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Testimony Before the District of Columbia Council
Committee of the Whole
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Public Hearing:
Bill 25-0317 – Extended Students’ Right to Home or Hospital Instruction
Amendment Act of 2023

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Introduction

Children’s Law Center believes every child should grow up with a strong foundation of family, health and education and live in a world free from poverty, trauma, racism and other forms of oppression. Our more than 100 staff – together with DC children and families, community partners and pro bono attorneys – use the law to solve children’s urgent problems today and improve the systems that will affect their lives tomorrow. Since our founding in 1996, we have reached more than 50,000 children and families directly and multiplied our impact by advocating for city-wide solutions that benefit hundreds of thousands more.

Thank you for the opportunity to testify today regarding B25-0317, the Extended Students’ Right to Home or Hospital Instruction Amendment Act 2023 (the “Act”). Through our medical-legal partnership, Healthy Together, Children’s Law Center represents DC families seeking educational supports to ensure that students with disabilities or other health concerns have access to their education through an appropriate plan that meets their learning needs. Through this case work, we are able to identify systemic concerns that affect students in the District. My testimony today is grounded in the experiences of our attorneys and clients who interact with DC’s education system daily.

Home and hospital instruction (HHI) is a crucial form of education access for students who are unable to attend school in person due to a temporary or intermittent

health condition. Students eligible for HHI may be hospitalized due to a planned medical procedure (e.g., surgery) that requires a long hospital stay or they may have a chronic illness (e.g., sickle cell anemia) that causes them to have repeated, intermittent absences that total more than 10 school days. Such health conditions can cause educational disruptions and a school's "HHI program is designed to promote a participating student's academic progress by allowing the student to stay current with classroom instruction in core subjects, to the greatest extent possible."¹

In 2019, Children's Law Center testified in support of Bill 23-0392, the Students' Right to Home or Hospital Instruction Act.² In that testimony, we highlighted three categories of concerns that we had with the provision on HHI in the District – a lack of transparency, HHI application denials and delays without justification, and a lack of legally enforceable minimum standards governing the quantity and quality of HHI.³ The Council passed the Students' Right to Home or Hospital Instruction Act in December 2020 and it became law in March 2021. The law established basic principles for HHI and required OSSE to promulgate regulations to guide LEAs in their development of HHI programs and policies that followed the statutory timelines and protections. Crucially, the law created an appeals process by which parents could dispute a wrongful denial of HHI by their student's school. Unfortunately, nearly three years since the passage of the law, we continue to see many of the same issues that we outlined in our 2019 testimony.

The proposed legislation we are discussing today – Bill 25-0317, the Extended Students’ Right to Home or Hospital Instruction Amendment Act of 2023 – proposes an important clarification to the definition of “health condition” that, if passed, will ensure pregnant and post-partum students are not denied HHI because the regulations do not explicitly include pregnancy.⁴ Given our case experience supporting students and families applying for HHI, we believe that regulatory ambiguity poses a serious barrier to education access by allowing schools to deny HHI applications despite medical advice to the contrary.

Further, we want to raise to the Committee’s attention several implementation concerns we have seen in the years since the Student’s Right to Home or Hospital Instruction Act of 2020 was passed. We strongly encourage the Committee to address these regulatory and implementation concerns by passing Bill 25-0317 with the additional legislative clarifications outlined in our testimony below. These amendments are necessary to improve DC’s educational offerings for students experiencing serious medical concerns.

OSSE’s Significant Regulatory Process Delays Have Caused Wide-Spread Noncompliance with the Law

Since the passage of the Students’ Right to Home or Hospital Instruction Act of 2020, nearly every phase of the regulatory rollout has been delayed by the Office of the State Superintendent of Education (OSSE). These regulatory delays have meant that the

majority of DC schools were out of compliance with the law for at least a full school year. Some continue to be out of compliance today.

