

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Student Hearing Office  
810 First Street, NE, Second Floor  
Washington, DC 20002

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on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.<sup>1</sup>

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

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2012 FEB 7 AM 9:30

OSSE  
STUDENT HEARING OFFICE

**HEARING OFFICER DETERMINATION**

**BACKGROUND AND  
PROCEDURAL HISTORY**

Student is a \_\_\_\_\_ year old male, who will turning \_\_\_\_\_ in less than a month. He currently attends \_\_\_\_\_ grade at a DCPS senior high school.

On October 28, 2011, Petitioner filed a Complaint, alleging that Respondent DCPS failed to develop an IEP that reflects student's substantial learning needs and deficits in reading comprehension, written expression, speech/language and math; denied Student a free appropriate public education ("FAPE") by failing to implement the IEP and provide appropriate specialized instruction and a full range of special education services; and failed to ensure meaningful parental participation by excluding Petitioner from a 9/29/10 IEP meeting. As relief for these alleged denials of FAPE, Petitioner requested that Student be placed in an accredited special education school that offers an extended program with options for a diploma until age 21 and intensive supports in reading and math curricula, comprehensive speech and language intervention, and integrated vocational training.<sup>1</sup>

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<sup>1</sup> The hearing acknowledges that IDEA requires a State to make FAPE available to all children residing in the State between the ages of 3 and 21, inclusive. 34 C.F.R. § 300.101(a). However, the District of Columbia requires its local educational agencies ("LEAs") to make FAPE available to all disabled children between the ages of 3 and 22 who reside within or are wards of the District. See 5 D.C.M.R. § 3002.1.

On November 14, 2011, DCPS filed its Response, which consisted of twenty numbered paragraphs that denied the allegations of the Complaint and asserted facts and claims in support of DCPS's position that it did not deny Student a FAPE.

The parties chose to participate in mediation in lieu of a resolution session. The mediation process began on November 22, 2011. Although Petitioner and the mediator were of the opinion that an agreement which narrowed the issues for hearing had been reached, DCPS denied that there was an agreement. Ultimately, the hearing officer determined that there was no enforceable agreement and the matter was scheduled for hearing on the original claims alleged in the Complaint. The 45-day timeline ran from November 28, 2011 through January 11, 2012, which was the initial HOD deadline.

The due process hearings in this case were initially scheduled for December 19 and 20, 2011. The hearing was initially convened on December 19, 2011. However, on Petitioner's Emergency Motion for a Continuance and subsequent Amended Motion for a Continuance, the hearings were rescheduled to January 25 and 26, 2012, with the result that the HOD deadline was extended to February 6, 2012. The hearing officer also conducted a 6.5 hour hearing on January 11, 2012 to receive compelled testimony from three DCPS employees pursuant to Petitioner's Notices to Appear.

The hearing officer convened the final two-day due process hearing on January 25 and 25, 2012, as scheduled.<sup>2,3</sup> DCPS's disclosed documents numbered 1 through 15 (Respondent's Exhibits 1 – 15) were admitted into the record without objection. Petitioner's disclosed documents numbered 1 through 66 (Petitioner's Exhibits 1 – 66) were handled as follows: Petitioner's Exhibits 1-9, 12-31, 33-34, 41-52, 54-61 and 65-66 were admitted without objection. Petitioner's Exhibits 10-11, 32, 35-36, 38-39, 62-63 and 64 were admitted over objection. Petitioner's Exhibit 37 was conditionally excluded as incomplete and not clearly relevant to Student, and the condition was never removed with the result that the document ultimately was excluded.

Over the course of the two-day hearing, the hearing officer received opening statements, testimonial evidence, and closing statements from both parties. Thereafter, the hearing officer concluded the hearing.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

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<sup>2</sup> Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

<sup>3</sup> Between the filing of the Complaint and the final two-day hearings in January 2012, the parties filed an array of Motions, Oppositions/Responses thereto, Requests for Notices to Appear, and other pleadings, and the hearing officer issued an array of responsive Orders. *See* the Administrative Record.

the assessments. The Plan lists appropriate annual goals for the long-range goals and interests identified.<sup>7</sup>

