

SANDRA HERRERA,

Appellant

v.

BALTIMORE CITY BOARD
OF SCHOOL COMMISSIONERS

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 16-10

OPINION

INTRODUCTION

Sandra Herrera appealed the decision of the Baltimore City Board of School Commissioners (local board) terminating her from her teaching position. The appeal was referred to the Office of Administrative Hearings (OAH) which issued a Proposed Decision affirming the decision of the local board. Appellant filed Exceptions and the local board filed its Response. Oral Argument is scheduled for February 23, 2016.

FACTUAL BACKGROUND

The facts in this case center on the Appellant's ability to manage a classroom and whether the school system illegally denied her an accommodation for her disability that would have helped her manage her classroom.

The Administrative Law Judge's (ALJ) Proposed Decision contains findings of fact. This Board adopts the findings of facts only as set forth below.

In 1999, Appellant was diagnosed with Attention Deficit Disorder (AD). (Finding of Fact #3). She began teaching in the Baltimore City Schools in 2007. (Finding of Fact #5). In the 2012-2013 school year she was assigned to teach seventh grade science at Roland Park Middle School two days before classes began. (Finding of Fact #11). On the day the students were to arrive, she went to an administrator at the school and mentioned she had AD. She told him that she would do her best but that "these things had been an issue for the last three or four years." (Tr. 234). She then asked if she could start the next day. She also asked if the long-term substitute teacher in her science class could remain in her class for an extra week. Her requests were denied. (Finding of Fact #12).

The Appellant took steps to improve, or to smooth, her transition to the school. She asked the administration for, and received, a copy of a year book so that she could learn students' names. She asked for certain cabinets in the classroom to be "re-keyed" in order to keep students out of the cabinets. (That request was denied based upon expense). She noticed that there was a "scan-tron" machine at the school so she brought "scan-tron" cards to expedite grading tests and quizzes. (Soon thereafter, the "scan-tron" machine disappeared from the school.) She asked the

school counselor to speak with some of her students in one disruptive class. (That request was granted). From the beginning of the school year, however, the learning environment in the Appellant's classroom was problematic. (Finding of Fact #13) (Appellant's Ex. 3 and 6). In October 2012, the Appellant disclosed to the Assistant Principal that she had AD. The Assistant Principal asked how she could help her and the Appellant said that she did not know. (Finding of Fact #14).

On November 11, 2012, the Appellant faxed to the central office of the school system a "Reasonable Accommodation Request Form." The Appellant asked for "a classroom assistant to enhance my organization and timeliness, thereby allowing me to improve my classroom management..." (Finding of Fact #15) (CEO Ex. 16). On November 16, 2012, the Appellant requested by email, an accommodation through Allison Huey, a Labor Relations specialist with the school system. The Appellant asked for a classroom aide to help with classroom organization and classroom management. (Finding of Fact #16).

On some undisclosed date before December 1, 2012, the Assistant Principal conducted a formal observation of the Appellant teaching a class. During that observation period, the Assistant Principal noted that the Appellant failed to introduce a lesson objective and revisit that objective; and did not check to determine if the students understood the material that was presented. The Assistant Principal observed students who were "off task," throwing paper stars, talking constantly, and walking around the classroom. The Assistant Principal did not see any of the "positive behavior system"—a discipline system – being implemented in the classroom. Some students were idle and did not appear to know, or choose to implement, any classroom routines. The classroom itself was cluttered. The Appellant was yelling over the din. The Assistant Principal observed many of the same behaviors when the next class entered the room. (Finding of Fact #17).

On December 5, 2012, the Labor Relations specialist with the school system wrote to the Appellant's doctor asking for medical documentation to support the Appellant's request for an accommodation. (Finding of Fact #19)(CEO Ex. 17). On January 4, 2013, the Labor Relations specialist sent an email message to the Appellant explaining that she needed documentation from the Appellant's doctor in order to "complete my review." She also asked if the accommodation request was for a full-time or part-time classroom aide. (Finding of Fact #22). There is no evidence in the record that the Appellant or the doctor responded at that time. Indeed, it was not until July 30, 2014 that a physician wrote a "To-Whom-It-May-Concern" note stating that he had been treating the Appellant for Attention Deficit Hyperactivity Disorder since the end of 2009. (Finding of Fact #32). By that time the termination process was well underway.

Specifically, on January 2, 2013, the Appellant was placed on a Performance Improvement Plan (PIP)(CEO Ex. 2). On January 10, 2013, an administrator did an "informal observation" of the Appellant teaching a class. The observer saw students shouting out, students not seated, and students not focused on the presentation. As a result of the informal observation, the administrator suggested that the classroom environment be remedied by desks being rearranged into small groups, "readiness" being reinforced, the classroom being organized and tidied, and the students being engaged with visual aids and hands-on activities. (Finding of Fact #23) (CEO Ex. 3).

After January 10, 2013, but before January 15, 2013, the Appellant was given her mid-year evaluation. Of the four “performance domains” of evaluation, she was found to be “satisfactory” on three and “unsatisfactory” in the “Learning Environment” domain. A disorganized and disorderly classroom environment was a major reason for the unsatisfactory evaluation. (Finding of Fact #24)(CEO Ex. 6).

On April 12, 2013, another Assistant Principal did a formal observation of the Appellant teaching a class. He observed the following: Students were talking and not focused, the Appellant had to scream to momentarily gain the students’ attention, and at times the clamor of the students was so loud that the observer could not determine what the Appellant was talking about. The observer concluded that the Appellant had established low behavioral expectations in the classroom and student misbehavior caused significant interruption in learning. (Finding of Fact#26) (CEO Ex. 7).

On April 29, 2013, the Appellant was given her Annual Evaluation by the Principal. She received a score of 60 out of 100 possible points. She was scored as satisfactory - - 18 points - - in three of four “performance domains” of evaluation. Those were planning and preparation, instruction/instructional support, and professional responsibilities. She was scored as unsatisfactory - - 6 points - - in learning environment. Comments on the learning environment “performance domain” section of the evaluation document were that the classroom was disorganized and out of order, materials were misplaced or not available, students were regularly removed for misbehavior, the Appellant was unable to manage classroom behavior and unable to implement a behavior management plan, and the Appellant was “unable to reinforce high expectations for all students with regard to achievement and behavior.” (CEO Ex. 8, p. 1). Other criticisms were that lesson objectives were not posted on the board, the Appellant did not maintain a grade book that was consistent with professional standards, and the Appellant had to be reminded on several occasions to pick up current individual education plans for some of her students who had educational disabilities. (CEO Ex. 8, p. 2). On that date, the Principal advised the Appellant that he would recommend that the Board terminate the Appellant. (Finding of Fact #27).

