

**COMMONWEALTH OF VIRGINIA
VIRGINIA DEPARTMENT OF EDUCATION
Office of Special Education and Student Services
Division of Special Education and Student Services**

In re: [REDACTED]

Due Process Hearing
([REDACTED] Public
Schools)

Administrative Hearing Officer:
Frederick R. Gerson, Esq.

VDOE Case No. 23-038

**HEARING OFFICER DECISION
KEY TO PERSONAL IDENTIFICATION INFORMATION**

Student	[REDACTED]
Student's ("AGE")	Age [REDACTED] years old
Student's Birthday	[REDACTED]
Parent	[REDACTED], Mother
LEA	[REDACTED] Public Schools
LEA Representative 1	[REDACTED]
LEA Representative 2	[REDACTED], Interim Director/Associate Director of Exception Education, [REDACTED]
LEA Counsel	Nicole Thompson, Esq.
Student's Advocate	Parent
High School	[REDACTED] High School
1:1 Nurse	[REDACTED], LPN, One to One Nurse
Director	[REDACTED], Chief Wellness Officer/Former Director of Exceptional Education, [REDACTED]
HS Case Manager	[REDACTED], Case Manager, [REDACTED] High School
HS Principal	[REDACTED], Executive Director, [REDACTED] High School
Instructional Specialist	[REDACTED], Instructional Specialist, Office of Exceptional Education, [REDACTED]

Lead Speech Pathologist	[REDACTED], Lead Speech and Language Pathologist, Office of Exceptional Education, [REDACTED]
Nurse Coordinator	[REDACTED], Coordinator, School Health Services, Culture, Climate, and Student Services Office, [REDACTED]
Occupational Therapist	[REDACTED], Occupational Therapist, [REDACTED]
Physical Therapist	[REDACTED], Physical Therapist, [REDACTED]
RM Coordinator	[REDACTED] BSc, Coordinator of Risk Management, [REDACTED]
Secondary Coordinator	[REDACTED], M.Ed., Coordinator, Secondary Schools, Office of Exceptional Education, [REDACTED]
Speech Pathologist Supervisor	[REDACTED], Speech and Language Pathologist, [REDACTED]
	[REDACTED], Medicaid Coordinator and Department Supervisor, OT, PT, Adaptive PE and Assistive Technology, Office of Exceptional Education, [REDACTED]

**COMMONWEALTH OF VIRGINIA
VIRGINIA DEPARTMENT OF EDUCATION
Office of Special Education and Student Services
Division of Special Education and Student Services**

LEA Representative:

Dr. [REDACTED]
Associate Direct of Exceptional Education
[REDACTED], M.Ed
Coordinator of Systems & Processes for
Exceptional Education
[REDACTED] Public Schools
[REDACTED]
Va.
Dr. : ([REDACTED]) [REDACTED]
Dr. Email:
[REDACTED]
Ms. Office: ([REDACTED]) [REDACTED]
Ms. [REDACTED]
[REDACTED]

Parent:

Ms. [REDACTED], Mother
[REDACTED]
Va. [REDACTED]

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BY HAND: to Parent

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**COMMONWEALTH OF VIRGINIA
VIRGINIA DEPARTMENT OF EDUCATION
Office of Special Education and Student Services
Division of Special Education and Student Services**

In re: Student¹

Due Process Hearing
([REDACTED] Public
Schools)

Administrative Hearing Officer:
Frederick R. Gerson, Esq.

VDOE Case No. 23-038

HEARING OFFICER DECISION

INTRODUCTION AND PROCEDURAL HISTORY²

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Parent pursuant to the Individuals with Disabilities Education Act, as amended (the “IDEA”), 20 U.S.C. § 1400, *et seq.*, and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 8 VAC 20-81-10, *et seq.* (the “Virginia Regulations”). In this proceeding, generally stated, Parent seeks relief against the LEA, [REDACTED] Public Schools (“[REDACTED]”) for [REDACTED]’s alleged failure to implement Student’s Individualized Education Program (“IEP”) during the 2022-2023 school year.

Student, an AGE child, is a resident of [REDACTED], Virginia. Student attends High School, a regional high school, which [REDACTED] and other surrounding local educational agencies pay to send interested students. [REDACTED] is responsible for the provision of special education services to Student because Student resides in the City of [REDACTED]. While Parent’s original Due Process Complaint Notice, was dated October 11, 2022, for the reasons stated in the Introductory Letter of Hearing Officer, dated October 14, 2022, the filing date of the original Due Process Complaint Notice, was determined to be October 13, 2022, the date on which the Due Process Complaint Note was filed with the Virginia Department of Education (“VDOE”). The undersigned Hearing Officer was appointed on, October 13, 2022.

At the outset of these proceedings, Parent did not provide an email address to either [REDACTED], LEA Counsel or to the hearing officer and Parent made plain her wish not to be emailed. Throughout these proceedings if communications occurred by email, Parent was sent a copy of such emails and attachments, such as hearing officer orders, via regular

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

² Throughout this decision, the following reference designations shall be used: for Parent’s Exhibits, “P Exh. <Exhibit #> at < Bates Page #>”; for LEA Exhibits, “RPS Exh. <Exhibit #> at < Bates Page #>”; for verbatim transcript of the hearing “Day <Tr. Day #> at < Page #>”.

mail and on some occasions via overnight mail. Additionally, when expediency was required, concerning scheduling or similar non-substantive matters, Parent communicated with hearing officer's assistant via text and phone, other than a singular instance of an *ex parte* communication noted below in this section.

On October 19, 2022, the hearing officer convened the first prehearing conference call with the parties to include Parent and LEA Counsel.³ During the first prehearing conference call, by agreement the parties set the hearing dates and we also discussed the issues to be determined and other prehearing matters, to include the LEA's Notice of Insufficiency/Response to Due Process Complaint, dated and filed October 19, 2022. For the reasons stated in the First Prehearing Report and Order, also dated October 19, 2022, after the hearing officer amended the Due Process Complaint Notice with Parent's consent, the LEA withdrew its Notice of Insufficiency. Further, as stated in the First Prehearing Report and Order, the Amended Due Process Complaint Notice, was filed on October 19, 2022. A copy of the Amended Due Process Complaint Notice was also attached as an exhibit to the First Prehearing Report and Order.

The parties met for the first resolution session on October 26, 2022, and at this time did not resolve the issues in dispute.

On November 1, 2022, the hearing officer received an *ex parte* communication from Parent in the form of a voicemail, which the hearing officer did not listen to. A second prehearing conference call was convened by the hearing officer on November 2, 2022, to discuss Parent's *ex parte* communication.⁴ As detailed in the Second Prehearing Conference Call and Order, dated November 8, 2022, Parent expressed concerns about the resolution process. For the reasons stated in the Second Prehearing Report and Order, the hearing officer declined to insert himself into the resolution process.

The parties met for the first and second mediation sessions on November 2 & 10, 2022, respectively, and met for the second resolution session on November 4, 2022. While the parties did not resolve the issues in dispute during these sessions, the parties stated that during the foregoing mediation and resolution sessions they had made progress on some, but not all, of the issues in dispute.

The hearing officer issued an Agenda for the Third Prehearing Conference Call, dated November 8, 2022, which call was held as agreed by the parties on November 14,

³ The first prehearing conference call was recorded by the hearing officer with the consent of the parties and transcribed by a Court Reporter retained by the LEA. As stated during the first prehearing conference call and in the First Prehearing Report and Order, dated October 19, 2022, the Court Reporter's transcript shall be the official record of the first prehearing conference call.

⁴ The second prehearing conference call was recorded by the hearing officer with the consent of the parties. The second prehearing conference call was *not* transcribed by a Court Reporter. As stated during the second prehearing conference call and in the Second Prehearing Report and Order, dated November 8, 2022, the hearing officer's recording shall be the official record of the second prehearing conference call. The hearing officer distributed the recording of this call to parent via flash drive and to LEA Counsel via a cloud drive.

2022.⁵ As detailed in the Third Prehearing Conference Call and Order, dated November 17, 2022, LEA Counsel, requested a 10-day continuance to the timeline, and Parent consented to the extension request, based on the progress the parties had made through the resolution and mediation process. Further, at the time of the third prehearing conference call, the parties were in the process of setting a third mediation session. Accordingly, the hearing officer granted the request for a 10-day extension to the timeline, finding it was in the best interest of the child to grant a 10-day extension to the timeline. 34 C.F.R. § 300.515(c) and 8 VAC 20-81-210(P)(9). The Third Prehearing Report and Order also detailed the changes to the timeline discussed and agreed to during the call, to include the hearing officer's decision deadline and other deadlines.

Also, as detailed in the Third Prehearing Conference Call and Order, the Parent provided and agreed to a detailed statement, clarifying, and narrowing the issues that Parent would present at the hearing. During the foregoing phone conference and as stated in the Third Prehearing Conference Call and Order, the hearing officer advised Parent that the issues for decision shall be limited as "clarified and narrowed by Parent" citing 8 VAC 20-81-210(M)(3) & (O)(3). The detailed statement of the issues is set forth below in this Decision.

The parties met for the third mediation session on November 28, 2022, at which time the parties stated that they continued to make progress on some, but not all, of the issues in dispute.

