

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION

Office of Dispute Resolution and Administrative Services

In re:

[REDACTED]

}
} Hearing Officer: Peter B. Vaden

Due Process Hearing Request
([REDACTED] Public Schools)

}
} VDOE Case No. 23-037

HEARING OFFICER DECISION
KEY TO PERSONAL IDENTIFICATION INFORMATION

Student	[REDACTED]
Age	[REDACTED] years old
Birthday	[REDACTED]
Grade (2022-2023 school year)	[REDACTED]
Petitioner/Mother	[REDACTED]
Petitioner/Father	[REDACTED]
LEA Representative	[REDACTED]
Private School 2 Administrator	[REDACTED]
Teacher 1	[REDACTED]
Special Education Teacher 1	[REDACTED]
Teacher 2	[REDACTED]
Special Education Teacher 2	[REDACTED]
Special Education Teacher 3	[REDACTED]
Teacher 2	[REDACTED]
Independent Psychologist	[REDACTED]
Principal	[REDACTED]
Support Liaison	[REDACTED]
Private School 1	[REDACTED] School
Private School 2	[REDACTED]
Head of School	[REDACTED]
County School 1	[REDACTED] School
Grade Z	[REDACTED]
Grade Y	[REDACTED]
Grade X	[REDACTED] Grade (SY 2019-2020)
Grade W	[REDACTED] Grade (SY 2020-2021)
Grade V	[REDACTED] Grade (SY 2021-2022)

Parents' Counsel 1

Harold Belkowitz, Esq.

Parents' Counsel 2
[REDACTED] PS' Counsel 1
[REDACTED] PS' Counsel 2

Adrianna Del Principe, Esq.
John Cafferky, Esq.
Emily Haslebacher, Esq.

**COMMONWEALTH OF VIRGINIA
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Office of Dispute Resolution and Administrative Services

In re:	STUDENT ¹
	}
	} Hearing Officer: Peter B. Vaden
Due Process Hearing Request	}
([REDACTED] Public Schools)	} VDOE Case No. 23-037

HEARING OFFICER DECISION

INTRODUCTION AND PROCEDURAL HISTORY

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

Student, an AGE youth, is a resident of [REDACTED], Virginia. Petitioners' Due

¹ Personal identification information is provided in attached Key to Personal Identification Information.

Process Complaint was filed on October 4, 2022 and named ■■■PS as respondent. The undersigned hearing officer was appointed on October 12, 2022. On October 17, 2022, I convened a telephone prehearing conference with MOTHER, PARENTS' COUNSEL 1, PARENTS' COUNSEL 2, LEA REPRESENTATIVE 1, ■■■PS' COUNSEL 1 and ■■■PS' COUNSEL 2 to set the due process hearing dates and discuss issues to be determined and other matters. On October 18, 2022, ■■■PS, by counsel, filed its Answer to the due process complaint. On October 19, 2022, ■■■PS convened a resolution meeting with the parents and Parents' Counsel 1 to discuss the due process complaint and the facts that formed the basis of the complaint. The resolution meeting was held within 15 days of the complaint's filing as provided in 34 C.F.R. ' 300.510(a). ■■■PS did not resolve the due process complaint to the satisfaction of the parents. The 30-day resolution period was not adjusted.

At the October 17, 2022, prehearing conference, the due process hearing was originally scheduled for December 6 through 9, 2022. On November 23, 2022, Petitioners, by counsel, requested a continuance of the hearing date due to the unavailability of an expert witness. The parties agreed to reschedule the due process hearing to January 31, 2023 through February 3, 2023. Upon the continuance request of the parents, which was not opposed by ■■■PS, to accommodate the new hearing dates, I extended the final decision due date from December 18, 2022 to February 24, 2023.

Prior to the due process hearing, I issued subpoenas *duces tecum* requested by the respective parties. On October 27, 2022, I issued an agreed protective order covering certain documents pertaining to tests administered to Student asserted to be protected by the respective publishers' intellectual property rights (the "Confidential Protocol Documents").

The due process hearing was held before this Impartial Hearing Officer over 4 days, on

January 31 through February 3, 2023. By agreement of both parties, the entire hearing was convened by videoconference on the Zoom One platform, hosted by ■■■PS. The hearing, which the parents elected to open to the public, was transcribed by court reporters. Both parents appeared for the virtual hearing and were represented by Parents' Counsel 1 and Parents' Counsel 2. Respondent ■■■PS was represented at the hearing by LEA Representative 1 and by ■■■PS' Counsel 1 and ■■■PS' Counsel 2. Parents' Counsel 1 and ■■■PS' Counsel 1 made opening statements.

Petitioners called as witnesses MOTHER, PRIVATE SCHOOL 2 ADMINISTRATOR, TEACHER 1, SPECIAL EDUCATION TEACHER 1, TEACHER 2, SPECIAL EDUCATION TEACHER 2, SPECIAL EDUCATION TEACHER 3 and INDEPENDENT PSYCHOLOGIST. ■■■PS called as witnesses FIRST GRADE TEACHER, PRINCIPAL, SUPPORT LIAISON and LEA Representative. Petitioners' Exhibits P-1 through P-135 and P-150 through P-172 were admitted into evidence without objection. Exhibits P-173 and P-174 were admitted into evidence under seal, without objection, subject to the October 27, 2022, Protective Order. Exhibits P-144, P-145, P-149 and P-175 were admitted over ■■■PS' objections. I sustained ■■■PS' objections to Exhibits P-136, P-137 and P-138 through P-143. ■■■PS' Exhibits R-1 through R-81, R-83 through R-89, R-91 through R-106, R-107 (Parts A, C, F, G, H, I, and J), R-108, R-111 and R-112 were admitted into evidence, including Exhibits R-1, R-2, R-4 through R-6, R-9, R-12, R-14, R-15, and R-17 through R-19 admitted over Petitioners' objections. I sustained Petitioners' objections to Exhibit R-90 and Exhibit R-107, Parts B, D, E, K and L.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The issues for determination in this case, as certified in the October 17, 2022

