

**District of Columbia
Office of the State Superintendent of Education**

Office of Dispute Resolution
810 First Street, N.E., Suite 2001
Washington, DC 20002

OSSE
Office of Dispute Resolution
November 21, 2014

<p>STUDENT¹, By and through PARENT,</p> <p style="text-align: center;"><i>Petitioner,</i></p> <p>v.</p> <p>DISTRICT OF COLUMBIA PUBLIC SCHOOLS,</p> <p style="text-align: center;"><i>Respondent.</i></p>	<p>Impartial Hearing Officer:</p> <p>Charles M. Carron</p> <p>Date Issued:</p> <p>November 21, 2014</p>
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HEARING OFFICER DETERMINATION

I. 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 September 30, 2014, on behalf of the Student, who resides in the District of Columbia, by Petitioner, the Student’s Parent, against Respondent, District of Columbia Public Schools (“DCPS”).

¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

On October 2, 2014 the undersigned was appointed as the Impartial Hearing Officer.

On October 9, 2014 Respondent filed its Response, stating, *inter alia*, that Respondent has not denied the Student a free appropriate public education (“FAPE”).

A Resolution Meeting was held on October 9, 2014 but it failed to resolve the DPC. The statutory 30-day resolution period ended on October 30, 2014.

The 45-day timeline for this Hearing Officer Determination (“HOD”) started to run on October 31, 2014 and will conclude on December 14, 2014.

The undersigned held a Prehearing Conference (“PHC”) by telephone on October 21, 2014 at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by November 5, 2014 and that the Due Process Hearing (“DPH”) would be held on November 13, 2014.

The undersigned issued a Prehearing Conference Summary and Order (“PHO”) on October 22, 2014.

Petitioner elected for the hearing to be closed.

At the DPH, the following documentary exhibits were admitted into evidence without objection:

Petitioner’s Exhibits: P-1 through P-41 and P-51 through P-58

Respondent’s Exhibits: R-1 through R-20

Petitioner’s Exhibits P-42 through P-50 were admitted over Respondent’s objections, for the reasons stated on the record at the DPH.

The following witnesses testified on behalf of Petitioner at the DPH:

- (a) Petitioner;
- (b) Registered Nurse, who was admitted by stipulation as an expert in protocols to follow in working with children with seizure disorders; and
- (c) Advocate, who was admitted over Respondent's objection as an expert in the development of Individual Education Programs ("IEP"s) and compensatory education plans for students with Intellectual Disability ("ID").

Special Education Teacher testified on behalf of Respondent at the DPH.

The parties gave oral closing arguments and did not file written closing arguments or briefs.

II. JURISDICTION

The DPH was held pursuant to the IDEA, 20 U.S.C. §1415(f); IDEA's implementing regulations, 34 C.F.R. §300.511, and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§5-E3029 and E3030. This decision constitutes the HOD pursuant to 20 U.S.C. §1415(f), 34 C.F.R. §300.513, and §1003 of the *Special Education Office of Dispute Resolution Due Process Hearing Standard Operating Procedures*.

III. CIRCUMSTANCES GIVING RISE TO THE COMPLAINT

The circumstances giving rise to the DPC are as follows:

The Student is male, Current Age, and as of the DPH is not attending school.²

² Petitioner testified that the Student is not attending school because Petitioner does not believe Public School can supervise him properly, and Respondent has not offered another school. Petitioner and Advocate testified about their failed efforts to enroll the Student in his neighborhood school, and Respondent's counsel asserted that Petitioner

The Student has been determined to be eligible for special education and related services as a child with a Multiple Disabilities (“MD”) under the IDEA, based upon his ID and Other Health Impairment (“OHI”).

Petitioner claims that Respondent has denied Student a FAPE by failing to address his seizure disorder, as described in more detail in Section IV *infra*.

IV. ISSUES

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

(a) Since January 14, 2014, has Respondent denied the Student a FAPE because his IEP did not include a full-time dedicated aide to prevent him from injuring himself when experiencing a seizure?

(b) Since January 14, 2014, has Respondent denied the student a FAPE because his IEP fails to include goals and objectives for adaptive/daily living?

(c) Since January 14, 2014, has Respondent denied the Student a FAPE because his IEP fails to include an appropriate plan of action to address his seizures at school and to ensure his safety when having seizures at school?

(d) Since January 14, 2014, has Respondent denied the Student a FAPE because his Location of Services (“LOS”), *i.e.*, Public School, does not have staff to supervise the student adequately due to his seizure disorder?

had failed to provide medical documentation to support home instruction of the Student. Petitioner testified that she does not trust Public School because the principal of Public School lied to her about the swimming pool incident on January 31, 2014 (*see*, Section VIII, *infra*). It is not necessary for the undersigned to determine why the Student is not currently attending school in order to decide the issues in this case.

V. RELIEF REQUESTED

Petitioner requests the following relief:³

- (a) findings in Petitioner's favor on all issues;
- (b) that the Hearing Officer develop an IEP for the Student consistent with the claims in the DPC, *i.e.*, including a dedicated aide, a safety plan, and goals for adaptive/daily living, or order Respondent to do so;
- (c) an Order that Respondent fund placement and provide transportation for the Student to attend Non-Public School A⁴ or some other appropriate public or Non-Public School A;
- (d) an Order that Respondent provide a dedicated aide within one school day;
- (e) an Order that Respondent convene a Multi-Disciplinary Team ("MDT") meeting with Petitioner within 10 days to revise the Student's IEP to include a dedicated aide and adaptive/daily living goals and determine placement, with placement to be made within 10 days;
- (f) appropriate compensatory education; and
- (g) any other relief deemed appropriate.

³ In the DPC, Petitioner also requested the following relief which the undersigned determined to be inappropriate: (a) an Order that an MDT determine compensatory education, which the undersigned struck because controlling case law precludes remanding such a determination to any body that includes representatives of Respondent; and (b) a request for attorney's fees and costs, which only a court can award.

⁴ In the DPC, Petitioner also had sought placement and funding Non-Public School B, but Petitioner withdrew that request prior to the DPH.

VI. BURDEN OF PROOF

In a special education DPH, the burden of persuasion is on the party seeking relief. DCMR §5-E3030.3; *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief 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).

