

STATE OF VERMONT  
AGENCY OF EDUCATION

Special Education Due Process Case # DP-23-03

**ORDER RE: SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT**

By agreement of the parties, the three due process complaints filed by Parents on September 8, 2022, September 9, 2022, and September 23, 2022 have been consolidated under Docket Number DP-23-03. The parties further agreed to a schedule for the resolution of any prehearing dispositive motions that would address any or all of the 21 claims asserted in the three due process complaints.

On September 30, 2022, the School District filed a Motion for Summary Judgment and a Statement of Undisputed Facts that requested an order dismissing a number of the claims and entry judgment in its favor on the remaining claims. Parents filed their responsive pleadings in a timely fashion and, on October 11, 2022, the School District filed its reply to Parents' memorandum in opposition to the School District's request for dismissal and summary judgment.

**1. DUE PROCESS COMPLAINTS ARE SUBJECT TO SUMMARY DISPOSITION**

The Second Circuit has held that due process complaints are subject to summary disposition. *See J.D. ex rel. J.D. v. Pawlet School District*, 224 F.3d 60, 68-69 (2d Cir. 2000). As the Court observed: "the purpose of an adversarial hearing is to resolve disputed issues of

fact. Issues of law reside where they always have - with the adjudicator, whether an administrative or judicial officer."

Although the Court in *J.D. ex rel. J.D.* addressed only the application of Rule 56 summary judgment motions to complaints filed under the Individuals with Disability Education Act (IDEA), there is nothing in the opinion suggesting that summary disposition of due process complaints for failure to state a claim under Rule 12(b)(6) would be inappropriate. After all, resolution of both Rule 12(b)(6) motions to dismiss and Rule 56 motions for summary judgment require an adjudicator to resolve issues of law, not disputed issues of fact.

## **2. STANDARD OF REVIEW**

When ruling on a Rule 12(b)(6) motion to dismiss, the adjudicator must take the allegations of the complaint to be true and "draw all reasonable inferences in favor of the plaintiff." *Bernheim v. Litt*, 79 F.3d 318, 321 (2d Cir. 1996). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Summary judgment should be granted when the record shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *City of Burlington v. Hartford Steam Boiler Inspection and Ins. Co.*, 190 F. Supp. 2d 663 (D. Vt. 2002). To decide such a motion, the adjudicator must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party, and decide whether a fact-finder could decide in favor of that party under applicable law. *Scott v. Harris*, 550 U.S. 373, 378 (2007).

### 3. UNDISPUTED FACTS<sup>1</sup>

Student is in the 12<sup>th</sup> grade at a high school in the School District. Student has a diagnosis of ADHD and receives supports pursuant to a 504 plan.

While attending middle school in the School District during the school year 2018-2019, Parents alleged that the School District failed to comply with its Child Find obligations by failing to identify Student as a student with a disability.

On February 4, 2019, the Director of Student Support Services sent an email to Parents informing them that they had a right to request an evaluation to determine whether Student qualified for special education and related services under IDEA. This email also provided a link to the Vermont Agency of Education's family resources page and a link to a webpage that included a copy of the Parent Rights in Special Education Notice.

On March 14, 2019, Parents notified the School District that they intended to file a due process complaint. Parents' notification indicated that they were aware that due process complaints were subject to a statute of limitations and that the statute was triggered when a person knew or should have known about an alleged violation of a student's rights under federal and state law.

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<sup>1</sup> When the School District filed its Motion for Summary Judgment, it submitted a Statement of Facts and a number of exhibits providing evidentiary support for these factual assertions. *See* Fed. R. Civ. Pro. 56(c)(1). In their response to the School District's motion, Parents did not assert that the materials providing evidentiary support for those facts were either unreliable or inadmissible. Fed. R. Civ. Pro. 56(c)(2).

Because Parents did not challenge the reliability or the admissibility of the materials providing evidentiary support for the School District's factual assertions, those facts are "undisputed for the purposes of the motion." Fed. R. Civ. Pro. 56(e)(2).

In April 2019, Parents filed a due process complaint with the Vermont Agency of Education (AOE). On April 11, 2019, AOE provided Parents with a copy of a document entitled “Notice of Procedural Safeguards: Rights of Parents of Students with Disabilities, Effective Date June 1, 2018.” The Notice of Procedural Rights provides the following information on page 20:

**Due Process Complaint Procedures**  
**Filing a Due Process Complaint**  
**34 CFR §300.507**  
**General**

You or the school district or supervisory union may file a due process complaint on any matter relating to a proposal or a refusal to initiate or change the identification, evaluation or educational placement of your child, or the provision of a free appropriate public education (FAPE) to your child.

The due process complaint must allege a violation that happened not more than two (2) years before the filer of the complaint knew or should have known about the alleged action that forms the basis of the due process complaint. However, if you have unilaterally placed your child in an independent school and are seeking reimbursement, the due process complaint must be filed within ninety (90) days of the placement.

The above timeline does not apply to you if you could not file a due process complaint within the timeline because:

Your school district or supervisory union specifically misrepresented that it had resolved the issues identified in the complaint;

or Your school district or supervisory union withheld information from you that it was required to provide you under Part B of the IDEA and Vermont Special Education Rules.

After Parents’ due process complaint was filed in April 2019, the School District filed a motion for summary judgment. In that motion, the School District argued that Parents’ claims were barred by Vermont’s two-year statute of limitations. VSER 2365.1.6.1.

On May 2, 2019, Parents and the School District participated in a mediation session and entered into an agreement that resolved the issues raised in the then-pending due process

complaint. The agreement included this provision: “With respect to future disputes the parties agree to schedule a meeting as soon as reasonably possible and to include a neutral third party should either party request it with any associated costs born[e] by the district.”

Several weeks later, Parents requested a specific academic schedule for Student’s upcoming first year in high school. Parents did not want Student enrolled in an Earth and Space Science class. One of the school’s Science teachers responded by informing Parents that students enrolled in Biology were required to take the Earth and Space Science course. In August 2019, Parents informed the School District that Student had attended summer school and could demonstrate proficiency to opt out of the required Earth and Space Science course.

During the 2019-2020 school year, Student took a geometry course taught by a specific teacher.

