

VIRGINIA:

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

In the matter of
[REDACTED], a minor,
by [REDACTED] parent, [REDACTED],
Petitioner

v. VDOE Case #: 22-089

[REDACTED] PUBLIC SCHOOLS, Respondent

**Rhonda J. S. Mitchell
Hearing Officer**

**Representatives:
Dr. Daryl Conrad Roselle, Advocate for Petitioner
Dannielle Hall-McIvor, Esquire, Counsel for Respondent
Kamala Lannetti, Esquire, Counsel for Respondent**

Hearing Officer Decision

Introduction and Procedural History

On February 23, 2022, petitioner, [REDACTED] (parent, petitioner, Ms. [REDACTED]), filed a *pro se* request for due process hearing (complaint) on behalf of her [REDACTED], [REDACTED] ([REDACTED] or student). The complaint was filed against [REDACTED] Public Schools ([REDACTED] PS) pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et. seq.* Petitioner and [REDACTED] were later represented by Advocate Daryl Conrad Roselle. [REDACTED] PS was represented by Attorneys Danielle Hall-McIvor and Kamala Lannetti of the [REDACTED] Attorney's Office. [REDACTED] PS responded to the complaint via prior written notice dated March 2, 2022. Reginald Frazier was appointed as case monitor by the Virginia Department of Education and attended the hearing for the first two days. The precise timeline for this proceeding is located on the case closure report.

On March 4, 2022, counsel for [REDACTED] PS filed a notice of insufficiency. The Hearing Officer by decision dated March 6, 2022, found the complaint to be legally sufficient.

On March 4, 2022, counsel for [REDACTED] PS also filed a Motion to Dismiss. Petitioner responded to the Motion to Dismiss on March 15, 2022. By decision dated March 18, 2022, the Motion to Dismiss was denied.

The hearing was originally scheduled for March 28, 29, and 30, 2022 with an extension date of March 31st, if needed. However, on or about March 25, 2022, petitioner requested a delay due to difficulties obtaining the student's medical records. Petitioner considered the introduction of these documents relevant to the hearing and essential to her case in chief. Over the objection of [REDACTED] PS, the Hearing Officer granted the delay and the hearing was rescheduled for April 25, 26, 27, and 28, 2022 with April 29, 2022, scheduled as an extension day, if needed. The decision due date was established as June 10, 2022.

On March 29, 2022, counsel for [REDACTED] PS filed a Motion to Reconsider the hearing delay. The parent's advocate responded to the Motion on March 30, 2022, asserting it to be in the best interest of the student to sustain the delay. Given the timing of the Motion to Reconsider (filed after the hearing was originally scheduled to start), the pending Easter holiday school closure, and the parent's assertions regarding there being no adverse affects on the student, the Hearing Officer upheld the hearing delay via prehearing order dated April 1, 2022.

During the course of this proceeding, the Hearing Officer entered six prehearing orders and conducted seven prehearing conferences. Exhibits were timely exchanged and sent to the Hearing Officer. Counsel for [REDACTED] PS issued three attorney *subpoenas duces tecum* for the student's medical records. The Hearing Officer entered three witness subpoenas for petitioner. A copy of all prehearing orders, decisions, notices, exhibits, subpoenas and other relevant documents have been filed with the record.

The Hearing

The four day hearing commenced on April 25, 2022. Petitioner's advocate, Dr. Daryl Roselle, began with an opening statement followed by an opening statement from Danielle Hall-McIvor, counsel for [REDACTED] PS. Petitioner then called the following witnesses:

Day 1:

[REDACTED], MD: student's pediatric gastroenterologist (stipulated as an expert in his field)
Transcript pages (Tr. pgs.) 44-51

[REDACTED]: student's aunt
Tr. pgs. 67-95

[REDACTED], MD: student's primary pediatrician (stipulated as an expert in his field)
Tr. pgs. 105-132

[REDACTED]: student's aunt
Tr. pgs. 136-151

[REDACTED]: student's maternal grandmother
Tr. pgs. 171-202

Day 2:

██████████: petitioner/parent
Tr. pgs. 219-315

Day 3:

██████████ (continued): petitioner/parent
Tr. pgs. 316-366

██████████: student's former homebound teacher
Tr. pgs. 382-391

Joint Witnesses for both parties:

██████████: Assistant Principal, ██████████ High School
Tr. pgs. 395-426

██████████: Special Education Coordinator, ██████████ PS
Tr. pgs. 456-516

Day 4:

██████████: Office of Student Leadership, Homebound Coordinator, ██████████ PS
Tr. pgs. 537-610 and Tr. pgs. 689-696 (recalled)

Witness for ██████████ PS:

██████████: Director of Compliance and Special Education Services, School Board
Representative, ██████████ PS (stipulated as an expert in special education)
Tr. pgs. 615-684

Rebuttal Witness for Petitioner:

██████████: petitioner/parent
Tr. pgs. 697-739

Exhibit books from both parties were accepted into evidence without objection. Supplemental exhibits were admitted without objection during the hearing. Applying applicable standards for witness credibility, the witnesses were determined to be credible.

Issues

The issues in this case are as follows:

Whether ██████████ Public Schools (██████████ PS) failed to properly implement the student's individualized education program (IEP), thereby denying the student a free appropriate public education (FAPE).

Whether ██████████ PS failed to provide the student with appropriate accommodations for ██████████ disabilities, thereby denying the student a FAPE.

Whether ██████████ PS should provide the student with a secondary plan, extended homebound services and/or intermittent services for ██████████ to receive a FAPE.

Factual Synopsis and Findings of Fact

██████████ (student) is a █████ year old, █████ grade student enrolled at █████ High School, █████ PS. █████ was identified as a student eligible for special education services pursuant to the IDEA in September 2019. The student had a 504 plan prior to September 2019.

There is no issue regarding █████'s eligibility to receive special education services pursuant to the Individuals with Disabilities Education Act (IDEA). █████ qualifies for special education services under the category of other health impairment. █████ triennial review was due in May 2022.

The student has been diagnosed with attention deficit hyperactivity disorder (ADHD). The symptoms of ADHD may present as the student having problems paying attention to details, concentration, remembering instructions and making careless mistakes. As a result of ADHD, █████ exhibits an executive functioning deficit. Executive function deficit or dysfunction occurs when the brain has difficulty with the skills of attention, memory, flexible thinking, time management and organization.

██████████ has a █████. █████ was diagnosed with bilateral retinoblastoma and is solely dependent on █████ left eye for sight. █████ suffers from eye fatigue when forced to work on a computer for long periods. The testimony indicated that █████ did better when working with paper copies of █████ school work. Providing paper copies is provided in █████ individualized education program (IEP) as an accommodation during in-person instruction at the school.

Of particular concern during the hearing was █████'s irritable bowel syndrome (IBS). The record established that the student suffers from severe IBS. IBS is an intestinal disorder causing pain in the belly, gas, diarrhea, vomiting and constipation. In █████'s case, this condition often causes █████ to be either bed-ridden or on the toilet for prolonged periods of time. █████ symptoms are frequently sudden and uncontrollable. Due to this condition, the student is uncomfortable with routine in-person learning in the brick and mortar school setting. █████ IBS frequently requires █████ to be in the bathroom during morning hours, causing █████ to miss the school bus. █████ pain often confines █████ to the bed causing █████ to miss school altogether.

