DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
STUDENT HEARING OFFICE
810 First Street, N.E. 2d Floor
Washington, DC 20002

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Student Hearing Office
February 22, 2013

STUDENT, **By and through PARENT** [1] ***Petitioner,*** **v.** **DISTRICT OF COLUMBIA PUBLIC SCHOOLS,** ***Respondent.***	))))))))))	**Bruce Ryan, Hearing Officer** **Issued: February 21, 2013**

HEARING OFFICER DETERMINATION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent District of Columbia Public Schools ("DCPS"). The Administrative Due Process Complaint ("Complaint") was filed November 29, 2012, on behalf of an [redacted] (the "Student") who resides in the District of Columbia and who has been determined to be eligible for special education and related services as a student with a disability under the IDEA. Petitioner is the Student's grandmother and guardian.

Petitioner alleges that DCPS has denied Student a free appropriate public education ("FAPE") in several respects, as set forth at pages 5-10 of the Complaint and described further below under the specified hearing issues. On December 7, 2012, DCPS filed a timely Response to the Complaint, which denies the allegations that it failed to provide a FAPE to the Student. The 30-day resolution period ended without agreement on December 29, 2012.

[1] Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

On January 10 and 16, 2013, a Prehearing Conference ("PHC") was held to discuss and clarify the issues and requested relief, and a Prehearing Order ("PHO") was issued on January 24, 2013. At the PHC, the parties agreed to schedule the due process hearing for February 1, 2013. The hearing date was subsequently rescheduled to February 14, 2013, pursuant to a continuance motion granted February 6, 2013. [2]

On January 23, 2013, DCPS filed a partial motion to dismiss, arguing that Petitioner failed to state a claim upon which relief can be granted under the IDEA to the extent her claims were based on the status of the special education teacher's certification. Petitioner filed an opposition to the motion, and the Hearing Officer exercised his discretion to defer ruling on the legal issue raised in the motion for the reasons stated on the record at the outset of the hearing. *See Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("*SOP*"), § 401 (C) (7) (allowing parties to provide evidence relating to disputed facts).

On January 25, 2013, the parties filed their original five-day disclosures, as required. They then supplemented those disclosures on February 6 and 7, 2013.

The Due Process Hearing was held in Hearing Room 2004 on February 14, 2013. Petitioner elected for the hearing to be closed. At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner's Exhibits: P-1 through P-32.

Respondent's Exhibits: R-1 through R-14.

In addition, the following Witnesses testified on behalf of each party:

Petitioner's Witnesses: (1) Parent-Petitioner; and (2) [redacted] Educational Advocate.

Respondent's Witness: Special Education Teacher/Case Manager.

The parties submitted written closing statements on February 15, 2013.

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[2] *See Interim Order on Continuance Motion* (Feb. 6, 2013). The *Interim Order* also granted the parties' request to extend the 45-day timeline for issuance of the Hearing Officer Determination ("HOD") from February 12, 2013 to February 21, 2013, in order to allow the due process hearing to be rescheduled.

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* 5-E DCMR §§ 3029, 3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("*SOP*"). The HOD deadline is February 21, 2013.

III. ISSUES AND REQUESTED RELIEF

As specified in the PHO, the issues presented for determination at hearing were: [3]

(1) Failure to Implement March 2012 IEP — Did DCPS deny the Student a FAPE by failing to implement the Student's March 2012 individualized education program ("IEP"), from 03/20/2012 to the present, by **(a)** failing to provide specialized instruction through a certified special education teacher, and **(b)** failing to provide dedicated-aide services on a full-time basis?

(2) Procedural/Parent Participation in 10/12/2012 MDT meeting — Did DCPS commit procedural error and/or deny the Student a FAPE by failing to ensure the parent's participation in the October 12, 2012 MDT meeting to conduct an annual IEP review, in violation of 34 CFR § 300.321-22?

(3) Failure to Develop Appropriate IEP (10/12/2012) — Did DCPS deny the Student a FAPE by failing to develop an appropriate IEP (*i.e.,* one that was reasonably calculated to confer educational benefit) on or about October 12, 2012, in that the IEP allegedly (a) removed nursing services as a related service under the IEP, and (b) failed to provide assistive technology services and goals, specifically relating to use of an i-Pad? [4]

(4) **Failure to Provide Appropriate Placement** — Did DCPS deny the Student a FAPE by failing to provide Student with an appropriate educational placement/location of services capable of implementing his IEP during the 2011-12 and 2012-13 school years, in that Public School allegedly cannot **(a)** provide specialized instruction through a certified special education teacher, and **(b)** provide dedicated-aide services on a full-time basis?

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[3] At the 01/16/2013 PHC, Petitioner withdrew her claim/issue relating to triennial evaluations (Complaint, pp. 5-7), as well as any claim/issue relating to missed sign language instruction, based on information obtained at resolution and DCPS' intent to re-evaluate. *See PHO (P-2),* p. 2; *P-4; P-18.*

[4] As discussed at the 01/16/2013 PHC, to the extent assistive technology has or should have been included in the Student's 10/12/2012 IEP pursuant to IEP Team agreement, ***Petitioner alternatively claimed that the Student had yet to be provided with his recommended assistive technology.*** *See* Complaint, pp. 9-10; *PHO,* p. 2 n. 2. At the PHC, DCPS indicated that it was issuing a letter of invitation ("LOI") for a meeting of the Student's multi-disciplinary team ("MDT") to address both the nursing services and assistive technology issues, which meeting was subsequently held. *See P-28; P-29.*

The Complaint requested that DCPS be ordered to: (a) immediately convene an MDT meeting to revise the Student's IEP; (b) provide the Student with his i-Pad within 15 business days; (c) fund the parent's placement/school of her choosing, with transportation; and (d) provide compensatory education services to be specified in the five-day disclosures. At the PHC, Petitioner withdrew her request for funding independent evaluations. *See PHO,* p. 3, ¶ 7.

