# **#22-030**

**VIRGINIA DEPARTMENT OF EDUCATION**

**DUE PROCESS HEARING**

**IN RE: XXXXXXXXX, a minor, by and through**

**Parents, XXXXXXXXXX and XXXXXXXXXXX,**

**Petitioners, FINDINGS OF FACT AND DECISION**

**- against -**

**Case No. 22-030**

**XXXXXXXXXXXXX School Board, Tiziana Ventimiglia, Esq.,**

**Hearing Officer**

**Respondent.**

**INTRODUCTION**

This matter comes before the undersigned Hearing Officer on Petitioners’ Notice of Due Process Complaint, filed on August 26, 2021 (hereinafter, “Complaint”). [[1]](#footnote-1) [[2]](#footnote-2) I was appointed shortly thereafter.[[3]](#footnote-3) Respondent’s Response to the Complaint was filed on September 7, 2021.[[4]](#footnote-4) [[5]](#footnote-5) Two resolution meetings were held on September 9, 2021, and September 24, 2021. The parties, however, were not able to reach an agreement.[[6]](#footnote-6) A First Prehearing Conference in the matter was scheduled for, and held on, September 14, 2021.[[7]](#footnote-7) The Prehearing Conference Summary and Order was issued on September 15, 2021.[[8]](#footnote-8) A Second Prehearing Conference was scheduled for, and held on October 4, 2021.[[9]](#footnote-9) The Second Prehearing Conference Summary and Order was issued on October 5, 2021.[[10]](#footnote-10)

The hearing was held on October 13, 2021, October 14, 2021, October 15, 2021, October 16, 2021, and October 18, 2021. It was an open hearing, with at least one person of the public in attendance each day. The Petitioners were represented initially by Ms. Cheryl Poe, an Advocate, and then by Ms. Lois Manes, Esq. who entered her appearance on September 29, 2021.[[11]](#footnote-11) Respondent was represented by LaRana J. Owens, Esq.[[12]](#footnote-12) Petitioners entered into evidence two Exhibit Books with 10 sections containing exhibits numbered 1 through 338.[[13]](#footnote-13) Respondent entered into evidence one Exhibit Book containing exhibits numbered 1 to 84.[[14]](#footnote-14) [[15]](#footnote-15)

Several motions were filed by both parties, as well as a multitude of subpoenas and requests for production of documents, and they are all made part of the record. Notable is a Partial Motion to Dismiss that was filed on September 9, 2021 by the Respondent.[[16]](#footnote-16) In said motion, the Respondent asked this Hearing Officer to dismiss 1) allegations which arose prior to August 26, 2019 as being barred by the 2-year statute of limitations; 2) prayers for relief such as monetary damages; and lastly 3) section 504 and ADA allegations. This hearing officer, by Order dated September 17, 2021, granted Respondent’s motion in part, allowing Petitioners to present evidence to determine whether reimbursement for private weekly therapy sessions, as well as private tutor services, and extra curriculum activities are proper; this Hearing Officer also stated that, although I would not decide matters relating to 504 issues, I would still hear evidence relating to the implementation of the services under the 504 Plan to determine whether those services, coupled with the IDEA services, provide FAPE.[[17]](#footnote-17)

Another notable motion was the Motion to Dismiss filed by the Respondent on October 6, 2021, asking this Hearing Officer to dismiss Petitioners’ Exhibit Books which were not received by the deadline imposed by the Prehearing Conference Summary and Order. Specifically, this Hearing Officer’s Order stated that the parties had to disclose and exchange Exhibit Books no later than October 6, 2021 at 5:00 pm. Petitioners’ Exhibit Books were mailed before 5 pm on October 6, 2021, but were not received until the following day, October 7, 2021. This Hearing Officer denied Respondent’s motion by Order dated October 7, 2021, finding that the delay was not proven to be prejudicial to the Respondent, and that, in balancing the respective positions, granting a small extension of time for delivery of the Exhibit Books is in XXXX’s best interest.[[18]](#footnote-18)

Lastly, notable was Petitioners’ Motion to Allow Remote Testimony dated September 29, 2021.[[19]](#footnote-19) This Hearing Officer granted the motion to allow such testimony upon the receipt, among other things, of a statement by the witness explaining the circumstances of her travel that prevented her to testify in person, and a notarized statement pursuant to Rule 1:27(e)(2)(A), (B), and (C) of the Supreme Court of Virginia.[[20]](#footnote-20)

**JURISDICTION**

The due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Act (hereinafter, “IDEA”),[[21]](#footnote-21) 20 U.S.C. § 1400 *et seq*., and its implementing regulations, 34 C.F.R. § 300 *et seq*., and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 8 VAC § 20-81 *et seq*.

**BACKGROUND**

XXXXXXXXX is the student at the center of this due process hearing. XXXX is XX years old and, at the time of the filing of the request for due process, she attended XXXXXXXX Elementary School, located in the XXXXXXXXX School Division, in XXXXXXXXX, Virginia. XXXX is now in XXXX grade. XXXX is currently eligible for special education services under the disability category of “Other Health Impairment”. The last agreed upon Individualized Education Program (IEP) is dated December 9, 2019. Since then, the Petitioners have attended multiple IEP meetings and asked that the school make changes to the IEP, and also asked that XXXX be found eligible under a “Specific Learning Disability”, namely dyslexia, which the Petitioners believe would trigger, among other things, different services, accommodations, and different educational settings. Respondent has drafted and proposed several IEPs, but the Petitioners have not provided consent.

## **ISSUES AND RELIEF SOUGHT**

Issues: The issue(s) to be determined are as follows:

1. Issue 1:
   1. 1(a) Whether XPS denied XXXX FAPE when they failed to provide support and services to address all disabilities within the construct of her IEP for the 2019-2020 school year;
   2. 1(b) Whether XPS denied XXXX FAPE when they failed to provide support and services to address all disabilities within the construct of her IEP for the 2020-2021 school year;
   3. 1(c) Whether XPS denied XXXX FAPE when they failed to provide support and services to address all disabilities within the construct of her draft IEP for the 2021-2022 school year, prepared without meaningful parent participation, denying FAPE, and preventing access to education when it fails to provide special education-related services and accommodations for her severe disability deficit.
2. Issue 2: Whether XPS denied XXXX FAPE when they failed to offer appropriate Extended School Year services to include accommodation documented on her IEP for the 2019-2020 school year, causing regression and interfering with XXXX’s ability for academic and developmental progress.
3. Issue 3: Whether XPS denied XXXX a FAPE, caused harm, and regression and interfered with academic and development progress when they unilaterally limited the type, amount, and duration of those services for Extended School Year services during the 2019-2020 school year.
4. Issue 4:
   1. 4(a) Whether XPS denied XXXX a FAPE and caused regression whey they failed to develop appropriate special education and related services, supplementary aids and services, and program modifications to meet XXXX’s unique needs for the 2020-2021 school year;
   2. 4(b) whether the draft IEP for 2021-2022 prepared without meaningful parent participation, denies FAPE and prevents access to education when it fails to provide special education-related services and accommodations for her severe disability deficit.
5. Issue 5:
   1. 5(a) Whether XPS denied XXXX a FAPE when they failed to consider, review, and/or revise XXXX’s IEP to remediate her severe deficits identified by private providers in reading and language art skills which include explicit, systematic, and intentional instruction in phonological awareness, phonic decoding, vocabulary, language structure, reading fluency and reading comprehension for the 2019-2020 school year which caused exacerbated symptoms related to her anxiety;
   2. 5(b) Whether XPS denied XXXX a FAPE when they failed to consider, review, and/or revise XXXX’s IEP to remediate her severe deficits identified by private providers in reading and language art skills which include explicit, systematic, and intentional instruction in phonological awareness, phonic decoding, vocabulary, language structure, reading fluency and reading comprehension for the 2020-2021 school year which caused exacerbated symptoms related to her anxiety;
   3. 5(c) Whether the draft IEP for 2021-2020 prepared without meaningful parent participation, denies FAPE and prevents access to education when it fails to provide special education-related services and accommodations for her severe disability deficit.
6. Issue 6:
   1. 6(a) Whether XPS denied XXXX a FAPE when it failed to provide her with reading intervention as defined under the Every Student Succeeds Act (ESSA) and the Virginia Department of Education guidance, to address XXXX’s reading disability of Dyslexia for the 2019-2020 school year;
   2. 6(b) Whether XPS denied XXXX a FAPE when it failed to provide her with reading intervention as defined under the Every Student Succeeds Act (ESSA) and the Virginia Department of Education guidance, to address XXXX’s reading disability of Dyslexia for the 2020-2021 school year;
   3. 6(c) Whether the draft IEP for 2021-2022 prepared without meaningful parent participation, denies FAPE and prevents access to education when it fails to provide special education-related services and accommodations for her severe deficit.
7. Issue 7: Whether XPS denied XXXX FAPE when they failed to honor the parent’s request for a re-evaluation on April 27, 2020.
8. Issue 8: Whether XPS denied XXXX FAPE when they only used the discrepancy model to reject eligibility as a student with a specific learning disability, failed to give meaningful consideration to the IEE and other private evaluations, which all identify XXXX as a student with the specific disability of Dyslexia and refused to follow when asked, the required eligibility documentation during May 17, 2021 eligibility meeting.
9. Issue 9:
   1. 9(a) Whether XPS denied XXXX FAPE when they failed to develop IEP goals, accommodations, or related services to address her disability of ADHD and anxiety for the 2019-2020 school year;
   2. 9(b) Whether XPS denied XXXX FAPE when they failed to develop IEP goals, accommodations, or related services to address her disability of ADHD and anxiety for the 2020-2021 school year;
   3. 9(c) Whether the draft IEP for 2021-2022 prepared without meaningful parent participation, denies FAPE and prevents access to education when it fails to provide special education-related services and accommodations for her severe disability deficit.

Relief sought: Petitioner requests the following relief:

1. Private school placement for current and prospective education needs and payment at XXXXXXXXX XXX Academy of $25,500.00. These cost include:
   * 1. Enrollment fee - $500.00
     2. Materials - $100.00
     3. Technology fee - $100.00
     4. Tuition MS - $24,800.00
2. The Assistive Technical (A.T.) device and software support as recommended by the CHKD evaluation to help with the writing and spelling process and reading support.
3. Immediate compensatory scientifically-based individual remediation tutoring by a qualified instructor until XXXX achieves grade-level skills commensurate with her average cognitive and functional ability. This is the skill of reading, spelling, writing, and math.
4. A ruling by this Hearing Officer that XXXX be identified as a child with a specific learning disability of Dyslexia, math and language base skill under IDEA and 504.
5. A ruling by this Hearing Officer that the Special Education Department received VDOE training in the use of VTSS for students with reading, writing, and spelling disabilities.
6. Cost of copayment (up to $50 per visit) for private weekly therapy sessions for XXXX to address anxiety, esteem, and depression until released by therapist.
7. Reimbursement for private tutor services Educational Coaches, totaling $1,350.00.
8. Reimbursement of $678.00 plus $100 uniform fee for the cost of extra curriculum social activities during the fall and spring session.

## **PERTINENT/RELEVANT TESTIMONY REVIEW**

Total Number of Witnesses: 10 (Joint Witnesses: 4)

Expert Witnesses: 8

Fact Witnesses: 1

Expert and Fact Witnesses: 1

**XXXXXXXXXXXXX (Joint Witness) – Expert Witness**

Mr. XXXXX, Assistant Principal at XXXXXXXX Elementary School, is found to be an expert in the areas of Special Education Eligibility, IEP Development and Special Education Programming.[[22]](#footnote-22) [[23]](#footnote-23) Mr. XXXXX testified that he has interacted with XXXX multiple times. He has also interacted with the Petitioners multiple times during IEP meetings. He was a credible witness and his testimony was given great weight.

He testified that XXXX is hard working, aims to please, always has smile on her face, conscientious, always doing her best, and very diligent.

During the 2019-2020 and 2020-2021 school years, XXXX received intervention in reading through the Sonday System which was administered in the general education setting during Power Up time.[[24]](#footnote-24) He explained that the Sonday System is a multi-sensory approach to reading instruction; it is an explicit systematic approach.[[25]](#footnote-25) He also testified that XXXX received Leveled Literacy Intervention (LLI) toward her goal of comprehension and that LLI can be delivered within her reading services outlined in her “stay-put” IEP. XXXX received LLI daily in a small group intensive reading intervention.[[26]](#footnote-26)

Mr. XXXXX testified that XXXX’s Running Record from September 2019 to June 2021 for LLI show steady progress.[[27]](#footnote-27) Specifically, XXXX began in September of 2019 at a Level Q, progressed to an R, back down to Q just to jump two levels a few months later to Level S, and eventually to Level T. Her grades were based on the general education curriculum.[[28]](#footnote-28)

Mr. XXXXX also testified that XXXX’s MAP assessment for math and reading showed significant progress: in the Spring of the 2020-2021 school year, she was in the 54th percentile in reading compared to her national peers, meaning that XXXX from the Fall of 2020 made more progress than 54% of her peers; similarly, in math, XXXX was in the 46th percentile, meaning that she made more progress than 46% of her peers.[[29]](#footnote-29)

At the end of her XXXX grade, XXXX had good grades, more specifically B- in English, B- in math, A in Science, and A in Social Studies.[[30]](#footnote-30)

During the 2019-2020 school year, XXXX’s grades were average to above average; more specifically, XXXX’s grade in English was C+, B- in Math, B in Science; and B+ in Social Studies, as evidenced by her XX grade report card.[[31]](#footnote-31)

During the 2020-2021 school year, XXXX achieved honor roll as evidenced by her report card.[[32]](#footnote-32) At XXXXXXXX Elementary School, XXXX made progress in reading, as evidenced by report cards, but also looking at her running record or her guided reading level.[[33]](#footnote-33)

XXXX’s MAP (Measure of Academic Performance) assessment also shows that XXXX performed well.[[34]](#footnote-34)

On October 26, 2020, the IEP Team proposed a new IEP. Petitioners did not provide consent to this IEP. Under this IEP XXXX was to receive Reading, Writing, and Math services in the General Education setting. Specifically, XXXX was to receive 30 minutes once a day for writing; 60 minutes once a day for math; and 90 minutes once a day for reading. This IEP also provided for various accommodations for State and non-State testing.[[35]](#footnote-35) The October 2020 proposed IEP also provided for Extended School Year services. Specifically, 60 minutes twice per week, in Special Education Classroom setting from June 28, 2021 to August 27, 2021.[[36]](#footnote-36) The Petitioners did not provide consent to this IEP.[[37]](#footnote-37)

In the light of an upcoming triennial review in May 2021, Petitioners gave consent for the school to conduct further evaluations, including classroom observations by Mr. XXXXX, Assistant Principal at XXXXXXXX Elementary.[[38]](#footnote-38)

Mr. XXXXX conducted three classroom observations: on November 13, 2020, he observed XXXX for approximately 30 minutes during a guided reading group, in a virtual setting. He stated that XXXX was engaged, on task, working hard for Ms. XXXXX, and answering questions and reading,[[39]](#footnote-39) even though she demonstrated, once, a sign of ADHD, showing frustration, by throwing her head back on the sofa. She quickly regained control of herself and got back to finish the lesson.[[40]](#footnote-40) During the course of a second 30-minute observation conducted on November 18, 2020, XXXX demonstrated to be engaged, on task, completed every assignment, and answered questions.[[41]](#footnote-41) Lastly, in the course of a XXXX 30-minute observation in the general education setting, Mr. XXXXX observed XXXX while she was being administered the Sonday System, one-on-one with Ms. XXXX. Mr. XXXXX stated that “she progressed through the lesson and was able to participate throughout the lesson.”[[42]](#footnote-42)

On January 11, 2021, January 26, 2021, and again on May 17, 2021, the IEP Team reconvened to determine possible new eligibility categories. The gap between dates was necessary to allow further evaluations, at the request of the Petitioners.

