

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Student Hearing Office  
810 First Street, N.E., 2<sup>nd</sup> floor  
Washington, D.C. 20002

OSSE  
Student Hearing Office  
June 21, 2013

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STUDENT,<sup>1</sup>

Petitioner,  
v

SHO Case No:  
Erin H. Leff, Hearing Officer

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Respondent

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**HEARING OFFICER DETERMINATION**

**STATEMENT OF THE CASE**

On March 27, 2013 the student, Petitioner herein (“Student” or “Petitioner”), filed an Administrative Due Process Complaint Notice (“Complaint”), HO 1,<sup>2</sup> requesting a hearing to review the identification, evaluation, placement or provision of a free, appropriate public education (“FAPE”) to Student by District of Columbia Public Schools (“DCPS”) under the Individuals with Disabilities Education Act, as amended (“IDEA”). 20 U.S.C.A. §1415(f)(1)(A). Respondent DCPS filed a Response to Petitioner’s Administrative Due Process Complaint Notice (HO 5) on April 4, 2013. This was within the 10 day timeline for filing a response established in 34 C.F.R. § 300.508(e)(1). A resolution meeting was held on April 24, 2013. The parties were not able to reach an agreement and executed a Resolution Period Disposition Form

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<sup>1</sup> Student has reached the age of majority and brings this action on his own behalf. Personal identifying information regarding Student is provided in Appendix A, attached hereto.

<sup>2</sup> Hearing Officer Exhibits will be referred to as “HO” followed by the exhibit number; Petitioner’s Exhibits will be referred to as “P” followed by the exhibit number; and Respondent’s Exhibits will be referred to as “R” followed by the exhibit number.

on the same date so indicating. HO 7. The 45 day timeline began to run on April 27, 2013, the day after the 30 day resolution period ended. Following the Prehearing Conference held on May 1, 2013, I issued a Prehearing Conference Order on May 3, 2013. HO 8.

The due process hearing in this matter was originally scheduled to begin on May 23, 2013. A few minutes after the scheduled start of the hearing Petitioner's counsel received a text from Petitioner's mother indicating he had been taken to the hospital and would not be able to appear. Accordingly, Petitioner's counsel moved for a 10 day continuance on the record. Respondent's counsel did not object. I granted Petitioner's motion on the record and asked that counsel provide a written motion memorializing the request made on the record. The written Motion for Continuance was filed on May 23, 2013 (HO 11), and I issued an Order granting the continuance on May 29, 2013 (HO 12). My Hearing Officer Determination is due on June 20, 2013.

At all times relevant to these proceedings Petitioner was represented by Roberta Gambale, Esq., and Maya Washington, Assistant Attorney General, represented DCPS. By agreement of the parties, the hearing was rescheduled for June 4 and 6, 2013. The hearing was held as scheduled in Room 2003 of the Student Hearing Office.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C. §§ 1400, *et seq.*; District of Columbia Code, §§ 38-2561.01, *et seq.*; federal regulations implementing IDEA, 34 C.F.R. §§ 300.1, *et seq.*; and District of Columbia regulations at D.C. Mun. Reg. tit. 5-E §§ 3000, *et seq.*

## **ISSUES**

The issues are:

- 1) Whether DCPS denied Student a free, appropriate public education (“FAPE”) by failing to conduct or fund a comprehensive vocational re-evaluation, as agreed at the multidisciplinary team (“MDT”) meeting held on December 12, 2012;
- 2) Whether DCPS denied Student a FAPE by failing to provide the student an appropriate individualized education program (“IEP”) at the November 1, 2012 MDT meeting. The IEP does not include either physical therapy (“PT”) or occupational therapy (“OT”);
- 3) Whether DCPS denied Student a FAPE by failing to include an appropriate transition plan and/or goals in the IEPs of November 1, 2012 and/or December 12, 2012. Student is not interested in barbering and unable to provide such services due to having muscular dystrophy. There are insufficient hours in the transition plan. Student requires additional goals addressing functional skills in independent living and employment; and
- 4) Whether DCPS denied Student a FAPE by failing to conduct an assistive technology assessment in response to parent’s request at the November 1, 2012 IEP meeting.

## **RELIEF REQUESTED**

Petitioner requested:

- 1) DCPS will fund a comprehensive vocational/transition assessment;
- 2) DCPS will conduct or fund OT, PT and assistive technology assessments;
- 3) Following the receipt of these assessments DCPS will convene an MDT meeting to review the assessments and revise the student’s IEP, as appropriate;
- 4) DCPS will fund 1 hour of OT and 30 minutes of PT each week until the assessments are completed and reviewed by the MDT; and
- 5) DCPS will provide the student compensatory education

## **SUMMARY OF THE EVIDENCE**

### A. Exhibits

Exhibits admitted on behalf of Petitioner are:

P-1 Meeting Notes dated October 4, 2012;<sup>3</sup>

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<sup>3</sup> Petitioner’s disclosure cover letter incorrectly indicates these note are from a May 2012 meeting.

