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OSSE  
Office of Dispute Resolution  
March 30, 2018

**Confidential**

Parent on Behalf of Student, <sup>1</sup>  Petitioner,  v.  District of Columbia Public Schools ("LEA")  Respondent.  Case # 2017-0339  Date Issued: March 30, 2018	HEARING OFFICER'S DETERMINATION  Hearing Dates: March 5, 2018 March 20, 2018  Counsel for Each Party listed in Appendix A  <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
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<sup>1</sup> Personally identifiable information is in the attached Appendices A & B.

**JURISDICTION:**

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on March 5, 2018, and March 20, 2018, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution (“ODR”) 1050 First Street, N.E., Washington, D.C. 20003.

**BACKGROUND AND PROCEDURAL HISTORY:**

The student or (“Student”) is age \_\_\_\_\_ and in grade \_\_\_\_\_.<sup>2</sup> Student’s parent (“Petitioner”) resides in the District of Columbia. Student has been determined eligible for special education and related services pursuant to the IDEA with a disability classification of intellectual disability (“ID”). Student is assigned to a DCPS school (“School A”). During school year (“SY”) 2016-2017 student attended a District of Columbia Public Charter School (“School B”). District of Columbia Public Schools (“DCPS”) is Student’s local educational agency (“LEA”) and was Student’s LEA when Student attended School B. On December 21, 2017, Petitioner filed the current due process complaint asserting DCPS denied Student a free appropriate public education (“FAPE”) by, inter alia, failing to review and revise Student’s individualized educational program (“IEP”) to address Student’s need for hospital and/or homebound instruction.

**Relief Sought:**

Petitioner seeks as relief that the Hearing Officer order DCPS to amend Student’s IEP to include hospital and homebound instruction when Student is in hospital or home due to illness, fund and independent augmentative alternative communication (“AAC”) assessment, provide Student assistive technology (“AT”) and AAC services, fully implement Student’s IEP and provide Student compensatory education.

**LEA Response to the Complaint:**

The LEA filed a response to the complaint on January 3, 2018. DCPS asserts that the student has not been denied a FAPE. In its response DCPS asserts the IEP currently in place is appropriate; Student has not been coming to school and Petitioner has failed to provide the documents necessary for home and hospital (“HHIP”) services. Student may have been in the hospital for a short period in October or November 2017, but Petitioner never provided the documentation to support the need for HHIP instruction. Student’s evaluations are current. With regard to an AT assessment, student was not available to be assessed and DCPS provided Petitioner funding for an independent AT evaluation.

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## **Resolution Meeting and Pre-Hearing Conference:**

The parties held a resolution meeting on January 24, 2018. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on January 21, 2017, and originally ended [and the Hearing Officer's Determination ("HOD") was originally due] on March 6, 2017.

Petitioner's counsel was not available on February 23, 2018, the date that was offered by the Hearing Officer for the second day of hearing. The next available day for both counsel was March 5, 2018. Petitioner's counsel filed a motion to extend the HOD due date by eleven (11) calendar days from March 6, 2018, to March 17, 2018, to correspond to the number of days that the hearing date was being continued. Respondent's counsel also agreed to the continuance and extension of the HOD due date.

On March 6, 2018, Petitioner filed a second motion extending the HOD deadline for twenty-four (24) calendar days, shifting the HOD deadline from March 6, 2018, to March 30, 2018.

The undersigned Hearing Officer ("Hearing Officer") convened a pre-hearing conference on January 31, 2018, and issued a pre-hearing order ("PHO") on February 4, 2018, outlining inter alia, the issues to be adjudicated.

## **ISSUES:** <sup>3</sup>

The issues adjudicated are:

1. Whether the DCPS denied the student a FAPE by failing to review and revise the student's February 6, 2017, IEP to modify the student's least restrictive environment (LRE) and/or school setting to allow for home and hospital bound instruction due to the frequency and severity of the student's chronic illness<sup>4</sup> and/or to provide appropriate AT services.<sup>5</sup>
2. Whether DCPS denied the student a FAPE by failing to (a) timely evaluate the student pursuant to parental request in spring 2017 for an AT assessment, (b) and/or perform an AAC assessment, (c) and/or timely review the November 2017 independent AT

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<sup>3</sup> The Hearing Officer restated the issues at the hearing and the parties agreed that these were the issues to be adjudicated. At the outset of the hearing, Petitioner's counsel withdrew issue #3 of the PHO regarding educational records.

<sup>4</sup> Petitioner alleges that in October 2017 the student's doctor(s) recommended some form of home instruction for the student and Petitioner's counsel informed DCPS of same, sending the doctor(s) report to DCPS in October 2017. As result, the Hearing Officer considers the allegation that the student's IEP/LRE was not reviewed and revised within a reasonable time after DCPS was notified in October 2017 of Student's need for some form of home instruction.

