VIR GINIA:

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

In the matter of by parent, etitioner	
v.	VDOE Case #: 22-089
	PUBLIC SCHOOLS, Responden
	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
a pro se Education Advocate I Kamala La complaint monitor by	request for due process hearing (complaint) on behalf of her public Schools (PS) pursuant to the Individuals with Disabilities Act (IDEA), 20 U.S.C. §1400, et. seq. Petitioner and were later represented by Daryl Conrad Roselle. PS was represented by Attorneys Danielle Hall-McIvor and annetti of the Attorney's Office. PS responded to the via prior written notice dated March 2, 2022. Reginald Frazier was appointed as case of the Virginia Department of Education and attended the hearing for the first two days. The triangle of the proceeding is located on the case closure report.
	rch 4, 2022, counsel for PS filed a notice of insufficiency. The Hearing Officer by ated March 6, 2022, found the complaint to be legally sufficient.

On March 4, 2022, counsel for 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 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 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 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 PS. Petitioner then called the following witnesses:

Day 1:

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

: student's aunt

Tr. pgs. 67-95

, MD: student's primary pediatrician (stipulated as an expert in his field)

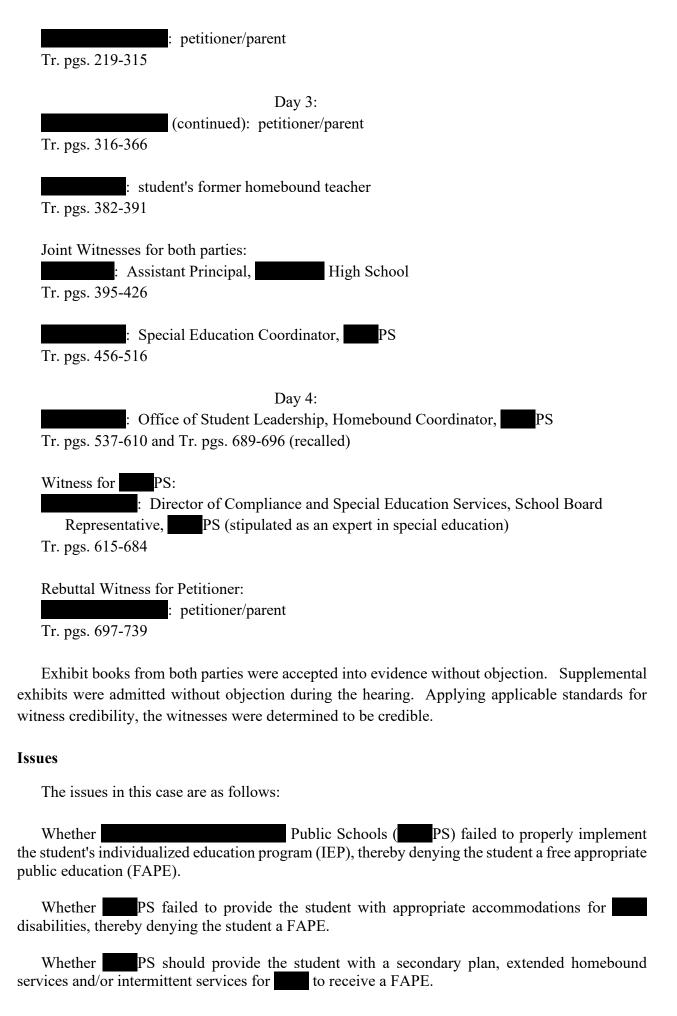