Due to IBS, █████'s doctors have referred █████ for pain management counseling and gastro physical therapy. The IBS can at times make █████ feel anxious, embarrassed, uncertain and stressed. IBS can promote low self-esteem.

██████████ attended in-person school at █████ High from September to December 2021. However, due to the symptoms of █████ IBS, █████ was frequently absent or tardy and often missed assignments. On or about October 27, 2021, petitioner completed a request for homebound instruction but the student's pain and palliative care physician would not refer the student because he had not seen █████ since 2020.

On or about December 2, 2021, the petitioner again requested homebound services. On December 8, 2021, Dr. [REDACTED], [REDACTED]'s pediatrician, certified [REDACTED] for intermittent homebound. [REDACTED] was approved for nine weeks of homebound instruction.

In light of the student's homebound placement, [REDACTED] IEP team met on or about December 15, 2021 to review the student's needs while on homebound. The team determined that the student would receive 15 minutes of consult services per week from December 15, 2021 - January 31, 2022 while participating in 8 hours of virtual homebound instruction.

On or about January 26, 2022, petitioner requested an extension of homebound. [REDACTED] again certified [REDACTED] for intermittent homebound. [REDACTED] was approved for an additional four weeks of intermittent homebound services to end on February 28, 2022.

The IEP team met on February 3, 2022 and continued the 15 minutes per week consult services until February 28, 2022. Homebound services were scheduled to expire on or about February 28, 2022 and [REDACTED] was scheduled to return to in-person learning at the high school on March 1, 2022. However, when petitioner filed this due process complaint on February 23, 2022, [REDACTED] PS extended homebound services until around mid-March 2022.

[REDACTED] PS enrolled [REDACTED] in the computer-based educational program called "Edgenuity" to receive [REDACTED] homebound educational services. Edgenuity provides an online curriculum for grades K thru 12. The evidence shows that the parent and student are dissatisfied with Edgenuity as well as the lack of support received from the school while enrolled in the virtual program.

[REDACTED] has not attended in-person school since [REDACTED] was first approved for homebound services. Once homebound services were terminated in March and [REDACTED] enrollment in Edgenuity was terminated, [REDACTED] was supposed to begin school using the web-based Schoology system. [REDACTED] PS was also sending [REDACTED] paper copies of [REDACTED] work to be completed and returned to the teacher(s).

[REDACTED]'s grades have been erratic and there is considerable concern that [REDACTED] will not pass the [REDACTED] grade. Primarily due to IBS, [REDACTED] has missed a lot of school and a lot of course assignments. At the time of this hearing, [REDACTED]'s grades indicate that [REDACTED] is failing the [REDACTED] grade. (P Ex. A-7)

During the course of this proceeding, [REDACTED] PS proposed that [REDACTED] be provided with skill-based assignments for each of [REDACTED] courses. The grade [REDACTED] receives on the project will serve as [REDACTED] class grade for the [REDACTED] grade. [REDACTED] would receive an "incomplete" grade for each class until the projects were graded. With this proposal, if successful, [REDACTED] could pass the [REDACTED] grade and graduate on time.

At the close of the hearing, petitioner requested that [REDACTED] be transferred from [REDACTED] High School. The Hearing Officer ruled that this issue was not properly before her and that there had been no evidence presented on the topic of a school transfer. Counsel for [REDACTED] PS noted that the issue of a transfer for the next school year could be considered by the IEP team when it was convened.

Witness Summaries

(The witnesses were duly sworn by the Hearing Officer.)

According to [REDACTED], [REDACTED]'s gastroenterologist, [REDACTED] has been diagnosed with IBS. [REDACTED] suffers with abdominal pain, constipation, chronic and fecal urgency, as well as some vomiting. (Tr. pg. 52; SB Ex. 839 supp) He last saw [REDACTED] on November 29, 2021. He discussed prescribed medications and referrals. (Tr. pg. 50) He had no opinion regarding [REDACTED]'s school arrangements. (Tr. pg. 47) Dr. [REDACTED] was called as a witness for the petitioner.

Dr. [REDACTED], [REDACTED]'s pediatrician for 10-12 years, testified that due to [REDACTED] IBS it might be very difficult for [REDACTED] to attend in-person school on a daily basis. Due to morning pain and discomfort, it might be difficult for [REDACTED] to arrive at school on time. Due to the unpredictable nature of IBS, [REDACTED] may be embarrassed and suffer emotional distress. (Tr. pg. 110) He testified that [REDACTED]'s symptoms have been a difficult challenge because they have been more persistent than most of his patients diagnosed with IBS. (Tr. pg. 116) [REDACTED] testified on behalf of the petitioner.

On December 8, 2021, [REDACTED] recommended intermittent homebound services for [REDACTED]. His overall testimony indicated that he held with the premise that [REDACTED] continue intermittent homebound educational services due to the severity and unpredictable nature of [REDACTED] IBS. (SB Ex. 372; Tr. pg. 118)

[REDACTED] was asked about several missed appointments and follow-ups by [REDACTED] with various doctors. He discussed the negative impact of COVID on otherwise routine office operations and patient follow through. (Tr. pg. 130)

Three of [REDACTED]'s relatives, two aunts ([REDACTED] and [REDACTED]), and [REDACTED] grandmother ([REDACTED]), testified as witnesses for the petitioner. They testified to the overall impact that [REDACTED]'s IBS has had on the family and on [REDACTED]. They explained how they have observed [REDACTED] staying close to home or if out, insuring [REDACTED] was close to a bathroom. They explained that [REDACTED] wants to attend school in person but is simply uncomfortable doing so because of [REDACTED] IBS. [REDACTED] is afraid of having an accident and being embarrassed at school or on the school bus. They have witnessed [REDACTED] pain associated with IBS along with [REDACTED] long stays in the bathroom and bed confinement. The IBS has limited [REDACTED] activities overall and has prevented [REDACTED] from participating in normal teenage activities. (Tr. pgs. 67, 136, 171)

[REDACTED], petitioner's witness, was employed by [REDACTED] PS as [REDACTED]'s tutor or homebound teacher from the spring of 2019 to March 8, 2020 for 6 to 8 hours per week. She described [REDACTED] as pleasant, polite, eager to work and an excellent listener. She testified that lessons would sometimes be halted or postponed because of [REDACTED]'s IBS symptoms and bathroom visits. She explained how she was assigned students and lessons. She testified that she never had a problem with [REDACTED] going into the bathroom to play games or watch videos to avoid [REDACTED] lessons. She stated that she is certified to teach [REDACTED] now and that [REDACTED] would receive credit. (Tr. pg. 382)

██████████, Assistant Principal, ██████████ High School, provided testimony as a joint witness. (Tr. pg. 395- 426) She has not personally met the student. (Tr. pg. 444) She explained the skill-based projects proposed by ██████████ PS for ██████████ to pass the ██████████ grade. She testified that the projects would check ██████████ knowledge base and readiness for SOLs. She explained that the zeros now showing on ██████████'s record could be removed and replaced with the project grades. She reinforced the desire of she and the student's teachers to work with ██████████ and ██████████ parent to insure ██████████ educational success by going back to teach ██████████ anything ██████████ may have missed.

Dr. ██████████ discussed and explained the SOL boot camp and the use of SOL tutoring. She explained that ██████████ could get a 375 on ██████████ SOLs to pass and receive a locally awarded verified credit.

