

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

STUDENT, ¹)	
through the GUARDIAN,)	Hearing Officer: NaKeisha Sylver Blount
<i>Petitioner,</i>)	
)	Case No: 2017-0183
v.)	
)	Date Issued: September 13, 2017
District of Columbia Public Schools)	
<i>Respondent.</i>)	

Hearing Officer Determination

SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act (“IDEA”), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and D.C. Code 38-2561.02(a).

PROCEDURAL BACKGROUND

This is a due process complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 et seq.

The DPC was filed on June 30, 2017 by Petitioner (Student’s guardian), a resident of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On July 11, 2017, Respondent filed its Response, denying that Respondent denied Student a free appropriate public education (“FAPE”).

The parties convened a Resolution Session Meeting (“RSM”) in this matter on July 13, 2017. The parties did not reach an agreement during the RSM; however, they agreed to keep the resolution process open for the entire 30-day resolution period. Accordingly, the parties agree that the 45-day timeline for the Hearing Officer’s Determination (“HOD”) in this matter began to run on July 30, 2017 and concludes on September 13, 2017.

The undersigned Impartial Hearing Officer (“IHO” or “Hearing Officer”) convened a Pre-hearing Conference (“PHC”) on July 18, 2017, during which the parties discussed and clarified the issues and the requested relief. The PHC was summarized in the Pre-Hearing

¹ Personal identification information is provided in Appendix A.

Conference Summary and Order (the “PHO”) issued on July 20, 2017, which ordered that five-day disclosures would be filed by August 7, 2017 and that the DPH would be held on August 14, 2017 and August 17, 2017.

The DPH was held on August 14, 2017 and August 17, 2017 at the Office of Dispute Resolution, 810 First Street, NE, Rooms 2004 and 2006. Petitioner elected for the hearing to be closed. Petitioner was represented by [PETITIONER’S COUNSEL], Esq. DPCS was represented by [RESPONDENT’S COUNSEL], Esq.

Petitioner’s and Respondent’s disclosures were timely filed, except that Respondent’s exhibit R-34 was filed on August 9, 2017. At the DPH, Petitioner’s exhibits P-1, P-4, P-6, P-8 through P-13; P-15; P-17 through P-28; P-69 through P-75; P-77 through P-79; P-82; P-83 ; P-84 and P-85 were admitted without objection. Petitioner’s exhibits P-2, P-3, P-5, P-7, P-14, P-16, P-29 through P-45, P-46 through P-68, P-76, P-80, P-81 were admitted over Respondent’s objection.

On December 31, 2017, a different IHO issued an HOD regarding Student (“December 2016 HOD”).² To the extent that the undersigned deems them relevant, the undersigned may adopt findings from the December 2016 HOD.

Petitioner called the following witnesses at the DPH:

- (a) Parent
- (b) Educational Advocate A³
- (c) Educational Advocate B⁴
- (d) Nonpublic Director

Respondent called the following witnesses at the DPH:

- (a) Special Education Teacher
- (b) School Psychologist⁵
- (c) Assistant Principal

Petitioner and Respondent gave oral closing arguments.

ISSUES

As discussed at the PHC and reflected in the PHO, the following issues were presented for determination at the DPH:

- (a) Whether DCPS denied Student a FAPE by failing to comprehensively evaluate Student, by failing to agree to conduct or initiate a speech and language

² Disclosed in Petitioner’s exhibits as P-79, and in Respondent’s exhibits as R-1.

³ Qualified, over Respondent’s objection, as an expert in psychology, neuropsychology and special education programming.

⁴ Qualified, without objection, as an expert in special education programming, IEP development, placement and LRE.

⁵ Qualified, without objection, as an expert in school psychology.

- evaluation, occupational therapy evaluation, vision assessment, or assistive technology assessment at either the June 1, 2017 or June 14, 2017 meetings.
- (b) Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP/placement/LRE/location of services following the March 1, 2017 IEP meeting (“March 1, 2017 IEP”) and/or the June 1, 2017 June 14, 2017 IEP meetings (“June 14, 2017 IEP”).
 - (c) Whether Student should be awarded compensatory education for the denials of FAPE found pursuant to the December 31, 2016 HOD.
 - (d) Whether DCPS denied Student a FAPE by failing to consistently provide Student with a dedicated healthcare aide, as required pursuant to the December 31, 2016 HOD and/or MDT determination.

