

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

OSSE
STUDENT HEARING OFFICE
2011 SEP 12 AM 10:25

STUDENT, a minor, by and through
his Parent¹

Petitioner,

v

Erin H. Leff, Hearing Officer

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
ORDER

STATEMENT OF THE CASE

On June 27, 2011 Parent, on behalf of her child ("Student"), filed an Administrative Due Process Complaint Notice ("Complaint"), HO 1,² 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

¹ Personal identifying information is provided in Appendix A, attached hereto.

² 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.

with Disabilities Education Act, as amended ("IDEA"). 20 U.S.C.A. §1415(f)(1)(A) (Supp. 2010). Respondent filed a Response to Parent's Administrative Due Process Complaint Notice (HO 7) on July 25, 2011, and an amended response (HO 12) on August 3, 2011 pursuant to my Memorandum and Order of August 1, 2011 (HO 11).³ In my Prehearing Conference Order (HO 10) I found Respondent's delay in filing a Response to the due process complaint impeded preparation for the prehearing conference and directed Respondent's counsel to be prepared to proceed first at hearing. A resolution meeting was held on July 11, 2011. The parties were not able to reach an agreement and executed a Resolution Period Disposition Form on July 12, 2011 so indicating. HO 5. As a result, the 45 day timeline began to run on June 28, 2011, and my Hearing Officer Determination is due on September 10, 2011.

I held a telephone prehearing conference on June 29, 2011. HO 7. By agreement of the parties, the hearing was scheduled for August 26 and 30, 2011. The hearing was held as scheduled in Room 2006 of the Student Hearing Office.

Following Respondent's resting after presenting its case at the due process hearing, Petitioner made a Motion for Judgment on the issue of placement arguing the Respondent had not established the educational program had provide Student educational benefit and Student had made no meaningful educational progress. Petitioner added there was no support for the

³ On July 22, 2011 Petitioner filed a Motion for Default Judgment, (HO 6), because Respondent, DCPS, had not filed a response to the due process complaint and because Respondent had not held a resolution session as required by IDEA. 34 C.F.R. § 300.510. Upon receipt of Petitioner's Motion for Default Judgment, DCPS filed, on July 25, 2011, its response to the due process complaint. DCPS filed an opposition to the Motion for Default Judgment on July 27, 2011. I found that DCPS' original response, filed July 25, 2011 (HO 7) did not address all the factors required and did not provide Petitioner with sufficient information to fully prepare for the due process hearing. In a Memorandum and Order dated August 1, 2011 (HO 11), I denied the Motion for Default Judgment and ordered DCPS to file an amended response to the due process complaint³ no later than August 4, 2011.

⁴ Beth Levene, supervising attorney with Shaina Pealer, also participated in the hearing and prehearing conferences.

reduction in services to Student and DCPS had not provided required prior written notice when it refused Petitioner's request for a change in placement. Respondent argued in response that the burden of proof remained with the Petitioner and that these issues were discussed at the IEP meetings in which Petitioner participated and signed the IEPs indicating her consent to the IEPs implementation. In sum, Respondent contended there was sufficient evidence in the record to be considered by the finder of fact. I denied the Motion, indicating Petitioner had not met the burden of proof. Moreover, there was no evidence in the record establishing The Harbour School, Petitioner's proposed placement, was appropriate. In addition placement is to be based on the IEP and, again, Petitioner had not met the burden of proof to establish the IEP was not appropriate, as alleged.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2010); and the District of Columbia Municipal Regulations, Title 5e, Chapter 30, Education of Handicapped (2003).

ISSUES

The issues are:⁵

Whether DCPS denied the student a free, appropriate public education by failing to:

- 1) Provide the student all required evaluations on a timely basis from 2009⁶ to the present;
- 2) Provide the student with an appropriate placement from 2009⁷ to the present. This includes the student's placements at _____ and at _____ School;

⁵ As noted in my Prehearing Conference Order, Petitioner's original due process complaint included nine issues. Two were withdrawn during the prehearing conference. The remaining seven issues have been renumbered for ease of reference.

⁶ Petitioner's counsel, subsequent to the prehearing conference, sent an email, on July 27, 2011, indicating all claims would be limited to the two years immediately preceding the filing of the instant due process complaint on June 27, 2011.

⁷ As noted in FN 6, this claim is limited to the two years immediately preceding the filing of the due process complaint on June 27, 2011.

- 3) Develop appropriate Individual Educational Programs (“IEPs”) for the student from 2009 to the present. This includes the IEPs dated February 17, 2009⁸ and May 24, 2010;
- 4) Implement the student’s February 17, 2009 IEP;⁹
- 5) Implement the student’s May 24, 2010 IEP;
- 6) Develop an appropriate IEP for the student for the 2011 – 2012 school year. The student’s last IEP is dated May 24, 2010; and
- 7) Include all required IEP team members at the March 29, 2011 IEP meeting

SUMMARY OF THE EVIDENCE

A. Exhibits

Exhibits admitted on behalf of Petitioner are found in Appendix B¹⁰.

- P-3 2004.05.17 IEP¹¹
- P-4 2008 .04.07 IEP, MDT Meeting Notes, and Transportation Form¹²
- P-5 2009.02.17 IEP
- P-6 2009.02.17 Annual IEP Review Notes
- P-7 2009.08.31 MDT Meeting Notes
- P-8 2009.10.16 MDT Meeting Notes, Behavior Intervention Plan and Completion of Services Form
- P-9 2010.01.28 Prior Written Notice
- P-10 2010.02.01 IEP
- P-11 2010.02.01 MDT Meeting Notes
- P-12 2010.02.01 Assessment Accommodations Consideration Tool
- P-13 2010.04.12 Placement Meeting Notes
- P-14 2010.05.24 IEP
- P-15 2010.05.24 Prior Written Notice and IEP Review / Placement Meeting Notes
- P-16 2010.12.06 Letter of Invitation to a Meeting
- P-17 2011.12.13 Draft IEP

⁸ As noted in FN 6, this claim is limited to the two years immediately preceding the filing of the due process complaint on June 27, 2011.

⁹ As noted in FN 6, this claim is limited to the two years immediately preceding the filing of the due process complaint on June 27, 2011.

¹⁰ Proposed Petitioner exhibits 1, 2, 21, 21, 21, 24, 25, and 28 were not admitted into evidence.

