#20-025

### VIRGINIA DEPARTMENT OF EDUCATION DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES

XXXXXXXX County Public Schools Mr. & Mrs. XXXXXXXXX

School Division (XCPS) Parents

Mr. John F. Cafferky, Esq. X.X.

Ms. Emily K. Haslebacher, Esq. Child

Counsel Representing XCPS

Mr. Michael J. Eig, Esq.

Ms. Paula A. Rosenstock, Esq.

Counsel Representing Parents

Mr. Reginald Frazier, Esq. Evaluator

Morgan Brooke-Devlin, Esq. Parents initiated Hearing

Hearing Officer

### HEARING OFFICER DECISION

### Procedural Background:

This action stems from the filing of a Due Process Complaint filed with the Virginia

Department of Special Education and Student Services Office of Dispute Resolution by Mr. XXXXXXXXX and Mrs. XXXXXXXXX, Parents, against XXXXXXX County Public Schools (XCPS) alleging that the XXXXXXX School District failed to provide X.X. (XX) a free and appropriate public education (“FAPE”) in contravention of the Individuals with Disabilities Education Act, [20 U.S.C. §§ 1400](https://casetext.com/statute/united-states-code/title-20-education/chapter-33-education-of-individuals-with-disabilities/subchapter-i-general-provisions/section-1400-short-title-findings-purposes) *et seq.* (“IDEA”). The Parents allege that XCPS has failed to provide XX with Individualized Education Programs (IEPs) that contain appropriate goals, accommodations, services and placement to enable XX to access a meaningful educational benefit, given his unique educational needs.

The Due Process Complaint was filed on October 21, 2019, and this Hearing Officer was appointed on October 24, 2019. A First Pre-hearing Conference was held on October 29, 2019. At the Conference a joint Motion was made by the parties to extend the Due Process Hearing timeline and decision date due to severe scheduling conflicts. A determination was made that an extension of time would be in the student’s best interest and that there would be no negative impact on the student if the parties’ Motion was granted. Accordingly, the Motion was granted and the Due Process Hearing was set for January 27-31, 2020. The Parent’s Attorney agreed to give XCPS attorney additional time, until November 5, 2019, in which to file the XCPS Answer to the Due Process Complaint. The XCPS Answer was duly filed on November 5, 2019.

On January 17, 2020, the parties made a joint Motion to permit the Parents to file an Amended Due Process Request. The Motion to Amend set out the reasons for the request to amend, among which was a January14, 2020 IEP meeting, and the Parent’s desire to include additional allegations arising from that meeting in their Due Process Request. The parties agreed that amending the hearing request to include all relevant information would be in the best interest of the student. As the request to amend was timely, agreed to by both parties and in the best interest of the child, the Motion was granted permitting the amendment. The Parents were given until January 27, 2020 to file their Amended Due Process Request, The Amended Due Process Request was timely filed and Answered by XCPS.

The January 27-31 hearing dates were cancelled and the Hearing was set for March 16-20, 2020.

On March 13, 2020, in light of the Covid-19 Pandemic and the declared State of Emergency in the Commonwealth of Virginia, and upon the Motion of the parties, it was determined that the March 16-20, 2020 hearing should be cancelled and re-scheduled for April 20-24, 2020. The subsequent closure of the XXXXXX Public Schools then necessitated that the hearing be continued until June 1, 2020, and that it be conducted by video conference.

The Due Process Hearing was held on June 1-5, 10, 11 & 15, 2020. The parties introduced a total of two hundred and one exhibits and nineteen witnesses. Upon the joint motion of the parties all exhibits were admitted to the record.

This Decision is issued within the time limitation period under the IDEA. The record includes the Parent’s Due Process Request and Amended Request, XXXXXX County Public Schools Response to the Due Process Request and the Amended Request, Orders, the Parent’s exhibit book, the XCPS exhibit book, Parents and XCPS Closing and Briefs including Proposed Findings of Fact and Conclusions of Law as well as the full written transcript of the Hearing and this Hearing Officer Decision.

### A. Burden of Proof:

In *Schaffer v. Weast,* 554 F.3d 470 (4th Cir. 2009) the United States Supreme Court held that in determining the appropriateness of a proposed educational program the burden of proof, in an administrative hearing challenging an IEP, is properly placed upon the party seeking relief, whether that is the parent of a disabled child or the school district.

The Parents filed this due process hearing request on behalf of XX and accordingly they have the burden of proving that the special education programs proposed by XXXXXX Public Schools, to be provided at XXXXXXXX Middle School, were not appropriate and, that if they are not found to be appropriate, that the program at the XXX School, chosen by the Parents, was and continues to be appropriate. Accordingly, I find that the Parents have the burden of proof on all issues raised and allegations made in the Amended Due Process Complaint and this Due Process Hearing. *Florence County Sch. Dist. v. Carter,* 510 U.S. 7, 15 (1993).

### B. Threshold Issue: Statute of Limitations

The IDEA as well as the Commonwealth of Virginia have a two-year statute of limitations period during 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). 20 U.S.C. Section 1415 (b)(6)(B).

According to 34 CFR 300.511(f) the only exceptions are when the parent is prevented from requesting a due process hearing due to (a) specific misrepresentations by the District that it had resolved the problems forming the basis of the complaint, or (b) the district’s withholding of information from the parent that the IDEA required it to provide and, if because of that, the parent was prevented from filing a complaint.

The Parents removed XX from XCPS in August of 2017 and unilaterally placed him at the XXX School in Washington D.C. for the 2017-2018 school year. The Parents’ Complaint was filed on October 21, 2019, almost two years after they removed XX from XCPS. Accordingly, absent the Parents proving that there exists an exception in their favor, the two-year statute of limitations period began to run on October 21, 2017.

The threshold issue in this case is whether the Parents have met their burden of proof in establishing that there exists in their favor an exception to the two year statute of limitations regarding alleged violations and XCPS’s failure to provide XX with FAPE.

In their Complaint the Parents referenced, among other things, alleged violations and denial of FAPE by XCPS concerning XX for many years pre-dating October 21, 2017.

Mrs. XXXXX testified that the Parents were increasingly concerned about XX’s progress at XCPS, when he was in 4th and 5th grades, leading to a “lack of trust”. Tr. at 239. The Parents argued that XX had failed to make meaningful progress during his time at XCPS, and had actually regressed in many areas.

However, The Parents consented to all IEPs proposed by XCPS for XX beginning from when he was in Kindergarten through fifth grade. *XCPS* -22, 31 & 47.

Much of the Parent’s case rests upon their allegations that XX was not provided FAPE by XCPS while he was a student in XXXXXXX from Kindergarten through fifth grade. After close examination of the exhibits and testimony I do not find that there was any evidence or testimony introduced by the Parents to support a finding that they were prevented from requesting a due process hearing due to (a) specific misrepresentations by the District that it had resolved the problems forming the basis of the complaint, or (b) the district’s withholding of information from the Parents that the IDEA required it to provide and, if because of that, the Parents were prevented from filing a complaint.

I do not find Mrs. XXXXX’s testimony regarding her being given assurances by XX’s teachers in Kindergarten and first grade that XX would catch up in reading and writing skills by second grade (Tr. 226-228) to be a misrepresentation by XCPS or that XCPS withheld information required by the IDEA to be provided to parents. This is especially true when XCPS provided XX with an IEP in second grade to address his special education needs.

Based on my review of the evidence and testimony I find that neither of the exception to the two year statute of limitations as set out in 34 CFR 300.511(f) have been established by the Parents in this matter.

Both parties were specifically asked to address the issue of the application of the two-year Statute of Limitations in their Closing Arguments. Parents failed to address this issue and instead argued that XCPS had denied XX FAPE for his entire tenure as a student at XCPS. There was no argument, testimony or exhibits addressed, or cases cited to support a finding that the two-year Statute of Limitations should not be applied to their case and the allegations made in their Complaint.

It is clear that any purported claims and allegations accruing prior to October 21, 2017 are time-barred by IDEA’s two-year limitations period. 20 U.S.C. §1415(b)(6)(B). *See Fairfax Cnty. Sch. Bd. v. Knight*, 107 LRP 2101 (E.D. Va. 2006) (parent may recover for only that conduct of the school district that was alleged to have occurred within two years prior to the filing date of the due process hearing request); *Davis v. Hampton Public Sch. Dist.*, 53 IDELR 17, 231 (E.D. Va.), affirmed 352 F. App's 780 (4th Cir. 2009) (challenge to alleged misclassification of student was not brought within two years, and was therefore time-barred); *Emery v. Roanoke City Sch. Bd.*, 432 F.3d 294, 300 n.2 (4th Cir. 2005) (statute of limitations bars parents’ request for a due process hearing); *R.R. v. Fairfax Cnty. Sch. Bd.*, 338 F.3d 325, 332-33 (4th Cir. 2003) (same).

It is well settled that IDEA claims “‘accrue when the parents know of the injury or the event that is the basis for their claim.’” *Richards v. Fairfax County Sch. Bd.*, 798 F. Supp. 338, 341 (E.D. Va. 1992) (quoting *Hall v. Knott County Bd. of Educ.*, 941 F.2d 402, 408 (6th Cir. 1991), *See also R.R. ex rel. R. v. Fairfax County Sch. Bd.*, 338 F.3d 325, 331-333 (4th Cir. 2003).