At the outset of the hearing, the parties discussed and agreed to resolve certain of the above issues and requests for relief. Specifically, the parties stipulated that the 10/12/2012 IEP would be amended (a) to specify the specific feeding times of 10:00 AM and 2:00 PM for the Student's G-Tube feedings by the school nurse or other designated individual, and (b) to include appropriate assistive technology services and goals relating to the Student's use of an i-Pad. [5] Petitioner also withdrew items (b) and (c) of the above requests for relief, in that the parties stipulated that an i-Pad has now been provided to the Student (*see R-14*), and Petitioner had not identified any proposed school placement.

IV. FINDINGS OF FACT

Based upon the evidence presented at the due process hearing, this Hearing Officer makes the following Findings of Fact:

1. Student is an [redacted] student who is a resident of the District of Columbia.
2. The Student currently attends Public School located in the District of Columbia.
3. Student has been determined to be eligible for special education and related services as a child with a disability under the IDEA since approximately January 2008. His primary disability is Autism Spectrum Disorder ("ASD" or "Autism"). *See P-1; P-22; Pet. Test.*
4. The Student has also been diagnosed with other physical and medical conditions, including chronic lung disease, gastro-esophageal reflux disease, seizures, gross motor delays, fine motor and visual motor delays, and speech delays. *See Pet. Test.; Carter Test.; Teacher Test.; P-6; P-24; see also Pet's Written Closing.*
5. In November 2010, the Student was re-evaluated by DCPS and found to remain eligible as a disabled child with Autism. The Student's MDT met and developed an IEP, which

[5] DCPS also stipulated that appropriate training for use of the Student's i-Pad would be provided within 30 calendar days from the date of hearing. As discussed further below, Petitioner continued to assert that DCPS failed to provide the recommended assistive technology device (i-Pad) and training in a timely manner and requested compensatory education relief for such failure. *See* note 4, *supra.*

provided 15.5 hours per week of specialized instruction in an Outside General Education setting and four (4) hours per week of specialized instruction in a General Education setting, along with the following related services in an Outside General Education setting: 60 minutes per week of physical therapy ("PT") services; 60 minutes per week of occupational therapy ("OT") services; 60 minutes per week of speech/language therapy ("SLP") services; and one hour per *day* of School Health & School Nursing services. *See P-20,* p. 10. The IEP also provided for the full-time support of a dedicated aide. *Id.*

6. The purpose of the Student's School Health & School Nursing services is for a school nurse to administer feedings to the Student and to check on other medical conditions affecting the Student. The Student is fed at school twice daily with liquefied pre-packaged bottles through a gastro-intestinal feeding tube ("G-Tube"). *See Pet. Test.; Teacher Test.; R-4,* p. 2; *P-23,* p. 2.
7. The dedicated aide services are required because the Student is non-verbal, cannot feed himself, is accident-prone due to gross motor deficits, frequently has seizures, and requires restroom assistance and changing. *Pet. Test.; Teacher Test.*
8. The Student's IEP was revised in October 2011 to increase the OT services to 90 minutes per week and to change the hours of specialized instruction outside of general education from 15.5 to 15 hours per week. The October 2011 IEP also restated the time/frequency of the PT services as 240 minutes per month, rather than 60 minutes per week. Otherwise, the October 2011 IEP maintained the same type and amount of services as the November 2010 IEP. *See P-21,* p. 11.
9. The Student's IEP was again revised in March 2012 to change back the OT services to 240 minutes per month, but otherwise maintained the same type and amount of services as the October 2011 IEP. *See P-22,* p. 11.
10. Around the end of the 2011-12 school year, the Student was recommended for assistive technology ("AT") because he is non-verbal and the AT would help him to communicate and access the educational curriculum. Petitioner was informed that the AT would consist of an i-Pad and related software, along with appropriate training for the Student and his family. DCPS indicated that the i-Pad and services would be put in place on a

30-day trial basis by the start of the 2012-13 school year. *See Pet. Test.; Carter Test.; Teacher Test.; P-19; P-23,* p. 3.

