

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

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Student/Child:	)	
Parent(s):	)	
	)	
Child/Parents' Advocate:	)	<b>Case No. 22-126, 131, and</b>
	)	<b>22-133</b>
	)	<b>Hearing Officer:</b>
	)	
Petitioners	)	
	)	
v.	)	
	)	
Local Educational Agency:	)	
(LEA)	)	
LEA's Attorney:	)	
Esq.	)	
	)	
Superintendent of LEA: Dr. Supt.	)	
	)	
Respondent	)	

**MEMORANDUM ORDER CONCERNING REBUTTAL AND MOTION TO STRIKE**

The LEA asked the Hearing Officer to grant its motion to strike or dismiss the parents' complaints at the conclusion of the parents' presentation of their case in chief and the LEA resting having not presented a case-in-chief. The LEA asserted in its motion that the parents' evidence was insufficient.

**I. Procedural History**

On August 24 and 25, 2022, the Hearing Officer held a due process hearing (DPH) on issues involving three due process complaints (DPC) the parents filed. The complaints are identified as Parents' due process complaints two (2), four (4), and six (6).<sup>1</sup> Parents filed these three complaints on June 15, 24, and 29, 2022, respectively.<sup>2</sup> At the commencement of this

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<sup>1</sup> Parents had also filed another DPC on June 24, 2022 (DPC3) and a DPC on June 28, 2022 (DPC5). The Hearing Officer dismissed DPC#3 on July 19, 2022. Hearing Officer dismissed DPC#5 with prejudice on July 18, 2022.

<sup>2</sup>The Hearing Officer notes that the DPH involving hearable claims asserted in the three DPCs was initially scheduled for July 26, 27, and 28, 2022. By then, the resolution period would have concluded for DPCs 2 and 4. Also the parties had waived the resolution period for DPCs 4 and 6. However, after the Hearing Officer had set the DPH on these complaints, Parents withdrew their waiver of the resolution period for DPC #6. Parents' withdrawal required a rescheduling of the DPH involving DPC#6 to comply with IDEA's requirement. The implicated requirement

hearing, the Hearing Officer granted each party 10 minutes to present an opening statement. Parents' advocate used the entire time to make statements<sup>3</sup>; LEA counsel utilized a portion of the allotted time.

The Hearing Officer then afforded each party an opportunity to present a case-in-chief. Parents filed the complaints and therefore bore the burden of proof. *Schaffer v. Jerry Weast*, 105 LRP 55797 (November 14, 2005). Accordingly, following opening statements, Parents presented their case-in-chief.

For this reason, the parents' advocate called two witnesses to testify on behalf of the parents. Parents' advocate had requested witness subpoenas for these two witnesses.<sup>4</sup> First, the parent conducted direct examination of Assistant Superintendent of Special Education. This examination lasted for about 67 minutes.<sup>5</sup> The LEA's attorney then conducted a cross examination

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essentially prohibits a DPH from occurring prior to the expiration of the resolution period if this period is not waived by both parties. The parties then agreed to the rescheduled date and time, August 24 and 25, from 3:00 p.m. to 7:00 p.m. each day, for a DPH on DPC6. The DPH set to commence on July 26, 2022, remained scheduled for DPCs 2 and 4. However, on July 22, 2022, one business day before the DPH was to begin on DPCs 2 and 4, the parents requested a continuance. The LEA objected to the withdrawal of the resolution period waiver and requested the DPH occur on all three complaints as previously scheduled for July 26, 27, and 28, 2022. As set forth in one of her two orders issued on July 27, 2022, the Hearing Officer determined good cause existed to continue the DPH and that such continuance was in the child's best interest. Upon considering the close relationship between the issues in the complaints, the narrowing of those issues, the witnesses were identical, and each party's representation regarding the time the party anticipated needing to present their/its case, the Hearing Officer determined the time allotted on August 24 and 25, 2022, for the hearing was sufficient time set aside for a DPH involving all three complaints DPC2,4, and 6.

<sup>3</sup> As part of her opening statement, Parents' Advocate complained that the father of the child desired to attend the hearing, but he had to work and his employment required him to be "on-call." The advocate posited that the father could attend if the hearing was held virtually. The Hearing Officer notes that when the DPH was initially scheduled both parties agreed to the in-person hearing. Later the parents requested a virtual hearing. The LEA objected arguing, among other things, that a virtual hearing would not afford the LEA an opportunity to confront witnesses and that it would be difficult to determine the demeanor of a witness in a virtual setting. LEA was also concerned that during a virtual hearing, it would be difficult to determine if witnesses were using documents or other writings to assist them in answering questions during their examination. The Hearing Officer carefully considered the arguments for and against a virtual hearing. Moreover, the Hearing Officer noted her awareness of issues arising during virtual hearings such as, but not limited to, screens freezing, participants/witnesses being dropped from the internet connection, difficulties arising when attempting to share or display documents, poor visibility, and poor sound quality, delays caused by these issues, and the delays' impact on judicial efficiency especially considering the time set aside for the hearing each day was 4 hours. The Hearing Officer also took notice that at least one of the parents was attending the in-person hearing. Further, parents had not represented the father was precluded from taking leave from his job to attend the hearing in person. After careful consideration and balancing the equities, the Hearing Officer denied the request for a virtual hearing.

<sup>4</sup> The Hearing Officer had set August 4, 2022, as the deadline for filing requests for witness subpoenas. When it was noted that the parents' advocate had missed the deadline, the Hearing Officer extended the filing deadline to August 19, 2022, for the parents' advocate to request the issuance of any witness subpoenas. Within the extended time, the advocate requested two witness subpoenas for the individuals. The Hearing Officer issued those orders and as noted in the decision, those witnesses testified in Parents' case-in-chief.

<sup>5</sup> The Hearing Officer was able to determine the length of each party's examination of a witness as the faces of the room's wall clock and a manual desk clock were visible to the Hearing Officer throughout the hearing and the Hearing Officer was able to determine the beginning and end times of each examination. Further, she noted the objections

of this witness, lasting about 65 minutes. Next, the parents' advocate conducted a re-direct examination of Assistant Superintendent of Special Education which lasted for seven (7) minutes. The Hearing Officer also allowed LEA Counsel to re-cross the witness. This examination lasted about two (2) minutes. The Hearing Officer afforded both parties adequate time to examine the witness.

In addition to their first witness providing testimony, Parents, through their advocate presented Principal to testify in parents' case-in-chief. Parents' advocate's direct examination of this witness lasted about 70 minutes. Cross examination of Principal was then conducted by LEA's attorney which lasted about 20 minutes. Parents' advocate was then afforded time to conduct redirect examination. This second examination of Principal for the parents lasted about one hour. LEA Counsel conducted re-cross of Principal for about 17 minutes.<sup>6</sup> The Hearing Officer afforded both parties adequate time to examine the witness.

Parents' advocate stated that she had concluded the parents' case-in-chief after the direct and cross examinations referenced above of Parents' first witness, Assistant Superintendent of Special Education, and Parents' second witness, Principal. The child's mother was present during the hearing. The mother was not precluded from testifying during the presentation of the parents' case-in-chief. Rather, Parent chose to not testify during the parents' case-in- chief. Parents' advocate elected to not present the parent in the parents' case-in-chief.

Next, the LEA rested; that is, the LEA did not present a case-in-chief.

Parents' advocate then sought to call the child's mother as a rebuttal witness. LEA counsel objected arguing such testimony would not be appropriate as the LEA had decided to not present evidence in a case-in-chief. In addition, LEA counsel moved to strike or dismiss the case on the grounds that the Parents' evidence was insufficient not meeting their burden of proof.

After hearing any arguments from the parties that they chose to make regarding whether the rebuttal testimony should be allowed and regarding the motion to strike, the Hearing Officer temporarily took the matters under advisement while addressing the Parents' proposed exhibits.