4. Student's previous IEP is dated October 25, 2010. This IEP required Student to receive 14 hours of specialized instruction outside general education. It included all of the goals listed in Student's May 23, 2011 IEP, repeated verbatim for the most part, with one additional goal in each of the three academic areas. This IEP also contained the exact same present level of educational performance information and needs statements as Student's May 23, 2011.<sup>8</sup>
5. The Post-Secondary Transition Plan included in Student's October 25, 2010 IEP was substantially the same as the Plan in Student's May 23, 2011 IEP, in that the long-range goals were similar, assessments were listed without any results, and many of the annual goals were exactly the same.<sup>9</sup>
6. Student's November 2, 2009 IEP identified his primary disability as SLD and entitled him to receive 14 hours of specialized instruction in general education and 60 minutes per week of speech-language pathology services outside general education. The two annual goals in the area of written expression from Student's October 25, 2010 IEP were repeated verbatim in this IEP, along with one additional goal, and one of the repeated goals also appears verbatim in Student's May 23, 2011 IEP. The Post-Secondary Transition Plan was very similar to the Plan in Student's October 25, 2010 IEP, in that the long-range goals were similar, assessments were listed without any results, and some of the annual goals were exactly the same.<sup>10</sup>
7. A student's IEP goals should be formulated based upon standardized testing that's been administered, progress on existing IEP goals, if any, observational data, report card data, and work samples. A student's IEP goals should remain the same from year to year only where the student has not made progress toward the goals.<sup>11</sup>
8. In connection with Student's October 25, 2010 IEP, DCPS conducted an analysis of existing data for Student, which consisted of a review of the IEP services, Student's attendance record, academic achievement testing administered to Student on October 7, 2010, and speech/language assessments administered to Student on October 19, 2010.<sup>12</sup>
9. The IEP team determines how it is going to monitor a student's progress, what will demonstrate sufficient progress, and how often progress will be measured. One word comments, such as "progressing," are not very helpful in monitoring progress because they do not give any specific information concerning how a student is progressing with respect to his goals.<sup>13</sup>

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<sup>7</sup> Respondent's Exhibit 5.

<sup>8</sup> Compare Respondent's Exhibits 5 and 6; testimony of educational consultant.

<sup>9</sup> Respondent's Exhibit 6.

<sup>10</sup> Respondent's Exhibit 7; Petitioner's Exhibit 31.

<sup>11</sup> Testimony of educational consultant.

<sup>12</sup> Petitioner's Exhibits 29 and 44.

<sup>13</sup> Testimony of educational consultant.

10. Student's annual IEP goals have accuracy criterion, such as "4 out of 5 trials," or "earn at least an 80%." The IEPs also state that Student's progress is to be measured via work samples, observations and/or verbal response.<sup>14</sup>
11. If a student's annual IEP goals are not mastered by the end of the 4<sup>th</sup> quarter, then the student has not made expected progress. If a student has not mastered his IEP goals in one year, the IEP team should review the goals to determine why and whether appropriate services were provided to the student.<sup>15</sup>
12. Of the IEP Progress Reports included in the record for this case, one report covers SY 2009/10 and merely indicates that Student was "Progressing" on each of his annual IEP goals by the end of the school year. The other report covers the second reporting period of SY 2010/11 and states that Student was "Progressing" on most of his annual goals but two of the goals were "Not Introduced" and one goal was "Just Introduced."<sup>16</sup>
13. Petitioner is entitled to have the hearing officer draw the following adverse inference against DCPS: DCPS did not track Student's progress toward reaching his IEP goals during any part of SY 2010/11, except for the period from October 20, 2010 through January 21, 2011, and for any part of SY 2011/12 up through December 21, 2011.<sup>17</sup> This adverse inference is appropriate because, despite DCPS's obligations under IDEA to maintain Student's educational records and to allow Petitioner an opportunity to inspect and review those educational records, the only IEP Progress Reports DCPS has provided to Petitioner during the course of this administrative action cover SY 2009/10 and the period during SY 2010/11 from October 20, 2010 through January 21, 2011.
14. A student's performance in class, as reflected by his grades, is one indication of whether or not a student is receiving or has received the supports specified in his IEP. IEP Progress Reports and Progress Reports also tend to indicate whether special education services are being provided to a student.<sup>18</sup>
15. During SY 2009/10, Student received the following grades: A in Math Resource SC; A- in English I; C+ in Extended Literacy 10; C in Biology I and Geometry; and D in World History/Geo 2, Algebra I, and Environmental Science. During SY 2010/11, Student received the following grades: A in Computer Applications II, U.S. Hist./Geo., and Art 1; B+ in Learning Lab 3: Career Explora.; B in Computer Applications I and Algebra II & Trigonometry; C+ in English II; and C in Spanish I and Spanish II. As of the end of Advisory 1 during SY 2011/12, Student had earned a final grade of B in Physical Education, and he was earning an A in Journalism I, a C in Probability & Statistics (1.0), and a C- in Business Administration Mgmt.<sup>19</sup>

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<sup>14</sup> Testimony of educational consultant; *see* Petitioner's Exhibits 5 - 7.

<sup>15</sup> Testimony of educational consultant.

<sup>16</sup> Respondent's Exhibits 3 and 4; Petitioner's Exhibit 33 at 2-3; *see* Petitioner's Exhibit 34 at 6-9.

<sup>17</sup> At the January 26, 2012 due process hearing in this case, the hearing officer granted Petitioner's oral motion for an adverse inference.

<sup>18</sup> Testimony of SEC at current school.

<sup>19</sup> Petitioner's Exhibits 1 and 14; Respondent's Exhibit 1.

## ISSUE(S)

The issues to be determined are as follows:

1. Did DCPS fail to develop an IEP that reflects student's substantial learning needs and deficits in reading comprehension, written expression, speech/language and math, because Student requires an IEP that includes substantial special education services in and out of general education, more accommodations, more precise and appropriate goals, significant speech/language services, and a transition plan reflecting that he may not be college bound and needs more focus on vocational training?
2. Did DCPS deny Student a FAPE by failing to implement Student's IEP and provide appropriate specialized instruction and a full range of special education services?
3. Did DCPS fail to ensure meaningful participation by excluding Petitioner from a 9/29/10 IEP meeting?

