

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

PARENT on behalf of
STUDENT,¹

Petitioner,

v

Erin H. Leff, Hearing Officer

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

STATEMENT OF THE CASE

On _____ parent, Petitioner herein, on behalf of the student (“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 with Disabilities Education Act, as amended (“IDEA”). 20 U.S.C.A. §1415(f)(1)(A). Respondent DCPS simultaneously filed a Response to and a Motion to Dismiss Petitioner’s Administrative Due Process Complaint Notice (HO 4) on _____. This response was filed within the 10 day timeline for filing a response established in 34 C.F.R. § 300.508(e)(1). Petitioner filed a response and objection to the Motion to Dismiss (“Motion”)

¹

(HO 6) on _____ and I filed a Memorandum Opinion and Order (HO 7) denying the Motion on the same date. A resolution meeting was held on _____ The parties were not able to reach an agreement. HO 8. The 45 day timeline began to run on _____ the day after the 30 day resolution period ended. Respondent filed an Amended Response and Renewed Motion for Summary Adjudication (HO 9) on _____ The Motion for Summary Adjudication was withdrawn by email of _____ following Petitioner’s withdrawal (HO 10), on the same date, of an issue involving failure to comprehensively re-evaluate the Student. Following the Prehearing Conference held on _____ I issued a Prehearing Conference Order on _____ HO 11. My Hearing Officer Determination is due on _____

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

ISSUE

The issue is:

Whether DCPS denied Student a FAPE by failing to develop an appropriate individualized education program (“IEP”) that included speech/language therapy, occupational therapy and physical therapy as direct services on

RELIEF REQUESTED

Petitioner requested:³

Development of an IEP to include speech/language therapy, occupational therapy and physical therapy as direct services on Student’s IEP. DCPS will include the goals and objectives from the independent evaluations in these areas on Student’s IEP.

SUMMARY OF THE EVIDENCE

A. Exhibits

Exhibits admitted on behalf of Petitioner are:⁴

- Disclosure Letter
 - Developmental Evaluation Report
 - MDT Notes
 - MDT Notes
 - Audiology & Hearing Aid Evaluation (Children’s Hospital)
 - Data Evaluation Review
 - Triennial Worksheets
 - Meeting Notes & IEP
 - Observation Report – Psychological
 - Physical Therapy Evaluation Report & DCPS Review
 - Speech/Language Evaluation Report & DCPS Review
 - Occupational Therapy Evaluation Report & DCPS Review
 - Audiological Report (DCPS)
 - MDT Notes & IEP
 - Compensatory Education, PT and OT
 - Assistive Technology Evaluation Report (DCPS)
 - IEP
 - P 19 Curriculum Vitae, OT
 - P 20 Curriculum Vitae, SLP
 - P 21 Curriculum Vitae, PT
 - P 22 Curriculum Vitae, Advocate
 - P 23 Proposed IEP Goals and Statement from occupational therapist
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Exhibits admitted on behalf of Respondent are:

R-01	Service tracker S/L	Date:	various during 9/13
R-02	Service tracker PT	Date:	
R-03	AT device request	Date:	
R-04	AT assessment	Date:	
R-05	IEP	Date:	
R-06	Meeting notes	Date:	
R-07	attendance records	Date:	
R-08	Independent OT assessment by DCPS OT	Date:	
R-09	PT Independent review	Date:	
R-10	S/L Independent review by DCPS SLP	Date:	
R-11	Service tracker S/L	Date:	various during 5/13
R-12	Service tracker PT	Date:	
R-13	Data sheet	Date:	9/13

Exhibits admitted by the Hearing Officer are:⁵

HO 1	Administrative Due Process Complaint Notice filed
HO 2	Notice of Hearing Officer Appointment of
HO 3	Prehearing Conference Scheduling Letter and Order re Timelines of
HO 4	District of Columbia Public Schools' Response and Motion to Dismiss the Administrative Due Process Complaint Notice of
HO 5	Prehearing Notice of
HO 6	Petitioner's Response and Objection to Respondent's Motion to Dismiss of 2013
HO 7	Memorandum Opinion and Order of
HO 8	Resolution Period Disposition Form of
HO 9	District of Columbia Public Schools' Amended Response and Renewed Motion for Summary Adjudication of
HO 10	Petitioner's Notice of Withdrawal of Issue #2 of
HO 11	Prehearing Conference Order of
HO 12	Consent Order from Prior Matter re Instant Student forwarded
HO 13	Miscellaneous emails ⁶ <ul style="list-style-type: none">● Chain of re scheduling● 2d Chain of re scheduling● Chain re scheduling and notices● Chain of re time of hearing● 2d Chain of re time of hearing● Chain of re format of forwarded document● re review of Motion to Dismiss● Chain of re holding of resolution meeting● Chain of re holding status conference re Motion to Dismiss● Chain of re Respondent's Motion for Summary Adjudication● Respondent's email of withdrawing Motion for Summary Adjudication