Therefore, I find that the Parents have not met their burden of proof on this issue and that any claims made regarding the period prior to October 21, 2017 are found to be time-barred

Testimony and exhibits introduced regarding XX’s progress in the years prior to his beginning 6th grade at the XXX School, including but not limited to: evaluations, reports, IEPs and proposed IEPs, which have been listed in the general factual findings portion of this decision and referred to in discussion have been used solely for the purpose of putting the relevant two year time period in context and are to be viewed as a background narrative of XX’s history as a student at XCPS, and do not form the basis for a determination of FAPE during any period prior to October 21, 2017**.**

Other than evidence needed to determine whether FAPE was provided to XX within the two year time period beginning October 21, 2017, claims and allegations made in the Parents’ Amended Due Process Complaint and in the parties’ Closing Arguments regarding alleged denial of FAPE prior to the October 21, 2017 time period will not be considered in making a determination regarding FAPE during the period beginning with October 21, 2017. [[1]](#footnote-1)

Consequently, I limit the time frame in this Decision to the allegations of denial of FAPE and other matters raised within the two-year period beginning on October 21, 2017, going forward.

### C. ISSUES:

**1.** Were the Individual Education Programs (IEPs) provided and proposed by XCPS for XX for the fall 2017-2018, 2018-2019 and 2019 to 2020 school years appropriate and designed to permit XX to make meaningful educational progress in the least restrictive environment, given his unique needs, and in accordance with the meaning of the Individual with Disabilities Act, 20 U.S.C., §§ 1400 (IDEA)?

**2.** Are the Parents entitled to reimbursement and/or public funding under IDEA arising from their unilateral removal of XX from XCPS and placement of XX in the XXX School in XXXXXXXXXXXXX for the fall 2017-2020 school years?

### D. General Factual Findings:

**1.** XX is a well-adjusted and well-liked fourteen year old young man who lives with his parents in XXXXXXX Virginia.

2. Beginning in the fall of 2011, XX attended XCPS public schools from Kindergarten through fifth grade. XX attended XCPS XXXXXX Elementary School (XXXXXX), which was his neighborhood school, from Kindergarten until he left to begin attending the XXX School in sixth grade.

3. XCPS found XX eligible for special education and related services as a student with Specific Learning Disabilities in January of 2014, when he was in second grade. *XCPS.*12. This eligibility was based upon identified weaknesses in the areas of reading, phonological awareness and written expression. The Parents attended the meeting and agreed with this determination.

4. In January of 2014, XX was provided with an IEP, while in second grade, which was consented to by the Parents. *XCPS-*12.

5. XX continued to receive special education services in third, fourth and fifth grades. The IEP teams reviewed the proposed goals, accommodations, services, and appropriate placement for XX. *XCPS* -22. At each meeting the Parents were given the opportunity to participate as part of the IEP team, to express and discuss concerns and to contribute their ideas and suggestions for each IEP. *XCPS*-22, 31 & 47. The Parents consented to each of these IEPs. *XCPS* 22, 31, & 47.

6. The amount of special education services in the IEPs were gradually increased over the years. Tr. 304

7. While in fifth grade XX was evaluated by Ms. XXXXXXXX, an XCPS school psychologist. She found that XX had average cognitive skills, but had weaknesses in phonological memory, retrieval efficiency, word decoding and fluency. These weaknesses were found to impact his ability to read. She also found that he had challenges with his writing and math skills. *P.*-06

8. XXXXXX, XX’s XCPS 5th grade special education teacher conducted an Educational Evaluation and administered the Woodcock-Johnson Test of Achievement (“WJ”) to XX when he was in fifth grade. The test results showed that XX’s reading, math, and written language scores fell within the low to low average range. His academic skills and academic fluency were in the low range and his academic applications were in the average range. *P.* - 7

9. XX is a student with mild to moderate learning disabilities. Tr. 838-839 He has mild deficits in some areas, such as passage comprehension, oral reading and more moderate deficits in some areas, such as fluency. Tr. 838-839.

10. With the agreement of his Parents XX continued to be found eligible for special education and related services, on October 26 2016.

11. The last IEP agreed to by XCPS and the Parents was the November 16, 2016 IEP which was implemented over the course of the 2016-2017 school year. *XCPS*-31 & 47. This IEP increased the hours of support in the general education classroom to 3.5 hours per day and 30 minutes per week of occupational therapy. *P*-11.

12. At the end of 5th grade XX passed the Standard of Learning Assessments (SOL) in every subject but math: science- pass advanced (501); reading -pass (472); math-did not pass (391). In 4th grade XX scored (438) in reading; got an advanced pass (514) in social studies and passed math (418). XX showed progress in reading from 4th to 5th grade. *P-* 30-5.

XX’s math score was sufficiently high at 391 (passing score is 400) that he was eligible to re-take the test but his Parents declined this opportunity. *P*-21, 2 &1.

13. The Parents allege that the reason that XX did so well on his 5th grade SOL reading assessment was because XCPS teachers, in contravention of his IEP which only provided read-aloud accommodations for non-reading assessments, read-aloud the reading questions on his SOL which were intended to assess his reading abilities.

A student’s IEP determines whether they receive read-aloud accommodation. Tr. 1032. XX’s fourth and fifth grade IEPs included the read-aloud accommodation by which portions of tests were read-aloud to X such as in science and social studies but they did not include accommodation for read-aloud for reading assessments. *XCPS*-47 at 12; XCPS-31 at 12.

Ms. XXXXXXX, XX’s XCPS 5th grade special education teacher, who proctored the 5th grade reading SOL, testified that XX was not provided with read-aloud accommodation for the reading SOL. Tr. 1032-33.

She explained that XCPS staff are trained in the importance of adhering to a student’s IEP accommodations for reading and other subjects and that the staff are trained so that understand that they are not permitted to deviate from the student’s IEP. She emphasized that staff are made aware that any deviation from the IEP could be the basis, for among other things, losing their job and teaching credentials. Tr. 1353-54; Va Code § 22.1-292.1.

I find the Parents’ allegation to be without merit. I believe that X was mistaken or confused when he told his parents that he had been read-aloud the reading portion of his SOL.

It should also be noted that the Parents failed to address this concern with XCPS at the time of the 5th grade SOLs; nor is it documented that they raised this concern in subsequent IEP meetings or communications with XCPS.

I find Ms. XXXXXX’s recollections and testimony to be far more credible than Mrs. XXXXX’s vague recollections of discussions occurring during an IEP meeting regarding read-aloud accommodations or the written statement signed by XX in June of 2020, almost four years after the alleged event. *P*.96

14. XX made passing grades in his end of 5th grade report card. He earned an A in science and social studies, a B in English Language arts-reading, and a C in math and English Language arts-writing. *XCPS*-34.

15. XX’s teacher, Ms. XXX, testified that these grades are not simply handed out, but are based on actual work, quizzes and tests successfully completed by XX. Tr. 1300-1305. As a result of his passing his classes, he was promoted to sixth grade. Tr. 1304-1205.

16. XX’s XCPS teachers testified that he had improved a full year going from 4-2 to 5-1 in his instructional reading level in reading, writing, and math. *XCPS-*34; *XCPS*-28; Tr. 1041-43.

17. Ms. XXXXXX XX’s XCPS 5th grade special education teacher testified that “I think that it is meaningful progress to move up that much in a grade level…it was definite progress that was made. “ Tr. 1042-1043.

18. The IEP team met on June 7, 2017, to develop an IEP for 2017-2018 school year to discuss XX’s transition to middle school. *XCPS*-57; *P*-24.

XX’s last IEP had been developed only six months before so the team reviewed and discussed X’s progress since then using teacher input and testing performed. They noted that X consistently performed “proficiently” on reading assignments throughout the year as shown by quizzes, tests, creative and comprehensive tasks and benchmark evaluations used to “gauge student understanding and growth in reading.” Tr. 1302,1311-12.

Services proposed included 17.5 hours of specialized instruction per week, 10.5 of which would be provided in the self-contained special education setting for reading, writing, and math instruction, with the remainder provided in a co-taught science and social studies classes. *P.*24.at 11;Tr. 1059-62. Also proposed was 1 hour per month of Occupational Therapy. *P*.24.

The Parents’ input was considered and incorporated into the IEP. Tr.1057. Mrs. XXXXX advised the team that she wanted to take the IEP home to discuss it with her husband before signing. By e-mail to Ms. XXXXX on June 22, 2017, the Parents advised her that they would not be signing off on the IEP until XX’s doctors had a chance to review it. *P*-26.

19. On August 9, 2017 the Parents sent XCPS an e-mail along with a copy of a neuropsychological report they had commissioned from Dr. XXXXXXXX from the XXXXXX Group. *P*-27. In the e-mail they reference sections of the report in support of their rejection of the 6/7/2017 proposed IEP and their decision to remove XX from XCPS and enroll him in the XXX School:

“In light of the report we plan to enroll X in the XXX School of XXXXXXXXX, a school dedicated to educating students with learning differences like L and we reserve our right to seek tuition funding from the school district.” *P*-28.