RELIEF REQUESTED

Petitioner requested the following relief:

- (a) a finding that Student has been denied a FAPE;
- (b) an Order that DCPS immediately revise Student’s IEP to provide for a full time, out of the general education setting (27.5 hours), which can address Student’s medical needs, as well as Student’s low cognitive and academic functioning, provide for a dedicated nurse at school and during transportation, address Student’s vision impairment, address the amount of behavioral support services Student needs, address the triggers for Student’s Sickle Cell and seizures and other supports as warranted, and update Student’s safety/medical plan;
- (c) an Order that DCPS fund an independent assistive technology assessment for Student and that DCPS conduct a functional vision assessment for Student;⁶
- (d) an Order that DCPS consistently provide a dedicated nurse to Student on all days Student is able to attend school, and ensure that the nurse is fully apprised of Student’s medical needs;
- (e) an Order that DCPS submit to Nonpublic School 2 a referral for Student and, if Student is accepted, to place Student there, and/or that DCPS submit a referral to OSSE for a private placement, and/or that DCPS fund placement for Student at Nonpublic School 1;
- (f) an Order that, pending the identification of a suitable location of services for Student, DCPS shall fund independent tutoring and/or related services for Student;
- (g) an Order that Student be awarded compensatory education of the denials of FAPE that have occurred;
- (h) an Order that Student’s right to request additional compensatory education based on the results of the above-referenced evaluations be reserved.

FINDINGS OF FACT

1. Student is [AGE] years old and is in the [GRADE] grade. Student resides in Washington, D.C. with Parent and attends District School.⁷

⁶ At the start of the DPH, the parties agreed that DCPS had already provided to Petitioner an independent speech and language evaluation authorization and an independent occupational therapy evaluation that Petitioner had requested in the DPC. Therefore, Petitioner withdrew the requests for these evaluations.

2. Student's cognitive ability falls in the extremely low range. Student requires a great deal of repetition and assistance to learn and retain concepts; however, Student has the ability to learn. Student's visual memory and verbal memory are relative strengths.⁸

3. Student's ability to isolate/identify particular sounds (phonological awareness) is very low. This impedes Student's ability to learn to read, though it is not impossible for Student to learn to read. Interventions such as whole word reading instruction would be helpful.⁹

4. Student's expressive language ability (speech within age appropriate expectations) is a relative strength for Student; however, Student's receptive language (ability to understand language) is impaired to some extent by Student's variable attention.¹⁰

5. Student has a complex set of medical needs. Student is diagnosed with Sickle Cell Anemia, asthma and an enlarged spleen.¹¹ Student also experiences frequent fatigue.¹²

6. Student has endured multiple strokes since 2013, which have resulted in softening of Student's brain tissue. As a result, Student experiences neurological deficits and challenges.¹³

7. Student is diagnosed with a Seizure Disorder,¹⁴ and has experienced numerous seizures since 2015. Sometimes Student has as many as 2-3 seizures per week.¹⁵ Student experiences two types of seizures, epileptic and pseudo-seizures.¹⁶ Potential triggers for Student's seizures include, but are not necessarily limited to, overstimulation, stress, distress, fatigue, asthma, heat.¹⁷

8. Depending on the type of seizure, it may or may not be necessary and appropriate to call an ambulance. For example, when Student has pseudo-seizure comes out of quickly. Epileptic seizures require attention from an ambulance.¹⁸

9. On September 3, 2016, Student's team prepared an "Individual Student Medical Safety Plan" ("Safety Plan") for Student. The Safety Plan outlined steps staff would take when Student exhibited symptoms of seizures, stroke, asthma, and/or complications of Sickle Cell Anemia. One of the parameters the Safety Plan sets out is that "Nurse will contact the

⁷ Testimony of Parent; testimony of Educational Advocate A.

⁸ Testimony of Educational Advocate A.

⁹ Testimony of Educational Advocate A; P-24-4.

¹⁰ P-24-4; P-35-2; P-37-2.

¹¹ Testimony of Parent; testimony of Educational Advocate A; P-29-1; P-15-7; P-24.

¹² P-24-6.

¹³ Testimony of Parent; testimony of Educational Advocate A; P-15-7; P-24; P-25.

¹⁴ P-29-1.

¹⁵ Testimony of Educational Advocate A.

¹⁶ Testimony of Educational Advocate B; P-29.

¹⁷ Testimony of Educational Advocate A; P-29-2; P-15-8.