In September 2019, Student’s 504 team developed Student’s 504 plan that included the following accommodation: “If [Student] or parents request, teachers will provide [Student] with two weeks advance notice of content in order for [Student] to preview material, and utilize organizational and time management strategies.” The 504 Plan did not include any accommodation requiring the provision of study guides.

In October 2019, Parents asked the school to switch Student to a different geometry class that was taught by a different teacher. The school notified Parents that there was not another geometry class that would fit into Student’s schedule.

In January 2020, Student took the geometry midterm exam and received a grade of 64.

During the school year 2020-2021, Student was in the 10<sup>th</sup> grade and took Algebra II with a specific teacher.

In November 2020, Parents hired an attorney to represent them in connection with their complaints against the School District.

On January 7, 2021, Student's Algebra II teacher provided Student with a final exam review packet. Student took the final exam on January 21, 2021 and received a grade of 66.

In March 2021, Student's 504 team met and discussed Student's geometry and Algebra II test results. The school's Director of Student Support Services suggested that Student's 504 plan be revised to include study skill development focused on the application of multiple concepts for summative exams. The School District added this accommodation to Student's draft 504 Plan. Parents subsequently declined this proposal and requested that study skills be removed from Student's 504 Plan.

When Student's 504 Plan was finalized in April 2021, it included the following accommodation: "Teachers will provide [Student] a course syllabus with the course scope & sequence included. (To be provided at the beginning of the course.) Advanced notice of content will allow [Student] to preview material, and utilize organizational and time management skills."

Student's 504 team also agreed to include the following accommodation: "Teachers will provide study guides no later than 14 calendar days before math and science summative assessments."

A copy of Student's final 504 Plan was sent to Parents on April 9, 2021.

In June 2021, Student's 504 Plan team agreed to add the following accommodation to the Plan: "Permit teacher approved memory aid/cue card use for use on midterm and final exams in math and science."

During the June 2021 504 Plan team meeting, the Director of Student Support Services stated: "I hear you saying that you are interested in having the school do [a reevaluation], which we can do and it is an appropriate responsibility for the school to hold. It doesn't mean that we would use the assessor chosen by parents."

In June 2021, the 504 Plan team also discussed the submission of Student's 504 Plan to a local college to support Student in a dual enrollment course during the summer of 2021. There was a discussion about whether a copy of the Plan should first be sent to Parents before sending it to the local college. Parents agreed that if any additional changes were made to the 504 Plan, the team could resubmit the 504 Plan to the local college.

Following this meeting, the team approved Student's 504 Plan for the school year 2021-2022. *See Ex. B, School District's Statement of Facts.*

Parents requested that Student be evaluated by a particular psychologist who worked at a hospital in Boston. In August 2021, the Director of Student Support Services notified Parents that she had contacted the hospital in Boston to schedule an evaluation and learned that the physician was booking into May 2022. The Director of Student Support Services explained what would need to happen to schedule the evaluation. Alternatively, the Director of Student Support Services offered to explore a local option so that the evaluation could be completed before May 2022.

Student was in the 11<sup>th</sup> grade during the school year 2021-2022 and was assigned to a Pre-Calculus class with a particular teacher.

On March 30, 2022, Parents informed the School District that there was no need to reevaluate Student because “the 504 Plan along with our ample support at home is effective; therefore, there will be no changes for the 2022-2023 school year. [Student] gets neither special education nor related services. ([Student] is not on an IEP) **[Student’s] 504 Plan, dated June 4, 2021, will continue for [Student’s] senior year at [the high school] (August 2022 through June 2023).**” (emphasis in the original).

In April 2022, Student’s Pre-Calculus class was scheduled to take a test. The teacher posted a copy of the study guide to the Google Classroom.

Parents filed a Due Process Complaint with the Agency of Education, alleging, in part, that Student’s Pre-Calculus teacher had provided Student with an incomplete review packet that was inconsistent with the rest of the school’s math department.

A hearing on this Due Process Complaint was scheduled to begin on May 25, 2022. At 3:58 pm on May 24, 2022, Parents sent an email withdrawing the Complaint “pursuant to [VSER] 2365.1.6.9(b) A Parent may withdraw a request for a due process hearing without prejudice until such time as the parent retains legal counsel.”

On June 30, 2022, Parents submitted a bill to the School District from the hospital in Boston for a private evaluation performed by the psychologist employed at that hospital. A copy of the evaluation was not provided with the invoice.

On July 5, 2022, the Director of Student Support Services sent a message informing Parents that the School District was willing to pay for an evaluation and, that if Parents wanted the District to consider the evaluation completed by the psychologist in Boston, they should provide a copy of the evaluator's report to the District. The Director of Student Support Services indicated that the report had to comply with the requirements of federal law, i.e., 34 C.F.R. 104.35(b), and that the School District would consider covering the cost of the testing.

Shortly after receiving this message from the Director of Student Support Services, Parents sent a message that did not provide a direct response to the School District's request for a copy of the evaluation.

After receiving Parents' message, the Director of Student Support Services replied as follows:

I'm happy to consider payment for the evaluation after I receive the report for review. We would not pay for an evaluation without a review of the report. I would also like a release to be able to speak to the evaluator if needed.

Please provide the report and then I can be in touch about the district covering the cost of the report as well as a time to review 504 eligibility.

#### **4. LEGAL ISSUES RAISED IN PARENTS' DUE PROCESS COMPLAINTS**

The three Due Process Complaints raise 21 individual claims. Each of these claims must be individually considered in light of the School District's motion that seeks either dismissal of these claims or entry of judgment in its favor on the remaining claims.

Parents' first Due Process Complaint alleges fourteen claims for relief; Parents' second Due Process Complaint alleges five claims for relief; and, Parents' third Due Process Complaint alleges two claims for relief.

