

VIRGINIA:

DEPARTMENT OF EDUCATION  
OFFICE OF DUE PROCESS AND COMPLAINTS

	)		
	)		
	)	Guardian/Parent	)
	)		)
v.	)		)
	)		)
	)	PUBLIC SCHOOLS	)
	)		)
School	)		)
	)		)
	)		)

IN RE: Student

DECISION

I.

PROCEDURAL HISTORY

On \_\_\_\_\_ pursuant to request by \_\_\_\_\_ and legal guardian of the Student (hereinafter called either "Parent" or "\_\_\_\_") for a Due Process Hearing, the undersigned was appointed as Hearing Officer to hear said cause.

An Initial Prehearing Report filed by the undersigned on \_\_\_\_\_ set the hearing upon the merits for \_\_\_\_\_ at the Offices of \_\_\_\_\_ Public Schools (hereinafter either "PS" or "School") (See Initial Prehearing Report of \_\_\_\_\_).

Counsel for School requested the issuance of various subpoenas to elicit necessary medical evidence together with a request for a formal prehearing conference (See letter from \_\_\_\_\_ dated \_\_\_\_\_). School's counsel further requested a continuance of the hearing date due to conflict with another hearing involving School. (See letter \_\_\_\_\_, supra).

A prehearing was held on \_\_\_\_\_ at which time counsel for Parent agreed to supply the requested medical documents. Upon a showing that the education of the Student would not be adversely affected by the requested continuance (this because Student was on \_\_\_\_\_ break), trial in this cause was continued until \_\_\_\_\_. See Second Pretrial Order, dated \_\_\_\_\_. An appropriate Addendum to the Initial Prehearing Report was duly filed and served on \_\_\_\_\_.

In conformity with the Second Pretrial Order, the name of each party's witnesses and copies of all proposed exhibits were exchanged five (5) working days prior to the hearing. The hearing upon the merits commenced at 10:00 a.m. of \_\_\_\_\_ at the \_\_\_\_\_ School. That hearing, however, was recessed at 4:00 p.m. when during \_\_\_\_\_ rebuttal testimony Parent raised a new evidentiary point (Tr. 207-214). Counsel for School asked for a continuance in order to address that point, which was granted, without objection by Parent's counsel. In this regard it was noted that Student's educational progress would not be affected by the continuance nor the supply of agreed upon special educational services. (See Tr. 207-214).

The hearing was resumed on \_\_\_\_\_ at 10:30 a.m. at the headquarters of School. Pursuant to stipulation by the parties, the transcript of the resumed hearing was made available by \_\_\_\_\_, with the final decision to be filed herein by \_\_\_\_\_ (See letter dated \_\_\_\_\_ from School's counsel).

## II.

### PARENT'S CASE CONCERNS ALLEGED PROCEDURAL ERRORS BY SCHOOL

There is no dispute between the parties as to Student's determination as Other Health Impaired (OHI) (Tr. 84, 85). Likewise, the parties agree that Student has been receiving appropriate special educational services pursuant to the Individuals with Disabilities Education Act, 20 U.S.C.A. 1400 et seq. for many years (Tr. 84, 85-87).

Pursuant to the Second Pretrial Order an IEP meeting was held on \_\_\_\_\_ to develop an updated Individualized Educational Program (IEP). Earlier, a Triennial Evaluation in accordance with the timelines set forth in that Order, was timely held. Parent received advance notice and attended those meetings which complied with all appropriate procedural safeguards and regulations. Parent consented to the resultant IEP, dated \_\_\_\_\_ (See School's substituted Exhibit 17, See also School's Ex. 16 being the Triennial Review dated \_\_\_\_\_).

Counsel for the Parent stated in the Second Pretrial Conference and at the inception of the hearing (Tr. 4-24) that the sole issues raised by Parent herein were procedural. At trial these issues were defined as whether in the late \_\_\_\_\_ and \_\_\_\_\_ of \_\_\_\_\_ School had promptly held an IEP meeting as required by law and requested by Parent; and whether because of the alleged failure of School to do so, School had timely set in motion a Due Process Hearing requested by Parent. This limitation of issues was confirmed by Parent's counsel in \_\_\_\_\_ letter dated \_\_\_\_\_, as well as in closing argument (Tr. 1-40, Vol. II).

Parent made no request in this proceeding for any relief in the form of special educational services or amendments to the Student's IEP, nor is there any claim by Parent in this proceeding that Student was denied any requisite special educational services or regular educational services. Indeed, Parent seeks no relief herein other than favorable factual findings related to the aforesaid two alleged procedural errors, both of which occurred prior to the current and agreed to IEP of (Tr. 5-7, Tr. 7, Vol. 2).