¹¹ Admitted for the limited purpose of showing speech was not included on the IEP despite an evaluation expressing the need for speech services

¹² Admitted for the limited purpose of establishing a benchmark to show how students scores have changed over time

- P-18 2011.01.24 Draft IEP
- P-19 2011.01.24 Consent for Initial Evaluation/Reevaluation
- P-20 2011.03.29 Attendance Sheet, Second Consent for Initial Evaluation/Reevaluation, Draft IEP and Transition Plan, as received from DCPS on July 5, 2011
- P-26 2004.01.14 – Psychoeducational Evaluation (D. Wright)
- P-27 2004.04.29 – Speech/Language Evaluation (Linda D. Bressant)
- P-29 2009.02.13 – Educational Evaluation (A. Andrews)
- P-30 2009.05.05 – Psychological Evaluation (Cathy Wu)
- P-31 2009.05.09 – Physical Therapy Evaluation (Gil Antonio)
- P-32 2009.05.11 – Occupational Therapy Re-Evaluation (Paula Richard)
- P-33 2010.01.11 – Assistive Technology Evaluation (Leonard McPherson)
- P-34 2010.05.26 – Woodcock-Johnson III Tests of Achievement (Caroline L. Jones)
- P-35 2011.02.23 – Educational Evaluation – Woodcock-Johnson III Tests of Achievement (Patricia Drummond)
- P-36 2011.03.19 – Occupational Therapy Evaluation (William L. McGrath)
- P-37 2011.04.09 – Physical Therapy Evaluation (Denise R. Hagley)
- P-38 2011.05.02 – Psychological Evaluation (Stefanie M. Consolla)
- P-39 2011.07.18 – Language Processing Evaluation (Linda E. Spencer)
- P-40 2010.06.18 – 4th Advisory Report Card for School Year 2009-2010 and Final Grades
- P-41 2010.08.23 – 2011.03.29 – Student Discipline Report
- P-42 2010.09.13 – 2010.12.14 – Occupational Therapy Service Tracker
- P-43 2011.03.07 – 2011.06.13 – Occupational Therapy Service Tracker
- P-44 2010.10.28 – Report to Parents on Student Progress
- P-45 2010.12.06 – Class Schedule
- P-46 2010.12.07 – Discipline Referral Form
- P-47 2010.12.16 – Report from Disciplinary Record
- P-48 2011.01.21 – Report to Parents on Student Progress
- P-49 2011.02.08 – Discipline Referral Form
- P-50 2011.02.10 – Class Schedule
- P-51 2011.02.10 – Transcript and Letter of Understanding
- P-52 2011.02.10 – Notice of Proposed Disciplinary Action
- P-53 2011.02.10 –Manifestation Meeting Minutes
- P-54 2011.02.22 – Report to Parents on Student Progress
- P-55 2011.03.01 – 2011.03.31 – Monthly Behavior Sheet
- P-56 2011.04.27 – Office Discipline Referral Form and Incident Report
- P-57 2011.06.20 – Report to Parents on Student Progress
- P-58 2010.11.17 – Records Request to School
- P-59 2010.12.10 – Records Request to School
- P-60 2010.01.25 – Records Request to
- P-61 2010.01.25 – Records Request to School
- P-62 2011.01.26 – Letter to re IEP Meeting and Record Request
- P-63 2011.01.28 –Records Request Response from School

- P-64 2011.02.04 – Letter to . re Follow-Up from IEP Meeting and Jan. 26 Letter
- P-65 2011.02.11 – Letter to . re Proposed Suspension
- P-66 2011.02.11 – Letter to Office of General Counsel re Record Request
- P-67 2011.02.23 – Email from Instructional Superintendant Denying Long-Term Suspension
- P-68 2011.02.23 – Letter to re Independent Educational Evaluation
- P-69 2011.03.28 – Email to to Confirm 3.29.11 IEP Meeting
- P-70 2011.03.30 – Letter to re Follow-Up from March 29th IEP Meeting
- P-71 2011.05.04 – Letter to re Follow-Up from May 2 Voicemail
- P-72 2011.07.01 – Updated Records Request to Roosevelt High School
- P-73 2011.07.05 – Fax to . Including Completed Occupational Therapy, Physical Therapy and Psychological IEEs
- P-74 2011.07.26 – Email to A. West Including Completed Speech-Language IEE
- P-75 2011.08.02 – Email to C. Cooley re Coordinating Joint Exhibits for 5-Day Disclosures
- P-76 2011.08.02 – Confirmation of Delivery Receipt for Email to C. Cooley re Coordinating Joint Exhibits for 5-Day Disclosures
- P-77 2010 to 2011 Woodcock Johnson III Tests of Achievement Comparison Chart for Herbert Cooper
- P-78 2010 to 2011 IEP Comparison Chart for
- P-79 2010 to 2011 Overview IEP Comparison Chart for
- P-80 2010 to 2011 School Profile,
- P-81 2011.06.15 – Acceptance Letter from School
- P-82 C.V. of Dr. Stefanie M. Consolla
- P-83 C.V. of
- P-84 C.V. of
- P-85 Petitioner's Compensatory Education Plan
- P-86 The Harbour School Brochure
- P-87 The Harbour School Admission Policy
- P-88 The Harbour School 2010 Graduate Outcome Survey
- P-89 Petitioner's Amended Compensatory Education Plan¹³

Exhibits admitted on behalf of Respondent are found in Appendix C.

- R-1 Transcript
- R-2 IEE
- R-3 Attendance Summary
- R-4 IEP Progress Report
- R-5 5/26/09 IEP and related minutes¹⁴

¹³ This exhibit was admitted into evidence on August 26, 2011, the second day of hearing. This Amended Compensatory Education Plan included additional proposed hours of compensatory education added after R5 was admitted into evidence during the first day of hearing.

Exhibits admitted on behalf of Hearing Officer are found in Appendix D.

- 1 Administrative Due Process Complaint Notice dated June 27, 2011
- 2 Notice of Hearing Officer Appointment dated June 29, 2011
- 3 Prehearing Conference Scheduling Letter and Timeline Order of July 1, 2011
- 4 Prehearing Conference Notice of July 8, 2011
- 5 Resolution Period Disposition Form executed July 12, 2011
- 6 Motion for Default Judgment dated July 22, 2011
- 7 DCPS' Response to Parent Administrative Due Process Complaint dated July 25, 2011
- 8 DCPS' Opposition to Petitioner's Motion for Default Judgment dated July 27, 2011
- 9 Petitioner's Reply in Support of its Motion for Default Judgment dated July 29, 2011
- 10 Prehearing Order dated July 30, 2011
- 11 Memorandum and Order dated August 1, 2011
- 12 DCPS' Amended Response to Parent's Administrative due Process Complaint Notice
- 13 Proposed Hearing Officer Exhibits
- 14 District of Columbia Public Schools' Objections to Petitioner's Five Day Disclosures dated August 12, 2011

B. Testimony

Petitioner testified and presented the following witnesses:

- Ph. D., admitted as an expert in the field of special education
- Ed.D., Executive Director, School
- Stefanie M. Consolla, Ph.D., admitted as an expert in comprehensive psychological evaluations
- Linda Spencer, Ph.D., admitted as an expert in speech/language pathology

DCPS presented the following witnesses:

- Special Education Coordinator, School

¹⁴ This exhibit was introduced during the first day of hearing on August 15, 2011. I admitted it into evidence over Petitioner's objection. It had not been included in Respondent's 5-day disclosures although it was referenced in DCPS' amended response. This is the IEP that was in effect when Student entered and is, therefore, relevant to the instant matter. Petitioner noted she had not seen this IEP prior to the hearing. Because I allowed the late introduction of this exhibit, I provide Petitioner approximately 30 minutes at the time of hearing to review the exhibit and further granted Petitioner the opportunity to recall witnesses on the second day of hearing if the new evidence required additional testimony. Petitioner filed an Amended Compensatory Education Plan which I admitted (See FN 13) and recalled Dr Iseman to testify about the basis for the amended plan.