Tr. pgs. 105-132

: student's aunt

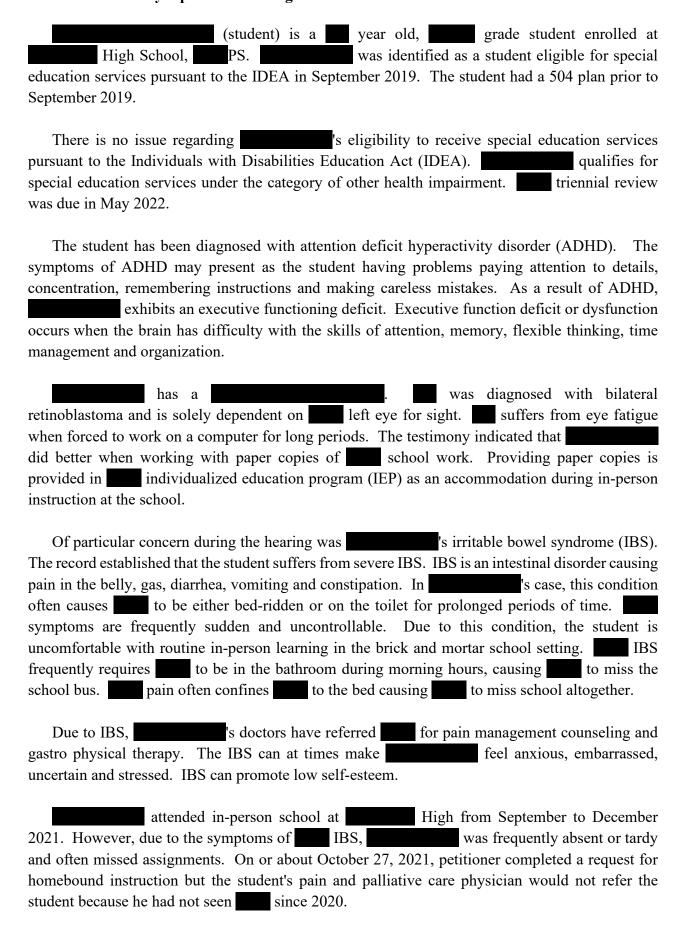
Tr. pgs. 136-151

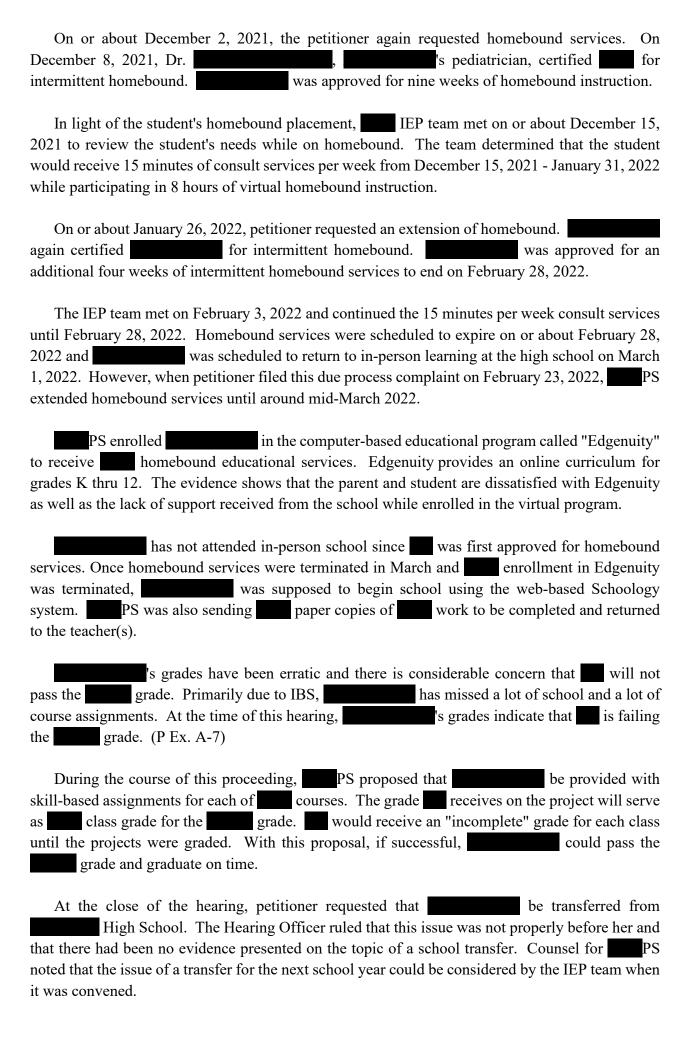
: student's maternal grandmother

Tr. pgs. 171-202



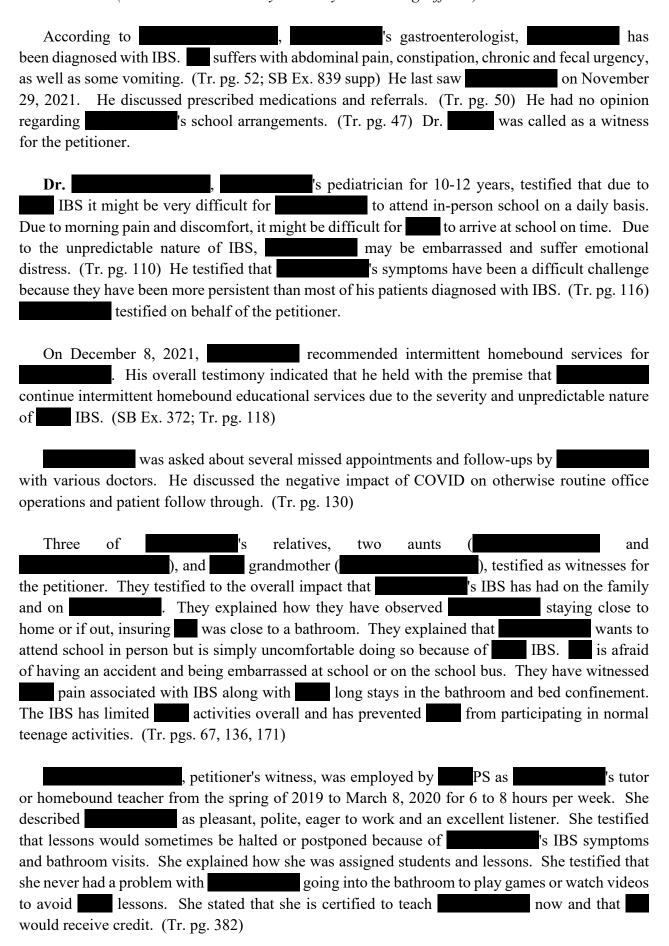
Factual Synopsis and Findings of Fact

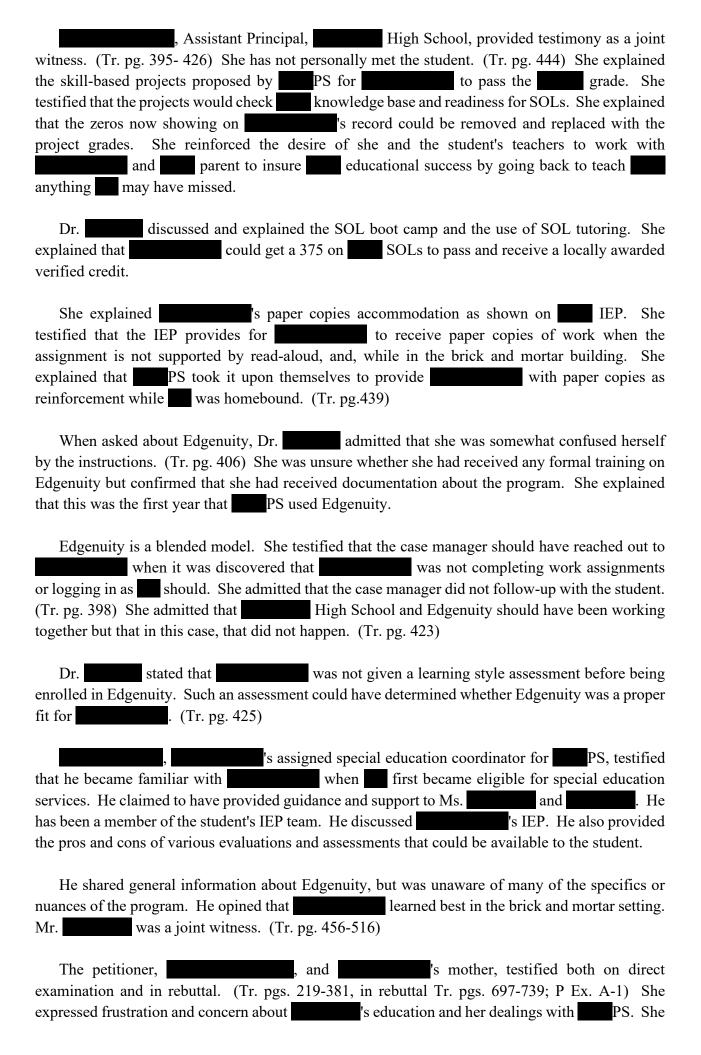


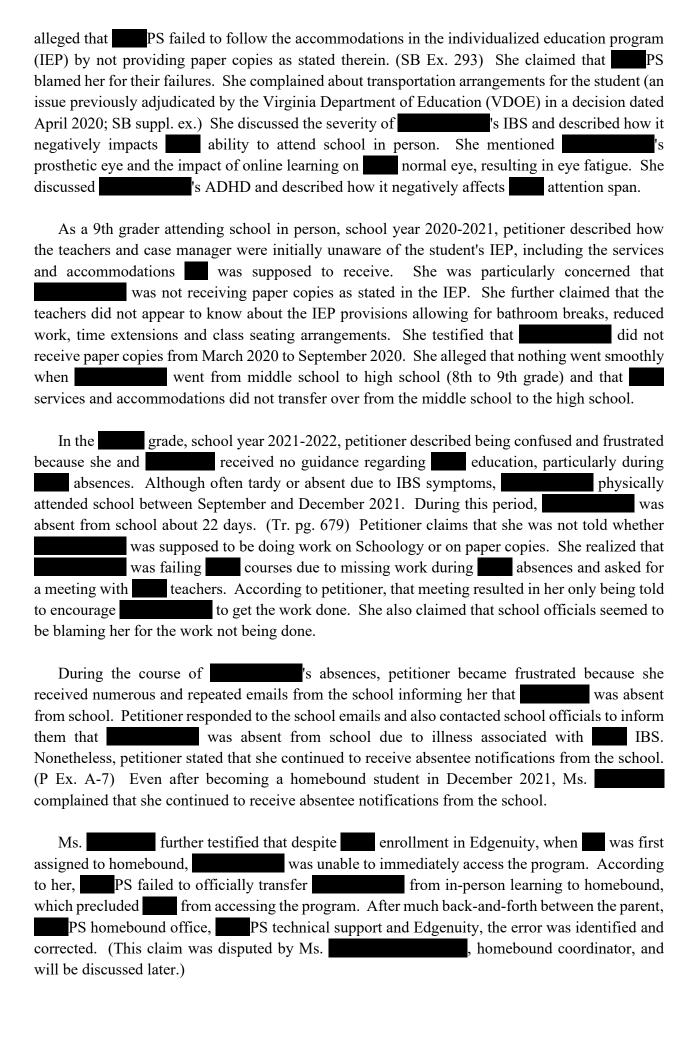


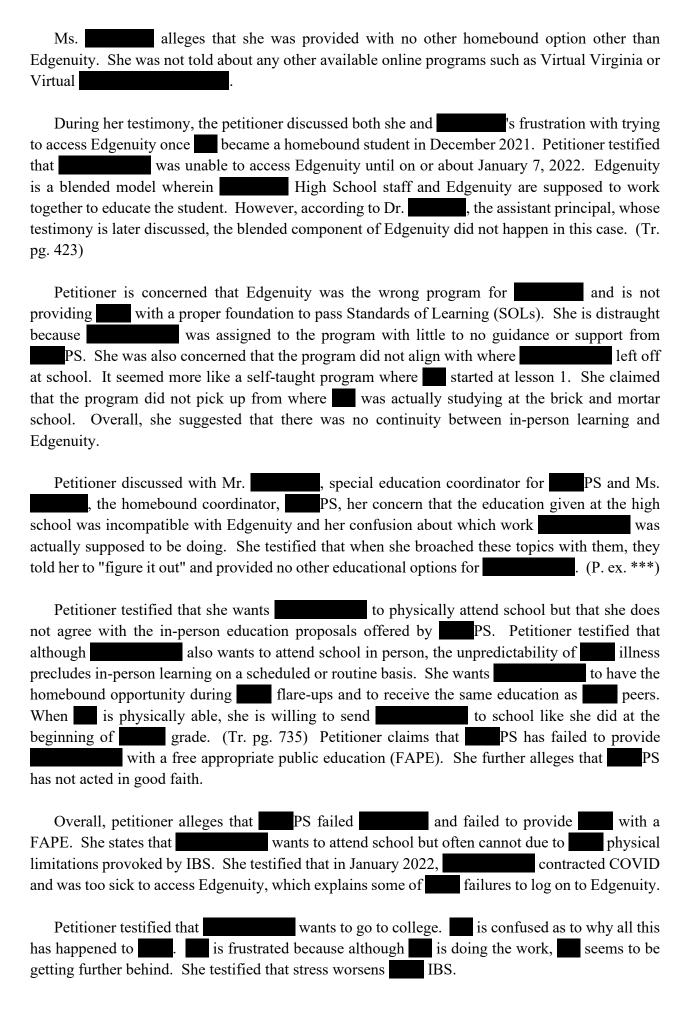
Witness Summaries

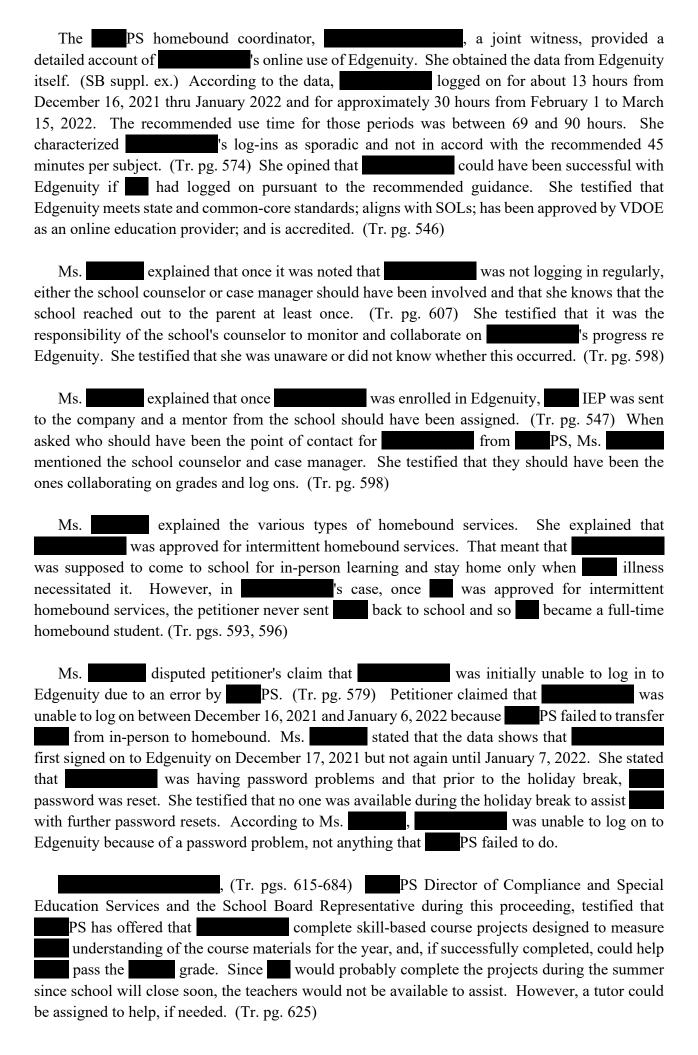
(The witnesses were duly sworn by the Hearing Officer.)