### III.

#### SUMMARY OF THE TESTIMONY

##### (a)

##### (Parent)

Parent was the Complainant's sole witness. After briefly describing relationship to Student (Tr. 24-25), Parent testified that Student had missed considerable school during the of school year due to injuries and illness (Tr. 25-6)

Parent then related that had attended an IEP meeting for Student on testified that this meeting was recessed when <sup>1/</sup> gave to the School's IEP Committee letters from the Student's physicians suggesting homebound instruction (Tr. 30-31); this because they believed Student had been repeatedly struck by fellow students resulting in trauma to head (Tr. 44-50)<sup>2/</sup>. The physicians wished this situation to be resolved before Student returned to School (Tr. 44-50).

According to , when School's IEP Committee received these letters from , it felt it could not proceed with the IEP meeting until it talked to (the Student's special education supervisor) who was not present (Tr. 26-31).

On , Parent and briefly talked by telephone. told Parent that ( ) had been trying to reach the Student's physicians without success and did not want to resume the recessed IEP meeting until they talked (Tr. 29-33).

<sup>1/</sup> was the attorney provided by School to assist Parent and Student (Tr. 27, 176-178).

<sup>2/</sup> The School denied Student was injured by fellow students. In any event both sides agree that this issue is not present herein, except by way of background. Accordingly, it will not be addressed herein.

Parent testified that [redacted] had repeatedly tried to reach [redacted] without success (Tr. 28). The following colloquy then ensued:

“Q: After that meeting [I.e., [redacted]], did you ask for another IEP meeting?

A: Yes, after they took so long I called [redacted] [I.e., [redacted]] but I could never get [redacted] didn't return my calls.

Q: Did you leave messages for [redacted] ?

A: Yes, I did.

Q: What was the message you left?

A: I was trying to find out why the IEP meeting was held up and I wanted to see if [redacted] was going to schedule it or what was going on with it.

Q: Did you ever ask for an IEP meeting in writing?

A: Yes, I left a note at the school board (Tr. 28-9).

This note left for [redacted] stated:

“I confirm our conversation on [redacted]. I request an IEP meeting for my [redacted]

Call me if you have any questions.

Sincerely

(Parent's Ex. 1)

(See also Tr. 30)

According to Parent there were no conversations or other communications between School and [redacted] relating to [redacted] written request for an IEP meeting dated [redacted] (See Student's Ex. 1) until late [redacted] (Tr. 46-58). There were however an exchange of voice mail messages between Parent and Student's Special Ed teacher ([redacted]) (in mid-[redacted]) and a brief visit by the School's nurse in late [redacted] (see e.g. Tr. 53-56).

On [redacted] Parent left a note, in an envelope addressed to [redacted], with the secretary at the School where Student was attending (Tr. 56-59).

This note<sup>3/</sup>, received as Student's Ex. 4, as well as School's Ex. 11; read: “It was requested that I request a Due Process Hearing on the placement of [redacted]

<sup>3/</sup> The original of this note was not presented at the hearing. A Xerox copy was introduced. It contained [redacted]'s telephone and fax numbers as well as [redacted] address which someone had added (Tr. 58-60).

( )

Sincerely,

I will be represented by counsel, ”

After dropping off this note heard nothing from or School relating to due process request until received an envelope from the School date stamped by the post office on (Tr. 73-4). This envelope contained a form to be used to request a due process hearing together with a copy of a printed copy of the Federal procedural safeguards and instructions relating to due process hearings (Tr. 73, 61-63, School's Ex. 17). For this reason, Parent assumed had received request and was then responding to it (Tr. 58-59) (The envelope also contained a letter to Parent from setting up an IEP meeting for ).

then filled out the first page of the enclosed due process request form and returned it to counsel (Parent's ex. 2, Tr. 73-4).

stated did not know in advance about or attend the IEP meeting convened by the School on (Tr. 63-64).

On , and counsel, , attended the meeting to discuss Student's IEP (Tr. 64-65). This meeting was abruptly ended when the School was advised by counsel that there would be no IEP meetings until the due process complaint procedure had been started (Tr. 64-71).

On cross examination Parent largely repeated or expanded testimony on direct. did admit, however, that during the of , namely during the time that all of this was going on" . . . that answering machine had been unhooked while house was being renovated (Tr. 54, 53-85, 184-5).

