Student was reported to have significant difficulty with peer interactions across settings; that Student was noted to be frequently withdrawn and to struggle with reciprocal social interactions. Student was also reported to display high levels of atypical language and to have difficulty communicating effectively both at home and at school; to demonstrate sensory sensitivity, stereotyped behaviors and behavioral rigidity at home, although not reported at school. Attention also appeared to be a concern for Student at home, but not at school. School Psychologist 1 reported that Student did not currently demonstrate hyperactive or impulsive behaviors, difficulty with executive functioning, or other behaviors commonly associated with ADHD, although Student did have an historical diagnosis of ADHD (Combined type), for which Student was medicated at the time of the evaluation. Exhibit R-95.
33. On March 4, 2020, Petitioners’ Counsel wrote XXPS to request funding for Independent Educational Evaluation (IEE) occupational therapy (OT), speech and language and educational assessments of Student. By letter of March 9, 2020, XXPS responded that it would authorized IEE speech and language and educational assessments of Student. XXPS denied funding for an IEE OT assessment because XXPS has completed an OT consultation for Student, not an OT evaluation. Exhibit R-100.
34. At a special education eligibility meeting at XXXXX School 2 on March 5, 2020, the XXPS eligibility team determined that Student was eligible for special education under the Autism and OHI-ADHD disability classifications. The Student was found not to meet criteria for a Specific Learning Disability (SLD) because the team found that Student did not have a processing disorder in the areas where Student demonstrated underachievement, namely, Basic Reading Skills, Reading Comprehension, Listening Comprehension, Written Expression/Spelling and Oral Expression. The parents and Petitioners’ Counsel attended the eligibility meeting and Mother gave consent to add Autism as an eligibility classification. The parents disagreed with the determination that Student did not meet criteria for the SLD disability. Exhibit R-98, Testimony of Mother.
35. On April 20, April 22 and May 6, 2020, XXXXXX School 2 convened IEP Team meetings to update Student’s XXPS IEP. Parents and Petitioners’ Counsel attended the meetings. On the May 6, 2020 IEP, Student’s Areas of Eligibility were stated to be Autism and OHI. Communication, Reading, Writing/Written Language, and Executive Functioning were identified as Areas of Need for Student. The May 6, 2020 IEP provided for Student to receive 105 hours per month of Autism services, including 90 hours in the special education setting and 15 hours in the general education classroom. In addition, Student would receive 2 hours per month of Speech and Language services in the special education setting. The May 6, 2020 (and August 19, 2020) IEPs provided Classroom Accommodations and Modifications including extended time on assignments and assessments; frequent breaks; opportunity for breaks in non-instructional space to address sensory needs, small group testing; clearly defined limits and expectations for class work, assignments and assessments; opportunity for copy of teacher notes; frequent check-in for understanding and clarification of multi-step tasks, graphic organizers, read aloud entire assignments/assessments to Student; alternate means of response - mark in assignment documents; accessible electronic text, alternate response using word processor; spell checker; reduced language level; reading level; plain English and Assistive Technology support. The IEP stated a begin date of August 25, 2020. The school members of the IEP team proposed to implement the IEP at Student’s neighborhood XXPS school, XXXXXX SCHOOL 4. Exhibits P-63, P-71.
36. Under XXPS’ proposed IEPs, Student would be placed in a small, self-contained, setting for all core courses, a personal development course and a literacy class. This accounts for 23 hours out of the 30-hour school week. Student would have one course with nondisabled peers in the general education setting, such as physical education or an elective, where Student would still be supported by a special education teacher or an instructional assistant. Testimony of Department Chair.
37. The May 6, 2020 and August 19, 2020 proposed IEPs included transition goals and services. Special Education Teacher 1 drafted the transition plan for the IEPs after interviewing Student by telephone. The transition plan reflects Student’s goal to attend college to learn design and construction skills and ultimately to design and build buildings. The plan also reflects Student’s goal to, one day, live on XXX own. The plan indicates that transition services would include career/college guidance and related courses and that Student’s progress toward the transition goals would be measured by consultation and classroom participation. Testimony of Special Education Teacher 1, Exhibits P-63, P-71.
38. The parents disagreed with the proposed IEP because it did not provide for a private day placement, did not include numerous additional goals and objectives and did not provide for a positive reinforcement system. XXPS remained open to considering additional areas of need and goals, when additional data would be collected and Student’s current academic performance could be assessed. Exhibits R-103, R-104.
39. XXXXXX School 4 is Student’s neighborhood school. It is a base school, meaning it is a general education school that offers special education classes. XXXXXX School 4 has a capacity of 2,500 students in four grades. This includes some 400 special education students. There are close to 200 staff members. XXXXXX School 4 has some 200 hallways. Testimony of Department Chair.
40. On May 11, 2020, Petitioners’ Counsel gave written notice to XXPS by email that the parents believed that Student required a private day placement, with a small class size in order to receive FAPE and that Student would be unable to appropriately access an education at a large school such as XXXXXX School 4. The parents asserted that the May 6, 2020 IEP was inappropriate, among other reasons, because it contained inadequate identification of goals; inadequate special education services; inadequate related services, including but not limited to occupational therapy and counseling; lack of appropriate assistive technology support and services; inappropriate school placement; and an inadequate transition plan. Petitioners’ Counsel gave notice that the parents intended to enroll Student in Nonpublic School 2 for the 2020‑2021 school year and to seek reimbursement from XXPS for all costs and expenses incurred with regard to the private day placement for the 2019-2020 and the 2020‑2021 school years. In the May 11, 2020 notice, Petitioners’ Counsel did not inform XXPS that the parents disagreed with the proposed IEP begin date of August 25, 2010. Exhibit P-64.
41. In June 2020, Independent Speech-Language Pathologist conducted an IEE speech-language evaluation to determine Student’s then-present level of expressive and receptive language functioning. In her June 25, 2020 report, Independent Speech-Language Pathologist found that Student’s speech-sound production, voice and fluency were within normal limits. Independent Speech-Language Pathologist administered to Student the Clinical Evaluation of Language Fundamentals, Fifth Edition (CELF‑5). From these CELF-5 scores, Independent Speech-Language Pathologist found that Student had a mixed receptive‑expressive language disorder characterized by difficulties with things such as following directions, difficulty with vocabulary use, difficulty understanding word relationships, difficulty recalling certain lengths of utterances, in addition to difficulties making inferences and understanding sequence‑based questions while listening to stories read aloud. Other areas of difficulty included Student’s narrative language, which can impact pragmatic language with the higher‑level difficulties, including making inferences, as well as seeing the main idea, seeing the big picture, and understanding receptively peer interactions and the vocabulary used by peers. Exhibit R-107, Testimony of Independent Speech Language Pathologist. Independent Speech Language Pathologist’s scores and findings were similar to the scores and findings of School Speech-Language Pathologist. Testimony of School Speech-Language Pathologist.
42. On or about July 2, 2020, XXPS approved funding authorization for the parents to obtain an IEE OT evaluation of Student. Exhibit R-108.
43. On July 7, 2020, an independent occupational therapist conducted the IEE OT evaluation of Student. She reported that on sensory processing measures, Student had overall mild functional challenges regarding sensory processing skills. Student exhibited challenges with hand strength and fine motor coordination and demonstrated difficulty sustaining anti-gravity positions. Based on the Behavior Rating Inventory of Executive Functioning (BRIEF), completed by a parent, and the examiner’s observations, Student demonstrating significant difficulty across areas of executive functioning with challenges regarding organization, ideating 5 sentences on a given topic, with working memory and self‑monitoring. Based on a parent’s response to the Roll Evaluation of Activities of Life (REAL), Student was demonstrating challenges in the areas of Housework/Chores and School‑Related Skills, notably using an organization system to keep track of assignments. The independent occupational therapist recommended that Student would benefit from occupational therapy focused on improving executive functioning skills for enhanced participation in independent activities of daily living and school‑based tasks. Exhibit R-109.
44. On August 19, 2020, XXPS convened an IEP team meeting to consider the IEE Speech Language and OT evaluations of Student. The parents and Petitioners’ Counsel attended the meeting. On the August 19, 2020 IEP, Student’s Areas of Eligibility were stated to be Autism and OHI. Communication/Using Language, Reading, Writing/Written Language, and Executive Functioning were identified as Areas of Need for Student. The August 19, 2020 IEP team left Student’s special education and related services unchanged at 105 hours per month of Autism services, including 90 hours in the special education setting and 15 hours in the general education classroom and 2 hours per month of Speech and Language services in the special education setting. The August 19, 2020 IEP also outlined the alternative services which Student would receive virtually while schools remained closed due to the COVID-19 pandemic. XXXXXX School 4 was identified as the location for Student’s IEP services. Exhibit R-117.
45. On August 19, 2020, Petitioners’ Counsel informed XXPS that the parents disagreed with XXPS’ February 2020 psychological evaluation of Student and requested funding for the parents to obtain an IEE psychological evaluation. Exhibit R-116. XXPS approved this IEE request on August 20, 2020. Exhibit R-118.
46. Clinical Psychologist conducted an IEE psychological evaluation of Student in August and September 2020. She conducted a virtual interview of Student on August 25, 2020 and conducted a battery of tests in September 2020. The tests included cognitive and academic achievement measures and executive functioning rating scales issued to Mother and Student. In her September 28, 2020 evaluation report, Clinical Psychologist reported that Student’s cognitive scores were in the Average range. Student’s reading ability on the Nelson Denny Test of Reading indicated extremely poor word knowledge. Student’s overall reading index score was 73. Student’s overall writing score measured with the Test of Written Language, 4th Edition (TOWL-4) was Average. Mathematics, measured with the Wechsler Individual Achievement Test (WIAT) was a strength for Student with an overall score of 104. Clinical Psychologist concluded that her findings supported diagnoses for Student of Attention Deficit Hyperactivity Disorder, Combined Type and Specific Learning Disorder with impairment in Reading (Dyslexia). She noted that it did not appear that Student had ever been clinically diagnosed with Autism Spectrum Disorder and her evaluation had not been undertaken for that purpose. Clinical Psychologist reported, *inter alia*, that ADHD is a constant problem for Student. She wrote that Student can focus for about 45 minutes before needing a break and beyond that XXX mental stamina becomes depleted and XX becomes vulnerable to the intrusion of distractions from within and without. Exhibit P-73.
47. Following receipt of Clinical Psychologist’s IEE assessment of Student, XXPS requested to conduct a follow-up psychological evaluation to consider additional areas of special education eligibility for Student. XXPS psychologist, SCHOOL PSYCHOLOGIST 2, conducted a supplemental psychological reevaluation of Student in December 2020 and January 2021. In her January 5, 2021 psychological evaluation report, School Psychologist 2 reported, *inter alia*, that Student appeared to have difficulty sustaining working memory, which had a negative impact on XXX ability to remain attentive and focused for appropriate lengths of time, making Student more liable to lose focus mid-task or struggle to complete tasks with multiple steps. Exhibit P-83.
48. On January 19, 2021, after the due process complaint was filed in this case, the XXPS eligibility team determined that Student met criteria for the Specific Learning Disability impairment, in addition to criteria for Autism and OHI-ADHD. The parents gave consent to this determination. Testimony of School Psychologist 1, Exhibit R-142.

