**#22-001**

**VIRGINIA DEPARTMENT OF EDUCATION**

# DUE PROCESS HEARING

**In re: Child Written Decision and Order**

# BACKGROUND

* 1. **FACTUAL AND PROCEDURAL HISTORY**

This matter came to be heard upon a Due Process Request seeking a Hearing Officer’s decision. The Petitioner filed a Due Process Notice (the “DPN”) on July 5, 2021 under the Individuals With Disabilities Education Act (the “Act”), 20 U.S.C. 1400, *et seq*., and the regulations at C.F.R., Part B, Section 300, *et seq.*, (the “Regulations”). The Child (“X.X.” or the “Child”), who appears by and through his next friends, the Parents (the “Parents”), who are, together, collectively, (the “Petitioner”); the Respondent is (the “School Board”) who responds to the Petitioner’s DPN in which the Petitioner alleges the Respondent failed to provide the Child a free, appropriate public education (a “FAPE”).

The due process hearing was held before the undersigned Hearing Officer over three days, August 9, 2021, August 10, 2021 and on August 16, 2021 at City, Virginia. The hearing was open to the public and transcribed by a court reporter. 1 A Parent Advocate (the “Advocate”) represented the Petitioner at the Due Process Hearing. School Board Counsel (“School Counsel”) and the City Special Education Director and Assistant Director (the “City Representatives”) represented the Respondent at the hearing. This decision is timely and within the statutory limitation period under the Act.

The Petitioner seeks the Hearing Officer’s determination that the Respondent’s

1 In this Decision, the Hearing Officer will refer to the Due Process Hearing transcripts numerically, in

chronological order, as follows: “Tr.” for transcript page, followed by the page(s) and lines. Transcripts marked Day1, appear as “Tr.1, Day 2 appears as “Tr.2” and Day 3 appears as “Tr.3” followed by the page(s), and transcript line(s). The Hearing Officer will refer to the exhibits herein for the Parents as “P1- 42“ and to the School Board Exhibits as “SB1- 49. “

Individualized Educational Program (the “IEP”) does not provide the Child (a “FAPE”) in the least restrictive environment (the “LRE”) and, therefore, that the Child’s proper placement for the 2021-2022 school year is at the Private School; and that financial reimbursement to the

Petitioner’s unilateral placement of the Child at the private school (the “Private School”) for the above school year is warranted.

The Petitioner asserts also that IEP deficiencies persist in the Child’s 2021-2022 IEP to which the Petitioner asserts they consented without knowing all the facts regarding private placement options other than Public Day School placement, and, the Petitioner asserts they consented to the IEP without fully knowing the Child’s disability status and without understanding the procedural safeguards provided to them just prior to signing the 2021-2022 IEP and further, the Petitioner asserts that the IEP team did not adequately review the results of private psychoeducational testing and diagnoses indicating the Child has dyslexia and

for that reason, has not shown adequate growth in his special education program; these matters, complicated by the Respondent’s inattention to the Child and his special education program during the Covid pandemic health crisis, directly caused the Petitioner to mistrust the Respondent school district’s ability to continue to provide special education services to the Child during the 2021-2022 school year and required the Petitioner to unilaterally place the Child in a Private School where the Petitioner believes he will access appropriate special education services for the Child’s disabilities; therefore, the Petitioner avers reimbursement to the Private School the Child now attends, is proper.

# PROCEDURAL HISTORY

The administrative record in this case includes the Petitioner’s DPN filed on July 5, 2021; the Respondent’s Notice of Insufficiency; the Hearing Officer’s Written Order Denying

Insufficiency; the First Pre-Hearing Conference; a resolution meeting having occurred

between the parties without reaching a Settlement Agreement; the First Pre-Hearing Conference; the First Pre-Hearing Report and Order; the Second Pre-hearing Conference; the Second Pre- Hearing Report and Order; the Petitioner’s exhibits identified and numbered P1- 42 and witness list timely submitted; the Respondent’s exhibits identified and numbered SB1-49 and witness list timely submitted; the due process hearing occurring on August, 9, 2021, August 10, 2021 at City, Virginia and virtually on August 16, 2021; the above exhibits having been admitted to record at the due process hearing, the Petitioner and the Respondent’s witnesses having been duly sworn, the Hearing Officer having taken their testimony, under oath, before a duly sworn court reporter; the hearing transcripts having been provided to the Petitioner and the Respondent by August 30, 2021 per the Hearing Officer’s Post-Hearing Order; the Petitioner’s Written Closing

Remarks and the Respondent’s Written Closing Remarks having been timely submitted to the Hearing Officer and the Hearing Officer’s Written Decision dated September 17, 2021.

# FACTUAL FINDINGS

1. The Child is now a XXXX grade student who attended the Public Day School at the Elementary School in Respondent’s school district from kindergarten, 2016 to through his XXXXXX grade year, 2020- 2021. The Child now attends a Private School where the Parents placed the Child after they became dissatisfied with the Public Day School program offered to the Child for the 2021-2022 school year. The Parents believe the Child will receive better special education services at the Private School. **SB9: 50.**
2. Since his kindergarten years, the Child struggled with reading in kindergarten and obtained a “U” for an unsatisfactory grade in language arts, and an “S” for a satisfactory grade in the remaining core subject areas. In first grade, he received final grades of “B” in math and “As” in Science and Social Studies. At the end of his second grade year, the Child obtained final grades of “B” in Language Arts and an “A” in the remaining core subject areas. **SB9: 50. P8: 1.**
3. As a result of the Covid pandemic health crisis on or about March 12, 2020, the Public Day School closed for grades K-12 per the State Governor’s Order in this City. 2 As a result, statewide schools closed and the Child’s Elementary School teachers did not give final grades at the school year’s end in the Child’s third grade year. But during the first two sessions of the third grade school year, 2019-2020; the Child received the following grades: “Language Arts: “C/A;” Mathematics: “C/C;” Science: “B/B;” Social Studies: “A/B.” **SB9: 50**.
4. In contrast to his average to excellent academic achievement reflected in the Child’s first through mid-third year lettered grades he achieved at the Public Day School, the Child did not meet benchmark expectations in the PALS 3 reading and writing assessment in kindergarten, first grade, or in the fall of his second grade year. **SB9: 50**. But the Child exceeded benchmark expectations in reading for the spring, second grade and the fall, third grade. **SB9: 50**. On the MAP 4 assessment, the Child obtained the following scores: Fall (2018) – 24th percentile, Math – 68th percentile; Winter (2019) – 81st percentile in Reading, Math - 82nd percentile; Spring (2019)

57th percentile in Reading, Math – 83rd percentile; Fall (2019) – Reading - 47th percentile, Math – 69th percentile; Winter (2020) – Reading – 16th percentile, Math – 75th percentile**. SB 9: 50.**

1. In the Child’s kindergarten year (2016-2017), it became evident to his then

teacher, the Child required assistance in reading. After the first eligibility meeting under the IDEA, the IEP determined the Child to be eligible for special education services under the label “Specific Learning Disability” (SLD). 5

2 *See also* Executive Order No. 51, State of Virginia*, Temporary Stay at Home Order, Due To Novel Coronavirus (Covid 19), et seq.,* entered on May 12, 2020.

