January 30, 2024

VIA HAND DELIVERY

Rhonda J. Scott Mitchell, Hearing Officer
Redacted

Re: Prince William County Public Schools/ In Re: REDACTED
Written Closing Argument

Dear Hearing Officer Mitchell:

This letter represents Prince William County Public Schools' ("PWCS") closing argument ("closing argument") to the special education due process hearing ("the Hearing") that took place on December 5, 2023, and January 9, 2024, through January 11, 2024, with regard to REDACTED ("REDACTED a ninth (9th) grade student who currently attends The Wakefield School ("Wakefield") as a result of her Parents placing her at the same. PWCS argues that during the course of the hearing, REDACTED parents, REDACTED and REDACTED ("the Parents" or "the ACTED failed to meet their burden of proof that, other than in the manner which PWCS already admitted to doing so, PWCS failed to provide a free, appropriate public education ("FAPE") as defined by the federal and Virginia special education regulations. In order to prevail and receive reimbursement for private placement, the REDACTED must demonstrate (1) that PWCS did not provide FAPE; and (2) if it found that FAPE was not provided, that (a) they provided adequate notice prior to the removal; and (b) the private placement provides FAPE. PWCS contends that, other than the compensatory education hours that PWCS admits it owes REDACTED the Parents did not demonstrate through documentary evidence or through witness testimony that REDACTED and/or the REDACTED are entitled to any relief and are certainly not entitled to having PWCS pay for a private, college preparatory school that does not offer the specially designed instruction which would be required to provide REDACTED with FAPE. The record demonstrates that the REDACTED did not meet their burden of proof that PWCS failed to provide FAPE to justify a unilateral placement under the law. Moreover, even if the Hearing Officer finds that the compensatory education that PWCS admits it owes constitutes a lack of FAPE, the REDACTED unilateral placement of REDACTED is still not justified because (1) the REDACTED did not provide timely notice as required by law; and (2) the unilateral placement does not offer FAPE as defined by law. Given the testimony, and/or lack thereof, for certain issues, which were presented at the hearing, as well as the

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documentary evidence admitted into the record, PWCS requests that the Hearing Officer rule in its favor and not find PWCS liable in any manner.

A. Burden of Proof

It is well established that the party filing a due process complaint has the burden of proof in a due process hearing. "The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). As such, in this matter, the burden is on the REDACTED to demonstrate that REDACTED was deprived of FAPE to the extent that necessitates placement is a private school that does not provide special education services, as defined by the Regulations Governing Special Education Programs for Children with Disabilities in the Virginia ("VA Special Education Regulations"). According to the VA Special Education Regulations, FAPE is defined as:

> *"Free appropriate public education"* or "FAPE" means special education and related services that: (34 CFR 300.17)
> 1. Are provided at public expense, under public supervision and direction, and without charge;
> 2. Meet the standards of the Virginia Board of Education;
> 3. Include an appropriate preschool, elementary school, middle school or secondary school education in Virginia; and
> 4. Are provided in conformity with an individualized education program that meets the requirements of this chapter.

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 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 Va. Admin. Code 20-81-10

The Parents failed to meet their burden of proof that REDACTED was deprived of FAPE and/or was not making meaningful educational progress. In referring to the Individuals with Disabilities Education Improvement Act ("IDE(I)A"), the Supreme Court of the United States stated, "It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 1001, 197 L. Ed. 2d 335 (2017). In *Endrew F.*, the Court once again rejected the standard that a school division has to maximize the potential of a student with a disability that was rejected in *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 189–90, 102 S. Ct. 3034, 3042, 73 L. Ed. 2d 690 (1982). In *Rowley*, the Court states, "Certainly the language of the statute contains no requirement like the one imposed by the lower courts—that States maximize the potential of handicapped children "commensurate with the opportunity *190 provided to other children." The Court in *Rowley* goes on to state, "We think, however, that the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential 'commensurate with the opportunity provided other children.'" *Id.* at 198, 3046.

In determining whether a student should attend a private placement at public expense, the Supreme Court of the United States has also stated, "In considering the equities, courts should generally presume that public-school officials are properly performing their obligations under IDEA. See *Schaffer v. Weast,* 546 U.S. 49, 62–63, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005) (STEVENS, J., concurring)." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 247, 129 S. Ct. 2484, 2496, 174 L. Ed. 2d 168 (2009).

Given the above standard, the REDACTED failed to meet their burden of proof that REDACTED was deprived of FAPE due to PWCS owing her compensatory education, that REDACTED was not making meaningful, educational progress, and should attend a private school that does not offer special education services at public expense.

B. Placement at a Private School That Does Not Offer Special Education Services is Not Appropriate

PWCS admitted during the hearing, and by way of a settlement agreement signed before the start of Day 2 of the hearing, that PWCS owes REDACTED compensatory education for services that were not provided while REDACTED received intermittent home-based instruction during the 2021-2022 school year and homebound instruction

during the 2022-2023 school year.[1] However, PWCS' inability to deliver those hours due to a lack of available licensed teachers, the REDACTED preference for in-person instruction, and the REDACTED derogatory questioning of the licensed educators does not rise to the level of requiring PWCS to use public money to send REDACTED to a school which the head of the school states does not provide specialized instruction and/or does not follow an IEP. It is noted that during the course of the hearing, the Hearing Officer stated she had an issue with the Parents' assertion that PWCS owing seventy-six (76) hours over and above the hours agreed upon in the settlement agreement means that PWCS should pay for Wakefield. (N.T. p. 515).

