

**District of Columbia**  
**Office of the State Superintendent of Education**  
**Office of Dispute Resolution**  
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OSSE  
Office of Dispute Resolution  
March 14, 2023

**Confidential**

<b>Parent on behalf of Student<sup>1</sup></b>	)	Case No. 2022-0224
	)	
<b>Petitioner</b>	)	Hearing Dates: February 28 – March 1, 2023
	)	
<b>v.</b>	)	Conducted by Video Conference
	)	Date Issued: March 14, 2023
<b>District of Columbia Public Schools</b>	)	
	)	Terry Michael Banks,
<b>Respondent</b>	)	Hearing Officer

**HEARING OFFICER DETERMINATION**

**INTRODUCTION**

Petitioner is the parent of an X-year-old student (“Student”) whose assigned school is School A. On December 29, 2022, Petitioner filed a Due Process Complaint Notice (“*Complaint*”) alleging that the District of Columbia Public Schools (“DCPS”) denied the student a free appropriate public education (“FAPE”) by (1) failing to provide Student an appropriate Individualized Education Program (“IEP”) and placement for the 2022-23 school year, and (2) failing to conduct a functional behavior assessment (“FBA”) and develop a behavior intervention plan (“BIP”) for Student. On January 9, 2023, DCPS filed *District of Columbia Public Schools’ Response to Parent’s Administrative Due Process Complaint* (“*Response*”), denying that it had denied Student a FAPE in any way.

**SUBJECT MATTER JURISDICTION**

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. Section 1400 *et seq.*, its implementing regulations, 34 C.F.R. Sect. 300 *et seq.*, Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

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<sup>1</sup> Personally identifiable information is attached in the Appendix and must be removed prior to public distribution.

## PROCEDURAL HISTORY

On December 29, 2022, Petitioners filed the *Complaint* alleging that DCPS denied Student a FAPE by (1) by failing to provide Student an appropriate IEP and placement on May 26, 2022. Specifically, Petitioner alleged that the IEP provided insufficient specialized instruction, failed to provide extended year services (“ESY”) during the summer of 2022, and failed to provide a more therapeutic setting that would be capable of addressing Student’s severe anxiety; and (2) failing to conduct an FBA and develop a BIP to address Student’s attendance related to his/her autism and anxiety. On January 9, 2023, DCPS filed its *Response*, in which it refuted allegations in the *Complaint* denying that it had denied Student a FAPE, *inter alia*, as follows:

1. During the 2020-21 school year, Student was part of DCPS Virtual School due to her/his asthma and COVID-19 exposure risk. Virtual learning was offered for students who had a documented medical condition. DCPS terminated virtual learning as an option at the end of the 2021-22 school year.
2. Student attended classes at [REDACTED] throughout the 2021-22 school year until March 29, 2022, when s/he stopped attending.
3. An IEP Annual Review was conducted for Student on May 20, 2022. The IEP team prescribed 7.5 hours per week of specialized instruction outside general education, one hour per week inside general education, two hours per month each of behavioral support services (“BSS”), occupational therapy (“OT”), speech-language (“S/L”) therapy, and numerous classroom aids and services. Petitioner participated fully in the development of the IEP, and the IEP was appropriate when it was developed.
4. Petitioner elected not to send Student to school at the beginning of the 2022-23 school year. DCPS referred Petitioner’s failure to send Student to school to the Children and Family Services Agency (“CFSA”).
5. In August 2022, Petitioner submitted a Physician Verification form to DCPS. That form was signed by a social worker, not a physician, who had never met Student.
6. On October 3, 2022, Petitioner’s attorney notified Student’s MDT by email that “due to [Student’s] severe anxiety, [s/he] is not able to attend school,” and requested a meeting to discuss Student’s transition to school. [REDACTED] notified the attorney that Student was considered to be truant.
7. There is no report by a physician or psychologist characterizing Student’s anxiety as “severe” or “extreme.”
8. DCPS has a Home and Hospital Instructional Program (“HHIP”) that provides instruction and support to students whose attendance has been interrupted by a physical disability and/or health impairment resulting in confinement at home and/or a hospital for three weeks or more. To receive HHIP services, a parent

must submit (a) an HHIP request for services, (b) proof of immunization, (c) physician verification, (d) parental consent, and (e) consent to share. Petitioner has not submitted a physician verification that Student has a physical and/or health impairment resulting in confinement at home and/or hospital for three weeks or more.

9. Parent was informed prior to the beginning of the 2022-23 school year that Student was no longer eligible for HHIP services based upon Petitioner's prior application. On October 26, 2022, Petitioner's attorney was informed that DCPS would not provide home services for Student. On October 27, 2022, DCPS notified Petitioner's attorney that Student did not qualify for HHIP, was considered truant, proposed a meeting to discuss Student's transition to return to school. On October 28, 2022, Petitioner's attorney informed DCPS that Student's therapist and psychiatrist advised that Student could not attend school, but provided no written documentation.
10. On November 1, 2022, DCPS met with Petitioner, her attorney, Student's therapist, and a representative of the HHIP. DCPS again informed Petitioner that her documentation did not qualify Student for HHIP services. However, DCPS agreed to a six-week Transition Plan ("Plan") with HHIP and [REDACTED] to begin on November 14, 2022 including in-person instruction at home in first week, a tour of the school and meeting with staff daily during the second and third weeks while still receiving in-person instruction at home, Student attending morning classes in the fourth week, Student attending 75% of the school day in the fifth week, and full transition to school in the sixth week.
11. The Transition Plan was shared with Petitioner's counsel on November 14, 2022. The attorney requested a shift in time for the teachers to attend Student's home, to which DCPS acceded.
12. Between November 16 and December 9, 2022, Petitioner refused to comply with the Plan on at least eleven occasions. On November 21, 2022, Petitioner's attorney informed DCPS that Petitioner no longer agreed with the Plan because it no longer met her expectations. On November 29, 2022, Petitioner's counsel informed [REDACTED] that Student would not attend school in-person. On December 1, 2022, Student's educational advocate emailed a formal dissent to the Plan.
13. DCPS cannot agree to provide any of the services requested in the prayer for relief if Petitioner refuses to send Student to school

The parties participated in resolution meetings on January 17, 2023 that did not result in a settlement. A prehearing conference was also conducted that day by video conference, and the Prehearing Order was issued that day.

The due process hearing was conducted on February 28 and March 1, 2023 by video conference. The hearing was open to the public at Petitioner's request. Petitioner filed Five-day Disclosures on February 21, 2023 containing a witness list of four witnesses and documents P-1

through P-104. Respondent filed objections to expert testimony from Witness A and Witness B for Petitioner's failure to disclose the witnesses' financial interests in the litigation. Rulings on those objections were deferred until *voir dire* of the witnesses. DCPS also objected to proposed Exhibits P1-P4 and P97-P101 on the collective grounds of relevance, hearsay, authentication, lack of foundation, and duplicative submission. Objections to P1-P4 were overruled. Rulings on the objections to P97-P101 were deferred until the documents were authenticated during the hearing. During the hearing, those documents were authenticated and Petitioner's Exhibits P1-P104 were admitted into evidence.

Respondent's disclosures, also filed on February 21, 2022, contained a witness list of seven witnesses, including five experts, and documents R1 through R-63. On February 24, 2023, Petitioner filed an objection to Witness G's designation as an expert witness due to DCPS failure to file the witness' resume. This objection was sustained. At the beginning of DCPS' direct case, its proposed Exhibits, R1 – R63 were offered and admitted into evidence.

Petitioner presented as witnesses in chronological order: Petitioner, Witness A, and Witness B. Witness A was admitted as an expert in Clinical Social Work and Witness B was accepted as an expert in Special Education. Respondent presented as witnesses in chronological order: Witness C, Witness D, Witness E, and Witness F. Witness C was accepted as an expert in School Social Work, and Witnesses D and Witness F were admitted as experts in Special Education. At the conclusion of testimony, the parties' counsel gave oral closing arguments and were authorized to file cites to supporting authorities no later than March 6, 2023. On March 6, 2023, both parties filed a list of authorities on which they rely.

## ISSUES

As identified in the *Complaint* and the *Prehearing Order*, the issues to be determined in this case are as follows:

1. Whether DCPS denied Student a FAPE by failing to provide Student an appropriate IEP and placement on May 26, 2022. Specifically, Petitioner alleges that the IEP provided insufficient specialized instruction, failed to provide ESY during the summer of 2022, and failed to provide a more therapeutic setting that would be capable of addressing Student's severe anxiety.
2. Whether DCPS denied Student a FAPE by failing to conduct an FBA and develop a BIP to address Student's attendance related to his/her autism and anxiety.

