

**COMMONWEALTH OF MASSACHUSETTS**  
Division of Administrative Law Appeals  
**Bureau of Special Education Appeals**

**In Re:** Student v.  
Brookline Public Schools

BSEA # 2303670

**Ruling on Parent’s First and Second Motions to Amend the Hearing Request;  
Parent’s Motion for the District to Implement the IEP and Department Compensatory  
Service Plan;  
Brookline Public Schools’ Request for Protective Orders in Response to Parent’s Request  
for Production of Documents Objection to Parent’s Motion for the District to Implement  
the IEP and Department Compensatory Service Plan and Motion to Join Father as a Party;  
Parent’s Motion to Compel the District to Provide Massachusetts Teacher Certification  
Licensure;  
Parent’s Motion to Compel The District To Provide Massachusetts Teacher Certification  
Licensure For Kevin Keeley, Anastasia Kranz and “Gabby”;  
Parent’s Motion to Compel the District to Secure DESE Certified Special Education  
Teachers and Related Service Providers;  
Brookline Public Schools’ Response to Mother’s Motion to Amend Hearing Request,  
Response to Mother’s Motion to Compel, and Partial Motion to Dismiss Mother’s Hearing  
Request and Amended Hearing Request;  
Parent’ 2<sup>nd</sup> Motion for the District to Provide a Massachusetts Special Education Certified  
Teacher Pursuant to 603 CMR 7.00 and the IDEA and a Motion for Protection Order And  
Motion for Stay-put;  
Parent’s Motion to Compel 3-year Reevaluation prior to Developing IEP June 2023/2024;**

On October 26, 2022, Parent filed the instant Hearing Request initially against Brookline Public Schools (Brookline or District) and the Massachusetts Department of Elementary and Secondary Education (DESE). Thereafter, on April 3, 2023, a Ruling was issued dismissing DESE as a Party; disallowing Parent’s objection to the Hearing Officer’s order that she submit her over 100 paged motion/ objections with exhibits in hard-copy; and denying her motion for recusal of the Hearing Officer.

Following the granting of a request for postponement of the Hearing, on April 3, 2023, Parent’s<sup>1</sup> advocate filed a *Motion to Amend the Hearing Request*, seeking to extend the period covered in her initial Hearing Request, involving the 2019-2020, 2020-2021, 2021-2022, 2022-2023, by adding the period from September 16, 2022, to the present date. In this Amendment, Parent sought an additional 18 weeks of compensatory education as follows: 315 hours of Academic Support; 18 hours of occupational therapy, 18 hours of speech and language services, and 9 hours of physical therapy.

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<sup>1</sup> In the context of this Ruling the term “Parent” refers to Mother only.

On April 19, 2023, Parent filed a *Motion for the District to Implement the IEP and Department Compensatory Service Plan*, noting that on April 3, 2023, Parent informed Brookline that her family had returned from their overseas trip and requested that Brookline resume implementation of Student's services.

On May 1, 2023, Brookline Public Schools filed a Request for Protective Orders in Response to Parent's Request for Production of Documents, noting that it was not seeking an immediate ruling or an order as it hoped to collaboratively resolve the discovery issues with Parent's advocate.<sup>2</sup> If a ruling were needed at a later time, the District would alert the BSEA and request a ruling. In this communication, Brookline further objected to Parent's Motion for District Implementation of the IEP and DESE's Compensatory Plan.

The May 1, 2023 filing also included Brookline's Motion to Join Student's Father to the instant matter, consistent with Rule I.J. of the *Hearing Rules for Special Education Appeals*. Via email, the advocate objected to the District's motion not being filed in a more formal format. (For reasons explained later in this Ruling, Brookline's submission is treated as a motion, despite it having been embedded in a letter.)

On May 8, 2023, Parent's advocate filed a *Second Motion to Amend the Hearing Request*

...to include the failure of the District to implement the last active IEP which is 2019 for the entire 2020/2021, 2021/2022, 2022/2023 school year. The parent is also seeking additional compensatory services for the 2022/2023 school year.

The advocate noted in this Second Motion to Amend her allegations/claims were in addition to those filed in her initial Hearing Request and First Motion to Amend the Hearing Request. This Motion alleged failure by the District to implement Student's Compensatory Services plan upon Student's return from an approximately three month stay overseas.<sup>3</sup>

Parent further disputed some of the assertions contained in the District's May 1, 2023, letter regarding provision of related services, and highlighted the District's failure to provide licensing information for the tutors it was attempting to secure to provide Student one-to-one academic tutoring.

Citing numerous federal regulations<sup>4</sup>, the Second Amendment raised allegations that DESE/ PRS, the BSEA and Brookline had directly or indirectly contributed to IDEA violations, noting her intention to file civil rights violation complaints against the three, aforementioned entities

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<sup>2</sup> A June 2, 2023, email communication between the Parties and this Hearing Officer shows that the Parties were working together to resolve discovery issues, and notes documents Parent wished to receive.

<sup>3</sup> On April 3, 2023, Parent notified the District that Student had returned from India and was now available to resume his education. Parent clarified that no compensatory services were being requested for the period from January through late March or early April of 2023, during which the family had been out of the country.

<sup>4</sup> 34 CFR 300.156(d), 34 CFR §§300.136, 300.151-300.153, 34 CFR §300.140(b), and 34 CFR 300.323(a).

with the U.S. Department of Education Office of the Inspector General, among other federal agencies, and opining that dismissing DESE constituted an error of law on the part of the Hearing Officer.

In addition to compensatory services claims, and substantive and procedural IDEA violations, this Second Amendment cited Section 504 of the Rehabilitation Act of 1973 (Section 504) violations by the District as well as fraud allegations.

On May 10, 2023, Parent's advocate filed a *Motion to Compel The District To Provide Massachusetts Teacher Certification Licensure For Kevin Keley, Anastasia Kranz and "Gabby"*, seeking an order that Brookline provide Parent information regarding the licensure of each individual the District proposed to provide instruction and related services to Student consistent with PRS 6924 Findings and DESE's Compensatory Services Plan.

On May 15, 2023, Parent filed another *Motion to Compel the District to Secure DESE Certified Special Education Teachers and Related Service Providers* (which appears to be a continuation of the May 10, 2023 Motion) and requested to be heard on this motion.

