#22-003

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

XXXXX XXXXXX Public Schools Mr. & Mrs. XXXX

School Division Parents

(XXX) Child

Ms. Kandise Lucas

Parent’s Advocate

Mr. John F. Cafferkey, Esq.

Representing XXXXX XXXXXX Public Schools

Morgan Brooke-Devlin, , Esq.

Hearing Officer

Mr. Brian K. Miller, Esq.

VDOE Evaluator

# HEARING OFFICER DECISION

PROCEDURAL HISTORY:

This Administrative Due Process Hearing was held pursuant to the *Individuals with Disabilities Education Act, 20 USC § 1400 et seq. (“IDEA”); and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia*, 8 VAC 20-81.

The Parent’s Request for a Due Process Hearing was received by the LEA on July 3, 2021. The Hearing Officer was appointed on July 9, 2021. The Hearing Officer Decision was due on September 16, 2021 and is timely rendered.

On July 13, 2021, the Virginia Department of Education (SEA) filed a Reply to the Due Process Complaint and a Motion to Dismiss it as a party to the Parents’ Complaint. The LEA nor the Parent or her Advocate filed a response. The Hearing Officer issued a Decision on July 21, 2021, granting the SEA Motion to Dismiss.

A Pre-Hearing Telephone Conference was held on July 15, 2021. During the Conference the dates, time and location of the Due Process Hearing, were established. The Hearing Officer discussed the parties’ planned dates for resolution hearings and was advised that a resolution hearing date and time had been set.

It was later determined that the parties participated in two resolution sessions but that these had not resulted in any agreements or resolution. TR. Day 2: 9-19. A third Resolution session was discussed but not held. Mr. XXXXXXXXXXXXX, Acting Coordinator of Due Process and Eligibility for XXPS, who participated in the two Resolution meetings, wrote a letter to the Parents expressing his view that the meetings had not been productive and that a third meeting was not likely to be successful, due, among other things, to the Parent’s communication to him following the second Resolution meeting which caused him to believe that they were not acting in good faith. TR. Day 2: 49: XXPS Ex. 78-002; TR. Day 2:91-94, 103.

A Pre-Hearing Report and Order was issued on July 15, 2021, and, the Due Process Hearing was set to be heard on July 28, 29, and 30, 2021.

The LEA made a Motion to Dismiss the Parent’s Due Process Request due to their failure to comply with the Pre-Hearing Order and the IDEA requirement that they provide their hearing exhibits to the LEA five business days prior to the hearing.

Before the hearing began on July 28, 2021, Counsel for the LEA argued his Motion to Dismiss and the Parent’s Advocate presented her argument against the Motion. The Hearing Officer determined that the hearing would not be dismissed but that the LEA would be permitted to object to any exhibits or testimony on the basis that it had been prejudiced in its trial preparation by the Parent’s failure to comply with the Order and regulations. Tr. Day 1: 9-42.

The Hearing was extended an additional day to August 3, 2021. The Hearing was held remotely.It was open to the public and transcribed by a court reporter.

Mrs. XXXX was present throughout the hearing and Mr. XXXX was present at various times during the hearing. Ms. Kandise Lucas was present and served as the Parent’s Advocate. Mr. John F. Cafferky, Esquire, represented the XXXXX XXXXXX Public Schools (“XXPS”, “LEA” or “the School Board”). Also present were Ms. XXXXXXXXXXXX, Acting Director, Office of Special Education Procedural Support for XXXXX XXXXXX Public Schools, and Mr. Brian K. Miller, Esquire, who was appointed by the Virginia Department of Education to monitor and evaluate the hearing.

The Parents called XXPS employees: Ms. XXXXXXXXXXXXXXX, Assistant Principal of XXXXXXX Middle School; Ms. XXXXXXXXXXXXX, Procedural Support Liaison for XXPS: Mr. XXXXXXXXXXXXX, Acting Coordinator of Due Process and Eligibility for XXPS, Ms. XXXXXXXXXX, Principal of XXXXXXX Secondary School, and, the Parent, Ms. XXXX, as witnesses. Both Ms. XXXXXXXXX and Ms. XXXXXXXX were qualified as experts.

The School System called: Ms. XXXXXXXXXXXX, Ms. XXXXXXXXXXXXXXX, Program Manager in the Office of Special Education Procedural Support with XXXXX XXXXXX Public Schools, and Ms. XXXXXXXXXXXX. Ms. XXXXXXXX was qualified as an expert.

To the extent that the procedural history and findings of fact actually represent conclusions of law, they should be so considered and *vice versa.* See: *SAS Institute Inc. v. H. Computer Systems, Inc*., 605 F. Supp. 816 (M.D. Tenn. 1985) and *Bonnie Ann F. v. Calallen Independent School District*, 835 F. Supp. 340, 20 IDELR 736 (S. D. Tex. 1993)

## RECORD:

The record includes the Parent’s Due Process Request, the School Board’s Response, the SEA’s Motion to Dismiss and the Order Dismissing the SEA as a party to the Complaint, the Pre-Hearing Report and Order, e-mails, the School Board and Parent’s exhibits; the Parent’s written closing argument and supporting documents; School Board’s written closing argument and supporting documents, the transcript and the Hearing Officer Decision. [[1]](#footnote-1)

## BURDEN OF PROOF:

In *Schaffer v. Weast,* 554 F.3d 470 (4th Cir. 2009), the United States Supreme Court held that the burden of proof, in an administrative hearing challenging the IEP, is properly placed upon the party seeking relief, whether that is the disabled child or the school district. *Id.,* at 537. The standard of proof is by a preponderance of the evidence. 8 VAC 20-81.0.13.

All but one of the Parent’s witnesses were XXPS personnel. Federal courts have rejected claims where Parents try to prove their case through the testimony of school division witnesses and failed to meet their burden. See, e. g. *O.S. v. Fairfax Cnty. Sch. Bd*., 804 F.3d 354 (4th Cir. 2015).