Per the Supreme Court of the United States, "Parents "are entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and the private school placement was proper under the Act." *Carter,* 510 U.S., at 15, 114 S.Ct. 361." *Forest Grove Sch. Dist. v. T.A.,* 557 U.S. 230, 246, 129 S. Ct. 2484, 2496, 174 L. Ed. 2d 168 (2009) (Emphasis in original)(Internal quotations included.) "Proper" under the IDEIA is a school that provides FAPE.

In this current matter, the REDACTED did not meet their burden of proof that (1) REDACTED was deprived of FAPE; and (2) that the private, college preparatory school in which REDACTED is enrolled, but does not provide specially designed instruction, is appropriate in order to prevail. It is incredulous that the REDACTED are claiming that PWCS did not provide REDACTED with FAPE and then requesting that PWCS pay for a private school that its Head of School, Redacted (" Redacted ") says does not provide the key elements that determine FAPE. Moreover, Private School is a private school which only offers general education options. Redacted testified that Private School is a private school, not a private day school which only serves students with disabilities. Redacted testified clearly and credibly that Private School does not provide specially designed instruction. (N.T. pp. 734, 735-736, 740). Given that testimony, by definition, Private School does not provide special education services. If Private School does not provide special education services, then it cannot provide FAPE. By definition, FAPE cannot be provided without special education services as stated above. Additionally, Redacted stated that Private School would not follow an Individualized Education Plan ("IEP") that a school division would propose for REDACTED and is not obligated to follow an IEP drafted for REDACTED (N.T. pp. 734,735-736). By definition, FAPE cannot be provided if the special education is not provided in accordance with an IEP. Therefore, since Private School has stated that it does not provide specially designed instruction, and thus special education, and since Private School has stated that it will not implement an IEP, then Private School cannot provide FAPE.

[1] PWCS agreed to provide REDACTED with one hundred five and one-half (105.5) hours of compensatory education.

It is noted that the REDACTED knew that Private School could not, and would not, provide special education services, and thus could not provide FAPE, when REDACTED applied to Private School Ms. REDACTED verified that the statement made by Redacted the Director of Admission, which appears as a part of REDACTED Private S school record on page 17 of PWCS Exhibit 101 was true in August of 2023 and remained true as of the date she testified. (N.T. p.740).

Further, Private School teachers do not need to be licensed by the Commonwealth of Virginia (N.T. p. 738) and, at the time of the hearing, only two (2) of seven (7) of REDACTED teachers were licensed by the Commonwealth of Virginia. The two (2) teachers who are licensed by the Commonwealth of Virginia to teach are not licensed in the areas in which the REDACTED have expressed concerns which are Algebra and English. Additionally, one of the two teachers who is licensed, Dr. Redacted is not licensed to teach general biology, but rather is licensed in Latin PreK-12.

In contrast, in October of 2023, PWCS proposed an IEP to the REDACTED which is reasonably calculated to provide FAPE and enable REDACTED to make meaningful, educational progress when accessing the general education curriculum. Moreover, in order to resolve this matter prior to the hearing[2], PWCS offered to allow REDACTED to attend any comprehensive PWCS high school, including Colgan High School[3], which was where the REDACTED fought to have her attend during the summer of 2023, and Brentsville High School, which is PWCS' smallest high school. In addition to the above, prior to the hearing, PWCS offered the following to ensure REDACTED would receive FAPE as a PWCS student:

- PWCS will provide special transportation from REDACTED home to the school selected by the REDACTED for the 2023-24 and 2024-25 school year.
- PWCS will make available to REDACTED 60 minutes per day of academic resource support by a special educator, in-person or virtually, to assist with planning, coordinating and/or remediating assignments impacted by student absences.
- A designated staff member from the Special Education Department (SED) will attend all meetings for REDACTED during the 2023-24 and 2024-25 school year(s).

[2] While PWCS acknowledges that settlement negotiations are not typically a part of the due process hearing, the Parents, and witnesses who appeared on behalf of PWCS who had settlement authority, were asked by the Hearing Officer about the educational program offered to REDACTED by PWCS in order to resolve the matter. (N.T. pp. 1144-1145, pp. 1157-1158).

[3] REDACTED applied to the competitive, criteria/merit based Fine Arts program at Colgan High School and was not accepted. Mrs. REDACTED now claims they discriminated against her.

- An IEP meeting to plan for REDACTED transition to the selected school will occur no later than 20 business days following the signing of this Agreement to address the development of a structured plan for transition. The last proposed IEP, developed on October 5, 2023, will serve as the draft. The IEP meeting would be facilitated by the Virginia Department of Education (VDOE).
    - The IEP team will discuss and determine any reduction of assignments, quantity of assignments to demonstrate mastery, and/or modifications to assignments.
    - The IEP team will consider a delayed start time (8:30 a.m.) and/or early release (12:30 p.m.) from school.
    - The IEP team will consider whether REDACTED will complete her physical education requirements for 9th and 10th grade through Virtual Virginia.
    - The IEP team will consider whether REDACTED will require participation in a Learning Strategies class for special education services toward her IEP goals.
    - The IEP team will consider whether REDACTED requires a collaborative general education class for Algebra 1 and/or any subsequent core math class.