## FINDINGS OF FACT

1. Student is X years old and was enrolled in School A during the 2021-22 school year.<sup>2</sup>

2. On November 30, 2020, Examiner A, Student's psychiatrist, completed a Psychiatric Initial Evaluation of Student.<sup>3</sup> Student's mood was somewhat anxious; his/her affect was slightly constricted but appropriate.<sup>4</sup> S/he denied any hallucinations or delusion and his/her responses were goal directed without any evidence of any formal thought disorder. S/he denied any suicidal or homicidal ideation and was future oriented.<sup>5</sup> Examiner A's primary diagnosis was "Social Anxiety Disorder (Selective Mutism), Receptive/Expressive Language Disorder, Adjustment Disorder with disturbance of Conduct and emotion rule [out?] high functioning Autism Spectrum Disorder/Pervasive Developmental Disorder (formerly Asperger's):"

Constellation of early developmental difficulty (likely language disorder) with slight delay with overlap of sensitive temperament contributing to presentation of greater ease with those close and familiar to patient with progressive anxiety symptoms starting upon entering school with previous symptoms computable with a social anxiety presentation (selective mutism). Current additional stressor of Dad now unfamiliar entering life as likely precipitating factor to current worsening of anxiety symptoms especially given the reported unstructured and out of context nature of contact that has been abrupt and without transition. Currently diagnostically, this supports an anxiety disorder of a Social Anxiety Disorder (selective mutism in childhood), language disorder with an adjustment disorder with disturbance of conduct and emotions. A high functioning autism spectrum disorder (pervasive developmental disorder) formerly Asperger's could also support the two former diagnoses.<sup>6</sup>

Examiner A recommended that Student undergo a speech and language assessment as well as supportive individual and family therapy for coping strategies and processing the impact of stress of the father now entering Student's life.<sup>7</sup>

3. On May 21, 2021, when Student was in grade C at School A, DCPS completed a Comprehensive Psychological Evaluation of Student. At that time, s/he lived with Petitioner, an older brother, and older twin sisters. Student did not speak words or sentences until after the age of two, stuttered and stammered, and others who were unfamiliar with him/her found it difficult to understand his/her language.<sup>8</sup> In developing [REDACTED] examination, Examiner B interviewed Petitioner, Student, and Teacher A. A fifteen-minute observation of Student was conducted virtually due to COVID-19 restrictions. Throughout the observation, Student had her/his camera off and did not

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<sup>2</sup> Petitioners' Exhibit ("P:") 15 at page 1 (176). The exhibit number and exhibit page numbers are followed by the electronic page number in the disclosure in parentheses, i.e., P:15:1 (176).

<sup>3</sup> P5:1 (58).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 2 (59).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 3 (60).

<sup>8</sup> P7:1 (75).

participate.<sup>9</sup>

Student underwent two days of testing. The first day was conducted virtually, but on the second day, Examiner B walked Student to School A. “[S/he] seemed more comfortable and talkative during this second session.”<sup>10</sup>

On the Kaufman Assessment Battery for Children (“KABC-2”), Student’s general cognitive ability was measured on the on Fluid-Crystallized Index (“FCI”) and on the Nonverbal Index (“NVI”). S/he scored in the Low range on the FCI (78) and the NVI (79). Student also scored Low in Visual Processing (78) and Short-Term Memory (80). S/he scored in the Below Average range in Long-Term Retrieval (84), Fluid Reasoning (88), and Crystallized Knowledge (87).<sup>11</sup> From Student’s Nonverbal Reasoning & Novel Problem Solving scores, Examiner B concluded that because these measures have a significant relationship to higher-level skills in reading, writing, and math, “[s/he] would find things such as finding the main idea of a story, internalizing math procedures, forming and recognizing concepts... identifying and perceiving relationships... generalizing past solutions to new problems, reorganizing or transforming information... or discovering underlying principles to reach a solution, organiz[ing] math problems by using information provided within the problem, or suing specific information in a reading passage to reach general conclusions... difficult when compared to a typical peer.”<sup>12</sup> Her/his Below Average score in Crystallized Intelligence indicated that Student would have difficulty learning vocabulary, with reading comprehension, and answering factual questions.<sup>13</sup>

On the Woodcock-Johnson Test of Achievement (“WJ-IV”), Student scored in the Low range in Broad Reading (79) and Basic Reading Skills (78), Extremely Low in Broad Mathematics (68), Math Calculation Skills (67), and Written Language (68). Examiner B concluded that Student would have difficulty with grade level tasks requiring word identification, decoding and comprehension of written text, age-level tasks requiring problem solving, number facility, automaticity, reasoning, and accurately spelling grade level vocabulary.<sup>14</sup>

Student’s adaptive functioning was measured on the Vineland-3 Adaptive Behavior Scales. The five measured categories were Communication, Social Daily Living Skills, Socialization, Motor Skills, and Adaptive Behavior Composite. Teacher A rated Student in the Moderately Low range in every category. Petitioner rated her/him Adequate in Socialization and Moderately Low in all others. Student’s maladaptive behaviors included getting fixated on objects or parts of objects, repeating physical movements over and over, toileting accidents, compulsive behavior, and getting so fixated on a topic that it annoys others.<sup>15</sup>

On the i-Ready math assessment at the beginning of the 2020-21 school year, Student’s score placed her/him at the previous grade level overall, but at grade level in Algebra and Algebraic Thinking. S/he was two grades below level in Numbers and Operations and Measurement and Data. S/he did not take the mid-year i-Ready assessment. On the Reading Inventory at the

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<sup>9</sup> *Id.* at 4 (78).

<sup>10</sup> *Id.* at 5 (79).

<sup>11</sup> *Id.* at 6 (80).

<sup>12</sup> *Id.* at 8 (82).

<sup>13</sup> *Id.* at 9 (83).

<sup>14</sup> *Id.* at 10-11 (84-85).

<sup>15</sup> *Id.* at 11-12 (85-86).



beginning of the 2020-21 school year, Student scored at the beginning reader level. S/he read seven words from a grade level passage with 88% accuracy in one minute. On the mid-year assessment, “[Student] grew in [her/his] ability to read a grade level text with accuracy;” Student read thirty words with 97% accuracy in one minute. In Written Expression, Student is reported to have failed to complete the majority of writing assignments.<sup>16</sup> A Strength and Difficulties Questionnaire was completed during the school year to Petitioner and Teacher B to measure Student’s emotional, social, and behavioral development. Teacher B was complimentary of Student’s comportment:

Overall, [Student] has done an amazing job. S/he participates fully and seems to like school. Some of these questions were tricky because we’ve been learning online, but in general, [Student] is doing great. My biggest concern is [his/her] confidence and trying new things/taking risks, especially when things are a new format or seem intimidating to [him/her]. [S/he] is a true perfectionist, so if [s/he] doesn’t know that [REDACTED] right it can really throws [him/her] off.”<sup>17</sup>

Petitioner rated Student at high risk for emotional disorder, medium risk for hyperactive or concentration disorder, and low risk for behavior disorder.<sup>18</sup>

Examiner B concluded that Student met the eligibility criteria for Autism Spectrum Disorder (“ASD”).<sup>19</sup>

4. On May 24, 2021, DCPS completed a Speech and Language Evaluation Report.<sup>20</sup> Examiner D noted the findings of an Initial Speech and Language Evaluation conducted in January 2017 by Examiner C.<sup>21</sup> Examiner D noted that the previous evaluation found Student, *inter alia*, to be in the Average range in Auditory Comprehension, Expressive Communication, and Total Language, indicating that Student “would not have difficulty using language to access and progress with the curriculum in [his/her] classroom setting.”<sup>22</sup> Teacher A, who was Student’s general education teacher during the in-person portion of the 2020-21 school year, reported that

[Student] is a kind and sweet student, but... is often hesitant to participate, especially in whole group activities. S/he often relies on explicit instructions provided to him/her individually, and [s/he] has difficulty processing/understanding words in phonemic awareness tasks. She points out that [Student] has difficulty generating ideas for writing prompts or selecting from a choice of options.<sup>23</sup>

Teacher A also reported that Student requires significant supports to initiate and maintain participation, and she struggles to understand Student. Complete utterances for speaking and writing tasks is difficult for Student without “significant scaffolds.”<sup>24</sup> During an observation of

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<sup>16</sup> *Id.* at 13 (87).

<sup>17</sup> *Id.* at 14 (88).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 16 (90). Examiner B confirmed Student’s prior diagnosis of anxiety. *Id.* at 2 (76) and 16 (90).

<sup>20</sup> P8:1 (101).

<sup>21</sup> P4:1 (48).

<sup>22</sup> P8:2 (102).

<sup>23</sup> *Id.* at 3 (103).

<sup>24</sup> *Id.* at 13 (113).