## FINDINGS OF FACT<sup>4</sup>

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is a     year-old male, who will turn     years old in less than one month. He currently attends     grade at a DCPS senior high school.<sup>5</sup>
2. Student's current IEP is dated May 23, 2011. The IEP identifies Student's primary disability as Specific Learning Disability ("SLD") and requires Student to receive 14 hours per week of specialized instruction outside general education, 7 hours of which are to be used to address implementation of Student's transition plan during the first semester of the school year, and 7 hours per week of specialized instruction outside general education. The IEP includes annual goals in the academic areas of mathematics, reading and written expression.<sup>6</sup>
3. The Post-Secondary Transition Plan included in Student's May 23, 2011 IEP identifies college/university, community college, and vocational training as post-secondary education and training goals; full-time competitive employment in the field of information technology as the employment goal; and purchasing a home to live alone or living with friends as independent living goals. The Plan lists an array of assessments that purportedly were administered in late 2010 to early 2011, but no results are listed for

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<sup>4</sup> To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved..

<sup>5</sup> See Complaint.

<sup>6</sup> Respondent's Exhibit 5; Petitioner's Exhibits 26 and 28.

16. As of August 27, 2011, Student's Full Scale IQ was 83, which is in the Low Average range. His overall thinking and reasoning skills with and without using words, Verbal Comprehension and Perceptual Reasoning, respectively, fell within the low average range as well, while his working memory and processing speed skills fell within the average range.<sup>20</sup>
17. As of August 17, 2011, Student's reading skills ranged from the 4<sup>th</sup> to 6<sup>th</sup> grade levels based on the Woodcock-Johnson III Tests of Achievement ("WJ-III"). However, on the Wechsler Individual Achievement Test-III ("WIAT-III"), which is more comparable to real-life reading, Student's reading skills ranged from the 2<sup>nd</sup> to 6<sup>th</sup> grade levels, with the 2<sup>nd</sup> grade level representing his reading comprehension score. Moreover, as revealed by Student's scores on the WIAT-III, Student's math skills ranged from the 4<sup>th</sup> to 6<sup>th</sup> grade levels, and his written language skills ranged from the 5<sup>th</sup> to 6<sup>th</sup> grade levels.<sup>21</sup> However, DCPS did not have this data in its possession on May 23, 2011 when it developed Student's current IEP.
18. As of October 7, 2010, as revealed by Student's scores on the WJ-III, Student's reading skills ranged from the 3<sup>rd</sup> to 7<sup>th</sup> grade levels, his math skills ranged from the 3<sup>rd</sup> to 8<sup>th</sup> grade levels, with the 8<sup>th</sup> grade level representing his computational score, and his written language skills as represented by sentence writing was at the 6<sup>th</sup> grade level.<sup>22</sup>
19. As of April 10, 2007, Student's reading skills ranged from the 2<sup>nd</sup> to 5<sup>th</sup> grade level based on the WJ-III, his math skills ranged from the 2<sup>nd</sup> to 4<sup>th</sup> grade levels, and Student's writing fluency was at a 3<sup>rd</sup> grade level.<sup>23</sup>
20. The skill sets measured by the WJ-III and the WIAT-III are similar enough to allow the standard scores from the two instruments to be compared for purposes of determining progress over time.<sup>24</sup> A comparison of Student's scores on achievement testing administered in April 2007 and October 2010 reveal that Student made more than *de minimis* progress in improving his reading, math and written language skills between 2007 and 2011.
21. To qualify for educational speech language services under DCPS guidelines, a speech language disability must impact education and the student must score at least 1.5 standard deviations below the mean standard score. By contrast, in a clinical setting, all weaknesses are addressed, whether or not they affect education.<sup>25</sup>
22. Student received a speech-language assessment in October 2010 by DCPS, DCPS's evaluation was a comprehensive evaluation that looked at Student's entire set of

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<sup>20</sup> Petitioner's Exhibit 48 at 2; testimony of psychologist.

<sup>21</sup> Petitioner's Exhibit 48 at 7-8; testimony of psychologist.

<sup>22</sup> See Petitioner's Exhibit 44 at 5; testimony of psychologist.

<sup>23</sup> Petitioner's Exhibit 40 at 2.

<sup>24</sup> Testimony of psychologist.