- PWCS agreed to provide data collection toward IEP goal progress with REDACTED quarterly IEP progress reports during the 2023-24 and 2024-25 school year(s).

- PWCS agreed to schedule an IEP meeting with the family quarterly to discuss REDACTED progress, review goals, and review accommodations. A list of proposed dates for these meetings will be provided to the Parents within seven (7) days of the signing of this Agreement.

It is noted that several of the accommodations the IEP team was to consider as stated above, such as the learning strategies class, are items that the REDACTED stated she was getting at Private School and could easily be offered by PWCS if REDACTED IEP team found the same to be appropriate to assist her in making meaningful, educational progress. The above, along with the selection of any PWCS high school, was rejected on behalf of the Parents by their non-attorney representative because PWCS was not offering to pay "even one penny" for Private School

The REDACTED cannot have it both ways. Either REDACTED requires specially designed instruction, as evidenced by qualifying for services under the IDEIA, and attend a school that can and will deliver specially designed instruction to be provided FAPE or she "needs" to attend Private School The intent of the IDEIA is provide specially

designed instruction because it is necessary to provide FAPE. In this instance, the two are mutually exclusive.

The Parents did not put forth any evidence that REDACTED needs a learning environment that can be considered more restrictive than a public day school. The only evidence that the Parents proffered through testimony is that REDACTED is happy at Private School and, without evidence, claimed that it would be "detrimental" to RED well-being to return to PWCS. However, this claim has no merit. First, it is pure speculation that it would be "detrimental" to REDACTED to return to PWCS. REDACTED has never attended high school in PWCS. They do not know what type of experience she will have in a public high school. Moreover, the REDACTED have been given the opportunity for REDACTED to attend any high school in PWCS. As such, even if REDACTED did not want to attend high school with those she attended middle school with, she does not have to do so.

More importantly, REDACTED "doing well" at Private School does not meet the legal standard required for a hearing officer to find that PWCS should pay for REDACTED to attend Private School In *M.B. v. Fairfax Cnty. Sch. Bd.*, 660 F. Supp. 3d 508, 529 (E.D. Va. 2023), the Court found that if the school division offered FAPE, success in a private school is a non-factor in making such a determination. The Court stated:

> M.B.'s success at Phillips School does not alter the IDEA's substantive requirement that school districts provide an IEP that gives the student an opportunity to make reasonable, not ideal, progress, and that school districts place students in the least restrictive environment possible. It is understandable that M.B.'s parents may take issue with these legal standards and wish that the IDEA demanded more of the school system, but the Hearing Officer properly determined that FCPS met the IDEA's requirements here. FCPS clearly provided M.B. with an IEP and proposed placement that enabled M.B. to make reasonable progress in light of M.B.'s circumstances. Thus, Plaintiffs' request for reimbursement for M.B.'s 2021-22 school year at Phillips School and their request for funding for M.B.'s placement at Phillips School going forward must be denied.

M.B. v. Fairfax Cnty. Sch. Bd., 660 F. Supp. 3d 508, 529 (E.D. Va. 2023)

Given that Private School cannot and will not offer FAPE and given that the REDACTED are claiming that PWCS denied REDACTED FAPE, the REDACTED request that PWCS pay for REDACTED to attend Private School must be rejected under the law. The REDACTED have not met their burden of proof that REDACTED needs a learning environment other than a public day school. PWCS has offered an IEP intended to enable REDACTED in making

meaningful, educational progress and has offered REDACTED a placement that is her least restrictive learning environment. For all of the foregoing reasons, REDACTED should not attend Private School at public expense.

C. PWCS Did Not Receive Timely and Sufficient Notice of Private Placement

Moreover, PWCS contends that the notice given to PWCS about placing REDACTED in a private school was not proper. While PWCS agrees that it was given written notice more than ten (10) days prior to the start of the PWCS school year, the email still does not meet the notice requirements that have been upheld by the courts and other hearing officers.

Per 8 VAC 20-81-150(B) regarding the placement of a child in private school when FAPE is at issue:

> B. Placement of children by parents if a free appropriate public education is at issue.
> 1. Local school divisions are not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if the local school division made a free appropriate public education available to the child and the parent(s) elected to place the child in a private school or facility. (34 CFR 300.148(a))
> 2. Disagreements between a parent(s) and a local school division regarding the availability of an appropriate program for the child and the question of financial responsibility are subject to the due process procedures of 8 VAC 20-81-210. (34 CFR 300.148(b))
> 3. If the parent(s) of a child with a disability, who previously received special education and related services under the authority of a local school division, enrolls the child in a private preschool, elementary, middle, or secondary school without the consent of or referral by the local school division, a court or a special education hearing officer may require the local school division to reimburse the parent(s) for the cost of that enrollment if the court or the special education hearing officer finds that the local school division had not made a free appropriate public education available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a special education hearing officer or a court even if it does not meet the standards of the Virginia Department of Education that apply to education provided by