20. The XXX School, located in XXXXXXXXXX, is a private day school limited to teaching students with learning disabilities. Tr. 437-474.

In order to get to the XXX School XX is dropped off at a shopping center near his house and then takes a bus into the city which takes almost an hour each morning. Tr. 343.

The school has four divisions including an elementary, intermediate, junior high and high school with grade levels from first through twelfth grade. Tr. 517-18. Approximately 375 students attend the XXX School with 100 of them attending the junior high division of seventh and eighth grades. Tr. 473.

All students enrolled at the XXX School have learning disabilities thus there are no general education peers. Tr. 475. All activities XX engages in, such as Art, Music, Physical Education, sports, lunch and recess, are done in a restrictive special education environment. Tr. 484.

21. Dr. XXXXXXXX, the Compliance Specialist for XCPS, sent the Parents a letter on August 16, 2017, advising them that XCPS staff were willing to reconvene the IEP team to “explore placement options and to review the XXXXXX report.” She also asked that XCPS be permitted to observe XX at the XXX School “regarding strategies programs or curriculum.” *P*. 28-2.

22. The Parents sent a letter to XCPS, Office of Special Education on August 24, 2017, stating that they would meet with the IEP team on August 28, 2017 and that:

“…we are not parentally placing nor withdrawing X; are we unilaterally placing him and seeking tuition funding and transportation for his education at the XXX School because we believe that the school district has not offered X a free appropriate public education (FAPE).” *.P.*-28.

23. The XCPS IEP team and Mrs. XXXXXX met on August 28, 2017. *P*-30.The team reviewed the relevant factors for the IEP, which included but were not limited to: Medical, Transition Testing background; Present levels of Academic and Functional Performance; reviewing Standardized Testing results, including end of 5th grade SOLs Science Pass Advanced (501); Reading Pass (472) Math not passed (391) end of 4th grade SOLs where XX passed all assessments and a summary of current XCPS assessments; *P*.30-1, 2-4.

The team reviewed XX’s annual goals and benchmarks or short term objectives; special education accommodations, services and related services.

The team proposed a new goal to address XX’s fine motor functioning. The IEP also contained goals in all other areas of academic and behavioral areas, including reading, decoding, written expression, reading comprehension, math reasoning and calculation, and attention/organization. *P-*30 8-19. Also included in X’s IEP were accommodations such as checks for understanding, extra time to complete assignments, read-aloud for non-reading tests, structured movement breaks, use of word processor, graph paper, small group assignments, modification of homework to show mastery and chunking and scaffolding of assignments. *P*. 30-11.

Additionally, XCPS proposed to increase X’s specially designed instruction from 17.5 to 21 hours per week, to include specific organization and executive functioning instructions in the self-contained instructional studies course. It also proposed an increase in Occupational Therapy services from 1 hour per month to 1 hour per week.

The 8/29/17 Proposed IEP would also have provided XX English and Math as well as an additional reading course, in a small group, self-contained special educational setting. Organization and executive functioning instruction would have also been taught in a self-contained classroom. *P.* 30-11 and Tr. 1065-67.

The remaining core classes such as science and social studies would have been taught in a co-taught classroom. *P*.30-1.

In co-taught classes students with disabilities participate in regular education classes with their non-disabled peers and receive grade level curriculum while being supported by a certified special education teacher. *P.*30; Tr. 769; Tr. 1067..

XXXXXXXX Middle School, XX’s neighborhood school, which is 1.6 miles from his home, was proposed as the least restrictive environment for XX. In proposing XXXXXXXX, the team found that a private placement was unnecessarily restrictive for X given his achievements and progress in the general education setting with small groups special education support. *XCPS*-30; Tr.1068. The team also confirmed that it believed that XX would benefit from self-contained reading, writing, and math support and that it was being offered and would be available to XX at XXXXXXXX Middle School for the fall 2017-2018 school year. *XCPS*-30; Tr. 789; Tr. 1068.

24. The August 28, 2017, prior Written Notice listing the Other Factors relevant to the team’s decision noted:

“Teacher narratives, along with XX’s 3’d and 4th quarter grades and IEP progress reports were reviewed. In addition the educational testing and private neuropsychological evaluation were also reviewed. Ms. XXXXX expressed concerns about the level of reading/spelling supports her son needed and wanted to know what Reading interventions strategies and supports we use with students at XXXXXXXX Middle School.

Ms. XXXXXX, Reading specialist, joined the IEP meeting to explain Reading interventions, strategies and supports that are used by her and other reading teachers at XXXXXXXXXXX Middle School. Ms. XXX also talked about how the student’s needs would be addressed, as well as the frequency of testing. Several accommodations were added to the IEP based on the needs of the student. XXXXXXXXXXX Middle School was offered for FAPE, where the student would be in the least restrictive environment.

Our Special Education Coordinator, XXXXXXXXX, requested that a counselor or SPED teacher visit the XXX School to observe XX in the instructional setting. Ms. XXXXX agreed that it would be a good idea to conduct the observation and she signed a release of information consent form giving consent for the observation to occur. Ms. XXXXX wanted her husband to be able to review the IEP before a decision was made and the IEP signed. Ms. XXXXX did mention that L started his first day on Monday, August 28, 2017” *P.* 30-19.

25. The Parents withdrew XX from XCPS on August 28, 2017, the very same day as the August 28, 2017 IEP meeting, to attend 6th grade at the XXX School in XXXXXXXXX XX has continued to attend the XXX School from grade six through the present. *P*-29.

26. On September 11, 2017, Mr. and Mrs. XXXXX sent a letter to the XCPS Office of Special Education. In it they stated that they had reviewed the proposed IEP and that they were still unclear about some things, such as how and when the instructional teaching contained in the IEP would be delivered during the school day and when, where and with what ratio would XX receive Orton Gillingham reading methodology.

They also noted that they did not see any reference in the IEP to the private testing that they had had done at the XXXXXX group.[[2]](#footnote-2) *P.* 32

27. The Parents hired Dr. XXXXXXXX of the XXXXXX Group, in June of 2017 to prepare a neuropsychological evaluation of XX. As with the XCPS testing she reported that X had a “solid foundation of cognitive skills, including above average verbal reasoning an general knowledge average vocabulary, age appropriate fluid reasoning and some solid spatial analysis skill. “ *P.* 27. The report confirmed the prior diagnosis of learning disability in reading/dyslexia and learning disability in written language/dysgraphia. P. 27 at 17.

The Woodcock Johnson Test of Achievement scores demonstrated that X had made and maintained gains in the areas of reading, writing, and math. *P*. 27 at 14. X was shown to have distinct strengths, both actual and relative, in passage comprehension, math calculation, applied math problems, oral reading, and sentence writing fluency. *P.* 27 at 14.

Dr. XXXXX tested X’s attention and executive functioning. *P*. 27. There were demonstrated difficulties with attention regulation, dividing attention, stamina and planning. *P*. 27 at 17. Based on these evaluations Dr. XXXXX diagnosed X with Attention Deficit Hyperactivity Disorder- Predominantly Inattentive Presentation (ADHD)

28. Ms. XXXXXXXXX, an XCPS school counselor, observed XX at the XXX School on October 19, 2017. *XCPS*. 64. She observed XX for a morning meeting and a writing and reading activity. She observed that X used read-aloud materials, completed all assignments, was easily redirected and actively participated in group discussions as well as individual worksheet projects. However, X was also observed to become easily distracted, attempted to distract other students and take longer to transition between activities than others .*XCPS.* 64. She did not observe X receiving any multisensory instruction. *XCPS* 64.

29. The XCPS IEP team met again on November 8, 2017; to review Ms. XXXXXX’s report. *XCPS*.65-55. As a result of the Parents continued disagreement with the proposed IEPs the team agreed to have the XCPS School Psychologist, XXXXXXX, consult with Dr. XXXXX to discuss her private neuropsychological report. The team agreed to re-convene after this meeting was held. *XCPS*. 66.

30. The XXX School prepared an IEP on November 14, 2017. It recommended 29 hours of Special Education Services per week and 360 minutes of Occupational Therapy per month.(6 hours total); 6 Total Related Service hours per week (for a minimum of 24 weeks per year) and 35 hours of Total Specialized Instruction and Related Services per week. The XXX School found that XX’s current level of functioning for reading was 3’d grade and that his instructional level for math was only 4th grade. This was puzzling since XX had passed his 4th and 5th grade SOLs in reading, passed his 4th grade Math assessment and had come very close to passing his 5th grade math assessment. XX had also made passing grades on his 5th grade report card and had been promoted to 6th grade.

The Parents did not have Dr. XXXXX attend or participate in this November 14, 2017, XXX School IEP meeting or the May 21, 2018, XXX School IEP meeting[[3]](#footnote-3). *P*. 27; *XCPS*70-01.

31. The Parents did not call the XXX School IEP team members as witnesses at the Due Process Hearing to testify regarding the XXX IEP and explain, for example, how they interpreted testing, assessments, made observations and developed their Impact Statements.

