



On July 6, 2017, a status conference in the above-captioned matter was conducted by the undersigned Hearings Officer. Petitioners were represented by Ms. Cookson and the Parent Advocate; Respondent was represented by Kris Murakami, Esq. Ms. Murakami participated via telephone. At the July 6, 2017 status conference, the parties stipulated that the sole issue for the hearing would be:

The DOE failed to provide Petitioner with special education and related services in a safe, controlled educational environment given Student's hypersensitivity to heat and infection, both of which can be fatal, which is a denial of FAPE. Petitioner needs an air-conditioned educational environment, including air-conditioning in all areas and buildings where Student receives Student's education and related services, e.g. the cafeteria, computer room, and classroom where transition visits will be taking place.

On July 10, 2017, the Hearings Officer filed a Stipulation and Order regarding the stipulation, and dismissed Petitioners' remaining claims without prejudice.

The due process hearing was held on July 31, 2017 through August 1, 2017 by the Hearings Officer. Petitioners were represented by Ms. Cookson and Mr. Bassett. Parent 1 and the Parent Advocate were present. Respondent was represented by Ms. Murakami, and the DOE DT was present on behalf of the Respondent.

At the conclusion of the hearing, Petitioners made an oral Closing Argument. Respondent requested the submission of a written closing. The Hearings Officer granted Respondent's request, and the Closing Brief was due on September 25, 2017. Petitioners' Reply Brief was due on October 16, 2017. Ms. Murakami made an oral request to extend the decisional deadline from September 4, 2017 to October 18, 2017, and from October 19, 2017 to December 2, 2017. The extension was granted on August 25, 2017.

On September 22, 2017, Ms. Murakami requested an extension to file Respondent's Closing Brief to September 27, 2017 due to illness. Respondent had no objection. The Hearings Officer extended the deadline to September 27, 2017 and extended Petitioners' Reply Brief filing to October 18, 2017.

Respondent filed its Closing Brief on September 27, 2017. Petitioners filed its Reply Brief on October 18, 2017.

Having reviewed and considered the evidence and arguments presented, together with the entire record of this proceeding, the Hearings Officer renders the following findings of fact, conclusions of law and decision.

## **II. ISSUES PRESENTED**

In their March 22, 2017 Request and subsequent Stipulation and Order filed on July 10, 2017, Petitioners allege procedural and substantive violations of the Individuals with Disabilities Education Act (“IDEA”). Petitioners allege that the Student’s May 24, 2016 Individualized Education Program (“IEP”) DOE denied Student a free appropriate public education (“FAPE”). Specifically:

1. The DOE failed to provide Student with special education and related services in a safe, controlled educational environment given Student’s hypersensitivity to heat and \_\_\_\_, both of which can be fatal.

Petitioners request the following relief:

1. Placement in an air-conditioned educational environment, including air-conditioning in all areas and buildings where Student receives Student’s education and related services, e.g. the cafeteria, computer room, and classroom where transition visits will be taking place.

## **III. FINDINGS OF FACT**

1. Student was born on \_\_\_\_\_. Pet. Exh. 2 at 02.
2. Student has been diagnosed with: \_\_\_\_\_ Student sees Physician 1, Physician 2, Physician 3, Physician 4, Physician 5, and specialist regularly. Pet. Exh. 4.
3. Student is eligible for special education (“SPED”) and related services under the criteria Other Health Disability. Pet. Exh. 5.
4. Student attended the Home school from January 2016 to May 2016. TR 43:25 – 44:4.
5. Principal 1 testified as an expert in educational administration. TR 319:4-7.
6. Principal 1 met with Parents prior to Student’s attendance at the Home School. They discussed Student’s medical issues and Principal 1 assigned the DOH Provider to ensure that the Home School would respond appropriately in a medical situation. Principal 1 also put services into place to respond to Student’s medical needs. Principal 1 informed the faculty, staff, and service providers of Student’s needs and how to respond. TR 320:4 – 322:15.

7. Principal 1 testified that Parents did not provide Principal 1 with any doctor's letters or recommendations regarding Student's \_\_\_ prior to attending the Home School. TR 325:18 – 326:2.

8. On October 30, 2015, Parent 1 sent an email to the Home School regarding Student's medical conditions and needs. Parent 1 wrote, "[o]n very warm days like today[,] the classroom will need to have air conditioning available to Student (as will any classroom that Student attends in for the future) to keep Student's body temperature regulated and prevent Student from overheating which would cause symptoms." Parent 1 also explained that Physician 1 agreed to have Student attend the Home School daily from 8:00 a.m. to 11:30 p.m. After one to two months, the Physician 1 would reassess Student's overall health, stamina and any other illness. Resp. Exh. 5 at 151.

9. On November 11, 2015, the Physician 1 sent the \_\_\_ a letter stating that Physician 1 recommended Student attend the Home School daily from 8:00 a.m. to 11:30 a.m. Resp. Exh. 5 at 153-154.

10. On November 12, 2015, the \_\_\_ completed a consultation report of Student. Student had been receiving homebound services and had not attended a DOE school campus. The only source of information was from Parent 1. The report stated that Student had a condition that made Student susceptible to severe life-threatening infections. To ensure Student's \_\_\_ were stable for Student's \_\_\_, Student needed to eat every few hours, stay hydrated, be provided with frequent breaks, and prevent overheating. Any stress on Student's system could trigger Student's \_\_\_. Student had occasional eruptions of \_\_\_. The \_\_\_ recommended developing a health care plan, emergency protocols, services, monitoring Student's activity tolerance and providing breaks when necessary, avoiding strong magnetic fields, practicing good hygiene, and having ongoing communication with Parents. The \_\_\_ stated, "[Student's medical condition (\_\_\_\_\_) places Student at risk for life-threatening medical problems, which require special considerations for Student's health and safety, when determining Student's placement." Resp. Exh. 7 at 722-773; TR 125:9 – 135:11.

11. The DOE SPED teacher testified as an expert in special education. TR 189:23 – 190:2.

12. In preparation for Student to attend the Home School, the SPED teacher met with Parents in November 2015 and December 2015 to gather information on Student's needs. The SPED teacher, Student's Service Provider, and the adults in the

classroom reviewed Student's five emergency action plans ("EAPs").<sup>1</sup> There was no discussion about Student's \_\_\_ and the possibility it could be life-threatening. The Service Provider was responsible for testing Student's vital signs, upon Student's arrival at school. If Student's \_\_\_ level was low, the Home School staff would have Student eat something and re-check the level 20 minutes later. If it was too high, they would give Student either water or some rest time and have Student perform non-physical tasks. Resp. Exh. 5 at 174-175; TR 192:5 – 193:14; TR 199:1-14; TR 203:23 – 204:7; TR 251:23 – 253:18.

13. An \_\_\_ is based on a medical need or issue. It outlines what the need is and what action should be taken. TR 322:16 – 323:2.

14. On December 15, 2015, the Home School conducted an IEP meeting. Parent 1, the Parent Advocate, Principal 1, Student Services Coordinator ("SSC"), \_\_\_, DOE Related Service Provider 1, DOE Related Service Provider 2, DOE Related Service Provider 3, District Teacher 2, School Health Aide, and SPED and general education teachers were present. Resp. Exh. 3 at 019-043.

15. The IEP stated that Student sees Physician 6 for Student's \_\_\_. Parent 1 noted that Student had medication. Resp. Exh. 3 at 022.

16. The Home School and Parents decided that from January 6, 2016 through November 12, 2016, Student would attend school three days a week from 8:00 a.m. to 11:30 a.m. because of Student's medical needs and doctor's approval. The goal was to have Student attend five days a week. Student would participate in a fully self-contained SPED classroom and would participate with students without disabilities in the general education environment when appropriate for music and lunch. The IEP was implemented to the extent possible in the time Student attended the Home School. TR 193:18 – 194:20.

17. Prior to Student attending the Home School, the Parents gave their consent to allow the DOE to communicate with Student's doctors directly. The consent was later revoked by Parents on January 23 and 25, 2016. All communication regarding Student's medical conditions and needs would be through Parents. Resp. Exh. 5 at 156-157; TR 334:5 – 35:9.

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<sup>1</sup> Student had symptoms for Student's vital signs. There was no \_\_\_ for symptoms. TR 202:22 – 203:18.

18. During the Spring 2016, Student's classroom at the Home School had open windows on both sides for cross-ventilation and ceiling fans. The SPED teacher testified it could get warm, but it was usually "comfortable." TR 204:22 – 205:11.