On September 12, 2013, the Appellant appeared at a pre-termination hearing. She had proper notice and an opportunity to be heard about the recommendation to terminate her employment. (Finding of Fact #28). On October 21, 2013, the interim Chief Executive Officer issued a Statement of Charges recommending that the Board terminate the Appellant because of “incompetence.” (Finding of Fact #31). Effective October 21, 2013, the Appellant was suspended without pay. (CEO Ex. 22).

After October 21, 2013, but sometime before September 30, 2014, the Appellant challenged the termination recommendation by asking for a hearing before a Hearing Examiner appointed by the Board. (Finding of Fact #34). On September 30, 2014, the Hearing Examiner held a hearing at which many witnesses, including the Appellant, testified. (Finding of Fact #35). On December 8, 2014, the Hearing Examiner affirmed the termination recommendation. (Finding of Fact #36). On February 10, 2015, the Board voted to terminate the Appellant. (Finding of Fact #37). This appeal ensued.

STANDARD OF REVIEW

Because this appeal involves the termination of a certificated employee pursuant to §6-202 of the Education Article, the State Board exercises its independent judgment on the record before it in determining whether to sustain the termination. COMAR 13A.01.05.05(F)(1) and (2). The local board has the burden of proof by a preponderance of the evidence on the termination issue. COMAR 13A.01.05.05(F)(3).

As to the issue of disability discrimination, however, the Appellant bears the burden of proof. *Tangires v. Johns Hopkins Hospital*, 79 F. Supp. 2d 587,594 (D.Md. 2000).

The State Board referred this case to OAH for proposed Findings of Fact and conclusions of law by an ALJ. In such cases, the State Board may affirm, reverse, modify, or remand the ALJ's proposed decision. The State Board's final decision, however, must identify and state reasons for any changes, modifications, or amendments to the proposed decision. *See* Md. Code Ann., State Gov't §10-216.

LEGAL ANALYSIS

The Appellant takes exception to Findings of Fact 7, 8, and 9. We have not adopted those Findings of Fact because they are not material to this case.

Appellant takes exception to Findings of Fact 13, 14, 20, 21, and 27 attempting to refute the facts therein. She provided no citations to the transcript or the record, however, to support her version of the facts. We deny those exceptions.

The ALJ concluded that the Board had met its burden to prove that the Appellant showed incompetence because, *inter alia*, her "classroom was out of control, unrestrained, and not conducive to learning." (ALJ Proposed Decision at 15). In light of the facts stated above, based on the evidence in the record, we agree.

The Appellant argues, however, that the problems in her classroom were related to her attention deficit disorder, that the school system knew of her disability, and it failed to make reasonable accommodations. Several of the Findings of Fact are relevant to that argument. In October 2012, the Appellant told her Assistant Principal that she had AD. (Finding of Fact #4). On November 11, 2012, the Appellant sent a "Reasonable Accommodation Request Form" to the central office asking for a classroom assistant. (Finding of Fact #15)(CEO Ex. 16). She followed up that request on November 16, 2012 to Alison Huey, a school system Labor Relations Specialist. (Finding of Fact #16). On December 5, 2012, Ms. Huey wrote to Appellant's doctor for medical documentation to support the requested accommodation. On January 4, 2013, the Labor Relations Specialist e-mailed the Appellant that she needed medical documentation to support the requested accommodation. (Finding of Fact #22)(CEO Ex. 18). It was not until July 30, 2014, long after she had been removed from the classroom, placed on administrative leave and the termination proceedings had begun, that Appellant's doctor wrote a "To-Whom-It-May-

Concern” note that he had been treating the Appellant for AD since 2009.¹ (Finding of Fact #32). The letter stated:

7/30/14

To Whom it May Concern:

I have been treating Sandra Herrera for Attention Deficit/Hyperactivity Disorder (AD/HD) since 12/4/2009. Ms. Herrera’s challenge is in organization, and she would need an accommodation that would assist her in organizing her classroom and curriculum. I would suggest a professional organizer or AD/HD coach. Additionally, Ms. Herrera needs additional time in preparing for the school assignments. I understand Ms. Herrera’s school assignments have changed each year, with some assignments being given with little time to prepare for the first day of class. Ms. Herrera needs an assignment within her credentials and with a well motivated group of students (to minimize unnecessary classroom distractions). Any improvement plan for Ms. Herrera would need to focus on the accommodation rather than discipline.

Please contact me with any questions.

Sincerely,

Glenn Brynes, MD

(Appellant’s Ex. 5).

Under the Americans with Disabilities Act, the reasonable accommodations process is a two way street. The employee can request an accommodation; the employer can ask for medical documentation to support the requested accommodation; and the employee needs to provide the documentation. In this case, the employer requested medical documentation in December 2012 and January 2013, but the employee did not provide it until July 30, 2014. The Appellant asserts that the school system’s failure to provide accommodations, thereafter, was discriminatory.

To establish a *prima facie* case for “failure to accommodate,” the Appellant needs to produce evidence that she was an individual who had a disability; that her employer had notice of the disability; with reasonable accommodation she could perform the essential functions of her teaching job; and that the school system refused to make such accommodation. *See, e.g., Jacobs v. North Carolina Administrative Office of the Courts*, 780 F.3d. 562, 579 (4th Cir. 2015). Essential functions are the fundamental job duties of the employment position. It does not include marginal functions of the position. 29 C.F.R. §1630.2.

¹ In 2010, when the Appellant was assigned to a different school, she asked for an accommodation. (CEO Ex. 13). There were several requests over several months from Ms. Huey for documentation, but apparently the Appellant did not send documentation. (CEO Exs. 14 & 15).

A. Appellant's *Prima Facie* Case

Appellant's performance in the classroom was far from satisfactory. In our view, she did not perform the essential functions of her job. The Appellant, however, suffers from AD. Her doctor does not state outright in the July 30, 2014 letter that she is "disabled," but he does imply so and he connects her disability to her problems managing her classroom. We will accept, therefore, that the Appellant has established that she has a disability.