Mr. XXXXX testified that the eligibility committee considered all sorts of data during the Eligibility Meeting: all school evaluations, all independent evaluations, academic data to include XXXX’s report cards, running record, and all available assessments, parental input was also considered. The committee went through criteria worksheets for Speech-Language Impairment,[[43]](#footnote-43) Other Health Impairment,[[44]](#footnote-44) and Specific Learning Disability.[[45]](#footnote-45) XXXX did not meet the criteria for Specific Learning Disability or for Speech-Language Impairment. She did continue to meet the criteria for Other Health Impairment; the chronic health conditions noted in the worksheet were Attention Deficit Disorder / Attention deficit hyperactivity disorder, as well as anxiety.[[46]](#footnote-46) The Specific Learning Disability worksheet, among other factors, considers whether or not there is a severe discrepancy between the student’s achievement and his/her intellectual ability. Both the school evaluation and the Oceanside Evaluation showed an IQ of 85. Her academic achievement did not show a severe discrepancy and, therefore, she did not meet the criteria for a Specific Learning Disability.

Mr. XXXXX explained how XXXX made progress under the terms of the “stay-put” IEP. The IEP Progress Report dated June 9, 2021 shows that XXXX mastered several of her goals.[[47]](#footnote-47) More specifically, between October 6, 2019 and June 9, 2021, for reading she mastered the goal of decoding unfamiliar words going from a Mastery Level 3 to Mastery Level 5; similarly for math she mastered the goal of problem solving going from a Mastery Level 4 to Mastery Level 5; in writing she mastered the goal for proper grammar, capitalization, and punctuation going from a Mastery Level 4 to Mastery Level 5.[[48]](#footnote-48)

A new Draft IEP dated July 28, 2021 was prepared.[[49]](#footnote-49) Petitioners did not participate and did not provide consent. Under the terms of this DRAFT IEP, XXXX is to receive Executive Functioning Services in the General Education setting, 25 minutes 4 times a day (a total of 100 minutes each day), while Reading services are to be provided once a week for 40 minutes, in the Special Education setting.

Mr. XXXXX testified that although the 40 minutes once a week in the Special Education setting is a more restrictive environment, as XXXX would be taken out of her classroom and receive services in a different room with other special education students, the remaining services would be rendered in the general education setting.

Mr. XXXXX testified that the Petitioners never requested a private day school placement in any of the interactions with school personnel.[[50]](#footnote-50)

**XXXXXXXXXXXX (Joint Witness) – Expert Witness**

Ms. XXXXXXX is the Reading Specialist at XXXXXXXX Elementary. She was found to be an expert in Reading Comprehension.[[51]](#footnote-51) [[52]](#footnote-52) She was a credible witness, and her testimony was given great weight.

Ms. XXXXXXX testified that in 2018, XXXX was given a pre-reading test to determine if the Sonday System could/should have been used. XXXX scored higher than the group of students who had been identified as potential candidates for the Sonday System, scoring a 94 out of 100.[[53]](#footnote-53) Because no phonological difficulties were identified, she was not given the Sonday System in 2018. Then, at the request of the Petitioners, the IEP team started using the Sonday System for phonological awareness such as blending and segmenting words and sentences, rhyming, and then also being able to generate rhymes, manipulate phoneme sounds.[[54]](#footnote-54) Ms. XXXXXXX testified that the Sonday System is an Orton-Gillingham based system.[[55]](#footnote-55)

Ms. XXXXXXX testified that during the 2019-2020 school year, the Sonday System was implemented by Ms. XXXXXXX, her special education teacher.[[56]](#footnote-56) Then, during the 2020-2021 school year, the Sonday System was implemented by Ms. XXXX, under her supervision. Ms. XXXX is not a certified teacher, rather a Teacher’s Assistant who was trained by Ms. XXXXXXX in the use of the Sonday System.[[57]](#footnote-57) Ms. XXXXXXX testified that although she has never administered services directly to XXXX, she has direct knowledge on how the Sonday System was administered because she supervised Ms. XXXX, reviewed Ms. XXXX’s notes, frequently discussed XXXX’s progress with Ms. XXXX, and reviewed XXXX’s assessments.

XXXX’s assessment for the Sonday System 1 – Pre and Post-tests in Spelling and Read Words, shows meaningful progress between October 2019 and February 2021.[[58]](#footnote-58) Specifically, in the Pre-test in October 2019, XXXX scored 56 percent and in February 2021, she scored a 94 percent.[[59]](#footnote-59) Similarly, in decoding, XXXX during the pre-test had to stop at level G because she had missed four consecutive words, but in the post-test, she made it all the way to list K, mastering many of the words.[[60]](#footnote-60)

Ms. XXXXXXX testified that XXXX also received LLI, which is a systematic, explicit, teacher-directed intervention and it provides practice with word study and phonics. It has comprehension in it as well as fluency and writing.[[61]](#footnote-61) It can have a multi-sensory approach built within the program.[[62]](#footnote-62) The program allows for acceleration across reading, writing, and phonics,[[63]](#footnote-63) and can be used both in the General Education setting, as well as the Special Education setting.

**XXXXXXX XXXXX – Expert Witness**

Ms. XXXXX was XXXX’s case manager and special education teacher for the 2020-2021 school year (XXX grade).[[64]](#footnote-64) With over 37 years of experience as a special education teacher, she is found to be an expert in IEP Development and Implementation.[[65]](#footnote-65) [[66]](#footnote-66) She was found to be a credible witness, and her testimony was given great weight. Ms. XXXXX has worked 6 years at XXXXXXXXX Public Schools.

Ms. XXXXX provided specifically designed instructional services to XXXX to include her goals and accommodations in the areas of reading, math, and writing, implementing the “stay-put” IEP.[[67]](#footnote-67) She provided these services in a virtual setting, as well as in an in-person setting. Services were provided in the inclusion setting, within the general education setting. This means that she worked collaboratively with the general education teacher.[[68]](#footnote-68) At times she would work with XXXX at her desk or at the back of the room with a group of Special Ed students or other students who receive services, or at times in her work room when accommodations such as Read Aloud were provided, not to give the other students an unfair advantage during a test.[[69]](#footnote-69)

Ms. XXXXX, using LLI, worked with XXXX on decoding, fluency, accuracy, vocabulary, and, sometimes, writing and phonics because they are all components of the program. She testified that LLI includes multi-sensory components, and it also addresses comprehension.[[70]](#footnote-70)

During the time that Ms. XXXXX provided services in the virtual setting, she noticed few instances when XXXX would display signs of frustration, behaviors also reported by XXXX’s mother.[[71]](#footnote-71) To address the problem, Ms. XXXXX provided additional support by no longer having XXXX use the break out room, rather by using a separate link altogether so that the only students who knew she was in the break out session would be the ones in the group with her.[[72]](#footnote-72) In another occasion, when XXXX showed behaviors of frustration, she asked her if she wanted to stop, but XXXX said no and proceeded with the lesson.[[73]](#footnote-73)

Overall, Ms. XXXXX testified that she did not notice behavioral problems severe enough or significant enough to develop a Behavior Intervention Program or Plan for XXXX. In one instance, Ms. XXXXX noticed during a virtual session that XXXX was in someone else’s home and she was inattentive in all of her tasks, brushing her hair, and playing.[[74]](#footnote-74) She contacted Mrs. XXXXX who reassured her that this would not happen anymore. Although XXXX expressed negative feelings about virtual instruction,[[75]](#footnote-75) according to Ms. XXXXX all children preferred to be in school because they were connected to their teachers and to their peers.[[76]](#footnote-76)

In March 2021, during an IEP meeting, Mrs. XXXXX asked for a Functional Behavior Assessment. The IEP team in the end found that XXXX did not require behavioral intervention.

During the 2020-2021 school year, instruction was virtual from September 16, 2020 until October 16, 2020, then the school adopted a hybrid model from October 16, 2020 until November 16, 2020 during which the students stayed at home (virtual setting) for two days, and went to school for two days, with one asynchronous day as planning day. Then after November 16, 2020, students returned full time at school for in person learning.[[77]](#footnote-77)

XXXX was offered the same opportunity that every other student was offered in terms of hybrid or in person learning.[[78]](#footnote-78) When face to face started, XXXX returned to school like with all the other students.

XXXX, like all the other students, at times changed her answers on tests and quizzes. Although she had re-take accommodations,[[79]](#footnote-79) not every test or quiz that shows changed answers is because of a re-take.

Ms. XXXXX contributed to the Five Point Scale data that was supposed to be collected for six weeks.[[80]](#footnote-80) She thought it was for 14 days or 2 weeks.[[81]](#footnote-81) From the data gathered, according to Ms. XXXXX, the only thing that was shown is that XXXX has some test anxiety.[[82]](#footnote-82)

In math, XXXX can perform multi-step problems and word problems. At times they need to be clarified as she is not very confident. [[83]](#footnote-83) Ms. XXXXX also testified that word problems in math are difficult for all students, as it is a difficult concept. [[84]](#footnote-84)

Ms. XXXXX worked with XXXX in the area of Writing: She was given prompts and she had to write in her journal twice a week; worked on grammar, punctuation, and capitalization.[[85]](#footnote-85)

According to Ms. XXXXX, at the end of the XXX grade, in math, XXXX could keep pace with her non-disabled peers in calculation skills, with accommodations. [[86]](#footnote-86)

Ms. XXXXX testified that the proposed IEP from October 2020 would have been appropriate for XXXX,[[87]](#footnote-87) and that XXXX can receive appropriate public education within the public school setting.[[88]](#footnote-88)

Ms. XXXXX also testified that to her knowledge, Parents never asked for private day school placement.[[89]](#footnote-89)

**XXXXXXXXXXX – Expert Witness**

XXXXXXXXXXX was found to be an expert as a Reading Specialist and in the area of Cognitive Behavior. [[90]](#footnote-90) Although a credible witness, Ms. XXXXXXX does not hold any certifications in the Commonwealth of Virginia, never met XXXX, never evaluated her, never talked to her teachers, and never attended an IEP meeting for XXXX. Because of this, her testimony was heavily discounted.

Ms. XXXXXXX testified that XXXX cannot progress with the services as they are provided, because XXXX has been diagnosed with a Special Learning Disability, Dyslexia. In her opinion, “if you can understand language and you can comprehend, if you can read, there is reading comprehension, […] but if you cannot read the words, there is not enough strategies for comprehension in the world. You have to be able to read the words fluently to comprehend them.”[[91]](#footnote-91)

**Cheryl A. Poe – Fact Witness and Expert Witness**

Ms. Poe, the advocate for XXXX and her Parents, was found to be an expert in Special Education Advocacy and Services.[[92]](#footnote-92) Ms. Poe also testified as a fact witness.

However, Ms. Poe never evaluated XXXX. Ms. Poe is the child’s advocate in the instant matter. She also testified that she is receiving compensation for her services as an advocate. For these reasons, her testimony was greatly discounted, and purely conclusions of law were not considered pursuant to Code of Virginia §8.01-401(3)(B).

Ms. Poe testified that she attended IEP meetings for XXXX in 2021 and requested that the IEP Team contract with someone to provide face to face instruction to XXXX because the virtual setting did not work for her.[[93]](#footnote-93) Ms. Poe also questioned why in Extended Year Services DRAFT IEP, accommodations were marked as “N/A” given that accommodations were available under prior IEP.[[94]](#footnote-94) She also noted that the IEP Team did not conduct any new evaluations to examine XXXX’s ADHD, nor conducted any BRIEF testing for the executive functioning which can also look at ADHD.[[95]](#footnote-95)

According to Ms. Poe, the relationship with the IEP Team was strained.[[96]](#footnote-96)

**XXXXXXXXXXXX (Joint Witness) – Expert Witness**

Mr. XXXXXX is the Special Education Administrator with XXXXXXXXX Public School. He was found to be an expert in the areas of Eligibility for Special Education Services, Educational Programming, and Planning.[[97]](#footnote-97) [[98]](#footnote-98) He was a credible witness, and his testimony was given great weight.

Mr. XXXXXX never interacted directly with XXXX; however, he is very familiar with her school record, attended conferences with the Parents, and IEP meetings during the 2019-2020 and 2020-2021 school year;[[99]](#footnote-99) He spoke with her XX grade teacher, Ms. XXXXXXX and Ms. XXXXXXX, her special education case manager, as well as the XXX grade teachers, Mr. XXXXXXXX and Ms. XXXXX, her special education teacher.[[100]](#footnote-100) Mr. XXXXXX was present in the IEP meetings that resulted in the “stay-put” IEP.

As part of the eligibility process the Team discussed how XXXX was performing based on the classroom data and the other measures on a day-to-day basis.