- Chain of [redacted] re retraction of email withdrawing Motion
 - [redacted] notification of additional Petitioner’s witness
 - [redacted] reminder to Petitioner’s counsel to provide disclosure list as a Word document
 - Chain of [redacted] re hearing Motion to Strike as a Preliminary Matter
 - Chain of [redacted] re compensatory education claim *
 - Chain of [redacted] re Reed v. Dist. of Col.*
 - 2d chain of [redacted] re compensatory education and Reed case*
 - [redacted] email forwarding Reed case*
 - [redacted] chain re Reed and record being closed*
- HO 14 List of Proposed Hearing Officer Exhibits filed
- HO 15 Respondent’s Motion to Strike Compensatory Education Plan of

B. Testimony

Petitioner testified and presented the following witnesses:

- OT testified as an expert in occupational therapy evaluations and recommendations for school purposes
- PT testified as an expert in physical therapy evaluations and recommendations for programming for students
- SLP testified as an expert in speech-language evaluations and recommendations for students
- Advocate⁷

DCPS presented the following witnesses:

- DCPS SLP
- DCPS OT
- DCPS PT

FINDINGS OF FACT

Based upon the evidence presented, I find the following facts by a preponderance of the evidence⁸:

1. Student [redacted] Shortly after birth, while in the NICU for other reasons, she was diagnosed with ependyoblastoma (a tumor on her spinal cord) for which she received

chemotherapy from 2 to 5 months of age. The chemotherapy caused bilateral hearing loss.

Student also has periventricular leukomalacia, polymicrogyria, chromosome 17 variant, epilepsy and ureteropelvic junction obstruction. Student has cerebral palsy, spastic quadriplegia and low vision. She is non-verbal and non-ambulatory. Student requires assistance with all activities. She is tube fed and has limited alertness. P 3; P 5; P 6; P 11; P 12; P 13; P 17; Testimony of OT; Testimony of PT; Testimony of SLP; Testimony of Petitioner; Testimony of Advocate; Testimony of DCPS OT; Testimony of DCPS PT; Testimony of DCPS SLP.

2. Student is classified as having multiple disabilities (Intellectual Disability, Other Health Impairment, Hearing Impairment, Visual Impairment). P 9; Testimony of OT.

3. Student enrolled in Attending School during the 2009 -2010 school year.⁹ P 12.

4. Student's peripheral vision is better than her direct vision. Student's hearing is better in her left ear. For this reason it is preferred that verbal communication occur from her left. Student has bi-lateral hearing aids. It is recommended she wear them throughout the day. Student misses as much as 70% of verbal communication if she does not wear her hearing aids. Student does not wear her hearing aids consistently in school. Student also has bilateral hand splints. There is information suggesting she also has not been wearing these in school as she should. Recently the school has requested information on Student's possible allergic reaction to the splints and has indicated it will address the use of the splints once that question is resolved. P 5; P 6; P 13; P 14; P 17; Testimony of OT; Testimony of Petitioner.

5. Student's IEPs have required she receive full time special education outside the general education environment. In addition to special instruction, Student's IEP includes physical therapy, occupational therapy, speech/language therapy and, audiology services as related services. A November 2009 Individual Family Service Plan ("IFSP") included these services on

⁹ Attending School is a separate, full time, public special education school.

a direct basis. A January 2010 IEP based on the IFSP also included provision of these services on a direct basis. Physical therapy, occupational therapy and speech/language services are now provided on a consultative basis. Speech–language services were changed to consultative services at an IEP meeting held in May 2010 after Student had been enrolled in Attending School for a few months. The rationale for the change was to allow Student to remain in the classroom to receive language stimulation and pre-language skills.¹⁰ Physical therapy was changed from direct to consultative services at a meeting in March 2011. The rationale was that Student had shown no progress. Student was to receive consultation for positioning and handling. Occupational therapy was changed from direct to consultative services at a meeting in November 2012, again because Student was deemed not to have made progress. P 4; P 5; P 7; P 9; P 12; P 15; P 18; Testimony of DCPS OT; Testimony of DCPS SLP; Testimony of DCPS PT; Testimony of Petitioner.

6. Student is often absent from school due to her medical needs. Student was absent for a total of 76.5 days in the 2012 -2013 school year. In addition to her on-going medical needs and appointments, the school contacts 911 when she has seizures in school despite a doctor’s order indicating this is not necessary if the seizures last less than 5 minutes.¹¹ The school also requires Student not be in school if she has a runny nose. During the 2012-2013 school year she had surgery on her hamstrings. R 7; Testimony of Petitioner.