It is well-established in Virginia that where a party calls the opposing party’s witnesses as its own, an adverse witness’s testimony that is clear, reasonable, logical, and not contradicted by any other evidence is binding on the party who calls him/her. *Brown v Metz,* 240 Va. 127 (1990) (emphasis added). Furthermore, in assessing the evidence, “IDEA requires great deference to the views of the school system rather than those of even the most well-meaning Parents.” *A.B. v. Lawson*, 354 F.3d 315, 328 (4th Cir. 2004). The Supreme Court confirmed this in *Endrew F*., 137 S. Ct. at 1001, saying “[l]ocal educators deserve latitude in determining the individualized education program most appropriate for a disabled child.” *Accord Hartmann v. Loudoun Cnty. Bd. of Educ*., 118 F.3d 996, 1001 (4th Cir. 1997

The Parents filed this Due Process Hearing Request: accordingly, the Parents have the burden of proof and persuasion in this matter and are bound by the testimony of their witnesses.

## RES JUDICATA:

A previous Due Process Hearing was held in January of 2021, in which the Parents claimed violations including, among other things, similar allegations against XXPS as some of those that are set out in the present Due Process Hearing Request. A Decision in that matter was issued on January 14, 2020, appealed and, subsequently upheld. Therefore, it was determined that all allegations made by the Parents regarding violations and events that occurred prior to January 14, 2020, would be considered *res judicata.* Tr. Day 1: 70

### ISSUES:

1. Is XXX being provided with FAPE?
2. Would the Proposed IEPs provide XXX with FAPE?
3. Whether the Parents were denied a meaningful opportunity to participate in the Student’s IPE meetings so as to provide informed consent to the IEP.
4. Whether the LEA violated procedural safeguards by failing to properly maintain the Student’s records and or withholding Student Records from the Parents.
5. Did the LEA violate procedural safeguards by holding an IEP meeting when the Parents were not able to attend?

**FINDINGS OF FACT**:

After considering the all of the evidence submitted by the Parties, including documentary evidence and testimony of witnesses, I find the following:

Issue A: Is XXX being provided with FAPE?

1. STANDARD APPLIED:

In *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch.  Dist. RE-1*, 137 S. Ct. 988 (2017), the Supreme Court further explained the fundamental standard of appropriateness under the IDEA first set out in its decision over 35 years ago in *Hendrick Hudson Cent.  Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). Specifically, the Court stated that an appropriate education for a student with a disability is one that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” 137 S. Ct. at 999. The Court further explained that an IEP should be “*reasonably calculated to enable the child to achieve passing marks and advance from grade to grade*.” *Id.* at 999 (emphasis added). At the same time, *Endrew F.* reaffirms that an IEP must be “reasonable,” but not “ideal.” *Id*. (citing *Rowley*, 458 U.S. at 206-07).

XXX’s stay-put IEP as implemented, and X.’s proposed IEPs of September 3, 2020 and April 27/June 14, 2021 all clearly meet and indeed exceed these thresholds*.*

1. STUDENT:

a. The student, XXX, is a XX-year-old XXXX at XXXXXXX Secondary School. He is eligible for special education as a student with Specific Learning Disability, and Other Health Impairment on the basis of ADHD. XXX is well liked, and participates in golf, basketball, and interscholastic baseball. XXPS Ex. 74-010.

b. The Student has experienced some academic weaknesses, but he also exhibits average and, at times, above average performance on many tests of reading and writing skills and average cognitive functioning. XXPS Ex. 7, 74 at 014-018; XXPS Ex. 1-009.

c. XXX’s last fully executed and “agreed to” IEP is dated November 17, 2017, and continues to be the IEP used by XXPS Ex. 1-009. It provides for a team-taught English class (regular class with general and special education teacher) and a small amount of additional support also in regular classes. Tr. Day 4:112-14.1. All these regular classes contain about 30 students. Tr. Day 1:163.

d. The Student has made meaningful progress in light of his unique circumstances since the implementations of the November 17, 2017 IEP.

During, his freshman year, he successfully completed regular courses (not special education ones), such as English, World History, Spanish, Biology and Business Law in full-sized classes (not smaller ones), earning a B average overall. XXPS Ex. 7.

In 10th grade, XXX successfully completed demanding regular classes in (among others) Chemistry and English (the latter being “team taught” with a special education teacher, but otherwise of regular size), as well as even more rigorous “honors” level classes in Geometry and Government, again earning about a B overall. XXPS Ex. 69.

In addition, XXX has progressed on his IEP goals, consistent with his disabilities, successfully mastering almost all the goals, other than those for work completion (which XXPS has tried to make part of subsequent proposed IEPs). XXPS Ex. 60.

XXPS witnesses, who qualified as expert witnesses, further testified that he has continued to progress educationally, and has received a meaningful educational benefit. Tr. Day 1:168-172; Tr. Day 1:288-89.

When asked if she had an opinion about XXX’s academic progress, Ms. XXXXXXXXX, the assistant principal of XXXXXXX Secondary School, who has served on the last four IEPs conducted by the LEA for XXX and is, therefore, familiar with the Student and his academic progress stated:

1. *“I do. And similar to what I shared during the question about his ninth-grade year, again, a student who is earning, primarily, As and Bs in their classes is an above-average performance. What I also think is important to note during XXX's tenth grade year is that some of those grades are in honor-level classes; so, he earned an A for the year in an honors geography class and a B for the year in an honors government class. So, his classes during his ninth-grade year were of a standard level, and he took two classes this past school year of an honors level and was quite successful in those.”*

When asked what XXX is enrolled in for in the coming school year, she testified that: *“He is signed up for multiple honors level classes, in addition to an B level class; and so, he, I believe, is signed up for three honors classes”* Tr. Day 1: 172.

1. The Parents have alleged in their Complaint that XXX, has been denied FAPE and traumatized due to the termination of the Facilitated IEP meeting on February 25, 2021, before he had the opportunity to speak to the team. On the day of the meeting, it was found that the Parent had invited numerous, unidentified representatives from various advocacy groups.