She explained ██████████'s paper copies accommodation as shown on ██████████ IEP. She testified that the IEP provides for ██████████ to receive paper copies of work when the assignment is not supported by read-aloud, and, while in the brick and mortar building. She explained that ██████████ PS took it upon themselves to provide ██████████ with paper copies as reinforcement while ██████████ was homebound. (Tr. pg.439)

When asked about Edgenuity, Dr. ██████████ admitted that she was somewhat confused herself by the instructions. (Tr. pg. 406) She was unsure whether she had received any formal training on Edgenuity but confirmed that she had received documentation about the program. She explained that this was the first year that ██████████ PS used Edgenuity.

Edgenuity is a blended model. She testified that the case manager should have reached out to ██████████ when it was discovered that ██████████ was not completing work assignments or logging in as ██████████ should. She admitted that the case manager did not follow-up with the student. (Tr. pg. 398) She admitted that ██████████ High School and Edgenuity should have been working together but that in this case, that did not happen. (Tr. pg. 423)

Dr. ██████████ stated that ██████████ was not given a learning style assessment before being enrolled in Edgenuity. Such an assessment could have determined whether Edgenuity was a proper fit for ██████████. (Tr. pg. 425)

██████████, ██████████'s assigned special education coordinator for ██████████ PS, testified that he became familiar with ██████████ when ██████████ first became eligible for special education services. He claimed to have provided guidance and support to Ms. ██████████ and ██████████. He has been a member of the student's IEP team. He discussed ██████████'s IEP. He also provided the pros and cons of various evaluations and assessments that could be available to the student.

He shared general information about Edgenuity, but was unaware of many of the specifics or nuances of the program. He opined that ██████████ learned best in the brick and mortar setting. Mr. ██████████ was a joint witness. (Tr. pg. 456-516)

The petitioner, ██████████, and ██████████'s mother, testified both on direct examination and in rebuttal. (Tr. pgs. 219-381, in rebuttal Tr. pgs. 697-739; P Ex. A-1) She expressed frustration and concern about ██████████'s education and her dealings with ██████████ PS. She

alleged that [REDACTED] PS failed to follow the accommodations in the individualized education program (IEP) by not providing paper copies as stated therein. (SB Ex. 293) She claimed that [REDACTED] PS blamed her for their failures. She complained about transportation arrangements for the student (an issue previously adjudicated by the Virginia Department of Education (VDOE) in a decision dated April 2020; SB suppl. ex.) She discussed the severity of [REDACTED]'s IBS and described how it negatively impacts [REDACTED] ability to attend school in person. She mentioned [REDACTED]'s prosthetic eye and the impact of online learning on [REDACTED] normal eye, resulting in eye fatigue. She discussed [REDACTED]'s ADHD and described how it negatively affects [REDACTED] attention span.

As a 9th grader attending school in person, school year 2020-2021, petitioner described how the teachers and case manager were initially unaware of the student's IEP, including the services and accommodations [REDACTED] was supposed to receive. She was particularly concerned that [REDACTED] was not receiving paper copies as stated in the IEP. She further claimed that the teachers did not appear to know about the IEP provisions allowing for bathroom breaks, reduced work, time extensions and class seating arrangements. She testified that [REDACTED] did not receive paper copies from March 2020 to September 2020. She alleged that nothing went smoothly when [REDACTED] went from middle school to high school (8th to 9th grade) and that [REDACTED] services and accommodations did not transfer over from the middle school to the high school.

In the [REDACTED] grade, school year 2021-2022, petitioner described being confused and frustrated because she and [REDACTED] received no guidance regarding [REDACTED] education, particularly during [REDACTED] absences. Although often tardy or absent due to IBS symptoms, [REDACTED] physically attended school between September and December 2021. During this period, [REDACTED] was absent from school about 22 days. (Tr. pg. 679) Petitioner claims that she was not told whether [REDACTED] was supposed to be doing work on Schoology or on paper copies. She realized that [REDACTED] was failing [REDACTED] courses due to missing work during [REDACTED] absences and asked for a meeting with [REDACTED] teachers. According to petitioner, that meeting resulted in her only being told to encourage [REDACTED] to get the work done. She also claimed that school officials seemed to be blaming her for the work not being done.

During the course of [REDACTED]'s absences, petitioner became frustrated because she received numerous and repeated emails from the school informing her that [REDACTED] was absent from school. Petitioner responded to the school emails and also contacted school officials to inform them that [REDACTED] was absent from school due to illness associated with [REDACTED] IBS. Nonetheless, petitioner stated that she continued to receive absentee notifications from the school. (P Ex. A-7) Even after becoming a homebound student in December 2021, Ms. [REDACTED] complained that she continued to receive absentee notifications from the school.

Ms. [REDACTED] further testified that despite [REDACTED] enrollment in Edgenuity, when [REDACTED] was first assigned to homebound, [REDACTED] was unable to immediately access the program. According to her, [REDACTED] PS failed to officially transfer [REDACTED] PS from in-person learning to homebound, which precluded [REDACTED] from accessing the program. After much back-and-forth between the parent, [REDACTED] PS homebound office, [REDACTED] PS technical support and Edgenuity, the error was identified and corrected. (This claim was disputed by Ms. [REDACTED], homebound coordinator, and will be discussed later.)

Ms. [REDACTED] alleges that she was provided with no other homebound option other than Edgenuity. She was not told about any other available online programs such as Virtual Virginia or Virtual [REDACTED].

During her testimony, the petitioner discussed both she and [REDACTED]'s frustration with trying to access Edgenuity once [REDACTED] became a homebound student in December 2021. Petitioner testified that [REDACTED] was unable to access Edgenuity until on or about January 7, 2022. Edgenuity is a blended model wherein [REDACTED] High School staff and Edgenuity are supposed to work together to educate the student. However, according to Dr. [REDACTED], the assistant principal, whose testimony is later discussed, the blended component of Edgenuity did not happen in this case. (Tr. pg. 423)

Petitioner is concerned that Edgenuity was the wrong program for [REDACTED] and is not providing [REDACTED] with a proper foundation to pass Standards of Learning (SOLs). She is distraught because [REDACTED] was assigned to the program with little to no guidance or support from [REDACTED] PS. She was also concerned that the program did not align with where [REDACTED] left off at school. It seemed more like a self-taught program where [REDACTED] started at lesson 1. She claimed that the program did not pick up from where [REDACTED] was actually studying at the brick and mortar school. Overall, she suggested that there was no continuity between in-person learning and Edgenuity.

Petitioner discussed with Mr. [REDACTED], special education coordinator for [REDACTED] PS and Ms. [REDACTED], the homebound coordinator, [REDACTED] PS, her concern that the education given at the high school was incompatible with Edgenuity and her confusion about which work [REDACTED] was actually supposed to be doing. She testified that when she broached these topics with them, they told her to "figure it out" and provided no other educational options for [REDACTED]. (P. ex. ***)

Petitioner testified that she wants [REDACTED] to physically attend school but that she does not agree with the in-person education proposals offered by [REDACTED] PS. Petitioner testified that although [REDACTED] also wants to attend school in person, the unpredictability of [REDACTED] illness precludes in-person learning on a scheduled or routine basis. She wants [REDACTED] to have the homebound opportunity during [REDACTED] flare-ups and to receive the same education as [REDACTED] peers. When [REDACTED] is physically able, she is willing to send [REDACTED] to school like she did at the beginning of [REDACTED] grade. (Tr. pg. 735) Petitioner claims that [REDACTED] PS has failed to provide [REDACTED] with a free appropriate public education (FAPE). She further alleges that [REDACTED] PS has not acted in good faith.