19. The SPED teacher testified that SPED teacher did not see Student become overheated in the classroom. Student always had a water bottle on the table Student was working on. When Student was outside of the classroom for Physical Education ("PE"), they tried to make sure Student was in a shaded area. Following PE, they would take Student to the air-conditioned library for Student's body to cool down. During recess, Student would play in a partially shaded area. When Student had a physical activity, the Home School staff would have water or Powerade with them. They would have Student take breaks, drink liquids, and then continue with the activity. All the adults working with Student would provide Student with drinks throughout the school-day. TR 205:15 – 208:21.

20. The Service Provider testified that Service Provider was contacted one or two times when Student had symptoms at the Home School. Service Provider would take Student's vital signs because of Student's condition. TR 270:23 – 271:12.

21. Student's lunch was in the cafeteria. The cafeteria had cross-ventilation and ceiling fans. After lunch, the Home School staff would take Student's vital signs and have Student use the restroom before Student was picked up. TR 208:25 – 209:20.

22. The SPED teacher testified that one-day Parent 1 told SPED teacher that Student had symptoms behind Student's knee. The SPED teacher did not see the symptoms, because Student was wearing jeans. Parent 1 said Student was being treated with medication. The SPED teacher did not observe Student to have symptoms at any other time during Spring 2016. TR 210:18 – 211:3.

23. Student participated in a field trip at \_\_\_\_ from 9:00 a.m. to 11:30 a.m. Student walked and was provided with frequent hydration. The SPED teacher did not observe Student to be in distress. The Service Provider was with Student the entire time. TR 211:4 – 213:3.

24. Student participated in a walking field trip from 9:00 a.m. to 11:30 a.m. The Service Provider and Student's aide ("1:1") was with Student the entire time and provided Student with hydration and snack breaks. The SPED teacher did not observe Student to be fatigued. TR 213:4 – 214:7.

25. On February 26, 2016, Student participated in a school-wide run-walk activity. The students went to the field, warmed up, and walked around the field for approximately 30-minutes. The SPED teacher brought a tarp for Student to sit on in the shade with Student's water bottle. After one lap around the field, Student sat down in the shade, had a drink, and cheered Student's classmates on. Parent 2 was also present with Student's sibling. Resp. Exh. 5 at 158-159; TR 214:13 – 216:6.

26. On March 7, 2016, Principal 1 sent Parents a letter responding to their March 1, 2016 letter regarding the protocols to address Student's medical needs throughout Student's school day. Principal 1 noted that Student walked at Student's own pace and after each lap the SPED teacher provided Student with juice and snacks. Parent 2 participated in the event and did not communicate any concerns about Student's condition. Approximately 30 minutes after the challenge, Student attended Student's related service session, where Student was laughing and did not show signs of physical distress. Principal 1 asked if the Home School could have information from Physician 1 to include any limitations or restrictions that should be implemented if Student is assessed to have symptoms at school. Principal 1 recommended that if Student appeared to be sleepy or lethargic, Student's vital signs would be assessed, and prior to any physically strenuous activities, Student would have Student's vital signs assessed. If symptoms were detected, Student would not participate in that activity. Resp. Exh. 5 at 158-159; TR 335:23 – 337:8.

27. Student had a communication book at the Home School. The communication book mapped out the activities for the day and included Student's vital signs, food-intake, and toileting. The book had an area where Parents would sign to show that they had read it and a comment section if they needed to communicate with the SPED teacher. TR 216:22 – 217:19.

28. On March 7, 2016, the Home School conducted an IEP review meeting. Parent 1, the Parent Advocate, Principal 1, SSC, DOE Related Service Provider 1, DOE Related Service Provider 3, DOE Related Service Provider 2, DT 1, District Teacher 2, and SPED and general education teachers were present. The projected ending date for majority of the SPED services and supplementary aids and services was November 12, 2016. Student would participate in a fully self-contained SPED classroom on a modified school day, from 8:00 a.m. to 11:30 a.m. Student would participate with students without

disabilities in the general education environment when appropriate for music and lunch. Resp. Exh. 3 at 046-070.

29. On May 24, 2016, the Home School conducted an IEP meeting. Parent 1, the Parent Advocate, Principal 1, SSC, \_\_\_\_, DOE Related Service Provider 1, DOE Related Service Provider 3, DT 1, District Teacher 2, and SPED and general education teachers were present. The projected ending date for majority of the SPED services and supplementary aids and services was November 12, 2016. Student would participate in a fully self-contained SPED classroom on a modified school day, from 8:00 a.m. to 11:30 a.m. Student would participate with students without disabilities in the general education environment when appropriate for recess, field trips, \_\_\_\_, Music, and school-wide activities and assemblies. Student was provided with Extended School Day (“ESY”) after breaks of no more than 13 calendar days. Pet. Exh. 2.

30. The SPED teacher testified that Student progressed socially and academically at the Home School. Student had friends and enjoyed being part of the group. TR 225:4-20.

31. The SPED teacher testified that Parents made no request for air-conditioning or state it was medically necessary during Spring 2016. TR 216:7-17.

32. Principal 1 testified that Parents made no request for air-conditioning or state it was medically necessary during Spring 2016. TR 337:23 – 339:11.

33. Student attended a private school from August 2016 to the end of October 2016. TR 122:17-21.

34. Principal 1 was not aware that Student would not be returning to the Home School in the 2016-2017 school year. Prior to the start of the school year, Principal 1 made sure Service Provider and \_\_\_\_ were available. TR 341:18 – 342:18.

35. The SPED teacher was not aware that Student would not be returning to the Home School in the 2016-2017 school year. SPED teacher had planned and prepared for Student’s return. SPED teacher made sure all of Student’s EAPs, Service Provider, and \_\_\_\_ were in place. The SPED teacher was ready to receive Student upon the first day of instruction. TR 218:21 – 219:9; 225:21 – 226:17.

36. On July 28, 2016, Parents informed the Home School that Student would not be attending the first quarter of the 2016-2017 school year.<sup>2</sup> They would inform the

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<sup>2</sup> This was approximately one or two days prior to the start of the 2016-2017 school year. TR 340:12-15.

Home School Student's attendance for the second quarter once that decision was made. Resp. Exh. 5 at 179.

37. On August 26, 2016, Parents sent an email to the Home School stating that Student would be attending a "private learning environment that is air conditioned and offers a strong emphasis on parent involvement in every aspect to include parent participation in the classroom... We will update the school at the end of the school year as to our decisions in enrollment for the 2017/2018 school year." Resp. Exh. 5 at 184.

38. At the end of September 2016, the SPED teacher contacted Parents to schedule an IEP meeting, because the annual IEP was due in November 2016. Two meeting dates were scheduled, but Parents cancelled. The IEP meeting date was rescheduled to December 2016. TR 221:4 – 222:6.

39. Physician 7 testified as an expert. TR 24:23 – 25:1.

40. Physician 7 has been Student's physician since Student was six weeks old. Student's last physical exam was on November 4, 2016. Pet. Exh. 4; TR 26:22-25.

41. The Physician 7 wrote a Brief Medical Summary of Student on July 10, 2017. Student was diagnosed with \_\_\_\_\_ when Student was two days old. Student was tube fed for Student's first two years. Student was hospitalized \_\_\_\_ times since Student was born. In \_\_\_\_ 2014, Student was hospitalized with \_\_\_\_\_. Student had \_\_\_\_\_ Student's \_\_\_\_\_. Since then Student's \_\_\_\_ status has been stable on medication and close monitoring. Student has had episodes of \_\_\_\_ and \_\_\_\_\_. Student also \_\_\_\_\_. According to Physician 7, Student had stopped going to the Home School because of exacerbation of Student's \_\_\_\_ and increase in fatigue due to the school environment. Pet. Exh. 4; TR 26:12 – 21.

42. The Physician 7 testified that the life expectancy of children with \_\_\_\_\_ is approximately two years to two years and six months. TR 27:21-24.

43. On November 8, 2016, the Physician 7 wrote a letter in support of Parents' request to place Student at DOE School 2 for reasons related to Student's health. The Physician 7 stated that Student has \_\_\_\_\_, which is exacerbated by the lack of air-conditioning at the Home School. Flare-ups of Student's \_\_\_\_\_ make Student prone to secondary infection, scarring, and general discomfort. Physician 7 agreed with Parents request to transfer Student to DOE School 2, because it had air-conditioning. The Physician 7 did not state the temperature of the air-conditioning in Physician 7's letter, but Physician 7 testified at the hearing that the temperature should be "in the range of 70

degrees, give or take a couple degrees,” to keep Student from \_\_\_ and to prevent exhaustion from the heat. Overheating could lead to \_\_\_ that makes Student fussy, tired, and to lose Student’s appetite. This puts additional stress on Student’s body and \_\_\_ and symptoms could affect Student’s \_\_\_\_. All of Student’s classroom environments would require air-conditioning. Pet. Exh. 6 at 48; TR 31:5 – 35:5.