Her doctor suggested the following accommodations: a professional organizer or an AD/HD coach; additional time to prepare assignments; and assignments "within her credentials with a well motivated group of students." Whether those accommodations would be considered reasonable or would have helped the Appellant perform satisfactorily in the classroom remains an open question.

In the usual case, once an employer has sufficient documentation of a disability and has received a request for a reasonable accommodation, the Americans with Disabilities Act requires the employer to initiate an interactive process with the employee to determine what, if any, reasonable accommodations can be made. *See* 29 C.F.R. app. §1630.9. ("Once an individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the individual with a disability.").

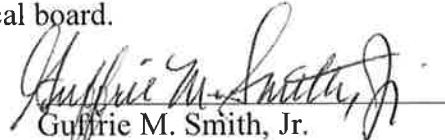
Here, the employer did not initiate the "interactive process" after receiving the July 30, 2014 letter. Failure to initiate an interactive process is not an independent basis for liability under the Americans with Disabilities Act, however. *See Ozlowski v. Henderson*, 237 F.3d 837, 840 (7th Cir. 2001). An employee still must present evidence that she is "qualified individual with a disability" and that a reasonable accommodation would have allowed her to perform the essential functions of her job. *Jacobs v. North Carolina Administrative Office of the Courts*, 780 F.3d at 580; *Wilson v. Dollar General Corp.*, 717 F.3d 337,345 (4th Cir. 2013).

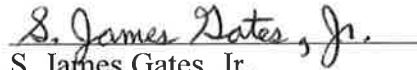
The reasonable accommodation inquiry proceeds in two steps. "First, was the specific accommodation requested...reasonable? Second, had the [school system] granted the accommodation, could [the Appellant] perform the essential functions of the position?" *Wilson v. Dollar General Corp.*, 717 F.3d at 345.

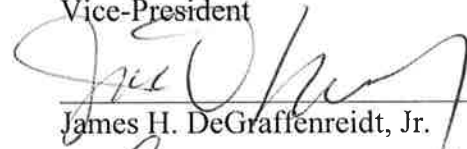
The Appellant strongly believes, and has argued in her Exceptions and to the ALJ, that if her AD had been reasonably accommodated she would have been able to perform the essential functions of her job. (*See* Appellant's Exceptions at 5-7; Appellant's Post Hearing Memorandum 1-3.) Yet, she cites no evidence or expert testimony that, with the accommodations her doctor requested after she was removed from the classroom and placed on administrative leave, she could perform the essential functions of her job as a classroom teacher. Without such evidence her arguments are only conjecture. She cannot meet the burden of proof in her *prima facie* case that she was an otherwise qualified person with a disability. 42 U.S.C. §12112(b)(5)(A). Thus, she cannot show that her termination was discriminatory.

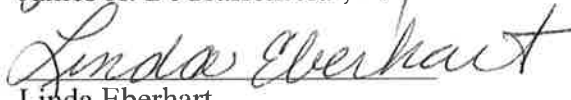
CONCLUSION

For all the reasons cited herein, we adopt the decision of the ALJ, excluding Findings of Fact 7, 8, and 9, and affirm the decision of the local board.


Guffrie M. Smith, Jr.
President


S. James Gates, Jr.
Vice-President

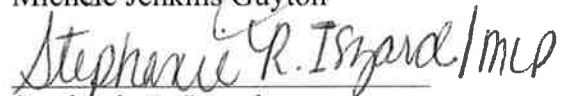

James H. DeGraffenreidt, Jr.

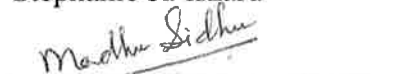

Linda Eberhart
Absent

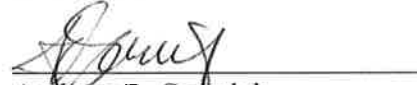
Chester E. Finn, Jr.
Absent

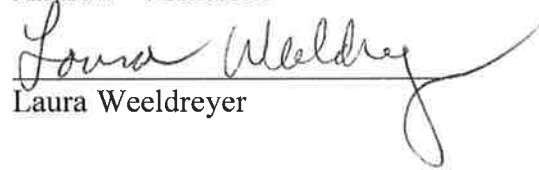
Larry Giammo


Michele Jenkins Guyton


Stephanie R. Iszard


Madhu Sidhu


Andrew R. Smarick


Laura Weeldreyer

March 22, 2016

SANDRA K. HERRERA,

APPELLANT

v.

BALTIMORE CITY BOARD OF

SCHOOL COMMISSIONERS

* BEFORE WILLIAM SOMERVILLE,

* AN ADMINISTRATIVE LAW JUDGE

* OF THE MARYLAND OFFICE OF

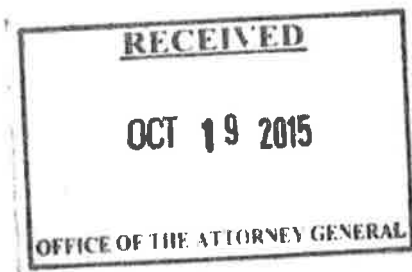
* ADMINISTRATIVE HEARINGS

* OAH CASE NO.: MSDE-BE-01-15-10617

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
PROPOSED ORDER



STATEMENT OF THE CASE

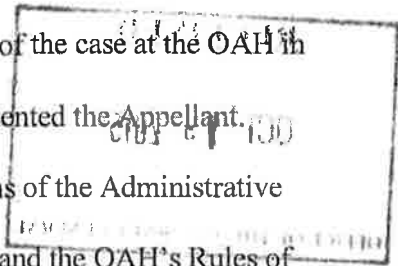
On or before October 21, 2013, Tisha Edwards, the Baltimore City Public Schools' (BCPS) Interim Chief Executive Officer (CEO), recommended in a formal Statement of Charges document to the Baltimore City Board of School Commissioners (Board) that the Appellant's employment be terminated based on "incompetence." At that time, the Appellant was placed on "a status of suspension without pay effective as of October 21, 2013, pending subsequent action by the Board." (CEO Ex. 22.) Thereafter, the Appellant filed a request for a hearing to challenge that determination before a Hearing Examiner appointed by BCPS. On September 30, 2014, a Hearing Examiner conducted an evidentiary hearing. Eilene Brown, Associate Counsel for the Board, represented the Board. Donna M.B. King, Esquire, represented the Appellant. On December 8, 2014, the Hearing Examiner recommended to the Board that it affirm the termination. On February 10, 2015, the Board voted to affirm the Hearing Examiner's recommendation; the Board issued a formal Order to that effect on February 20, 2015.