The Students' Right to Home or Hospital Instruction Act of 2020 ("the Act") was passed by the Council on December 1, 2020 and was effective from March 16, 2021.⁵ The Act required that OSSE promulgate regulations to implement the law no later than 120 days after the applicability date of the act.⁶ The law was funded in the FY22 Budget⁷ and, as such, its applicability date would have been October 1, 2021, the start of the fiscal year.⁸ Therefore, OSSE's rulemaking was due no later than January 29, 2022.⁹ Timeliness of these regulations was important to ensure that Local Education Agencies (LEAs) were able to adopt and implement their home and hospital instruction program by the beginning of school year 2022-2023 (SY22-23), as required by the law.¹⁰ However, OSSE did not publish a notice of proposed rulemaking until September 9, 2022.¹¹

As a result, LEAs had no guidance from OSSE as to how to implement the Act prior to the start of SY22-23. Schools were left with two unenviable choices: 1) be out of compliance with the law or, 2) develop and implement a program without guidance that could ultimately have to be discarded and redone if not aligned with OSSE's final rulemaking. Given the strain on school staff since the pandemic, it is not surprising that most LEAs opted to wait for OSSE guidance before investing in creation and implementation of their home and hospital instruction programs.

The regulatory delays continued. After publication of the proposed rulemaking, the public comment period was open for 30 days, closing on October 12, 2022. OSSE received only three comments for review¹², of which Children’s Law Center was one.¹³ However, OSSE did not publish a notice of final rulemaking until May 12, 2023 – eight months after the close of public comment and nearly the end of SY22-23.¹⁴

In June 2023, Children’s Law Center and other advocates met with OSSE regarding the need for clear guidance to LEAs addressing the most common issues that we see in our HHI cases. We specifically highlighted the need for timeliness to ensure that schools would have time to review any guidance and develop their HHI policies with enough time to have them in place for the start of the SY23-24. However, OSSE did not publish their HHIP Guidance and Procedural Manual until August 2023¹⁵, after most LEAs had already begun the new school year. At that time, LEAs were instructed to have their HHI policies submitted to OSSE and published on their website by September 30, 2023.¹⁶ While it took OSSE nearly a year to develop proposed regulations, another eight months to finalize those regulations, and then three more months to publish the relevant guidance documents, they gave LEAs just six weeks (during one of the busiest parts of the school year) to review the guidance and adopt compliant policies.

Given the significant delays from OSSE, it is not surprising that schools have largely been out of compliance with the requirement to have a HHI policy adopted and published on their website. As of this writing (Nov. 28, 2023), we could find only 39 of 70

LEAs that have published an HHI policy on their website. As a result, three years after this Council passed a law to support students with serious health conditions, students across the District continue to face unacceptable barriers to accessing HHI.

Students Continue to Face Persistent Barriers to Accessing Home & Hospital Instruction

Despite three years since the passage of the Act, we have continued to see the same HHI problems that we testified about in 2019 – a lack of transparency, HHI application denials and delays without justification, and a lack of legally enforceable minimum standards governing the quantity and quality of HHI.¹⁷ The most prominent concern in our cases has been schools continuing to second guess the medical opinion of students' doctors. Often this manifests as schools insisting that they need to speak with the medical professional having signed the student's certification of need. When a school cannot get ahold of the doctor, they either delay their decision on the student's application or deny the application altogether.

In a recent case, the school denied our client's HHI application because the school couldn't get ahold of the doctor within the timeline in which the school is required to approve or deny the application for HHI.¹⁸ The school did not claim that anything was missing from the student's application; only that they had additional questions for the doctor. In their denial letter, DCPS claimed that "**the student was determined ineligible**" (emphasis in original) because "speaking with the treating physician who has completed the HHIP Physician Verification form is protocol in determining eligibility for HHIP

services."¹⁹ Further, DCPS's Home and Hospital Instruction Program (HHIP) Parent Guidebook states:

"Once the [HHIP Physician Verification] form is completed and submitted, the HHIP Office will reach out to the treating physician. A determination of eligibility for services will be made within five (5) calendar days once all forms are submitted, and the parent/guardian will be notified of the determination. However, **any delays in speaking with the physician may delay the determination of eligibility** for services."²⁰ (emphasis added).

This protocol violates both the plain text of the law and the Council's intent in passing the Act.