3 The PALS testing instrument is the Process Assessment of the Learner test which measures reading and writing

skills in young children. It can be used to diagnose an oral and written language disability.

4 The MAP is the testing instrument of the Measure of Academic Progress test which measures a child’s academic growth but not necessarily a grade equivalency standard.

5 A “specific learning disability” per the Act and Virginia Regulations at 8VAC -20-81-10 is defined as follows: A disorder in one or more of the psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, write, spell, or do mathematical

calculations, including conditions such as perceptual disabilities, brain injury, dyslexia, or developmental aphasia. SLD does not include specific learning problems that are primarily the result of visual, hearing, or motor disabilities; of environmental, cultural, or economic disadvantage. *See also* 34 C.F.R. 300.8(c)(10).

But the School Psychologist’s notes reflect the Child’s SLD was exacerbated by his inattention and anxiety in the general education classroom. Thus, the Respondent determined X.X. needed small group instruction in reading. And at that time, the Respondent also provided X.X. with IEP accommodations to support his emerging reading comprehension skills. **SB2: 3.**

1. On June 18, 2019, the Child’s First Reading Teacher wrote about him in extremely positive terms and stated the Child enjoyed playing “spelling games” and the Child was able to read on a “second to third grade level …despite his PALS scores in oral reading” which were lower. **SB3: 28.** Also, the Child’s First Reading Teacher reported she delivered reading services to the Child in a small group, multi-sensory environment in which the Child demonstrated constructing “paragraphs with a distinct main idea.” **SB3: 28.** Regarding specific disciplinary measures, the First Reading Teacher noted how easily she redirected the Child whom she often corrected by telling him “to focus,” “to settle down” and “to give others opportunities.” **SB3: 28.** But in her note toward the concluding entry in the First Reading Teacher’s written report,

she stated, “The Child has issues with spelling rather than reading.” **SB3: 28.**

1. The Child’s scores on the PALS Data Review – Summed Scores Chart which compiled

the Child’s PALS scores from kindergarten through his first third grade semester shows a stable, upward score progression. **SB28: 187.** And, in the fall, second grade, and in the spring, third grade, the Child’s First Reading Teacher noted, “[The Child] exceeded reading benchmarks.

# SB28: 187.

1. In kindergarten, the Parents became concerned about the Child’s language and writing Problems and his inattention reported to them by his kindergarten teacher. The Parents followed up with their family pediatrician. **Tr.1 47: 2-12.** He recommended a local Licensed Clinical Psychologist, with whom he was familiar, to evaluate the Child. On February 22, 2016, the Licensed Clinical Psychologist delivered her report after she evaluated the Child. As a

result of her testing, the Licensed Clinical Psychologist diagnosed the Child with Attention

Deficit Hyperactivity (ADHD) Disorder and to be “at risk” for a reading disability (dyslexia) because of his “weaker phonological skills.” **P9: 9.** The Licensed Clinical Psychologist found the Child’s intelligence to be in the average range per the Wechsler the Child having attained a full scale IQ score of 90. The Licensed Clinical Psychologist referred the Child back to his pediatrician for medications and gave extensive recommendations for managing the Child’s inattention at school and at home. **P9: 9-13.**

1. During his years, in-person, at the Elementary School, the Child continued to make academic progress and achieved grade level benchmarks in reading through his fall and winter semesters, third grade year. But because of the Covid pandemic health crisis, as stated above, he did not receive spring semester grades. **SB9: 50.** And soon after March 12, 2020,6 City Elementary School students, attended school in a virtual educational environment.
2. The Parent who testified at the due process hearing is a highly educated individual. **Tr.1 42: 3-4.** But she denied she consented in an informed manner at the operative meeting in January 2021.The Parent asserted the Respondent withheld information from the

Parent and did not adequately explain procedural rights to her and withheld the Child’s complete academic record. Also, the Parent believes the IEP team predetermined the Child’s placement at the Public Day School**. Tr.1, 56: 12-17; Tr1, 68: 17-25; Tr.1, 69: 1-25; Tr.1**

# 179:14-25; Tr.1 180:1-12.

1. The Parent, testified she was “very happy” with the elementary school

“as a whole.” **Tr. 2 146: 15-18.** And was “particularly happy” when the Child was with his First Reading Teacher” and was “happy with the progress he had made” in second and third grade with the First Reading Teacher. **Tr.2 146: 15-18; Tr.2 147: 3-24**. The Parent described the “growth” the Child made when the Child received daily one-on-one special education reading skill instruction for two and one half hours from the First Reading Teacher. **Tr.2 147: 3-24.** The

6 *See also* Executive Order No. 51, State of Virginia, *Temporary Stay At Home Order Due to Novel Coronavirus (Covid-19)*, *et seq.,* entered on March 12, 2020.

Parent testified she became dissatisfied, however, with the Child’s Second Reading Teacher who provided daily thirty minutes one-on-one special education reading skill instruction. **Tr.2 149: 10-23.**

1. The Parent testified she participated in all the IEP meetings held for the Child at the Elementary School. She recalled receiving all of the procedural safeguard paperwork

the Elementary School staff provided to her. **Tr.2 150: 8-16; Tr.2, 152: 8-16**. The Parent testified she didn’t “know to ask questions” [about placement] but admitted she didn’t ask

any the Elementary School [placement] questions. **Tr.2 161: 12-16**. But the Parent admitted the Elementary School staff answered every question she asked. **Tr.2 150: 8-16; Tr.2 152: 24-25.**

1. The Parent testified she was unable to work from home to “facilitate any virtual learning.” **Tr.1 46: 19-25.** But the Parent located a daycare center near home and admitted,

“[I]n all honesty, it probably wasn’t the best environment… It was the best I could come up with in this time.” **Tr.1 48: 1-10**. But as the Child attended class in the virtual learning environment, the Parent testified she became concerned that the Child had not “grown or progressed.” **Tr.1 48: 11-12**. The Parent remarked during her testimony the Child no longer was able to “engage” with her about his academic work. **Tr.1 48: 12-16** The Parent testified the Child

did not discuss “what they learned that day.” **Tr.1 48: 12-16**.

1. The Parent testified she was unhappy also with the Child’s Second Reading Teacher because the First Reading Teacher had worked successfully with the Child through second and third grade at the Elementary School and she seemed more “invested” in the Child. **Tr.1 49: 13-** The Parent emailed and called the Principal numerous times to request the First Reading Teacher to be reassigned to the Child for his XXXX grade year at the Elementary School.