On May 17, 2023, Brookline filed a *Response to Mother's Motion to Amend Hearing Request; Response to Mother's Motion to Compel, and Partial Motion to Dismiss Mother's Hearing Request and Amended Hearing Request* in response to Parent's numerous motions to amend and to compel. Brookline did not object to Mother's Amendments insofar as the amendments sought to extend Parent's denial of FAPE allegation through the end of the 2022-2023 school year on the basis of administrative efficiency, noting that the claims were substantially similar. Brookline's *Partial Motion to Dismiss* was filed on the grounds of failure to state a claim upon which relief can be granted, asserting the BSEA's lack of jurisdiction. Following the granting of a 26-day extension for Parent to file a response, on June 12, 2023, Parent filed a *Motion to Object to the District's Motion to Dismiss*, which was in essence an objection to the District's motion for partial dismissal, rather than a new motion.

On June 6, 2023, Parent filed a 2<sup>nd</sup> *Motion for the District to Provide a Massachusetts Special Education Certified Teacher Pursuant to 603 CMR 7.00 and the IDEA and a Motion for Protection Order And Motion for Stay-put*. Once again Parent requested an Order that the District provide teachers and related services staff that held the pertinent Massachusetts certification to implement Student's last accepted IEP, that the District be prevented from filing claims with other public agencies in retaliation against Parent, and that a ruling on this motion be entered expeditiously.

On June 9, 2023, Parent filed a *Motion to Compel 3-year Reevaluation prior to Developing IEP of June 2023/2024* and requested that Brookline be ordered to perform the evaluation remotely rather than in person.

Lastly, on July 7, 2023, Brookline filed its *First Request for Production of Documents* and on the same date, also requested issuance of four subpoenas *duces tecum* to private providers for Student. On July 20, 2023, Parent's advocate filed a *Motion to Quash the District's Request for Subpoenas and Motion for Protective Order*, and on July 26, 2023, Brookline filed an

*Opposition to Mother's Motion To Quash or Limit District's Subpoena Duces Tecum.* Thereafter, on August 1, 2023, Parent's advocate filed *Parent's Sur Reply to the District's Response to the Parent's Motion to Quash the Subpoenas for Medical Records.* A Ruling on these Motions was issued separately on August 1, 2023.

On August 4, 2023, as the instant Ruling was about to be issued, Parents filed a *Third Motion to Amend the Hearing Request*, which motion will be addressed at a later time.

As explained below, this Ruling is issued in consideration of the Parties' arguments, submissions and applicable law and regulations.

**Facts:**

The following facts are intended to provide background information for purposes of this Ruling only:

- Student is a twelve-year old-fifth grader resident of Brookline. The Parties agree that he presents with a complex medical profile and multiple disabilities including global developmental delays and autism. Over the years, Brookline has increased the level and intensity of services, recommending moving him from an inclusion program to a substantially separate program at the Lincoln School's Adaptive Learning Center (ALC). Parent rejected this placement in favor of placement at the Baker School through open enrollment under his previous inclusion program IEP. and Brookline acquiesced. According to Brookline, Student has a significantly long history of absences. At the conclusion of first grade, the District recommended that he repeat first grade. While Student's team continued to propose a substantially separate placement at the ALC, Parent rejected the IEPs and placement, and Student remained in the inclusion program at the Baker School pursuant to stay-put (2018-2019 IEP). His absenteeism continued, and he continued to struggle in his inclusion program. For the 2019-2020 school year, Student's second grade, the Baker School Team recommended participation in a substantially-separate day school setting with expertise dealing with students with complex medical presentations. When the District and Parent could not agree on potential day placements to send referral packets, Student remained in his stay-put inclusion program at the Baker School.
- During the summer of 2019, Brookline funded an independent neuropsychological evaluation conducted by Dr. Roosa. Parent also sought a private Autism Language program evaluation by Dr. Shane, and Brookline conducted an AAC evaluation.
- Student was due for his 3-year re-evaluation in the spring of 2020 during the COVID-19 pandemic. Given mandatory school closures Student was not then evaluated. (According

to Brookline, Parent agreed to delaying the evaluation so that Student could be evaluated in-person upon returning to school.)<sup>5</sup>

- As a result of the COVID-19 pandemic, DESE required school districts to offer a fully remote learning option to students. Parent asserted continued stay-put and opted for the Remote Learning Academy (RLA). According to Brookline, it developed a plan to reflect how IEP services would be delivered through the RLA, but no specific RLA agreement exists between Brookline and Parents. Instead, Brookline developed a plan based on Student's stay-put IEP to show how the services would be implemented. Parent declined PT and Adaptive Physical Education services during that school year, but Student participated in other remote services.
- During the summer of 2021, Student participated in some of the ESY service sessions offered.
- While Brookline acknowledged that Student made some progress in remote learning during the 2020-2021 year, the District remained concerned about Student's ability to effectively access and participate in his education via a remote platform, given his numerous disabilities. As such, Brookline continued to recommend that participation in in-person program in a substantially separate day school.
- On August 27, 2021, Parent submitted a letter from Dr. Bauman, child neurologist, recommending that due to his co-morbid diagnoses, Student remain homebound for that school year to avoid high exposure to the coronavirus, and that his situation be re-evaluated in the spring of 2022. Brookline noted that the letter was insufficient to meet the requirements for physician's authorization for home-hospital education consistent with 603 CMR 28.03(3)(c), and provided Parents the DESE's *Physician's Affirmation of Medical Reasons That Student is Home-Hospital Bound For Medical Reasons for More than 60 School Days* form, which form includes the required elements for home-hospital services approval. The District also sought consent to speak with Dr. Bauman, and with Student's cardiologist and pediatrician to better understand his need for home-hospital education.
- Student did not attend school at the beginning of the 2021-2022 school year, so his Team re-convened on September 20, 2021, and recommended in-person programming in a private day-school, noting however that if Parent provided the required documentation for a home-hospital bound education for medical reasons, it would reconvene the Team and develop a new plan. The overdue 3-year re-evaluation was also discussed and Brookline offered to conduct an in-district evaluation utilizing COVID safety measures, but Parent sought to wait until they felt comfortable bringing Student for an in-person evaluation. Brookline asserts that Student "requires an in-person evaluation in order to

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<sup>5</sup> Given the private and District evaluations conducted in the summer of 2019, Brookline offered to conduct a truncated evaluation in June of 2020, but Parent rejected the offer in favor of an in-person evaluation in September of 2020.

validly and accurately assess” his needs. Parent rejected exploration of private special education day schools, refused consent for referrals to be sent and did not otherwise respond to the IEP.