3. Initially, Student was receiving all of his core academic classes in resource. Students are not able to earn a high school diploma through classes taken in resource. Petitioner expressed her desire that Student obtain a high school diploma. No one on the multidisciplinary team ("MDT") discussed whether this was an appropriate goal for Student with Petitioner.¹⁶ In response to this request, Student was moved to a new English class in January 2011. This class would allow him to obtain Carnegie Units toward a high school diploma. The class was for students who were learning English as a second language. This class was selected because it was the smallest English class that would allow Student to obtain credit toward a diploma. All other general education English classes were very large. Student's transition to this class was difficult. Over time his performance improved. Testimony of _____ Student received a great deal of assistance in this class. The teaching assistant assigned to the class frequently removed Student from class to work with him independently. On at least one observed occasion¹⁷ this assistance involved the teaching assistant's directly interceding in Student's work by typing Student's answers to a test into a computer and questioning his answers if Student provide incorrect information. It was difficult to determine, on this occasion, what Student was able to produce on his own. Testimony of _____ Student received a D+ in this class. R 1; P 57.
4. On a second school visit Student was observed in his computer class. His teacher reported he was doing little work and would receive a passing grade because the other students in the class made learning difficult. Testimony of _____

¹⁶ After a subsequent meeting with _____ Petitioner learned what was required to obtain a diploma and decided this was an inappropriate goal for Student. She determined it was more realistic for him to get a certificate. Testimony of Petitioner.

¹⁷ _____ observed Student in his classes at _____ on two separate occasions.

5. Student received two Carnegie Units in the 2010- 2011 school year. He needs 24 to graduate with a diploma. Eighteen of these Carnegie Units needed for graduation with a diploma must be in core academic subjects. Student received one Carnegie Unit in a core academic subject in the 2010- 2011 school year. Testimony of R 1.
6. At Petitioner's request, an IEP meeting was held in December 2010. At that meeting Petitioner expressed concerns about Student's progress and the need for him to be placed in a more restrictive environment. She did not agree with the IEP that was developed at that meeting. Testimony of Testimony of Petitioner; P 17.
7. At an IEP meeting in January 2011, Petitioner learned Student was to receive occupational therapy ("OT") as a consult service. He was not to receive any direct OT service. Testimony of Testimony of Petitioner. Student did not receive all IEP required OT services during the 2010 -2011 school year. P 42; P 43.
8. Another IEP meeting was held on March 29, 2011.¹⁸ No changes were made to the IEP. Petitioner thought there would be an IEP meeting following this March 2011 IEP meeting. She thought the subsequent meeting would be held to discuss program and placement after the independent educational evaluations were received. DCPS made no attempt to schedule this meeting. Testimony of Petitioner; Testimony of Boyd; P 20.
9. DCPS authorized Independent Educational Evaluations for Student. On February 24, 2011 comprehensive psychological, occupational therapy and physical therapy evaluations were authorized. On April 29, 2011 an Adaptive Physical Therapy Evaluation was authorized. R 2. The reports from these assessments were received by DCPS in July

¹⁸ The IEP from March is dated March 28, 2011 rather than March 29, 2011. There is no evidence of another IEP from March 2011. It is extremely unlikely that two different IEPs were developed at meetings held on two consecutive days, and there is no evidence suggesting this occurred. I, therefore, am treating the March 28, 2011 IEP as the same document as the IEP identified by Petitioner as the March 29, 2011 IEP

2011, but the MDT did not meet to review them. The Complaint Compliance Officer at central office told the Special Education Coordinator not to hold a meeting to review the IEEs because there was a due process hearing scheduled. Testimony of

10. Student had some minor disciplinary incidents at during the 2010 -2011 school year. One incident that might have resulted in Student's being suspended for 30 days was reviewed, and he was not suspended. Testimony of Boyd.

11. Student had difficulty interacting with his peers at He was bullied. Other students either took his possessions or coerced him into giving them away. On one occasion he was and on another a student sprayed him with Both of these students were expelled. However, one of them continued to threaten Student at the bus stop. As a result Student was escorted to the bus stop by school police on a daily basis as a safety precaution. Testimony of

12. The team never considered Student for Extended School Year services for the summer of 2011, despite recognizing the need to do so. Testimony of P 20

13. Prior to his placement at his neighborhood school, Student had attended only separate, special education schools. He attended and School. These are all protected environments. Testimony of Petitioner; Testimony of

14. Student also attended Petitioner selected as a placement for Student in the 2009 – 2010 school year based on its being identified as a learning center in its name. DCPS did not suggest or recommend a placement for student for the 2001 -2010 school year. . Petitioner did not have a clear understanding of the program provided at Petitioner was not aware Student

would be placed in the eighth grade at _____ and was not aware he would only be allowed to stay there one year. Student struggled with the curriculum at _____ and could not keep up with his classes. Student did not receive the word processor required by his IEP while at _____ Testimony of Petitioner; Testimony of _____

15. Student has been evaluated in the areas of education, speech, assistive technology, occupational therapy, physical therapy and speech. Student has received the following evaluations:¹⁹

1/14/2004	Psycho-educational evaluation
5/5/2009	Psychological evaluation
5/2/2011	Psychological evaluation (Dr. Consolla)
4/29/2004	Speech-language evaluation
11/18/2011	Language Processing Evaluation (Dr. Spencer)
5/9/2009	Physical therapy evaluation
4/9/2011	Physical Therapy evaluation
5/11/2009	Occupational therapy re-evaluation
3/19 2011	Occupational Therapy evaluation
1/11/10	Assistive technology evaluation
2/13/2009	Educational Evaluation
5/26/2010	Educational Evaluation (Woodcock-Johnson III Tests of Achievement)
2/23/2011	Educational Evaluation (Woodcock-Johnson III Tests of Achievement).

16. Student is kind, gentle, rather innocent young man. His social skills are limited as is his ability to communicate. His receptive language skills are better than his expressive language skills. He continues to exhibit fine motor difficulties and gross motor difficulties although his gross motor skills are improving. Cognitively his rote memory

¹⁹ Student has received additional assessments as well. However, they occurred prior to the time frame relevant to the instant complaint and are not in evidence.

skills are better than his associative skills. He has pervasive academic difficulties. His reading skills are at the second grade level, and his math skills are at the third grade level. It is difficult to assess his written language skills due to his fine motor difficulties. His handwriting is very poor. His spelling skills also are limited. For example, he cannot consistently spell his last name. He is able to recognize words and call them out, but his comprehension is very limited. Student has difficulty interacting with his peers.

Testimony of [redacted] Testimony of Petitioner; Testimony of [redacted] P 38; P 39.

17. The psychological evaluation performed by Cathy Wu, DCPS school psychologist, in May 2009 did not accurately assess Student. She used a Reynolds Intellectual Assessment Scales ("RAIS")²⁰ which made Student appear higher functioning cognitively than his actual abilities. On this assessment Student appeared as if he did not have an intellectual disability but rather had learning disabilities only. Student's placements following this evaluation have not addressed his needs. Student was lower functioning than the other students at [redacted] Center. The school was not able to address his needs. After one year at [redacted] Student was transferred to [redacted] has not been able to address Student's needs. Testimony of Petitioner; Testimony of [redacted] Testimony of [redacted] P 26; P 30; P 38.