VII. CREDIBILITY

Petitioner was not credible. With regard to the January 21, 2014 swimming pool incident (*see*, Section VIII, *infra*), on direct examination Petitioner testified that the Student was on his medication and that she was sure the babysitter had administered the medication because she left it on top of the microwave each day when she left for work and it always was gone when she returned. When confronted by the undersigned with her contrary statement to the hospital, Petitioner claimed not to have understood the question on direct. The undersigned does not credit Petitioner's asserted lack of understanding. Petitioner testified on direct examination and reiterated upon questioning by the undersigned that the Public School swimming coach had called her on the phone and they spoke for two to three hours about the January 31, 2014 incident—an incident of several minutes' duration. The undersigned does not believe that any conversation regarding that incident could have taken nearly that long. The undersigned finds that Petitioner exaggerated. When questioned about why she never provided medical documentation to Respondent, Petitioner stated that she did not have any such documentation, and that

when she asked the Student's doctor for a report, he declined to provide one, instructing her to tell Respondent about the Student's seizures, the Student's medication, and what Respondent needed to do in the event of a seizure. The undersigned finds it very unlikely that a doctor would decline to provide a report on a child's medical condition when requested by the parent. In fact, the Student's treating neurologist did provide such a letter in June 2014. Petitioner testified that during the period from March through May 2014, the Student suffered numerous seizures at home, and was hospitalized at least once; however, she claimed not to have retained any hospital discharge documents—although she did retain the hospital discharge documents from January 2014 that were introduced in the instant case. The undersigned finds it incredible that Petitioner would destroy or lose some medical documentation that would have supported her claims while retaining other documentation. Petitioner's Advocate testified that Petitioner had told her that the Student had many seizures at school after January 2014; even Petitioner admitted at the DPH that there had been only two such seizures. Accordingly, the undersigned concludes that Petitioner exaggerated the frequency and severity of the Student's seizures.

Registered Nurse testified honestly but not reliably. She initially testified that the Student's seizures were all of one type ("absence" seizures). On cross-examination, she admitted that at least one of his seizures was another type (a "complex partial" seizure). She testified incorrectly as to the medication the Student was taking. She testified that "'breakthrough' seizures" means seizures that occur between other seizures, or seizures on "other days" which is nonsensical and contrary to the common understanding of that phrase to mean seizures that occur even though the individual is taking anti-seizure

medication (as Advocate correctly testified). Registered Nurse testified that the Student requires a dedicated (“one on one”) aide because he has “frequent” seizures; however she did not know the current frequency of his seizures. In short, Registered Nurse’s testimony was unpersuasive when it conflicted with the testimony of other witnesses (particularly the Student’s treating neurologist).

Advocate was credible; however, the compensatory education plan that she developed lacked factual support, as discussed in Section VIII, *infra*.

Special Education Teacher was credible.

VIII. FINDINGS OF FACT

Facts Related to Jurisdiction

1. The Student is a male of Current Age. R-7-1.⁵
2. The Student resides in the District of Columbia. Testimony of Petitioner.
3. The Student has been determined to be eligible for special education and related services under the IDEA as a child with MD due to ID and OHI. P-6-3.

July 2010 Speech and Language Evaluation

4. Respondent conducted a speech and language evaluation of the Student in July 2010. P-16-1.

5. Respondent concluded that the Student’s speech and language skills were not commensurate with his age, linguistic environment and cognitive functioning, and were

⁵ When citing exhibits, the third range represents the page number within the referenced exhibit, in this instance, page 1.

impacting his academic achievement, and that he therefore qualified for speech and language intervention services. P-16-8.

July 2010 Psychiatric Evaluation

6. A psychiatric evaluation of the Student was conducted for Respondent in July 2010. P-17-1.

7. The Student was diagnosed with Pervasive Developmental Disorder, NOS [Not Otherwise Specified], Attention Deficit Hyperactivity Disorder (“ADHD”), Combined Type, and Mixed Receptive-Expressive Language Disorder. P-17-6.

8. The Student also was diagnosed with a seizure disorder. *Id.*

9. The evaluator concluded that the Student’s seizure disorder, developmental delays, hyperactivity and inattentiveness contributed to his behavioral challenges and poor academic performance and slowed the learning process. *Id.*

July 2010 Comprehensive Psychological Evaluation

10. Respondent conducted a comprehensive psychological evaluation of the Student in July 2010. P-15-1.

11. The evaluator found that the Student’s general cognitive ability was in the Mentally Deficient range with a Full Scale Intelligence Quotient (“FSIQ”) of 53. P-15-11.

12. The evaluator found that the Student exhibited hyperactivity, impulsiveness, inattentiveness, aggression, inappropriate and disruptive behavior and lack of pleasure. *Id.*

September 27, 2010 Evaluation Summary Report

13. On September 27, 2010, Respondent issued an Evaluation Summary Report summarizing the 2010 evaluations. P-58.

14. The Student was found to be unable to engage in the academic process to any significant degree and he was constantly aggressive, including hitting, kicking, spitting, and attempting to abscond from the classroom. P-58-5.

February 19, 2013 IEP

15. On February 19, 2013, the Student's IEP Team,⁶ including Petitioner, met for the annual review of the Student's IEP. P-8-1, P-30-1.

16. The Student's 22 absences since the beginning of the school year were discussed, and Petitioner stated that there was a conflict between her work schedule and the Student's pickup/drop-off schedule, resulting in the Student being absent. P-30-1.

17. The IEP stated that all of the Student's instruction would be provided in the outside of general education setting. P-8-15.

18. The IEP stated that the Student would receive Speech-Language Pathology ("SLP"), Occupational Therapy ("OT") and Behavioral Support Services ("BSS"). *Id.*

19. The IEP stated that the Student did not require a dedicated aide. *Id.*

February 22, 2013 OT Assessment

20. On February 22, 2013, Respondent conducted an OT assessment of the Student, with a report dated February 25, 2013. P-14-1.

⁶ The parties sometimes refer to an IEP Team as an MDT. The difference is not material to the resolution of the issues in the instant case.

21. The Student's special education teacher at that time reported that the Student had a tonic/clonic seizure that month, "and there is a question as to how much seizure activity is occurring and if there is or needs to be a change in medicine." P-14-3.

22. The Student's SLP therapist also stated concern over the Student's possible seizure activity and its effects. *Id.*

23. The evaluator found that the Student's functional level in the school setting with regard to Activities of Daily Living ("ADL") was "Within Functional Limits" ("WFL") for toileting, hand hygiene, and feeding (P-14-4) but "Needs Address" ("NA") for dressing and fine motor ADLs/fastening (P-14-5).

24. The evaluator concluded that the Student's sensory processing difficulties adversely affected his ability to plan motor movements to complete school-based ADLs independently, "such as putting on his coat or changing for aquatics." P-14-8 and -9.

25. The evaluator recommended, *inter alia*, that the Student's "caregiver" (in this case, Petitioner) (a) provide the Student with community-based swim lessons to develop overall strength and coordination as well as body awareness, (b) provide the school with up to date medical information "so that we can steer treatment, and be aware of antecedents to seizures" and (c) try to get the Student to school consistently. P-14-9.