> the Virginia Department of Education and provided by the local school division. (34 CFR 300.148(c))
> 4. The cost of reimbursement described in this section may be reduced or denied: (34 CFR 300.148(d))
> a. If:
> (1) At the most recent IEP meeting that the parent(s) attended prior to removal of the child from the public school, the parent(s) did not inform the IEP team that they were rejecting the placement proposed by the local school division to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
> **(2) At least 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parent(s) did not give written notice to the local school division of the information described above;**
> b. If, prior to the parent's(s') removal of the child from the public school, the local school division informed the parent(s), through proper notice of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parent(s) did not make the child available for the evaluation; or
> c. Upon a judicial finding of unreasonableness with respect to actions taken by the parent(s).
> 5. Notwithstanding the above notice requirement, the cost of reimbursement may not be reduced or denied for the parent's(s') failure to provide the notice to the local school division if: (34 CFR 300.148(e))
> a. The parent is illiterate or cannot write in English;
> b. Compliance with this section would likely result in physical or serious emotional harm to the child;
> c. The school prevented the parent(s) from providing the notice; or
> d. The parent(s) had not received notice of the notice requirement in this section.
>
> 8 Va. Admin. Code 20-81-150 (Emphasis added)

In *Sarah M. v. Weast*, 111 F. Supp. 2d 695, 701 (D. Md. 2000), the Court delineated what constitutes a removal. The Court stated:

> "The Court therefore concludes that "removal" in the federal statute pertaining to prior notice requirements refers to the actual physical removal of the child from public school. If the removal occurs during

> the school year, the ten business days count back from the date of the intended actual physical removal.
> If the decision to enroll in private school occurs during a summer recess, the ten business days mark from the beginning of the public school year (or sooner if the child is physically placed in private school)."

Based on the documentation received by PWCS from the REDACTED under *Sarah M.*, the REDACTED did not provide sufficient prior notice. During the hearing, the Parents introduced an attachment to an email that was sent by the REDACTED at 11: 05 a.m. on August 9, 2023. At the very end of the attachment, which documented the Parents' concerns, the Parents indicated that they would be placing REDACTED in a private school and would be asking for reimbursement. PWCS started school on August 21, 2023. As such, there were only eight (8) business days between Mrs. REDACTED email and "the beginning of the public school year." Therefore, the REDAC did not provide sufficient notice legally required by the federal and/or Virginia regulations.

Additionally, the REDACTED pursued a private placement prior to providing notice of the same to PWCS. Another Virginia hearing officer has held that taking such a step prior to giving notice does not constitute sufficient notice. In VDOE case number 22-001, Hearing Officer Sarah Smith Freeman ("Hearing Officer Freeman") held the following when a parent enrolled a student in a private school for the following school year and then asked the school division for reimbursement:

> Also, the Hearing Officer did find the Petitioner failed to provide the Respondent adequate notice of the Petitioner's intent to remove the Child from the Respondent school district. The Petitioner was honest. She freely admitted she signed the Private School paperwork and paid the non-refundable tuition deposit just days before requesting consideration for private placement in March 2021. But the equities in this time sequence are clear. The Petitioner had no intent to keep the Child in the Public Day School after she paid the Private School's non-refundable tuition deposit. Thus, the Respondent never had the opportunity to correct alleged deficiencies in the Child's special education program.
>
> And the Act, at 20 U.S.C. Sec. 1412(a)(10)(C)(iii) states the Petitioner was required to provide the Respondent ten (10) day written notice prior to removing the Child to the Private School. But the Petitioner failed to provide timely notice. And as stated above, the Hearing Officer does not find valid information was withheld from the Petitioner who was not justified in the failure to provide adequate notice to the Respondent

> before informing the Respondent of the Petitioner's intent to remove the Child from school. The Respondent must receive adequate notice prior to the Child's removal to provide the Respondent the opportunity to correct alleged deficiencies. Also, as stated herein, the Petitioner did not provide, in a timely manner, the outside psychological report to the Respondent school district before expecting the Respondent school district to rely upon its import. Nor did the Petitioner wait for the audiology report which the Petitioner asserted the Child required to move forward in his special education coursework. In fact, the audiology report conveyed a great deal of useful information about the Child's speech- language issue and made recommendations for instruction. Fortunately, the Respondent school district already had many of the speech-language instructions in place. *See also Glendale Unified School District v. Almasi,* 122 F. Supp. 2d 1093 (C.D. Cal. 2000) (affirms the hearing officer's finding that the parents' actions of withholding information from the school district impaired the district's ability to make decisions related to the student's education); *See also Florence County Sch. Distr. Four v. Carter,* 510 U.S. 7, at 16 (1993); *Werner v. Clarkstown Cent. Sch. Dist.,* 363 F. Supp.. 2d. 656 (S.D.N.Y. 2005) (held that the parent's cooperation with the IEP team regarding placement was a sham).

Based on PWCS Exhibit 101, pp. 17-19, the REDACTED started the admissions process with Wakefield as of July 2, 2023. The application and the application fee were submitted on August 8, 2023, one (1) day prior to Mrs. REDACTED sending her email to PWCS. (PWCS Exhibit 101, p. 17).