(b)

is a Special Education Coordinator for the School and has been working in this field for seventeen years (Tr. 79-80). has worked with Student since grade (Tr. 80) and has attended many IEP meetings for (Tr. 81). is School's contact person with regard to Student. regularly dealt with Parent while Student was attending School (" ") (Tr. 82). also had almost daily contact with Student's Special Education teacher at , and particularly during the periods in question here (Tr. 82-83).

noted that Student has long been and still is classified as Other Health Impaired (OHI) with special education services being delivered in language and math (Tr. 83-84), with educational services being delivered in regular classes for science, social studies and the like (Tr. 84, See Also School's Ex. 3-7, 15, 16).

testified that Student was doing "exceptionally well"; and was making "progress across the board" (Tr. 86), also that confidence level "increased" (Tr. 87).

said that once a year the School prepared an IEP for Student. Thus, for example, an IEP was prepared for Student in for the period up to (Tr. 87). The School on prepared a proposed IEP for Student for the period of to (Tr. 87-88, School's Ex. 10). This was presented to Parent at the meeting. noted that was not at the meeting. (Tr. 89)

stated that was called to the end of that meeting by Parent's legal representative ( ), who requested that Student receive homebound instruction instead of in-school instruction (Tr. 89-91). It was understanding that this request was orally made, no written medical report being then presented (Tr. 90-91).

testified that it was then decided to reschedule the IEP meeting until ( ) could be present (Tr. 91). added that no rescheduled date was then set - rather School was to call Parent who was to then "get back in touch" with School to confirm when they could "meet again" (Tr. 91).

testified further that was opposed to granting Student a homebound education in view of the excellent progress was making at School under the current in-school educational program (Tr. 91-93), as compared with Student's past history revealing that Student's progress went way down when received homebound instruction (Tr. 92).

testified that understood that had made numerous attempts to reach Parent, mostly by voice mail and once by a letter (Tr. 93). said that understood that School ( ) finally reached and, as a result, the IEP meeting was rescheduled for (Tr. 93-95). School's personnel were present for that meeting but Parent was not present (Tr. 94). Nevertheless a draft IEP was prepared (School's Ex. 12).

further said that a day or so after (the School's social worker handling Student's case) had called to apprise of Parent's Due Process Hearing request (Tr. 96-97). testified that then reached said that then told that did not want a

due process hearing (Tr. 98) and would talk to \_\_\_\_\_ in order to set a date for the IEP meeting (Tr. 97-98), namely for \_\_\_\_\_ (Tr. 98).

\_\_\_\_\_ next reviewed School's Ex. 12, ... p. 4, which indicated that \_\_\_\_\_ (Student's Special Education teacher at \_\_\_\_\_) had tried to contact Parent twice by telephone and once by letter in order to set the IEP meeting for \_\_\_\_\_. On \_\_\_\_\_ School's IEP Committee met and prepared a suggested IEP for Student's school years from \_\_\_\_\_ through \_\_\_\_\_ (See Ex. 12, supra). (As before noted Parent was not present)

\_\_\_\_\_ then testified that School was concerned about Student missing school in the late \_\_\_\_\_ of \_\_\_\_\_ (Tr. 100). Student was, however, promoted to \_\_\_\_\_ School. School felt that in view of Student's exceptional progress at \_\_\_\_\_, that special education in \_\_\_\_\_ next year (at \_\_\_\_\_ School) should be slightly reduced with more time in general education (Tr. 101, cf School's Ex. 10 with School's Ex. 12).

Shortly after the \_\_\_\_\_ meeting \_\_\_\_\_ tried to reach Parent by telephone without success (Tr. 102). On \_\_\_\_\_ sent a letter to Parent to confirm the \_\_\_\_\_ IEP meeting (See Student's Ex. 5). This letter reviewed the events relating to Student's surgery in late \_\_\_\_\_, and enclosed copies of the proposed ( \_\_\_\_\_ ) IEP, release of information forms, parental safeguards (School's Ex. 17), and a due process request form. (See Student's Ex. 5)

On \_\_\_\_\_ an IEP meeting was convened at School. School's Committee, Parent and \_\_\_\_\_ attorney were present (Tr. 101). That meeting ended shortly after its inception when Parent's attorney stated that there would be no IEP meeting until the due process request was processed and a Hearing Officer named \_\_\_\_\_ (Tr. 104, 111-114). The IEP proposed at this meeting was the same as the one sent to Parent which was the same as that prepared for the \_\_\_\_\_ meeting (Tr. 111). \_\_\_\_\_ then prepared a memo documenting what occurred at this meeting (See School's Ex. 13).

The School on \_\_\_\_\_ tried to hold an IEP meeting with Parent - this because it was graduation day for Student at \_\_\_\_\_ and \_\_\_\_\_ Parent was present (Tr. 115). Parent, according to \_\_\_\_\_, went to \_\_\_\_\_ car, promising to come right back, and attend, but never did (Tr. 115).