On November 29, 2022, the hearing officer convened the fourth prehearing conference call with the parties to include Parent and LEA Counsel.⁶ As detailed in the Fourth Prehearing Conference Call and Order, dated November 30, 2022, Parent, requested a 38-day continuance to the timeline, and LEA Counsel consented to the extension request, based on the progress the parties had made through the resolution and mediation process and the desire to schedule further mediation and/or resolution sessions. Accordingly, the hearing officer granted the request for a 38-day extension to the timeline, finding it was in the best interest of the child to grant a 38-day extension to the timeline. 34 C.F.R. § 300.515(c) and 8 VAC 20-81-210(P)(9). The Fourth Prehearing Report and Order also detailed the changes to the timeline discussed and agreed to during the call, to include new hearing dates, and the hearing officer's decision deadline, thereafter, being February 19, 2023, and other deadlines.

Following the fourth prehearing conference call the parties did not conduct any further mediation sessions but did meet for a final resolution session on December 9, 2022. During this final resolution session, the parties did make progress and reached

⁵ The third prehearing conference call was recorded by the hearing officer with the consent of the parties and transcribed by a Court Reporter retained by the LEA. As stated during the third prehearing conference call and in the Third Prehearing Report and Order, dated November 17, 2022, the Court Reporter's transcript shall be the official record of the first prehearing conference call.

⁶ The fourth prehearing conference call was recorded by the hearing officer with the consent of the parties and transcribed by a Court Reporter retained by the LEA. As stated during the fourth prehearing conference call and in the Fourth Prehearing Report and Order, dated November 30, 2022, the Court Reporter's transcript shall be the official record of the first prehearing conference call.

agreement on some issues. The parties' agreements made during mediation and resolution sessions is noted below in this decision.

As detailed in the Fifth Prehearing Report and Order, dated January 6, 2023, following the fifth prehearing conference call, the parties exchanged their exhibits and witness lists in a timely manner. Also as detailed in the Fifth Prehearing Report and Order, in a timely manner, Parent requested the issuance of fifteen (15) witness subpoenas. LEA Counsel initially objected to four (4) of the foregoing witness subpoenas requesting an offer of proof concerning either relevancy and/or that the witness's testimony would be duplicative. Shortly after receipt of [REDACTED]'s objections, the hearing officer issued Parent's eleven (11) witness subpoenas that at that time were not objected to. After the hearing officer issued Parent's eleven (11) witness subpoenas, LEA Counsel filed one additional objection on the same grounds to a witness for whom a subpoena had already issued. After numerous email contacts with counsel for the LEA and the hearing officer's assistant's contacts with Parent via telephone, the hearing officer was not able to secure an agreed date and time from the parties until January 4, 2023, concerning the LEA objections because of the upcoming holidays, planned vacations, and [REDACTED]'s winter break closure. To provide Parent sufficient time to have the witness subpoenas served, the hearing officer thereafter issued the four (4) witness subpoenas to which the LEA had objected prior to issuance, subject to the LEA's objection.

On January 6, 2023, the hearing officer convened the fifth prehearing conference call with the parties to include Parent and LEA Counsel.⁷ As detailed in the Fifth Prehearing Report and Order, the hearing officer overruled [REDACTED]'s witness objections pursuant to Parent's proffer while noting that during the hearing [REDACTED] may again object to the testimony of each such witness as irrelevant or duplicative and the undersigned will consider such objections at that time. Additionally, the hearing officer further stated in the Fifth Prehearing Report and Order at 8:

Further, as stated during the fifth prehearing conference call, the undersigned shall consider that the parties' agreed that a three and a half day hearing is appropriate for the issues to be fully addressed in this hearing. Accordingly, during the hearing, and in fairness to the parties, the undersigned will monitor the duration of each parties opening, the duration of each witness's testimony (direct, cross-examination, and redirect), and closing, giving close to equal time to each party to present its case, while recognizing Parent bears the burden of proof, and thus providing Parent slightly more time than the LEA. Further, the undersigned on his own, or upon the objection of a party will consider whether testimony is relevant, whether such individuals are the best people to testify to the alleged fact or opinion, and whether such testimony is cumulative.

⁷ The fifth prehearing conference call was recorded by the hearing officer with the consent of the parties and transcribed by a Court Reporter retained by the LEA. As stated during the fifth prehearing conference call and in the fifth Prehearing Report and Order, dated January 6, 2023, the Court Reporter's transcript shall be the official record of the first prehearing conference call.

As detailed in the Sixth Prehearing Report and Order, dated January 9, 2023, the hearing in this matter was to commence on January 9, 2023, but did not because of Parent's documented emergency room visit that resulted in Parent not returning home until the early morning hours on the same day the hearing was to commence. Thereafter, on the morning of January 9, 2023, in the hearing room, with LEA Counsel and LEA Representative 1 present, the hearing officer recorded the proceeding and adjourned the hearing until Wednesday, January 11, 2023, at 9 a.m., circulating the electronic recording of the proceeding that day to the parties.

The first two days of the hearing were held on January 11 and 12, 2023, and the final three days were held on January 23, 24, and 25, pursuant to the agreement of the parties as detailed in the Scheduling Order, dated January 13, 2022. Throughout the first two days of the hearing, and again as detailed in the Scheduling Order, the hearing officer reiterated to the parties, and quoted the passage as set forth above from the Fifth Prehearing Report and Order, concerning the number of days agreed to for the hearing, and the amount of time the hearing officer would allot to each party to present its case. The parties had ample opportunity to present their case. On the final day of the hearing, January 25, 2023, the parties presented their closing argument.

During the hearing, the hearing officer admitted the following documentary evidence:

P Exh. 1	Due Process Complaint Notice
P Exh. 3	June 19, 2019
P Exh. 5	████ One to One Nurse Job Description
P Exh. 7	████ Calendar
P Exh. 9	Student Medical Order for Special Health Care Needs
P Exh. 10	Handwritten Therapy Log
P Exh. 11	Handwritten Teacher Log
P Exh. 12	Handwritten Feeding Log
P Exh. 14 (pp. 5-11)	Various █████ Records
P Exh. 17	Various █████ Records to include OT, Partial ST, and PT Therapy Logs
P Exh. 19	Nurse Service Agreement and related documents
R. Exh. 21	Rifton Equipment Brochure
████ Exh. 1	June 19, 2019, IEP
████ Exh. 2	Nursing Service Agreement
████ Exh. 3	Speech Pathologist Log

Exh. 4	Occupational Therapist Log
Exh. 5	Physical Therapy Log and Partial Speech Pathologist Log
Exh. 6	Pages from Written Therapist Communication Log
Exh. 7	Meeting Minutes and Prior Written Notice Re Transportation
Exh. 8	October 19, 2022, Transcript of First Prehearing Conference ⁸
Exh. 10	November 1, 2022, Recording of Second Prehearing Conference
Exh. 12	Due Process Complaint Notice
Exh. 13	October 19, 2022, Notice of Insufficiency/Response to Due Process Complaint Notice
Exh. 15	Job Description for Instructional Assistant
Exh. 16	High School First Marking Period Report Card
Exh. 17	March 5, 2020, Hearing Officer Decision

Additionally, at the conclusion of the hearing, the hearing officer set a filing deadline February 9, 2023, if the parties wished to submit argument in support of their positions, while noting explicitly no such written submission was required. Both parties timely submitted written argument. During the hearing and as set forth in the Fourth and Fifth Prehearing Reports and Orders, the hearing officer confirmed the decision deadline as February 19, 2023.

Parent called the following individuals to testify, listed in the order they testified: (1) Supervisor, (2) Lead Speech Pathologist, (3) Instructional Specialist, (4) Nurse Coordinator, (5) Director, (6) Secondary Coordinator, (7) 1:1 Nurse, (8) HS Case Manager, and (9) HS Principal. called on the following individuals to testify, listed in the order they testified: (1) RM Coordinator, (2) Speech Pathologist, and (3) Secondary Coordinator.

JURISDICTION

The hearing officer has jurisdiction pursuant to the Individuals with Disabilities Education Act (the “IDEA”)⁹ 20 U.S.C. § 1400 *et seq.*, and its implementing regulations, 34 CFR § 300 *et seq.*, and the Regulations Governing Special Education Programs for

⁸ The LEA’s exhibits include documents not normally considered evidence, such as prehearing conference call transcripts, the LEA Notice of Insufficiency/Response to Due Process Complaint, and Student v. RPS, VDOE Case No. 20-026 (March 5, 2020), which decision concerns the same parties and the same Individualized Education Program (“IEP”) of Student.

⁹ During 2004, the United States Congress reauthorized the IDEA as the Individuals with Disabilities Education Improvement Act. See Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), effective July 1, 2005. The amendments provide that the short title of the reauthorized and amended provisions remains the Individuals with Disabilities Education Act. See Pub. L. 108-446, § 101, 118 Stat. at 2647; 20 U.S.C. § 1400 (2006) (“This chapter may be cited as the ‘Individuals with Disabilities Education Act.’”).

Children with Disabilities in Virginia, 8 VAC § 20-81 *et seq.* (the “VA Special Education Regulations”).