Parents asked for the admission of some of their proposed exhibits. During the presentation of evidence by the witnesses, LEA Counsel had represented that it may have an objection to Parents' exhibits on the basis of relevancy. Accordingly, the Hearing Officer instructed the parties that she would rule on the admissibility of parents' exhibits as each of those exhibits were offered as evidence during the course of the hearing. Parents had submitted 25 exhibits as part of its disclosures. Prior to concluding the hearing, after considering any objections raised to Parents' exhibits, the Hearing Officer admitted Parents' exhibits 1, 3, 5, 7, 16-3, and 24. The Hearing Officer excluded none of the parents' exhibits. However, Parents' advocate withdrew parents' proposed exhibits 2,4,6, 8 through 15, 16-1 and 16-2, 17 through 23, and 25.

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made by the non-calling party's advocate or attorney.

<sup>6</sup> The Hearing Officer notes that during examinations conducted by each party, the opposing party injected multiple objections which the Hearing Officer addressed.

There had been no objections to the proposed exhibits of the LEA. In fact, during the parents' case-in-chief, the advocate had referenced several of the LEA's exhibits. Hence, the Hearing Officer admitted LEA's exhibits as evidence during the presentation of the parents' case-in-chief. Particularly, the Hearing Officer admitted as evidence the school's exhibits 1 through 18, 3a, 5a, and 13a.

After providing each party with two opportunities to respond to the objection to rebuttal testimony and the motion to strike, the Hearing Officer sustained the Respondent's objection to rebuttal and granted the motion to strike. Below is the Hearing Officer's decision memorializing the decisions made.<sup>7</sup>

## **II. Issues and Burden of Proof**

**A. Issues:** The issues before the Hearing Officer are the following:

1) Whether the parents provided consent on June 7, 2022? If so, was that consent sufficient? If so, has the child been denied a FAPE?

2) Whether the child is entitled to compensatory services since May 13, 2022?

3) Were the parents denied meaningful participation in the resolution meeting held on June 27, 2022;

4) Did the parents have access to the child's educational records for the resolution meeting?

5) Did the LEA (i) on May 18, 2022, create a PWN noting the following:

[LEA] proposed that [the child] does not require ESY services as [LEA] does not have any data that the benefits gained during the regular school year would be significant jeopardized if [the child] does not receive ESY services.

and (ii) propose on June 8, 2022, that the child be retained due to attendance issues and lack of progress?

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<sup>7</sup> Before issuing her written decision, the Hearing Officer granted Parents' Advocate and LEA counsel leave to submit caselaw with annotations in support of their respective positions on the objection to the rebuttal evidence and motion to strike. The LEA submitted its caselaw with annotations on August 26, 2022. The deadline set for the parents' advocate to submit any caselaw citations and annotations was 5:00 p.m. on September 2, 2022. The Hearing Officer received a filing from the parents' advocate on September 2, 2022. The transmission indicates the filing was sent at 5:05 p.m. That said, the Hearing Officer has considered both the filing from the LEA sent on August 26, 2022, and the Parents' advocate's September 2, 2022, filing.

If the LEA did so, did the LEA deny the child a FAPE?

6) Does a PWN dated/created on May 18, 2022, state the following:

[LEA] proposed that [the child] does not require ESY services as [LEA] does not have any data that the benefits gained during the regular school year would be significant jeopardized if [the child] does not receive ESY services.

On or about May 18, 2022, did the LEA consider only regression and recoupment to determine if the child was eligible for ESY?

If so, did the LEA deny the child a FAPE? For any such denial, are compensatory services due for any failure to properly assess the child for ESY?

### **B. Burden of Proof**

Parents filed the complaints and therefore bore the burden of proof by a preponderance of the evidence. *Schaffer v. Jerry Weast*, 105 LRP 55797 (November 14, 2005).

### **III. Statement of Facts**

1. The student is a child with a disability under the autism category. (S3 at 2). The IEP team initially determined during an IEP meeting held on November 17 and 18, 2021, that a private day placement is appropriate for the child. Until a Private Day School (PDS) could be secured, the IEP resulting from the IEP meeting held on November 17 and 18, 2022 (IEP dated November 18, 2021/November 18, 2021, IEP) proposed homebased instruction for 15 hours a week and virtual speech and language services for 30 minutes a week. (S 2 at 6 (Statement of Facts #5); p1-41).

2. Parent has contended that she provided partial consent to the IEP dated November 18, 2021, on November 17, 2021, and on December 2, 2021. As noted below, the parent had not provided consent by November 17, 2021, and/or December 2, 2021. (S 2 (Hearing Officer's Decision dated May 13, 2022; p1-40 through 46).

3. The IEP team had discussed other prospective PDSs during the November 17-18, 2021, IEP meeting. They were PDSs I, II and III. Parent's preference was PDS I. Parent understood from comments from her advocate that PDSs II and III were not suitable assignments for the child. On November 29, 2021, Parent signed a "Consent for Release of Confidential Information" which granted the LEA permission to release information to PDS I, a prospective school assignment for the child's private day school placement. PDS I declined to admit the child and by letter dated December 8, 2021, notified the parents and the LEA's behavior specialist. (S 2 at 6-8 (Statement of Facts ##10, 11, and 16); P1-41 through 43).

Parent did not sign releases to permit the LEA to provide information about the child to PDSs II and III. (Tr. 137, 285-286).

4. On or about January 2022, Parent became aware of PDS IV. This school became Parent's preference for the child's PDS assignment. Hence, the parent signed a release in January 2022, authorizing the LEA to exchange information about the child with PDS IV. Parent's release also requested that she be copied on any records sent to PDS IV. (S1 at 9 (Statement of Fact #20); P1-42).

5. As of January 2022, the LEA was of the view that it was unable to implement the proposed IEP dated November 18, 2021, to include the provision of a PDS, because the parent had not provided clear consent to the November 18, 2022, IEP. (S1; P1-40-46).

The parents then filed a due process complaint on January 28, 2022, asking that the Hearing Officer find that they had partially consented to the IEP dated November 18, 2021, which provided for the homebased instruction and speech and language services until a PDS placement could be secured.

6. After holding a DPH on April 15, 2022, the Hearing Officer issued her decision on May 13, 2022, finding that the parents had failed to provide the partial consent alleged; accordingly, the LEA could not implement the IEP and provide a private day school assignment or until one could be secured home based instruction. (S1 at 15).

7. Prior to the April 15, 2022, DPH occurring, the IEP team held a meeting on February 25, 2022, which the LEA reconvened on March 10, 2022. The meeting resulted in a proposed IEP which also offered a PDS placement. The IEP team determined that the child's IEP could be implemented in PDS II, III, IV, and V. The parent preferred PDS IV and requested the LEA assign the child to PDS IV. (S1 at 10 (Statement of Fact #27)).

8. Parent did not consent to the implementation of the March 10, 2022, IEP.

9. Even though the IEP team proposed PDS II, III, and V as well as PDS IV, Parent did not sign releases for the exchange of information between the LEA and PDSs II, III, and V. (Tr. 137, 283; S1 at 10 (Statement of Facts # 27)).

10. Child's IEP team met again on May 9, 2022, to develop the child's annual IEP. (S3).

11. Parent and Parent's Advocate attended the May 9, 2022, IEP meeting by telephone. Parent had been given the option of attending in person or by telephone. Those present for the meeting were two special education teachers, Behavior Specialist, Speech Language Pathologist, Principal, Lead Special Education Teacher, Teacher, and the parent (mother). (S3 at 1).

12. All of the IEP members were permitted to provide input. Parent's advocate was reminded repeatedly to wait her turn and speak. Parent's advocate presented with an argumentative tone, and repeatedly interrupted others. She was uncooperative and unwilling to stay on task and focus on the child. Her conduct obstructed the meeting. After being given several reminders, the advocate was disconnected from the meeting. Before being disconnected the parent was informed that she would be called back on the number that the LEA had on file for her. Once the advocate

was disconnected, the IEP team called the parent twice. There was no answer either time. The meeting then proceeded. (S3 at 30; Tr. 366-367).