Student in a virtual classroom, Student had to be prompted to turn on his/her camera three times. S/he kept the camera on after the third prompt, but had difficulty initiating the assigned task. Student was responsive to Teacher A when prompted.<sup>25</sup>

Testing was conducted virtually in four sessions of 30-90 minutes. Throughout, Student presented “as a very sweet and hardworking student,” and remained focused. Student’s auditory function at the conversational level was within normal limits, but s/he frequently heard words differently than stated, sometimes hearing nonsense words. Examiner D opined that “Further evaluation of phonological processing and auditory processing disorder are warranted.”<sup>26</sup>

Examiner D administered the Goldman-Fristoe Test of Articulation (“GFTA-3”) to assess Student’s articulation of consonant sounds. On the Sounds-in-Word subtest, her/his 32 errors were significantly below normal limits. On the Sounds-in-Sentences subtest, her/his 29 errors was also significantly below normal limits. Examiner D concluded that Student presented with moderate delays in articulation and phonology. On the Peabody Picture Vocabulary Test (“PPVT-4”), Student’s receptive vocabulary fell within normal limits. His/her scores on the Expressive Vocabulary Test (“EVT-3”) also fell within normal limits. The Clinical Evaluation of Language Fundamentals (“CELF-5”) identifies and diagnoses language deficits in school-aged children. In Sentence Comprehension, Student scored “slightly below normal limits on this task, indicating that [s/he] is able to understand various grammatical structures expected for [his/her] age.” S/he scored significantly below normal limits in Word Structure and Word Classes, slightly below normal limits in Formulated Sentences, and within the average range in Recalling Sentences.<sup>27</sup> Examiner D concluded that Student “presents with receptive and expressive language skills significantly below limits when compared to same-aged peers, as evidenced through [her/his] difficulties in word knowledge, sentence formulation, and comprehension of sentences.”<sup>28</sup> However, his/her pragmatic language skills were age-appropriate: “[Student] demonstrated the ability to use language for a variety of social functions, including requesting, commenting, and answering and asking questions. [S/he] often made and responded to greetings to and from others. [Student] participated in back-and-forth conversation, introduced new topics, and stayed on topic in conversations.”<sup>29</sup>

Examiner D concluded that Student presents with a moderate delay in receptive and expressive language skills and moderate to severe delay in articulation and phonology skills. Given Student’s difficulty processing auditory prompts, Examiner D also “suspected” Auditory Processing Disorder, and recommended a follow-up with an audiologist to confirm the presence or absence of this disorder.<sup>30</sup>

5. On May 26, 2021, DCPS completed an FBA of Student.<sup>31</sup> The Defining Behaviors were:

Sensitivity to Noise - 12 seconds long, 10 times per day

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 4 (104).

<sup>27</sup> *Id.* at 5-12 (105-112).

<sup>28</sup> *Id.* at 12-13 (112-113).

<sup>29</sup> *Id.* at 13 (113).

<sup>30</sup> *Id.* at 14 (114).

<sup>31</sup> P9:1 (117).



Antecedent Behaviors: loud sound of flushing toilet, fire alarm drill, excessive noise in large crowds

Her/his Reaction?: S/he will cover her/his ears.

Replacement Behavior: Provide Student headphones to reduce negative behavioral responses

Difficulty Engaging with Peers (4 minutes long, twice per day).

Antecedent Behaviors: anxious when initiating interaction with peers

Her/his Reaction?: S/he will ask Petitioner to ask his/her sister to play with him/her; s/he will be seen sitting alone because s/he is uncomfortable asking or initiating play. S/he may stutter or pull/scratch her/his hair.

Replacement Behavior: When feeling anxious, Student can request to speak with a “safe person” whom s/he advises provides calming support.<sup>32</sup>

6. On June 8, 2021, Student was administered a i-Ready Math Assessment. Her/his Overall Placement score of 347 placed her/him at a grade H level, two grades below her/his grade level at the time. It was also lower than her/his previous score of 389 on September 17, 2020, one grade below her/his level at the time.<sup>33</sup>

7. On June 8, 2021, when Student was completing grade C at School A, DCPS developed his/her Initial IEP. S/he was classified with ASD.<sup>34</sup> The Consideration of Special Factors indicated that his/her behavior impeded his/her learning or that of other children: “[Student] has been diagnosed with Social Anxiety Disorder. As a result of this diagnosis, [Student] frequently displays anxiety in academic settings which makes completing [his/her] work difficult. [Student] requires small group and individual check-ins to support her/him in accessing academic content.”<sup>35</sup> In Mathematics, the Present Levels of Academic Achievement and Functional Performance (“PLOP”) indicated that Student participated in virtual learning throughout the school year. His/her teacher reported that it was difficult to assess his/her progress because s/he did not complete many assignments. The PLOP reported that Student’s i-Ready score at the beginning of the school year was commensurate with the prior grade level. Student did not take the mid-year assessment. The baselines were: (1) s/he struggles to complete calculations with accuracy, (2) s/he has difficulty identifying what problems are asking him/her to solve for and choosing the proper operation needed to create an equation, and (3) s/he is working on the prerequisite skills for multiplication and division. The goals were: (1) given a set of 10 addition and subtraction problems within 100, Student will be able to solve them with 80% accuracy, (2) given five one-step problems, s/he will be able to identify what the problem is asking, the operation needed, and set up the appropriate equation, and (3) given a set of 10 multiplication or division problems within 100, s/he will solve them with a learned strategy with 80% accuracy.<sup>36</sup>

In Reading, the PLOP reported that Student’s Reading Inventory assessment at the beginning of the year reflected scores of a “beginning reader.” On the Dynamic Indicators of Basic Early Literacy Skills (“DIBELS”), Student read seven words from a grade level text with 88%

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<sup>32</sup> P9:1-3 (117-19).

<sup>33</sup> Respondent’s Exhibit (“R:”) 50A at page 256. The exhibit number is followed by the electronic page number i.e., R50A:256.

<sup>34</sup> P14:1 (160).

<sup>35</sup> *Id.* at 2 (161).

<sup>36</sup> *Id.* at 3-4 (162-63).

accuracy in one minute at the beginning of the year; in January, s/he read 30 words with 97% accuracy in one minute. The baselines were: (1) s/he currently struggles to use decoding skills to read unfamiliar words, and (2) s/he is able to respond to some factual questions about texts s/he has read, but has difficulty with inferential questions. The goals were: (1) given a list of 20 CVC, CCVC, CVCC, and CVCe words, Student will decode them with 80% accuracy, and (2) after reading a text at his/her instructional level, or after hearing a text read aloud, Student will be able to answer factual and inferential questions with 75% accuracy.<sup>37</sup> In Written Expression, the PLOP reported that Student scored in the Low Range in Broad Written Language on the WJ-IV. Her/his teacher expressed difficulty assessing Student's skills as "[s/he] has not completed many assignments this year." The baseline was (1) Student has struggled to produce written work this school year, and s/he needs help segmenting words; s/he can write a few words at a time. The goals were: (1) given a prompt on a familiar topic, s/he will be able to write a 4-5 sentence paragraph that includes a topic sentence, 2-3 supporting details, and a conclusion sentence all with correct capitalization and punctuation with 75% accuracy, and (2) given 10 CVC, CCVC, CVCC and CVCe words, s/he will be able to segment each word into its sounds and spell with at least 80% accuracy.<sup>38</sup>

In Communication, the PLOP reported findings from Student's Speech and Language Evaluation Report. The team anticipated that Student would have difficulty expressing her/his wants, needs, thoughts, and ideas intelligibly for structured curriculum-based tasks and unstructured social tasks in the general education environment. The baselines were: (1) s/he uses the phonological process of gliding in 50% of occurrences, and vocalization in 47% of occurrences, (2) s/he displayed difficulties with grammatical structures on the Word Structured Task on the CELF-5, and (3) Student has difficulty using language cohesively. The goals were: (1) s/he will produce the /r/ and the postvocalic r phonemes in the initial, medial, and final positions of words at the sentence level with 80% accuracy, (2) s/he will produce complete sentences using specified grammatical structures with 80% accuracy, and (3) s/he will retell a narrative with a minimum of five sentences using a minimum of four elements of story grammar.<sup>39</sup>

In Emotional, Social, and Behavioral Development ("Behavior"), the PLOP interpreted the results of a recent SDQ to indicate that Student is at high risk for an emotional disorder and low to medium risk for a behavior disorder. The baselines were: (1) Student experiences anxiety in various social settings which causes her/him difficulty with peer and adult interaction, and (2) s/he has an interest in interacting and will respond to peer interaction. The goals were: (1) s/he will learn and practice three new coping strategies to manage anxiety through roleplaying, and (2) s/he will appropriately gain the attention of a peer for play or conversation and terminate the interaction appropriately during unstructured activity on 4/5 opportunities.<sup>40</sup>

The IEP team prescribed 7.5 hours per week of specialized instruction in Mathematics, Reading, and Written Expression outside general education, one hour per week of specialized instruction in Written Expression inside general education, and two hours per month each of BSS, OT, and S/L outside general education. Other Classroom Aids and Services included "noise buffers" in loud areas (cafeteria, bathroom breaks), color coded communication cards, preferential

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<sup>37</sup> *Id.* at 4-5 (163-64).

<sup>38</sup> *Id.* at 5-7 (164-66).

<sup>39</sup> *Id.* at 7-8 (166-67).