11. On or about October 2, 2012, DCPS convened a meeting of the Student's MDT. Petitioner requested the meeting to discuss behavioral concerns, *i.e.*, the Student's hitting other students in the class room. *See P-23* (meeting notes). The aggressive behaviors were believed to be associated with a recent change in the Student's medications and cleared up when the new medication was later removed. *See id.; Pet. Test.; Teacher Test.*
12. At the 10/2/2012 MDT meeting, the team also discussed the fact that the Student had not yet received his recommended AT device. *P-23,* p.3.
13. On or about October 12, 2012, the Student's IEP was amended to remove the School Health & School Nursing services as a related service. *P-24,* pp. 1, 11. *See also id.,* p. 12; *P-28,* p. 2. DCPS decided to replace that service with a garbled sentence added to the Least Restrictive Environment ("LRE") section of the IEP *(i.e.*, that "the nurse prov[id]es has [sic] a G tube for feeding"). *P-24,* p. 12. The sentence appears under an item relating to "supplemental support and services that were previously attempted in a general education setting." *Id.* DCPS' only explanation for this change was that "ODA has requested that the nurse be taken of[f] as a participating member of the student's IEP team." *P-24,* p. 1. *See also Teacher Test.* (testifying that DCPS central office required the change, but that he did not know why).
14. Prior to the 10/12/2012 IEP amendment, DCPS sent a Letter of Invitation to the parent inviting her to an IEP meeting to discuss the removal of the student's nursing services as a related service in his IEP. The parent requested to participate in the meeting to discuss the removal, but DCPS failed to ensure the parent's participation. The parent did not consent to amend the IEP without convening a meeting. The Teacher/Case Manager testified that DCPS proceeded to make this change unilaterally because he erroneously thought that the parent had waived her right to participate in such meeting. *Teacher Test.; see also Pet. Test.; R-5.*
15. The 10/12/2012 IEP provides 16 hours per week of specialized instruction in an Outside General Education setting, four (4) hours per week of specialized instruction in a General Education setting, and the following related services in an Outside General Education setting: 240 minutes per month of PT services; 240 minutes per month of OT services;

and 60 minutes per week of SLP services. *P-24,* p. 11. In addition, the 10/12/2012 IEP continues to require the full-time support of a dedicated aide. *Id.*

16. On or about January 11, 2013, while this due process complaint proceeding was pending, DCPS sent a notice to Petitioner proposing to amend the Student's IEP by adding communications goal(s) for an AT device under the supplemental aids portion of the IEP. On 1/15/2013, Petitioner signed the IEP amendment form agreeing to amend the IEP without convening an IEP team meeting. *See R-3.*
17. On or about January 14, 2013, DCPS convened a resolution meeting to discuss the issues raised in the instant complaint. *See R-4.* DCPS did not offer a settlement. However, Petitioner agreed not to pursue a triennial re-evaluation claim at this time because DCPS was undertaking to reevaluate the Student with comprehensive psychological, speech/language, OT, and PT assessments. *Id.,* p. 4 (1/16/2013 email correspondence).
18. On or about January 16, 2013, DCPS sent another notice to Petitioner proposing to amend the Student's IEP with the following changes:

    " Other: A communications goal(s) needs to be added under the assistant [sic] technology section in order [for] [Student] to receive a communication device." *R-10,* p. 7.

    "Also, the parent requested that we specify the times in which [Student] goes to the nurse. The statement should read, 'The nurse provides [Student] with a G tube for feeding at 10 am and 2 pm 5 days a week.'" *Id.*

19. On or about January 16, 2013, DCPS issued a letter to Petitioner that authorizes her to obtain 50 hours of individualized instruction/tutoring services for the Student, independently, at the specified rate of $65.00 per hour. The deadline for completion of all services is 9/8/2013. The letter states that "[t]hese missed services are intended to remediate any educational harm through today's date." *P-5.*
20. On or about January 24, 2013, Petitioner through counsel requested that an MDT meeting be convened to amend the Student's IEP with respect to both the AT goals and the G-Tube feeding specifications. On 1/25/2013, DCPS then issued a Letter of Invitation ("LOI") for a meeting to complete the amendment on January 30, 2013. *See R-10.*
21. On or about January 30, 2013, DCPS convened an MDT meeting to amend the IEP and begin the re-evaluation process. *R-13.* At this meeting, the team discussed the AT device, the G-Tube feedings, and the dedicated aide services, as well as proposed assessments.

Id. DCPS explained that the results of all assessments will provide information that relates to AT use. *Id.,* p. 3.

22. The parties stipulated at hearing that the Student's IEP shall require the nurse to provide G-Tube feedings to the Student twice daily at 10:00 AM and 2:00 PM.
23. The parties stipulated at hearing that the Student's IEP shall include appropriate assistive technology services and goals relating to the Student's use of an i-Pad, and that DCPS shall provide appropriate training for use of such device within 30 calendar days from the date of hearing.
24. During the 2012-13 school year at Public School, the Student has been enrolled in a classroom for Autism students in Kindergarten through 2d grade. The classroom consists of eight students, with one Special Education Teacher and four dedicated aides. The dedicated aides are assigned to the class pursuant to the IEPs of the Student and three other children. *See Teacher Test.*
25. The Special Education Teacher provides instruction that is specially designed to meet the IEP goals of the students in his class, and he also employs positive behavioral interventions and supports in accordance with behavioral management training and guidance received from DCPS' Autism Team. *See Teacher Test.* The dedicated aides in the classroom have assisted the Teacher with these tasks under his supervision and direction. *Id.*
26. The Special Education Teacher has four years' experience teaching Autism students in DCPS and at a non-public day school in Maryland; he previously held a provisional certification in special education in Maryland; he has passed his Praxis I and Praxis II (Special Education) exams; and he is in the process of completing coursework for his OSSE certification in special education, which is expected by June 2013. *Teacher Test.*
27. The Teacher/Case Manager testified that during the 2012-13 school year the Student has generally been with his dedicated aide during the school day at all times except during the aide's lunch hour. During that time, the Student is at lunch and recess and is supervised by the Teacher or the dedicated aide of another student in the classroom. The Teacher indicated that at the beginning of the school year, the Student was paired with another student of similar abilities, with the aide occasionally assisting the other child while the Student was next to her taking a break from instruction as required by his IEP.