Mr. XXXXXX testified that XXXX is responding well to interventions that were put in place.[[101]](#footnote-101)

When asked about the administration of the Sonday System, Mr. XXXXXX testified that there could have been days when Sonday was not administered.[[102]](#footnote-102) However, the school continued to work with XXXX and her parents to make sure she received Sonday instruction.[[103]](#footnote-103)

The proposed IEP of October 2020 included Extended School Year (ESY) services. ESY services are also included in the “stay-put” IEP.[[104]](#footnote-104) Although not right away, the Parents did raise concerns about ESY services being rendered virtually.[[105]](#footnote-105) However, based on the data the school had, XXXX did benefit from virtual instruction[[106]](#footnote-106) , and in-person instruction was not available in the summer of 2020.

Mr. XXXXXX confirmed that in the course of the re-evaluation meeting, the IEP Team considered all evaluations that were completed.[[107]](#footnote-107) He explained that when considering whether XXXX would qualify under the Specific Learning Disability category, the Team went through all steps of the criteria worksheet, and the Team did not feel that there was a severe discrepancy, looking at Ms. XXXXX’s report and Dr. XXXXXXX’s report.[[108]](#footnote-108) He stated that although XXXX has an IQ of 85 “one cannot just look at numbers […] XXXX is performing a XXXX where we may expect her, […] this just goes back to her dedication and her perseverance, and […] the services and accommodations.”[[109]](#footnote-109) Mr. XXXXXX agrees with the eligibility determination of Other Health Impairment.[[110]](#footnote-110)

Mr. XXXXXX testified that the proposed IEP in October 2020 was appropriate because it addressed her needs for specially designed instruction. It contained goals and accommodations based on the information the IEP Team had available, and it reflected what she needed to have in order to access the general education curriculum.[[111]](#footnote-111)

In regards to the DRAFT IEP of July 2021, the Parents did not attend this IEP meeting, despite the fact that they were provided three possible dates.[[112]](#footnote-112) Mr. XXXXXX testified that the DRAFT IEP had two goal areas: one for executive functioning – 25 minutes four times a day in the general education setting for Math, English, Science, and Social Studies, with a special education teacher present; and a proposal of 40 minutes once per week of specially designed instruction for reading in special education class with her special education case manager. And it had several accommodations[[113]](#footnote-113), including Assistive Technology after an AT trial was done with the AT specialist who observed and interacted with XXXX, and noticed that XXXX tended to use the dictionary tool to look up definitions of the words, and use the word prediction software to help her with spelling.[[114]](#footnote-114) According to Mr. XXXXXX, the DRAFT IEP is appropriate for XXXX.[[115]](#footnote-115)

Lastly, Mr. XXXXXX testified that Parents never requested private school day placement.[[116]](#footnote-116)

**Dr. XXXXXXXXXXXXX– Expert Witness**

Dr. XXXXX is found to be an expert in Learning Disability in the areas of Language Arts, Dyslexia, and Math, and an expert in Academic and Educational Therapy and General Education.[[117]](#footnote-117) [[118]](#footnote-118) She was a credible witness. However, Dr. XXXXX never spoke with XXXX’s teachers regarding her progress, never observed XXXX in the academic setting within the public school, and she is not familiar with the teaching methodologies that her various teachers may have used with XXXX in order to provide instruction to her. For these reasons her testimony was heavily discounted and given little, if any, weight.

Dr. XXXXX has over 28 years of experience in public schools, and has worked for the past 6 years at XXXXXXXXX XXX Academy, the proposed school for private placement.

XXXXXXXXX XXX Academy is a private school. Its population is comprised of students with autism, SLD, dyslexia, ADD/ADHD, and then some children who just don’t fit the public school.[[119]](#footnote-119)

XXXXXXXXX XXX Academy uses personnel trained in Wilson Sounds in Syllables and also SPIRE, as well as Orton-Gillingham.[[120]](#footnote-120) These programs are all scientifically based.[[121]](#footnote-121)

Class sizes are small, with only 4 to 5 students.[[122]](#footnote-122) However, if XXXX were to attend this school, she would not have an opportunity to interact with her typically developing peers as her peers would be students with learning problems or learning issues.[[123]](#footnote-123)

Dr. XXXXX testified that Mrs. XXXXX works at XXXXXXXXX XXX Academy, since August 2021.

According to Dr. XXXXX, the DRAFT IEP from July 2021, does not meet XXXX’s needs. For example, when she looked at the services, she testified that she would not limit the services to Executive Skills and that she would add Reading. [[124]](#footnote-124) Dr. XXXXX also disagreed with Reading services of 40 minutes per week in the special education setting. She stated that she would have 1 hour three times a week of intense instruction in reading.[[125]](#footnote-125) Dr. XXXXX believes that the IEP does not address enough her decoding deficit.[[126]](#footnote-126) She also testified that decoding should be more specific about what decoding strategies, how it needs to be instructed. She stated “this is just saying what she will do. I know it's an IEP and this is what she will do, but how is she going to accomplish this?” During her testimony, Dr. XXXXX was given the opportunity to look over some of XXXX’s writing samples. She stated “these aren’t bad compared to my kids”.[[127]](#footnote-127)

**XXXXXXXXXXXXXXXXX (Joint Witness) – Expert Witness**

Ms. XXXXX is a school psychologist for XXXXXXXXX Public Schools. She was found to be an expert in School Psychology, Special Education Evaluations, and Eligibility[[128]](#footnote-128) [[129]](#footnote-129). She was a credible witness, and her testimony was given great weight. She has worked as a school psychologist for 13 years. In her career, she has conducted between 600 and 700 psychological evaluations and has attended a similar number of IEP meetings.[[130]](#footnote-130) She has also attended over 1000 child study team meetings.[[131]](#footnote-131)

Ms. XXXXX first evaluated XXXX in 2018 because there was a concern that XXXX might be a student with a disability. XXXX had an IQ of 94. Ms. XXXXX used several tests to conduct the evaluation, including the Kaufman test for educational data. XXXX’s reading composite score was 95, math was 88 in the below average range, written language 89 below average range, decoding 86 below average range. In the Kaufman test, XXXX is in the 18th percentile. This means that in the overall Bell curve, she is in the average range. Ms. XXXXX also used the Conners test which focuses on behaviors and characteristics similar to a student who might have ADHD or Attention Deficit characteristics.[[132]](#footnote-132) In the Conners test – the teachers showed her elevated in the area of aggression and defiance.

In the school year 2020-2021, Ms. XXXXX attended re-evaluation meeting to determine if further assessments for XXXX were needed.

In the school year 2019-2020, Ms. XXXXX completed a new psychological evaluation for XXXX. Due to COVID, PPE was used: masks, plexiglass, and Ms. XXXXX was also using a face shield.[[133]](#footnote-133) She noticed that XXXX spoke with a soft voice, that she showed challenges in using the mask required for COVID. However, she did not show any signs of frustration. She had adequate attention for the tasks that she needed to complete.[[134]](#footnote-134)

In the November 12 , 2020 Psychological Evaluation[[135]](#footnote-135), Ms. XXXXX used the WISC-V which is an overall building measure that is appropriate for XXXX’s age and grade; the KTEA which allows to see different areas of academic skills; the Gray Oral Reading Test (GORT) because of concerns about her reading skills.[[136]](#footnote-136) She also used the Behavior Assessment System for Children, because of concerns raised at the re-evaluation meeting regarding XXXX’s attention and anxiety.[[137]](#footnote-137) Her overall ability score was in the low average range; her academic score was in the below average range for reading, below to low average for math, low to below average for language, below average to average for decoding. Overall, based on her calculation, XXXX was not considered significantly delayed.[[138]](#footnote-138) Parents gave consent to conduct this new evaluation. [[139]](#footnote-139)

When conducting XXXX’s evaluation, Ms. XXXXX took into consideration other reports and evaluations, including the evaluation conducted by XXXXXXXXX Psychological Association in 2017, her own evaluation from 2018, the CHKD speech, language, and literacy evaluation from 2019.[[140]](#footnote-140) However, Dr. XXXXXXX’s report was not available at that time.[[141]](#footnote-141) Ms. XXXXX reviewed Dr. XXXXXXX’s report in the May 2021 eligibility meeting. [[142]](#footnote-142)

Ms. XXXXX testified that XXXX’s full-scale IQ was 85 in her evaluation. This means that her score was a little lower than the average number, average being 100.[[143]](#footnote-143) She explained that based on guidelines provided by the publishers of the WISC-V as well the National Association it was suggested that they rely on the full-scale IQ score when PPE is being used. The full-scale IQ score is more robust because it contains subtests together. So if there was any error that occurred in an individual subtest, that would be balanced out by having more versus an index score, which only contains two subtests.[[144]](#footnote-144) When asked about the impact of PPE even in a full scale IQ result, Ms. XXXXX testified that there is a chance that 85 is not an accurate score because of all of those environmental and emotional extenuating circumstances […] which is why we look at the confidence interval.[[145]](#footnote-145) Ms. XXXXX noted in her evaluation, that there was not a significant discrepancy between her IQ score and achievement scores.[[146]](#footnote-146) [[147]](#footnote-147) Ms. XXXXX’s findings with regard to the BASC are based on a rating scale completed by the teacher and the parents. The teacher indicated scores that were at risk for learning problems and functional communication. The parent indicated at risk for anxiety, social skills, and functional communication.[[148]](#footnote-148)

Ms. XXXXX participated in the three eligibility meetings in 2021. She testified that the Team considered all the evaluations that had been provided, as well as data from the classroom, work samples, test scores, state and local testing as well as the input from the parents, her teachers, and other staff members.[[149]](#footnote-149) Ms. XXXXX testified that the IEP Team went through every step of the eligibility criteria for Specific Learning Disability, ultimately finding that there was not a severe discrepancy with regards to any of the areas, including written expression[[150]](#footnote-150). Ms. XXXXX also testified that spelling is not an independent area and that it could fall within written expression.

Ms. XXXXX testified that a diagnosis is not an independently-qualified student. […] just because a student has been diagnosed with something, doesn’t mean [..] it is an automatic qualification.[[151]](#footnote-151) She stated that it is a two-prong analysis: you have to have a disability and then require specially designed instruction.[[152]](#footnote-152) She further testified that a private diagnosis might show that a student has a disorder on medical criteria, but that doesn’t mean that they are necessarily having an educational impact from it that we would see at school.[[153]](#footnote-153)

Ms. XXXXX testified how the Team went through the steps for the criteria worksheet for Other Health Impairment, finding that she did meet the criteria and that she required specially designed instruction in the area of executive functioning and reading. [[154]](#footnote-154) She also described how the Team went through the steps for the criteria worksheet for Speech-Language Impairment, ultimately finding that she did not meet the criteria.[[155]](#footnote-155)

Ms. XXXXX agrees with the DRAFT IEP’s placement in the public school setting primarily receiving support in the classroom with some opportunities for some small groups outside the classroom.[[156]](#footnote-156)

**Dr. XXXXXXXXX – Expert Witness**

Dr. XXXXXX is the Assistant Director of Exceptional Learning with XXXXXXXXX Public Schools. She was found to be an expert in the areas of Eligibility for Special Education Services as well as Educational Programming and Planning.[[157]](#footnote-157) [[158]](#footnote-158) She is a credible witness, and her testimony was given great weight.

Dr. XXXXXX testified that she has participated in thousands of eligibility meetings,[[159]](#footnote-159) and that the IEP Team works to achieve consensus. If three is a disagreement, [the Team] discusses those disagreements. If there is a member of the Team who does not agree with the decision, then they can write a dissenting opinion statement which we would then attach to the eligibility minutes. [[160]](#footnote-160)

She stated that in the course of an eligibility meeting in determining whether or not there is a severe discrepancy between a student cognitive ability and the achievement testing, the Team looks, among other things, at the findings of the school psychologist, more specifically whether “there is a significant discrepancy between the KTEA scores based on full scale IQ of the WISC-V”[[161]](#footnote-161)

The Team also used the regression model, that is a “statistical method that is used to calculate the cut scores for which [the team determines] whether or not there is a severe discrepancy in any of the areas noted in step 3 [of the SLD worksheet].”[[162]](#footnote-162)

In considering the category of Specific Learning Disability, the Team used the discrepancy model, but also “considered a variety of other reports and information, information from classroom teachers, data points from the school, and XXXX’s response to general education interventions […] in specially-designed instruction, […] looked at her progress, […] grade performance, […] access to grade level instruction, […] and determined she was not eligible.”[[163]](#footnote-163) [[164]](#footnote-164) The Team also used all available evaluations, including Dr. XXXXXXX’s evaluation from Oceanside and CHKD.[[165]](#footnote-165)

Dr. XXXXXX testified that “as a committee, we were able to determine that XXXX did not meet the criteria under SLD based on her response to the interventions […] and the amount of growth and progress that she had made, but also we did not find that she was a student with a learning disability because her cognitive ability and her achievement were commensurate.”[[166]](#footnote-166)

Dr. XXXXXX noted that the eligibility category is not part of the IEP itself. She further stated that student eligibility for special education simply opens the door to allow the student to receive specially designed instruction.

The DRAFT IEP does not include ESY, and removes the writing special education service from 2019. However, it includes “executive functioning and study skills, and a reading goal.”[[167]](#footnote-167) In the DRAFT IEP, the reading services are 40 minutes one time per week in special education setting.