Similar to the parent in VDOE case number 21-001, prior to giving notice to PWCS, the REDACTED had no intent on keeping REDACTED in PWCS. Paying a non-refundable application fee and then enrolling the student at Private School two (2) days after the start of PWCS' academic year (PWCS Exhibit 101, p. 17) clearly demonstrates the REDACTED did not have any intent on returning REDACTED to PWCS. Prior to the REDACTED giving notice, PWCS did not have the opportunity to "correct" the alleged inequities in REDACTED special education program. It is noted that PWCS tried several times to schedule meetings to complete the IEP meeting that had been started in June of 2023.

Finally, it is noted that the REDACTED have stated that REDACTED will never attend PWCS schools again.

Given the above, PWCS asserts that the REDACTED did not give timely and sufficient notice of their placement of REDACTED in a private school under the federal and Virginia

regulations and, thus the Hearing Officer should refuse payment by PWCS of Private School

D. PWCS Does Not Owe REDACTED Compensatory Education Other Than What Has Already Been Agreed To.

In addition to not meeting their burden of proof that REDACTED should attend a private, college preparatory school that does not offer specially designed instruction, and thus cannot provide FAPE, at public expense, the Parents did not meet their burden of proof that REDACTED is owed compensatory education hours in addition to the hours agreed upon in the settlement agreement and did not offer any information regarding how they came to believe those hours are owed. As stated above, during the course of the hearing, the Hearing Officer stated she "would have an issue" with the Parents' assertion that PWCS owing seventy-six (76) hours over and above the hours agreed upon in the settlement agreement means that PWCS should pay for Private School (N.T. p. 517).

Further, the Parents did not provide any credible testimony as to how they came to the amount they believe is owed and/or how they arrived at that number of hours. While the Parents' representative attempted to justify the request for an additional seventy-six (76) hours, she was not under oath and subject to cross-examination.[4] As such, any such justification should either be dismissed completely or given no weight. Further, when PWCS, in an attempt to resolve this matter prior to the hearing going forward on Day 4, offered thirty-five (35) hours of additional compensatory education and asked for a justification for the additional seventy -six (76) hours requested, the REDACTED refused the offer of thirty-five (35) hours, continued to insist on the seventy-six (76) additional hours without justification, and added monetary requests in the amount of sixteen thousand, six hundred and ninety-nine dollars ($16,699)[5], which they believe is the per pupil expenditure for students in PWCS, as well as one hundred percent (100%) of REDACTED tuition at Private School for two (2) years.[6]

It is anticipated that the REDACTED will attempt to provide a justification for the additional hours during in their closing brief and that the justification attempt will be related to homebound hours not delivered. It is noted that Virginia homebound guidelines, which are not Virginia law, regulation, or policy, and which is an exhibit presented by the Parents, specifically states that homebound is not supposed to

[4] The Parents' representative calculated one point six (1.6) hours for the forty-six (46) days that REDACTED was absent allegedly due to illness to equal seventy-six (76) hours. (N.T. 969).

[5] This is the amount the Parents believe PWCS spends per pupil each school year. Regardless of the amount, when a child is not enrolled in a school division, the school division does not receive funding for that student.

[6] This request changed throughout the resolution and hearing process, but the request from the REDACTED always included a monetary amount.

supplant instruction in school. (Parents' Exhibit 5, Page 10). The Virginia guidelines also specifically state that homebound instruction is supposed to prevent a student with a medical condition from falling *significantly* behind. Any award for any additional compensatory education, regardless of the form it takes, for homebound services would directly contradict the Virginia guidelines that say that homebound instruction is not to supplant school instruction. The language in the guidelines clearly demonstrates there is nothing that requires a school division to provide the same instruction to a student receiving homebound services as it does to a student who is receiving education in the building.

Moreover, it is noted that on October 18, 2022, Ms. Graham offered the REDACTED a schedule to make up services. (PWCS Exhibit 47). However, the Parents rejected the proposed schedule. (PWCS Exhibit 47). Additionally, the REDACTED did not sign the November 7. 2022, IEP that was offered, which included as a schedule to make up all of the services owed from intermittent homebased instruction. (PWCS Exhibit 54).

The request for an additional seventy-six (76) hours without justification also ignores the fact that REDACTED was not entitled to any homebound services for one (1) month from January 24, 2023, through February 22. After REDACTED initial homebound certification ended as of January 23, 2023 (N.T. p. 648), the REDACTED did not make a new request until February 8, 2023. However, this application did not meet the homebound requirements. (PWCS Exhibit 64). A new request was then submitted on February 16, 2023, which was approved as of February 23, 2023. (PWCS Exhibit 66). In the interim, REDACTED should have been attending school at Gainesville Middle School, but she never returned to the building. While PWCS admits that REDACTED was still owed homebound hours from the first (1st) round of homebound instruction[7], from PWCS' perspective, REDACTED should have been attending school. As such, no compensatory education time should be awarded for any homebound hours from January 23, 2023, through February 23, 2023.

Further, the REDACTED did not consent to the IEP proposed in March of 2023 to provide additional homebound hours. Moreover, REDACTED did not return to school until late April 2023 and did not attend school for a full day until May of 2023. (PWCS Exhibit 83).

As such, the REDACTED did not meet their burden of proof that PWCS failed to provide FAPE and that REDACTED should attend Private School at public expense because they did not prove that REDACTED is owed an additional seventy-six (76) hours in addition to the ones PWCS already agrees that REDACTED is owed. Therefore, REDACTED should not attend Private School at public expense.