<sup>5</sup> Petitioner alleges the AT assessment was first requested in spring 2017 and the November 2017 independent assessment recommended AT services. As a result, the Hearing Officer considers the allegation that the student's IEP was not reviewed and revised within a reasonable time following the request for the AT assessment in spring 2017.

assessment, and/or (d) review and revise the student's IEP as necessary as result of the results of the independent AT assessment.

3. Whether DCPS denied the student a FAPE by failing to implement the student's IEP since October 2017 while the student was either in hospital or at home convalescing.

### **RELEVANT EVIDENCE CONSIDERED:**

This Hearing Officer considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 142 and Respondent's Exhibits 22 through 34<sup>6</sup>) that were admitted into the record and are listed in Appendix A.<sup>7</sup> The witnesses testifying on behalf of each party are listed in Appendix B.<sup>8</sup>

### **SUMMARY OF DECISION:**

Petitioner had the burden of persuasion on all issues adjudicated except issue #1. The burden of persuasion fell to Respondent on issue #1 after Petitioner met a prima facie case. The Hearing Officer concluded Respondent did not sustain the burden of persuasion by a preponderance of the evidence on issue #1 with regard to AT services only. Petitioner sustained the burden of persuasion by a preponderance of the evidence on issue #2, but did not sustain the burden of persuasion on issue #3. As a result, the Hearing Officer directed DCPS to conduct an AAC evaluation and convene and IEP team meeting to review the evaluation and discuss and determine appropriate services for Student.

### **FINDINGS OF FACT:**<sup>9</sup>

1. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of ID. Student is currently assigned to School A. DCPS is Student's LEA. During school year SY 2016-2017 Student attended School B, a

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<sup>6</sup> Respondent disclosed 15 documents total: R22- through R-34; there is no R-1 through R-21, as those documents were disclosed for a prior HOD.

<sup>7</sup> Any item disclosed and not admitted or admitted for limited purposes was noted on the record and is noted in Appendix A.

<sup>8</sup> Petitioner presented five witnesses: (1) Student's mother (Petitioner), (2), Student, (3) an educational advocate employed by the law firm representing Petitioner, designated an expert witness, (4) a second educational advocate employed by the law firm representing Petitioner, designated an expert witness, and (5) an independent assistive technology consultant who assessed Student, designated an expert witness. Respondent presented two witnesses: (1) DCPS HHIP unit representative, designated an expert witness and (2) a DCPS assistive technology specialist, designated an expert witness.

<sup>9</sup> The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within a parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

public charter for which DCPS was the LEA. Student also attended job-training sessions at School A. (Petitioner' Exhibits 4-4, 4-22, 5-1).

2. On April 25, 2017, Petitioner filed a due process complaint in which she alleged DCPS had failed to provide Student with a FAPE for SY 2016-2017 by failing to provide an appropriate IEP.<sup>10</sup> (Petitioner's Exhibit 4-1, 4-2, 4-3)
3. Petitioner's due process complaint also alleged DCPS had denied Student a FAPE by failing to fully implement Student's IEP by, inter alia, failing to provide HHIP services and/or home instruction during extended medical absences due to medical concerns. Petitioner also claimed DCPS had denied Student a FAPE by failing to timely and comprehensively evaluate Student with psychological, occupational therapy ("OT"), physical therapy ("PT"), and speech and language evaluations. (Petitioner's Exhibit 4-3)
4. The Impartial Hearing Officer ("IHO") issued an HOD on June 27, 2017. The IHO found that during SY 2016-2017, Student's IEPs were finalized on September 22, 2016, and February 6, 2017, and that draft IEPs were developed, but not finalized, on April 6, 2017, and June 8, 2017. The IHO found that each IEP stated that Student "currently has no communication needs at this time" and did not require assistive technology or services. (Petitioner's Exhibit 4-1, 4-5)
5. The IHO found that the Student had a complex medical history that included Down's Syndrome, hypertension, chronic kidney and lung disease, and asthma. The IHO found that Petitioner's counsel made a formal request for evaluations via letter dated March 17, 2017, requesting a comprehensive psychological, functional behavior assessment ("FBA"), behavior intervention plan ("BIP"), Adaptive, Vineland and a medical assessment. (Petitioner's Exhibit 4-5)
6. The IHO found that on April 6, 2017, the IEP team met and agreed to perform speech and language testing, and to meet with the assistive technology provider before agreeing to assistive technology ("AT"). (Petitioner's Exhibit 4-6)
7. The IHO found that an April 11, 2017, prior written notice ("PWN") stated the IEP team had agreed to perform an AT evaluation because of Student's limited communication abilities. The IHO found that a speech and language assessment, dated April 12, 2017, had been performed that stated that Student had reached a plateau in oral communication skills in 2017 and that "ethically and professionally" speech and language services should not continue; Student's speech is nearly unintelligible to those who have not interacted with Student at length. The IHO found that an outside speech and language therapy evaluation performed on May 31, 2016, concluded Student required on-going speech and language services as well as an augmentative and alternative communication to determine

