

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Office of Dispute Resolution
1050 First Street, NE
Washington, DC 20002
Tel: 202-698-3819
Fax: 202-478-2956

OSSE
Office of Dispute Resolution
October 20, 2021

Confidential

District of Columbia Public Schools (“DCPS”) Local Education Agency (“LEA”) Petitioner, v. Parents ¹ Respondents. Case # 2021-0109 Date Issued: October 20, 2021	HEARING OFFICER’S DETERMINATION Hearing Date: October 7, 2021 Counsel for Each Party listed in Appendix A <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

¹ Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The due process 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.

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing (“Student”) resides with Student's parents (“Parents”) in the District of Columbia, and the District of Columbia Public Schools (“DCPS”) is Student's local educational agency (“LEA”). Student is currently age ___² and is eligible for special education pursuant to IDEA with a disability classification of Autism Spectrum Disorder (“ASD”)

DCPS developed an individualized educational program (“IEP”) for Student dated July 30, 2020. That IEP was amended on October 29, 2020. It prescribes a least restrictive environment (“LRE”) in a separate non-public special education school. DCPS has attempted to place Student in a non-public school with an OSSE certificate of approval (“COA”). However, Parents have challenged the school placement proposed in prior due process complaints that have been adjudicated. Parents’ Counsel has expressed an intention of appealing the most recent Hearing Officer’s Determination (“HOD”) issued August 6, 2021.

Parents and DCPS agreed that Student would be provided instruction and related services virtually on an interim basis during the Covid emergency, starting with extended school year (“ESY”) summer 2020 and during SY 2020-2021, pending a final determination of an appropriate non-public separate school that could meet Student’s needs. Student continued to attend that DCPS program (“School A”) virtually, starting with ESY during summer 2020 until the end of school year (SY) 2020-2021. Petitioners and DCPS have agreed that for SY 2021-2022, Student will be provided instruction and related services virtually on an interim basis at a different DCPS school (School B).

DCPS filed this due process complaint against Parents on August 5, 2021, seeking an order directing Parents to participate in a meeting to update Student’s July 30, 2020, IEP. DCPS alleges that on repeated occasions, starting in May 2021, DCPS offered several dates to convene Student’s IEP meeting. DCPS alleges that it provided Parents with a draft IEP and although Parents agreed to attend the IEP meeting, neither parents nor their Counsel showed up for the scheduled meeting.

² Student’s age and grade are listed in Appendix B.

RELIEF SOUGHT:

DCPS seeks an order from the undersigned independent hearing officer (“IHO”) requiring Parents to attend an IEP meeting within 14 calendar days of the entry of the IHO’s decision.

Parents’ Response to the Complaint:

Parents filed a timely response to the complaint on August 16, 2021. In their response, Parents stated the following:

As alleged by DCPS, [Parents] are currently in the process of obtaining an independent educational evaluation (“IEE”) to examine issues unaddressed by DCPS’s existing evaluation. DCPS voluntarily agreed to fund this evaluation rather than to litigate to defend their existing evaluation. As a closely related matter, an August 6, 2021, HOD regarding [Student] ordered DCPS to “request a transportation study from OSSE.”

Because the DCPS-funded reevaluation is pending and because DCPS, to the [Parents’] knowledge, has yet to acquire the additional information as ordered in the August 6, 2021, HOD, an IEP development meeting would at this time be not only wasteful, but counterproductive.

Resolution Meeting, Pre-Hearing Conference, and Order:

The parties did not participate in a resolution meeting because the LEA filed the complaint. The 45-day period began on August 6, 2021, and ended, and HOD was due on September 19, 2021. The IHO offered September 7, 2021, as the original hearing date. The parties were not available on that date, and they agreed to hearing dates in October 2021. DCPS filed a motion for continuance and extension of the HOD due date for 31 calendar days, extending the HOD date from September 19, 2021, to October 20, 2021. That motion was granted, and the HOD is now due on October 20, 2021.

