

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution
1050 First Street, N.E., Third Floor
Washington, D.C. 20002

OSSE
Office of Dispute Resolution
November 13, 2019

<i>Student</i> , ¹)	Case No.: 2019-0192
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 11/13/19
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates (Room): 10/2/19 (423),
("DCPS"),)	10/3/19 (423), 10/23/19 (423) &
Respondent.)	10/28/19 (423)
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student's Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Improvement Act ("IDEA") due to lack of an appropriate Individualized Education Program ("IEP") and IEP implementation, among other things. DCPS asserted that it had taken all necessary actions and had not denied Student a FAPE on any claim.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

Procedural History

Following the filing of the due process complaint on 7/31/19, the case was assigned to the undersigned on 8/1/19. On 8/13/19, Respondent filed a response and did not challenge jurisdiction. The resolution meeting occurred on 8/30/19, but did not resolve the case. The 30-day resolution period ended on 8/30/19. A final decision in this matter must

¹ Personally identifiable information is provided in Appendix A, including terms initially set forth in italics.

Hearing Officer Determination

Case No. 2019-0192

be reached no later than 45 days following the end of the resolution period, as extended by a 30-day continuance granted on 10/12/19, which requires a Hearing Officer Determination (“HOD”) by 11/13/19.

Following the prehearing conference on 9/16/19 and issuance of the Prehearing Order on 9/17/19, the due process hearing took place on 10/2/19, 10/3/19, 10/23/19 and 10/28/19 and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present in person for most of the hearing.

Petitioner’s Disclosures, submitted on 9/25/19, contained a cover letter and documents P1 through P143. Petitioner submitted Supplemental Disclosures on 9/26/19, which contained a cover letter and document P144. Documents P1 through P144 were all admitted into evidence without objection. Petitioner also submitted Supplemental Disclosures on 9/30/19, containing a cover letter and document P145 to which Respondent objected based on lack of timeliness; the objection was upheld and P145 was not admitted into evidence.

Respondent’s Disclosures, submitted on 9/25/19, contained a cover letter and documents R1 through R27. Respondent submitted Supplemental Disclosures on 9/26/19, containing a cover letter and documents R28 and R31 (but not R29 or R30). Of these documents, Respondent offered into evidence only R4, R5, R6, R12, R13, R17, R18, R24, R25, R26, R27 and R28, which were admitted without objection.

Petitioner’s counsel presented 8 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. *Teacher of Visually Impaired* (qualified without objection as an expert in Visual Impairment for Children Needing Special Education)
2. Parent
3. *Treating Doctor* (qualified without objection as an expert in Ear, Nose and Throat (“ENT”) and Otolaryngology)
4. *Nurse Practitioner* (qualified without objection as an expert in Pediatric Nursing for Children with Complex Needs)
5. *Home and Hospital Instruction Program (“HHIP”) Special Education Teacher* (qualified over objection as an expert in Special Education and Specialized Instruction)
6. *HHIP Speech-Language Pathologist* (qualified without objection as an expert in Speech-Language Pathology)
7. *HHIP Occupational Therapist* (qualified over objection as an expert in Occupational Therapy)

Hearing Officer Determination

Case No. 2019-0192

8. *Special Education Advocate* (qualified over objection as an expert in Special Education Programming and Placement)

Respondent's counsel presented 7 witnesses in Respondent's case (*see* Appendix A):

1. *Resolution Specialist*
2. *DCPS HHIP Speech-Language Pathologist*
3. *DCPS HHIP Special Education Teacher* (qualified without objection as an expert in Special Education)
4. *DCPS HHIP Occupational Therapist* (qualified without objection as an expert in School-Based Occupational Therapy)
5. *Local Education Agency ("LEA") Representative at Public School* (qualified without objection as an expert in Special Education with respect to Medically Fragile Children)
6. *Medical & Education Support ("MES") Program Manager* (qualified without objection as an expert in Special Education Programming for Medically Fragile Students)
7. *HHIP Program Manager* (qualified without objection as an expert in Special Education Programming, especially as to Medically Fragile Students and ESY)

Petitioner's counsel presented Parent as the sole rebuttal witness.

The issues to be determined in this Hearing Officer Determination are:

Issue 1: Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP from 3/3/19 to present, by failing to provide (a) a dedicated nurse to address Student's significant medical needs; (b) additional Extended School Year ("ESY") services of specialized instruction and related services of Occupational Therapy ("OT"), speech-language, and vision, along with transportation or home-based instruction; (c) private transportation, a dedicated nurse on the bus, and door to bus assistance; and (d) a more restrictive setting when Student was too medically fragile to attend in a school building.² *Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.*

Issue 2: Whether DCPS denied Student a FAPE by (a) failing to appropriately implement Student's IEP from 3/3/19 to the present by not providing all the specialized instruction and related services required by the IEP, or (b) improperly modifying Student's

² Issue 1 includes both issues A and B from pages 17 and 22 of the attachment to the due process complaint.

Hearing Officer Determination

Case No. 2019-0192

IEP unilaterally to only 2 hours/week of specialized instruction. *Petitioner has the burden of persuasion on this issue.*

Issue 3: Whether DCPS denied Student a FAPE by failing to provide Petitioner access to education records in response to requests to Public School and Home and Hospital Instruction Program (“HHIP”). *Petitioner has the burden of persuasion on this issue.*

The relief requested by Petitioner is:

1. A finding that Student was denied a FAPE.
2. Within 10 days, DCPS shall convene the IEP team and amend Student’s IEP to provide (a) a 1:1 dedicated nurse at school and during any home-based instruction; (b) appropriate accommodations and services, including private transport, a nurse on the bus, and door to bus assistance; and (c) additional ESY services, including specialized instruction and the related services of occupational therapy, speech-language, and vision. DCPS shall also provide the current hours and services on Student’s IEP.
3. DCPS shall provide a fast-track plan for Student to receive HHIP services when needed.
4. DCPS shall provide Parent access to Student’s education records from Public School and HHIP.
5. DCPS shall provide Student with compensatory education for any denials of FAPE from 3/3/19 to the present.³
6. Any other just and reasonable relief.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact⁴ are as follows:

³ Petitioner’s counsel was put on notice at the prehearing conference that at the due process hearing Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student’s alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent was encouraged to be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

⁴ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness’s testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when

Hearing Officer Determination

Case No. 2019-0192

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁵ Student is *Age*, *Gender* and in *Grade* at Public School.⁶ Student has already gone through a lot in life, despite Student's young age.⁷

2. Health Challenges. Student was born prematurely at 25 weeks, weighing 2 lbs. 4 oz., with chronic lung disease, initially requiring a ventilator, and hypoxic brain injury; among many other things Student has spastic, quadriplegic cerebral palsy, seizures, severe hypoxic-ischemic encephalopathy, and cortical vision impairment, and is dependent on others for all activities of daily living; Student remains dependent on a tracheostomy ("trach") and gastrostomy tube ("g-tube"), and is non-verbal.⁸ Student spent the first 6 months after birth in the hospital before ever going home; Student cannot walk or crawl.⁹

3. Student's IEP disability classification is Multiple Disabilities due to Visual Impairment including Blindness, and Orthopedic Impairment.¹⁰ Student's current IEP, dated 7/8/19, provides for 24.5 hours/week of specialized instruction outside general education; 2 hours/month of specialized instruction outside general education for Vision Instruction; 4 hours/month outside general education for each physical therapy, occupational therapy and speech-language pathology; along with 30 minutes/month of physical therapy consultation services, all of which has been unchanged since 8/9/18.¹¹

4. Due to Student's serious medical issues, Student only attended 1 day of school in 2018/19¹² and 8 days in 2019/20 as of the start of this hearing on 10/2/19.¹³ Student was not attending school when the hearing commenced, due to medical issues, but was able to go back to school before the hearing concluded on 10/28/19.¹⁴ Student is in the Medical & Education Support ("MES") program at Public School which is for children with both complex medical needs and severe cognitive impairments.¹⁵ Student's medical team supports Parent in trying to get Student engaged in school, but would prefer for Student to be educated at home.¹⁶

another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁵ Parent.

⁶ *Id.*

⁷ *Id.*

⁸ P61-1; P62-1; P14-3; P119-7.

⁹ Parent.

¹⁰ P102-1; P20 (8/9/18 eligibility).

¹¹ P102-15 (7/8/19 IEP); P8-16 (3/27/19 IEP); P12-18 (8/9/18 IEP).

¹² All dates in the format "2018/19" refer to school years.

¹³ Parent.

¹⁴ Parent; HHIP Program Manager.

¹⁵ MES Program Manager.

¹⁶ Nurse Practitioner.

Hearing Officer Determination

Case No. 2019-0192

5. Nursing Needs. Student should not be exposed to flus and colds.¹⁷ Student needs to be exposed only to the same people each day, including caregivers.¹⁸ Nursing interventions may include g-tube feeds, respiratory medication administration, oxygen administration, trach and oral suctioning, trach tube changes, medication administration by g-tube, and pulse oximetry measurements.¹⁹ Student's condition is life-threatening without immediate intervention when needed; if Student's trach falls out action must be taken within 5 minutes.²⁰ Student cannot call out or seek help when in distress.²¹ Student wears a pulse-oxygen monitor ("pulse oximeter") on Student's toe.²² Student needs the cleanest environment possible.²³ Infection control is extremely important for Student; anyone in close contact with Student should use hand sanitizer before touching Student.²⁴

6. All children with trachs require an alert caregiver who is trained in trach care to be with them at all times; a trach that is plugged with secretions or dislodged can be life threatening, so requires immediate intervention by a trained nurse.²⁵ Student's pulmonary specialist and ENT agreed that Student needs a dedicated nurse.²⁶

7. DCPS's goal is to provide necessary medical services in order to permit access to Student's academics.²⁷ The MES program at Public School is specifically designed for medically fragile students and has extensive nursing services available; other students have medical complexities similar to Student.²⁸ DCPS contracts with an outside provider to provide nursing and supervise RNs.²⁹ The company observes the students and if there is a need for more support in the classroom it is added "hands down."³⁰

8. Within the MES program, a child's doctor makes the recommendation about a dedicated nurse to the IEP team; it is the IEP team that decides the appropriate required actions; the doctor who recommended the dedicated nurse for Student is not familiar with the MES program and does not know what services the MES team can or can't provide.³¹ Student's IEP team concluded that a dedicated nurse was not needed for Student at school.³²

¹⁷ R6-2.

¹⁸ *Id.*

¹⁹ P6-1.

²⁰ R6-1,2.

²¹ Nurse Practitioner.

²² P102-8.

²³ R5-2.

²⁴ P79-3.

²⁵ P61-1.

²⁶ P40-1.

²⁷ P40-2.

²⁸ P43-2; MES Program Manager.

²⁹ R6-3.

³⁰ R6-4; MES Program Manager.

³¹ P43-3.

³² MES Program Manager.

Hearing Officer Determination

Case No. 2019-0192

9. DCPS encouraged Student's medical providers to observe at Public School to be able to make an informed decision about the need for a dedicated nurse.³³ Treating Doctor acknowledged in her testimony that she doesn't know anything about the MES nurses, but that it was not feasible for her to visit the school or talk by telephone.³⁴ Nurse Practitioner stated that it was not necessary for her to observe the Public School environment, as Student should have a dedicated nurse in all cases.³⁵ Nurse Practitioner cannot come to school during her workday; she has never spoken with the MES nurses by telephone and doesn't know their qualifications.³⁶

10. DCPS assigned Student to 1 of the 2 MES classrooms at Public School; there are 7 children (counting Student) in Student's MES class with 2 nurses, and 4 children in the other MES class with 1 nurse, so with staff there are 11 children and 9 adults in total in the MES classrooms.³⁷ Three of the 11 children have trachs (including Student): 1 has a dedicated nurse covered by insurance (making a total of 10 other children for 9 adults to monitor), while the other child with a trach does not have a dedicated nurse.³⁸ Each MES classroom has a teacher and 2 assistants who are given the medical documents about children in the class and are vigilant concerning medical emergencies; all adults in the classroom are monitoring the children for signs of distress, including pulse oximeters.³⁹ In an emergency, the school nurse at Public School can step in as a 4th trained nurse to assist in the MES classrooms.⁴⁰

11. MES Program Manager and others at DCPS reviewed Student's record and medical orders and are confident that the MES program is fully able to support Student.⁴¹ Nurse Practitioner is asking for support for Student that is already being provided; the invitation to Nurse Practitioner to observe the MES program remains open.⁴² MES Program Manager credibly testified that she has no concerns "whatsoever" about taking care of the MES program children this year.⁴³ In 2019/20, Student has been attending the MES program without a dedicated nurse; the program has been sending home information each day; Parent sent instructions and requests for more specific information.⁴⁴

12. DCPS staff credibly asserted that the MES program at Public School has the staffing to support Student; Student doesn't need a dedicated nurse.⁴⁵ There is never any extended

³³ R5-2; R6-4.

³⁴ Treating Doctor.

³⁵ Nurse Practitioner.

³⁶ *Id.*

³⁷ LEA Representative; MES Program Manager; P33-4; R6-2.

³⁸ LEA Representative.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ MES Program Manager.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ P49; P51-1.

⁴⁵ P33-4.