<sup>40</sup> *Id.* at 8-9 (167-68).

seating, visual prompts/cues, checks for understanding, additional time to complete assignments, repetition of directions, and positive reinforcement.<sup>41</sup> The team declined to prescribe extended year services (“ESY”).<sup>42</sup>

8. On August 10, 2021, DCPS issued Student’s 2020-21 school year report card. Her/his grades were as follows: Proficient in Social Studies, Science, Art, Health & Physical Education, and World Languages (Spanish), Basic in Speaking and Listening, and Below Basic in Reading and Writing & Language. In the twelve graded behavioral categories, Student performed Independently in seven, with Limited Prompting in Follows Directions, Rarely in Completes Class Work on Time, Completes and Returns Homework, and Participates in Class Discussion, and With Frequent Prompting in Uses Time Wisely.<sup>43</sup>

9. Petitioner testified that Student began to refuse to go to school during the 2021-22 school year. In fact, Petitioner testified that Student became a recluse; s/he refused to leave the apartment and refused to initiate play with his/her siblings. At school, Student would dig into or scratch his/her head, shake, and hide. Therefore, Petitioner elected not to send Student to School A at the beginning of the 2021-22 school year.

10. On October 8, 2021, Examiner A completed a form that was submitted to School A in support of Petitioner’s application for Student to receive virtual instruction at home that provided as follows: “[Student] suffers from anxiety. [His/her] anxiety is causing [him/her] headaches, upset stomachs, and shaking. This is making it hard for hard for [her/him] to go to school and stay at school.”<sup>44</sup>

11. On October 13, 2021, DCPS notified Petitioner that Student had five unexcused absences during the school year. The letter informed Petitioner of the potential consequences of continued truancy up to referral to the Child and Family Agency after ten unexcused absences for a child in Student’s age group.<sup>45</sup> On October 14, 2021, DCPS notified Petitioner that Student had accumulated seven unexcused absences.<sup>46</sup>

12. On October 15, 2021, Student was accepted into DCPS’ Virtual Learning Program for the remainder of the 2021-22 school year.<sup>47</sup> Petitioner testified that she was informed in February 2022 that DCPS would provide no virtual instruction during the 2022-23 school year. The program ended on July 1, 2022.<sup>48</sup>

13. On April 28, 2022, DCPS issued Student’s IEP Progress Report for the first three reporting periods of the 2021-22 school year. In Mathematics, Student was reported to have made No Progress on all three goals due to attendance by Teacher C.<sup>49</sup> In Reading, Student was reported to be Progressing on both goals. Teacher C reported that Student was able to read CVC words with

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<sup>41</sup> *Id.* at 12 (171).

<sup>42</sup> *Id.* at 15 (174).

<sup>43</sup> P77:1 (390).

<sup>44</sup> P12:1 (152).

<sup>45</sup> R55A (311).

<sup>46</sup> *Id.* at (313).

<sup>47</sup> P89 (437-38).

<sup>48</sup> P91 (442).

<sup>49</sup> P19:1-2 (216-17).

85% accuracy, CCVC and CVCC words with 80% accuracy, CVCe words had not been introduced, and s/he is able to answer factual questions to a read aloud with 67% accuracy.<sup>50</sup> In Written Expression, Student was reported to have made No Progress on either goal due to attendance.<sup>51</sup> In Communication, Student was reported to be progressing on two goals and to have mastered the goal of producing complete sentences using grammatical structures by Speech Pathologist A. As for the other two goals, s/he was able to indirectly target /r/, produce r-blends with 90% accuracy, initial /r/ with less than 50% accuracy, was able to produce three sentences containing various story elements, and was able to determine story grammar elements with at least 75% accuracy.<sup>52</sup> In Behavior, Student was progressing on the goal of learning three coping skills, but continued to struggle with anxiety, requiring prompts and roleplay opportunities to practice coping strategies. S/he made no progress on the goal of improving his/her interaction skills.<sup>53</sup>

14. On May 20, 2022, when Student was in grade F at School A, DCPS completed an Annual IEP meeting.<sup>54</sup> The Consideration of Special Factors was unchanged from the previous IEP.<sup>55</sup> In Mathematics, PLOP indicated that Student participated in the DCPS virtual learning program. Student does not participate in the large class setting and has not completed many assignments this year. In small groups, s/he showed little engagement throughout the beginning of the year, but in the spring of 2022, s/he grew comfortable with the teacher and his/her peers. On the i-Ready assessment, Student scored at the grade H level, three grades below his/her current level. The baselines were: (1) s/he completes addition/subtraction problems within 20 without regrouping with prompting and needs support with regrouping; and (2) s/he needs more than two prompts to support him/her in solving a word problem; strength is addition/subtraction, needs support with multiplication/division. The goals were unchanged from the previous IEP.<sup>56</sup>

In Reading, the PLOP reported that Student's confidence had grown during the spring; s/he is reading grade H level books. The baselines were: (1) s/he currently struggles to use decoding skills to read unfamiliar words, and (2) s/he has mastered responding to factual questions within a text with multiple choice questions and with short answer questions, and is improving on answering inferential questions with support. The goals were unchanged from the previous IEP.<sup>57</sup> In Written Expression, the PLOP reported that Student was able to complete short sentences and was building his/her writing stamina. S/he show a strong grasp of writing conventions, hesitancy when writing unknown words. S/he has completed a five-sentence paragraph n a 2:1 small group using a graphic organizer. Student was characterized as disengaged during the school year. The baselines were (1) Student has struggled to produce written work this school year, (2) s/he is able to write 5/5 CVC words, CCVC and CVCC 3/5. The goals were unchanged from the previous IEP.<sup>58</sup>

In Communication, the PLOP reported that Student received services through the Virtual Academy to support his/her receptive and expressive language skills and his/her articulation skills.

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<sup>50</sup> *Id.* at 2-3 (217-18).

<sup>51</sup> *Id.* at 3-4 (218-19).

<sup>52</sup> *Id.* at 4-5 (219-200).

<sup>53</sup> *Id.* at 5-6 (220-21), as reported by Social Worker A.

<sup>54</sup> P15:1 (176).

<sup>55</sup> *Id.* at 2 (177).

<sup>56</sup> *Id.* at 3-5 (178-80).

<sup>57</sup> *Id.* at 5-6 (180-81).

<sup>58</sup> *Id.* at 7-8 (182-83).

S/he had made “good” progress on comprehension skills. S/he is able to answer basic WH questions and identify many elements of a story. Her/his difficulty with the vocalic /r/ sound impacts his/her intelligibility. The baselines were: (1) s/he is performing goal 1 at 60-70% accuracy, (2) s/he is performing the goal 2 skill with 65% accuracy, and (3) Student has difficulty with the goal 3 concepts, but performs them with 65-75% accuracy. The goals were: (1) s/he will produce the /r/ and the postvocalic r phonemes in the initial, medial, and final positions of words at the sentence level with 80% accuracy (repeated from the previous IEP), (2) s/he will formulate sentences when given target words and a model to increase awareness of grammar structure and vocabulary with 80% accuracy, and (3) s/he will answer WH questions pertaining to main ideas, making inferences/predictions, and problem solving, with 80% accuracy when presented with pictures, short stories or other verbal information.<sup>59</sup>

In Emotional, Social, and Behavioral Development (“Behavior”), the PLOP interpreted the results of a recent SDQ to indicate that Student is at high risk for an emotional disorder and low to medium risk for hyperactivity of concentration disorder, and a low risk for a behavioral disorder. “[Student] frequently displays anxiety in various social settings which makes developing peer relationships difficult. However, once [Student] is comfortable, [s/he] can be engaging. [S/he] appears to be most comfortable when play is initiated by the peer.” The baselines and goals were unchanged from the previous IEP.<sup>60</sup>

The prescribed services and Other Classroom Aids and Services from the previous IEP remained unchanged.<sup>61</sup> The team declined to prescribe extended year services (“ESY”).<sup>62</sup>

15. On June 2, 2022, Student was administered a i-Ready Math Assessment. Her/his Overall Placement score of 370 placed her/him at a grade H level, three grades below her/his grade level at the time. It was also reflected a slight regression from the beginning of the year (“BOY”) of 378 and middle of the year (“MOY”), 371.<sup>63</sup>

16. On July 6, 2022, DCPS issued Student’s 2021-22 school year report card. Her/his grades were as follows: Advanced in Music, Art, and Health & Physical Education, and Basic in Speaking and Listening, Reading, Writing & Language, Math, Social Studies, and Science. In the twelve graded behavioral categories, Student was graded only through the second term. S/he performed Independently in five categories and with Frequent Prompting in Follows Directions, Completes Class Work on Time, Works Well with Others/Cooperates, Uses Time Wisely, Completes and Returns Homework, Participates in Class Discussion, and Makes an Effort.<sup>64</sup>

17. DCPS’ Home and Hospital Instruction Program (“HHIP”) provides instruction to students with a health impairment resulting in hospitalization or confinement at home for three or more weeks.<sup>65</sup> Eligibility for the program must be supported by a physician or licensed psychologist:

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<sup>59</sup> *Id.* at 8-9 (183-84).

<sup>60</sup> *Id.* at 9-10 (184-85).