32. On November 20, 2017, the Parents sent a letter to the XCPS Office of Special Education. They reiterated that they disagreed with XCPS recommendations of continued program and placement as proposed and believed that it was important that Dr. XXXXX, who had prepared the private neuropsychological report for the XXXXXX Group, participate in the next IEP meeting. They asked that Dr. XXXXX be permitted to attend by telephone or in person at the next IEP meeting and provided dates and times when they would be available. As in their prior letters to XCPS they were professional and polite and stated that they remained open and willing to consider any appropriate plan, program or placement for XX*. P*. 38.

33. XCPS conducted another IEP meeting on December 21, 2017.[[4]](#footnote-4) The purpose of the meeting was to review and revise the IEP, as appropriate. Both Parents attended in person and Dr. XXXXX, a private licensed psychologist attended by telephone. *XCPS*-67-01

The class observation of XX performed at the XXX School by Ms. XXXXXX, XCPS school counselor, and Dr. XXXXX’s report and recommendations were discussed and reviewed*. P.* 39-20.

After considering the observations made at the XXX School, Dr. XXXXX’s recommendations, and the Parent’s strong desire for XX to be taught in small self-contained instructional settings the team proposed that all of XX’s 21 hours of specially designed instruction be provided in the special education setting, including science and social studies. *P.* 39. He would have continued to receive 1 hour of Occupational Therapy each week. *P*.39-13.

Under this proposal XX would have continued to interact with his general education peers during lunch, physical education, art, music and recess. *P*.39-13.

The team again proposed XXXXXXXXXXX Middle School. *P.*39.

34. The Parents wrote to the XCPS Office of Special Education on January 25, 2018. They thanked XCPS for taking the time to review Dr. XXXXX’s neuropsychological evaluation for the 12/21/17 IEP meeting. The explained in detail why they disagreed with and rejected the proposals made for XX by XCPS. Specifically, they believed that XX needed a more supportive educational setting than was being offered by XCPS and that the IEP program and placement at XXXXXXXXXXX Middle School offered by the School District was still not appropriate to meet XX’s needs. *P.* 41.

35. XCPS convened a Special Education Review Committee (SERC referral) on January 5, 2018. Its report stated that:

“X is parentally placed at the XXX School of XXXXXXXXXXXXX, after attending XXXXXX Elementary School from Kindergarten to 5th grade. Parents are considering enrolling him at XXXXXXXXXXX. The XXXXXXXXXXX Middle School members of the IEP team have proposed the following services at XXXXXXXXXXX Middle School to address X’s learning needs: Special Education Setting-Reading 3.5 hours per week, Written Language 3.5 hours per week; Math 3.5 hours per week; Organization 3.5 hours per week, and Occupational Therapy 1 hour per week’ General Education Setting-Reading in Content Area 7 hours per week.” *XCPS* 68-01. [[5]](#footnote-5)

36. Ms. XXXXXXXX, XCPS Special Education Coordinator, conducted another classroom observation of XX at the XXX School on February 1, 2018. X was seen to actively and independently work at his writing assignment for the entire period. He used accommodations such as his laptop, templates, graphic organizer, highlighters, and an editing checklist. He completed his work with the minimum of assistance from the teacher, *XCPS*-69.

37. XXXXXXX Public Schools convened an IEP meeting on June 1, 2018. In addition to the XCPS personnel, Mr. & Mrs. XXXXX as well as their Attorney Mr. Michael Eig, attended the meeting.

38. XXXXXXX Public Schools sent the Parents a Prior Written Notice dated June 15, 2018, that noted:

“The IEP team reviewed and updated the PLAAFPs, Medical and IEP goals. Parents gave permission for the speech language pathologist to X. Parents also gave permission to visit the XXX School and update information on the IEP. The IEP team did not review the Accommodations, Services, ESY, Testing, Least Restrictive Environment, or Parent Statement sections of the IEP. The IEP team will reconvene to review results of the speech and language assessments as well as to address the sections of the IEP that were not discussed at this meeting.” P-52-2.

39. XCPS speech pathologist, XXXXXXXXX conducted a speech-language evaluation of XX at the XXX School on July 12, 2018. XCPS-71; P-52-53. Results of his speech and language evaluations revealed that XX had average receptive and expressive language skills when compared with his same age peers, as demonstrated by his Core Language Score from the Clinical Evaluation Fundamentals, 5th Edition, where he earned a score of 10, which falls in the average range. “He demonstrated strengths in his ability to identify semantic relationships as well as recall sentences verbatim. X’s articulation, voice and fluency skills are all age appropriate at this time. X generated an organized and succinct expanded complete narrative that was organized and independently communicated.” P. 53-1-4. It was noted that L’s narrative language skills assessment indicated that he “may benefit from extended time to formulate responses.” *P.* -53 at 3-4; Tr. 1138-39.

40. The Parents, through Counsel, notified XCPS by letter dated August 6, 2018 that they were continuing XX’s unilateral placement at the XXX School for the 2018-2019 school year. *P.* 54.

41. XXXXXXX Public Schools held an IEP meeting on September 11, 2018. In addition to the XCPS personnel, Mr. & Mrs. XXXXX as well as their Attorney, Mr. Michael Eig, attended the meeting. *P.* 55.

XXXXXXXXX, the XCPS XXXXXXXXXXX Middle School speech pathologist, attended the meeting and reviewed the speech and language (S&L) evaluation with the team. *XCPS*. 75; Tr. at 1140. Based upon her presentation the team agreed that X would benefit from S&L services in the special education setting for one hour per week in addition to receiving an accommodation of extra time for oral responses. *XCPS*-75 at 16; *P.* 55; Tr. 1138-1142.

The IEP team proposed updated goals in all of X’s areas of need, including decoding, written expression, reading comprehension, math reasoning and calculation, attention/organizing and motor functioning. *XCPS-*75 at 11-15.

The team also proposed to continue the 21 hours of specially designed instruction in the self-contained setting for English, math, science, social studies, reading, and instructional studies. XCPS-75 at 11-15.

In addition to the newly proposed speech and language related service hours the team increased X’s OT service from 1 hour per week to 1.5 hours per week in the special education setting, with an additional 30 minutes of OT consultation per month. *XCPS*-75 at 21.

42. The IEP team again proposed the XXXXXXXXXXX Middle School, which is X’s neighborhood school, for his 7th year of school as being the best and least restrictive environment for him.

The team explained to the Parents that it believed that the XXX School was unnecessarily restrictive for X based on his needs and further discussed how XXXXXXXXXXX could meet his needs in a less restrictive environment. *XCPS-*75 at 22>

43. The Prior Written Notice of September 11, 2018 reported in the “Explanation of why the District proposes or refuses to take the action.” Section that:

“X’s recent XCPS speech and language evaluation was reviewed by XCPS speech/language Pathologist, XXXXXXX. Based on the evaluation the following accommodation was discussed and added to the IEP; allow extra time for oral responses and direct SLP services twice a week in reading. Parents requested XXX School progress reports to be incorporated into the XCPS proposed IEP. XCPS staff was not in agreement. The Progress reports from XXX School can and will be maintained by XCPS staff as anecdotal information. Contained in the XXX progress report were methodologies identical to XCPS including Orton-Gillingham intervention and Read Naturally. Parents requested that the XXX School participate in the IEP meeting but they were not informed of the meeting by the Parents and thus unavailable. Parents would like to discuss extended-school year at a later date.” *P*. 55-23.

44. The Prior Written Notice listed a “Description of each evaluation procedure, assessment, record, or report used as the basis for the proposed or refused action”:

“ Teacher narratives from 6th grade XXX School Math, Reading, Written Language, Science, and Social Studies teachers; XXX School Individualized Education Program; 2017-2018 XXX School Assessment Summary; XCPS 5th grade classroom and district assessments; XCPS October 2016 Educational and Psychological Assessments; June 2017 Private Psychoeducational assessment.” *P.* 55-23

45. The Parents rejected the proposed IEP. XCPS offered to do an additional observation of XX at the XXX School but the Parents did not agree at that time:

“XCPS staff offered to observe X again at the XXX School, and Parents were advised to hold off on that recommendation. Parents signed the IEP to reject the proposal to include placement in the LRE at the XCPS Public school. Parent stated that the XXXXXXXXXXX Middle School was too large. An administrative transfer was discussed with the Parents wanting to explore a different program or school within XCPS*.” P.* 55-23.

XCPS offered to reconvene the IEP team if the Parents would like to invite the XXX School representatives. *P.* 55-24.

**46.** XCPS conducted a third classroom observation of XX at the XXX School on March 12, 2019. The observation of X’s English Language Arts and Pre-Algebra classes was conducted by Ms. XXXXXXXX, Special Education Department Chair at XXXXXXXXXXX Middle School. In English X was observed reading out loud, offering responses to explicit and implicit comprehension questions and following along in his text while others were reading. *XCPS*-77.

Ms. XXX also reported that she did not observe XX receiving anything recommended by Dr. XXXXX’s evaluation other than the small class size. She did not see any multisensory instruction or visual reminders as recommended by Dr. XXXXX in either of the classes she observed. *XCPS*-77. During both classes X behaved in a mature, appropriate and on-task manner. XCPS-77; Tr. 1319-21.