- P-2 Electronic Communications with Individualized Education Program attached to Roberta Gambale from Representative of Nonpublic School dated March 27, 2013;
- P-3 Letter to from Owner/Founder dated August 30, 2012;
- P-4 Electronic Communications with Transition assessment attached to Roberta Gambale from Owner/Founder dated May 6, 2013;
- P-5 Behavioral Intervention Plan dated May 10, 2012;
- P-6 Electronic Communications to LEA Rep from Educational Advocate dated February 28, 2013;
- P-7 Electronic Communications chain to from Educational Advocate dated October 2, 2012;
- P-8 Electronic Communications to Roberta Gambale from dated September 28, 2012;
- P-9 Electronic Communications chain to Roberta Gambale from dated July 5, 2012;
- P-10 Electronic Communications chain to Roberta Gambale from Owner/Founder dated July 12, 2012;
- P-11 Electronic Communications chain to Roberta Gambale from dated August 3, 2012;
- P-12 Updated Psychoeducational & Psychological Evaluation dated April 4, 2012;
- P-13 Psychiatric Evaluation dated April 13, 2012;
- P-14 Speech Language Evaluation /Re-Evaluation dated October 29, 2010;
- P-15 Physical Therapy Screening dated October 27, 2010;<sup>4</sup>
- P-16 Occupational Therapy evaluation report dated October 28, 2010;
- P-17 Curriculum Vitae for Educational Advocate;
- P-18 Curriculum Vitae for Owner/Founder;
- P-19 Curriculum Vitae for Special Education Teacher/Advocate;
- P-20 Compensatory Educational Proposal
- P-21 Hearing Officer Determination dated April 10, 2012.
- P-22 Meeting Notes dated December 12, 2012

Exhibits admitted on behalf of Respondent are:

R-1	Student Attendance	2012-2013 SY
R-2	RSM Notes	April 24, 2014
R-3	MDT Notes	November 1, 2012
R-4	MDT Notes	November 1, 2012
R-5	MDT Notes	October 4, 2012
R-6	Private Agency Transition Assessment	August 30, 2012
R-7	Occupational Therapy Evaluation	October 28, 2012
R-8	Physical Therapy Screening	October 27, 2010

Exhibits admitted by the Hearing Officer are:<sup>5</sup>

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<sup>4</sup> This document is incorrectly identified as a psychiatric screening in Petitioner's 5-day disclosure cover letter.

- HO1 Administrative Due Process Complaint Notice filed March 27, 2013
- HO2 Notice of Hearing Officer Appointment of March 28, 2013
- HO3 Prehearing Conference Scheduling Letter of April 1, 2013 with email correcting proposed dates attached
- HO4 Prehearing Notice dated April 3, 2013
- HO5 District of Columbia Public School's [sic] Response to Parent's Administrative Due Process Complaint dated April 4, 2013
- HO6 Miscellaneous Order dated April 15, 2013 with email amendment of April 16, 2013
- HO7 Resolution Period Disposition Form dated April 24, 2013
- HO8 Prehearing Conference Order dated May 3, 2013
- HO9 Miscellaneous emails
  - 3/29/13 from DCPS re assigned attorney In this matter
  - Multiple chains re scheduling prehearing conference on April 2, 2013 and April 3, 2013
  - 4/24/13 from DCPS re assigned counsel
  - Chains (2) of April 29., 2013 re contact numbers for prehearing conference
- HO10 List of Proposed Hearing Officer Exhibits filed May 13 2013
- HO11 Petitioner's Motion for Continuance of May 23 2013
- HO12 Order granting continuance of May 29, 2013

B. Testimony

Petitioner testified and presented the following witnesses:

- Representative of Nonpublic School, Nonpublic School
- Petitioner's mother
- , Educational Advocate, Brown and Associates
- , Special Education Teacher/Advocate, Private Agency
- , Owner/Founder, Private Agency testified as an expert in transition services

DCPS presented the following witnesses:

- , Physical Therapist
- , Occupational Therapist, DCPS
- , Progress Monitor/LEA Representative, DCPS

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<sup>5</sup> Emails forwarding the documents of record to opposing counsel and the hearing officer are filed with the documents of record unless otherwise noted.

## FINDINGS OF FACT

Based upon the evidence presented, I find the following facts by a preponderance of the evidence:<sup>6</sup>

1. Student is                    old. He attends Nonpublic School, a full time, non-public special education school providing services to students with emotional disabilities, specific learning disabilities, other health impairments and multiple disabilities. Student was placed at Nonpublic School pursuant to a Hearing Officer Determination of April 10, 2012. HO 1; P 2; P 12; P 21; Testimony of Representative of Nonpublic School.
2. Student is classified as a student with specific learning disabilities. In addition to learning disabilities student has a physical disability, muscular dystrophy,<sup>7</sup> and a history of behavioral and attendance issues. It is difficult to keep Student engaged in school. His academic skills are low, and he becomes frustrated when he does not make progress. Student's attendance deteriorated throughout the course of the 2012-2013 school year. He does not currently attend Nonpublic School because he does not think he is learning. Some of Student's absences are attributable to his physical disability and illness. Student has a history of attendance issues from prior schools as well as Nonpublic School. P 2; P 12; Testimony of LEA Rep; Testimony of Student's mother; Testimony of                    ; Testimony of Student.
3. Student's intellectual functioning is in the extremely low range as measured by the Wechsler Adult Intelligence Scale –Version Four. His academic functioning on the Woodcock-Johnson III is also in the extremely low range. His reading skills are at the elementary level. Testimony of Special Education Teacher/Advocate; P 12

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<sup>6</sup> In the findings that follow I cite exhibit numbers and/or testimony as bases for the findings. Some exhibits were introduced by both Petitioner and Respondent. The citations to exhibits reference only one party's exhibit number in those instances where both parties have introduced the same exhibit.