The Students' Right to Home and Hospital Instruction Act of 2020 creates a presumption in favor of the medical certification of need when an LEA is deciding on an application for Home and Hospital Instruction. DC Code § 38-251.03(a)(3) says:

"An LEA may deny an application for home or hospital instruction **only in the event that the application or a medical certification of need is missing or incomplete**. Nothing in this provision shall prohibit an LEA, as part of its review of the application and medical certification, from proposing accommodations to allow the student to remain in school; **provided, that the medical professional signing the medical certification of need shall agree in writing** that such accommodations meet the medical needs of the student and permit in-school instruction" (emphasis added).

This provision makes it clear that an application for HHI can only be denied when part of the application is missing (i.e., not in cases where the school disagrees with the medical certification of need). While this provision allows LEAs to offer accommodations that keep the student in school, it does not permit a school to deny an application for HHI on the grounds that they could not get ahold of the doctor before their decision deadline.

However, we continue to see schools ignore this provision or use the caveat to second guess the medical opinion of a student's doctor.

Before passage of the Act, this section was thoroughly considered and specifically amended by the Committee of the Whole to ensure a careful balance of both the doctor's medical expertise and the school's educational expertise.²¹ In proposing an amendment to this section, Chairman Mendelson argued that this language "makes clear that an LEA can work [with](*sic*) a medical professional and a student's parents to identify the best pathway forward for a student, both medically and academically."²² The intent of this change was not to allow a school to unilaterally deny an HHI application when they disagree with it. As we saw with our client, DCPS has used this caveat language to add an administrative hurdle to their HHI application procedure that is outcome determinative for students.

In our June 2023 meeting with OSSE, advocates raised this concern with the agency and urged them to address this misunderstanding in their guidance to LEAs. Ultimately, OSSE's HHIP manual simply restates the law:

"Upon receipt of a completed application, the LEA will:

"[...]

"4. Issue a denial only if the application or medical certification of need is missing information or otherwise incomplete

"a. A doctor's letter of medical certification is presumed to be accurate and should only be denied if it is missing information."²³

The absence of clear guidance from OSSE allows LEAs to continue misusing the provision of the law to delay or deny HHI for students whose applications meet the plain text

requirements of the law. In our June meeting, OSSE stated that there was little they could do to prevent violations of the HHI law and regulations until an appeal was filed. We disagree with this limited understanding of OSSE's ability to provide proactive guidance. However, given their position, we urge Council to close the relevant regulatory and legislative loopholes currently being used to prevent students with serious medical conditions from accessing their education.

Additional Gaps in the Law Leave Students without Remedies for Education Missed During Procedural Delays

In addition to the abovementioned implementation concerns, we also draw the Council's attention to gaps in the law that undercut its enforcement. First, the law lacks a clear grant of authority to the appeals panel to grant remedies to students upon successful appeal. Second, the law does not clearly empower families to appeal the substance of inadequate HHI implementation plans. We have raised each of these concerns with OSSE. From our conversations with the agency, it is our understanding that they do not feel they are able to make additional regulatory changes without explicit legislative authority.

The Law Must Empower the Appeals Panel to Grant Compensatory Remedies Upon Successful Appeals of Home or Hospital Application Denials

Under the current statutory framework, families are able to appeal the decision to deny their application for HHI. However, in practice, we have found that the appeals panel does not have the authority to grant any sort of compensatory remedy in cases

where they find that the LEA wrongfully denied a student's HHI application. They are able to determine the denial was erroneous and the LEA is required to initiate HHI services within five days of the panel's determination.²⁴ However, there is no express authority for the panel to order that an LEA make up for the HHI missed during the pendency of the appeal. As a result, the educational time lost may not be recoverable by the student.

For a student with a disability as defined by the Individuals with Disabilities Education Act (IDEA), federal law provides due process mechanisms through which a student is able to seek compensatory education for specialized instruction or related services denied by their LEA. When students covered by the IDEA are wrongfully denied HHI, they may be able to seek compensatory remedy through that process. However, this option is only available to students with disabilities as defined by the IDEA. Students who are not eligible for the IDEA due process protections are left without access to compensatory education for educational time missed due to an LEA's wrongful HHI denial.