ISSUES AND RELIEF SOUGHT

The issues for determination in this case, as agreed to by the parties and certified in the Third, Fourth and Fifth Prehearing Reports and Orders, are:

1. Whether the LEA has provided Student with physical therapy (“PT”), occupational therapy (“OT”), and speech therapy (“ST”) services in accordance with his Individualized Education program (“IEP”), and if so, whether these failures amounted to a denial of a free appropriate public education (“FAPE”).
2. Whether LEA instructional assistants and/or other LEA staff or contractors have failed to provide Student with services in accordance with his IEP if (a) they are not present at Student’s school upon his arrival; or (b) they are present at Student’s school upon his arrival or departure but fail to assist Parent with removing Student from Parent’s vehicle or getting Student into Parent’s vehicle; and (c) if so, whether these failures amounted to a denial of FAPE.
3. Whether LEA instructional assistants and/or other LEA staff or contractors have failed to provide Student with services in accordance with his IEP if Student is moved from one class to another, not in his gate trainer, but in his activity/positioning chair, and if so, whether these failures amounted to a denial of FAPE.
4. Whether LEA instructional assistants and/or other LEA staff or contractors have failed to provide Student with services in accordance with his IEP if (a) they fail to take notes on Student’s behalf when he is not present in class because he is receiving other services; (b) they fail to take notes on Student’s behalf when he is not present in class for reasons other than an absence resulting from him receiving other services; or (c) they fail to submit Student’s work to his teachers; and (d) if so, whether these failures amounted to a denial of FAPE.
5. Whether the LEA has provided Student with services in accordance with his IEP and denied Student FAPE if the LEA fails to provide Student with any service as delineated in his IEP on a day that High School is open, but the LEA is closed, and if so, whether these failures amounted to a denial of FAPE.
6. In any instance where the undersigned has determined that the LEA has denied Student FAPE, what relief is Student entitled to, to include but not be limited to whether Student is entitled to compensatory education services, and if so, in what amount or duration.

THE PARTIES' AGREEMENTS

The parties reached at least a partial agreement during their mediation or resolution sessions regarding the following issues: Issues 4(a) and 4(b), the parties have agreed to a technological solution referred to as “swivel software”; Issue (5) [REDACTED] agreed that the instructional assistant and one to one nurse shall be present on a day that High School is open, but [REDACTED] is closed, unless Student is otherwise absent. However, concerning these agreements and Issue 5, the question as to whether Student is entitled to compensatory services for the time preceding the parties’ agreement remains at issue.

The parties also agreed to draft a 1-page document, to be prepared by High School, that summarizes the services [REDACTED] provides to Student pursuant to his IEP and that provides instruction to nurses, aides and other staff providing these services. The parties believe this 1-page document may resolve issues that arise from staff and aide transitions. At the conclusion of the hearing, the hearing officer understood that [REDACTED] has approved this agreement and it is merely awaiting Parent’s final review and approval.

FINDINGS OF FACT¹⁰

After considering all the evidence, as well as the argument of LEA Counsel and Parent, this hearing officer’s findings of fact during the relevant timeframe are as follows¹¹:

1. Parent filed with [REDACTED] the original Due Process Complaint Notice, dated October 11, 2022, on October 11, 2022. The Virginia Department of Education did not receive a copy of original Due Process Complaint Notice until October 13, 2022.
2. The original Due Process Complaint Notice was amended by the hearing officer with the consent of the parties and filed on October 19, 2022. The Amended Due Process Complaint, as stated therein, corrected the name of the school that Student attends to High School, while also noting his home school.
3. As stated in the Amended Due Process Complaint Notice, Parent complains generally that that [REDACTED] is not implementing Student’s IEP “as written” and cites certain specific deficiencies.
4. During these proceedings, Parent delineated [REDACTED]’s specific failures concerning its implementation of Student’s IEP as set forth above in this Decision, in the “Issues and Relief Sought” section set forth above.

¹⁰ To the extent the other sections entitled, “Introduction and Procedural History,” “Jurisdiction,” “Issues and Relief Sought,” and “Conclusions of Law” include findings of fact, those findings are incorporated into this section.

¹¹ See *infra*, conclusions of law, holding that October 19, 2022, the date of the Amended Due Process Complaint Notice, is the last day on which to consider events and issues as set forth in Parent’s Complaint.

5. Student's current in place IEP dates from 2019, [REDACTED] Exh. 1, and was amended October 2021, by a 1-page Nursing Services Agreement. [REDACTED] Exh. 2.¹²

6. Parent consented to Student's current IEP on July 2, 2019, and provided partial consent to the Nursing Services Agreement, agreeing to the nursing services as stated therein, on October 15, 2021. [REDACTED] Exh. 1 at 59; [REDACTED] Exh. 2.

7. There is no dispute between the parties concerning Student's eligibility for special education and related services and further that Student is medically fragile.

8. In the IEP's Present Level of Academic Achievement and Functional Performance ("PLAAFP") section, the IEP notes that Student's elementary eligibility team determined that he remained eligible for special education and related services under the primary category of Multiple Disabilities and the secondary category of Speech and Language Impairment. [REDACTED] Exh. 1 at 2.

9. As set forth in the PLAAFP section, Student's primary disability category is based on the eligibility team determining that Student is other health impaired and has an orthopedic impairment, as well as an impairment in speech and language. *Id.*

10. Concerning Student's other health impairment, based on his diagnosis of periventricular leukomalacia that causes Student to be fatigued often and influences his transition, mobility, positioning, feeding, toileting, vision and communication skills. Accordingly, Student requires assistance, with positioning, mobility, manual tasks, feeding, daily living tasks, and moving throughout the school day. *Id.*

11. Student's periventricular leukomalacia diagnosis also qualifies him as having an orthopedic impairment that requires accommodations such as special seating equipment to help him with posture and mobility at school. *Id.*

12. For Student to access his education he also requires assistive technology to include but not be limited to, read aloud software, a speaking calculator, and digital textbooks. *Id.*

13. Because of his disabilities, Student's IEP states: Student's "physical needs including accessibility to learning activities, positioning, posture, manual tasks, feeding, daily living skills, mobility and self-care require 100% assistance." *Id.* at 6.

14. Student's IEP contains 46 accommodations/modifications. *Id.* at 46-50.

15. One such accommodation/modification states: "instructional assistant from arrival to departure to provide support in areas to include: . . . mobility." *Id.* at 48.

16. The accommodation/modification section of the IEP when discussing supports for school personnel notes: Student "requires the assistance of instructional

¹² Parent included Student's IEP and the Nursing Services Agreement as a part of Parent's Exhibits as P. Exhs. 3 and 19 at 1. For ease of reference, where the parties have the same exhibit that is entered into evidence, the hearing officer cites to [REDACTED]'s exhibit.

aides for . . . mobility. . . . [Student] also requires moderate to maximum assistance to complete all activities across the school setting [Student] is dependent upon his aides to support him through the school day.” *Id.* at 50.

17. Further, the Nursing Services Agreement states that the one to one nurse “will support mobility and personal care needs.” ██████ Exh. 2.

18. Pursuant to Student’s IEP, as amended by the Nursing Service Agreement, Student is to have one instructional aide and a one to one nurse at school from “arrival until departure” to provide support in areas to include but not be limited to Student’s mobility needs. ██████ Exh. 1 at 48; ██████ Exh. 2.

19. Pursuant to ██████’s job description for an instructional aide, the ability to occasionally lift fifty (50) pounds is required. ██████ Exh. 15 at 1.

20. Pursuant to ██████’s job description for a one to one nurse, the ability to lift one hundred fifty (150) pounds is required. ██████ Exh. 15 at 1; Tr. Day 2 at 216.

21. Student unequivocally weighs less than 150 pounds, Tr. Day 2 at 216-18, and based on the totality of evidence currently weighs between 60 and 80 pounds. To implement Student’s IEP and the accommodations and modifications as stated therein, and to support Student’s mobility and personal care needs, his instructional aide and/or nurse must lift Student regularly. Tr. Day 2 at 25, 36-42, 72-73, 89, 210-11.

22. Student’s first academic day of school at High School was August 22, 2022, while August 18, 2022, was freshman orientation. Tr. Day 1 at 221-223; Tr. Day 4 at 233; P. Exh. 20 at 2.

23. Student attends High School, which is a regional school that ██████ and other surrounding LEAs pay to send interested students such as Student. Tr. Day 4 at 211-13, 333-34.

24. High School is not a ██████ school. Tr. Day 4 at 333-34.

25. High School is responsible for providing Student with instruction, Tr. Day 4 at 333-34, while High School’s model and “standard operating practice” is that it is the LEA’s responsibility, such as ██████, to provide supplementary services, such as ST, OT, PT, a one to one nurse and an instructional aide. Tr. Day 4 at 282-83

26. The hearing officer finds the testimony of HS Principal and the High School attendance records, *see* P. Exh. 5 at 2-3, further finds HS Principal and the High School attendance records credible based as to whether Student’s absence or tardiness resulted directly from ██████ staffing issues. *See* ██████ Exh. 5 at 1-2 (Physical Therapist’s Log notes reflecting instructional aide staffing issues).¹³

¹³ *See infra* nn. 15 & 16.

27. The totality of the testimonial evidence to include the Physical Therapist's Log reflect that that ■■■ had occasional staffing issues during the timeframe at issue. *Id.*; *but see* Tr. Day 4 at 156-57 (Case Manager testimony for the period between October 10 and 19, 2022, the time frame for which she has knowledge); Tr. Day 4 at 366-67 (testimony of HS Principal the about the occasional dates on which ■■■ staff issues occurred). However, the totality of the evidence also reflects in response to these staffing issues, ■■■ sent additional staff, such as the Instructional Specialist and Secondary Coordinator among others, to High School to ensure that Student was provided the services as set forth in his IEP. Tr. Day 2 at 99, 24-26, 102-03; Tr. Day 3 at 124, 139, 156-57, 211; Tr. Day 5 at 104-20.