Ms. XXX testified that based on her observation the services or methods provided to XX at the XXX School could also be provided by XCPS at the XXXXXXXXXXX Middle School. Tr. 884.

**47.** Ms. XXX, X’s XCPS 5th grade science teacher, conducted a fourth observation of XX at the XXX School on May 30, 2019. *XCPS-*99; Tr. 1319-21. X was seen to demonstrate appropriate behaviors, complete all assigned individual assignments, work independently, and engage in appropriate classroom discussions. *XCPS-*99; Tr. 1319-21.

**48.** Parents, by Counsel, sent XCPS a letter dated August 9, 2019 advising that they would be continuing XX’s unilateral placement at the XXX School for the 2019-2020 school year. *P*. 63.

**49.** Dr. XXXXXXX, XCPS Compliance Specialist, responded to the Parents’ letter on August 19, 2019: “Mr. & Mrs. XXXXX: XCPS staff are awaiting you response to determine if you are available to reconvene the IEP meeting as you requested. Thank you. “*XCPS*-82-at 3. She also requested that XCPS be provided with any new information collected by the XXX School so that it could be considered in the context of the IEP meeting and invited the Parents to have the XXX School staff attend the meeting. XCPS-82 at 2.

**50.** The IEP team met on October 8, 2019. Present were the XCPS staff, Mr. and Mrs. XXXXX, Ms. Paula Rosenstock, Esq., for the Parents., Ms. XXXXXX, Head of Middle School, the XXX School and Mr. XXXXXXXXXX, Advocate for the family, appeared by telephone. The team proposed that updated evaluations for X’s triennial reevaluation be performed. The Parents agreed to the team proposal. *XCPS*-86.

**51.** XCPS school psychologist, XXXXXXX, conducted a psychological evaluation of XX on October 28 and November 8, 2019. XCPS-88. As with prior XCPS and private evaluations X’s cognitive skills fell squarely within the average range, earning a General Abilities Index score of 91, despite weaknesses in processing speed and long-term storage and retrieval skills. *XCPS*-88 at 4, 12; Tr. at 1453-55. It was also shown that X continued to have “strong social skill “ and a good work ethic, important strengths to both educational performance as well as functioning outside of school. Tr. 1457-58.

**52.** On October 31, 2019, an XCPS educational evaluation was done by Ms. XXX. XCPS-89. In the testing session, X demonstrated effective self-advocacy skills. The results of the Woodcock-Johnson Test of Achievement demonstrated continued weaknesses in the areas of broad reading, fluency, broad math, and spelling. *XCPS*-89 at 5; Tr. 835-37. X’s learning disability was characterized as mild to moderate, depending on whether the task is timed. Tr. 837-39.

**53.** An occupational therapy (OT) evaluation was conducted by XCPS occupational therapist, Ms. XXXXXXXXXXX, on November 12, 2019. X displayed average visual perceptual skills as well as diminished endurance and hand fatigue during longer writing assignments. *XCPS*-90 at 5.

54. In December of 2019, XX was found to continue to be eligible for special education and related services under the category of SLD. *XCPS*-93 at 4-7 .He was also found to be eligible as Other Health Impairment based upon the diagnosis of Attention Deficit Disorder (ADHD) pursuant to the XCPS and private psychological evaluations. *XCPS*-93 at 3. Mr. and Mrs. XXXXX agreed with the eligibility determination. XCPS-93 at 3.

55. An XCPS IEP meeting was held On January 14, 2020, for the purpose of proposing an annual IEP for XX. *P*-78-79; *XCPS*-100

Following discussion between the Parents, their advocates and the XCPS staff regarding the recent XCPS evaluations for XX, Parental input and XXX School data, the team proposed an appropriate IEP that identified and addressed all areas of X’s needs.

The team updated the goals in the area of reading, decoding, written expression, reading comprehension, math reasoning, math calculation, attention/organization, motor functioning, expressive language, social-emotional functioning, and self-determination/advocacy. *XCPS*-96 at 18-28.

The team proposed multiple accommodations such as read-aloud for non-reading tests, extended time on assignments, oral responses, movement breaks, word processor use, modification of homework, chunking and scaffolding of assignments, preferential seating, graphic organizers and agenda checks, etc. *XCPS*-96 at 29, A>PS-100.

Special education services were proposed to increase from 21 to 24.5 hours per week to provide additional support in elective courses. *XCPS*-96 at 29-30. X would continue to receive 21 hours of self-contained specialized instruction in English, reading, math, instructional studies, science, and social studies, as well as 3.5 hours of special education support in team-taught specials, and/or electives such as health. XCPS-96 at 29.-30; *XCPS*-100 at 2. The team continued to propose 1 hour per week of speech and language services, 1.5 hours per week of OT, and 30 minutes per month of OT consultation, all within the special education setting. *XCPS*-96 at 30; *XCPS*-100 at 2.

Extended school year was proposed but declined by the Parents. *XCPS*-96 at 31-2, *XCPS*-100 at 2.

Placement at the XCPS XXXXXXXXXXX Middle School was again proposed as being able to meet X’s needs at his neighborhood public school. X would be able to receive all of the goals, accommodations and specialized instruction contained in the proposed IEP. XCPS 101 at 1.

Parent’s again rejected the XCPS proposed IEP.

56. Mr. XXXXXXXXX, the Parents’ special educational consultant prepared an Educational Consultant Report Regarding XX dated November 30, 2018. *P.* 56. In his report he made numerous observations and recommendations regarding XX.

On September 24, 2018, He observed several 7th grade co-taught classes at XXXXXXXXXXX Middle School, such as social studies, reading and writing classes. He then observed two elective French classes and a math class. *P.*56 at 3.

XX was not among the students observed as he had been removed from XCPS over a year earlier to attend the XXX School. All of the special education students in the classes observed had their own specially designed IEPs and none were identical to that which had been proposed by XCPS for XX. Tr.1554. Mr. XXXXXX was accompanied by and spoke primarily with Mr. XXXXXXX; an assistant principal who is not special education certified, is not a reading specialist, and does not teach classes. Nor did he participate in XX’s IEP meetings, and thus was not familiar with what had been proposed by XCPS for XX, or the specifics of the reading programs available at the school. Tr.1554.

At the conclusion of his report Mr. XXXXX discussed his concerns about a XXXXXXXXXXX Middle School Placement for XX which included his concern that “the reading class does not offer an evidence base intervention provided with fidelity for decoding fluency” P.56 at 4.

It appears that this “concern” was based totally upon on a statement reportedly made by Mr. XXXX, who was teaching the 7th grade reading class (not a co-taught class) that he did not use any specific reading intervention. Mr. XXXXX did not report that he had asked Mr. XXXX about his use of Orton-Gillingham in the reading class or if he was trained in Orton-Gillingham.

Mr. XXXXX did not, at any time, contact XXXXXXXXXXX with a request that he interview their reading specialist to discuss what was available in reading instruction at the school. Ms. XX, the XXXXXXXXXXX Middle School reading specialist, testified that Mr. XXXXXX had never contacted the school to speak with the reading specialist because, if he had, she would have been the person he would have spoken with.Tr.1198.

Q. Ms. XX, did Mr. XXXXX interview you or discuss what was available at XXXXXXXXXXX Middle School in reading instruction at any time?

A. No.

Q. Would you have been the person that he would have been directed to?

A. Yes, yeah.Tr.1199.

If Mr. XXXXX had spoken with Ms. XX he would have been told that she and all XCPS Middle School reading specialists are Orton-Gillingham trained. Tr.1204.

57. In his November 30, 2018, report Mr. XXXXXXX related that he had observed XX in some of his XXX School classes on October 4, 2018. One of those classes was a reading class. He described what he observed X doing in class which did not include his being instructed with Orton-Gillingham methodology. He asked Ms. XXXXX, who was teaching the class, if Orton-Gillingham was used with X.:

“I spoke to Ms. XXXX. Orton-Gillingham is used with X. Ms. XXXX is Orton-Gillingham trained through the Atlantic Seaboard Dyslexia Education Center, and provides the evidence based intervention with fidelity.” P. 56 at 2.

Mr. XXXXXXX did not report any specifics such as when and how X. received Orton-Gillingham or the results. Also, since Mr. XXXXXXX had not observed this methodology being used it is not clear how he was able to report that Ms. XXXX provided the evidence based intervention with fidelity. P. 56 at 3.

Mr. XXXXXXX also noted that after attending the XXX School for over a year XX was reading at the mid-3rd to 4th grade reading level and that his reading fluency was only at the 55% level for the 7th grade level. Tr.1204. Despite this, Mr. XXXXXXX expressed no concerns regarding the XXX School. *P*. 56 at 4-5.

58. Mr. XXXXXXX testified that he attended the January 14, 2020, IEP meeting and that the IEP team considered and incorporated many of his recommendations into the January 2020 IEP. Tr. 1552. He confirmed that the IEP team had proposed, among other things, that XX receive reading supports during sports and elective periods, which had been recommended in his November 30, 2018, Report. Tr.1553*; P*. 56 at 4-5.