Overall, petitioner alleges that [REDACTED] PS failed [REDACTED] and failed to provide [REDACTED] with a FAPE. She states that [REDACTED] wants to attend school but often cannot due to [REDACTED] physical limitations provoked by IBS. She testified that in January 2022, [REDACTED] contracted COVID and was too sick to access Edgenuity, which explains some of [REDACTED] failures to log on to Edgenuity.

Petitioner testified that [REDACTED] wants to go to college. [REDACTED] is confused as to why all this has happened to [REDACTED]. [REDACTED] is frustrated because although [REDACTED] is doing the work, [REDACTED] seems to be getting further behind. She testified that stress worsens [REDACTED] IBS.

The [REDACTED] PS homebound coordinator, [REDACTED], a joint witness, provided a detailed account of [REDACTED]'s online use of Edgenuity. She obtained the data from Edgenuity itself. (SB suppl. ex.) According to the data, [REDACTED] logged on for about 13 hours from December 16, 2021 thru January 2022 and for approximately 30 hours from February 1 to March 15, 2022. The recommended use time for those periods was between 69 and 90 hours. She characterized [REDACTED]'s log-ins as sporadic and not in accord with the recommended 45 minutes per subject. (Tr. pg. 574) She opined that [REDACTED] could have been successful with Edgenuity if [REDACTED] had logged on pursuant to the recommended guidance. She testified that Edgenuity meets state and common-core standards; aligns with SOLs; has been approved by VDOE as an online education provider; and is accredited. (Tr. pg. 546)

Ms. [REDACTED] explained that once it was noted that [REDACTED] was not logging in regularly, either the school counselor or case manager should have been involved and that she knows that the school reached out to the parent at least once. (Tr. pg. 607) She testified that it was the responsibility of the school's counselor to monitor and collaborate on [REDACTED]'s progress re Edgenuity. She testified that she was unaware or did not know whether this occurred. (Tr. pg. 598)

Ms. [REDACTED] explained that once [REDACTED] was enrolled in Edgenuity, [REDACTED] IEP was sent to the company and a mentor from the school should have been assigned. (Tr. pg. 547) When asked who should have been the point of contact for [REDACTED] from [REDACTED] PS, Ms. [REDACTED] mentioned the school counselor and case manager. She testified that they should have been the ones collaborating on grades and log ons. (Tr. pg. 598)

Ms. [REDACTED] explained the various types of homebound services. She explained that [REDACTED] was approved for intermittent homebound services. That meant that [REDACTED] was supposed to come to school for in-person learning and stay home only when [REDACTED] illness necessitated it. However, in [REDACTED]'s case, once [REDACTED] was approved for intermittent homebound services, the petitioner never sent [REDACTED] back to school and so [REDACTED] became a full-time homebound student. (Tr. pgs. 593, 596)

Ms. [REDACTED] disputed petitioner's claim that [REDACTED] was initially unable to log in to Edgenuity due to an error by [REDACTED] PS. (Tr. pg. 579) Petitioner claimed that [REDACTED] was unable to log on between December 16, 2021 and January 6, 2022 because [REDACTED] PS failed to transfer [REDACTED] from in-person to homebound. Ms. [REDACTED] stated that the data shows that [REDACTED] first signed on to Edgenuity on December 17, 2021 but not again until January 7, 2022. She stated that [REDACTED] was having password problems and that prior to the holiday break, [REDACTED] password was reset. She testified that no one was available during the holiday break to assist [REDACTED] with further password resets. According to Ms. [REDACTED], [REDACTED] was unable to log on to Edgenuity because of a password problem, not anything that [REDACTED] PS failed to do.

[REDACTED], (Tr. pgs. 615-684) [REDACTED] PS Director of Compliance and Special Education Services and the School Board Representative during this proceeding, testified that [REDACTED] PS has offered that [REDACTED] complete skill-based course projects designed to measure [REDACTED] understanding of the course materials for the year, and, if successfully completed, could help [REDACTED] pass the [REDACTED] grade. Since [REDACTED] would probably complete the projects during the summer since school will close soon, the teachers would not be available to assist. However, a tutor could be assigned to help, if needed. (Tr. pg. 625)

She discussed options available to [REDACTED] including late arrival due to [REDACTED] IBS morning symptoms. She discussed Virtual [REDACTED] that would allow [REDACTED] to zoom into the classroom for direct instruction. [REDACTED] would then complete the work on Schoology. With this option, [REDACTED] could either turn the computer screen off or away from [REDACTED] if [REDACTED] was indisposed. [REDACTED] would continue to hear the audio live. This option would require the student to sign in on time in the mornings. [REDACTED] would be able to participate in class discussions. (Tr. pg. 623)

Ms. [REDACTED] discussed various evaluations and cited that [REDACTED] 2019 evaluation revealed that he had a problem with work avoidance. She mentioned that [REDACTED] does not have an intellectual disability and is capable of doing the work. She testified that the student is due for [REDACTED] triennial review and opined that a clinical interview by a school clinical psychologist might be helpful to the IEP team to identify additional educational supports that [REDACTED] might need, such as self-advocacy. (Tr. pgs. 632, 633)

She discussed [REDACTED]'s last consented to IEP that had [REDACTED] returning to school on March 1, 2022. After that, the student should have been working in Schoology. (Tr. pg. 643) In her opinion, to succeed in school, [REDACTED] must be self-directed and self-motivated. Ms. [REDACTED] alleges that [REDACTED] should be educated in person at [REDACTED] High School as [REDACTED] is no longer eligible to receive homebound services. She states that [REDACTED] PS has offered the student in person learning at [REDACTED] High School. She contends that [REDACTED] PS has provided [REDACTED] with a FAPE. She opines that in-person learning is [REDACTED]'s least restrictive environment.

Dr. [REDACTED], [REDACTED]'s pain management specialist, was scheduled to testify for petitioner, however, she was out on maternity leave during the hearing and unavailable. Dr. [REDACTED] wrote a letter dated March 16, 2022 in which she explains that she treats [REDACTED] for chronic abdominal pain secondary to inflammatory bowel disease. She states in her letter that [REDACTED]'s underlying condition results in daily severe pain and fecal urgency. She explains that [REDACTED]'s urgency requires that [REDACTED] have unlimited access to a bathroom and that, in a regular school setting, this may not always be readily available and might cause [REDACTED] to miss a lot of class. She further explains that such a situation could cause the student to be anxious. She writes that anxiety could exacerbate [REDACTED]'s irritable bowel disease.

Dr. [REDACTED]'s letter asks that [REDACTED] be continued on homebound. She writes, "I request that you continue to allow [REDACTED] to complete school via homebound for the foreseeable future. Please understand that these requests are imperative to [REDACTED]'s health and overall wellbeing." (P. Ex. A-6)

Argument Summaries

Petitioner

Petitioner, Ms. [REDACTED], alleges that [REDACTED] PS failed to properly implement [REDACTED]'s IEP, thereby denying [REDACTED] a FAPE; failed to provide appropriate accommodations in light of [REDACTED] disabilities, thereby denying [REDACTED] a FAPE; and failed to extend [REDACTED] homebound educational services despite [REDACTED] continued need for such services. Petitioner claims that [REDACTED] PS showed a

wanton disregard for the student's disabilities by insisting that [REDACTED] return to the brick and mortar school full time.