See Teacher Test.; P-3; P-4. To the extent the dedicated aide's attention may have been diverted on some occasions to assist temporarily with another student, Petitioner has not shown that such episodes had any material impact on the Student's education.[6]

V. DISCUSSION AND CONCLUSIONS OF LAW

As the party seeking relief, Petitioner was required to proceed first at the hearing and carried the burden of proof on the issues specified above. "Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a Free Appropriate Public Education (FAPE)." 5-E DCMR §3030.3; *see Schaffer* v. *Weast,* 546 U.S. 49 (2005). The Hearing Officer's determination is based on the preponderance of the evidence standard, which generally requires sufficient evidence to make it more likely than not that the proposition sought to be proved is true.

A. General Legal Background

FAPE means "special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)..." 20 U.S.C. § 1401(9); *see* 34 C.F.R. § 300.17; DCMR 5-E3001.1.

The "primary vehicle" for implementing the goals of the IDEA is the IEP, which the statute "mandates for each child." *Harris v. District of Columbia,* 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (*citing Honig v. Doe,* 484 U.S. 305, 311-12 (1988)). *See* 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1. "The IEP must, at a minimum, `provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Reid v. District of Columbia,* 401 F. 3d 516, 519 (D.C. Cir.

[6] While Petitioner testified that she observed the Student without his dedicated aide on several occasions, *Pet. Test.,* her testimony did not refute or contradict the Teacher's testimony regarding the school's overall practice and experience during the 2012-13 school year. Since the parent raised concern about the practice of having aides occasionally helping other students, the Student is no longer paired with any classmate, and DCPS has committed to having the dedicated aide work solely with the Student during all classroom instruction. *See Teacher Test.; R-13; DCPS' Written Closing Statement.*

2005), *quoting Board of Education* v. *Rowley,* 458 U.S. 176, 200, 207 (1982). *See also Kerkam v. McKenzie,* 862 F. 2d 884 (D.C. Cir. 1988). The "IEP must be 'reasonably calculated' to confer educational benefits on the child, but it need not 'maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children." *Anderson* v. *District of Columbia,* 109 LRP 18615 (D.D.C. 2009).

Judicial and hearing officer review of IEPs is "meant to be largely prospective and to focus on a child's needs looking forward; courts thus ask whether, at the time an IEP was created, it was 'reasonably calculated to enable the child to receive educational benefits.'" *Schaffer* v. *Weast,* 554 F.3d 470,477 (4th Cir. 2009) (citing *Rowley,* 458 U.S. at 207). "[A]n individualized education program ("IEP") is a snapshot, not a retrospective. In striving for "appropriateness," an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1041 (3d Cir. 1993) (citations omitted). *See also Lessard v. Wilton Lyndeborough Coop. Sch. Dist.,* 518 F.3d 18, 29 (1st Cir. 2008) (same); *Adams v. State of Oregon*, 195 F. 3d 1141, 1149 (9th Cir. 1999) (same).

"Designing an appropriate IEP is necessary but not sufficient. DCPS must also implement the IEP, which includes offering placement in a school that can fulfill the requirements set forth in the IEP." *O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008). Moreover, statutory law in the District of Columbia requires that "DCPS shall place a student with a disability in an appropriate special education school or program" in accordance with the IDEA. D.C. Code 38-2561.02 (b). *See also Branham v. District of Columbia*, 427 F. 3d 7, 12 (D.C. Cir. 2005), *citing McKenzie v. Smith*, 771 F.2d 1527, 1534-35 (affirming "placement based on match between a student's needs and the services offered at a particular school").

Educational placement under the IDEA must be "based on the child's IEP." 34 C.F.R. 300.116 (b) (2). DCPS must also ensure that its placement decision is made in conformity with the Least Restrictive Environment ("LRE") provisions of the IDEA. *See* 34 C.F.R. §§ 300.114-300.116. The IDEA requires each public agency to ensure that "[t]o the maximum extent appropriate, children with disabilities ... are educated with children who are nondisabled," and that "removal of children with disabilities from the regular educational environment occurs only if the nature and severity of the disability is such that education in regular classes with the use of

supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. §1412 (a) (5); 34 C.F.R. §300.114 (a) (2). *See also* 5-E DCMR §3011.1; *e.g., Daniel R.R. v. El Paso,* 874 F.2d 1036 (5th Cir. 1989).