\_\_\_\_\_ concluded \_\_\_\_\_ testimony by stating that, in \_\_\_\_\_ opinion, the IEP for Student for \_\_\_\_\_ grade (i.e., \_\_\_\_\_ school) was "most appropriate", and would provide \_\_\_\_\_ with a Free Appropriate Public Education (FAPE), particularly in view of the progress Student had made in \_\_\_\_\_ school (Tr. 117-119). Likewise, \_\_\_\_\_ felt all of the earlier IEP's for Student at \_\_\_\_\_ were appropriate and that Student had not only received educational benefit (FAPE) but also had made much progress (Tr. 117-118).

On cross examination, \_\_\_\_\_ essentially confirmed \_\_\_\_\_ testimony on direct, noting that \_\_\_\_\_ always returned any calls \_\_\_\_\_ received from Parent (Tr. 120). \_\_\_\_\_ also explained the inconsistency between the date stamp of \_\_\_\_\_ on a copy of Parent's Due Process Request with date of \_\_\_\_\_ contained in that request. According to \_\_\_\_\_ the date stamp showed when \_\_\_\_\_ ( \_\_\_\_\_ ) got the copy of the request - not when the request was received by School - namely shortly after \_\_\_\_\_ (Tr. 134).

In response to questions by the undersigned, \_\_\_\_\_ stated that \_\_\_\_\_ felt there was no reason why the IEP meeting for Student should be deferred pending Parent's due process hearing request; and for this reason continued to urge an IEP meeting (Tr. 148-150). \_\_\_\_\_ also believed that Parent's brief due process hearing request of \_\_\_\_\_ was not sufficiently complete to comply with law, and thus had enclosed the School's suggested form along with the printed safeguards (School's Ex. 17) when \_\_\_\_\_ wrote to Parent on \_\_\_\_\_ (Tr. 139-142). However, according to \_\_\_\_\_, PS makes allowances for a parent's lack of sophistication with regard to due process complaints (Tr. 141-142).

#### IV.

#### ISSUES PRESENTED

As before noted, Parent raises only two procedural issues related to the Individuals with Disabilities Education Act, 20 U.S.C.A. 1400 et seq.(IDEA) and its governing regulations, namely:

1. Did the School violate the pertinent regulations by failing to promptly hold the required annual IEP review (i.e., for the school period beginning \_\_\_\_\_ ; and

2. Did the School timely institute a Due Process Hearing after it received the Parent's request on or about \_\_\_\_\_

School's defense raises the following issues:

3. Assuming the abbreviated IEP meeting of \_\_\_\_\_ was not timely resumed or replaced with another IEP meeting, did such delay prejudice Student's education (including the delivery of special educational services), or deny \_\_\_\_\_ a Free Appropriate Public Education (FAPE) as required by IDEA.

4. Was the brief handwritten note of \_\_\_\_\_ by Parent requesting a due process hearing in compliance with the appropriate regulations, and if not, did such preclude the due process request from being promptly processed?



Further, pursuant to the pertinent Virginia Regulations, this Hearing Examiner is required also to address the issue of whether Student was entitled to and receiving FAPE.

V.

## DISCUSSION

(a)

### Facts

There is no dispute that Student was attending school at from the through the grade. Likewise, it is undisputed that Student had been determined, since the grade, to be Other Health Impaired (OHI). Further, it is undisputed that was entitled to and was receiving substantial special educational services (40% in language and mathematics). Also, it is undisputed that all of the IEP's prepared in the years prior to were appropriate and consented to by Parent.

School's testimony and exhibits revealing that Student had made exceptional progress as a result of the special education supplied during school were undisputed. Indeed, the IEP proposed for Student's first year in school (i.e., grade), reduced the supply of special educational services from 40% to 32%. Parent consented to this IEP. Further, Parent did not challenge School's opinion, based upon the Student's past performance, that the special educational services supplied up to the grade had provided Student with outstanding results; and that the IEP for current (i.e., grade) school year is appropriate and is designed to provide with substantial educational benefit.

Although not fully developed at trial, it is apparent that various of the proposed IEP's in question here, (namely the IEP's proposed by School without Parent's presence on , and ) related to the proposed education of Student in grade at School (School's Ex. 12). Thus, if the proposed IEP's contained any deficiencies (which they do not appear to have) they are mooted by the now pertinent and agreed to IEP of , which covers the same period. Therefore, the impact of the procedural delays raised by Parent relates solely to Student's schooling at School during the period from until the end of the School year or.

There was also in place at an IEP dated , consented to by Parent, which covered the supply of special and general education services to Student for the period beginning and ending . See school's Ex. 4). There is no suggestion that the educational services called for therein were not supplied, nor is it challenged that Student continued to receive appropriate special and

general education services from School during the period from \_\_\_\_\_ through \_\_\_\_\_ when Student graduated from \_\_\_\_\_. Indeed, Student's excellent educational progress at \_\_\_\_\_ testifies eloquently as to the benefit provided to \_\_\_\_\_ the prior IEP's prepared for \_\_\_\_\_ while \_\_\_\_\_ was at \_\_\_\_\_.