As an [REDACTED]th grader, petitioner alleges that [REDACTED] did not receive paper copies from September to March of 2020. She alleges that [REDACTED]PS failed to follow [REDACTED]'s IEP, which called for [REDACTED] to receive paper copies while attending school in person.

Petitioner further alleges that [REDACTED]PS enrolled [REDACTED] into the Edgenuity program without considering [REDACTED] disabilities of eye fatigue and ADHD. She alleges that [REDACTED] was enrolled in the program without guidance or support from [REDACTED]PS, and when she inquired, she was told to "figure it out." Petitioner alleges that she was given no educational options other than Edgenuity once [REDACTED] was approved for homebound services.

She claims that the student did not have access to the virtual program, Edgenuity, from on or about December 16, 2021 to on or about January 6, 2022 due to a failure of [REDACTED]PS to properly enroll [REDACTED]. She claims that [REDACTED] was enrolled in Edgenuity without benefit of a peer-review to establish its suitability for [REDACTED].

Petitioner claims that [REDACTED]PS did not provide [REDACTED] with the specially designed instruction, educational resources or reasonable accommodations that [REDACTED] needed to succeed in light of [REDACTED] disabilities. Petitioner further alleges that [REDACTED]PS failed to follow VDOE truancy policies as they relate to [REDACTED]'s frequent school absences.

Petitioner alleges that [REDACTED]PS blames her for [REDACTED] failing the [REDACTED] grade instead of acknowledging its own deficiencies. Petitioner argues that although both she and [REDACTED] want [REDACTED] to return to in-person learning at the school, the unpredictable nature of [REDACTED] IBS flare-ups require that [REDACTED] remain on an intermittent homebound placement.

Respondent

[REDACTED]PS argues that [REDACTED]'s eligibility for homebound educational services has expired and that [REDACTED] is no longer entitled to these services. They argue that [REDACTED]'s current IEP requires that [REDACTED] return to in person instruction on March 1, 2022. [REDACTED]PS contends that they have appropriately implemented the student's IEP and have provided [REDACTED] with a FAPE.

[REDACTED]PS further claims that they have provided the student with many accommodations that appropriately address [REDACTED] disabilities. They claim that the Edgenuity program provided the student with 24/7 access so [REDACTED] could keep up with [REDACTED] courses until [REDACTED] could attend school in person. They further argue that Edgenuity has extended hours of access to teachers and tutors and that [REDACTED] failed to take advantage of the opportunities offered by Edgenuity as evidenced by the fact that [REDACTED] failed to sign on for one-half of the recommended time. [REDACTED]PS contends that they provided [REDACTED] with an appropriate educational opportunity that provided [REDACTED] with a FAPE.

[REDACTED]PS argues that it was the parent who chose homebound services for [REDACTED] and that such an educational placement is not made by an IEP team. They explain that the parent applies for homebound services. Such services must meet regulatory requirements, including time periods to access homebound services. [REDACTED]PS contends that they cooperated with the parent by allowing

the student to remain on homebound services past the regulatory time period while attempting to resolve this complaint.

PS contends that the student's IEP provides for a multitude of accommodations that allow for intermittent attendance and makeup work. They contend that PS has provided access to High School classes through Schoology and through comprehensive projects designed to demonstrate competency.

In summary, PS argues that it has offered a FAPE and that IEPs were designed to address deficits in math, reading and self-management. They argue that PS has also considered's unique visual, attention deficit and gastrointestinal needs, and have provided appropriate accommodations that would permit to access education.

Burden of Proof

The Petitioner, as the party who filed the request for a due process hearing, has the burden of proof in this proceeding. *See, e.g., N.P. by S.P. v. Maxwell*, 711 F. App'x 713 (4th Cir. 2017) (At impartial due process hearing, the parents bear the burden of proving their child was denied a free appropriate public education.) *Id.* at 716, *citing West v. Schaffer ex rel. Schaffer*, 377 F.3d 449, 456 (4th Cir. 2004), *aff'd*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). The burden of persuasion shall be met by a preponderance of the evidence. *See, e.g., Cty. Sch. Bd. of Henrico Cty., Va. v. R.T.*, 433 F. Supp. 2d 657, 671 (E.D. Va. 2006) (Hearing Officer's factual conclusions supported by the preponderance of the record evidence.)

Legal Analysis, Discussion and Hearing Officer's Findings

Issue 1:

Whether Public Schools (PS) failed to properly implement the student's individualized education program (IEP), thereby denying the student a free appropriate public education (FAPE).

The Individuals with Disabilities Education Act (IDEA), requires the development and implementation of IEPs that are reasonably calculated to provide an educational benefit to the disabled student. *See Hartmann v. Loudoun County Board of Education*, 118 F 3d 996, 1001 (4th Cir. 1997.) The substance of the IEP must be reasonably calculated to provide the student with some educational benefit. *See Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 205, 102 S. Ct. 3034, 3050, 73 L. Ed. 2d 690 (1982). In the case of *Endrew F. v. Douglas County School District*, 137 S. Ct. 988 (2017), the U. S. Supreme Court further defined the standard of *some* educational benefit by requiring school systems to offer an IEP that is reasonably calculated to enable a child to make educational progress in light of the child's individual circumstances. The IEP has two general purposes: to establish measurable annual goals for the student; and to state the special education and related services, supplementary aids, accommodations and services that the school district will provide to, or on behalf of the student.

IEPs are a necessary component of FAPE. IEPs should include academic and functional goals designed to meet the student's needs resulting from his disabilities. The IEP is also important for

the disabled student since it identifies and implements special education and related services as well as supplemental aids to be provided to the student. These services and aids should be designed to enable the student to advance appropriately and reach identified goals.

In the case of Sumter County Sch. Dist. 17 v. Heffernan, 642 F.3d 478, 484 (4th Cir. 2011), the Court addressed situations where a local school board failed to implement, in material part, an IEP by opining:

Given the relatively limited scope of a state's obligations under the IDEA, we agree with the District that the failure to perfectly execute an IEP does not necessarily amount to the denial of a free, appropriate public education. However, as other courts have recognized, the failure to implement a material or significant portion of the IEP can amount to a denial of FAPE. *Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007) (“[A] material failure to implement an IEP violates the IDEA.”); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 n.3 (8th Cir. 2003) (“[W]e cannot conclude that an IEP is reasonably calculated to provide a free appropriate public education if there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit.”); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (“[A] party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.”). Accordingly, we conclude that a material failure to implement an IEP, or, put another way, a failure to implement a material portion of an IEP, violates the IDEA.

The IEP team in this case recommended that ██████████ receive 15 minutes per week of consult services while being educated in the homebound setting. (See ██████████ PS PWN, response to the complaint dated March 2, 2022) There was no evidence presented that ██████████ PS provided the 15 minutes per week consult services. In fact, to the contrary, petitioner alleges that she and ██████████ were given little to no support or guidance once ██████████ was enrolled in the online Edgenuity program. She also alleges that she was provided with no options other than Edgenuity for ██████████ to receive homebound instruction.