### **Claims alleged in the first Due Process Complaint**

1. District failed to create 2019 504 Plan pursuant to Parents' recommendation that were effective in Student's 8<sup>th</sup> grade plan.
2. District failed to align Student's 2019 504 Plan to Student's 2017 evaluation and 9<sup>th</sup> grade schedule.
3. District failed to place Student with a geometry teacher in 2019 who had a syllabus that aligned with Student's 504 Plan.
4. District failed to place Student with a geometry teacher in 2019 who was willing to provide a timely syllabus.
5. District failed to modify Student's 504 Plan during 2019-2020 school year after Parents lodged complaints based on Student's hardships in geometry class.
6. District failed to modify Student's placement during 2019-2020 school year after Parents lodged complaints based on Student's hardships in geometry class.
7. District failed to modify Student's 504 plan based on failed math cumulative test scores in 2018, 2019, and 2020.
8. District failed to provide Student with geometry midterm review packet two weeks before January 2020 exam.
9. District failed to provide Student with a geometry syllabus within 10 days of request.
10. District failed to reimburse Parents for Section 504 evaluation.
11. District failed to adopt, notify, and offer Parents grievance procedures before April 2021.
12. District failed to provide Student access to a study guide for a Chapter Five Pre-Calculus test that was reflective of the "content of the Chapter Five Pre-Calc assessment."
13. District failed to provide Student's Pre-Calculus teacher with access to peer teacher for Pre-Calculus and Pre-Calculus test review materials that were reflective of the content of tests.
14. District failed to review and grant approval of Student's 504 Plan dated June 4, 2021 before sending it to a local college for summer course.

### **Claims alleged in the second Due Process Complaint**

15. District engaged in retaliation by changing Student's high school schedule on May 21, 2019.
16. District engaged in discrimination by changing Student's high school schedule on May 21, 2019 by adding Earth and Space Science and requiring Student to submit summer work to show proficiency in Earth and Space Science prior to the start of the 2019-2020 school year before allowing Student to opt out of the class.
17. District failed to provide Student with a free education by requiring Student (but not Student's peers) to submit summer work to show proficiency in Earth and Space Science prior to the start of the 2019-2020 school year, at a cost to Parents.
18. District failed to provide Student with a FAPE when it stated in a 2021 mediation session that it would not investigate Parents' concerns around the Earth and Space Science registration process in spring and summer 2019.
19. District breached Paragraph 5 of the 2019 mediation agreement between the parties.

### **Claims alleged in the third Due Process Complaint**

20. District failed to provide Student with a review packet for Algebra 2 within ten days of Student's request.
21. District failed to enter into a mediation agreement on a form that reflected Parents' right to enforce the agreement through a due process complaint.

### **5. LEGAL ISSUES RAISED IN THE SCHOOL DISTRICT'S MOTION**

The School District's motion raises the following legal issues:

- Whether Parents' claims set forth above as 1, 2, 3, 4, 5, 6, 8, 9, 15, 16, and 17 are barred by Vermont's two-year statute of limitations for the filing of due process complaints. VSER 2365.1.6.1(a)(1).
- Whether the undisputed facts entitle the School District to judgment as a matter of law on claims set forth above as 7, 10, 19, and 20.
- Whether judgment must be entered for the School District on the claim set forth above as 12 because Parents failed to prosecute that claim.
- Whether judgment must be entered for the School District on the claims set forth above as 11, 13, 14, 18, and 21 because those claims fail to state a claim upon which relief may be granted.

### **6. CONCLUSIONS OF LAW**

#### **a. Are Claims 1, 2, 3, 4, 5, 6, 8, 9, 15, 16, and 17 barred by Vermont's two-year statute of limitations for the filing of due process complaints?**

In most cases,<sup>2</sup> a due process complaint must be filed "[w]ithin two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint." VSER 2365.1.6.1(a)(1).<sup>3</sup>

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<sup>2</sup> Exceptions to the two-year deadline are set forth in VSER 2365.1.6.1(2)-(3). Those exceptions do not apply in this case.

<sup>3</sup> The use of the phrase "should have known" in VSER 2365.1.6.1(a)(1) means that the limitations period does not begin until a party discovers or, in the exercise of reasonable

It is undisputed that Parents were aware of Vermont’s two-year statute of limitations no later than April 2019. On March 19, 2019, Parents notified the School District that they intended to file a due process complaint and that they were aware that due process complaints were subject to a statute of limitations and that the statute was triggered when a person knew or should have known about an alleged violation of a student’s rights under federal and state law.

In April 2019, Parents filed a due process complaint with the Vermont Agency of Education (AOE). On April 11, 2019, AOE provided Parents with a copy of a document entitled “Notice of Procedural Safeguards: Rights of Parents of Students with Disabilities, Effective Date June 1, 2018.” The Notice of Procedural Rights provides the following information on page 20:

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You or the school district or supervisory union may file a due process complaint on any matter relating to a proposal or a refusal to initiate or change the identification, evaluation or educational placement of your child, or the provision of a free appropriate public education (FAPE) to your child.

The due process complaint must allege a violation that happened not more than two (2) years before the filer of the complaint knew or should have known about the alleged action that forms the basis of the due process complaint. However, if you have unilaterally placed your child in an independent school and are seeking reimbursement, the due process complaint must be filed within ninety (90) days of the placement.

The above timeline does not apply to you if you could not file a due process complaint within the timeline because:

Your school district or supervisory union specifically misrepresented that it had resolved the issues identified in the complaint;

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diligence, should have discovered both the fact of an injury and its cause. *See University of Vermont v. W.R. Grace & Co.*, 152 Vt. 287 (1989).

or Your school district or supervisory union withheld information from you that it was required to provide you under Part B of the IDEA and Vermont Special Education Rules.

Finally, after Parents' due process complaint was filed in April 2019, the School District filed a motion for summary judgment. In that motion, the School District argued that Parents' claims were barred by Vermont's two-year statute of limitations. VSER 2365.1.6.1.

- Claim 1 is based on conduct that occurred in 2019. Parents were aware of the conduct underlying this claim in 2019. By mid-2019, Parents were aware that due process complaints were subject to Vermont's two-year statute of limitations. Nevertheless, they waited until September 2022 to file a Due Process Complaint that alleged that the School District's conduct violated Student's rights under federal education law. For that reason, Claim 1 is time-barred and is dismissed with prejudice.
- Claim 2 is based on conduct that occurred in 2019. Parents were aware of the conduct underlying this claim in 2019. By mid-2019, Parents were aware that due process complaints were subject to Vermont's two-year statute of limitations. Nevertheless, they waited until September 2022 to file a Due Process Complaint that alleged that the School District's conduct violated Student's rights under federal education law. For that reason, Claim 2 is time-barred and is dismissed with prejudice.
- Claim 3 is based on conduct that occurred in 2019. Parents were aware of the conduct underlying this claim in 2019. By mid-2019, Parents were aware that due process complaints were subject to Vermont's two-year statute of limitations. Nevertheless, they waited until September 2022 to file a Due Process Complaint that alleged that the School District's conduct violated Student's rights under federal education law. For that reason, Claim 3 is time-barred and is dismissed with prejudice.