February 28, 2013 Seizure

26. On February 28, 2013, the Student had a seizure at school. P-12-1.

27. He was walking in the hallway and fell "flat belly down on the floor." P-12-3.

28. The Student injured his lip. *Id.*

29. The seizure occurred for less than a minute, after which the Student was able to walk to the health suite with assistance. *Id.*

March 4, 2013 Academic Achievement Testing

30. On March 4, 2013, Respondent administered the Woodcock-Johnson III Normative Update Tests of Achievement to the Student. P-13-1.

31. The Student's standard scores were very low in all areas. P-13-1 through -3.

March 2013 Reevaluation

32. On March 25, 2013, Respondent's school psychologist issued a report reviewing all of the evaluation data then available regarding the Student. P-12-1 and -2.

33. The school psychologist noted that the Student had a history of absence seizure disorder (*i.e.*, a brief loss of consciousness that can occur several times per day without being detected). P-12-1.

34. In January 2013, Petitioner had reported to Respondent that the Student's seizures usually occurred in warm weather and when he was overheated from activities. P-12-3 and -4.

35. The school psychologist noted that in the area of adaptive/daily living skills, the Student was showing appropriate behavior when transitioning from one class to another and in fastening; he was able to button small front buttons and buckle his belt. P-12-2.

36. The Student had shown "remarkable progress" on his self-help skills. P-5-2.

37. The Student's strengths in adaptive/daily living skills included feeding, dressing and undressing, toileting, grooming, and explaining what to do in different situations (*e.g.* when he was sleepy, cold, tired, hungry, thirsty, sick, cut fingers, had dirty hands, entered a dark room, was offered candy by a stranger or had an untied shoe). P-5-1.

38. The Student's areas of weakness in adaptive/daily living skills were knowing the functions of community helpers and knowing where to go for different services. *Id.*

39. The Student's teacher had reported that attendance was a problem for the Student, with 22 absences from August 20, 2012 to February 26, 2013 that had a negative impact on his academic performance in school. P-12-2 and -4.

40. On March 26, 2013, the Student's MDT determined that he remained eligible for special education and related services as a child with MD based upon his ID and his OHI (due to his seizure disorder). P-6-1 through -4, P-7-1, P-11-4.

March 26, 2013 Eligibility and IEP Meeting

41. The Student's MDT/IEP Team met on March 26, 2013, without Petitioner in attendance. P-31-1 and -2.

42. Petitioner had advised Respondent that she would be half an hour late to the meeting but she did not arrive by then. P-31-2.

43. The Team concluded that the Student continued to be eligible for special education and related services as a child with MD, comprising ID and OHI due to his seizure disorder. *Id.*

44. The Student's IEP was amended to add two OT goals and to correct errors in dates. P-4-1.

45. Under the heading, “AREA OF CONCERN: Communication/Speech and Language,” the IEP described how the Student’s weaknesses in expressive and receptive communication had an adverse impact upon his adaptive/daily living skills:

[The Student] needs to ... (3) demonstrate the ability to identify ten community workers and ten places in the community from which to seek assistance, support, or directions in the event of an emergency situation; and (4) identify community workers and places in the community from which to seek assistance, support or directions in the event of an emergency situation during community integration activities to insure safety and security.

P-4-7.

46. The IEP contained a goal for identifying the roles of community workers from whom to seek assistance or support in the event of an emergency situation. P-4-8.

47. The IEP contained the following objective to achieve the goal described in the previous paragraph:

By February 18, 2014, [the Student] will demonstrate the ability to identify ten community workers and ten safe places in the community from which to seek assistance, support or directions in the event of an emergency situation during community integration activities to insure safety and security given (a) verbal prompts and (b) independently for 9 of 10 trials presented with 90% mastery as measured by observation and checklist.

Id.

48. Under the heading, “AREA OF CONCERN: Motor Skills/Physical Development,” the IEP described the Student’s need for assistance “managing his belt buckle during toileting.” P-4-10.

49. The IEP stated that the Student needed to be able to “complete clothing management (belt buckle) for toileting or changing for P.E.” P-4-11.

50. The IEP contained the following goal: “By February 18, 2014, [the Student] will demonstrate functional gross/fine motor skills to maximize independence with activities of daily living skills with 80% accuracy.” P-4-12.

51. The IEP contained the following objectives to achieve the goal described in the preceding paragraph:

1. By February 18, 2014, [the Student] will independently buckle his belt buckle on and off his person 100% of opportunities over 2 consecutive weeks.
2. By February 18, 2014, [the Student] will independently put his jacket on 4 out of 5 opportunities over 2 consecutive weeks.
3. By February 18, 2014, [the Student] will change clothing during aquatics/PE with minimal assistance including fasteners and with no more than 1 verbal cue per article of clothing 2 out of 5 trials.

Id.

52. The IEP continued the Student’s full-time outside of general education specialized instruction and related services and stated that the Student continued not to require a dedicated aide. P-4-13.

53. The Team addressed Petitioner’s previously stated concern about how the Student’s seizures were handled by agreeing to follow DCPS procedures, *i.e.* “stabilization of the student, contact of an ambulance if warranted, and notification of the parent.” P-31-2.

54. The school physician recommended that Petitioner contact a neurologist regarding the Student’s seizures (*Id.*) although there is no evidence in the record that this was communicated to Petitioner.

April 22, 2013 IEP

55. The Student’s IEP was amended on April 22, 2013, to edit Extended School

Year (“ESY”) special education service terms and to change the Student’s transportation services. P-3-1.

Summer 2013 Transportation

56. The Student qualified for transportation for summer 2013 ESY services due to his seizure disorder. P-10.

August 26, 2013 Aquatics Program Medical Information Questionnaire and Permission Slip

57. On August 26, 2013, Petitioner completed a medical information questionnaire for Public School’s Aquatics Program, stating, *inter alia*, that the Student was subject to seizures for which he was receiving treatment including medication. P-33-1.

58. Also on August 26, 2013, Petitioner signed a permission slip for the Student to participate in an Adapted Aquatics Program. R-4-1.