Dr. XXXXXX testified that the least restrictive environment is based on the student’s individualized needs. So at any point in time, for some students a least restrictive could be a self-contained classroom. For some students, their least restrictive environment is a resource classroom with a Special Education teacher. And for some students the least restrictive environment could be in the general setting with support in there.”[[168]](#footnote-168) In the DRAFT IEP, it was determined that to bring XXXX the least restrictive environment, “she needed pull-out instruction in the Special Ed classroom to address her reading at the middle school level.”[[169]](#footnote-169)

Dr. XXXXXX testified that XXXX’s score in the math prognostic test was not used in determining eligibility. She stated it “wouldn’t have been appropriate to consider because [the test] is determining whether or not she is appropriate for advanced math placement. It does not assess whether or not she is meeting grade level standards in math. It is merely a predictor test to determine if she needed an advanced placement for math in XXXX grade. It does not assess whether or not she is meeting current grade level standards.”[[170]](#footnote-170)

Special education students who received related services that cannot be provided virtually, and English learners return to on-campus instruction with transportation required, returned to in-person instruction earlier than other students. However, Dr. XXXXXX testified that “XXXX returned on October 12, but XXXX also did not receive 90 per cent of her special education services in a Special Ed classroom. She received her services in a General Ed classroom”.[[171]](#footnote-171)

ESY services were proposed under the October 26, 2020 IEP, but parents did not sign consent to that IEP. Dr. XXXXXX informed Mrs. XXXXX that if she declined to implement the October 26, 2020 IEP, they could make arrangements to provide ESY services based on the “stay-put” IEP. Various letters were sent to the Parents, on July 6, July 12, and July 26, with no response.[[172]](#footnote-172) Dr. XXXXXX secured Ms. XXXXX first, then Ms. XXXXXX. When Ms. XXXXXX reached out to the Parents, Mrs. XXXXX “required Ms. XXXXXX to answer a number of questions back to her before she would schedule ESY”[[173]](#footnote-173) Dr. XXXXXX testified that she felt that those questions had already been answered in her communications from July , July 12, July 26, August 9. Eventually, she asked Ms. XXXXXX to “provide the parents with dates that you can begin providing services, because [she] wanted to get the services in place for XXXX”.[[174]](#footnote-174) By the time the parent scheduled their first session, it was unfortunately the last day that Ms. XXXXXX was available.[[175]](#footnote-175) ESY services were “available […] within the month of August, and we could have mete those service hours in the amount of time that we had. […] Ms. XXXXXX was able to meet with XXXX one time.”[[176]](#footnote-176) Dr. XXXXXX reiterated that the school had secured two teachers to provide services during the school year. However, “during a meeting […] Mrs. XXXXX […] indicated that she […] just wanted XXXX to go to school during the school day. [The school] intention is to make up these hours this upcoming summer [or] now, as well.”[[177]](#footnote-177)

One of the accommodations that XXXX receives, is Read Aloud. In the DRAFT IEP, Real Aloud is provided for X grade Math, Civics, and SOL test.[[178]](#footnote-178) Dr. XXXXXX testified that she learnt that the Parents would like XXXX to have more Read Aloud accommodations only in the course of these due process proceedings.[[179]](#footnote-179) The school also offered to reconvene the IEP Team to address any IEP related concerns the Parents may have had.[[180]](#footnote-180) However, the parents never reached out. [[181]](#footnote-181)

Dr. XXXXXX spoke with XXXX’s teachers regarding her education performance. Her teachers “indicated that XXXX was making appropriate progress in their classes. She was an active participant in instruction. They described her as a hard worker, diligent worker, that she was also conscientious about her work.”[[182]](#footnote-182)

Dr. XXXXXX agrees with the eligibility determination.[[183]](#footnote-183) She also testified that the Parents did not give consent to the eligibility determination.[[184]](#footnote-184)

Dr. XXXXXX testified that the 2019-2020 IEPs were appropriate based upon the time they were developed. The “stay-put” IEP of December 2019[[185]](#footnote-185) provides her with free appropriate public education. She has made progress on this IEP, she’s had the IEP implemented with fidelity. The May 2020 IEP[[186]](#footnote-186) is also appropriate, testified Dr. XXXXXX.[[187]](#footnote-187) The October 26, 2020 IEP “continues to provide services that XXXX requires based on her present level of educational performance, academic performance. It has goals included to address XXXX’s reading, her writing, her math. It has appropriate accommodations to meet her needs and services.”[[188]](#footnote-188)

An IEP is a fluid document, […] the team can convene to make modifications to a student’s IEP as deemed appropriate by the team.

The DRAFT IEP from July 2021 is also appropriate, Dr. XXXXXX testified. “The Team reviewed a summary of XXXX’s testing results, reviewed […] her most recent reading scores based on the Fountas & Pinnell assessment and where she was in her reading instruction, […] her response interventions that were provided through the Sonday System, […] her growth of her Lexile levels, […] all the evaluations that were conducted, including teacher input and proposed goals and services based on all of that information.[[189]](#footnote-189)

Dr. XXXXXX explained that in the DRAFT IEP a math goal was not added because “XXXX had mastered her math goals that were in the 2019 IEP. In addition, [the team] considered her performance in the math class, her grades, the appropriateness of her accommodations.” The Team proposed to collect data for the first 9 weeks and reconvene to add [a math goal][[190]](#footnote-190)[[191]](#footnote-191) based on information from the Oceanside Evaluation, our PEP (phonetic) Kaufman Test for Educational Achievement, and WIAT, and wanted to determine whether there was a possible weakness in her math skills in calculation and reasoning.”

Dr. XXXXXX testified that if the data collected indicated that XXXX needed a math goal, [the Team] would propose an IEP meeting to discuss the proposal of a math goal or goals.[[192]](#footnote-192)

The DRAFT IEP contained accommodations for Assistive Technology for writing, specifically the word prediction software with the spelling and dictionary feature.[[193]](#footnote-193) This is because XXXX performed very well during a trial period using some assistive technology, specifically text to speech, speech to text, word prediction software through her Google Chromebook.[[194]](#footnote-194)

In the DRAFT IEP, XXXX would receive services in reading, 40 minutes in a special education classroom, Dr. XXXXXX testified.[[195]](#footnote-195) Her core academic courses would be in the general education setting with the support of special education staff as a co-taught class. [[196]](#footnote-196) XXXX would receive services in executive functioning and study skills four times a day, 25 minutes each, during the core courses. [[197]](#footnote-197)

Dr. XXXXXX offered mediation in several letters, but did not receive any interest in going to mediation.[[198]](#footnote-198)

In August 2021, the parents indicated that they rejected the “draft IEP”. Dr. XXXXXX testified that the Team indicated that the DRAFT IEP was not a proposed IEP and that the purpose of the July meeting was to begin discuss[ing] the development of the IEP. One of the reasons they rejected the DRAFT IEP is that their parental input was not considered. Dr. XXXXXX informed them that on numerous occasions they had contacted them and that they took into consideration input from previous communications as well as input from their private providers.[[199]](#footnote-199)

Mrs. XXXXX communicated with Dr. XXXXXX and asserted that she would engage a private instructor to provide ESY services. Dr. XXXXXX informed her that any expense incurred from a private provider would be at [the parents’] expense[[200]](#footnote-200) due to the fact that ESY services had been offered by the school.

Lastly, Dr. XXXXXX testified that the Petitioners never requested private day placement at XXXXXXXXX XXX Academy.

**XXXXXXXXXXX – Fact Witness**

Mrs. XXXXX is XXXX’s mother and testified as a fact witness. Her love for XXXX   
}”is abundantly clear. However, while credible, her testimony was somewhat discounted because of her bias towards her child. Although, in so far as she provided opinions, those opinions were not considered as she was not identified as an expert witness.

Mrs. XXXXX testified that from a very young age XXXX struggled in school, even in kindergarten. In first grade “she struggled miserably with sight words, with reading, with math, telling time, counting money […] days of the week, […] months, years.”[[201]](#footnote-201) Mrs. XXXXX knew “it wasn’t normal, and [she] kept talking to the teachers.”[[202]](#footnote-202) At home Mrs. XXXXX pushed XXXX, they read all the time, practice sight words, yet “[it was] not sticking.[[203]](#footnote-203)

Mrs. XXXXX “turned into teacher instead of mom […] and it crushed our relationship that year”.[[204]](#footnote-204) XXXX started “hating school. She cried all the time because the work was so hard for her”[[205]](#footnote-205) That year, Mr. XXXXX had been laid off so he had been living in XXXXXXXXXXX, and they thought they would be moving [there].[[206]](#footnote-206) Mrs. XXXXX requested that XXXX be held back in first grade because they did not feel she was prepared to go into second. However, Dr. XXXXXX, the school principal, looked at her grades and told, at the end of the summer, that she was not going to retain XXXX, and that she did not feel that there was enough data to support it.[[207]](#footnote-207)

In reviewing some of XXXX’s tests, for example a running record of 100 words, Dr. XXXXXX agreed that XXXX taking 14 minutes was an extremely long time. [[208]](#footnote-208) In second grade XXXX continued to struggle, Mrs. XXXXX testified.[[209]](#footnote-209) Mrs. XXXXX requested that XXXX be evaluated in second grade, but the child study Team met and denied the request[[210]](#footnote-210) despite showing them evidence that XXXX had a difficult time completing homework. For example, it took two hours for one particular assignment.[[211]](#footnote-211)[[212]](#footnote-212)

In 2018 Mrs. XXXXX was not aware of what dyslexia is and did not know of her specific learning disability.[[213]](#footnote-213) XXXX experienced great test anxiety. Mrs. XXXXX testified that even going to the computer lab, XXXX would tense up because she would normally test in the computer lab.

After learning of the SLD, dyslexia diagnosis Mrs. XXXXX began to research “non stop, reading about it, talking to people, asking questions, […] taking webinar classes, [going] to dyslexia conferences, talking to different reading specialists, read several dyslexia books, watched YouTube videos. [[214]](#footnote-214)

Mrs. XXXXX testified that XXXX behaves differently at school compared to when she is at home. Mrs. XXXXX testified that at school “XXXX gives 150 percent”. However, at home “on top of tutoring, she had homework, it would be a battle, crying and screaming and fighting because she didn’t know how to do it. She couldn’t read it.”[[215]](#footnote-215) Mrs. XXXXX testified that she couldn’t just come home and just cook dinner and let her do her homework. “You have to be sitting next to her doing homework because we have to read it to her. We have to explain it to her and we have to work with her on it, or else she can’t do it.”[[216]](#footnote-216)

Mrs. XXXXX was never made aware that anybody else would perform Sonday, she was under the impression that Ms. XXXXXXX was trained in it, and she would be the one that would facilitate it.[[217]](#footnote-217)

XXXX would come home and share some of her frustrations regarding her time with Ms. XXXX with Sonday.[[218]](#footnote-218) Mrs. XXXXX testified that Ms. XXXX had a heavy XXXXXXX accent and XXXX would come home upset because she would get the words wrong because she couldn’t understand Ms. XXXX.[[219]](#footnote-219) She expressed this concern, but did not have a resolution.[[220]](#footnote-220) She also expressed concerns about Sonday not be used regularly. The school responded that because Sonday was given during Power Up in the general education classroom, XXXXXXXX is not required to make up the time that it is missed due to personnel or student absences, [or if] there was an assembly.[[221]](#footnote-221)

During XX grade XXXX had homework, but during XXX grade, XXXXXXXX Elementary made the decision to not assign homework. However, during virtual setting, “our home was now school”, Mrs. XXXXX testified.[[222]](#footnote-222) “So instead of only getting the brunt at the end of the school, I was lucky enough to get the brunt all day.”[[223]](#footnote-223)

Mrs. XXXXX testified that she asked several times for a certified instructor to provide specific reading instruction in the special education setting, but that the school “did not acknowledge the dyslexia, that’s what she has and that’s what’s going on.”[[224]](#footnote-224)

Mrs. XXXXX testified that she did not give consent to the October 2020 proposed IEP because she had “asked for a re-evaluation and [she] could not sign it in good faith because they did not address all of her disabilities”.[[225]](#footnote-225)

According to Mrs. XXXXX the DRAFT IEP is not appropriate. It takes away Real Aloud that she has had for the past three years; she no longer has extended time on everything; she used to have retakes on tests lower than 65; she had had her assignments broken into smaller sections for the past 3 years.[[226]](#footnote-226)

Mrs. XXXXX does not believe that XXXX has truly mastered her goals.

Mrs. XXXXX testified that when the school sent various letters offering opportunities to meet regarding the development of the July 2021 IEP, she sent a response declining participation. More specifically Mrs. XXXXX responded that [she has] been mentally, emotionally, and financially drained by the IEP Team, and that [she] could not physically, mentally, emotionally go through another meeting to restate [her] concerns over and over again that [she] has stated for four years when [the school] does not agree that XXXX has a disability of dyslexia.[[227]](#footnote-227) And that [she] did not foresee how one more meeting, unless it was going to be a miracle meeting. [she] had held too many meeting and shared too many times [her] concerns. [she] could not go through another meeting to be rejected again.[[228]](#footnote-228)

Mrs. XXXXX, in a correspondence with XXXXXXXXX XXX Academy, indicated that she would be available to meet with them on July 28, 2021, the same day the IEP Team met, for July to have a two-day trial at the academy.[[229]](#footnote-229)

Mrs. XXXXX testified that after expressing her concerns about Ms. XXXX giving the Sonday, the school division responded to that request and Ms. XXXXXXX began implementing the Sonday System instead of Ms. XXXX, [[230]](#footnote-230) but that the school never really addressed her concern of consistent administration of Sonday.