As the statute and regulations indicate, the failure to provide services in conformity with a student's IEP can constitute a denial of FAPE. *See* 34 C.F.R. § 300.17(d). In order to constitute a denial of FAPE, however, courts have held that the aspects of an IEP not followed must be "substantial or significant," and "more than a *de minimus* failure"; in other words, the deviation from the IEP's stated requirements must be "material." *Catalan* v. *District of Columbia,* 478 F. Supp. 2d 73 (D.D.C. 2007), *quoting Houston Indep. Sch. Dist. v. Bobby R.,* 200 F.3d 341,349 (5th Cir. 2000). *See also Wilson v. District of Columbia*, 111 LRP 19583 (D.D.C. 2011) ("Although the D.C. Circuit has not yet squarely addressed the question of what standard governs failure-to-implement claims under the IDEA, the consensus approach to this question among the federal courts that have addressed it has been to adopt the standard articulated by the Fifth Circuit in *Houston Independent School District v. Bobby R.* "); *S.S. ex rel. Shank v. Howard Road Academy,* 585 F. Supp. 2d 56, 68 (D.D.C. 2008); *Catalan* v. *District of Columbia,* 478 F. Supp. 2d at 76 (failure to implement claims require "contextual inquiry into the materiality (in terms of impact on the child's education) of the failures to meet the IEP's requirements").

B. <u>Issues/Alleged Denials of FAPE</u>

Petitioner claims that DCPS denied the Student a FAPE by (1) failing to implement his March 2012 IEP with respect to specialized instruction and dedicated aide services; (2) failing to ensure her participation in the October 2012 annual review meeting; (3) failing to develop an appropriate IEP and to timely provide assistive technology under his October 2012 IEP; and (4) failing to provide an appropriate placement. For the reasons discussed below, the Hearing Officer concludes that Petitioner has failed to meet her burden of proof on Issue 1; she has met her burden of proof on Issues 2 and 3 (as clarified at hearing); and she has failed to meet her burden of proof on Issue 4.

Issue 1: Failure to Implement March 2012 IEP

The Hearing Officer agrees with DCPS [7] that Petitioner may not bring a due process complaint alleging a denial of FAPE based on DCPS' alleged failure to provide a highly qualified special education teacher. Pursuant to the IDEA, complaints regarding the failure of a particular LEA employee to be highly qualified are properly brought against the State Education Agency ("SEA") pursuant to §§300.151 through 300.153. *See* 34 C.F.R. §300.18(f); *e.g., Prince Georges County Pub. Schools,* 51 IDELR 33 (SEA Md. 2009); 71 Fed. Reg. 46561-62 (Aug. 14, 2006) (clarifying regulations). Accordingly, as a matter of law, Petitioner cannot prevail on its claim that DCPS failed to implement the March 2012 IEP by failing to provide specialized instruction through a certified special education teacher, as alleged under Issue 1 (a). Petitioner would need to file a complaint about Public School's staff qualifications with the SEA. [8]

With respect to the dedicated aide services (*i.e.,* Issue 1(b)), Petitioner has failed to prove that DCPS materially deviated from IEP requirements this school year. The Teacher/Case Manager testified that the Student is generally with his dedicated aide during the school day at all times except during the aide's lunch hour. During that time, the Student is at lunch and recess and is supervised by the teacher or the dedicated aide of another student in the classroom. The Teacher indicated that at the beginning of the school year, the Student was paired with another student of similar abilities, with the aide occasionally assisting the other child while the Student was next to her taking a break from instruction as required by his IEP. *See Teacher Test.; P-3; P-4.* Since the parent raised concern about this structure, the Student is no longer paired with this classmate, and DCPS has committed to having the dedicated aide work solely with the Student during all class instruction. *See Teacher Test.; R-13; DCPS' Written Closing Statement.*

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[7] *See DCPS' Written Closing Statement*, p. 2; *DCPS' Motion to Dismiss*, filed Jan. 23, 2013).

[8] *Damian J. v. Sch. Dist. of Phil.*, 2008 WL 191176 (E.D. Pa. 2008), cited by Petitioner in her opposition to DCPS' motion to dismiss, is of little precedential significance. The decision addresses the 2005-06 school year, which predates the August 2006 rule clarifications above, and does not cite or discuss Section 300.18. Moreover, the instructor in *Damian* had no prior experience teaching a special education classroom and no behavioral management training whatsoever. In contrast, the Student's teacher has four years' experience teaching Autism students in DCPS and at a non-public day school in Maryland; he has had extensive behavioral management training in this area; he previously held a provisional certification in special education in Maryland; he has passed his Praxis I and Praxis II (Special Education) exams; and is completing coursework for his certification in special education by June 2013. *See Teacher Test.; Findings,* ¶¶ 24-25.

To the extent the dedicated aide's attention may have been diverted on some occasions to assist temporarily with another student, Petitioner has not shown that such episodes had any material impact on the Student's education. Thus, it appears that any discrepancy in the provision of the Student's dedicated aide services was minor and has since been corrected. *Cf. Catalan* v. *District of Columbia,* 478 F. Supp. 2d at 76 (failure to implement claims require "contextual inquiry into the materiality (in terms of impact on the child's education) of the failures to meet the IEP's requirements"). The agreed change appears to resolve this issue prospectively and will be included in the Order issued herein.