<sup>61</sup> *Id.* at 12 (187).

<sup>62</sup> *Id.* at 15 (190).

<sup>63</sup> R50A:257.

<sup>64</sup> P78:1 (395).

<sup>65</sup> R48:251.

The Physician Verification Form must include the student's medical and/or psychological diagnosis and anticipated length of time the student will be unable to attend school. This form must be completed by a physician and/or licensed psychiatrist or psychologist who is providing treatment to the student.<sup>66</sup>

18. On August 25, 2022, Petitioner submitted a Physician Verification Form in support of an application for HHIP that was completed by Witness A, a social worker.<sup>67</sup> The form indicated that Student had diagnoses of Unspecified Delay in Development and Post-Traumatic Stress Disorder, Acute. Witness A checked "Yes" to the question: "Is the student currently confined to the home or hospital. Because of the above-listed diagnosis" since November 2021. Witness A responded "weekly" to the question: "How often do you see/treat the student for the above-mentioned diagnosis?" Witness A responded as follows as to the reason for home confinement and how Student would be significantly limited/impacted in the regular school environment:

[Student] tends to experience physical symptoms such as nausea, crying, shaking uncontrollably when stressed. Emotional symptoms include nightmares, trouble sleeping, clinging to caregivers, withdrawn mood, nervousness, and anxiety.

Witness A responded "No" to the question: "Can the student attend school if accommodations are put in place? If yes, what accommodation do you recommend?" Witness A added:

In person shall be recommended at this time. [Student] has trauma-related behaviors. [S/he] has a fear of going outdoors. [S/he] is fearful of new people and new surroundings. [S/he] has difficulty sleeping and eating at times. [S/he] is very fearful of unfamiliar surroundings.

In response to a query as to her treatment plan and "What specific strategies are being implemented to help the student transition back to school if he/she cannot transition now," Witness A provided:

- Weekly individual therapy, 45 minutes per session to include play therapy
- Monthly psychiatric management
- Strategies include voice control
- Cognitive Behavioral Therapy
- Supportive Therapy
- Client Centered Therapy
- Emotional Support – Animal

In response to a question as to appropriate supports to be put in place once transition is appropriate, Witness A responded:

[Student] could benefit from a home instruction program at this time. For successful transition [Student] should be made aware of the transition if given the opportunity to start at least one day in school with a designated one-on-one designated aide for the 2023-24 school year.

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<sup>66</sup> *Id.* at 253.

<sup>67</sup> P13:1 (154).

Witness A stated that Student was not taking any medications.<sup>68</sup>

19. On September 30, 2022, Petitioner's "newly retained attorney," Attorney A, requested work packets or technology for Student as his/her anxiety prevented him/her from attending school. She also proposed postponing the IEP meeting scheduled for October 4<sup>th</sup> to facilitate the attendance of Witness A, Student's therapist.<sup>69</sup> On October 3, 2022, School A, through Witness F replied, noting that Student's IEP was not due for renewal and that the meeting scheduled for the following day was to discuss a plan to transition Student back to in-person classes. Witness F notified Attorney A that HHIP had found Student ineligible for home-based instruction and offered dates to meet to discuss a transition plan. On October 26, 2022, School A's Assistant Principal, notified Attorney A that "we do not provide instruction or work for home school," declining to make work packets available to Student.<sup>70</sup> On October 27, 2022, Witness F emailed Attorney A reiterating School A's position that as Student was not eligible for home services, s/he was considered truant, and the purpose of the next meeting would be to develop a plan to transition Student back to School A.<sup>71</sup>

20. On November 10, 2022, DCPS issued Student's IEP Progress Report for the first reporting period of the 2022-23 school year. None of the goals had been introduced in any of the Areas of Concern, because "[Student] has not been present in school during this reporting period."<sup>72</sup>

21. On November 10, 2022, HHIP developed a Transition Plan to facilitate Student's return from home to in-person classes. DCPS forwarded the plan to Petitioner's counsel on November 14, 2022.<sup>73</sup> The plan contemplated Student's complete transition to full-time in-person classes in six weeks. S/he would receive instruction by two School A teachers at home for a total of six hours and twenty minutes during the first week. During the second week, in addition to the home instruction, Student would come to School A on Monday (8:25 a.m. – 9:30 a.m.) to walk through the building, to meet staff, and to interact in the Social Emotional Learning block, and on Tuesday (8:25 a.m. – 10:15 a.m.) to meet staff, participate in the SEL block, to participate in one rotation of a needs-based small group instruction. During the third week, Student would attend school every day increasing his/her time in school from 110 minutes on Monday, to three hours on Tuesday, to three hours and thirty minutes on Wednesday, to four hours and five minutes on Thursday and Friday. The four hours and five minutes of week three would extend through the fourth week. In week five, on Thursday, his/her day would be extended to five hours thirty-five minutes (2:00 p.m.). On Friday, s/he would attend a full day. In the sixth week, Student would begin attending throughout the school day.<sup>74</sup>

22. The Transition Plan was initiated on November 14, 2022 with a 1.5 hour visit by Teacher D. Petitioner cancelled on November 16, 2022 and November 17, 2022, terminated the

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<sup>68</sup> *Id.* at 1-3 (154-56).

<sup>69</sup> P92:6 (449).

<sup>70</sup> P93:3 (454).

<sup>71</sup> *Id.* at 2 (453).

<sup>72</sup> P22:1-6 (239-44).

<sup>73</sup> P95:1 (472).

<sup>74</sup> P86:1-3 (428-30)



visit early on November 18 and 22, 2022, and cancelled on November 28 and 30, December 1, 2, and 4, 2022.<sup>75</sup>

23. On November 21, 2022, Petitioner's counsel notified School A that Petitioner's team did not agree with the Transition Plan. "...[w]e don't think transitioning [him/her] to the school building this soon is feasible after having one week of at home services, evidenced by [his/her] inability to return to the school today." Attorney A offered to provide a formal dissent, if necessary.<sup>76</sup> Later that day, Respondent's counsel, Attorney B, requested a formal dissent.<sup>77</sup> On November 29, 2022, School A inquired of Student's "whereabouts during the school day" as the Transition Plan required Student to begin coming to School A "for a certain period every day."<sup>78</sup>

24. On November 30, 2022, Petitioner's Educational Advocate, Witness B, sent School A an email expressing Petitioner's dissent to the Transition Plan.<sup>79</sup> Witness B asserted that a Transition Plan that would expose Student "to people outside [her/his] home" would first require the collection of

baseline behavioral data to be obtained and analyzed to develop an appropriate plan which takes into consideration [her/his] current level of interaction and exposure to people outside [her/his] home and [her/his] current difficulties with leaving [her/his] home while providing an appropriately extended timeline that will allow for [her/him] to return to in-person instruction.<sup>80</sup>

Witness B's email to School A also requested a significantly amended IEP including specialized instruction outside general education for all academic subjects,<sup>81</sup> and four evaluations: comprehensive psychological, speech and language, occupational therapy (including a sensory profile), and assistive technology.<sup>82</sup>

25. On January 14, 2023, Witness B, Petitioner's Educational Consultant, who is employed by Attorney A's law firm, prepared a Compensatory Education Proposal.<sup>83</sup> The Proposal asserted that DCPS' failure to provide an appropriate IEP and placement for the 2021-22 school year was for 42 days and 105 days for the 2022-23 school year. The failure to conduct an FBA and implement a BIP amounted to 102 days. The asserted harm was that Student is performing well below grade level; without increased specialized instruction, his/her achievement gap has widened. Witness B asserted that "With a full-time IEP in a therapeutic, small setting, appropriate behavioral supports, and small group setting, [Student] would have been able to master the goals on [his/her] IEP. [Student] could have demonstrated academic growth of at least one year with his/her basic skills of Reading, Mathematics, and Writing." As compensatory education services for the alleged denial of services, Witness B proposed 157.5 hours of tutoring, 10.5 hours of BSS, and 10.5 hours

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<sup>75</sup> R40:223.

<sup>76</sup> P96:4 (487).

<sup>77</sup> *Id.* at 3 (486).

<sup>78</sup> *Id.* at 2 (485).

<sup>79</sup> P87:1 (432).

<sup>80</sup> *Id.* at 1-2 (432-33).

<sup>81</sup> *Id.* at 2-3 (433-34).

<sup>82</sup> *Id.* at 3 (434).

<sup>83</sup> P102:1 (514).

of OT.<sup>84</sup> Witness B testified that she was unaware of *Reid v. District of Columbia*.<sup>85</sup>

26. Witness A is the social worker who has been treating Student for eighteen to twenty-four months. Witness A testified that Student is resistant to going to school because s/he was attacked by older students in a bathroom; s/he urinated on him/herself and was afraid to return to school. Witness A characterized Student as very timid, wears his/her emotions on his/her sleeve, and very mistrusting of others. Witness A recommended that Student receive home instruction rather than be required to return to school because Student has not “gotten over” what happened in the bathroom. Witness A opined that Student would become “catatonic” if s/he were required to return to school; s/he would become “stiff as a board” and would not talk to anyone. Witness A also opined that an appropriate transition plan for Student would permit her/him to receive home-based, online instruction throughout the remainder of the 2022-23 school year and during the summer, and “maybe” have him/her return to in-person instruction in the fall. On cross-examination, Witness A admitted that she has never met Student in person. She conceded that she provided the diagnosis of PTSD on the Physician Verification Form submitted to HHIP in August 2022. Witness A testified that Student never told Petitioner about the attack in the bathroom. She opposed HHIP’s Transition Plan, but admitted that she had never read it. She also testified that she has never developed a treatment plan for Student.