### E. X’s Progress while attending XXXXXXX Elementary School:

Throughout his years at XXXXXX Elementary School, XX I find that X made appropriate and meaningful progress, in light of his disability, towards his IEP goals and objectives. X’s 5th grade special education teachers were unanimous in their opinions that X made good progress that year. XX’s DRA and Teacher’s College Reading Assessment scores which are used to assess functioning in the area of reading established that XX had made significant and meaningful progress towards his reading goals. Tr. 1025-27, 1044-45. X received passing grades on his 5th grade report card (*P*.25), and passed his 5th grade Science and Reading SOL assessments.

As *Endrew F.* explains, a student’s progress must be considered within the context of their individual circumstances. 137 S. Ct. 988, 999 (2017). In assessing a student’s progress, it is well-established that a court should not look to any one single measure, whether SOL score, or IEP goal, or anything else. Instead, the totality of measures, including the student’s performance on IEP goals; day-to-day work and the observations of teachers; criterion-referenced and standardized assessments, and report card grades are all relevant. See *S.H. v. Fairfax County School Board*, 875 F. Supp.2d 633 (E.D. Va. 2012); *Fairfax County Sch. Bd. v. Knight*, 1:05CV1472 (LMB), 2006 WL 6209927, at \*11 (E.D. Va. Aug. 23, 2006), aff'd, 261 Fed. Appx. 606 (4th Cir. 2008).

### F: Least Restrictive Environment:

The IDEA requires disabled students to be educated in the "least restrictive environment," which means, "to the maximum extent appropriate . . . with children who are not disabled." *See I.E. v. Ramsey Bd. of Educ.,* [435 F.3d 384, 389](https://casetext.com/case/le-v-ramsey-bd-of-educ#p389) (3d Cir. 2006)(quoting [20 U.S.C. § 1412(a)(g)(A)](https://casetext.com/statute/united-states-code/title-20-education/chapter-33-education-of-individuals-with-disabilities/subchapter-ii-assistance-for-education-of-all-children-with-disabilities/section-1412-state-eligibility)).

The IDEA further requires that an educational placement be in the “least restrictive environment” (LRE) wherever possible and appropriate. *Rowley*, 458 U.S. at 202; 34 C.F.R. § 300.114(a)(2)(i). This is not just a “laudable goal, but also a requirement of the Act.” *DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989. Among other things, this means that under the IDEA, a school system must ensure that the student’s placement is “as close as possible to the child’s home.” 34 C.F.R. § 300.116(b)(3); *see also Rowley*, 458 U.S. at 202. Further to that point, IDEA mandates that unless the IEP requires otherwise, “the child is educated in the school that he or she would attend if nondisabled.” 34 C.F.R. § 300.116(c). Here, for X, that is XXXXXXXXXXX.

Additionally, IDEA requires that schools consider private placements only when no public placement is appropriate for the student. *See Hessler v. State Bd. of Educ*., 700 F.2d 134 (4th Cir. 1983). In fact, the least restrictive environment mandate makes clear that school systems should only employ a private placement when the student’s disability is so severe that she cannot be educated in a public-school setting. 34 C.F.R. §300.114(a)(2)(ii). Thus, placement in a regular public school is inherently less restrictive than a private setting. *See, e.g., Mark and Ruth A. v. Grant Wood Area Educ. Agency*, 795 F.2d 52 (8th Cir. 1986). Measured by these legal mandates, XCPS’ proposed program at XXXXXXXXXXX is the LRE appropriate for XXX.

Under these criteria the XXX School is not found to be an appropriate placement for XX because it is overly restrictive. The fact that the XXX School is located almost an hour away from XX’s home, and is not, therefore, located “as close as possible to the child’s home” is problematical. However, the main problem is that it does not provide XX with an education “among children who are not disabled." *See I.E. v. Ramsey Bd. of Education. Id.* XX’s disability is not so severe that he cannot be educated in a public-school setting. While in XCPS he thrived socially among his non-disabled peers and was well adjusted and popular. Isolating XX in a school comprised of only disabled students is not appropriate and unnecessary.

### G. Evaluating the Testimony and Credibility of the Witnesses:

In determining the relative weight to be given to the testimony of the witnesses I find that the testimony of the XXXXXXX Public School’s experts which included XX’s special education reading and other special education teachers, school psychologist, and other professionals who possessed significant special educational experience, and who were knowledgeable about the proposed IEPs, XXXXXXXXXXX Middle School and the programs available there, as well as XX’s individual needs, educational needs, abilities and limitations, to be entitled to greater weight than those of the Parents’ witnesses.

Many of the XCPS witnesses were members of the IEP teams who drafted the proposed IEPs for XX and who participated in the most recent IEP meetings. These witnesses consisted of educational experts, including teachers and staff who had direct experience with X and/or were directly familiar with the programming XCPS could offer and provide. XXXXXX, XXXXXX, XXXXXXX, XXXXXXXX, XXXXXXX, and XXXXXX were active participants in X’s IEP process, whether presently or in the past, and all were accepted as experts in their respective fields.

The opinions of these staff members as to the appropriateness of XCPS’ previously and currently proposed IEPs, including their respective goals, accommodations, services, and placements, are supported by the record and are owed deference. In the IEP meetings they reviewed X’s academic records, report cards and progress notes as well as the private evaluations and reports provided by the parents from Dr. XXXXXXXX, Mr. XXXXX XXXXXXX and the XXX School staff, to reach their IEP recommendations.

For instance, more weight was given to Ms. XXXXX and Ms. XXX’s testimony than that of Mr. XXXXXXX, the Parents’ educational consultant.

Ms. XXXXX, X’s fifth grade special education co-teacher, was accepted as an expert in special education and elementary education, with 8 years’ experience in both fields. *XCPS-*97F; Tr. 1005.She was XX’s 5th grade reading teacher who saw and worked with XX a day by day basis, she administered his SOL assessments and other testing. She was able to observe XX and testify knowledgably about X’s progress in reading. She also participated in his IEP meetings where she contributed essential information and guidance based on her in-depth knowledge of XX and his educational needs.

Ms. XXX, X’s fifth grade general education co-teacher, was received as an expert in the field of elementary education, also with eight years’ experience. *XCPS*-97C; Tr. 1286. Ms. XXX also personally observed XXX at XXX School in 2019. *XCPS*-99.

X worked with Ms. XXXXX and Ms. XXX, both of whom hold current licenses and certifications, (*XCPS* 97 C&F) nearly *all day every day* throughout the 2016-17 school year. Tr. 1007-08, 1288. Together, their testimony established that X made material and appreciable progress while attending XXXXXX. Tr. 1051-52, 1305-06.

By comparison, I gave less weight to the testimony to the expert opinions of Mr. XXXXXX XXXXXXX, the Parent’s educational consultant. Mr. XXXXXXX was accepted as an expert in the field of special education having been active in the field for over forty years. However, he holds no current special education endorsements or certifications in Virginia, Maryland or D.C. Mr. XXXXXXX began as a special education teacher but has not taught full time since around 1978. T. 54, 59. Since 2006 he has been the executive director of the XXXXXXX Education Group. Tr. 54. One of the things that his Group does is advocate for Parents in special education cases. Mr. XXXXXXX agreed that a majority of the cases in which he has testified involved students who are in private school whose parents are seeking tuition and an IEP for their child. Tr.58.

Mr. XXXXXXX went to the XCPS XXXXXXXXXXX Middle School in the fall of 2018; more than a year after XX had left to go to the XXX School. His stated purpose was to evaluate the IEPs proposed for XX’s at XXXXXXXXXXX Middle School by observing other special education students in several classes, such as a reading, social science and math class. The effectiveness and relevance of this exercise is questionable, in that the students observed all had different IEPs from that proposed by XCPS for XX.

Additionally, Mr. XXXXXXX did not ask to speak to the XXXXXXXXXXX Reading specialist, Ms. XX, nor did he ask to speak with XX’s 5th grade XXXXXXXX Elementary School teachers such as Ms. XXXXX, his 5th grade special education reading teacher. Tr. 150-152.

The only actual contact Mr. XXXXXXX had with XX were two observations at the XXX School. Tr.147-50. He never evaluated XX or spoke with him. I did not find his expert opinion that the XXX School was the best placement for XX to be entitled to much weight. Tr. 95-96. In part, because I do not believe that his opinion was fully informed as it demonstrated a lack of knowledge of the programs offered in the XCPS IEPs and available at XXXXXXXXXXX Middle School.

Also, Mr. XXXXXXX acknowledged that after attending the XXX School for over a year XX was reading at the mid-3rd to 4th grade level; that his reading fluency was only at the 55% level for the 7th grade; and that there had been some regression in his math skills. Further, he confirmed that when X had finished the 8th grade he was only reading at the 7th grade level. Despite this, he still provided an opinion that the XXX School would be the best placement for XX. Tr. 173-177; Tr. 1558-1560. *P*. 56 at 4-5.

I gave a great deal of weight to the testimony of the following XCPS witnesses: Ms. XXX, Special Education Department Chair at XXXXXXXXXXX and XXX’s current case carrier, was received as an expert in the field of special education, with over twenty years’ experience. *XCPS*-97E; Tr. 754. Participating in the September 11, 2018 and January 14, 2020 IEP meetings, as well as observing XXX at XXX School and conducting educational testing of XXX in 2019, Ms. XXX demonstrated extensive personal knowledge of the programs, services, and instruction available to XXX at XXXXXXXXXXX, offering numerous real-life examples.