¹⁸ Testimony of Educational Advocate B; P-29.

paramedics if student is confused after a seizure for more than 30 minutes or if an epileptic seizure last[s] for more than 5 minutes.”¹⁹

10. Though Parent explained to District School personnel the difference between an epileptic seizure and a pseudo-seizures and showed them a video of Student having both kinds of seizures; though medical documentation Parent provided to District School in September 2016 indicates that calling an ambulance is not always necessary, depending on the type of seizure; and contrary to the protocol set out in the Safety Plan, District School routinely called an ambulance when Student had either type of seizure.²⁰

11. Student is essentially without vision in Student’s right eye. Student also has impaired balance and is prone to falling and tripping. In one instance Student bumped into a wall due to Student’s visual impairment and suffered a concussion.²¹

12. Student’s vision is sharper in Student’s left eye than Student’s right eye, and Student’s field of vision in the left eye is not impaired. Student’s visual acuity in the left eye, without corrective lenses, measures approximately 20/50 when Student is looking from a distance and approximately 20/20 when Student is looking up close.²²

13. Student’s visual disability, in addition to fine motor skills impairments Student experiences, impede Student’s ability to write legibly or draw easily, and compromises Student’s ability to perform visual special measures.²³

14. Student’s medical team recommended by letter on September 21, 2016 that print be enlarged for Student in the educational setting. The March 2017 neuropsychological evaluation also made this recommendation.²⁴

15. DCPS determined that Student did not meet the criteria of a student with a visual impairment, because its criteria require a student to have visual acuity of 20/70 or less in the better eye, with correction, and that the student’s visual impairment adversely affects the student’s educational performance.²⁵ Student’s visual acuity in the left eye measured above 20/70, and it was determined Student’s vision did not adversely impact Student’s educational performance because Student did not express difficulty with seeing the work Student did in class.²⁶

¹⁹ P-15.

²⁰ Testimony of Parent.

²¹ Testimony of Parent; testimony of Educational Advocate A; testimony of Educational Advocate B; P-28.

²² Testimony of Parent; testimony of Educational Advocate A; testimony of Educational Advocate B; P-28.

²³ P-24-5.

²⁴ P-29-2; P-24-4.

²⁵ R-22-119.

²⁶ Testimony of Special Education Teacher; P-28; R-22.

16. Student's medical issues and impaired memory impede Student's ability to perform certain basic life tasks. Student does not know how to put shoes on the correct feet or tie them. Student has difficulty navigating a school building and the community. When in public, Student holds onto Parent's arm because of the trouble balancing and tendency to fall. Student's visual impairment adversely impacts Student's depth perception and Student, for example, has difficulty stepping off curbs and has fallen down stairs, necessitating medical attention.²⁷ Student experiences fine motor skills impairment which cause Student to write extremely slowly and causes Student's gait to be uneven.²⁸

17. When in school, Student tends to be easily distracted by the classroom environment.²⁹ It would be difficult at this time for Student to make appropriate academic progress in a general education setting.³⁰

18. Student sometimes demonstrates some impulsivity, defiance and aggression, related to Student's illness. However, Student's social skills are relative strengths. Student desires to go to school and is discouraged by not being able to go to school. Student longs for interaction with other students.³¹

19. The March 2017 neuropsychological recommended that DCPS conduct a functional behavior assessment for Student to determine why Student tends to become frustrated when faced with tasks above Student's ability level.³²

20. In the appropriate setting and with a great deal of repetition and academic support, Student has capacity to ultimately (prior to graduation) achieve growth approximately five grade levels above where Student is currently performing, which would be closer to Student's grade level as of now.³³

21. In the December 2016 HOD, the previous Hearing Officer ordered as follows: "Pending completion of Student's reevaluation and IEP revision, in order that Student may return to school without delay, DCPS shall, within 15 school days of the issuance of this decision, ensure that a full-time dedicated aide is available for Student on days that Student attends school. DCPS shall ensure that the dedicated aide has appropriate health care training and skills to respond to Student's seizure episodes at school, pursuant to Student's safety plan, and to administer emergency seizure response medications as prescribed for Student."³⁴

22. DCPS arranged for dedicated nursing support after the December 2016 HOD; however, the nursing support was inconsistent. The nurse did not consistently show up at

²⁷ Testimony of Parent.

²⁸ P-24-3.

²⁹ R-25-129;

³⁰ Testimony of School Psychologist.

³¹ P-1-11; P-2-12; P-24-4.

³² P-24-7.

³³ Testimony of School Psychologist.