- Claim 4 is based on conduct that occurred in 2019. Parents were aware of the conduct underlying this claim in 2019. By mid-2019, Parents were aware that due process complaints were subject to Vermont’s two-year statute of limitations. Nevertheless, they waited until September 2022 to file a Due Process Complaint that alleged that the School District’s conduct violated Student’s rights under federal education law. For that reason, Claim 4 is time-barred and is dismissed with prejudice.
- Claim 5 is based on conduct that occurred during the 2019-2020 school year. Parents were aware of the conduct underlying this claim no later than June 2020. By mid-2019, Parents were aware that due process complaints were subject to Vermont’s two-year statute of limitations. Nevertheless, they waited until September 2022 to file a Due Process Complaint that alleged that the School District’s conduct violated Student’s rights under federal education law. For that reason, Claim 5 is time-barred and is dismissed with prejudice.
- Claim 6 is based on conduct that occurred during the 2019-2020 school year. Parents were aware of the conduct underlying this claim no later than June 2020. By mid-2019, Parents were aware that due process complaints were subject to Vermont’s two-year statute of limitations. Nevertheless, they waited until September 2022 to file a Due Process Complaint that alleged that the School District’s conduct violated Student’s rights under federal education law. For that reason, Claim 6 is time-barred and is dismissed with prejudice.
- Claim 8 is based on conduct that occurred in January 2020. Parents were aware of the conduct underlying this claim in January 2020. By mid-2019, Parents were aware that due process complaints were subject to Vermont’s two-year statute of limitations.

Nevertheless, they waited until September 2022 to file a Due Process Complaint that alleged that the School District's conduct violated Student's rights under federal education law. For that reason, Claim 8 is time-barred and is dismissed with prejudice.

- Claim 9 is based on conduct that occurred sometime during the 2019-2020 school year. Parents were aware of the conduct underlying this claim no later than June 2020. By mid-2019, Parents were aware that due process complaints were subject to Vermont's two-year statute of limitations. Nevertheless, they waited until September 2022 to file a Due Process Complaint that alleged that the School District's conduct violated Student's rights under federal education law. For that reason, Claim 9 is time-barred and is dismissed with prejudice.
- Claim 15 is based on conduct that occurred in May 2019. Parents were aware of the conduct underlying this claim in May 2019. By mid-2019, Parents were aware that due process complaints were subject to Vermont's two-year statute of limitations. Nevertheless, they waited until September 2022 to file a Due Process Complaint that alleged that the School District's conduct violated Student's rights under federal education law. For that reason, Claim 15 is time-barred and is dismissed with prejudice.
- Claim 16 is based on conduct that occurred in May 2019. Parents were aware of the conduct underlying this claim in May 2019. By mid-2019, Parents were aware that due process complaints were subject to Vermont's two-year statute of limitations. Nevertheless, they waited until September 2022 to file a Due Process Complaint that alleged that the School District's conduct violated Student's rights under federal

education law. For that reason, Claim 16 is time-barred and is dismissed with prejudice.

- Claim 17 is based on conduct that occurred prior to the start of the 2019-2020 school year. Parents were aware of the conduct underlying this claim no later than June 2020. By mid-2019, Parents were aware that due process complaints were subject to Vermont's two-year statute of limitations. Nevertheless, they waited until September 2022 to file a Due Process Complaint that alleged that the School District's conduct violated Student's rights under federal education law. For that reason, Claim 17 is time-barred and is dismissed with prejudice.

**b. Do the undisputed facts entitle the School District to judgment as a matter of law on claims set forth above as 7, 10, 19, and 20?**

As noted above, summary judgment should be granted only when the record shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *City of Burlington v. Hartford Steam Boiler Inspection and Ins. Co*, 190 F. Supp. 2d 663 (D. Vt. 2002). When considering a motion for summary judgment, the adjudicator must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party, and decide whether a fact-finder could decide in favor of that party under applicable law. *Scott v. Harris*, 550 U.S. 373, 378 (2007).

**i. Claim 7 – District failed to modify Student's 504 plan based on failed math cumulative test scores in 2018, 2019, and 2020.**

Student received a low grade on math exams in 8<sup>th</sup> grade (2018), 9<sup>th</sup> grade (2020), and again in the 10<sup>th</sup> grade in 2021.

In March 2021, Student's 504 team met and discussed Student's geometry and Algebra II test results. The school's Director of Student Support Services suggested that Student's 504 plan

be revised to include study skill development focused on the application of multiple concepts for summative exams. The School District added this accommodation to Student's draft 504 Plan. Parents subsequently declined this proposal and requested that study skills be removed from Student's 504 Plan.

When Student's 504 Plan was finalized in April 2021, it included the following accommodation: "Teachers will provide [Student] a course syllabus with the course scope & sequence included. (To be provided at the beginning of the course.) Advanced notice of content will allow [Student] to preview material, and utilize organizational and time management skills."

Student's 504 team also agreed to include the following accommodation: "Teachers will provide study guides no later than 14 calendar days before math and science summative assessments."

A copy of Student's final 504 Plan was sent to Parents on April 9, 2021.

In June 2021, Student's 504 Plan team agreed to add the following accommodation to the Plan: "Permit teacher approved memory aid/cue card use for use on midterm and final exams in math and science."

Because the undisputed facts demonstrate that the School District modified Student's 504 Plan in response to the low grades Student received on math summative exams, the School District is entitled to judgment on Claim 7.

**ii. Claim 10 – The School District failed to reimburse Parents for Section 504 evaluation.**

Section 504 requires local education authorities to conduct periodic evaluations of students with 504 Plans. 34 C.F.R. 104.35. The following facts are not in dispute:

During the June 2021 504 Plan team meeting, the Director of Student Support Services stated: “I hear you saying that you are interested in having the school do [a reevaluation], which we can do and it is an appropriate responsibility for the school to hold. It doesn’t mean that we would use the assessor chosen by parents.”