Hearing Officer Determination

Case No. 2019-0192

period when Student is not attended in the classroom, nor any time without an adult in the classroom.⁴⁶ Nurse Practitioner never heard of any problem reported with the nurses and Student's trach at school, apart from Parent's report that a nurse didn't want to suction Student when sleeping, even though the pulse oximeter was "alarming."⁴⁷

13. The MES staff felt comfortable with Student in the classroom; they have worked with children more medically fragile than Student and children who need more medical support than Student.⁴⁸ DCPS HHIP Special Education Teacher provided specialized instruction to Student at home and in a hospital; at the hospital DCPS HHIP Special Education Teacher was the only adult in the room with Student for an hour; at home there were no issues for the nurse when DCPS HHIP Special Education Teacher was there.⁴⁹ MES Program Manager observed Student receiving HHIP instruction at home; the nurse was in the back of the room and didn't need to be next to Student.⁵⁰ Student has 16 hours/day of coverage by outside nurses at home; the nurse at home keeps an eye on Student but does prepare food in the kitchen and goes to the bathroom as needed.⁵¹

14. Education at School. Both Treating Doctor and Nurse Practitioner made clear that Student goes to school based on Parent's preference; school exposure results in higher medical risks for Student.⁵² Several 5th grade general education students routinely come to interact with the MES students.⁵³ Use of a pulse oximeter to monitor Student helps.⁵⁴ The children in Student's class receive about 1 hour/day of special education instruction, generally 3-4 blocks of 15-20 minutes each.⁵⁵

15. In 2018/19, Student got sick shortly after attending school for 1 day on 5/2/19 and was hospitalized from 5/5/19 to 5/9/19.⁵⁶ On 5/5/19, Student was found unresponsive and grey at 6:30 AM when Student's apnea monitor alerted *Parents*; they began CPR/chest compression and called 911.⁵⁷ After the hospitalization, Parent wanted to have a slow transition back into school.⁵⁸ Nurse Practitioner provided a formal letter on 5/16/19 stating that Student should slowly acclimate to school, beginning 2 days/week and increasing over the summer, with a goal of attending full time in Fall 2019.⁵⁹ On 5/30/19, Student's medical provider felt that "summer school" would be a good way for Student to begin developing a

⁴⁶ LEA Representative.

⁴⁷ Nurse Practitioner.

⁴⁸ LEA Representative.

⁴⁹ DCPS HHIP Special Education Teacher.

⁵⁰ MES Program Manager.

⁵¹ Parent.

⁵² Treating Doctor; Nurse Practitioner.

⁵³ R12-1.

⁵⁴ Treating Doctor.

⁵⁵ LEA Representative.

⁵⁶ R5-1; P80-1; P-116-15.

⁵⁷ P80-14.

⁵⁸ R5-1 (5/21/19).

⁵⁹ P79-1,3; P116-15.

Hearing Officer Determination

Case No. 2019-0192

tolerance for other children/providers with shorter school days and fewer infection risks in the summer.⁶⁰

16. Nurse Practitioner later provided a formal letter on 8/23/19 requesting that Student gradually transition into school in 2019/20, beginning 2 days/week and increasing as tolerated.⁶¹ After beginning school in 2019/20, Student was hospitalized from 9/19/19 to 9/24/19 and released on a Tuesday evening with the recommendation of remaining out of school for the remainder of the week to fully recover.⁶²

17. HHIP Services. HHIP is only way DCPS provides home-based instruction.⁶³ HHIP is not a full-time placement; no child on HHIP receives 24.5 hours/week of specialized instruction.⁶⁴ DCPS HHIP Special Education Teacher stated that specialized instruction in HHIP is limited to 2 hours/week, for fewer hours are needed in a 1:1 setting.⁶⁵ HHIP never provides 5 hours/day of specialized instruction to any child; medically fragile children cannot tolerate more than 1 hour/day, which generally is sufficient.⁶⁶

18. Student was kept out of school during flu season in 2018/19, following doctor's orders.⁶⁷ HHIP initially began for Student on 11/28/18 and was projected to end on 3/29/19.⁶⁸ DCPS declined to hold an IEP meeting to amend Student's IEP to reflect the services Student would receive while in HHIP.⁶⁹ HHIP Program Manager acknowledged that DCPS should have had an IEP meeting when it was setting up HHIP services for Student.⁷⁰ DCPS's HHIP Handbook provides that an IEP team meeting to review and revise a student's IEP is to be convened within 10 school days after eligibility for HHIP is determined.⁷¹ The specialized instruction hours may need to be reduced based on the student's medical status as determined by the student's physician; HHIP or any member of the team does not have veto authority over decisions made by the IEP team.⁷² HHIP operated during the summer but with shorter days, from 7/1/19 to 7/26/19.⁷³

19. Student's first home visit by the HHIP physical therapist was on 12/3/18.⁷⁴ DCPS HHIP Special Education Teacher saw Student from January to March 2019 and once in

⁶⁰ P78-4.

⁶¹ P58-1.

⁶² P57-1.

⁶³ R6-6.

⁶⁴ P42-1; P43-4.

⁶⁵ DCPS HHIP Special Education Teacher.

⁶⁶ *Id.*

⁶⁷ P43-5.

⁶⁸ P101-18.

⁶⁹ P43-5.

⁷⁰ P42-1.

⁷¹ P68-12.

⁷² *Id.*

⁷³ R5-3.

⁷⁴ R18-3.

Hearing Officer Determination

Case No. 2019-0192

April 2019.⁷⁵ Student received services 6 times from DCPS HHIP Special Education Teacher in reporting period 3 (1/24/19-4/5/19); Student progressed but did not master the goal.⁷⁶ Petitioner alleged that occupational therapy HHIP services were missed, but DCPS HHIP Occupational Therapist confirmed on the last day of HHIP that no services were missed.⁷⁷

20. On 5/13/19 Petitioner's counsel tried to set up an IEP meeting to request HHIP services after Student's hospitalization, but the team wasn't available until 5/21/19.⁷⁸ Petitioner's counsel noted that Student will be absent for lengths of time due to fragility and would benefit from continuing HHIP when needed.⁷⁹ HHIP Program Manager refused as HHIP is provided only as needed on a case-by-case basis; it would be improper to predetermine services for a student.⁸⁰ HHIP hours can't be added to a "full time" IEP.⁸¹ HHIP Program Manager stated that a doctor's recommendation will not keep Student in HHIP or dictate the IEP team's decision.⁸²

21. As noted above, Student went into the emergency room on 9/19/19 and was discharged from the hospital on 9/24/19, the second hospitalization of the calendar year; medical restrictions kept Student at just 2 days/week, so Petitioner's counsel requested home instruction on the days when Student is not in school.⁸³ Nurse Practitioner considered that Student is heading into flu season by early October; Student's team is seeking HHIP to begin as of 11/1/19.⁸⁴ HHIP Program Manager agreed that children who are very medically fragile should stay out of school during "peak" flu season, the dates for which DCPS relies on input from the Centers for Disease Control and Prevention ("CDC").⁸⁵ When a HHIP referral is submitted, DCPS reaches out to the parties and works to resolve it.⁸⁶ HHIP Program Manager testified that HHIP services can be set up within a couple of days.⁸⁷

22. ESY 2019. Based on the data from Student's DCPS HHIP team, Student did not qualify for ESY in 2019 for occupational therapy, speech-language pathology, vision or specialized instruction, but did qualify for physical therapy; HHIP Program Manager concluded that Student would be supported at *Future School* for ESY.⁸⁸ Student had not been seen by a physical therapist since the beginning of April, and did not qualify for ESY

⁷⁵ R4-2.

⁷⁶ P25-1.

⁷⁷ P33-3.

⁷⁸ P106-30.

⁷⁹ R6-1.

⁸⁰ *Id.*

⁸¹ R6-6.

⁸² P43-5.

⁸³ P106-1; P104-3; P109-1.

⁸⁴ Nurse Practitioner.

⁸⁵ HHIP Program Manager.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ R4-2.