**Tr.1 50: 9-15.** But the Principal never responded. The Parent went to the Elementary School to speak to the Principal about having the First reading Teacher reassigned to the Child. T**r.1**

**50: 16-19.** The Parent testified the Elementary School Principal never responded to the Parent

after telling her he would consider it. **Tr.1 50: 16-19.**

1. Until this past year, the Elementary School Principal, who has taught at the Elementary School for thirty-five years, testified he thought both Parents “seemed pleased” with [the Child’s] educational progress. **Tr.2 203: 10-22.** He testified further**,** they had never expressed **“**unhappiness” to him. **Tr.2 203: 10-22**. The Elementary School Principal admitted he is not endorsed in special education, however, he testified he is Virginia licensed and endorsed to teach first through seventh grades and has qualified to be a Virginia state licensed Public School principal. **Tr.2 202: 5-7.** .
2. The Elementary School Principal described the Child’s special education reading program at the daycare center as not ideal but the special education reading teacher

worked with the Child for “what was supposed to be” 30 minutes daily for five (5) days from 11:30 A.M. to 12:00 P.M. **Tr.2 334: 8-11.** But school personnel learned that the Child began to miss much of the virtual instruction provided because he did not tune in to the teacher or tuned in late to listen to the teacher. **SB11: 56.** In response, the Elementary School Principal testified the Child’s virtual instruction teacher contacted the daycare center to make

certain the daycare center prompted the Child to begin the day’s instruction. **Tr.2 334: 14-23.** . The Elementary School Principal admitted he knew the Child’s non-attendance in the virtual environment to be a “frequent problem.” **Tr.2 334: 16.**

1. The Elementary School Principal testified regarding the Parents’ assertion the Child did not make reading progress during virtual instruction by stating that “just because a child is not reading at grade level does not mean the Child is not making progress. **Tr.2 386: 19-24.** He referred to the Child’s academic growth at the Elementary School since kindergarten and stated the Child made “good progress” **Tr.2 208: 18-25** every year and exceeded grade level PALS benchmarks in the fall and winter of third grade. **Tr.2 209: 1-4.** Also, he testified that Parents may not demand certain teacher assignments or particular reading programs. The Elementary

School Principal testified that a parent is not permitted to select the Child’s First Reading Teacher over the Second Reading Teacher or choose one reading program over another. **Tr.2 357: 1-12**. But he responded to the Parent’s allegation by testifying he assigned the

Second Reading Teacher to give reading instruction to the Child in XXXXXX grade. She was licensed and trained, as all Elementary School special education teachers at the school are, in many reading methodologies. The Second Reading Teacher was trained and gave the Child instruction in another reading methodology, SIPPS. But he assigned the Second Reading Teacher to the Child because she could provide one-on-one instruction to the him. Also, the Elementary School Principal explained, the school district introduced the SIPPS reading program at

citywide schools during the Child’s XXXXXX grade year. **Tr.2 361: 5-14.** And the Elementary School Principal testified, the First Reading Teacher simply had a higher case load than the Second Reading Teacher that year. **Tr.2 361: 1-10.** The Elementary School Principal’s explanation for the Second Reading Teacher’s assignment to the Child, and his refusal to reassign the First Reading Teacher to the Child, is credible.

1. The Elementary School Principal also testified regarding the twenty point gain the Child achieved on the Woodcock-Johnson after the December 2020 re-evaluation completed by the School Psychologist. **SB15; SB40; Tr.2 210:1-10.** The Child’s Woodcock-Johnson evaluation in reflected one standard deviation in scoring from kindergarten through third grade. **Tr.2 210: 1**- **10.**
2. The Advocate questioned the Elementary School Principal regarding the Child’s low score on the *Measurement of Academic Progress Test* (the “MAP”) which was completed in December 2020 in preparation for the Child’s renewed special education eligibility to requalify the Child for SLD. The Elementary School Principal testified the Child’s relatively low reading score, placing him in the 16th percentile, is not reliable because the low score likely resulted from the Child “rapidly guessing.” **SB9: 50**; **Tr.2 297: 1-19**. The Elementary School Principal

testified the Child achieved a score of 189 to 190 in third grade which placed him in the 41st percentile. Also, he testified, the average time for an average student to complete the MAP is 55 minutes, not the 20 minutes it took the Child to complete the test. **Tr.2 297: 12-15.** The witness also explained why he did not believe “rapid guessing” to be presented as an interfering behavior. He stated that rapid guessing was “far more common” in the virtual environment than “in real school time.” **Tr.2 297: 1-19**. The Elementary School Principal testified, “So I certainly would not take the results of this test – even the data it provides, about what he is able to do and then develop an instructional program based on that. Because we think the results do not really

tell us where he is academically.” **Tr.2 297: 1-19.**

1. The Advocate questioned the Elementary School Principal about the reason why the IEP team did not consider drafting a Behavior Intervention Plan for the Child in response to his rapid guessing which she referred to as an “interfering behavior.” The Elementary School Principal stated that in the “real world” **Tr.2 296: 1-11** students would be instructed to “slow down” **Tr.2 296:** which is not possible in the virtual environment. There are “limits about what a teacher can do” **Tr.2 300: 9-10** in a virtual environment. Standardized tests, he testified, are not “normed” for a virtual environment because these tests are given usually only in an “in-person” environment, not in a virtual one. **Tr.2 300: 3-7.** .
2. In April 2020, a Licensed Clinical Psychologist evaluated the Child by giving him more educational testing. But her evaluation is incomplete and the Licensed Clinical

Psychologist did not testify. In her evaluation noted above, she noted variability in the Child’s memory and learning skills, and she stated therein, the Child demonstrated “a significant difference between his fine motor speed and fine motor sequencing, a difference often seen in children with attention or learning issues**.” P9: 12.** “However,” she stated, “[The Child’s] visual motor precision and his ability to copy what he sees (visual motor integration) were average.” **P9: 12.** The Licensed Clinical Psychologist again noted the Child’s executive functioning skills

to be an area of weakness. She stated the Child may not do as well

with too much information or too many directions given at once.” **P9: 12**. It’s also difficult for the Child to transition from one thing to the next. **P9: 12.**

1. The Licensed Clinical Psychologist’s diagnosis is ambiguous in the above evaluation. She stated X.X. showed “significant weakness” in phonological processing abilities which finding is “consistent” with the “possibility” of a reading disability. **P9: 13.** The Licensed Clinical Psychologist continues in the next paragraph of her evaluation to state the Child’s academic testing **confirms** a reading disability (dyslexia). Despite the above ambiguity, the Licensed Clinical Psychologist diagnoses the Child’s difficulties to be caused by Attention Deficit Hyperactivity, Combined type, and also that the Child meets the criteria for having a “specific learning disability in reading (dyslexia); moderate” and “is also exhibiting an anxiety disorder.” **P9: 13.** But the Licensed Clinical Psychologist admits her findings to be somewhat confusing when she admits to her surprise that the Child does well in math despite what she referred to as his “associative memory weaknesses.” **P9: 13.** The Licensed Clinical Psychologist’s evaluation is also confusing when she diagnoses the Child to have a

reading disability (dyslexia) diagnosis and also states the Child’s reading comprehension is affected by his reading weaknesses, but she notes his ability write complete sentences, understand sentence structure and that his writing fluency tested in the normal range. **P9: 13.** Further, the Licensed Clinical Psychologist attributed the Child’s anxiety to be rooted in his fear of failure for perhaps not being able to do well in academic testing. **P9: 13.**

1. On December 20, 2020, the Licensed School Psychologist prepared her reevaluation report on the Child for his continued eligibility for special education during

his XXXXXX grade year at the Public School. In the area of “broad reading” fell within the low average development range. But in the broad reading testing category, in the areas of decoding, comprehension, word attack, oral reading and fluency, the School Psychologist tested his skills and found the Child to be “evenly developed” with equally aged students. **SB9: 51.** In the area of written language, the Child’s scores fell into the low average range, however, his spelling, written expression and fluency skills were “evenly developed.” **SB9: 51.**