XXPS had repeatedly requested that the Parent provide the names of her invitees to the meeting and Ms. XXXX had not done so. After discussing this issue with the Parent and her Advocate Ms. XXXXXXX and Dr. XXXX, the VDOE appointed facilitator, determined that there was very little likelihood that the meeting would be productive and they agreed that the meeting should be discontinued. Ms. XXXXXXX then advised the Parties that the meeting was over. Ms. XXXX refused to leave the meeting and prompted her son to begin speaking despite being told that the meeting was over. Tr. Day 4:275-282.

Ms. XXXX testified that X. was traumatized by the events of February 25, 2021 and that X. is frightened to attend IEP meetings due to the presence of the XXPS legal counsel being present at IEP meetings.

Ms. XXXX’s allegations were not supported by any other witness or exhibits.

The Hearing Officer listened to the recording of the February 25, 2021, Facilitated IEP meeting and, in particular, paid close attention to X. when he spoke. He had to be urged to speak by his mother to speak and did not appear to be upset or traumatized in any way. XXPS Ex. 59-L.

1. XXX is xxxxxxxx years old, and, according to Ms. XXXX, he is competent to do a “student led IEP meeting.” However, the Parents did not call XXX as a witness to testify regarding their allegations. [[2]](#footnote-2)
2. The Parents failed to sustain their burden of proving their allegations regarding their son having been traumatized or afraid to attend IPE meetings due the attorney for XXPS being present.

RULING:

For the reasons set out above it is determined that the November 17, 2017, IEP is found to have provided and continues to provide the student with FAPE as evidenced by his steady and meaningful progress and grades achieved as reflected in his report cards, exhibits and the testimony of XXPS educators. XXPS. Ex. 7, 69. TR. Day 1:172.

The Student was not denied FAPE due to the termination of the Facilitated IEP meeting held on February 25, 2021, which prevented him from speaking to the IEP team.

Issue B.: Would the Proposed IEPs provide XXX with FAPE?

1. XXPS has held over fourteen IEP meetings since 11/17 2017. None of these meetings has resulted in a new IEP agreed to by the Parents.
2. An IEP was proposed on September 3, 2020. XXPS Ex. 56. Ms. XXXXXXXX outlined the increased number of services, etc., being proposed for S. Tr. Day 4:112-114.
3. The September 2020 IEP proposed goals in reading, writing and study skills, and included numerous instructional accommodations. *Id.* at 040-42.
4. For special education, the team proposed 3.75 hours a week in a small class, special education reading elective, and an additional hour per week of support in study skills and writing in some of his regular classes, as well as a half-hour per month consultation with an employment transition representative. *Id*. at 24, 37.
5. IEP meetings were held in April and June of 2021, to formulate and hopefully reach agreement on a new IEP for XXX The team again proposed goals in reading, writing and work completion, and a self-contained reading class, as well as an hour per week of special education support in some regular classes, consultation from an employment transition specialist, and 2 weekly hours of recovery services over the summer for the effects of having virtual education during the last school year. XXPS Exhibits. 74-042, 73.
6. Ms. XXXXXXXX, who was qualified as an expert, identified XXPS Ex. 73, as a Prior Written Notice dated 5/5/2021 and XXPS Ex. 74 as the 6/14/2021 proposed IEP and stated that the IEP proposed was appropriate for S. She explained that:
7. *The IEP outlines the goals that were identified as areas of need for him. The team collaborated with parents, with the guests, and advocates and experts that they brought to the -- that they brought to the meeting with them. At times we even collaborated on writing them together during the meeting versus drafting them in advance and sending them out, but always searching parental input. We used research-based data from various experts through independent educational assessments, as well as XXXXX XXXXXX administered assessments and performance assessments from X. himself, and used all of that data together with teacher input, hearing from his teachers how he was doing, how his progress was coming along, identified the goals to target his specific areas of need. And in collaboration with even his development as part of the transition plan that is outlined in the IEP, identified the accommodations to support his needs and support his attainment of those goals, and then ultimately, proposed the services and the placement where those goals would be serviced*. Tr. Day 4:110- 111.

1. XXPS witnesses testified that the proposed IEPs and placement (at XXXXXXX) would have been appropriate. Tr. Day 1:145, 159-62; Tr. Day 2: 286-87; Tr. Day 4:107-108. Parents again declined to sign the Proposed IEP.
2. Several witnesses, all qualified as experts in special education, testified that the goals, services, supports, and accommodations in the proposed IEPs appropriately addressed XXX’s educational needs. Tr. Day 2: 264-74; Tr. Day 4: 129.
3. Ms. XXXXXXXXX, who was also qualified as an expert, testified that she believed that the April and June 14th, 2021 proposed IEPs would provide FAPE for XXX:

*Q. Do you believe that the IEP that is proposed on June 14th -- as of June 14th, 2021, provide FAPE for XXX?*

*A. Yes, I do.*

*Q. Okay. And can you explain to the hearing officer what provisions of FAPE it provides?*

*A. Sure. I think it is developed to meet XXX's unique needs in order to help ensure that he makes progress in light of his circumstances.* Tr. Day 1: 173.

1. The Parents, have prevented the Student from receiving additional needed services due to their failure to act in good faith as members of the IEP team and their refusal to cooperate or act collaboratively with the XXPS IEP team members.
2. The Parent’s claims that the XXPS IEP team did not contain appropriate specialists or teachers as part of the IEP team is unsupported by the evidence or testimony introduced and, is found to be without merit and is rejected.
3. A review of the exhibits and testimony demonstrates that the members of the IEP teams who participated in the previous IEP meetings were appropriately chosen and qualified to participate and provide their input and recommendations as part of the IEP teams. Tr. Day 2:142-149; XXPS Ex. 68 A-P.
4. In an attempt to act in a collaborative fashion with the Parents the XXPS IEP team honored the Parents’ request that additional educators be added to the IEP team. Frequently, at the Parent’s and/or Ms. Lucas’ request, the IEP teams included not just the three members required by IEP regulations (8 VAC 20-81-110(C)(1)(b)-(d)), but at times, almost a dozen or more XXPS staff in a variety of specialized disciplines. See, e.g., XXPS Ex. 56-001 to 006 (listing participants for the ten IEP meetings between March 10 and September 3, 2020).

The professional background for each of those IEP team members is extensive and each was well qualified to serve as an IEP member. See XXPS Ex. 68(A) through 68(P), for their resumes.