Hearing Officer Determination

Case No. 2019-0192

when Student left HHIP; based on Parent's report, Student's abilities had not regressed; however, the physical therapist decided to have Student work on sitting and standing goals during ESY, so agreed to ESY for 2 hours/month on the IEP.⁸⁹

23. Student did not qualify for ESY for speech-language pathology as there was no regression over winter and February breaks, and any regression could be reasonably recouped in the new school year.⁹⁰ Student did not qualify for ESY in occupational therapy, where Student made small and steady progress; DCPS HHIP Occupational Therapist did not believe Student would regress.⁹¹ Student would not regress significantly on vision over the summer, so did not need ESY.⁹² In specialized instruction, Student made progress each session regardless of any break in service between sessions, so did not qualify for ESY; Student made progress in both goals.⁹³ An ESY form was completed, stating that Student had not regressed after a break in service in any critical skill.⁹⁴

24. A series of letters about Student's need for ESY were prepared by related services providers and given to their contracting agency; each spoke of concern about regression, but only vision mentioned recoupment and it did not address whether there would be an excessive period for recoupment.⁹⁵

25. Following Multi-disciplinary Team ("MDT") meetings, an IEP amendment was generated that Parent signed on 6/20/19 providing ESY in only physical therapy for the summer of 2019, along with transportation.⁹⁶ ESY was scheduled to be from 7/1/19 to 7/26/19, from 8:00 AM to 1:00 PM; Student was to receive only 2 hours/month of physical therapy; it was unclear to Parent what Student would do the rest of the time.⁹⁷ Student was to attend Future School for ESY; the nurses in the MES program at Public School go to Future School for ESY.⁹⁸ ESY is to be provided in the student's least restrictive environment ("LRE"), and services may be provided in a student's home.⁹⁹ The intent of ESY is to provide FAPE to students, not to provide additional resources or maximize programming beyond FAPE.¹⁰⁰

⁸⁹ P36-2; P102-19; *cf.* R4-1, P35-1.

⁹⁰ R4-1; P35-1,2; P36-2,3; DCPS HHIP Speech-Language Pathologist.

⁹¹ R4-2; P35-2; P36-3; DCPS HHIP Occupational Therapist.

⁹² R4-2; P35-2; P36-3.

⁹³ R4-2; P36-3,4.

⁹⁴ P37-2.

⁹⁵ P52-1,2 (HHIP Occupational Therapist re occupational therapy); P53-1 (HHIP Special Education Teacher re learning basic numbers); P54-1 (HHIP Speech-Language Pathologist re speech-language pathology); P55-1 (Teacher of Visually Impaired re vision; "if there is regression, it will require time to re-learn").

⁹⁶ P5-1; Parent.

⁹⁷ P119-22; Parent.

⁹⁸ P36-4; R5-3.

⁹⁹ P66-4.

¹⁰⁰ P66-2.

Hearing Officer Determination

Case No. 2019-0192

26. Petitioner's counsel requested information about ESY numerous times, including after ESY had already begun, when Student was missing physical therapy.¹⁰¹ DCPS was trying to figure out ESY for Student on 7/8/19 and thereafter.¹⁰² HHIP Program Manager testified that specialized instruction would be included as part of ESY in addition to physical therapy.¹⁰³ Bus transportation for ESY was a significant challenge and DCPS was still trying to get it sorted out during the final week of ESY, without success.¹⁰⁴

27. Single Transportation with Dedicated Nurse and Door-to-Bus Service.

Transportation of Student has been a major issue; early on, Parent raised concerns about Student riding a bus for an extended period of time.¹⁰⁵ On 5/2/19, Student arrived on the bus for the first time at Public School and was late, around 9:12 AM; the bus driver then said he was going to pick up Student at 6:30 AM.¹⁰⁶ On 5/3/19 the bus came without a nurse; after 3 calls, OSSE sent a "rescue team emergency bus," but Parent could not pick up Student to put Student on the bus.¹⁰⁷ Parent has a back issue, so can't carry Student out the door and down the stairs and needs assistance in getting Student on and off the bus.¹⁰⁸ Parent depends on help to get Student into the car or Parent's apartment, so consistent timing of the bus is important.¹⁰⁹

28. Nurse Practitioner provided a formal letter dated 5/22/19 requesting private (or "single") transportation to and from school for a number of reasons.¹¹⁰ Single transport with a dedicated nurse is appropriate for Student due to trach and morning feeding needs.¹¹¹ Student's IEP was amended on 5/21/19 to provide special education transportation with single transportation for Student to and from school with a dedicated nurse on the bus.¹¹² This was incorporated in the 6/5/19 IEP which provided for "SINGLE TRANSPORT BUS AND NURSE – MONITOR EQUIPMENT" and specialized equipment with a ramp lift as Student was transported in a medical stroller.¹¹³ Student's current 7/8/19 IEP provides for both special education transportation and ESY transportation with "SINGLE TRANSPORT BUS AND NURSE – MONITOR EQUIPMENT" and specialized equipment with a ramp lift as Student was in a medical stroller.¹¹⁴ HHIP Program Manager acknowledged that

¹⁰¹ P106-9 (7/8/19); P106-14 (6/24/19); P106-16 (6/20/19).

¹⁰² P106-7.

¹⁰³ HHIP Program Manager.

¹⁰⁴ P106-3,4.

¹⁰⁵ R5-1.

¹⁰⁶ Parent; R5-2.

¹⁰⁷ P39-1; P106-34.

¹⁰⁸ P40-3; R6-3.

¹⁰⁹ P122-2.

¹¹⁰ P59-1.

¹¹¹ R5-3.

¹¹² P7-1.

¹¹³ P6-20 (capitalization in original).

¹¹⁴ P102-19,20 (capitalization in original).

Hearing Officer Determination

Case No. 2019-0192

Student has the right to a nurse on the bus, but that DCPS can't guarantee it will be the same nurse each day.¹¹⁵

29. OSSE Division of Student Transportation ("DOT") is a related service provider of transportation and does not and cannot interfere with the IEP process; OSSE DOT staff do not enter students' residences and are not allowed to lift students; bus attendants greet students at the outermost door of students' residences and transport them to the bus.¹¹⁶ OSSE runs transportation and does "hand to hand" rather than "door to door" handoffs.¹¹⁷

30. Student's first day of school in 2019/20 was 8/28/19, but the bus arrived without a nurse and was going to pick up 3 other children.¹¹⁸ On 8/28/19 on the way home from school an incident occurred on the bus when the RN needed to suction Student so had the bus pull to the side of the road; the nurse thought the trach tube was coming out so called for paramedics who took Student on a stretcher by ambulance to the hospital.¹¹⁹ The paramedic called Parent and said he didn't know about trachs and that Student was shaking; Parents immediately went to the hospital and found that Student was "completely fine" and not distressed; Student's trach was fine and no intervention or procedure was done by the paramedic or hospital.¹²⁰

31. On 9/18/19 in the morning pick-up the nurse on the bus was concerned that the pulse oximeter kept alarming, but Parent assured the nurse that Student was fine and it could either be a need for suctioning or the pulse oximeter needed adjustment; the bus soon left for school where there were no issues with the morning handoff.¹²¹

32. Education Records. Both Petitioner and Respondent put a great deal of effort into trying to resolve concerns about Student's education documents.¹²² Resolution Specialist worked to collect and provide records; some requested documents, such as service trackers for specialized instruction, do not exist so could not be provided.¹²³ Petitioner's counsel requested service trackers for all providers, but the request made in the summer could not be filled until fall due to Public School not having any 12-month employees; HHIP Program Manager promised to ask service providers to pull their documents.¹²⁴ On 9/19/19, Petitioner's counsel noted records that DCPS provided on 9/13/19 and 9/16/19, but listed 10 more groups of documents; DCPS on 9/24/19 provided 18 more documents, but Petitioner's counsel then asked for 9 more documents, including the HHIP manual "once it is completed"; on 9/25/19, the day disclosures were due for this hearing, DCPS provided a

¹¹⁵ R5-1.