³⁴ P-79-23; R-1-23.

school, and on at least one occasion, the nurse sent Student to take a walk in the hallway by alone when Student was feeling well, notwithstanding Student's history of having collapsed in a school hallway previously.³⁵

23. Student missed a significant number of school days during the 2016-2017 school year at District School, often stemming from Student's medical condition and needs, along with the unavailability of and/or challenges with dedicated nursing support.³⁶ Student demonstrates some degree of impulsivity, defiance and aggression, related to Student's illness. However, Student's social skills are relative strengths. Student desires to go to school and is discouraged by not being able to go to school. Student longs for interaction with other students.³⁷

24. During the 2016-2017 school year, Student received limited amount of home instruction from DCPS, but did not attend school regularly enough to do enough work to receive a grade or measure progress. Such large gaps in attendance would cause Student to regress academically, given the complex combination of medical and cognitive challenges Student experiences.³⁸

25. On April 6, 2017, Student had an independent neuropsychological evaluation through Nonpublic School 2.³⁹ Student has not had an occupational therapy, speech and language evaluation, assistive technology evaluation, or assessment to determine the impact of Student's visual impairment on Student's ability to access the curriculum ("vision assessment"). Parent has been requesting an occupational therapy assessment, a speech and language assessment and assistive technology accommodations since at least September 2, 2016.⁴⁰ Parent has been requesting a vision assessment since at least June 1, 2017.⁴¹

26. Student's March 1, 2017 IEP assigned the disability classification "Other Health Impairment" ("OHI"), and provides 25 hours of specialized instruction outside the general education setting. It indicates the Student does not need assistive technology, or Extended School Year services. It does not account for Student's visual impairment, such as accommodations like large print, though it does provide preferential seating. It does not provide for a dedicated nurse. However, it indicates that Student "receives one-on-one care from the school nurse as needed to address health concerns." It describes Student's least restrictive environment as follows: "To address [Student]'s academic and medical needs, Student will . . . best benefit from services offered outside the general education setting."⁴²

27. Student's June 14, 2017 IEP assigned the disability classification "Multiple Disabilities (Intellectual Disability ("ID") and OHI), and provides 25 hours of specialized

³⁵ Testimony of Parent; testimony of Educational Advocate B.

³⁶ Testimony of Parent; testimony of Educational Advocate B; P-29.

³⁷ Testimony of Educational Advocate A.

³⁸ Testimony of School Psychologist; testimony of Parent; testimony of Educational Advocate A.

³⁹ P-24.

⁴⁰ Testimony of LEA Representative; P-1-13; P-15-5.

⁴¹ P-5-5.

⁴² P-8.

instruction outside the general education setting. It indicates the Student does not need assistive technology or ESY services. It does not account for Student's visual impairment, such as accommodations like large print, though it does provide preferential seating. It does not provide for a dedicated nurse. However, it indicates that Student "one-on-one care from dedicated nurse daily to address health concerns." It describes Student's least restrictive environment as follows: "To address [Student]'s academic and medical needs, Student will . . . best benefit from services offered outside the general education setting."⁴³

28. On July 12, 2017, in an effort to resolve the instant DPC which had recently been filed, DCPS proposed to amend Student's June 14, 2017 IEP to add positive behavioral interventions, strategies and supports; increase the amount of specialized instruction Student would receive to 27.5 hours per week; and add (unspecified) consultative services to address Student's needs.⁴⁴ During the July 12, 2017 RSM meeting, DCPS agreed to provide ESY to Student at Parent's request, but did not add to Student's IEP because District School has an extended school year already.⁴⁵

29. As of at least March 1, 2017 District School had concluded that it could no longer meet Student's needs and the frequency of Student's seizures. Student's team determined that Student required a more restrictive setting, and DCPS proposed City School for Student, as City School is able to serve medically fragile students.⁴⁶

30. Parent and Educational Advocate B toured City School, and Parent liked the school and approved of Student attending there, at least in the interim. Parent wanted to bring Student for a tour, but subsequently City School determined that, while it could meet Student's medical needs, it would not be an appropriate academic setting for Student, but its other student were non-verbal and more profoundly disabled than Student. Student would have been the only verbal student among the group.⁴⁷

31. Student did not go to City School, DCPS proposed a different school before ultimately assigning Student to the Individual Learning Support ("ILS") Program at Local School. The ILS Program is designed to serve students with ID, but is not targeted toward students who are medically fragile.⁴⁸

32. Nonpublic School 1 is a full-time, separate, special education day school that serves multiple disabilities and provides academic remediation in all academic subjects. It also provides group and individual therapy and art therapy.⁴⁹

⁴³ P-2.

⁴⁴ R-26-135 and R-26-136.

⁴⁵ Testimony of Educational Advocate B; R-5-056.