<sup>25</sup> Testimony of DCPS speech pathologist.

communication skills, and Student received a Core Language Score of 98 during that evaluation, where 100 represented the score of a typical student, with the result that he did not meet DCPS's standards for speech language services, especially since there was no significant difference between Student's expressive and receptive language scores.<sup>26</sup>

23. Student received a speech-language assessment in August 2011 by Petitioner's expert psychologist. Student did not qualify for speech language services under DCPS standards based on the results of this evaluation, because Student passed the language tests administered when one takes into account that Student received a low score on the Grammaticality Judgment subtest of the Comprehensive Assessment of Spoken Language ("CASL"), which skewed his overall composite score on the CASL, and Student received a low score on the Expressive Vocabulary subtest from the WIAT-III Oral Language & Listening Comprehension Assessment, which skewed his overall oral expression score.<sup>27</sup>
24. DCPS's expert speech language pathologist in this action spoke with Student's case manager and four of his teachers to determine whether Student has any speech/language issues from their respective perspectives, and all of the educators said Student is doing well. None of the educators were of the opinion that Student has a speech language problem that affects his academics.<sup>28</sup>
25. Student does not qualify for educational speech language services under DCPS guidelines, because he does not have a speech language disability that impacts his education and his scores on objective speech language assessments that have been administered do not fall at 1.5 standard deviations below the mean standard score.
26. Student's current school utilizes four-by-four class programming, with the result that students take four classes each semester and each class represents 7 hours of class time per week.<sup>29</sup>
27. During SY 2009/10, Student received specialized instruction in the following classes: Extended Literacy 10, which was co-taught by a general education teacher and a special education teacher; English 1, which was taught by a licensed special education teacher; and Math Resource SC, which was taught by a licensed special education teacher.<sup>30</sup>
28. Student failed to receive English I and Algebra I during SY 2009/10, with result that he was technically still a 9<sup>th</sup> grader at start of SY 2010/11 and had to take those classes before he could officially be classified as a 10<sup>th</sup> grader. However, this oversight was due to the special education coordinator's failure to schedule Student to take the necessary

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<sup>26</sup> Testimony of DCPS speech pathologist; Respondent's Exhibit 2.

<sup>27</sup> Testimony of DCPS speech pathologist; Petitioner's Exhibit 48.

<sup>28</sup> Testimony of DCPS speech pathologist.

<sup>29</sup> Testimony of SEC at current school; see Petitioner's Exhibit 54 at 28.

<sup>30</sup> Testimony of SEC at current school; Petitioner's Exhibits 1 and 9; Respondent's Exhibit 1.

classes during SY 2009/10, and was not due to any failure on Student's part or any inadequacy in his IEP.<sup>31</sup>

29. During SY 2009/10, DCPS provided Student with speech-language pathology services in a group of 2-3 students during the period extending from September 1, 2009 through at least March 30, 2010, unless the service provider could not locate Student, the provider was not available, student was unavailable, or school was closed.<sup>32</sup>
30. During SY 2010/11, Student received specialized instruction in the following classes: Learning Lab 3/Career Exploration 1, which was taught by a special education teacher; English 2, which was co-taught by a general education teacher and a special education teacher; and Algebra II and Trigonometry, which was taught by a special education teacher.<sup>33</sup>
31. In his Career Exploration class during SY 2009/10, Student learned how to apply to colleges and take the SAT. He also took the PSAT, although he does not know his score. Student has the potential to go to college, but he would also benefit from some vocational training, such as internships, so that he will also have the option of pursuing a career after high school graduation.<sup>34</sup>
32. During SY 2011/12, the teacher for Student's English III class was a special education teacher.<sup>35</sup>
33. During the first semester of SY 2011/12, Student took Business Administration from a teacher who was not a licensed special educator. Student's special education case manager only stopped in to visit the class approximately 1 to 3 times throughout the semester. The teacher was concerned about the accommodations and modifications Student was entitled to receive. She asked Student's case manager, but it wasn't until second semester of SY 2011/12, well after the class had ended, that the case manager told the teacher what accommodations Student was entitled to receive. In the absence of that information, the teacher provided Student with extended time on homework and tests, and she allowed Student to redo work if necessary. For example, on one occasion Student turned in a paper that was filled with information that he "cut and pasted" from other sources, which constituted plagiarism. The teacher allowed Student to redo the paper with her in class and after school. Student ultimately earned a C in the class by doing the work to bring up his grade. The grade was based on warm-ups, class work, homework, projects, quizzes, tests and participation. Student was totally engaged in the class, and he loved taking the lead. There are no prerequisites for the class, but a student needs to be able to read at the 6<sup>th</sup> grade level and do basic math on a 5<sup>th</sup> to 8<sup>th</sup>-9<sup>th</sup> grade level. The teacher felt that Student could do the work in her class.<sup>36</sup>

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<sup>31</sup> Petitioner's Exhibit 52 at 4-5; Petitioner's Exhibits 60-61.

<sup>32</sup> Petitioner's Exhibit 45 at 9-15; *see also*, Petitioner's Exhibit 34 at 5.

<sup>33</sup> Testimony of SEC at current school; Petitioner's Exhibit 1; *see* Respondent's Exhibit 6 at 1.

<sup>34</sup> Testimony of educational consultant; Respondent's Exhibit 51.

<sup>35</sup> Testimony of SEC at current school; Petitioner's Exhibit 14.

<sup>36</sup> Testimony of teacher at current school; *see* Petitioner's Exhibit 64 at 5-6.