**CONCLUSIONS OF LAW**

Based upon the above findings of fact and argument of counsel, as well as this hearing officer’s own legal research, the conclusions of law of this hearing officer are as follows:

Burden of Proof

The Petitioners, as the parties who filed the January 5, 2021 request for a due process hearing, must bear the burden of proof in this proceeding. *See, e.g., N.P. by S.P. v. Maxwell*, 711 F. App’x 713 (4th Cir. 2017) (At impartial due process hearing, the parents bear the burden of proving their child was denied a free appropriate public education. *Id.* at 716, *citing Weast v. Schaffer ex rel. Schaffer*, 377 F.3d 449, 456 (4th Cir. 2004), *aff’d*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). The burden of proof shall be met by a preponderance of the evidence. *See. e.g., Cty. Sch. Bd. of Henrico Cty., Va. v. R.T.*, 433 F. Supp. 2d 657, 671 (E.D. Va. 2006)(Hearing Officer’s factual conclusions supported by the preponderance of the record evidence.)

Analysis

I.

Did XXPS deny the student a free appropriate public education (FAPE) by not continuing its child-find obligations and providing equitable services to the student, when the student was placed by the parents in private schools, for more than five years prior to March 5, 2020?

XXXXXXXXXXXXX Public Schools (XXPS) initially determined that Student was eligible for special education and related services in May 2008 under the Autism disability classification. Except for the 2011-2012 and part of the 2012-2013 school years, Student was enrolled in XXPS through the 2013-2014 school year. At the beginning of the 2014-2015 school year, the parents withdrew Student from XXPS and unilaterally placed Student at Nonpublic School 1, a private day school in XXXXXXXXXXXX. Student attended Nonpublic School 1 through the 2018-2019 school year. For the 2019-2020 school year, the parents placed Student at Nonpublic School 2, a private day school in XXXXXXXXXXX XXXXXX, XXXXXXXX, which Student currently attends.

Prior to December 2019, the parents did not seek XXPS funding for Student to attend private school. On December 12, 2019, Petitioners’ Counsel informed XXPS that the parents wanted XXPS to re‑start the special education eligibility process for Student. XXPS reevaluated Student in the winter of 2020. On March 5, 2020, the XXPS eligibility team determined that Student continued to be eligible for special education services under the disability criteria for Autism and for Other Health Impairment, due to Attention Deficit-Hyperactivity Disorder (OHI-ADHD).

After several IEP team meetings with the parents, on May 6, 2020, XXPS finalized a new IEP for Student. By letter of May 11, 2020, Petitioners’ Counsel gave notice to XXPS that the parents were rejecting the May 6, 2020 IEP and placement proposed by XXPS and that they intended to enroll Student at Nonpublic School 2 at XXPS’ expense.

I.

Child Find/Equitable Service Prior to March 2020

From the start of the 2014-2015 school year until December 2019, XXPS did not reevaluate Student for educational needs or provide any equitable services to Student. In their complaint, the parents contended that by not continuing its child-find obligations and providing equitable services, XXPS denied Student a FAPE. XXPS responds that after the parents withdrew Student from XXPS and unilaterally placed Student at the private schools, it had no duty to engage in child-find or to provide other special education services until it received the parents’ December request to restart the eligibility process.