<sup>7</sup> Muscular dystrophy can be associated with cognitive impairment as well as behavioral, vision and speech issues.

4. Student does not like being associated with people with disabilities He understands his illness and attempts to escape the difference imposed on him by it through trying to be a “normal” adolescent. He tends to follow others. P 13.
5. Student did not receive physical therapy (“PT”) while at Nonpublic school. Nonpublic school does not have a physical therapist on staff, and DCPS did not provide a physical therapist. PT was on Student’s IEP when he entered Nonpublic School. Student received consultative PT services in the 2010-2011 school year. P 1; Testimony of Physical Therapist; Testimony of LEA Rep.
6. An annual IEP meeting was held at Nonpublic School on October 4, 2012. At that meeting a physical therapy screening was recommended. A screening has not been completed. DCPS indicated it would not provide Student Speech to Text assistive technology unless an assistive technology assessment supported the need for such technology. An assistive technology assessment has not been initiated or completed. Student’s schedule was to have been revised following this meeting to include academic instruction in reading and writing only. This did not occur. P 1; Testimony of Educational Advocate; Testimony of LEA Rep
7. Student received an occupational therapy (“OT”) evaluation in October 2010. The same occupational therapist attempted to observe Student prior to the November 1, 2012 meeting held at Nonpublic School. However, at the time of her attempted observation Student was not engaged in an activity that would provide relevant information. When the occupational therapist spoke to Student, he stated he did not want OT services. The therapist did not think additional assessments were necessary at the time of this attempted observation. Student appeared stronger than in 2010. Student’s handwriting is slow and laborious. There is some possibility Student may

need OT services in a future transition program. P 16; Testimony of Educational Advocate; Testimony of Occupational Therapist; Testimony of Special Education Teacher/Advocate.

8. Student received a PT screening in October 2010. A screening is a smaller version of an evaluation. It provides a sampling of functional skills. If a therapist thinks a more complete battery is required following a screening, the therapist makes the recommendation to the MDT who then determines whether to request a PT assessment. A PT assessment or screening is intended to assure a student can perform the gross motor activities necessary to access his/her education. The recommendation of the 2010 assessment was that Student had some weakness but was independent; there was no impact on his ability to participate in the school program. Consultative services for monitoring mobility were recommended to the MDT. Prior to the November 2012 meeting the same physical therapist observed and spoke to Student at school and spoke to his teachers. She concluded Student did not need PT at his current site; Student told the therapist that he did not need PT. PT assessments/screenings are site specific. Student may need a PT assessment/screening should the location of his programs and services change. P 15; Testimony of Educational Advocate; Testimony of Physical Therapist

9. A team meeting was held at Nonpublic School on November 1, 2012. The purpose of the meeting was to review Student's IEP. Both the occupational therapist and the physical therapist who had assessed Student in 2010 and updated their assessments in preparation for this meeting participated in the November 1, 2012 meeting. Each provided an analysis of student's needs in her area of specialization. Following the therapists' analyses the IEP team determined Student did not require OT or PT services at Nonpublic School. The team also determined an updated occupational therapy assessment would be appropriate were Student to move to another setting. P 15; P 16; R 4; Testimony of Representative of Nonpublic School

10. Student, his mother and their advisors do not agree regarding Student's needs for OT and PT. Student has frequently stated he does not need these services. His mother and their advisors have consistently stated he does need these services. Testimony of Student's mother; Testimony of Educational Advocate.

11. The Office of the State Superintendent of Education ("OSSE") scheduled a placement review meeting at Nonpublic school for Student on December 12, 2012. Nonpublic School was not providing the program of half day academics focused on reading and writing and half day vocational training discussed with Student at earlier meetings. This combination of services was agreeable to the team, including Student. OSSE closed the matter of possible transfer when Student indicated at the meeting that he wanted to stay at Nonpublic School until an alternative placement was determined. Petitioner, through counsel, and Nonpublic School staff agreed additional vocational assessment was necessary. DCPS disagreed and chose not to fund such an evaluation. P 22; Testimony of Representative of Nonpublic School; Testimony of LEA Rep.

12. Student was referred to Project Search. Project Search is a program designed to assist students in moving from school to work. Students in Project Search are provided internships and shadowing experiences for one school year. At the end of the school year they exit DCPS with a certificate. Students are interviewed as part of the acceptance process for Project Search. Student had two interviews scheduled. He did not appear for either interview. He missed one of these interviews because his mother forgot to wake him. Testimony of Student's Mother; Testimony of Owner/Founder; Testimony of LEA Rep.