28. Student was absent and/or tardy from High School because of ■■■ instructional aide staffing issues as follows:

Date	School Week	Weekday	Arrival Time
8/24/2022	8/22-8/26	Wednesday	12:20 PM
8/29/2022	8/29-9/2	Monday	Absent ALL Day
8/30/2022	same	Tuesday	1:00 PM
8/31/2022	same	Wednesday	9:30 AM
9/27/2022	9/26-9/30	Tuesday	11:00 AM
9/29/2022	same	Thursday	10:23 AM
10/4/2022	10/3-10/7	Tuesday	9:53 AM
10/10/2022	10/10-10/14	Monday	10:20 AM
10/17/2022	10/17-10/19 ¹⁴	Monday	10:30 AM

P Exh. 20 at 2-3.

29. Student's IEP requires that ■■■ provide him with the following related services: Occupational Therapy ("OT") 60 minutes per week; Physical Therapy ("PT") 60 minutes per week; and Speech/Language Therapy ("ST") 60 minutes per week. ■■■ Exh. 1 at 55.

¹⁴ October 19, 2022 is the last day on which to consider events and issues as set forth in Parent's Due Process Notice Complaint for the reasons stated in the Conclusions of Law, below.

30. Student's IEP further states as part of the "Explanation of Placement Decision, that OT, PT and ST services shall be delivered twice weekly in 30-minute sessions. [REDACTED] Exh. 1 at 58.

31. The hearing officer finds credible the Occupational Therapist Log, [REDACTED] Exh. 3, Physical Therapy Log and partial Speech Pathologist Log, [REDACTED] Exh. 5, and Speech Therapy Log, [REDACTED] Exh. 3, for each of the foregoing therapists that provided direct services to Student concerning their delivery of services to Student. Tr. Day 1 at 192-194, 336-50; Tr. Day 5 at 11, 92-99. The Occupational Therapist Log and Physical Therapy Log and partial Speech Pathologist Log were also included as part of Parent's exhibits at P. Exh. 17.

32. During each of the foregoing six (6) school weeks wherein Student was absent because of [REDACTED] staffing issues, the Speech Pathologist delivered ST services in accordance with Student's IEP. Further, in any week where the Speech Pathologist did not provide the ST services, she attempted to do so but did not because of no fault of her own, or [REDACTED], and/or Student's absence did not result from [REDACTED] staffing issues. *Compare* [REDACTED] Exh. 3 (Speech Pathologist Log) *with* P. Exh. 20 at 2-3; Tr. Day 5 at 30-31, 99.

33. October 4, 2022, is the only day on which Student was tardy because of [REDACTED] staffing issues and Speech Pathologist did not provide ST services. However, on this day, the Speech Pathologist was at High School and was unable to provide the ST services because Student was unavailable for the entire time the Speech Pathologist was at the High School. [REDACTED] Exh. 3 at 21; Tr. Day 5 at 30-31, 99.

34. Other than for the week of October 3, 2022, during each of the foregoing six (6) school weeks wherein Student was absent because of [REDACTED] staffing issues, the Occupational Therapist, delivered OT services in accordance with Student's IEP. Further, other than for the week of October 3, 2022, in any week where the Occupational Therapist did not provide the ST services, she attempted to do so but did not because of no fault of her own and/or Student's absence did not result from [REDACTED] staffing issues. *Compare* [REDACTED] Exh. 4 (Occupational Therapist Log) *with* P. Exh. 20 at 2-3; Tr. Day 1 at 193-94.

35. The Occupational Therapist stated in her note, dated August 25, 2022, that she intended to deliver OT services on Tuesdays and Thursdays and that she discussed this with High School staff. [REDACTED] Exh. 4.

36. During many of the school weeks during the relevant time frame, to include the weeks of September 5 and 19, 2022, the Occupational Therapist delivered more than 60-minutes of direct therapeutic services. [REDACTED] Exh. 4 at 1-6.

37. During the week of October 3, 2022, the Occupational Therapist Log fails to include any note concerning the delivery of OT services and student was tardy on October 4, 2022, a Tuesday, and a day that OT services would normally be delivered.

38. During the weeks of August 22, 2022, August 29, 2022, September 5, 2022, and October 17, 2022, the Physical Therapist's logs do not include any entry evidencing

the delivery or services or the reasons why services were not delivered. [REDACTED] Exh. 5 at 1-2.

39. During the weeks of September 12, 2022, September 19, 2022, September 26, 2022, October 3, 2022, and October 10, 2022, the Physical Therapist delivered PT services in accordance with Student's IEP; and further during the weeks of September 26, 2022, and October 3, 2022, delivered more than 60 minutes of PT services. [REDACTED] Exh. 5 at 1-2.

40. Student's daily academic schedule at High School, consistent with his classmates, is generally as follows: Student arrives at approximately 8:00 a.m.; Morning Meeting occurs from 8:50 a.m. to 9:00 a.m. and does not include an instructional component; AP Computer Science Principles occurs from 9:04 a.m. to 10:04 a.m.; Personalized Learning Time occurs from 10:08 a.m. to 11:08 a.m. and during this time students should work on academic assignments; Algebra I and lunch occur from 11:12 a.m. to 12:48 p.m., with about twenty-five (25) minutes of this time period allotted for lunch; Global Studies I occurs from 12:52 p.m. to 1:52 p.m.; Biology occurs from 1:56 p.m. to 2:56 p.m.; and the school days ends at approximately 3:00 p.m. P. Exh. 20 at 1 and 4; Tr. Day 4 at 163-165, 198-200, 236, 247-253.

41. At High School, students receive grades during each marking period and marking periods are six (6) weeks. Tr. Day 4 at 88-89.

42. Student's first marking period ended on or about September 30, 2022. *Id.*; P. Exh. 20 at 2.

43. High School grades students on a ten (10) point scale but uses letters other than "A" or "B", etc., to denote a student's grade. For the first marking period, translating Student's grades, and using an "A", "B" scale, etc., Student received either an A or a B in all academic classes other than Algebra, in which he received a D. Tr. Day 4 at 145-146, 386-77; [REDACTED] Exh. 16.¹⁵

44. Student arrived at High School from middle school with significant gaps in his math education. Tr. Day 4 at 326-28.

45. Based on Student's daily course schedule and the dates that he was absent and/or tardy from High School because of [REDACTED] staffing issues, Student missed Algebra I class on August 24, 2022, August 29, 2022 and August 31, 2022.

¹⁵ Student's IEP states that Student is to be provided mathematics instruction in a special education setting for one (1) hour per day. During the testimony of HS Principal and HS Case Manager the question arose as to whether High School was implementing this aspect of Student's IEP. This aspect of Student's IEP is not set forth as an issue to be decided as it is not stated in the Due Process Complaint Notice, the Amended Due Process Complaint Notice, nor the issues that the parties agreed to and certified as the being the issues for determination. Accordingly, the hearing officer does not decide in this Decision whether this aspect of Student's IEP was being implemented by High School, nor whose responsibility, High School or RPS, it was to implement this aspect of Student's IEP.

46. Student's Report Card includes a Comments section, and his Report Card does not include any comments concerning Student's attendance, that attendance had an impact on his grades, nor that missed assignments, or the failure to turn in assignments, impacted his grades. [REDACTED] Exh. 16; Tr. Day 4 at 146-47, 383-85.

47. The hearing officer finds the testimony of HS Principal credible that Student is making educational progress at High School in all subjects to include Algebra, corroborated by her opinion Student would be an excellent example for other disabled students who wished to attend High School and seek a regular diploma. Tr. Day 4 at 334-44, 386-87.¹⁶

48. Student's IEP states that during transitions between classes that his one to one nurse or instructional aide should use his gait trainer. [REDACTED] Exh. 1 at 48. Further, the IEP states Student should use his gait trainer at least once per day. [REDACTED] Exh. 1 at 34; Tr. Day 3 at 206-07.

49. On occasion, the 1:1 Nurse or instructional aide have transitioned Student at High School using his activity chair and not his gate trainer. Tr. Day 3 at 245-46. The 1:1 Nurse made the decision to use the activity chair, as opposed to his gait trainer, as she believed it was safer in tight spaces and in areas of High School where the floor was cluttered with cords and similar obstructions. *Id.*¹⁷

50. Student's IEP requires that Student's instructional aide "scribe for written work . . . during instruction and assessments" and "enter answer choices on assessments." [REDACTED] Exh. 1 at 49.

51. On occasion, Student's instructional aides have failed to electronically submit Student's assignments. Tr. Day 4 at 85-86. On these and other occasions,

¹⁶ Again, during the testimony of HS Principal and HS Case Manager the question arose as to whether High School was providing mathematics instruction in a special education setting for one (1) hour per day to Student per his IEP. HS Principal when asked whether High School was implementing this aspect of Student's IEP was evasive, initially refusing to answer questions about this aspect of Student's IEP and its implementation at High School. Tr. Day 4 at 344-45. Later in HS Principal's testimony, after a short recess, when seeking to correct or clarify her non-answer, HS Principal implied she spoke with another individual and then testified that Student was receiving this instruction, although not for one (1) hour per day and not in a special education setting. HS then refused to answer who she spoke with or provided her this information. Tr. Day 4 at 346-52. For the reasons, set forth *supra* in n.14, while this aspect of Student's IEP is not at issue in this proceeding, the hearing officer finds HS Principal's testimony concerning this aspect not credible and evasive, while the hearing finds other aspects of her testimony credible. *Parham v. Commonwealth*, 64 Va. App. 560, 565, 770 S.E.2d 204, 207 (2015) (the fact finder "may 'accept the parts of a witness' testimony it finds believable and reject other parts as implausible.'"), quoting, *Moyer v. Commonwealth*, 33 Va. App. 8, 28, 531 S.E.2d 580, 590 (2000) (*en banc*).