34. Although DCPS presented testimony that Student is receiving the intensive instructional support and targeted interventions called for in his current IEP, DCPS was unable to support this testimony with precise information or any documentation tending to show when, where and to what extent Student is receiving the support and interventions.<sup>37</sup>
35. DCPS has provided some pullout special education services to Student, but those services are not reflected on Student's schedule and there is no other documentation of those services.<sup>38</sup> Hence, based on the record in this case it is not possible to determine exactly how many hours of pullout services Student has received.
36. Co-teaching is not the only method of providing a student with specialized instruction in general education. Other methods include collaboration between special education and general education teachers, social workers going into general education classes, and utilization of aides. However, DCPS has no documentation indicating whether, and/or to what extent, such other methods have been used to provide push-in services to Student.<sup>39</sup>
37. Petitioner presented testimonial evidence to the effect that Student has said that he has to go to see his case manager to receive specialized instruction and is not otherwise receiving specialized instruction or receiving any of his IEP accommodations besides extended time. Similarly, DCPS presented testimonial evidence that Student received pullout services during SY 2010/11 that are not reflected on his class schedule and is also receiving pullout and push-in services during the current school year that are not reflected on his class schedule. However, all of this testimonial evidence was too vague, imprecise and lacking in indicia of reliability to support a finding of fact regarding whether, and to what extent, Student has been and is receiving the specialized instruction required under his IEPs.<sup>40</sup>
38. Petitioner in this action is Student's maternal uncle. Student has lived with Petitioner almost continuously since 1994, including a number of years when Student lived with both Petitioner and Student's maternal grandmother, but excluding a period of time in 2010 when Student resided with a different maternal uncle. In March 1997, Student's biological mother signed, in the presence of a Judge of the Superior Court of District of Columbia, a document consenting to the adoption of Student by Petitioner. However, the record does not include a subsequent Order of Adoption. Instead, the record includes a Custody Order, which awarded Petitioner permanent, sole legal and physical custody of Student on December 5, 2011, and which does not indicate that Petitioner was at any point considered by the Court to be Student's adoptive father.<sup>41</sup>
39. A September 29, 2010 MDT meeting was scheduled to take place for Student and DCPS did not allow Petitioner to participate in the meeting. Instead, DCPS invited another one

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<sup>37</sup> Testimony of SEC at current school.

<sup>38</sup> Testimony of SEC at current school.

<sup>39</sup> Testimony of SEC at current school.

<sup>40</sup> See testimony of SEC at current school; testimony of educational consultant; testimony of Parent.

<sup>41</sup> Testimony of Petitioner; Petitioner's Exhibits 58 and 59.

of Student's maternal uncles who had physical custody of Student at the time. In doing so, DCPS relied upon the following documentation: a July 20, 2010 Order of the Superior Court of the District of Columbia, Family Court, Domestic Relations Branch, which ordered that Student would continue to reside at the address where he was living with the other uncle, that the other uncle could enroll Student in school and in the summer work program and open a bank account for Student, but also allowed Petitioner liberal visits with Student and identified Petitioner as Student's paternal uncle; a July 20, 2010 Civil Protection Order, which, *inter alia*, required Petitioner to stay at least 100 feet away from the other uncle, his vehicle, and the residence at which he resided with Student; and an August 26, 2010 "Sworn Statement of Other Primary Caregiver," in which the other uncle stated that Student's biological mother died on 10/21/01, Student's maternal grandmother, with whom Student resided after the mother's death, died on 6/17/10, and Student had come under the other uncle's primary care and support since June 17, 2010.<sup>42</sup>

40. The parent who has parental rights as identified in DCPS's database is the parent who is invited to meetings.<sup>43</sup> Based on the documents in DCPS's possession at the time, DCPS reasonably concluded that the other uncle with whom Student was residing was Student's "parent" for purposes of the September 29, 2010 meeting and any other IEP meeting held in connection with Student's October 25, 2010 IEP.
41. Student is a successful cameraman at his current DCPS high school, and he films various events for the school. Student is also in the robotics club at his current school. Student feels good about the success he's achieved in these non-academic areas.<sup>44</sup>
42. As of December 12, 2011, Student had earned 22.5 Carnegie units toward graduation. He needs an additional 7 Carnegie units in certain specific subjects to meet the graduation requirements, and if he achieves passing grades in his current courses, he will earn 3.5 of those remaining 7 Carnegie units.<sup>45</sup>
43. As of November of 2011, Student had a cumulative GPA of 2.51 and he was ranked 35 out of the 156 students in his class.<sup>46</sup>
44. Student has stated that he is happy at his current DCPS high school and would like to remain there; however, Student does not want to eliminate any options if he can obtain a better education elsewhere.<sup>47</sup>
45. All of the teachers at Student's current DCPS high school have stated that they like Student. Student's teachers generally describe him as a hardworking student with good attendance. He is generally cooperative and respectful and has many friends at school.

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<sup>42</sup> Respondent's Exhibits 11 and 13; *see also*, Respondent's Exhibit 10 at 2-3; Petitioner's Exhibit 66.