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<sup>10</sup> Petitioner alleged the IEP was inappropriate because it did not provide sufficient behavioral support services ("BSS"), present levels of performance ("PLOPS"), goals, a dedicated aide, a safe learning environment, and classroom and testing accommodations, and (b) an appropriate least restrictive environment ("LRE") for medically and emotionally fragile students with placement/setting/location of service in a small, therapeutic, structured, special education day school in a program suitable for medically and emotionally fragile students.

an appropriate communication system, along with counseling and art or music therapy. (Petitioner's Exhibit 4-6)

8. The IHO found Student was not attending school partially due to illness, and because Student found the environment "too loud". The IHO found that by January 3, 2017, Student appeared ill during a home visit by an attendance counselor and a social worker and Petitioner advised that Student could not return to school. HHIP forms were sent to Petitioner to have the forms completed by Student's physician. However, DCPS made unsuccessful attempts to reach Petitioner between January 1, 2017 and March 9, 2017. (Petitioner's Exhibit 4-7, 4-8)
9. The IHO found that Student's physician completed the HHIP form on March 3, 2017, checking the box indicating that student was not confined to home or hospital, but adding by hand that "[p]sychosocial stressors and parent safety concerns conflict with school attendance". The physician recommended full-time homebound service delivery because Student was unable to attend any portion of the school day due to Student's fear related to school. The IHO found that Petitioner gave the Physician Verification Form to two women from DCPS on March 8, 2017, and that on March 15, 2017, one of the women left a message on Petitioner's voicemail regarding a meeting on Petitioner's request for HHIP. (Petitioner's Exhibit 4-8)
10. The IHO found that on April 6, 2017, Student's IEP team met and as of that date, Student had not returned to school, and when asked whether Student could return to school for assessments, Petitioner responded in the affirmative. Petitioner's educational advocate sent notice that Student would return to school on April 10, 2017, and on April 13, 2017, Student was determined ineligible for HHIP because Student was not confined to home or hospital and Student's treating physician never returned a call to discuss and verify information. (Petitioner's Exhibit 4-8)
11. The IHO found that on April 26, 2017, and April 27, 2017, Student refused to get up to go to the school and on June 1, 2017, after arriving at school, Student vomited, had tremors, twitching and rapid eye blinking and was taken to the hospital. The IHO found that Student had been absent from school for two (2) weeks before this incident and did not return to school thereafter. (Petitioner's Exhibit 4-8, 4-9)
12. The IHO determined that DCPS failed to provide Student with an appropriate IEP because it lacked a BSS with counseling services to help address Student's fears; did not contain anything in the area of concern for written language, and did not contain accommodations for statewide assessments. The IHO determined Student did not require a dedicated aide, and that Student's placement at School A was an appropriate placement for Student. (Petitioner's Exhibit 4-14, 4-15, 4-16)
13. The IHO determined that Petitioner failed to meet the burden of proof that DCPS failed to implement Student's IEP by failing to provide HHIP services. The IHO determined that the Student requires school for social and vocational interactions that cannot fully and successfully be achieved through home instruction. The IHO wrote, "[h]ome

instruction is not appropriate if Student can be assisted in attending school.” The IHO urged that going forward when Student was medically unable to attend school DCPS should coordinate with Petitioner to provide Student as much educational support as is feasible and reasonable. (Petitioner’s Exhibit 4-16, 4-17)