Prehearing Order, are:

- a) Whether ■■■PS denied the student a free appropriate public education (FAPE) by not ensuring that an appropriate Individualized Education Program (IEP) was developed for the student on November 18, 2020, in that this IEP did not address the student's alleged lack of meaningful progress in reading, writing and communication and did not provide for a private day placement as Student's educational placement;
- b) Whether ■■■PS denied the student a FAPE by not ensuring that an appropriate IEP was developed for the student on January 27, 2021, in that this IEP did not address the student's alleged lack of meaningful progress in reading, writing and communication and did not provide for a private day placement as Student's educational placement;
- c) Whether ■■■PS denied the student a FAPE by not providing the student in-person special education services during the 2020-2021 school year;
- d) Whether ■■■PS denied the student a FAPE by not convening an IEP team meeting to review the student's IEP after January 27, 2021.

For relief, the parents request the hearing officer to issue an order (a) requiring ■■■PS to reimburse the parents for tuition, fees and costs for Student's enrollment at PRIVATE SCHOOL 1 during the 2020-2021 school year, including transportation expenses; (b) requiring ■■■PS to reimburse the parents for tuition, fees and costs for Student's enrollment at PRIVATE SCHOOL 2 during the 2021-2022 and 2022-2023 school years, including transportation expenses; (c) requiring ■■■PS to pay for the student's future tuition, fees, costs and expenses to attend Private School 2, including transportation and the provision of any other appropriate related and supplemental services; (d) requiring ■■■PS to reimburse the parents for any tutoring or other private educational support services they incurred for the student during the two years preceding the filing of their due process complaint and (e) requiring ■■■PS to provide compensatory education to the student for denials of FAPE established at the due process hearing. The parents also requested that the hearing officer award any other relief deemed appropriate.

STIPULATION

On Day 3 of the due process hearing, the respective parties, by counsel, stipulated on the record to the following:

In an effort to streamline the hearing, and in lieu of Parents calling [HEAD OF SCHOOL at Private School 1] to testify as a witness, the parties stipulate to the following:

1. Head of School would testify regarding [Student's] enrollment at Private School 1 in 2021 and the contents of the documents already admitted into evidence regarding Student's education there.
2. Private School 1 was a proper private school placement under the IDEA because it was reasonably calculated to enable Student to receive educational benefits.
3. Private School 1 charged the amount identified in Exhibit P-108 as Student's tuition and fees for his/her enrollment.

■■■■PS' Counsel 1 stated on the record that ■■■■PS was in agreement with this stipulation insofar as the stipulation only pertains to the present case and this student.

FINDINGS OF FACT

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

1. At all times concerned in this proceeding, Student has been a resident of ■■■■■■■■■■, Virginia where he/she lives with FATHER and Mother. Testimony of Mother.
2. Student was originally determined eligible for special education and related services by ■■■■PS on May 11, 2017, under the Developmentally Delayed area of disability, due to delays in articulation. The initial IEP team proposed preschool resource services for 1 hour per week for the remainder of the 2016-2017 school year and Speech Therapy for 4 hours per month when Student would transition to ■■■■PS' COUNTY SCHOOL 1 in the fall of 2017. Exhibits P-4, P-5, P-6.
3. On a teacher-given assessment proceeding a February 1, 2018, IEP team meeting,

Student was able to identify the letter “a” and the letter “b”, out of 20 letters [*sic*]. Student was also able to write the letter “j” when prompted. At the time, Student was in GRADE Z.

Exhibit P-8.

4. On a teacher given assessment proceeding a February 13, 2019, IEP team meeting, when Student was in GRADE Y, Student was able to identify 15 upper case letters and 14 lower case letters. Student was able to write 12 letters of the alphabet when prompted.

Exhibit P-20.

5. For the 2019-2020 school year, Student was in GRADE X. In a September 16, 2019, teacher narrative, Teacher 2 wrote that when working on writing, Student struggled to remember what certain letters looked like. Student needed assistance forming sentences, letters, and spelling words. Student was skipping numbers when counting, had many reversals when writing numbers, and had difficulty applying number sense knowledge to independent practice. Student needed to have everything read to him/her and required written assignments to be scribed for him/her. Exhibit P-27.

6. When Student took the Developmental Reading Assessment (DRA) in September 2019, Student was reading at Level 2, Kindergarten level. This was years behind Student’s current Grade X expectations. Testimony of Special Education Teacher 2.

7. On an educational assessment given by the County School 1 special education teacher in October 2019, Student scored within Average limits on Listening Comprehension, Associational Fluency, and Object Naming Facility. Student scored in the Below Average limits on Phonological Processing, Nonsense Word Decoding, Reading Comprehension, Reading Vocabulary, Letter & Word Recognition, Math Concepts & Applications, Math Computation, and Math Fluency. Student scored in the Low range for all Written Language subtests (Written Expression, Spelling, and Writing Fluency), as well as Word Recognition Fluency, Silent

Reading Fluency and Letter Naming Facility. Exhibit P-30.

