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VIRGINIA DEPARTMENT OF EDUCATION

DUE PROCESS HEARING REPORT

SCHOOL DIVISION: [redacted] PUBLIC SCHOOLS
LEA COUNSEL: [redacted]

NAME OF PARENTS: [redacted]
NAME OF CHILD: [redacted]
PARENTS' COUNSEL: [redacted]

PARTY INITIATING HEARING: PARENTS

HEARING OFFICER: [redacted]

INTRODUCTION

This matter came for hearing on [redacted], in [redacted] in the town of [redacted] Virginia, before [redacted] duly appointed Hearing Officer. Present in person in addition to this Hearing Officer and the Court Reporter were the parents and their counsel, as well as parents' counsel's legal assistant, counsel for the LEA and the School Division's representative, [redacted]

The due process hearing was requested by counsel on behalf of the parents on [redacted] as a result of their claims for reimbursement for expenses related to their [redacted] placement at the [redacted] School for the [redacted] Specifically, the parents sought reimbursement for educational expenses from [redacted] through [redacted], and related transportation and extended school year expenditures. (Hearing Officer Exhibits 6 and 7).[1] The extended school year reimbursement issues were resolved through mediation in advance of the hearing and the issue withdrawn from this Hearing Officer's consideration. The transportation reimbursement issues were resolved by counsel the morning of the hearing, and accordingly withdrawn from this Hearing Officer's consideration.

The sole remaining issue for resolution is the parents' claim for reimbursement for educational expenses related to the child's placement at the [redacted] School for the [redacted] (hereinafter '[redacted] from [redacted] through [redacted] While convened for the hearing of this matter, the parties, through counsel, advised this Hearing Officer that they had stipulated to all relevant facts and that the matter could be appropriately decided without resort to live testimony. At the parties' joint request, the hearing was concluded without the presentation of any live testimony. The parties' stipulated to all documentary evidence and this Hearing Officer accepted the same, without objection, into the record. Counsel for the parties' stipulated

[1] Hearing Officer Exhibits will be designated by the letters HO, followed by the exhibit number. Parents' exhibits will be designated by the letter P, followed by the exhibit number. School Board exhibits will be designated by the letters SB, followed by the exhibit number.

to a briefing schedule and requested that this Hearing Officer issue a ruling based exclusively on the documentary record and written submissions.[2]

FINDINGS OF FACT

Based upon the stipulations of the parties, this Hearing Officer makes the following findings of fact:

1. The Student was born on [redacted]

2. The Student was most recently found eligible for special education services through [redacted] Public Schools ([redacted]PS") on [redacted] with the Identified Handicapping Conditions of [redacted] (primary) and [redacted] (secondary).

3. For the [redacted] school year, the Student, then aged [redacted] was served in a self-contained class in a regular school facility, after the Parents' request for a residential placement was denied.

4. An Individualized Education Program ("IEP") meeting to discuss the Parents' request for Student to attend the Summer [redacted] Program at [redacted] School for the [redacted]") was held on [redacted] and the matter of funding the recommended summer program at [redacted] was referred to the [redacted] Family Assessment and Planning Team ("FAPT").

5. FAPT convened on [redacted] and voted to recommend to the Community Policy and Management Team (CPMT) that Student participate in the [redacted] Summer Program from [redacted] through [redacted] using Comprehensive Services Act funds.

6. CPMT met on [redacted] and accepted FAPT's recommendation to fund the [redacted] Summer Program for Student from [redacted]

7. An IEP meeting was held on [redacted] and a residential placement was determined to be the least restrictive appropriate placement based on this [redacted] year old Student's "assessed deficit areas and the need for Total Communication and a consistent [redacted] training program."

8. On [redacted] Parents notified [redacted]PS of their intent to privately place Student at [redacted] on [redacted] the first day of school at [redacted]

9. Parents considered [redacted] an appropriate placement.

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[2] Sifting through the documentary evidence without the aid of live testimony was no easy task, but did provide a measure of immediate relief in dealing with the numerous allegations raised on brief that were unsupported by any citation to the record, as the record (or universe of evidence) was conveniently limited.