1. PARTIAL CONSENT TO IEP:

The Parent’s claim that XXPS failed to implement the “partial consent form” sent to XXPS on June 14, 2021, is found to be without merit. XXPS Ex. 86.

When questioned about the partial consent form Ms. XXXXXXXXX stated:

*A. Sure. In my review of that -- when receiving that Dropbox version, there are many aspects of that partial consent that I am unable to read. Those portions that I am able to read do not clearly, in my opinion, delineate exactly what the parent is consenting to. Much of it appears to be their data or input or thoughts about it rather than what they are in agreement with or not in agreement with.*

*Q. By the way, did -- in addition to this 113-page document, did you also get a video from the parent?*

*A. Yes. So, after I notified video Mr. and Mrs. XXXX that I could not read all of that partial consent and then asked for a clearer copy, I was provided a nine-plus minute video of someone turning the pages of the partial consent, which, unfortunately, did not allow for any clearer understanding of what they were consenting to.* Tr. Day 1:186.

In response to a question about the partial consent form Ms. XXXXXXX testified:

*“There was a document for which we received on -- it was June 14th or 15th. To my knowledge at this time, that document is not clear and has not been inputted and is not considered a partial agreement as of yet, because there is a lot of clarity we are still looking for*.” *Id.*

She went on to testify that XXPS had asked the Parents to clarify the document at least three times and it was still not clear.

1. Ms. XXXX testified at length about her disagreements with the IPE proposals. She was not able to identify one proposal that she even partially agreed with or gave consent to. For example:

*Q Ms. XXXX, so for the reasons that you've articulated in your testimony, you have not fully consented to anything on the services page; isn't that, right?*

*A No, why would I?* Tr. Day 3:219

The Hearing Officer, along with the XXPS personnel, is unable to decipher the 113-page document sent to XXPS by the Parents which they describe as a Partial Consent to an IEP. After hearing Ms. XXXX testify it is not clear which proposed IEP she is responding to or what, if anything she is in partial agreement with, *Id.*

The IEP teams who participated in the 2020 and 2021 IEP meetings were appropriately chosen and qualified to participate and provide their input and recommendations as part of the IEP teams. Tr. Day 2:142-149; XXPS Ex. 68 A-P.

The Parents failed to provide XXPS with a clear partial consent form which would could be implemented by the LEA. The LEA did not violate the Parent’s rights to have a partial consent implemented where they failed to provide a clear and understandable partial consent form to the LEA.

XXPS did not violate the Parent’s rights by conducting an IEP on June 14, 2021 to determine if S. required ESY services for the 2021 summer period.

RULING:

The IEPs Proposed by XXPS subsequent to the November 17, 2017 IEP, including the IEP proposed in September of 2020, and the June 14, 2021 IEP, are all found to have been developed and calculated to provide FAPE to XXX XXPS Exhibits: 56, 73-74-042; Tr. Day 2: 264-74; Tr. Day 4: 129.

Issue C.: Were the Parents denied a meaningful opportunity to participate in the Student’s IEP meetings so as to provide informed consent to the IEP?

1. An extensive review of the audio and video recordings of the 2020 and 2021 IEP meetings, proposed IEPs and Prior Written Notices, amply demonstrates that the Parents were given extensive and meaningful opportunities to fully participate in their son’s IEP meetings. XXPS IEP members made every reasonable effort to accommodate their requests, respond to questions and concerns and to consult with the Parents and include them as IEP members pursuant to the requirements of the “IDEA”. XXPS. Ex.59: Tr. Day 4:120-22.
2. Also apparent from the review of the recordings is that the Parent is confident that she knows more than the XXPS IEP team members and that she believes that her superior knowledge and experience qualifies her to be in charge of the IEP meetings. XXPS Ex. 59.
3. Ms. XXXX’s attempts, personally, and through her Advocate, to control the IEP meetings by asking endless questions, challenging the authority and expertise of the XXPS IEP members have resulted at best in a lack of progress towards completing a new expanded IEP for X. and, at worst, in a chaotic travesty of the intent and purpose of the IEP process. XXPS Ex. 59. (*See for example:* August 18, 2020 Re-evaluation and IEP meetings, etc.)
4. When asked if she believed the Parents had been given the opportunity to fully participate in IEP meeting, Ms. XXXXXXX responded:

*A. Ms. XXXX had been afforded every opportunity to participate and contribute to the IEP process over the years, and every draft that was provided, her input has been sought. Discussion has been sought. Every IEP meeting that I've attended, we've had difficulty even getting through the introductions. So, we've not been able to have any legitimate discussions about -- about X.'s needs or his goals or his services because every meeting is disrupted and it's -- it's distracted, and it's about everything but X.. It's about records that are from elementary school five or seven years old. It's about -- you know, this test item was scored incorrectly. It's never about -- Tr. Day 3: 361.*

Ms. XXXXXXXX testified that, in her opinion, the Parents had a complete opportunity to fully participate in the IEPs.:

*Q. Can you tell us why you say that?*

*A. Sure. So, parents were always sent invite letters. I believe I was able to demonstrate that. They're offered opportunities to provide input prior to the meeting. They were asked if they were having guests join so that we could provide guest links for the advocates, or any other consultants, or private providers to allow them to have access into the meeting. They were a part of all the cover pages, documented that they were there. Their voice was heard, certainly. If their hand was raised, they were called upon as part of the meeting forum and decorum to share input, to ask questions, and to offer any other information.:* And:

*A. They were offered opportunities, if asked, to review records. Sometimes that was immediately after a meeting or arrangements were made to meet with them to review records. They had opportunities for input throughout.* Tr. Day 4: 121-122.

e. The Parents failed to introduce any credible evidence or testimony to establish that they were denied the opportunity to meaningfully participate in their son’s IEP meetings.

f. A review of the exhibits and testimony fails to demonstrate that XXPS denied the Parents full participation in the IEP Meetings for the Student, truncated the Parents’s input or their participation by limiting the areas of concern that the Parents were permitted to have and express.