8. In October 2019, a ■■■PS psychologist conducted a psychological evaluation of Student, focused on cognitive and behavioral assessments. It had been reported that Student's teachers had reported concerns with his/her academic progress across areas and that Mother wondered if Student had dyslexia. The psychologist reported that Student demonstrated cognitive skills falling in the Average range overall but demonstrated areas of processing deficits for complex visual processing and phonological processing, consistent with dyslexia. The examiner reported that Student had many social emotional strengths, though concerns were noted with his/her sense of self-esteem related to academic progress. Exhibit P-28.

9. On December 4, 2019, the County School 1 IEP Reevaluation committee determined that Student met IDEA criteria for a Specific Learning Disability (SLD) based on a significant discrepancy between Student's cognitive abilities and his/her performance on academic assessments and in the classroom. The team determined that Student no longer met criteria for Developmental Delay. Father gave consent for this eligibility determination. Exhibit P-38.

10. Following the December 2019 ■■■PS reevaluation, the parents requested ■■■PS to provide funding to obtain an Independent Educational Evaluation (IEE) of Student. On December 6, 2019, ■■■PS approved the parents' request for psychological, educational, and speech/language IEEs of Student at public expense. Exhibit P-39.

11. In January 2020, Independent Psychologist conducted an IEE Psychoeducational Evaluation of Student. On the IEE evaluation, Student's performance yielded a Full Scale IQ in the Average range. Independent Psychologist reported that tests of academic achievement revealed multiple areas of severe deficit for Student. Tests of reading skills revealed severe deficits in all areas. Student was not yet automatic with the alphabet. He/she was unable to

read real words or decode nonsense words, with formal scores all falling below the Average range and several scores below expectation for entering kindergarten. Tests of reading fluency and accuracy were also extremely weak. Comprehension was severely deficient when Student had to do the reading him/herself, but much stronger and at least Average when Student got to listen to passages. Tests of written language revealed severe deficits in all areas, including spelling, sentence writing fluency, and the content of sentences. Tests of math skills fell in the Low Average range with paper-and-pencil computations, the Low Average range with Applied Word Problems and the Low range with fluency for basic facts. In his undated written report, Independent Psychologist reported that Student's performance strongly indicated the presence of a severe language-based learning disability impacting on all areas of academic achievement, with reading and writing being particularly impaired. Independent Psychologist reported that Student clearly met the criteria for dyslexia, which he characterized as a learning disability impacting on reading and spelling that is most often based in phonological processing deficits. Exhibit P-129.

12. In his IEE report, Independent Psychologist recommended, *inter alia*, that Student's significant weaknesses in academics required intensive work with an educational specialist, using an Orton-Gillingham-based program, to address underlying difficulties. Such work should include a structured multisensory instructional approach to teaching basic reading and spelling skills. Independent Psychologist recommended that for best results, the instruction should take place a minimum of three times weekly. Exhibit P-129.

13. From the side of ■■■PS, there was not any disagreement with anything Independent Psychologist came up with. Testimony of Support Liaison.

14. The IEP team at County School 1 met for the annual review of Student's IEP on February 11, 2020. This meeting was held before Independent Psychologist's report on Student

was received and before the school closed due to COVID-19. Communication, Reading, Written Language and Mathematics were identified as areas of need for Student. It was reported that Student's parents were excited by the progress Student had made in the 2019-2020 school year and that the parents were providing tutoring services to address Student's dyslexic tendencies. The February 11, 2020, IEP provided for Student to receive 15.8 hours per week of special education learning disability (LD) services, including 12.5 hours in the special education setting. The IEP stated that Student would receive academic instruction for Language Arts, Speech, and Math in the special education curriculum and participate with his/her peers in all activities, specials, lunch, recess, and in science and social studies. The IEP also provided for 3 hours per month of Speech Language (SL) services for Student. Exhibit P-43.

15. Beginning mid-March 2020, ■■■PS schools were closed down due to the COVID-19 pandemic. County School 1 closed everything and did not have students or teachers back into the building prior to 2021. ■■■PS schools were considered closed from mid-March through mid-June of 2020. Through the end of that school year, ■■■PS schools were allowed to provide online continuity of learning - any kind of instruction - just to stay connected with the students. This virtual instruction was optional, and students were not graded. Testimony of Principal.

16. From spring 2020 forward, there were a lot of ■■■PS projections about when children would return to in-person instruction. County School 1 ended the 2019-2020 school year with online virtual services. In July 2020, the school district's expectation was that students would be able to return to in-person classes at the start of the 2020-2021 school year. That date was repeatedly put off. In the fall of 2020, County School 1 provided online virtual services only, which ran from 9:00 a.m. to 3:30 p.m., Tuesday through Friday. For virtual services, children would access instruction online by computer from their homes. On Mondays, children would not log in, but would work independently on "asynchronous" tasks, assigned by

the teachers, while teachers were planning for the following week. Starting March 16, 2021, County School 1 offered an optional hybrid schedule, which would have allowed Student to attend school in-person two days per week and to participate online two days per week. By April 29, 2021, all County School 1 parents were given the option of sending their children back to school for 4 days per week. For the 2021-2022 school year, █████PS reverted back to its normal bell schedule, fully in person. Testimony of Principal.

17. The County School 1 IEP team met on May 14, 2020, to consider Independent Psychologist's psychological evaluation report on Student, as well as a recent Assistive Technologies (AT) services evaluation. At the meeting, the goals, objectives, accommodations and services in Student's February 11, 2020, IEP were determined still appropriate, with the addition of extended school year (ESY) services. Exhibit P-50. The May 14, 2020, IEP team approved an IEP Addendum to go into effect at the start of the 2020-2021 school year. This IEP addendum provided the same hours of special education LD services and SL services as the February 11, 2020, IEP. The Addendum IEP added that Student would receive explicit instruction for reading with a proven reading program that addressed his/her diagnosis of dyslexia. Mother consented to this IEP because she wanted Student to receive services. Exhibit P-48, Testimony of Mother.