While the record herein contains considerable evidence relating to injuries allegedly sustained by Student while at \_\_\_\_\_ as before noted, both parties agree that it is not an issue in this proceeding. At best, it is merely res gestae.

As earlier set forth, Parent's case seeks only to elicit findings in \_\_\_\_\_ favor establishing that the School unduly delayed holding an IEP meeting covering the balance of Student's School year at \_\_\_\_\_ beginning \_\_\_\_\_; and ending \_\_\_\_\_; and more importantly, a finding that \_\_\_\_\_ request for a Due Process Hearing of \_\_\_\_\_ was not acted upon within the five business day period required by the pertinent Regulations.

Driving Parent's request for such findings and a declaration that \_\_\_\_\_ is the prevailing party with respect thereto is the need for Parent to lay a foundation for a future request before an appropriate Court for the award of attorney's fees. As hereinafter set forth, the undersigned has no authority to award attorney's fees. Under the pertinent Federal regulations only a Court can award attorney's fees. However, to do this there must be findings justifying such award and declaring the Parent to be the prevailing party. Thus Parent here seeks to lay the factual foundation for a later request to the Court.

The evidence is confusing, and sometimes contradictory, with regard to Parent's contention that the \_\_\_\_\_ IEP was not promptly resumed. Parent is adamant in testifying that after \_\_\_\_\_ telephone call with \_\_\_\_\_ of \_\_\_\_\_, despite requests by \_\_\_\_\_, \_\_\_\_\_ heard nothing from School about convening another IEP meeting until \_\_\_\_\_ received \_\_\_\_\_'s letter of \_\_\_\_\_ with its enclosures. Parent, however, admits that \_\_\_\_\_ telephone answering service was off during the \_\_\_\_\_ of \_\_\_\_\_ (the exact dates were never given). And no dates were given by \_\_\_\_\_ as to when \_\_\_\_\_ purportedly called \_\_\_\_\_ or others at School regarding \_\_\_\_\_ request for an IEP meeting.

The School, on the other hand, insists that it repeatedly tried to reach Parent in order to set up an IEP meeting after the \_\_\_\_\_ meeting had been recessed. The School, apparently believing it had reached \_\_\_\_\_ prior to \_\_\_\_\_ convened an IEP meeting on \_\_\_\_\_, and prepared a proposed IEP for that meeting. Parent, as before noted, testified that \_\_\_\_\_ knew nothing about a meeting - so did not attend.

Finally, when the two parties finally met after admitted notice to Parent, namely on \_\_\_\_\_ in order to prepare an IEP for Student, Parent's counsel abruptly terminated the meeting refusing to consider any IEP until a hearing officer was appointed - this

despite entreaties from the School that they consider the IEP draft there present regardless of the pending due process request.

In retrospect, the School should have sent a return receipt letter to Parent promptly after its initial attempts to set a new IEP meeting had failed. And School should have documented its telephone requests during the period from early \_\_\_\_\_ until \_\_\_\_\_,

Parent also should have persisted in \_\_\_\_\_ attempts to reach the School - particularly after unplugged answering machine in the \_\_\_\_\_ of \_\_\_\_\_. Indeed, it appears that after delivering \_\_\_\_\_ demand for Due Process Hearing on \_\_\_\_\_, Parent lost interest in setting up an IEP meeting. That clearly was \_\_\_\_\_ position as of \_\_\_\_\_.

An appropriate IEP meeting was finally scheduled during Pretrial by joint agreement between the parties and the undersigned. It resulted in the now effective \_\_\_\_\_ IEP which is governing Student's current education in the \_\_\_\_\_ grade at \_\_\_\_\_ School.

The ultimate factual conclusion is that while the parties may have tried to communicate in the period from early \_\_\_\_\_ until \_\_\_\_\_ in order to set up an IEP meeting, no contact was ever proven.

The facts relating to Parent's request for a due process hearing are relatively undisputed: On \_\_\_\_\_, by way of a brief handwritten note of that date delivered to the School on that date, a written request for a due process hearing. No action was taken thereon until \_\_\_\_\_, on \_\_\_\_\_ mailed a packet to \_\_\_\_\_ enclosing a letter to \_\_\_\_\_, the School's due process request form (never returned to the School), a multi-page copy of the pertinent procedural safeguards relating to due process hearings and a copy of the proposed IEP (School's Ex. 17). On \_\_\_\_\_, the School named the undersigned as Hearing Officer, thereby setting in motion the due process hearing procedure requested by \_\_\_\_\_ on \_\_\_\_\_. This proceeding then ensued.