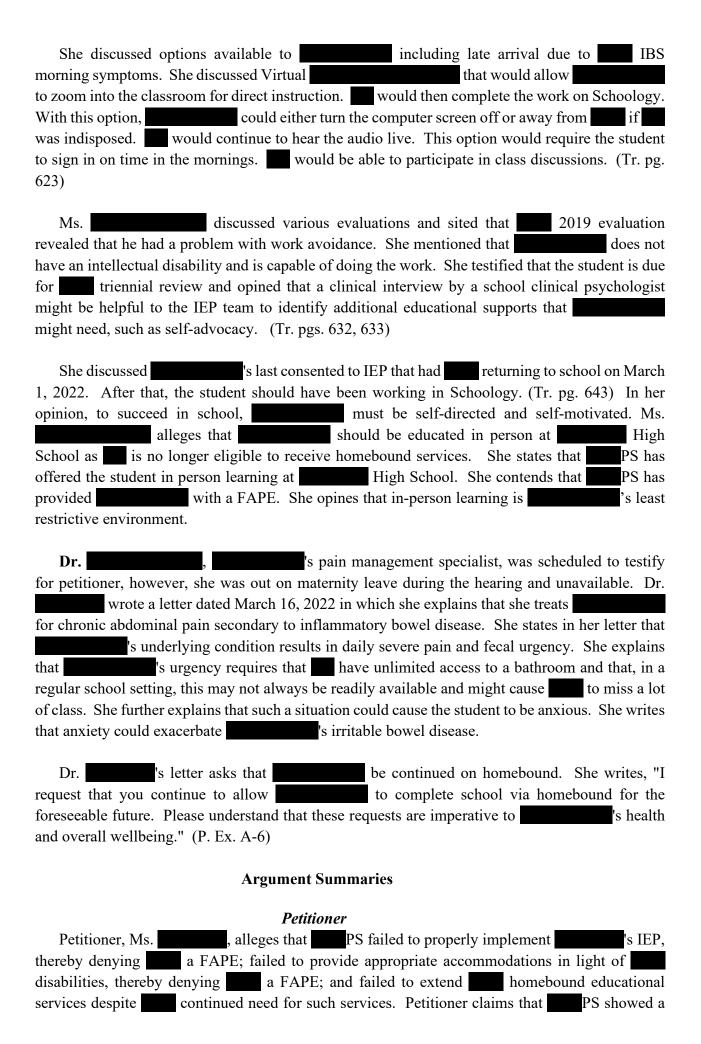


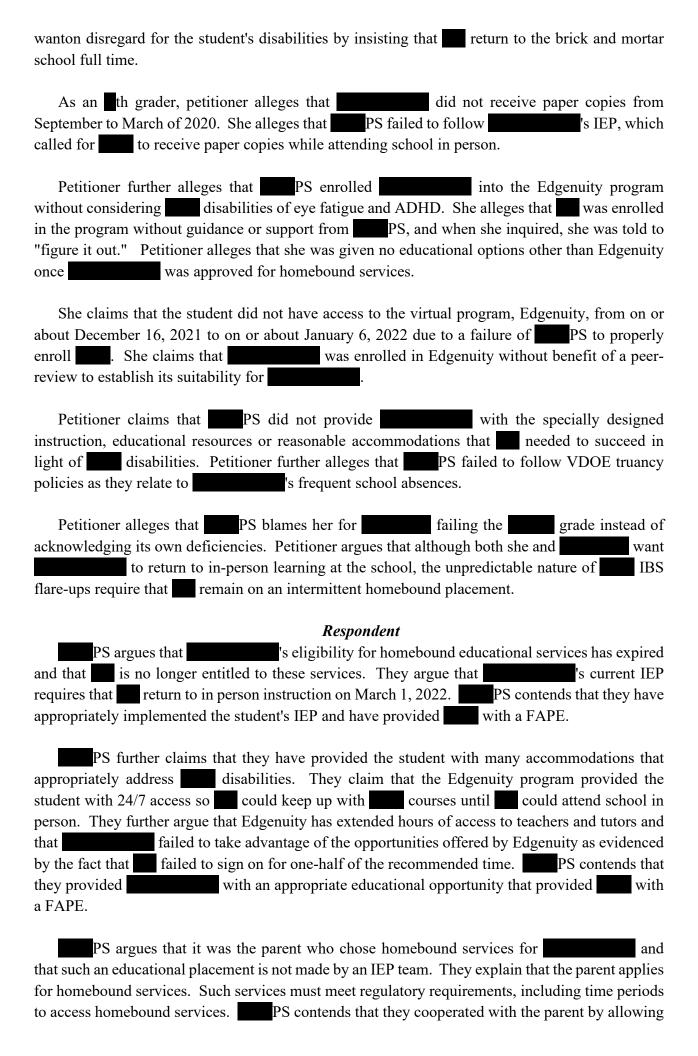












PS contends that the student's IEP provides for a multitude of accommodations that allow for intermittent attendance and makeup work. They contend that PS has provided access to High School classes through Schoology and through comprehensive projects designed to demonstrate competency.

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 sunique visual, attention deficit and gastrointestinal needs, and

the student to remain on homebound services past the regulatory time period while attempting to

resolve this complaint.

Burden of Proof

have provided appropriate accommodations that would permit to access education.