18. Student was not able to make expected progress with virtual instruction. On a lot of days, Student wasn't available to learn / wasn't into it. Student would have some meltdowns and Mother would help guide Student back in front of the computer. Sometimes Student wouldn't turn on the computer camera. A lot of times, Student wouldn't log on. Testimony of Special Education Teacher 1. Special Education Teacher 2 experienced a lot of muting and unmuting of Student's mic or his/her running away from the computer, or simply not clicking the link to join in the first place. Testimony of Special Education Teacher 2.

19. Student's attendance online was poor in the 2020-2021 school year. During the second quarter, November 2020 to January 2021, Student joined 69 out of 106 possible general education sessions on time and was tardy for 37 sessions. Student logged out of sessions early, and before the end of lessons, in 59 out of the 106 sessions and was absent from class a total of 9 general education sessions. Student did not log on for general education sessions when whole group tests were given. Student was offered a total of over three hours per day of virtual instruction in the special education setting. Out of the 144 possible special education sessions in the second quarter, Student attended only 41 sessions. Student did not attend any of the Monday virtual special education sessions, provided specially for Student, designated for reading intervention. Exhibit P-77. Student was scheduled to attend two 30-minute virtual speech sessions per week. Student did not attend speech sessions after Nov. 9, 2020. Exhibit P-76.

20. As of January 21, 2021, for nearly all of the May 14, 2020, Addendum IEP goals, Student had not demonstrated progress, or the goals had not yet been introduced. Exhibit P-76.

21. On an i-Ready reading diagnostics assessment given on October 1, 2020, when Student was in Grade W, Student's overall score placed him/her at the ■ grade level, years below Student's current grade. Subscores were at the levels for ■ (Phonics), Grade ■ (Phonological Awareness and High Frequency Words) and Grade ■ (Vocabulary and Comprehension Literature) and early Grade ■ (Comprehension Informational Text). Exhibit P-58.

22. On an i-Ready mathematics diagnostics assessment given on October 19, 2020, when Student was in Grade W, Student was at grade-level in tested areas, except for Base-Ten numbering system and Geometry, where Student tested at the ■ placement levels. Exhibit P-61.

23. On November 9, 2020, Mother wrote Special Education Teacher 3, by email, to request an IEP meeting for Student. Mother wrote, *inter alia*, that Student was struggling with the new schedule and needed all of his/her instruction to be multi-sensory to optimize learning; that while more hours of special education services had been added, the hours were very demanding and not multi-modal in presentation; that the parents wanted Student to have as much of an inclusive education as possible while addressing his/her needs, but the numerous pullouts were overtaxing, singling him/her out, and were putting him/her behind without addressing Student's needs in a systematic proven methodology. Mother wrote that she was questioning the effectiveness of the interventions Student was receiving. Exhibit P-67.

24. ■■■PS convened an IEP Addendum meeting for Student on November 18, 2020. All members of the IEP team, including both parents and their educational advocate, participated virtually. Parents shared that Student was motivated, but was exhausted, that Student had been engaging in a lot of negative self-talk and that Student was becoming more aware of his/her deficits. They parents expressed concern that they had not observed Student making significant progress. The parents expressed concerns that Student had been instructed using the "Foundations" reading program for several years and they do not see much progress in Student's literacy skills. The parents requested the team to consider private day placement for Student, citing their concerns with Student's lack of progress academically, the significance of his/her dyslexia, his/her emotional well-being, and his/her need for multisensory and multi-modal instruction across the day, in addition to being among other students with learning differences. The school representatives agreed that Student needed instruction broken down, with increased processing time and instruction using multi-modality and multisensory approaches. ■■■PS staff shared that Student had been consistently provided with multi-modal and multisensory instruction and provided some examples of tools they were using. ■■■PS staff agreed with

parents that it would be appropriate to explore other evidence-based programs or approaches to determine if there were something that would be a better fit and that might increase the rate of progress. Based on concerns expressed by the parents, the IEP team reviewed Student's services in the virtual environment. ■■■PS members of the team proposed to continue existing IEP services when Student would return to in-person instruction. During the virtual instruction period, the ■■■PS team members proposed to shift Student's instruction in Math to the general education setting. Over the parents' dissent, the IEP team decided that during the ongoing virtual learning period, Student would receive 14.5 hours per week of special education LD services, including 6.5 hours outside of general education. Student would receive 3 hours per month of SL services in the special education setting. The IEP provided that after Student returned to in-person services, he/she would receive 15.8 hours per week of special education LD services, including 12.5 hours outside of general education. SL Services would be continued at 3 hours per month. Exhibit R-91.

25. Around December 7, 2020, County School 1 made a switch for Student from the Foundations reading program to Orton Gillingham instruction. Special Education Teacher 3 was the designated Orton Gillingham provider. Student was offered 1:1 virtual special education instruction for one hour per day, five days a week. Although Mondays were "asynchronous" days for other students, Special Education Teacher 3 offered Student individualized virtual reading instruction on Mondays because of his/her reading needs. Special Education Teacher 3 had only very limited success in getting Student to participate in the virtual 1:1 special education sessions. Student would not participate in the 1:1 Orton Gillingham sessions. Testimony of Special Education Teacher 3.