¹⁷ The hearing officer finds the testimony of the 1:1 Nurse concerning Student's transitions in High School and whether, when, and why she used Student's activity chair versus his gait trainer credible. Tr. Day 3 at 245-46. The hearing officer notes that at a later point in her testimony, the 1:1 Nurse started to answer "I don't recall" to numerous questions, some of which were not relevant to issues for determination (e.g., questions concerning Student's hospital admission) and some of which were relevant to the issues for determination (e.g., whether the 1:1 Nurse arrived timely to High School; assisting Student in and out of Parent's vehicle). Tr. Day 3 at 268-275, 289. On these other issues, the hearing officer finds that the 1:1 Nurse was evasive, and her testimony not credible. *Parham v. Commonwealth*, 64 Va. App. at 565.

Student's HS Case Manager may also assist with the submission of assignments, and this would be within the normal scope of duties of Student's High School case workers. Tr. Day 4 at 92, 152-53.

52. Student's IEP requires that High School provide Student with a "copy of the notes, study guides and interactive notebook/resource guide." ■■■■ Exh. 1 at 49.

53. During the timeframe at issue in this proceeding, ■■■■ assigned at least one instructional aide to Student that was unable to assist with the lifting of Student and this aide was then replaced by ■■■■ with another instructional aide. Tr. Day 2 at 81-82; Tr. Day 3 at 148-149, 152-53, 211-13, 285, 287.

54. During the timeframe at issue in this proceeding, when ■■■■ received notice that the instructional aide and/or nurse were having issues with lifting Student it would send additional staff to High School to assist with the lifting of Student. Tr. Day 2 at 25, 36-42, 72-73, 89, 210-11; Tr. Day 3 at 124, 139, 152-53, 211-13, 228

55. ■■■■ staff assisted Parent with getting Student in and out Parent's vehicle when Student was in an ■■■■ middle school and, initially, the same ■■■■ individual that assisted Parent while Student was in middle school, assisted Parent when Student commenced High School. Tr. Day 3 at 232-33. Based on the totality of evidence, ■■■■ assisted Parent with getting Student in and out of Parent's vehicle at least through September. *See also* Tr. Day 3 at 139-140.

56. At some point during the timeframe at issue in this proceeding, the person who assisted Parent with getting Student in and out Parent's vehicle when Student was in an ■■■■ middle school stopped coming to High School, and the PT reviewed with the one to one nurse how to lift Student in and out of Parent's vehicle. Tr. Day 3 at 236-238.

57. During the timeframe at issue in this proceeding, and sometime during October 2022 and prior to October 13, 2022, at the direction of the RS Risk Management Coordinator, ■■■■ advised the instructional aide and one to one nurse assigned to Student that if either was injured while lifting Student in or out of Parent's vehicle while on school grounds that ■■■■ worker's compensation policy would not cover their loss. Tr. Day 2 at 212-13; Tr. Day 3 at 92-93, 139-140; Tr. Day 4 at 409-411.

58. On or about October 13, 2022, at High School, ■■■■ staff and Parent held a meeting with Parent at which time ■■■■ formally notified Parent handing parent Prior Written Notice ("PWN"), stating ■■■■ "proposes that ■■■■ is not responsible for lifting and transporting [Student] from personal vehicles into his mobility devices upon his arrival at school and into his parent's automobile from his mobility device . . . upon his departure for school." ■■■■ Exh. 7. *See also*, Tr. Day 3 at 200-206; Tr. Day 4 at 298-99.

59. The first time ■■■■ staff refused to assist Parent with lifting Student into and out of Parent's vehicle on school grounds occurred at the end of September 2022 and/or early October. Tr. Day 4 at 298-99.

60. The PWN also included the reasons that [REDACTED] was proposing that it would no longer assist with Parent with lifting Student in and out of Parent's vehicle and its proposed alternative to use a special transportation van. These reasons include but are not limited to: lifting Student in and out of Parent's vehicle is not required by Student's IEP; Student has grown since his IEP went into effect; [REDACTED] staff believed it would be safer for Student to transition from a special transportation van and into and out of his equipment then from Parent's personal vehicle. Parent refused [REDACTED]'s offer of a special transportation van stating that the use of special transportation failed while Student was in elementary school. [REDACTED] Exh. 7; Tr. Day 3 at 196-206; Tr. Day 4 at 298-99.

CONCLUSIONS OF LAW¹⁸

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

The IDEA

The purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education ("FAPE") that emphasizes special education and related services designed to meet their unique needs." *Bd. Of Educ. v. Rowley*, 458 U.S. 176, 179-91 (1982); *Hinson v. Merritt Educ. Ctr.*, 579 F. Supp. 2d 89, 98 (D.D.C. 2008)(citing 20 U.S.C. § 1400(1)(A)). Implicit in the congressional purpose of providing access to a FAPE is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the disabled child. *Rowley*, 458 U.S. at 200; *Hinson*, 527 F. Supp. 2d at 98 (citing *Rowley*, 458 U.S. at 200). FAPE is defined as:

[S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA . . . include an appropriate preschool, elementary school, or secondary school education in this State involved; and are provided in conformity with the individualized education plan (IEP).

20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. The VA Special Education Regulations also set forth the foregoing definition of FAPE in 8 VAC 20-81-10.

Further, the VA Special Education Regulations defines "special education" as follows:

"Special education" means specially designed instruction, at no cost to the parent(s), to meet the unique needs of a child with a disability, including instruction conducted in a classroom, in the home, in hospitals, in institutions, and in other settings and instruction in physical education. The

¹⁸ To the extent the other sections entitled, "Introduction and Procedural History," "Jurisdiction," "Issues and Relief Sought," and "Findings of Fact" include conclusions of law, those conclusions are incorporated into this section.

term includes each of the following if it meets the requirements of the definition of special education: (§ 22.1-213 of the Code of Virginia; 34 CFR 300.39)

1. Speech-language pathology services or any other related service, if the service is considered special education rather than a related service under state standards;
2. Vocational education; and
3. Travel training.

8 VAC 20-81-10.

In deciding whether an LEA such as █████ provided a student a FAPE, the inquiry is limited to (a) whether the LEA complied with the procedures set forth in IDEA; and (b) whether the student's IEP is reasonably calculated to enable the student to receive educational benefit. *Rowley*, 458 U.S. at 206-07. Under this second "substantive" prong, a LEA need not maximize the potential of children with disabilities, but the door of public education must be opened in a meaningful way, and the IEP must provide the opportunity for more than only "trivial advancement." *P. v. Newington Bd. of Ed.*, 546 F.3d 111, 119 (2d Cir. 2008)(citations omitted). As stated more recently by the United States Supreme Court "[i]t requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 403 (2017).

In matters alleging a procedural violation, a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused the child a deprivation of educational benefits. 34 C.F.R. § 300.513(a)(2). The foregoing standard is set forth in the VA Special Education Regulation at 8 VAC 20-81-210(O)(17):

In matters alleging a procedural violation, a special education hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies:

- a. Impeded the child's right to a free appropriate public education;
- b. Significantly impeded the parent's(s') opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or
- c. Caused a deprivation of educational benefits.

Accordingly, in instances of an alleged IDEA procedural violation claim, such a claim is viable only if the procedural violations affected the student's substantive rights. *T.B., Jr. v. Prince George's Cnty. Bd. of Educ.*, 897 F.3d 566, 574 (4th Cir. 2018)(citing *Lesesne v.*

District of Columbia, 447 F.3d 828, 834 (D.C. Cir. 2006); other citations omitted). The LEA's failure "to perfectly execute an IEP does not necessarily amount to the denial of [FAPE]" rather only "a failure to implement a material portion of an IEP, violated the IDEA" and is a denial of FAPE. *Sumter Cnty. Sch. Dist. 17 v. Heffernan*, 642 F.3d 478, 484 (4th Cir. 2011). Compensatory education is not an appropriate remedy for purely procedural violations of the IDEA. *Maine Sch. Admin. Dist. No. 35 v. Mr. R.*, 321 F.3d 9, 19 (1st Cir. 2003).

Burden of Proof

Parent, as the party who filed the Due Process Complaint Notice bears the burden of proof. *See e.g., N.P. by S.P. v. Maxwell*, 711 F. App'x 713, 716 (4th Cir. 2017) (the parents bear the burden of proving their child was denied a free appropriate public education), *citing, Weast v. Schaffer ex rel. Schaffer*, 377 F.3d 449, 456 (4th Cir. 2004), *aff'd*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). The party that bears the burden of proof may satisfy such burden by a preponderance of the evidence. *See. e.g., Cty. Sch. Bd. of Henrico Cty., Va. v. R.T.*, 433 F. Supp. 2d 657, 671 (E.D. Va. 2006) (stating the hearing officer's factual conclusions are supported by the preponderance of the record evidence.)