The IHO conducted a pre-hearing conference (“PHC”) in this matter on August 26, 2021, and issued a pre-hearing order on September 9, 2021, outlining, inter alia, the issues to be adjudicated.

The issue adjudicate is: ³

³ At the outset of the hearing, DCPS Counsel withdrew two of the issues that were delineated in the PHO:

- (a) If the Hearing Officer issues an order directing Petitioners to attend an IEP meeting within 14 days of the issuance of the HOD, does the Hearing Officer have the authority to order concluding that Petitioners have waived their right to a Free Appropriate Public Education (“FAPE”) from DCPS for Student for school year (“SY”) 2021-2022 ?
- (b) If the Hearing Officer has the authority to order that Petitioners have waived their right to a FAPE from DCPS for Student for SY 2021-2022, should the Hearing Officer do so ?

Did Parents fail to attend a scheduled IEP meeting on July 30, 2021, and if so, is their failure to attend a sufficient basis for the Hearing Officer to order Parents to attend an IEP meeting within 14 days of the issuance of the HOD ?

Parents’ Motion to Dismiss

On September 24, 2021, Parents filed a Motion to Dismiss DCPS’s due process complaint asserting first that there is an outstanding transportation study ordered by the IHO in a prior HOD; second, that DCPS lacks standing to file the due process complaint; and third, there is no alleged violation by IDEA by Parents and their alleged rejection of the invitation to attend an IEP meeting is not such a violation. Finally, Parents assert that IDEA only allows an LEA to file a due process complaint allowing the LEA to perform the evaluation over a parent’s objection, not an order enjoining a parent to take any action.

On September 28, 2021, DCPS filed an Opposition to Parents’ Motion to Dismiss. In its opposition, DCPS asserts that the federal IDEA regulations provide that “[a] parent *or a public agency* may file a due process complaint on any of the matters described in §300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).” 34 C.F.R. § 300.507(a)(1) (emphasis supplied.) Under judicial precedent, a controversy must exist between the parties that is

definite and concrete, touching the legal relations of parties having adverse legal interests It must be a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240–41, 57 S.Ct. 461, 464, 81 L.Ed. 617 (1937).

In this case, DCPS filed a due process complaint on the provision of FAPE to Student – specifically, DCPS’ need to hold an IEP meeting for the provision of an appropriate IEP and placement for the 2021-2022 school year. DCPS’ complaint is akin to a counterclaim in civil litigation and could result in an administrative determination by the hearing officer that the parent has prevented DCPS from offering the Student FAPE with an appropriate IEP and placement for the 2021-2022 school year. This outcome would not be an advisory opinion because it would be specific relief, in that it could result in an order requiring the parent to attend an IEP team meeting and relieve the District of the obligation to continue attempting to obtain their participation. Therefore, in seeking a determination by the hearing officer that it can’t get the parent to attend an IEP meeting to offer a FAPE to Student for the 2021-2022 school year, DCPS has stated a claim upon which relief can be granted.

Ruling: As DCPS aptly points out, the federal IDEA regulations provide that “[a] parent *or a public agency* may file a due process complaint on any of the matters described in §300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).” 34 C.F.R. § 300.507(a)(1) (emphasis supplied.) Parents do not point to any persuasive case law in support of their claim that this section requires dismissal of this action. DCPS, as the LEA, has a right to file a due

process complaint and is not restricted to file a due process complaint regarding evaluation of a child. DCPS has asserted a viable claim in its attempts to provide Student with a FAPE. Consequently, the Hearing Officer denied Parents' motion to dismiss on the record during the hearing and directed that the due process hearing proceed.