18. It is not possible to obtain a valid full scale IQ score on Student. His fine motor skills interfere with his capacity to write thus processing speed factors do not reflect his cognitive ability. Instead they are reflective of his physical limitations. Student's verbal comprehension scores and perceptual reasoning scores are extremely low. His working memory is rated as low average. None of his scores come close to the 89 he scored on the

²⁰ The RAIS is generally used as a screening tool. The results tend not to be consistent with scores obtained on the Wechsler Intelligence Scale for Children ("WISC"), the generally accepted standard for intelligence testing. Testimony of [redacted]

RIAS and nothing in his history accounts for the approximately 19 point difference between the RIAS and his overall abilities on the WISC or Woodcock Johnson III Tests of Achievement ("W-J"). Testimony of

19. The results of the W-J indicate Student, in addition to having an intellectual disability, has a learning disability as he is not scoring near where he would be expected to score based on his IQ scores. Moreover, his recent decline in both his academic and his performance scores on the W-J are directly related to the recent reduction in services and change in his placement at Testimony of P 38.

20. In 2004, DCPS discontinued direct, speech language service to Student based on an assessment showing he did not have a minimum of a two year delay in language skills. The report indicated his language skills were age appropriate. In 2011 an independent speech language evaluation determined he had marked deficiencies in both receptive and expressive language that make it difficult for him to make progress with a grade level curriculum. The report from the 2004 assessment has some scoring errors. Moreover, it did not thoroughly assess Student's expressive language abilities. In May 2009 Student showed strengths in expressive language on the Vineland Adaptive Behavior scales and major weaknesses in written and receptive language. These discrepancies should have alerted DCPS to the need for a new speech language evaluation. In addition, Student's responses to instruction also should have alerted DCPS to a need for a speech language evaluation to determine whether his struggles in the classroom were language based. Testimony of Testimony of P 27; P 39.

21. Currently, Student is able to understand a great deal of what is said to him, particularly if it relates to his experience. In general his language is concrete and literal. He has

difficulty formulating an explanation that is explicit, detailed and accurate. Student has difficulty with the language used in a high school curriculum as well as the language used by his nondisabled peers. He cannot comprehend or use complex language. Student's language disability also contributes to his behavioral issues, and it contributes to his poor self image. Testimony of P 39.

22. Student's February 17, 2009 IEP was not in effect in the two years immediately preceding the filing of this complaint. R 5
23. Student's 5/26/09 IEP provided full time special education services outside of general education. It included 29 hours of special instruction and 1 hour each of occupational therapy, physical therapy and behavioral support services outside of general education each week. R 5.
24. Student's 2/1/10 IEP provided full time special education services outside of general education. It included 29 hours of special instruction and 1 hour each of occupational therapy and behavioral support services outside of general education each week. It does not include goals in speech. Student also was to receive assistive technology in the form of a portable word processor with learning and studying features. Six specified programs were to be loaded onto the word processor. P 10. The assistive technology had not been provided as of the end of the 2009 -2010 school year. R 4.
25. Student's 5/24/10 IEP did not provide full time special education services. It included 19.5 hours of special instruction and 45 minutes of behavior support services outside of general education each week. Student also was to receive one hour of occupational therapy consultative services each month.²¹ In addition, Student was to receive assistive technology in the form of portable word processor with learning and studying features.

²¹ Petitioner was not aware Student was receiving only consultative services. See FN 14, below.

The same six specified programs were to be loaded onto the word processor. There is no explanation for the reduction in hours on this IEP. This IEP does not include goals in written language, speech or social skills. It indicates Student's needs in motor skills are to be addressed through the provision of assistive technology. P 14; P 15. The Present Levels of Performance on this IEP do not consistently and accurately reflect the scores Student achieved on the W- J in either the 2/13/09 administration (P 29) or the 5/26/10 administration. (P 34).²² Student did not receive all the occupational therapy services require by this IEP. P 42; P 43.

26. Student's 3/28/11 IEP²³ includes 19.5 hours of specialized instruction outside general education and 6.5 hours of specialized instruction inside general education each week. He also is to receive 1 hour of occupational therapy consultative services each month. In addition, Student was to receive assistive technology in the form of portable word processor with learning and studying features. The same six specified programs were to be loaded onto the word processor. Because the programs were not loaded on the word processor eventually provided Student and because the word processor was not allowed to go home with Student the team agreed his assignments should be sent home on a thumb drive. This only happened one time. The number of accommodations included on this IEP increased in comparison to the number provided on earlier IEPs. Testimony of Petitioner; Testimony of P 20.

27. At the time Student enrolled in in August 2010, he did not receive the assistive technology device required by his 5/24/10 IEP. Student did not receive the

²² This 5/26/10 administration occurred two days after the 5/24/10 IEP was developed, and it would be only coincidence if these scores matched those on the IEP.

²³ There is a draft IEP from January 24, 2011 that contains the same service configuration as this IEP. The January 2011 IEP is incorrectly dated as January 2012. P 18.

assistive technology device until January 2011, and the device received in January 2011 did not contain the appropriate software. Stipulation by DCPS.

28. Student's behavior deteriorated while at _____ Student was happy when he entered _____ then realized he did not fit in with his peers and the work was too hard for him. Testimony of Petitioner.

29. Petitioner signed many of Student's IEPs. She did not understand this signature indicated her agreement with the contents of the IEP.²⁴ She thought her signature meant she had received the "booklet" provided to her at the meetings. When she learned that her signature indicated agreement with the IEP she stopped signing them. Petitioner did not know she could disagree with the proposed IEP. Testimony of Petitioner.

30. Between the 5/26/10 administration of the W-J and the 2/23/11 administration of the W-J, Student showed no change in broad reading, spelling and academic fluency. He showed a slight increase in passage comprehension and math fluency. In all other tests Student's scores decreased between the two administrations. Some decreases were small – only 0.1 grade level. In others, such as applied problems and writing samples the student lost 1.0 grade level or more. These are extremely significant losses as his grade equivalent scores range from mid first grade level to one score at the fourth grade level. P 77.

31. Student was placed in _____ School for the 2011-2012 school year because it is his neighborhood school. P 15. Petitioner was not aware she could object to the proposed placement. Testimony of Petitioner.

32. Student requires a full time, separate, special education program that provides a functional curriculum with small group instruction. Speech language services should be

²⁴ Each of the IEPs that Petitioner signed has the box checked indicating her agreement with the contents of the IEP. Petitioner is not able to read so could not understand this statement.

built into the overall programming provided to Student. Student needs to be in a program with other students with whom he can communicate rather than with his nondisabled peers as his language disabilities place him in a socially isolated position when he is with his nondisabled peers. Social skills training should be a part of the curriculum. Social skills training should be provided in a safe environment that will support Student trying new things. Student also requires occupational therapy, counseling and career/vocational training and guidance. Testimony of _____ Testimony of _____ Testimony of _____
P 38; P 39.