The federal IDEA regulations provide that due process is not applicable to complaints that a local education agency (LEA) has failed to meet the Act’s requirements concerning providing equitable services to parentally‑placed private school children with disabilities. *See* 34 C.F.R. 300.140(a), 300.138. I find that I do not have jurisdiction over Petitioners’ allegation that XXPS failed to provide equitable services to Student after the parents placed Student in private school.[[3]](#footnote-3)

With regard to child find for parentally placed private school children, the LEA in which the private school is located must meet the child find requirements of the IDEA, including the triennial reevaluation mandate. *See* 34 C.F.R. 300.140(b), 300.138. The Act requires that a special education reevaluation must occur at least once every three years, and not more frequently than once a year, unless the parent and the public agency agree otherwise. *See* 34 C.F.R. 300.303. Contrary to the position of XXPS, the IDEA requires that the child’s LEA conduct the triennial reevaluation of a parentally placed private school child, even without a request from the parents.

Prior to the parents’ placing Student at Nonpublic School 1, Student was last reevaluated by XXPS on May 24, 2013. Student’s triennial reevaluation was due by May 24, 2016. That school year Student was attending Nonpublic School 1, which is located in XXXXXXXXXXXX. There was no evidence at the hearing that the parents and XXPS agreed that Student would not be reevaluated. I find that by not reevaluating Student by May 2016, XXPS violated the IDEA’s triennial reevaluation mandate.

XXPS argues that even if it failed to conduct a triennial reevaluation in May 2016, Petitioners’ claim is barred by the IDEA’s two-year statute of limitations. *See, e.g., A.H. by P.H., v. Arlington School Board*, No. 120CV00981LMBMSN, 2021 WL 1269896, at \*7 (E.D. Va. Apr. 6, 2021) (“The IDEA as well as the Commonwealth of Virginia have a two‑year statute of limitations period within which parents can raise concerns and note objections regarding their child’s educational process and/or bring complaints regarding the actions taken or not taken by the School system in the delivery of a free and appropriate education to the child (FAPE). [citation omitted]. The two year period runs from the date the party knew or should have known about the alleged violations of the law or regulations.” *Id.* at n. 9 (quoting with approval hearing officer’s decision.)) XXPS has the burden to prove facts necessary to establish an application of the statute of limitations. *See, e.g., Adams v. Alliant Techsystems, Inc.*, 201 F. Supp. 2d 700, 711 (W.D. Va. 2002).

In this case, over four years lapsed between May 2016, when XXPS should have reevaluated Student and January 2021, when Petitioners filed their due process complaint. The parents may not have known that the IDEA and the Virginia Regulations required XXPS reevaluate Student when XX was at Nonpublic School 1, but their lack of knowledge of the law does not toll the IDEA’s two-year statute of limitations. *See, e.g.*, *Miller v. Pacific Shore Funding*, 224 F.Supp.2d 977, 986-87 (D.Md.2002) (“The discovery rule . . . applies to discovery of facts, not to discovery of law. Knowledge of the law is presumed. Ignorance of the rights it grants and protects does not toll the statute of limitations.” (emphasis in original) (internal citations omitted)), *aff’d*, 92 F. App’x 933 (4th Cir.2004); *Richards v. Fairfax Cty. Sch. Bd.*, 798 F. Supp. 338, 341 (E.D. Va. 1992), *aff’d sub nom. Richards v. Fairfax Cty*., 7 F.3d 225 (4th Cir. 1993) (Ignorance of the legal right to sue does not generally prevent the limitations period from running.)

In her hearing testimony, Mother acknowledged that Student’s April 1, 2014 XXPS IEP stated that the 3-year reevaluation date was May 24, 2016 and she testified that XXPS did not contact her in 2016 to do a triennial review. I find that the parents knew, or should have known, that Student was due to be reevaluated for special education by May 24, 2016 and that XXPS did not conduct a reevaluation until the winter of 2020. Therefore, XXPS has established that Petitioners’ claim that XXPS denied Student a FAPE by not continuing its child-find obligations after they placed Student in private school is barred by the IDEA’s two-year statute of limitations.

Since the 2019-2020 school year, Student has attended Nonpublic School 2, a private school located in XXXXXXXXXXX XXXXXX, XXXXXXXX. From that school year, forward, the IDEA’s child find obligations, including special education reevaluations, became the responsibility of the out-of-state school district. *See* 34 C.F.R. 300.131(f).

Even if Petitioners’ triennial reevaluation claim were not time barred, XXPS’ omission to conduct the triennial reevaluation of a student in 2016 was a procedural - not substantive - violation of the IDEA. *See, e.g., I.T. ex rel. Renee T. v. Department of Educ.*, 2012 WL 3985686, 16 (D.Haw., Sept. 11, 2012). *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012). *See, also, T.B., Jr. by & through T.B., Sr. v. Prince George’s Cty. Bd. of Educ.*, 897 F.3d 566, 573 (4th Cir. 2018) (*cert. denied*, --- U.S. ----, 139 S. Ct. 1307, 203 L.Ed.2d 415 (2019)(Failure to timely respond to parents’ request for evaluation was procedural violation of the IDEA.) Procedural violations may only be deemed a denial of FAPE if the procedural inadequacies:

(i) Impeded the child’s right to a FAPE;

(ii) Significantly impeded the parent’s opportunity to participate in the decision‑making process regarding the provision of a FAPE to the parent’s child; or

(iii) Caused a deprivation of educational benefit.

34 C.F.R. 300.513(a)(2). A procedural violation “that did not actually interfere with the provision of a FAPE is not enough. Rather, the procedural violation must have caused substantive harm. Specifically, the prospect of recovery for a procedural violation of the IDEA depends on whether the Student’s disability resulted in the loss of a FAPE.” *T.B.*, 897 F.3d at 573 (citations and internal quotations omitted.)

Here, until December 2020, the parents have not sought FAPE from XXPS since the placed Student in Nonpublic School 1 at the beginning of the 2014-2015 school year. Mother testified to the parents’ satisfaction with how well Student has done at both Nonpublic School 1 and Nonpublic School 2. There was no evidence that XXPS’ failure to reevaluate Student during the years Student attended Nonpublic School 1 caused any substantive harm to Student or impeded the parents’ opportunity to participate in the decision making process. Under these facts, I cannot conclude that XXPS’ procedural omission to conduct the triennial reevaluation of Student by May 2016 may be deemed a denial of FAPE.

II.

Did XXPS deny Student a FAPE, beginning May 2020, by not identifying Specific Learning Disability as a disability classification?

On December 12, 2019, Petitioners’ Counsel informed XXPS’ that the parents wanted XXPS to re‑start the special education eligibility process for Student. XXPS reevaluated Student in the winter of 2020. At a special education eligibility meeting at XXXXXX School 4 on March 5, 2020, the XXPS eligibility team determined that Student was eligible for special education under the Autism and OHI disability classifications. In XXPS’ March 5, 2020 eligibility determination, over the parents’ objection, Student was found not to meet criteria for a Specific Learning Disability (SLD) because the XXPS members of the team found that Student did not have a processing disorder in the areas where Student demonstrated underachievement, namely, Basic Reading Skills, Reading Comprehension, Listening Comprehension, Written Expression/Spelling and Oral Expression.