DUE PROCESS HEARING:

Due to the COVID-19 emergency, the hearing was conducted via video teleconference on October 7, 2021.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the following as evidence and the source of findings of fact: (1) the testimony of the witnesses, and (2) the documents submitted in the parties' disclosures (Parents' Exhibits 1 through 6 and DCPS's Exhibits 1 through 10) that were admitted into the record and are listed in Appendix A.⁴ Witnesses' identifying information is in Appendix B.⁵

SUMMARY OF DECISION:

The burden of persuasion fell to DCPS on the issue adjudicated. DCPS met its burden of persuasion by a preponderance of the evidence. The IHO directed DCPS to convene an IEP meeting to review and update Student's IEP for SY 2021-2022 and that Parents participate. DCPS is directed to update Student's IEP even if the Parents continue to refuse to participate and to convene another IEP meeting to review Student's IEP once Parents have provided DCPS with the pending IEE report.

FINDINGS OF FACT:⁶

1. Student resides with Parents in the District of Columbia and is a child with a disability pursuant to IDEA, with a disability classification of Autism Spectrum Disorder ("ASD"). DCPS is Student's LEA. (Parent's Exhibit 2)

⁴ Any item disclosed and not admitted, or admitted for limited purposes, was noted on the record and is noted in Appendix A.

⁵ DCPS presented one witness, and the Parent's called one witness, a DCPS staff member, based on a requested notice to appear. The witnesses who testified are listed in Appendix B. The Hearing Officer found the witnesses credible unless otherwise noted in the Conclusions of Law. Any material inconsistencies in the testimony of witnesses that the Hearing Officer found are addressed in the Conclusions of Law.

⁶ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parenthesis following the finding. Documents cited are noted by the exhibit number. If there is a second number following the exhibit number, it denotes the page of the exhibit (or the page number of the entire disclosure document) 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.

2. DCPS developed an IEP for Student dated July 30, 2020. That IEP was amended on October 29, 2020. It prescribes an LRE in a separate non-public special education school. DCPS has made attempts to place Student in a non-public school with an OSSE COA. However, Parents challenged the school placement proposed in a prior due process complaint that has been adjudicated and that Parents' Counsel has expressed an intention to appeal. (Parent's Exhibit 2)
3. Parents and DCPS agreed that Student would be provided instruction and related services virtually on an interim basis during the Covid emergency, starting with ESY during summer 2020 and during SY 2020-2021, pending a final determination of an appropriate non-public separate school that could meet Student's needs. Student continued to attend that DCPS program, School A, virtually starting ESY during summer 2020 through SY 2020-2021. (Parent's Exhibit 2)
4. On May 12, 2021, DCPS offered the date of June 4, 2021, at 9:30 am or 1:00 pm to meet for Student's annual IEP meeting, and Parents' Counsel responded by saying: "I'm afraid June 4th is impossible for me. As you may be aware, the deadline for the decision of the active complaint is June 13. I suggest we meet after that." (DCPS Exhibit 4-8)
5. On May 17, 2021, DCPS offered another date, June 15, 2021, at 1:30 pm for Student's annual IEP meeting. On May 19, 2021, both Student's mother and her Counsel responded and confirmed that the date would work for them to meet and hold Student's annual IEP meeting. (DCPS Exhibits 4-5, 4-6)
6. In the last weeks of May and the beginning of June 2021, Student's mother met individually with each of Student's teachers and related service providers at School A to review the updated draft present levels and IEP goals for Student's annual IEP. Student's mother gave input and recommendations to the teachers and related service providers who were working to develop Student's annual IEP in preparation for the IEP meeting confirmed for June 15, 2021. (Witness 1's testimony)
7. On June 8, 2021, DCPS sent Student's draft IEP to Parents and their Counsel. On June 9, 2021, Parents' counsel emailed DCPS stating, "[Parents] request a publicly funded independent educational evaluation to correct for deficiencies in DCPS's latest evaluation. We look forward to receiving the authorization. The parents wish to postpone the development of the next IEP until the authorization and completion of the independent evaluation. Please confirm that the upcoming meeting has been postponed." (DCPS Exhibit 6, PDF page 41, DCPS Exhibit 5-5, DCPS Exhibit 8)
8. On June 10, 2021, DCPS asked for clarification stating, "Can you please confirm which assessments the [Parents] s disagree with and why? We need to review the assessments in question, and then we will respond to the request." (DCPS Exhibit 5-4)
9. On June 11, 2021, Parents' Counsel stated that the evaluation as a whole does not adequately explore [Student's] needs regarding class environment and transportation. DCPS continued to ask for which assessments there were disagreements with as the most

recent DCPS evaluation was a psychoeducational that had been completed on June 25, 2019. (DCPS Exhibit 5-4)