The Students' Right to Home or Hospital Instruction Act of 2020 covers a broader group of student who have temporary health conditions that may or may not be related to a disability covered by the IDEA. For example, a student may need to undergo surgery that requires a lengthy hospital stay. Or, as envisioned by the bill before the Committee today, a student may need HHI during pregnancy and the post-partum period. These

health conditions would not make a student eligible for the IDEA's due process protections. The lack of compensatory remedy for students denied HHI could allow LEAs effectively deny any instruction to these students.²⁵

Moreover, during the pendency of the HHI appeal, students accumulate unexcused absences, and the appeals panel does not feel that they have the power to order the Local Education Agency (LEA) to correct the student's attendance record. In the meantime, a family may be referred to Court Social Services and the Office of the Attorney General for truancy²⁶ or to the Child and Family Services Agency for educational neglect.²⁷ The family now has to fight another battle to remove these referrals from their record.

According to the Committee Report for B23-0392, the purpose of the law was, among other things, "to promptly support students during their absence of ten or more consecutive or cumulative days due to a health condition to minimize interruption in a student's academic coursework [... ,] to remove unnecessary barriers to instructional services by determining eligibility based on cumulative and consecutive absences, [... and] to offer opportunities for parent recourse in the event that an eligibility determination is denied."²⁸ However, if the appeals panel lacks the authority to order compensatory remedies, the entire purpose of the Act is undermined. Instead, the appeals process can be used to delay or completely deny instruction to students who are eligible for home or hospital instruction. Therefore, we urge the Council to add legislative

language to § 38–251.05 providing express authority to the appeals panel to order compensatory education for students wrongfully denied HHI.

The Law Must Allow Families to Appeal the Substance of Home or Hospital Instruction Implementation Plans

For those families that are able to overcome the administrative burdens and regulatory hurdles and receive and approval for HHI, they still run the risk of receiving an implementation plan that provides *de minimus* instruction. As we testified at the hearing for the Act, “even when students are found eligible, there are no legally enforceable minimum standards governing the quantity and quality of HHI. Too often students receive too little HHI and end up falling far behind their peers.”²⁹ We see students receive HHI implementation plans that propose only two or three hours of direct instruction per week. This cannot be an acceptable replacement for a full week of school time. At the hearing for B23-0392, we proposed “that the bill require LEAs to provide at least 5 hours per week of direct home or hospital instruction for students in Kindergarten through 5th grade, and at least 2 ½ hours per week per core subject for students in grades 6 through 12. This would bring DC in line with the minimum HHI standards in school jurisdictions in other states.”³⁰

Since that hearing, schools in DC and elsewhere have learned so much about how to deliver instruction to students who are not able to physically present in the classroom. After the broad application of virtual learning throughout the pandemic, it is unacceptable to continue providing *de minimus* instruction to students eligible for HHI.

We urge the Council to revisit our original proposal for minimum education standards for students receiving HHI. Additionally, we hope that LEAs will capitalize on the flexibility and adaptability learned during virtual learning to ensure that students requiring HHI are receiving meaningful access to their education.

Our experience supporting families through this process has taught us that the ability to appeal an application denial is often the only way to access instruction. Given this landscape, it will be crucial that any minimum standards set for HHI must be accompanied by the ability to appeal the substance of implementation plans. Under the current regulations, families can only appeal the procedural decision to deny an HHI application. This means that an LEA can propose a plan that offers only *de minimus* instruction time and families are without recourse. We raised this concern to OSSE through our public comment in response to their Notice of Proposed Rulemaking,³¹ but OSSE declined to amend the regulations to allow for substantive appeals.