(b)

#### Pertinent Law

The governing Virginia Regulations place upon the School (i.e., Local Educational Agency "LEA") the burden of developing an IEP for each student determined to be eligible for special education services (See 8 VAC 20-80-62A). The governing regulations further require that an IEP Team, which includes the Parent (8 VAC 20-80-62-C a) "shall review the IEP periodically, but not less than annually" in order to assess the child's progress, any reevaluations, the child's anticipated needs and information supplied by the Parent or any other pertinent matters (8 VAC 20-80-62-6). (Underscoring Supplied)

The Virginia Regulations state also that the school's notice "should be in writing, but may be given in person or by telephone with proper documentation" (8 VAC 20-80-62-D a).

Pertinent here is 8 VA 20-80-62-D-2-4, which provides

"4 A meeting may be conducted without the parent or parents in attendance if the local educational agency is unable to convince the parent or parents to attend. In this case, the local educational agency must have a record of the attempts to arrange a mutually agreed on time and place such as:

- a. Detailed records of telephone calls made or attempted and the results of those calls;
- b. Copies of correspondence sent to the parent or parents and any responses received; and
- c. Detailed records made of visits made to the parent or parents' home or place of employment and the results of those visits.

It is clear from these provisions that the burden is upon the School to arrange for a timely annual review, after due notice to Parent, of Student's IEP. It initially did so and the IEP meeting of \_\_\_\_\_ ensued. However, after that meeting had been postponed to a future date, those same regulations imposed upon the School the continuing burden of setting up an appropriate continuation of that review IEP meeting, and providing the Parent with due notice thereof. This the School did not timely do. True it is that there were extenuating circumstances; and true it is that at least after \_\_\_\_\_, Parent did not wish to convene an IEP meeting, and true it is that the School tried on three occasions to hold the requisite review IEP meeting all without success - this because Parent was not present (allegedly according to Parent because \_\_\_\_\_ had no notice). Nevertheless, the annual review IEP meeting was not promptly held.

The School under 8 VAC 20-80-62-D-2 could have proceeded without \_\_\_\_\_, but again it did not fulfill all of the procedural steps required by the Virginia Regulations allowing it to so act. At the bare minimum the School should have sent \_\_\_\_\_ a certified letter return receipt required; and, it should have more carefully documented all of its various attempts to notify Parent of a proposed meeting, particularly before early \_\_\_\_\_. This School did not do. The School tried and acted in good faith, but nonetheless is in technical violation of the Regulations.

Having determined that Parent has prevailed upon the issue of School's failure to promptly hold an annual IEP review for Student in accordance with the pertinent Virginia Regulations, the next question is whether Student was injured or denied FAPE thereby.

Clearly, was not. The landmark case of Board of Education v. Rowley, 458 U.S. 176 (1982) requires School to provide Student with an IEP reasonably designed to provide Student with an appropriate educational opportunity. accord: Bales v. Clark, 523 F. Supp. 1366 (E.D.Va. 1981). This School clearly did. Thus, as to alleged procedural violation number 1, Parent has proved a technical violation, but this violation of the Regulations (namely failure to promptly hold the annual review IEP) falls under the category of Damnum Absque Injuria. In short, a wrong with no legal injury or damage to the plaintiff (Cf. Salley v. St. Tammany Parish School Bd., 57 F. 3d 458 (5 Cir. 1995). Parent is thus entitled to no relief by way of additional special or general educational services for this technical default - and, indeed, has sought none. Accordingly, none will be given.

Parent's case with regard to the failure of the School to promptly convene a due process hearing as requested by Parent on is likewise proven. The pertinent Virginia Regulations require that School "shall appoint" the hearing officer within five business days of the request for a hearing." (8 VAC 20-80-76 C 4) This School did not do. The written request for a due process hearing to determine placement (Cf. VAC 20-80-76 B) was made on The undersigned was not appointed until , more than 40 days after the deadline.

Again there were extenuating circumstances. The Parent's request did not comply with the procedural requirements of 8 VAC 20-80-76 C 2 b, c, d and e. However, School should, and indeed does, take into consideration a parent's lack of sophistication concerning procedural technicalities. (See 8 VAC 20-80-76 I 4, ensuring that parent's right to a hearing is not delayed or denied for failure to complete the request notice).

Also, School was under the impression that Parent had abandoned request ... but, unfortunately it was unable to prove that Parent withdrew request. In any event, the Regulation is clear in requiring that the School (LEA) must appoint a hearing officer within five business days of receipt of the request. This, absent clear proof of a withdrawal by Parent, preferably in writing, School must do (See: 8 VAC 20-80-76 D 2).