26. By letter of December 10, 2020, Parents' Counsel 1 informed Principal that the parents disagreed with ■■■PS' position that the November 18, 2020, IEP Addendum offered

Student a FAPE and that County School 1 was Student's least restrictive environment. Counsel provided notice that the parents intended to enroll Student in a private day placement at a school that would appropriately provide for Student's needs as a student with an SLD and in particular dyslexia, and that the parents intended to seek reimbursement from ■■■PS for all costs and expenses incurred for their private placement of Student. Exhibit R-94. By letter of December 30, 2020, Petitioner's Counsel wrote Support Liaison that the parents did not believe that the proposed November 18, 2020, IEP (including its goals, services, and placement) offered a FAPE to Student, and that the parents did not consent to the IEP and intended to privately place Student and seek reimbursement from ■■■PS. Exhibit P-73.

27. On January 11, 2021, in the middle of Student's Grade W year, Teacher 2 completed a Teacher Evaluation of Student Strengths and Needs for Student's Private School 2 admissions application. Teacher 2 wrote that for reading, Student was still working on decoding sight words on at the Grade W level. For writing, Student was able to identify the sound of letters and letters themselves as well as initial sounds but was not able to independently write a story. In math, Student had a strong number sense and demonstrated understanding of the parts of numbers. Student could do double digit addition and subtraction with regrouping and multiply by relying on repeated addition. Exhibit P-83.

28. ■■■PS convened an IEP annual review meeting for Student on January 27, 2021. All IEP team members, including the parents, Parents' Counsel 1 and their educational advocate attended virtually. At this point in time, ■■■PS had not yet returned to in-person classes and Student was offered only online instruction. The school staff reported on Student's poor record of online attendance. Exhibit P-77.

29. At the January 27, 2021, IEP team meeting, the parents informed the team that they intended to enroll Student in a private school and would be seeking reimbursement from

■■■PS. The parents noted that they did not believe the current ■■■PS IEP provided Student FAPE and shared that they were actively searching for a private school for Student. The parents requested that the IEP team consider private day placement for Student based on their concerns with Student's lack of progress, his/her need for multi-sensory instruction across the day and his/her emotional well-being. ■■■PS team members considered this request but affirmed their belief that the programming available at County School 1 was able to meet Student's needs and provide him/her with FAPE. Additionally, ■■■PS staff stated that County School 1 was able to implement the IEP and had been providing Student with multisensory and multi-modal instruction. The ■■■PS staff stated that when Student was in attendance, he/she was able to access the general education curriculum with special education services and participate in the curriculum with his/her peers. Exhibits P-77, P-80.

30. Over the parents' dissent, the January 27, 2021, IEP team decided that during the ongoing virtual learning period, Student would receive 15 hours per week of special education LD services, including 7 hours outside of general education. Student would receive 3 hours per month of SL services in the special education setting. These would be online services. Exhibits P-77, P-78.

31. The January 27, 2021, IEP stated that Student would be returning to face-to-face service delivery and an addendum would be held to discuss services prior to his/her return. The IEP provided that after Student returned to in-person services, he/she would receive 17.5 hours per week of special education LD services, including 12.5 hours outside of general education. SL Services would be continued at 3 hours per month. Exhibit P-77.

32. By email from Mother of February 16, 2021, the parents wrote Principal and Special Education Teacher 3 that they did not agree with ■■■PS' proposed January 27, 2021, IEP and that they were withdrawing Student from County School 1, effective immediately. Exhibit

subsequently remedy the IEP's deficiencies, and the parents enrolled Student at Private School 1 beginning March 1, 2021; that the parents planned to enroll Student at Private School 2 in fall 2021 for the 2021-2022 school year. Counsel wrote that in addition, Student was entitled to compensatory education services due to ■■■PS' denial of FAPE prior to Student's enrollment at Private School 1, noting that they had hired a private provider at a cost exceeding \$10,000. Counsel passed on the parents' settlement demand to ■■■PS, including, *inter alia*, reimbursement for Student's Private School 1 tuition and expenses, payment for tuition, fees and expenses at Nonpublic School 2 for the 2021-2022 school year and revision of Student's ■■■PS IEP to identify private day placement as Student's least restrictive environment. Exhibit R-104.

37. By letter of August 24, 2021, Support Liaison wrote the parents that ■■■PS had been advised that they had withdrawn Student from ■■■PS and enrolled Student at Nonpublic School 2 for the 2021-2022 school year; that Student continued to be eligible for special education services and ■■■PS continued to offer these services to Student. Support Liaison wrote that ■■■PS would like to reconvene Student's IEP team to review his/her special education needs and services. Support Liaison requested data and records from Private School 1 and Student's private provider, as well as evaluations for the IEP team to better address the parents' concerns regarding Student's receiving a FAPE and to consider the need for a private school placement. Support Liaison requested that the parents sign and return a Notice and Consent form for parental consent for evaluations. Support Liaison wrote that when the evaluations would be complete, an IEP meeting will be scheduled at County School 1 to review the results, consider private school placement for Student at Private School 2, consider the parents' request for compensatory services and "make revisions as appropriate." Exhibit R-105.

38. Neither the parents nor their attorneys contacted Support Liaison or County School 1 in response to the August 24, 2021, letter. Testimony of Mother, Testimony of

Support Liaison.

39. The parents unilaterally placed Student at Private School 2 for the 2021-2022 and 2022-2023 school years. The parents have paid Private School 2 for the costs of Student's tuition and other private school expenses. Testimony of Mother.

40. The parents filed their request for a due process hearing in this matter on October 4, 2022. Hearing Officer Notice.

41. In the fall of 2022, [REDACTED] PS conducted special education reevaluations of Student. Exhibit P-144. Student's [REDACTED] PS IEP team met in February 2023. Representation of Counsel.