On or about March 10, 2015, the Appellant noted an appeal to the Maryland State Board of Education (MSBE). The MSBE referred the case to the Office of Administrative Hearings (OAH) to conduct another hearing, in accordance with section 6-202 of the Education Article of the Maryland Annotated Code. By regulation, the Administrative Law Judge is to submit to the MSBE “a proposed decision containing findings of fact, conclusions of law, and recommendations.” Code of Maryland Regulations (COMAR) 13A.01.05.07E.

On May 8, 2015, I conducted a Prehearing Conference by telephone.

On June 29, 2015, I conducted a “*de novo*” hearing on the merits of the case at the OAH in Hunt Valley. Ms. Brown represented the Board and the Ms. King represented the Appellant.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the procedural regulations for appeals to the State Board, and the OAH’s Rules of Procedure. Md. Code Ann., State Gov’t §§ 10-201 through 10-226 (2014); COMAR 13A.01.05; COMAR 28.02.01.



ISSUES

- 1) Whether the Board properly terminated the Appellant for those reasons set forth in its notice of action, pursuant to Md. Code Ann., Educ. §6-202(a)(1)?
- 2) Whether the Board improperly denied a required accommodation, such that termination was premature or improper in this case?

SUMMARY OF THE EVIDENCE

Exhibits

The parties offered as “Joint Exhibit 1” a two-and-a-half-inch thick packet of documents containing the following:

- Transcript from the hearing below
- Hearing Examiner’s Decision

- Order of the Board, February 20, 2015
- CEO's Exhibits 1 through 22 from the hearing below (more fully described and set forth in pages 3 and 4 of the Hearing Examiner's Decision)
- Appellant's Exhibits 1 through 6 -- excluding 5 -- from the hearing below (more fully described and set forth in pages 3 and 4 of the Hearing Examiner's Decision)
- Hearing Examiner's Exhibit 1 (another copy of the transcript)

The Appellant offered as "Appellant's Exhibit 5," a note dated July 30, 2014, which I admitted into evidence.

Testimony

The Appellant offered testimony in her case.

FINDINGS OF FACT

Upon considering demeanor evidence, testimony, and other evidence, I find the following facts by a preponderance of the evidence:

1. At all times relevant, the Appellant was a "certificated teacher" employed by the Board.
2. From 1978 until 1999, the Appellant worked as a teacher in Texas.
3. In 1999, the Appellant was diagnosed with ADHD or ADD¹, an attention deficit disorder; she admits that her weaknesses involve scheduling and organization.
4. In recent years, the Appellant has been taking ADD medicines and antidepressants in relatively strong doses.
5. Around 2007, or so, the Appellant began working as a teacher for the Board.
6. While working as a teacher for the Board, the Appellant was often moved to different schools at the end of the school year; she taught science courses.

¹ ADD means Attention Deficit Disorder. The Appellant testified, as a layman, that she had ADD and she described what she believed to be symptoms of the disorder. She also used the term "ADHD" or Attention Deficit Hyperactivity Disorder interchangeably with ADD.

7. During school year 2009-2010, on December 4, 2009, the Appellant recognized that she was having difficulty in her teaching duties while assigned to the Friendship Academy. Her Annual Evaluation was less than satisfactory. (Tr. 234.) She sent a request to Allyson Huey, Labor Relations specialist with the school system, for accommodations from the school system. The Appellant, however, did not follow through with the request process.
8. On April 27, 2010, the Appellant withdrew her request for accommodations expressing that the point was “moot” because she had been transferred from the school. (CEO Ex. 14.)
9. The Appellant taught at Franklin Square School during the 2011-12 school year. Her Annual Evaluation there was less than satisfactory. (Tr. 234.)
10. During the summer of 2012, the Appellant did not know to which school she would be assigned.
11. On a Sunday afternoon, two days before the 2012-13 school year started for the students, the Appellant received a telephone call assigning her to Roland Park Middle School, to teach a seventh-grade general science course.
12. On the Tuesday of that week, the day on which the students were to arrive, she went to an administrator at the school and mentioned that she had ADD. She told him that she would do her best but that “these things had been an issue for the last three or four years.” (Tr. 234.) She then asked if she could start on the next day. She also asked if the long-term substitute teacher in her science class could remain in her class for an extra week. Her requests were denied.
13. The Appellant took steps to improve, or to smooth, her transition to the school. She asked the administration for, and received, a copy of a year book so that she could learn students’ names. She asked for certain cabinets in the classroom to be “re-keyed” in order to keep

students out of the cabinets. (That request was denied based upon expense.) She noticed that there was a “scan-tron” machine at the school so she bought “scan-tron” cards to expedite grading tests or quizzes. (Soon thereafter, the “scan-tron” machine disappeared from the school.) She asked a school counselor to speak with some of her students in one disruptive class. (That request was granted.) From the beginning of the school year, however, the Appellant had learning environment problems. (Appellant’s Ex. 3 and 6.)

14. In October 2012, the Appellant disclosed to the Assistant Principal that she had ADD. The Assistant Principal asked how he could help her and she said that she did not know.
15. On November 11, 2012, the Appellant faxed to the central office of the school system a “Reasonable Accommodation Request Form.” The Appellant asked for “a classroom assistant to enhance my organization and timeliness, thereby allowing me to improve my classroom management” (CEO Ex. 16.)
16. On November 16, 2012, the Appellant requested by email message, an accommodation through Allyson Huey, a Labor Relations specialist with the school system. The Appellant asked for a classroom aide to help with classroom organization and classroom management.
17. On some undisclosed date before December 1, 2012, the Assistant Principal did a formal observation of the Appellant teaching a class. During that observation period, the Assistant Principal noted that the Appellant failed to introduce a lesson objective and revisit that objective. The Assistant Principal noted that the Appellant did not check to determine if the students understood the material that was presented. The Assistant Principal observed students who were “off task,” throwing paper stars, talking constantly, and walking around the classroom. The Assistant Principal did not see any of the “positive behavior system” -- a discipline system -- being implemented in the classroom. Some students were idle and

did not appear to know, or choose to implement, any classroom routines. The classroom itself was cluttered. The Appellant was yelling over the din. The Assistant Principal observed many of the same behaviors when the next class entered the room.