On January 19, 2021, after receiving additional information including a September 28, 2020 IEE psychological reevaluation report and a January 5, 2021 XXPS reevaluation, the XXPS eligibility team determined that Student met criteria for the SLD impairment, in addition to criteria for Autism and OHI-ADHD. The Petitioners contend that XXPS’ March 4, 2020 determination that Student did not meet criteria for the SLD disability was a denial of FAPE.

I find that Petitioners’ claim that XXPS denied Student a FAPE by not identifying SLD as a disability does not state a claim for which relief may be granted. The IDEA requires that upon completion of an eligibility evaluation, the LEA eligibility team, including the parents, determines whether the child is a child with an IDEA disability who, by reason thereof, needs special education and related services. *See* 34 C.F.R. 300.8. But federal and state law are clear that school districts are not required to classify a student in a particular category. *See, e.g.* *Letter to Anonymous*, 48 IDELR 16 (OSEP 2006) (Child’s identified needs, not the child’s disability category, determine the services that must be provided to her); *Heather S. v. State of Wis.*, 125 F.3d 1045, 1055 (7th Cir. 1997) (IDEA not concerned with labels, but with whether a student is receiving a FAPE); *Lauren C. by & through Tracey K. v. Lewisville Indep. Sch. Dist.*, 904 F.3d 363, 377 (5th Cir. 2018) (IDEA promises: a FAPE: regardless of child’s diagnosis.) The Virginia Regulations explicitly provide that children are *not* required to be identified by their disabilities on IEPs or on communications to parents. See 8 VAC 20-81-80(E).[[4]](#footnote-4)

III.

Did XXPS deny Student a FAPE by not ensuring that its IEPs developed for Student beginning May 2020 and it’s proposed location of services were appropriate?

In their complaint, the parents seek tuition reimbursement from XXPS for their unilateral placement of Student at Nonpublic School 1 for the 2018-2019 school year and at Nonpublic School 2 for the 2019-2020 and 2020-2021 school years. The parents also seek reimbursement for tutoring and other private educational support services they obtained for Student. As the U.S. District Court for the District of Maryland recently explained *C.B. v. Smith*, Civil Action No. 8:18‑cv‑01780‑PX, 2019 WL 2994671 (D.Md. July 9, 2019), parents of children with disabilities are afforded the opportunity to participate in the development of their child’s IEP. Once an IEP is finalized, the parents may accept or reject it. If the parents reject the public school IEP as failing to provide a free appropriate public education (FAPE), they may pursue administrative remedies before a hearing officer in a due process proceeding. In the interim, the parents may elect to pay for services, to include placement in a private school, and afterwards seek reimbursement from the school district. *C.B. supra*.

In reimbursement cases, the hearing officer applies the two‑step *Burlington-Carter* framework analysis in determining whether parents demonstrated (1) that the district has violated the IDEA, and (2) that private placement is proper under the IDEA. *Sumter Cty. Sch. Dist. 17 v. Heffernan on behalf of T.H.*, No. CV 03:07‑1357‑JFA, 2009 WL 10688706, at \*3 (D.S.C. July 20, 2009), *aff’d sub nom. Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478 (4th Cir. 2011) (*citing School Comm. of Burlington v. Department of Ed.*, 471 U.S. 359 (1985); *Florence County School District Four v. Carter*, 510 U.S. 7 (1993)).

After XXPS determined in March 4, 2020 that Student continued to be eligible for special education and related services, Student’s IEP team, including the parents and Petitioners’ Counsel met on April 20, April 22 and May 6, 2020 to develop a new IEP for Student. Student’s Areas of Eligibility in the May 6, 2020 IEP were stated to be Autism and OHI. Communication, Reading, Writing/Written Language, and Executive Functioning were identified as IEP Areas of Need. The May 6, 2020 IEP provided for Student to receive 105 hours per month of Autism services, including 90 hours in the special education setting and 15 hours in the general education setting. In addition, Student would receive 2 hours per month of Speech-Language services in the special education setting. XXPS proposed to implement the IEP in Student’s neighborhood XXPS school, XXXXXX School 4.

The IEP team met again on August 19, 2020 to consider recently completed Independent Educational Evaluation (IEE) Speech-Language and OT evaluations of Student. The IEP present levels of performance and annual goals were updated but the IEP team did not agree to change Student’s location of services from XXXXXX School 4 or to increase Student’s special education or related services.[[5]](#footnote-5) Petitioners contend that the May 6, 2020 and August 19, 2020 IEPs were not appropriate for Student and on that basis, seek reimbursement from XXPS for their expenses for Student to remain at Nonpublic School 2 for the 2020-2021 school year.

In determining whether the public agency has offered a child an appropriate IEP, the hearing officer’s inquiry is two-fold. “First, has the State complied with the procedures set forth in the IDEA? And second, is the IEP developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.” *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 206-07, 102 S. Ct. 3034, 3051, 73 L. Ed. 2d 690 (1982). With respect to the 2020 proposed IEPs, Petitioners have not alleged that XXPS failed to comply with the IDEA’s procedural requirements. Therefore, I turn to the second, substantive, prong of the *Rowley* inquiry: Were XXPS’ proposed May 6 and August 19, 2020 IEPs and educational placement appropriate for Student?

In *D.H. v. Fairfax Cty. Sch. Bd.*, No. CR 1:19‑CV‑1342, 2021 WL 217098, at \*8-9 (E.D. Va. Jan. 19, 2021),U.S. District Judge T. S. Ellis, III recently explained the requirements for an appropriate IEP:

At the center of the IDEA’s education delivery system is the IEP. A Student’s IEP is a document that is created through collaboration between school staff and parents that “describes the child’s unique needs and the state’s plan for meeting those needs.” *R.F. by & through E.F. v. Cecil Cty. Pub. Sch.*, 919 F.3d 237, 241 (4th Cir.), *cert. denied*, 140 S. Ct. 156 (2019) (*quoting M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 323 (4th Cir. 2009)).R.F., 919 F.3d at 241 (*citing Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE‑1*, 137 S. Ct. 988, 994 (2017)). Under the IDEA, IEPs must include “a statement of the child’s present levels of academic achievement and functional performance,... a statement of measurable annual goals, . . . a description of how the child’s progress toward meeting the annual goals . . . will be measured, . . . , [and] a statement of the special education and related services and supplementary aids and services . . . to e provided to the child.” 20 U.S.C. 1414(d)(1)(A)(i). The IEP team is required to revise the IEP “as appropriate,” at least once a year, to address “lack of expected progress” among other factors. Id. 1414(d)(4)(A). The Supreme Court has made clear that, in order “[t]o meet its substantive obligation under the IDEA [to prove a FAPE], a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 999. In addition to this substantive requirement, the IDEA also requires that “each disabled student receive instruction in the ‘least restrictive environment’ (‘LRE’) possible.” *AW ex rel. Wilson v. Fairfax Cty. Sch. Bd.*, 372 F.3d 674, 681 (4th Cir. 2004) (*citing Bd. of Educ. v. Rowley*, 458 U.S. 176, 180- 82 (1982)). The Fourth Circuit has explained that the LRE requirement “reflects the IDEA’s preference that ‘[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled.” *AW ex rel. Wilson*, 372 F.3d at 681.

*D.H.*, 2021 WL 217098, at 8-9. A reviewing court may fairly expect [school] 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. *Endrew F.*, 137 S.Ct. at 1002.

a. Was the content of the proposed IEPs inappropriate?