⁴⁶ Testimony of Parent; testimony of Educational Advocate B; testimony of Special Education Teacher; testimony of LEA Representative.

⁴⁷ Testimony of Educational Advocate B.

⁴⁸ R-23-122; R-6.

⁴⁹ Testimony of Nonpublic Director.

33. Nonpublic School 1 has two nurses on its staff (one for the upper school and one for the lower school). It also has some teachers on its staff who are certified to administer medication.⁵⁰

34. Nonpublic School 1 has experience with students with medical disorders similar to Student's Sickle Cell and seizure disorder. It could provide a safe learning environment for a student like Student with both of these conditions, and it has a gym with specific apparatus to help Student manage some of Student's motor skills needs.⁵¹

35. Nonpublic School 1's teachers are special education certified.⁵²

36. Nonpublic School 1's tuition is \$63,000 per year. It holds a certificate of approval from OSSE.⁵³

37. Student has been accepted to Nonpublic School 1, provided that DCPS provide Student a dedicated aide while Student is attending. Nonpublic School 1 requires Student to have a dedicated aide due to Student's "remarkable medical history."⁵⁴

38. Nonpublic School 1 is approximately 1 hour and 15 minutes from Parent's home.⁵⁵

39. In the December 2016 IEP, the previous IHO stated that "[u]ntil Student has been appropriately reevaluated and the extent of special education and related services Student now requires can be determined, there is insufficient evidence to craft an appropriate compensatory education remedy. Therefore, I will deny without prejudice Petitioner's request for a compensatory education award. In the event that Petitioner and DCPS are unable to agree upon appropriate compensatory education for Student hereafter, Petitioner may file a new due process complaint to seek further compensatory education relief for the denials of FAPE I have found in this decision."⁵⁶

40. In the December 2016 IEP, the previous IHO ordered that "Petitioner's requests for . . . compensatory education for the denials of FAPE determined in this decision are denied without prejudice."⁵⁷

CONCLUSIONS OF LAW

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of

⁵⁰ Testimony of Nonpublic Director.

⁵¹ Testimony of Nonpublic Director.

⁵² Testimony of Nonpublic Director.

⁵³ Testimony of Nonpublic Director.

⁵⁴ Testimony of Nonpublic Director.

⁵⁵ Testimony of Parent.

⁵⁶ P-79-22; R-1-22.

⁵⁷ P-79-23; R-1-23.

proof that the action and/or inaction or proposed placement is inadequate or adequate to provide Student with a FAPE.” 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief, except that once Petitioner has established a prima facie case, Respondent shall carry the burden of persuasion on issues regarding the appropriateness of an IEP or placement (issue (b)). The burden of persuasion shall be met by a preponderance of the evidence. *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party with the burden of persuasion must persuade the impartial hearing officer by a preponderance of the evidence. DCMR 5-E3022.16; *see also, N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

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 student’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).

- (a) Whether DCPS denied Student a FAPE by failing to comprehensively evaluate Student, by failing to agree to conduct or initiate a speech and language evaluation, occupational therapy evaluation, vision assessment, or assistive technology assessment at either the June 1, 2017 or June 14, 2017 meetings.**

An LEA must ensure that a student is reevaluated when a parent requests reevaluation, provided that a reevaluation must not occur more than once per year (unless the parties agree otherwise), and must occur at least every three years. There is not an IDEA mandated deadline for completing a parentally requested reevaluation, provided the reevaluation is completed within a reasonable time of the request. *See Herbin ex rel. Herbin v. District of Columbia*, 362 F.Supp.2d 254, 259 (D.D.C. 2005). Here, Student has not yet had an occupational therapy, speech and language evaluation, assistive technology evaluation, or vision assessment. Parent has been requesting an occupational therapy assessment, a speech and language assessment and assistive technology accommodations since at least September 2, 2016. Parent has been requesting a vision assessment since at least June 1, 2017. Given the extent of Student’s motor skills, visual and cognitive impairment as discussed in the findings of fact above; and given the extent to which Student is academically below grade level expectations and the amount of school Student has had to miss, an occupational therapy, an assistive technology and a vision assessment were warranted. Additionally, while Student’s expressive language ability is a relative strength, Student’s receptive language (ability to understand language) is impaired to some extent by Student’s variable attention; therefore, a speech and language evaluation was also warranted.