In June 2021, the 504 Plan team also discussed the submission of Student’s 504 Plan to a local college to support Student in a dual enrollment course during the summer of 2021. There was a discussion about whether a copy of the Plan should first be sent to Parents before sending it to a local college. Parents agreed that if any additional changes were made to the 504 Plan, the team could resubmit the 504 Plan to the local college.

Following this meeting, the team approved Student’s 504 Plan for the school year 2021-2022. *See Ex. B, School District’s Statement of Facts.*

Parents requested that Student be evaluated by a particular psychologist who worked at a hospital in Boston. In August 2021, the Director of Student Support Services notified Parents that she had contacted the hospital in Boston to schedule an evaluation and learned that the physician was booking into May 2022. The Director of Student Support Services explained what would need to happen to schedule the evaluation. Alternatively, the Director of Student Support Services offered to explore a local option so that the evaluation could be completed before May 2022.

Student was in the 11<sup>th</sup> grade during the school year 2021-2022 and was assigned to a Pre-Calculus class with a particular teacher.

On March 30, 2022, Parents informed the School District that there was no need to reevaluate Student because “the 504 Plan along with our ample support at home is effective; therefore, there will be no changes for the 2022-2023 school year. [Student] gets neither special education nor related services. ([Student] is not on an IEP) **[Student’s] 504 Plan, dated June 4, 2021, will continue for [Student’s] senior year at [the high school] (August 2022 through June 2023).**” (emphasis in the original).

On June 30, 2022, Parents submitted a bill to the School District from the hospital in Boston for an evaluation for a private evaluation performed by the psychologist employed at that hospital. A copy of the evaluation was not provided with the invoice.

On July 5, 2022, the Director of Student Support Services sent a message informing Parents that the School District was willing to pay for an evaluation and that, if Parents wanted the School District to consider the evaluation completed by the psychologist in Boston, they should provide a copy of the evaluator’s report to the District. The Director of Student Support Services indicated that the report had to comply with the requirements of federal law, i.e., 34 C.F.R. 104.35(b) and that the School District would consider covering the cost of the testing.

Shortly after receiving this message from the Director of Student Support Services, Parents sent a message that did not provide a direct response to the School District’s request for a copy of the evaluation.

After receiving Parents' message, the Director of Student Support Services replied as follows:

I'm happy to consider payment for the evaluation after I receive the report for review. We would not pay for an evaluation without a review of the report. I would also like a release to be able to speak to the evaluator if needed.

Please provide the report and then I can be in touch about the district covering the cost the report as well as a time to review 504 eligibility.

In this case, the School District offered to have Student reevaluated in June 2021 and Parents declined that offer in May 2022. Without first notifying the School District that they had engaged the services of a psychologist employed by a Boston hospital to reevaluate Student, Student was evaluated by that psychologist. In June 2022, Parents submitted the bill for that evaluation to the School District, but refused to provide a copy of the evaluation to the School District. Thus, the School District has been unable to determine (a) whether the psychologist's evaluation conforms with federal law, and (b) how the evaluation would inform Student's 504 Plan team about further changes in that Plan.

Under these circumstances, the School District has no obligation to reimburse Parents for the evaluation they commissioned on their own initiative. For that reason, judgment on this issue is entered in favor of the School District.

**iii. Claim 19 – The District breached Paragraph 5 of the 2019 mediation agreement between the parties**

In their Complaint, Parents allege that the School District violated the parties' mediation agreement by failing to pay for cost incurred by them.

The mediation agreement included the following provision: “With respect to future disputes the parties agree to schedule a meeting as soon as reasonably possible and to include a neutral third party should either party request it with any associated costs born[e] by the district.”

Parents’ Complaint does not seek reimbursement of costs associated with the employment of a neutral third party to resolve “future disputes.”

Because there is no evidence that the School District breached this provision of the parties’ March 2019 mediation agreement, judgment is entered in the School District’s favor on this issue.

**iv. Claim 20 – The District failed to provide Student with a review packet for Algebra 2 within ten days of Student’s request**

Parents’ Complaint alleges that the School District violated Student’s 504 Plan by failing to provide Student with an Algebra II review packet within 10 days of when a request for that packet was made.

The undisputed facts related to this issue are as follows:

In September 2019, Student’s 504 team developed Student’s 504 plan that included the following accommodation: “If [Student] or parents request, teachers will provide [Student] with two weeks advance notice of content in order for [Student] to preview material, and utilize organizational and time management strategies.” The 504 Plan did not include any accommodation requiring the provision of study guides.

Student’s 504 Plan that was in effect in December 2020 did not require Student’s teachers to provide Student with an Algebra II test review packet. Nevertheless, in early January 2021, Student’s Algebra II teacher provided Student with a study review packet for the upcoming exam.

Because (a) Student’s 504 Plan in effect during the school year 2020-2021 did not require Student’s teachers to provide Student with an Algebra II review packet and, (b) Student’s teachers did provide Student with a study review packet for the upcoming exam in that subject, judgment must be entered in the School District’s favor on this issue.

**c. Should Claim 12 be dismissed because Parents failed to prosecute that claim in a previous due process proceeding?**

On April 22, 2022, Parents filed a Due Process Complaint alleging that the School District failed to fulfill its obligations required by Student’s 504 related to the following issues:

- Teachers will provide study guides no later than days 14 calendar days before math and science summative or unit assessments.
- Teachers will provide Student a course syllabus with the course scope and sequence included (*to be provided at the beginning of the course*). Advance notice of content will allow Student to preview material and utilize organizational and time management. *Ex. EE, School District’s Statement of Facts.*

Parents’ April 22<sup>nd</sup> Complaint affirmed that “[t]he issues identified below are not the subject of a previous or concurrent due process complaint, administrative complaint, or mediation.” *Ex. DD, School District’s Statement of Facts.*

The matter was assigned to an AOE hearing officer who issued a scheduling order establishing the following deadlines for the resolution of Parents’ Complaint:

If a Due Process hearing is required, the schedule will be as follows:

1. A Detailed Written Statement of the issues and any alleged procedural violations will be drafted by the Parents and emailed to the District and the Hearing Officer on or before midnight on May 11, 2022.
2. A Statement of Defenses will be drafted by the District and emailed to the Parents and the Hearing Officer on or before midnight on May 13, 2022.
3. A Pre-hearing Conference will be held on May 16, 2022 via Zoom and will begin at 11:30 AM Eastern Standard Time (EST). The conference shall end no later than 4:30 PM.