The Students' Right to Home or Hospital Instruction Act of 2020 states: "A parent has a right to appeal the approval or denial decision made by the LEA."³² Contrastingly, OSSE's regulations state that an appeal "shall be limited to the LEA's decision to approve and shall not include an appeal of the LEA's written plan for implementation of home or hospital instruction."³³ The Act affirmatively provides parents with a right to appeal an LEA's application decision. However, OSSE's regulations went further to prohibit any appeal regarding the substance of an implementation plan. In their Notice of Final

Rulemaking, OSSE responded to our concern arguing that “[t]he intent of Section 2509.2 is to appropriately shape the scope of a parent's appeal of an LEA’s approval of a home or hospital instruction request. D.C. Official Code § 38-251.05 limits appeals and mediation processes to the application for home and hospital instruction only; written plans for home or hospital instruction implementation are not subject to appeal or mediation.” We do not agree that the law prohibits substantive appeals. However, given OSSE’s position, we believe legislative intervention is necessary to ensure that families have an opportunity for recourse in the event that the LEA proposed an inadequate HHI implementation plan. We urge the Council to amend the DC Code § 38-251.05(b) to permit substantive appeals when an LEA proposes an implementation plans that do not meet minimum standards of instruction.

Thank you for this opportunity to testify and I welcome any questions.

¹ Office of the State Superintendent of Education, *Students’ Right to Home and Hospital Instruction Act of 2020: Guidance and Procedural Manual*, at 2 (August 2023), available at:

https://osse.dc.gov/sites/default/files/dc/sites/osse/page_content/attachments/Home%20and%20Hospital%20Instruction%20Guidance%20Manual.pdf

² See B23-0392, the “Students’ Right to Home or Hospital Instruction Act of 2019, Joint Public Hearing Before the Comm. of the Whole and the Comm. on Educ., D.C. Council, (Oct. 21, 2019) (testimony of Charles (Buck) Logan, Special Counsel, Children’s Law Center), available at: <https://childrenslawcenter.org/wp-content/uploads/2021/07/CLC-Testimony-on-HHIP-Bill-B23-392-Final.pdf>

³ *Id.*, at 2-3.

⁴ See Office of the State Superintendent of Education, Notice of Final Rulemaking, 70 D.C. Reg. 006850, 006853 (May 12, 2023)(wherein OSSE declined to add “pregnancy or birth of a child” to the definition of health condition “because the definition of health condition included in the proposed rulemaking is consistent with D.C. Official Code § 38-251.01”).

⁵ See Council of the District of Columbia, Legislative Information Management System, B23-0392 – Students’ Right to Home or Hospital Instruction Act of 2019, available at: <https://lims.dccouncil.gov/Legislation/B23-0392>

⁶ See Students’ Right to Home or Hospital Instruction Act of 2020, D.C. Code § 38-251.10 (2021).

⁷ See Fiscal Year 2022 Budget Support Act of 2021, Subtitle I. Subject -to-Appropriations Repeals and Modifications, D.C. Law 24-45, § 7201, 68 DCR 010163 (Nov. 13, 2021); see also Council of the District of Columbia, Complete List of Legislation Passed Subject to Funding, at 20 (revised July 6, 2023), available at: <https://dccouncil.gov/wp-content/uploads/2023/10/2023-10-15-Subject-to-Funding-Legislation-quarterly-report.pdf>

⁸ See Students’ Right to Home or Hospital Instruction Act of 2020, D.C. Law 23-204, § 12, 67 DCR 14756; see also Email from Christina Setlow, Deputy Comm. Dir., Comm. of the Whole, Council of the District of Columbia, to Danielle Robinette, Policy Attorney, Children’s Law Center (Dec. 15, 2021, 14:55 EST) (on file with author) (noting that the permanent version of the FY22 BSA was not effective until 11/13/21, but the Council passed an emergency version that was effective on 10/1/21 and the HHIP law was not specifically excepted from the emergency bill).

⁹ See D.C. Code § 38.251.10.

¹⁰ See D.C. Code § 38.251.02(a).

¹¹ See Office of the State Superintendent of Education, Notice of Proposed Rulemaking, 69 D.C. Reg. 011081 (Sept. 9, 2022).

¹² See OSSE, Notice of Final Rulemaking, *supra* note 4, at 006851.

¹³ Children’s Law Center, Comment Letter on Proposed Rulemaking for 5A DCMR Chapter 25 Students’ Right to Home and Hospital Instruction (Oct. 11, 2022) (on file with author).

¹⁴ See OSSE, Notice of Final Rulemaking, *supra* note 4.

¹⁵ See OSSE, *Students’ Right to Home and Hospital Instruction Act of 2020: Guidance and Procedural Manual*, *supra* note 1.