33. Student has been accepted at _____ School _____ is a full time, private, special education school that provides programs and services for students with learning challenges including autism, learning disabilities, and other health impairments among other disabilities. Students are not provided programs based on their disabilities but rather by their learning profiles. The acceptance process includes a two to three day school visit during which the applicant attends classes and meets the students and teachers with whom s/he will be interacting. Following this visit the team determined Student to be a good fit for the school. Testimony of _____

34. At _____ Student would be placed in a class of 6 – 8 students with a teacher²⁵ and a teaching assistant. The program is an eleven month program. The extended school year limits the loss of learning that results when students are out of school for extended vacations. Students are placed in each class based on cognitive ability, age, social/emotional skills and years of eligibility. Students can be on an academic, diploma track or on a certificate track. This is fluid assignment and may change based on students' demonstrated needs and abilities. _____ has a job skills/vocational training component

²⁵ All teaches are certified and considered highly qualified under the No Child Left Behind requirements.

that involves a four year sequence of progressive involvement in employment. Students receive a social skills improvement plan and attend a social skills class every week.

Related service providers are on staff, and assistive technology is available as required by students' IEPs as well as in the classrooms. Speech language services are infused into the curriculum in the classroom. Testimony of

35. Petitioner's Amended Compensatory Education Plan ("Plan") proposes Student receive an array of services to compensate him for the services he missed during the 2009-2010 and 2010-2011 school years as well as missed extended school year services that were identified on the 5/25/09 IEP and were never initiated. The Plan includes 1160 hours of academic tutoring, 25 hours of behavioral support services, 29 hours of occupational therapy services, and 50 hours of speech/language services. Services are to be provided when school is not in session. The services missed during the school year are compensated at a rate of 1 to 2. The services missed during the extended school year are compensated at a rate of 1 to 1 as these services would have prevented Student from losing ground during the summer and thereby allowed him to progress further in the Fall when school reconvened. Testimony of P 89.

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 all witness testimony presented in this matter to be credible, some witnesses were more persuasive than others. Where these differences in persuasiveness are relevant to my determination, I so indicate.

Whether DCPS denied the student a FAPE by failing to provide Student all required evaluations on a timely basis from 2009²⁶ to the present.

The IDEA requires a reevaluation of an eligible student with a disability occur at least once every three years unless the parent and the school district agree a reevaluation is not necessary. 34 C.F.R. §300.303(b)(2). The student is to be assessed in all areas of suspected disability. 34 C.F.R. §300.304(c)(1)(iv)(4). The test instruments used by the evaluators are to be technically sound. 34 C.F.R. §300.304(b)(3).

In the instant matter, Student has an intellectual disability (“ID”), specific learning disabilities (“SLD”) in reading and math, cerebral palsy (“CP”), a speech/language impairment, attention deficit hyperactivity disorder (“ADHD”) and emotional/behavioral difficulties. He receives services as a student with multiple disabilities (either OHI, OH and LD or ID, OH and LD). Student received the following evaluations:

1/14/2004	Pyscho-educational evaluation
5/5/2009	Psychological evaluation
5/2/2011	Psychological evaluation (IEE)
4/29/2004	Speech-language evaluation
7/18/2011	Language Processing Evaluation (IEE) ²⁷
5/9/2009	Physical therapy evaluation
4/9/2011	Physical Therapy evaluation
5/11/2009	Occupational therapy re-evaluation
3/19 2011	Occupational Therapy evaluation
1/11/10	Assistive technology evaluation
2/13/2009	Educational Evaluation
5/26/2010	Educational Evaluation (Woodcock-Johnson III Tests of Achievement)

²⁶ As noted in FN 6, this claim is limited to the two years immediately preceding the filing of the due process complaint on June 27, 2011.

²⁷ The 5/2/11 Psychological evaluation and the 11/18/11 Language Processing Evaluation were Independent Educational Evaluations authorized by DCPS.

2/23/2011

Educational Evaluation (Woodcock-Johnson III Tests of Achievement)

The array of testing listed above shows that Student was evaluated in multiple areas of disability repeatedly and timely since 2009.²⁸ Student received a psychological assessment in 2009 and a psychological assessment in 2011. He received formal, educational assessments in 2009, 2010 and 2011. The frequency of these assessments and reassessments is within the IDEA three year time frame. He received physical therapy and occupational therapy assessments in 2009 and 2011. He received an assistive technology evaluation in 2010. 34 C.F.R. §300.303(b)(2). However, the occurrence of these multiple assessments does not reflect an overall evaluation plan designed to assess student in all areas of suspected disability as required by IDEA. 34 C.F.R. §300.304(c)(1)(iv)(4). It is difficult to determine which assessments are to be grouped to form an evaluation. Moreover, areas that should have been identified as areas of concern were not assessed. It is as if Student was viewed through a lens that created a tunnel vision focusing on some aspects of his disabilities and closing off others.

The evidence in this case is replete with incidents of missed opportunity to identify and/or address Student's significant, multiple needs. "The IDEA contemplates a special education designed to meet a disabled child's unique needs and seeks to assure the effectiveness of efforts to educate children with disabilities. *Rowley*, 458 U.S. at 203, 102 S.Ct. at 3049. An appropriate education specific to a disabled child's needs must begin with full recognition of the disability and assessment of its extent. School authorities cannot properly address problems which they do not understand." *Bd. of Ed. of Oak Park & River Forest High School Dist. Number 200 v. Illinois St. Bd. of Ed. and Kelly E., By and Through Her Parent and Next Friend, Nancy E.*, 21 F. Supp.2d 862, 875 (N.D. Ill. 1998).

²⁸ Any possible delay in reevaluations preceding 2009 is not before me as it is outside the two year statute of limitations period discussed *supra*.

It is noteworthy, for example, that despite Student's significant expressive and receptive language disabilities identified in the July 2011 independent speech evaluation, DCPS did not identify a need to assess Student in this area between April 2004 and the authorization for the independent evaluation. Petitioner's expert identified events which should have alerted DCPS to the need to assess Student's language skills despite his having had his speech therapy discontinued pursuant to the speech evaluation of 2004.²⁹ These events include Student's response to instruction and the weak scores he achieved in some areas of language on the Vineland Test of Adaptive Behavior Skills administered as part of the psychological performed in 2009. DCPS also did not evaluate Student's behavior problems.³⁰

It also is clear that some of the evaluations performed did not accurately assess Student's abilities. While at first glance this appears to be outside the scope of this issue, I find it is not. In order to fully assess a student in all areas of suspected disability, the evaluation must do so accurately. Therefore, the IDEA includes the requirement that the instruments used are to be technically sound. Here, two experts convincingly testified the RIAS is not technically sound for the purpose for which it was used. It is a screening tool, not a basis for determining cognitive ability. The results of the test alone should have caused concern. A nineteen point increase in tested ability without a basis for this to have occurred should have led the evaluator to suggest and the MDT to order further testing.

²⁹ This report was credibly discredited by Petitioner's expert in speech/language pathology.

³⁰ In this it should be noted that behavior problems do not simply include a student's acting out, disruptive or dangerous behavior. Behavior problems include, as is the case with Student, extreme passivity, inability to interact appropriately with peers and inability to protect one's self from repeated abuse from peers. Moreover, Student also was beginning to demonstrate some more overt behavioral problems such as leaving the school building and speaking inappropriately to teachers.

I find, by a preponderance of the evidence that due to the failure to evaluate Student's speech/language needs and behavioral needs and to identify the need for further cognitive testing and DCPS did not provide Student with all required evaluations on a timely basis.