44. Physician 7 testified that Physician 7 had concerns the \_\_\_ might go out of control and cause infection possibly causing sepsis or other complications. It might also cause a flare-up of Student’s \_\_\_\_. In Physician 7’s medical opinion, “air-conditioning is vital to help control the \_\_\_ and prevent the complications associated with it.” TR 29:19 – 30:20.

45. Physician 7 testified that Physician 7 did not see the need to limit Student’s outdoor activities such as physical education (“PE”) or recess. TR 50:6 – 51:1.

46. Physician 7 testified that Physician 7 saw Student on January 30, 2016 for a flare-up of \_\_\_ requiring antibiotics for symptoms. Student was lethargic, had a low-grade fever, and a lot of \_\_\_\_. Student had a follow-up appointment on February 7, 2016. At Student’s November 4, 2016 physical examination, Student also had \_\_\_\_. TR 46:10 – 47:13.

47. The Parent Advocate testified as an expert in special education. TR 71:19-22.

48. The Parent Advocate advised Parent 1 to provide Physician 7’s November 8, 2016 letter to the Home School and request that Student be transferred to DOE School 2. The Parent Advocate testified that DOE School 2 was close to Student’s home and there was air-conditioning in all the buildings including the cafeteria. TR 78:23 – 79:23.

49. The Parent Advocate testified that Student needed air-conditioning “everywhere.” Parent Advocate explained that Physician 7 told Parent 1, Student’s “\_\_\_ follows Student everywhere Student goes. TR 102:16-19.

50. Principal 2 is the principal of DOE School 2 Parents wanted Student to transfer to. TR 289:3.

51. Principal 2 testified that Principal 2’s school has air-conditioning window units in the cafeteria that were purchased by a \_\_\_\_\_ that rents their facilities. The \_\_\_\_\_ closes the cafeteria doors when they have their \_\_\_\_\_. Principal 2 testified that the air-conditioning units are typically not used during the school day unless it is exceptionally

warm and the doors in the cafeteria are left open for the Students to enter and exit. The kitchen in the cafeteria requires ventilation when in use. TR 289:18 – 291:22.

52. All the classrooms at DOE School 2 have two air-conditioning window units. Principal 2 testified that the temperature for the air-conditioning units in the classroom can be adjusted. The air-conditioning units in the cafeteria are up too high to adjust the temperature. Even when the air-conditioning units are on in the cafeteria, it is not as comfortable as the air-conditioning in the classrooms or library because approximately 150 to 200 students are there and the kitchen ovens are on. Principal 2 testified that if a student was medically required to be in a temperature-controlled environment, Principal 2 would not place the student in the cafeteria for lunch. Principal 2 would have the student eat lunch in the classroom or library. TR 291:23 – 294:16.

53. On November 10, 2016, Parent 1 provided Physician 7's November 8, 2016 letter to Principal 1. Parent 1 informed Principal 1 that Student was ready to start attending school on December 1, 2016. Parent 1 testified that Parent 1 thought that was a "reasonable amount of time to allow for getting the appropriate paperwork completed" and provide the accommodation for Student. TR 80:2-10; TR 84:9-11; TR 122:6-16.

54. Parent 1 testified that it is important to monitor Student to make sure Student does not become exhausted or overheated. Parent 1 stated that Student could have recess and PE outside, but Student would need to return to a room with air-conditioning to allow Student to cool off. Parent 1 testified at the hearing that Student plays outside when Student is at home, and they have air-conditioning kept between 68 and 71 degrees there. TR 142:24 – 145:13.

55. On November 15, 2016, Principal 1 sent Parents a letter referencing the Physician 7's letter dated November 8, 2016 regarding Student's transfer to DOE School 2. Principal 1 stated the IEP team would consider their request and again requested Parents sign a consent for the DOE to speak directly with Physician 7 to seek clarification. Principal 1 also had six specific questions for Physician 7 to answer regarding Student's appropriate program and placement to prevent exhaustion, any changes to Student's medical needs from when Student last attended the Home School, and what differentiates DOE School 2 from the Home School. Resp. Exh. 5 at 196-197.

56. On November 21, 2016 at 1:42 p.m., Principal 1 sent Parents an email stating that Student's offer of FAPE could be implemented at the Home School. The request to transfer to DOE School 2 was denied. Principal 1 further stated that they

would discuss providing the air-conditioning accommodation at the next IEP meeting. Resp. Exh. 5 at 217.

On November 21, 2016 at 3:41 p.m., Parent 1 sent Principal 1 an email requesting a visit to the classroom the next day to check the temperature of the classroom and make/model and BTU of the air-conditioning units installed to provide to Student's "medical experts." Parent 1 requested a response by 5:00 p.m. that day. Parent 1 also requested an emergency IEP meeting on either November 28 or 29, 2016. Principal 1 did not respond and Parent 1 did not visit the Home School. Resp. Exh. 5 at 221.

57. On December 12, 2016, the Home School conducted an IEP meeting. Parent 1, Parent Advocate, Principal 1, SSC, DOH Provider, DOE Related Service Provider 1, DOE Related Service Provider 3, DOE Related Service Provider 2, DT 1, District Teacher 2, and SPED and general education teachers were present. Pet. Exh. 1.

58. At the meeting, Parent 1 orally provided Physician 7s responses to the Home School's six questions to the IEP team. Parent 1 stated that Student's program needs to be appropriately paced to avoid exhaustion. Regarding Student's medical condition, Parent 1 stated it is constantly evolving. When asked about why Physician 7 thought that DOE School 2 would be appropriate, Parent 1 stated that Physician 7 could not divulge confidential information about other students. Parent 1 eventually responded that Physician 7 knew that DOE School 2 had a certified teacher for \_\_\_\_; therefore, Student's placement there was more appropriate. Student was having difficulty generalizing, and Student needed to have a teacher present to help with Student's communication needs.<sup>3</sup> Resp. Exh. 7, 12/12/16 IEP audio 37:35 – 1.11:10.

59. The SPED teacher testified that the IEP team tried to seek clarification on the air-conditioning issue, because when Student had previously attended the Home School Student was not in air-conditioning the entire day. The IEP team also sought clarification on the required temperature of the air-conditioning and the duration Student needed to be in it. Physician 7 did not specify a temperature in Physician 7's November 8, 2016 letter. Parent 1 responded that the air-conditioning at home was between 76 and 77 degrees. Resp. Exh. 7, 12/12/16 IEP audio 29:09 – 33:07, 1.32:40 – 1.36:04; TR 222:3 – 224:3.

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<sup>3</sup> The IEP team informed Parent 1 that the certified teacher already had students the certified teacher was teaching, and that certified teacher's services were written in the students' IEPs. Student did not have this service listed in any of Student's prior IEPs. Resp. Exh. 7, 12/12/16 IEP audio 1.05:18 – 1.11:10.

60. The IEP team discussed the denial of Student's transfer to DOE School 2. The Principal told Parent 1 that air-conditioning would be provided at the Home School because it was medically necessary. One IEP member noted that if the Home School could provide air-conditioning, a change of location was not necessary. Resp. Exh. 7, 12/12/16 IEP audio 1.13:00 – 1:18:23; TR 81:23 – 84:4; TR 97:21-24; TR 123:17-25; TR 135:12 – 138:17.

61. Parent 1 stated that Parent 1 did not feel Student could attend the Home School because it did not have air-conditioning. The IEP team tried to get clarification whether Student would be attending the Home School. Principal 1 asked Parent 1 if Student would attend the Home School if they installed air-conditioning. Parent 1 responded that DOE School 2 was the safest environment, because it addressed all of Student's medical needs. Parent 1 stated that Student's \_\_\_\_\_ was a medical need, and needed a certified teacher on campus. Resp. Exh. 7, 12/12/16 IEP audio 1.22:00 – 1:24:10.

62. Principal 1 stated that right after Parent 1 had presented Principal 1 Physician 7's letter dated November 8, 2016, Principal 1 had discussions with DOE facilities to determine the possibilities of installing air-conditioning and the electrical load. Principal 1 spoke with the District office regarding the options of window units, split-air, and portable air-conditioning units and the procurement process. Principal 1 was waiting for a response from facilities and the District. Principal 1 explained to the IEP team that installing air-conditioning would take time, because of the size of the classroom. Parent 1 responded that it was a "delay tactic" and Parent 1 could have Student at the Home School that week. Resp. Exh. 7, 12/12/16 IEP audio 33:50 – 34:33, 1.24:15 – 1.28:40; TR 355:23 – 358:11.