There is a dearth of evaluative data for Student in these potential areas of disability, and Student is significantly behind Student’s peers in the amount of instruction Student has been able to receive (due to frequent inability to attend school) and the rate at which Student can acquire new information. Due the urgency of attaining a clear picture of Student’s academic needs, the failure to conduct these evaluations since June 1, 2017 and/or June 14, 2017 constitutes an

unreasonable delay on these facts. The delay in collecting the evaluative data impeded Student's right to a FAPE and caused Student a deprivation of educational benefit, in addition to (ii) significantly impeding Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to Student, in that Parent did not have access to the data for educational planning purposes. Petitioner meets the burden of proof on this issue.

(b) Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP/placement/LRE/location of services through the March 1, 2017 and/or June 14, 2017 IEPs.

An "IEP must, at a minimum, 'provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). While an LEA is not required to maximize a student's educational potential, it also cannot "discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir.1985).

In order for an IEP to be appropriate, (1) the LEA must have complied with IDEA's administrative procedures and (2) the IEP must be reasonably calculated to provide some educational benefit to Student. *See N.T. v. District of Columbia*, 839 F.Supp.2d 29, 33 (D.D.C.2012), quoting *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir.2003); *J.N. v. District of Columbia*, 677 F.Supp.2d 314, 322 (D.D.C. 2010). The appropriateness of an IEP must be assessed as of the time the IEP was developed. *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008), quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir.2008) ("Because the question . . . is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so, . . . the measure and adequacy of an IEP can only be determined as of the time it is offered to the student. . . . Neither the [IDEA] nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement.") Petitioner does not assert that the LEA failed to comply with the administrative procedures attendant to developing Student's January 2016 IEP. Rather, Petitioner claims that Student's January 2016 IEP is not reasonably calculated to provide Student educational benefit.

Student's March 1, 2017 and June 14, 2017 IEPs provided 25 hours of specialized instruction outside the general education setting, which did not cover the entire school day. Given the extent of Student's cognitive and academic challenges, along with Student's distractibility and medical challenges that can be triggered by stress, it would be difficult to see how Student could safely or effectively interact with non-disabled peers during the school day at this time and achieve educational benefit. The IEPs do not indicate that Student has a visual impairment or provide the recommended accommodation of enlarged print. DCPS had determined that Student did not qualify as a student with a visual impairment; however, the March 2017 neuropsychological and Student's medical team by way of a September 2016 letter recommended enlarged print for Student, and there has not been a vision assessment to analyze the likely impact of Student's visual limitations on Student's education. Importantly, the IEPs do

not provide for a dedicated nurse, consistent with the previous Hearing Officer's order. Given the particular nature of Student's medical condition, Student actually needs this extremely high level of assistance in order to safely make it to school on the bus and to make it through the school day, as Student's symptoms and triggers must be steadily monitored by a trained professional. Additionally, when Student has seizures, a trained provider needs to be with Student to immediately assess the type of seizure and the appropriate response. The school nurse is not an adequate substitute for this particular student, because while the testimony was that the school nurse could reach Student's classroom in approximately 30 seconds when "flat out running," such assumes, for instance, that the school nurse would be immediately available to get to student and not in another part of the building taking care of another student. It does not provide for a dedicated nurse. Respondent does not meet the burden of persuasion that the March 1, 2017 or June 14, 2017 IEPs were appropriate.

To the extent that a student's IEP is appropriate, the student's educational placement is also appropriate, if it is able to implement the terms and conditions of the IEP. *O.O. ex rel. Pabo v. District of Columbia*, 573 F.Supp.2d 41, 55 (D.D.C.2008) (Where a student's IEP was adequate, a school capable of implementing the IEP was an appropriate placement.) As stated above, Student's March 1, 2017 and June 14, 2017 were not appropriate. Additionally, DCPS assigned Student to a series of schools (City School, another school, and ultimately Local School) that cannot meet both Student's medical and cognitive needs. Respondent does not meet the burden of persuasion that the locations of service assigned after the March 1, 2017 and June 14, 2017 IEPs were appropriate.

(c) Whether Student should be awarded compensatory education for the denials of FAPE found pursuant to the December 31, 2016 HOD.

In the December 2016 IEP, the previous IHO stated that "[u]ntil Student has been appropriately reevaluated and the extent of special education and related services Student now requires can be determined, there is insufficient evidence to craft an appropriate compensatory education remedy. Therefore, I will deny without prejudice Petitioner's request for a compensatory education award. In the event that Petitioner and DCPS are unable to agree upon appropriate compensatory education for Student hereafter, Petitioner may file a new due process complaint to seek further compensatory education relief for the denials of FAPE I have found in this decision." Student is entitled to compensatory education for the denials of FAPE the Hearing Officer found in December 2016 and the denials of FAPE found in the instant HOD.