## **FINDINGS OF FACT**

**(By a preponderance of the evidence)**

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer’s Findings of Fact are as follows:

1. At all times concerned in this proceeding, XXXX has been a resident of XXXXXXXXX, Virginia where she lives with her parents, Mrs. XXXXXXXXXXX and Mr. XXXXXXXXXX.
2. XXXX is XX years old, and at the time of the filing of the Request for Due Process Hearing, she attended XXXXXXXX Elementary School, in XXXXXXXXX, Virginia, in the XXXXXXXXX School Division.
3. XXXX is hard working, aims to please, always has smile on her face, conscientious, always doing her best, very diligent. She is often described as a model student.[[231]](#footnote-231)
4. XXXX’s initial diagnosis in January 2018 was 1) Attention Deficit/Hyperactivity Disorder, Predominately Inattentive Presentation, Mild, and 2) Specific Learning Disorder with impairment in Reading Fluency and Comprehension.[[232]](#footnote-232)
5. In April, 2021, XXXX’s diagnosis changed to 1) a Specific Learning Disability, Moderate, specifically affecting basic reading skills, reading fluency, and phonological processing; 2) XXXX also struggles with math and writing fluency, moderate; and 3) Anxiety not Otherwise Specified.[[233]](#footnote-233)
6. In January 2018, XXXX had a Full Scale IQ of 96,[[234]](#footnote-234) but in in November 2020, XXXX’s Full Scale IQ was 85.[[235]](#footnote-235)
7. In April 2018, XXXX’s language skills were age-appropriate for her chronological age.[[236]](#footnote-236)
8. In May 2018, in reading, math, and written language, XXXX performed within level.[[237]](#footnote-237)
9. In May 2018, XXXX was found eligible for services under the IDEA, under the category of Other Health Impairment (OHI). More specifically, the Basis for Eligibility Determination was Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder, and Anxiety.[[238]](#footnote-238)
10. The OHI eligibility determination of 2018 was appropriate.
11. In November 2020, XXXX performed at an average range on her auditory comprehension skills.[[239]](#footnote-239)
12. The May 21, 2019 IEP[[240]](#footnote-240), was subsequently amended on December 4, 2019; This is the last agreed upon IEP or the “stay-put” IEP.[[241]](#footnote-241)
13. Under the “stay-put” IEP of December 2019, XXXX is to receive services in the academic areas of Reading, Math, and Writing. This specifically designed instruction is appropriate and affords XXXX a FAPE.
14. The “stay-put” IEP also laid out specific annual goals,[[242]](#footnote-242) as well various accommodations for State and non-State testing, and classroom accommodations, [[243]](#footnote-243) to address her needs. These annual goals and accommodations are appropriate and afford XXXX with a FAPE.
15. XXXX needs a reading and spelling program that directly and explicitly teaches phonetic decoding strategies; this can be accomplished by using a structured literacy program or multisensory structured language program that uses Orthon-Gillingham principles.
16. XXXX does well with in-person learning and with virtual learning.
17. During the 2019-2020 school year, and the 2020-2021 school year, XXXX successfully received reading intervention through the Sonday System, which was administered in the general education setting during Power Up time.[[244]](#footnote-244)
18. The Sonday System is a multi-sensory approach to reading instruction; it is an explicit systematic approach.[[245]](#footnote-245) It is an Orton-Gillingham based system.[[246]](#footnote-246)
19. At the request of the Petitioners, the Sonday System was implemented for phonological awareness, such as blending and segmenting words and sentences, rhyming, and then also for being able to generate rhymes, and manipulate phoneme sounds.[[247]](#footnote-247)
20. During the 2019-2020 school year, the Sonday System was successfully implemented by Ms. XXXXXXX, her special education teacher.[[248]](#footnote-248)
21. When Mrs. XXXXX expressed concerns about the thick XXXXXXX accent of the person giving the Sonday, the school promptly addressed the issue and Ms. XXXXXXX began implementing the Sonday System instead.[[249]](#footnote-249)
22. During the 2020-2021 school year, the Sonday System was successfully implemented by Ms. XXXX with the supervision of Ms. XXXXXXX, the reading specialist at XXXXXXXX Elementary, and made progress toward her reading goals.
23. Ms. XXXX is not a certified teacher, rather a Teacher’s Assistant, but was trained by Ms. XXXXXXX in the use of the Sonday System.[[250]](#footnote-250)
24. XXXX’s assessment for the Sonday System 1 – Pre and Post-tests in Spelling and Read Words, shows meaningful progress between October 2019 and February 2021.[[251]](#footnote-251)
25. XXXX also received Leveled Literacy Intervention (LLI) toward her goal of comprehension.
26. XXXX successfully received LLI daily in a small group intensive reading intervention[[252]](#footnote-252) and made progress toward her reading goals.
27. LLI can be delivered within XXXX’s reading services outlined in her “stay-put” IEP.[[253]](#footnote-253)
28. LLI is a systematic, explicit, teacher-directed intervention and it provides practice with word study and phonics. It has comprehension in it as well as fluency and writing.[[254]](#footnote-254)
29. LLI can have a multi-sensory approach built within the program.[[255]](#footnote-255)
30. LLI allows for acceleration across reading, writing, and phonics,[[256]](#footnote-256) and can be used both in the General Education setting, as well as the Special Education setting.
31. XXXX has made meaningful academic progress in school year 2019-2020.
32. XXXX’s progress has been continually evaluated.
33. XXXX’s Running Record from September 2019 to June 2021 for LLI show steady progress.[[257]](#footnote-257)
34. XXXX’s grades were based on the general education curriculum.[[258]](#footnote-258)
35. XXXX’s MAP assessment for math and reading also showed significant progress.[[259]](#footnote-259)
36. At the end of her XXXX grade, XXXX had good grades, more specifically B- in English, B- in math, A in Science, and A in Social Studies.[[260]](#footnote-260)
37. At the end of her fourth grade (2019-2020 school year), XXXX’s grades were average to above average more specifically, XXXX’s grade in English was C+, B- in Math, B in Science; and B+ in Social Studies.[[261]](#footnote-261)
38. During the 2020-2021 school year, XXXX achieved honor roll.[[262]](#footnote-262)
39. At the end of her XXX grade (2020-2021 school year), XXXX’s grades were B+ in English, B in Math, B- in Science, and B- in Social Studies.[[263]](#footnote-263)
40. By the end of her XXX grade, in math, XXXX could keep pace with her non-disabled peers in calculation skills, with accommodations. [[264]](#footnote-264)
41. XXXX has made meaningful academic progress in school year 2020-2021.
42. At XXXXXXXX Elementary School, XXXX made progress in reading, as evidenced by report cards, but also looking at her running record or her guided reading level.[[265]](#footnote-265)
43. Between October 6, 2019 and June 9, 2021 XXXX made substantial progress, and mastered several of her goals, in all three areas of Reading, Math, and Writing.[[266]](#footnote-266)
44. The services, goals, and accommodations of the October 26, 2020 proposed IEP are appropriate to meet XXXX’s needs.[[267]](#footnote-267)
45. The Parents did not provide consent to the October 26, 2020 proposed IEP.
46. The Extended School Year (ESY) Reading services in the October 26, 2020 proposed IEP in the area of Reading are appropriate to meet XXXX’s needs.[[268]](#footnote-268)
47. The Petitioners did not provide consent to the proposed October 26, 2020 IEP.[[269]](#footnote-269)
48. The eligibility committee worked diligently from January 2021 to May 2021 with the Parents to allow further evaluations before the final eligibility meeting took place in May 2021.
49. The eligibility committee considered all categories of eligibility categories and a multitude of data during the Eligibility Meeting: all school evaluations, all independent evaluations, academic data to include XXXX’s report cards, running record, and all available assessments, and parental input.
50. The eligibility committee correctly disregarded a prognostic test for advanced math placement that XXXX failed, because a prognostic test does not assess whether or not a student is meeting grade level standards in math.
51. The eligibility committee completed correctly the criteria worksheets for Speech-Language Impairment,[[270]](#footnote-270) Other Health Impairment,[[271]](#footnote-271) and Specific Learning Disability.[[272]](#footnote-272)
52. XXXX continues to meet the criteria for Other Health Impairment.[[273]](#footnote-273)
53. The discrepancy model is an appropriate model that can be used to complete the Specific Learning Disability criteria worksheet.
54. The services in the area of Executive Functioning / Study Skills and Reading, the goals and the accommodations, including Read Aloud and Assistive Technology, in the Draft IEP dated July 28, 2021[[274]](#footnote-274) are appropriate to meet XXXX’s needs.
55. Petitioners did not participate to the IEP meetings for the DRAFT IEP, nor gave consent to it.
56. The Parents never reached out to school to request changes to the DRAFT IEP.
57. Petitioners never requested a private day school placement in any of the interactions with school personnel.[[275]](#footnote-275)
58. During virtual instruction, XXXX seldom displayed signs of frustration. When that happened, XXXX’s teacher successfully addressed the behavior.
59. Overall, XXXX’s behavioral problems during virtual learning were never severe enough or significant enough to develop a Behavior Intervention Program or Plan.
60. Behavioral intervention is not necessary for XXXX.
61. During the COVID-19 pandemic restrictions for school attendance, XXXX was offered the same opportunity that every other student was offered in terms of hybrid or in person learning.[[276]](#footnote-276)
62. The Five Point Scale confirmed that XXXX has some test anxiety.[[277]](#footnote-277)
63. XXXX receives appropriate public education within the public school setting, which is also the Least Restrictive Environment..
64. XXXXXXXXX XXX Academy (XXA), the private school requested by the parents, is not the Least Restrictive Environment.
65. If XXXX were to attend XXA, she would not have an opportunity to interact with her typically developing peers as her peers would be students with learning problems or learning issues.[[278]](#footnote-278)
66. ESY services were available in the summer of 2021, either under the proposed October 26, 2020 IEP or the “stay-put” IEP.
67. XXXX only received one day of ESY services in the summer of 2021 because the Parents did not make her available.
68. The “stay-put” IEP, as drafted and implemented, affords XXXX a FAPE
69. The all subsequent proposed IEPs, including the October 26, 2020 proposed IEP, as drafted, afford XXXX a FAPE.
70. The DRAFT IEP of July 28, 2021, as drafted, affords XXXX a FAPE.
71. No private placement is required.
72. XXXX received a FAPE in school year 2019-2020.
73. XXXX received a FAPE in school year 2020-2021.
74. At all times, the IEP Team considered the Parents’ input in the drafting of the “stay-put” IEP.
75. At all times, the IEP Team considered the Parents’ input in the drafting of the proposed IEP of October 26, 2020.
76. At all times, the IEP Team considered the Parents’ input in the drafting of the DRAFT IEP of July 28, 2021.

## **CONCLUSIONS OF LAW AND DISCUSSION**

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer’s own legal research, the Conclusions of Law of this Hearing Officer are as follows:

* + - 1. The Respondent is the prevailing party
      2. The Petitioners failed to introduce evidence to carry the burden of proof to grant the relief requested by the Due Process Request.

Burden of Proof

In this administrative due process proceeding initiated by the Petitioners, the burden of proof and persuasion is on the Petitioners. Schaffer, ex rel. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528 (2005). The standard of proof shall be med by a preponderance of the evidence, pursuant to 8VAC20-81.O.13. See. e.g., Cty. Sch. Bd. of Henrico Cty., Va. v. R.T., 433 F. Supp. 2d 657, 671 (E.D. Va. 2006) (Hearing Officer’s factual conclusions supported by the preponderance of the record evidence.)

Analysis

**Issue 1**:

- 1(a) Whether XPS denied XXXX FAPE when they failed to provide support and services to address all disabilities within the construct of her IEP for the 2019-2020 school year;

-1(b) Whether XPS denied XXXX FAPE when they failed to provide support and services to address all disabilities within the construct of her IEP for the 2020-2021 school year;

-1 (c) Whether XPS denied XXXX FAPE when they failed to provide support and services to address all disabilities within the construct of her draft IEP for the 2021-2022 school year, prepared without meaningful parent participation, denying FAPE, and preventing access to education when it fails to provide special education-related services and accommodations for her severe disability deficit.

During the 2019-2020 and 2020-2021 school years, XXXX received services under the “stay-put” IEP. Specifically, the original IEP dated May 21, 2019 was amended on December 4, 2019 for the purpose of adding a decoding goal and deleting a behavior goal; this became the last agreed upon IEP (the “stay-put” IEP) as the Parents did not provide consent to any other subsequent proposed IEP in 2020 and 2021. The “stay-put” IEP includes services in the areas of Reading, Writing, and Math. The specific goals within these areas address the needs that the Team identified. The Parents provided consent to this IEP, *i.e.* the Parents agreed with the needs identified, the services, the goals, and the accommodations, all specifically designed to support XXXX. The services are to be provided as follows:

* Writing: 30 minutes 5 times per week in the general education setting.
* Math: 45 minutes 5 times per week in the general education setting.
* Reading; 90 minutes 5 times per week in the general education setting.

The testimony rendered overwhelmingly showed that XXXX made meaningful academic progress, and even made the principal’s honor roll in the XXXX quarter of the 2020-2021 school year as evidenced by her report card. The services provided were instrumental in achieving these results. These services, coupled with the various accommodations, are designed to address XXXX’s needs by focusing on the specific goals listed in the IEP. As highlighted in *Letter to Anonymous, 48 IDELR 16 (OSEP 2006)* “it is the child’s identified needs, not the child’s disability category, to determine the services that must be provided to the child.” Therefore, the focus needs to be on the needs and the services, not on the disabilities.

The Team convened in July 2021 to prepare an annual IEP for the 2021-2022 school year. XXXX had finished the XXX grade with good grades: B+ in English, B in Math, B- in Science, and B- in Social Studies. The specifically designed instruction services are:

* Executive Functioning/ Study Skills: 25 minutes four times per day in the general education setting.
* Reading: 40 minutes once per week in the special education setting.

Many hours of testimony were dedicated to explain why the services changed. The Petitioners argue that these services, coupled with the specific goals, and various accommodations, would not allow XXXX to make any meaningful progress. The Parents did not provide consent this IEP, therefore, we do not know whether XXXX would have made progress, because XXXX instruction is still delivered under the “stay-put” IEP, and the new services cannot be implemented.

The question for this Hearing Officer is whether this DRAFT IEP is reasonably calculated to enable XXXX to make progress. Under *Endrew F v. Douglas County School District RE-1,137 S.Ct. 988, 69 IDLER 174 (U.S. Mar. 22, 2017)*, the Court decided that to meet a substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriately in light of that child's particular circumstance.

 The Parents failed to meet their burden to show that the services proposed would not have yielded any results. Rather, in their questioning of the witnesses, they focused more on what this IEP did not provide. The Parents argue, for example, that there no longer is a math goal. However, notable is the testimony of Dr. XXXXXX, who testified that in this IEP a math goal was not added because XXXX had mastered her math goals that were in the 2019 IEP. Nonetheless, the Team proposed to collect data for the first 9 weeks and reconvene to add a math goal based on information from the Oceanside Evaluation, our PEP (phonetic) Kaufman Test for Educational Achievement, and WIAT. The purpose of the 9 weeks was to determine whether there was a possible weakness in her math skills in calculation and reasoning. This testimony evidences the willingness of the Team to amend and modify the IEP in the light of new data. Dr. XXXXXX unequivocally testified that if the data collected indicated that XXXX needed a math goal, the Team would propose an IEP meeting to discuss the proposal of a math goal or goals. This is a Team that understands the need to reassess and modify the IEP when necessary. Furthermore, there was ample testimony that XXXX would receive services in the area of Executive Functioning in her core courses, which include math. More specifically, the services would be provided in an inclusion setting (this means in the general education classroom with the support of special education teachers), 25 minutes four times each day, for a total of 100 minutes per day in the four core classes of English, Math, Science, and Social Studies.