13. In preparing the child's annual IEP on May 9, 2022, the IEP indicated that the child's IEP could be implemented in PDSs II, III, IV, and V. (S3 at 26).

14. Even though the IEP team proposed PDS II, III, and V as well as PDS IV, Parent did not cooperate and provide sign releases for the exchange of information between the LEA and PDSs II, III, and V. (Tr. 137, 283; S3 at 26).

15. The parents did not consent to the May 9, 2022, IEP. (S3).

16. Subsequent to the May 9, 2022, annual IEP meeting, the parents provided on May 13, 2022, partial consent to the November 18, 2021, IEP. By then, practically 6 months had lapsed. (P1-16 through 26; S2).

17. Specifically, the parents wrote the following on the November 18, 2021, IEP:

I consent to my student being placed privately at [PDS IV] as proposed in the 11/18/21 IEP. I also agree to the goals documented in the May 17, 2021, IEP to be implemented while at [PDS IV] for the first thirty days of attendance.

(P1--23; S2 at 16)

18. In addition, in the section of the November 18, 2021, IEP that identified the services the IEP team had proposed the child receive, the parents crossed out homebased services. The next page of the IEP continued to identify services proposed. On this second page listing services, the parents wrote "I consent to the services below." The only services proposed were speech/language virtually for 30 minutes a week. On this same page, the IEP team had noted the child did not need extended school year (ESY) services. The parents made no notations that they disagreed with the decision to not provide the child with ESY services. (P1-22; S2 at 14)

19. The next page of the November 18, 2021, IEP lists the continuum of placement options the IEP team considered. The listing indicated that the IEP team had considered Public Day School, PDS, and Homebased instruction. This is noted by the boxes adjacent to those placement options being checked. The parents wrote by the PDS option the words "[PDS IV]." (P1-23; S2 at 15).

20. Parents consented to the accommodations proposed on the November 18, 2021, IEP by writing on the accommodation section of the IEP, "I consent to the accommodations below. (P1-21; S2 at 11-12).

21. On the last page of the proposed November 18, 2022, IEP, the parents crossed out the statement, "I give consent to implement this IEP." Parents then wrote the following, "I give consent to implement the sections of the IEP identified." (P1-24; S2 at 17).

22. A signature appears on the line denoted for the parents' signature. The IEP is dated May 13, 2022. (P1-24; S2 at 17).

23. Parent has never consented to the homebased instruction proposed until a private day school assignment can be made. (Tr. 218).

### **Consideration of Extended School Year Services**

24. As part of developing the child's annual IEP on May 9, 2022, the IEP team considered whether the child required Extended School Year (ESY) Services. (Tr. 243; S3 at 28 and S3a at 1-2). This deliberation was done during the latter portion of the IEP meeting. By then, the child's advocate had been removed from the meeting due to her conduct as noted above. As referenced above, to reconnect the parent to the meeting, the parent was telephoned back twice dialing her telephone number. The parent did not answer the telephone either time. The IEP meeting proceeded. (Tr. 249, 366).

25. The IEP team members present at the time the team was deliberating about ESY services were Principal, Special Education Lead Teacher, Speech Pathologist, Behavior Specialist/Data Service person, Interim Case Manager, Classroom Teacher Representative. (Tr. 243, 382; S3).

26. In its deliberation about whether the child required ESY services, the IEP team considered multiple factors. To facilitate the team's deliberation, the team used the ESY checklist which provided a list of information that may be reviewed to determine if a child requires ESY services. (Tr. 244, 264; P3-2 through 3; S3a).

27. The IEP team considered the child's last agreed upon IEP, the May 21, 2021, IEP, as well as the proposed IEP dated November 18, 2021, IEP. (Tr. 245).

28. Also, the IEP team considered the child's attendance record when. Child had not attended school for the 2021-22SY since November 2021. The IEP team considered that the LEA had offered the child in-person instruction at the school. In lieu of the in-person instruction, the addendum to the November 18, 2021, IEP had provided for homebased instruction which would have provided instruction until a PDS could be secured. The IEP team concluded the lack of attendance was due to the parents' withholding the child from school. Accordingly, the child had accumulated 101 absences of which nine (9) had been excused. The child's report card and attendance record reflect that during the first quarter the child was absent 0 days, the second quarter he was absent 9 days, the third quarter he was absent 41 days, and the fourth quarter he was absent 51 days. (Tr. 221-223, 274; S7 at 3).

29. In addition, the team considered the child's work samples from the period August 2021 to December 2021. The IEP team had received these work samples around January 2022, and the IEP team reviewed them. The IEP team was missing second semester instruction work samples because the parent had not sent the child to school for instruction or permitted homebased instruction since November 2021. (Tr. 254-257).

30. Regarding work samples, if the parents had the child complete any work samples at home



after January 2022, they were not reviewed in the deliberation about whether the child required ESY services. This was because those work samples had not been made available to the IEP team by the May 9, 2022, IEP meeting. Prior to the advocate being disconnected from the IEP meeting, the parent requested to share the work samples virtually. Because Parent was participating by telephone, they could not be presented by the parent at the May 9 meeting. However, prior to the May 9, 2022, IEP meeting, the parent had opportunities to provide those work samples to the IEP team.

The Hearing Officer finds it reasonable to conclude that the parent could have provided any additional samples of work from the child by several means; such as, but not limited to, having them delivered to the school,<sup>8</sup> mailing them to the school, or other delivery means.

The evidence demonstrates that it is unknown whether any work samples of the child from January 2022 to May 9, 2022, equated to work produced by the child as a result of receiving highly qualified instruction or could otherwise be authenticated.

(Tr. 251-256).

31. The IEP team also considered the child's progress reports and report cards, annotated notes and observations of the teachers during its deliberation regarding ESY. (Tr. 264).

32. Regarding whether the child regressed during long breaks, the May 9, 2022, IEP team considered the child's summer break between the conclusion of his third-grade year and the beginning of his fourth-grade year (2021-22SY) and that the child did not show signs of regression. This had been the longest period for which the child was not receiving services from the LEA, excepting November 2021 until the end of the school year when the child's parent had withheld him from school. (Tr. 265-266).

32. The IEP team on May 9, 2022, considered Child for ESY services and determined those services were not required. (Tr. 315; P3-3; S3 at 28).

33. Two letters by Doctor were provided to the IEP team in 2022. Specifically, those letters were a letter dated October 11, 2021 (received January 2022), the other is dated January 14, 2022. During IEP meetings held between January 2022 and May 9, 2022, the IEP team did consider those letters. For purposes of determining whether the child required ESY services, the letters were not considered. This was the case because one was deemed irrelevant. The other letter contained some factual inaccurate information; that is, the doctor stated the child was receiving homebased instruction when he was not because the parent had not consented to those services. Further, one of the letters indicated Doctor saw the child intermittently. (Tr. 280-281, 418; P5-3 through 4).

34. On May 9, 2022, the IEP team thoroughly reviewed multiple factors in addition to regression and recoupment to determine if the child required ESY services. After doing so, the

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<sup>8</sup> Hearing Officer is cognizant of testimony stating that parent was unwilling to present herself to Elementary School. (Tr. 255). Notwithstanding, the Hearing Officer finds it reasonable to conclude that arrangements could have been made to deliver any additional samples to Elementary School.

IEP team determined the child did not require ESY services. (Tr. 244; P3-2through 3; S3a).

In utilizing the varied information before them and referenced above, the IEP team also deliberated individually on each of the following questions:

- Whether the child shows severe regression that he is unable to recoup within a reasonable time so that benefits received during the regular school year are significantly jeopardized?
- Whether the child's progress toward IEP goals on critical life skills would be jeopardized without ESY services?
- Whether there are critical life skills that are at a breakthrough point?
- Whether an interruption of programming (which addresses interfering behaviors) would significantly jeopardize the child's educational programming the next school year if the child did not receive ESY services?
- Would the nature of severity of the child's disability (autism) jeopardize the child's receipt of benefit from his educational program during the regular school year without ESY services?
- Were there any special circumstances that will significantly jeopardize the child's receipt of benefit from his educational program during the regular school year without ESY services?