59. Petitioner agreed to inform the school of “any health problems or changes in health status that might affect or limit my child’s participation in the activity listed above, including but not limited to medications my child is taking...” *Id.*

September 13, 2013 Seizure

60. The Student had a seizure at school on September 13, 2013. P-32-1.

61. The seizure lasted less than a minute, perhaps only two seconds. *Id.*

62. Prior to the seizure, the Student had been playing outdoors. *Id.*

63. Respondent called Emergency Medical Services (“EMS”) and Petitioner. *Id.*

64. Petitioner requested that the Student remain at school and be placed on the school bus. *Id.*

65. Respondent's school physician advised that instead of the Student riding the bus, he be evaluated at Children's National Medical Center ("CNMC") and that Petitioner assume care for him there, or that Petitioner pick up the Student at school. *Id.*

66. Petitioner did not elect either of those alternatives, and the Student remained at school and was placed on the school bus. *Id.*

November 2013 Seizure

67. The Student had a seizure on November 6, 2013 for which he was taken to the CNMC Emergency Department. P-24-2, R-19-3.

68. The Student was not medicated at the time because Petitioner had run out of seizure medications two weeks prior. R-19-3.

January 14, 2014 IEP

69. The Student's IEP Team met on January 14, 2014 for the annual review of his IEP. P-2-1.

70. Petitioner participated by telephone. *Id.*

71. As of January 14, 2014, the Student was able to identify eight of 16 safety/environmental signs presented. P-2-3.

72. Under the heading, "AREA OF CONCERN: Communication/Speech and Language," the IEP contained the same language (P-2-6) as the March 26, 2013 IEP

(P-4-7) regarding how the Student's weaknesses in expressive and receptive communication had an adverse impact upon his adaptive/daily living skills and the same goal for identifying the roles of community workers from whom to seek assistance or support in the event of an emergency situation (*compare, P-2-6 with P-4-8*).

73. The IEP contained the following objective to achieve the goal described in the previous paragraph:

By January 13, 2015, in response to query, [the Student] will state the names of ten community workers, their roles an[d] ten safe places in the community from which to seek assistance, support or directions in the event of an emergency situation during community integration activities to insure safety and security given (a) verbal prompts and (b) independently for 9 of 10 trials presented with 90% mastery as measured by observation and checklist.

P-2-7.

74. Under the heading, "AREA OF CONCERN: Motor Skills/Physical Development," the IEP stated that the Student was able to "buckle and unbuckle his belt on his person with modified independence 80% of opportunities" and required "minimal assistance and increased time to complete buckle's (sic buckles) off of his person."

P-2-10.

75. Because the Student had mastered the buckling objective, it was discontinued.

Id.

76. The IEP described the Student's need for assistance completing buttoning independently, managing clothing for aquatics/PE clothing changes, and putting on his coat including zipper. *Id.*

77. The IEP contained the following goal: “By February 18, 2014, [the Student] will demonstrate functional gross/fine motor skills to maximize independence with activities of daily living skills with 75% accuracy.”⁷ P-2-11.

78. The IEP contained the following objective to achieve the goal described in the preceding paragraph:

1. By January 13, 2015, [the Student] will independently put his jacket on 4 out of 5 opportunities over 2 consecutive weeks.
2. By January 13, 2015, [the Student] will change clothing during aquatics/PE with minimal assistance including fasteners and with no more than 1 verbal cue per article of clothing 3 out of 4 trials.⁸

Id.

79. Petitioner’s advocate agrees that the IEP contains adequate adaptive/daily living skills goals.⁹ Testimony of Advocate.

80. Special Education Teacher addressed the Student’s adaptive/daily living goals through instruction in the classroom. Testimony of Special Education Teacher.

81. The IEP continued the Student’s full-time outside of general education specialized instruction and related services and stated that the Student continued not to require a dedicated aide. P-2-12.

⁷ This goal was the same as the goal in the March 26, 2013 IEP except the prior IEP had an accuracy goal of 80%. P-4-12.

⁸ These objectives are the same as the two related objectives in the March 26, 2013 IEP (P-4-12) except the completion date is advanced a year and the frequency standard for changing clothes was increased from 2 out of 5 to 3 out of 4 trials.

⁹ Advocate testified that she would prefer to see these goals stated in a separate “Area of Concern.” The undersigned does not find the location of the goals in the IEP to be material.

January 31, 2014 Incident

82. On January 31, 2014, the Student did not take his morning dose of seizure medication; the Student's babysitter was responsible for administering his medication and according to Petitioner, the babysitter did not always do so. P-21-1.

83. Prior to school, and at school prior to aquatics class, the Student was acting normal. *Id.*

84. During aquatics class, the Student had a seizure and nearly drowned in the Public School pool. P-18-4.

85. CPR was performed on the Student at the pool. *Id.*

86. The Student was awake and there is no evidence that his pulse had stopped. P-25-3.

87. EMS was called. P-19-1.

88. The Student was transported by ambulance to the Emergency Department of CNMC and then admitted to CNMC's Pediatric Intensive Care Unit ("PICU") as an inpatient. P-18-1 and -4, P-20-1, P-21-1.

89. CNMC PICU concluded that the Student's seizure was "likely secondary to missed [seizure medication] dose this morning and possible poor compliance with med[ication] in general." P-21-3.

90. A CNMC neurologist concluded that the Student's submersion had been brief and he was unlikely to have suffered any anoxic injury (*i.e.* injury from lack of oxygen). P-24-3.

91. The Student was discharged from CNMC on February 3, 2014. P-18-2.

92. Based upon the entire record, the undersigned finds that the incident of January 31, 2014 was caused by the confluence of (a) Petitioner's determination that it was safe for the Student to participate in adaptive aquatics despite his seizure disorder, (b) the Student's caregiver's failure to give him his seizure medication, and (c) Petitioner's failure to inform Public School that the Student had not taken his seizure medication and/or that he should not participate in aquatics that day despite her written agreement to inform Public School of any health problems or changes in health status that might affect the Student's participation (R-4-1).

93. There is no evidence in the record that the incident of January 31, 2014 would have been prevented if the Student had a full-time dedicated aide, particularly as there is no evidence that the aide would have been in the pool in physical contact with the Student.

94. There is no evidence in the record that the incident of January 31, 2014 would have been prevented, or that the response to the Student's seizure would have been different, if his IEP had included a written plan of action to address his seizures at school and to ensure his safety when having seizures at school.

95. There is no evidence in the record that the incident of January 31, 2014 was attributable to Public School having inadequate staff to supervise the Student.¹⁰

96. As terrifying as this incident may have been to Petitioner, the Student, his classmates, and Public School staff, the incident does not establish that Public School

¹⁰ Even if the aquatics instructor/swimming coach failed in this instance adequately to supervise the Student—which has not been demonstrated by the record evidence—such a failure would not establish that Public School had inadequate staff.

was an inappropriate LOS for the Student.¹¹

97. Because Petitioner can withhold consent for the Student to participate in the aquatics program, the Student's attendance at Public School after the incident did not, and does not, pose a drowning risk.