The Parents also argue that this DRAFT IEP drastically reduce the Reading services. Undoubtedly, the number of minutes is less. 40 minutes per week versus 450 minutes per week. However, the 40 minutes per week would now be in a special education class, which is a different environment, intensely focused on this service. An argument could be made that placing XXXX in a special education setting does not meet the requirements of 8VAC 20-81-130(A) and 34 C.F.R. §300.114(2)(i), which state that an LEA must ensure that, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled, in the least restrictive environment (LRE). However, even though, LRE is a mandate, the student does not have an absolute right to be in the general education classroom. The student only has the right to have such considered first and rejected for good reason. The LRE for each student must be determined based upon an analysis of the above factors and that student’s individualized situation. To this effect, Dr. XXXXXX testified that “the least restrictive environment is based on the student’s individualized needs. At any point in time, for some students a least restrictive could be a self-contained classroom. For some students, their least restrictive environment is a resource classroom with a special ed teacher. And for some students the least restrictive environment could be in the general setting with support in there.” In XXXX’s case, Dr. XXXXXX then testified that, in the DRAFT IEP, it was determined that to bring XXXX the least restrictive environment, “she needed pull-out instruction in the special ed classroom to address her reading at the middle school level.”

Lastly, the Parents allege that the DRAFT IEP was prepared without their “meaningful participation”. It is important to note that page 8 of DRAFT IEP includes the Parents’ input, as it had been reported to the IEP Team, and includes a narrative the describes their concerns regarding virtual instruction, as well as XXXX’s diagnosis of Dyslexia, and issues with decoding.[[279]](#footnote-279)

Dr. XXXXXX and Mr. XXXXXX both testified that the Parents chose not to participate in the drafting of the IEP. More importantly, Mrs. XXXXX herself testified that when the school sent various letters offering multiple opportunities to meet regarding the development of the July 2021 IEP[[280]](#footnote-280), she sent a response declining participation. More specifically Mrs. XXXXX responded that [she has] been mentally, emotionally, and financially drained by the IEP Team, and that [she] could not physically, mentally, emotionally go through another meeting to restate [her] concerns over and over again that [she] has stated for four years when [the school] does not agree that XXXX has a disability of dyslexia. And that [she] did not foresee how one more meeting, unless it was going to be a miracle meeting. [she] had held too many meetings and shared too many times [her] concerns. [she] could not go through another meeting to be rejected again.

*Ellemberg* dictates that the Parents have to attempt to participate in the IEP process. *Ellenberg v. The New Mexico Military Inst.*, 478 F.3d 1262 (10th Cir. 2007) (the court held that the parents’ failure to attempt to amend a student’s IEP through the IEP process before pursuing an IDEA claim is a failure to exhaust administrative remedies and bars the parents’ claim).

For the reasons stated above, the Parents have not met their burden of proof and persuasion in showing that the “stay-put” IEP and DRAFT IEP did not provide support and services to meet XXXX’s needs.

**Issue 2:** Whether XPS denied XXXX FAPE when they failed to offer appropriate Extended School Year services to include accommodation documented on her IEP for the 2019-2020 school year, causing regression and interfering with XXXX’s ability for academic and developmental progress.

Based on the testimony of Mr. XXXXXX, in-person instruction was not available in the summer of 2020 due to the COVID-19 Emergency. Therefore, XXXX was to receive virtual instruction, instead. However, the Parents did not provide consent. Mr. XXXXXX also testified that initially the Parents did not raise any objections to virtual instruction when the Team met in June 2020, and that only later they raised concerns. However, based on the data the school had, XXXX appeared to be benefitting from virtual instruction. Mr. XXXXX testified that the Parents ultimately did not make XXXX available for ESY services. The testimony overwhelmingly showed that XXXX would have received ESY if the Parents had made her available.

Petitioners did not meet their burden, by a preponderance of the evidence, to show that XPS denied XXXX FAPE when she did not receive ESY services in the summer of 2020.

**Issue 3**: Whether XPS denied XXXX a FAPE, caused harm, and regression and interfered with academic and development progress when they unilaterally limited the type, amount, and duration of those services for Extended School Year services during the 2019-2020 school year.

In the Summer of 2020, XXXX did not receive the ESY services that were offered by the School. In-person instruction was not available during the summer of 2020 due to the COVID-19 pandemic. The evidence show that the Parents did not make XXXX available to receive those services. The evidence also shows that the concerns the Parents had regarding how XXXX responded to virtual instruction, were not supported by any school data, which instead showed that XXXX responded well to virtual instruction. Furthermore, the parents did not provide any evidence that XXXX regressed or suffered any harm in her academic and development progress.

ESY services were also offered for the summer of 2021. Dr. XXXXXX testified that several attempts were made by the School to arrange ESY services for the summer of 2021. ESY services could have been delivered either under a proposed IEP from October 2020 if the Parents had provided consent or under the “stay-put” IEP from December 2019. In the proposed IEP from October 2020, XXXX could have received in-person instruction in the area of Reading for 60 minutes twice per week, in a special education setting. In the alternative, under the “stay-put” IEP from December 2019 XXXX would have received instruction in the area of Reading, in a home-based setting, for 60 minutes three times a week. Dr. XXXXXX testified that despite multiple correspondence and attempts to coordinate ESY services, Mrs. XXXXX only made XXXX available for one day.

For this reason, the Parents have failed to meet their burden to show that XXXX was harmed, or regressed academically or developmentally for the offered ESY services in the summer of 2020.

**Issue 4:**

* 4(a) Whether XPS denied XXXX a FAPE and caused regression whey they failed to develop appropriate special education and related services, supplementary aids and services, and program modifications to meet XXXX’s unique needs for the 2020-2021 school year;
* 4(b) whether the draft IEP for 2021-2022 prepared without meaningful parent participation, denies FAPE and prevents access to education when it fails to provide special education-related services and accommodations for her severe disability deficit.

These issues revolve around the appropriateness of XXXX’s IEP, in terms of services, supplementary aids, and program modifications, in the light of XXXX’s unique needs. This requires a two-step analysis. First I need to determine if XPS has complied with the procedures set forth in the IDEA; then I need to determinate if the IEP developed is reasonably calculated to enable XXXX to receive educational benefits. If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 206-07, 102 S. Ct. 3034, 3051, 73 L. Ed. 2d 690 (1982). With respect to the “stay-put” IEP of December 2019, and the other proposed or drafted IEPs, Petitioners have not alleged that XPS failed to comply with the IDEA’s procedural requirements. Therefore, I turn to the second, substantive, prong of the Rowley inquiry: Were the “stay-put” IEP and the proposed other IEPs appropriate for XXXX?

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

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

All IEPs in question contain a statement of the child’s present levels of academic achievement and functional performance, a statement of measurable annual goals, a description of how the child’s progress toward meeting the annual goals will be measured, and a statement of the special education and related services and supplementary aids and services. Interestingly, the Parents really have not so much argued that the “stay-put” IEP lacks services, goals, or accommodations. They argue that the “stay-put” IEP is not working, and cannot work because it is not designed to address XXXX’s diagnosis of a specific learning disability, dyslexia. However, whether an IEP is working or not is determined by whether the student makes meaningful steady progress in the areas of need that have been identified by the Team; the Parents participated in the IEP meetings that led to the “stay-put” IEP and provided consent. XXXX needed help in the areas of writing, reading, and math. Specific goals were set with several accommodations. By the time XXXX finished the 2020-2021 school year she was able to master some of the goals (math) and showed that she made substantial progress towards the others. Therefore, following the Endrew F analysis, XPS offered an IEP reasonably calculated to enable XXXX to make progress appropriate in light of the child’s circumstances.”

As far as the DRAFT IEP from July 2021, the parents chose not to participate to the IEP meetings that lead to the DRAFT IEP, despite multiple letters and invitations, as testified by Dr. XXXXXX.[[281]](#footnote-281) The DRAFT IEP contained a very detailed summary of test history, a summary of all current assessments which included school evaluations as well as the independent evaluations, and a statement of parent input from prior communications. The Team set five specific annual goals in the category of Executive Functioning / Study Skills, and one goal in the category of Reading. Each goal has a detailed description and states how XXXX is expected to respond to master each goal. There is also an extensive list of accommodations, which also includes Assistive Technology. Lastly, the services listed took into consideration the possibility that schools may close again due to the COVID-19 pandemic and laid two possible settings, one for in-person learning and one for virtual learning: 100 minutes per day in general education classroom in the areas of Executive Functioning/ Study Skills; and 40 minutes per week in special education classroom for Reading. When asked why this DRAFT IEP did not have a math goal, Dr. XXXXXX testified that XXXX had mastered her math goals. She also added that the Team planned on gathering data for the first 9 weeks to see if a goal math needed to be added. I find that this DRAFT IEP meets the requirements for FAPE and that the Parents have failed to meet their burden for this issue.

**Issue 5**:

* 5(a) Whether XPS denied XXXX a FAPE when they failed to consider, review, and/or revise XXXX’s IEP to remediate her severe deficits identified by private providers in reading and language art skills which include explicit, systematic, and intentional instruction in phonological awareness, phonic decoding, vocabulary, language structure, reading fluency and reading comprehension for the 2019-2020 school year which caused exacerbated symptoms related to her anxiety;
* 5(b) Whether XPS denied XXXX a FAPE when they failed to consider, review, and/or revise XXXX’s IEP to remediate her severe deficits identified by private providers in reading and language art skills which include explicit, systematic, and intentional instruction in phonological awareness, phonic decoding, vocabulary, language structure, reading fluency and reading comprehension for the 2020-2021 school year which caused exacerbated symptoms related to her anxiety;
* 5(c) Whether the draft IEP for 2021-2020 prepared without meaningful parent participation, denies FAPE and prevents access to education when it fails to provide special education-related services and accommodations for her severe disability deficit.

During the 2019-2020 and the 2020-2021 school years, the LEA implemented the services of the “stay-put” IEP. The Parents argue that XXXX, due to her diagnoses, required the services to be delivered with different methodologies than those used by her teachers. The testimony given by Mr. XXXXX and Ms. XXXXXXX, however, overwhelmingly show that the methodologies used allowed XXXX to make meaningful progress towards her goals.

Mr. XXXXX testified that during the 2019-2020 XXXX received intervention in Reading through the Sonday System, which was administered in the general education setting during Power Up time. Ms. XXXXXXX, her special education teacher, implemented the system. Ms. XXXXXXX, the reading specialist at XXXXXXXX Elementary testified that during the 2020-2021 school year, the Sonday system was implemented by Ms. XXXX, a Teaching Assistant, under her supervision. Ms. XXXX was trained by Ms. XXXXXXX in the use of the Sonday system. Ms. XXXXXXX testified that it was the Parents who requested the use of the Sonday for phonological awareness, such as blending and segmenting words and sentences, rhyming, and then to be able to generate rhymes, manipulate phoneme sounds.

Ms. XXXXXXX testified that the Sonday is a multi-sensory approach to reading instruction; it is an explicit systematic approach, based on Orton-Gillingham. Ms. XXXXXXX testified that XXXX’s assessment for the Sonday System 1 – Pre and Post Test in spelling and read words, show progress between October 2019 and February 2021, going from a score of 56 percent to 94 percent. Similarly in decoding, she went from a level G to list K, mastering many of the words.

Ms. XXXXXXX also testified that XXXX received Leveled Literacy Intervention (LLI) toward her goal of comprehension. LLI allows for acceleration across reading, writing, and phonics, and can be used both in the General Education setting, as well as the Special Education setting. LLI is also a systematic, explicit, teacher-directed intervention and it provides practice with word study and phonics. It has comprehension in it as well as fluency and writing. Ms. XXXXXXX also testified that LLI can have a multi-sensory approach built within the program. LLI was administered daily in a small group intensive reading intervention.

XXXX was continually evaluated and she made progress. Specifically, XXXX’s Running Record from September 2019 to June 2021 for LLI show steady meaningful progress. XXXX began in September of 2019 at a Level Q, progressed to an R, and after a few months, jumped to an S, and then a T. Her grades were based on the general education curriculum.

Similarly, Mr. XXXXX testified that XXXX’s MAP assessment for math and reading showed significant progress: in the Spring of the 2020-2021 school year, she was in the 54th percentile in reading compared to her national peers, meaning that XXXX from the Fall of 2020 made more progress than 54% of her peers; similarly, in math, XXXX was in the 46th percentile, meaning that she made more progress than 46% of her peers.

XXXX’s teachers used the Sonday system (at the Parents request) and LLI. There is nothing in the IDEA that requires an IEP to include specific instructional methodologies. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46665 (August 14, 2006). In *J.L. v. Mercer Island Sch. Dist*., 575 F.3rd 1025, 52 IDLER 241 (9th Cir. 2009), the Court noted that an LEA is not required to provide the parents’ preferred teaching methodology. Also, in *Barnett v. Fairfax County School Bd*., 721 F. Supp. 757 (E.D. Va. 1989), citing *Rowley*, 458 U.S. at 208, 102 S. Ct. at 3051 the court noted that “while a school system must offer a program which provides educational benefits, the choice of the particular educational methodology employed is left to the school system.”

In the DRAFT IEP of July 2021 for the 2021-2022 school year, XXXX is to receive Assistive Technology (AT) as one of her accommodations. Mr. XXXXXX testified that the decision to include AT was made because during an AT trial, the AT specialist who observed and interacted with XXXX, noticed that XXXX tended to use the dictionary tool to look up definitions of the words, and use the word prediction software to help her with spelling. Dr. XXXXXX also confirmed that the DRAFT IEP contained accommodations for Assistive Technology for writing, with the word prediction software with the spelling and dictionary feature. This is because XXXX performed very well during a trial period using some assistive technology, specifically text to speech, speech to text, word prediction software through her Google Chromebook.

These appear to be informed decisions, based on actual knowledge and observation of XXXX while using this accommodation. For these reasons, the Parents have failed to meet their burden of proof and persuasion that the “stay-put” IEP and the DRAFT IEP did not include services and accommodations, as drafted or in its implementation, in reading and language art skills designed to address her deficits identified by private providers.