- During the 2021-2022 school year, DESE no longer authorized full remote learning programs, instead requiring alternatives for consideration of students in need of a home-hospital education for medical reasons on an individual basis. In late September or early October of 2021, Dr. O’Connor, Student’s pediatrician, completed a home-hospital form for the period from September 1 to December 1, 2021, on the basis of Student’s issues with mask wearing, school stamina and possible exposure to COVID. On its face the form did not meet the necessary regulatory standards and Parent refused consent for the District to speak directly with Dr. O’Connor.
- In late September 2021, Parent sought approval to home school Student, which plan Brookline approved on September 27, 2021. Parent asked for provision of special education services to be offered remotely. Brookline offered in-person special education services, but Parent refused. According to Brookline, Parent did not submit a medical recommendation for remote services and remote services were not recommended in Student’s IEP.
- Between December of 2021 and March of 2022, Brookline offered Student’s stay-put IEP services remotely as a courtesy. In April of 2022, Student and Parent left the United States for India and they did not return until the 2022-2023 school year.
- Parent sought and received approval to homeschool Student for the 2022-2023 school year (fifth grade). Brookline continued to recommend participation in a substantially separate, special education day school, but Parent declined. The District also offered in-person, drop-in services to Student based on his stay-put IEP, but Parent declined and instead requested remote services.
- Parent filed a DESE/PRS complaint, and in August of 2022, DESE ordered Brookline to provide compensatory services to Student based on its analysis that the District had failed to offer Student stay-put services from September to December of 2021. (Brookline disagrees with DESE’s finding and seeks an order that it fulfilled its responsibilities by offering Student in-person educational services consistent with his stay-put IEP.)

Parent and Student left for India sometime between December of 2022 or January of 2023, and returned to the United States in early April of 2023

## **DISCUSSION:**

### **1. Parent’s First Motion to Amend the Hearing Request and Brookline’s Partial Motion to Dismiss:**

Parent's April 3, 2023, Amendment sought to extend Parent's claims regarding Brookline's failure to implement a DESE Corrective Action compensatory education plan and allegations regarding further denial of FAPE. The Amended Hearing Request added the period from September 16, 2022, to the present date (extending the initial request which alleged violations starting on or about September of 2019 through presumably April of 2022-2023 school year). The Amendment sought an additional 18 weeks of compensatory education as follows: 315 hours of Academic Support; 18 hours of occupational therapy, 18 hours of speech and language services, and 9 hours of physical therapy.

The Amendment again raised claims against DESE related to PRS 6924, alleging that DESE had violated Student's right to a FAPE in its failure to: a) monitor the District's provision of FAPE to the Student; b) monitor implementation of the 2022 to 2023 IEP; and c) monitor implementation of the corrective action plan.

Parent sought immediate implementation of the accepted IEP services, provision of all compensatory services owed and the establishment of a deadline for said implementation. Additionally, relying on DESE's August 23, 2022 PRS 6924, Parent sought an order from the Hearing Officer that DESE withhold funds from Brookline and to set a date by which the funds would be withheld. Parent further sought an

...order that in the event the District forced Mother to file in court of law that District will pay for the fees related to filing an enforcement order and any services needed to ensure the District was served.

Parent further raised ADA and civil rights violations claims and sought to exhaust administrative remedies before proceeding with a damages action against DESE and the District pursuant to Section 1983, Section 504 of the Rehabilitation Act of 1973, the ADA, the Massachusetts Civil Rights Act and Title IX of the Education Act Amendments of 1972 (20 U.S.C. 1681).

As a matter of administrative efficiency and because the claims regarding denials of FAPE in this Amendment were substantially the same as in the initial Hearing Request (albeit for a longer period of time) Brookline did not object to those portions of the amendment. Similarly, Brookline did not object to claims falling within the jurisdiction of the BSEA, although it denied Parent's allegations and ultimately sought total denial of Parent's viable claims following participation in a fair hearing.

Regarding the remaining claims involving DESE, ADA and civil rights violations, Section 1983 action against DESE and the District, damages under Section 504 of the Rehabilitation Act of 1973, the ADA, the Massachusetts Civil Rights Act and Title IX of the Education Act Amendments of 1972 (20 U.S.C. 1681), Brookline moved to Dismiss. (Partial dismissal of Parent's claim is addressed in Section 7 of this Ruling.)

Insofar as Parent's Motion to Amend seeks to extend denial of FAPE allegations and compensatory education services as against Brookline, or otherwise raises issues falling within the jurisdiction of the BSEA, for the period from October 26, 2020, through the date of her

Motion on April 3, 2023, Parent's Motion is **ALLOWED**. Parent's Motion as to the remaining claims is **DENIED**, as explained later in this Ruling.

I note that to the extent that Parent's educational claims pursuant to Section 504 of the Rehabilitation Act of 1973 are identical to those falling under the IDEA, those claims are allowed to proceed and do not require separate analysis.

**2. Parent's Second Motion to Amend the Hearing Request and Brookline's Partial Motion to Dismiss:**

On May 8, 2023, Parent's advocate filed a *Second Motion to Amend the Hearing Request*

...to include the failure of the District to implement the last active IEP which is 2019 for the entire 2020/2021, 2021/2022, 2022/2023 school year. The Parent is also seeking additional compensatory services for the 2022/2023 school year [including the period from April 3 to May 8, 2023].

On page 5 of her *Second Motion to Amend*, she specifically noted that all her allegations/claims were in addition to those filed in her initial Hearing Request and *First Motion to Amend the Hearing Request*.

Parent further asserted that by May 8, 2023, Student's Compensatory Services had not been implemented after the District had been informed of Student's return to the District on or about April 3, 2023. Parent also disputed some of the District's assertions in their email of May 1, 2023<sup>6</sup>, noting that Student had not received speech and language services since the beginning of the 2022-2023 school year. The advocate further argued that Student had received compensatory OT services from November 6, 2022, through January 20, 2023, and compensatory academic service from September 27, 2022, to January 17, 2023, but no IEP services for the 2022-2023 school year.

In her second Amendment, Parent's advocate argued that the District had not provided licensing information on the tutors it was attempting to secure for Student's one-to-one academics, presumably because they were not properly licensed, which she argued constituted further denial of FAPE.