CONCLUSIONS OF LAW

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

Burden of Proof

The Petitioners, as the parties who filed the October 4, 2022, request for a due process hearing, must bear the burden of proof in this proceeding. *See, e.g., N.P. by S.P. v. Maxwell*, 711 F. App'x 713 (4th Cir. 2017) (At impartial due process hearing, the parents bear the burden of proving their child was denied a free appropriate public education. *Id.* at 716, *citing Weast v. Schaffer ex rel. Schaffer*, 377 F.3d 449, 456 (4th Cir. 2004), *aff'd*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). The burden of proof shall be met by a preponderance of the evidence. *See, e.g., Cty. Sch. Bd. of Henrico Cty., Va. v. R.T.*, 433 F. Supp. 2d 657, 671 (E.D. Va. 2006) (Hearing Officer's factual conclusions supported by the preponderance of the record evidence.)

Analysis

a) Whether [REDACTED] PS denied the student a free appropriate public education (FAPE) by not

ensuring that an appropriate Individualized Education Program (IEP) was developed for the student on November 18, 2020, in that this IEP did not address the student's alleged lack of meaningful progress in reading, writing and communication and did not provide for a private day placement as Student's educational placement;

b) Whether █PS denied the student a FAPE by not ensuring that an appropriate IEP was developed for the student on January 27, 2021, in that this IEP did not address the student's alleged lack of meaningful progress in reading, writing and communication and did not provide for a private day placement as Student's educational placement;

c) Whether █PS denied the student a FAPE by not providing the student in-person special education services during the 2020-2021 school year;²

d) Whether █PS denied the student a FAPE by not convening an IEP team meeting to review the student's IEP after January 27, 2021.

In this proceeding, the parents seek reimbursement from █PS for tuition and related expenses for their unilateral placement of Student at Private School 1 from March through July 2021 and at Private School 2 for the 2021-2022 and the 2022-2023 school years. The parents also seek reimbursement for private tutoring services they obtained for Student from September 2020 through February 2021.

Laches

Before reaching the reimbursement claims, I consider █PS' post-hearing email submission suggesting that the parents may be estopped from seeking relief in this case under the equitable doctrines of laches/estoppel. It is axiomatic that a claimant who has filed his action within the statute of limitations provided by Congress is entitled to a presumption that laches will not apply. *See, e.g., In re Brin-Mont Chemicals, Inc.*, 154 B.R. 903, 908 (M.D.N.C. 1993) (applying North Carolina law.) The IDEA statute of limitations, also adopted by regulation in

² Parents' Counsel 1 clarified in his closing argument that this case is about the failure to provide a private day placement for Student and the parents were not claiming that by not providing in-person special education services, █PS had failed to implement Student's IEPs or that it was *per se* improper for a school division to provide virtual services. *See* Transcript, Day 4, pps 157-161.

Virginia, for denial of FAPE claims is two years. *See* 20 U.S.C. '1415(f)(3)(C); 8 VAC 20-81-210 E(1). Here Petitioners filed their due process request on October 4, 2022, less than two years after the contested IEPs in this case were developed on November 18, 2020 and January 27, 2021, respectively. I find that the doctrines of laches/estoppel do not apply.

Reimbursement for Parental Private Placements

As the Fourth Circuit Court of Appeals explained in *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315 (4th Cir. 2009), the IDEA provides for private school tuition reimbursement ‘if (1) the school district fails to provide a FAPE and (2) the parental placement is Areasonably calculated to enable the child to receive educational benefits.’ *Id.* at 325, *citing Carter By & Through Carter v. Florence Cnty. Sch. Dist. Four*, 950 F.2d 156 (4th Cir. 1991), *aff’d*, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993); *Sch. Comm. of Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). *See, also, e.g., Fairfax Cnty. Sch. Bd. v. A.G.*, No. 121CV00840-MSN-JFA, 2022 WL 4016882, at *2 (E.D. Va. Sept. 2, 2022) (Parents may be reimbursed for unilateral private placement when a court or hearing officer determines that (1) a school district failed to provide a FAPE and (2) the private placement was suitable); *Lexington Cty. Sch. Dist. One v. Frazier ex rel. D.T.*, No. 3:10B01808BMBS, 2011 WL 4435690, at *8 (D.S.C. Sept. 22, 2011) (‘Under what has been denominated the *Burlington-Carter* framework, a parent may recover tuition reimbursement if: (1) the proposed IEP was inadequate to offer the child a FAPE, and (2) the private education services obtained by the parents were reasonably calculated to enable the child to receive educational benefits’). A hearing officer must also consider the appropriate and reasonable level of reimbursement and may even deny full reimbursement for tuition if he finds such expenses unreasonable. *See M.N. by & through Norman v. Sch. Bd. of City of Virginia Beach*, No. 2:17CV65, 2018 WL 717005, at *14 (E.D.Va. Feb. 5, 2018) (citing *Carter*, 510 U.S. at 16).

In this case, the parents base their private school reimbursement claim on ■■■PS' alleged failures to offer Student FAPE with the school district's proposed November 18, 2020 and January 27, 2021, IEPs. As Parents' Counsel 1 acknowledged in closing argument, the parents' private school tuition expenses were incurred beginning March 1, 2021, when the parents unilaterally placed Student at Private School 1. This was after the January 27, 2021, IEP was finalized. Therefore, for purposes of the private school tuition reimbursement claims, I do not reach the appropriateness of the earlier November 18, 2020, IEP Addendum.

Private School 1 Reimbursement

The parents allege that ■■■PS' January 27, 2021, IEP was inappropriate for Student because the IEP did not address Student's alleged lack of progress in reading, writing and communication and did not provide for a private day school as Student's educational placement. The school division responds that Student would have been provided FAPE under the January 27, 2021, IEP and that County School 1 was Student's least restrictive environment.