Issue 6:

6(a) Whether XPS denied XXXX a FAPE when it failed to provide her with reading intervention as defined under the Every Student Succeeds Act (ESSA) and the Virginia Department of Education guidance, to address XXXX’s reading disability of Dyslexia for the 2019-2020 school year;

6(b) Whether XPS denied XXXX a FAPE when it failed to provide her with reading intervention as defined under the Every Student Succeeds Act (ESSA) and the Virginia Department of Education guidance, to address XXXX’s reading disability of Dyslexia for the 2020-2021 school year;

6(c) Whether the draft IEP for 2021-2022 prepared without meaningful parent participation, denies FAPE and prevents access to education when it fails to provide special education-related services and accommodations for her severe deficit.

After reviewing these issues, and referenced guidance from VDOE, I find that the “stay-put” IEP provide XXXX a FAPE. Similarly, the proposed IEP of October 2020, as well as the DRAFT IEP of July 2021, as drafted, provide XXXX a FAPE. All IEPs in question contain services in the area of Reading. In the “stay-put” IEP, XXXX is to receive 90 minutes, five times per week in the general education setting to address her reading needs. There are 3 specific goals and several accommodations, including Read Aloud. Ms. XXXXXXX testified in detail about reading interventions through the Sonday System, which is a multi-sensory approach to reading instruction; it is an explicit systematic approach, based on Orton-Gillingham. Ms. XXXXXXX also testified that XXXX received Leveled Literacy Intervention (LLI) toward her goal of comprehension. LLI allows for acceleration across reading, writing, and phonics, and can be used both in the General Education setting, as well as the Special Education setting. LLI is also a systematic, explicit, teacher-directed intervention and it provides practice with word study and phonics. It has comprehension in it as well as fluency and writing. Ms. XXXXXXX also testified that LLI can have a multi-sensory approach built within the program. LLI was administered daily in a small group intensive reading intervention.

XXXX’s progress using both the Sonday system and LLI is well documented. Between October 2019 and February 2021, XXXX went from a score of 56 percent to 94 percent. Similarly in decoding, she went from a level G to list K, mastering many of the words. For LLI, XXXX’s Running Record from September 2019 to June 2021 shows steady meaningful progress, going from a Level Q to a level T. these grades are all based on the general education curriculum. Petitioners’ argument that Sonday and LLI are not adequate are not supported by the data and, more importantly, are not supported by XXXX’s continued progress.

The DRAFT IEP of July 2021, addresses XXXX’s needs in the area of Reading and includes a specific reading goal, with AT accommodations (word prediction software and access to literary support/ dictionary tool) both in general education classroom and special education classroom for reading assignment.

I find that the Parents have not met their burden of proof and persuasion in showing that XPS failed to provider with reading intervention as defined under VDOE guidelines.

**Issue 7**: Whether XPS denied XXXX FAPE when they failed to honor the parent’s request for a re-evaluation on April 27, 2020.

The testimony on this issue is minimal. In April 2020, Mrs. XXXXX asked that XXXX be reevaluated. The Parents argue that the school did not honor her request for re-evaluation. However, Mrs. XXXXX herself testified that when the school reopened, evaluations were indeed proposed for XXXX when schools reopened, and that evaluations were able to be done. Similarly, Mr. XXXXXX confirmed in his testimony, that the parents had stated in an email in April that they wanted XXXX to be evaluated once traditional in-person instruction resumed; and that, in September 2020, the IEP team convened and proposed updated evaluations since school was resuming for in-person instruction, and the parents did provide consent for those evaluations, and more importantly, that those evaluations took place.

For these reasons, the Parents failed to meet their burden of proof and persuasion that XPS failed to honor the Parents request for a re-evaluation on April 27, 2020.

**Issue 8**: Whether XPS denied XXXX FAPE when they only used the discrepancy model to reject eligibility as a student with a specific learning disability, failed to give meaningful consideration to the IEE and other private evaluations, which all identify XXXX as a student with the specific disability of Dyslexia and refused to follow when asked, the required eligibility documentation during May 17, 2021 eligibility meeting.

The evidence overwhelmingly shows that the Team convened several times (January 11, 2021, January 26, 2021, and May 17, 2021) to determine whether XXXX continued to meet the eligibility criteria of Other Health Impairments, or if she also qualified under a Specific Learning Disability, Dyslexia, or Speech-Language Impairment. The reason for the gap between the January meetings and the May meeting was to allow further evaluations at the request of the parents. Several expert witnesses, who participated in these eligibility meetings, testified that the members of the Team methodically went through each criteria worksheet, step by step.

Evidence showed that XXXX did not meet the criteria for a Specific Learning Disability due to a multitude of factors. Furthermore, although substantial weight was given to the fact that there was not a severe discrepancy between XXXX’s academic achievement and her cognitive ability, many other things were considered: information from classroom teachers, XXXX’s response to general education interventions, grade performance, all evaluations that were available, including the independent evaluations from Oceanside and CHKD. Parents input was also considered.

The allegation that the Team did not meaningfully consider the IIEs is not supported by the evidence, which instead shows that Dr. XXXXXXX from Oceanside, for example, personally addressed the Team members and explained her findings. Under *TS v. Board of Educ. of Town of Ridgefield*, 10 F.3d 87, the court noted that “No definition of the term "considered" is offered in either the federal or state regulations. Nor do they require that the [Team] assign a specific weight to any item of information presented to it for its consideration. [T]he results of independent evaluations need not be considered conclusive […] but rather as additional information to be considered along with all other information.” In XXXX’s case, the evidence shows that every Team member was very familiar with XXXX as a person, and as a student, and they all considered all evidence available to them, including the Independent Evaluations. They were all informed participants in the eligibility meetings.

Many hours of testimony were spent over the appropriateness of the discrepancy model in the eligibility criteria worksheet for Specific Learning Disability. The Petitioners were not persuasive in showing that the discrepancy model is an inappropriate method to be used in determining eligibility, nor were they persuasive in showing that the underlying data used was somehow flawed, misused, or misinterpreted.

More importantly, the Parents seem to be more concerned about labels rather than focusing on working with the Team to identify a need and tailoring the IEP to address that need. Federal and state law are clear that school districts are not required to classify a student in a particular category. See, e.g. *Letter to Anonymous*, 48 IDELR 16 (OSEP 2006) (Child’s identified needs, not the child’s disability category, determine the services that must be provided to her); *Heather S. v. State of Wis.,* 125 F.3d 1045, 1055 (7th Cir. 1997) (IDEA not concerned with labels, but with whether a student is receiving a FAPE); *Lauren C. by & through Tracey K. v. Lewisville Indep. Sch. Dist*., 904 F.3d 363, 377 (5th Cir. 2018) (IDEA promises: a FAPE: regardless of child’s diagnosis.)

The Petitioners failed to meet their burden of proof and persuasion on this issue.

**Issue 9:**

* 9(a) Whether XPS denied XXXX FAPE when they failed to develop IEP goals, accommodations, or related services to address her disability of ADHD and anxiety for the 2019-2020 school year;
* 9(b) Whether XPS denied XXXX FAPE when they failed to develop IEP goals, accommodations, or related services to address her disability of ADHD and anxiety for the 2020-2021 school year;
* 9(c) Whether the draft IEP for 2021-2022 prepared without meaningful parent participation, denies FAPE and prevents access to education when it fails to provide special education-related services and accommodations for her severe disability deficit.

During the 2019-2020 and the 2020-2021 school year, XXXX made progress, and the evidence presented is that she made substantially more than just *de minimis* progress. In the case of *Endrew F. v. Douglas* County School District, 137 S. Ct. 988 (2017), the United States Supreme Court held that to meet its substantive obligation under the Individuals with Disabilities Education Act (IDEA), a school must offer an IEP that is reasonably calculated to enable a student to make progress appropriate in light of the student's circumstances. The Court said, "When all is said and done, a student offered an educational program providing merely more than *de minimis* progress from year to year can hardly be said to have been offered an education at all." The substance of the IEP must be reasonably calculated to provide the student with educational benefit. See *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 205, 102 S. Ct. 3034, 3050, 73 L.Ed. 2d 690 (1982).

The Parents argue that it is XXXX’s disabilities that should drive the IEP. In this specific issue No. 9 for example, the Parent’s position is that the IEP should specifically be tailored to address her ADHD. However, it is clear from *Letter to Anonymous*, 48 IDELR 16 (OSEP 2006) that “it is the child’s identified needs, not the child’s disability, to determine the services that must be provided to the child.”

The “stay-put” IEP addressed XXXX’s needs in the areas of Writing, Reading, and Math. Specific goals where assigned, with various accommodations. Whether or not an IEP is appropriate is measured by the progress that a student makes, following its directives. XXXX’s steady and meaningful progress, as described by Mr. XXXXX, Mr. XXXXXX, Dr. XXXXXX, Ms. XXXXX, Ms. XXXXXXX, Ms. XXXXX, is clear evidence that the “stay-put” IEP worked for XXXX. All experts who testified for the Responded, stated unequivocally, that the DRAFT IEP from July 2021 is appropriate and, if the Parents had given consent to it, it would have allowed XXXX to make meaningful steady progress. Dr. XXXXXX said it best when she testified that an “IEP is a fluid document”. It is an opportunity for teachers, parents, professionals to come together and build a structure, made of services, goals, and accommodations, that allows a student with a disability to thrive in school.

The evidence overwhelmingly shows that many evaluations were conducted throughout the years, some by the school, some by private providers; many IEP meetings; many letters; many conversations; all with the single objective of providing XXXX with a Free Appropriate Public Education.

Overall, I find that the testimony given by Mr. XXXXX, Ms. XXXXXXX, Ms. XXXXX, Mr. XXXXXX, Ms. XXXXX, and Dr. XXXXXX has been very compelling in regards to the diligence with which XPS has implemented the “stay-put” IEP, worked to draft new IEPs, and considered new eligibility criteria for XXXX. They all testified that the “stay-put” IEP and the subsequent proposed/drafted IEPs are appropriate for XXXX; designed to allow her to access the general education curriculum, identifying her needs, and providing her with the services, with specific goals, and accommodations, and related services so that she can make meaningful progress. Their testimony about XXXX’s progress has also been very compelling. They are all professional educators, many with demonstrated commitment of a lifetime. In the light of so much evidence that was produced in the course of this 5-day hearing, I give deference to their judgment. See *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist*. RE-1, No. 15-827, 137 S. Ct. 988 (2017) (stating that a court or hearing officer is required to give deference to the judgment of school board witnesses who are professional educators).

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

The Petitioners ask this Hearing Officer to find that a Private School Placement is necessary because XPS failed to provide XXXX with FAPE. It is unclear why the Parents never requested a private placement before this due process proceeding; The Petitioners have identified XXXXXXXXX XXX Academy (XXA) as the right school for XXXX. Dr. XXXXX, the reading specialist at XXA testified that Mrs. XXXXX started working at XXA in the summer, but no evidence was introduced that the Petitioners even mentioned XXA to the XPS or other members of the IEP Team. The Court in *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 260 (2009) stated that “Given the burden of private school placement, it makes good sense to require parents to try to devise a satisfactory alternative within the public schools, by taking part in the collaborative process of developing an IEP that is the ‘modus operandi’ of the IDEA”), (quoting Burlington Sch. Comm. v. Mass. Dep’t. of Educ., 471 U.S. 359, 368 (1985)). Yet, in the present case, the Parents not only stopped participating in the IEP process, but never even mentioned a private day school placement. Dr. XXXXX testified and described the environment where XXXX would be if she attended this private school. XXA would be a very restrictive environment. The entire setting is a special education setting. The evidence shows that XXXX does not require such a restrictive environment. She does well in the public school setting, as every school expert testified. The Petitioners are free to enroll XXXX in any school they see best, but that should not at public expense, if the public school can provide XXXX with FAPE, which the evidence overwhelmingly shows.

Furthermore, in regard to private placement matters, case law is clear and undisputed.  In *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 326-27 (4th Cir. 2004), a child's parent argued that her son required private placement because he "was not fulfilling his potential" in the public school system. The court rejected that argument, holding that "nowhere does IDEA require that a school system ‘maximize' a student's potential."  (*Id*. at 327 (quoting *Rowley*, 458 U.S. at 189)). To provide FAPE, an LEA must simply "provide personalized instruction with sufficient support services to enable the handicapped child to benefit educationally from that instruction."  *Hessler ex rel. Britt v. State Bd. of Educ*., 700 F.2d 134, 139 (4th Cir. 1983).  Only if an LEA cannot provide FAPE to a child with a disability does the IDEA provide for placement in private school at public expense.  *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369 (1985).   See also *R.H. v. Plano Indep. Sch. Dist*., 607 F.3d 1003, 1014-15 (5th Cir. 2010) ("If it appears that the district is not in a position to provide [FAPE] in the public school setting, then (and only then) must it place the child (at public expense) in a private school that can provide those services." (quoting *W.S. ex rel. C.S. v. Rye City Sch. Dist*., 454 F. Supp. 2d 134, 148 (S.D.N.Y. 2006)).  See also *Lawson*, 354 F.3d at 320 ("The parent may recover if (1) the proposed IEP was inadequate to offer the child a FAPE and (2) the private education services [...] were appropriate to the child's needs.").

The Petitioners also ask that this Hearing Officer rule that XXXX be given Assistive Technical device and software support. We have heard from several of the school witnesses that AT would be made available as part of the DRAFT IEP of July 2021. The evidence shows, indeed, that XXXX took a keen interest in AT after a brief trial.

The other compensatory services requested (such as therapy and tutoring) are not appropriate as the evidence shows that XPS has been able to provide XXXX with FAPE through the “stay-put” IEP of 2019, and that the October 2020 IEP as well as the DRAFT IEP from July 2021, if implemented, would provide FAPE.

The Petitioners ask that this Hearing Officer finds that XXXX is eligible under IDEA as a child with a Specific Learning Disability, Dyslexia, math and language basis skills. The evidence shows that the eligibility criteria worksheet was correctly applied and therefore, such a finding, would be contrary to the evidence presented.

Lastly, the Petitioners ask that this Hearing Officer make a ruling that the Special Education Department receive VDOE training in the use of VTSS for students with reading, writing, and spelling disabilities. I do not believe that, as a Hearing Officer, I have the authority to make such a ruling, but even if I did, no sufficient evidence was presented during the hearing for me to even consider this relief.

**ORDER**

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered that the Respondent is the prevailing party in this hearing and that no relief is awarded to the Petitioners.

SO ORDERED.