Citing numerous federal regulations<sup>7</sup> the advocate further alleged that DESE, the BSEA, PRS and Brookline have, directly or indirectly, contributed to or have violated the IDEA, and she stated her intention to file civil rights violation complaints against these entities with the U.S. Department of Education Office of the Inspector General, among other federal agencies. She

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<sup>6</sup> "I hope you and your family are doing well. I'm writing to let you know that I'm in the process of securing providers to resume the services that had been in place prior to your departure to India (OT, Speech & language, Academics). Unfortunately, the same folks aren't available but as soon as I identify suitable replacements, I'll let you know. I did connect with LearnWell today and they're looking for a tutor and feel optimistic they may have someone by next week. If you have any restriction or preferences regarding times/days, feel free to let me know so that I can keep that in mind while planning."

<sup>7</sup> 34 CFR 300.156(d), 34 CFR §§300.136, 300.151-300.153, 34 CFR §300.140(b), and 34 CFR 300.323(a).



further argued that in dismissing the DESE as a party, the Hearing Officer had made an error of law and noted that Parent

...will be able to remedy the issue of the SEA[DESE]/ PRS not being a party to a case because of 603 CMR 28.08(2) as the state law violates the Parent's right to a fair and impartial hearing and is in direct violation of the Supremacy Clause, not to mention the SEA[DESE]/ PRS waived their right to Sovereign Immunity when the SEA accepted the IDEA grant to 34 CFR 300.177...therefore the Parent has a solid case for appeal...[and] Parent has other federal options to assist her in holding the SEA[DESE] accountable for their actions or lack thereof, not just a federal court judge.

Parent further claimed Section 504 of the Rehabilitation Act of 1973 (Section 504) violations for the District's failure to educate Student by not implementing his IEP and compensatory education plan, thus discriminating against Student, and that the District's and DESE/PRS' "misconduct [and] violations of state and federal regulations, clearly [constituted] an issue of fraud". Parent also argued that in order to receive federal funds, the District had to make assurances that the programs would be operated in compliance with IDEA Part B, opining that the District's lack of compliance with "the federal Title 34 Education Subtitle B regulations and therefore had denied [FAPE] to her son, among other violations of rights to an education".

In her submission, Parent clarified that since the family had been out of the country between January of 2023 and late March/ early April of 2023, she was not seeking compensatory services for the period from January 2023 through March of 2023, when Student was in India.

Parent also claimed that she did not receive a proper notice of a team meeting containing a list of participants and their titles, and that Student's team did not schedule an IEP meeting to develop Student's IEP during the 2020-2021, 2021-2022 and 2022-2023 school years, in violation of 34 CFR 300.324(a) et al and 34 CFR 300.322(b).

Thus, Parent sought an Order that both her and her son's procedural due process rights were violated; that Brookline immediately implement Student's 2019 IEP; an award of compensatory services to Student for interruptions/failures in the provision of services during the 2020-2021, 2021-2022 and 2022-2023 school years; provision of the names, titles and positions of teachers and related service providers responsible for the implementation of Student's IEP for the 2020-2021, 2021-2022 and 2022-2023; and that the District's state and federal funds be withheld until the District fully meets its obligations toward Student.

Lastly, the advocate warned the Hearing Officer of her knowledge of alternative venues to pursue Parent's rights in the event of an unfavorable ruling, including an appeal to federal court, noting that "Parent has many options to ensure that the IDEA Part B grant and its regulations are implemented by the SEA/PRS and the BSEA with or without a federal court judge

Brookline's May 17, 2023 response and objections noted its assent to the portions of Parent's Second Amendment which sought to extend the period of Brookline's alleged violations of FAPE through the 2022-2023 school year, inclusive of the period between April 3 and May 8,

2023. Similarly, Brookline assented to claims falling within the jurisdiction of the BSEA but objected to all other claims, seeking partial dismissal of the same.

As with the previous Amendment, Brookline specifically objected to the portions of Parent's claim involving findings against DESE, DESE's withholding of federal funds from Brookline until it had fully met its obligations regarding Student, and monetary and punitive damages claims under a plethora of statutes and regulations unrelated to special education. As a matter of administrative efficiency and because the claims regarding denials of FAPE in this Amendment were substantially the same as in the initial Hearing Request (albeit for the period of time covered), Brookline did not object to those portions of the amendment. Similarly, Brookline did not object to claims falling within the jurisdiction of the BSEA.

Brookline moved to dismiss the remaining claims involving DESE, ADA and civil rights violations, Section 1983 action against DESE and the District, damages under Section 504 of the Rehabilitation Act of 1973, the ADA, the Massachusetts Civil Rights Act and Title IX of the Education Act Amendments of 1972 (20 U.S.C. 1681), (As noted in Section 1 of the Discussion, partial dismissal of Parent's claims is addressed in Section 7 of this Ruling.)

As with Parent's First Amendment, Parent's Motion is **ALLOWED** with respect to issues falling within the jurisdiction of the BSEA, consistent with the IDEA and Section 504, to wit: allegations regarding procedural and substantive denials of FAPE by Brookline and attendant request for compensatory services for the extended period of time (October 26, 2020 through the end of the 2023-2023 school year). Parent's Motion is **DENIED** as to the remaining claims, explained later in this Ruling

### **3. Parent's Motion for District's Implementation of the IEP and DESE's Compensatory Service Plan:**

Parent's *Motion for District Implementation of the IEP and DESE's Compensatory Services Plan* was received on April 19, 2023.

The Motion indicates that on or about April 3, 2023, Parent informed Brookline that her family had returned from their extended stay in India, and that Student's services could resume. According to Parent's advocate, Brookline immediately responded that it would create a new contract with the outside agencies that were delivering services to Student prior to the family's departure abroad. Parent however, asserts that prior to April 3, 2023, Brookline did not offer Student the "remote learning program" previously agreed to, noting that the District had failed in its responsibility to take the necessary steps to "recruit, hire, train and retain personnel", which resulted in a denial of FAPE to Student. Parent sought an Order of immediate implementation of Student's IEP, and compensatory services inclusive of a specific number of service hours to be delivered. The advocate further threatened that if her Motion was not granted, she would file a third amendment to the Hearing.