10. On [redacted], after receipt of Parents' faxed letter, [redacted]PS notified Parents by phone message and faxed letter not to enroll Student at [redacted]. Parents received the phone message and the faxed letter on [redacted].

11. Parents placed Student at [redacted] on [redacted].

12. The FAPT meeting to discuss student's case was scheduled for [redacted].

13. The letter dated [redacted] from the CSA Coordinator was the first time that the requirement of approval of out of state placements by the "Interstate Compact of Virginia" was referenced in connection to Student's case.

14. From [redacted] until [redacted], [redacted]PS was considering placement options for Student in addition to [redacted].

15. [redacted]PS made the determination to place Student at [redacted] on [redacted].

16. FAPT met on [redacted] and recommended Student's placement in the 7-day residential program offered by [redacted].

17. On [redacted], the Parents requested an IEP meeting to finalize the [redacted] IEP. Scheduling of this meeting required coordination among [redacted]PS, [redacted], and the Parents.

18. The sending agency, for purposes of the Interstate Compact Placement Request, was [redacted]PS. The Interstate Compact Placement Request was signed by the [redacted]PS case manager on [redacted], signed by the Virginia State Compact Administrator on [redacted] and signed by the [redacted] Compact Administrator on [redacted].

19. The IEP meeting to finalize the [redacted] IEP was held on [redacted] and the private placement where the Student had been unilaterally enrolled since [redacted] was confirmed as an appropriate placement.

20. The amount of tuition owed the [redacted] School for the [redacted] for the period [redacted] through [redacted] is $28,292.70. CPMT denied payment on [redacted] for this six week period in accordance with its interpretation of CSA policy.

ARGUMENTS RAISED

The parents argue that there was no IEP in effect for [redacted] at the beginning of the [redacted] school year, and that this procedural and substantive violation of IDEA constituted a failure by the LEA to provide [redacted] with the federal and state-mandated FAPE. Their argument continues that this denial of a FAPE necessitated their enrollment of [redacted] in a private residential facility, namely [redacted] and that the financial responsibility for this placement should be borne by the LEA. The parents also argue that [redacted] was denied a FAPE because they were denied effective participation in the IEP development and the placement process (from [redacted] to

[redacted], and that the LEA improperly allowed funding considerations to delay [redacted] appropriate private placement (from [redacted] to [redacted]. The parents' allege that the LEA prevented them from giving it timely notice of their intent to place [redacted] at [redacted].

The LEA itself placed [redacted] at [redacted] and accepted financial responsibility for this placement as of [redacted]. The dispute focuses of payment from the beginning of the [redacted] school year, [redacted] until the date the LEA assumed financial responsibility for the placement. The LEA denies responsibility for all [redacted] expenses prior to [redacted] on the grounds that the parents failed to give it the statutorily required notice in advance of their unilateral placement, and failed to give it sufficient time to implement [redacted] IEP. The LEA also contends that the parents' placement of [redacted] at [redacted] was "inappropriate and premature" prior to [redacted].

DISCUSSION AND CONCLUSIONS OF LAW

Based upon all of the evidence presented, the applicable statutes, regulations and case law, and the arguments presented by the parties, the Hearing Officer makes the following conclusions of law:

1. [redacted] ([redacted]) is handicapped, having [redacted] disabilities and comes within the purview of IDEA.

2. [redacted] requires specific education and related services in order to derive benefit from [redacted] education.

3. At all times relevant hereto, [redacted] parents have resided in [redacted] Virginia, thus [redacted] Public Schools ("LEA" [redacted] or "[redacted]PS") is responsible for educating [redacted] and providing [redacted] with a Free Appropriate Public Education ("FAPE").