27. Witness B, who authored the dissent to HHIP’s Transition Plan, testified that Petitioner’s team opposed the plan because it would require Student to return to school too soon. Petitioner’s team wanted “baseline data” collected to determine whether Student was ready to return to school. Witness B reiterated Petitioner’s assertion that Student is not able to leave home. Witness B opined that the appropriate program for Student would include online instruction, in-home tutoring by a special education teacher, BSS, OT, and S/L services. She also testified that Student’s regression on assessments indicate that his/her IEP has an insufficient amount of specialized instruction, and that s/he requires ESY. On cross-examination, Witness B admitted that she has never met Student, never observed her/him in or out of a classroom, had never spoken to any of his/her teacher, or Examiner A or Witness A, who prepared supporting documentation for the Virtual Program in 2021-22 and HHIP in 2022-23, respectively.

28. Witness C, a social worker at School A, testified that she has known Student since 2020 and provided limited, voluntary services at Student’s home occasionally during the periods of virtual learning. She described Student as quiet, responsive to questions, did not initiate conversations, shy, and pleasant, but whose behavior was otherwise unremarkable. Witness C testified that Student’s behaviors were “not out of ordinary” except that Student ate alone away from crowds due to his/her aversion to noise. Witness C was unaware of the alleged attack on Student in a bathroom at School A. Witness C testified that BSS cannot be provided and an updated FBA could not be conducted because Student has not returned to School A, and DCPS no longer operates a virtual platform for students.

29. Witness D, the Assistant Principal at School A, testified that s/he had been at School A since 2014 and was familiar with Student and her/his older siblings. Witness D testified that she provided Student headphones due to her/his sensitivity to noise; Witness D was aware of Student’s reluctance to eat in the lunchroom because of the noise. Witness D characterized Student’s

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<sup>84</sup> *Id.* at 7-8 (520-210).

<sup>85</sup> 401 F.3d 516 (D.C. Cir. 2005).

interaction with her/his classmates when s/he attended in-person for about a month in January 2021, as “great.” Student would have “moments of anxiety but was OK.” When it was reported to Petitioner that Student was “jerking [his/her] leg,” Petitioner picked up Student from school, attributed the behavior to anxiety, and Student never returned to School A. Witness D testified that DCPS’ virtual platform for instruction, that was available for students with preexisting health conditions during the 2021-22 school year, was terminated after that school year.

30. Witness E is the Director of HHIP. She testified that Petitioner’s application for home instruction for Student was denied because the treatment provider had never met Student and had no treatment plan for Student. Moreover, if the student were refusing to leave the home, it would be expected that the child would be receiving psychiatric care, but there was no psychiatric treatment plan. Witness E testified that the HHIP Transition Plan for Student was very conservative, spanning “an entire advisory” period before Student would resume full-time in-person classes. Witness E testified that the in-home component of the Transition Plan was unsuccessful because Petitioner “was not supportive” and cancelled many of the scheduled in-home visits, and the in-person component was unsuccessful because Student did not attend. Witness E testified that Student did not meet the requirements for ESY because there was no data to indicate that s/he regresses over weekends, holidays, or breaks.

31. Witness F, the local education agency (“LEA”) representative from School A, participated in the May 26, 2022 IEP meeting. She testified that the IEP team did not agree with Petitioner’s request for virtual instruction as Student’s educational setting because Student does not consistently turn on her/his computer camera. The Classroom Aids were designed, in part, to address Student’s sensitivity to noise. Some of the goals in the IEP were repeated from the previous IEP due to Student’s “limited engagement” during virtual instruction. Witness F opined that in order for Student to progress, s/he must return to in-person classes. School A can conduct more reliable baseline testing if Student is in-person. Witness F testified that School A has not received documentation of Student’s anxiety level.

## **CONCLUSIONS OF LAW**

Based upon the above Findings of Fact, the arguments of counsel, and this Hearing Officer’s own legal research, the Conclusions of Law of this Hearing Officer are as follows: The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

Where there is a dispute about the appropriateness of the child’s individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.<sup>86</sup>

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<sup>86</sup> D.C. Code Sect. 38-2571.03(6)(A)(i).

Two of the issues in this case involve the alleged failure of DCPS to provide an appropriate IEP and placement. Under District of Columbia law, DCPS bears the burden as to these issues. Petitioner bears the burden of persuasion as to all other issues presented. The burden of persuasion must be met by a preponderance of the evidence. The burden of persuasion must be met by a preponderance of the evidence.<sup>87</sup>

**Whether DCPS denied Student a FAPE by failing to provide Student an appropriate IEP and placement on May 26, 2022. Specifically, Petitioner alleges that the IEP provided insufficient specialized instruction, failed to provide extended year services (“ESY”) during the summer of 2022, and failed to provide a more therapeutic setting that would be capable of addressing Student’s severe anxiety.**

The Supreme Court’s first opportunity to interpret the predecessor to IDEA, The Education of the Handicapped Act (“EHA”), came in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.<sup>88</sup> The Court noted that the EHA did not require that states “maximize the potential of handicapped children ‘commensurate with the opportunity provided to other children.’”<sup>89</sup> Rather, the Court ruled that “Implicit in the congressional purpose of providing access to a ‘free appropriate public education’ is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child...”<sup>90</sup> Insofar as a State is required to provide a handicapped child with a ‘free appropriate public education,’ we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction... In addition, the IEP, and therefore the personalized instruction should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public school system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”<sup>91</sup>

More recently, the Court considered the case of an autistic child under IDEA who, unlike the student in *Rowley* was not in a general education setting.<sup>92</sup> The Tenth Circuit had denied relief, interpreting *Rowley* “to mean that a child’s IEP is adequate as long as it is calculated to confer an ‘educational benefit [that is] merely... more than *de minimis*.”<sup>93</sup> The Court rejected the Tenth Circuit’s interpretation of the state’s obligation under IDEA. Even if it is not reasonable to expect a child to achieve grade level performance,

... [h]is educational program must be appropriately ambitious in light of [his/her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives... It cannot be the case that

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<sup>87</sup> *Schaffer v. Weast*, 546 U.S. 49 (2005).

<sup>88</sup> 458 U.S. 176, 187 (1982).

<sup>89</sup> *Id.* at 189-90, 200

<sup>90</sup> *Id.* at 200.

<sup>91</sup> *Id.* at 203-04.

<sup>92</sup> *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

<sup>93</sup> *Id.* at 997.

the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.<sup>94</sup>

In *Endrew*, the Supreme Court held that an IEP must be designed to produce more than minimal progress in a student's performance from year to year:

When all is said and done, a student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to 'sitting idly... awaiting the time when they were old enough to drop out...' The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."<sup>95</sup>

Student was first found eligible near the end of the 2020-21 school year. The June 8, 2021 Initial IEP, as to which Petitioner has no complaint, prescribed goals in math, reading, written expression, communication, and behavior, 7.5 hours per week of specialized instruction in Mathematics, Reading, and Written Expression outside general education, one hour per week of specialized instruction in Written Expression inside general education, and two hours per month each of BSS, OT, and S/L outside general education. Other Classroom Aids and Services included "noise buffers" in loud areas (cafeteria, bathroom breaks), color coded communication cards, preferential seating, visual prompts/cues, checks for understanding, additional time to complete assignments, repetition of directions, and positive reinforcement. The team declined to prescribe ESY.

Petitioner testified that Student began refusing to go to school at the beginning of the following school year, 2021-22, but Petitioner offered no reason for Student's school avoidance. Witness A, Student's therapist, testified that Student was afraid to go to school because s/he had been attacked by older students in a bathroom. However, Witness A, conceded that Petitioner was unaware of the alleged bathroom assault, and Student never reported the incident to school officials. Witness E, the HHIP Director, testified that Petitioner told her that Student was reclusive because Student's father once tried to kidnap him/her. Whether this alleged kidnapping took place or not, it was alleged to have taken place years before, and would not explain why Student would suddenly begin to resist leaving home at the beginning of the 2021-22 school year.

Although Student did not attend classes in-person at the beginning of the 2021-22 school year, there is no evidence that Petitioner informed School A at that time, or at any time during the 2021-22 school year, that the absences were due to Student's anxiety, school avoidance, or fear of attack or kidnapping. Student began participating in the 2021-22 school year on or about October 15, 2021, after s/he was accepted into DCPS' Virtual Learning Program. That program was available for families still concerned with exposure to COVID-19, for children with pre-existing medical conditions. However, Witness F testified that Student habitually did not turn on his/her camera during virtual instruction, and the records indicate that Student did not turn in many of his/her assignments during the 2021-22 school year. On the last Progress Report before Student's

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<sup>94</sup> *Id.* at 1000-01 (citations omitted).