Standard of Review

While the IDEA sets standards for the education of children with disabilities, the IDEA does not displace the traditional notion that the primary responsibility for education belongs to educators. *MM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 533 (4th Cir. 2002) ("The courts should, to the extent possible, defer to the considered rulings of the administrative officers, who also must give appropriate deference to the decisions of professional educators."). Virginia special education hearing "are themselves expected to 'give appropriate deference to the decisions of professional educators.'" *T.B., Jr.*, 897 F.3d at 572 (quoting *M.M.*, 303 F.3d at 533 (4th Cir. 2002)). A special education hearing officer should not "second guess" the educational decisions of professionals with first-hand experience not only with the student in this case, but with a wide variety of other students." *T.B., Jr.*, 897 F.3d at 576-77 (quoting *M.M.*, 303 F.3d at 532); *see also Cty. Sch. Bd. of Henrico Cty. v. Z.P.*, 399 F.3d 298, 307 (4th Cir. 2005) ("[A]t all levels of an IDEA proceeding, the opinions of the professional educators are entitled to respect.").

The Relevant Time for the Issues in Dispute in This Hearing is August 18, 2022 Through October 19, 2022

Parent filed the original Due Process Complaint Notice on October 13, 2022, which was then amended and filed by the hearing officer with the consent of the parties on October 19, 2022. Parent's Amended and original Due Process Complaint Notice establish the commencement of the timeframe during which the alleged issues took place as the beginning of the High School, school year, which in Student's case, was his first day of High School, which was freshman orientation that occurred on August 18, 2022. Further, the end of the time frame during which the alleged issues took place is the filing date of the Amended Due Process Complaint Notice, which was October 19, 2022. *See T.B. v. Prince George's Cnty. Bd. of Educ.*, No. GJH-15-03935, 2016 WL 7235661, at *7 (D. Md. Dec. 13, 2016) (stating that in a dispute where the 2-year statute of limitations was at issue

“the ALJ’s approach starting with the date the complaint was filed, looking backward two years, and including any violations within that two year period, is nothing more than a functional, efficient device to determine which claims are time-barred”), *aff’d sub nom. T.B., Jr. v. Prince George’s Cnty. Bd. of Educ.*, 897 F.3d 566 (4th Cir. 2018).

Consistent with limiting the timeframe at issue to be between August 18, 2022, through October 19, 2022, is that Parent never sought to amend the due process complaint a second time, to expand the timeframe at issue. Amendments to a party’s due process notice are also not permitted within five (5) calendar days of the due process hearing commencement. 8 VAC 20-81-210(G)(1)(b). Upon any such amendment, the applicable timeline for the due process hearing resets. 8 VAC 20-81-210(G)(2).

Decision As To The Specific Issues Raised By Parent

Issue 1. ██████’s Did Not Materially Fail To Provide Student PT, OT, And ST Services As Set Forth In Student’s IEP, And Accordingly Student Was Not Denied FAPE

Parent failed to satisfy her burden and prove that ██████ was materially deficient in its provision of OT, PT and ST services as set forth in Student’s IEP. The totality of testimonial and documentary evidence demonstrate that during the timeframe at issue Student received each of these therapeutic services and any ██████ deficiency was non-material.

Student’s IEP requires that ██████ provide him with 60 minutes each of OT, PT and ST services every week and further states that ██████ deliver the foregoing services twice weekly in 30-minute increments. Parent argues generally that ██████ did not deliver these services because of the failures of his ██████ instructional aide, one to one nurse, his assigned therapists, or other ██████ staff and contractors. The totality of the testimonial evidence to include the Physical Therapist’s Log reflect that that ██████ had staffing issues during the time frame at issue. However, the totality of the evidence also reflects in response to these staffing issues, ██████ sent additional staff, such as the Instructional Specialist and Secondary Coordinator among others, to High School to ensure that Student was provided the services as set forth in his IEP.

Concerning Student’s High School attendance record, the hearing officer finds the testimony of High School Principal credible, and finds High School’s documentary attendance records accurate pursuant to the totality of the evidence, as to the cause of Student’s absence or tardiness. In other words, where Student’s attendance records stated that Student was absent or tardy because of issues arising from ██████ staff, the hearing officer finds that believable and has credited this evidence. Further, the hearing officer also finds credible the Logs of Student’s Occupational Therapist, Physical Therapist, and Speech Pathologist, as to their delivery of OT, PT and ST services. As stated above the PT services Log includes discussion of ██████’s staffing issues related to Student. The hearing officer also finds testimony of Student’s Speech Pathologist credible as to the delivery of

ST services. While Student's Speech Pathologist testified at the hearing, Student's assigned Physical Therapist and Occupational Therapist did not testify.¹⁹

The hearing officer has closely reviewed and compared the dates on which Student was absent or tardy because of [REDACTED] staffing issues and compared these dates with the Logs of Student's Occupational Therapist, Speech Pathologist and Physical Therapist.

As set forth in the findings of fact, concerning Occupational Therapist, while there was a single school week wherein the Occupational Therapist does not note in the Log the delivery of any therapeutic services, during at least 2-weeks during the relevant timeframe, the Occupational Therapist notes the delivery of more than 60 minutes of therapeutic services to Student. During many of the school weeks during the relevant time frame, to include the weeks of September 5 and 19, 2022, the Occupational Therapist delivered more than 60-minutes of direct therapeutic services, or during other weeks where the Occupational Therapist attempted to deliver OT services to Student but was unable to do because of no fault of her own and/or Student's absence did not result from [REDACTED] staffing issues.

Similarly, concerning Physical Therapist, while there are three (3) school weeks wherein the Physical Therapist's Log do not include any entry evidencing the delivery of services or the reasons why services were not delivered there are two (2) weeks where the Physical Therapist delivered more than sixty (60) minutes of PT services. During the remaining weeks, the Physical Therapist of PT services in accordance with Student's IEP.

Finally, concerning Speech Pathologist, the hearing officer also concludes that ST services delivered the ST services in accordance with Student's IEP. During each of the school weeks wherein Student was absent because of [REDACTED] instructional aide and/or [REDACTED] staffing issues, the Speech Pathologist delivered ST services in accordance with Student's IEP. Further, in any week where the Speech Pathologist did not provide the ST services, she attempted to do so but did not because of no fault of her own and/or Student's absence did not result from [REDACTED] staffing issues.

Accordingly, the hearing officer concludes Student received OT, PT and ST services in accordance with his IEP, or in the alternative, that [REDACTED] did not materially deviate from his IEP concerning the delivery of these services and thus Student was not denied FAPE. *See Walker v. D.C.*, No. CV 12-00411 JEB/DAR, 2014 WL 3883308, at *7 (D.D.C. Aug. 6, 2014), *report and recommendation adopted sub nom. A.W. v. D.C.*, No. CV 12-411 (JEB), 2014 WL 12884524 (D.D.C. Sept. 19, 2014)(holding that where student received the services as set forth in the IEP and where parent had proven only a few omissions

¹⁹ While Student's Speech Pathologist testified at the hearing, Student's assigned Physical Therapist and Occupational Therapist did not testify. Parent intended to call Student's assigned Physical Therapist, but she was ill during most days on which the hearing was held and was not available to testify. Tr. Day 2 at 296-97; Tr. Day 4 at 24. While discussing why Parent wished to call Physical Therapist as a witness, Parent proffered specifically, that Physical Therapist would testify about training RPS staff about how to properly lift Student in and out of Student's vehicle, Tr. Day 3 at 307-09, and Parent obtained this testimony from others, such as Student's 1:1 Nurse. Tr. Day at 289-90.

concerning the provision of services pursuant to a student's IEP, Parent had failed to carry its burden to show a "material" failure).

Issue 2. Pursuant To Student's IEP As Amended By The Nurse Service Agreement, Student's Instructional Aide And One To One Nurse Shall Assist Parent With Removing And Getting Student Into Parent's Vehicle When On High School Grounds But During The Relevant Timeframe Any Such Failure By █████ Did Not Deny Student FAPE

Based on Student's disability and as set forth in Student's IEP and the section entitled "Factors for IEP Team Consideration," Student's "physical needs including accessibility to learning activities, positioning, posture, manual tasks, feeding, daily living skills, mobility and self-care require 100% assistance." █████ Exh. 1 at 6. Further this same section of Student's IEP notes that Parent transports Student to and from school and that Student's █████ aides assist Student out of and into Parent's car and out of and into Student's gait trainer. *Id.* at 8. This is also stated in the PLAAF section of Student's IEP. *Id.* at 18. The Factors for IEP Team Consideration and PLAAF sections of an IEP are important because together it provides a baseline that reflects the entire range of a Student's needs, including both academic (reading, math, communication, etc.), and nonacademic (daily life activities, mobility, etc.) areas. 34 CFR 300.324(a). While Student's last consented to and in place IEP is from 2019 the parties do not contest that Student's needs regarding mobility have materially changed since 2019.