18. At some point after the formal observation, but before a “Professional Improvement Plan” (PIP) was established and implemented, the Assistant Principal and the Appellant met, discussed a plan, and jointly drafted terms of an improvement plan.
19. On December 5, 2012, the Labor Relations specialist with the school system wrote to the Appellant’s doctor asking for medical documentation to support the Appellant’s request for an accommodation. (CEO Ex. 17.)
20. The Appellant’s physician refused to send the Labor Relations specialist documentation regarding the Appellant’s condition or conditions. When notified of the refusal, the Appellant did not go to another doctor for documentation.
21. On January 2, 2013, the Appellant was placed on the PIP. The terms of the plan caused the Appellant to have to be more detail-oriented and more organized, among other things. The plan called for the Appellant to take certain actions to enhance student cooperation and reduce noise levels, to improve student behavior, to improve student redirection, to de-escalate conflict in the classroom, to improve communication with parents, to improve classroom management, to clarify for students daily lesson objectives (by posting them on the board), to reduce the frequency of students leaving their assigned seats, and to maintain an accurate grade book. (CEO Ex. 2.) The Appellant knew what she needed to do to satisfy the terms of the PIP, but she “couldn’t get there.” (Testimony of the Appellant.)
22. On January 4, 2013, the Labor Relations specialist at the school system sent an email message to the Appellant explaining that she needed documentation from the Appellant’s

doctor in order to “complete my review.” She also asked if the accommodation request was for a full-time or part-time classroom aide.

23. On January 10, 2013, an administrator did an “informal observation” of the Appellant teaching a class. The observer saw students shouting out, students not seated, and students not focused on the presentation. As a result of the informal observation, the administrator suggested that the classroom environment be remedied by desks being rearranged into small groups, “readiness” being reinforced, the classroom being organized and tidied, and the students being engaged with visual aid and hands-on activities. (CEO Ex. 3.)
24. After January 10, 2013, but before January 15, 2013, the Appellant was given her mid-year evaluation. Of the four “performance domains” of evaluation, she was found to be “satisfactory” on three and “unsatisfactory” in the “Learning Environment” domain. A disorganized and disorderly classroom environment was a major reason for the unsatisfactory evaluation. (CEO Ex. 6.)
25. On or about March 1, 2013, the Appellant and an Assistant Principal reviewed the PIP and the Appellant was continued on the plan.
26. On April 12, 2013, another Assistant Principal did a formal observation of the Appellant teaching a class. He accurately observed the following: Students were talking and not focused, the Appellant had to scream to momentarily gain the student’s attention, and at times the clamor of the students was so loud that the observer could not determine what the Appellant was talking about. The observer accurately concluded that the Appellant had established low behavioral expectations in the classroom and student misbehavior caused significant interruption in learning. (CEO Ex. 7.)
27. On April 29, 2013, the Appellant was given her Annual Evaluation by the Principal. She was given a score of 60 out of 100 possible points. She was scored as satisfactory -- 18

points -- in three of four "performance domains" of evaluation. Those were her planning and preparation, her instruction/instructional support, and her professional responsibilities. She was scored as unsatisfactory -- 6 points -- in her learning environment. Accurate comments on the learning environment "performance domain" section of the evaluation document were that the classroom was disorganized and out of order (CEO Ex. 9.), materials were misplaced or not available, students were regularly removed for misbehavior, the Appellant was unable to manage classroom behavior and unable to implement a behavior management plan, and the Appellant was "unable to reinforce high expectations for all students with regard to achievement and behavior." (CEO Ex. 8, p. 1.) Other criticisms were that lesson objectives were not posted on the board, the Appellant did not maintain a grade book that is consistent with professional standards, and the Appellant has had to be reminded on several occasions to pick up current individual education plans for some of her students who had educational disabilities. (CEO Ex. 8, p. 2.) On that date, the Principal advised the Appellant that he would recommend to the Board to terminate the Appellant.

28. On September 12, 2013, the Appellant appeared at a pre-termination hearing. The Appellant had proper notice and an opportunity to be heard about the recommendation to terminate her employment.
29. On September 13, 2013, the Appellant filed a complaint, case no. 531-2013-01440, with the Maryland Commission on Civil Rights alleging that she was not given a reasonable accommodation under the Americans with Disabilities Act.
30. Sometime after the pre-termination hearing, the Board employee who conducted the informal pre-termination hearing determined that it was appropriate to "move forward with

the recommendation to” terminate the Appellant. (Tr. 214.) The Board employee began drafting a “Statement of Charges” document to that effect.

31. On October 21, 2013, an interim Chief Executive Officer of the Board issued the Statement of Charges document recommending that the Board terminate the Appellant based on “incompetence.”
32. On July 30, 2014, a physician wrote a “To-Whom-It-May-Concern” note stating that he had been treating the Appellant for Attention Deficit Hyperactivity Disorder since the end of 2009.
33. On August 14, 2014, the Appellant’s complaint initially filed with the Maryland Commission on Civil Rights, case no. 531-2013-01440, was dismissed. After the federal Equal Employment Opportunity Commission investigated, the federal Commission determined that no statutory violation was established. (CEO Ex. 20.)
34. After October 21, 2013, but sometime before September 30, 2014, the Appellant challenged the recommendation for termination by asking for a hearing before a Hearing Examiner appointed by the Board.
35. On September 30, 2014, the Hearing Examiner held a hearing at which many witnesses, including the Appellant, testified.
36. On December 8, 2014, the Hearing Examiner affirmed the recommendation to terminate the Appellant.
37. On February 10, 2015, the Board voted to terminate or dismiss the Appellant.
38. Thereafter, the Appellant filed with the MSBE a request for hearing to challenge the Board’s determination.
39. At all relevant times, the Board had a written policy by which it evaluated teachers and remedied or sanctioned unsatisfactory performance. (CEO Ex. 1.)