After considering each question individually, the team then answered each question in the negative and determined the child did not require ESY services. (Tr. 315-319).

35. The May 9, 2022, proposed IEP was provided to the parent. At no time did the parent request reconsideration of whether child required ESY services. (Tr. 320).

36. Principal has been the principal of Elementary School for over 12 years. He has participated in multiple IEP meetings where ESY services were being considered. Child has attended Elementary School from his kindergarten year until his fourth-grade year during the 2021-22SY, five years. Historically, the child had not received ESY services. (Tr. 312, 319, 335).

The Hearing Officer finds the Parents have not met their burden and demonstrated the ESY decision was wrongly made.

### **Process for Securing Private Day Placement**

#### **CSA Form**

37. The LEA historically funds a PDS placement/assignment through the Child Services Act (CSA) process. (Tr. 71, 190).

38. As authority for following the process, the LEA has relied on a January 28, 2022, Memorandum from the VDOE Superintendent of Instruction to superintendents of LEAs. That memorandum provides in pertinent part the following:

With the passage of the Comprehensive Services Act in 1992, the responsibility for funding of certain special education services

shifted from the school division to the Community and Policy Management Team (CPMT) as the fiscal agent for CSA Pool Funds. CSA funded services include all services delineated in an IEP that identifies a private day school or a private residential program as the student's placement in the least restrictive environment. Each CPMT must have policies and procedures in place to ensure a student's full access to private program IEP services in accordance with IDEA and with the Regulations Governing Special Education Programs for Children with Disabilities in Virginia.

(S 14).

39. The Community Policy and Management Team (CPMT) is an entity within the county where the LEA sits. The CPMT reviews, among other requests, budget requests to fund a PDS placement. CPMT determines if there is funding for the PDS placement. CSA approves the funding for a private day school. To approve PDS funding, the CSA must receive a signed CSA consent form from the parents.

The CSA process for funding a PDS placement involves the following:

- The LEA obtaining a signed IEP from the parents;
- The LEA obtaining releases from the parents to exchange information about the child to prospective private day schools the IEP team has determined are appropriate; and
- The Parents providing the CSA with a signed CSA consent form.

(Tr. 84, 136-137).

Once the LEA receives a signed IEP, signed CSA consent form, and signed releases to provide the child's information to prospective PDSs, the LEA submits a referral request to CSA asking that PDS funding be approved.

The process of the LEA assigning a student to a PDS normally takes one to two weeks. (P7-3; S5).

40. The purpose of receiving the signed CSA form in the CSA process is to enable the CSA to open a case on the child with a disability whose IEP specifies a PDS placement. This is the case so that the CSA can determine if funding can be obtained for the placement. (Tr. 137).

41. Once the parents sign the CSA consent form, it is provided to the LEA. The LEA then completes the Child and Adolescent Needs and Strengths Assessment (CANS). The LEA then provides the completed assessment and the child's IEP to the CSA case manager. A budget request is then submitted to CPMT. The budget request does not identify the child for which the funds are sought. (Tr. 139).

42. As referenced above, on May 13, 2022, the parent signed the IEP dated November 18, 2021, giving consent to the IEP being implemented partially, to include implementation of the PDS placement. The parent's advocate transmitted to the Assistant Superintendent of Special

Education an email on May 13, 2022, at 6:10 p.m., indicating that the parents partially consented to the IEP dated November 18, 2021. The email requested the LEA facilitate the child's placement at PDS IV.

In addition, the email stated "[o]ur parent declined to provide consent to CSA to open a FAPT case."

(S2).

43. By letter dated May 19, 2022, Assistant Superintendent of Special Education wrote to the parents. This letter acknowledged receipt of the partially consented to November 18, 2021, IEP. In addition, the letter explained that to move forward with the process of assigning the child to a PDS, the LEA required a signed CSA consent form. The letter indicated this consent form had previously been provided to the parents.

The May 19, 2022, letter acknowledged that the parent had already provided a release for PDS IV. However, releases were also needed for PDSs II, III, and V. Another copy of the releases was enclosed in the letter, and the parent was asked to sign them and return them immediately.

(P7-2, 6 through 8; S4).

44. By letter dated May 25, 2022, the Assistant Superintendent of Special Education wrote to the parents again. This letter informed the parents that PDS IV had informed the LEA that PDS IV had only "conditionally accepted" the child. Further, PDS IV was awaiting a CSA contract. This letter also informed the parents that the CSA was an entity of the county, not the LEA and that a signed CSA consent form was necessary so that information could be released or exchanged between the LEA and the CSA. The letter noted that the process of the LEA assigning the child to a PDS normally took no more than two weeks; however, the process had been delayed by the parents not returning a signed IEP, and consent form. In the letter, parents were directed to contact Assistant Superintendent of Special Education if they had questions. In addition, the letter provided the parents with the website for CSA and indicated that information regarding CSA could be found at the website.

Another copy of the CSA form was enclosed with the letter.

Tr. 183; P7-3;S5).

45. By letter dated June 6, 2022, Assistant Superintendent of Special Education wrote to the parents again requesting the parents sign the CSA consent form. The letter also noted, among other things, that the LEA has made services available for the child and continues to be willing and ready to move forward with the assignment to a PDS once the consent form is signed and returned.

The letter noted that if the parents had questions/concerns they could contact the Assistant Superintendent of Special Education.

(P7-9; S6).

46. On June 7, 2022, Assistant Superintendent of Special Education submitted a referral request for CSA approval for funding for a LEA student for a private day school. Attached to the request were (i) the LEA referral for CSA funding request, (ii) redacted Hearing Officer decision issued on May 13, 2022, (iii) redacted IEP dated November 18, 2021, signed on May 13, 2022, and (iv) email from the parent dated May 29, 2022, regarding consent to issue a contract to PDS IV for the child.

(Tr. 165-166).

The May 29, 2022, email is address to CSA Manager from the parent. It states the following:

Ms. [CSA Manager],

I grant consent to you to issue a private placement contract to [PDS IV] on behalf of our son, [Child], effective immediately. You previously received a copy of the IEP that is in effect. I do not grant consent to any other agencies to have access to this information other than your agency and [PDS IV]]. Please forward a copy of this contract to me, via email, once it is issued.

Thank you,

[Parent]

(S9)

47. CSA Manager denied CSA funding. CSA Manager noted in part that by not signing the CSA consent form, the CANS could not be completed. Further, information could not be shared between the referring agency, the CSA office, CPMT, OCS, and others as deemed by Code.

In her response, CSA Manager also stated that she would be willing to work with the Assistant Superintendent of Special Education and the family to obtain proper consent.  
(Tr. 165-166; S9 at 2).

48. By email transmitted on June 10, 2022, the parent provided her own written consent to CSA. The consent is dated June 7, 2022. The parent's June 7, 2022, consent restricted the release of confidential information about the child. Particularly, Parent's June 7, 2022, consent only authorized the release of information from the LEA about the child to the CSA within the County's Department of Social Services.

(Tr. 173; P1-24 and 25; S12 at 27).

49. On June 24, 2022, Assistant Superintendent of Special Education submitted a second

referral request for CSA approval for funding for a LEA student for a private day school. Attached to the request were (i) the second LEA referral for CSA funding request, (ii) unredacted Hearing Officer decision issued on May 13, 2022, (iii) unredacted IEP dated November 18, 2021, signed on May 13, 2022, and (iv) June 7, 2022, consent from parent, emailed on June 10, 2022, by the parent's advocate.

CSA Manager denied CSA funding again. CSA Manager noted in pertinent part that June 7, 2022, consent of the parent was not sufficient because it "does not provide the consent necessary to determine eligibility, open a CSA case, and provide client specific information from the mandatory uniform assessment tool to the state office of Children's Services (OSC) per VA Code."

In her response, CSA Manager also stated that she would be willing to work with the family to obtain proper consent.

(Tr. 173, 179- 181S12 at 2).