1. During his interview with the Licensed School Psychologist, the Child said he thinks school is “terrible” and does not care much for either “in person” or “virtual learning.” **SB9: 52**. The Child also told the Licensed School Psychologist he takes his ADHD medication “almost every day” but “doesn’t think he needs it.” The Child lamented he cannot play sports at his school and reports he plays basketball, video games and makes YouTube videos in his spare time. **SB9: 52.**
2. The Child did not fully participate in virtual learning. A teacher prepared the following observation of the Child during virtual learning at the Daycare Center on December 11, 2020:

The students left to complete asynchronous assignments and were instructed to return for writing. The Child did return but had his camera off. The teacher got the class started and asked to turn their cameras [on]. [The Child] did not. The teacher asked him again but he did not turn his camera on. Later he turned his camera on but only for 1 or 2 minutes before he completely left the class. The observation concluded. **SB11: 56.**

1. In March 2021, the Parent contracted with the Private School upon learning that the Child was accepted. The Parent indicated she had fully researched the Private School and had the Child interviewed there. The Parents indicated she consummated the written contract with the private school, paid the deposit and spoke with other parents whose children attended the Private School. **Tr.1 200: 1-8.**
2. The Elementary School Principal emailed the Parent the Child was logging on and off the virtual special education class on April 20, 2021. The Principal sent an email to the Parent to inform her that the Child did not participate in his virtual special education class:

“I came into the Zoom meeting at 11:30. [The Child] was supposed to be in class at 11:30. He did not show up, so [the Second Reading Teacher] called [the Daycare Center]. At 11:35 [the Child] joined. There was a great deal of background noise and activity seen in the room. [The Child] was not using headphones. [The Second reading Teacher] started an activity

to support writing in nearpod, but [the Child] went to the wrong link. She redirected him to the corrected nearpod link, but suddenly he told her he had to leave for a minute (no reason given). At 11:43 he went off camera. At 11:49 he came back and told the teacher he had to wash his hands. Again, lots of background noise and [the Child] was not wearing the headphones. [The Second Reading Teacher] started the nearpod activity. Holden then told her he had to go get his lunch. [The Second Reading Teacher] told him he has to stay with her for another 10 minutes and then he could go get his lunch. [The Child] initially responded to the first question verbally. When [the Second Reading Teacher] asked him to type his answer in nearpod, he left class (11:55) without notice, and did not return. While the teacher had planned an activity to support his writing development, at best, he participated in instruction for less than 5 minutes of the 30 minute period. It seemed to be a highly distracting environment with lots of background noise and activity. He was late in coming in (5 minutes), left the class in the middle of instruction for 6 minutes, then left the class again at 11:55 and did not return. Out of the 30 minutes he was on camera for 15 and responded to the instruction one time (verbally). **SB16: 69.**

1. The Parent responded to the Elementary School Principal’s email that she would take the matter up with the Child. **Tr.1 75: 11-9.** The Elementary School Principal did not refer the matter for the IEP to consider preparation of a functional behavior assessment to correct the Child’s “interfering behaviors.” **Tr.2 76: 5-7.** He responded that the City was “one hundred percent virtual” at that point Tr.2the location choice for the virtual instruction was the Parent’s selection “[a]nd we didn’t have breakout rooms.” **Tr.1 334: 5-6**. “So we worked with the parent through the child care center. One of the responsibilities of the parent was to provide an appropriate environment.” **Tr.2 326: 12-15.** The Elementary School Principal stated that it would have been “problematic” to have individuals going into daycare centers because [teachers] were not allowed to go in the building at all. **Tr.2 326: 4-8**.
2. The Licensed School Psychologist reported that some teachers noted the Child’s behavior is consistent with his ADHD diagnosis which the Public Day School teachers have reported since 2017. Also, the Licensed School Psychologist noted the Child’s speech was “often mumbled” and contained “articulation errors” and “tangential” in that he easily wandered off the topic. **SB9: 51.** During academic testing on December 2, 2020, the Licensed School Psychologist reported that the Child quickly responded to the administered tasks and answered questions

quickly by “placing limited forethought in his answers.” **SB9: 51.** In the Licensed School Psychologist’s report, she made the following behavioral observation: “[The Child] frequently responded to items prior to them being administered in their entirety and asked multiple times how much longer the testing would last.” **SB9: 51.**

1. The Licensed School Psychologist recommended the Child continue to receive special education services as a child with a SLD and added the Child continued to display ADHD for which he takes medication. The Child’s cognitive skills, she reported, fall within an average development range. She reported also the Child’s math skills are in the average range,

but found deficits in reading and written language achievement. **SB9: 51.** When the Licensed School Psychologist reviewed the Connors 3 Teacher report from regarding the Child’s class performance, the teacher noted the Child’s inattention which was in the clinical range. But the teacher noted average scores in hyperactivity, impulsivity, learning problems, executive functioning aggression and peer relations. But when the Child’s special education teacher completed the Connors 3 regarding the Child’s class performance, she noted aggression but gave average scores in inattention, hyperactivity, impulsivity, learning problems, executive functioning, and peer relations. **SB9: 52**. The teacher reports did not clearly indicate aggression.

1. Between May 12 and May 13, 2021 an Audiology Expert who is a speech-language pathologist evaluated the Child extensively. Though the Audiology Expert did not testify at the hearing, he provided a comprehensive written report which is contained in the Petitioner’s documents. The Audiology Expert has attained doctorate level expertise and has written numerous audiology treatises currently used as textbooks in the audiology field. The Audiology Expert has valid, current Virginia licenses in speech-language pathology and specializes in diagnosing auditory processing disorders. **SB26: 148.**
2. The Audiology Expert reported the Parent reported “no significant concerns” in the area

of “decoding” which is typically descriptive of “dyslexia” 7 which means an individual experiences deficits in processing phonemes and discriminating sounds and words. Thus, decoding difficulties also indicate that an individual has issues in reading, spelling and writing.

But, the Audiology Expert reported the Child’s verbal cognitive abilities to be above

the mean, and comported with his WESC-V IQ score of 108/70th percentile. The Audiology Expert reported also the Child’s reading difficulties are not attributable to verbal cognitive problems (dyslexia is a verbal cognitive deficit). The Auditory Expert determined the Child has a “specific auditory processing disorder (APD) and a language knowledge and/or

processing disorder.” **P10: 9.** Thus, the Audiology Expert did **not** find dyslexia to be the source of the Child’s special education difficulties. The Audiology Expert explained that the prior psychological report prepared by the Licensed Clinical Psychologist “looked at one, and only one” factor of auditory phonological processing which involves blending sounds or phonemes into individual parts in which the Child performed poorly on the CTOPP-2 given to him by the Licensed Clinical Psychologist. But the Audiology Expert gave the Child comprehensive testing in this area. From these more complete testing devices, the Audiology Expert concluded X.X. had an audiology processing issue, not dyslexia. The Audiology Expert mentioned also he tested the Child independently of prior testing by the Licensed Clinical Psychologist and did not base his evaluation on her prior review. The Audiology Expert used the WISC – V which is a reliable testing instrument. **P10: 2.**

1. The Audiology Expert described the Child’s academic issue as APD which he defined as “a problem in understanding spoken language due to an imperfect ability to listen because of underlying auditory perceptual deficits. The Audiology Expert explained that auditory information processing represents a series of steps after an individual’s person’s ear “receives”