Ms. XXXX, XXXXXXXXXXX Speech Language Pathologist. With nearly 25 years’ experience, she was accepted as an expert in the field of speech language pathology. *XCPS*-97D; Tr. 1131. Ms. XXXX personally evaluated XXX’s S&L skills, authored a report with her findings, and actively participated in the September 11, 2018, and January 14, 2020 IEP meetings. *XCPS*-86; *XCPS-*75; XCPS-96. Ms. XXXX, XCPS school psychologist, was received as an expert in the field of school psychology. *XCPS-*97H; Tr. 1449. She was personally involved in XXX’s reevaluation, authoring his 2019 psychological evaluation following her observations, testing, and interview of XXX, attending the December 3, 2019 eligibility meeting, as well as the January 14, 2020 IEP meeting. *XCPS*-88; *XCPS*-93; XCPS-96.

Ms. XX, XXXXXXXXXXX’s Middle School Reading Teacher, with 10 years’ experience as a reading specialist, was received as an expert in the field of reading instruction. *XCPS*-97J; Tr. 1177, 1180. Participating in XXX’s August 28, 2017, and January 14, 2020 IEPs meetings, Ms. XX provided extensive personal knowledge of the reading programs, services, methodologies, instruction, and accommodations available to him at XXXXXXXXXXX. *XCPS*-60; *XCPS*-96; Tr. 1180-88.

Additionally, I found highly credible the testimony of XXXXXXXX and XXX XXXXX, staff at XXX’s neighborhood high school, XXXXX High School (XXXXXX), that the current proposed IEP would carry XX into ninth grade.

I gave weight to the testimony of Ms. XXXX, reading teacher at XXXXXX and accepted as an expert in the field of special education with 8 years’ teaching experience, who testified to her extensive personal knowledge of the reading programs, instruction, and services utilized at XXXXXX, and which would be available to XXX. *XCPS*-107; Tr. 1389-99.

Similarly, Ms. XXXXX, special education department co-chair, was received as an expert in the field of special education with 20 years’ experience. *XCPS*-106; Tr. 1363. Ms. XXXXX’s testimony regarding XXXXXX’s ability to not only implement XXX’s IEP, but to also enable a smooth transition from XXX School to the public high school setting displayed a deep knowledge of her subject and was given due weight. Tr. 1364-71.

Federal courts have recognized in XXX XXXXXXXX XCPS, that when it comes to considering the evidence, factors such as quality and quantity of contact with the student, first-hand knowledge of the student, and knowledge of the proposed program, matter. *See Doyle v. Arlington Cnty. Sch. Bd.*, 806 F. Supp. 1253, 1254 (E.D. Va. 1992), *aff’d*, 39 F.3d 1176 (4th Cir. 1994); *M.M. v. Arlington Cnty. Sch. Bd.*, 59 IDELR 198 (E.D. Va. 2011) (“greater weight was afforded to [XXXX’] witnesses who possessed significant special educational experience, were knowledgeable with the proposed IEP, [ ] School and programs there, and were aware of M.M. individual needs, educational needs, abilities and limitations.”).

I considered Dr. XXXXXXX’s neuropsychological evaluation (P.27) and testimony to be credible and entitled to be given considerable weight. Dr. XXXXX’s evaluation and diagnosis of dyslexia and dysgraphia were consistent with XCPS’s prior evaluations. She further appropriately diagnosed XX with ADHD which was incorporated into XX’s next proposed IEP.

I found that the testimony of Ms. XX, who qualified as expert in educational administration, and who is a general administrator of the junior high program at XXX School, who oversees the daily operations of the school, but has no regular contact with XXX to be interesting and informative but not probative. T. 463, 469-70.

Ms. XX has never assessed XX as a student, does not teach him or any other students, and has no concrete knowledge of X’s educational progress or XCPS’ previous or presently proposed placements having never worked in a public school or stepped foot in XXXXXXXXXXX. Tr. 456-65, 470, 514-17, 521-22. Part of her job is testifying in special education hearings, ordinarily on behalf of families seeking private school tuition, Tr. 515-16.

Similarly, I do not give much weight to the testimony of Ms. XXX, director of speech, language and literacy at XXX School. According to her testimony she has not participated in X’s XCPS or XXX School IEPs, has not assessed him as a student, has not provided him speech and language or other services, and has no knowledge of X’s progress or proposed placements at XCPS having never spoken to XCPS staff, visited XXXXXXXXXXX, or reviewed his XCPS educational records. Tr. 722-24, 729-30. She is not currently certified as a teacher in any state, and was last accredited as a reading teacher in Massachusetts almost 15 years ago. Tr. 666-67.

It should be noted that the Parents did not introduce any of X’s actual XXX School teachers, or others who personally interacted with him as witnesses at the hearing.

I found Mr. and Mrs. XXXXX’s testimony to be that of intelligent and loving parents but I fail to be persuaded by their testimony when considered against the XCPS witnesses.

### H. Discussion:

**FAPE:** The IDEA is a federal statute that provides students with disabilities and the right to a FAPE designed to meet their needs. 20 U.S.C. § 1400(d)(1)(A). Central to the IDEA is the requirement that local school districts develop, implement, and annually revise an IEP that is calculated to meet the eligible student's specific educational needs. *Thompson R2-J Sch. Dist. v. Luke P., ex rel. Jeff P.,* [540 F.3d 1143](http://www.specialedconnection.com/LrpSecStoryTool/servlet/GetCase?cite=540+F.3d+1143), 1148-49 (10th Cir. 2008); 20 U.S.C. § 1414(d). Thus, the determination of whether a FAPE has been provided turns in large part on the sufficiency of the IEP for each disabled child. *Tyler V., ex rel. Desiree V. v. St. Vrain Valley Sch. Dist. No. RE-1J,* 2011 WL 1045434 (D. Colo. 2011) (unpublished) (*citing A.K. v. Alexandria City Sch. Bd.,* 484 F.3d 672, 675 (4th Cir. 2007)).

In *Rowley*, 458 U.S. 176 (1982) [553 IDELR 656](http://www.specialedconnection.com/LrpSecStoryTool/servlet/GetCase?cite=553+IDELR+656), the Supreme Court established the following two-part test that courts should use to decide the appropriateness of a student's education:

1. Has the state complied with the procedures set forth in the IDEA?

2. Is the IEP, developed through the IDEA's procedures, reasonably calculated to enable the child to receive educational benefits?

The Supreme Court held that when this two-part test is satisfied, the state has complied with the obligation imposed by Congress, and the courts can require no more. I find that both parts of this two-part test have been satisfied.

A student receives a free appropriate public education through the IEP process. *MM v. School District of Greenville County,* 303 F.3d 523 (4th Cir. 2002). Appropriate IEPs "must contain statements concerning a disabled child's level of functioning, set forth measurable annual achievement goals, describe the services to be provided, and establish objective criteria for evaluating the child's progress." *J.P. ex rel. Peterson v. County Sch. Bd. of Hanover County, Va.,* [516 F.3d 254](http://www.specialedconnection.com/LrpSecStoryTool/servlet/GetCase?cite=516+F.3d+254), 257 (4th Cir. 2008); 20 U.S.C. § 1414(d).

The Parent’s claims that XX’s educational issues are so severe that they mandate a finding that a placement in the XXX School is required to provide him with meaningful education and FAPE is found to be unsupported by the record and evidence and without merit.

*Endrew F. ex rel. Joseph F. v. Douglas City. Sch. Dist*.,RE-1,137 S. Ct. 999 (2017) enlarged upon the 1982 *Rowley* case, holding that an appropriate education for a student with a disability is one that is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. “ The Court further stated that an IEP must be “reasonable” but need not be “ideal” *Id.* There is no doubt but that the XCPS Proposed 2017-2018, 2018-2019, and 2019-2020 IEPs met this standard.

In *Hartmann v. Loudoun County,* 118 F.3d 996, 1004 (4th Cir. 1997), cert. denied, 552 U.S. 1046 (1998), the 4th Circuit, quoting the *Rowley* decision, stated that federal courts cannot run local schools and that they must be given "latitude" in creating an IEP.

In *Schaffer v. Weast*, 554 F. 3d.470 (4th Cir. 2009) the Court held that the District Court was correct when it “declined to use evidence to Monday-morning quarterback the school system.” The Court also noted that: Judicial review would simply not be fair to school districts, whose decisions would be judged in hindsight based on later assessments of a student’s needs at a later point in time.” *Id.* at 477.

XXXXXXX County Public Schools made every effort to reach consensus with the Parents and meet their demands in order to reach an agreed upon IEP and have XX return to XCPS. Each IEP proposal contained additionally appropriate special education time, goals and accommodations. Mr. XXXXXXX, the Parent’s educational consultant, admitted that many of the recommendations contained in his Report were included and incorporated into the January14, 2020 proposed IEP. The team had also, in prior proposed IEPs, included findings and recommendations from Dr. XXXXX’s private neuropsychological evaluation. The team reacted to various reports, testing and observations by adding special education time, services, accommodations, to better meet XX’s needs, in their 2017-2020 IEP proposals.