4. Parental notice requirements were satisfied by the LEA.

DISCRETIONARY AWARD

The case law regarding financial responsibility for a unilateral private residential placement is clear: The LEA *may be* held responsible if (1) it did not provide a FAPE and (2) the private placement was educationally necessary and appropriate. IDEA permits the discretionary denial or reduction of reimbursement when parental/unilateral placement occurs without 10 business days prior notice to the LEA.[3]

[3] In HO 2, paragraph 8, the parties were ordered to identify the issues in the case at or before the pre-hearing conference, and WERE put on notice that issues not timely raised would not be considered. The parties responded with HO 6, 7, and 12. No objections were heard to HO 13, the Initial Pre-Hearing Report and Addendum. No objections were heard to the same identification of issues at the commencement of the hearing. For the first time in its reply brief, the LEA characterizes this case as concerning "a challenge by the [parents] to the statutory process mandated by the Commonwealth of Virginia for the placement of students with disabilities in out-of-state facilities. This case should not be confused with a routine request for reimbursement...." LEA reply brief at 1. This Hearing

FAPE

To determine whether the parents are entitled to any reimbursement for placing [redacted] at [redacted] from [redacted] through [redacted] this Hearing Officer must determine whether the [redacted], IEP was appropriate. In determining whether an IEP is appropriate and whether the school system has fulfilled its obligations to provide a student with a FAPE, the proper inquiry is twofold. See *Board of Educ. V. Rowley, 458 U.S. 176, 206, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982).* (1) Whether IDEA's procedural requirements in developing and implementing the IEP were complied with and (2) whether the IEP is "reasonably calculated" to enable the child to receive educational benefits. See *id. at 206-07.* The failure to meet the procedural requirements of the Act itself is an "adequate ground . . . for holding that a school failed to provide . . . a FAPE." *Hall v. Vance County Bd. Of Educ., 774 F.2d 629, 635 (4th Cir. 1985).*

The federal regulations provide that "at the beginning of each school year, each public agency shall have in effect an IEP for every child with a disability within its jurisdiction." "An IEP [must be] in effect before special education and related services are provided to an eligible child under this part; and [be] implemented as soon as possible following the meetings under § 300.343." 34 C.F.R. § 300.342 (1999). In addition, the Secretary's interpretive guidelines provide that an IEP is considered "in effect" when the IEP (1) has been developed properly (at meetings involving all of the participants specified in the statute); (2) is regarded by both the parents and agency as appropriate with respect to the child's needs, goals and objectives, and services to be provided; and (3) will be implemented as written. See 34 C.F.R. pt. 300 app. C (question 3) (1997). If there is no IEP in effect at the beginning of the school year, then IDEA's requirements have been violated and there is adequate ground for holding that the LEA failed to provide a FAPE.[4]

The only IEP at issue in this case is dated [redacted] (P 11/SB 1). This five page document is legally inadequate and obviously incapable of being implemented as written. As noted by the parents, this document "was missing most of the required sections. This IEP did not contain a statement of annual goals, including short-term instructional objectives; did not contain

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Officer will not consider the introduction of this new issue, in blatant violation of the order set out in HO2. Nonetheless, this Hearing Officer finds that this new issue is overshadowed by the findings herein, as follow, and is thus rendered moot. For the same reason (mootness), this Hearing Officer denies the LEA's suggestion that the SEA must be joined as a necessary party to this matter. This untimely suggestion underscores the untimeliness of the underlying argument. The LEA is estopped from requesting the joinder of the SEA, for the first time, subsequent to the scheduled hearing of this matter.

[4] The LEA makes much of placing the burden of proof in this case on the parents. Notably, when this Hearing Officer raised this issue at the pre-hearing conference, LEA's counsel denied the significance of the question and argued that deciding this case on the basis of burden of proof would constitute reversible error on appeal. Ironically, it then raised the issue on brief. Without deciding the question, this Hearing Officer must ultimately agree with the LEA's initial position and that argued by the parents in their reply brief: the issue is a "red herring," because ultimately the evidence on the record clearly enables this Hearing Officer to make a decision on the case, on its merits by a preponderance of the evidence, without placing the burden on either party. If, as the LEA contends, the burden of proof is on the parents, then they have met it.