7 Virginia regulations define dyslexia as a specific learning disability that is neurological and is characterized by difficulties with fluent word recognition, poor spelling and decoding typically resulting from a deficit in phonological component of language that is unexpected in relation to other cognitive abilities. *See also Guidelines for Educating Students with Specific Learning Disabilities,* “*Foundational Competencies”,* at p. 6.

an auditory symbol**. P10: 4.** Then the central nervous system inside the brain gets involved and the processes interact with each other ultimately reaching the message’s final import. **P10: 4.** He further explained in his report that these multiple auditory processes, which must perform succinctly, must not be deficient or the auditory message will not be clear. **P10: 4.**

1. The Auditory Expert’s testing results for the Child showed no problems in the sensory auditory processes: hearing, awareness and recognition of sound, hypersensitivity to sound, overloading which is a problem in breaking down sound. But the Auditory Expert’s testing results for the Child show he has an auditory processing deficiency in the area of auditory extraction. **P10: 5.** The Auditory Expert defined the auditory extraction process as the mechanism by which an individual extracts (or converts) meaningful elements of a word or signal to comprehend the word’s meaning. Further testing showed that X.X. has a weakness “with the auditory extraction at the level of auditory temporal (speed of) extraction … which needs interventions.” **P10: 6.** Also, the Auditory Expert found no problems in the Child’s understanding of linguistic or phonemic extraction. Clearly, the Audiology Expert reported, the Child is able understand what he reads. **P10: 6.**
2. The Audiology Expert, who stated the Child has excellent listening skills and his verbal cognitive abilities are “above the mean,” examined the area of X.X.’s auditory attention and distractibility**. P10: 6**. Though the Parent had rated the Child “high” on the distractibility scale. **P10: 6.** But the Audiology Expert found no problems in the Child’s distractibility or inattention. He found no problems with “impulsive responding.” **P10: 6.** But the Audiology Expert qualified his assertion when he opined that the Child has “no problems with attention” if the Child is “on his ADHD medication.” **P10: 6.** Also, the Audiology Expert reported “very normal findings” for the Child being able to filter out background noises and sounds when he is listening. However, the Audiology Expert cautioned that the Child might become “emotionally overloaded,” and have negative interactions, if he’s trying to do his work and background noise

is present. **P10: 7.**

1. But the Audiology Expert did find that the Child has significant problems with organizing and sequencing auditory information. The Auditory Expert indicated the Child does have executive functioning issues and suggested the Child could benefit from having a comprehensive clinical psychological examination. **P10: 8.**
2. The Audiology Expert also opined the Child’s primary audiological deficiency is in the auditory integration which is the process by which we take in pieces of information to form a unified whole to understand what we hear**. P10: 7.** The Child’s results were mixed and showed weaknesses in putting pieces of words together he hears and reads to form a whole. **P10: 7.**
3. The Audiology Expert was quite specific in describing how educators can deal with the Child’s APD and states, the Child experiences auditory and language processing issues, difficulties with grammatical language knowledge and speech articulation. He concludes:

“The auditory processing and language processing problems likely contribute to him being able to appropriately, rapidly, and completely ‘getting’ and understanding what is said to him and what he reads.” The phonological processing problems, grammatical language problems, and language processing problems, as well as lexical integration problems and temporal processing difficulties likely contribute to him being able to respond appropriately and quickly and write appropriately in response to questions asked for written assignments. These problems can and will interfere with his academic performance.” **P10: 7.**

1. The Audiology Expert offered suggestions or learning strategies appropriate for the Child such as previewing the information prior to giving it to him, chunking instructions, giving him extra time and software programs designed specifically for the Child’s APD. **P10: 9.** Also, the Audiology Expert cautioned that for the Child to move forward in his education the Child should receive evidence-based treatments, accommodations and instruction from a qualified speech- language pathologist. **P10: 8-10.**
2. The Public Day School provides a competent Licensed Reading Specialist who testified as an expert witness at the due process hearing. She is a trained professional who has acquired vast expertise as reflected on her resume. **Tr.3 162: 22.** At the Private School no witnesses testified regarding Virginia licensing credentials and the Private School is not accredited or licensed as a Virginia Private School for students with disabilities. **SB31: 202-328**. The Hearing Officer notes the Public Day School already utilized many learning strategies and suggestions the Audiology Expert and the Licensed Clinical Psychologist recommended such as “chunking,” “previewing information” and providing the Child extra time to complete his work. **Tr.2 329: 10-23.** At the Public School, the Elementary School Principal stated the school district has an audiologist who may read and interpret the Audiology Expert’s report. Tr.2 329: **10-23.** The Private School might not necessarily employ a Virginia licensed speech-language arts professional which the Child requires, and the Public School provides, on staff. Also, the Elementary School Principal testified that all special education teachers employed at the Public Day School are endorsed and Virginia licensed. **Tr.2 358**: **6-11.**
3. The Petitioner called a Dyslexia Advocate who testified as an expert in dyslexia advocacy at the due process hearing. **Tr.2: 97: 23-25**. The Dyslexia Advocate testified regarding numerous special education community and national organizations she chairs or in which she participates since 2015. **Tr.1 98: 1-7**. But her testimony did not elucidate the issue of whether or not the Child receives a FAPE at the Elementary School he attended.
4. The Dyslexia Advocate used many multi-syllabic words during her testimony to describe the dyslexia disorder. She mentioned “neuroplasticity,” “neurological wiring,” “comorbid” and “neurodiversity.” **Tr.1 100: 9-15**. But she candidly admitted she was not a medical provider, **Tr.1 101: 16-20,** not a licensed school psychologist, **Tr.1 103: 10-13,** and not a reading specialist, **Tr.1 103: 14-17**. Thus, the Hearing Officer did not glean much insight from the Dyslexia Advocate who lacked the educational or experiential expertise to address the Audiology

Expert’s contrary finding effectively stating the Child’s primary learning issue is not dyslexia.

**P10: 2.** The Dyslexia Advocate was similarly not positioned to explain why the Audiology

Expert’s testing did not find dyslexia whereas the Licensed Clinical Psychologist’s report did diagnose the Child with dyslexia. **P9: 9; P10: 2.**

1. The Petitioner presented a Special Education Teacher as an expert witness who was not currently licensed in Virginia but testified she has a permanent special education license in New York. **Tr.1 206: 15-17**. She testified she achieved the masters level of education with a

concentration in special education. **Tr.1 206: 10-14**. The Special Education Teacher testified she had written hundreds of IEPs and chaired IEP meetings, **Tr.1 212: 19-22**, but admitted she was not licensed in Virginia as a teacher or administrator, **Tr.1 214: 14-18,** and not licensed as a special education administrator in the state of New York. **Tr.1 214: 14-18; Tr.1 216: 21-24**.