14. As a result of the IHO’s findings and determinations, the IHO ordered DCPS to convene an IEP meeting to, inter alia, review all evaluations which were not completed and reviewed by the time of the due process hearing (speech-language, comprehensive psychological/educational, assistive technology), and revise Student’s IEP as appropriate. DCPS was also ordered to provide funding for 40 hours of play therapy, from an independent provider chosen by Petitioner, and provide or fund 40 hours of mentoring for Student from a nondisabled peer who will engage with Student in shared societal activities. All service hours not used within 14 months will be forfeited. (Petitioner’s Exhibit 4-19, 4-20)
15. Student has not used little if any of the compensatory education that was granted by the HOD. (Petitioner’s testimony, Witness 1’s testimony, Petitioner’s Exhibit 4-20)
16. On July 6, 2017, DCPS emailed Petitioner’s attorney and forwarded an attachment of the June 27, 2017 HOD and a service authorization letter for 40 hours of play therapy. DCPS requested the Petitioner’s attorney provide several dates and times between July 6, 2017, and July 18, 2017, when an IEP meeting could be convened. (Petitioner’s Exhibit 110-3, 110-4, 110-5)
17. On September 7, 2017, DCPS convened an IEP meeting for Student to comply with the June 27, 2017 HOD. The IEP meeting notes reflect the purpose of the meeting was to review all evaluations completed by June 27, 2017, and revise Student’s IEP. (Petitioner’s Exhibit 107-2, 107-3)
18. The September 7, 2017, IEP team reviewed Student’s speech and language therapy evaluation from April 2017. The speech and language pathologist determined that the Student’s skills had reached a plateau and that Student did not require speech and language therapy services. Petitioner and her attorney disagreed with the assessment and requested an independent speech and language assessment. Petitioner’s attorney also mentioned the independent AT evaluation and was advised that the authorization for the independent evaluation (“IEE”) would be sent via email. Petitioner’s attorney also requested the authorization for play therapy (or mentoring). DCPS advised that the authorization had been provided but could be sent again, if necessary. (Petitioner’s Exhibit 107-3, 107-4, 110-5)
19. The team began discussing Student’s IEP; however, DCPS advised that it was difficult to revise Student’s IEP because Student had not been to school. During the meeting, Petitioner requested HHIP documents, and was advised that the documents needed to be completed by a psychiatrist and not a physician, particularly with an allegation that Student suffers from post-traumatic stress disorder (“PTSD”). (Petitioner’s Exhibit 107-4)

20. Student's related service providers and all members of the IEP team preferred to wait for Student to begin attending school before providers could create meaningful IEP goals, update present levels, and change any related services. The team determined that they would revisit Student's IEP in January 2018, or once the student had attended school regularly enough for the team to adequately update the IEP. (Petitioner's Exhibit 107-4)
21. Although DCPS gave Petitioner the HHIP forms at the September 7, 2017, meeting, Petitioner was delayed in returning the HHIP forms because she had to wait for an appointment with the physician and then Student was hospitalized for two weeks in September 2017 through October 2017. (Petitioner's testimony)
22. On September 7, 2017, at 11:42 a.m., Petitioner's attorney forwarded an email to DCPS requesting the IEEs for a speech and language and assistive technology assessments. (Petitioner's Exhibit 110-1)
23. On September 7, 2017, at 6:21 p.m., Petitioner's attorney forwarded an email to DCPS referencing medical tests that were being performed on Student and requesting IEEs for the Speech and AT assessments. Petitioner represented that Student has begun independent play therapy and it was going well. (Petitioner's Exhibit 109-1)
24. On September 20, 2017, DCPS forwarded an email to Petitioner's attorney which contained attachments of the September 7, 2017, IEP meeting notes and an authorization letter for an IEE for the AT assessment. DCPS did not conduct the AT assessment itself because of a staff shortage. DCPS also requested that Petitioner's attorney confirm the team's agreement to convene a follow-up meeting once Student began to regularly attend school, to develop meaningful goals, present levels of performance, and levels of related services. (Witness 5's testimony, Petitioner's Exhibit 107-1)
25. On September 26, 2017, Petitioner's attorney forwarded an email to DCPS confirming the September 20, 2017, email contents as representative of the agreement between Petitioner and DCPS. (Petitioner's Exhibit 104-2)
26. On October 17, 2017, a Physician Verification Form was completed regarding Student's medical condition. The form was completed by a Doctor of Psychology (psychologist) and contained medical information related to Student. The medical information did not contain any psychiatric diagnosis. The information detailed Student's September 21, 2017 hospital visit. (Respondent's Exhibit 24-8, 24-11, 24-12, 24-13, 24-31)
27. Student's treating psychologist from Children's National Medical Center ("CNMC") informed Petitioner that the HHIP form had been sent to School A on November 6, 2017. In late November 2017, DCPS told Petitioner a home instructor would come to provide instruction to Student on Tuesdays and Thursdays. This was the only time the teacher had available on her schedule. The teacher told Petitioner she would start instructing Student after the Christmas holidays. (Petitioner's testimony)