Whether DCPS denied the student a FAPE by failing to develop appropriate IEPs for Student from 2009 to the present. This includes the IEPs dated February 17, 2009³¹ and May 24, 2010.

Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP for Student for the 2011 – 2012 school year. Student's last IEP is dated May 24, 2010.

The preceding two issues are grouped here for discussion. While the first issue relates to what has been developed for student in the two years preceding the filing of the due process complaint and the second issue relates to the IEP that is intended to be delivered in the current, 2011-2012, school year, the legal issues underlying both claims are similar, if not identical. I will distinguish between the claims in the discussion that follows when appropriate.

Under the IDEA each local education agency is required to provide a FAPE to each student found eligible for special education and related services. A FAPE is:

Special education and related services that . . . are provided at public expense, under public supervision and direction, and without charge; . . . [m]eet the standards of the [state educational agency] . . . [i]nclude an appropriate preschool, elementary school, or secondary school education . . . ; and . . . [a]re provided in conformity with an . . . IEP that meets the requirements of [the IDEA regulations].

34 C.F.R. § 300.17. *See also*, D.C. Code § 30.3001.1.

An IEP is a written statement that includes, in pertinent part, the eligible student's: present levels of academic and functional performance; the affect of the student's disability on his/her involvement and progress in the general curriculum; measurable annual academic and functional

³¹ As noted in FN 6, this claim is limited to the two years immediately preceding the filing of the due process complaint on June 27, 2011. This IEP was not in effect in these two years. The IEP dated 5/26/09 was one of the two IEPs in effect during these two years. Petitioner was not aware that the 5/26/09 IEP existed. It had not been provided to her when she requested records. I allowed the introduction of this IEP as R 5 at the time of hearing and, therefore, will address its appropriateness here.

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. If a student's behavior impedes the student's learning or that of other students, the team is to consider interventions and strategies to address the behavior. *Id.* 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). All students found eligible for services under IDEA are determined to fit in one of 13 eligibility categories. 34 C.F.R. § 300.306. *See also*, D.C. Code § 30.3001. Services are to be provided to eligible students based on their individualized educational needs as determined by the evaluation process and reflected in their IEPs. §300.304(b)(1)(ii) & §300.304(c)(2).

In the instant matter, Student had four IEPs in the two years immediately preceding the filing of this due process complaint. The first of these IEPs is dated 5/26/09. It was developed when Student attended _____ School. It provided full time special education services outside of general education. It included 29 hours of special instruction and 1 hour each of occupational therapy, physical therapy and behavioral support services outside of general education each week. It did not provide speech/language services.

Student's second IEP dated 2/1/10 also provided full time special education services outside of general education. It included 29 hours of special instruction and 1 hour each of occupational therapy and behavioral support services outside of general education each week. Student also was to receive assistive technology in the form of a portable word processor with learning and studying features. Six specified programs were to be loaded onto the word processor. Like the prior IEP it did not include speech/language services. It was developed when Student attended .

The third IEP, dated 5/24/10, is the IEP that was developed for Student when he was transitioning to School. It is the first IEP developed for Student that did not provide full time special education services. It included 19.5 hours of special instruction and 45 minutes of behavior support services outside of general education each week. Student also was to receive one hour of occupational therapy consultative services each month. In addition, Student was to receive assistive technology in the form of a portable word processor with learning and studying features. The same six specified programs identified on the 2/1/10 IEP were to be loaded onto the word processor. There is no explanation for the reduction in service hours on this IEP. This IEP does not include goals in written language, speech or social skills. It indicates Student's needs in motor skills are to be addressed through the provision of assistive technology. The Present Levels of Performance on this IEP do not consistently and accurately reflect the scores Student achieved on the W- J in either the 2/13/09 administration or the 5/26/10 administration.

The goals on this IEP appear well beyond Student's identified abilities. The vast majority of the goals in math and reading first acknowledge his low level of academic and achievement and then indicate he is to meet a goal reflecting a complex skill. For example, Student's math

present level of performance is stated to be at the 2.8 grade level. One of the math goals states, "Given tasks at his instructional level [Student] will use linear equations to model and analyze problems involving [sic] proportional relationships. . . ." It is unlikely that an individual at Student's level could perform tasks involving proportional relationships. This IEP appears to describe a student other than the student herein. There is a statement on the IEP suggesting Student could perform math at the 6th grade level. There is also a statement indicating he knows his multiplication tables up to 10 x 10. Yet subsequent testing showed he did not know his multiplication tables through 10. It is not possible to connect this IEP's goals to Student's very limited achievements.

Student's 3/28/11 IEP, the fourth IEP, developed while Student attended _____ and _____ after Petitioner's repeatedly expressed concerns that the program being provided to Student was not addressing his needs, continues to provide student a part time program. It includes 19.5 hours of specialized instruction outside general education and 6.5 hours of specialized instruction inside general education each week. He also is to receive 1 hour of occupational therapy consultative services each month. In addition, Student is to receive assistive technology in the form of portable word processor with learning and studying features. The same six specified programs were to be loaded onto the word processor. Some effort was made to address Student's needs by increasing the number of accommodations and supports provided him, but none of these could compensate for Student's long standing needs in the areas of speech and written language that were not being addressed. The lack of focus on the individual needs of Student underlying this IEP is reflected in the Present Level of Performance section for the Area of Emotional, Social and Behavioral development which identifies Student as a _____ year old _____ grade student when he was a _____ year old _____ grade student, and the IEP was intended to carry

over into his grade year. In this IEP, too, the goals are well beyond Student's early elementary skill level. For example, Student is noted to be reading at the 1.5 grade level yet the goals require him to perform complex reading analysis such as evaluating the adequacy of details and facts to achieve a specific purpose.

DCPS, in defending the IEPs at issue here, argues that having agreed to an IEP by signing it, the parent is precluded from subsequently challenging it. This is not the case. Here, Petitioner who signed the IEPs dated 5/26/09, 2/1/10 and 5/24/10 was unaware that her signature meant she agreed with the contents of the IEP. She is unable to read and believed her signature indicated she had received the booklet provided to parents at IEP meetings. When she learned she was not required to sign the IEP and her signature indicated her agreement with the IEP she stopped signing the IEPs. (*See*, IEP date 3/28/11, P 20.) Moreover, even if Petitioner had signed the IEP indicating her agreement with it, she would not be precluded from subsequently filing a due process complaint regarding the IEP. *See* Letter to Lipsitt, 52 IDELR 47 (OSEP 2008).

To determine whether these IEPs provide FAPE I must determine whether the school complied with the IDEA's procedures and whether the IEP developed through these procedures was reasonably calculated to enable the student to receive educational benefit. *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir. 2003). Here there has been no issue raised as to the procedures used to develop the IEP. Rather the question is whether the IEPs at issue were reasonably calculated to provide educational benefit as required by *Rowley*. I find, by a preponderance of the evidence, they were not. As noted above, the evaluation process underlying these IEPs was incomplete and inadequate. A team cannot write an IEP that will provide educational benefit if it does not have all the information it needs regarding the student's needs. The failure to identify Student's extensive speech/language and social skill needs were

sufficient in and of themselves to preclude these IEPs from meeting the educational benefit standard. Communication is core to all we do and clearly is integral to functioning within a classroom. The inability to communicate and the failure to address this disability preclude effective education. But here there is more. As Student aged, his IEPs provided less and less. In the usual course of a student's education this ratcheting back of services might be appropriate programming, but here, Student was not developing better skills with age, he was stagnating at best and perhaps even regressing. This is not a basis for decreasing service. It is a basis for increasing service. The IEPs, thus, do not address Student's individual needs as required by IDEA.