February 7, 2014 IEP Progress Report

98. As of February 7, 2014, the Speech-Language and Motor Skills/Physical Development goals in the Student's January 14, 2014 IEP had not yet been introduced. P-27-3 and -5.

March 5, 2014 Seizure

99. On March 5, 2014, the Student had a seizure in the cafeteria at school, in the form of a staring episode, then he slumped over, did not fall to the ground, and recovered in 30-60 seconds, after which he was talking and ambulatory. P-26-1, P-34.

100. The Student was taken to the school nurse's station and then transported to CNMC by EMS. P-34-1.

May 8, 2014 Seizure

101. On May 8, 2014, the Student had a seizure in the gym at school, in the form of shaking and spitting, and then lying on the floor. P-35-1 through -9.

¹¹ Whether Petitioner has a viable tort claim against Respondent is beyond the scope of this hearing officer's jurisdiction.

102. The Student was treated by the school nurse, who called EMT, and EMT transported the Student to CNMC. *Id.*

Petitioner's Failure to Share Medical Documentation During School Year 2013-2014

103. During School Year 2013-2014, Petitioner did not provide Public School with current medical documentation regarding the Student's treatment for seizures including his medication, despite Respondent's requests and efforts to make a home visit. R-11-1 and -2.

104. One medical document provided by Petitioner appeared to have an altered date. R-11-2.

June 4, 2014 Letter from CNMC Child Neurology Fellow

105. On June 4, 2014, CNMC's Child Neurology Fellow wrote a letter "to whom it may concern," stating in full as follows:

[The Student] has been experiencing frequent breakthrough seizures many of which have occurred at school. I think it is important for an adult to be present in the same room as [the Student] at all times to be able to react and get help as needed should he have additional seizures. He does not need to have a one on one aid[e] as these events are infrequent. He likely should not be swimming at school and should not be climbing to heights that would result in injury should he have a seizure. His activities are otherwise not restricted at this time.

Please do not hesitate to call should have you have additional questions or clarifications.

R-14-1.

106. Petitioner's counsel attempted to discredit the recommendations of the neurologist because his letter contains inconsistent statements about the frequency of the

Student's seizures ("frequent breakthrough seizures" versus "these events are infrequent").

107. Inasmuch as the neurologist had been the Student's treating neurologist for approximately one year (Testimony of Petitioner), and had full knowledge of the Student's seizure disorder, the undersigned finds this inconsistency in his letter to be immaterial.

Supervision Required to Protect the Student's Safety at School

108. The appropriate protocol for dealing with children's seizures is to avoid any known triggers of seizures, to help the child lie down, protect the child's head, loosen tight clothing, time the seizure, call "911" if the seizure lasts more than five minutes or is of a type different from the child's usual seizures, change the child's clothing if wet, notify the "chain of command" and the child's parent, if the child is transported to the hospital, have a staff member that knows the child ride with the child, and document the seizure in a log book. Testimony of Registered Nurse.

109. Based upon the entire record, and in particular the opinion of the CNMC neurologist (Finding of Fact 105, *supra*), the undersigned finds that the Student does not require a full-time dedicated aide to prevent him from injuring himself when experiencing a seizure.

Supervision of the Student Available at Public School

110. At Public School, the Student's classroom had eight students and four adults—the teacher, one instructional aide, and two dedicated aides. Testimony of Special Education Teacher.

111. The dedicated aides were assigned to other children but were able to assist the Student. *Id.*

112. At Public School, there always was an adult within sight of the Student, except when he was in the bathroom that was within his classroom. *Id.*

113. All of the staff at Public School that interacted with the Student had met to discuss appropriate procedures in the event he had a seizure. *Id.*

114. Those procedures comprised identifying whether the Student was having a seizure by calling his name, calling the nurse who would come to assess him and transport him to her station by wheelchair if necessary, calling Emergency Medical Services if appropriate, determining whether the Student needed to be transported to the hospital, calling Petitioner, and providing a staff member to ride with the Student if he needed to be transported to the hospital. *Id.*

115. The Student's seizures were documented. R-8, R-9.

116. If the Student spent more than five minutes in the bathroom, the teacher or one of the aides would check on him. Testimony of Special Education Teacher.

117. After the January 31, 2014 incident, Public School restricted the Student from swimming and from strenuous physical activity. *Id.*

118. Registered Nurse agrees that Public School staff know how to act when the Student has a seizure. Testimony of Registered Nurse.

119. Based upon the entire record, the undersigned finds that since January 14, 2014, Public School has had staff to supervise the Student adequately to protect the Student's safety at school.¹²

Non-Public School A

120. The classroom that the Student would attend at Non-Public School A has a dedicated aide for each child. Testimony of Advocate.

121. Non-Public School A drafted an "action plan" to deal with the Student's seizures were he to attend that school. Testimony of Petitioner.

122. The "action plan" comprises having someone watch the Student at all times, determining when he has a seizure and the duration of the seizure, having a school nurse assess him and transport him by wheelchair if necessary, and calling Petitioner. *Id.*

123. The tuition charged by Non-Public School A is not in evidence.

Petitioner's Compensatory Education Plan

124. Petitioner's Compensatory Education Plan (the "Plan") is based upon the assumption that the Student's absences from school since January 31, 2014, and commensurate lack of instruction, are due to Petitioner's refusal to have him attend Public School because Petitioner believes the Student is not safe there. Testimony of Advocate.

¹² The supervision the Student receives at school far surpasses the supervision he receives at home, where, according to Petitioner, he is allowed to play outside with the expectation that some neighbor will notice if he has a seizure. Although not necessary to determine the issues in the instant case, the undersigned also finds that Public School staff responded appropriately to the Student's seizures.

125. The Plan does not specify the educational deficits that the Student suffered because Petitioner did not have sufficient information to determine such deficits. *Id.*

126. Advocate did not attend IEP Team meetings or discuss the Student's academic progress (or lack thereof) with the Student's teachers. *Id.*

IX. CONCLUSIONS OF LAW

Purpose of the IDEA

1. The IDEA is intended "(A) 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 [and] (B) to ensure that the rights of children with disabilities and parents of such children are protected..." 20 U.S.C. §1400(d)(1), *accord*, DCMR §5-E3000.1.

FAPE

2. The IDEA requires that all students be provided with a free appropriate public education ("FAPE"). FAPE means:

special education and related services that –

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. §1401(9); *see also*, 34 C.F.R. §300.17 and DCMR §5-E3001.1.