DATED:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ HEARING OFFICER

**NOTICE OF RIGHT TO APPEAL**

This decision is final and binding unless either party appeals in a federal district court within 90 calendar days of this decision, or in a state circuit court within 180 calendar days of the date of this decision.**APPENDIX A – PERSONALLY IDENTIFIABLE INFORMATION**

**XXXXXXXXX v. XXXXXXXXXXXXX SCHOOL BOARD**

**Case No. 22-030**

Student’s Name

XXXXXXXXX

Date of Birth

XX/XX/XXXX

Student’s I.D. Number

XXXXXXX

Attending School

XXXXXXXX Elementary, XXXXXXXXX, VA

Recommended School

N/a

Parent

XXXXXXXXXXX

Parent

XXXXXXXXXX

Lea Representative / Assistant Director of Exceptional Learning, XXXXXXXXX Public Schools

Dr. XXXXXX XXXXXX

Assistant Principal, XXXXXXXX Elementary School

XXXXXXXXXXXXX

Reading Specialist, XXXXXXXX Elementary School, XXXXXXXXX Public Schools

XXXXXXXXXXXX

Special Education Teacher, XXXXXXXX Elementary School

XXXXXXX XXXXX

Special Education Administrator, XXXXXXXXX Public Schools

XXXXXXXXXXXX

School Psychologist, XXXXXXXXX Public Schools

XXXXXXXXXXXXXXXXX

Mother

XXXXXXXXXXX

Advocate, and Executive Director Advocating 4 Kids, Inc.

Cheryl A. Poe

Reading Specialist, XXXXXXXXX XXX Academy

Dr. XXXXXX XXXXX

Executive Director, and Co-Founder at Decoding Dyslexia XXXXXXXXXX

XXXXXXXXXX

Counsel for Petitioners: Lois Manes, Esq.

Counsel for Respondent: LaRana Owens, Esq.

Hearing Officer: Tiziana Ventimiglia, Esq.

Case Evaluator: Reggie Frazier, Esq.

**APPENDIX B – LIST OF EXHIBITS CITED**

**XXXXXXXXX v. XXXXXXXXXXXXX SCHOOL BOARD**

**Case No. 22-030**

**List of Exhibits included in Decision**

**Petitioners’ Exhibits**

PrE-1

XXXXXXXXX Psychological Associates, by and through XXXXXXXXX, Psy.D. and XXXXXXXXXX, M.A., M.S. - Report dated January 24, 2018

PE-2

Speech-Language Evaluation Report by XXXXXX, speech language pathologist, dated April 17, 2018.

PE-3

Psychological/Educational Report by XXXXX XXXXX, Ed.S. School Psychologist, dated May 3, 2018.

PE-6

Speech, Language, and Literacy Evaluation Report by Children’s Hospital of the King’s Daughters (CHKD) dated May 13, 2019.

PE-9

Psychological/Educational Evaluation by XXXX XXXXX, Ed.S., on November 12, 2020 and November 19, 2020 PE-15

Psychological evaluation report by XXX XXXXXXX, Psy.D., Oceanside Evaluations / April 2021

PE-34

Measure of Academic Performance (MAP)

PE-86

Basis for Eligibility 5/9/18

PE-117

Proposed IEP – October 26, 2020

PE-80A

SEC Report 10/11/17

PE-86

Basis for Eligibility Determination dated May 9, 2018

PE -96

Speech-Language Impairment /Eligibility Worksheet

PE-97

Other Health Impairment / Eligibility Worksheet

PE-98

Specific Learning Disability / Eligibility Worksheet

PE -105

May 21, 2019 IEP

PE-108

Stay-Put IEP / December 4, 2019 Amendment

PE-117

Proposed IEP10/26/2020

PE-121A

PWN – 03/12/21

PE-272

XXXX – writing about virtual learning

PE-273

XXXX – writing about virtual learning

PE-274

XXXX – writing about virtual learning

PE-279

LLI Supporting Resources

PE-337

XXXXXXXXXXX Resume

PE-338

Dr. XXXXXXXXXXXXX Resume

**Respondent’s Exhibits**

SD-5

XXXX Grade Report Card

SD-9

Stay Put IEP 12/4/19

SD-15

IEP 5/13/20

SD-19

XXXX Grade Report Card

SD-33

October 26, 2020 IEP

SD-36

Mr. XXXXX observation 11/13/2020

SD-37

Mr. XXXXX observation 11/18/2020

SD-38

Psychological Evaluation 11/12/2020

SD-39

Speech-Language Evaluation / November 20, 2020.

SD-40

Mr. XXXXX observation 11/30/20

SD-44

SEC Report 1/11/21

SD-63

XXX Grade Report Card

SD-63A

IEP Progress Report – Annual Goal, dated June 9, 2021

SD-64

Correspondence regarding IEP meeting

SD-66

Correspondence regarding ESY services and IEP meeting

SD-69

Draft IEP July 28, 2021

SD-70

PWN 7/28/21

SD-73

Winsor Learning – Orton-Gillingham Based Program

SD-75

Sonday System Pre and Post Tests / Spelling and Read Words

SD-76

LLI Running Record from September 2019 to June 2021

SD-78

XXXXXXXXXXXX Resume

SD-79

XXXXX XXXXX Resume

SD-81

XXXXXXXXXXXX Resume

SD-82

XXXXXXXXXXXXX Resume

SD-84

Vv v XXXXXXXXXXXXXXXXX

1. The Hearing Officer Exhibits will be referred to as “HO” followed by the exhibit number; Petitioners Exhibits will be referred to as “PE” followed by the exhibit number; and, Respondent Exhibits will be referred to as “SD” followed by the exhibit number. When citing a third range to any exhibit, the third range represents the page number within the referenced exhibit. References to testimony rendered during the Hearing will be referenced at “T” followed by the page number (due to the fact that different court reporters were used, the 4th day of testimony will be referenced as 4T followed by the page number.) [↑](#footnote-ref-1)
2. HO 1 – Notice of Due Process Complaint [↑](#footnote-ref-2)
3. HO 2 – Letter of Appointment of Hearing Officer. [↑](#footnote-ref-3)
4. HO 3 – Response to the Complaint by Respondent. [↑](#footnote-ref-4)
5. All prehearing reports are incorporated herein by reference. [↑](#footnote-ref-5)
6. HO 4 – Email from Respondent’s counsel notifying outcome of resolution meetings. [↑](#footnote-ref-6)
7. HO 5 – Prehearing Conference Summary and Order. [↑](#footnote-ref-7)
8. *Id.* [↑](#footnote-ref-8)
9. HO 5 – Second Prehearing Conference Summary and Order. [↑](#footnote-ref-9)
10. *Id.* [↑](#footnote-ref-10)
11. HO 6 – Entry of Appearance by Ms. Lois Manes, Esq. [↑](#footnote-ref-11)
12. See footnote 2. [↑](#footnote-ref-12)
13. HO 7 – Petitioners’ Exhibit Books; Email from Petitioner; [↑](#footnote-ref-13)
14. HO 8 – Respondent’s Exhibit Book. [↑](#footnote-ref-14)
15. A more detailed list of the exhibits cited herein is attached as Appendix B to this decision. [↑](#footnote-ref-15)
16. HO 9 – Respondent’s Partial Motion to Dismiss [↑](#footnote-ref-16)
17. HO 10 – Order / Partial Motion to Dismiss [↑](#footnote-ref-17)
18. HO 11 – Order / Motion to Dismiss. [↑](#footnote-ref-18)
19. HO 12 – Petitioners’ Motion to Allow Remote Testimony. [↑](#footnote-ref-19)
20. See footnote 8. [↑](#footnote-ref-20)
21. In 2004, Congress reauthorized the Individuals with Disabilities Education Act as the Individuals with Disabilities Education Improvement Act. *See* Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), effective July 1, 2005. The amendments provide that the short title of the reauthorized and amended provisions remains the Individuals with Disabilities Education Act. *See* Pub. L. 108-446, § 101, 118 Stat. at 2647; 20 U.S.C. § 1400 (2006) ("This chapter may be cited as the 'Individuals with Disabilities Education Act.'"). [↑](#footnote-ref-21)
22. T-105, 106 – Testimony of Mr. XXXX [↑](#footnote-ref-22)
23. SD-82 [↑](#footnote-ref-23)
24. T-117 – Testimony of Mr. XXXXX [↑](#footnote-ref-24)
25. T-117 – Testimony of Mr. XXXXX [↑](#footnote-ref-25)
26. T-164 – Testimony of Mr. XXXXX [↑](#footnote-ref-26)
27. SD-76 [↑](#footnote-ref-27)
28. T-188 – Testimony of Mr. XXXXX [↑](#footnote-ref-28)
29. PE -34 [↑](#footnote-ref-29)
30. SD – 5; T-108, 109 – Testimony of Mr. XXXXX [↑](#footnote-ref-30)
31. SD -19; T-110. – Testimony of Mr. XXXXX [↑](#footnote-ref-31)
32. SD 63; T-110, 111 – Testimony of Mr. XXXXX [↑](#footnote-ref-32)
33. T-118 – Testimony of Mr. XXXXX [↑](#footnote-ref-33)
34. T-120 – Testimony of Mr. XXXXX [↑](#footnote-ref-34)
35. SD-33 [↑](#footnote-ref-35)
36. PE-117; T126 – Testimony of Mr. XXXXX [↑](#footnote-ref-36)
37. T-126 – Testimony of Mr. XXXXX [↑](#footnote-ref-37)
38. SD-36; T-127 – Testimony of Mr. XXXXX [↑](#footnote-ref-38)
39. T-129 – Testimony of Mr. XXXXX [↑](#footnote-ref-39)
40. T-180 – Testimony of Mr. XXXXX [↑](#footnote-ref-40)
41. SD-37; T-129 – Testimony of Mr. XXXXX [↑](#footnote-ref-41)
42. T-131 – Testimony of Mr. XXXXX [↑](#footnote-ref-42)
43. PE -96 [↑](#footnote-ref-43)
44. PE -97 [↑](#footnote-ref-44)
45. PE -98 [↑](#footnote-ref-45)
46. PE -97 [↑](#footnote-ref-46)
47. SD-63A [↑](#footnote-ref-47)
48. T-153 – Testimony of Mr. XXXXX [↑](#footnote-ref-48)
49. SD69 [↑](#footnote-ref-49)
50. T-161 – Testimony of Mr. XXXXX [↑](#footnote-ref-50)
51. T-244 – Testimony of Ms. XXXXXXX [↑](#footnote-ref-51)
52. SD-78 [↑](#footnote-ref-52)
53. T-205 – Testimony of Ms. XXXXXXX [↑](#footnote-ref-53)
54. T-208 – Testimony of Ms. XXXXXXX [↑](#footnote-ref-54)
55. T-215 – Testimony of Ms. XXXXXXX [↑](#footnote-ref-55)
56. T-202 – Testimony of Ms. XXXXXXX [↑](#footnote-ref-56)
57. T-204 – Testimony of Ms. XXXXXXX [↑](#footnote-ref-57)
58. SD - 75 [↑](#footnote-ref-58)
59. T-238 – Testimony of Ms. XXXXXXX [↑](#footnote-ref-59)
60. T-239 – Testimony of Ms. XXXXXXX [↑](#footnote-ref-60)
61. T-220 – Testimony of Ms. XXXXXXX [↑](#footnote-ref-61)
62. T-236 – Testimony of Ms. XXXXXXX [↑](#footnote-ref-62)
63. PE-279. [↑](#footnote-ref-63)
64. T-285 – Testimony of Ms. XXXXX [↑](#footnote-ref-64)
65. T-357 – Testimony of Ms. XXXXX [↑](#footnote-ref-65)
66. SD-79 [↑](#footnote-ref-66)
67. T-285 – Testimony of Ms. XXXXX [↑](#footnote-ref-67)
68. T-286 – Testimony of Ms. XXXXX [↑](#footnote-ref-68)
69. T-287-288 – Testimony of Ms. XXXXX [↑](#footnote-ref-69)
70. T372 – Testimony of Ms. XXXXX [↑](#footnote-ref-70)
71. T312 – Testimony of Ms. XXXXX [↑](#footnote-ref-71)
72. T312 – Testimony of Ms. XXXXX [↑](#footnote-ref-72)
73. T365 – Testimony of Ms. XXXXX [↑](#footnote-ref-73)
74. T304 – Testimony of Ms. XXXXX [↑](#footnote-ref-74)
75. PE272-273-274 [↑](#footnote-ref-75)
76. T314 – Testimony of Ms. XXXXX [↑](#footnote-ref-76)
77. T305 – Testimony of Ms. XXXXX [↑](#footnote-ref-77)
78. T316 – Testimony of Ms. XXXXX [↑](#footnote-ref-78)
79. T331 – Testimony of Ms. XXXXX [↑](#footnote-ref-79)
80. PE121A [↑](#footnote-ref-80)
81. T336 – Testimony of Ms. XXXXX [↑](#footnote-ref-81)
82. T408 – Testimony of Ms. XXXXX [↑](#footnote-ref-82)
83. T352 – Testimony of Ms. XXXXX [↑](#footnote-ref-83)
84. T354 – Testimony of Ms. XXXXX [↑](#footnote-ref-84)
85. T378 – Testimony of Ms. XXXXX [↑](#footnote-ref-85)
86. T355 – Testimony of Ms. XXXXX [↑](#footnote-ref-86)
87. T399 – Testimony of Ms. XXXXX [↑](#footnote-ref-87)
88. T401 – Testimony of Ms. XXXXX [↑](#footnote-ref-88)
89. T400 – Testimony of Ms. XXXXX [↑](#footnote-ref-89)
90. PE-337 [↑](#footnote-ref-90)
91. T542 – Testimony of Ms. XXXXXXX [↑](#footnote-ref-91)
92. T591 – Testimony of Ms. Poe [↑](#footnote-ref-92)
93. T610 – Testimony of Ms. Poe [↑](#footnote-ref-93)
94. T615 – Testimony of Ms. Poe [↑](#footnote-ref-94)
95. T624 – Testimony of Ms. Poe [↑](#footnote-ref-95)
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100. T822 – Testimony of Mr. XXXXXX [↑](#footnote-ref-100)
101. T753 – Testimony of Mr. XXXXXX [↑](#footnote-ref-101)
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