Ms. XXX, who was accepted as an expert in this case, testified that she had observed X at the XXX School and that XXXXXXXXXXX Middle School could provide everything that X was receiving at the XXX School. *XCPS*-77; TR. 884.

In fact, when she was asked if she had compared the XXX School IEPs with the XCPS January 14, 2020 proposed IEP she testified that she had:

Q, Could you tell me what, if any substantive differences there are between those two IEPs?

A: There really are none. We used the…I used the XXX School IEP, just had the documents side by side as I worked with my team to create the proposed IEP. And we included ---we added all of the pertinent and recent data that had been included in the XXX School IEP. And then we used that data to draft the goals and the accommodations.

Q. And those the goals and accommodations were agreed to at that time by the Parents and their advocates?

A. Correct. Tr. 885-88

A close review of the evidence, exhibits, and testimony introduced at the hearing, including what XX would receive at XCPS per the proposed IEPs, supports Ms. XXX’s opinion that there seemed to be very little difference, if any, between what special education services and accommodations XX would receive at either school.

Regardless, it would appear that the Parents were determined, to reject any IEP which did not recommend that XX attend the XXX School at the expense of the school district.

Parents have the right to participate in decisions about their children’s placements. However, the IDEA does not give Parents the right to control or veto placement decisions. *White v. Ascension Parish Sch. Bd*., 343 F. 3’d 373, (5th Cir. 2003). While the Parents had an absolute right to make their placement preference for a private placement at the XXX School known to the IEP teams the teams’ failure to grant their request and agree to fund the costs for XX to attend the XXX School was not a violation on the part of the IEP team; nor did it constitute a denial of FAPE.

School Districts need not cater to a Parent’s preference and place the student in what the Parent considers the "better" placement. *Z.W. v. Smith*,[47 IDELR 4](http://www.specialedconnection.com/LrpSecStoryTool/servlet/GetCase?cite=47+IDELR+4)(4th Cir. 2006, *unpublished*); *Bradley v. Arkansas Dep't of Educ.*, [106 LRP 21288](http://www.specialedconnection.com/LrpSecStoryTool/servlet/GetCase?cite=106+LRP+21288) , 443 F.3d 965 (8th Cir. 2006); and *A.S. v. New York City Dep't of Educ.*, [63 IDELR 246](http://www.specialedconnection.com/LrpSecStoryTool/servlet/GetCase?cite=63+IDELR+246)(2d Cir. 2014), *unpublished*).

According to a well-worn analogy from the 6th U.S. Circuit Court of Appeals, FAPE does not require a "Cadillac." Rather, it requires a "Chevrolet." The 6th Circuit observed that:

"The Act requires that the Tullahoma schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student. Appellant, however, demands that the Tullahoma school system provide a Cadillac solely for appellant's use. We suspect that the Chevrolet offered to appellant is in fact a much nicer model than that offered to the average Tullahoma student. Be that as it may, we hold that the Board is not required to provide a Cadillac, and that the proposed IEP is reasonably calculated to provide educational benefits to appellant, and is therefore in compliance with the requirements of the IDEA." *Doe v. Board of Educ. of Tullahoma City Sch.*,[20 IDELR 617](http://www.specialedconnection.com/LrpSecStoryTool/servlet/GetCase?cite=20+IDELR+617)(6th Cir. 1993), *cert. denied*,[111 LRP 3215](http://www.specialedconnection.com/LrpSecStoryTool/servlet/GetCase?cite=111+LRP+3215) , 511 U.S. 1108 (1994).

In this case, XCPS has offered XX what certainly qualifies as a much better model than a Chevrolet. In fact, it appears that they are proposing a Cadillac with no cost to the Parents.

The XCPS Proposed 2017-2018, 2018-2019 and 2019-2020 IEPs have been carefully reviewed for their appropriateness on the basis of whether or not they are reasonably calculated to confer some educational benefit on XX and it has been determined that they would provide FAPE to XX. The LEA is not required to provide the best possible education or an ideal education in order to provide a FAPE to the Child. *Endrew, Id.* However, what XCPS has proposed for XX is or comes close to an ideal education given his needs.

### I. Reimbursement:

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

As stated herein, I find by a preponderance of the evidence that t**he Proposed 2017-2018, 2018-2019 and 2019-2020 IEPs were appropriate and calculated to** provide XX with FAPE pursuant to the Individuals with Disabilities Education Act, [20 U.S.C. §§ 1400](https://casetext.com/statute/united-states-code/title-20-education/chapter-33-education-of-individuals-with-disabilities/subchapter-i-general-provisions/section-1400-short-title-findings-purposes) *et seq.* (“IDEA”) and in accordance with *Endrew F. v. Douglas County School District*, [137 S. Ct. 988](https://casetext.com/case/f-jennifer-f-v-douglas-cnty-sch-dist-re-1) (2017). All 2017-8 & 2019 -2020 Proposed IEP were calculated to provide XX an educational program reasonably calculated to enable him to make meaningful progress appropriate in light of his circumstances.

Tuition reimbursement is expressly precluded for a unilateral parental placement of a student at a private facility where the district “made FAPE available to the child” in a timely manner prior to the placement. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300. 148. *L.C. v. Fairfax County Bd. of Educ.,* 875 F. Supp. 2d. 633,657 (E.D. Va. 2012).

With regard to whether Mr. & Mrs. XXXXX are entitled to reimbursement, I find that the facts are not in dispute, and that as a matter of law, reimbursement is not permitted**.** XXXXXXX Public Schools is under no obligation to pay for the XXX School when they offered FAPE prior to and after the unilateral placement of XX in the XXX School.

Once it is determined that XCPS offered FAPE prior to the unilateral placement at XXX School it is not necessary to address the appropriateness of the XXX School as a placement for XX. However, I find that the XXX School is not an appropriate placement because it is an overly restrictive environment for XX. The IDEA requires that special education students be educated along with non-special education students in the least restrictive environment. At XXX School XX is being educated with all special education students instead of being able to interact with non-special education students in, for example, extracurricular activities, lunch and sports. Unlike some students who simply cannot cope with demands of a public school setting and require that they are educated in an environment where they are restricted and confined to allow them to access their education XX is social, gregarious, well behaved and able to make friends. His disability does not appear to negatively impact his interaction with other students and he experienced no social or emotional problems while attending XXXXXXX Elementary School.

### J. Specific Findings of Fact:

The Individual Education Programs (IEPs) provided and proposed by XCPS for XX for the fall 2017-2018, 2018-2019 and 2019 to 2020 school years were appropriate and designed to permit XX to make meaningful educational progress in the least restrictive environment, given his unique needs, and in accordance with the meaning of the Individual with Disabilities Act, 20 U.S.C., §§ 1400 (IDEA).

The XCPS proposed fall 2017-2018, 2018-2019 and 2019 to 2020 school years IEPs were designed to provide XX with a free and appropriate public education (FAPE), because XCPS provided XX with an educational program reasonably calculated to provide him meaningful educational benefit specially designed for his unique educational needs and to make progress appropriate in light of his circumstances.

### RULING

Mr. and Mrs. XXXXX have not succeeded in meeting their burden of proof in their assignments of violations and errors by XCPS of XX.’s right to FAPE. The facts set out above as well as a thorough review of the transcripts and exhibits, including the Proposed 2017-2018, 2018-2018 and the 2019-2020 IEPs, the supporting documents, and the testimony of XCPS personnel and other witnesses conclusively demonstrates that XX. was provided with and/or offered FAPE during the relevant periods.

The Parents’ placement of XX in the XXX School was a Unilateral Placement and in accordance with IDEA they are not entitled to reimbursement.

### PREVAILING PARTY:

XXXXXXX County Public Schools

### RIGHT OF APPEAL

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

ENTERED: August 2, 2020

Morgan Brooke-Devlin

Morgan Brooke-Devlin, Esq.

Hearing Officer

Mr. Michael J. Esq.

Mr. John F. Cafferky, Esq.

Ms. Paula A. Rosenstock, Esq.

Ms. Emily K. Haslebacher, Esq.

Dr. XXXXXXXXX

Mr. Reginald Frazier, Esq

### CERTIFICATE

I certify that I have e-mailed copies of the above Decision to the following parties on this 2’dday of August, 2020.

Morgan Brooke-Devlin

Morgan Brooke-Devlin, Esq.

Hearing Officer

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Falls Church, Virginia 22046

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mbdevlin@gmail.com

1. The Parties Moved to have all exhibits in their exhibit binders entered into evidence. The Motion was granted and all exhibits were admitted. It should be noted that these exhibits included documents that pre-dated the October 21, 2017, two year statute of limitation date. [↑](#footnote-ref-1)
2. The 8/29/17 IEP team noted that they had reviewed the private

   educational testing and neuropsychological evaluation provided by the

   Parents. *P*. 30-19 [↑](#footnote-ref-2)
3. Despite insisting that she be present at

   the 12/21/17 XCPS IEP meeting. [↑](#footnote-ref-3)
4. One of the dates provided by the Parents. [↑](#footnote-ref-4)
5. A total of 22 hours. [↑](#footnote-ref-5)