The IEP

3. The “primary vehicle” for implementing the goals of the IDEA is the IEP which the IDEA “mandates for each child.” *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). The IDEA defines IEP as follows:

(i) In general: The term “individualized education program” or “IEP” means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

(I) a statement of the child’s present levels of academic achievement and functional performance, including—

(aa) how the child’s disability affects the child’s involvement and progress in the general education curriculum;

(bb) for preschool children, as appropriate, how the disability affects the child’s participation in appropriate activities; and

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child’s other educational needs that result from the child’s disability;

(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

(VI)

(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412 (a)(16)(A) of this title; and

(bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why—

(AA) the child cannot participate in the regular assessment; and

(BB) the particular alternate assessment selected is appropriate for the child;

(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications

20 U.S.C. §1414(d)(1)(A).

4. To be sufficient to provide FAPE under the IDEA, an “IEP must be ‘reasonably calculated’ to confer educational benefits on the child ... but it need not ‘maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.’” *Anderson v. District of Columbia*, 606 F. Supp. 2d 86, 92 (D.D.C. 2009), quoting *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 200, 207 (1982)(“*Rowley*”).

[T]he “basic floor of opportunity” provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

Rowley, 458 U.S. at 201.

5. The United States District Court for the District of Columbia recently summarized the case law on the sufficiency of an IEP, as follows:

Consistent with this framework, “[t]he question is not whether there was more that could be done, but only whether there was more that had to be done under the governing statute.” *Houston Indep. Sch. Dist.*, 582 F.3d at 590.

Courts have consistently underscored that the “appropriateness of an IEP is not a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so”; thus, “the court judges the IEP prospectively and looks to the IEP’s goals and methodology at the time of its implementation.” Report at 11 (*citing Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148-49 (10th Cir. 2008)). Academic progress under a prior plan may be relevant in determining the appropriateness of a challenged IEP. *See Roark ex rel. Roark v. Dist. of Columbia*, 460 F. Supp. 2d 32, 44 (D.D.C. 2006) (“Academic success is an important factor ‘in determining whether an IEP is reasonably calculated to provide education benefits.’”) (*quoting Berger*

v. Medina City Sch. Dist., 348 F.3d 513, 522 (6th Cir. 2003)); *Hunter v. Dist. of Columbia*, No. 07-695, 2008 WL 4307492 (D.D.C. Sept. 17, 2008) (citing cases with same holding).

When assessing a student's progress, courts should defer to the administrative agency's expertise. *See Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 195 (2d Cir. 2005) (“Because administrative agencies have special expertise in making judgments concerning student progress, deference is particularly important when assessing an IEP's substantive adequacy.”). This deference, however, does not dictate that the administrative agency is always correct. *See Cnty. Sch. Bd. of Henrico Cnty., Virginia v. Z.P. ex rel. R.P.*, 399 F.3d 298, 307 (4th Cir. 2005) (“Nor does the required deference to the opinions of the professional educators somehow relieve the hearing officer or the district court of the obligation to determine as a factual matter whether a given IEP is appropriate. That is, the fact-finder is not required to conclude that an IEP is appropriate simply because a teacher or other professional testifies that the IEP is appropriate The IDEA gives parents the right to challenge the appropriateness of a proposed IEP, and courts hearing IDEA challenges are required to determine independently whether a proposed IEP is reasonably calculated to enable the child to receive educational benefits.”) (internal citations omitted).

An IEP, nevertheless, need not conform to a parent's wishes in order to be sufficient or appropriate. *See Shaw v. Dist. of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002) (IDEA does not provide for an “education ... designed according to the parent's desires”) (citation omitted). While parents may desire “more services and more individualized attention,” when the IEP meets the requirements discussed above, such additions are not required. *See, e.g., Aaron P. v. Dep't of Educ.*, Hawaii, No. 10-574, 2011 WL 5320994 (D. Hawaii Oct. 31, 2011) (while “sympathetic” to parents' frustration that child had not progressed in public school “as much as they wanted her to,” court noted that “the role of the district court in IDEA appeals is not to determine whether an educational agency offered the best services available”); *see also D.S. v. Hawaii*, No. 11-161, 2011 WL 6819060 (D. Hawaii Dec. 27, 2011) (“[T]hroughout the proceedings, Mother has sought, as all good parents do, to secure the best services for her child. The role of the district court in IDEA appeals, however, is not to determine whether an educational agency offered the best services, but whether the services offered confer the child with a meaningful benefit.”).

K.S. v. District of Columbia, ___ F. Supp. 2d ___, 113 LRP 34725 (2013).

When an IEP Must be Revised

6. IEPs must be reviewed and revised:

Review and revision of IEPs—(1) *General*. 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.

34 C.F.R. §300.324(b).

Adequacy of the Adaptive/Daily Living Goals in the Student’s IEPs

7. Because the Student’s IEPs included goals and objectives for adaptive/daily living and he was making progress toward those goals and objectives (*see*, Findings of Fact 45-51 and 71-78 *supra*), the undersigned concludes that the Student’s IEPs were reasonably calculated to provide educational benefit in the area of adaptive/daily living and did not deny the Student a FAPE.

8. Because the Student did not require a dedicated aide (*see*, Finding of Fact 109, *supra*), the fact that the Student’s IEPs did not provide a dedicated aide did not render those IEPs inappropriate.

Appropriateness of Public School as the Student’s Location of Services

9. When determining the school that a student with an IEP should attend—sometimes referred to as the Location of Services (“LOS”)—the LEA must select a setting that is able to *substantially* implement the IEP. As recently stated by the United States District Court for the District of Columbia:

Because the plaintiffs are entitled to reimbursement for F.J.’s education at Accotink only if the defendant has deprived F.J. of a FAPE, the Court begins its analysis with that assessment. See 20 U.S.C. §§1412(a)(10)(C)(ii). In order to provide a student with a FAPE, the student’s education must be “provided in conformity with the IEP” developed for her, and therefore, the educational agency must place the student in a setting that is capable of fulfilling the student’s IEP. See *id.* § 1401(9); 34 C.F.R. §300.116 (2012) (providing that a child’s educational placement “[i]s based on the child’s IEP”); *O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (citing § 1401(9)).

As an initial matter, the parties disagree as to the standard the Court must apply in assessing the plaintiffs’ claim that DCPS deprived F.J. of a FAPE. Citing *Hinson v. Merritt Educational Center*, 579 F. Supp. 2d 89 (D.D.C. 2008), the plaintiffs assert that “the Hearing Officer incorrectly imported the standard applicable to claims of a failure to implement an IEP,” and assessed whether Ballou was able to substantially implement the IEP, whereas “the proper standard . . . is whether or not it can implement the IEP as written.” Pls.’ Mem. at 8–9. The defendant, on the other hand, urges the Court to apply the same standard used by the hearing officer and to require the plaintiffs to show “more than a de minimis failure to implement all elements of [the] IEP” in order to succeed on their claim. Def.’s Mem. at 13–14 (quoting *Catalan ex rel. E.C. v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007)). The Court agrees with the defendant.