g. The Parents have failed to establish, by testimony or evidence, their claim that “XXPS improperly limited IEP discussions to specific areas of the IEP that were pre-determined by the school staff, with the goal of “suppressing the Parents’ right to secure all relevant information and avoid accountability in order to provide informed consent.” (*See*: Parent’s Due Process Complaint)

h. Ms. XXXXXXX described the difficulty of conducting IEP meetings with Ms. XXXX and her Advocate and her observation of the Parent’s participation in the IEP meetings:

*“We have attempted every meeting to try to be productive and collaborative and try to get through the process that the school folks are actually obligated to get through. You have -- you have both been obstructionists and very, very difficult to work with throughout the entire process at every turn. It is nearly impossible to get a word in edge-wise in a meeting between the two of you, and it's very difficult to move through a process that we're required to do when that happens*.” Tr Day 3: 365.

i. Ms. XXXXXXX testified that Ms. XXXX was an active participant and member of *the IEP team:*

*A. I believe that she was part of that team to support in that process of creating the IEP, as I shared before. She shared information with us from private providers. She shared -- she had opportunities to share any input prior to. Information was sent home for her review, and she was always given an opportunity, during the IEP meeting, to participate in that development. We may have drafted it, but we have always, always asked for the participation. TR. Day 1: 292*

j. The “IDEA’s encouragement of Parental participation does not require [a school] District to bend to every Parental demand, only that the District give due consideration to the Parents’ requests in developing an IEP that meets an eligible student’s educational needs*.” Long Beach Unified Sch. Dist*., 119 LRP 12831 (SEA CA 2019) (citing *Cupertino Union Sch. Dist. v. K.A*., 75 F.Supp.3d 1088, 1103 fn. 12 (N.D. Cal. 2014)). Parent may not be satisfied with XXPS’ IEP proposals, but she does not have the authority to command the school system; they may provide their input. *Tice v. Botetourt Co. Sch. Bd.,* 908 F.2d 1200 (4th Cir. 1990); *Henrico Cnty. Sch. Bd. v. R.T.*, 433 F. Supp. 2d 657 (E.D. Va. 2006). See also *T.S. v. Ridgefield Bd. of Educ.,* 808 F. Supp. 926 (D. Conn. 1992) (in IEP context, “consider” is not synonymous with “agree”).

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**Parent’s Conduct:**

The Hearing Officer reviewed the audio and video recordings of IEP and other meetings between XXPS and Ms. XXXX during the 2020 to 2021 period. XXPS Ex. 59 A-Q.[[3]](#footnote-3)

Initially, in most hearings, Ms. XXXX (alone and/or with her Advocate) appear to be expressing genuine concerns and reasonable questions. However, it shortly becomes clear that regardless of the responses given by the XXPS IEP team she is rarely satisfied with the information she is given and proceeds to argue, be confrontational, and ask more and more increasingly off-topic questions. The Advocate often makes racial and other *ad hominem* accusations and threats when challenged or asked to conform to professional standards. The result of this is that the IEP meetings seldom made any meaningful progress. It appears that in many instances Ms. XXXX’s questions, arguments, and demands, were intentionally intended to frustrate and undermine the IEP meetings and IEP progress.

On many occasions, they refused to adhere to the meeting agenda, or basic protocol for orderly taking turns, hijacking the discussion on tangential issues such as detailed questioning about the background of each XXPS participant, and examination of the minutia of individual subtest scores. Tr. Day 2:124-34; Tr. Day 4: 122-26.

The XXPS IEP members answered, or attempted to answer, each question patiently and respectfully and then tried to move the meetings forward to conclusion. Ms. XXXX, her Advocate or her invited guest members to the IEP meetings, would then ask more questions and in some instances were confrontational, argumentative and dismissive of the IEP team. XXPS. Ex. 59, 79.

Ms. XXXXXXXX testified about the Parent and her Advocate’s behavior during meetings:

*“And then it began to escalate to where personal commentaries were made, disparaging commentaries on a personal level, as well as on professional levels to the point that they sounded quite threatening in an attempt -- attempt to be intimidating, and those related to teacher salaries or threats to take the team to due process, threats to contact the school board, invitations related to revoking our licenses, use of racial concerns towards the advocates and making allegations of racial superiority or otherwise using race as a threatening tool in a meeting, specifically, white privilege, white supremacy, white power toward the advocate.”*

*Q. When you say "toward the advocate," what do you mean by that?*

*A. Well, Ms. Lucas would make those allegations that team members were racially biased against her or discriminating against her as a black female participating in the meeting, and that we were using our -- either our white power, our white privilege, our white supremacy in order to dominate and dictate her participation in the meeting. Those types of statements were made regularly. At one point we were told as an IEP team that we were raping the parents' rights to participate -- of their rights to participate in a meeting. So, this sort of very disparaging language was used very -- difficult language in a professional setting where the purpose of the meeting was to focus on XXX.* Tr. Day 4: 124-125.[[4]](#footnote-4)

Ms. XXXXXXXXX, the Parent’s witness, was asked by the Advocate if Ms. XXXX asked questions about the IEP members credentials and whether she considered those questions to be disruptive to the meeting:

*A. Ms. XXXX does ask questions about the credentials of the members there at the meetings, yes.*

*Q. Is that -- is that interruption or is that a parent trying to get information about the team?*

*A. When Ms. XXXX asks those questions, XXPS staff members answered, and Ms. XXXX then continued to ask that same question repeatedly; so, when that question has been addressed, yes, I would consider it being a disruption when it has been asked repeatedly but already answered. TR. Day 1: 230*

Especially egregious is the August 18, 2020, IEP meeting where Ms. XXXX asked continuous questions about the composition of the IEP team and the general education teacher’s credentials for approximately the first half hour which prevented the meeting from going forward.

