



POWHATAN COUNTY PUBLIC SCHOOLS

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July 7, 2023

Dr. Samantha Marsh Hollins
Assistant Superintendent
Office of Special Education and Student Services
Virginia Department of Education
P.O. Box 2120
Richmond, VA 23218

re: Letter of Implementation

Dear Dr. Hollins:

This letter is written in response to your June 23, 2023 Letter of Implementation from the Virginia Department of Education (VDOE) regarding [REDACTED]. Your assertion that Powhatan County Public Schools (PCPS) has improperly delayed the implementation of the student's IEP is legally and factually incorrect.

1. The VDOE incorrectly interpreted the Hearing Officer's decisions.

Contrary to your statement, the Hearing Officer did not "order [] placement in a private day school." The student's placement in a private day school was never in dispute. The student's Individualized Education Program (IEP) team proposed a placement in a private day school on November 18, 2021. The parents, however, refused to provide written consent to the implementation of the IEP until May 13, 2022. Consent to the implementation of the IEP was not given until after an administrative due process hearing in which Hearing Officer Ternon Galloway Lee issued a decision on May 13, 2022, confirming that a vague text message did not constitute consent to implement the IEP. Even then, the parents only provided partial consent to the IEP, refusing to allow PCPS to provide homebased services pending a private day school placement as proposed by the IEP team.

Thereafter, the parents in this case continued to refuse to sign releases authorizing the school division to make application to the private day schools identified by the IEP Team. Further, the parents have repeatedly refused to cooperate with the application process or sign the consent form to release funding through the Children's Services Act (CSA). Following the May 13, 2022 Hearing Officer decision, the parents initiated six additional special education due process proceedings. All of the due process decisions were issued in favor of the school division, and each indicated that PCPS has continued to make a free appropriate public education available to the student.

Your legally flawed letter indicates that the school division has somehow delayed the student's assignment to a private day school. This assertion is in conflict with the Hearing Officer's decisions. With regard to due process hearing decisions two through six, the Hearing Officer combined the proceedings and issued a twenty-seven-page decision in favor of the school division. The Hearing Officer, after hearing testimony from several witnesses over two days, August 24, 2022 and August 25, 2022, ruled:

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 Only*, 303 F.3d 523 (4th Cir. 2011) (failure to have IEP completed caused by parents' failure to cooperate).

See Hearing Officer Decision re: complaints #2 - #6.

Furthermore, with regard the seventh request for due process hearing, which also pertained to the issue the parents' refusal to sign the necessary releases, the Hearing Officer stated:

Parents claim the LEA denied the child a FAPE by delaying his placement at PDS because of an interagency dispute with CSA regarding parental consent and funding. These claims were presented in the prior hearing held on August 24-25, 2022. The Hearing Officer heard testimony and received exhibits addressing the CSA process, the parents' refusal to sign the CSA consent form, attempts made to work with the parent to obtain a proper consent so that placement could be made, the delay in the child being placed at a PDS, and the cause of the delay. After considering all the evidence the HO determined that any delay in placement was caused by the parents, not the LEA. The Hearing Officer found the LEA had not denied a FAPE.

See Hearing Officer Decision on Motion to Dismiss #7.

Your statement that the VDOE has “recently been advised” of this situation is factually incorrect. As you know, during each of the due process hearings, the VDOE had its representative present during each prehearing conference and at each administrative hearing. Moreover, the Hearing Officer provided the VDOE with copies of her written hearing decisions, and the school division timely submitted implementation plans for those decisions to the VDOE. Thus, the VDOE has been aware, since September of 2022, of the Hearing Officer’s various decisions in this matter. The VDOE’s letter indicating that PCPS has somehow denied the student a free appropriate public education is factually and legally inaccurate and contradicted by its own Hearing Officer’s decisions. Id.

Further, the Virginia Regulations state that: “A free appropriate public education shall be available to all children with disabilities who need special education and related services.” 8 VAC 20-81-100. PCPS continues to make a free appropriate public education available to the student. PCPS has made numerous efforts to encourage the Parent to cooperate with the process for applying and assigning the student to an appropriate private day school, which includes signing the releases authorizing PCPS to make application to several private day schools identified by the IEP Team. In addition, PCPS has requested that the parents sign the CSA consent form which is purportedly required by the Office of Children’s Services (OCS). Further, PCPS has made two referrals to OCS to request CSA funding for a private school placement. Both referrals were rejected by OCS as the parents continue to refuse to sign the necessary consent form to release funding or cooperate with the placement process. In addition, PCPS sought court intervention by filing a CHINS petition with the Powhatan County Juvenile and

Domestic Relations Court in an effort to have the parents participate with the process so that the student could be assigned to a private day school. The Court declined the school division's request and, instead, released the student from Virginia's compulsory attendance requirements.