The plaintiffs have misread *Hinson v. Merritt Educational Center* as requiring that a student’s placement conform to the IEP “as written.”

See Pls.’ Mem. at 7–9; Pls.’ Opp’n at 5–6. To be sure, in *Hinson*, another member of this Court held that the appropriateness of the student’s placement must be evaluated with reference to the IEP “as written,” *Hinson* 579 F. Supp. 2d at 104, but the plaintiffs’ interpretation of this phrase is incorrect when the Court’s words are placed in context. In *Hinson*, the plaintiff argued that the school designated by DCPS was an inappropriate placement because it could not meet the plaintiff’s proposed standards for her child’s IEP. *Id.* The Court’s conclusion that “to show that placement is inappropriate, plaintiff must show that [the school] is unable to implement the IEP as written,” therefore refers to evaluating a placement from the standpoint of how the IEP is actually drafted, and not from the perspective of how a parent believes the IEP ought to be written. *Id.* *Hinson* does not, as the plaintiffs suggest, support the proposition that a proposed placement is appropriate only if the school is capable of fulfilling every requirement of the IEP exactly as written. The plaintiffs cite to no other authority to support their argument that a placement must be able to satisfy all of the requirements of the IEP “as written,” and the Court’s research has found none.

The standard used by the hearing officer and pressed by the District is the standard formulated by the Fifth Circuit for failure-to-implement claims in *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000), and widely adopted by other federal courts. See, e.g., *Sumter Cnty. Sch. Dist. 17 v. Heffernan*, 642 F.3d 478, 484 (4th Cir. 2011); *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 821–22 (9th Cir. 2007); *Melissa S. v. Sch. Dist. of Pittsburgh*, 183 F. App’x 184, 187 (3d Cir. 2006); *Garmany v. Dist. of Columbia*, ___ F. Supp. 2d ___, ___, 2013 WL 1291289, at *3 (D.D.C. 2013); *Savoy*, 844 F. Supp. 2d at 31. This standard requires that a plaintiff “must show more than a de minimis failure to implement all elements of [the student’s] IEP, and instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP” in order to prevail on a failure-to-implement claim. *Catalan*, 478 F. Supp. 2d at 75 (quoting *Bobby R.*, 200 F.3d at 349), *aff’d sub nom. E.C. ex rel. Catalan v. Dist. of Columbia*, No. 07-7070, 2007 U.S. App. LEXIS 21928 (D.C. Cir. Sept. 11, 2007). Courts applying this standard “have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.” *Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011) (citations omitted).

The defendant’s view finds support in both logic and case law. In order to provide a FAPE, after an IEP is designed, the District “must . . . implement the IEP, which includes placement in a school that can fulfill the requirements set forth in the IEP.” *Pabo*, 573 F. Supp. 2d at 53 (citing §1401(9)); see also *Savoy*, 844 F. Supp. 2d at 31 (characterizing the

plaintiff's claims that the school to which the student was assigned after he aged out of his prior placement "failed to provide the number of hours and types of services required by [the student's] IEP" as failure-to-implement claims). At bottom, an allegation that a student's placement is not appropriate because the school cannot implement one or more provisions of that student's IEP is a claim that the educational authority has failed to properly implement the student's IEP by placing the student at a school which is capable of implementing it. The fact that the plaintiffs' claim here is a "prospective" challenge, which arises "at [a] different point[] in the process of implementing and developing an IEP" from a claim which alleges that a school has failed to implement a student's IEP during the student's attendance there, Pls.' Opp'n at 5, is a distinction without a difference. The Court sees no logical reason to require perfect compliance with a student's IEP in determining an appropriate placement when, as the plaintiffs concede, imperfect compliance with the IEP would be permissible once the student begins attending the school. See *id.* Accordingly, because placing a student in an appropriate educational setting is an element of implementing the IEP, the Court will assess the appropriateness of F.J.'s proposed placement at Ballou by determining whether Ballou was capable of substantially implementing F.J.'s IEP.

The plaintiffs contend that F.J.'s placement at Ballou is inappropriate because Ballou is incapable of providing F.J. with the thirty-one hours of specialized instruction required by her IEP and does not have the necessary staff to provide adequate instruction in Spanish and physical education, both required for F.J. to receive a diploma. Pls.' Mem. at 8–10. Shamele Straughter, Ballou's Special Education Coordinator, confirmed that students in Ballou's program are in school for a total of 32.5 hours each week but receive only 28.25 hours per week of actual instruction after breaks are subtracted. See A.R. at 363–64. Ms. Straughter testified, however, that "when individuals create IEPs that are 32 hours, what they are actually trying to do is ensure that [the students] do not engage with their non-disabled peers during non-instructional time[,] which include[s] lunch and transition." A.R. at 359–60. The plaintiffs attempt to discredit this testimony by arguing that such an interpretation is inconsistent with the generally understood meaning of "instruction" and noting that Ms. Straughter was not part of the Team that developed F.J.'s IEP, see Pls.' Opp'n at 2–3, but they failed to offer any evidence that contradicted Ms. Straughter's hearing testimony. In any event, even if F.J.'s IEP is read as calling for precisely thirty-one hours of instructional time, the difference between thirty-one and a little over twenty-eight does not constitute a material deviation from the requirements of the IEP. Admittedly, a deviation in hours of instruction can, in certain circumstances, be a substantial deviation resulting in the denial of a FAPE. See, e.g., *Van Duyn*, 502 F.3d at 823 (finding that a 50% deprivation of hours was material); see also *Heffernan*, 642 F.3d at 481 (finding that providing

seven and a half to ten hours of the required fifteen hours, in combination with the school's failure to use the teaching method specified in the IEP, was material). However, a comparison of the hours that would have been provided by Ballou with the hours mandated by the IEP reveals that the deviation alleged here is relatively slight, as Ballou was capable of providing F.J. with 91% of the hours of specialized instruction required by her IEP. Other members of this Court have reached the same conclusion when faced with similar deviations. See, e.g., *Savoy*, 844 F. Supp. 2d at 34 (finding that a difference of less than one hour per week was not material); *Catalan*, 478 F. Supp. 2d at 76 (holding that failure to receive "a handful of sessions" of therapy and therapist's shortening of several other sessions was not material). The situation here is in stark contrast to the losses in *Sumter* (50–67% of the hours required by the IEP per week) and *Van Duyn* (50% of hours required by the IEP). Moreover, the Court notes that the private placement selected for F.J. (*Accotink*), provides similar hours as Ballou—30.5 hours of school per week and 28.33 hours of actual instruction. A.R. at 187–88. While not dispositive, the fact that F.J. received less than the number of specialized instruction hours called for by the IEP at *Accotink* and approximately the same number of hours she would have received at Ballou, is proof that the discrepancy in hours Ballou would have provided is not material.