13. Student has had three vocational/transition assessments. On May 6, 2012 he was assessed using the CareerCruising-Matchmaker. On September 26, 2012 Student's functional skills were assessed using a Learning Styles Assessment and a student interview. On August 30, 2012,

Private Agency completed a 15 page Transition Assessment Report that serves as the basis for a proposed Transition/StepDown Community Support Plan. DCPS was willing to consider including the recommendations from the Private Agency transition assessment in Student's transition plan. This did not occur. P 1; P 2; P 4; Testimony of LEA Rep.

14. Student's October 4, 2012 IEP includes a transition plan. The transition plan includes a student input section, an assessment results section and an activities for post-secondary education and training section addressing the areas of education and training and employment, independent living. Each identified area includes a long range goal, short-term measurable goals, an identified service, extracurricular activities and community participation and a course of study. P 2.

15. The transition plan included with Student's October 4, 2012 IEP indicates Student will be trained as a barber. The transition plan should include goals creating more job related experience such as shadowing and career exploration, life skills that will support Student's independence and a support group to help address Student's health issues. P 2; Testimony of Representative of Nonpublic School; Testimony of Owner/Founder.

16. Nonpublic School is responsible for drafting Student's IEP and DCPS is responsible for finalizing the IEP and making sure it is in the SEDS, computer data base. Testimony of LEA Rep.

17. Student requires a phonics based program to learn to read. He responds well to one on one tutoring. He has difficulty with comprehension. Testimony of Special Education Teacher/Advocate.

18. Student's educational focus is on learning to read and on getting a job. Student requires intensive remediation. Student does not want to stay at Nonpublic School. Testimony of Student's mother; Testimony of Educational Advocate; Testimony of Student.

19. Student also requires vocational training as part of his transition plan. Barbering is not an appropriate career goal. Student is unable to stand for extended periods of time. The licensing exam in this field is written at a reading level far beyond Student's. There are concerns about the selection of appropriate career options for Student due to his low academic skills, his distractibility and his physical limitations. Student is interested in working in an office building, perhaps answering telephones. Testimony of Student; Testimony of Educational Advocate; Testimony of Special Education Teacher/Advocate.

20. Student requires a rehabilitation specialist assessment to address his physical and medical limitations in relation to future vocational choices. This would include assessing Student's physical endurance. Testimony of Special Education Teacher/Advocate.

21. The compensatory education plan includes a summer transition program at Private Agency and a 12 week truancy evaluation/ FBA and intervention services program at Private Agency. Private Agency provides educational services for DCPS and OSSE as well as charter schools. Student received funding to attend Private Agency during the summer of 2012. There was a conflict with the summer school program at Nonpublic School, and he was not able to attend the entire Private Agency summer program. P 9; Testimony of Educational Advocate; Testimony of Owner/Founder.

### **DISCUSSION**

The following discussion is based on my review of the exhibits introduced by the parties, witness testimony and the record in this case. While I find witness testimony presented in this matter to be credible, meaning that I find no witnesses intentionally misstated the truth or attempted to mislead me. However, persuasiveness of the testimony and thus the weight given to the testimony were particularly troublesome determinations here. In the instant matter, Petitioner

is the            year old student whose educational rights under IDEA are the subject matter of the instant litigation. Everyone who testified was focused on his educational rights, difficulties and needs. However, as the adult student bringing this case, it is Petitioner's view and the related relevant law that must be controlling. It is clear Student and those who advise him are not of one mind as to his needs and interests. It is also clear, as stated in the psychiatric evaluation in evidence, that Student is a follower. He follows rather than leads and while this may be understandable for a young man struggling with his physical, cognitive and academic difficulties, it makes reaching a determination in this matter particularly difficult. Student testified, for example, that he would be willing to have both occupational and physical therapy. However, the overwhelming evidence is that he has consistently rejected such interventions in recent years. It is my view his testimony was swayed by the testimony he heard prior to his own testimony and by his advisors' insistence that this would be beneficial to him. Petitioner's witnesses' testimony clearly was presented, throughout this hearing, in support of their view of what would be beneficial to Student. I am not convinced it consistently presented a view of what Student/Petitioner thought would be beneficial to him. Student appears to have understood the issues and to know what his goals are – he wants to learn to read, write and do math. He wants vocational assistance. These are reasonable goals. He is not interested in additional services.

It is important to recognize here that the evidence in this hearing has frequently followed a pattern that resulted in confused and sometimes logically tortured statements. Often Petitioner's documents and/or witness testimony indicate DCPS made a specific agreement to act in a certain manner. In contrast DCPS evidence and witness testimony indicate a much less definitive position on DCPS' part. I do not suggest that Petitioner is in any way intentionally misstating what occurred. However, it appears likely that Petitioner's advocates and other

witnesses are so concerned about Petitioner's future well-being that they have perhaps misheard DCPS' statements or misconstrued the intent of the communication. In any event, the intense desire to have something be true does not, in fact, make it true. It is in this context that I must make determinations in the instant matter.