a statement of the specific special education and related services to be provided for the child, did not contain the projected dates for initiation of services and the anticipated duration of the services (month, day, and year); and did not contain appropriate objective criteria and evaluation procedures and schedules for determining, at least annually, whether the short term instructional objectives are being achieved." Parents brief at 11. Substantively, it is too woefully deficient to deserve further amplification on the point. Although the parties have generously stipulated that this IEP was "finalized" at a [redacted] meeting, a comparison between the two documents clearly demonstrates that [redacted] IEP was not fully developed until [redacted] The [redacted] document does not meet the requirements of state and federal law; the [redacted] document (SB 20) is 31 pages long and contains all of the requirements of state and federal law.[5] Thus, I find that:

5. There was no IEP in effect for [redacted] at the beginning of the [redacted] school year.

6. The [redacted]PS failed to provide [redacted] a FAPE.

The LEA's brief thoroughly discusses and argues the reasonableness of the administrative delay during which it "implemented" [redacted] IEP. In its initial statement of issues, the LEA characterized this same IEP as being "in effect," although it does not use this term again in its brief. See HO 12. The use of these terms is misleading since the terms have special meaning in this context and it is clear that the [redacted] was not in a state or form that rendered it "in effect" or capable of being "implemented as written." As a practical matter, there can be no implementation delay where there is no IEP to implement.

The LEA's position, that the administrative delay (from [redacted] through [redacted] may not have been avoidable, is appreciated. The plain language of the Virginia Interstate Compact Act ("VICA") makes clear that the LEA could not have taken any abbreviated route to achieve the [redacted] placement without exposing itself to potential criminal liability for violating VICA's mandate.[6] Nonetheless, compliance with VICA does not excuse the LEA from

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[5] The LEA relies heavily on the warnings it gave the parents of its unwillingness to pay for [redacted] in advance of exhausting all administrative paperwork requirements. This is a most troubling argument that, in effect, the LEA should be excused from violating IDEA by the parents' knowing and voluntary waiver. The cases cited by the LEA do not support this position. There are, clearly, specific mandates of IDEA that *can* be waived by a parent, but overall compliance cannot be and it violates the spirit of IDEA to suggest that a school can avoid its obligations to a student by merely giving a parent advance warning of its intention to do so and daring the parent to act contrary to its instructions. It is a black letter principle of contract law that a court may refuse to enforce a contract that is illegal or otherwise contrary to public policy, despite a signatory's consent thereto. Having found the [redacted] IEP to be contrary to the mandates of, and incomplete under, IDEA, it is void and enforceable despite the parents' alleged "consent" thereto.

[6] Va. Code Ann. § 63.1-219.2 (2001)
ARTICLE IV. Penalty for Illegal Placement
The sending, bringing, or causing to be sent or brought into any receiving state of a child in violation of the terms of this compact shall constitute a violation of the laws respecting the placement of children of both the state in which the sending agency is located or from which it sends or brings the child and of the receiving state. Such violation may be punished or subjected to penalty in either jurisdiction in accordance with its laws. In addition to liability for any such punishment or penalty, any such violation shall constitute full and sufficient grounds for the suspension or

compliance with IDEA: in the end, IDEA required the LEA to have an IEP in effect for [redacted] at the beginning of the [redacted] school year, and it is clear that this was not accomplished.

In light of the above analysis, the "placement" issue, so thoroughly briefed by the LEA, is moot. It is almost ironic, though, that the LEA's counsel devoted so much effort to explaining it to this Hearing Officer when, had the LEA incorporated and applied the explanation to its development of [redacted] IEP in [redacted] of [redacted], this whole situation might have been averted. After all, the [redacted] document could have had much the same content of the [redacted], without designation of the exact residential setting as IDEA permits the IEP to designate an "anticipated" location for services. 20 USC 1414 (d)(1)(A)(vi).

This Hearing Officer declines to comment on the parents' allegation that the LEA committed procedural violations of IDEA by failing to include them in the "placement" decision. The argument is moot under the circumstances.

The LEA's argument regarding the SEA's potential liability for tuition period at issue raises an interesting point, which is however, not only untimely but moot under the circumstances. The failure to have an IEP in effect at the beginning of the [redacted] school year is attributable to the LEA, not the SEA, and thus there is no legal basis for imposing the disputed financial responsibility on the SEA rather than the LEA.