4. The following are to be presented for the Pre-hearing Conference, no later than 10:00 am EST on May 16, 2022 using a digital drop box or by email to the Hearing Officer and both parties:
  - a. A list of the witnesses to be called by each party at the Hearing and a brief summary of the testimony of each witness;
  - b. A statement of facts that are not expected to be contested;
  - c. An email provided by the District with the relevant portion of the Student's file referred to as the Core Exhibits (these may be supplemented in the 5-Day material by either party). The Core Exhibits are to be numbered and indexed.
5. At the Pre-hearing Conference, the Detailed Written Statement of the issues will be reviewed to determine if each issue has been narrowed to the greatest extent possible. In addition, the number of witnesses to be called by a Party will be reviewed to ensure that no more than one day will be needed for a Party to present its case.
6. 5 Day Material - An updated witness list as well as any material to be offered by either party at the Hearing (in addition to the Core Exhibits) is to be marked as "District" or "Student" Exhibit # \_\_\_\_\_ (add ascending numerals) and shall be emailed to the Hearing Officer and the Opposing Party on or before May 18, 2022 at 6:00 PM.
7. Affidavits may be used at the Hearing if they are emailed to the Hearing Officer and Opposing Party on or before May 20, 2022 and if the witness is available for cross-examination, unless otherwise agreed.
8. The Hearing will be held on May 25th, May 26th, and May 27th of 2022 from 11:00-6:00 EST via Zoom.
9. Requests for Findings of Fact and Conclusions of Law will be emailed to the Opposing Party and the Hearing Officer on or before June 3, 2022.
10. The Hearing Officer's Order will be emailed to the Parties on or before June 18, 2022. *Ex. EE, School District's Statement of Facts.*

On May 24, 2002, at 3:58:15 p.m., Parents sent an email to the hearing officer with the following message:

Parents are withdrawing DP 22-10 (S.J.) pursuant to 2365.1.6.9 **(b) A parent may withdraw a request for a due process hearing without prejudice until such time as the parent retains legal counsel.** *Ex. FF, School District's Statement of Facts.* (emphasis in the original).

Pursuant to VSER 2365.1.6.9(b), the hearing officer granted Parents' request to withdraw their Complaint until "such time as the parent retains legal counsel."

On September 8, 2022, Parents filed the first of three Due Process Complaints that have been consolidated under docket number DP-23-03. Claim 12 in the September 8, 2022 Complaint was one of the issues raised in the previously dismissed April 22, 2022 Complaint, i.e., the teacher's alleged failure to provide Student with a study guide before an April 2022 exam. Parents, however, did not disclose this fact when they filed their new Complaint on September 8, 2022.

Citing VSER 2365.1.6.9(c), the School District seeks dismissal of Claim 12 because Parents did not retain legal counsel before re-filing the dismissed claims in their September 8, 2022 Complaint. Parents' response to the School District's motion to dismiss the claims lends support to the School District's argument that Claim 12 should be dismissed for failure to prosecute. In their memo Parents provided the following explanation for their request for dismissal of the claim:

Parents withdrew the complaint based on the Hearing Officer's modified scope, the Hearing Officer's modified evidence and the Hearing Officer's modified witness list, all of which the parents asked for reconsiderations and were denied. Parents' Response, p. 46.<sup>4</sup>

Dissatisfaction with a hearing officer's procedural/evidentiary rulings does not provide a basis for dismissal under VSER 2365.1.6.9(b). Parents had an opportunity to present evidence at the May 2022 hearing to prove the claims alleged in their April 2022 Due Process Complaint. Based on their disagreement with the hearing officer's procedural/evidentiary orders, they

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<sup>4</sup> In their Response to the School District's motion to dismiss this claim, Parents do not assert or otherwise suggest that they tried and failed to retain legal counsel between May 2022 and September 2022 before filing the September 8, 2022 Due Process Complaint.

decided not to prosecute those claims in May 2022. When they requested dismissal of these claims on May 24, 2022, they invoked a rule that affords an unrepresented party to retain an attorney.

Because Parents had an opportunity to prosecute Claim 12 in May 2022 and chose not to do so because they disagreed with the hearing officer's prehearing orders, that claim is now dismissed with prejudice for failure to prosecute. VSER 2365.1.6.9(c).

**d. Should Claims 11, 13, 14, 18, and 21 be dismissed because they fail to state a claim upon which relief can be granted?**

The School District has moved for dismissal of Claims 11, 13, 14, 18, and 21 because those claims, according to the School District, fail to state a claim upon which relief may be granted. Fed. R. Civ. Pro. 12(b)(6). Under this rule, a claim will fail if it asserts a legal theory that is not cognizable as a matter of law. When a claim is challenged under Rule 12(b)(6), all well-pleaded allegations are presumed to be true and all reasonable doubts and inferences are resolved in the favor of the pleader, and the pleading is viewed in the light most favorable to the non-moving party.

**i. Claim 11**

Claim 11 alleges that the School District failed "to adopt, notify, and offer parents grievance procedures prior to April 6, 2021." In support of this allegation, Parents cite 34 C.F.R. §§ 104.7(b) and 104.8, which require school districts to adopt and publish grievance procedures providing for the prompt and equitable resolution of student disability discrimination complaints.

The question raised by the School District's motion to dismiss is whether 34 C.F.R. §§ 104.7 and 104.8 create a private cause of action to enforce these regulations. Applying the factors adopted by the Supreme Court in *Cort v. Ash*, 422 U.S. 66 (1975), three federal district courts have held that these regulatory provisions do not create a private right of action. *See*

*Guckenberger v. Boston University*, 974 F. Supp. 106 (D. Mass. 1997); *Power ex rel. Power v. School Board of City of Virginia Beach*, 276 F. Supp. 2d 515 (E.D. Va. 2003); *A.W. by Ms. C v. Marlborough Co.*, 25 F.Supp. 2d 27 (D. Conn. 1998). These cases, unlike those decided by the United States Supreme Court, the Second Circuit Court of Appeals, and the Vermont Supreme Court, do not constitute binding legal authority for the purposes of resolving legal issues in this proceeding. These cases do, however, provide persuasive legal authority for this hearing officer to conclude that the regulatory provisions cited by Parents in support of Claim 11 do not create a private cause of action.