¹¹⁶ P131-1 (OSSE Assistant General Counsel on 4/12/19).

¹¹⁷ R6-3.

¹¹⁸ P122-9.

¹¹⁹ P65-1.

¹²⁰ P122-10.

¹²¹ P122-1.

¹²² P104; P105.

¹²³ Resolution Specialist.

¹²⁴ P33-3.

Hearing Officer Determination

Case No. 2019-0192

couple more documents.¹²⁵ Petitioner sought a photo taken on a phone by a DCPS employee that purportedly showed Student improperly restrained for bus transport; DCPS credibly explained that the photo had been deleted pursuant to DCPS's privacy policies.¹²⁶

33. Compensatory Education. For compensatory education for any denial of FAPE, Petitioner is seeking 220 hours of specialized instruction plus 25 hours each of occupational therapy, physical therapy, speech-language pathology and vision to be used over 18-24 months.¹²⁷ The 220 hours of specialized instruction would be challenging for Student to use after being at school all day.¹²⁸ At the 8/30/19 resolution meeting, Petitioner's counsel asked for physical therapy to make up for not receiving physical therapy during ESY.¹²⁹

34. Prior HOD. A prior HOD with the same parties was issued by another Hearing Officer on 3/3/19 (revised 3/12/19) and ordered that once Student was authorized to return to school an IEP meeting should be held to determine Student's need for a dedicated nurse; prior to that IEP meeting MES Program Manager was to have the opportunity to observe Student and directly communicate with Student's health care providers and was to offer them an opportunity to observe Student's MES classroom.¹³⁰ MES Program Manager did observe Student at home on 4/12/19 receiving HHIP services and in school on 5/2/19, and directly communicated with Student's health care provider, Nurse Practitioner.¹³¹ MES Program Manager and others did offer Nurse Practitioner and others an opportunity to observe the MES classroom.¹³² Nurse Practitioner declined the opportunity to observe the MES classroom; no one observed from Parent's medical team.¹³³

Conclusions of Law

Based on the Findings of Fact above, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law are as follows:

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA "aims to ensure that every child has a meaningful opportunity to benefit from public education").

¹²⁵ P104-1,3,4,5; P105-6,7; P3-10.

¹²⁶ P33-4; HHIP Program Manager.

¹²⁷ Special Education Advocate.

¹²⁸ LEA Representative.

¹²⁹ P34-2.

¹³⁰ P4-20.

¹³¹ MES Program Manager.

¹³² MES Program Manager; HHIP Program Manager.

¹³³ MES Program Manager; Resolution Specialist.

Hearing Officer Determination

Case No. 2019-0192

“The IEP is ‘the centerpiece of the statute’s education delivery system for disabled children.’” *Endrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017), quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988). “The IEP is the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Endrew F.*, 137 S. Ct. at 994, quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

Once a child who may need special education services is identified and found eligible, Respondent must devise an IEP, mapping out specific educational goals and requirements in light of the child’s disabilities and matching the child with a school capable of fulfilling those needs. See 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Endrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 1001. The Act’s FAPE requirement is satisfied “by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), citing *Rowley*, 458 U.S. at 203. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child’s potential. *Rowley*, 458 U.S. at 198. In its decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that “[w]hen all is said and done, a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.” *Endrew F.*, 137 S. Ct. at 1001.

In addition, the LEA must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.114; *Endrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible); *Montuori ex rel. A.M. v. Dist. of Columbia*, 2018 WL 4623572, at *3 (D.D.C. 9/26/18).

A Hearing Officer’s determination of whether a child received a FAPE must be based on substantive grounds. 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 a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child’s *substantive* rights. *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), quoting *N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

Hearing Officer Determination

Case No. 2019-0192

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a prima facie case. D.C. Code Ann. § 38-2571.03(6); *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). “Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] 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 FAPE.” 5-E D.C.M.R. § 3030.3.

Issue 1: *Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP from 3/3/19 to present, by failing to provide (a) a dedicated nurse to address Student’s significant medical needs; (b) additional ESY services of specialized instruction and related services of occupational therapy, speech-language, and vision, along with transportation or home-based instruction; (c) private transportation, a dedicated nurse on the bus, and door to bus assistance; and (d) a more restrictive setting when Student was too medically fragile to attend in a school building. (Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.)*

Petitioner did establish a prima facie case on all these issues through testimony and documentary evidence. Respondent then met its burden of persuasion on the dedicated nurse and ESY services, but not all of the remaining issues.

The applicable legal standard for analyzing the appropriateness of the IEPs at issue in this case was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether they were “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 1001. As the Court of Appeals for the District of Columbia emphasized in *Z.B.*, 888 F.3d at 517, *Endrew F.* “raised the bar on what counts as an adequate education under the IDEA,” requiring more than “merely some” educational benefit. *See also Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 51 (D.D.C. 2016) (IEP must be “reasonably calculated to produce meaningful educational benefit”).

The measure and adequacy of the IEPs are determined as of the time they were offered to Student, rather than with the benefit of hindsight. *See Z.B.*, 888 F.3d at 524; *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The appropriateness of Student’s IEPs are analyzed by considering the specific concerns raised by Petitioner, which are considered below in turn.¹³⁴ *See* 34 C.F.R. § 300.320(a); *Honig*, 484 U.S. at 311.

¹³⁴ A Hearing Officer must also determine whether “the State complied with the procedures” set forth in the IDEA. *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), quoting *Rowley*, 458 U.S. at 206-07. The allegations in this matter were not simply procedural violations, as discussed in the text.

Hearing Officer Determination

Case No. 2019-0192

“Related services” must be provided if they are required to assist a student with a disability to benefit from special education. *See* 34 C.F.R. § 300.34(a); *Irving Independent Sch. Dist. v. Tatro*, 468 U.S. 883, 890, 104 S. Ct. 3371, 82 L. Ed. 2d 664 (1984). The issue is whether, in the absence of the related services at issue, Student’s IEPs were still reasonably calculated to enable Student to make appropriate progress in light of Student’s circumstances and Student was nonetheless able to access the curriculum to advance toward meeting Student’s annual goals pursuant to 34 C.F.R. § 300.320(a)(4). *See* *Damarcus S.*, 190 F. Supp. 3d 35; *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013). Related services, as with any other service in an IEP, are determined on an individual basis by the student’s IEP team. *See Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. at 46663.