[7] This issue was resolved per the settlement agreement.

E. The REDACTED Did Not Meet Their Burden of Proof that REDACTED was Denied FAPE During the 2021-2022 School Year

The REDACTED did not meet their burden of proof that REDACTED was deprived of FAPE during the 2021-2022 school year. There was no evidence provided that REDACTED was not provided her accommodations under the Section 504 of the Rehabilitation Act plan ("Section 504 plan") that was in effect during the 2021-2022 school year.

Per the website of the U.S. Department of Education Office of Civil Rights ("OCR"), on the Protecting Students with Disabilities page, FAPE under Section 504 is defined as:

> **Free appropriate public education (FAPE)**: a term used in the elementary and secondary school context; for purposes of Section 504, refers to the provision of regular or special education and related aids and services that are designed to meet individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and is based upon adherence to procedures that satisfy the Section 504 requirements pertaining to educational setting, evaluation and placement, and procedural safeguards

While the REDACTED claim that the Section 504 Plan was "a failure" (PWCS Exhibit 19, p.1), they did not present any evidence to support that claim. The REDACTED did not present any evidence to demonstrate that REDACTED was not provided with access to regular or special education and related aids or services to meet her individual needs as adequately as the needs of students without a disability. Through two (2) PWCS staff members they called as witnesses, the Parents weakly attempted to demonstrate that REDACTED physical education teacher did not follow her Section 504 plan when REDACTED said she coughed up blood but there is no evidence of the same.[8] However, this attempt was refuted by the documentation presented by PWCS which clearly states that REDACTED never coughed up blood on the day in question (PWCS Exhibit 119, p. 60) and by the fact that the witnesses testified REDACTED (1) was not engaged in a high impact activity, but a warm up activity; (2) did not ask to go to the nurse as she could have through the Section 504 plan; and (3) continued to participate in class without incident. (N.T. p. 273, 438). The REDACTED weak attempt to perpetuate this obvious falsehood throughout the rest of REDACTED time at Gainesville Middle School and throughout the hearing when they knew there was no evidence to support the same only underscores the vitriol that is driving the REDACTED actions in this due process matter.

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[8] It is noted that the physical education teacher had no reason to suspect that there would be a reason that REDACTED would cough up blood since the REDACTED withheld information that REDACTED was on blood thinners due to her medical condition at the time of this reported incident.

Moreover, PWCS did not deprive REDACTED with FAPE during the 2021-2022 school year regarding whether she was eligible for services under the IDEIA. It is noted that REDACTED did not physically attend school in a school building, specifically Gainesville Middle School, until the beginning of the 2021-2022 school year. REDACTED started attending school with PWCS at the beginning of the 2020-2021 school year, but because of COVID-19, and presumably her medical condition, she did not attend school in the building. Mary Katherine Graham ("Mrs. Graham"), the principal of Gainesville Middle School, who was an assistant principal when REDACTED started attending Gainesville, testified that there were no issues with REDACTED education and no complaints from the parents until REDACTED had to attend school in person. (N.T. p. 371).

Even though Mrs. REDACTED testified, she did not present any credible evidence regarding how Gainesville failed to implement the Section 504 plan prior to December 2021. Additionally, Mrs. Amanda Mallory ("Mrs. Mallory"), Supervisor of Procedural Support[9], and Mrs. Sherry Baker ("Mrs. Baker"), administrative coordinator of Procedural Support, both testified that in December of 2021, they became involved in the matter, and along with members of the school-based team and the REDACTED updated REDACTED Section 504 Plan[10], and proposed that REDACTED be evaluated for eligibility under the IDEIA. It is not "gaslighting" or "victim blaming[11]" to point out that the REDACTED did not sign the consent to evaluate REDACTED for eligibility under the IDEIA until approximately one (1) month after the consent was provided to them for signature as their non-attorney representative erroneously claims. Even if the REDACTED believe they have valid reasons for not providing consent for approximately thirty (30) days, it does not negate the fact that PWCS cannot move forward without the consent, and thus is not responsible for the delay they caused.

Moreover, it was the REDACTED that did not sign the proposed IEP until the end of the 2021-2022 school year. Per the Virginia Special Education Regulations, a school division cannot implement an IEP until a parent provides consent for implementation of the same. 8 VAC 20-81-110(B)(2)(d), (N.T. pp. 639-640). Again, both Mrs. Mallory and Mrs. Baker testified that the IEP was timely discussed and offered but was not consented to until June of 2022, at which point the school year was over. (N.T. pp. 494, PWCS Exhibit 2, page 21). Even if the REDACTED believe they have valid reasons for not providing consent to the proposed IEP, it does not negate that fact that PWCS cannot move forward without the consent, and thus is not responsible for the delay they caused.

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[9] Since the time of the hearing Mrs. Mallory has been promoted to Assistant Director for Procedural Support.

[10] This led to delivery of the intermittent home-based services.

[11] PWCS does not agree that there is a "victim" in this scenario.

For all of the foregoing reasons, the REDACTED did not meet their burden of proof that REDACTED was deprived of FAPE during the 2021-2022 school year and therefore is entitled to attend Wakefield at public expense.