28. On November 17, 2017, Student received an IEE AT evaluation, which was performed in a “non-academic” setting. The evaluator included in the background information that student did “not attend school but instead receives home and hospital instruction from the school system based on parental report”. As a part of the evaluator’s behavioral observations, he noted that Student was “ambulatory and able to navigate environment independently”. The evaluator observed that Student “did not display any work avoidance behaviors throughout the entire evaluation.” (Petitioner’s Exhibit 99-3, 99-4)
29. The IEE AT evaluator did not formally assess Student’s auditory skills, administered an informal handwriting task, and an informal fine motor task. The IEE determined that Student “will benefit from assistive technologies to assist with executive functioning, written expression, reading, motor skills and communication.” The evaluator recommended Student be provided a dedicated laptop computer, electronic books with text to speech output and other technologies including assistive writing software. (Petitioner’s Exhibit 99-4, 99-5)
30. The IEE AT evaluator recommended that Student receive an ACC evaluation, “so a reliable and functional communication system is established as soon as humanly possible.” The evaluator advised that Student was unfamiliar with the use of technology and requires repeated practice utilizing the assistive technologies, or they will go unused. The evaluator recommended a minimum of 4 hours of formal assistive technology training and/or consultative services. (Petitioner’s Exhibit 99-5, 99-6)
31. The independent evaluator believes that typically a speech language pathologist or a health care provider conducts an AAC assessment. An AAC evaluation is not within the scope of practice of the independent evaluator who conducted Student’s independent AT assessment. (Witness 3’s testimony)
32. DCPS was able to confer with Student’s health care provider and despite the HHIP form not being filled out correctly, in December 2017, DCPS approved Student for HHIP instruction and assigned a HHIP teacher to go to Student’s home to provide instruction. On December 20, 2017, the teacher contacted Petitioner and offered to come to provide Student instruction, but Petitioner declined the services that day. Thereafter, DCPS could not reach Petitioner by telephone to schedule the home instruction. As result of not being able to reach Petitioner, and after contacting Petitioner’s attorney, DCPS ended the HHIP authorization for Student on January 18, 2018. DCPS has not yet received a new HHIP form from Petitioner that is required. DCPS procedures require that the HHIP services be re-authorized by a physician verification form every 60 days. When a student with an IEP is approved for HHIP, the student will be provided all related services in the IEP and 2 to 4 hours of home instruction per week. (Witness 4’s testimony, Respondent’s Exhibits 24-B-115, 26, 29)
33. DCPS convened an IEP meeting for Student on January 24, 2018, at which the independent AT assessment was reviewed. Petitioner’s attorney requested that the devices recommended in the IEE be provided to Student and that an AAC assessment be

conducted. The DCPS AT specialist could not agree or disagree with the recommended AT devices because the devices recommended in the IEE had not been tried with Student and Student had not been attending school. DCPS agreed to conduct the AAC assessment. The DCPS AT specialist has scheduled with Petitioner to conduct the AAC assessment on April 9, 2018. (Witness 1's testimony, Witness 5's testimony, Respondent's Exhibit 27)

34. Student's current IEP prescribes 31.75 hours per week of specialized instruction per week and the following related services: 60 minutes per month of OT, 2 hours per month of speech and language pathology, and 30 minutes per month of OT consultative services. (Respondent's Exhibit 5-12)
35. DCPS performed a review of the IEE evaluation report. The DCPS review report is dated February 13, 2018. The DCPS reviewer found that the IEE evaluator did not review Student's formal education evaluations and that all assessments performed by the evaluator were "informal". The DCPS reviewer reported that the IEE evaluator stated that trials had been performed; however, most of the specific devices and supports recommended by the IEE evaluator were not trialed. The DCPS reviewer advised that the IEE evaluator had not assessed Student's communication needs or reviewed Student's communication needs based on formal evaluations. The DCPS reviewer states, "the IEE does not complete any formal or informal communication assessments or make recommendations for support that could enhance communication." (Witness 5's testimony, Respondent's Exhibit 23)
36. Student has not attended school at all during SY 2017-2018 because Student was hospitalized for two weeks in October/November 2017 as well as for psychological issues related to post-traumatic stress disorder. Student also experiences seizures on occasion. Petitioner does not intend to send Student back to School A for the remainder of SY 2017-2018. (Petitioner's testimony)
37. Petitioner's educational advocate opined that Student would be more functional in communication and in the community if Student had the AT evaluation and Student's IEP had been implemented since October 2017. The educational advocate recommended as compensatory education that Student receive 15 hours of direct assistive technology services and 5 hours of indirect services as well as assistive technology as follows: 1 to 2 years of Learning Ally subscription for \$135 annually, electronic books with text to speech output, a laptop with AT writing support software, keyboarding training: Type to Learn (web based) Adaptive writing tool e.g. PenAgain, Adaptive trackball (e.g. BIGracker from Ablenet AT for communication. (Witness 2's testimony, Petitioner Exhibit 142)

## **CONCLUSIONS OF LAW:**

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--  
(a) Are provided at public expense, under public supervision and direction, and without charge;  
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. West*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, as noted in the PHO, Petitioner had the burden of production on all issues adjudicated and the burden of persuasion on all issues adjudicated except issue #1. The burden of persuasion fell to Respondent on issue #1 after Petitioner met a prima facie case.<sup>11</sup> The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008). See also 20 U.S.C. §1451 (i)(2)(C)(iii).

**ISSUE 1:** Whether the DCPS denied the student a FAPE by failing to review and revise the student's February 6, 2017, IEP to modify the student's LRE and/or school setting to allow for home and hospital bound instruction due to the frequency and severity of the student's chronic illness and/or to provide appropriate AT services.