Issue 2: Procedural/Parent Participation in 10/12/2012 MDT meeting

The IDEA requires each public agency to "take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate." 34 C.F.R. §300.322 (a). This includes "(1) notifying parents of the meeting early enough to ensure that they will attend; and (2) scheduling the meeting at a mutually agreed on time and place." *Id.* The notice must include the purpose, time, and location of the meeting, who will attend, and other required information. *Id.,* §300.322 (b). A public agency may conduct a meeting without a parent in attendance only "if the public agency is unable to convince the parents that they should attend." *Id.,* §300.322 (d). In that situation, the public agency "must keep a record of its attempts to arrange a mutually agreed on time and place, such as – (1) detailed records of telephone calls made or attempted and the results of those calls; (2) copies of correspondence sent to the parents and any responses received; and (3) detailed records of visits made to the parent's home or place of employment and the results of those visits." *Id.*

In this case, the evidence shows that DCPS failed to comply with these procedural requirements in seeking to amend the Student's IEP with respect to his school health and school nursing services in October 2012. DCPS sent a Letter of Invitation to the parent inviting her to an IEP meeting to discuss the removal of the student's nursing services, as a related service in his IEP. DCPS conceded that the parent requested to participate in the meeting to discuss the removal, but DCPS failed to ensure the parent's participation. The Teacher/Case Manager testified that he erroneously thought that the parent had waived her right to participate in such meeting when DCPS proceeded to make this change unilaterally. *Teacher Test.; see Pet. Test.*

"In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies – (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child; or (iii) caused a deprivation of educational benefit.". 34 C.F.R. 300.513 (a) (2). *See also Lesesne v. District of Columbia,* 447 F.3d 828 (D.C. Cir. 2006) (IDEA claim is viable only if procedural violation affects student's or parent's substantive rights); *Kruvant v. District of Columbia,* 99 Fed. Appx. 232 (D.C. Cir. 2004) (same).

Petitioner has carried her burden of proof because she has shown that DCPS' procedural violation in amending the IEP in this manner significantly impeded the parent's opportunity to participate meaningfully in the decision-making process as to the Student's IEP services. 34 C.F.R. § 300.513 (a) (2) (ii). The violation also may have caused a deprivation of educational benefit to the Student by precluding a full team discussion of important medical information and possibly contributing to a failure to administer a feeding on one or more occasions. [9] *Id.,* § 300.513 (a) (2) (iii).

Issue 3: Failure to Develop Appropriate IEP & Provide Assistive Technology

As noted above, an IEP must be reasonably calculated to confer meaningful educational benefits on the disabled child when it was created. Petitioner proved by a preponderance of the evidence that the 10/12/2012 IEP was not appropriate for the Student in that the IEP (a) failed clearly to provide related nursing services for his G-Tube feedings, and (b) failed to provide the Student with his recommended assistive technology services and goals.

(a) Nursing services

Under the IDEA, "related services" are defined as any "supportive services as are required to assist a child with a disability to benefit from special education," and expressly "include ***school health services and school nurse services***." 34 C.F.R. § 300.34 (a) (emphasis added). Consistent with this requirement, the Student's prior IEPs included one hour per day of "School Health and School Nursing" services as a related service. *P-20,* p. 10; *P-21,* p. 11. The services were determined to be needed in order to feed the Student at school twice daily with

[9] The parent and educational advocate testified that on at least one occasion this school year, the Student has missed a feeding. *See Pet. Test.* (Student arrived home with one of his two bottles still full); *Carter Test.*

liquefied pre-packaged bottles through a G-Tube and administered by a school nurse. *See Findings,* ¶ 6.

In the Student's 10/12/2012 IEP, DCPS decided to remove the School Health and School Nursing services as a related service and replace it with a garbled sentence added to the LRE section of the IEP (*i.e.*, that "the nurse prov[id]es has [sic] a G tube for feeding"). *P-24,* p. 12. The sentence appears under an item relating to "supplemental support and services that were previously attempted in a general education setting." *Id.* DCPS' only explanation for this change was that "ODA has requested that the nurse be taken of[f] as a participating member of the student's IEP team." *P-24,* p. 1. *See also Teacher Test.* (testifying that DCPS central office required the change, but that he did not know why).

As Petitioner points out, what this section means is that this was a support that was provided in the general education setting and failed. [10] By its terms, the new IEP language does not require that DCPS provide nursing services or when they must do so. *See Pet's Written Closing, p.4.* Thus, the amended IEP does not effectively substitute for the prior provision of a related service under the IEP. Moreover, even assuming *arguendo* that this would constitute only a procedural deficiency in the IEP, such procedural inadequacy nevertheless appears to have had a substantive impact under 34 C.F.R. § 300.513 (a) (2) for the same reasons described under Issue 1 above.

The parties have now agreed to amend the IEP to provide more specific requirements regarding the time and frequency of feedings. Specifically, the agreed provision would read as follows: "[Student] goes to the nurse Monday through Friday twice a day to be fed through a GI feeding tube at 10 am and 2 pm." *R-1* (1/24/2013 IEP Amendment Form). However, DCPS still proposes to place the new language within the LRE section of the IEP, rather than to ensure the Student's right to receive such health/nursing services as a related service under the IDEA. Absent the parent's consent to the former approach, DCPS should correct this error at the reconvened MDT meeting requested by Petitioner and ordered herein.

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[10] Such "supplemental supports and services," as used in the LRE section of the IEP, appear to refer to those "aids, services, and other supports that are provided ... to enable children with disabilities to be educated with non-disabled children to the maximum extent appropriate in accordance with §§ 300.114 through 300.116." 34 C.F.R. § 300.42. This is not the purpose of the Student's nursing services.