In determining whether the public agency has offered a child an appropriate IEP, the hearing officer's inquiry is two-fold. 'First, has the [District] complied with the procedures set forth in the IDEA? And second, is the IEP developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.' *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 206B07, 102 S. Ct. 3034, 3051, 73 L. Ed. 2d 690 (1982).

Parental involvement in IEP decision making is a procedural requirement of the IDEA. In argument, Parents' Counsel 1 submitted that at the January 27, 2021, IEP team meeting, ■■■PS impeded the parents' involvement by not seriously considering their request for a private day placement for Student. This procedural claim was not identified in the Prehearing Order as

an issue for determination in this case. *See* Prehearing Order, October 17, 2022. Assuming that the issue were properly before the hearing officer, I find that the County School 1 representatives did in fact consider the parents' private school placement request at the January 27, 2021, meeting, but maintained that they did not agree with the request, because they believed that County School 1 was able to meet Student's needs. *See* Exhibit P-80 (Sound recording of meeting). Courts have held repeatedly that while the IDEA does require parental involvement and participation in the IEP process, the parents' right to participate in the formulation of their child's IEP does not constitute a veto power over the IEP team's decisions. *See, e.g., A.W. ex rel. Wilson v. Fairfax Cnty. Sch. Bd.*, 372 F.3d 674, 683 (4th Cir. 2004); *Fitzgerald v. Fairfax Cnty. Sch. Bd.*, 556 F. Supp. 2d 543, 557 (E.D. Va. 2008). Here, I find that the parents did not establish that the school team's decision at the January 27, 2021, IEP meeting, not to support a private school day placement for Student, hindered the parents' right to participate in the development of the IEP.

Turning to the second, substantive, prong of the *Rowley* inquiry, was [REDACTED] PS' proposed January 27, 2021, IEP and educational placement appropriate for Student? In *D.H. v. Fairfax Cty. Sch. Bd.*, No. CR 1:19-CV-1342, 2021 WL 217098, at *8B9 (E.D. Va. Jan. 19, 2021), U.S. District Judge T. S. Ellis, III 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 Andrew 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

be 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, 180B 82 (1982)). The Fourth Circuit has explained that the LRE requirement reflects the IDEA’s preference that “[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled.” *AW ex rel. Wilson*, 372 F.3d at 681.

D.H., 2021 WL 217098, at 8:9. A reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP was reasonably calculated to enable the child to make progress appropriate in light of his circumstances. *Endrew F.*, 137 S.Ct. at 1002.

The January 27, 2021, IEP at issue was developed during an unparalleled time in the history of U.S. public education. In March 2020, because of COVID-19, nearly every U.S. public school district, including ■■■PS, closed schools to in-person learning. For the rest of the 2019-2020 school year, ■■■PS only offered non-compulsory virtual instruction. Beginning with the start of the 2020-2021 school year, both for general education and special education, County School 1 offered only online virtual instruction to students, generally 4 days per week. This continued until March 2021. Starting March 16, 2021, County School 1 offered an optional hybrid schedule, which would have allowed Student to attend school in-person two days per week and to participate online two days per week. By April 29, 2021, all parents were given the option of sending their children back to school, in person, for 4 days per week. County School 1 only returned fully to regular in-person classroom instruction at the start of the 2021-2022 school

year.

Virtual instruction was undoubtedly a challenge for nearly all elementary children and their families. This was especially true for Student, who has a severe language-based learning disability, which effects all areas of academic achievement, especially reading and writing. Virtual programming simply did not work for Student, who by all accounts, in the first 2 quarters of the 2020-2021 school year, avoided participation in online classes or was only minimally engaged in the programming. Unsurprisingly, by January 2021, Student had not made expected progress in reading. Nor did he/she progress on annual IEP goals in the second quarter of the school year.

The Fourth Circuit Court of Appeals has held that the proper inquiry as to appropriateness of a proposed IEP placement is whether the setting was reasonably calculated to enable the student to make progress appropriate in light of his circumstances. *See R.F. by & through E.F. v. Cecil Cty. Pub. Sch.*, 919 F.3d 237, 246B47 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 156, 205 L. Ed. 2d 46 (2019) (*citing Andrew F.*, 137 S.Ct. at 999.) At the November 18, 2020 and January 27, 2021, IEP team meetings, it was clear that Student was not making expected progress in the virtual education setting.

In argument at the due process hearing, █████ PS Counsel 1 focused on Student's lack of regular online attendance as a possible contributing factor. Blaming Student for his/her lack of progress in the virtual setting does not pass muster. At the January 27, 2021, IEP team meeting, the principal's designee appropriately emphasized that nobody was blaming Student for his/her lack of progress during virtual learning. Moreover, once a special education student's nonattendance becomes excessive, a school district has an affirmative duty to take some sort of responsive action. *See, e.g., Springfield Sch. Comm. v. Doe*, 623 F. Supp. 2d 150, 159 (D. Mass.

2009). There was no evidence that ■■■PS proposed any sort of concrete action, such as providing a dedicated aide for Student, to address Student's poor online attendance and participation in virtual instruction.

At both the November 18, 2020, and January 27, 2021, IEP team meetings, the parents requested that ■■■PS place Student in a private day school. However, in the January 27, 2021, IEP, school representatives continued to offer Student only virtual instruction pending a return to in-person classes, including 15 hours per week of online special education LD services, even though it was known that Student was not progressing with virtual, online, programming. I conclude that the parents have met their burden of persuasion that the County School 1 IEP team's decision to provide Student only virtual instruction in the January 27, 2021, IEP was not reasonably calculated to enable Student to make progress appropriate in light of his/her circumstance.³ This was a denial of FAPE.