DISCUSSION

Burdens

In this matter, with regard to its case in chief, the Board has the burdens of production and persuasion; the standard of proof is by a preponderance of the evidence. COMAR 13A.01.05.05F(3). With regard to a preponderance of the evidence, a trier of fact can properly accept all, some, or none of the evidence offered. *Sifrit v. State*, 383 Md. 116, 135 (2004); *Edsall v. Huffaker*, 159 Md. App. 337, 341-43 (2004).

Arguments of the Parties

The Board argues that it has offered credible evidence from which a trier of fact can determine that the Appellant was “incompetent” under the applicable statute with regard to her teaching skills and duties. The Board also argues that there was no failure to accommodate a disability under the Americans with Disabilities Act (ADA).

The Appellant argues what is in essence an affirmative defense. She argues that if her ADD had been reasonably accommodated, then she would not have been determined to be incompetent under the evaluation instrument used by the Board.

Analysis

1.) peculiar process

The process in this type of administrative case is peculiar. When a local board notifies a certificated employee² of a pending sanction, the employee is entitled to challenge the sanction in a hearing before a local board’s hearing examiner, and then, if dissatisfied, the employee can challenge the local board’s determination, again, in a hearing *de novo*, through the Maryland State

² “Certificated employee” is merely an awkward way to express a school employee who holds, or who is eligible to hold, an “educator certificate” issued by the MSDE. *See* Md. Code Ann., Educ. §6-101 (must be eligible); §6-101.1 (“educator certificate”); §6-401(e) (“certificated professional individual”); §6-501(g) (“non-certificated individual”).

Board of Education. Md. Code Ann., Educ. §6-202(a) (Supp. 2015); COMAR 13A.01.05.05F. The statute addresses both substantive law and procedure, as follows:

(1) On the recommendation of the county superintendent, a county board may suspend or dismiss a teacher, principal, supervisor, assistant superintendent, or other professional assistant for:

- (i) Immorality;
- (ii) Misconduct in office, including knowingly failing to report suspected child abuse in violation of § 5-704 of the Family Law Article;
- (iii) Insubordination;
- (iv) Incompetency; or
- (v) Willful neglect of duty.

(2) Before removing an individual, the county board shall send the individual a copy of the charges against him and give him an opportunity within 10 days to request a hearing.

(3) If the individual requests a hearing within the 10-day period:

- (i) The county board promptly shall hold a hearing, but a hearing may not be set within 10 days after the county board sends the individual a notice of the hearing; and
- (ii) The individual shall have an opportunity to be heard before the county board, in person or by counsel, and to bring witnesses to the hearing.

(4) The individual may appeal from the decision of the county board to the State Board.

Md. Code Ann., Educ. §6-202(a).

In an appeal of a termination or dismissal of a certificated employee pursuant to Education Article section 6-202, the Maryland State Department of Education's (MSDE) agency regulations provide the following:

- (1) The standard of review for certificated employee suspension or dismissal actions shall be **de novo** as defined in F(2) of this regulation.

- (2) The State Board shall exercise its independent judgment **on the record** before it in determining whether to sustain the suspension or dismissal of a certificated employee.
- (3) The local board has the burden of proof by a preponderance of the evidence.
- (4) The State Board, in its discretion, may modify a penalty.

COMAR 13A.01.05.05F (emphasis added).

“*De novo*” review and review “on the record” are inconsistent legal concepts. *See Board of Educ. of Mont. Co. v. Spradlin*, 161 Md. App. 155, 183 (2005) (the Court addressed *de novo* re-litigation in which a fact finder is free to interpret evidence as if the prior fact finder had not previously determined the facts, as opposed to review of a case “on the record” in which facts are essentially set or fully determined by the adjudicator below). Although the above-referenced regulation might cause mild cognitive dissonance to law students, lawyers, and judges who read it, I can reconcile the inconsistent concepts, to some extent, under Maryland’s Administrative Procedure Act. I interpret the above-referenced agency regulation to mean that I am to hear the matter anew, consider the cold transcribed record below as if it were written testimony, Md. Code Ann., State Gov’t §10-206 (promulgation of procedural regulations); COMAR 28.02.01.21E (pre-filed written testimony), and then exercise my independent judgment, independent credibility determinations, and independent discretion to determine facts, and ultimately to recommend a decision on the issues.

2.) “incompetency”

In the instant case, the narrow basis for the Board’s dismissal action under section 6-202(a)(1) of the Education Article is “incompetency.” Nowhere in the statutory scheme, or in any of the MSDE’s agency regulations, is that term defined.

Some pre-existing agency policy of the MSBE touches on the concept of “incompetency.” See Md. Code Ann., State Gov’t §10-214(b) (pre-existing policy). Competency and incompetency of a teacher has been the subject of a few written opinions issued by the MSBE over the years.

In 1976, the MSBE issued *Crawford v. Bd. of Ed. of Chas. Co.*, 1 MSBE Ops. 503 (1976). In that case the MSBE, citing 4 A.L.R. 3d 1090 (1965), determined that teacher incompetence could be shown by a lack of requisite knowledge to teach, or by the inability to impart knowledge to students. *Id.* 517. A few years later, the MSBE issued *Lum v. Wash. Co. Bd. of Ed.*, 3 MSBE Ops. 403 (1984) in which the same test for incompetency was applied.

In 1985, the MSBE issued *Avery v. Balto. City Bd. of Ed.*, 4 MSBE Ops. 10 (1985) in which a different test was applied. Without citation to law or precedent, the MSBE coined the “serious teaching deficiencies” doctrine. “Serious teaching deficiencies” tended to show incompetency in that case. Several years later, the MSBE issued *Shiflett v. Carroll Co. Bd. of Ed.*, 6 MSBE Ops. 617 (1993) in which the MSBE again applied the vague “serious teaching deficiencies” test to determine incompetence. *Id.* 624.

More recently,³ in *Mua v. Prince George’s Co. Bd. of Ed.*, MSBE Op. No. 13-34 (2013) the MSBE applied, without citation to authority, what sounds like a dictionary definition of incompetence. The MSBE wrote, “Incompetence is when an employee is lacking knowledge, skills, and ability or failing to adequately perform the duties of an assigned position.” *Id.* 15.