1) *Whether DCPS denied Student a FAPE by failing to conduct or fund a comprehensive vocational re-evaluation, as agreed at the MDT meeting held on December 12, 2012*

4) *Whether DCPS denied Student a FAPE by failing to conduct an assistive technology assessment in response to parent's request at the November 1, 2012 IEP meeting*<sup>8</sup>

The IDEA requires a local education agency, here DCPS, to ensure that a reevaluation of each child with a disability is conducted at least once every three years, unless the parent and public agency agree one is not necessary. 34 C.F.R. § 300.303(b). A public agency also must ensure that a reevaluation occurs if the child's educational or related service needs warrant a reevaluation or if the child's parent<sup>9</sup> requests a reevaluation. 34 C.F.R. § 300.303(a). A reevaluation may occur not more than once a year unless the parent and public agency agree otherwise. 34 C.F.R. § 300.303(b). A reevaluation is to be conducted in accordance with regulations establishing the requirements for evaluation and reevaluation. 34 C.F.R. §§ 300.304 through 300.311. *Id.* These regulations require, among other standards, that the student be evaluated in all areas of suspected disability. 34 C.F.R. § 300.304(c)(4).

#### Vocational re-evaluation

OSSE called a meeting on December 12, 2012 to discuss Student's possible transfer to another school because Nonpublic School was not providing the half day of intensive reading

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<sup>8</sup>Issues 1 and 4 are addressed together as they have overlapping issues of law.

The initial request for assistive technology services was made at the October 4, 2012 IEP meeting and it is that request I address here. The discussion, or lack thereof, of assistive technology at the November 1, 2012 meeting was follow-up to the October 4, 2012 discussion.

<sup>9</sup> As the instant student has reached the age of majority, his educational rights have transferred from his parent to him. All references to parent in the regulations are to be read as referring to the Petitioner/student in this matter.

and writing remediation and half day vocational training agreed to during the October and November 2012 meetings. During the December meeting Student determined he did not want to transfer to another school until his program could be set, and this discussion was discontinued. The team assembled also discussed the need for further vocational evaluation. Petitioner's representatives expressed the need for a comprehensive vocational assessment. Nonpublic School staff agreed Student needed additional vocational assessment taking into account his cognitive and physical needs. The evidence presented at hearing did not raise any question regarding whether there had been a discussion of vocational re-evaluation and Petitioner's request for such a re-evaluation assessment. The representative of Nonpublic school and the DCPS representative agreed the need for such a reevaluation was discussed. At the December meeting Petitioner's attorney, acting on his behalf, and the Nonpublic School representative agreed such an evaluation was necessary to determine the impact of his physical limitations and what vocational training would be appropriate for Student taking into consideration all of his identified needs. The DCPS representative testified that sufficient information was available. DCPS did not agree to fund the reevaluation. However, DCPS' position is not supported by the facts or the law.

A reevaluation is to address all areas of suspected disability. Here, the representative of the school working with Student and his attorney, acting on his behalf, expressed the need for a comprehensive vocational evaluation. The school staff who worked with Student on a regular basis were aware of his needs. Student's attorney asked for the reevaluation on his behalf. They agreed there was insufficient information to develop an appropriate transition plan for Student in the vocational area. As stated by the Court in *Cartwright v. Dist. of Columbia*, 267 F. Supp.2d 83 (D.D.C. 2003) the plain language of the IDEA regulation is that a local education agency

must comply with a parent's request to reevaluate. *See*, 34 C.F.R. § 300.303(a)(2). It is axiomatic that a student must be evaluated in all areas of suspected disability. 34 C.F.R. § 300.304(c)(4). Here the request was made by Student's advocate acting on his behalf as he is an adult. The school of attendance agreed. Under IDEA Student is entitled to the requested evaluation. DCPS does not have the option of denying the request.

I therefore find by a preponderance of the evidence that DCPS denied Student a FAPE when, following the December 12, 2012 meeting, it failed to conduct or fund a vocational evaluation as requested by Student and agreed with by the representative of Student's school of attendance at said meeting.

#### *Assistive technology evaluation*

An assistive technology device, under IDEA, is defined as "any item, piece of equipment, or product system . . . that is used to increase, maintain, or improve the functional capabilities of a child with a disability." 34 C.F.R. § 300.5. A public agency must ensure that required assistive technology devices are made available to an eligible student as part of his/her special education services, related services, or supplementary aids and services. 34 C.F.R. § 300.105. Moreover, the use of school purchased assistive technology devices must be made available to the student outside the school setting if the device is necessary in order for the child to receive a FAPE. *Id.*

The parties agree the Student's advocate requested the student be provided assistive technology in the form of a computer based voice to text/ text to voice program at the October 4, 2012 IEP meeting. In response to the request DCPS indicated assistive technology could not be provided without an assistive technology assessment. The team was to reconvene to discuss whether such an evaluation was warranted at the same time it met to discuss the OT and PT

evaluation requests. The assistive technology request was not discussed at the meeting on November 1, 2012.

At hearing DCPS raised questions about the requested assistive technology suggesting it is usually used for students with disabilities different than Student's disabilities. This is not relevant. The question is whether the technology would be appropriate for Student based on his individual needs. It is not a question of whether other students with disabilities the same as or similar to the instant student's frequently or ever have received such technology as part of an IEP process. The question is whether Student requires such assistive technology § 34 C.F.R. 300.324(a)(2)(v).