50. Parent or parents' advocate has expressed concerns about the information that could be obtained about the child if the parent signed the CSA consent form in its original form. By letter dated and mailed to the parent on July 18, 2022, CSA Manager then presented an edited version of the CSA consent form to the parent for signing. The edited version no longer required the parent to consent to the disclosure of financial information, employment information, the sharing of information with the local Family Assessment and Planning Team, Medicaid except therapeutic Day Treatment. Parent again declined to consent to release confidential information too broad. Accordingly, Parent declined to sign either the original or edited CSA form. (Tr. 162-163; P1-4 through 5; S5, S13a).

51. The LEA and CSA Manager attempted to work with the parent such that she would feel comfortable providing the consent required by CSA to process the child's case for PDS placement funding.

For example, CSA Case Manager also sent correspondence to the parents regarding working with them on their concerns. She attached a modified release deleting some of the disclosures for the parents to sign in an effort to work with the parents. (S13a; Tr. 148).

52. Parent has continued to decline to sign the CSA consent form. In fact, during the June 27, 2022, resolution meeting, parents' advocate stated parents would not sign the release. (Tr. 325).

### **Releases for Other Private Day Schools**

53. In determining the school to which the child will be assigned, the LEA require applying to several private day schools: PDS II, III, IV, and V. As such the LEA has requested the parent sign releases for PDS II, III, and V. The purpose of the LEA obtaining releases from the parent for the child's information to be released to prospective and specific private day schools is to investigate or obtain information about each prospective school, to provide alternatives or options in assigning the child to a PDS, to determine other available schools, especially considering the preferred school or one or more schools may not work out for the child. (Tr. 94, 96, 131-137, 191, 290).

Even though the LEA requested the parent provide releases for PDS II, III, and V several times, the parent has not provided them. (Tr. 100, 283),

54. The Hearing Officer finds LEA is unable to perform the function of exploring several private day schools and determining the appropriate school if the parents refuse to sign releases consenting to the exchange of information so that the LEA can move forward with assigning a particular PDS.

55. The child has only been conditionally accepted at PDS IV. (Tr. 182). Accordingly, the Hearing Officer finds that for this reason, and possibly others, the child may not be admitted to the school. (P7-3; S5)

### **June 27, 2022, Resolution Meeting**

56. The LEA held a resolution meeting on June 27, 2022, to resolve the dispute which was the subject of the parents DPCs<sup>2</sup> and 3<sup>9</sup>. The dispute or concern involved, among other matters, parent's June 7, 2022, consent and the CSA consent form. (Tr. 322).

57. The parents had requested a virtual format and the LEA complied with that request. The evidence reflects that those present at the meeting were Assistant Superintendent of Special Education, Principal, the child's mother (Parent), the Advocate, a representative from PDS IV, and a representative from CSA. (Tr. 322).

58. The parent discussed in depth her concerns. Parent expressed concerns about the CSA process; particularly, the CSA consent form Parent was being asked to sign. The CSA representative spoke with the parent during the meeting to explain the CSA process. The CSA representative also offered several times during the meeting to go over the CSA process and the items on the CSA consent form with the parent during the resolution meeting. CSA Representative also offered to meet with the parent and each of the agencies listed on the form to explain the purpose of the requested consent to provide information to CSA/agencies listed on the CSA consent form. (Tr. 90, 322-323).

59. In addition, the advocate and the Assistant Superintendent of Special Education conversed during the beginning of the meeting about the consent process. The Assistant Superintendent of Special Education was able to answer some of the advocate's questions during the meeting. (Tr. 326).

60. Prior to the resolution meeting occurring, the parent and advocate had expressed a desire to have representatives from PDS IV and from CSA attend the meeting. A representative from each of those entities attended the meeting. As referenced above, the CSA representative offered to answer questions of the parents regarding the CSA consent form during the meeting and outside of the meeting. (Tr. 325-335).

61. During the time CSA Representative was speaking, the evidence shows the parents'

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<sup>9</sup> Prior to the DPH, the Hearing Officer dismissed parents' DPC3.

advocate repeatedly interrupted CSA Representative and others during the meeting so that their comments could not be heard. Advocate also stated during the meeting that the parent would not sign the CSA consent form. (P1-8 through 9; Tr. 145). Eventually, the advocate was dropped from the meeting because of her conduct. At that point, the LEA telephoned the mother twice, to rejoin the mother to the meeting. There was no answer each time the LEA called the mother. (Tr. 145; P1-8 through 9).

62. The Hearing Officer finds the parent had the opportunity to meaningfully participate in the June 27, 2022, resolution meeting.

### **Access to Educational Records**

63. The LEA scheduled the June 27, 2022, resolution meeting for 10:00 a.m. The meeting was confirmed by letter dated Friday, June 24, 2022, and provided to the parent. Parents were informed in the letter that they could review the child's education records on Monday, June 27, 2022, between 7:00 a.m. and 9:45 a.m. Parents offered nothing more regarding this issue.

(Tr. 321; S10; S11).

The Hearing Officer finds the parents have failed to meet their burden and show the parent was not afforded meaningful participation.

### **Other**

64. The evidence reflects, as in this case, that some parents are refusing to sign the CSA consent form as provided by CSA. This refusal results in CSA funding being denied for the private day school as eligibility cannot be verified. Evidence presented on behalf of the parents - an administrative memorandum dated January 11, 2018, from the Commonwealth of Virginia and Office of Children Services - which administers the CSA, notes that in the event the parents of the child with a disability refuse to sign the CSA consent form, the local educational agency would be responsible for the cost of providing the private day school. (P 1).

### **Rebuttal objection**

65. Parents presented a case-in-chief. In doing so, parents' advocate presented two witnesses to testify, Assistant Superintendent of Special Education and Principal. Parents/Parents advocate did not designate any of the witnesses she called as "hostile witnesses."

66. The child's mother was present throughout the hearing. Throughout the presentation of the parents' case-in-chief, the child's mother sat beside the advocate.

67. The mother was not prevented from testifying during the parents' case-in-chief.

68. The mother chose to not testify during the parents' case-in-chief.

69. Parents' advocate elected to not call the mother during the parents' case-in-chief.



Parents did not designate their witnesses as hostile.

70. The LEA presented no case-in-chief.

71. Assistant Superintendent of Special Education has been a member of the CMPT team for at least five years. She has served as Special Education Director for the LEA for four years. The Hearing Officer observed the demeanor of the witness and found her testimony credible. (S17).

72. Principal has served as the principal of Elementary School for over 12 years. He has served as the child's principal for grades kindergarten through 4<sup>th</sup> grade. Principal has participated in multiple IEP meetings to include IEP meetings where a determination is being made regarding whether the student requires ESY services. (Tr. 335-36; S 18). The Hearing Officer observed the demeanor of the witness and found his testimony credible.

73. LEA has continued to offer the child a FAPE.

74. Hearing Officer has remained impartial throughout the proceedings in this matter.

#### **IV. Analysis**

##### **A. Rebuttal Testimony**

After presenting two school employees as their witnesses in the parents' case-in-chief, the parents rested. The LEA then represented that it had no witnesses to call and rested. Accordingly, the LEA presented no case-in-chief. The parents then requested to call a rebuttal witness, the child's mother. The LEA objected. After hearing arguments from the parties for and against the request to present rebuttal evidence, the Hearing Officer sustained the objection during the hearing. However, before issuing her written decision, the Hearing Officer granted the parties an opportunity to provide the Hearing Officer with case law and any annotations to support their respective positions. The Hearing Officer has considered any timely filings and sustains the objection to the rebuttal evidence for reasons noted during the hearing and here.

Rebuttal evidence maybe permitted in response to matters raised during the other party's case-in-chief. *See Henning v. Thomas*, 235 Va 181 (March 4, 1988). Further, it is within the discretion of the tribunal to permit such rebuttal testimony. *Id.*; *See also, Allen v. Prince George's County, Maryland*, 737 F.2d 1299, 1305 (4<sup>th</sup> Cir. 1984) (noting "[r]ebuttal evidence has been defined by the Fourth Circuit as "evidence ... introduced to counter new facts **presented in the [adversary's] case in chief,**" including either "surprise evidence" presented by the other party or "evidence unavailable earlier through no fault of the plaintiff." (Emphasis added).