The Parent’s Advocate, joined the meeting seventeen minutes after the meeting began and immediately began a continuous diatribe where she refused to permit anyone else to speak, spoke over the IEP team members, made bullying racial accusations and threatened the IEP team members. She refused to stop speaking, arguing, or interrupting Ms. XXXXXXXX, Ms. XXXXXXXX, and other XXPS members, so that Ms. XXXXXXXX, the meeting facilitator, could begin the hearing or attempt to respond to Ms. XXXX’s questions or Ms. Lucas’ accusations. It should be noted that the XXPS IEP team remained professional throughout. XXPS Ex. 59-H,79.[[5]](#footnote-5)

The Parents Advocate asked Ms. XXXXXXX, who was the Parent’s witness at the Hearing:

*Q. You made the comment -- and correct me if I'm wrong -- that Mrs. XXXX is uncollaborative, argumentive, and hostile. Please provide examples of that for the hearing officer.*

*A. Thank you. I didn't know that you were referring back to the rules question, and that's what I was trying to understand. Okay. So, times of being uncollaborative or hostile: When there are disruptions to the meeting when either yourself or Mrs. XXXX were calling me a white supremacist, white privilege, racist, derailing the focus on XXX and stating inappropriate things about me; stating, I'll due process you to death. I will social media you to death -- making threats within an IEP meeting, to me, makes it hostile and argumentative and uncollaborative because the focus is no longer on XXX and does make it very personal. Especially if you're going to say, I'm going to social media you to death, I don't know what information you, Ms. Lucas, or Mrs. XXXX are going to put out on the Internet for the world to see. TR. Day 2:186.* XXPS Ex. 59.

Ms. XXXXXXX later testified further about the August 18, 2020, IEP meeting and what occurred during that meeting and the document she prepared memorializing statements made by the Advocate and Ms. XXXX on that date. LEA Council asked her:

*Q. And as far as -- Ms. XXXXXXX, in preparing this, you said you listened to the audio recording of this August 18th meeting?*

*A. I did.*

*Q. All right. And the 37-minute period, approximately, where in the recording is that?*

*A. It starts at about 17 minutes when Ms. Lucas enters the -- the meeting and goes for approximately 37 minutes. And, like I said, I just did a snippet of it. That doesn't mean this is just all of it.*

*Q. All right. What was concerning -- what, if anything, was concerning to you about being described as a white supremacist?*

*A. It's -- its -- its racist. It's putting me out there in a negative light. It is untrue about me, especially when you look at statements -- when somebody makes a statement that you are a white supremacist. It is defamation of my character. And then, in the same time frame, say, I'm going to social media you to death, when you say a statement like that after saying somebody is a white supremacist, it is -- it is scary to think what somebody would put out on social media that is untrue. And -- and it -- and its defamation of my character, and it is something that the world can see, that my children have access to. It is very, very personal when you want to put that out there and say -- and threaten a team that anything that is said in this meeting about them will be – TR. Day 2: 240; XXPS Ex. 79.*

The threats and racial accusations reported in the XXPS Exhibit 79, and more, were heard by the Hearing Officer being made by the Advocate on the August 18, 2020, IEP recording in XXPS Ex. 59.

When Ms. XXXX was questioned about her Advocate’s behavior, accusations and threats made by her, she admitted that the Advocate was speaking for her and refused to disavow what was said or written by her. Basically, she condoned the behavior, accusations and threats made by her Advocate in communications, in IEP and other meetings including the August 18, 2020, Re-Evaluation and IEP meetings. TR. Day 3:118-121, 137-140, 151-156, 158-159, 164, 231-233.: XXPS Ex. 59 and 79.

Under several IDEA provisions, including 20 U.S.C. § 1412(a)(10)(C), as well as judicial and administrative decisions considering remedies in the IDEA context, relief may be denied in cases of Parental noncooperation and/or unreasonableness. *See, e.g., J.S. v. Scarsdale Union Free Sch. Dist.*, 826 F. Supp.  2d 635 (S.D.N.Y. 2011); *Dep’t of Educ.*, *State of Hawaii v. M.F.*, 57 IDELR 157 (D. Hawaii 2011)  (overturning hearing officer’s decision which did not consider Parents’ unreasonable conduct); *Rockwell  Independent Sch. Dist. v. M.C.*, 116 LRP 9727 (5th Cir. Mar. 10, 2016) (denying tuition claim where  Parents “broke down” IEP development process); *Fairfield Bd. of Educ*., 69 IDELR 21 (SEA CT 2016)  (finding Parents’ conduct as “unreasonable,” a hearing officer denied their reimbursement request); *In  re: Student with a Disability* 106 LRP 64257 (SEA VA 2003) (parents did not act in good faith and  deliberately tried to thwart, frustrate, and sabotage LEA efforts to provide FAPE); *Bettinger v. New York  City Bd. of Educ.*, 49 IDELR 39 (S.D.N.Y.).

In this case, in numerous respects, the threatening, obstreperous and corrosive conduct of the Parent and her Advocate has fundamentally interfered with the IEP focus on XXX and addressing his educational needs.

## RULING:

The record in this case overwhelmingly illustrates that Parents had the opportunity to (and did) meaningfully participate in X.’s IEP meetings and that XXPS IEP members made every effort to set a professional, respectful, collaborative, and productive tone for such meetings and to encourage meaningful Parental participation so as to provide informed consent to the IEP. XXPS did not engage in predetermination of the Students IEPs.

However, the Parent’s conduct and that of her Advocate, severely compromised the XXPS IEP members ability to complete the IEP process.

Issue D:

Whether the LEA violated procedural safeguards by failing to properly maintain the Student’s records and or withholding Student Records from the Parents.

1. The Parents have not sustained their burden of proving that they were denied their right to be provide with copies of their Son’s school records or that they have been denied their request to review the records. They failed to introduce any credible testimony or exhibits to support their claims.
2. The testimony and exhibits of the XXPS substantively proved that the LEA provided the Parents with the required safeguards regarding the maintenance of the Student’s records and permitting the Parents to review and inspect those records on multiple occasions.
3. Testimony also established that all of XXX’s school records were located at XXXXXXX Secondary School, in addition to some which were kept electronically. Ms. XXXXXXXXX testified that she had provided XXX’s complete records to the Parent a week before the present hearing. When asked by Parent’s Advocate to describe the location and components of XXX’s school records, she testified:

*A. Sure. Our special education service files are located in our special education office. XXX's files are maintained in a binder, and his protocols are in folders or envelopes. And his recordings are located on USB sticks, and his work samples are located within a binder. His cumulative record is in a folder that is housed in our student services office.*

*Q. Okay. So, you brought -- so in the process of appearing -- inspecting and review of a record, you have all of that information available for the parent, correct?*

*A. That is correct.*

The Witness was then asked if she had ever denied a parent’s request to review a student’s recordsand she responded “No.”