Again, having found a violation, namely improper delay, the question next is whether Student suffered any educational injury due to that delay. Again, the answer is no. Even if a due process hearing had been promptly held and its decision rendered within 45 days, the school year (which ended ) would have ended before any effective educational relief for that year could be supplied.

More importantly, Parent here seeks no relief by way of educational order or special education modifications. No educational harm is present. Parent seeks only a factual determination relating to procedure. And, equally as important, whatever earlier procedural flaws which might have existed with regard to Students future education were cured by the review IEP as to which Parent consented (School Ex. 16).

Accordingly, since no relief relating to Student's education, special or general, was sought by Parent, and there appearing to be no basis in this record for awarding the same or modifying the IEP, none is awarded herein; and that IEP is confirmed.

With regard to attorney's fees the parties and the undersigned are in agreement that only a Court may award the same. Cf. 30 CFR 300.513; Prince William County School Board v. Malone, 662 F. Supp. 999, CE.D.Va. 1987) (holding that a Virginia hearing officer has no authority to award attorney's fees).

The School argues, most convincingly, that Parent should not be declared to be the prevailing party herein because Parent requested no and achieved no substantive relief. See e.g., Cady v. Chicago, 43 F3d 326 (7 Cir. 1994); Salley v. St. Tammany Parish School Bd., *supra* (a case under IDEA). Parent counters with the assertion, as is true, that 8 VAC 20-80-76 K11 requires the Hearing Officer to rule upon each issue presented and determine the prevailing party with regard thereto. This the undersigned has done.

Finally, with regard to Parent's attempt to limit this hearing solely to a consideration of two procedural points, the very Virginia Regulations relied upon by Parent in case require the undersigned in a due process hearing to include in findings a determination of whether, *inter alia*, the child has a disability; whether the child needs special education and related services, and whether the LEA is providing a Free Appropriate Education (FAPE) to the child. (See 8 VAC 20-80-76-J 17; See also 34 CFS Section 300.508, 511, 521 and 528). This the undersigned also has done herein.

## V.

### FINDINGS OF FACT

1. Student is an \_\_\_\_\_ year old \_\_\_\_\_ currently attending \_\_\_\_\_ school ( \_\_\_\_\_ grade) at \_\_\_\_\_ School in the \_\_\_\_\_ Public School System ( \_\_\_\_\_ PS).
2. Student was diagnosed as Other Health Impaired (OHI) when \_\_\_\_\_ first began to attend \_\_\_\_\_ PS, namely at the \_\_\_\_\_ School (" \_\_\_\_\_ ") in the \_\_\_\_\_ grade.
3. Student was determined to be eligible for Special Education in the \_\_\_\_\_ grade and has so designated by \_\_\_\_\_ PS from that date forward.
4. Student was receiving special education services at \_\_\_\_\_ for about 40% of \_\_\_\_\_ basic school studies, namely in language and mathematics, the rest of \_\_\_\_\_ education (60%) being in general classes.
5. Student made exceptional educational progress while at \_\_\_\_\_.

6. Student was promoted from \_\_\_\_\_ to \_\_\_\_\_ School at the close of grade (in \_\_\_\_\_).
7. Student currently receives 30% of \_\_\_\_\_ education by way of special educational services delivered at \_\_\_\_\_ School, which Student began in \_\_\_\_\_.
8. The Individualized Educational Program (IEP) currently in force for Student, dated \_\_\_\_\_, was approved by Student's Parent.
9. Student at \_\_\_\_\_ was being educated by IEP's which had an annual anniversary date of \_\_\_\_\_.
10. Student's last IEP at \_\_\_\_\_ which was consented to by Parent, was dated \_\_\_\_\_ and covered the school period up to \_\_\_\_\_.
11. On \_\_\_\_\_ School, after due notice to Parent, and with Parent in attendance, convened an IEP committee to approve the required annual IEP review for the next year.
12. School recessed this meeting when Parent's representative orally requested homebound schooling because of the possible continuation at school of medical trauma problems.
  - a. School's IEP Committee wished to discuss this unforeseen request with \_\_\_\_\_ (Student's Special Education Coordinator) who had been overseeing special education services since the \_\_\_\_\_ grade before proceeding further.
  - b. \_\_\_\_\_ was against home schooling because Student was making excellent progress at \_\_\_\_\_ pursuant to its Special Education program.
  - c. In the past when Student had been home schooled \_\_\_\_\_ educational progress had been drastically reduced.
13. On \_\_\_\_\_ and Parent talked by telephone.
  - a. At this time, \_\_\_\_\_ explained that \_\_\_\_\_ wished to talk to Student's physicians before School reconvened the \_\_\_\_\_ annual review IEP meeting.
  - b. School was having trouble in reaching these physicians.
14. Parent testified that \_\_\_\_\_ heard nothing further about an IEP meeting from the School until late \_\_\_\_\_.