<sup>43</sup> Testimony of SEC at current school.

<sup>44</sup> Testimony of educational consultant.

<sup>45</sup> Petitioner's Exhibit 5.

<sup>46</sup> Petitioner's Exhibit 5.

<sup>47</sup> Testimony of educational consultant.

Student puts forth effort to complete class assignments, although his effort is not always maximal. Student requires support in some of his classes, and he willingly seeks and receives assistance.<sup>48</sup>

### CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

#### **1. Alleged Failure to Develop an Appropriate IEP**

IDEA defines a free appropriate public education to mean special education and related services that, *inter alia*, are provided in conformity with an IEP. 34 C.F.R. § 300.17(d). In this context, "related services" means, *inter alia*, such developmental, corrective and other supportive services as are required to assist a child with a disability to benefit from special education, including speech-language pathology services. 34 C.F.R. § 300.34(a). Insofar as a state is required to provide a disabled child with a FAPE, it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Board of Education of the Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982) ("*Rowley*"). Hence, if the child is being educated in the regular classrooms of the public education system, the child's IEP should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Id.*

Ultimately, "a student's IEP must be 'reasonably calculated to enable the child to receive educational benefits.'" *Hinson v. Merritt Educational Ctr.*, 579 F.Supp.2d 89 (D.D.C. 2008) (quoting *Rowley*, 458 U.S. at 206-7). "An IEP need not be the best possible one, nor one that will maximize the child's educational potential; it must only provide the child a basic floor of opportunity. [However, t]he educational benefits cannot be de minimis; rather, they must represent 'meaningful progress' for the child's education." *Socorro Indep. Sch. Dist. v. Angelic Y.*, 107 F. Supp. 2d 761 (W.D. Tex. 2000) (citations omitted).

In the instant case, Petitioner asserts that Student's October 25, 2010 and May 23, 2011 IEPs are inadequate to meet Student's needs as a result of his significant deficits. Petitioner argues that Student's ability level is higher than his academic achievement levels, which demonstrates that Student has a lot of unrealized potential. Petitioner further points out that Student's IEPs have nearly identical goals, some of which were carried over verbatim from Student's 2009 IEP, with the result that the goals are not tailored specifically to meet Student's needs. Petitioner asserts that Student has made little to no progress and argues that, as a result, Student's IEP goals should have been adjusted to reflect that lack of progress. Petitioner also maintains that Student has significant speech/language delays, and that his IEPs are inappropriate for failure to include speech/language services to address those delays. Finally, Petitioner argues that Student requires a transition plan that offers more vocational training.

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<sup>48</sup> Testimony of Parent; Petitioner's Exhibits 51 and 52.

DCPS disagrees with Petitioner's position, pointing out that an LEA does not have to "maximize" a disabled child's opportunity. Instead, governing case law holds that a disabled child's IEP must be reasonably calculated to provide educational benefit and should permit the child to receive passing marks and advance from grade to grade. DCPS argues that Student has been successful both in and outside of class at his current DCPS school. DCPS also maintains that Student does not require speech/language services and insists that Student has done quite well in school without the services. DCPS also disagrees that Student's transition plans are inappropriate for failure to focus more on vocational training. Finally, DCPS complains that although Petitioner presented evidence that Student's IEP goals were unchanged, Petitioner failed to present any evidence as to how exactly the IEP should be changed.

The evidence in this case reveals that although DCPS failed to consistently track Student's progress toward reaching his IEP goals during SY 2010/11 and the first semester of SY 2011/12, Student was able to achieve passing marks and advance to the next grade under his October 2010 IEP, and Student has received passing marks during the first semester of SY 2011/12 under his May 23, 2011 IEP. Petitioner further asserts that Student has made little to no progress under his 2010 and 2011 IEPs; however, objective test data reveals that Student made more than *de minimis* progress between 2007 and 2010. This was the only data in DCPS's possession at the time it developed Student's 2010 and 2011 IEPs, and based on IDEA regulations requiring reevaluations at least once every three years, Student's 2010 assessment data was still valid when DCPS relied upon it in connection with the development of his 2010 and 2011 IEPs. *See* 34 C.F.R. § 300.303(b)(2) (reevaluations to be conducted at least every 3 years); *Jaccari J. ex rel. Sandra J. v. Bd. of Educ. of City of Chicago, District No. 299* (N.D. Ill. 2010) (adequacy of IEP can only be determined as of time it is offered to student and not at some later date) (citation omitted). Furthermore, the evidence in this case reveals that Student does not qualify for speech language services in the educational environment because he does not meet DCPS criteria for the provision of such services. Under these circumstances, the hearing officer concludes that Petitioner has failed to meet its burden of proving that Student's October 25, 2010 and May 23, 2011 IEPs are inappropriate for failure to address Student's needs and deficits in reading comprehension, written expression, speech/language and math. *See Socorro Indep. Sch. Dist., supra* (IEP need not maximize the child's educational potential; it must only provide a basic floor of opportunity).