63. The IEP team brought up the issue of a geographic exception ("GE"). Parent 1 stated that the process did not apply to Student because of the severity of Student's medical needs. Parent 1 said that Student could be placed at DOE School 2 without a GE. The IEP team explained to Parent 1 that the IEP would have to document a change in the location of Student's program and that air-conditioning was medically necessary, before Student could be "programmatically placed" there. Parent 1 responded that DOE School 2 could provide services immediately. Resp. Exh. 7, 12/12/16 IEP audio 1.28:45 – 1.32:33.

64. The IEP team agreed to add air-conditioning to the Supplementary Aids and Services section of the IEP; however, the meeting was continued to another date for completion. Resp. Exh. 7, 12/12/16 IEP audio 1.32:40 – 1.36:04

65. Parent 1 invited DOH Provider to attend Student's medical appointments on multiple occasions, so that DOH Provider could speak to the doctors directly. DOH Provider did not respond or attend any medical appointments, and DOH Provider did not ask the doctors any questions regarding Student's medical needs. TR 138:18 – 142:4

66. On December 20, 2016, the Parent Advocate sent an email to Principal 1 requesting Principal 1 to clarify what "timely manner" meant regarding Principal 1's response to the air-conditioning installation. Parent Advocate also discussed the denial of transfer to DOE School 2. Pet. Exh. 6 at 46-47; TR 87:6 – 89:20.

67. On December 22, 2016, the Parent Advocate re-sent the December 20, 2016 email to the Principal 1 and requested an immediate response. Parent Advocate stated that Student needed to attend school on January 9, 2017, after the Winter 2016 break. Pet. Exh. 6 at 46-47; TR 87:6 – 89:20.

68. On December 28, 2016, Principal 1 responded to Parents' December 19, 2016 letter regarding the transfer to DOE School 2. Principal 1 referenced Parent 1's August 26, 2016 that stated Student would not attend the Home School for the 2016-2017 school year; however, Principal 1 clarified that Student would be attending school "as soon as possible." Principal 1 stated that the Home School was working towards making accommodations to provide air-conditioning in Student's classroom by January 9, 2017. Pet. Exh. 6 at 45.

69. On December 29, 2016, Parents sent a letter responding to Principal 1's December 28, 2016 letter. Parents stated that Principal 1 did not address air-conditioning in all areas and buildings that Student would be in, namely the cafeteria, computer room, and classroom. Parents continued to request Student's transfer to DOE School 2. Parents stated that Student should have been attending school from December 1, 2016, but this date was delayed due to lack of air-conditioning. Pet. Exh. 6 at 42-45.

70. On January 4, 2017, the Principal 1 sent Parents a letter stating that Student's classroom would have air-conditioning installed by January 9, 2017. Principal 1 noted that the questions that were submitted to Physician 7 were asked for clarification purposes regarding the extent to which air-conditioned was required at the Home School, Student's appropriate pacing, scheduling of school activities, and any changes to

Student's medical condition. Principal 1 was concerned about providing a safe learning environment. Pet. Exh. 6 at 40-41.

71. Principal 1 testified that Principal 1 would not prevent a Student from making a GE request to another DOE school. It would be up to the transferring school to approve the GE. TR 421:15 – 424:5.

72. Principal 2 testified that the GE process started on January 1, 2017 and ended on March 1, 2017. Principal 2 accepted every Student that applied for a GE. TR 294:17 – 296:4.

73. On January 6, 2017, Physician 7 wrote a letter at Parents' request providing specific directives to assist the Home School to provide Student with the "most appropriate environment without compromising Student's health and safety while optimizing Student's educational experience." Physician 7 wrote that the Home School "will provide air-conditioning in all buildings that [Student] will be present in such as the classroom (to include \_\_\_ as transitional visits will be beginning shortly), the cafeteria and computer labs. It has been documented that [Student's] stamina is greatly increased along with Student's focus for learning, and Student's \_\_\_ symptoms [*sic.*] much less when in an air condition [*sic.*] environment." Physician 7 had never observed Student at the Home School or visited there, Physician 7 based Physician 7's letter on information from Parents. The Physician 7 had never visited DOE School 2 and relied on Parents' information. Pet. Exh. 6 at 38-39; TR 36:1-19; TR 47:14 – 48:15; TR 52:2 – 53:7.

74. On January 7, 2017, Physician 4 recommended monitoring Student's symptoms when Student is at risk. Physician 4 stated \_\_\_\_\_ children are usually "at risk for sudden death but these seem to be mostly due to symptoms rather than symptoms. Resp. Exh. 7 at 774.

75. At 10:35 a.m. on January 11, 2017, Parents sent an email to the Principal 1 requesting information regarding the make/model, location, and BTU of the installed air-conditioning units. Parents requested a response by 3:00 p.m. that same day in order to provide the information to Student's "medical professionals." Pet. Exh. 6 at 36.

76. On January 18, 2017, Principal 1 sent an email to Parents stating that two LG 10,000 BTU portable air conditioners were installed in Student's classroom. Principal 1 noted that the DOE did not receive any air-conditioning specification or guidelines from Student's medical team. Pet. Exh. 6 at 35.

77. Principal 1 testified, “programming-wise, [the Home School] could make it where there is air-conditioning in every building that [Student] is participating in.” TR 413:14-17.

78. Principal 1 testified that Student could have lunch in an air-conditioned area with other students for socialization. This had been done with other students previously. TR 359:15-24.

79. On January 19, 2017, Physician 1 sent an email to Principal 1 regarding Student’s EAP. Physician 1 asked Principal 1 to specify exactly what matter Physician 1 would like to provide. Physician 1 stated, “I am not willing to duplicate [the Physician 7’s] recommendations, being Physician 1, I would like to focus on [Student’s] care and condition.” Resp. Exh. 3 at 119.

80. On January 25, 2017, Principal 1 sent Parent 1 an email requesting Physician 1 to answer four questions.

- 1) Has there been any changes to [Student’s] medical condition, since Student last attended [the Home School] (May 2016, that the IEP team should consider in the development of Student’s educational program for the current school year?

Answer: As to my knowledge, there were no significant changes to [Student’s] condition in the last year.

- 2) What is [Student’s] current medical status to attend school (frequency and duration)?

Answer: I cannot answer that...I know [Student’s] exercise toleration is limited. So that [*sic.*] smartest answer from a doctor, who does not see [Student] every day would be: Student should be allowed to exercise and rest as much as Student needs, without unnecessary overexertion.

- 3) What is considered a physically exerting activity (duration?) In the school environment for [Student]?

Answer: I can imagine that during a hot day without air condition, attending classes and physiotherapy sessions may be exhausting for Student, however, this again changes from person to person, so the advocate would be Student’s parents, who know exactly how much Student can tolerate.

- 4) What is [Student's] current medical status to participate in physical activities throughout the school day (frequency and duration)?

Answer: **Recess:** May participate without restriction. Should be allowed to rest as needed without unnecessary overexertion. **PE Class:** May participate without restriction. Should be allowed to rest as needed without unnecessary overexertion. Should not be required to complete tasks if appears tired. **Related Service Sessions:** May participate without restriction. Should be allowed to rest as needed without unnecessary overexertion. Should not be required to complete tasks if appears tired.

Resp. Exh. 3 at 120-121.

81. On January 27, 2017, the Parent Advocate sent a letter to the DOE Complex Area Superintendent requesting that Student be transferred to DOE School 2 because Student was symptomatic and needed air-conditioning.<sup>4</sup> Pet. Exh. 6 at 34.

82. In March 17, 2017, Parent 1 took Student to the Home School to conduct a 45-minute observation. Student participated in 15 minutes of recess outside. Student climbed and played with other students. After recess, they went to the classroom. Parent 1 testified it was a “long walk from the play structure back to the classroom.” When Parent 1 helped Student wash Student’s hands, Student’s skin was warm and Student was perspiring. Parent 1 estimated that the temperature of the air-conditioned room was between 79 and 84 degrees. TR 145:14 – 147:13; TR 164:11 – 167:14.

#### **IV. CONCLUSIONS OF LAW**

##### **A. Burden of Proof**

The Supreme Court held in *Schaffer* that “[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.” *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). “The Court concluded that the burden of persuasion lies where it usually falls, upon the party seeking relief.” *Id.* at 535; *see also Stringer v. St. James R-1 Sch. Dist.*, 446 F.3d 799, 803 (8th Cir.2006) (following *Schaffer* in context of claim that IEP was not being

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<sup>4</sup> The Parent Advocate did not send the Complex Area Superintendent a letter requesting air conditioning at the Home School when Student attended in Spring 2016, because Parent Advocate was unaware it was a medical need. TR 109:4-20.

implemented). Neither *Schaffer* nor the text of the IDEA supports imposing a different burden in IEP implementation cases than in formulation cases.