F. The REDACTED Did Not Meet Their Burden of Proof that REDACTED was Denied FAPE During the 2022-2023 School Year

The REDACTED did not meet their burden of proof that REDACTED was denied FAPE when she was attending school during the 2022-2023 school year. While the REDACTED made an attempt to try to demonstrate that one teacher did not follow the IEP that was in effect at the time, that allegation was quickly disproved by a review of the IEP that was in effect at the time of the incident. As stated above, PWCS has already agreed that it owes her compensatory education for hours of homebound instruction not received during the 2022-2023 school year.

The REDACTED attempted, but failed, to demonstrate that Natalie Buttner ("Ms. Buttner"), REDACTED eighth (8th) grade Advance Algebra teacher, did not follow the IEP. It is noted that seemingly for no reason, Mrs. Buttner was the object of both REDACTED and Mrs. REDACTED vitriol during the approximately three (3) months that REDACTED was physically in her class during the beginning of the 2022-2023 school year. (PWCS Exhibit 42, page 1, N.T. pp. 699-700, 702-703,704, 708-709) The REDACTED tried to claim that in September of 2022, Ms. Butter did not allow REDACTED to use her "fast pass" to go to leave class to go to the bathroom due to feminine hygiene issue. However, even a cursory review of the IEP that was in effect at time of this alleged incident demonstrates that a fast pass to go to the restroom was not an accommodation for REDACTED at that time. (PWCS Exhibit 2, page 21). Ms. Buttner testified that, during the incident in which she did not let REDACTED go to the restroom, REDACTED did not have a fast pass to the bathroom, Ms. Buttner was following school rules regarding when during class time students were allowed to leave class to use the restroom. (N.T. p. 689). Ms. Buttner stated that if REDACTED had a fast pass to go the restroom, she absolutely would have let REDACTED go to the restroom despite the school rule. (N.T. 699). Ms. Buttner pointed out that it was after this encounter that the IEP was amended to allow REDACTED to use a fast pass for the restroom. It is noted that when REDACTED returned to school in person in the spring of 2023, she was not in Ms. Buttner's class. (N.T. pp. 695-696).

In addition to the false allegation against Ms. Buttner, the REDACTED attempted to claim that REDACTED did not receive FAPE during the 2022-2023 school year because she did not pass Advanced Algebra and she did not pass all of her Standards of Learning ("SOL") exams. While grades and the passage of SOLs can be, and are used, to demonstrate progress on the student's grade level progress, in this particular

matter, failure in class and not passing the SOLs does not tell the full story. It is not "victim-blaming[12]" or "gaslighting" to point out that Ms. Buttner credibly testified that REDACTED did not do any work in her class when REDACTED was present. Ms. Buttner credibly testified that REDACTED would not take out the materials needed to participate in class despite Ms. Buttner stating to do so multiple times. (N.T. p. 703). Ms. Buttner also testified that REDACTED would draw on her hand instead of completing classwork and would leave the classroom without permission with a friend. (N.T. pp. 703,704). Ms. Buttner also relayed this information to her principal, Ms. Graham. (N.T. pp. 412-413, 706). Given Ms. Buttner's credible testimony, it is no surprise that REDACTED progress in math was minimal or that she did not pass the math SOL. At a minimum, a student has to be willing to receive instruction to make progress.

In addition to REDACTED failing to participate in the learning process in math, Gainesville recommended that REDACTED take a pre-algebra class and the REDACTED refused to let her switch math classes. (N.T. p. 414, PWCS Exhibit 54). In November of 2022, the IEP team proposed a Learn Acts or Math Support class to provide support in math. (PWCS Exhibit 54). However, the Parents rejected this option of a special class setting for math because "it might have a negative impact on her mental health." (PWCS Exhibit 54). It is noted that when REDACTED testified, she said that would have been open to taking a different math class. (N.T. p. 1317). Again, the Parents' arguments are conflicting with each other. Claiming she was not provided FAPE because she did not receive instruction to complete the previous math class, but not accepting a different math class when offered does not make sense and does not bolster any argument regarding the claim that REDACTED did not receive FAPE.

Additionally, claiming that REDACTED was not provided with FAPE during the 2022-2023 school year at Gainesville Middle School is in direct contrast with her performance on her Private School entrance exams and the testimony of Ms. REDACTED Private School Head of School. Based on Ms. REDACTED testimony, if REDACTED did not have a good educational foundation, then REDAC would not have performed well enough on Private School entrance exams to be admitted to Private School (N.T. p. 744). Ms. REDA stated that their only concern upon her admission was her performance in Algebra I, which is being addressed by having her take Algebra I again. (N.T. p. 744). Per Ms. REDACTED and the report of REDACTED Algebra I teacher at Private School REDACTED is engaging in the class and open to receiving instruction. (PWCS Exhibit 101, p.87, N.T. p. 761). Per the documentation from Private School REDACTED is doing well academically at Private School and is capable of performing of high school level work, despite several absences (N.T. p. 749). REDACTED doing well at Private School would not be possible if she had not been provided with FAPE at Gainesville Middle School.

[12] PWCS does not believe there is a "victim" in this matter.