In addition to objecting to Student’s placement at XXXXXX School 4, the Petitioners allege that XXPS’ IEPs proposed for Student in 2020 were inappropriate because,

- the IEPs did not include annual goals in the areas of social skills, social engagement, vocabulary, life skills, typing, self‑advocacy, handwriting, and communication/rigidity;

- the IEPs did not provide an appropriate statement of Student’s present levels of educational performance (PLOPs);

- the IEPs did not include school accommodations that Student required;

- the IEPs did not appropriately discuss the appropriate least restrictive environment (LRE) for Student;

- the IEPS did not provide for Student’s educational placement in a self‑contained setting for all classes and

- the IEPs lacked an appropriate post-secondary transition plan.

As explained below, I find that Petitioners did not meet their burden of proof on these claims.

i. Goals and Present Levels of Performance

Federal IDEA regulations require that every IEP contain, *inter alia*,

(1) A statement of the child’s present levels of academic achievement and functional performance, including

(i) How the child’s disability affects the child’s involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) . . .

(2)(i) A statement of measurable annual goals, including academic and functional goals designed to:

(A) Meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and

(B) Meet each of the child’s other educational needs that result from the child’s disability. . . .

*See* 34 C.F.R. 300.320(a); *See, also,* 8 VAC 20-81-110(g); *Endrew F., supra,* 137 S.Ct. at 999. (An IEP is constructed only after careful consideration of the child’s present levels of achievement, disability and potential for growth.)

XXPS’ proposed May 6, 2020 and August 19, 2020 IEPs contained annual goals and Present Levels of Performance (PLOPs) for Communication, Using Language, Reading, Writing/Written Language and Executive Functioning, as well as transition goals. XXPS’ expert, Department Chair, testified about the reading, writing, and executive functioning goals for the IEPs, which she explained used the data from the XXPS’ assessments at Nonpublic School 2. She opined that these annual goals were appropriate for Student. XXPS’ speech-language expert, School S-L Pathologist, discussed the IEP goals for Communication and Using Language and likewise opined that they were appropriate. I found the opinions of both of these experts to be credible and they were not refuted by Petitioners’ experts. Nor did Petitioners’ experts opine that the Present Levels of Performance in the proposed IEPs were not appropriate. I find that Petitioners have not established that the Annual Goals or the Present Levels of Performance in the proposed May 6, 2020 or August 19, 202o IEPs were not appropriate for Student.

ii. School and Classroom Accommodations/Modifications

The IDEA requires that an IEP provide a statement of supplementary aids and services, based on peer‑reviewed research to the extent practicable, and individual accommodation for testing that will be provided to enable the student to advance appropriately toward attaining the annual IEP goals and to make progress in the general education curriculum. *See* 34 C.F.R. 300.320(a)(4), (6). In an April 21, 2020 email, Petitioners’ Counsel requested XXPS to add the following accommodations to Student’s IEP:

Alternative means of response: mark in assignment document

Accessible text: electronic text

Clearly defined limits and expectations for classwork, assignments and assessments.

Positive reinforcement system

Reduced pencil and paper tasks

Assignment notebook (may be using ATS device)

Teacher provided notes

Small group testing to minimize distractions and sensory issues

Frequent breaks for movement and to renew mental stamina.

Reduced assignments to emphasize quality over quantity

Text‑to‑speech device

Provide modeling of steps for multi‑step tasks

Check for understanding

Provide word banks

Mark in assignment document

Reduced language/reading level

Use of a pencil grip

Use of fidgets

Available space for sensory break in a noninstructional space

Many of these requested accommodations were provided in the proposed May 6, 2020 and August 19, 2020 IEPs as Classroom Accommodations and Modifications, including extended time on assignments and assessments; frequent breaks; opportunity for breaks in non-instructional space to address sensory needs, small group testing; clearly defined limits and expectations for class work, assignments and assessments; opportunity for copy of teacher notes; frequent check-in for understanding and clarification of multi-step tasks, graphic organizers, read aloud entire assignments/assessments to Student; alternate means of response - mark in assignment documents; accessible electronic text, alternate response using word processor; spell checker; reduced language level; reading level; plain English and Assistive Technology support.

XXPS’ expert, Department Chair, testified that XXPS got a lot of the information regarding the types of accommodations that Student needed from Nonpublic School 2 and that the accommodations and modifications in XXPS’ proposed IEP were comparable to what Student was receiving at Nonpublic School 2. Department Chair opined credibly that the proposed IEP accommodations and modifications were appropriate and her opinion was not rebutted by Petitioners. I find that Petitioners have not established that the accommodations and modifications provisions in the May 6, 2020 and August 19, 2020 proposed IEPs were not appropriate or adequate for Student.

iii. IEP Discussion of Least Restrictive Environment

Petitioners allege that XXPS’ proposed IEPs were not appropriate because they did not provide detailed discussion of the appropriate least restrictive environment (LRE) for Student or of the data the IEP team used to reach its LRE determination.

The IDEA provides that an IEP must include an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class. *See* 20 U.S.C. 1414(d)(1)(A)(i)(V). However, while school districts must inform parents about placements alternatives that were considered and rejected, there is no requirement to detail LRE considerations in a child’s IEP. *See U.S. Department of Education, Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46579, 46588 (August 14, 2006) (While public agencies have an obligation under the [IDEA] to notify parents regarding placement decisions, there is nothing in the Act that requires a detailed explanation in children’s IEPs of why their educational needs or educational placements cannot be met in the location the parents’ request. We believe including such a provision would be overly burdensome for school administrators and diminish their flexibility to appropriately assign a child to a particular school or classroom, provided that the assignment is made consistent with the child’s IEP and the decision of the group determining placement;) 71 Fed. Reg. 46662 (Public agencies only required to include information in IEP which is explicitly required by the IDEA.) *But see Brown v. District of Columbia*, 179 F. Supp. 3d 15, 27 (D.D.C. 2016) (It only makes sense that an IEP team is required to discuss a Student’s specific LRE and the IEP is required to include at least a brief description of it.)

In the Least Restrictive Environment (LRE) pages of XXPS’ proposed IEPs for Student, there are boxes checked to indicate that there was consideration of Student’s being educated with children without disabilities to the maximum extent appropriate, that removal from the regular education environment only occurs when education in regular classes with the use of supplemental aids and services cannot be achieved satisfactorily and that consideration was given to any potential harmful effect on the student or on the quality of service that the student needs. The LRE page states that Student would have access to the general education setting during assemblies, hallways/ transition, cafeteria and general education electives. On the IEP Services pages, it is stated that Student’s total time in a general education instructional setting would be 7 hours out of a 30 hour school week. Even if a brief description of Student’s LRE were required in the proposed IEPs as the court concluded in *Brown v. District of Columbia, supra,* I find that the IEPs proposed by XXPS for Student meet this standard. The Petitioners have not shown that XXPS denied Student a FAPE by not adequately discussing the appropriate LRE for Student in the proposed IEPs.

iv. Self-Contained Setting for All Classes

Under XXPS’ proposed IEPs, Student would be placed in a small, self-contained, setting for all core courses, a personal development course and a literacy class. This accounts for 23 hours out of the 30-hour school week. Student would have one course with nondisabled peers in the general education setting, such as physical education or an elective, where Student would still be supported by a special education teacher or an instructional assistant. XXPS’ special education expert, Department Chair, opined that the proposed classroom placement for Student in the XXPS IEPs was appropriate and met Student’s needs. Petitioners’ expert, Clinical Psychologist, opined in her testimony that Student needs a small classroom environment with small group instruction but she did not contend that Student should not be placed, with appropriate supports, with typically developing students for physical education or electives as proposed by XXPS. I find that Petitioners did not meet their burden of persuasion that the proposed IEP provision for Student to attend physical education and elective classes in the general education setting was inappropriate or would deny Student a FAPE.

v. Post-Secondary Transition Plan

The Virginia Regulation require that not later than the first IEP to be in effect when a child turns 14, every IEP shall include age‑appropriate:

(1) Measurable postsecondary goals based upon age‑appropriate transition assessments related to training, education, employment, and where appropriate, independent living skills; and

(2) Transition services, including courses of study, needed to assist the child in reaching those goals. Transition services shall be based on the individual child’s needs, taking into account the child’s strengths, preferences, and interests.