DCPS argued that there was no request for an assistive technology assessment, only a request for assistive technology.<sup>10</sup> DCPS' argument places form above substance and does not meet the intent or spirit of IDEA. A student is to be assessed in all areas of suspected disability, and an IEP is to be developed that addresses all of student's educational needs resulting from his/her identified disabilities. If Student has a possible need for assistive technology, DCPS must determine whether that technology is necessary for the student to receive a FAPE. DCPS' responsibility is to provide eligible students FAPE. This responsibility clearly is not intended to include seeking reasons not to provide necessary assessments. I believe DCPS understands this. If a parent at an IEP meeting asked that his/her student receives speech services, DCPS would not deny that student speech services simply because the parent had not requested a speech-language assessment. DCPS would inform the parent an assessment needed to be completed to determine whether the student should receive speech. DCPS would then take the next steps in that process to initiate the assessment. The request for assistive technology is not different. I also note DCPS was concerned that Petitioner's educational advocate stated the requested technology

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<sup>10</sup> I note Petitioner asserts there was an express assistive technology assessment request, but I am not convinced.

was free when in fact it required Student have available a computer. I note cost is another factor that is not to be considered in a FAPE determination except in the most extraordinary of circumstance. The cost of a computer clearly is not in that ballpark.

I therefore conclude by a preponderance of the evidence that DCPS denied Student a FAPE by failing to conduct an assistive technology assessment in response to parent's request at the October 4, 2012 IEP meeting.

2) *Whether DCPS denied Student a FAPE by failing to provide the student an appropriate IEP at the November 1, 2012 MDT meeting. The IEP does not include either physical therapy or occupational therapy*

Each child with a disability who is found eligible for special education and related services under the IDEA is to be offered a FAPE that addresses his/her individual educational needs. 34 CFR § 300.1. An IEP is a written statement that includes, in pertinent part, the eligible student's: present levels of academic and functional performance; the effect of the student's disability on his/her involvement and progress in the general curriculum; measurable annual academic and functional goals designed to meet the student's educational needs resulting from his/her disability; a statement of the special education and related services, supplementary aids and services, and program modifications and supports to be provided to the student to allow him/her to advance toward attaining the IEP goals and progress in the general curriculum and to participate in nonacademic activities. In addition the extent of the student's participation with nondisabled peers must be addressed. 34 C.F.R. § 300.320. *See also*, D.C. Code § 30.3009. In developing the IEP the team is to consider the strengths of the child, the concerns of the parent for enhancing the education of the student, the results of the most recent evaluation and the academic, developmental and functional needs of the student. 34 C.F.R. § 300.324(a). *See also*, D.C. Code § 30.3007. An IEP that memorializes the team's FAPE determination must be

designed to provide the student with some educational benefit. *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176, 203-204 (1982). Pursuant to 34 C.F.R. § 300.324(b) the local education agency must assure the IEP is reviewed at least annually to determine whether the student's goals are being achieved. Further the IEP is to be revised to address lack of expected progress, the results of reevaluations, information provided to or by the parent, the child's anticipated needs or other matters. *Id.*

In the instant matter, Student's annual IEP review meeting was held on October 4, 2012. and a revised IEP dated October 4, 2012 was developed.<sup>11</sup> Neither an occupational therapist nor a physical therapist attended the October 4, meeting. A second meeting was held on November 1, 2012 to allow participation of an occupational therapist and a physical therapist. Prior to the November meeting, both the occupational therapist and physical therapist reviewed the reports they had written about Student in 2010 and attempted to update the information through a school visit at Nonpublic School. Both therapists determined Student is not in need of current OT or PT services. Both therapists stated Student had expressly told them he did not want such services, and both therapists testified there might be a need to reassess the need for Student to receive OT or PT when he changes settings such as to a new school or a work site. The IEP does not include either OT or PT services.

At hearing, Petitioner's witnesses testified that they believed Student required occupational therapy and physical therapy on his IEP based on their awareness of Student's physical limitations and their beliefs that OT and PT would have to be of benefit to him. Counsel argued that neither the occupational therapist nor the physical therapist should be able to assess Student's needs without a full evaluation, that a screening was not sufficient. However, the initial

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<sup>11</sup> While the copy of this IEP in evidence is not signed, it was discussed as being Student's current IEP by both parties' witnesses.

2010 assessments (whether full assessments or screenings) and the 2012 updates, whatever their limitations, were made by individuals with specialized knowledge in these areas, and it is their recommendations indicating Student did not require OT or PT at this time that were accepted by the MDT. The opinions to the contrary were provided by individuals without specialized knowledge in OT and PT. I cannot give much weight to opinion testimony and legal argument that is not based on specialized knowledge when it directly contradicts the specialists' opinions. Moreover, despite Student's testimony that he would be willing to participate in OT and PT services, it is my view that while he meant he would participate when he so testified, Student actually will not participate in such services should they be offered. Student tends to follow rather than lead, and it is likely he was swayed by the testimony he heard prior to his own. However, Student clearly is interested in those things he perceives as leading him to employment. He has made clear on multiple occasions and in multiple ways that he wants to learn to read and write and he wants vocational training. He had made clear on multiple occasions that he does not want either OT or PT services. He does not believe, whether misguided or not, that he needs them. He is an adult, and he and the MDT are in agreement. OT and PT are not needed services.