For that reason, Claim 11 must be dismissed with prejudice as it fails to state a claim upon which relief may be granted.

**ii. Claim 13**

Claim 13 alleges that the School District failed to provide Student’s pre-calculus teacher with access to a peer teacher for test review materials which were reflective of the contents of tests for that course. The question raised by the School District’s motion is whether Parents have standing to pursue a complaint on behalf of a member of the high school’s faculty.

In Vermont, due process hearing officers have the authority to adjudicate claims brought by parties that have standing to pursue claims arising under the IDEA and Section 504 of the Rehabilitation Act. “Standing” is a doctrine that enforces the jurisdictional limits of a particular forum by identifying the “category of litigants empowered to maintain a lawsuit ... to seek redress for a legal wrong.” *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009).

The School District correctly points out that Claim 13 (as set forth in the September 8<sup>th</sup> Complaint) “seemingly seeks to bring a claim on behalf of [Student’s pre-calculus teacher]” to the effect that the School District somehow denied Student’s teacher access to relevant test

review materials. Because Parents do not have standing to pursue a complaint on the teacher's behalf in this forum, Claim 13 must be dismissed for failing to state a claim upon which relief may be granted.<sup>5</sup>

**iii. Claim 14**

Claim 14 alleges that the School District failed to allow Parents the opportunity “to review and or grant parents approval on a 504 Plan dated June 4, 2021, before sending the report on June 4, 2021, to [a local college's] disability office for a dual enrollment summer course beginning in June of 2021.”

A manual developed and published by the Vermont Agency of Education provides the following information about Section 504 of the Rehabilitation Act:

Section 504 of the Rehabilitation Act prohibits discrimination on the basis of disability which is defined in the Rehabilitation Act as a failure to provide students with disabilities the same opportunity to benefit from educational programs, services, or activities as provided to their nondisabled peers. This means that districts/schools must make programs and activities accessible as well as the buildings and grounds. As a civil rights statute, Section 504 focuses on insuring a level of access to educational services (including both academic and extra-curricular activities) that is equal to the level of access provided to non-disabled students. This includes providing eligible students who have a physical or mental disability with a free appropriate public education (FAPE).

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<sup>5</sup> The School District also sought dismissal of Claim 13 by asserting that (a) it was included in Parents' April 2022 Due Process Complaint and, (b) Parents failed to prosecute Claim 13 by requesting dismissal of the earlier Complaint on May 24, 2022. *School District's Motion for Summary Judgment*, pp. 4, 20-22.

This hearing officer has reviewed the April 2022 Complaint, *Ex. DD, School District Statement of Facts*, and it does not identify the School District's alleged failure to provide Student's pre-calculus teacher with access to a peer teacher for pre-calculus test review materials which were reflective of the contents of tests as an issue subject to resolution in that due process proceeding.

For that reason, Claim 13, unlike Claim 12, is a new claim, one that was not previously raised and subsequently dismissed in the April 2022 Due Process Complaint. For that reason, Claim 13 is not subject to dismissal for failure to prosecute.

Eligibility determinations must be made by a team of persons knowledgeable about the meaning of the evaluation data, the needs of the student and about the accommodations/service options that are available. Although not specifically required by the Section 504 regulations, parental participation should always be encouraged throughout the Section 504 process as a best practice. The team should draw from a variety of sources in determining eligibility, including, for example, aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background and adaptive behavior. No formal testing is required as part of a 504 evaluation and in many instances the evaluation will involve gathering and analyzing information that already exists. The team must determine if the student has a mental or physical disability or impairment that substantially limits a major life activity. If a parent disagrees with the decision of the team regarding eligibility or placement, he or she may request a due process hearing.

Vermont Agency of Education, *Section 504 of the Rehabilitation Act of 1973 and Vermont Schools: A Manual for Parents, Families, and Schools* (2015), pp. 3-5.

The following undisputed facts demonstrate that Parents were involved in the development of Student's 504 Plan between March 2021 and June 2021:

In March 2021, Student's 504 team met and discussed Student's geometry and Algebra II test results. The school's Director of Student Support Services suggested that Student's 504 plan be revised to include study skill development focused on the application of multiple concepts for summative exams. The School District added this accommodation to Student's draft 504 Plan. Parents subsequently declined this proposal and requested that study skills be removed from Student's 504 Plan.

When Student's 504 Plan was finalized in April 2021, it included the following accommodation: "Teachers will provide [Student] a course syllabus with the course scope & sequence included. (To be provided at the beginning of the course.) Advanced notice of content will allow [Student] to preview material, and utilize organizational and time management skills."

Student's 504 team also agreed to include the following accommodation: "Teachers will provide study guides no later than 14 calendar days before math and science summative assessments."

A copy of Student's final 504 Plan was sent to Parents on April 9, 2021.

In June 2021, Student's 504 Plan team agreed to add the following accommodation to the Plan: "Permit teacher approved memory aid/cue card use for use on midterm and final exams in math and science."

During the June 2021 504 Plan team meeting, the Director of Student Support Services stated: "I hear you saying that you are interested in having the school do [a reevaluation], which we can do and it is an appropriate responsibility for the school to hold. It doesn't mean that we would use the assessor chosen by parents."

In June 2021, the 504 Plan team also discussed the submission of Student's 504 Plan to a local college to support Student in a dual enrollment course during the summer of 2021. There was a discussion about whether a copy of the Plan should first be sent to Parents before sending it to the local college. Parents agreed that if any additional changes were made to the 504 Plan, the team could resubmit the 504 Plan to a local college.

Following this meeting, the team approved Student's 504 Plan for the school year 2021-2022. *See Ex. B, School District's Statement of Facts.*

Based on these facts, it is impossible to conclude that the School District failed to allow Parents to review Student's 504 Plan in June 2021 before the Plan was provided to the local college.