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 Weast v. Schaffer ex rel. Schaffer, 377 F.3d 449, 456 (4th Cir. 2004), aff'd, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). The 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

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).

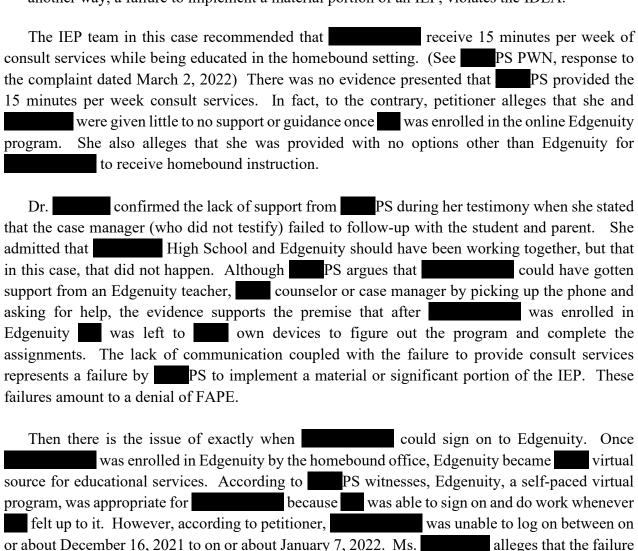
The Individuals with Disabilities Education Act (IDEA), requires the development and implementation of IEPs that are reasonably calculated to provide an educational benefit to the disabled student. See *Hartmann v. Loudoun County Board of Education*, 118 F 3d 996, 1001 (4th Cir. 1997.) The substance 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.

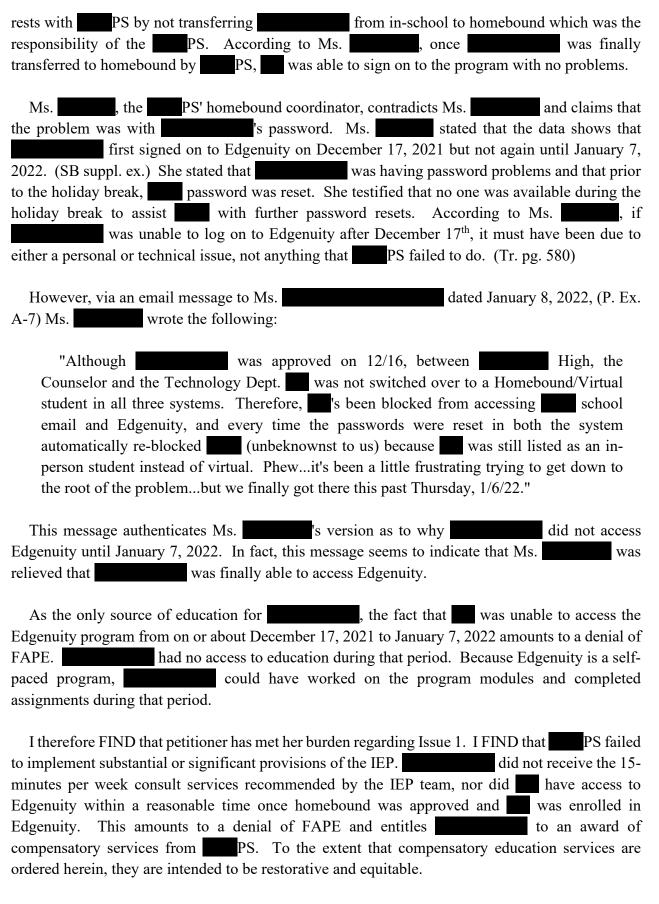
IEPs are a necessary component of FAPE. IEPs should include academic and functional goals designed to meet the student's needs resulting from his disabilities. The IEP is also important for