I therefore find by a preponderance of the evidence that DCPS did not deny Student a FAPE by failing to include occupational therapy and physical therapy on Student's IEP after the November 1, 2012 meeting.

3) *Whether DCPS denied Student a FAPE by failing to include an appropriate transition plan and/or goals in the IEPs of November 1, 2012 and/or December 12, 2012. Student is not interested in barbering and unable to provide such services due to having muscular dystrophy. There are insufficient hours in the transition plan. Student requires additional goals addressing functional skills in independent living and employment*

Under IDEA, transition services are a coordinated set of activities for a student with a disability, "that is designed to be within a results-oriented process, that is focused on improving

the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities. . .” 34 C.F.R. § 300.43(a)(1). Transition services are to be “based on the individual child's needs, taking into account the child's strengths, preferences and interests.” 34 C.F.R. § 300.43(a)(2). They are to include instruction, related services, community experiences, the development of employment and other post-secondary adult living objectives and, if appropriate, the acquisition of daily living skills and provision of a functional vocational evaluation. *Id.* Transition services are to be included in a student’s IEP beginning not later than the first IEP to be in effect when a student with a disability turns 16. Such services may be included in a student’s IEP at a younger age if the IEP team determines it is appropriate. 34 C.F.R. § 300.320(b). The transition services in the IEP must include

- (1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and
- (2) The transition services (including courses of study) needed to assist the child in reaching those goals.

34 C.F.R. § 300.320(b). These services are to be updated annually. *Id.*

Because the instant Student is \_\_\_\_\_ years of age, he must have an IEP that includes a transition plan meeting IDEA requirements, and he does. Student’s October 4, 2012 IEP includes a Post-Secondary Transition Plan (“Plan”). The plan includes a student input section, an assessment results section and an activities for post-secondary education and training section addressing the areas of education and training and employment, independent living. Each identified area includes a long range goal, short-term measurable goals, an identified service, extracurricular activities and community participation and a course of study.

The student input section includes relevant information although it is brief. The three assessments conducted by Nonpublic School's Transition Coordinator are identified and summarized. The transition goal areas include short term measurable goals that are relevant to the goal area. However, the transition plan focuses on Student becoming a barber. He expressed interest in other areas of employment as well, but nothing in the plan focuses in these other areas other than one mention of maintenance<sup>12</sup> work as an alternative to barbering.

Owner/Founder, who has extensive knowledge and experience in transition planning and therefore, was qualified as an expert in this area, testified as to the limited understanding of Student's needs, limitations and interests reflected in this plan. Her agency completed a transition assessment in August 2012 that resulted in many recommendations for services and goals for the student that could have been included in the plan but were not. Petitioner's advocate's notes from the October meeting indicate the DCPS representative stated these recommendations would be included in the plan, but the other notes from this meeting do not support this view.

Petitioner provided no evidence regarding the number of transition hours needed for Student's plan to meet his needs, and Petitioner provided little evidence as to Student's need for independent living skills. Coincidentally it is this area of the plan that is best developed. It includes functional goals that support developing familiarity with apartment leases and paystubs,<sup>13</sup> for example. On the other hand, the vocational area provides limited support for Student's future. It's focus on barbering about which many concerns have been raised as a career goal for Student. The information needed to determine Student's physical endurance in relation to Student's muscular dystrophy and how it effects his vocational planning was not available nor

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<sup>12</sup> I also question whether this is a viable career goal for Student given his physical limitations.

<sup>13</sup> I note, however, that without the necessary reading and mathematics skills these independent living skills will be difficult if not impossible to achieve.

was it identified. Petitioner's repeated efforts in meetings to highlight concerns about the barbering goal appears to have been ignored. Before planning for a barbering career, or any other career, it is essential to understand what Student can do. It is also important to create a plan reflecting Student's interests. He is not interested in barbering. Student must be appropriately assessed. It is also important that DCPS review the transition assessment and recommendations provided by Private Agency to determine whether any or all of the recommendations should be included in Student's transition plan.

I, therefore, find, by a preponderance of the evidence that DCPS denied Student a FAPE by failing to include an appropriate transition plan and/or goals in the IEPs of November 1, 2012 and/or December 12, 2012. Student is not interested in barbering and likely unable to provide such services due to having muscular dystrophy and to his limited academic skills. He requires employment goals addressing appropriate areas of interest in which he is able to be involved.

### **COMPENSATORY EDUCATION**

Under *Reid*, a hearing officer may award compensatory education services that compensate for a past deficient program. *Reid v. District of Columbia*, 401 F. 3d 516, 365 U.S. App. D.C. 234 (D.C. Cir 2005) citing *G.ex. RG v Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4<sup>th</sup> Cir. 2003). IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* “. . .the inquiry must be fact-specific and . . . the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” *Reid* at 524.