**Conclusion:** Respondent sustained the burden of persuasion by a preponderance of the evidence with regard to the alleged failure to modify Student's LRE and/or school setting to allow for

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<sup>11</sup> DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

home and hospital bound instruction due to the frequency and severity of the student's chronic illness. However, with regard to AT services, the Hearing Officer concludes DCPS' failure to timely conduct and review Student's AT evaluation significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE.

34 C.F.R. § 300.324(b)<sup>12</sup> requires that a student's IEP be updated at least annually to determine whether the annual goals for the child are being achieved and revise the IEP to address any lack of expected progress toward the annual goals and in the general education curriculum.

In *Board of Education v. Rowley* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

"The IEP is the "centerpiece" of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must "focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits."

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.<sup>13</sup>

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<sup>12</sup> 34 C.F.R. § 300.324(b): Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team-- (i) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and (ii) Revises the IEP, as appropriate, to address-- (A) Any lack of expected progress toward the annual goals described in Sec. 300.320(a)(2), and in the general education curriculum, if appropriate; (B) The results of any reevaluation conducted under Sec. 300.303; (C) Information about the child provided to, or by, the parents, as described under Sec. 300.305(a)(2); (D) The child's anticipated needs; or (E) Other matters.

<sup>13</sup> Pursuant to 34 C.F.R. § 300.115 - Continuum of alternative placements (a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. (b) The continuum required in paragraph (a) of this section must-- (1) Include the alternative placements listed in the definition of special education under Sec. 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34C.F.R. § 300.550; see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

The second, substantive, prong of the *Rowley* inquiry is whether Student's IEP was reasonably calculated to enable Student to make progress appropriate in light of Student's individual circumstances. In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the "educational benefits" requirement pronounced in *Rowley*. To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Andrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

Petitioner alleges DCPS failed to modify Student's LRE and/or school setting to allow for home and hospital bound instruction due to the frequency and severity of Student's chronic illness. Petitioner alleges that in October 2017 the student's doctor(s) recommended some form of home instruction for the student and Petitioner's counsel informed DCPS of same sending doctor(s) report to DCPS in October 2017.

The reason the IEP meeting was convened on September 7, 2017, was to discuss and comply with the June 27, 2017 HOD. The HOD, among other things, required that the parties convene a meeting to discuss Student's IEP and make changes to the goals and develop behavioral support services. The team determined that they could not reasonably make changes to goals, and related services for the student until they had the opportunity to observe Student to discover what needed to be changed, and how to make changes that would be beneficial to Student's education. Petitioner and Petitioner's attorney agreed to wait until January 2018, or until Student had begun attending school on a regular basis. After the meeting, DCPS confirmed Petitioner's agreement via email.

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class placement. Pursuant to DC Code § 38–2561.02. (c) Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia.

At that September 7, 2017, meeting Petitioner requested HHIP services and was provided the forms to initiate the services. Neither Petitioner nor her counsel at that meeting requested that Student's IEP be amended to include HHIP services. It stands to reason that if Petitioner's counsel agreed not to yet amend Student's IEP to include the changes that the June 27, 2017, HOD directed, and there was no specific request from Petitioner to amend the IEP to include HHIP services, that DCPS would not have reasonably done so.

The evidence demonstrates that Petitioner finally provided the required HHIP documentation in November 2017 as there were contradictions among Student's health care providers about the reasons Student could not attend school. Nonetheless, despite the contradictions, DCPS authorized Student for home instruction by December 15, 2017. Despite Student being authorized for the instruction DCPS attempted repeatedly to contact Petitioner to no avail, including through her attorney, in order for the instruction to be delivered.

DCPS convened an IEP meeting on January 24, 2018, at which Student's IEP was reviewed. Petitioner renewed her request for HHIP services and DCPS again requested that Petitioner provide documentation from a health care provider that clearly indicated the reason Student is unable to attend school, as the contradictions from the health care providers persisted.

Based on this evidence, I conclude that DCPS made a good faith effort to provide Student the HHIP services and as result DCPS should not be held responsible for the HHIP services ultimately not being provided. Consequently, I conclude that DCPS sustained the burden or persuasion by a preponderance of the evidence that there was no reasonable basis for DCPS to amend Student's IEP to include HHIP services at the September 7, 2017, meeting or the January 24, 2018, meeting.

Petitioner also asserts DCPS failed to review and revise Student's IEP to include AT services. The evidence demonstrates that the June 27, 2017, HOD directed DCPS to review and revise Student's IEP to among other things consider the results of evaluations including an AT evaluation. Thus, DCPS convened an IEP meeting on September 7, 2017. At that meeting the team determined that because Student was not attending school at the time Student's IEP could not be effectively amended.