³ In *Prasad v. Prince George’s Co. Bd. of Ed.*, MSBE Op. No. 14-15 (2014) and in *Crump v. Mont. Co. Bd. of Ed.*, MSBE Op. No. 10-29 (2010) the MSBE found incompetence on the facts of the case, but did not address the definition of incompetence.

The Maryland courts have spoken⁴ on the definition of teacher incompetence. Many absences, alone, does not constitute incompetence. *Toland v. State Bd. of Ed.*, 35 Md. App. 389, 398 (1977). The Court in *Bd. of Ed. of Chas. Co. v. Crawford*, 284 Md. 245, 259 (1979) applied existing employment contract law, writing, “Implicit in any employment contract is an implied promise on the part of an employee to perform his duties in a workmanlike manner. In the case of a teacher this must mean in accordance with established professional standards.”

In *Bd. of School Commissioners of Balto. City v. James*, 96 Md. App. 401(1993), the Court acknowledged that determining teacher incompetence was “necessarily qualitative in nature” and quoting *Clark v. Whiting*, 607 F. 2d 634, 639 (4th Cir. 1979) wrote “teacher's competence and qualifications ... are by their very nature matters calling for highly subjective determinations, determinations which do not lend themselves to precise qualifications and are not susceptible to mechanical measurement or the use of standardized tests.”⁵

Section 6-202(c)(3) of the Education Article authorizes local school boards to establish their own “performance evaluation criteria” to measure a teacher’s performance⁶ and to determine competency. *See also* COMAR 13A.07.04.02.02A(1). In the instant case, the small portion of the

⁴ Courts around the country have also weighed in on “incompetence” in various trades and professions. *Wight v. State Board of Engineering Contractors*, 250 N.W.2d 412, 414 (1977) (dictionary definition of incompetence as “lack of ability, legal qualification, or fitness to discharge the required duty”); *Simmons v. Board of Examiners for Land Surveyors*, 213 Neb. 259, 261; 329 N.W.2d 92, 94 (1983) (Incompetence is a lack of proficiency and skill to perform a professional function); *Atty. Griev. Comm’n of Md. v. Guida*, 391 Md. 33, 54(2006) (elements of competent representation are legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation); *Md. State Funeral Directors Assoc. v. Mears*, 150 Md. 294 (1926)(competency for undertaker’s license shown by merely being “qualified for the work by experience”); *Moore v. Guthrie Hosp. Inc.*, 403 F. 2d 366, 368 (1968)(lack of competency of a physician cannot be inferred from failure to effect a cure, alone, because a physician can do all that is expected of a competent physician without achieving a successful result).

⁵ This description resonates with Justice Stewart’s famous comment on defining hard core pornography, “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . .” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)(concurring opinion).

⁶ Local school systems differ. Competency and skills in establishing and maintaining a satisfactory learning environment in a large, urban, public school, for instance, might look very different than competency and skills in establishing a productive learning environment in a small, rural, schoolhouse or in a non-public school. *See Shilkret v. Annapolis Emerg. Hosp. Assn.*, 276 Md. 187, 200 (1975) (in which the Court recognized some differences between urban and rural physician practice settings and adopted a standard of care expected of a reasonably competent practitioner in the same class and acting under similar circumstances).

Performance-Based Evaluation Handbook that the Board offered into evidence gives some insight into the Board's competency standards. (CEO Ex. 1.) The Board evaluates on the four "domains" noted above and a teacher can be rated as proficient, satisfactory, or unsatisfactory in each of the "domains." With regard to the overall rating of the evaluation, "unsatisfactory" is defined as "overall performance does not meet a sufficient number of the performance expectations identified in the four domains. The combined points for the four domains total 69 or below. Assistance and improvement are required in order to justify continued employment." (CEO Ex. 1, p. 8.) The evaluation forms (CEO Ex. 6 and 8.) and PIP (CEO Ex. 2.) give additional insight into the standards adopted by the Board. The evaluation form, for instance, under the "learning environment domain" contemplates that a teacher will establish classroom rules and standards and enforce those, will implement classroom management procedures, will present an organized, productive, safe, and orderly classroom environment, will establish an atmosphere of mutual respect, will express high expectations regarding attendance, achievement, and behavior, will present "a classroom culture that can improve use of academic learning time,"⁷ and will improve organization of classroom space to best promote learning. (CEO Ex. 6.)

In the instant case, I conclude that the Board has demonstrated that the Appellant's classroom learning environment was entirely unsatisfactory and, with regard to that domain of teaching, the Appellant showed incompetence. The Appellant's classroom was out of control, unrestrained, and not conducive to learning. Physically, it was a disorganized mess. Intellectually or scholastically, the environment was without structure. (Findings of Fact 17, 21, 23, 26, and 27.) The Appellant was aware of her organization and management problems. (Findings of Fact 15 and 18.) One witness credibly opined that a major component of being an effective teacher is organization. (Tr. 112.) With regard to establishing and maintaining an orderly learning

⁷ I merely quoted this "expectation" from the form because I do not know what those words are supposed to mean, and no witness explained them.

environment in this seventh-grade science class, the Appellant demonstrated an inability to impart knowledge, *Crawford v. Bd. of Ed of Chas. Co.*, 1 MSBE Ops. 503 (1976), demonstrated a serious teaching deficiency, *Avery v. Balto. Co. Bd. of Ed.*, 4 MSBE Ops. 10 (1985), lacked skills and ability to perform the duties in accordance with established professional standards, *Bd. of Ed. of Chas. Co. v. Crawford*, 284 Md. 245, 259 (1979), and did not meet performance standards set forth in the Board's policy. *Performance-Based Evaluation Handbook* (2003). (CEO Ex. 1.) The Board has met its burdens to show incompetency in the "learning environment domain."

3.) reasonable accommodation

The Appellant argues that under the ADA, 42 U.S.C.A. §12112, because there was a failure of the Board to accommodate her disability posed by her ADD or ADHD, she should not have been deemed to be incompetent under Md. Code Ann., Educ. §6-202(a) (Supp. 2015). She argues that if she had been properly accommodated, then her unsatisfactory marks in the "learning environment domain" would probably not have occurred. The Board argues that there was no failure to accommodate.