(a) Dedicated Nurse at School. Respondent met its burden of persuasion on this issue, which was the most highly disputed aspect of this case, as well as the prior hearing earlier this year. The question was whether Student needed a 1:1 nurse who was solely dedicated to watching and attending to Student all of the time, or whether the shared nurses assigned to Student’s classroom could safely monitor and attend to Student along with another half dozen children. There is no question that “related services” include school nurse services which can be provided by any qualified person, and must be provided if they are required to assist a student with a disability to benefit from special education. *See* 34 C.F.R. § 300.34(a),(c)(13). Here, Student’s IEP team determined that while Student of course needed nursing as a related service, Student did not require a dedicated nurse at school. This Hearing Officer concurs with the IEP team based on the persuasive testimony and other evidence set forth herein.

The perspective of Parent and Nurse Practitioner in seeking a dedicated nurse to try to ensure Student’s absolute safety at school is certainly understandable. Yet the weight of Nurse Practitioner’s testimony was lessened by the fact that she had little information about the MES program and declined to talk to nurses involved or to observe the program, which would have informed her views even if she was not persuaded. The MES program at Public School is specifically designed for medically fragile children like Student and includes nursing services adequate for their care, according to the experts who do know it. The MES staff feel comfortable with Student in the classroom and have worked with children who are more medically fragile than Student and who need even more medical support than Student.

There are 7 children (counting Student) in Student’s MES class, with 2 nurses and 3 other adults who have received medical information about the students and also monitor the children for signs of distress. In an emergency, the school nurse at Public School could also step in as an additional trained nurse to assist. The testimony was that there is never any extended period when Student is not attended in the MES classroom, nor any time without an adult in the classroom. Nurse Practitioner acknowledged that she never heard of any problem with the MES nurses and Student’s trach at school, apart from Parent’s concern that a nurse didn’t want to suction Student when sleeping, even though the pulse oximeter was alarming. The impact of that incident is moderated by another situation Parent described when the pulse oximeter was alarming and causing concern to the nurse on the bus, but Parent told the nurse not to worry about it, making clear that discretion is needed in responding appropriately to the alarm.

Hearing Officer Determination

Case No. 2019-0192

The undersigned found particularly persuasive the testimony by MES Program Manager that if more support is needed in Student's classroom an additional nurse can and will be added. While Petitioner and Nurse Practitioner emphasized the need for Student to have a dedicated nurse by Student's side constantly at school, that seemed not to be the case elsewhere, suggesting that Public School was being held to a higher standard. DCPS HHIP Special Education Teacher provided specialized instruction to Student at the hospital where DCPS HHIP Special Education Teacher was the only adult in the room with Student for an hour. MES Program Manager observed Student receiving HHIP instruction at home where the nurse was in the back of the room. Student has 16 hours/day of coverage by outside nurses at home who keep an eye on Student in another room while preparing food in the kitchen and who leave Student when necessary to use the bathroom.

In sum, the undersigned concludes that Student does not require a dedicated nurse to benefit from special education and be able to access Student's curriculum by safely going to school. *See* 34 C.F.R. § 300.34(a); *Rowley*, 458 U.S. at 203.

(b) ESY Eligibility in 2019. Respondent also met its burden of persuasion on Student's ESY eligibility for 2019, based on the evidence from Student's DCPS HHIP providers, who provided the bulk of Student's education and related services in 2018/19. ESY is necessary to provide a FAPE under 34 C.F.R. § 300.106(a) when the benefits a disabled child gains during a regular school year will be "significantly jeopardized" if the child is not provided with an educational program during the summer months. *Johnson v. Dist. of Columbia*, 873 F. Supp. 2d 382, 386 (D.D.C. 2012), *quoting MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 537-38 (4th Cir. 2002); *see also S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 68-69 (D.D.C. 2008) (adopting standard from *MM*). However, the "mere fact of likely regression" is not a sufficient basis for finding ESY eligibility, for all students may regress to some extent during lengthy breaks; ESY is required only when regression will substantially thwart the goal of "meaningful progress." *Johnson*, 873 F. Supp. 2d at 386, *quoting MM*, 303 F.3d at 538. A 3/10/11 memorandum from the Acting State Superintendent of Education for D.C. explained that ESY is appropriate only if, in addition to the likelihood of "significant regression," the time required for recoupment is "extraordinary," based on student data, for any critical skill jeopardized.

The DCPS HHIP providers who worked with Student in 2018/19 were clear that Student did not meet the standards for ESY for the summer of 2019, apart from the physical therapist who seemed to state that Student did not meet the standards, but should have physical therapy anyway, so it was added to Student's IEP and is discussed as an implementation matter below. Beyond that, Student did not qualify for ESY for speech-language pathology as there was no regression over winter and February breaks, and any regression could be reasonably recouped. Student did not qualify for ESY in occupational therapy, where Student made small and steady progress and DCPS HHIP Occupational Therapist did not believe Student would regress. Similarly, the provider concluded that Student would not regress significantly on vision over the summer, so would not need ESY. Finally, as for specialized instruction, Student made progress each session regardless of any break in service, so did not qualify for ESY.

Hearing Officer Determination

Case No. 2019-0192

On the other hand, Petitioner submitted a series of letters about Student's need for ESY from related service providers, each of whom spoke of concern about regression, but recoupment was mentioned only with vision and even then did not address whether there would be an excessive period for recoupment. As a result, these letters do not address the appropriate requirements for determining ESY, and are not persuasive.

The undersigned thus concludes that DCPS met its burden by demonstrating no violation concerning ESY on Student's IEP. An IEP amendment was generated that Parent signed on 6/20/19 providing ESY for only physical therapy in the summer of 2019 and ESY was not required for the remaining services.

(c) Single Transportation with Dedicated Nurse and Door-to-Bus Service.

Respondent failed to meet its burden on this issue to a degree. Student needed single transportation to and from school with a nurse on the bus (who is dedicated since there are no other students on the bus), which was finally agreed to by the IEP team and included on Student's amended IEP on 6/5/19. School transportation is a related service to which Student was entitled based on Student's IEPs, although single transportation had been a matter of dispute, along with specifically where Student would be picked up and dropped off. *See* 34 C.F.R. §§ 300.34(a),(c)(16), 300.323(c)(2).

Prior to the 6/5/19 amended IEP, there was significant back and forth in trying to sort out transportation issues in the Spring of 2019, although the impact on Student was minimized by the fact that HHIP services were provided to Student at home into April 2019, and Student was not able to go to school most of the time even when not receiving HHIP services. However, even after the IEP was amended both for special education transportation and ESY transportation there were remarkable transportation challenges in trying to transport Student, which were not made easier by Student's serious medical needs. The undersigned is of the view that there should have been more coordination to ensure that there was clarity for Parent about what would be happening when. Parent is dependent on nursing schedules at home as well as school and bus schedules, so needs and is entitled to reasonable communication concerning this critical issue.

As for "door-to-bus" services, the undersigned's review of documents and testimony suggests there is not actually (or is no longer) a controversy or dispute between the parties, as Parent intends to have Student ready at the outermost door for pick-up and the bus expects to pick-up Student from the outermost door of Student's residence. While there was much emphasis on hand-to-hand versus door-to-door pick-up and drop-off, it seems that they are not in conflict, for the hand-off from one nurse to another nurse or Parent that DCPS urged can occur at the outermost door of Student's residence.