10. On June 15, 2021, at 1:30 pm, the DCPS team gathered at the mutually agreed-upon time. Neither Parents, nor their Counsel showed up for Student's scheduled annual IEP meeting. The DCPS team was prepared to discuss and review the following items: Present levels, data collected throughout the school year at School A progress and mastery Student obtained towards previous IEP goals, and to propose new IEP goals for this annual IEP year. This information had been sent in the IEP draft. (Witness 1's testimony)
11. The team also was prepared to discuss related services, service delivery, service time, and placement. Additionally, the team wanted to discuss transportation concerns and the results of the discussion that DCPS had with OSSE transportation regarding supports they provide and the process they go through to determine what types of supports are needed for Student's transportation for in-school instruction. The team also was ready to discuss possible changes to accommodations and supplemental aids and services, as well as class size restrictions. Finally, the team was prepared to discuss assessment and evaluations needs with Parents. (Witness 1's testimony)
12. On July 19, 2021, DCPS sent Parents and their Counsel a letter of invitation to hold Student's annual IEP meeting on July 30, 2021, at 9:15 am. (DCPS Exhibit 4-4)
13. On June 14, 2021, Parent's counsel sent DCPS an email that stated the following:
"We notified you of the meeting postponement last Wednesday. Your email this morning was your first word that DCPS wished to continue regardless. In any case, DCPS cannot unilaterally insist on a particular IEP meeting time. The parents will not participate in the development of an IEP based on an adequate evaluation, and will contest any actions DCPS takes tomorrow in the absence of parental participation. Re your other comments, the parents' dissatisfaction with the evaluation is not necessarily specific to particular assessments. As I answered you previously, "[t]he evaluation as a whole does not adequately explore [Student's] needs regarding class environment and transportation." Those questions may be addressed in multiple separate assessments, including assessments not performed as part of DCPS's evaluation. When DCPS funds an independent evaluation, as I hope they will, the parents will consult with experts to identify the appropriate evaluators to adequately examine [Student's] needs in these areas. (Parent's Exhibit 6-2)
14. On July 21, 2021, Parent's Counsel sent an email to DCPS stating the following:
"Am I correct that DCPS has yet to authorize an independent evaluation? The [Parents] wish to have the new evaluation completed before revising the IEP. They are happy to discuss possible placements for the new school year, though. Of course, the imminent HOD may change the situation. (Parent's Exhibit 5-2)
15. On July 21, 2021, Parent's Counsel responded to the invitation to the annual IEP meeting stating that "[Parents] wish to have the new evaluation completed before revising the IEP.

They are happy to discuss possible placements for the new school year, though” (DCPS Exhibit 3-4)