Although DCPS had issued a PWN that it would conduct an AT evaluation on April 11, 2017, it did not do so prior to the start of the next school year. Although Respondent alluded to Student no being available to be evaluated in its response to the complaint, the evidence demonstrates that the AT evaluation was not completed by DCPS due to a staff shortage. At best, had DCPS been able to preform the evaluation it would have been completed by the time of the September 7, 2017, meeting and would have been able to be reviewed then. DCPS eventually issued Petitioner an IEE authorization for the evaluation in September 2017.

The independent evaluation was completed on November 30, 2017, and recommended student be provided AT devices and software. However, when the evaluation was reviewed by an IEP team on January 24, 2018, the DCPS AT specialist could not agree that Student would benefit from the AT the IEE recommended because the AT devices had not been tried with Student and Student had not been attending School. In addition, DCPS was of the opinion that the IEE

should have also included an AAC assessment, which it did not. Consequently, a determination of what AT student would benefit from and be provided, as well as recommendations regarding an alternative communication system for Student have been significantly delayed.

Had DCPS completed the AT evaluation itself within a reasonable time following the April 11, 2017, PWN, it stands to reason that Student might already be benefitting from AT rather still awaiting an evaluation and a review by an IEP team. Because the AAC evaluation has not yet been conducted and DCPS has not yet determined what specific AT Student should be provided, I conclude, although more aptly addressed to issue #2 below, that DCPS' failure to timely complete the AT evaluation itself pursuant to its own PWN significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, despite the fact that DCPS later authorized an IEE.

**ISSUE 2:** Whether DCPS denied the student a FAPE by failing to (a) timely evaluate the student pursuant to parental request in spring 2017 for an AT assessment, (b) and/or an AAC assessment, (c) and/or failed to timely review the November 2017 independent AT assessment, and/or (d) failed to review and revise the student's IEP as necessary as result of the results of the independent AT assessment.

**Conclusion:** Petitioner sustained the burden of persuasion by a preponderance of the evidence on this issue.

34 C.F.R. § 300.303(a) makes clear that, "A local education agency ("LEA") shall ensure that a re-evaluation of each child with a disability is conducted if a public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or...if the child's parents or teacher requests a re-evaluation." and that the reevaluation must be conducted at least once every three years. Requests for evaluations/reevaluations are to be conducted in a timely manner. *Herbin v. Dist. of Columbia*, 362 F. Supp. 2d. 254, 259, 261 (D.C.C. 2005).

34 C.F.R. §300.304 provides evaluation procedures that require that the agency use a variety of assessment tools, and it specifically states that the agency must not use any single measure or assessment as the sole criterion for determining if the child is a child with a disability and determining an appropriate program.<sup>14</sup>

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<sup>14</sup> 34 C.F.R. § 300.304 Evaluation procedures. (a) Notice. The public agency must provide notice to the parents of a child with a disability, in accordance with § 300.503, that describes any evaluation procedures the agency proposes to conduct. (b) Conduct of evaluation. In conducting the evaluation, the public agency must— (1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining— (i) Whether the child is a child with a disability under § 300.8; and (ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities); (2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and (3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. (c) Other evaluation procedures. Each public agency must ensure that— (4) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;

34 C.F.R. §300.324(b) requires that DCPS review and revise child's IEP, as appropriate, to address the results of any reevaluation.

As previously stated Although DCPS had issued a PWN that it would conduct an AT evaluation on April 11, 2017, it did not do so prior to the start of the next school year due to a staff shortage. At best, had DCPS been able to preform the evaluation it would have been completed by the time of the September 7, 2017, meeting and would have been able to be reviewed then. DCPS eventually issued Petitioner an IEE authorization for the evaluation in September 2017 and the IEE was completed on November 30, 2017. An IEP team reviewed the IEE on January 24, 2018.

However, the DCPS AT specialist could not agree that Student would benefit from the AT the IEE recommended because the AT devices had not been tried with Student and Student had not been attending School. In addition, DCPS was of the opinion that the IEE should have also included an AAC assessment, which it did not. Consequently, a determination of what AT student would benefit from and be provided, as well as recommendations regarding an alternative communication system for Student have been significantly delayed.

As previously stated in issue # 1 above, had DCPS completed the AT evaluation itself within a reasonable time following the April 11, 2017, PWN, it stands to reason that Student might already be benefitting from AT rather still awaiting an evaluation and a review by an IEP team. Because the AAC evaluation has not yet been conducted and DCPS has not yet determined what specific AT Student should be provided, I conclude that DCPS' failure to timely complete the AT evaluation itself pursuant to its own PWN significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, despite the fact that DCPS later authorized an IEE.

**ISSUE 3:** Whether DCPS denied the student a FAPE by failing to implement the student's IEP since October 2017 while the student was either in hospital or at home convalescing.