(b) Assistive technology device/services

Under IDEA regulations, each public agency must ensure that assistive technology devices and/or services are made available to a child with a disability to the extent required to provide FAPE. *See* 34 C.F.R. § 300.105. "Assistive technology device" means "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability." 34 C.F.R. §300.5. "The term does not include a medical device that is surgically implanted, or the replacement of such device. *Id.* "Assistive technology service" means "any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device." 34 C.F.R. §300.6. Such services include (*inter alia*) evaluation of needs, selecting and customizing of equipment, and training and technical assistance for the child and his family. *Id.,* §300.6 (a), (c), (e).

In this case, the evidence shows that the Student was recommended for assistive technology ("AT") at the end of the 2011-12 school year because he is non-verbal and the AT would help him to communicate and access the educational curriculum. The AT was to consist of an i-Pad and related software, along with appropriate training for the Student and his family. DCPS indicated that such AT device and services would be in place by the start of the 2012-13 school year, and thus they should have been included in the Student's IEP by October 2012. *See Pet. Test.;* [redacted] *Test.; Teacher Test. See also R-7; R-9* (IEP Progress Reports); *P-19.*

However, DCPS failed to provide the recommended AT device and failed to include any goals and objectives for the AT device or services in the Student's 10/12/2012 IEP. *See Pet. Test.; Teacher Test.; P-23.* The AT device was not provided to the school until the date of the resolution meeting on the due process complaint in mid-January 2013 (*P-3; P-4*); DCPS did not develop AT goals and objectives for the Student's IEP until 1/30/2013 (*R-13; R-14*); and the AT device still is not in use because DCPS has yet to provide training. [11]

[11] DCPS argues that since the IEP Team was proposing only a 30-day trial of the i-Pad at the conclusion of the 2011-12 school year, it "was never intended to be used on a permanent basis" and thus his 10/12/2012 IEP did not need to include the use of an AT device or AT goals. *DCPS' Written Closing,* p. 5. However, this was not an "all-or-nothing" proposition. The evidence indicates that while this particular device would be tried for 30 days, a decision had been made that the Student would likely benefit from AT support to access the curriculum. Due to DCPS' delays, the IEP Team has been unable to determine whether the recommended AT device (i-Pad) is appropriate to meet the Student's needs or whether other AT equipment needs to be utilized. *See Pet's Written Closing,* pp. 5, 9.

Accordingly, Petitioner has met her burden of proof on Issue 3. Appropriate relief will be provided for the denial of FAPE found herein, and consistent with the parties' stipulation.

Issue 4: Failure to Provide Appropriate Placement

As noted above, DCPS must offer placement in an appropriate school or program that can fulfill the requirements set forth in an appropriate IEP, and must ensure that its placement decision is made in conformity with the Least Restrictive Environment ("LRE") provisions of the IDEA. *See* D.C. Code 38-2561.02 (b); *McKenzie v. Smith*, 771 F.2d 1527, 1534-35 (D.C. Cir. 1985); *O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008). In this case, Petitioner has failed to prove that Public School cannot fulfill the requirements of the Student's IEP, either as developed on 10/12/2012 or as appropriately modified pursuant to the terms of this HOD and the MDT meeting ordered herein. Accordingly, the Hearing Officer concludes that Petitioner has failed to meet her burden of proof under Issue 4.

C. <u>Appropriate Relief</u>

The IDEA authorizes the Hearing Officer to fashion "appropriate" relief, *e.g.,* 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter,* 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia,* 401 F.3d 516, 521-24 (D.C. Cir. 2005). Based on the evidence presented at the due process hearing, the findings and conclusions above, and relevant equitable considerations, the Hearing Officer concludes that the relief set forth below is appropriate to address the violations and denials of FAPE found herein. DCPS shall be ordered (a) to convene an MDT meeting and review and revise the Student's IEP, as appropriate, and (b) to provide compensatory education services, as specified herein.

Compensatory education is one of the equitable remedies available to a hearing officer, exercising his authority to grant "appropriate" relief under IDEA. Under the theory of 'compensatory education,' courts and hearing officers may award 'educational services...to be provided prospectively to compensate for a past deficient program.'" *Reid v. District of Columbia*, 401 F. 3d 516, 521 (D.C.Cir. 2005) (quotations omitted). Compensatory education is fact-specific relief designed to compensate a student for the educational benefits of which he or she was deprived. *See, e.g., Gill v. District of Columbia,* 751 F. Supp. 2d 104, 110-12 (D.D.C. 2010); *Friendship Edison Public Charter School v. Nesbitt*, 532 F. Supp. 2d 121, 125 (D.D.C.

2008). An IDEA petitioner generally has the burden of proposing a well-articulated plan demonstrating what it is she wants and the reasoning why her request would ameliorate the denial of FAPE, although a court or hearing officer ultimately must determine what is equitable. *Gill, supra. See also Reid,* 401 F. 3d at 523-24 ("compensatory education involves discretionary, prospective, injunctive relief crafted by a court [and/or hearing officer] to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student").