Dr. ██████████ confirmed the lack of support from ██████████ PS during her testimony when she stated that the case manager (who did not testify) failed to follow-up with the student and parent. She admitted that ██████████ High School and Edgenuity should have been working together, but that in this case, that did not happen. Although ██████████ PS argues that ██████████ could have gotten support from an Edgenuity teacher, ██████████ counselor or case manager by picking up the phone and asking for help, the evidence supports the premise that after ██████████ was enrolled in Edgenuity ██████████ was left to ██████████ own devices to figure out the program and complete the assignments. The lack of communication coupled with the failure to provide consult services represents a failure by ██████████ PS to implement a material or significant portion of the IEP. These failures amount to a denial of FAPE.

Then there is the issue of exactly when ██████████ could sign on to Edgenuity. Once ██████████ was enrolled in Edgenuity by the homebound office, Edgenuity became ██████████ virtual source for educational services. According to ██████████ PS witnesses, Edgenuity, a self-paced virtual program, was appropriate for ██████████ because ██████████ was able to sign on and do work whenever ██████████ felt up to it. However, according to petitioner, ██████████ was unable to log on between on or about December 16, 2021 to on or about January 7, 2022. Ms. ██████████ alleges that the failure

rests with [REDACTED] PS by not transferring [REDACTED] from in-school to homebound which was the responsibility of the [REDACTED] PS. According to Ms. [REDACTED], once [REDACTED] was finally transferred to homebound by [REDACTED] PS, [REDACTED] was able to sign on to the program with no problems.

Ms. [REDACTED], the [REDACTED] PS' homebound coordinator, contradicts Ms. [REDACTED] and claims that the problem was with [REDACTED]'s password. Ms. [REDACTED] stated that the data shows that [REDACTED] first signed on to Edgenuity on December 17, 2021 but not again until January 7, 2022. (SB suppl. ex.) She stated that [REDACTED] was having password problems and that prior to the holiday break, [REDACTED] password was reset. She testified that no one was available during the holiday break to assist [REDACTED] with further password resets. According to Ms. [REDACTED], if [REDACTED] was unable to log on to Edgenuity after December 17th, it must have been due to either a personal or technical issue, not anything that [REDACTED] PS failed to do. (Tr. pg. 580)

However, via an email message to Ms. [REDACTED] dated January 8, 2022, (P. Ex. A-7) Ms. [REDACTED] wrote the following:

"Although [REDACTED] was approved on 12/16, between [REDACTED] High, the Counselor and the Technology Dept. [REDACTED] was not switched over to a Homebound/Virtual student in all three systems. Therefore, [REDACTED]'s been blocked from accessing [REDACTED] school email and Edgenuity, and every time the passwords were reset in both the system automatically re-blocked [REDACTED] (unbeknownst to us) because [REDACTED] was still listed as an in-person student instead of virtual. Phew...it's been a little frustrating trying to get down to the root of the problem...but we finally got there this past Thursday, 1/6/22."

This message authenticates Ms. [REDACTED]'s version as to why [REDACTED] did not access Edgenuity until January 7, 2022. In fact, this message seems to indicate that Ms. [REDACTED] was relieved that [REDACTED] was finally able to access Edgenuity.

As the only source of education for [REDACTED], the fact that [REDACTED] was unable to access the Edgenuity program from on or about December 17, 2021 to January 7, 2022 amounts to a denial of FAPE. [REDACTED] had no access to education during that period. Because Edgenuity is a self-paced program, [REDACTED] could have worked on the program modules and completed assignments during that period.

I therefore FIND that petitioner has met her burden regarding Issue 1. I FIND that [REDACTED] PS failed to implement substantial or significant provisions of the IEP. [REDACTED] did not receive the 15-minutes per week consult services recommended by the IEP team, nor did [REDACTED] have access to Edgenuity within a reasonable time once homebound was approved and [REDACTED] was enrolled in Edgenuity. This amounts to a denial of FAPE and entitles [REDACTED] to an award of compensatory services from [REDACTED] PS. To the extent that compensatory education services are ordered herein, they are intended to be restorative and equitable.

Compensatory education is special education instruction and/or related services owed to a student with disabilities as a result of a school system's failure to provide them with services in accordance with their individualized education program (IEP). Hearing officers have the authority to grant relief as deemed appropriate based on their findings. Equity practices are considered in fashioning a remedy, with broad discretion permitted. *Florence County School District Four v.*

Carter ex rel Carter, 510 U.S. 7, 17 (1993). The hearing officer should grant compensatory education if appropriate with an inquiry that is “qualitative, fact-intensive and above all, tailored to the unique needs of the disabled student.” *Branham v. District of Columbia*, 427 F.3d 7, 9 (D.C. Cir. 2005). Where a court finds a deprivation of FAPE it should return the student to the educational path that would have been traveled had the educational agency provided that child with an appropriate education in the first place. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 620 (3d.Cir. 2015).

I FIND that compensatory educational services are necessary in this case to return the student to the educational path that he would have traveled had [REDACTED] PS provided [REDACTED] with an appropriate education in the first place. I FIND that [REDACTED] was denied a FAPE.

Issue 2:

Whether [REDACTED] PS failed to provide the student with appropriate accommodations for [REDACTED] disabilities, thereby denying the student a FAPE.

When reviewing an IEP for FAPE, the following legal analysis should be considered:

“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. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the IDEA, and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” See *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 205, 102 S. Ct. 3034, 3050, 73 L.Ed. 2d 690 (1982).

The IDEA is a federal statute that provides students with disabilities and the right to a FAPE designed to meet their needs. 20 U.S.C. § 1400(d)(1)(A). Central to the IDEA is the requirement that local school districts develop, implement, and annually revise an IEP that is calculated to meet the eligible student's specific educational needs. *Thompson R2-J Sch. Dist. v. Luke P., ex rel. Jeff P.*, 540 F.3d 1143, 1148-49 (10th Cir. 2008); 20 U.S.C. § 1414(d). Thus, the determination of whether a FAPE has been provided turns in large part on the sufficiency of the IEP for each disabled child. *Tyler V., ex rel. Desiree V. v. St. Vrain Valley Sch. Dist. No. RE-1J*, 2011 WL 1045434 (D. Colo. 2011) (unpublished) (citing *A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 675 (4th Cir. 2007)).

In the case of *Board of Education v. Rowley*, 458 U.S. 176 (1982) 553 IDELR 656, the Supreme Court established the following two-part test that courts should use to decide the appropriateness of a student's education:

Has the state complied with the procedures set forth in the IDEA?

Is the IEP, developed through the IDEA's procedures, reasonably calculated to enable the child to receive educational benefits?

The Supreme Court held that when this two-part test is satisfied, the state has complied with the obligation imposed by Congress, and the courts can require no more.

As cited in respondent's closing brief, *Endrew F. ex rel. Joseph F. v. Douglas City. Sch. Dist.*, RE-1,137 S. Ct. 999 (2017) enlarged upon the 1982 *Rowley* case, holding that an appropriate education for a student with a disability is one that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. The Court further stated that an IEP must be "reasonable" but need not be "ideal" *Id.*

In ██████'s case, ██████ is failing the ██████ grade. ██████ has not made overall progress. ██████ PS has not satisfied the requirements of *Rowley* or *Endrew*. ██████'s enrollment in Edgenuity did not provide ██████ with an opportunity to make educational progress in light of ██████ individual circumstances. Edgenuity is designed to be a self-paced educational tool that permits the student to review the lesson, complete the correlating assignment(s) and then move on to the next module of instruction. Edgenuity is solely virtual. ██████ has only one natural eye and suffers from eye fatigue. ██████ PS should have considered this condition and made an appropriate accommodation. A solely virtual program was inappropriate.