The Special Education teacher admitted she was not a school psychologist in Virginia or in New York, **Tr.1 216: 21-24**, not qualified to do a speech-language evaluation, **Tr.1 217: 1-4,** and

has not held a job in a public school capacity since 2014. **Tr.1 218: 21-23.**

1. The Special Education Teacher participated in a resolution meeting for the Child at the Public Day School he attended. **Tr.1 239: 12-17**. She stated the Public Day School team made “conflicting statements,” **Tr.1 239: 12**, regarding the school’s collected data. She wanted to know how the Child “did” on grammatical judgment, his spelling and on decoding assessments. **Tr.1 239: 12-17; Tr.1 241: 21-24.**
2. The School Psychologist testified, aside from the above credentialing issues, the Special Education Teacher was only present for a portion of the resolution meeting. **Tr.3 48: 1-11.** , Also, she testified, a special education teacher cannot give [psychological testing instruments] and is not qualified to analyze [the testing data]. She testified further, a special education teacher may read [the psychological test instrument] but “to truly analyze, you must have had real training to analyze raw data. **Tr.3 59: 2-14.**
3. The Special Education Teacher however, supports the Audiology Expert’s findings because, she said, “he really pulled it all together in a quite tight way” **Tr.1, 253: 4-7** “and that she could now fully understand X.X.’s “phonological loop.” **Tr.1, 253: 4-7; Tr.1 253: 10-12.** Finally, the Special Education Teacher questioned why the IEP team had not initiated a functional behavior assessment for the Child, why his special education service hours were “cut” and why the IEP team did not write ESY hours into the Child’s IEP. **Tr.1 253: 6-7, 12-16, 22.** The Special Education teacher questioned why the IEP team had not completed the CTOPP to identify the Child’s dyslexia “precursers.” **P17: 4; Tr.1 260: 3-6; Tr.1 262: 9-13; Tr.1 266: 11-**

**13.** But this witness was not a Virginia licensed Special Education Administrator or a licensed school psychologist in this state, thus, the witness was not in a position to testify, in a qualified capacity, upon these issues or to opine on the testing data selected by them.

1. The School Psychologist testified at the due process hearing. She conducted psychoeducational, phonological and memory testing on the Child in preparation for his special education re-eligibility meeting in December 2020. **Tr.3 23: 17-22.** The School

Psychologist has known the Child since he first entered the Elementary School in kindergarten in the 2016-2017 school year. The School Psychologist also conducted the Child’s first eligibility meeting just prior to his first grade entry. **SB9; Tr.3 23: 17-22; Tr.3 24: 1-21.** She testified the Child’s original reading and written language scores fell into the extremely low-average range which she stated were “below 70” but then the Child’s [reading and writing] scores “jumped into the 80’s almost 20 points” the following year after he received special education reading instruction. **Tr.3 30: 20-25; Tr.3 31**: **1-10**. She stated that a “substantial jump” in scores, equal to one standard deviation, represents the Child made “significant progress at [the Elementary School]. **Tr.3 31: 1-10.**

1. The School Psychologist testified that for the Child to academically perform “below grade level and continuing to have difficulties” does not indicate an additional disability in

reading**. Tr.3 34: 1-5.** Further, the School Psychologist explained, [standardized] reading test scores are not necessarily related to curriculum though parents and teachers see grade equivalency and are often “misled.” **Tr.3 35**: **1-10.** She testified, “Because grade equivalency [on standardized reading achievement test] scoring has little to do with public school curriculum.” **Tr.3 35: 1-10.**

1. The School Psychologist testified about the December 2020 eligibility meeting in which the Parent also participated. The School Psychologist did not recall the Parent ask any questions about [reading] test results. And the witness further stated, “I routinely ask parents if they have any questions after giving my report…Then I will talk until they don’t have any questions anymore and I don’t recall that happening.” **Tr.3 36: 22-25**; **Tr.3 37: 1**; **SB13.**
2. The School Psychologist admitted knowing about “pieces” of the Licensed Clinical Psychologist’s Report, indicating the Child “meets the criteria for dyslexia” completed in the spring 2021 which was provided to the School Psychologist. **P9 13.** But the School Psychologist stated she “never received the complete evaluation from the Licensed Clinical Psychologist” until much later. **Tr.3 40: 10-16** When the School Psychologist received the above report,

she testified the report was redacted, undated and missing the Licensed Clinical Psychologist’s signature. **SB3 40-41.** The School Psychologist testified the most recent version of the Licensed Clinical Psychologist’s Evaluation “starts at page six.” **Tr.3 40: 24-25; Tr.3 41: 1-7.** The Parent admitted she did not initially provide the entire evaluation from the Licensed Clinical Psychologist and only initially provided test results to the Elementary School. The Parent testified she provided the redacted, unsigned report because the Licensed Clinical Psychologist’s original evaluation contained personal information. **Tr.1 8: 1-10**.

1. Currently the Child is enrolled at the Private School for the 2021-2022 school year. The Private School is accredited by the Virginia Association of Independent Schools. The Private School is not state accredited for instructing disabled children though the Parent believes the

Private Schools’ primary function is to treat dyslexia and “related learning disabilities.” **Tr.1 173: 12-13**; **SB30; SB31.** But the Parent admitted at the hearing does not know if the Private School teachers are state licensed in special education or if the Private School teachers are qualified in any capacity. **Tr.1 173: 12-13.**

1. The Parent testified that “the entire [application to the Private School] process was completed before she involved the IEP team. She further testified that the entire process [application and paying the Private School’s initial tuition deposit] was done prior to [her] bringing the matter before the IEP team for placement determination. **Tr.3 175: 20-23.** Per the Parent’s statement, she completed the application and tuition process in March 2021. **Tr.3 177:13-14.**
2. The Respondent offers the Public Day School instructional program represented by the

IEP dated February 19, 2021, to which the Parent assented, which was to function for the 2021- 2022 school year states the Child may attend school the Public Day School along with children without disabilities. And the IEP dated February 19, 2021, states as follows regarding the Child’s placement decision in the least restrictive environment which the Hearing Officer deems appropriate:

“Public Day School – Due to significantly below grade level progress the IEP team agrees that [the Child’s] IEP goals and objectives require specialized instruction in a special education classroom outside of the general education classroom. During the COVID pandemic, this instruction will be delivered through a distance learning classroom until such time that it is deemed safe to return to the school environment. During distance learning he will receive 150 minutes of language arts instruction weekly in a special education distance learning setting. If, at any point during the duration of this IEP, in person teaching resumes, he will receive 300 minutes of language arts weekly in a special education classroom. If school buildings open and then close again, he will receive services virtually as described above. The Child will participate in all non-academic activities with his general education class in both settings. Accommodations and modifications will be addressed in both virtual and in person learning. The Parent gives permission in a small group special education virtual setting with his camera on.”

The Parent signed the IEP on February 19, 2021. The IEP placement decision is straightforward. The Parent had adequate opportunity to object to its contents. But the Parent consented to the 2021-2022 IEP. **SB1 19.**

## **LEGAL STANDARDS AND FINDINGS**

# Procedural Considerations and Burden of Proof

The Petitioner bears the burden of proof as the party seeking relief at a due process hearing, *Schaffer v. Weast,* 546 U.S. 49 (2005) (“The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.”).

* 1. **Provision of a Free, Appropriate Public Education**

a. The Act “ensures that all children with disabilities have available to them a free, appropriate public education that emphasizes special education and related services

designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. Sec. 1400(d)(1)(A). Also, the Act authorizes federal assistance

to states that comply with the Act. Thus, a free, appropriate public education (“FAPE”) means a “special education and related services that have been provided at public expense, under public supervision, and direction, and without charge. The IEP is the “educational instruction specially designed to meet the unique needs of the handicapped child … supported by such services as are necessary to meet the unique needs of the handicapped child to benefit from the instruction.” *See County Sch. Bd. of Henrico v. Z.P. ex Rel. R.P.*, 399 F.3rd 298 (4th Cir. 2005).