PARENTS' PLACEMENT

In its briefs, the LEA for the first time challenges the appropriateness of the parents' "premature" [redacted] placement, and alleges that "services would have been available to [redacted] at [redacted] under the last IEP until the placement would be approved" and that "the current IEP ... would have continued in effect until the residential IEP was implemented." Brief at 2 and 10. Absolutely no evidence supports the LEA's new allegation and no "last" or "current" IEP has been referred to in this proceeding. Neither party has submitted that the Extended School Year IEP amendment, or excerpts from the [redacted] IEP, (P 8b or 7a), are documents under consideration. The absence of any evidence tending to suggest that any services were in fact offered to [redacted] for the anticipated period of administrative delay is curious. As this Hearing Officer has not seen or heard any evidence to support the LEA's allegation, no weight or credibility can be afforded to it. This missing evidence is crucial because it is one of the key facts that distinguishes this case from *Board of Education v. Brett Y.*, a 1998 unpublished decision out of the Fourth Circuit and relied upon by the LEA. The only IEP on the table is P 11 and SB 20, and it has been found legally inadequate.

Logically then, the LEA's only objection to the parents' [redacted] placement can be that it was "premature." But this is not a proper substantive objection because the law requires that the appropriateness of a placement be evaluated only in terms of affording educational benefit. *See, Rowley.* The LEA's subsequent confirmation of [redacted] as the appropriate placement, or location for services, for [redacted] is significant, as is the fact that no other placement or service

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revocation of any license, permit, or other legal authorization held by the sending agency which empowers or allows it to place, or care for children.

location was identified in a valid or relevant IEP document placed before this Hearing Officer for consideration. As a result, there is no basis upon which a finding of educational benefit can be made vis-à-vis some other placement or service location. Clearly, some placement is necessary to afford educational benefit; the parents' proffer that [redacted] afforded [redacted] educational benefit goes unchallenged by the LEA. As a result, I also find that:

7. [redacted] was an appropriate placement.

REIMBURSEMENT AMOUNT

It is clear that IDEA grants this Hearing Officer discretion to deny or reduce the parents' claim for reimbursement for failure to provide 10 business days advance notice to the LEA of their intent to privately place [redacted] at [redacted]

> (ii) Reimbursement for Private School Placement
> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or hearing officer *may require* the agency to reimburse the parents for the cost of that enrollment *if* the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.
>
> (iii) Limitation on Reimbursement
> The cost of reimbursement described in clause (ii) *may* be reduced or denied-
> If- (aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
> (bb) 10 business days (including any holidays that occur on a business day prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in division (aa);
>
> (iv) Exception
> Notwithstanding the notice requirement in clause (iii)(1), the cost of reimbursement may not be reduced or denied for failure to provide such notice if –
> (III) the school prevented the parent from providing such notice:

20 U.S.C. 1412(a)(10)(C) (emphasis added). As relevant to this case, Virginia's regulations regarding reimbursement, found at 8 VAC 20-80-66 (B) (4-5), are not significantly different.

This Hearing Officer notes that the decision to deny or reduce a reimbursement request is discretionary, as is the decision to award reimbursement in the first instance. The only exception to the discretionary standard, is if "the school prevented the parent from providing such notice" and a denial or reduction might otherwise be made for deficient notice.

The parties have stipulated that the parents first gave notice to the LEA on [redacted]. They placed [redacted] at [redacted] on [redacted] was a [redacted], and the following [redacted] was [redacted]. Thus, the parents' gave only 1 business day's advance notice to the LEA. This enrolment was without the consent or referral of the LEA. SB 3, 4, 9. As of the beginning of the [redacted]PS school year, and as of [redacted], [redacted] was without educational services provided by [redacted]PS, and had been without such services for about a month. P 12b. As a matter of law, I find that:

8. The parents failed to give the LEA 10 business days advance notice of their intent to privately place the child. The parents gave the LEA 1 business day of advance notice of their intent to privately place the child.

9. The parents enrolled [redacted] in a private secondary school without the consent of or referral by the LEA (public agency).