██████ also has ADHD. As a consequence of ADHD, ██████ exhibits an executive functioning deficit. This disability causes attention deficits, memory deficits, time management problems and a lack of organizational skills. Edgenuity alone did not provide appropriate supports or accommodations for these deficits. This finding is supported by the fact that ██████ did not sign on to the program as it was designed and when signed on, had a mentionable amount of idle time. During ██████ enrollment in Edgenuity, ██████ displayed a lack of organizational skills, a lack of time management, as well as overall attention deficits -- all traits of ADHD. This student needed appropriate supports and services to educationally progress using the Edgenuity program. I FIND that ██████ PS did not provide appropriate supports and services. It was unreasonable to expect this student to educationally progress via Edgenuity alone.

█████ PS argues that local educators should be afforded latitude and deference when determining the IEP most appropriate for a disabled child. The IDEA was not designed to deprive local educators of the right to apply their professional judgment. Instead, it should establish a "basic floor of opportunity" for every handicapped child. *See Rowley*, 458 U.S. at 201. States must provide specialized instruction and related services "sufficient to confer some educational benefit upon the handicapped child," *id.* at 200, but the Act does not require "the furnishing of every special service necessary to maximize each handicapped child's potential," *id.* at 199. Local educators should be given deference when educating a disabled child. *T.B., Jr. by and through his Parents, T.B., Sr. and F.B. v. Prince George's County Board of Education*, et al., 897 F.3d 566 (4th Cir., 2018).

In this case, ██████ PS failed to provide ██████ with a basic floor of opportunity to educationally succeed and progress. Consequently, ██████ PS failed the second prong of the *Rowley* test.

Edgenuity alone did not provide the specialized instruction and related services ██████ needed to receive educational benefit. When ██████ was enrolled in Edgenuity, it does not appear that ██████ PS appropriately or adequately considered or provided accommodations for ██████'s potential for eye fatigue based on having to watch a computer screen for hours each

day, nor did they consider or make accommodations for [REDACTED] attention span deficits, lack of organizational skills and lack of time management skills caused by [REDACTED] ADHD.

[REDACTED]'s IEP is also inappropriate because it fails to address [REDACTED] chronic absenteeism. It fails to provide the services, accommodations and supports based on the student's unique needs to receive a FAPE. This issue of absenteeism needed to be addressed by [REDACTED] PS even in the virtual setting because, according to Edgenuity data, absenteeism seemed to follow the student even in the virtual only educational setting. [REDACTED]'s lack of log on hours in the Edgenuity program can theoretically be equated to absenteeism. Yet, little or no support was provided [REDACTED] while [REDACTED] was enrolled in Edgenuity.

For the above stated reasons, I FIND that [REDACTED] PS failed to provide the supports and services necessary for [REDACTED] to make educational progress. The fact that [REDACTED] PS enrolled [REDACTED] into this program, offering no other educational options, reasonable supports or services during [REDACTED] homebound confinement, exacerbated [REDACTED] eye fatigue and did not sufficiently account for [REDACTED] ADHD. [REDACTED] PS therefore did not provide [REDACTED] with an educational opportunity that was reasonably calculated to enable [REDACTED] to receive educational benefits. [REDACTED] IEP lacked specialized instruction and related services sufficient to confer educational benefit upon [REDACTED]. Accordingly, I FIND that [REDACTED] was denied a FAPE. Petitioner has met her burden of proof as to Issue 2.

Issue 3:

Whether [REDACTED] PS should provide the student with a secondary plan, extended homebound services and/or intermittent services for [REDACTED] to receive a FAPE.

Of note is the fact that [REDACTED] recommended [REDACTED] for *intermittent* homebound services. Intermittent means that [REDACTED] was supposed to go to school when [REDACTED] was well enough to attend. (SB Ex. 351) However, the two letters sent to the parent from the [REDACTED] PS Homebound Office approving homebound services (SB Ex. 391, dated Dec.16, 2021; SB Ex. 430, dated Feb. 3, 2022) clearly state that [REDACTED] was approved for *full-time* virtual homebound services. The second letter states that [REDACTED] will continue to receive virtual homebound instruction through Edgenuity. Therefore, according to those two letters, [REDACTED] was not approved for intermittent homebound but for full-time virtual homebound services. Per these two letters from [REDACTED] PS to the parent, [REDACTED] was not required to go to school when [REDACTED] felt well enough to attend. [REDACTED] education was totally dependent on Edgenuity.

[REDACTED] PS argues that [REDACTED]'s least restrictive environment (LRE) is in the brick and mortar public school setting. The testimony indicates that both petitioner and [REDACTED] agree and want [REDACTED] to attend school in person. Under the LRE requirement of the IDEA, students with disabilities must not be placed in special classes or separate schools or otherwise removed from the regular education environment unless "the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 CFR 300.114 (a).

Although the IDEA contemplates school-based placements for most students with disabilities, a district may have to provide services in a student's home in some circumstances. An IEP team may place a student on home instruction if it determines that the student cannot receive an educational

benefit in a less restrictive setting. See 34 CFR 300.115 (b)(1) (requiring districts to make available a continuum of educational placements that includes "instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions"). A district also may provide temporary homebound services if a student is unable to attend school due to a short-term illness or injury.

Many factors may be considered in making a placement determination, the most important of which is the conformity with the least restrictive environment considerations of 34 CFR 300.114 through 34 CFR 300.118 ; 34 CFR 300.116 ; and 65 Fed. Reg. 36,591 (2000). What is pertinent in making the placement decision will vary, at least to some extent, based upon the child's unique and individual needs. *Letter to Anonymous*, 21 IDELR 674 (OSEP 1994). A student's educational placement should reflect his strengths as well as his deficits.

Home instruction may be necessary for a student with a disability who is unable to attend school for medical or psychological reasons. *Albuquerque Pub. Schs. v. Sledge*, 74 IDELR 290 (D.N.M. 2019) (A kindergartner with a seizure disorder needed home instruction so she could receive medical marijuana that could not be administered on school grounds); *New Jersey Dep't of Educ. Complaint Investigation C2012-4341*, 59 IDELR 294 (N.J. Super. Ct. App. Div. 2012, unpublished) (Home instruction was the least restrictive environment for a 4-year-old boy with a body temperature regulation disorder who required an environment of at least 77 degrees Fahrenheit to maintain an internal body temperature of 96.5 to 98 degrees.); *Tindell v. Evansville-Vanderburgh Sch. Corp.*, 57 IDELR 71 (S.D. Ind. 2011) (Home instruction was appropriate for a student who had such severe anxiety that he was unable to attend classes outside the home.); *Mt. Zion Unit Sch. Dist. No. 3*, 111 LRP 51317 (SEA IL 04/04/11) (Because the district had no way to limit exposure to dangerous levels of stimuli, home instruction was the only reasonable option for a teenager with post-concussion syndrome.); and *Georgetown Indep. Sch. Dist.*, 45 IDELR 116 (SEA TX 2005) (A student with severe aplastic anemia required home instruction due to his immune-suppressed condition and the high risk of infection at school.)