Ms. XXXXXXXXX later testified:

*Q. Okay. To your knowledge, was Mrs. XXXX afforded the opportunity to inspect and review her child's entire record within 45 days after the request?*

*A. I wouldn't -- Ms. XXXX, as far as I'm aware, has made multiple FERPA requests, and so I guess I would need to know which one you're referring to?*

*Q. As of June 29th, 2021, to your knowledge, has Ms. XXXX been provided with the opportunity to review -- to review and inspect her child's record?*

*A. Yes.*

*Q. The entire record?*

*A. Yes.*”

Tr. Day 1:229-230

Ms. XXXXXXX testified that she had never denied a parent’s request to review their child’s records:

*Q. Have you -- have you had an occasion to direct or deny a parent access to review and inspect their student's record?*

*A. No. A parent has not been denied access to review and inspect a record.* Tr. Day 1: 311.

Ms. XXXX identified and condoned a July 8, 2021, e-mail sent to XXXXXXXXXX, a XXPS employee in the Due Process department, who was sending records to Ms. XXXX, wherein her Advocate compared him to the Ku Klux Klan, Hitler, and Saddam Hussein and, told him that he should be ashamed of himself for: “Using similar tactics that demonize and criminalize those who seek humanity and justice”, and that they: “refuse to permit systemic oppression to rape our families of their human rights to be educated”. Tr. Day 3: 221-224.

This was in response to an e-mail from Mr. XXXXXXX to Ms. XXXX on July 8, 2021, apologizing for any confusion regarding the records and explaining that copies of the records requested by the Parents were being delivered to the XXXX home instead of being made available for inspection and review at the school: ”Due to your and your Advocates previous behavior, including attempts to photograph and copy copyrighted items, accusing staff members of hitting you and refusing to leave the premises at the conclusion of a meeting.” XXPS Ex. 80.

## RULING:

XXPS has properly maintained the Student’s records at XXXXXXX Secondary School and by appropriate electronic means. They have not withheld the Student Records from the Parents.

The Parents have been provided their son’s records on multiple occasions in accordance with FERPA and other Parental requests. XXPS has provided the Parents with all required procedural safeguards regarding the maintenance of the Student’s records and permitting the examination and review of said records.

ISSUE E: Did the LEA violate procedural safeguards by holding an IEP meeting when the Parents were not able to attend?

a. The Parent’s claim that XXPS violated their rights to participate in the June, 2021 IEP meeting which was held in response to the Parent’s request that ESY services for XXX be considered for the summer period, is found to be without merit.

In order to properly constitute an IEP meeting to respond to the Parent’s request for ESY services for the summer period XXPS needed to act on the request before the school year ended. Ms. XXXXXXXXX explained the difficulties presented:

*Q. Ms. XXXXXXXXX, was -- in the scheduling of the IEP in June of 2021, what, if any, concern did you have about being able to get staff members who actually knew and had worked with the student here to consider extended school year services.* Tr. Day 1: 154.

*A. Certainly. I guess a little bit of background about that scheduling process would be that there was a request made at the end of May by Ms. XXXX to do that consideration for ESY for summer services. We also received correspondence from Ms. Lucas asking for the team to meet prior to June 10th. We proposed a date for June 9th. We were told on June 8th from Ms. XXXX that she would not be able to attend; so, we went back through availability for our staff members. Ms. XXXX made a request for June 17th. We went through all possible available dates for our team. There are a number of people on the XXPS side of that IEP team that were ending their contracts, not just for the school year but with regards to their actual role within XXPS; and so, in an attempt to ensure that we had a knowledgeable group of staff members who are knowledgeable about XXX and how he had performed during the 2020-2021 school year, we wanted to make sure that we met while they were still available and could provide that input. As a result, the only available date for that was June 14th. Id.*

There is little doubt but that the Parent would have complained if XXPS failed to conduct an IEP meeting to determine if S. required ESY services during the summer. Having requested the meeting, it was incumbent upon the Parent to make themselves available. Since this meeting was being held remotely it is difficult to understand why the Parent did not attend. The reasons given by the Parents for not attending the meeting they requested are not found to be compelling or adequate.

XXPS made every effort to accommodate their schedules and those of the XXPS employees who would no longer be available to participate in the IEP meeting. XXPS acted in the best interest of the Student to provide FAPE in going forward with the IEP ESY determination.

## RULING:

For the reasons set out above XXPS did not violate the Parent’s procedural safeguards by holding an IEP meeting without the Parents being present.

CREDIBILITY WEIGHT GIVEN TO WITNESS TESTIMONY:

The Hearing Officer finds that the testimony of the XXPS witnesses should be given great weight and that Ms. XXXX’s testimony should be given little, or no weight, for the reasons set out below.

A court or hearing officer is required to give deference to the judgment of school board witnesses who are professional educators. *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch.* Dist. RE-1, No. 15-827, 137 S. Ct. 988 (2017); *Springer by Springer. Fairfax Cnty. Sch. Bd., 134F.* 3d 659,663 (4th Cir. 1998).

“Courts are required to give deference to the state and local education authorities whose primary duty is to administer the IDEA.” M. M. by DM and EM v. Sch. Dist. Of Greenville Cnty., 303 F. 3d 523, 531 (4th Cir. 2002).

The IDEA requires that “great deference to the views of the school system rather than those of even the most well-meaning parent.” A.B. v. Lawson, 354 F.3d 315 (4th Cir. 2004)

In this hearing the Parent’s witnesses, with the exception of Ms. XXXX, were all XXPS school employees. All of XXPS witnesses were employees of the School Division.

Ms. XXXXXXX’s credibility was challenged by the Parent’s Advocate: Tr. Day 4:365.