On May 1, 2023, Brookline objected to this motion, asserting that Parent appeared to seek an order on new claims for the period from April 3, 2023 to April 19, 2023, the date of Parent's First Amendment to the Hearing Request and the date of the instant motion, noting that instead

of amending her hearing request to include this new claim, Parent was attempting to circumvent the process by raising new claims outside the scope of the First Amended Hearing Request. Brookline further argued that Parent's motion failed to meet the legal standard for summary judgment, which would require a hearing on the merits given Brookline's objection.

Brookline is persuasive that Parent's Motion, in essence demanding a ruling without a hearing, is indeed an attempt to circumvent the Hearing process. Moreover, the general issue raised in the instant Motion is part of the initial Hearing Request; the motion simply seeks to extend the period of the alleged violation beyond April of 2023. (The issue involving allegations of failure to implement the last-agreed upon IEP, failure to offer services, and compensatory services through the 2022-2023 school year was included in Parent's Second Amendment to the Hearing Request filed on May 8, 2023.)

On May 17, 2023, Brookline again objected to Parent's Motion and sought an order dismissing this claim.

I hereby **DENY** Parent's request for a ruling absent an evidentiary hearing. Parent's claims will be addressed at the Hearing on the merits scheduled for August 14, 2023. At that time, Parent may present evidence on her claims extending from October of 2020 through the end of the 2022-2023 school year. A determination on this request is therefore **DEFERRED**, pending the presentation of evidence at Hearing.

#### 4. **Brookline's Motion for Joinder of Father:**

In her letter of May 1, 2023, Brookline's counsel moved to join Student's father to the instant matter, consistent with Rule I.J. of the *Hearing Rules for Special Education Appeals*.

Via emails to the BSEA, Mother's advocate objected to the format of Brookline's joinder request, arguing it was not a formal motion. Initially, Brookline was advised to file a formal motion, however, upon closer review of Brookline's May 1, 2023 submission, I find that it contains all elements necessary for a motion.

Consistent with Rule I.J. of the *Hearing Rules for Special Education Appeals*, invoked specifically in the District's letter, Brookline moved to join Father as a necessary party<sup>8</sup>, explaining that Parents were married and that they shared physical and legal custody of student, including educational decision-making rights. Brookline argued that given Father's custodial and educational rights with respect to Student, there is substantial risk of prejudice to father if his interests are not represented at Hearing and it is clear that this matter may not be disposed of in his absence. I agree.

Rule I.J. of the *Hearing Rules for Special Education Appeals* provides in pertinent part

...to order joinder of a party upon a finding that (1) complete relief cannot be granted among those who are already parties or (2) the proposed party has an

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<sup>8</sup> "In compliance with BSEA Ruling dated April 3, 2023, in this matter, Brookline motions to join Student's father, to this matter as a necessary party."

interest relating to the subject matter of the case and is so situated that the case cannot be disposed of in its absence.

Brookline's position with respect to joinder of Father in this matter is thus persuasive. Father clearly meets the legal criteria to be considered a necessary party, thus warranting joinder.

Brookline noted that all of Mother's advocate's submissions referred to a "Parent", not "Parents", suggesting that the advocate did not represent Father.

Brookline again sought clarification as to who the advocate was representing in her May 17, 2023 submission, containing the *Motion for Partial Dismissal of Parent's Claims*, and requested an order joining Father as a necessary party.

Throughout the period of time preceding June 28, 2023, the advocate verbally stated that she represented both Parents, despite her not having filed an appearance on father's behalf. Review of Parent's initial Hearing Request reveals that the advocate did not name, include or provide any contact information for Father, nor was his name included as a second Parent or among those individuals copied on the Hearing Request. Similarly, Mother's First and Second Amended Hearing Requests make no mention of Father, and rather than using the term Parents in such requests, the advocate referred only to a Parent, meaning Mother. Her submissions do not reflect whether Father was copied.

Then, on June 28, 2023, the Advocate emailed the BSEA stating,

Pursuant to your request to clarify whether I am representing both Parents and the student, please accept this notice that I am representing both Parents and student in the BSEA 23-03670.

Subsequently, not having filed a formal appearance on behalf of both Parents of the minor child, the advocate insisted that Brookline had not properly filed a motion for joinder. The issue of the advocate's representation of Father was debated via email for months and was also the subject of telephone conversations. In light of the advocate's evasive and/ or contradictory responses, in addition to the fact that her motions and submissions continued to refer to and be filed on behalf of "Parent", the advocate was once again instructed to formally clarify her representation status for the record and file an appearance on behalf of Father, she noted via email on July 10, 2023<sup>9</sup>,

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<sup>9</sup> Earlier on July 10, 2023, the advocate wrote to the BSEA,

"For the record, my filing to intervene or provide my notice of appearance for the Father was brought about because the District stated they will file a Motion to Join the Father. I don't have a problem with the way things are, it is the District that stated they were going to file a Motion to Join Father.

For the record, I represent the Student's interests in the BSEA 2303670 matter educationally. There is currently no written request from the district to which I need to respond with a notice to intervene at this time. I have filed numerous hearings over 30 years with the BSEA and you Hearing Officer Figueroa were the hearing officer on a number of those cases in which I filed a due process hearing with only one Parent because (I can provide you with the BSEA number upon request), for the record again, the student is the Party, not the Parent.

...since it appears to be more than just clarification to the District, I am now stating that I am only representing the student and his mother.

Thus, as of July 10, 2023, the advocate was only representing Mother and Student. (Emphasis supplied).

Thereafter, via numerous email exchanges, the advocate continued to insist on the District's filing of a joinder motion, leading to the Hearing Officer asking her on July 26, 2023 if she was objecting to Father being a party in the instant case. The advocate did not immediately respond to the Hearing Officer's email inquiry, but on July 28, 2023, she filed an appearance on behalf of Father.

As noted above, it is clear that Father meets the legal criteria to be considered a necessary party, thus warranting joinder. Since the advocate has now entered an appearance on his behalf, the need to formally join him is moot. Father's standing as a party in this action is recognized as is his representation by the advocate. All previously issued rulings and determinations attach to him as well.

It is curious that the advocate in this matter, who has appeared numerous times before the BSEA, did not include or mention Father from the outset, and it is unfortunate that so much time, energy and financial resources have been expended as a result of the advocate's lack of clarity regarding Father, an individual who clearly has standing and a right to participate in this proceeding.