In this case, the Hearing Officer has determined that (i) DCPS committed a procedural violation of the IDEA in connection with the 10/12/2012 IEP amendment to remove the nursing services, which had a substantive impact on the parent and Student; and (ii) DCPS denied the Student a FAPE by failing to provide recommended assistive technology and include AT goals and services in the IEP between October 2012 and the present. The former violation is adequately addressed by the corrective IEP amendment and MDT meeting stipulated and ordered herein, and Petitioner has not proposed any additional compensatory education relief for such violation. *See P-6.* However, the latter denial of FAPE should be appropriately remedied by an award of compensatory education. [12]

By failing to provide an AT device, along with appropriate goals and services, until essentially the eve of the due process hearing, DCPS deprived the Student of the educational benefits of this technology for approximately four months (*i.e.,* 10/12/2012 to 2/14/2013). The Student was unable to be trained on and use a device that was expected to improve his functional communications capabilities and thereby facilitate his access to the curriculum. The testimony and other available evidence indicate that the Student's progress has been adversely affected. *See Pet. Test.;* [redacted] *Test.; R-7.*

Petitioner's compensatory education proposal, in relevant part, is fact-specific and is reasonably designed to compensate the Student for these deprived educational benefits. The Student's educational advocate explained how the "Eat, Speak, Play" organization can assist the Student with regard to evaluating and meeting his AT needs in light of DCPS' failure to provide his i-Pad device and services on a timely basis. "Eat, Speak, Play" is a collaborative of

[12] As discussed above, Petitioner did not meet her burden of proving any failure to implement the Student's March 2012 IEP with respect to either specialized instruction or dedicated aide services. Nor has she established any need for compensatory education in the form of individual tutorial services beyond the 50 hours already authorized by DCPS.

professionals specializing in meeting the educational needs of autistic children, including assistive technology and feeding therapy. The firm is based in Alexandria, Virginia, and serves students in the District and Northern Virginia. *See* [redacted] *Test.; P-6* (compensatory education proposal).

Petitioner proposes that this organization conduct an intensive in-home training and assessment of the Student's utilization of available assistive technologies – including the i-Pad and other recommended devices that can be used in the home environment in ways that support their usage in school – for approximately a six-week period. *See* [redacted] *Test.; P-6*, pp. 4-5. Such services would qualify as "assistive technology services" as defined in IDEA. 34 C.F.R. §300.6. Petitioner's proposal would help jump-start the Student's ability to benefit from appropriate assistive technologies, which has been frustrated by DCPS' delays in providing these important supports. It would also assist in determining which devices and services would be of most benefit to the Student given his unique special education needs. The results of this intensive in-home training and assessment may then be reviewed by the Student's IEP Team on the same general time frame as the results of the re-evaluation assessments the team has recently initiated, which are also expected to provide useful information relating to AT usage (*R-13,* p. 3).

VI. ORDER

Based upon the above Findings of Fact and Conclusions of Law, the stipulations of the parties at hearing, and the entire record herein, it is hereby **ORDERED**:

1. To the extent not already amended in these respects, and consistent with this HOD, Respondent District of Columbia Public Schools ("DCPS") shall amend the Student's individualized education program ("IEP") dated October 12, 2012, within **ten (10) calendar days** of this Order, as follows:

   (a) In the "**Related Services**" section of the IEP, add "**School Health and School Nursing"** Services in an Outside General Education setting for one (1) hour per day; and include the statement that "[Student] goes to the nurse Monday through Friday twice a day to be fed through a GI feeding tube at 10 am and 2 pm."

   (b) Include appropriate **assistive technology ("AT") services and goals** relating to the Student's use of an i-Pad device, including appropriate software and training for the Student and his parent. The goals shall be in the form agreed to by Petitioner and the IEP Team as of January 30, 2013, and the DCPS training shall be completed by **March 15, 2013.**

   (c) Require that the Student's **dedicated aide** shall provide full-time support to the Student and shall work solely with the Student during all classroom instruction.

2. As compensatory education, DCPS shall pay the reasonable and customary charges of the "Eat, Speak, Play" organization of Alexandria, Virginia, not to exceed **50 hours** of services, for it to conduct an intensive in-home training and assessment of the Student's utilization of available assistive technologies, including the i-Pad and other recommended devices that can be used in the home environment in ways that support their usage in school. The training and assessment shall be completed by **March 29, 2013**, and a written report of the results shall be provided to DCPS within 10 calendar days thereafter.

3. Within **20 calendar days** of DCPS' receipt of the report of the assessment provided in Paragraph 2 of this Order, DCPS shall convene a meeting of the Student's IEP Team (including Petitioner) to review the results and to review and revise, as appropriate, the Student's IEP. Without limiting the generality of the forgoing, the IEP Team may elect to revise the IEP provisions addressed in Paragraph 1 (b) of this Order to substitute a different AT device that it determines is more appropriate to meet the Student's needs, and to revise the AT services and goals as appropriate.

4. DCPS may elect to combine the meeting required under Paragraph 3 of this Order with a meeting to review the results of other assessments conducted by DCPS as part of the Student's re-evaluation, provided DCPS complies with the specified timeline.

5. Any delay in meeting any deadline in this Order caused by Petitioner or Petitioner's representatives (*e.g.,* absence or failure to attend a meeting, or failure to respond to scheduling requests) shall extend the deadline by the number of days attributable to such delay.

6. Petitioner's other requests for relief in her Due Process Complaint filed November 29, 2012, are hereby **DENIED;** and

7. The case shall be **CLOSED.**

Dated: February 21, 2013

Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia court of competent jurisdiction or in a District Court of the United States, without regard to the amount in controversy, within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).