16. On July 23, 2021, DCPS sent the Parents and their Counsel an authorization for a comprehensive psychological assessment and again invited them to proceed with the IEP meeting on July 30, 2021, as the team had enough information to update Student’s annual IEP. (Witness 1’s testimony, DCPS Exhibit 3-3)
17. On July 27, 2021, Parent’s Counsel sent an email to DCPS stating the following:
“As you know, it is not true that [Parent] “did not show” for an earlier scheduled meeting. [Parent] canceled the meeting well in advance because of the need for more evaluation, which needs DCPS did not substantively address until this July 23, 2021, email of yours. The record of the parties’ actual exchanges regarding IEP meetings is clear, notwithstanding DCPS’s regular attempts to distort that history by putting “prior written notice” on documents containing its litigation position statements. A meeting prior to a full and adequate evaluation would be premature and counterproductive. Moreover, as you know, an HOD is due within the next several days; that HOD is likely to impact the IEP development process. There is no reason that ██████ most recently agreed-upon IEP is insufficient for placement determination. Thank you for the authorization letter. We will begin work with what you have given us so far, but please be aware that the [Parents] seek a complete independent evaluation, not just a comprehensive psychological evaluation/assessment. If the evaluators require other new assessments in order to complete their full evaluation, we will let you know.” (Parents Exhibit 5)
18. On July 29, 2021, DCPS reached out again to the Parents and their Counsel with the meeting information to sign on for the IEP meeting on July 30, 2021, at 9:15 am. (DCPS Exhibit 4-1)
19. The DCPS team was again present on July 30, 2021, at 9:15 am on the call and prepared to discuss and review the following items: Present levels, data collected throughout the school year at School A, progress, and mastery Student obtained towards previous IEP goals, and to propose new IEP goals for this annual IEP year. This information had been sent in the IEP draft. The team also was prepared to discuss related services, service delivery, service time, and placement. (Witness 1’s testimony)
20. Additionally, the team wanted to discuss transportation concerns and the results of the discussion that DCPS had with OSSE transportation regarding supports they provide and the process they go through to determine what types of supports are needed. The team also was ready to discuss possible changes to accommodations and supplemental aids and services, as well as class size restrictions. Finally, the team was prepared to discuss assessment and evaluations needs with the family. (Witness 1’s testimony)
21. On July 30, 2021, neither Parents, nor their Counsel joined the virtual meeting to develop and review Student’s IEP and did not notify the DCPS team that they would not be attending the meeting. (Witness 1’s testimony)

22. On August 17, 2021, Parent’s Counsel sent an email to DCPS stating the following:
“While the parties remain in dispute regarding the appropriate school for [Student], the [Parents] remain interested in collaborating to mitigate the harm to the family. In lieu of a school all parties agree upon, the [Parents] are interested in temporary distance learning at a DCPS school beginning this fall if that is available. Please let us know if that is a possibility.” (Parents’ Exhibit 4)

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 the 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. Weast*, 546 U.S. 49, 126 S.Ct. 528, (2005). The burden of persuasion fell to Respondent on issues #1 and #3, once Petitioners established a prima facie case on those issues. Petitioner held the burden of persuasion on # 2 and # 4. ⁷ The normal standard is the

⁷ Pursuant to DC Code § 38-2571.03 (6):

(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.

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: Did Parents fail to attend a scheduled IEP meeting on July 30, 2021, and if so, is their failure to attend a sufficient basis for the Hearing Officer to order Parents to attend an IEP meeting within 14 days of the issuance of the HOD ?

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

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21." 20 U.S.C. § 1412(a)(1)(A). A "child with a disability" is defined by statute as a child with intellectual disabilities, physical impairments, or serious emotional disturbance "who, by reason thereof, needs special education and related services." *Id.* § 1401(3)(A). The District is required to enact policies and procedures to ensure that "[a]ll children with disabilities residing in the State, including ... children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated." *Id.* § 1412(a)(3)(A).

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").

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 second substantive prong of the *Rowley* inquiry is whether the IEP DCPS developed 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 City. 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. *Endrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

The key inquiry regarding an IEP’s substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student’s needs at the time, what the IEP offered was reasonably calculated to enable the specific student’s progress....” “Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.” *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Endrew F.*, supra, 137 S. Ct. 988.

Pursuant to 34 C.F.R. § 300.324 (b) (1) 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 § 300.320(a)(2), and in the general education curriculum, if appropriate; (B) The results of any reevaluation conducted under § 300.303; (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2); (D) The child’s anticipated needs; or (E) Other matters.