**5. Parent's Motion to Compel The District To Provide Massachusetts Teacher Certification Licensure For Kevin Keeley, Anastasia Kranz and "Gabby":**

In her May 10, 2023, Motion, Parent alleged that the District had failed to provide her with information regarding the above-named individuals' licensing status. She argued that the District was attempting to employ "unlicensed" individuals to offer the compensatory education services DESE ordered the District to provide. The Motion states, in part,

In the event the Hearing Officer forces the Parent to accept individuals that by law are not teachers as they are unlicensed and uncertified pursuant to 34 CFR 300.156 et al and 603 CMR 7.00, the Ruling would be an error of law and the Parent will appeal to a federal judge and report the issues to OSEP and others for review and then Parent is confident that the issue will either be decided by the judge in favor of the Parent or will be remanded back to the Hearing Officer to correct the ruling.

According to Parent, the District had not "provided Student with an appropriately licensed teacher" since November 22, 2022, in contravention of the DESE's PRS determinations regarding compensatory education owed Student for the previous two years. Specifically, Parent argued that Kevin Keeley, the individual who provided academic compensatory services from November 2, 2022, through January 2023, was not properly certified in Massachusetts. She

raised similar challenges regarding Anastasia Krantz and “Gabby”, further noting that none of the LearnWell teachers was properly certified. As a result, Parent argued that Brookline now owed Student additional compensatory services because the services offered by unlicensed individuals should not count. Parent further holds DESE responsible for the District’s failure to provide Student a Massachusetts licensed teacher or provider and again noted her opinion that the BSEA had erred in dismissing DESE as a Party. Therefore, she argued, Parent may opt to file for an investigation regarding the BSEA and the SEA’s interpretation of the IDEA. She again threatened that she would alert OSEP and other unspecified governmental agencies of the discrepancies between the IDEA and DESE’s interpretations.

Through the instant Motion, Parent also seeks an order that that the District provide verification of the Massachusetts licensing and certification information for the three previously mentioned individuals and any individual who offers Student services in the future. She also sought an order that Brookline provide teachers that are Massachusetts certified. The Motion indicated that failure by the Hearing Officer to order what Parent demands, would result in the Parent filing a third amendment to the hearing request, thus forcing the Hearing Officer to issue the desired orders after a Hearing.

Brookline objected to this request in its letter dated May 1, 2023, and again in its May 17, 2023, submission, noting that Parent’s request for licenses and certifications was part of Parent’s May 1, 2023, discovery request. The District was still within the 30-day timeline to respond to Parent’s May 1, 2023 discovery requests and thus the request was not yet ripe.

To the extent that Brookline has in its possession any licensing or certification information for the three individuals in Parent’s request, Brookline has agreed to submit them as part of its responses to discovery.

To the extent that this motion seeks to assert Parent’s claims regarding teacher and provider certification, Parent’s right to present evidence on this issue at Hearing is **PRESERVED** and a determination on these issues is **DEFERRED**. I would be remiss if I did not note that this claim is already contained in Parent’s Hearing Request and subsequent Amendments.

***6. Parent’s Motion to Compel the District to Secure DESE Certified Special Education Teachers and Related Service Providers:***

On May 15, 2023, Parent filed the instant Motion to Compel the District to Secure DESE Certified Special Education Teachers and Related Service Providers and requested a Hearing on the motion. This motion appears to be a continuation of the arguments previously raised in her May 10, 2023, Motion discussed above. Parent renewed her request that all teachers and service providers assigned to work with Student on his IEP and compensatory services hold the pertinent Massachusetts certification and requested that a timeline for hiring these individuals be established. Parent sought an Order that the District provide her with the

...public record regarding each special education teacher and related service provider for which the district is proposing to provide the IEP services for

which the corrective action order was issued as the student has not receive [sic] an education since September 2022/2023 to present.

As noted, this Motion expands on Parent's previous motion regarding teacher certification, indicating that Parent had previously requested the certification information from DESE. Parent argued that the District was attempting to use the fact that Parent refused to have her son work with individuals who lacked Massachusetts Certification against her (she had also previously mentioned this in the May 10, 2023 Motion), once again threatening to alert OSEP if DESE found that Brookline was not "providing DESE certified teachers, or [was] somehow exempt", noting that failure to maintain proper certification was a violation of the IDEA.

This Motion was received on the same date that Brookline submitted its response and objections to Parent's previous Motions and Amendments involving the same or similar issues. Brookline objected to a ruling without the opportunity to present evidence at a Hearing.

Parent's Motion is identical to previous requests raised in her Hearing Request and Amendments. It seeks a quick turn-around of issues previously raised by parsing issues for Hearing, except that this submission seeks a hearing on the Motion.

Parent' and the District's request to be heard on the issues contained in this Motion (previously raised in the Hearing Request and Amendments), is **GRANTED**. Parent may present evidence on these issues at the Hearing on August 14, 2023. A determination on these issues is **DEFERRED**.

***7. Brookline's Partial Motion to Dismiss Mother's Hearing Request and Amended Hearing Request:***

On May 17, 2023, Brookline moved for partial dismissal of Parent's claims, including the claims raised in her two Amendments, for failure to state a claim upon which relief can be granted.

Having been granted a request for an extension to file a response, on June 12, 2023 Parent filed a Motion to Object to the District's Motion to Dismiss.<sup>10</sup> Parent objected to the District's interpretation that the Hearing Request covered only the period from October 26, 2022 to the end of the 2022-2023 school year, because Parent' Hearing Request and two subsequent Amendments covered the periods starting in October of 2020 through the end of the 2022-2023 school year. Parent further stated that she was

...including a second complaint to ensure that her rights are not limited due to the statutes of limitations. The Parent seeks compensatory for the last two years from October 26, 2020 to October 26, 2022. The second due process complaint will include October 27, 2022 to 2023.

This part of Parent's submission is confusing, as her two Amendments to the Hearing Request already included a claim for compensatory services for alleged interruptions in provision of IEP

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<sup>10</sup> This is not a new motion but rather an Objection to the District's Motion.

services from October of 2020 through the end of the 2022-2023 school year. (The initial Hearing Request raised the same claims for the 2019-2020, 2020-2021, 2021-2022 and 2022-2023 school years.)