In the instant matter I have found Respondent denied Student a FAPE by failing to provide student necessary vocational/transition and assistive technology assessments. DCPS also

denied Student a FAPE by failing to provide him an appropriate transition plan. DCPS received requests from Petitioner for evaluations it did not provide. The transition plan included in Student's IEP does not fully address Student's needs, abilities and interests. I, therefore, conclude Student is entitled to compensatory education.

Petitioner's compensatory education plan is designed to address 180 hours of missed transition services in the areas of employment and independent living based on the view that Student should have received 10 hours of services in these areas for 18 weeks. There is no other evidence regarding the number of hours of missed services Student should have received. While I have not found the plan was insufficient as to independent living skills, it was insufficient as to employment for multiple reasons. The proposed compensatory education plan suggests Student can be compensated for the loss of these needed transition services through two programs provided by Private Agency. One program is work related and one is truancy related. While it is true that Student currently is not attending school, he did so at the beginning of the year. It is apparent, therefore, Student is not accessing the education available to him. He is not attending school, however, because the program is not providing the services he has stated he needs and to which the team has agreed. I find there is no nexus between the proposed truancy program and the denials of FAPE found in the instant HOD. I further find that the proposed work related program addresses numerous skills that student will need if he is to be successful in a work environment. I, therefore, find this program provides compensatory education that will help place Student in the position he would have been had he had an appropriate transition plan and will include it in the Order that follows.<sup>14</sup>

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<sup>14</sup> I recognize that Student was to attend this same program during the summer of 2012 as relief awarded in an earlier HOD. There were numerous reasons offered to explain his limited attendance last summer. I do not intend the same to occur this summer. My Order that follows will establish parameters to prevent this from occurring.

## **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law as follows:

1. DCPS denied Student a FAPE when, following the December 12, 2012 meeting, it failed to conduct or fund a vocational evaluation as requested by Student and agreed with by the representative of Student's school of attendance at said meeting.
2. DCPS did not deny Student a FAPE by failing to include occupational therapy and physical therapy on Student's IEP after the November 1, 2012 meeting.
3. DCPS denied Student a FAPE by failing to include an appropriate transition plan and/or goals in the IEPs of November 1, 2012 and/or December 12, 2012. Student is not interested in barbering and unable to provide such services due to having muscular dystrophy. He requires employment goals addressing appropriate areas of interest in which he is able to be involved.
4. DCPS denied Student a FAPE by failing to conduct an assistive technology assessment in response to parent's request at the October 4, 2012 IEP meeting.

## **ORDER**

Based upon the above Findings of Fact and conclusions of law, it is hereby ordered that:

1. Student is to receive a physical endurance assessment such as is provided by vocational rehabilitation services. If Student does not qualify for a vocational rehabilitation services physical endurance assessment alternative arrangements are to be made by DCPS. DCPS is to provide Petitioner transportation to the appointment. This assessment is to take place as soon as possible, and, in no event later than July 21, 2013 unless DCPS is able to provide Petitioner and his counsel documentation that no appointments are available by said date. If no appointments are available by said date, the appointment is to be scheduled at the first available date. All dates are to be agreeable to Petitioner and confirmed through his counsel. If Petitioner does not appear for the appointment, a second appointment is to be scheduled as described herein. If Petitioner does not appear for the second appointment, unless he provides written documentation of

illness/physical incapacity from a hospital or physician, DCPS will be deemed to have made the necessary efforts to comply with this Order. If Petitioner provides the required documentation of illness/physical incapacity, a third appointment is to be scheduled. This process is to be repeated until the assessment is completed or Petitioner fails to appear for a second appointment without documentation of illness or incapacity.

2. Within 10 days of DCPS' receipt of the report from this physical endurance assessment, DCPS is to convene an MDT to review the assessment and discuss the need for additional vocational assessment. The MDT is to include Petitioner, as well as his mother, educational advocate, and attorney, if he so chooses. Petitioner is to be given the opportunity to discuss the team recommendations regarding further assessment, if any, with the appropriate representative of Private Agency if he chooses, and the agency is willing to provide this input.

3. An assistive technology assessment is to be scheduled no later than July 30, 2013 on a date agreeable to Petitioner and communicated through his attorney. Scheduling of this assessment is to follow the same parameters for scheduling described in ¶1, regarding scheduling the physical endurance assessment. This assessment must address, among any other relevant factors, whether the use of voice to text/text to voice technology is recommended for Student to access his education.

4. Within 15 school days of DCPS' receipt of all assessments described here, the physical endurance assessment, the assistive technology assessment and any other MDT recommended vocational assessments, DCPS will convene an MDT meeting including Petitioner and his mother and advisors, if he chooses to include them, to review and revise, as appropriate Student's IEP.

5. As compensatory education, Student will attend the Private Agency

Program in the summer of 2013. If he is not able to attend this program on a full time basis, DCPS obligation to fund the program is voided.

6. Student is to receive an additional 30 hours of tutoring in reading, writing and mathematics from a provider of his choosing as compensatory education for services not received during the 2012-2013 school year. This tutoring is to focus on the functional skills Student will require to be successful in the work environment.

**IT IS SO ORDERED:**

June 20, 2013  
Date

  
Erin H. Leff  
Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 USC §1451(i)(2)(B).