Johnson v. District of Columbia, ___ F. Supp. 2d ___ (Civ. No. 12-0352 (RBW), August 27, 2013).

10. Because Public School had staff to supervise the Student adequately when he had seizures (*see*, Finding of Fact 119, *supra*), Public School was an appropriate LOS for the Student.

Procedural Violations

11. A parent may file a DPC over a local educational agency's procedural violations of IDEA. However, a procedural violation does not necessarily equate to a denial of FAPE. Rather, a hearing officer's determination of whether a child received a FAPE must be based on substantive grounds:

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies -

- (I) impeded the child's right to a free appropriate public education;
- (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
- (III) caused a deprivation of educational benefits.

(iii) Rule of construction

Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

20 U.S.C. § 1414(f)(3)(E)(ii). *See also*, 34 C.F.R. § 300.513(a). *Accord, Lesesne v.*

District of Columbia, 447 F.3d 828, 45 IDELR 208 (D.C. Cir. 2006).

12. Based upon the entire record, the undersigned concludes that Public School's failure to document its protocol for dealing with the Student's seizure disorder did not deny the Student a FAPE because the procedures were understood and followed by his teacher, the classroom aides, and Public School staff; however, the failure to document such procedures could lead to a future denial of FAPE due to other teachers or staff being unfamiliar with the procedures.

13. The undersigned therefore concludes that failure to document the Student's seizure disorder protocol is a procedural violation of IDEA that must be corrected.

Summary

14. Respondent's failure to include a full-time dedicated aide in the Student's IEP has not denied the Student a FAPE because he does not need such an aide to prevent him from injuring himself when experiencing a seizure, and such an aide would not in fact prevent such injuries.

15. Since January 14, 2014, the Student's IEP's have included adequate goals and objectives for adaptive/daily living.

16. The Student's IEPs since January 14, 2014 have failed to include documentation of Public School's plan of action to address seizures at school and to ensure his safety when having seizures at school; however, the absence of such a plan in the Student's IEP was a procedural violation of IDEA rather than a denial of FAPE because Public School had appropriate procedures in place that were followed when the Student had seizures at school.

17. Public School has staff to supervise the Student adequately despite his seizure disorder.

X. ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:

1. No later than November 28, 2014, Petitioner shall provide Respondent a list of all of the Student's health care providers since January 1, 2014, including physicians, clinics and hospitals, with addresses and telephone numbers.

2. Within two business days of receipt of the list referred to in Paragraph 1, Respondent shall provide Petitioner, via email or fax to Petitioner's counsel, one or more medical release forms authorizing Respondent to obtain copies of all medical documents from all of the health care providers on the list.

3. No later than December 15, 2014, whether or not Respondent has received the medical documents referred to in Paragraph 2 above, Respondent shall convene a meeting of the Student's IEP Team, including Petitioner, to review any medical documents received from the Student's health care providers, and to amend the Student's IEP to include or attach a safety plan to protect the Student in the event he has a seizure at school.

4. The safety plan developed by the IEP Team shall include, but not be limited to, the following:

(a) All school staff, including substitutes, that interact or may interact with the Student, shall receive a copy of the safety plan.

(b) The symptoms of the Student's seizures (including any advance warning signs) and any known triggers of the Student's seizures shall be listed, with a description of how school staff will minimize the Student's exposure to those triggers.

(c) An adult shall be in the same room (including standing at the door of the rest room) or hallway as the Student, or within view of the Student when outdoors, at all times that he is on school premises or any off-premises school activity such as a field trip.

(d) When the Student is in the rest room, the adult standing at the door shall converse with the Student at least once per minute to ensure that the Student has not suffered a seizure.

(e) The Student shall not be allowed to climb off the floor or the ground to a height that would be dangerous if he fell. The IEP Team shall determine and state in the safety plan what height that is, or shall determine that the Student shall do no such climbing.

(f) The Student shall be prohibited from entering a swimming pool or pool area.

(g) Whenever the Student appears to have a seizure at school:

(i) an adult in the room shall protect the Student's head to the extent possible;

(ii) an adult in the room shall loosen any tight clothing;

(iii) an adult in the room shall determine whether the Student is having a seizure by attempting to talk to him and by observing him;

(iv) an adult in the room shall time the apparent seizure;

(v) the Student shall be assessed as soon as possible by a school nurse or physician, who shall transport the Student to the nurse's office or station (by wheelchair if appropriate) if a seizure is confirmed;

(vi) Petitioner shall be notified as soon as possible;

(vii) Emergency Medical Services shall be called whenever Petitioner or any school official determines such a call to be appropriate;

(viii) if the Student is transported to the hospital, a staff member will accompany him until a parent or other family member arrives;

(ix) No later than the day following any seizure, a summary of the incident, including a description of the seizure including its duration, and the steps taken to address the seizure, shall be prepared by Respondent and a copy emailed to Petitioner, or mailed to her by U.S. mail if her email address is not known; and

(x) all such incident summaries shall be retained by Respondent for a period of at least three years and shall be available for review by Petitioner or her representatives upon request.

5. At the meeting described in Paragraph 3 above, the IEP Team shall discuss whether the Student's safety plan should include the Student wearing a helmet and/or whether the Student should be restricted from walking in the hallways and/or ascending or descending stairs without an adult holding his arm.

6. If during the remainder of School Year 2014-2015 after the meeting described in Paragraphs 3 and 5 above, Respondent receives any medical documents concerning the Student that describe any change in the nature or frequency of his seizures, or how those seizures should be addressed, Respondent shall convene a meeting of the Student's IEP Team within ten school days to review the medical documents and to revise the Student's safety plan as appropriate.

7. All written communications from Respondent to Petitioner concerning the above matters shall include copies to Petitioner's counsel by facsimile or email.

8. Any delay caused by Petitioner or Petitioner's representatives (*e.g.*, absence or failure to attend a meeting, or failure to respond to scheduling requests within one business day) shall extend Respondent's deadlines under this Order by the same number of days.

9. Petitioner's other requests for relief are DENIED.

Dated this 21st day of November, 2014.

A handwritten signature in cursive script, appearing to read "Charles Carron".

Charles Carron
Impartial Hearing Officer

NOTICE OF APPEAL RIGHTS

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