### **B. IDEA Requirements**

The Code of Federal Regulations (“CFR”) section 300-101 and the Hawai‘i Administrative Rules (“HAR”), Title 8, Chapter 60, requires that Respondents make available to students with a disability an offer of FAPE that emphasizes special education and related services designed to meet their unique needs.

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Court set out a two-part test for determining whether Respondent offered a FAPE: 1) whether there has been compliance with the procedural requirements of the IDEA; and 2) whether the IEP is reasonably calculated to enable the student to receive educational benefits. *Rowley* 458 U.S. at 206-207. Respondent is not required to “maximize the potential” of each student; rather, Respondent is required to provide a “basic floor of opportunity” consisting of access to specialized instruction and related services which are individually designed to provide “some educational benefit.” *Rowley* 458 U.S. at 200.

However, the United States Supreme Court recently determined in *Andrew F. v. Douglas County School Dist.*, 137 S.Ct. 988 (2017) that the educational benefit must be more than *de minimus*. The Court held that the IDEA “requires an educational program reasonably calculated to enable a child to make progress appropriate in the light of the child’s circumstances.” *Andrew* 137 S.Ct. at 1001. Similarly, the Hawaii District Court held that the IEP must be tailored to the unique needs of the child and reasonably designed to produce benefits that are “significantly more than *de minimus*, and gauged in relation to the potential of the child at issue.” *Blake C. ex rel Tina F. v. Hawaii Dep’t of Educ.*, 593 F.Supp.2d 1199, 1206 (D. Haw. 2009).

Under the IDEA, procedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural inadequacies that result in the loss of educational opportunity or seriously infringe on the parents’ opportunity to participate in the IEP formulation process clearly result in the denial of a FAPE. *W.G. v. Board of Trustees of Target Range School District*, 960 F.2d 1479 (9<sup>th</sup> Cir. 1992).

The mechanism for ensuring a FAPE under the IDEA is through the development of a detailed, individualized instruction plan known as an Individualized Education Program (“IEP”) for each child. 20 U.S.C. §§ 1401(9), 1401(14), and 1414(d). The IEP is a written statement, prepared at a meeting of qualified representatives of the local

educational agency, the child's teacher, parent(s), and where appropriate, the child. The IEP contains, in part, a statement of the present levels of the child's educational performance ("PLEP"), a statement of the child's annual goals and short-term objectives, and a statement of specific educational services to be provided for the child. 20 U.S.C. § 1401(19). The IEP is reviewed and, if appropriate, revised, at least once each year. 20 U.S.C. § 1414(d). The IEP is, in effect, a "comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." *Burlington v. Dep't of Educ. Of the Commonwealth of Massachusetts*, 471 U.S. 359, 368, 105 S.Ct. 1996, 2002 (1985).

An IEP must be tailored to the unique needs of the child and reasonably designed to produce benefits that are "significantly more than de minimus, and gauged in relation to the potential of the child at issue." *Blake C. ex rel Tina F. v. Hawaii Dep't of Educ.*, 593 F.Supp.2d 1199, 1206 (D. Haw. 2009). Lastly, an IEP must be evaluated prospectively as of the time it was created. Retrospective evidence that materially alters the IEP is not permissible. *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167 (2012).

**C. Whether the DOE failed to provide Student with special education and related services in a safe, controlled educational environment.**

Petitioners' Request alleges that the DOE failed to provide Petitioner with special education and related services in a safe, controlled educational environment given Student's hypersensitivity to heat and \_\_\_\_, both of which can be fatal, which is a denial of FAPE. Petitioners' Request challenges the May 24, 2016 IEP. Pet. Request, p. 3. Respondent asserts that Petitioners did not present credible evidence to prove that Student was denied a FAPE by not receiving air-conditioning in Student's educational environments. Respondents further argue that they provided Student with a safe environment that would allow Student to thrive.

When developing Student's IEP, the IEP team shall consider: (i) the strengths of the child; (ii) the concerns of the parents for enhancing the education of their child; (iii) the results of the initial evaluation or most recent evaluation of the child; and (iv) the academic, developmental, and functional needs of the child. 20 U.S.C. § 1414(d), *see also* HAR §8-60-48(a). The IEP contains, in part, a statement of the PLEPs, a statement of the child's annual goals and short-term objectives, and a statement of specific educational services to be provided for the child. 20 U.S.C. § 1401(19), *see also* HAR §8-

60-44(a). The statement of measurable annual goals must include academic and functional goals, designed to “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 “meet each of the child’s other educational needs that result from the child’s disability.” *Id.* The DOE shall have an IEP in effect at the beginning of each school year. HAR §8-60-47(a).

In accordance with the IDEA and the Court's decision in *Rowley*, the Ninth Circuit Court in *Van Duyn v. Baker School Dist.*, 502 F. 3d. 811, 822 (9<sup>th</sup> Cir. 2007) held that a *material* failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP. The court clarified that “the materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. However, the child’s educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided.” *Id.* As such, the Hearings Officer must determine what information the IEP team was aware of at the time of the May 24, 2016 IEP meeting, and the effect of the Physician 7’s November 8, 2016 letter on the existing IEP.

#### 1. Fall 2015

In the Fall of 2015, Parents informed the Home School that Student would start attending the Home School starting in January 2016. Principal 1 met with Parents prior to Student’s attendance, and they discussed Student’s medical issues. Parents gave their consent to allow the DOE to communicate with Student’s doctors directly. Principal 1 assigned DOH Provider to Student’s case to ensure that the DOE staff would respond appropriately in a medical situation. Principal 1 also put services into place to respond to Student’s medical needs throughout the school day.

October 30, 2015, Parent 1 sent an email to the Home School regarding Student’s medical conditions and needs. Parent 1 wrote, “[o]n very warm days like today[,] the classroom will need to have air-conditioning available to Student (as will any classroom that Student attends in for the future) to keep Student’s body temperature regulated and prevent Student from overheating which would cause symptoms.” Parent 1 also explained that Physician 1 agreed to have Student attend the Home School daily from 8:00 a.m. to

11:30 a.m. After one to two months, the Physician 1 would reassess Student's overall health, stamina and any other illness.

On November 12, 2015, the DOH Provider completed a consultation report of Student. Student had been receiving homebound services and had not attended a DOE school campus. The report stated that Student had a condition that made Student susceptible to severe life-threatening infections. To ensure Student's condition was stable, Student needed to eat every few hours, stay hydrated, be provided with frequent breaks, and prevent overheating. Any stress on Student's system could trigger Student's condition. Student had occasional eruptions of \_\_\_\_\_. The DOH Provider recommended developing a health care plan, emergency protocols, special services, monitoring Student's activity tolerance and providing breaks when necessary, avoiding strong magnetic fields, practicing good hygiene, and having ongoing communication with Parents. The \_\_\_\_\_ stated, "[Student's medical condition places Student at risk for life-threatening medical problems, which require special considerations for Student's health and safety, when determining Student's placement.]"

In preparation for Student to attend the Home School, the SPED teacher met with Parents in November 2015 and December 2015 to gather information on Student's needs. The SPED teacher, Service Provider, and the adults in the classroom reviewed Student's five EAPs. Student was monitored for \_\_\_\_\_. The Service Provider was responsible for testing Student's vital signs and adjusting levels.

There was no EAP for \_\_\_\_\_. There was no discussion about Student's \_\_\_\_\_ and the possibility it could be life-threatening. In fact, Principal 1 testified that Parents did not provide Principal 1 with any doctor's letters or recommendations regarding Student's \_\_\_\_\_ prior to attending the Home School.

On December 15, 2015, the Home School conducted an IEP meeting. Parent 1, the Parent Advocate, Principal 1, SSC, DOH Provider, DOE Related Service Provider 1, DOE Related Service Provider 3, DOE Related Service Provider 2, District Teacher 2, School Health Aide, and SPED and general education teachers were present. The IEP stated that Student sees Physician 6 for Student's condition. Parent 1 noted that Student had medication. The IEP did not state that Student needed air-conditioning and air-conditioning was not listed in the supplementary aids and services section.

The Home School and Parents decided that Student would attend the Home School three days a week from 8:00 a.m. to 11:30 a.m. because of Student's medical

needs and doctor's approval. The goal was to have Student attend five days a week. The IEP was implemented to the extent possible in the time Student attended the Home School. Student would participate in a fully self-contained SPED classroom on a modified school day and would participate with students without disabilities in the general education environment when appropriate for music and lunch.