Parents' advocate in arguing against the objection being sustained stated that the employees from the LEA who testified in the parents' case-in-chief provided testimony that would be inconsistent with what the parent would present as testimonial evidence. Further, parents' advocate argues that parents would be denied due process if the mother is not allowed to present rebuttal testimony.

Clearly, the record in the case at bar shows that the LEA presented no case-in-chief. Further, the parents were not precluded from calling the child's mother to testify in the parents' case-in-chief. The child's mother was present throughout the hearing. When the advocate stated she had concluded the parents' case-in-chief, the parent was sitting by the advocate's side

Assuming the parent had information that could have contradicted statements of the other two witnesses who presented evidence for the parents, the parents' advocate could have called the parent as the last witness in the parents' case-in- chief. A decision was made by the advocate or parent not to call the parent at that time. Accordingly, the parents have not been denied due process. Further, the record reflects no new facts presented in the LEA's case-in-chief as the LEA presented no case. Neither was there any surprise evidence to rebut. Accordingly, the Hearing Officer finds the tribunal properly sustained the objection to the presentation of rebuttal evidence.

## **B. Motion to Strike or Dismiss**

Next, the Hearing Officer turns to the Motion to Strike or dismiss the case for Parents' failure to meet their burden of proof.

As noted, the party seeking relief bears the burden of persuasion. Schaffer v. Jerry Weast, 105 LRP 55797 (November 14, 2005). Here, the parents seek relief. Accordingly, the parents bear the burden of proof in this matter by a preponderance of the evidence.

In its motion, the LEA contended that the parents had not met their burden on any of the issues before the Hearing Officer involving whether the LEA denied the child a FAPE.

The Individuals with Disabilities Education Improvement Act (IDEA/Act), 20 U.S.C. § 1400 *et seq.*, requires a state, as a condition of acceptance of federal financial assistance, to ensure a "free appropriate public education" (FAPE) to all children with disabilities. 20 U.S.C. § 1400 (d) and § 1412(a)(1). The Commonwealth of Virginia has elected to participate in this program and has required its public schools, including the LEA here, to provide FAPE to all children with disabilities residing in its jurisdiction. Va. Code Ann. § 22.1-214-215.

The Act imposes extensive substantive and procedural requirements on states to ensure that children receive a FAPE. 20 U.S.C. § 1415. *See also Board of Education v. Rowley*, 458 U.S. 176 (1982) and *Endrew v. Douglas County – School District RE-1*, 580 U.S. \_\_\_\_\_ (2017) 137 S. Ct. 988.

Here the parents essentially contend a denial of FAPE because the LEA has failed to timely implement a PDS placement, failed to provide the parents access to the child's educational records, and failed to allow the parent to meaningfully participate in a meeting, and wrongly decided whether ESY services are required.

**Issue 1:** The first issue concerns whether the parents' consent dated June 7, 2022, was sufficient to allow funding for a private day school and the assignment to a private day school?

First, the Hearing Officer considers the LEA's requests asking the parents to sign releases permitting the LEA to provide information about the child to three additional prospective PDSs.

The evidence shows that privately placing a child involves not just the funding aspect. Additionally, the IEP team must determine which private day schools are or may be appropriate, investigate/inspect the selected schools, collaborate with the parents about the schools, and then assign the child to a particular private day school. To investigate the school, the LEA must be able to exchange information with the schools about the child. In order to accomplish this task, the LEA requires the cooperation of the parent. Specifically, the LEA requires releases from the parent authorizing the LEA to exchange information with the prospective private day schools.

The evidence shows that in this case, the IEP team determined that Private Day Schools (PDS) II, III, IV, and V are appropriate for the child. The evidence reflects that the parents provided the LEA with a release to exchange information with PDS IV because the parent preferred the child be enrolled in PDS IV. The evidence reflects that the parents have refused after several requests from the LEA to provide releases for PDS II, III, and V.

The IEP team or LEA must be given an opportunity to consider more than one school to determine that the school where the child is placed is appropriate and the LRE based on the service delivery model of the prospective private day schools. *See* 8 VAC 20-81-130(A)(1); *see also* 71 Fed. Reg. 46,598 (2006) (FAPE includes not just the special education and related services that a child with a disability receives, but also an appropriate preschool, elementary, and secondary school education in the state involved).

Under the scenario in this case, parental consent is required for the LEA to provide personally identifiable information to prospective PDSs. VAC 20-81-170(G)(10); 34 C.F.R. §300.321 and 34 C.F.R. §300.622. Hence, clearly, the parents thwart the IEP team's ability to consider the other prospective private day schools and determine their appropriateness if they do not sign the releases permitting information to be provided to or exchanged with these other schools. In this case, the LEA desires to explore not just Private Day School IV, but also Private Day Schools II, III, and V. The evidence shows the parents refuse to sign the releases for information to be provided to PDSs II, III, and V. In effect, the parents are attempting to select the specific private day school the child will attend. The IDEA does not authorize the parents to determine the brick-and-mortar school of the child. *See Luo v. Baldwin Union Free Sch. Dist.*, 69 IDELR 88 (2d Cir. 2017) (unpublished). For the LEA, not the parent selects or assigns a child to a particular private day school. Moreover, when two or more equally appropriate locations (in this case specific private day schools) meet the student's special education and related services' need, the LEA, not the parent, has the flexibility to assign a student to a particular school. *Letter to Trigg*, 50 IDELR 48 (OSEP 2007). The parents certainly are members of the placement team. 34 C.F.R. §300.501(c). However, the decision as to the particular PDS the child is assigned is made by the LEA.

The parents' refusal to sign releases for PDSs II, III, and V has prevented the LEA from performing its placement duties. The June 7, 2022, consent fails to provide consent to release information about the child to PDSs II, III, and V. Accordingly, the June 7, 2022, release is insufficient in this regard.

The Hearing Officer also notes that even though Parents have selected PDS IV as the assigned private day school for the child, the evidence does not establish that PDS IV has “unconditionally” accepted the child. P-7 at 2, 3, 9, and 11; S-4; S-5; S-6.

Now the Hearing Officer also turns her focus to whether the June 7, 2022, consent is sufficient to facilitate or secure PDS placement funding.

Under applicable law, the State Educational Agency (SEA) is responsible for the provision of a FAPE to children with disabilities. In meeting its obligation, each State may use whatever state, local, federal, and or private funding that is available to provide a FAPE. 34 C.F.R. §300.103. Moreover, the Commonwealth Board of Education, under authority granted in §22.1-214 of the Code of Virginia has adopted the *Regulations Governing Special Education Programs for Children with Disabilities in Virginia*, effective January 25, 2010. These regulations require each local school division to provide a FAPE for children with disabilities aged two to 21, inclusive who reside in the school district. 8VAC20-81-30(B). By analogy as the state can obtain funding to provide a FAPE from varied public and private sources, the local school division can also.

In this case, funding for a private day school placement which is specified in the child’s IEP is available under the Comprehensive Service Act (currently known as the Children’s Service Act). §§2.2-5200 through 2.2-5214 of the Code of Virginia; 8 VAC 20-81-250(F)(1)(a). In particular, the Commonwealth of Virginia Department of Education has issued Superintendent’s Memo #018-10 addressing this funding. This memo provides in pertinent part the following:

With the passage of the Comprehensive Services Act in 1992, the responsibility for funding of certain special education services shifted from the school division to the Community and Policy Management Team (CPMT) as the fiscal agent for CSA Pool Funds. CSA funded services include all services delineated in an IEP that identifies a private day school or a private residential program as the student’s placement in the least restrictive environment. Each CPMT must have policies and procedures in place to ensure a student’s full access to private program IEP services in accordance with IDEA and with the Regulations Governing Special Education Programs for Children with Disabilities in Virginia.