**Conclusion:** Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

5E DCMR 3002.3 provides that:

- (c) The LEA shall ensure that an IEP is developed and implemented for each eligible with a disability served by the LEA.
- (d) The LEA shall ensure that special education and related services are provided to an eligible child with a disability in accordance with the child's IEP...
- (f) The LEA shall make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP.

“To prevail on a claim under IDEA, a party challenging the implementation of an IEP must show more than a *de minimus* failure to implement all elements of that IEP, and instead, must demonstrate that the ...authorities failed to implement substantial or significant portions of the

IEP” *Savoy v. District of Columbia* (DC Dist. Court) February 2012 adopted *Houston Indep. School District v. Bobby R.* 200 F3d 341 (5<sup>th</sup> Circ. 2000)

The evidence demonstrates that Student has not attended school at all during SY 2017-2018 and that Student was hospitalized for two weeks. However, Petitioner asserts that during the remainder of the time Student has not attended school because of medical and psychological reasons.

However, the evidence demonstrates that the medical documentation that has been provided to DCPS to substantiate why Student has not attended school has been contradictory. Despite DCPS’s efforts to obtain the medical documentation even through conferring with the Student’s health care providers, DCPS has not been given sufficient documented medical reasons why Student cannot attend school. It should be noted that this same issue was adjudicated in the June 27, 2017, HOD and the IHO found that Student benefitted from attending school and that there was an insufficient evidence to conclude that Student could not attend. In the current proceeding there was no testimony offered from any health care provider to attest to the reason(s) Student could not attend school.

Although there was medical documentation presented to DCPS, the DCPS witness credibly testified that she spoke with Student’s health care provider and that provider could not attest to the student’s inability to attend school and directed that another health care provider should be contacted. The evidence demonstrates that to date Petitioner has not provided DCPS sufficient medical documentation to explain why Student cannot attend School.

Nonetheless, despite the contradictions among the information from Student’s health care providers, DCPS authorized Student for home instruction by December 15, 2017. Despite Student being authorized for the instruction DCPS attempted repeatedly to contact Petitioner to no avail, including through her attorney, in order for the instruction to be delivered.

DCPS convened an IEP meeting on January 24, 2018, at which Student’s IEP was reviewed. Petitioner renewed her request for HHIP services and DCPS again requested that Petitioner provide documentation from a health care provider that clearly indicates the reason Student is unable to attend school, as the contradictions from the health care providers have persisted.

Consequently, absent sufficient evidence that Student cannot attend School, I do not conclude that Petitioner sustained the burden of persuasion by a preponderance of the evidence that DCPS denied Student a FAPE by failing to implement Student’s IEP because it did not provide Student HHIP services or otherwise failed to implement Student’s IEP.

**Remedy:**

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.)

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. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

I concluded that DCPS denied Student a FAPE by failing to timely conduct an AT evaluation and provide Student with appropriate AT services. Petitioner presented the AT evaluator who recommended AT devices and software for Student. However, it appears from the evidence that the AT recommended was not tried with Student. Petitioner also presented an educational advocate who prepared a proposed compensatory education plan that recommended specific AT devices and software. However, the advocate had never spoken with Student and admitted that she did not know the best technology that would assist student in communication. It would, therefore, not be prudent for me to award Student AT devices and software that may not work for Student. Consequently, I direct in the order below that DCPS promptly complete the AAC evaluation and that an IEP team promptly meet to determine the appropriate AT device(s) and software that should be provided Student as well as the appropriate alternative communication system that will assist Student augmenting communication.

**ORDER:** <sup>15</sup>

1. DCPS shall, with written authorization from Petitioner, conduct an AAC evaluation of Student within ten school days of the issuance of this Order.
2. DCPS shall, within ten calendar days of its completion of the AAC evaluation, convene an IEP team meeting to review the evaluation and determine what AT and AAC system is most appropriate for Student and shall provide Student said AT and AAC system within fifteen calendar days of the IEP meeting. The team shall also determine, and DCPS shall provide, an appropriate amount of formal assistive technology training and/or consultative services to Student within a reasonable time after Student is provided the AT and/or AAC system.
3. When the IEP team meeting is held pursuant to the provision in #2 above, the team shall also discuss and consider whether Student's medical and/or psychological condition prevent Student from attending school on regular basis and consider any medical documentation Petitioner has presented and/or any input and participation in the meeting from Student's health care provider(s) and determine if Student's IEP should be amended to include hospital and/or home bound instruction and related services and amend

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<sup>15</sup> Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

Student's IEP as appropriate based on the team's determination regarding Student's ability or inability to attend school.

4. All other relief requested by Petitioner is denied.

**APPEAL PROCESS:**

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

*/S/ Coles B. Ruff*

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Coles B. Ruff, Esq.  
Hearing Officer  
Date: March 30, 2018

Copies to:     Counsel for Petitioner  
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