Courts and Hearing Officers alike have consistently held that home placements based solely on parent preference are not appropriate. *A.K. v. Gwinnett County Sch. Dist.*, 62 IDELR 253 (11th Cir. 2014, unpublished), cert. denied, 114 LRP 43723 , 135 S. Ct. 78 (U.S. 2014) (Parents' wish to administer nonprescription nutritional supplements to an 11-year-old girl with multiple, severe disabilities during the school day did not outweigh the student's need to interact with same-age peers.); *Stamps v. Gwinnett County Sch. Dist.*, 59 IDELR 1 (11th Cir. 2012, unpublished), cert. denied, 112 LRP 54652 , 133 S. Ct. 576 (U.S. 2012) (Parent's fear that three siblings with an immune disorder would become sick at school did not relieve the district of its responsibility to offer FAPE in the LRE.); *Cheyenne Mountain Sch. Dist. #12*, 110 LRP 44427 (SEA CO 04/19/10) (Parents' concerns that a student might have a seizure during the 2.4 mile trip to school in a small school bus did not demonstrate that homebound placement was necessary.); and *Poway Unified Sch. Dist.*, 53 IDELR 208 (SEA CA 2009) (A parent's preference for keeping a 15-year-old with autism, an intellectual disability, and "leaky gut syndrome" at home was based on her unsupported belief that a school-based placement posed too many health and safety risks and was contrary to the goals of the IDEA.)

The nature of a student's disability may limit his availability for instruction. For this reason, the IEP team should consider any physical or mental factors that may impede the student's instruction when determining the scheduling and duration of homebound services. *Abington Heights Sch. Dist.*, 112

LRP 16163 (SEA PA 03/13/12) (A district erred in offering 10 hours of weekly in-home instruction, delivered in two-hour blocks in the late afternoon when the student's fatigue was at its worst, without considering the significant physical conditions that adversely affected the student's strength and ability to attend to instruction.)

In this case, both parties agree that [REDACTED] does best when [REDACTED] attends school in person. According to petitioner, [REDACTED] wants to go to school. However, the evidence supports the conclusion that [REDACTED]'s IBS often precludes [REDACTED] from attending school in person. The evidence also supports the fact that [REDACTED] can sometimes attend school in person as [REDACTED] did between September and December 2021. Intermittent homebound educational services best serve [REDACTED]'s needs.

According to the testimony, Virtual [REDACTED] would provide [REDACTED] with the opportunity to listen to instruction even though [REDACTED] computer's video/camera is turned off or turned away from [REDACTED]. That means that [REDACTED] can access [REDACTED] education through audio even when [REDACTED] is indisposed. The evidence indicates that [REDACTED] is most affected by IBS symptoms in the mornings. Via Virtual [REDACTED], [REDACTED] can listen to the instruction [REDACTED] was supposed to have in class and can also participate in classes when [REDACTED] is able. Virtual [REDACTED] should have been offered to the student as an option for on line learning.

I therefore FIND that [REDACTED] can receive a FAPE through intermittent homebound services. When [REDACTED] is unable to attend school, I FIND Virtual [REDACTED] to be [REDACTED] most appropriate virtual medium for a FAPE. Petitioner has met her burden of proof as to Issue 3.

Enrollment as an intermittent homebound student means that [REDACTED] must attend school in person whenever possible. Due to [REDACTED] IBS, [REDACTED] should be afforded late arrival. When unable to attend school in person, [REDACTED] should be able to access [REDACTED] current curriculum through Virtual [REDACTED]. When at home, [REDACTED] will be required to start [REDACTED] school day at the same time as [REDACTED] peers via Virtual [REDACTED].

Prevailing Party

Whether [REDACTED] Public Schools ([REDACTED] PS) failed to properly implement the student's individualized education program (IEP), thereby denying the student a free appropriate public education (FAPE). *Prevailing Party: Petitioner*

Whether [REDACTED] PS failed to provide the student with appropriate accommodations for [REDACTED] disability, thereby denying the student a FAPE. *Prevailing Party: Petitioner*

Whether [REDACTED] PS should provide the student with a secondary plan, extended homebound services and/or intermittent services for [REDACTED] to receive a FAPE. *Prevailing Party: Petitioner*

Orders

Based on a thorough review of the evidence and testimony presented in this case, along with applicable law and regulation, the Hearing Officer issues the following orders and relief:

[REDACTED] will be classified by [REDACTED] PS as an intermittent homebound student beginning school year 2022-2023. At least one recommendation from a doctor will be required every three months thereafter for [REDACTED] to maintain [REDACTED] status as an intermittent homebound student. It is the

responsibility of the parent to obtain the doctor's recommendation and provide it to the homebound office. [REDACTED] should attend school in-person as much as possible. When unable to attend school in person due to [REDACTED] disabilities, [REDACTED] will be educated using Virtual [REDACTED].

In an effort to help [REDACTED] pass the [REDACTED] grade and to gauge [REDACTED] current knowledge base, [REDACTED] will be provided with skill-based course projects as offered by [REDACTED] PS. These projects will be delivered to the student by [REDACTED] teachers or another [REDACTED] PS designee within 7 calendar days of this decision. As proposed by [REDACTED] PS, the project grade will be the student's grade for the course. [REDACTED] must complete all projects before the 2022-2023 school year begins. [REDACTED] PS is commended for offering this option to [REDACTED].

As a compensatory service, [REDACTED] will be assigned a tutor over the summer. [REDACTED] PS will assign a tutor within 7 calendar days of this decision and provide the name and contact information to the parent. The tutor will also be provided the name and contact information of the parent within those 7 calendar days. The tutor will assist [REDACTED] with the skill-based projects. The tutor will arrive in the afternoon at a time arranged between the parent and the tutor, 3 days each week, 3 hours per session, for four weeks. The weeks do not have to be consecutive and can be arranged between the parent and the tutor.

[REDACTED] will be given a clinical interview at the school by a school clinical psychologist. A [REDACTED] PS representative or member of the [REDACTED] High School staff will coordinate the place, date and time of the interview between the parent and clinical psychologist. The interview must occur before the beginning of school year 2022-2023. Once completed, an IEP team meeting will be convened and the results will be considered by the IEP team when reviewing the student's IEP.

As discussed at the end of the hearing, the IEP team should discuss the possibility of a school transfer for [REDACTED] at the next IEP meeting.

[REDACTED] will receive paper copies of [REDACTED] course work and assignments whether physically attending school or at home using Virtual [REDACTED] unless the student is able to print the paper copies [REDACTED] self via Schoology. Electronic transmission or facsimile is appropriate when [REDACTED] is not in the brick and mortar school. The IEP team should discuss the logistics of getting the paper copies to [REDACTED] at the next IEP team meeting.

[REDACTED] will be assigned a case manager who will check in with [REDACTED] or petitioner on at minimum a weekly basis. The case manager will provide educational support and guidance to [REDACTED] as well as routinely review [REDACTED] academic progress.

The IEP team will meet promptly to discuss implementation of these orders and to formulate an IEP that considers this decision.

Rights of Appeal

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

ENTERED: June 4, 2022

Rhonda J. S. Mitchell
Hearing Officer

CF:

Parent
Parent's Advocate
Counsel for [REDACTED] PS
Representative for [REDACTED] PS
VDOE
Case Monitor