It is clear from the recited facts that the Home School worked diligently with Parents, school personal, Student's doctors and service providers to provide Student with a safe learning environment and a FAPE.

## 2. Spring 2016

Student attended the Home school from January 2016 to May 2016 ("Spring 2016"). During Spring 2016, Student's classroom at the Home School had open windows on both sides for cross-ventilation and ceiling fans. The SPED teacher testified it could get warm, but it was usually "comfortable."

The SPED teacher testified that SPED teacher did not see Student become overheated in the classroom. Student always had a water bottle on the table Student was working on. When Student was outside of the classroom for PE, the staff tried to make sure Student was in a shaded area. Following PE, they would take Student to the air-conditioned library for Student's body to cool down. During recess, Student would play in a partially shaded area. When Student had a physical activity, the staff would have water or Powerade with them. They would have Student take breaks, drink liquids, and then continue with the activity. The staff working with Student made sure to provide Student drinks throughout the school-day.

Student's lunch was from 10:50 a.m. to 11:20 a.m. in the cafeteria. The cafeteria had cross-ventilation and ceiling fans. After lunch, the Home School staff would take Student's vital signs and have Student use the restroom before Student was picked up.

Physician 7 testified that Physician 7 saw Student on January 30, 2016 for symptoms. Student was symptomatic. Student had a follow-up appointment on February 7, 2016.

The SPED teacher testified that one-day Parent 1 told SPED teacher that Student had symptoms. The SPED teacher did not see the symptoms because Student was wearing jeans. Parent 1 said Student was being treated with medication. The SPED teacher did not observe Student to have symptoms at any other time during Spring 2016 and Parent 1 did not comment on the air-conditioning.

Student participated in a field trip from 9:00 a.m. to 11:30 a.m. Student walked throughout and was provided with frequent hydration. The SPED teacher did not observe Student to be in distress. The Service Provider and 1:1 were with Student the entire time. Student participated in a walking field trip from 9:00 a.m. to 11:30 a.m. The Service Provider and 1:1 were with Student the entire time and provided Student with hydration and snack breaks. The SPED teacher did not observe Student to be fatigued.

On February 26, 2016, Student participated in the \_\_\_\_\_, a school-wide run-walk activity. Students went to the field, warmed up, and walked around the field for approximately 30-minutes. The SPED teacher brought a tarp for Student to sit on in the shade with Student's water bottle. After one lap around the field, Student would sit down in the shade, have a drink, and cheer Student's classmates on. Parent 2 was also present with Student's sibling.

March 1, 2016, Parents sent Principal 1 a letter regarding the protocols to address Student's medical needs throughout Student's school day. On March 7, 2016, Principal 1 sent Parents a letter in response and noted that at the \_\_\_\_ Student walked at Student's own pace and after each lap the SPED teacher provided Student with juice and snacks. Parent 2 participated in the event and did not communicate any concerns about Student's condition. Approximately 30 minutes after the event, Student attended Student's related service session, where Student was laughing and did not show signs of physical distress. Principal 1 stated that if Student appeared to be sleepy or lethargic, Student's vital signs would have been taken, and prior to any physically strenuous activities, Student would have been assessed. If symptoms occurred, Student would not participate in that activity. Principal 1 asked if the Home School could have information from Physician 1 to include any limitations or restrictions that should be implemented if Student is assessed to have symptoms at school. The DOE did not have consent to speak directly with Student's doctors, because Parents had revoked their consent on January 23 and 25, 2017. All communication regarding Student's medical conditions and needs went through the Parents.

On March 7, 2016, the Home School conducted an IEP review meeting. Parent 1, the Parent Advocate, Principal 1, SSC, DOE Related Service Provider 1, DOE Related Service Provider 3, DOE Related Service Provider 2, DT 1, District Teacher 2, and SPED and general education teachers were present. The projected ending date for majority of the SPED services and supplementary aids and services was November 12, 2016.

Student would participate in a fully self-contained SPED classroom on a modified school day, from 8:00 a.m. to 11:30 a.m. Student would participate with students without disabilities in the general education environment when appropriate for music and lunch. There was no mention of a need for air-conditioning, and it was not provided in the supplementary aids and supports section as an accommodation.

The record shows that Student thrived while attending the Home School in Spring 2016. There was only one mention of symptoms and one or two instances of lethargy. The DOE staff and service providers were very diligent and ensured Student was safe and hydrated. The Home School provided Student with a safe learning environment and a FAPE.

### 3. May 24, 2016 IEP

On May 24, 2016, the Home School conducted an IEP meeting. Parent 1, the Parent Advocate, Principal 1, SSC, \_\_\_\_, DOE Related Service Provider 1, DOE Related Service Provider 3, DT 1, District Teacher 2, and SPED and general education teachers were present. The projected ending date for majority of the SPED services and supplementary aids and services was November 12, 2016. Student would participate in a fully self-contained SPED classroom on a modified school day, from 8:00 a.m. to 11:30 a.m., and Student would participate with students without disabilities in the general education environment when appropriate for recess, field trips, \_\_\_\_, Music, and school-wide activities and assemblies. Student was provided with Extended School Day (“ESY”) after breaks of no more than 13 calendar days. Again, there was no mention of a need for air-conditioning, and it was not provided in the supplementary aids and supports section as an accommodation.

Respondents have an obligation to provide services “in conformity with” a Student’s IEPs. 20 U.S.C.A. §1401(9). IEPs are binding under the IDEA, and the proper course for a school that wishes to make material changes to an IEP is to reconvene the IEP team pursuant to the statute—not to decide on its own no longer to implement part or all of the IEP. *See* 20 U.S.C.A. §§ 1414(d)(3)(F), 1415(b)(3).

Actions of school systems cannot be judged exclusively in hindsight. As the Court of Appeals for the First Circuit has observed, an IEP is a snapshot, not a retrospective. *Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1st Cir.1990), *cert. denied*, 499 U.S. 912, 111 S.Ct. 1122, 113 L.Ed.2d 230 (1991). In striving for “appropriateness,” an IEP must take into account what was, and was not,

objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted. *Id.* at 992.

The SPED teacher and Principal 1 testified that Parents made no request for air-conditioning or state it was medically necessary during Spring 2016. In fact, the Service Provider testified was only contacted one or two times when Student was lethargic at the Home School. Service Provider took Student's vital signs because of Student's diagnosis. There was no testimony that Student's lethargy was a result of lack of air-conditioning at that time. There was no testimony that the Service Provider was contacted for Student's symptoms. Even the Parent Advocate testified that Parent Advocate did not send the Complex Area Superintendent a letter requesting air-conditioning at the Home School in Spring 2016, because Parent Advocate was unaware it was a medical need.

The Hearings Officer notes that several times throughout the hearing, Petitioners objected to testimony and evidence that involved Spring 2016. Petitioners only wanted to focus on events that occurred in Fall 2016 and thereafter. The Hearings Officer denied Petitioners' objections and stated that the testimony and evidence from Spring 2016 was relevant, because it would show what information the DOE had and how they responded to it. TR 41:21 – 42:15.

The Hearings Officer finds that the May 24, 2016 IEP offered Student a FAPE.

#### 4. Fall 2016

Prior to the start of the school year, Principal 1 made sure Student's Service Provider and \_\_\_ were available for the 2016-2017. Principal 1 was not aware that Student would not be returning to the Home School. The SPED teacher was also not aware that Student would not be returning to the Home School. SPED teacher had planned and prepared for Student's return. SPED teacher made sure Student's services and providers were in place. The SPED teacher was ready to receive Student upon the first day of instruction. However, on July 28, 2016, one or two days prior to the 2016-2017 school year, Parents informed the Home School that Student would not be attending the first quarter there. Parents stated that they would inform the Home School Student's attendance for the second quarter once that decision was made.

On August 26, 2016, Parents sent an email to the Home School stating that Student would be attending a "private learning environment that is air conditioned and offers a strong emphasis on parent involvement in every aspect to include parent

participation in the classroom... We will update the school at the end of the school year as to our decisions in enrollment for the 2017/2018 school year.”

At the end of September 2016, the SPED teacher contacted Parents to schedule an IEP meeting, because the annual IEP was due in November 2016. Two meeting dates were scheduled, but Parents cancelled. The IEP meeting was rescheduled to December 2016.

The Hearings Officer finds that Respondents committed no procedural or substantive violations of the IDEA from June 2016 through November 10, 2016.