Student's IEP contains 46 accommodations/modifications. *Id.* at 46-50. One such accommodation/modification states: "instructional assistant from arrival to departure to provide support in areas to include: . . . mobility." *Id.* at 48. The accommodation/modification section of the IEP when discussing supports for school personnel notes: Student "requires the assistance of instructional aides for . . . mobility. . . . [Student] also requires moderate to maximum assistance to complete all activities across the school setting [Student] is dependent upon his aides to support him through the school day." *Id.* at 50. Further, the Nursing Services Agreement states that one to one nurse "will support mobility and personal care needs." █████ Exh. 2. Pursuant to Student's IEP, as amended by the Nursing Service Agreement, Student is to have one instructional aide and a one to one nurse at school from arrival until departure to provide support in areas to include but not be limited to Student's mobility needs. █████ Exh. 1 at 48; █████ Exh. 2.²⁰ Pursuant to █████'s job description for an instructional aide, the ability

²⁰ During the hearing, Parent presented evidence about whether Student is entitled to more than one instructional aide even though this was not an issue designated for determination prior to the hearing as set forth in prehearing orders and as discussed during more than one prehearing phone conference. The hearing officer notes, however, the IEP uses "assistant" and not "assistant~~s~~" (emphasis added) stating "instructional assistant from arrival to departure to provide support in areas to include: . . . mobility" which is the same section of the IEP Parent relies on to support Parent's argument that RPS must aid with Student getting in and out of Parent's vehicle. RPS Exh 1 at 48. Further, Parent's argument ignores the Nurse Services Agreement that amends the IEP and provides a one to one nurse – an additional assistant – to support Student and the delivery of services pursuant to his IEP. Further during the relevant timeframe Student had two (2) RPS staff assigned to him: an instructional aide and a one to one nurse. Finally, the hearing officer notes that RPS cites to a prior decision by and between RPS and Parent, VDOE Case No. 20-026, dated March 5, 2020 (RPS Exh. 17), concerning this issue, however, the hearing officer as stated therein makes no decision as to whether the IEP requires two (2) instructional assistants. VDOE Case No. 20-026 at page 25.n5.

to occasionally lift fifty (50) pounds is required. [REDACTED] Exh. 15 at 1. Pursuant to [REDACTED]'s job description for a one to one nurse, the ability to lift one hundred fifty (150) pounds is required. [REDACTED] Exh. 15 at 1; Tr. Day 2 at 216. Student unequivocally weighs less than 150 pounds and based on the totality of evidence weighs between 60 and 80 pounds. To implement Student's IEP and the accommodations and modifications as stated therein, and to support Student's mobility and personal care needs, his instructional aide and/or one to one nurse have to lift Student regularly. The IEP also references special transportation but provides no specifics other than stating "two way" and "special transportation to include a lift bus, monitor and air conditioning." [REDACTED] Exh. 1 at 49, 54.

[REDACTED] argues that it is not required to assist with getting Student in and out of Parent's vehicle once on High School grounds based on the testimony of RM Coordinator. RM Coordinator testified that [REDACTED]'s obligation pursuant to the IEP to provide 100% assistance with mobility did not occur until Student arrived at the High School building, literally, as opposed to arrival on the High School grounds. RM Coordinator further testified in support of the foregoing, that if a [REDACTED] staff person or contractor would suffer injury while providing this assistance such injury would not be compensable pursuant to [REDACTED]'s worker's compensation insurance policy. Tr. Day 4 at 429-444. RM Coordinator also distinguished school activities such as field trips because such activities would fall within the "duties" of either the instructional aide or one to one nurse. *Id.* at 428.

In support of its position, [REDACTED] further argues that [REDACTED], the LEA, does not violate the IDEA when and it applies a facially neutral policy when the parental request is not based on the student's educational needs, but on the parent's convenience or preference. [REDACTED] argues that RM Coordinator's testimony constitutes such a policy and then cites *Fick v. Sioux Falls Sch. Dist.* 49-5, 337 F.3d 968 (8th Cir. 2003) and *Timothy H. v. Cedar Rapids Cmty. Sch. Dist.*, 178 F.3d 968 (8th Cir. 1999). These cases are distinguished from Student's case, however, for the following reasons.

First, in both *Timothy H.* and *Fick*, the LEA policy at issue was a written policy applied by the LEA, while on Student's case there is no such written policy but merely the testimony of RM Coordinator. *Timothy H.*, 178 F.3d at 970; *Fick*, 337 F.3d 968 (a review of the record in this case makes plain the neutral policy was written, see 2002 WL 34247048 (Appellate Brief)). Second, the LEA's argument ignores what has historically occurred by and between Student and [REDACTED] concerning [REDACTED] staff assisting Parent and lifting Student in and out of Parent's vehicle upon arrival at school and when departing school. Third, the IEP itself does not make the distinction between school grounds and the school building. As stated in the IEP, [REDACTED] is to provide 100% assistance with mobility from "arrival" at school through Student's "departure" from school. Fourth, [REDACTED]'s job description for a one to one nurse position lists the ability to lift 150 pounds and further as stated by the 1:1 Nurse during her testimony the ability lift is a part of nurse training and a core nurse responsibility. Further, if assistance with lifting is needed Student has assigned to him an instructional aide, which, in accordance with [REDACTED]'s job description an instructional aide should have the ability to lift 50 pounds.

The hearing officer also notes that [REDACTED] and Parent held a meeting called by [REDACTED] on or about October 13, 2022, the purpose of which is as set forth in the PWN delivered to Parent at the meeting:

[REDACTED] proposes that [REDACTED] is not responsible for the lifting and transporting [Student] from personal vehicles into his mobility device . . . upon his arrival at school and into his parent's automobile from his mobility device . . . [and] upon his departure from school. [REDACTED] proposes that student utilize the special transportation services provided to and from school in his last consented to IEP. [REDACTED] proposes that a special transportation van be provided for the [Student] that complies with ADA regulations, and includes the use of a lift, monitor, and air conditioning as provided in the last consented to IEP from 2019

[REDACTED] Exh. 7 at 4. PWN must be sent at "a reasonable time" before an LEA proposes or refuses to initiate or change the provision of FAPE. 8 VAC 20-81-170(C); 34 CFR 300.503(a). The LEA must provide the PWR to parent after the decision is made, but not before the meeting. 71 Fed. Reg. 46,691 (2006). The LEA must provide the PWR to parent so that parent has enough time to fully consider the change and respond to the action before it is implemented. *Letter to Chandler*, 59 IDELR 110 (OSEP 2012). Although [REDACTED]'s decision to issue a PWR concerning this issue, does not resolve the issue in favor of Parent, it supports the hearing officer's conclusion that prior to the October 13, 2022, meeting, and issuance of the PWN, [REDACTED] was required to assist Parent with removing and getting Student into parent's vehicle upon Student's arrival and departure to and from High School grounds. *M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1197 (9th Cir. 2017)("An IEP, like a contract, may not be changed unilaterally.").

Concluding that Student's IEP requires [REDACTED] to aid Parent with getting Student into and out of Parent's vehicle upon his arrival and departure on High School grounds does not resolve the issue of whether Student was denied FAPE in this proceeding. To determine what relief if any, Parent is entitled to, the hearing officer has closely reviewed Student's High School attendance records and the testimony of High School principal, and High School's attendance records, corroborated by the Physical Therapist's Log, concerning when Student's absence and tardiness was caused by [REDACTED] staff either because [REDACTED] staff were not at High School to assist Parent with lifting Student in and out of Parent's vehicle or because they refused to do so. In short, the hearing officer concludes based on the totality of the evidence during the relevant timeframe that Student has in fact received FAPE, and not been denied FAPE, because he has received educational benefit and was making meaningful educational progress during the relevant timeframe.

Student's first marking period while at High School concluded shortly before October 19, 2022, the last day of relevant timeframe at issue in this proceeding. Student's grades during this marking period as reflected on his Report Card were either the equivalent of an A or B for all classes other than Algebra, in which class he received a D. Concerning Algebra, however, as testified to by HS Principal, Student arrived at High School from middle school with significant gaps in his math education. Further, HS Principal testified that she believed that student was making educational progress, to include in math. In support of this finding, is HS Principal's belief and prior statements that she thought Student could serve as an excellent example for other disabled student's attending public school and seeking to obtain a "regular" versus "modified" diploma. Tr. Day 4 at 335-36.

Concerning Student's absence and tardiness caused by [REDACTED] staff, based on Student's academic schedule as testified to by HS Principal, during the relevant timeframe, Student at most missed a total of three (3) Algebra classes, and missed other academic courses on a few occasions as well. However, Student's Report Card includes a Comments section that does not include any comments concerning Student's attendance, that attendance had an impact on his grades, nor that missed assignments, or the failure to turn in assignments, impacted Student's grades.

Accordingly, while the hearing officer concludes (a) that Student's IEP as amended by the Nurse Service Agreement, requires Student's instructional aide and one to one nurse to assist Parent with removing and getting student into Parent's vehicle when on school grounds; and (b) that [REDACTED]'s failure to do so during the relevant timeframe did *not* deny Student FAPE because the failures were sporadic and Student received educational benefit and was making meaningful educational progress while at High School during the relevant timeframe.²¹

Issue 3. [REDACTED]'s Did Not Materially Fail To Implement Student's IEP When Transitioning Student Between Classes In His Gait Trainer, And Accordingly Student Was Not Denied FAPE

Student's IEP states that during transitions between classes that his one to one nurse or instructional aide should use his gait trainer. [REDACTED] Exh. 1 at 48. Further the IEP states Student should use his gait trainer at least once per day. [REDACTED] Exh. 1 at 34; Tr. Day 3 at 206-07. On occasion, Student's 1:1 Nurse or instructional aide have transitioned Student throughout the High School using his activity chair and not his gate trainer. Tr. Day 3 at 245-46. The 1:1 Nurse made the decision to use the activity chair, as opposed to his gait trainer, as she believed it was safer in tight spaces and in areas of High School where the floor was cluttered with cords and similar obstructions. *Id.* Transitioning Student throughout High School on occasion in his activity chair and not his gait trainer, when the IEP states he shall use his gait trainer at least once a day is not a material deviation from his IEP and may be in accordance with his IEP. Accordingly, Parent has failed to satisfy her burden of proof that Student was denied FAPE when [REDACTED] staff on occasion transitioned Student in High School using his activity chair.