The uncontradicted evidence shows that the process for obtaining CSA funding for a PDS placement involves obtaining (i) a signed IEP specifying a PDS placement, (ii) a signed CSA consent form from the parents, and (iii) signed releases from the parents permitting the LEA to release information about the child to PDSs the IEP team has identified as appropriate.

Regarding obtaining a signed CSA consent form from the parents, the evidence shows that this consent is needed to enable, among other things, the CSA to obtain a CANS. This assessment is required under the CSA. §2.2-5212(A) of the Code of Virginia. Further, the CSA consent is required to permit the CSA to release information about the child to relevant agencies, teams, or entities. By way of example only, the Hearing Officer finds it reasonable to conclude that pursuant

to the Children's Service Act, the OCS requires among other data, information to ensure or determine if funds are being expended to appropriate schools and if proper procedures are employed to determine eligibility. Moreover, the CPMT requires data to assist it in meeting, among other tasks, its responsibility to anticipate the number of children and youth for whom services will be required. §2.2-5211 of the Code of Virginia. Without the parents signing the CSA consent form, CSA funding will not be granted for the child's PDS placement.

The evidence shows that the LEA is requesting the parents sign this consent form so that the LEA can obtain funding for the PDS. Historically, the process usually takes no more than two weeks when the process noted above is followed. The Hearing Officer finds the LEA's requests reasonable.

The evidence reflects that the CSA manager offered to work with the parent to address her concerns about the CSA consent form such that the parent could provide proper consent. During a resolution meeting on June 27, 2022, the consent form was explained to the parent. Even so, the parents' advocate stated that the parents would not sign the consent form. Parent's Advocate also was so disruptive during that meeting she prevented others from being heard including precluding CSA Manager from further explaining the CSA process. Due to the advocate's conduct, she was removed from the meeting. Further, following the June 27, 2022, resolution meeting, CSA Manager offered an edited CSA consent form for the parents to sign. The edited version reduced the number of agencies that would be permitted to receive information about the child. In addition, the edited form reduced the types of information subject to be released as a result of the consent. Parents declined to sign the edited version of the consent form as well. CSA Manager also offered to meet with the family to address the family's concerns. She proposed meeting with the family and the individual agencies identified on the consent form that would receive information about the child.

As noted above, the Hearing Officer finds the LEA has made a reasonable request to the parents. That said, the Hearing Officer is cognizant of the parents' concerns about the number of agencies that will receive the information. Specifically, parents stating that signing the consent form would be tantamount to "signing their child's life away." As noted above, the evidence reflects the LEA and CSA attempted, to no avail, to work with the parents to address the parents' concerns such that a proper consent could be obtained. Further, the CSA consent form and process was explained to the parent and or attempts to do so were thwarted by the parents' advocate.

Parents argue that even if Parents' June 7, 2022, consent is insufficient for CSA to fund a PDS assignment, the LEA remains responsible for paying for the assignment and should not delay implementation of the PDS assignment. In support of their argument, the parents have presented a memorandum from the Office of Children Services Director. In this memorandum, the director opines that if a parent refuses to sign the CSA consent and funding is not approved by CSA, the LEA must foot the bill.

The Hearing Officer finds the case *French v. New York State Dep't of Educ.* instructive regarding the situation before her. In that case, the court determined that the father repeatedly delayed the implementation of the child's IEP, repeatedly demonstrated an unwillingness to permit the child to attend school under any IEP in place, regardless of its reasonableness and regardless

of whether the district provided the Father with the relief he requested. The court declined to find the District at fault when the delay in implementation was caused by the actions of the parents. 55 IDELR 128; *see also, MM v. Sch. Dist. Of Greenville Cnty*, 303F.3d 523 (4<sup>th</sup> Cir. 2011).

Similarly, in the case before this Hearing Officer, the evidence demonstrates that the IEP team proposed a PDS in the IEP dated November 18, 2021. Until one could be secured the IEP team proposed homebased instruction for 15 hours a week and virtually speech and language services for 30 minutes weekly. For 6 months the parents did not sign the IEP giving permission for its implementation. During that time period the LEA offered and continues to offer in-person instruction at Elementary School since the parent did not sign the IEP. The parents have not presented the child for in-person learning at Elementary School or agreed to homebased instruction. While it is true that the Parent partially consented to the IEP dated November 18, 2021, the consent came 6 months after the IEP was proposed. In addition, the parents' advocate wrote the LEA on the same day that the partial consent was given and stated the parents declined to sign the CSA consent form. For the process of assigning the child to a PDS to be completed, a signed CSA consent form is required of the parents. Since signing the November 18, 2021, IEP on May 13, 2022, the parent has not signed the CSA consent form as presented to her in its original or modified form. In fact, the evidence reflects that Parents' advocate has stated the consent form will not be signed on several occasions. The evidence shows that the LEA and CSA have attempted to work with the parents on several occasions so that proper consent can be obtained. Explanations of the process have also been given to the parent. Of note, further clarifying has been prevented by the parents' advocate.

Considering the evidence, the Hearing Officer has determined the LEA's request for the parents to sign the CSA consent form is reasonable. The LEA has made two referral requests to CSA for funding the child's PDS placement. Both were denied because they lacked the proper consent from the parents. The latter referral attached the parents June 7, 2022, consent. In denying the funding request, CSA Manager stated that the consent was insufficient. Hearing Officer also finds any delay in the implementation of the PDS placement has been caused by the parents' uncooperativeness – refusal to provide the CSA with a signed consent and the refusal to provide the LEA with releases permitting information to be provide to three prospective PDSs. The delay in implementation of the PDS placement has not been caused by the LEA. *See, MM v. Sch. Dist. Of Greenville Cnty*, 303F.3d 523 (4<sup>th</sup> Cir. 2011). (failure to have IEP completed caused by parents' failure to cooperate).

In sum, the parents have not provided releases so that other PDSs can be considered. This has prevented the LEA from inspecting and investigating other schools deemed to be appropriate. The LEA must be allowed to pursue these options, especially considering PDS IV has not provided an unconditional admission of the child. The June 7, 2022, consent does not satisfy the requirement for providing those releases. Neither does the June 7, 2022, consent provide the required consent for CSA funding to be approved.

**Issue 2:** Issue two pertains to the request for compensatory services which the Hearing addresses later in this decision.

### **Issues 3 and 4**

Parents' third and fourth issues allege procedural safeguard violations by the LEA.

#### **Meaningful Participation in Meeting**

For one, the parents contend that they were denied meaningful participation in the resolution meeting held on June 27, 2022 (June 27, 2022, Resolution Meeting).

The IDEA affords parents certain procedural safeguards. One such procedural safeguard is parental participation in meetings. 34 C.F.R. §300.501(b); 8 VAC 20-81-170(A)(1)(b). In addition, the safeguards provide parents "an opportunity for meaningful input into all decisions affecting their child's education." *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 98 L. Ed. 2d 686 (1988). Courts have sensibly rejected, however, an interpretation of the IDEA that would "guarantee that parents must fully comprehend and appreciate to their satisfaction all of the pedagogical purposes in the IEP." *Colonial Sch. Dist. v. G.K. by and through A.K.*, 763 F. App'x 192, 198 (3d Cir. 2018). Thus, courts have not required "perfect comprehension by parents" and construe the IDEA to require "serious deprivation," before parents' participation rights are impacted. *Id.*

The evidence presented in the parents' case-in-chief demonstrated the LEA held a resolution meeting on June 27, 2022. The parents had requested a virtual format and the LEA complied with that request. The evidence reflects that those present at the meeting were Assistant Superintendent of Special Education, Principal, the child's mother (Parent), the Advocate, a representative from BNU, and a representative from CSA.

The uncontradicted evidence also shows that during this meeting the parent discussed in depth her concerns. Parent expressed concerns about the CSA process; particularly, the CSA consent form Parent was being asked to sign. The CSA representative spoke with the parent during the meeting to explain the CSA process. The CSA representative also offered several times during the meeting to go over the CSA process and the items on the CSA consent form with the parent during the resolution meeting. CSA Representative also offered to meet with the parent and each of the agencies listed on the form to explain the purpose of the requested consent to provide information to CSA/agencies listed on the CSA consent form.