10. The parents enrolled [redacted] at [redacted] on [redacted]

11. The LEA had not made a FAPE available to [redacted] for the [redacted] school year in a timely manner, or at all, prior to [redacted].

The LEA attacks the adequacy of the parental notice not only as untimely but also in substance because it alleges the parents failed to "state their concerns." This point is not well taken in light of the letter dated [redacted] admitted as Parents' Exhibit 12(b). This Hearing Officer agrees with the parents that they "set forth their major concerns justifying their unilateral placement: 1) that [redacted] begin [redacted] residential placement in a timely fashion for this [redacted] school year; 2) that [redacted] had not received needed and promised support services in the areas of communication and [redacted] after [redacted] return from this summer program; 3) that [redacted] had been without needed supports for almost five weeks, jeopardizing progress that was made at [redacted] during the summer; 4) that [redacted] had a critical need to be in a setting which appropriately met [redacted] needs; 5) that [redacted] had only a few years left in which to acquire the skills needed to live out [redacted] life in the least restrictive setting; 6) that [redacted] had to make enormous progress as [redacted] was far behind where [redacted] should be; 7) that the adolescent developmental years were crucial; 8) that [redacted] needed the continuity afforded by returning to a program staffed with professionals, trained in teaching the [redacted], who at that time had then had extensive experience with [redacted]; 9) that there was no other comparably appropriate program; and 10) that [redacted] needed a 24 hour a day/7

day a week immersion in Total Communication and intensive [redacted] training." Parents' Reply Brief at 1-2. Though perhaps not timely, this letter was not substantively deficient.[7] I find that:

12. The parents' notice to the school was sufficient to inform the IEP Team of their concerns and their intent to enroll their child in a private school at public expense.

The parents allege that the LEA prevented them from giving timely notice of their placement of [redacted] at [redacted]. The problem with this allegation, like so many raised by both parties on brief, is that it is objectively unsupported by any testimonial evidence (which the parties declined to present) or any documentary evidence of record. The mere argument of counsel cannot support any finding by this Hearing Officer on this point. This Hearing Officer's review of the documentary evidence underscores only that there were, in fact, scheduling conflicts and delays cited by both parties in this case. But there is no basis for this Hearing Officer to find that they were deliberately imposed by the LEA, with or without malice, for the purpose of interfering with the child's or parents' rights under IDEA. Thus, while it is fair to find that there were delays that may have impacted the timing of the parents' notice, there is no evidence to support a finding that the LEA acted deliberately to prevent the parents' timely notice of their placement decision.

13. The school did not prevent the parents from providing notice.

WEIGHING OF THE EQUITIES

The above findings make clear that this Hearing Officer's discretion in awarding or denying the parents' reimbursement claim is unfettered by the strictures of the law. Thus, a balancing of the equities must be made.

Critical to this Hearing Officer's consideration of the equities is that although the LEA was allegedly doing its best to comply with various administrative mandates, including the very clear legal mandates of the Interstate Compact Act, it did so without placing [redacted] in any appropriate *interim* educational setting pending all administrative approvals. In its initial statement of issues (HO 12), the LEA, by counsel, drew this Hearing Officer's attention to the Fourth Circuit's opinion in *Brett Y.* There, the Fourth Circuit held that a 30 day administrative delay in implementing an IEP did not deny the student a FAPE. However, in that case, the student had the benefit of an effective IEP and an interim placement. Unlike [redacted], that student was not sitting at home without any educational services. The parents' reimbursement request will not be denied because the LEA's violation of IDEA was just too blatant and too egregious in this regard.

The LEA's request that the parents' reimbursement request be reduced, for their failure to give sufficient advance notice of their intent to privately place [redacted], is granted. The parents were not without blame in the delays of which they complain. See P 9a (parents offered only two available dates for an IEP meeting, and only on the later date would the crucial [redacted] summer evaluation, dated [redacted] (P 10) have been available). Furthermore, the [redacted] IEP was

[7] Even if a reviewing court were to disagree with this finding, it should be noted that it was not outcome determinative to this Hearing Officer's discretionary award in this case.

clearly insufficient, and the parents were, as a result, at that time on notice that the LEA was not guaranteeing [redacted] placement as of the commencement of the [redacted] school year. In fact, as of the commencement of the [redacted]PS school year, [redacted] had no services and the LEA had not offered any projected date for the commencement of services, and the parents were in a position on [redacted] to give the LEA notice that they rejected the IEP that failed to set forth any specifically identified placement/service location and left [redacted] with no services at the beginning of the school year.