In terms of appropriate IEPs, the undersigned concludes that there was no violation related to transportation once Student's IEP was amended on 6/5/19 to provide single transportation with a dedicated nurse. Between 3/3/19 and 6/5/19 there may have been a technical violation from not having the necessarily level of transportation on Student's IEPs, but with Student only attending school 1 day (and possibly intending to go the next day), this Hearing Officer concludes that any impact was de minimis and did not prevent Student from going to school at that time. Thus, there was no substantive violation and no denial of

Hearing Officer Determination

Case No. 2019-0192

FAPE. The issue of implementation of transportation on Student's IEPs is discussed in Issue 2, below.

(d) More Restrictive Setting When Too Fragile to Attend School. DCPS failed to meet its burden of persuasion here, for it must provide Student a FAPE even when Student is too fragile to attend school, which happens with unfortunate regularity. While Student has begun to go to school with more frequency – increasing from only 1 day in 2018/19 – Student apparently has never been able to go more than a few days a week at most. Indeed, the common path for Student at various times, including after hospitalizations in May and September of this year, has been to begin Student at 2 days/week and seek to increase that gradually over time. The undersigned is aware of no record concerns from Student's IEP team about coming back on a part-time basis in such circumstances, yet Student is missing a great deal of school over the weeks and months by being unable to attend consistently for most or all of each week. At other times Student is out of school altogether when in the hospital or released to rest at home before returning to school. And the largest category is Student's removal from school during flu season – or peak flu season as DCPS prefers – which is as recurrent as the holidays.

Petitioner has sought IEP meetings to work out a plan to be prepared for Student missing school, but DCPS has resisted on the basis that it is premature to try to work out what should happen in the future, as though there is hope that Student will not miss school again in the future. It may be that HHIP is generally a temporary service that DCPS does not often add to IEPs. But IEPs are intended to be individualized and here Student appears likely to need HHIP services on a regular basis. DCPS asserts that HHIP should not be put in place until needed by Student, but that is a recipe for delay and missing the services required by Student's IEP. HHIP Program Manager testified that HHIP could be put in place in 2 days, yet the record in this case was that it took 8 days just to get a meeting scheduled to discuss HHIP. Given Student's circumstances, the only way Student can avoid frequently missing services is to have a streamlined or fast-tracked process for ensuring that services can be provided to Student when needed via HHIP or something akin to it.

The undersigned concludes that this rises to the level of a substantive violation and that Student has been denied a FAPE due to DCPS's refusal to be prepared to address Student's ongoing needs in order to ensure that Student receives required services. To name the problem is easier than to solve it, but to move this forward the undersigned orders Student's IEP team to meet to review and revise Student's IEP to incorporate a process to ensure that Student is able to receive all or at least a sizeable majority of the services on Student's IEP viewed on a monthly basis. This might be achieved through HHIP and/or other agreed upon mechanisms to ensure Student is receiving the services necessary for a FAPE. DCPS asserts that specialized instruction and possibly other services provided 1:1 through HHIP are more concentrated than education at school, so can be provided in smaller quantities, which may be appropriate for the IEP team to take into account and incorporate into Student's IEP. In this vein, the IEP team should incorporate the level of specialized instruction hours that Student actually needs at school and when unable to be in school.

While specifics are not in the record in any detail, the undersigned is clear that Student has missed many services since 3/3/19 – even at a modest level of 1 hour/day of

Hearing Officer Determination

Case No. 2019-0192

specialized instruction as suggested by several in testimony – for lack of having any such process in place of the sort discussed herein. This failure to provide needed services contributes to the compensatory education ordered below, although care has been taken not to duplicate the implementation claim, which is considered next..

Issue 2: *Whether DCPS denied Student a FAPE by (a) failing to appropriately implement Student’s IEP from 3/3/19 to the present by not providing all the specialized instruction and related services required by the IEP, or (b) improperly modifying Student’s IEP unilaterally to only 2 hours/week of specialized instruction. (Petitioner has the burden of persuasion on this issue.)*

Petitioner met her burden of persuasion on the implementation issue, although the extent to which DCPS failed to implement Student’s IEP raises subtleties discussed below. As a starting point, there is no doubt that at all relevant periods in this case Student has had a “full-time” IEP providing for significant amounts of related services and 24.5 hours/week of specialized instruction. Yet, DCPS has failed to provide any services for days and weeks at a time. *See Schiff v. Dist. of Columbia*, 18-CV-1382 (KBJ), 2019 WL 5683903, at *6 (D.D.C. 11/1/19), where the Court adopted the Report and Recommendation in which U.S. Magistrate Judge Deborah A. Robinson emphasized that a “total lack of any education is far ‘more than a minor discrepancy between the services a school provides to a disabled child and the services required by that child’s IEP’ in violation of the IDEA,” *quoting Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013).

(a) Failure to Implement IEP. For a failure to implement claim, the IDEA is violated only when a school district deviates materially from a student’s IEP. *See Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007). A material deviation requires more than a minor discrepancy or a “*de minimis* failure to implement all elements of [the student’s] IEP.” *Johnson*, 962 F. Supp. 2d at 268, *quoting Catalan v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). Courts are clear that it is “the proportion of services mandated to those provided that is the crucial measure for purposes of determining whether there has been a material failure to implement.” *Turner v. Dist. of Columbia*, 952 F. Supp. 2d 31, 41 (D.D.C. 2013), *citing Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). Notably, there is “no requirement that the child suffer educational harm in order to find a violation” in a failure to implement claim. *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016).

Here, there is no dispute that all of Student’s IEPs in effect since 3/3/19 called for 24.5 hours/week of specialized instruction outside general education; 2 hours/month of specialized instruction outside general education for Vision Instruction; 4 hours/month outside general education for each physical therapy, occupational therapy and speech-language pathology; along with 30 minutes/month of physical therapy consultation services, with the primary dispute over specialized instruction services. Nor is there any question that Student did not receive anything close to this level of specialized instruction services at any time. DCPS asserts that the 24.5 hours/week of specialized instruction on Student’s IEP was merely a placeholder to show that Student had a “full-time” IEP and could appropriately be placed in the MES program. Thus, one question is whether Student’s IEP should be taken at face value or understood as requiring only a much more modest level of

Hearing Officer Determination

Case No. 2019-0192

specialized instruction which would have been appropriate based on Student's circumstances.

As quoted above, the IEP is the "centerpiece" of the IDEA's education delivery system, *Endrew F.*, 137 S. Ct. at 994, and should mean something when the level of services is established for students. Accordingly, the undersigned finds a violation by DCPS failing to provide the service hours set forth on Student's IEPs. However, no one seriously asserted that Student would be well served or could possibly tolerate almost 5 hours/day of specialized instruction. The undersigned is convinced that the appropriate level of specialized instruction is likely the amount Student currently receives in the full-time MES program, which is about 1 hour/day. Thus, failure to deliver the number of specialized instruction hours in Student's IEPs in excess of what would benefit Student is a mere procedural violation. The substantive violation and denial of FAPE comes from not providing the specialized instruction hours that Student actually needed. The compensatory education awarded below is to make up for the substantial periods when Student was unable to attend school, yet was not provided any HHIP or other services by DCPS, which results in an award of specialized instruction and related services. *See Schiff*, 2019 WL 5683903, at *6.