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 <u>Sumter County Sch. Dist. 17 v. Heffernan</u>, 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.





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 PS provided with an appropriate education in the first place. I FIND that was denied a FAPE.

Issue 2:

Whether PS failed to provide the student with appropriate accommodations for 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)).

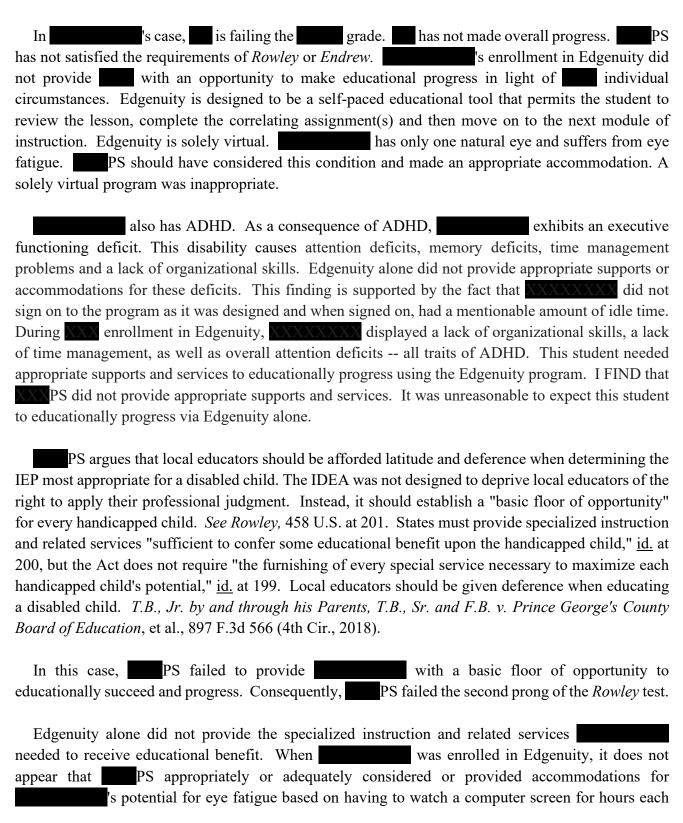
In the case of *Board of Education v. Rowley*, 458 U.S. 176 (1982) 553 IDELR 656, the Supreme Court established the following two-part test that courts should use to decide the appropriateness of a student's education:

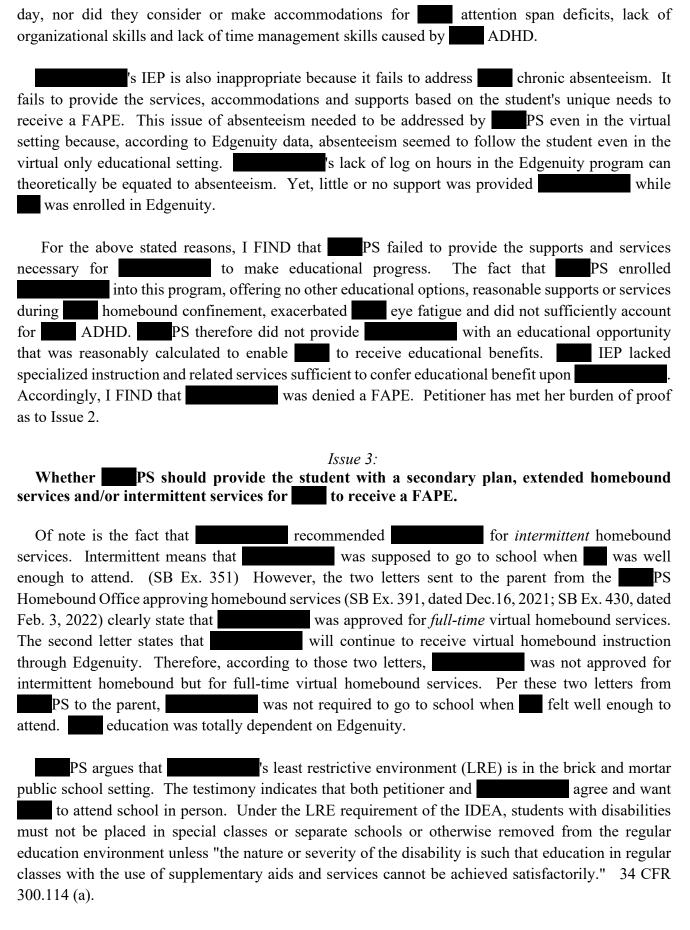
Has the state complied with the procedures set forth in the IDEA?