G. Credibility of the PWCS Witnesses

While PWCS does not have to meet any burden of proof in this matter, the PWCS staff that were called as witnesses firmly established that, while mistakes were made regarding the provision of homebound hours, REDACTED was provided with FAPE and was making meaningful, educational progress during the time that she was student at Gainesville Middle School. First, each of PWCS' witnesses were highly credentialed, highly trained, and qualified for the positions that they currently hold. In isolation, these qualities alone would be enough to establish a clear foundation for their credibility. While the Hearing Officer may be tempted to give the testimony of the PWCS staff member that was ordered to testify with little weight, it is noted that she was able to discuss the standards on which the goals were based. It is also noted that the PWCS staff members testified that they attend numerous IEP meetings for students all over PWCS. As such, it should not be a surprise that they do not remember the specific details of meetings that occurred several months ago. Moreover, the PWCS witnesses convincingly demonstrated that they were able to produce and explain the documents that were presented by PWCS with clarity and without confusion. The PWCS staff members called as witnesses proved their competency in teaching and/or serving students with disabilities in the Commonwealth of Virginia.

Moreover, Ms. Harper, who was called as a witness by PWCS, was credible. Despite the claims made on behalf of the REDACTED it is clear from Ms. Harper's testimony and the documentation provided by Wakefield that Wakefield cannot and will not offer FAPE because it does not provide specially designed instruction as required for FAPE by the federal and VA special education regulations. Moreover, it will not implement an IEP. As PWCS stated in its opening, and as Dr. Wendy Martin-Johnson testified to during her testimony (N.T. pp. 167, 1145) while Wakefield may be a fine school, PWCS believes it is a misappropriation of public funds to use public funds specifically designated for specialized instruction for students with disabilities to pay for REDACTED to attend Wakefield, a private, preparatory school when PWCS can provide REDACTED with special education services. (N.T. p. 1145).

H. Hearing Officer's Ability to Order Student to Attend Colgan High School

Per the Hearing Officer's directive, PWCS is addressing whether it believes that the Hearing Officer could order REDACTED to attend Charles Colgan High School ("Colgan") and order her into the Visual Arts program at Colgan High School. (N.T. pp. 823, 824-825). PWCS will comply with an order from the Hearing Officer to allow REDACTED to attend Colgan High School. As stated above, and on the record (N.T. p. 1157)

allowing REDACTED to attend Colgan High School, and provide transportation, was offered as a resolution in this matter. (N.T. pp. 823, 825).

PWCS would object to the placement of REDACTED into the art program in addition to placing her at Colgan. The Visual Arts program is an application, merit-based program. Dr. Wendy Martin-Johnson, the Director of Programs and Development for the PWCS Office of Special Education, succinctly and clearly articulated on the record PWCS' concerns about the Hearing Officer ordering REDACTED into an application, merit-based program. (N.T. pp.825-826). Ordering her into the program would create a slippery slope in that parents could file for due process not because the process was not followed, but simply to have their children placed in the program. Moreover, given that REDACTED did not previously meet the minimum performance standards, PWCS would not want to put any student in a situation where they may not be successful, but especially REDACTED given the reported self-esteem issues. As Mrs. Mallory testified to during the hearing, there is a new process that has been approved by the Virginia Department of Education that will allow the IEP team to consider if REDACTED needs accommodations to fulfill the requirements of the application process. REDACTED is eligible to apply for the Visual Arts program for her tenth (10th) grade year, using the new process.

While, as stated on the record, PWCS would comply with the Hearing Officer's order if she orders REDACTED into the art program at Colgan, nothing in the statement on the record and/or compliance with any order waives PWCS' right to appeal that aspect of any ruling.

I. Relationship with the REDACTED

On the last day of the hearing, the Hearing Officer asked the Parents' representative to address why it is felt that the Parents feel as though PWCS is blaming the Parents. The allegation that PWCS is "blaming" the Parents is patently false. It is not "blaming" the Parents to point out when the Parents did not sign documents that would begin services, such as eligibility documents or IEPs. It is not "blaming" the Parents when school division staff members point out that feel disrespected and attacked by the family, especially given the TikTok videos and other offensive public postings. Moreover, it is not "blaming" the Parents to point out when the REDACTED and the Parents' representative have failed to work collaboratively with PWCS.

As PWCS has stated previously, PWCS does not understand the level of hostility that it has experienced from the REDACTED and their representatives. PWCS has agreed that homebound hours are owed and understand that the REDACTED were frustrated by the lack of available teachers. However, PWCS' has made numerous efforts to remediate the concerns that were raised by the family. PWCS cannot only meet

REDACTED educational needs but is also committed to rebuilding a relationship of mutual trust with the REDACTED through methods such VDOE IEP Facilitation and data meetings. PWCS remains committed to working with the parents positively and to moving forward in the student's best interest.

J. Conclusion

For all of the foregoing reasons, PWCS generally and specifically denies the allegations made during the due process hearing and respectfully asks that the matter be found in favor of PWCS.

Respectfully,

Nicole M. Thompson
Assistant Division Counsel-Special Education
Office of Division Counsel

c: REDACTED and REDACTED Parents (hand delivery)
Kimberly Mehlman-Orozco, Parents' Representative (electronic mail)
Ashley Reyher, Ed.D., Associate Superintendent for Special Education (electronic mail)
Wendy Martin-Johnson, Ed.D., Director, Programs and Development, Office of Special Education (electronic mail)
Amanda Mallory, M.Ed., Assistant Director, Procedural Support, Office of Special Education (electronic mail)