5. Physician 7’s November 8, 2016 letter

On November 4, 2016, Physician 7 conducted Student’s physical examination. At that time, Student had a flare-up school year even though Student wasn’t attending the Home School. On November 8, 2016, Physician 7 wrote a letter supporting Parents’ request to place Student in a different school for reasons related to Student’s health. Physician 7 stated that Student has diagnosis which is exacerbated by the lack of air-conditioning at the Home School. Flare-ups of Student’s diagnosis make Student prone to symptoms, scarring, and general discomfort. Physician 7 agreed with Parents’ request to transfer Student to DOE School 2, because it had air-conditioning. Physician 7 did not state the temperature of the air-conditioning in Physician 7’s letter. At the hearing, Physician 7 testified that the temperature should be “in the range of 70 degrees, give or take a couple degrees” to keep Student from symptoms and to prevent exhaustion from the heat. Overheating could lead to symptoms that makes Student fussy, tired, and to lose Student’s appetite. This puts additional stress on Student’s body.

Physician 7 testified that Physician 7 had concerns symptoms might go out of control and cause symptoms possibly causing sepsis or other complications. It might also cause Student’s symptoms. In Physician 7’s medical opinion, “air-conditioning is vital to help control the \_\_\_ and prevent the complications associated with it.” Physician 7 testified there was no need to limit Student’s outdoor activities such as PE or recess; however, all of Student’s classroom environments would require air-conditioning.

The Parent Advocate advised Parent 1 to provide Physician 7’s November 8, 2016 letter to the Home School and request that Student be transferred to DOE School 2. The Parent Advocate testified that DOE School 2 was close to Student’s home and there was air-conditioning. The Parent Advocate further testified that Student needed air-

conditioning “everywhere.” Parent Advocate explained that Physician 7 told Parent 1 that Student’s “body follows Student everywhere Student goes.”

On November 10, 2016, Parent 1 provided Physician 7’s November 8, 2016 letter to the Principal 1. Parent 1 informed the Principal that Student was ready to start attending school on December 1, 2016. Parent 1 testified that Parent 1 thought that was a “reasonable amount of time to allow for getting the appropriate paperwork completed” and provide the accommodation for Student. Presumably, this paperwork was to transfer Student to DOE School 2.

Right after Parent 1 presented Principal 1 Physician 7’s letter dated November 8, 2016, Principal 1 had discussions with DOE facilities to determine the possibilities of installing air-conditioning and the electrical load. Principal 1 spoke with the District office regarding the options of window units, split-air, and portable air-conditioning units and the procurement process.

On November 15, 2016, Principal 1 sent Parents a letter referencing Physician 7’s letter dated November 8, 2016 regarding Student’s transfer to DOE School 2. Principal 1 stated the IEP team would consider their request and requested Parents sign a consent for the DOE to speak directly with Physician 7 to seek clarification. Principal 1 had six specific questions for Physician 7. Principal 1 asked questions regarding Student’s medical status, educational program and placement to prevent exhaustion, any changes to Student’s medical needs from when Student last attended the Home School, and what differentiates DOE School 2 from the Home School. The Parents did not provide consent.

On November 21, 2016 at 1:42 p.m., Principal 1 sent Parents an email stating that Student’s offer of FAPE could be implemented at the Home School. The request to transfer to DOE School 2 was denied. Principal 1 further stated that they would discuss providing the air-conditioning accommodation at the next IEP meeting. That same day, Parent 1 sent Principal 1 an email requesting a visit to the classroom the next day to check the temperature of the classroom and make/model and BTU of the air-conditioning units installed to provide to Student’s “medical experts.” Parent 1 requested a response by 5:00 p.m. that day. Parent 1 also requested an emergency IEP meeting on either November 28 or 29, 2016. It is unclear from the evidence if the Principal responded to Parent 1’s email or if Parent 1 visited the Home School.

Petitioners argue that the DOE failed to provide Student a safe air-conditioned educational environment as directed by Physician 7's letter dated November 8, 2016. They rely heavily on *G.B. v. New York City Dept. of Educ.*, 145 F.Supp.3d 230 (S.D.N.Y. 2015). In that case, the student had several documented and undisputed medical issues that required him to be in a climate controlled school and transportation accommodations. Student needed to be in climate control because he was at risk of seizure when becoming overheated or dehydrated. At his IEP meeting, the IEP team incorrectly discussed these medical issues "as though they were in the past." *Id.* at 253. The IEP failed to mention student's need to be in a climate controlled environment at school and on the bus, and it did not include any "medical alerts" that the staff should be aware of. *Ibid.* After the IEP meeting, the Department placed student in a school that did not have air-conditioning in the hallways, cafeteria, and auditorium. Similarly, his bus transportation did not mention the climate-controlled environment. The court found that the "deficiencies in the IEP concerning AB's health requirements deny him a FAPE." *Id.* at 254.

The Hearings Officer does not find *G.B.* to be persuasive. The Parents in *G.B.* explained to the IEP team student's medical needs and provided them with considerable documentation about his health issues. Parents provided the IEP team with a letter from student's neurologist about his need for a climate controlled bus. The IEP team also had a letter from student's developmental pediatrician that he not be exposed to extreme temperatures, and he required constant supervision. Parents also provided the Department with a HIPPA release to permit them to "obtain any and all medical information from the boy's doctors needed to reach a conclusion about his medical requirements." *Id.* at 253. Even though IEP team had *all* of Student's medical information, the IEP failed to document his medical needs. Likewise, the IEP failed to provide him with the medically-necessary accommodations to be in a climate controlled school and bus.

This is not the case here. Student had Service Provider for Student's diagnosis. There was no \_\_\_\_ for \_\_\_\_\_. The IEP made no mention of \_\_\_\_ or the possibility it could be life-threatening. The IEP only stated that Student sees Physician 6 for Student's \_\_\_\_\_, and Parent 1 noted that Student had medication as needed. If \_\_\_\_\_ was such a concern at the time of the IEP, Parent 1 would have undoubtedly insisted on an \_\_\_\_\_ to address it.

The only time the Home School became aware of Student's requirement to have air-conditioning was when Parent 1 provided them with Physician 7's letter on November 10, 2016. Once Principal 1 was notified, Principal 1 took the necessary steps to

accommodate Student, even though the IEP did not require Principal 1 to do so. In fact, Principal 1 took these steps, not knowing if Student would be attending the Home School in Spring 2017.

The Hearings Officer finds that Respondent committed no procedural or substantive violations of the IDEA through December 12, 2016.

6. December 12, 2016 IEP Meeting

On December 12, 2016, the Home School conducted an IEP meeting. Parent 1, the Parent Advocate, Principal 1, SSC, DOH Provider, DOE Related Service Provider 1, DOE Related Service Provider 3 DOE Related Service Provider 2, DT 1, District Teacher 2, and SPED and general education teachers were present.

The SPED teacher testified that the IEP team tried to seek clarification about the air-conditioning issue, because when Student had previously attended the Home School Student was not in air-conditioning the entire day. Student's classroom, recess, PE, and lunch were in areas without air-conditioning and SPED teacher did not witness any symptoms. Parent 1 stated that Student could have recess or PE outside, but Student would need to return to a room with air-conditioning to allow Student to cool off.

The IEP team also sought clarification on the required temperature of the air-conditioning and the duration Student needed to be in it, because Physician 7 did not specify a temperature in Physician 7's November 8, 2016 letter. At the IEP meeting, Parent 1 responded that the air-conditioning at home was between 76 and 77 degrees. However, at the hearing Parent 1 testified that the air-conditioning at home is kept between 68 and 71 degrees. Principal 1 told Parent 1 that air-conditioning could be provided at the Home School because it was medically necessary for Student. One IEP member noted that if the Home School could provide air-conditioning, a change of location was not necessary. The IEP team agreed to add air-conditioning to the Supplementary Aids and Services section of the IEP.

At the IEP meeting, Parent 1 provided Physician 7's responses to the IEP team. Parent 1 stated that Student's program needs to be appropriately paced to avoid exhaustion. Regarding Student's medical condition, Parent 1 stated it is constantly evolving. When asked about why Physician 7 thought that DOE School 2 would be appropriate, Parent 1 stated that Physician 7 could not divulge confidential information about other students. Parent 1 eventually responded that Physician 7 knew that DOE School 2 had a certified teacher for \_\_\_\_\_; therefore, Student's placement there was

more appropriate. Student was having difficulty generalizing, and Student needed to have a teacher present to help with Student's communication needs.<sup>5</sup> However, at the hearing Physician 7 testified that Physician 7 had never visited DOE School 2, and Physician 7 had not visited or observed Student at the Home School.