<sup>95</sup> 137 S.Ct. at 1000-01.

IEP was reviewed, Teacher C, Student's special education teacher, reported that Student had made no progress in math and written expression due to "attendance." In the context of virtual instruction, this means that Student was not consistently turning on his/her camera to participate in classroom instruction.

When the IEP team convened to review Student's IEP on May 20, 2022, the goals in math, reading, written expression, and behavior were unchanged from the previous IEP. Witness F, School A's LEA Representative, testified that the IEP goals were not changed because Student made no progress due to his/her lack of engagement in virtual instruction. The May IEP was drafted with the knowledge that virtual instruction would not be available in the 2022-23 school year, and Student would return to in-person classes as s/he did prior to the pandemic.

None of Petitioner's witnesses offered credible testimony as to the inadequacy of the IEP *as of the time it was drafted*. Both of Petitioners' expert witnesses testified that the IEP is inadequate because Student cannot leave the home. However, the issue of Student not leaving home did not crystallize as a chronic problem until months later, in August 2022, when Witness A filed the Physician Verification Form asserting that Student's anxiety was so extreme that s/he refused to leave home. Student did not attend School A after Petitioner's August 25, 2022 application for HHIP services was denied, based on Witness A's assertions on the Verification Form. HHIP denied the application because Witness A had never met Student in person, and the Verification Form revealed that there was no treatment plan in place to address Student's allegedly extreme anxiety.

Petitioner filed a list of six cases on which she relies to prove that DCPS failed in its obligation to address Student's alleged refusal to attend school. Reliance on *Harris v. District of Columbia*,<sup>96</sup> is apparently based on its language supportive of the linkage between a child's behavior and the child's ability to achieve academically. However, *Harris* did not involve DCPS' failure to address a student's truancy. Rather, it resolved, affirmatively, the narrow issue of whether an FBA qualified as an "evaluation" worthy of a parent being allowed to assert a right to an LEA-funded, independently conducted FBA under 34 C.F.R. Section 300.502(b)(1). The decision included dictum supportive of Petitioner's position:

The IDEA further recognizes that the quality of a child's education is inextricably linked to that child's behavior, and hence an effective educational evaluation must identify behavioral problems: the IEP team must, in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.<sup>97</sup>

In *Garris v. District of Columbia*,<sup>98</sup> the court upheld a hearing officer's conclusion that "whether the Student was provided with 4 hours of specialized instruction outside of a general education [setting] or 15 hours, as proposed by Plaintiffs' expert, it would have made no difference in the Student's academic achievement because the Student was not attending school on a regular

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<sup>96</sup> 561 F.Supp.2d 63 (D.D.C. 2008).

<sup>97</sup> *Id.* at 68, citing 34 C.F.R. §300.324(a)(2)(i). That provision of the Code of Federal Regulations addresses the Development, review, and revision of the IEP.

<sup>98</sup> 210 F.Supp.3d 187 (D.D.C.2016).

basis and was therefore unlikely to master the goals set forth in her IEP.”<sup>99</sup> Like Student here, the student’s truancy in *Garris* was attributed to a prior alleged assault on Student at school. Although DCPS developed a BIP that did not specifically address the assault, the student’s expert did not object to the content of the BIP. “The Hearing Officer thus concluded that, ‘[g]iven this testimony by Petitioner’s expert witness, given the Student’s questionable interest in school generally, and given the quality of the [Functional Behavior Assessment], I must find that Petitioner failed to meet her burden on this issue.”<sup>100</sup> Petitioner’s reliance on *Garris* is misplaced; the court upheld the Hearing Officer’s reliance on the student’s absenteeism to reject the claim that her IEP was inappropriate.

In *Middleton v. District of Columbia*,<sup>101</sup> the student was prescribed a full-time specialized instruction program outside of general education in the spring of his last year at Sousa Middle School. When he enrolled the following year at Woodson Senior High School, his educational advocate complained that the schedule included at least two general education courses, the student was placed on diploma track instead of certificate track, his math and English courses appeared to be too advanced for his skill level, and he was not consistently receiving one-on-one instruction. During the 2015-16 school year at Woodson, the student was absent 57 days. The court ruled that DCPS denied Student a FAPE because the student’s absences were directly related to his placement in a setting that was inconsistent with his IEP:

The school district either knew or reasonably should have known that A.T.'s issues stemmed from his inappropriate placement. Indeed, Ms. Middleton's educational advocate suggested as much early in the school year and repeatedly as the year progressed... And DCPS's own assessment of A.T. revealed that his resistance to attending some classes stemmed, in large part, from his inability to understand his assignments and from the size of his classes... Again, the Court will not attempt to disentangle the problem of A.T.'s inappropriate placement from his issues with attendance; they are clearly linked. Because a preponderance of the evidence shows that DCPS's behavioral interventions were insufficient under the circumstances, the Court accordingly concludes that DCPS violated the IDEA and denied A.T. a FAPE.<sup>102</sup>

In *Malloy v. District of Columbia*,<sup>103</sup> the court remanded this Hearing Officer’s determination that DCPS had not violated its child find obligations<sup>104</sup> when it failed to find a habitually truant student eligible for services. The court concluded that there was additional evidence in the records to suggest to DCPS that the student may have been disabled:

Yet C.E.'s consistently low grades, poor test scores, and teachers' concerns, along with his abysmal attendance record... more than put DCPS on notice some time before April 23, 2020, when C.E. was identified as disabled, that he might have a learning or behavioral disability.<sup>105</sup>

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<sup>99</sup> *Id.* at 191.

<sup>100</sup> *Id.* at 192.

<sup>101</sup> 312 F.Supp.3d 113 (D.D.C. 2018).

<sup>102</sup> *Id.* at 147.

<sup>103</sup> 2022 WL 971208, Civ. Action 20-cv-03219 (D.D.C. March 30, 2022).

<sup>104</sup> 34 C.F.R. § 300.111.

<sup>105</sup> *Id.* at 6.



*N.G. v. District of Columbia*,<sup>106</sup> is another case in which a court overturned an HOD in light of a Hearing Officer's overreliance on the student's absences to justify DCPS failure to find the student eligible for services. N.G. enjoyed academic success until she began exhibiting emotional problems in the eighth grade. In the ninth grade, she began having attendance problems, appeared sad, attempted suicide, was hospitalized and formally diagnosed with clinical depression. In the fall of 2002, in the tenth grade at Wilson (now Jackson-Reed) Senior High School, her grades were low and her attendance was erratic. In April 2003, a psychologist determined that the student was severely depressed and evidencing suicidal intent; the psychologist recommended immediate hospitalization. Upon discharge from Children's Hospital, she was characterized with a "major depressive disorder... needed 'lots of teacher attention, lots of one-on-one, lots of focused work, [and] small classes.'"<sup>107</sup> When the parent became convinced that Wilson would not address the student's emotional issues, the parent placed her in private boarding facilities outside the jurisdiction for the 2003-2004 school year. When the parent attempted to register as a non-attending student seeking special education services, she was discouraged from doing so by Wilson's staff.<sup>108</sup> Thereafter, the parent retained counsel who requested that Wilson immediately initiate child find procedures. DCPS conducted a psychological evaluation in May 2005 that provided no diagnosis or recommendation as to eligibility.<sup>109</sup> At the multidisciplinary team ("MDT") meeting on May 16, 2005, the team determined that the student was not eligible for services. The court overruled the Hearing Officer because he placed primary reliance on the opinion in one report that the student was skipping her classes to be with friends, to get food, or to go to someone's house.<sup>110</sup> This ignored evaluations and recommendations of the student's treatment providers:

In addition to the formal diagnoses, DCPS was also presented with significant other evidence that N.G.'s declining grades and poor attendance were caused by her disabilities. See, e.g., R. 250 (Letter from Dr. Robbins to Dr. Tarason stating, "[N.G.] has been suffering emotionally and academically from her untreated ADHD and depression."); R. 252 (Letter from Dr. Robbins to Ms. Gaines requesting N.G. be able to drop her math class because she was "struggling significantly to make up work" after being hospitalized); R. 226 (Parents' letter to teachers indicating that N.G.'s school work has "undoubtedly already been affected" by her depression); R. 227 (Parents' letter to Dr. Tarason indicating the circumstances which led to N.G.'s hospitalization have affected her performance all year).<sup>111</sup>

Finally, Petitioner cites *Joaquin v. Friendship Public Charter School*<sup>112</sup> for the proposition that "If a student is consistently absent and his or her chronic absenteeism is impeding him or her from being able to receive the services in his or her IEP, the public agency must take steps to address the truancy issue." This assertion appears nowhere in the decision. The parent offered four examples of Friendship's denial of FAPE: it provided insufficient specialized instruction, offered

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<sup>106</sup> 556 F.Supp.2d 11 (D.D.C. 2008).