The undisputed facts also demonstrate that Parents were present at Student's 504 Team meeting on June 4, 2021 when the team approved the proposed Plan. *Ex. B, School District's Statement of Facts.* The team's consideration and approval of Student's proposed 2021-2022 504 Plan is consistent with the following guidance provided by the Agency of Education: "Eligibility determinations must be made by a team of persons knowledgeable about the meaning of the evaluation data, the needs of the student and about the accommodations/service options that are available."

Section 504 of the Rehabilitation Act does not confer on Parent's the right to either approve or veto decisions made by a student's 504 team. That does not mean that an aggrieved parent is without recourse. As the Agency's manual states: "If a parent disagrees with the decision of the team regarding eligibility or placement, he or she may request a due process hearing."

Claim 14, however, does not take issue with a substantive decision made by Student's 504 team in June 2021. In fact, as Parents informed the School District in March 2022, "the 504 Plan along with our ample support at home is effective; therefore, there will be no changes for the 2022-2023 school year."

Instead, Claim 14 is a procedural objection that focuses on Parents' alleged inability to review and approve Student's 504 Plan before it was forwarded to a local college to facilitate Student's participation in a dual enrollment class.<sup>6</sup> Because Section 504 does not either require parental participation in the development of a student's 504 plan or confer on parents the authority to approve or veto decisions made by a 504 team, Claim 14 must be dismissed with prejudice for failing to state a claim upon which relief may be granted.

**iv. Claim 18**

Claim 18 alleges that the School District denied Student a FAPE based on a statement allegedly made during a March 2021 mediation session to the effect that the School District would investigate a complaint related to Student taking the Earth and Space Science course.

Under Vermont law, statements made by a party during mediation are privileged, not subject to discovery, and inadmissible in a proceeding.” 12 V.S.A. § 5715(a). For that reason, VSER 2365.1.4(j) requires parties to mediation to “sign a confidentiality pledge prior to the commencement of the mediation to ensure that all discussions that occur during mediation remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding.” There is one exception to this rule: a signed mediation agreement may be released “for the purpose of enforcement thereof in a due process hearing or court of competent jurisdiction.” VSER 2365.1.4(k)(1).

Furthermore, the following explanation of this rule can be found on page 23 of AOE's Notice of Procedural Safeguards: Rights of Parents of Students with Disabilities, Effective Date June 1, 2018:

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<sup>6</sup> Student's high school transcript indicates that Student completed and received credit for a biology course at a local college during the school year 2020-21.

Discussions that happened during the mediation process must be confidential. They cannot be used as evidence in any future due process hearing or civil proceeding of any Federal court or State court of a State receiving assistance under Part B of IDEA and Vermont Special Education Rules.

Claim 18 is based entirely on a confidential statement allegedly made by a School District official during mediation. Because the alleged mediation statement cannot be used as evidence in this proceeding, Claim 18 must be dismissed with prejudice.

**v. Claim 21**

Claim 21 alleges that the School District used a mediation form that did not state that Parents had the right to enforce the terms of the 2019 mediation agreement through a due process complaint. In its motion, the School District asserts that Claim 21 fails for two reasons: (1) the form used was created by Vermont's Agency of Education and was utilized by the mediator assigned to the case; and, (2) Parents cannot demonstrate any harm flowing from the use of that form.

Parents correctly point out that the form used to memorialize their mediation agreement with the School District does not indicate that the agreement can be enforced in a due process hearing. Instead, the form created by AOE states that the agreement is enforceable in "any state court of competent jurisdiction or in a United States District Court."

The form created by AOE and signed by the parties is not consistent with VSER 2365.1.4(k)(3), which states that a signed mediation agreement "[i]s enforceable in a due process proceeding, any state court of competent jurisdiction or in a district court of the United States."

Furthermore, it is easy to understand why a person who is not fully fluent in Vermont's Special Education Rules might be confused and unaware of their rights under law. Thus, on page 23 of its Notice of Procedural Safeguards: Rights of Parents of Students with Disabilities,

Effective Date June 1, 2018, AOE incorrectly advises the reader that a “written, signed mediation agreement is enforceable in any State court of competent jurisdiction (a court that has the authority under State law to hear this type of case) or in a district court of the United States.”

In light of the confusion sown by AOE as it relates to the enforcement of due process mediation agreements, the Agency would be well-advised to amend both its mediation agreement form template and the advice it provides to parents in its Notice of Procedural Safeguards: Rights of Parents of Students with Disabilities, Effective Date June 1, 2018.

That said, the School District cannot be held responsible for the misinformation AOE provides to the public and litigants in due process hearings. Furthermore, other than Claim 19 (i.e., payment of costs related to third party intervention to resolve “future disputes”), Parents are not seeking the enforcement of any other provision of the 2019 mediation agreement in this due process proceeding.<sup>7</sup>

For these reasons, Claim 21 must be dismissed with prejudice for failing to state a claim upon which relief may be granted.

## **CONCLUSION**

For the reasons set forth above:

- Claims 1, 2, 3, 4, 5, 6, 8, 9, 15, 16, and 17 are barred by Vermont’s two-year statute of limitations for the filing of due process complaints and are therefore dismissed with prejudice;
- The undisputed facts entitle the School District to judgment as a matter of law on Claims 7, 10, 19, and 20;

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<sup>7</sup> It should be noted that the fact that Parents included Claim 19 in their September 9, 2022 Due Process suggests that they were aware of their right under VSER 2365.1.4(k)(3) to seek enforcement of the 2019 mediation agreement in a due process proceeding.

- Claim 12 is dismissed with prejudice because Parents failed to prosecute that claim in a previous due process proceeding; and,
- Claims 11, 13, 14, 18, and 21 are dismissed with prejudice because they fail to state a claim upon which relief can be granted.

### **NOTICE OF APPEAL RIGHT**

Pursuant to Vermont Department of Education Rule 2365.1.8:

"(a) The decision of the hearing officer is final unless appealed to a state or federal court of competent jurisdiction.

(b) Parties have the right to appeal the hearing decision by filing a civil action in a federal district court or a state court of competent jurisdiction in accordance with Rule 2365.1.9."

Dated at Burlington, Vermont this 21<sup>st</sup> day of October 2022.

David J. Williams  
Due Process Hearing Officer  
Vermont Agency of Education