On the other hand, because Student was making progress under his October 2010 IEP, DCPS's inclusion of substantially the same academic annual goals from his October 25, 2010 in his May 23, 2011 IEP constituted a procedural violation of IDEA in connection with the development of Student's May 23, 2011 IEP. Similarly, the evidence in this case reveals that Student's Transition Plans have not changed substantially since 2009. Student learned how to apply to colleges and took the PSAT under the transition plan in his 2009 IEP, and he continued to focus on college-oriented goals under the transition plan in his 2010 IEP. Although Student has the potential to go to college, now that he is in the 11<sup>th</sup> grade and nearing the end of his high school career, he requires vocational training, in addition to the college-oriented training he has been receiving, so that he will also have the option of pursuing a career after graduation in the event he does not realize his potential to attend college. Instead of revising Student's Transition Plan to meet that need, DCPS has continued to provide Student with substantially the same Transition Plan he has had for the past three years.

Under these circumstances, the hearing officer concludes that Petitioner has met its burden of proving the inappropriateness of Student's May 23, 2011 IEP for failure to contain academic and transition goals specifically tailored to address Student's needs. Although this procedural violation on DCPS's part does not rise to the level of a denial of FAPE, the hearing officer will nevertheless order DCPS to convene an IEP meeting to review and revise Student's current IEP as necessary to ensure that the annual academic and transition goals in the current IEP goals are tailored to Student's specific needs. See 34 C.F.R. § 300.513(a)(2) (procedural inadequacies constitute denial of FAPE only where they impede right to FAPE, significantly impede parent's opportunity to participate, or cause deprivation of educational benefit); 34 C.F.R. § 300.513(a)(3) (granting hearing officer authority to order LEA to comply with procedural requirements); *Letter to Armstrong*, 28 IDELR 303 (OSEP 1997) (hearing officers must have authority to order relief necessary to ensure student receives FAPE).

## **2. Implementation of IEP**

As noted above, a FAPE consists of special education and related services that, *inter alia*, are provided at an appropriate secondary school in conformity with an IEP. See 34 C.F.R. § 300.17. Hence, an LEA denies a disabled student FAPE if it fails to implement the child's IEP. However, to "prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP." *Catalan v. District of Columbia*, 478 F. Supp. 2d 73 (D.D.C. 2007) (citation omitted). In other words, the deviations from the IEP must be material. *Id.*

In the instant case, Petitioner asserts that DCPS has failed to implement Student's IEPs since SY 2009/10 by failing to provide him with the specialized instruction required under his IEPs. DCPS disagrees, pointing out that Petitioner's evidence regarding implementation is limited to secondhand information that does not make clear exactly how much specialized instruction Student is receiving in and outside of general education. DCSP further argues that even if Student's IEP is not being implemented, there has been no harm to Student because he is doing very well in school.

The evidence in this case reveals that Student's November 2, 2009 IEP entitled him to receive 14 hours per week of specialized instruction in general education and 60 minutes per week of speech-language pathology services outside general education, and during SY 2009/10 Student received specialized instruction in his Extended Literacy 10, English 1, and Math Resource SC classes, as well as speech-language pathology services for the period extending from September 1, 2009 through at least March 30, 2010. Although the evidence does not reveal how many hours per week Student attended each class during SY 2009/10, the hearing officer concludes that the evidence is sufficient to demonstrate that DCPS substantially complied with Student's November 2, 2009 IEP. Hence, Petitioner has failed to meet its burden of proof on this claim with respect to Student's 2009 IEP. See *Catalan v. District of Columbia*, *supra*.

With respect to Student's October 25, 2010 IEP, the evidence reveals that the IEP required Student to receive 14 hours per week of specialized instruction outside general education, and during SY 2010/11 Student received specialized instruction in his Learning Lab 3/Career Exploration 1, English 2, and Algebra II and Trigonometry classes. The evidence further reveals that one class at Student's current school, which he also attended during SY 2010/11, equals seven hours per week. Based on this evidence, the hearing officer concludes that the evidence is sufficient to demonstrate that DCPS substantially complied with Student's October 25, 2010 IEP. Hence, Petitioner has failed to meet its burden of proof on this claim with respect to Student's 2010 IEP. *See Catalan v. District of Columbia, supra.*

Finally, as for Student's May 23, 2011 IEP, the evidence reveals that the IEP requires Student to receive 14 hours per week of specialized instruction outside general education and 7 hours per week of specialized instruction in general education, including 7 hours per week of specialized instruction targeted to implementation of his transition plan during the first semester of the school year. Moreover, the only credible evidence of record with respect to implementation of Student's current IEP demonstrates that Student is receiving specialized instruction in his English II class only, which equals 7 hours per week of specialized instruction, and that Student's general education teacher in business administration sought advice from Student's case manager regarding Student's IEP accommodations but the case manager failed to provide the required information prior to the end of the semester-long course. Hence, Petitioner has met its burden of demonstrating that DCPS has failed to implement Student's current IEP by failing to provide Student with all of the specialized instruction required under that IEP.