Absent any testimonial evidence to the contrary, an objective reading of the documentary evidence tends to demonstrate that the parents and the school were trying their best to maintain a productive and cordial relationship and attend to [redacted] educational needs. There is nothing to suggest any malevolence on the part of any party hereto. Unfortunately, it appears that in the process, the LEA lost sight of the forest for the trees. In hindsight, perhaps the LEA will acknowledge that it had a federally mandated duty to [redacted] and it needed to get the job done and have an IEP in effect for [redacted] at the beginning of the school year, even if the placement/service location[8] could only be noted as "anticipated." Furthermore, the LEA should have recognized that leaving a student without services for five weeks, and then not committing to so much as a time frame when services would commence, borders on the outrageous, given the clear mandates of IDEA. The LEA should have taken control of the situation well in advance of [redacted]

But, federal law clearly requires 10 business days notice from the parents; they ultimately gave 1 business day of notice. Their reimbursement request is reduced by 9 days. This reduction appears to roughly comport with the parents' stated expectations of the kind of delay they might have tolerated. (Parents' reply brief at 4-5). Furthermore, this division of financial liability takes into account that both parties failed to comply with IDEA, thus neither can be fairly required to bear the entire financial burden of the amount in dispute. By my estimates, the $28,292.70 figure represents 30 days of services, for a daily figure of $943.09. This daily calculation comports with the program costs provided to me (See SB7) which states that the daily rate for [redacted] is $943.09.

IDENTIFICATION OF PREVAILING PARTIES

Pursuant to 8 VAC 20-80-76 (K)(11), this Hearing Officer has the authority to determine the prevailing party on each issue that is decided. Having found that the LEA did not make a FAPE available to [redacted] in a timely manner prior to [redacted] parents' enrollment of [redacted] at [redacted] on [redacted], the Hearing Officer identifies the parents as the prevailing party on that issue.

As the reimbursement decision is entirely discretionary and based on a weighing of the equities, as permitted by state and federal law, this Hearing Officer's decision to reduce the parents' reimbursement claim, and hold them financially accountable for a fraction of the expenses associated with their placement of [redacted] at [redacted] is not to be construed in any way as a reflection of the strength of their case on the merits. If a reviewing Court were to find that this

[8] Use of the term "placement/service location" is only to acknowledge that the parents and LEA may disagree about the use of one term over the other. This is an attempt to discuss the issue without inciting either party.

Hearing Officer's reduction of the Parents' reimbursement claim was an abuse of discretion as inconsistent with the underlying conclusions of law, then presumably, the Parents' reimbursement claim would have to be honored in full (without any reduction).

ORDER

1. Of the $28,292.70 owing [redacted] for services to [redacted], the parents will bear the cost of $8,487.81. The LEA shall be responsible for the balance of $19,804.98.

APPEAL INFORMATION

8 VAC 20-80-76 (O) Right of Appeal

1. A decision by the hearing officer in any hearing . . . shall be final and binding unless the decision is appealed by a party within one year 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. . . .

3. If the hearing officer's decision is appealed in court, implementation of the hearing officer's order is held in abeyance except in those cases where the hearing officer has agreed with the child's parent or parents that a change in placement is appropriate in accordance with subsection E of this section. In those cases, the hearing officer's order must be implemented while the case is being appealed.

[redacted]

[redacted] Dated this [redacted]

CERTIFICATE OF SERVICE

I, [redacted], do hereby certify that this [redacted] I e-mailed a copy of this decision to counsel for the parties in this matter: to [redacted] – [redacted] and to [redacted] – [redacted] pursuant to their request that the decision be issued electronically and delivered in this manner.

cc: [redacted]