<sup>107</sup> *Id.* at 19.

<sup>108</sup> *Id.* at 23.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 28.

<sup>111</sup> *Id.*

<sup>112</sup> 2015 WL 5175885, Civil Action No. 14-01119 (D.D.C. Sept. 3, 2015).

no transition services, failed to implement the BIP fully, and placed the student in a different school, Options Public Charter School, that was inappropriate. The case was decided in the parent's favor only on Option's failure to provide transition services, which was conceded by Friendship. The court held that the LEA could not escape responsibility for not offering services prescribed on the IEP by asserting a lack of educational harm due to the student's truancy.

The Court is not unsympathetic to FPCS's observation that G.H.'s sporadic attendance was a major obstacle preventing him from enjoying the benefits of his specialized education. The record shows that FPCS's multiple communications with Ms. Joaquin did little to improve the situation and that FPCS ultimately referred G.H. to the Superior Court for truancy... Indeed, it is entirely possible that even if FPCS had fully implemented G.H.'s IEP, he would not have been present to receive any transition services. But such a counterfactual has no place in the instant inquiry: The Court is concerned only with whether material services mandated by G.H.'s IEP were "provided..." To hold otherwise would be to transform the IDEA into a protector of outcomes rather than opportunities; just as a plaintiff cannot prevail on a claim that a duly formulated and implemented IEP brought about no actual educational progress, the IDEA does not recognize a defense that the proper implementation of an IEP provision would have yielded no incremental benefit.<sup>113</sup>

Thus, the weight of recent District Court caselaw provides that if there is evidence that a student has social/emotional stressors that have a negative effect on his/her ability to access the curriculum, DCPS has an obligation to initiate child find procedures or address the issue in the IEP or BIP of an identified student, even if the student is chronically truant. These circumstances did not exist relative to Student at the time his/her IEP was developed in May 2022. At that time, there was no indication that Student was engaging in school refusal. Prior to the pandemic, Student had no significant behavioral issues; s/he was sensitive to noise and had difficulty interacting with others. While s/he was hesitant to initiate interaction with others, s/he was not described as anti-social in any way. During virtual instruction, Teacher B described Student's affect during the 2020-21 school year as "Overall, [Student] has done an amazing job. S/he participates fully and seems to like school."<sup>114</sup> Teacher A, Student's Teacher throughout the 2020-21 school year, described Student as "a kind and sweet student, but... is often hesitant to participate," who required supports to initiate and maintain participation, but who was responsive when prompted.<sup>115</sup> Student presented as a "as a very sweet and hardworking student," and remained focused throughout four 30-90 minutes testing sessions with Examiner D in May 2021,<sup>116</sup> offering no hint of a problem with school refusal. Examiner B conducted two days of testing in May 2021 – one day in the home, the second day she walked Student to School A. Examiner B observed that Student was *more comfortable and talkative* during the session at School A.<sup>117</sup>

Student's school avoidance became an issue for the first time in the fall of 2022, after DCPS terminated its virtual instruction program and HHIP denied Petitioner's August 2022 application for in-home services. The appropriateness of that HHIP's determination is not at issue in this case. Petitioner now asserts that Student's IEP required virtual instruction. However, there

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<sup>113</sup> *Id.* at 8.

<sup>114</sup> P7:14 (88)

<sup>115</sup> P8: 3, 13 (103, 113).

<sup>116</sup> *Id.* at 4 (104).

<sup>117</sup> P7:5 (79).

was no apparent need for such a provision, as DCPS had already announced the termination of virtual instruction at the end of the 2021-22 school year. Moreover, the record reveals that Student was not consistently attentive in front of his/her computer, suggesting that the virtual format is not Student's optimal learning environment.

Therefore, I conclude that DCPS has met its burden of proving that it provided Student an IEP on May 20, 2022 that was reasonably calculated to enable her/him to make progress appropriate in light of her/his circumstances. I also conclude that DCPS has met its burden of proving that the May 20, 2022 IEP is not inappropriate for failing to include ESY for the summer of 2021-22. Witness E, the DCPS' Director of ESY, testified that there was no data to support Student's need for ESY, i.e., regression during breaks of instruction. In addition, while Student did not evince academic growth during the school year, the April 28, 2022 Progress Report and the May 20, 2022 IEP PLOPs credibly attribute his/her poor showing to inconsistent engagement during virtual instruction and the failure to turn in assignments throughout the school year.

**Whether DCPS denied Student a FAPE by failing to conduct an FBA and develop a BIP to address Student's attendance related to her autism and anxiety.**

DCPS completed an FBA of Student on May 26, 2021. The Defining Behaviors were sensitivity to noise and difficulty engaging with peers. The latter problem had a daily duration of less than ten minutes. Until the beginning of the 2022-23 school year, School A had no reason to believe that Student's FBA required modification. The Assistant Principal testified that she gave Student headphones to use in loud environments, Student was allowed to eat outside of the lunchroom to avoid the noise, and the behavior goals on Student's IEPs address Student's difficulty initiating, maintaining, and ending interactions with peers and adults. None of these accommodations is very relevant in the virtual environment in which Student existed from the time the June 2021 IEP was drafted until the termination of DCPS' virtual instruction after the 2021-22 school year.

Knowing that DCPS would no longer offer virtual instruction, Petitioner applied for HHIP homebound services in August 2022. Once HHIP denied the application, DCPS was made aware that Student's school avoidance was an intractable issue when Petitioner did not cooperate with the Transition Plan HHIP developed, and then filed a formal dissent to the Plan.

Petitioner offered no explanation during her testimony for Student's alleged refusal to leave the home. Witness A testified that it was due to an attack by older students at School A, but Witness A conceded that Petitioner was unaware of this allegation, and Student never reported the attack to School A. Witness A also testified, without any supporting testimony or documentation, that Student would likely become "catatonic" were s/he forced to return to school. School A officials also indicate that Petitioner has offered other potential reasons for the school refusal including an allegation that Student's father once tried to kidnap him/her, and that Student is afraid of contracting Monkey pox at school. Petitioner's resistance to returning Student to school, including Petitioner's lack of cooperation with the home visits and school visits during the abbreviated implementation of the Transition Plan, is inexplicable in light of Student's relatively unremarkable social/emotional record at School A prior to the pandemic.

Local caselaw discussed in the previous section indicate that if there is evidence that a student has social/emotional stressors that have a negative effect on his/her ability to access the curriculum, and these stressors are affecting student's attendance, DCPS has an obligation to address these issues in the IEP or BIP. In fact, DCPS has no evidence of stressors that would warrant updating Student's IEP. Student was denied HHIP services, according to Witness E, because Student's therapists have no treatment plan designed to return her/him to in-person classes. Petitioner has offered no explanation for Student's refusal to leave the home, Witness A's allegation of a bathroom ambush is not corroborated by Petitioner or a report by Student, and Student is receiving no treatment designed to return him/her to the classroom. There is no documentation in Student's behavior PLOPs, Progress Reports, or report cards that s/he was exhibiting behaviors warranting a revision of his/her FBA or additional IEP services.

DCPS addressed Student's behaviors related to noise sensitivity and anxiety that School A staff observed in the classroom setting in the FBA developed on May 26, 2021. It was unaware of, and incapable of, addressing Student's alleged school avoidance that involved alleged behaviors exhibited only at home. Moreover, no physician or licensed psychologist has corroborated Petitioner's assertion that Student's anxiety is so extreme that s/he is incapable of leaving the home or attending school for the foreseeable future. I conclude that Petitioner has failed to meet her burden of proving that DCPS denied Student a FAPE by failing to update his/her FBA and develop a BIP to address his/her anxiety.

### **RELIEF**

For relief, Petitioner requests, *inter alia*, (1) an order requiring DCPS to revise Student's IEP to include additional services, ESY, and an appropriate location of services, (2) an order requiring DCPS to provide Student virtual instruction at home until such time that s/he is able to attend school in person, (3) an order requiring DCPS to place Student in a nonpublic program with transportation, (4) an order requiring DCPS to conduct an FBA and to reconvene an MDT meeting to develop a BIP, (5) compensatory education services, and (6) attorneys' fees.

### **ORDER**

Upon consideration of the *Complaint*, DCPS' *Response*, the exhibits from the parties' disclosures that were admitted into evidence, the testimony presented during the hearing, the closing arguments of counsel for the parties, and the parties lists of authorities, it is hereby

**ORDERED**, that the *Complaint* is **DISMISSED** with prejudice.

## APPEAL RIGHTS

This decision is final except that either party aggrieved by the decision of the Impartial Hearing Officer shall have ninety (90) days from the date this decision is issued to file a civil action, with respect to the issues presented in the due process hearing, in a district court of the United States or the Superior Court of the District of Columbia as provided in 34 C.F.R. §303.448 (b).

*Terry Michael Banks*  
Terry Michael Banks  
Hearing Officer

Date: March 14, 2023

Copies to: Attorney A, Esquire  
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