As relief for this and other alleged violations of FAPE, Petitioner has requested that Student be placed in an accredited special education school other than his current DCPS high school that offers an extended program with options for a diploma until age 21 and meets certain other specified requirements. However, the evidence in this case proves that Student has been successful both inside and outside of the classroom at his current school, his teachers like him, he has many friends at the school and is happy there, and he would like to remain at the school. Moreover, as the school was able to substantially implement Student's IEP calling for 14 hours per week of specialized instruction outside general education, the evidence demonstrates that the school has the ability to implement the current IEP.

Under these circumstances, the hearing officer will deny Petitioner's request for a different location of services and will instead order DCPS to revise Student's schedule to provide him with the full amount of specialized instruction in and outside of general education required under his May 23, 2011 IEP, and to keep documentation evidencing that Student is actually being provided with the required amount of specialized instruction.

### **3. Meaningful Participation by Parent**

The IEP team for a disabled child must include the child's parents. *See* 34 C.F.R. § 300.321(a)(1). Moreover, each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP team meeting or are afforded the opportunity to participate. 34 C.F.R. § 300.322(a). For these purposes, "parent" means a child's biological or adoptive parent; a foster parent, unless State law or regulations prohibit a foster

parent from acting as a parent; a guardian generally authorized to make educational decisions for the child, unless the child is a ward of the State; an individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or an appointed surrogate parent. 34 C.F.R. § 300.30(a). If a judicial decree or order identifies a specific person to act as the "parent" of a child or to make educational decisions on behalf of the child, then such person shall be determined to be the "parent." 34 C.F.R. § 300.30(a).

In the instant case, Petitioner asserts that DCPS violated IDEA by unfairly excluding Petitioner from the IEP meetings held in connection with Student's October 25, 2010 IEP meeting(s) on or about September 29, 2010 and/or October 25, 2010.<sup>49</sup> In support of this claim, Petitioner argues that although physical custody of Student had been awarded to a different party during the time period when the meeting(s) took place, Petitioner's rights as Student's adoptive parent were never cut off or transferred to the other party. However, as DCPS points out, the evidence in this case does not support Petitioner's claim that he is or he ever was Student's adoptive parent. Instead, the evidence proves only that Student resided with Petitioner for most of Student's life, including a period of time when Student and Petitioner resided with Student's maternal grandmother. After the grandmother's death, Student resided with a different maternal uncle pursuant to a July 20, 2010 Court Order, which also granted the other uncle the authority to enroll Student in school. The other uncle had also obtained a July 20, 2010 Civil Protection Order, which required Petitioner to stay at least 100 feet away from the other uncle and the residence where he resided with Student. The September and/or October 2010 IEP meetings were held during the time when Student was in the other uncle's custody pursuant to the Court Order and the other uncle had the Protective Order against Petitioner. In fact, it wasn't until December 5, 2011, well after the IEP meeting(s) at issue, that the Court awarded Petitioner permanent, sole legal and physical custody of Student.

Under these circumstances, the hearing officer concludes that DCPS acted reasonably when it determined that the other uncle with whom Student was residing at the time of the IEP meeting(s) was Student's "parent" for purposes of the meeting(s), especially since (1) the July 2010 Court Order that granted the other uncle authority to enroll Student in school reasonably could have been construed as an Order that made the other uncle either an individual acting in the place of the biological parent with whom Student lived, the individual who was legally responsible for Student's welfare, or a specific person identified by a judicial order to act as the parent or make educational decisions for Student, within the meaning of 34 C.F.R. § 300.30(a), and (2) Petitioner did not appear to qualify as the "parent" within the meaning of 34 C.F.R. § 300.30(a) during the time at issue. As a result, Petitioner has failed to meet its burden of proof on this claim.

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<sup>49</sup> The administrative record is unclear with respect to whether one or two meetings were held in connection with Student's October 2010 IEP. However, it is clear that any such meeting was held on September 29, 2010 and/or October 25, 2010, and both parties have agreed to have the hearing officer's determine herein whether DCPS unfairly excluded Petitioner from the meeting(s).

**ORDER**

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

1. Within 10 school days of the issuance of this decision, DCPS shall revise Student's schedule to provide him with the full amount of specialized instruction in and outside of general education required under his May 23, 2011 IEP. DCPS shall also keep until Student either graduates high school or turns 22 years old documentation evidencing that Student is actually being provided with the amount of specialized instruction required under his current IEP. Such documentation may consist of tracking logs, class schedules indicating the special education and/or general education certification(s) of the instructor(s), and/or any other documents that reflect the amount of specialized instruction Student has received. DCPS shall provide Parent with access to such documentation, at Parent's request, at least, but no more than, once per advisory.
2. Within 15 school days of the issuance of this Order, DCPS shall convene a full IEP team meeting to review and revise Student's May 23, 2011 IEP as necessary to ensure that the annual academic and transition goals in the current IEP are tailored to Student's specific needs.
3. All other claims and requests for relief in Petitioner's October 28, 2011 Complaint are **DENIED** and **DISMISSED**.

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

Date: 2/6/2012

/s/ Kimm Massey

Kim Massey, Esq.  
Hearing Officer