DCPS argues the IEPs were based on the information available to them at the time, and this may be true. However, this is akin to arguing that the District can nullify its responsibility to develop an appropriate program for a student by failing to determine what the student needs. Clearly this is not the intent of IDEA. The purpose of IDEA is to "ensure that all children with disabilities have available to them a [FAPE] . . . designed to meet their unique needs and prepare them for further education, employment, and independent living." 34 C.F.R. § 300.1(a). The failure to identify and address Student's speech/language and social/behavioral needs and to develop appropriate goals to address student's needs in reading, written language and math does not meet the requirements of IDEA. I find, therefore, that DCPS failed to develop IEPs from 2009 to the present, including the 3/28/11 IEP, that provide Student a FAPE.

*Whether DCPS denied the student a FAPE by failing to provide Student with an appropriate placement from 2009³² to the present. This includes the student's placements at .
School.*

³² As noted in FN 6, this claim is limited to the two years immediately preceding the filing of the due process complaint on June 27, 2011.

After a school district develops an IEP that meets all of a student's educational needs, it must identify a placement in which to implement the IEP. The placement is to be in the least restrictive environment in which the IEP can be implemented. 34 C.F.R. §§ 300.114 – 300.118. *See also*, D.C. Code §§ 30.3011 – 30.3013

Petitioner argues that Student was in an inappropriate placement for the 2009 – 2010 and 2010- 2011 school years. During the 2009-2010 school year Student attended Center. Student was not able to perform at the level of the other students at the Center. It is Petitioner's uncontroverted testimony that she selected _____ as Student's placement. DCPS did not suggest this school or any other school for Student for the 2009 -2010 school year. Petitioner selected _____ because its name included the words "learning center." Petitioner did not know what _____ program involved. She did not know Student would be assigned to the 8th grade, and she did not know he would only be allowed to attend the school for one year. IDEA requires the placement decision to be made by a group of persons, including the parent, and it is to be based on the child's IEP. 34 C.F.R. § 300.116. Here that did not happen.

Student's placement for the 2010- 2011 school year followed the development of the March 28, 2011 IEP. The meeting notes from the placement meeting held on 4/12/11 indicate Student will be placed at _____. The Prior Written Notice for this placement at _____ dated 5/24/10, indicates the reason for the proposed placement is that it is the neighborhood high school. It does not appear coincidental that the IEP to be implemented at _____ is the first IEP developed for Student that is not a full time IEP. _____ cannot provide a full time, special education program. The IEP and the identified placement do not address Student's needs.

The placement, like the IEP program, is not appropriate. _____ is not able to provide Student the placement he requires. It does not have the components identified by the experts who

testified in instruction, psychology and speech/language as necessary for this student to receive a FAPE. It does not have a full time special education self contained program. It is not able to infuse speech/language services into his curriculum. The school does not provide social skills training. _____ is not a protected environment that would allow Student to try new skills in safety. He does not have a peer group with whom he can interact. In addition, _____ does not provide an extensive vocational training program that will help prepare Student for a successful post-school outcome.

I find by a preponderance of the evidence Student was denied a FAPE when DCPS failed to follow the IDEA process for providing Student an appropriate placement in the 2009- 2010 school year. I further find, by a preponderance of the evidence that DCPS failed to provide Student an appropriate placement for the 2010- 2011 school year. The placement at Student's neighborhood school, _____ could not address Student's needs. I find that the Petitioner's proposed placement at _____ School is appropriate. _____ School's constellation of programs and services directly address Student's identified needs as described herein.

*Whether DCPS denied Student a FAPE by failing to implement the student's February 17, 2009 IEP.*³³

As indicated in FN 6 above Petitioner's counsel subsequent to the prehearing conference provided an email, on July 27, 2011, indicating all claims would be limited to the two years immediately preceding the filing of the instant due process complaint on June 27, 2011. The February 17, 2009 IEP was replaced by an IEP dated May 26, 2009. Therefore, the February 17, 2009 IEP was not in effect at any time within the two years immediately preceding the filing of the instant complaint. Therefore, all claims related to this IEP are hereby dismissed as they are

³³ As noted in FN 6, this claim is limited to the two years immediately preceding the filing of the due process complaint on June 27, 2011.

outside the IDE statute of limitations, and Petitioner agreed to limit all claims to the applicable period defined by the statute of limitations.³⁴

Whether DCPS denied Student a FAPE by failing to implement the student's May 24, 2010 IEP.

IDEA requires that a free, appropriate public education ("FAPE") must be available to all eligible children. 34 C.F.R. § 300.301. A FAPE is defined as special education and related services provided in conformity with an IEP." 34 C.F.R. § 300.17. While it is clear that *de minimis* deviations from the content of the IEP are contemplated, substantive deviations from the IEP can be construed as denials of FAPE. *See, Van Duyn v, Baker School District 5J*, 481 F.3d 770 (9th Cir. 2007).

Student's May 24 2010 IEP required Student receive 19.5 hours of special instruction and 45 minutes of behavior support services outside of general education each week. Student also was to receive one hour of occupational therapy consultative services each month and assistive technology in the form of a portable word processor with learning and studying features. Six specified programs were to be loaded onto the word processor. Student did not receive all the occupational therapy consultative services required by his IEP. More importantly he did not receive the word processor until January 2011, and the word processor provided did not include the software specified on Student's IEP.

The failure to provide all of Student's consultative occupational therapy services is a *de minimis* deviation from the IEP. Student was to receive only 1 hour of consultative services per month. This amount and format for delivering occupational therapy services suggests that the

³⁴ There was some discussion at hearing regarding whether this IEP should be in evidence. I ruled this IEP was the IEP in effect when Student entered . My subsequent review of the evidence, after the admission of R 5 reveals this determination was in error. The February 17, 2009 IEP, therefore, will not be used in my determinations in this matter.

failure to provide such services would not have a significant impact on student's ability to access his education particularly since a significant portion of these services were provided. Therefore, the failure to provide some of these consultative services would not create a cognizable harm..

However, where, as here, it is clear that a student needs assistive technology in order to access his education, the failure to provide this technology is, by definition, a denial of FAPE. Assistive technology is equipment used to increase, maintain or improve the functional capabilities of a child with a disability. 34 C.F.R. § 300.5. Student, in the case before me, has intellectual disabilities, learning disabilities, a speech/language impairment and cerebral palsy. He is unable perform the physical act of writing due to fine motor difficulties. He reads at the mid second grade level, performs math at the mid third grade level and writes just below the beginning second grade level. The word processor was intended to help address these issues and allow Student better access to the curriculum. Rather than use pencil and paper he would be able to use a keyboard. The software was to have included word prediction software, text to speech software, text reading software, digital textbooks, audio text books and a graphic organizer. All of these features would allow Student better access to the curriculum, improved abilities to perform his assignments and thus the potential for greater learning. But this did not occur because the word processor with the needed software was not provided Student. I, therefore, find, by a preponderance of the evidence, Student was denied FAPE by the failure to implement his May 24, 2010 IEP.