2. *The Letter of Implementation is not only legally improper but premature as the parents have filed an appeal.*

Rather than cooperate with the application and enrollment process, on November 3, 2022, the parents filed a Writ of Mandamus and Complaint for Injunctive Relief in Powhatan Circuit Court. The parents requested that the Court enter an order requiring the school division to bear the total costs of the private day school placement. However, the Court entered an Order against the parents and in favor of the school division on March 2, 2023. The parents filed a notice of appeal on May 24, 2023. The matter is currently pending before the Court of Appeals of Virginia.

3. *Parents cannot unilaterally select a private day school placement.*

Your letter seems to imply that the School Board is to enter a contract with the private day school selected by the parents. The parents have continuously refused to sign releases for any private day school, other than the one they selected. However, the law is clear that parents cannot unilaterally determine a private day school assignment. *Fairfax Cnty. Sch. Bd. v. Knight*, No. 1:05cv1472, 107 LRP 2101 (E.D. Va. 2006) ("[T]he IDEA does not give the parents a right to any particular private placement."). Further, the designation of a particular school is the prerogative of the school division. *Fitzgerald v. Fairfax Cnty. Sch. Bd.*, 556 F. Supp. 2d 543 (E.D. Va. 2008) ("[T]he IDEA is designed to ensure parental participation in decisions regarding their disabled child, but it does not ordinarily require parental consent such that parents may usurp or otherwise hinder an LEA's authority to educate and discipline disabled children.").

4. *State law does not obligate local school divisions to bear the cost of private day school placements.*

With the passage of the Comprehensive Services Act in 1992, the law definitively shifted the responsibility for funding private day school placements from the school division to the Community and Policy and Management Team (CPMT) as the fiscal agent for CSA Pool Funds. See Sup. Memo No. 018-10 (Jan. 29, 2010). 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. *Id.* Therefore, each CPMT must have policies and procedures in place that ensure a student's full access to private program services in accordance with IDEA, the student's IEP and with the Regulations Governing Special Education Programs for Children with Disabilities in Virginia. *Id.*

The local governing body and the State, not the School Board, are responsible for appropriating sufficient funds to cover private day school placements. According to Virginia Code Section 2.2-5211, "[t]he General Assembly and the governing body of each county and city shall annually appropriate such sums of money as shall be sufficient" to provide special education services to students "placed for purposes of special education in approved private school educational programs." See Va. Code § 2.2-5211(B)(1) & (C). The fiscal responsibility for the local share of the program, by law, is the responsibility of the local governing body, through its CPMT and fiscal agent. *Id.*; see also Va. Code §§ 2.2-5204 & 5206. The contracts for services and the cost of the services are set by the State and by CPMT. The School Board should not be expected to fund CSA programs. The law does not obligate the School Board to contribute

any funding to the CSA program. Requiring the school division bear the full cost of a private day school placement is therefore inconsistent with the statutory duties imposed on other entities.

5. *Your letter drastically minimizes the financial hardship imposed on the school division if it were to enter into a contract for a private day school placement without the ability to access its funding.*

The School Board would be required to fund the placement for over a decade if a parent continues to refuse to cooperate with the CSA process. Further, as you know, this parent is not the only parent who has been encouraged to not sign the CSA consent form while represented by a particular advocate. In the event parents of multiple students decline cooperating with the CSA process, the burden placed on the school division could be insurmountable. If a student requires a more restrictive learning environment, such as a residential setting, or needs additional support, such as a one-to-one paraprofessional, this would increase the financial burden placed on the school division even more. Further, the number of students requiring a private placement may vary from year to year, which is not within the School Board's ability to control. The cost for these programs also rises each year, which is also not within the School Board's ability to control.

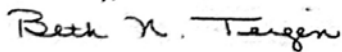
6. *Possible Resolutions proposed by PCPS.*

PCPS offers the following possible resolutions to this matter:

- VDOE coordinate with OCS to secure funding for the student. As previously mentioned, PCPS has made two referrals to OCS to provide funding for the private day school placement and was denied on both accounts due to the parents' failure to cooperate with the process.
- OCS transfer the funds directly to PCPS to cover the costs associated with the private day school placement so that the school division would not be impermissibly required to bear the costs of the private day school placement.
- VDOE fund the private day school placement. See 34 CFR 300.146.

Notwithstanding these possible resolutions, so that we can adequately address your position, please provide us with the VDOE's authority to overrule a special education hearing officer's decisions, a Powhatan Circuit Court decision, and to interfere with an ongoing appeal before the Court of Appeals of Virginia. We look forward to your prompt response.

Sincerely,



Beth Teigen
Superintendent

cc: Sandra Ramsey, Compliance and Corrective Action Plan Specialist