The rule set forth in 42 U.S.C.A. §12112 is as follows:

(a) General rule

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

The federal statute also defines "discriminate" as follows:

(b) Construction

As used in subsection (a) of this section, the term "discriminate against a qualified individual on the basis of disability" includes—

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the

accommodation would impose an undue hardship on the operation of the business of such covered entity;

42 U.S.C.A. §12112.

Recently, in *Smith v. Strayer U. Corp.*, 79 F. Supp. 3d 591, 599 (E.D. Va. 2015), the federal District Court wrote:

To establish a *prima facie* case of failure to accommodate a disability under the ADA, Plaintiff must establish: (1) she was an individual who had a disability within the meaning of the statute; (2) Defendant had notice of her disability; (3) with reasonable accommodation she could perform the essential functions of the position; and (4) Defendant refused to make such accommodations. *Wilson v. Dollar General Corp.*, 717 F.3d 337, 345 (4th Cir.2013) (quoting *Rhoads v. Fed. Deposit Ins. Corp.*, 257 F.3d 373, 387 n. 11 (4th Cir.2001) (quoting *Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 6 (2d Cir.1999)).

See also Adkins v. Peninsula Regional Med. Center, 224 Md. App. 115, 158 (2015)

(regarding Maryland's similar statute).

In the instant case, the Appellant has not shown several of those elements in her challenge to the Board's determination to dismiss her. Although she eventually proved that she was being treated for ADHD, she did not prove with credible, expert opinion evidence that her ADHD caused a disability,⁸ or that if it did cause a disability, how it would impair her with regard to her teaching skills and ability. At best, the Appellant offered bald allegations. Although the Appellant suggested in a form to the Board that she was seeking some kind of an accommodation, without documentation from her doctor to help confirm a disability, the Board was on "inquiry notice" at best. (Findings of Fact 15 and 16.) The Board moved forward with the interactive accommodation process, *see Hendricks-Robinson v. Excel Corp.*, 154 F. 3d 685, 700, (7th Cir. 1998), by attempting to verify the Appellant's condition. (Findings of Fact 19 and 20.)

⁸ The term "disability" means, with respect to an individual--(A) a physical or mental impairment that substantially limits one or more major life activities of such individual 42 U.S.C.A. §12102.

The Appellant did not show that with a reasonable accommodation she could perform the essential functions of the position, especially with regard to the “learning environment domain.”⁹ The Appellant has the burdens to specify what reasonable accommodation would help, *Ferry v. Roosevelt Bank*, 883 F. Supp. 435, 441-42 (1995); *Puckett v. Bd. of Trustees*, 17 F. Supp. 3d 1339, 1343 (N.D. Ga. 2014), and the Appellant has the burden to show that a reasonable accommodation existed. *Mays v. Principi*, 301 F.3d 866, 870 (7th Cir. 2002). She did not make it clear to the Board that she wanted a full-time, or a part-time, organizing aide in the classroom. Her cryptic suggestion sounded as if she wanted a teacher’s aide in the classroom. (Finding of Fact 15.) At the hearing before me, however, she suggested that she wanted an “organizing coach.” She did not prove with credible opinion evidence that an “organization coach” would remedy the deficits she alleges in the “learning environment domain” or that bringing in someone from “Cheryl’s Organizing Concepts, LLC” outside of the school system would be reasonable, in light of the need for background checks and student safety, among other things, under the circumstances. (Appellant’s Ex. 6.)

Finally, the Appellant has not shown that the Board at any time refused to make a reasonable accommodation. *Strayer U. Corp.*, 79 F. Supp. 3d 591, 599. In January 2013, the Labor Relations specialist of the school system contacted the Appellant and asked for the documentation to help her complete her review of the request. She also asked for clarification of the suggested accommodation. (Finding of Fact 22.) There was no showing of a response by the Appellant until September of that year when the Appellant filed a case with Maryland’s Commission on Civil Rights alleging that she had been denied an accommodation under the ADA.¹⁰ (Finding of Fact 29.)

⁹ In addition, the basis for the Board’s action has not been shown to be a mere pretext. *Sampson v. Methacton Sch. Dist.*, 88 F. Supp. 3d 422 (E.D. Pa. 2015).

¹⁰ That Maryland agency transferred the matter to the federal Equal Employment Opportunity Commission which investigated the case and dismissed it, finding that it could not conclude that a statute was violated. (Finding of Fact 33.)

The Appellant's position is not persuasive. She has not met her burdens.

CONCLUSIONS OF LAW

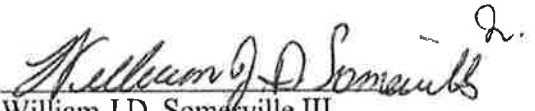
Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Board has shown that the Appellant was incompetent with regard to the "learning environment domain." Md. Code Ann., Educ. § 6-202(a) (Supp. 2015). I further conclude, as a matter of law, that the Appellant has not shown a violation of the ADA. *Smith v. Strayer U. Corp.*, 79 F. Supp. 3d 591, 599 (E.D. Va. 2015).

PROPOSED ORDER

I **PROPOSE** that the Maryland State Board of Education

ORDER that decision of the Baltimore City Board of School Commissioners terminating the Appellant for incompetence, as that term is used in the statute, Md. Code Ann., Educ. §6-202(a)(1), be, and is hereby, **UPHELD**.

October 13, 2015
Date Decision mailed


William J.D. Somerville III
Administrative Law Judge

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NOTICE OF RIGHT TO FILE EXCEPTIONS

Any party adversely affected by this Proposed Decision has the right to file written exceptions within fifteen days of receipt of the decision; parties may file written responses to the exceptions within fifteen days of receipt of the exceptions. Both the exceptions and the responses shall be filed with the Maryland State Department of Education, c/o Sheila Cox, Maryland State Board of Education, 200 West Baltimore Street, Baltimore, Maryland 21201-2595, with a copy to the other party or parties. COMAR 13A.01.05.07F. The Office of Administrative Hearings is not a party to any review process.

Copies Mailed to:

Sandra K. Herrera
c/o Donna M.B. King, Esquire
309 W. Pennsylvania Avenue
Towson, MD 21204

Donna M.B. King, Esquire
309 W. Pennsylvania Avenue
Towson, MD 21204

Eilene Brown, Associate Board Counsel
Office of Legal Counsel
Baltimore City Public Schools
200 E. North Avenue, Suite 208
Baltimore, MD 21202