¹⁶ See Office of the State Superintendent of Education, LEA Look Forward (Aug. 18, 2023), available at: <https://us4.campaign-archive.com/?u=8d76b5a43735fbdb6449d7cf3&id=7b84c7dc02#Grants>

¹⁷ See B23-0392, the “Students’ Right to Home or Hospital Instruction Act of 2019 (testimony of Charles (Buck) Logan), *supra* note **Error! Bookmark not defined.**, at 2.

¹⁸ See DC Code § 38–251.03(b)(2)

¹⁹ District of Columbia Public Schools, Office of Teaching and Learning, Home and Hospital Instruction Program (HHIP), “No Service Form” (2023) (on file with author).

²⁰ District of Columbia Public Schools, Office of Teaching and Learning, Home and Hospital Instruction Program (HHIP) Parent Guidebook, at 4, *available at*: https://dcps.dc.gov/sites/default/files/dc/sites/dcps/publication/attachments/HHIP%20Parent%20Handbook_FINAL_0.pdf

²¹ See Chairman Phil Mendelson, *An Amendment: B23-392, "Students' Right to Home or Hospital Instruction Act of 2020" (Engrossed Version)*, at 2 (Dec. 1, 2020), *available at*: <https://lms.dccouncil.gov/downloads/LIMS/43042/Meeting2/Amendment/B23-0392-Amendment1.pdf?Id=114641> (amendment unanimously passed by Comm. of the Whole).

²² *Id.*

²³ OSSE, *Students' Right to Home and Hospital Instruction Act of 2020: Guidance and Procedural Manual*, *supra* note 1, at 3-4.

²⁴ See DC Code § 38–251.05(b)(5).

²⁵ Imagine a hypothetical student injured in a car accident on a Saturday. On Sunday, the student undergoes surgery after which the surgeon recommends that the student be hospitalized for five days followed by two weeks of bed rest before the student can return to school. On Monday, the student's family submits a completed HHI application, and the clock starts on the statutory timeline. The school spends several days trying to speak to the surgeon to ask questions. On Friday, having not been able to reach the doctor and approaching their 5-day deadline, the school denies the student's HHI application. The following Monday, the family files an appeal with OSSE which refers the case to the Office of Dispute Resolution for the required mediation period. After 8 school days, the family and the school are unable to resolve their dispute and the case is referred to the appeals panel. The appeals panel takes only five of their allotted 10 school days to issue a decision in favor of the family. The school now has five more school days before they have to begin HHI for the student. Assuming no weekday holidays, 32 calendar days and 24 school days have passed since the family submitted their HHI application. Even though several stages were completed before the statutory deadline, the process has taken a full month while the student was only set to be away from school for three weeks. Despite success on appeal, the student was wrongfully denied 3 weeks of HHI and there is no recourse available given that the student is now able to return to school.

	Sun	Mon	Tues	Wed	Thurs	Fri	Sat
Week 1	Surgery	Family submits HHI app				School denies app	Student discharged from hospital
Week 2		Family files appeal & referred to ODR					
Week 3					Mediation ends; case to appeal panel		End of bed rest
Week 4		Available to return to school			Panel decides in favor of family		

²⁶ See D.C. Code § 38-208(c)(1)(B)

²⁷ See D.C. Code § 38-208(c)(1)(A)

²⁸ Council of the District of Columbia, Comm. on Educ., Report on B23-0392, the "Students' Right to Home and Hospital Instruction Act of 2019," at 6 (Feb. 11, 2020), *available at*:

https://lms.dccouncil.gov/downloads/LIMS/43042/Committee_Report/B23-0392-CommitteeReport1.pdf?Id=62995

²⁹ See B23-0392, the "Students' Right to Home or Hospital Instruction Act of 2019 (testimony of Charles (Buck) Logan), *supra* note **Error! Bookmark not defined.**, at 3.

³⁰ *Id.*, at 4.

³¹ See Children's Law Center, Comment Letter on Proposed Rulemaking for 5A DCMR Chapter 25, *supra* note 13.

³² D.C. Code § 38-251.05(b)

³³ 5A DCMR § 2509.2.