Issue 4. [REDACTED] Did Not Materially Fail To Implement Student's IEP Concerning Notetaking Or The Submission Of Student's Assignments

Because of the multiple mediation and resolution sessions held in this proceeding, as noted above, the parties agreed to a technological solution referred to as "swivel software" on this issue. However, the question of whether Student is entitled to

²¹ The hearing officer notes again the PWN delivered to Parent on October 13, 2022, providing Parent notice that it proposes to use a special education van for transporting Student to and from school, and [REDACTED]'s explanation for its proposal and how and why it arrived at its decision. While the parties did not present evidence or testimony during the hearing concerning the substance of the PWN and related meeting, included within the PWN are the meeting notes reflecting what occurred at the meeting to include Parent's response to [REDACTED]'s proposed action and the reasons Parent would not agree to [REDACTED]'s proposed action. The hearing officer makes no finding of fact or conclusions regarding [REDACTED] proposed action or Parent's response.

compensatory education remains for the period of time that preceded the parties' agreement.

Student's IEP requires that Student's instructional aide "scribe for written work . . . during instruction and assessments" and "enter answer choices on assessments." ■■■■■ Exh. 1 at 49. On occasion, Student's instructional aide has failed to electronically submit Student's assignments. Tr. Day 4 at 85-86. On these and other occasions, Student's High School Case Manager may also assist with the submission of assignments, and this would be within the normal scope of duties for Student's High School case workers. Tr. Day 4 at 92, 152-53. Further, Student's IEP requires that High School provide Student with a "copy of the notes, study guides and interactive notebook/resource guide." ■■■■■ Exh. 1 at 49. Nowhere does Student's IEP state that Student's instructional assistant is to take notes for Student when Student is not present, which also would not be necessary if High School is providing Student with a copy of notes study guides and interactive notebook/resource guide.

Parent produced no evidence that ■■■■■ staff failed to provide note taking for the benefit of Student. While Parent did elicit testimony from HS Case Manager that on occasion Student's instructional assistant failed to electronically submit Student's assignments, Student's HS Case Manager can also do this for Student, and any such failures seemingly had no material impact on Student's grades during the first marking period which covers nearly the whole timeframe that is in dispute. As discussed above, Student's Report Card includes a Comments section and while the Comments indicate Student's strong work habits, there is no statement that missed assignments, or the failure to turn in assignments, impacted his grades. ■■■■■ Exh. 16. Again, Student Report Card indicates he was an A or B Student in all his course other Algebra, but as testified to by HS Principal, he arrived at High School with deficits in his math education and that Student was making receiving educational benefit and making meaningful educational progress during the relevant timeframe, to include in math.

Accordingly, the hearing officer concludes ■■■■■ did not materially deviate from his IEP concerning the delivery of notetaking or assignment submission and thus Student was not denied FAPE.

Issue 5. Parent Failed To Satisfy Her Burden Of Proof And Failed To Prove ■■■■■ Did Not Provide Services To Student In Accordance With His IEP On A Day High School Was Open But ■■■■■ Closed

As with the foregoing issue, on this issue and because of the multiple mediation and resolution sessions held in this proceeding, the parties agreed that ■■■■■ would provide services to Student in accordance with his IEP on any day High School was open, unless Student was otherwise absent. The question of whether Student is entitled to compensatory education remains for the period of time that preceded the parties' agreement.

Parent failed to produce any evidence during this proceeding that ■■■■■ failed to provide Student services in accordance with IEP on a day ■■■■■ was closed but High School open. However, there is evidence that Student's Speech Pathologist did attempt to deliver

services to Student on a day [REDACTED] was open and High School closed. *Compare* [REDACTED] Exh. 3 at 21 *with* P Exh. 7. Accordingly, Parent has failed to satisfy her burden of proof that Student was denied FAPE because of [REDACTED]'s failure to deliver services on a day [REDACTED] was closed and High School open.

Issue 6. Student Is Not Entitled To Compensatory Education Services As Parent Has Failed To Satisfy Her Burden And Show That [REDACTED] Has Materially Deviated From Student's IEP Concerning The Delivery Of Services As Set Forth in Student's IEP During The Timeframe In Dispute

As set forth herein and in accordance with the standards required by the IDEA, while in certain instances, Parent has proven certain technical violations of Student's IEP during the relevant timeframe, these technical violations did not materially deviate from Student's IEP or have a material impact. In other words, the hearing officer has concluded that during the relevant timeframe, Student consistently received the services set forth in his IEP even while accounting for the deviations the hearing officer has found to have occurred, and thus [REDACTED] did not fail to "materially implement" Student's IEP. *Walker v. D.C.*, No. CV 12-00411 JEB/DAR, 2014 WL 3883308, at *7 (D.D.C. Aug. 6, 2014), *report and recommendation adopted sub nom. A.W. v. D.C.*, No. CV 12-411 (JEB), 2014 WL 12884524 (D.D.C. Sept. 19, 2014). Further, as set forth, the hearing has found and concluded that during the relevant timeframe Student was making meaningful, educational progress, and receiving educational benefit. Accordingly, during the relevant timeframe, Parent has failed to prove that these technical deviations deprived Student of FAPE.

Importantly, however, the hearing officer has concluded that at least prior to the issuance of the PWN, that Student's IEP as amended by the Nurse Service Agreement, does require Student's instructional aide and one to one nurse to assist Parent with removing and getting Student into Parent's vehicle when on High School grounds; while also concluding the failure to provide the foregoing assistance did not deny Student FAPE during the relevant time frame because the failures were sporadic, not material, and Student received educational benefit and was making meaningful educational progress while at High School during the relevant timeframe. These conclusions arise in part from the fact that [REDACTED] formal decision as set forth in the PWN on October 13, 2022, is so close in time to October 19, 2022, the end of the relevant timeframe at issue in this proceeding. Further, the PWN delivered to Parent on October 13, 2022, was not specifically delineated as an issue in this proceeding. As stated in the PWN, it provided Parent notice (a) that [REDACTED] proposes that Student's IEP does not require [REDACTED] staff to assist Parent with getting Student in and out of Parent's vehicle upon arrival and departure from school, (b) that [REDACTED] proposes to use a special education van for transporting Student to and from school, and (c) included [REDACTED]'s explanation for its proposal and how and why it arrived at its decision.

While the parties did not present evidence during the hearing concerning the substance of the PWN (e.g., such as expert testimony supporting [REDACTED]'s decision or Parent's refusal) and related meeting, included within the PWN are the meeting notes reflecting what occurred at the meeting to include Parent's response to [REDACTED]'s proposed action and the reasons Parent would not agree to [REDACTED]'s proposed action. The hearing

officer makes no finding of fact or conclusions regarding [REDACTED] proposed action or Parent's response, however the hearing officer believes this will likely be an ongoing dispute between the parties, and therefore notes the following.

While Parent is free to transport Student if she wishes, [REDACTED]'s obligation is to provide the transportation services that a disabled student requires to receive FAPE as stated in a student's IEP. *See Ramsey Bd. of Educ.*, 49 IDELR 268 (SEA NJ 2008). Further, when making decisions about transportation, in certain instances [REDACTED] does not have to yield to parental preferences. *In re: Student with a Disability*, 63 IDELR 178 (SEA VA 2013) (finding that a Virginia district was not required to concede to a parent's request that a student ride the same bus as he rode the previous school year). In fact, in certain instances if an LEA makes appropriate transportation services available and the parent fails to take advantage of them, the student cannot receive compensatory education for services lost during that period of refusal. *See, e.g., Richmond County Sch. Dist.*, 52 IDELR 55 (SEA GA 2009) (Georgia district was not liable for compensatory education after it arranged to provide the support services a student with autism needed to board and ride the bus independently). This follows naturally from the general rule that in setting an award of compensatory education, a court should consider the conduct of the parties. *Parents of Student W. v. Puyallup Sch. Dist., No. 3*, 31 F.3d 1489, 1497 (9th Cir. 1994) (holding that the parent's behavior is also relevant in fashioning equitable relief but cautioning that it may be a rare case when compensatory education is not appropriate); *Reid ex rel. Reid v. D.C.*, 401 F.3d 516, 524 (D.C. Cir. 2005) ("equity may sometimes require consideration of the parties' conduct, such as when the school system reasonably require[s] some time to respond to a complex problem . . . or when parents' refusal to accept special education delays the child's receipt of appropriate services" (citations and internal quotes omitted)); *Hogan v. Fairfax Cnty. Sch. Bd.*, 645 F. Supp. 2d 554, 572 (E.D. Va. 2009) ("the equitable nature of compensatory education demands a close look at the actions of all parties involved in the denial of a FAPE").

The hearing officer's sincere hope is that the parties can resolve their differences concerning transportation but if this is not possible, Parent may request a new due process hearing.

ORDER

Based on the Findings of Fact and Conclusions of Law, it is hereby ORDERED:

Parent's request for compensatory education services and all other relief requested is denied.

ENTER: _____

Frederick R. Gerson, Hearing Officer

cc: Persons on the Attached Distribution List, by hand or e-mail as indicated (Attachment 1)

NOTICE OF RIGHT TO APPEAL

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