(d) Whether DCPS denied Student a FAPE by failing to consistently provide Student with a dedicated healthcare aide, as required pursuant to the December 31, 2016 HOD and/or MDT determination.

In the December 2016 HOD, the previous Hearing Officer ordered as follows: "Pending completion of Student's reevaluation and IEP revision, in order that Student may return to school without delay, DCPS shall, within 15 school days of the issuance of this decision, ensure that a full-time dedicated aide is available for Student on days that Student attends school. DCPS shall ensure that the dedicated aide has appropriate health care training and skills to respond to Student's seizure episodes at school, pursuant to Student's safety plan, and to administer

emergency seizure response medications as prescribed for Student.” The undersigned credits Parent’s testimony that a dedicated healthcare aide was not consistently provided for Student following the December 31, 2016 HOD. Though Student often could not attend school due to health reasons, Student also at times could not attend school because the healthcare aide was not in place for the day. Parent attempted to communicate with the assigned aide when Student could not attend, but had various types of difficulties, including not having a consistent point person. The undersigned recognizes that a dedicated healthcare aide or nurse is a high level of services; however, due to Student’s unique set of needs, it is necessary at this time in order to permit Student to participate in a learning environment as the law entitles Student to do. Parent meets the burden of proof on this issue.

Request for Placement at Non-Public School

An order for DCPS to fund a placement at Nonpublic School 1 is part of the relief Petitioners seek for the denials of FAPE. Yet a denial of FAPE does not necessarily entitle a Student to private school placement at public expense. “An inadequate IEP is a necessary but insufficient condition for private school placement and reimbursement.” *N.T. v. District of Columbia*, 839 F.Supp.2d 29, 34 (D.D.C.2012); *Branham v. Gov't of the District of Columbia*, 427 F.3d 7, 8, 11 (D.C. Cir. 2005). Placement awards, must be tailored to meet the child’s specific needs. *Id.* To inform this individualized assessment, courts have identified a set of considerations relevant to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student’s disability, the student’s specialized educational needs, the link between those needs and the services offered by the private school, the placement’s cost, and the extent to which the placement represents the least restrictive educational environment. *Branham* at 12. Following is a discussion of each of the *Branham* factors as they relate to the facts of this case.

a. Nature and Severity of Student’s Disability

Student’s disability is severe. Student has extremely low cognitive ability and a complex set of medical needs, including experiencing two types seizures on a regular basis, multiple strokes and Sickle Cell Anemia. Student’s particular medical needs have resulted in softening of Student’s brain tissue and complicate Student’s cognitive challenges. Student is medically fragile, visually impaired, prone to falls and collision injuries, and has attention deficits, along with behavioral challenges related to Student’s medical impairments.

b. Student’s Specialized Educational Needs

Student requires an environment that can meet Student’s cognitive and complex medical needs.

c. Link between Student’s Needs and the Services Offered by Private School

Nonpublic School 1 is a full-time, separate, special education day school that serves multiple disabilities and provides academic remediation in all academic subjects. It also provides group and individual therapy and art therapy. Nonpublic School 1 has two nurses on its staff (one for the upper school and one for the lower school). It also has some teachers on its staff who are certified to administer medication. Nonpublic School 1 has experience with

students with medical disorders similar to Student's Sickle Cell and seizure disorder. It could provide a safe learning environment for a student like Student with both of these conditions, and it has a gym with specific apparatus to help Student manage some of Student's motor skills needs. Respondent raises an important consideration regarding the distance of the school from Student's home. However, the undersigned credits Parent's testimony that there is a hospital within a reasonable proximity of Nonpublic School 1 that could serve Student. Parent, who is intimately familiar with Student's medical needs and triggers, appears comfortable that with dedicated nursing support on the bus and at school, Student should be able to safely travel to and from Nonpublic School 1.

d. Cost of Placement at Private School

Nonpublic School 1's tuition is \$63,000 per year and it holds a certificate of approval from OSSE. The undersigned deems the costs to be reasonable for the services it offers.

e. Extent to Which Private School Represents Least Restrictive Environment

As of this time, a full-time special education school that can serve medically fragile students with cognitive impairments such as Student's, along with dedicated nursing/health aide support represents Student's LRE. Nonpublic School 1 meets these criteria, though as Parent suggests, Nonpublic School 2 (which will only consider accepting a student an LEA has referred).