Whether DCPS denied Student a FAPE by failing to include all required IEP team members at the March 29, 2011 IEP meeting.

The IDEA requires the IEP team for each child to include the following persons:

1. The parent(s) of the child;

2. Not less than one regular education teacher of the child;
3. Not less than one special education teacher of the child;
4. A representative of the public agency who is qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of the child;
5. An individual who can interpret evaluation results who may be one of the persons, other than the parent, described above;
6. Others with knowledge of or special expertise regarding the child; and
7. The child, when appropriate.

34 C.F.R. § 300.321 (a).

The attendance sheet for the March 2011 IEP meeting indicates all required participants were in attendance. The meeting participants included the parent, petitioner in the instant matter, a regular education teacher, a special education teacher, the special education coordinator who is a representative of the public agency and is an individual who can interpret evaluation results. In addition, a school social worker and two attorneys representing Petitioner attended the meeting.

Petitioner testified that the special education teacher did not attend the entire IEP meeting. She also testified that Student's English teacher did not attend the entire meeting. Student's English teacher does not appear on the list of participants in the meeting. A different general education teacher is on the list of participants and signed the form. Petitioner testified that both of the teachers who were present indicated Student was not completing assignments. However, neither teacher had brought this to Petitioner's attention prior to the meeting.

Under 34 C.F.R. § 300.321 (e), an IEP team member is not required to attend the meeting, in whole or in part, if the parent and the public agency agree in writing that the member's attendance is not necessary because his/her area of expertise is not being modified or discussed. The IEP from this meeting includes a note stating on the front page, "No current

changes were made to the IEP.” At this meeting, Petitioner signed a consent for an Adaptive Physical Education Assessment. There also was discussion of Student’s possible placement at _____ and Petitioner expressed her disagreement with this placement. Petitioner also indicated she did not agree with the goals. Nothing was finalized at this meeting other than ordering the Adaptive Physical Education Independent Educational Evaluation. Petitioner, expected there to be another meeting to develop the final goals and placement after all the assessment results were received. In this context it is difficult to find any harm flowing from the failure to place in writing, as required by IDEA, an agreement that Student’s teachers did not need to stay at the entire meeting. I find, DCPS did not comply with the IDEA requirement that the public agency and parent agree in writing that a required participant need not stay for the entire IEP meeting. I further find, by a preponderance of the evidence, this failure did not constitute a denial of FAPE. As discussed above, the failure to finalize the IEP and discuss Student’s possible eligibility for extended school year services created a denial of FAPE. This concomitant, incidental, procedural violation under these circumstances is at best *de minimis* in nature.

Is Student entitled to 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 (4th 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.

Here, Petitioner has established that DCPS did not 1) provide the student all required evaluations on a timely basis from 2009 to the present, 2) develop IEPs from 2009 to the present that provided Student a FAPE, 3) did not provide Student with appropriate placements in the 2009 – 2010 and 2010- 2011 school years, and 4) implement Student’s May 24, 2010 IEP. As a result of these failures to provide FAPE Student was harmed He was not provided an educational program that addressed his significant academic, speech/language and social skill needs. The IEPs provided in part during the 2009-2010 and 2010-2011 school years did not provide Student educational benefit. The extent of the harm includes the loss of hours in both the 2009—2010 and 2010-2011 school years.

The amended compensatory education plan provided by Petitioner is quite extensive. It is intended to be provided during times Student is not in school. Student will be attending a new school with an 11 month program. The plan calls for a total of 1264 hours of compensatory education to be provided at a rate of 6 hours per week (3 hours of tutoring, 1 hour each of behavior support, occupational therapy and speech). At this rate the 1160 hours of tutoring would take more than 7 years to complete. Such a remedy seems both extraordinary and excessive. The Harbour School has been proposed because it has a program designed to address Student’s identified needs, and it should be allowed to implement its program. On the other hand, I am mindful that Student has lost two years of appropriate service. While I recognize Student’s need for some additional assistance to compensate for these losses, compensatory education is an equitable remedy which must be applied with flexibility.

I decline to order the compensatory education plan be implemented as written. Student has missed educational services, behavioral services, occupational therapy services and speech language services. The behavioral services in his prior IEPs were intended to address many of the issues School address through its standard programming including social skills training. The occupational therapy services student missed were of a consultative nature and I have all ready found this loss to be *de minimis*. The educational services and speech/language services Student has missed again will be addressed by School's skills based programming and infusion of speech language services throughout the day.

However, the loss of these educational and speech/language services have placed Student at a disadvantage. It is appropriate, therefore, for Student to receive compensatory services in these two areas. I, therefore, find by a preponderance of the evidence, that student is entitled to a maximum of 1160 hours of tutoring. These tutoring services are to be provided each school year during the weeks when school is not in session. Student may not be provided more than 6 hours of tutoring per week. In addition to these hours of tutoring when school is not in session, Student may be provided additional tutoring up to a maximum of 3 hours per week during the academic year if School, DCPS, Petitioner and her academic advocate agree. All tutoring services are to cease when Student leaves high school or all 1160 hours of service have been provided, whichever occurs first. In addition, Student is to receive 50 hours of speech/language therapy. These services are to be provided in coordination with the speech/language therapist working with Student at School. The speech/language therapist at School is to determine the number of hours and frequency of service appropriate to supplement his/her work with Student³⁵.

³⁵ School speech/language therapist may provide these services if s/he thinks it would be beneficial to Student to have continuity of service provider in this area.

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 by failing to provide Student with all required evaluations on a timely basis.
2. DCPS denied Student a FAPE by failing to develop appropriate IEPs for Student from 2009 to the present, including the 3/29/11 IEP.
3. DCPS denied Student a FAPE when DCPS failed provide Student an appropriate placement in the 2009- 2010 school year and the 2010- 2011 school year. Petitioner's proposed placement of Student at _____ School is appropriate.
4. All claims related to the February 17, 2009 IEP are outside the two year statute of limitations.
5. DCPS denied Student a FAPE by failing to implement his May 24, 2010 IEP.
6. DCPS failure to comply with the IDEA requirement that the public agency and parent agree in writing that a required participant need not stay for the entire IEP meeting did not constitute a denial of FAPE.

ORDER

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

1. Within 10 business days, DCPS shall provide Student a prior notice of placement to _____ School. Student shall attend _____ School at DCPS expense for the remainder of the 2011-2012 school year, at a minimum;
2. DCPS shall provide Student transportation to and from _____ School, as required, for educational and IEP program purposes;
3. DCPS is to convene an MDT meeting, to include relevant staff from _____ School and Petitioner and her educational advocate, if Petitioner so chooses, in

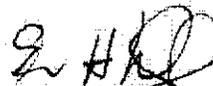
cooperation with The Harbour School within 30 days of Student's enrollment at The Harbour School to review and revise Student's IEP, as appropriate.

4. DCPS is to make arrangements to provide compensatory education, including any needed transportation, as specified in this Hearing Officer Determination at pp 34 – 36.

IT IS SO ORDERED:

9/10/11

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).