When the IEP team develops an IEP, the team must consider the strengths of the

child, parental concerns, and any evaluation results. Thus, an IEP is sufficient if it is ‘reasonably calculated to enable the child to receive educational benefits.’ ” *Z.P.*, 399 F.3d 298, at 300, (quoting *Rowley*, 458 U.S. 176, at 207).

In determining whether the Respondent provided the Child with a FAPE in the IEP, the Hearing Officer adopts a two part assessment: First, the Hearing Officer decides if the state complied with the procedure specified in the Act. Second, the Hearing Officer decides if the IEP is reasonably calculated to enable X.X. to receive educational benefits. *Rowley,* at 207;

The Hearing Officer is convinced that the Respondent fully complied with the Act’s

procedural requirements and the February 19, 2021, IEP is reasonably calculated to

enable the Child to receive educational benefit. The Respondent’s witnesses proved the Child achieved academic growth and progress which was considerable and not *de minimus*. By March 2021, the Petitioner knew the Child was enrolled at the Private School for the 2021-2022 school year. The Petitioner paid the Private School’s tuition deposit fee. The Petitioner did not give the Public Day School adequate notice that the Child had already left the Public Day School when the Parents requested the Public Day School to consider his private placement at the Private School for alleged procedural and substantive deficiencies, per the Act, on March 26, 2021.

# Least Restrictive Environment

a. The state must demonstrate that its disabled children have been placed in the least restrictive environment (“LRE”) to accommodate the special education student’s disabilities. 34

C.F.R. Sec. 300, 552(d). The Act requires also that a student’s special education needs be served by preparation of “an IEP which must be prepared at meetings between school representatives and the child’s parents. 20 U.S.C. Sec. 1401(a)(19), 1414(a)(5).

The Child’s least restrictive environment at this time is the Public Day School because the Child can be instructed in the company of his non-disabled children while he receives special education instruction and assistance. The Child showed substantial progress in the Public Day School environment. The fact that the Child received lower scores on standardized achievement tests in the Covid virtual learning environment does not reduce or obliterate the positive academic growth he made prior to the unique confines and limited testing access of the daycare locale where he received special education instruction during the Covid pandemic in his virtual environment from March 2020 to June 2021 until his XXXX grade re-entry into an in-person school environment.

# Reimbursement

* + 1. Reimbursement of special education expenses under the Act is appropriate

when it is determined that (1) the public school placement was not providing the child with a FAPE; and (2) the parents’ placement was proper under the Act. *See Sch. Comm. of Town of Burlington Mass. v. Department of Education of Mass.*, 471 U.S. 359 (1985); *see also Jaynes ex rel. Jaynes*, *v. Newport News School Board*, 13 Fed. Appx. 166 (4th Cir. 2001).

* + 1. The Respondent offered a FAPE to the Child during the pandemic health crisis and for the requisite two years prior to filing the DPN on July 5, 2021. The Petitioner unilaterally placed the Child in a Private School and did not provide the Elementary School adequate notice, actual or constructive, to the Public Day School administrators prior to enrolling the Child in the Private School.
    2. Notwithstanding the fact that the Petitioner did not notify the Public Day School administrators prior to the Child’s to his Private School placement, the Petitioner offered no credible evidence regarding Private School placement details other than a contract for the Private School and advertising material.

# DISCUSSION

1. **The Parents Procedural Rights Under The Act Were Not Violated:**

The Petitioner asserted at the due process hearing that their procedural rights were not provided to them and the Petitioner consented to the IEP without fully knowing that the Child had not met early reading benchmarks. The Petitioner asserts the Child’s reading skill deficits were withheld from them and the Child’s complete academic record, reflecting the Child’s poor reading skills, was purposely withheld from them. And, essentially, the Petitioner asserts the Respondent concealed the Child’s complete academic record from them.

Also, regarding withheld information, the Petitioners assert they assented to the successive IEPs, from first through XXXXXX grade, without actually knowing what the IEP content was or how low the Child’s reading scores were because they did not know what questions to ask of the IEP team. But these facts are not reflected by the evidentiary record in this case.

At each interval of the Child’s education, he has been given reading and speech-language skill interventions, innumerable special education hours and received expertise from well- trained, licensed special education professionals. The Respondent’s exhibits reflect successive written notices provided to the Petitioner, from first grade through XXXXXX grade. And the Child is now in XXXX grade. The Petitioner testified she was quite satisfied with the school’s supervision over the Child’s special education program until the Petitioner testified she became disenchanted with the Child’s Second Reading Teacher and the reading program methodology the teacher used. The Hearing Officer notes the Petitioner may not control a special education teacher assignment or reading program selected by the Public Day School. But the Petitioner became distraught and demanded responses, which never came to her, from the Public Day School. The Respondent’s Elementary School Principal testified he didn’t receive the Petitioner’s email but his lack of response is not tantamount to procedural error under the Act. The Petitioner worried because the Child showed lack of interest in the Respondent’s virtual lessons from the reading program. The Elementary School Principal testified he informed the Petitioner by email why the Child who had appeared was no longer actively participating in much of it.

Admittedly, the Hearing Officer questioned why the Elementary School Principal did not refer the Child’s failure to stay in the virtual special education instruction class directly to the IEP team for the preparation of a behavior intervention plan. But the Hearing Officer opines it is reasonable to understand the Respondent’s limitations when Covid health restrictions were paramount. The Elementary School Principal’s testimony is credible. The Respondent’s ability to reach out to students was confined to a virtual classroom setting. The Elementary School Principal testified there were no breakout rooms and the teachers were not permitted in daycare centers. Also, the Elementary School Principal testified the Petitioner selected the daycare center as their Child’s virtual environment during the Covid stay-at-home orders. But the daycare

center was noisy and chaotic. By the Petitioner’s admission during her testimony, it was the best locale she could find. But, as the Elementary School Principal testified and the Petitioner admitted, the daycare center was not likely an optimal setting for the Child’s special education service delivery.

But in the final analysis, the Petitioner’s locale was not the origin of the Child’s inattention at the daycare center. The Child is at an age when he knew what was expected of him in any educational class. And it was the Child’s decision to regularly forgo class and leave the virtual environment, or to not sign into the special education assignments. And the Child’s decision to leave class regularly was the reason he was unable to converse with the Parents about learned skills in the virtual environment.

Thus, the Child did not inexplicably regress in the virtual environment. The Child’s specific learning disability label addresses a student’s lack of cognitive abilities and does not apply to learning deficits which are primarily the result of environmental factors. And the Child’s ADHD did not cause the Child to remove his headphones whenever he felt like it.

Nor did the Child’s aggression or anxiety cause him to leave the learning environment at will. The Child knew to tune in. But frequently he didn’t tune in. These facts do not speak to inattention, anxiety, aggression, reading deficits or regression. When the Petitioner learned these facts, she admitted the Child knew what was expected of him in the virtual environment. When the Petitioner signed off on the last IEP in February 2021, the Petitioner clearly knew, or should have known, the Child was not cooperating fully with the special education teacher in the virtual environment.