In addition, the advocate and the Assistant Superintendent of Special Education conversed during the beginning of the meeting about the consent process. The Assistant Superintendent of Special Education was able to answer some of the advocates questions during the meeting.

In addition, the evidence demonstrates that prior to the resolution meeting, the parent and advocate had expressed a desire to have representatives from BNU and from CSA attend the meeting. A representative from each of those entities attended the meeting. In fact, as referenced above, the CSA representative offered to answer questions of the parents regarding the CSA consent form during the meeting as well as outside the resolution meeting setting.

During the time CSA Representative was speaking, the evidence shows the parents' advocate repeatedly interrupted CSA Representative and others during the meeting so that their comments could not be heard. Advocate also stated during the meeting that the parent would not sign the CSA consent form. Eventually, the advocate was dropped from the meeting because of her conduct. At that point, the LEA telephoned the mother twice, to rejoin the mother to the meeting. There was no answer each time the LEA called the mother's telephone number.

Considering the above, the Hearing Officer finds the parents have not met their burden and shown the LEA failed to permit the parent to meaningfully participation in the June 27, 2022, resolution meeting.

### **Access to Educational Records**

In issue four, the parents contend that the LEA did not give the parents access to the child's records prior to the resolution meeting.

A parent has a right to inspect and review the educational records relating to their child with a disability before a resolution meeting. The LEA must comply with a request and without unnecessary delay. 34 C.F.R. §300.613(a).

Evidence presented in the parents' case-in-chief shows that by letter dated Friday, June 24, 2022, the LEA confirmed a scheduled a resolution meeting for 10:00 a.m. on Monday, June 27, 2022. The letter also informed the parents that they could review the child's records prior to the resolution session on Monday, June 27, 2022, between 7:00 a.m. and 9:45 a.m. Parents offered nothing more regarding this issue.

The Hearing Officer finds the parents have failed to meet their burden.

### **Issues 5 and 6**

The fifth and sixth issues before the Hearing Officer centered around extended school year services (ESY). In essence, parents contend that statements made in a prior written notice (PWN) dated May 18, 2022, and a letter dated June 8, 2022, regarding retaining the child denied the child a FAPE. In addition, parents contend that the IEP teams failed to consider appropriate factors in determining whether the child qualified for ESY services.

A student's IEP team determines, on an individual basis, whether extended school year (ESY) services are required to provide the student a FAPE. 34 C.F.R. §300.106(a)(2). *See also, Burke County Bd. Of Educ. V. Denton*, 895 F.2d 973, 980 (4<sup>th</sup> Cir. 1990). Further, neither the IDEA or Virginia law requires the decision on ESY services to be made on a specific data. The IEP team is not required to base its decision on whether the services are needed on a specific type of data. *See e.g. T.T. v. Jefferson County Board of Education*, 77 IDELR 243 (N.D. Ala. 2020). The decision of whether ESY services are required is case specific.



In its deliberations during an IEP meeting held on May 9, 2022, the IEP team considered several factors before determining that the child did not require ESY. The IEP used a ESY check list to assist it in making the determination. For one, the IEP team reviewed the child's **most recent IEPs**. Particularly, the IEP team reviewed the November 2021 IEP and the May 21, 2021, IEP.

In addition to reviewing the IEPs, the evidence showed that the IEP team also reviewed **the child's attendance**. Regarding the child's attendance the evidence reflects that from November 2021, until the end of the 2021-22SY, the child did not attend school. This was the case because the parents withheld the child from school. In addition, the parents refused to sign the addendum to the November 2021 IEP which would have provided for the child to receive homebased instruction and virtual speech and language services. Accordingly, his attendance demonstrated that the child accumulated 101 absences during the 2021-22SY. The LEA had determined that most of them were unexcused. This was the case because, as mentioned, the IEP team determined that the parents had withheld the child from school. Additionally, even if the parent did not desire to return her child to school for in-person learning, the LEA had offered homebased instruction by way of an addendum to the November 2021 IEP. However, the parent declined to sign the addendum which would have provided the homebased instruction.

In its "ESY services" deliberation, the IEP team also reviewed the **child's work samples**. These work samples were from the period August 2021 December 2021, which the IEP team had received in January 2022 from the parents.

The evidence also shows that samples of work the parent had the child complete at home after January 2022, were not reviewed because they had not been made available to the IEP team by the May 9, 2022, IEP meeting was in session. Parent participated in the May 9, 2022, IEP meeting by telephone. She requested to share the latter work samples virtually, but because she was participating by telephone, they could not be presented by the parent at the meeting. That said, the evidence does establish that prior to May 9, 2022, IEP meeting, the parent could have provided the work samples to the school members of the IEP team, presumably by mail or by bringing them to the school. The evidence also reflects that it was unknown whether the latter work samples equated to work produced by the child as a result of receiving instruction by a highly qualified teacher.

The evidence also shows that the IEP team considered the child's progress reports and report cards, annotated notes and observations of the teachers.

In addition, the May 9, 2022, IEP team considered regression and recoupment as it relates to the child. In this deliberation, the IEP noted that during the 2021-22 SY, the child was enrolled as a fourth grader. Further, from the child's summer break between the conclusion of his third-grade year and the beginning of his fourth-grade year, the child did not show signs of regression. This had been the longest period for which the child was not receiving services from the LEA, excepting November 2021 until the end of the 2021-22SY when the child's parent had withheld him from school.

The IEP team noted on the May 9, 2022, IEP that it had considered ESY services and

determined the child did not require them.

The Hearing Officer is also cognizant of the two letters from doctor one dated October 11, 2021, and received from the parents in January 2022, and another letter dated January 14, 2022. The evidence reflects that during IEP meetings held in 2022, after December 2021, the IEP team did consider those letters. Moreover, for purposes of determining whether the child required ESY services, the letters were not considered. One was deemed irrelevant. The other letter contained some factual inaccurate information. Further, Doctor indicated he only saw the child intermittently.

Giving great thought to the above, as well as the language in the PWN regarding ESY, the Hearing Officer finds the evidence establishes that the IEP team thoroughly reviewed multiple factors in addition to regression and recoupment. After doing so, the IEP team determined the child did not require ESY. The Hearing Officer will not second guess the educators and substitute her own notions of sound educational policy for the school authority. *Hartmann v. Loudoun County Bd. Of Educ.*, 118 F.3d 996, 999(4<sup>th</sup> Cir. 1997).

Parents have failed to meet their burden and show that the IEP's decision which determined the child did not qualify for ESY services was wrongly made.

## **V. Decision and Order**

The Hearing Officer has considered all evidence presented whether by testimony or documents.

The Hearing Officer affirms that the objection to rebuttal evidence is sustained.

Furthermore, the Hearing Officer finds the parents have failed to meet their burden on the issues before her. With regard to issue one, the June 7, 2022, consent provided by the parents is insufficient. Regarding issue two, no compensatory services are due as the LEA has not denied the child a FAPE any denial of educational services is due to the parents withholding the child from school or instruction. Concerning issue three and four, the LEA provided the parents access to the child's educational records and the parent was provided meaningful participation in the resolution meeting. Regarding issues five and six, the language in the PWN does not somehow constitute a denial of FAPE. Moreover, the parents failed to meet their burden and show the ESY services determination was wrongly made.

Accordingly, the Hearing Officer dismisses these matters with prejudice.

## **VI. PREVAILING PARTY**

I have the authority to determine the prevailing party on the issues and find the prevailing party is the LEA on all issues.

## **VI. APPEAL INFORMATION**

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

ENTERED THIS 11<sup>th</sup> day of September, 2022.

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Ternon Galloway Lee, Hearing Officer

Cc: Parents  
Advocate for Parents  
Counsel for LEA  
Dir. of Special Education for LEA  
VDOE Coordinator  
Hearing Officer Monitor of the Proceedings