- note to
- a. Parent wanted to obtain a current IEP for Student and had written a so requesting on
  - b. Parent stated had no knowledge about a IEP meeting to be held at School on and thus, did not attend.
  - c. Parent in the of disconnected answering service.

15. testified that and others at the School had repeatedly tried to contact Parent to set up the IEP meeting, primarily by leaving telephone messages, but had been unable to reach Parent.

a. School attempted to convene an IEP meeting on , but could not proceed to an agreed upon review IEP because Parent was not present. It nonetheless prepared a proposed IEP for Student.

16. On , Parent, by way of a brief handwritten note dated and delivered to the School on that date, requested a due process hearing "on the placement" of Student.

17. Upon learning of the aforesaid request tried unsuccessfully to reach Parent by telephone; thereafter on mailed to Parent a due process request form prepared by the School together with a copy of the federal regulations relating to Parent's rights and due process procedures.

a. earlier apparently believed that was not interested in pursuing a due process hearing but merely wanted an IEP meeting.

18. As a part of the written communication to Parent from informed Parent that an IEP meeting for Student would be held on at the School; Parent was also given a copy of the School's proposed IEP.

19. An IEP meeting for Student was duly convened on with all of the School's required personnel present.

a. Parent and attorney were also present.

20. Parent's attorney refused to allow the IEP Committee to consider the proffered IEP for Student until a hearing officer had been appointed pursuant to Parent's requests for a Due Process Hearing.

a. The School tried, unsuccessfully, to persuade Parent and attorney, to consider the IEP then proposed notwithstanding the pendency of the due process request, but Parent and counsel abruptly left.



21. The School appointed the undersigned as Hearing Officer for this cause on

22. On (Student's graduation day from School) the School approached Parent, who was present there, and urged to immediately meet with the School's IEP Committee, also present, in order to prepare an IEP for Student.

a. Parent refused to attend.

23.. Pursuant to the Second Pretrial Order entered herein or and with the full consent of the parties, an IEP was prepared for Student covering the current school year.

a. Parent consented to that IEP which is now in effect for Student at the School of PS.

b. An appropriate Triennial Review was also held, pursuant to that Pretrial Order, in late

## VII.

### CONCLUSIONS OF LAW

1. Student is and has been entitled to receive special educational services pursuant to IDEA since began schooling at PS.

2. Student has received appropriate special educational services called for by the respective IEP's for Student and has duly progressed thereunder.

3. Student has been and is currently receiving a Free Appropriate Public Education (FAPE), as called for by IDEA in accordance with Board of Education v. Rowley, supra and Bales v. Clark, supra.

4. Parent, in this proceeding has not challenged the educational placement or special education services currently being provided to or in the past provided to Student by PS.

a. Parent seeks no relief, amendment or modification relating to the Special Education or general education being provided to Student by PS pursuant to the IEP.

b. Upon the record herein, Parent is not entitled to any educational services for Student pursuant to IDEA other than those currently being supplied.

c. The IEP for Student, being consented to by Parent and satisfactory to School, is hereby confirmed.

5. School, contrary to the appropriate Virginia regulations, failed to timely reconvene the annual review IEP meeting began on and Parent prevails upon this issue.

a. This delay did not prejudice, impact or otherwise adversely affect Student's education or the provision of special education services to by PS.

b. This delay did not deprive Student of FAPE, and the School prevails upon this issue.

6. The School failed to timely appoint a hearing officer to hear Parent's request for a due Process Hearing made on and Parent prevails on this issue.

a. Parent's failure to fully set forth the basis for that request did not prevent PS from promptly appointing a hearing officer as required by the pertinent regulations.

b. The failure of PS to timely appoint a hearing officer did not prejudice, impact or adversely affect Student's education or the provision to of appropriate special educational services.

c. The failure by PS to promptly appoint a hearing officer did not deprive Student of FAPE and School prevails upon the issue.

7. The undersigned has no authority to consider or award attorney's fees.

## VII.

### ORDER

There being no request by either party to enter an order pertaining to Student's education (as to which this Hearing Officer clearly has authority to consider), and there being no bases in the record for the issuance of such an order, none is entered herein

By: \_\_\_\_\_

Hearing Officer

IX.

RIGHT OF APPEAL

Parent and School each have the right to a review of this decision by filing an appropriate written appeal in either a State Circuit Court or appropriate Federal District Court within one (1) year from the date hereof.

X.

PROOF OF SERVICE

I hereby certify on this      day of                      that a copy of the foregoing Decision was mailed, first class mail, postage prepaid to:

Ms. Brenda Briggs, Coordinator  
Office of Due Process and Complaints  
Virginia Department of Education  
P.O. Box 2120  
Richmond, Virginia 23216-2120