*See* 8 VAC 20-81-110 (G)(10). Petitioners allege that XXPS’ proposed IEPs lacked an appropriate post-secondary transition plan for Student.

Both IEPs proposed for Student include transition goals and services. Special Education Teacher 1 drafted the transition plan for the IEPs after interviewing Student by telephone. The transition plan reflects Student’s goal to attend college to learn design and construction skills and ultimately to design and build buildings. The plan also reflects Student’s goal to, one day, live on XXX own. The plan indicates that transition services would include career/college guidance and related courses and that Student’s progress toward the transition goals would be measured by consultation and classroom participation. Petitioners offered no competent evidence that these transition plans in the proposed IEPs were not appropriate for Student. XXPS’ expert, Special Education Teacher 1 opined, credibly, that the IEP transition goals were reasonable for Student. I find that Petitioners have not met their burden of persuasion that the May 5, 2020 IEP or August 19, 2020 IEP lacked an appropriate post-secondary transition plan for Student.

In sum, I conclude that with respect to these alleged deficiencies annual goals and PLOPs, accommodations, LRE discussion, classroom setting and transition plan in the May 5, 2020 and August 19, 2020 IEPs proposed by XXPS, Petitioners have not met their burden of persuasion that the IEPs were not reasonably calculated to enable Student to make progress appropriate in light of his circumstance. *See Endrew F., supra,* 137 S.Ct.at 1002.

b. Did XXPS deny Student a FAPE by proposing an unsuitable location of services at XXXXXX School 4 for the 2020-2021 school year?

In the proposed May 6, 2020 and August 19, 2020 IEPs, XXPS designated XXXXXX School 4, Student’s neighborhood school, as the school location to implement Student’s IEP. The parents contend that because of Student’s attention challenges resulting from XXX autism and ADHD disabilities, a large public high school, like XXXXXX School 4, is not an appropriate school setting for Student.

The 4th Circuit Court of Appeals has held that the proper inquiry as to appropriateness of a proposed placement is whether the setting was reasonably calculated to enable the student to make progress appropriate in light of his circumstances. *See* *R.F. by & through E.F. v. Cecil Cty. Pub. Sch.*, 919 F.3d 237, 246-47 (4th Cir.), *cert. denied*, 140 S. Ct. 156, 205 L. Ed. 2d 46 (2019) (*citing Endrew F.*, 137 S.Ct. at 999.)

The IDEA requires participating states to educate children with disabilities in the [least restrictive environment]‑‑that is, alongside children who are not disabled “[t]o the maximum extent appropriate.”20 U.S.C. 1412(a)(5). It permits states to remove a child with disabilities from the “regular educational environment . . . only when the nature or severity of the disability of a child is such that education in regular classes [with appropriate supports] cannot be achieved satisfactorily.” *Id.* We have acknowledged that this statutory language “obviously indicates a strong congressional preference for mainstreaming” students into the general education classroom but that “[m]ainstreaming . . . is not appropriate for every [child with a disability].” *DeVries ex rel. DeBlaay v. Fairfax Cty. Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989). Instead, “[t]he proper inquiry is whether a proposed placement is appropriate under the [IDEA]”‑‑in other words, whether a child’s placement‑‑the setting where the child learns‑‑provides the child with a FAPE. *Id.* (citation omitted).

*R.F.*, 919 F.3d at 246. The parents’ burden in this case was to establish that XXPS’ proposal to place Student at XXXXXX School 4 for the 2020-2021 school year was not reasonably calculated to enable Student to make appropriate progress.

XXXXXX School 4 is an XXPS “base school,” meaning it is a general education school that offers special education classes. XXXXXX School 4 has a capacity of 2,500 students in four grades. This includes some 400 special education students. There are close to 200 staff members. XXXXXX School 4 has some 200 hallways.

For most of the school day - all but one period - Student would be taught in a small self-contained classroom setting with special education services. For health/ physical education and elective courses, Student would attend general education classes with typically developing peers. In these classes, Student would be accompanied by a special education teacher or instructional aide.

Since the 2014-2015 school year, Student has attended private special schools that primarily serve children with special needs. Through the 2018-2019 school year, Student attended Nonpublic School 1. Since the 2019-2020 school year, Student has attended Nonpublic School 2, a private college preparatory day school in XXXXXXXXXXX XXXXXX, XXXXXXXX where some 85% of the children have special needs. Student is in the upper division of Nonpublic School 2, which has some 173 students. The upper division is in a separate wing of the school building.

XXPS’ decision to place Student at a large public high school, after 6 years attending small private schools for children with special needs, appears to have been based largely on the recommendations of School Psychologist 1, who evaluated Student in February 2020. In her February 26, 2020 psychological evaluation report, School Psychologist 1 reported, *inter alia*, that at Nonpublic School 2, Student did not demonstrate hyperactive or impulsive behaviors, difficulty with functioning or other behaviors commonly associated with ADHD. She reported that a Nonpublic School 2 teacher’s responses to behavior rating scales indicated that attention did not appear to be a concern for Student at school. At the due process hearing, School Psychologist 1 testified that at Nonpublic School 2, there were not significant concerns about Student’s attention from Student’s teachers and she opined that Student would not have any difficulty at XXXXXX School 4 from an attention or concentration point of view.

Clinical Psychologist conducted an IEE psychological reevaluation of Student in August and September 2020. In her September 28, 2020 report,[[6]](#footnote-6) Clinical Psychologist reported, *inter alia*, that ADHD is a constant problem for Student. She wrote that Student can focus for about 45 minutes before needing a break and beyond that his mental stamina becomes depleted and XX becomes vulnerable to the intrusion of distractions from within and without.

Clinical Psychologist testified as an expert witness for the parents at the due process hearing. She testified that Student is extremely susceptible to being overstimulated. She opined that to be able to access an education, Student mostly needs a small classroom environment where there is little outside distraction, where there is not noise in the hallways as people are changing classes and where there is not that much going on outside the window. Clinical Psychologist further opined that it would be very difficult for Student to negotiate a large campus with lots of people and that even sitting in class thinking about going into a big crowded hallway between classes would be overstimulating for Student.

After receiving Clinical Psychologist’s September 25, 2020 IEE report, XXPS had a second XXPS psychologist, School Psychologist 2, conduct a supplemental psychological reevaluation to consider additional areas of special education eligibility for Student. In her January 5, 2021 psychological evaluation report, School Psychologist 2, who was not called to testify, reported, *inter alia*, that Student appeared to have difficulty sustaining working memory, which has a negative impact on XXX ability to remain attentive and focused for appropriate lengths of time, making Student more liable to lose focus mid-task or struggle to complete tasks with multiple steps.