Having found that ■■■PS denied Student a FAPE by failing to propose an appropriate IEP on January 27, 2021, I turn to the second part of the *Burlington-Carter* framework: Was the private placement chosen by the parents, Private School 1, proper under the IDEA. U.S. District Judge Joseph Anderson pronounced in *Heffernan, supra*, that the principal inquiry as to whether

³ The January 27, 2021 IEP provided for alternative special education services for Student for when schools would reopen. At the time of the IEP meeting, no one knew when ■■■PS would return to in-person classes. In fact, County School 1 would not reopen fully for in-person instruction until April 29, 2022 and then for only 4 days per week. The possibility that Student might have been able to return to in-person classes at some point later in the IEP year does not save the IEP. *See, e.g., M.L. v. Smith*, No. CV PX 16-3236, 2018 WL 3756722, at *7 (D. Md. Aug. 7, 2018) (Whether a challenged IEP provided a FAPE is based on the information available to the public school at the time the IEP was formulated.) *See, also, A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 682 (4th Cir. 2007) (Important policies served by the requirement of a formal written offer "creating a clear record of the educational placement and other services offered to the parents." *Id.* at 682, citing *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 768 (6th Cir.2001).

prior year's IEP for the child is under administrative or judicial review. *Id.* at 536. This holding has been followed more recently by the Third Circuit Court of Appeals in *A.B. through Katina B. v. Abington Sch. Dist.*, 841 F. App'x 392 (3d Cir. 2021). In *A.B.*, the Third Circuit explained that to trigger a public school district's responsibilities under IDEA, a parent who enrolls a child in a private school must request an evaluation or begin the public school enrollment process. *Id.* at 395. *See, also, Capistrano Unified Sch. Dist. v. S.W.*, 21 F.4th 1125, 1138 (9th Cir. 2021), *cert. denied sub nom. S.W. on Behalf of B. W. v. Capistrano Unified Sch. Dist.*, 214 L. Ed. 2d 20, 143 S. Ct. 98 (2022) ("We hold that, if the student has been enrolled in private school by her parents, then the district need not prepare an IEP, even if a claim for reimbursement has been filed. To be sure, when parents withdraw a student from public school and place her in private school, all they have to do is ask for an IEP, and then the district must prepare one. But regardless of reimbursement, when a child has been enrolled in private school by her parents, the district only needs to prepare an IEP if the parents ask for one." *Id.* at 1138.)

■ PS last proposed an IEP for Student on January 27, 2021, when county schools were closed for in-person classes due to the COVID-19 pandemic. On February 16, 2021, the parents notified ■ PS, by email from Mother to Principal and Special Education Teacher 3, that they did not agree with the proposed January 27, 2021, IEP and that they were withdrawing Student from County School 1, effective immediately. ■ PS wrote back to acknowledge Student's withdrawal. On March 1, 2021, the parents unilaterally enrolled Student in Private School 1. Prior to filing their October 4, 2022, Request for a Due Process Hearing in this proceeding, the parents did not seek administrative or judicial review of the November 18, 2020 or January 27, 2021, IEPs, did not request an evaluation by ■ PS or ask for an IEP, and did not seek to re-enroll Student in ■ PS.

short-term lodging and \$3,961.44 for transportation mileage. Petitioners' Counsel 1 represented that the mileage claim is based on the Internal Revenue Service rate for the use of a car in 2021.

In a 1994 Ninth Circuit Court of Appeals decision, *Union Sch. Dist. v. Smith*, 15 F.3d 1519 (9th Cir. 1994), the Court explained that, where a child's appropriate special education placement is at a non-residential program not within daily commuting distance of the family residence, transportation costs and lodging near the school are related services that are required to assist that child to benefit from the special education. *Id.* at 1527. Private School 1 is a nonresidential day school, not within daily commuting distance of the family's home in Northern Virginia. I find that the described lodging and transportation costs were required to assist Student to benefit from special education to attend Private School 1 and that the costs were reasonable. I will order ■■■PS to reimburse the parents for those expenses.

Lastly, Petitioners seek reimbursement for private virtual tutoring obtained for Student from mid-September 2020 through February of 2021. For the most part, this private tutoring predated the November 2020 and January 2021 IEPs at issue in this case. Reimbursement was only sought in Parents' Counsel 1's July 2021 settlement demand letter. Equity would prevent the hearing officer from awarding reimbursement in this scenario, where ■■■PS had no notice of the parents' intent to seek reimbursement for Student's private tutoring until some 6 months after the tutoring ended. *See S.H. v. Fairfax Cnty. Bd. of Educ.*, 875 F. Supp. 2d 633, 658 (E.D. Va. 2012). *See, also, M.N. by & through Norman v. Sch. Bd. of City of Virginia Beach*, No. 2:17CV65, 2018 WL 717005, at *14 (E.D. Va. Feb. 5, 2018) (Parent cites no case law, nor has the Court found any, where a court reimbursed tutoring services during the school year, as opposed to reimbursing unilateral private school placement.) I find that the parents are not entitled to reimbursement from ■■■PS for their private tutoring expenses.

ORDER

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

ORDERED:

1. Upon receipt of documentation of payment by the parents, as may be reasonably required, ■■■PS shall, without undue delay, reimburse the parents their costs for covered tuition and related expenses, including short-term lodging and transportation expenses, for Student's enrollment at Private School 1 from March 2021 through July 2021 and
2. All other relief requested by the Petitioners herein is denied

Date: February 22, 2023

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

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