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.*





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.

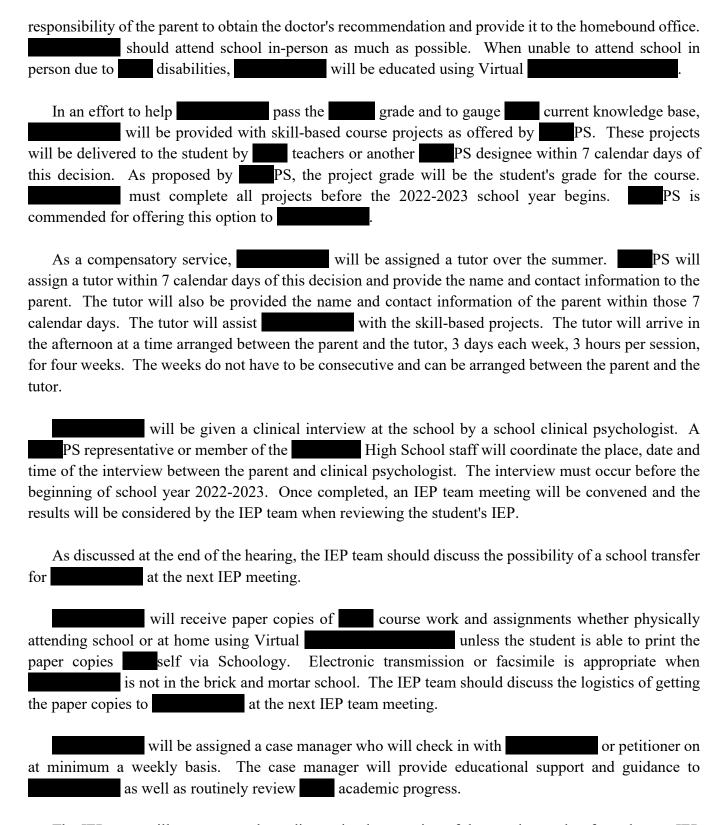
Home instruction may be necessary for a student with a disability who is unable to attend school for medical or psychological reasons. *Albuquerque Pub. Schs. v. Sledge*, 74 IDELR 290 (D.N.M. 2019) (A kindergartner with a seizure disorder needed home instruction so she could receive medical marijuana 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

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 does best when attends school in person. According to petitioner, wants to go to school. However, the evidence supports the 's IBS often precludes from attending school in person. The evidence also supports the fact that can sometimes attend school in person as between September and December 2021. Intermittent homebound educational services best serve 's needs. According to the testimony, Virtual would provide with the opportunity to listen to instruction even though computer's video/camera is turned off or turned away from . That means that can access education through audio even when is indisposed. The evidence indicates that is most affected by IBS symptoms in the mornings. Via Virtual can listen to the instruction was supposed to have in class and can also participate in classes when is able. Virtual should have been offered to the student as an option for on line learning. I therefore FIND that can receive a FAPE through intermittent homebound services. is unable to attend school, I FIND Virtual to be 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 must attend school in person whenever possible. Due to IBS, should be afforded late arrival. When unable to attend school in person, should be able to access current curriculum through Virtual . When at home, will be required to start school day at the same time as peers via Virtual Prevailing Party Public Schools (PS) failed to properly implement the Whether student's individualized education program (IEP), thereby denying the student a free appropriate public education (FAPE). Prevailing Party: Petitioner Whether PS failed to provide the student with appropriate accommodations for disability, thereby denying the student a FAPE. Prevailing Party: Petitioner Whether PS should provide the student with a secondary plan, extended homebound services and/or intermittent services for 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: will be classified by PS as an intermittent homebound student beginning school year 2022-2023. At least one recommendation from a doctor will be required every three months to maintain status as an intermittent homebound student. It is the thereafter for

LRP 16163 (SEA PA 03/13/12) (A district erred in offering 10 hours of weekly in-home instruction,



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

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 PS
Representative for VDOE
Case Monitor