On the issue of Student’s continuing attention challenges, I found Clinical Psychologist’s opinion more credible than that of School Psychologist 1. School Psychologist 1's dismissal of attention concerns for Student at school was based, apparently entirely, on the behavior rating scales responses of a single teacher at Nonpublic School 2, where Student was already being served in a small classroom setting in a small special school. Clinical Psychologist’s opinion that ADHD remained a constant problem for Student was based on her own observations of Student in a one-hour interview and over several hours of testing. I also find that School Psychologist 2's report in January 2021, that Student’s working memory challenges have a negative impact on XXX ability to remain attentive and focused for appropriate lengths of time, tended to support Clinical Psychologist’s opinion that attention at school was still a concern for Student. Also, School Psychologist 1 acknowledged in her December 19, 2019 psychological reevaluation report that Student had been diagnosed with ADHD in 2013, was taking medication for ADHD on the day of testing and that based on Mother’s rating scales responses, Student’s inattention fell in the Slightly Elevated to Very Elevated range. I conclude from the preponderance of the hearing evidence that Student’s placement at City School 4 may not *now* be considered reasonably calculated to enable Student to make progress appropriate in light of his circumstances. *See R.F., supra,* 919 F.3d at 246-47.

Whether at the time the XXPS IEPs were created, the IEPs were reasonably calculated to enable Student to make appropriate progress is a separate question. In *Schaffer ex rel. Schaffer v. Weast*, 554 F.3d 470, 477 (4th Cir. 2009), the 4th Circuit cautioned against “excessive hindsight‑based judging of IEPs.” “Judicial review of IEPs under the IDEA is meant to be largely prospective and to focus on a child’s needs looking forward. . . . Judicial review would simply not be fair to school districts, whose decisions would be judged in hindsight based on later assessments of a Student’s needs at a later point in time.” *Id.* 554 F.3d at 477 (internal quotations and citations omitted.)

Of course, XXPS’ IEP teams did not have either Clinical Psychologist’s September 28, 2020 IEE evaluation of Student or School Psychologist 2's January 5, 2021 reevaluation at the time of the May 6, 2020 and August 19, 2020 IEP meetings. In fact, it appears that Clinical Psychologist’s opinion about the inappropriateness of a large school campus for Student was not communicated to XXPS before Clinical Psychologist testified at the due process hearing on March 3, 2021. (Clinical Psychologist testified that she did not make educational recommendations in her evaluation report.) The IEP team did have Neuropsychologist’s 2018 psychological reevaluation report in which he recommended that the parents “explore the range of specialist educational settings” for Student, but Neuropsychologist did not explicit recommend against a large public school placement.

“[T]he measure and adequacy of an IEP can only be determined as of the time it is offered to the student. . . . Neither the statute nor reason countenance ‘Monday Morning Quarterbacking’ in evaluating the appropriateness of a child’s placement.” *O’Toole ex rel. OToole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 701-02 (10th Cir.1998). I conclude that the Petitioners have not met their burden of persuasion that, based upon the information available to the XXPS IEP teams at the time the IEPs were created in May and August 2020, XXPS’ proposal to place Student at City School 4 was inappropriate. However, I find that within a reasonable time after receipt of Clinical Psychologist’s IEE evaluation report, at least by the end of XXPS 2020-2021 winter break, XXPS had a duty to reconvene Student’s IEP team to review the IEE report and to revise Student’s IEP to provide an appropriate location of services. *See* 34 C.F.R. 300.324(b). *See, e.g., Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 524, 127 S. Ct. 1994, 2000, 167 L. Ed. 2d 904 (2007) (IDEA requires IEP team to revise the IEP when appropriate to address certain information provided by the parents.) XXPS failure to do so was a denial of FAPE.

c. Did XXPS deny Student a FAPE by not offering Student special education services or a special education placement at the last part of 2019‑2020 school year?

The Petitioners allege that XXPS further denied Student a FAPE because its proposed May 6, 2020 IEP provided a “Begin Date” of August 25, 2020 at the beginning of the 2020-2021 school year, instead of immediately upon completion of the IEP. (The parents had also claimed that XXPS denied Student a FAPE by not offering Extended School Year (ESY) services for Student over summer 2020. Petitioners, by counsel, withdrew the ESY claim in closing argument.)

This claim lacks merit. The IDEA does not set a specific time period for implementation of an IEP, but requires that special education and related services must be made available “[a]s soon as possible following development of the IEP.” 34 C.F.R. 300.323(c)(2). As the Second Circuit Court of Appeals explained in *D.D. ex rel. V.D. v. New York City Bd. of Educ.*, 465 F.3d 503 (2d Cir. 2006), *opinion amended on denial of reh’g*, 480 F.3d 138 (2d Cir. 2007), when the IEP meetings occur at the end of the school year, it may not be undue delay for the IEP team to determine that the child does not need special education and related services until the next school year begins.

[The IDEA regulations require] only that IEPs be implemented as soon as possible,” not” immediately, or within 30 days as Plaintiffs assert. In 1997, Congress amended various parts of the IDEA. Pub.L. No. 10517, 111 Stat. 37. The Secretary of Education subsequently published a notice of proposed rule making in the Federal Register to amend certain portions of the regulations governing the IDEA. 62 Fed.Reg. 55026 (Oct. 22, 1997). The notice invited comments on the proposed regulatory changes. *Id.* With respect to [former regulation 300.342], several commentators stated that the terms “as soon as possible” (in the regulation itself) and “undue delay” (in the accompanying commentary) were “not meaningful” and requested that the Secretary define or clarify those terms. 64 Fed.Reg. 12406, 12579 (Mar. 12, 1999). Commentators also recommended that the Secretary impose an “outside timeline,” such as 15 days, for the implementation of IEPs following the meetings. *Id.* The Secretary declined these suggestions, stating it would not be appropriate to add an outside timeline under [former section 300.342(b)] for implementing IEPs, especially when there is not a specific statutory basis to do so.” *Id.* Nevertheless, the Secretary commented that “with very limited exceptions” IEPs should be implemented without undue delay following the IEP meetings.” Id. The Secretary listed the following examples of “situations” that may warrant “a short delay”:

(1) when the IEP meetings occur at the end of the school year or during the summer, and the IEP team determines that the child does not need special education and related services until the next school year begins[ ] or (2) when there are circumstances that require a short delay in the provision of services (*e.g.*, finding a qualified service provider, or making transportation arrangements for the child). *Id.*

*D.D., supra* at 513-14.

In the present case, as early as January 6, 2020, XXPS advised the parents that they could enroll Student in XXXXXX School 4 right away and, pending completion of new special education assessments, Student would be provided services comparable to those in XXX last, April 1, 2014 XXPS IEP. Of course, the parents had already enrolled Student in Nonpublic School 2 for the rest of the 2020-2021 school year. The May 6, 2020 IEP was completed some five weeks before the end of school and there was no evidence at the hearing that the parents ever sought to re-enroll Student in XXPS before year end. Under these facts, I find that the IEP team’s providing for Student’s IEP services to start at the beginning of the 2020-2021 school year was not undue delay and did not result in a denial of FAPE to student.