Parent 1 stated that Parent 1 did not feel Student was safe at the Home School because it did not have air-conditioning. The IEP team tried to get clarification whether Student would be attending the Home School. Principal 1 asked Parent 1 if Student would attend the Home School if they installed air-conditioning. Parent 1 challenged Principal 1 and said Parent 1 could have Student there that week. Principal 1 stated Principal 1 was waiting for a response from facilities and the District. Regarding the air-conditioning. Principal 1 explained to the IEP team that installing air-conditioning would take time, because of the size of the classroom. Parent 1 responded that it was a "delay tactic."

The IEP team brought up the issue of a GE.<sup>6</sup> Parent 1 stated that the GE process did not apply to Student because of the severity of Student's medical needs. Parent 1 said that Student could be placed at DOE School 2 without a GE.<sup>7</sup> The IEP team explained to Parent 1 that the IEP would have to document a change in the location of Student's program and that air-conditioning was medically necessary, before Student could be "programmatically placed" there. Parent 1 responded that DOE School 2 could provide services immediately. Parent 1 stated that DOE School 2 was the safest environment, because it addressed all of Student's medical needs. Parent 1 stated that Student's diagnosis was a medical need, and Student needed a certified teacher on campus. However, Principal 2's testimony at the hearing is contrary to Parent 1's statement.

Principal 2 testified that all the classrooms at DOE School 2 have two air-conditioning window units and the temperature can be adjusted. Principal 2 also testified that the air-conditioning units in the cafeteria are typically not used during the school day unless it is exceptionally warm. The air-conditioning units in the cafeteria are up too high to adjust the temperature. Even when the air-conditioning units are on in the

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<sup>5</sup> The IEP team informed Parent 1 that the certified teacher already had students certified teacher was teaching, and that certified teacher's services were written in the students' IEPs. Student did not have this service listed in any of Student's prior IEPs. Resp. Exh. 7, 12/12/16 IEP audio 1.05:18 – 1.11:10.

<sup>6</sup> Principal 1 testified that Principal 1 would not prevent a Student from making a GE request to another DOE school. It would be up to the transferring school to approve the GE.

<sup>7</sup> Principal 2 testified that the GE process started on January 1, 2017 and ended on March 1, 2017. Principal 2 accepted every Student that applied for a GE.

cafeteria, it is not as comfortable as the air-conditioning in the classrooms or library because approximately 150 to 200 students are there, the doors are left open for the students to enter and exit, and the kitchen ovens are on. Principal 2 testified that if a student was medically required to be in a temperature-controlled environment, Principal 2 would not have the student eat lunch in the cafeteria. Principal 2 would have the student eat lunch in the classroom or library.

It is clear from the testimony at the hearing and the IEP meeting recording that Parents were adamant that Student attend DOE School 2. Parent 1's statement that Student could attend the Home School that week was disingenuous. Parents had no intention of having Student attend the Home School, despite the actions of the DOE. Even after the IEP meeting, Parents continued to insist on Student's transfer.

On December 19, 2016, Parents sent Principal 1 a letter regarding the transfer to DOE School 2. On December 28, 2016, Principal 1 responded to Parents' letter. Principal 1 stated that the Home School was working towards making accommodations to provide air-conditioning in Student's classroom by January 9, 2017.

On December 29, 2016, Parents sent a letter responding to the Principal 1's December 28, 2016 letter. Parents stated that the Principal 1 did not address air-conditioning in all areas and buildings that Student would be in, namely the cafeteria, computer room, and classroom. Parents continued to request Student's transfer to DOE School 2. Parents stated that Student should have been attending school from December 1, 2016, but this date was delayed due to lack of air-conditioning.

On December 20, 2016, the Parent Advocate sent an email to Principal 1 regarding the denial of transfer to DOE School 2 and the installation of the air-conditioning. On December 22, 2016, the Parent Advocate re-sent the December 20, 2016 email to Principal 1 and requested an immediate response. Parent Advocate stated Student needed to attend school on January 9, 2017, after the Winter 2016 break.

On January 4, 2017, the Principal 1 sent Parents a letter stating that Student's classroom would have air-conditioning installed by January 9, 2017. Principal 1 testified that if the cafeteria was too warm, Student could have lunch in an air-conditioned area with other students for socialization. This had been done with other students previously.

On January 6, 2017, three days prior to the start of the Spring 2017 semester, Parents directed Physician 7 to write a letter providing specific directives to assist the Home School with providing the "most appropriate environment without compromising

Student's health and safety while optimizing Student's educational experience." Physician 7 wrote that the Home School "will provide air-conditioning in all buildings that [Student] will be present in such as the classroom (to include \_\_\_\_\_ as transitional visits will be beginning shortly), the cafeteria and computer labs. It has been documented that [Student's] stamina is greatly increased along with Student's focus for learning, and Student's symptoms [*sic.*] much less when in an air condition [*sic.*] environment." Physician 7 testified at the hearing that Physician 7 based Physician 7's information about the Home School on Parent 1's information.

Parent 1 had Physician 7 write the January 6, 2017 letter knowing that air-conditioning would be ready for Student to attend the Home School and the computer labs were already air-conditioned. Parent 1 also knew that the Home School could not provide air-conditioning in the cafeteria, and DOE School 2 could. This continues to show that Parents had no intention of having Student attend the Home School. However, Parents request to have Student in an air-conditioned cafeteria fell short, because Principal 2 testified that Principal 2 would have Student eat in an air-conditioned classroom rather than the cafeteria, because it was not climate controlled.

January 9, 2017 came and went without Student attending the Home School. At 10:35 a.m. on January 11, 2017, Parents sent an email to the Principal 1 requesting information regarding the make/model, location, and BTU of the installed air-conditioning units. Parents requested a response by 3:00 p.m. that same day in order to provide the information to Student's "medical professionals." On January 18, 2017, Principal 1 sent an email to Parents stating that two LG 10,000 BTU portable air conditioners had been installed in Student's classroom. Principal 1 noted that Student's medical team never provided the DOE with any air-conditioning specification or guidelines from Student's medical team.

Even though air-conditioning was installed in the classroom at the Home School, by January 9, 2017, on January 27, 2017, the Parent Advocate sent a letter to the DOE Complex Area Superintendent requesting that Student be transferred to DOE School 2 because Student was medically fragile and needed air-conditioning.

On March 17, 2017, two months after the start of the Spring 2017 semester, Parent 1 took Student to the Home School to conduct a 45-minute observation. Student participated in 15 minutes of recess outside. Student climbed on the play structure, went down the slide, and played with other students. After recess, they went to the classroom.

Parent 1 testified it was a “long walk from the play structure back to the classroom.” When Parent 1 helped Student wash Student’s hands, Student’s skin was warm and Student was perspiring. Parent 1 estimated that the temperature of the air-conditioned room was between 79 and 84 degrees.

First, Parent 1 is not a thermostat, and Parent 1’s estimation of the classroom temperature was pure speculation. Second, it’s no surprise that Student was warm and perspiring after playing outside for 15 minutes and walking a distance. In fact, these were the concerns the IEP team had about Student having PE and recess outside. Nevertheless, Parent 1 and the Physician 7 stated that Student could have recess and PE outside. Parent 1’s estimation of the room temperature was just another excuse to avoid sending Student to the Home School.

Even though the December 12, 2016 IEP was not completed that day, the IEP team had indicated that air-conditioning would be placed in the supplementary aids and services section. The Hearings Officer finds that the Home School acted in good faith and installed the air-conditioning at Parents’ request by the start of Spring 2017. Had Student attended the Home School on January 9, 2017, as indicated by Parents and the Parent Advocate, the IEP requirement of air-conditioning in the classroom would have been satisfied.

The Hearings Officer finds that Respondent committed no procedural or substantive violations of the IDEA from December 12, 2016 to the present time.

**D. Whether Student is entitled to relief.**

Once a Hearings Officer holds that public placement of learning a disabled child violated IDEA, they are authorized to grant appropriate relief. The Hearings Officer has determined that Petitioners have not met their burden to show that the May 24, 2016 IEP procedurally or substantively violated the IDEA and denied Student a FAPE and they are not entitled to their requested relief.

**V. DECISION**

Based upon the above-stated findings of fact and conclusions of law, the Hearings

Officer concludes that Petitioners have not proven a denial of FAPE. Petitioners have not met their burden to show that the May 24, 2016 IEP procedurally or substantively violated the IDEA.

Respondent shall be deemed the prevailing party in this matter.

### **RIGHT TO APPEAL**

The parties have the right to appeal this decision to a court of competent jurisdiction within thirty (30) days after receipt of this decision.

DATED: Honolulu, Hawai'i, \_\_\_\_\_.

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ROWENA A. SOMERVILLE  
Administrative Hearings Officer  
Department of Commerce  
and Consumer Affairs

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