Pursuant to 34 C.F.R. § 300.323 at the beginning of each school year, each public agency must have an IEP effect for each child with a disability within its jurisdiction. The legal standard under the IDEA is that DCPS “must place the student in a setting that is capable of fulfilling the student’s IEP.” *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). *See also O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student’s IEP requirements).

In *Yates v. Charles Cty. Bd. Of Educ.*, 212 F.Supp.2d 470 (D. Md. 2002), a school district brought an action regarding its decision not to place the Student in a private school. It appears that the parents in *Yates* delayed the filing of a due process complaint for tuition reimbursement on tactical grounds and wanted to litigate the case at a time of their own choosing. The Maryland hearing officer (or “Administrative Law Judge”) agreed with the parents that there was no jurisdiction to hear the claim under the IDEA and dismissed the case. However, a federal court reversed, pointing to the language in the applicable regulation that “either a parent or a public agency may initiate a hearing.” 34 C.F.R. Sect. 507(a)(1). The Court pointed to the fact that the local educational agencies and school districts have a legal duty to develop IEPs and make placement decisions. The Court indicated that students can be harmed if there is no current IEP developed for a student, regardless of the current legal posture of the parties. As the Court stated, in relevant part:

The very premise of the IDEA is that the duty to develop individualized education programs and to make placement decisions resides in the public educational agencies themselves. See, e.g., 20 U.S.C. §§ 1412(a)(10)(B)(i), 1412(a)(10)(C), & 1414(a)(1); 34 CFR §§ 300.300 & 300.343(a). Necessarily concomitant with that duty is the existence of the

opportunity and the power to perform it. 202 F. Supp.2d at 472-473 (footnotes omitted).

The evidence in this case demonstrates that DCPS developed an IEP for Student on July 30, 2020, and amended it on October 29, 2020. Because the IEP was due to expire on July 30, 2021, DCPS made repeated attempts to convene an IEP meeting and to have Student's parents participate in the update of Student's IEP. Although the communication between DCPS at Parents and Parents' Counsel demonstrate that Parents wanted to delay the IEP meeting until after the authorized IEE and the transportation study ordered by the prior HOD were completed, there is no indication when these items will be completed.

IDEA makes it incumbent upon an LEA to ensure that a Student's IEP is updated annually and a current IEP is in place at the start of each school year. The obligation is not relieved simply because a parent has indicated that he or she prefers to wait until additional data is available to convene an IEP meeting and update a student's IEP. The facts of this case also demonstrate that there was pertinent data that was available for a team to discuss from Student's participation in virtual learning during ESY 2020 and SY 2020-2021 at School A that would be pertinent to the instructors and services providers in providing Student services for SY 2021-2022 at School B.

Based upon the facts of this case, the Hearing Officer concludes that DCPS made diligent efforts to fulfill its obligations pursuant to IDEA to convene an annual IEP meeting and that Parents, despite any belief that delay of the meeting was logical, refused to participate in that meeting. It is the opinion of this IHO that it is in the best interest of the Student that the IEP meeting should have been convened with the data that was developed, and a subsequent IEP meeting could have been held once additional data from the IEE and the transportation student was available.

Consequently, the IHO concludes that DCPS met its burden of persuasion by a preponderance of the evidence that Petitioners failed to attend a scheduled IEP meeting on July 30, 2021, and their failure to attend is a sufficient basis for the IHO to order Petitioners to attend an IEP meeting to update Student's IEP for SY 2021-2022.

ORDER: ⁸

1. Within fourteen (14) calendar days of the date of this order, DCPS shall convene an IEP meeting to review and update Student's IEP for SY 2021-2022, and it is further ordered that the Student's parents shall participate in that meeting.
2. DCPS is directed to update Student's IEP with any relevant data, even if Parents refuse to participate in the IEP meeting ordered in the provision above, and to convene another IEP meeting to review Student's IEP once Parents have provided DCPS the pending IEE report.

⁸Any 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.