Shifting to transportation, if Student cannot get to school a significant portion of the time due to lack of transportation on which Parent relies, that is a substantive violation and Student is denied a FAPE. *See* 34 C.F.R. § 300.513(a). Although OSSE provides the bus services, DCPS has responsibility for making a FAPE available to Student. *See* 5E D.C.M.R. § 3002.1; *Carnwath v. Grasmick*, 115 F. Supp. 2d 577, 582 (D. Md. 2000). Although the undersigned is not persuaded that there was any non-trivial harm to Student in 2018/19, DCPS's inability to provide needed transportation on a timely basis during ESY (when it appears transportation was never successfully provided to Student) and in 2019/20 contributes modestly to the compensatory education awarded below.

Finally, turning to ESY for the summer of 2019, physical therapy was the only service added to Student's IEP for ESY and was for only 2 hours/month, although HHIP Program Manager explained that specialized instruction would also have been provided while Student was at school, if DCPS had been able to transport Student to ESY. ESY was about a month long, so the loss from missing ESY was about 2 hours of physical therapy which is close to de minimis. However, given the totality of the circumstances the undersigned provides compensatory education for ESY below, and includes 4 hours of physical therapy to ensure that Student receives sufficient services to put Student in the place Student would have been but for the denial of FAPE by not providing the ESY included on Student's IEP.

Unilateral Modification of IEP. Unilateral modification of Student's IEP by DCPS would of course be improper, but Petitioner presented no evidence that any IEP modification by DCPS actually occurred. Student's IEP service levels have not changed in any of the IEPs at issue in this case and provide for 24.5 hours/week of specialized instruction. Any failure to provide more than 2 hours/week of specialized instruction is an implementation issue which was addressed in the prior subsection.

Hearing Officer Determination

Case No. 2019-0192

Issue 3: *Whether DCPS denied Student a FAPE by failing to provide Petitioner access to education records in response to requests to Public School and HHIP. (Petitioner has the burden of persuasion on this issue.)*

Parent did not meet her burden on the issue of education records. As a general matter, parents of a child with a disability have the right to examine all education records that pertain to the identification, evaluation, and educational placement of the child, and provision of a FAPE. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(a), 34 C.F.R. § 300.613(a) (parents must be permitted to inspect and review any education records relating to their child that are collected, maintained, or used by an agency). *See also Jalloh ex rel. R.H. v. Dist. of Columbia*, 535 F. Supp. 2d 13, 21 (D.D.C. 2008) (“parents have the right to examine records and DCPS must give parents the opportunity to inspect, review, and copy records”).

An “education record” under IDEA is defined by the regulations implementing the Family Educational Rights and Privacy Act (“FERPA”). 34 C.F.R. § 300.611(b). Under FERPA, an education record includes records, files, documents, and other materials which “(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.” 20 U.S.C. § 1232g(a)(4)(A); 34 C.F.R. Part 99.

Here, both Petitioner and Respondent put a great deal of effort into trying to resolve the issue of Student’s education records. DCPS worked to collect and provide all appropriate records. Some of the requested documents, such as service trackers for specialized instruction, were credibly stated not to exist so could not be provided. There were extensive, good faith communications in the record as the parties sought to deal with the issue, with Petitioner even asking for a policy document (rather than an education record) “once it is completed.” One particular point of contention was over a photo taken on a phone by a DCPS employee that purportedly showed Student improperly restrained for bus transport, but DCPS credibly explained that the photo had been deleted in keeping with DCPS’s privacy policies. Thus, the photo was not an education record because it was not maintained by an educational agency or institution.

Further, the scope of Petitioner’s disclosures suggests that Petitioner does have large quantities of documents she views as relevant, as over 1,300 pages of documents were submitted by Petitioner alone for this Hearing Officer’s review and analysis. On balance, the undersigned was not persuaded that DCPS failed to provide any documents that were necessary for Student’s education or for litigation concerning Student’s education.

Remedies

As an initial matter, DCPS is ordered below to convene Student’s IEP team to review and revise Student’s IEP by developing a streamlined process for ensuring that Student is provided a FAPE despite recurring medical challenges in getting to school 5 days/week, which could be a mechanism for quick, 2-day turnarounds on HHIP applications, or agreed upon processes for ensuring that Student monthly receives all or at least a sizeable majority of the services set forth on Student’s IEP. The IEP team should

Hearing Officer Determination

Case No. 2019-0192

also consider an appropriate level of services that will benefit Student and not merely be a marker to indicate the seriousness of Student's needs. With the expectation that Student will likely be on HHIP shortly to avoid peak flu season, and the approach of the holidays, the IEP team is given 60 days to convene and carry out these tasks.

Turning to compensatory education for denials of FAPE, there is often "difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position," *B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016), but that does not permit the effort to be avoided. See *Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required "to have a perfect case to be entitled to compensatory education." *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted).

Here, Petitioner's compensatory education proposal seeks 220 hours of specialized instruction along with 25 hours for each related service, which needs to be significantly adjusted downward due to the limited denials of FAPE found by the undersigned herein. In particular, the shift of specialized instruction from 24.5 hours/week (which was vigorously asserted by Special Education Advocate) to a more realistic figure of about 5 hours/week is a difference that must result in a significant reduction.

Based on all the evidence and the various factors discussed in this case, and carefully considering the totality of the circumstances, the undersigned considers that it is appropriate to award 40 hours of specialized instruction, 10 hours of physical therapy, and 8 hours each of occupational therapy, physical therapy, speech-language pathology and vision to make up for the denials of FAPE found above and restore Student to the position in which Student would be but for those denials of FAPE, as best as can be determined in these circumstances. These determinations by the undersigned are specifically tailored to address Student's unique needs as a matter of equity, as "hearing officers are reminded that '[t]he essence of equity jurisdiction' is 'to do equity and to mould each decree to the necessities of the particular case.'" *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), quoting *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005). All compensatory education hours are to be used within 18 months in order to ensure that the remedial services that Student needs are obtained without undue delay, along with minimizing any administrative burdens on Respondent which may result from compensatory education awards stretching over excessively long timeframes.

ORDER

Petitioner has prevailed in part in this case, as set forth above. Accordingly, **it is hereby ordered that:**

- (1) Within 60 days, DCPS shall convene Student's IEP team to review and modify Student's IEP to (a) incorporate a streamlined process to ensure that Student receives at least a sizeable majority of services set forth on Student's IEP (viewed on a monthly basis), through a mechanism for quick, 2-day turnarounds on HHIP

Hearing Officer Determination

Case No. 2019-0192

applications, and/or agreed-upon processes for ensuring that Student receives services when unable to attend school regularly, and (b) provide appropriate levels of services to meet Student's needs.

(2) As compensatory education for the denials of FAPE found herein, DCPS shall provide letter(s) of authorization within 10 business days after Petitioner's request(s) for a total of (a) 40 hours of specialized instruction, (b) 10 hours of physical therapy, and (c) 8 hours each of occupational therapy, speech-language pathology and vision, all from independent providers chosen by Petitioner. All hours are to be provided and used within 18 months; any unused hours shall be forfeited.

Any and all other claims and requests for relief are **dismissed with prejudice**.

IT IS SO ORDERED.

Dated in Caption

/s/ *Keith Seat*

Keith L. Seat, Esq.
Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state 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 Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

Copies to:

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