Aside from the virtual environment issues above and prior to the Child’s final year at the Public Day School, the Child made substantial progress in reading comprehension and related subjects as is reflected in the PALS scores. And the Hearing Officer did not find credible evidence supporting the Petitioner’s position that the Child’s academic record was withheld from

them. The Hearing Officer did not find the evidence suggested the Petitioner requested the Child’s academic record, prior to the due process hearing’s commencement, when the Petitioner requested the Child’s academic record. It is understandable that the Respondent needed time to copy the file. But the Hearing Officer asserts the Respondent, when requested to do so, timely submitted the Child’s complete academic record to the Petitioner.

Regarding the Petitioner’s assertions Respondent withheld information about the Child’s reading deficits. This accusation is simply not shown in this evidentiary record. According to the School Psychologist’s testimony, the witness stated the Petitioner did not request additional information. But the School Psychologist, who has worked with the Child’s IEP team since before his first grade year, stated she answers any questions parents have until

they no longer have any questions. The witness is credible. Also, the Child’s parent is a well educated, informed individual who certainly has the requisite intelligence to ask questions if she had them. If Petitioner had questioned any aspect of the Child’s 2021 IEP, before signing off or consenting to it, the Petitioner could have asked those questions.

But the Hearing Officer does find that the Petitioner failed to provide information to the Respondent. In fact, the Petitioner’s omission to provide essential data to the Respondent caused confusion for the Respondent in the Child’s special education service delivery. Namely, the Petitioner did not timely provide complete psychoeducational data to the Respondent which the Petitioner asserted was essential to the Child’s special education. The School Psychologist testified she received only data that was undated, unsigned, incomplete psychological reports from the Petitioner. Yet the Petitioner expected the Respondent to incorporate the Licensed

Clinical Psychologist’s report into instructional materials for the Child.

Also, the Hearing Officer did find the Petitioner failed to provide the Respondent adequate notice of the Petitioner’s intent to remove the Child from the Respondent school district. The Petitioner was honest. She freely admitted she signed the Private School paperwork

and paid the non-refundable tuition deposit just days before requesting consideration for private placement in March 2021. But the equities in this time sequence are clear. The Petitioner had no intent to keep the Child in the Public Day School after she paid the Private School’s non- refundable tuition deposit. Thus, the Respondent never had the opportunity to correct

alleged deficiencies in the Child’s special education program.

And the Act, at 20 U.S.C. Sec. 1412(a)(10)(C)(iii) states the Petitioner was required to provide the Respondent ten (10) day written notice prior to removing the Child to the Private School. But the Petitioner failed to provide timely notice. And as stated above, the Hearing Officer does not find valid information was withheld from the Petitioner who was not justified in the failure to provide adequate notice to the Respondent before informing the Respondent of the Petitioner’s intent to remove the Child from school. The Respondent must receive adequate notice prior to the Child’s removal to provide the Respondent the opportunity to correct alleged deficiencies. Also, as stated herein, the Petitioner did not provide, in a timely manner, the outside psychological report to the Respondent school district before expecting the Respondent school district to rely upon its import. Nor did the Petitioner wait for the audiology report which the Petitioner asserted the Child required to move forward in his special education coursework. In fact, the audiology report conveyed a great deal of useful information about the Child’s speech- language issue and made recommendations for instruction. Fortunately, the Respondent school district already had many of the speech-language instructions in place. *See also Glendale Unified School District v. Almasi,* 122 F. Supp. 2d 1093 (C.D. Cal. 2000) (affirms the hearing officer’s finding that the parents’ actions of withholding information from the school district

impaired the district’s ability to make decisions related to the student’s education); *See also Florence County Sch. Distr. Four v. Carter,* 510 U.S. 7, at 16 (1993); *Werner v. Clarkstown Cent. Sch. Dist.,* 363 F. Supp.. 2d. 656 (S.D.N.Y. 2005) (held that the parent’s cooperation with the IEP team regarding placement was a sham).

### **Did the Respondent Provide A FAPE**

In order to provide a FAPE in the IEP, the document “must contain statements concerning a disabled child’s level of function, set measurable goals, describe the services to be provided, and establish objective criteria for evaluating the Child’s progress.” *M.M. ex rel. D.M.*

*v. Sch. District of Greenville County,* 303 F.3d 523, 527 (4th Cir. 2002); *see also Doyle v. Arlington County School Bd.*, 953 F. 2d. 100, 106 (4th Cir. 1991); *see also* 20 U.S.C. Sec. 1414 (d)(1)(A).

In light of the above considerations regarding FAPE provision in the IEP, in this case, the Child’s academic record shows stable growth and progress in reading skill deficits which form the basis for his SLD and for which he receives speech-language services from the Respondent. The Child did not do well on the MAP test he took in the virtual learning environment because he rapidly guessed the test answers and did the test in twenty minutes which usually takes upwards of an hour to complete. But his MAP performance did not

demonstrate academic regression. The Child’s academic progress in reading comprehension and other related skills is slow and steady but resulted in the Child’s being able to reach grade level benchmarks, as reflected in the PALS scoring and his earlier reading comprehension scores reflecting one standard deviation upward, in from first through third grade. The Respondent’s witnesses stated clearly the standardized testing the Respondent utilized do not

actually correlate to grade level work which is a common misunderstanding for parents who may observe raw data and scoring. The Hearing Officer gives deference to the educators when their academic programming has a proven record of success with a particular special education student. And the Hearing Officer is entitled to weigh the evidence to determine, by a preponderance of the evidence, giving credibility to the witnesses and deference to the educators, that the Respondent provided FAPE to the Child. *See County Sch. Bd. of Henrico,* 399 F. 3d 298, 304 (4th Cir. 2005); *M.M. v. Sch. Dist. Of Greenville County*, 303 F. 3d 523, 532 (4th Cir. 2002)

(Actual educational progress is a factor to be considered in determining the appropriateness of an IEP under the IDEA.).

The Hearing Officer deems the IEP to satisfy the *Rowley* standard that this IEP provides “more than a basic floor of opportunity that access to special education and related services provides.” *See Tice by and Through Tice v. Botetourt County Sch. Bd.,* 908 f.2D 1200, 1207 (4th Cir. 1990) (quoting *Rowley,* 458 U.S. at 201). And the Respondent provides an IEP which is evidenced-based and offers the Child much more than a minimal amount of opportunity, which has been proven by his academic success through his IEP and his special education for many years. (*See Endrew F. v. Douglas County School District Re-1,* 137 S. Ct. 988, 69 IDELR 174 (U.S. Mar. 22, 2017).

- Signature Page To Follow –

# FINAL ORDER

The Petitioner not having met the burden of proof in this matter, reimbursement to the Petitioner is **DENIED** and nothing further to be done, this special education due process matter is **DISMISSED**, with Prejudice.

Dated: September 17, 2021

This is the signature of the Hearing Officer.


Sarah Smith Freeman, Hearing Officer

**RIGHT OF APPEAL NOTICE**

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.

# Decision Date: September 17, 2021 This is the Hearing Officer's signature.

Sarah Smith Freeman, Hearing Officer

# CERTIFICATE OF MAILING

I have emailed/mailed the above Written Decision to the Advocate and to School Counsel on this 17th day of September, 2021.



Sarah Smith Freeman, Hearing Officer

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