Parent's advocate further objected to the District's "attempt to overturn" the PRS 6924 Findings which she characterized as awarding Student 54 academic hours, despite Parent's claim that Student was owed 315 hours. She noted her intent to present the PRS report at hearing. The advocate continued that pursuant to 603 CMR 28.08(2), DESE/PRS findings are not reviewable by the BSEA, and explained that Brookline failed to comply with PRS' Corrective Action determinations. She further noted that "the Hearing Officer will determine whether she has jurisdiction for the Parent to move forward with her allegations against the SEA", that is DESE. Parent requested a determination regarding the BSEA's jurisdiction to order the District to implement PRS' corrective action orders.

Parent argued that the two-year statute of limitations applicable to IDEA disputes allowed her to raise compensatory claims going back two years from the date of filing of the Hearing Request. Since she requested a Hearing in the instant matter in October of 2022, she argued that she could raise claims dating back to October 26, 2020.

The rest of Parent' submission is a recitation of the same arguments raised in her Hearing Request, amendments and motions, including her allegations that the District failed to implement IEP services in the home, failed to provide properly credentialed personnel to deliver Student's program, failed to convene team meetings, issues regarding implementation of Student's "home-based approved program", and threatening to file discrimination claims against the District for treating students on IEPs differently than general education students stating that

...the District never provided any documentation in their Motion or to the Parent at any time that there is a catch to the home-based general education approved program in that the home-based program does not include students with IEPs.

Parent argued that the District specifically told Parent that Student could receive his IEP services in the home.

As noted in my Ruling dismissing DESE as a party in the instant case, the BSEA's authority to grant a Motion to Dismiss for failure to state a claim upon which relief can be granted is found in 801 C.M.R. 1.01(7)(g)(3) and Rule XVI of the *Hearing Rules for Special Education Appeals*. In the context of a Motion to Dismiss, the hearing officer must take as true all allegations made by the party against whom the motion is filed and must also take as true any inference that may be reasonably drawn from those allegations. See *Golchin v. Liberty Mutual Ins. Co.*, 451 Mass 222, 223 (2001). In order to survive a Motion to Dismiss, the opponent (herein Parent) must assert "factual allegations plausibly suggesting an entitlement to relief." *Iannochino v. Ford Motor Co.*, 451. Mass 623, 636 (2008).



In rendering a determination regarding the District's Partial Motion to Dismiss, I hereby adopt and incorporate by reference the well-reasoned arguments proffered by the District in its May 17, 2023, submission.

Consistent with the limited jurisdiction afforded the BSEA under federal and state special education law and regulations, a BSEA Hearing Officer may entertain disputes on

...any matter concerning the eligibility, evaluation, placement, IEP, provision of a special education in accordance with state and federal law, or procedural protections of state and federal law for students with disabilities. A Parent of a student with a disability may also request a hearing on any issue involving the denial of the free appropriate public education guaranteed by Section 504 of the Rehabilitation Act of 1973.

Therefore, the BSEA has jurisdiction to address Parents' claims relating to denial of FAPE due to alleged failures to implement Student's last-agreed upon IEP, provide compensatory services related to any alleged interruption in services, and procedural violations involving failure to properly and/or timely convene Student's Team meetings and conduct evaluations. Consistent with the IDEA 2-years statute of limitations, that authority in the instant case extends from October 26, 2020, through the end of the 2022-2023 school year. Parent may proceed with claims in this regard. 20 USC §1415(f)(3)(C); 34 CFR §300.507(a)(2). Claims falling outside the two-year statute of limitations are **DISMISSED as a matter of law**.

Parent's additional claims brought under a plethora of statutes and regulations that fall outside the IDEA and Section 504, to wit: claims for damages pursuant to 42 USC §1983, the Massachusetts Constitution, Civil Rights Acts and Title IX of the Education Act Amendments of 1972 (20 USC 1681), as well as claims for monetary and punitive damages not authorized under state and federal special education law are hereby **DISMISSED**. Similarly, damages under Section 504 and claims seeking an order that the District cover Parent's future court filings and service costs related to this matter are **DISMISSED as a matter of law**.

Despite issuance of a Ruling on April 3, 2023, dismissing DESE as a party in the instant case, Parent's Amendments continue to seek determinations involving DESE. Therefore, claims against DESE will not be entertained and the Ruling of April 3, 2023, will not be revisited. Brookline's Motion to Dismiss claims involving DESE is hereby **GRANTED**.

Similarly, Parent's request for an order seeking enforcement of DESE's Letter of Finding and Compensatory Services Plan, falls outside the jurisdiction of the BSEA. As noted in the Ruling of April 3, 2023, the BSEA lacks jurisdiction to enforce DESE/PRS findings. As such, Brookline's Motion to Dismiss in this regard is **GRANTED**. Consistent with the April 3, 2023 Ruling, Parents may, however, pursue the same allegations raised with PRS against Brookline at the BSEA, and they may use the PRS decision and compensatory plan as evidence to support their position in the matter before the BSEA.

**8. Parent's Motion for Protection Order and Motion for Stay-put Order:**

As noted earlier, on June 6, 2023, Parent filed a 2<sup>nd</sup> motion for an order requiring that Brookline provide Student teachers and staff that held the appropriate Massachusetts certifications. The instant request, in part, is a repetition of Parent’s previous Motions in this regard.

Parent further claimed that she had not yet received several of the documents requested from the District as part of discovery, including licensure waiver policy information.

She further alleged that because Student was receiving IEP services in the home, this exempted the District from ensuring that the personnel responsible for delivering the services possess the pertinent Massachusetts certification and licensure, noting that the District had not responded to her request for proof of certification.

The advocate cites to M.G.L. 76 §1 (addressing school attendance) as authority for Student to receive his IEP services when educated in the home. She further refers to a Massachusetts Supreme Judicial Court decision as the “Charles Decision” but provides neither a citation nor an explanation as to the applicability of said case to the case at bar. Further, without specifying a date or providing any context, the advocate alleged that Parent had received confirmation from the District that it would implement Student’s existing IEP as it was implemented before COVID, but in the home. Throughout this submission the advocate makes numerous references to Student being “home-schooled”<sup>11</sup>, arguing that Brookline’s Policy Manual supports her argument,

Nothing in this policy shall limit the Public Schools of Brookline’s obligation to provide a student participating in a home-based education program with special education services. If a student participating in home-based education program requires special education services, the student’s Parent/guardian should work directly with the Deputy Superintendent of Student Services.