Remedies

Private School Reimbursement

Having found that XXPS violated the IDEA and denied Student a FAPE by failing to propose an appropriate school to implement Student’s IEP by the end of XXPS’ 2020-2021 winter break, I turn to the second part of the *Burlington-Carter* framework: Was the private placement chosen by the parents, Nonpublic School 2, proper under the IDEA. U.S. District Judge Joseph Anderson pronounced in *Heffernan, supra,* the principal inquiry as to whether the private placement was “proper” is whether the placement was “reasonably calculated to enable the child to receive educational benefits.” *Id., citing Carter, supra*, at 163. This derived from the Supreme Court’s standard for IEP appropriateness in *Rowley, supra.* In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE‑1*, --- U.S. ----, 137 S.Ct. 988, 197 L.Ed.2d 335 (2017), the Court expanded upon the IEP appropriateness standard from *Rowley,* holding that the IDEA requires that an IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.,* 137 S. Ct. at 999. It follows that for a private placement selected by the parents to be proper under the IDEA, the private school must satisfy the substantive IEP appropriateness requirement, *i.e.*, it must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *See Endrew F.*, 137 S.Ct. at 999; *L.H. v. Hamilton Cty. Dep’t of Educ.*, 900 F.3d 779, 791 (6th Cir. 2018).

Here the evidence establishes that Nonpublic School 2 was proper for Student. Student started at Nonpublic School 2 at the beginning of the 2019-2020 school year and was already attending the private school when the XXPS IEP team met in spring 2020 to develop Student’s IEP. Nonpublic School 2 was one of several private day schools recommended to the parents by staff at Nonpublic School 1 when student was aging out of that school at the end of the 2018-2019 school year. The parents also spoke to Neuropsychologist about the school and visited the campus. They learned that Nonpublic School 2 focuses on students with learning differences, including children with dyslexia. The school offered very small classes, individualized attention from teachers and a one‑on‑one counselor who was constantly checking in with Student. By all accounts, Student has done very well at the school. Head of School testified, without rebuttal, that Nonpublic School has been an appropriate placement for Student. I find that the parents have established that their choice of Nonpublic School 2 proper, that is, it was reasonably calculated to enable Student to make progress appropriate in light of Student’s circumstances.

XXPS contends that the parents should be denied private school reimbursement because they unilaterally placed Student at Nonpublic School 2 at the beginning of the 2019-2020 school year, long before they provided notice to XXPS on May 11, 2020 that they were rejecting the IEP proposed by XXPS for Student. The federal IDEA regulations provide that the cost of private school reimbursement may be reduced or denied:

(1) If:

(i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section; . . . or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

*See* 34 C.F.R. 300.148(d).

I have found in this decision, that parents established that XXPS denied Student a FAPE by not timely revising Student’s XXXXXX School 4 placement location following receipt of Clinical Psychologist’s September 28, 2020 IEE evaluation report. This occurred months after the parents gave written notice to XXPS that they were rejecting the XXXXXX School 4 placement proposed by XXPS. I find no justification for denying or reducing reimbursement due the parents based on 34 C.F.R. 300.148(d).[[7]](#footnote-7)

Prospective placement for the remainder of the 2020‑2021 school year

The parents also request that I order OSSE to fund Student’s ongoing placement at Nonpublic School 2 for the remainder of the 2020-2021 school year. As of the due process hearing date, XXPS had not offered Student an appropriate IEP with a suitable placement location. In its *Burlington* and *Carter* decisions, the Supreme Court pronounced that if the school division has denied a child a FAPE, the court is authorised to fashion discretionary equitable relief including an appropriate and reasonable level of reimbursement for the parents’ private education expenses. *See Carter*, 510 U.S. at 16. Clearly, it would be too disruptive for Student and not equitable to require Student to change schools so late in the current, 2020-2021, school year. *Cf. Branham v. Government of the Dist. of Columbia*, 427 F.3d 7, 12‑13 (D.C. Cir. 2005) (Asking whether setting aside placement order might disrupt child’s education.) Therefore, I will require XXPS to fund parents’ tuition obligation for Student’s placement at Nonpublic School 2 for the remainder of the private school’s 2020-2021 regular school year. I will also order XXPS to ensure that a revised IEP for Student is promptly developed, in accordance with this decision and the requirements of the IDEA and the Virginia Regulations. Representatives of Nonpublic School 2 should be invited to participate in the IEP team meeting. *See* 34 C.F.R. 300.325(a)(2).

**ORDER**

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:

1. Upon receipt of documentation of payment by the parents, as may be reasonably required, XXPS shall, without undue delay, reimburse the parents their costs for covered tuition and related expenses, including covered transportation expenses, for Student’s enrollment at Nonpublic School 2 from the end of the 2020-2021 winter break through the present and shall continue to fund Student’s placement Nonpublic School 2 through the end of the private school’s 2020-2021 regular school year;

2. XXPS shall promptly reconvene Student’s IEP team to revise Student’s IEP in accordance with this decision and, specifically, to identify an appropriate school location to implement Student’s IEP for the 2021-2022 school year and

3. All other relief requested by the Petitioners herein is denied

Date: April 23, 2020 s/ Peter B. Vaden

Peter B. Vaden, Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. A decision by the special education hearing officer in any hearing is final and binding unless the decision is appealed by a party in a state circuit court within 180 days of the issuance of the decision, or in a federal district court within 90 days of the issuance of the decision . The appeal may be filed in either a state circuit court or a federal district court without regard to the amount in controversy.

1. On the fourth day of the hearing, LEA REPRESENTATIVE 2 appeared in place of LEA Representative 1 for part of the day. [↑](#footnote-ref-1)
2. During closing argument, Petitioners’ Counsel clarified that the parents were seeking reimbursement from XXPS for expenses incurred, not compensatory education. [↑](#footnote-ref-2)
3. In his oral closing argument made on March 12, 2021, Petitioners’ Counsel stated that the parents are not challenging XXPS for not providing an equitable services plan for Student. [↑](#footnote-ref-3)
4. Regardless of the disability classification for special education eligibility relied upon by the LEA, the LEA must ensure that IEP special education and related services are tailored to the unique needs of each child. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE‑1*, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017). In September 2020, Clinical Psychologist diagnosed Student with a learning disability in reading. Although Student was determined in March 2020 not to meet eligibility criteria for an SLD disability, XXPS did identify Reading as well as Communication/Using Language, Writing/Written Language, and Executive Functioning as areas of need for Student in its proposed May 6, 2020 and August 19, 2020 IEPs and provided annual goals and services for Student in each of these areas. [↑](#footnote-ref-4)
5. The August 19, 2020 also provided for reduced services that Student would receive via virtual instruction during the Coronavirus school closings. The appropriateness of the proposed virtual instruction services are not at issue in this proceeding. For purposes of this decision, I assume that the parent’s IEP and placement claims pertain only to Student’s special education needs and services for the normal, in-person, school sessions.) [↑](#footnote-ref-5)
6. Clinical Psychologist testified that the first page of her report is misdated September 25, 2020. [↑](#footnote-ref-6)
7. I find no grounds for requiring XXPS to reimburse the parents for their expenses for Student to attend Nonpublic School 1 in the 2019-2019 school year or for other expenses for tutoring and private educational services they obtained for Student. [↑](#footnote-ref-7)