*Q. You -- you seem to really have a negative perception of Ms. XXXX, correct?*

*A. Ms. Lucas, I testified earlier that you all have gone after my license. You all have threatened to picket my home. You have -- I didn't earlier, but you have called me incompetent. You wrote to the U.S. Department of Education calling me incompetent. You have done so many things that are uncalled for. Tr. Day 4:360 – 363.*

*Q. In your opinion.*

*A. That, yes, I do have a negative view of both of you, but every single meeting that I come into, because it's my job, every single meeting that I come into, I come into with the idea that we are going to try our best to have a productive and collaborative meeting. Id*. at 365

Having reviewed copies of the audio and video IEP meetings for XXX that Ms. XXXXXXX attended it was determined that she succeeded in fulfilling her responsibilities towards the Parents and Student and that she behaved in a professional and appropriate manner towards Ms. XXXX and her Advocate. And that, despite the reprehensible behavior of the Parent and her Advocate towards her, Ms. XXXXXXX is able to separate her personal feelings for the Parent from her professional duties and requirements. Therefore, I find that she is a credible witness and accord her testimony considerable weight.

Ms. XXXX’s testimony was not primarily directed to any special education issues regarding the Student, but rather towards her grievances with XXPS and her allegations concerning its failure to properly constitute an acceptable IEP team; as well as what she believed to have been a failure on the LEA to properly include the Parents and the Student in the IEP process.

Ms. XXXX’s testimony is not found to be credible in any respect, especially regarding her allegations regarding the deficits of the proposed IEPs, the XXPS IEP team, the XXPS Special Education personnel and the XXPS legal counsel. Although she frequently argues with and lectures the XXPS IEP team members, many of whom are experts in their fields, on various areas of Special Education and instruction, Ms. XXXX has not been employed as an educator since 2014; she has no credentials in speech and language; is not licensed or certified as any type of counselor, psychologist, language or occupational therapist; she is not certified as a special education teacher by the Virginia Department of Special Education or certified as a lead teacher; nor is she certified as a specialist in speech and language in the Commonwealth of Virginia. Tr. Day 3: 129 –132.

In addition, Ms. XXXX’s participation in and condonation of the abuse to which her Advocate has subjected the XXPS personnel displays a bias and animus that undercuts any credibility that she might have been accorded. TR. Day 3:119-121, 151-154. XXPS Exhibit 59.

Other than Ms. XXXX, all of the witnesses called by the Parents were professional educators employed by XXXXX XXXXXX Public Schools. Therefore, great deference is given to the testimony of the XXXXX XXXXXX School Board employees. Their professional judgments and opinions are accepted and found to be highly credible; and their decisions are found to be appropriate and supported by the testimony and evidence presented.

CONCLUSION

For the reasons stated in the above Rulings, it is found that the Complainants, Parents, have failed to meet their burden of proof to establish that the XXXXX XXXXXX Public Schools failed to provide the Student with FAPE or that their Procedural Safeguards under the IDEA were violated.

**PREVAILING PARTY**:

XXXXX XXXXXX Public Schools

ORDER

IT IS HEREBY ORDERED that this matter is dismissed.

RIGHT OF APPEAL NOTICE

This Decision is final and binding unless either party appeals in a federal district court within ninety (90) days of the date of this decision, or in a state court within 180 calendar days of the date of this decision.

**Decision Date:** September 16, 2021

Morgan Brooke-Devlin

Morgan Brooke-Devlin

Hearing Officer

**Morgan Brooke-Devlin, Esq**.

Hearing Officer

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Falls Church, Virginia 22046

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**CERTIFICATE**

I hereby certify that a true copy of the foregoing Decision was sent by e-mail on September 16, 2021, to the following Parties:

Mr. John F. Cafferky, Esquire

Ms. Kandise Lucas, Advocate

Mr. Brian K. Miller, Esquire

Morgan Brooke-Devlin

Morgan Brooke-Devlin

Hearing Officer

1. XXPS Exhibits: 1,7, 8, 68-G, 69,74,7 9, 83, 86, 87

   78, 81, 61, 68, 96,

   XXPS Exhibit Nos. 37, 46, 50, 52, 53, 54, 11, 56, 57, 59, 73, 74, 75, 76, and 79 from Day 2 of the Hearing were admitted into evidence on Day 3

   XXPS Exhibit No. 44, 115, XXPS Exhibit No. 7,7 22,1 14.

   XXPS Exhibit No. 80, 223, XXPS Exhibit No. 86

   Parent's Exhibit No.100-4 58, 104, Parent's Exhibit No. 87, 63. [↑](#footnote-ref-1)
2. At the end of the Hearing the Parent asked if the Hearing Officer

   would like to meet XXX. As the Hearing had terminated and the Court

   Reporter was no longer present; the Hearing Officer declined the offer. [↑](#footnote-ref-2)
3. Parent’s Advocate expressed concern that the XXPS audio exhibit number 59 was not identical to the audio exhibit that was previously provided to the Parent by Mr. XXXXXX. She asked that she be permitted to provide her own copy of this exhibit. Permission was granted and the Hearing Officer reviewed the audio recordings for the 8/18/2020, Re-Evaluation recording provided by the Parents on August 4, 2021, and did not find any discrepancies. Day 4: 4-7. [↑](#footnote-ref-3)
4. XXPS had two African American employees participating in the IEP meetings when these accusations were made: Speech Communication Supervisor, Ms. XXXXXXXXXXX, and Educational Specialist, Ms. XXXXXXXXX.

   Tr. Day 4: 126. [↑](#footnote-ref-4)
5. The Advocate objected to the introduction of XXPS Exhibit 79 on the basis that she was not in attendance at the 8/18/2020 IEP meeting:

   MS. LUCAS:” Well, that's problematic because I wasn't at the 8/18/20 IEP meeting. So, we would object to the admittance of this document, as it pertains to stating this occurred at the 8/18/20 IEP meeting. Otherwise, it's just inaccurate. It's not an accurate document.” The Hearing Officer admitted the document and, later, after listening to the full recording of the 8/18/2020 IEP meeting was able to ascertain that there was no doubt at all that the Advocate was present at that meeting. [↑](#footnote-ref-5)