Parent’s advocate notes that nothing in Brookline’s manual prevents Student “from receiving special education by Massachusetts certified Special Education teachers in the home program as he did during COVID-19”, and further that Brookline never imposed any limitations, reasons or conditions on these services. Parent further relies on 34 CFR 300.39(a)(1)(i) which she argued defined “special education instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings”, again repeating her claim regarding Massachusetts certification for individuals offering Student services in the home.

The advocate further restates her request for a “Protective Order” to prevent the District from filing a M.G.L. c.119 §51A complaint against Parent with the Department of Children and Families (DCF). According to the advocate, the District was retaliating against Parent for not accepting services for Student by Massachusetts uncertified individuals.

Parent’s request for a “protective order” precluding Brookline from filing a MGL c.119 §51A report, her request is **DENIED** as nothing in the IDEA or the Massachusetts special education

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<sup>11</sup> I note that home schooling in the education context is a term of art, different from home/hospital services, each with its own requirements, specific rights and responsibilities.

law and regulations authorizes a hearing officer to excuse a District from fulfilling its mandates under separate statutes, especially one designed to protect the welfare of children.

The instant motion further also invokes Student's stay-put rights to remote services consistent with the 2021 IEP,

...the last active IEP and corresponding educational placement/program pursuant to the District's emails confirming the last accepted IEP, remains in place until the Parent has exercised all her due process rights pursuant to the IDEA.

In its May 17, 2023, Brookline addressed the stay-put issue, objecting to the entry of any determination without Brookline having the opportunity to be heard, noting its disagreement that Student requires the accommodations sought by Parent.

Brookline concedes that there is disagreement regarding implementation of IEP services by qualified individuals relative to Parent's request that the teachers and services providers selected by Brookline for Student hold the appropriate Massachusetts licensing/certification. Brookline requested an opportunity to be heard. Moreover, this issue is contained in the initial Hearing Request and subsequent Amendments. As such, a determination is **DEFFERED** as this issue will be addressed at the upcoming Hearing.

***9. Parent's Motion to Compel 3-year Reevaluation prior to Developing IEP June 2023/2024:***

Parent moved to have Brookline conduct a three-year re-evaluation of Student prior to developing Student's IEP for the 2023-2024 IEP. Parent further requested that the evaluation be conducted virtually and use "technically-sound, valid and reliable instruments pursuant to 34 CFR 300.304". Parent specifically recommended the use of web-based testing assessments from vendors such as Pearson Clinical or others.

Parent noted her refusal to participate in a June 2023 Team meeting for Student until the three-year re-evaluation is conducted virtually, as she further refuses Student's participation in an in-person evaluation in Brookline, noting that Student has not attended school in person since 2019. Parent argued that since OSEP allowed schools to conduct remote evaluations during the COVID-19 epidemic, this should continue to be allowed now.

Parent further indicated that although the three-year re-evaluation is due, the District has never forwarded her- a consent for evaluation form.

Parent asserts that she has provided Student general education services through a home based program since 2019, and therefore concludes that Student's "current educational setting is in the home-based District approved program." She further argued that Brookline has ignored her requests regarding home schooling since September 24, 2021, when she first inquired about home schooling and whether the services in Student's IEP would be implemented in the home

alongside Parent's home school general education program. Parent states that the District provided her information in this regard but did not follow through with implementation of the IEP in the home school setting.

Parent's submission recited a litany of claims (also contained in multiple previous submissions) involving the District's failure to implement the IEP dating back to 2019, procedural violations excepting the period from January to March of 2023, and other unspecified periods when Student and Parent were in India.

Brookline did not formally respond to Parent's Motion.

The instant motion is yet another example of Parent's misuse of the motion process to achieve a desired result bypassing a Hearing. In effect, this request constitutes a new issue for Hearing and one for which a one-paragraph 3<sup>rd</sup> amendment to the Hearing Request would suffice; this in contrast to the lengthy, repetitive submissions by Parent's advocate. Given the proximity to the Hearing in mid-August, this motion will be addressed at Hearing.

#### Conclusion:

In conclusion, the advocate's use of motions, many of which read more like a continuation of the arguments contained in her previous submissions, appear to be the advocate's attempt to obtain her desired ultimate relief by by-passing the hearing process and the proper presentation of relevant testimonial and documentary evidence. This could also be the advocate's attempt to circumvent a previous Order by this Hearing Officer regarding the need for hard copies in the case of submissions over 25 pages inclusive of exhibits.<sup>12</sup> (Interestingly, she notes in the body of the emails containing many of her motion attachments that her submission does not exceed 25 pages.) The advocate's argumentative submissions (which do not constitute evidence) revolve around the same claims, issues and relief stated in her initial Hearing Request and the Amendments with 2 exceptions: Student's 3-year re-evaluation and discovery issues. Given that through her two amendments she was in essence simply seeking to extend the length of time covered in her initial Hearing request, as noted earlier, a one-page submission would have sufficed. The length and repetitive nature of the multiple, consecutive motions unnecessarily delays the process and wastefully increases the cost of litigation for both Parties.

Lastly, the advocate's repeated attempts to engage DESE in her Amendments to the Hearing Request (demanding that it be ordered to withhold funds to the District) after DESE was dismissed as a party via Ruling issued on April 3, 2023, demonstrates Parent's disregard for the determinations entered by this Hearing Officer, unnecessarily confuses the issues to be entertained at Hearing, and serves only to harass the District.

This matter is scheduled to proceed to Hearing on August 14, 15 and 16, 2023, at 10:00 a.m., at which time all the surviving issues raised by Parent in her numerous submissions will be addressed.

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<sup>12</sup> This order was entered after the advocate submitted a 104 page submission inclusive of several exhibits via email only.

In the hopes of clarifying surviving issues for Hearing, Parent's advocate is ordered to submit a one-page list of Parent's surviving issues for Hearing (each issue presented in a maximum of 3-lines), excluding re-statements of claims that have been dismissed. The document shall be formatted using a font of 12 or 12.5, double spaced, with one-inch margins. The relief sought shall be listed in the same manner. This document must be submitted along with the exhibit book and list of witnesses due by the close of business on August 7, 2023. Any objections will be addressed at the initiation of the Hearing on August 14, 2023.

The Parties are reminded that any disagreement with the Hearing Officer's Decision (including allegations involving errors of law) may be appealed to state or federal court within 90 days of the date of issuance of the Decision.

So Ordered by the Hearing Officer,

*Rosa I. Figueroa*

Rosa I. Figueroa

Dated: August 4, 2023