Request for Compensatory Education

The IDEA gives hearing officers "broad discretion" to award compensatory education as an "equitable remedy" for students who have been denied a FAPE. *See Reid, supra*, 401 F.3d at 522-23. The award must "provide the educational benefits that likely would have accrued from special education services" that the school district "should have supplied in the first place." *Id.* at 524. A compensatory education award must "rely on individualized assessments" after a "fact specific" inquiry. *Id.* "In formulating a new compensatory education award, the hearing officer must determine 'what services [the student] needs to elevate [redacted] to the position Student would have occupied absent the school district's failures.'" *Stanton v. Dist. of D.C.*, 680 F.Supp.2d 201, 206 (D.D.C. 2010), quoting *Anthony v. District of Columbia*, 463 F.Supp.2d 37, 44 (D.D.C. 2006); *Reid*, 401 F.3d at 527. *See also, e.g., Turner v. District of Columbia*, 2013 WL 3324358, 10-11 (D.D.C. July 2, 2013).

The undersigned has found that Student was harmed by (1) failing to agree to conduct or initiate a speech and language evaluation, occupational therapy evaluation, vision assessment, or assistive technology assessment; (2) appropriate IEP/placement/LRE/location of services through the March 1, 2017 and/or June 14, 2017 IEPs; and (3) failing to consistently provide Student with a dedicated healthcare aide, as required pursuant to the December 31, 2016 HOD. Additionally, Student is entitled to compensatory education for the denials of FAPE the previous Hearing Officer found in the December 31, 2016 HOD. Given the period of harm (two school years), the level of Student's complex disabilities, and the amount of school Student has missed, including due to insufficient or unavailable health support during the school day, the undersigned credits the testimony of Educational Advocate A that a total of 432 hours of tutoring support will be required to help Student to occupy the position Student would have, but for the denials of FAPE. Additionally six weeks at a summer camp for students with moderate to severe

disabilities compatible with Student's will help Student close the gap due to the social interaction Student did not get a chance to take part in while missing school.

ORDER

Based on the Findings of Fact and Conclusion of Law above, it is hereby **ORDERED** that:

- A. Within 10 school days of this Order, DCPS shall convene Student's IEP team to make the following IEP revisions: (1) provide at least 27.5 hours of specialized instruction outside the general education setting; (2) describe Student's LRE to reflect that Student requires a setting that can address Student's medical needs and low cognitive and academic functioning; (3) state that Student requires a dedicated nurse or healthcare aide throughout the day on all days Student is able to attend school, and during local education agency and/or state education agency provided transportation to and from school; (4) include appropriate accommodations for Student's vision impairment; (4) include an appropriate level of behavioral support services Student; (5) address the triggers for Student's Sickle Cell and seizures.
- B. Within 10 school days of this Order, DCPS shall convene Student's IEP team to review and revise Student's medical safety plan, as appropriate.
- C. Within 10 school days of this Order, DCPS shall fund an independent assistive technology assessment for Student.
- D. Within 10 school days of this Order, DCPS shall conduct a functional vision assessment for Student;
- E. Within 5 school days of this Order, DCPS shall fund placement for Student at Nonpublic School 1. DCPS shall provide transportation to and from school, and shall provide and fund dedicated healthcare aide or dedicated nursing support for Student during local education agency and/or state education agency provided transportation to and from school, as well as throughout the school day at Nonpublic School 1.
- F. Within 10 school days of this Order, DCPS shall submit to Nonpublic School 2 a referral for Student.
- G. If Student is accepted at Nonpublic School 2, Student's IEP team shall convene within 7 school days of the acceptance to provide input on whether Nonpublic School would be an appropriate location of services for Student.
- H. If Student is accepted at Nonpublic School 2, DCPS shall determine within 10 school days of the acceptance whether Nonpublic School 2 is an appropriate location of services for Student.
- I. Within 10 school days of this Order, DCPS shall fund as compensatory education for Student 432 hours of tutoring support.⁵⁸
- J. Within 10 school days of this Order, DCPS shall authorize for Student six weeks at a summer camp for students with moderate to serve disabilities compatible with Student's.

All other relief Petitioner requested in the complaint is **DENIED**.

⁵⁸ Tutoring services shall be funded at the OSSE rate.

2017-0183
Hearing Officer Determination

IT IS SO ORDERED.

Date: September 13, 2017

/s/ NaKeisha Sylvester Blount
Impartial Hearing Officer

Copies to:
Petitioner (by U.S. mail)
Petitioner's Attorney (electronically)
Respondent's Attorney (electronically)
OSSE-SPED (electronically)
ODR (electronically)

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).