7. Student spends most of the school day in her wheel chair. Student requires an adaptive chair and a stander to make her available for instruction. At the IEP meeting held on the DCPS PT, DCPS OT and Student’s classroom teacher recognized Student’s need for

¹⁰ There is no evidence suggesting that the possibility of providing direct speech/language services in the classroom was considered.

¹¹ Student has rescue mediation for seizures and a seizure rescue plan that is not implemented as 911 is always called.

adaptive furniture to increase Student's access to classroom activities and instruction and increase Student's availability for instruction by increasing her alertness. An activity chair was to be ordered. The use of an activity chair as well as a stander is specifically identified on the IEP agreed to on that date. These pieces of equipment are also identified on the IEPs of and The activity chair did not arrive until April 2013, five months after the IEP meeting in which the need for such a chair was identified. After providing Student a brief opportunity to use the chair, it was given to another student. The activity chair did not have the leg lifts Student required to use it. P 9; P 11; P 13; Testimony of OT; Testimony of PT; Testimony of Petitioner.

8. Student displays both voluntary and involuntary movement. Her head and upper extremity movements are volitional some of the time. It is not clear whether any of her leg movements are volitional. Voluntary movement can be determined based on Student's engagement, cause and effect and response to intervention. Voluntary and involuntary movement can coexist in individuals, such as Student, who have spasticity. Reflexive or involuntary movement is the basis for voluntary movement. Physical therapy can facilitate the change from involuntary to voluntary movement. Testimony of OT; Testimony of PT; Testimony of Petitioner.

9. As of March 2013 Student's teacher had not been adequately trained on Student's positioning/posture needs. The bean bag chair used for Student's naps is not appropriate because she was not properly positioned. Removing Student's harness while in her wheel chair, as was done, also is not appropriate. P 11; Testimony of PT.

10. Following Student's hamstring surgery at the beginning of 2013, her doctor provided a written order to Attending School for hands on physical therapy for standing, positioning and

range of motion direct service. The school did not provide this service. As a result student lost the gains she had made in surgery and regressed to having even less range of motion than she had had prior to surgery. Testimony of PT; Testimony of Petitioner.

11. Physically, as measured by the GMFM, Student is functioning at the bottom for children with the most severe form of cerebral palsy. This reflects her lack of direct services and movement. She has failed to make the progress that would be expected of a child with similar disabilities. P 11; Testimony of PT.

12. Student's low arousal level and thus her availability for learning can be improved through occupational therapy and physical therapy. Her vestibular system, which processes movement and impacts arousal, can be stimulated. Sitting in her wheelchair for most of the day in combination with her limited vision and hearing result in low arousal and interfere with her availability for learning. Proper positioning alleviates pain and increases alertness which would allow Student to be more available for learning. Medication side effects also may be impacting Student's arousal level. Testimony of OT; Testimony of PT.

13. Direct occupational therapy services allow the therapist to know what changes are occurring as a result of therapeutic intervention. Changes in the brain occur after repeated exposure to learning. This is neuroplasticity. Testimony of OT.

14. Classroom records indicate that from October through the first week of November 2012 Student demonstrated skills at a higher level than between the first week of November 2012 and mid- December 2012 after her direct occupational therapy services were cut to monthly consultation. P 13; Testimony of OT.

15. In addition to increasing alertness and availability for learning, proper positioning and direct physical therapy can prevent scoliosis, hip dislocations and fractures which interfere with school attendance. P 11; Testimony of PT.

16. Student requires activity. Student requires a trial with an activity based intervention such as a gait walker, a motorized wheelchair using a switch and/or swimming. P 11; Testimony of PT.

17. Student was provided compensatory occupational therapy and physical therapy at the IEP meeting held in June 2013. She is receiving these services at home. Student is responding to the therapies. These services include switch training. Student stays alert throughout the interventions and is showing progress. P 16; Testimony of Advocate; Testimony of Petitioner.

18. Student has communicative intent. Communicative intent can be verbal or non-verbal, including gestures and eye contact. Student reportedly makes vowel sounds when she is upset, smiles, gurgles and watches and tracks other students and bright colored objects. She responds to her mother's voice and to her teacher's voice. Positioning is important for the development of communication either through speech or through the use of a switch. Without direct speech services Student will regress and be unable to access the curriculum. Student's speech services were reduced on from 60 minutes of consultation to 30 minutes of consultation monthly due to her absences. Direct speech language services would help Student progress to the next level of communicative intent. P 4; P 10; P 12; P 17; P 18; Testimony of SLP.

19. DCPS has a policy allowing a related service provider to dismiss a student from or place a student on consultation rather than direct service after 3 years of no progress. Testimony of DCPS PT; Testimony of DCPS OT.

20. The DCPS related service providers do not think Student's needs for service are educational but rather medical in nature. P 11; Testimony of DCPS PT; Testimony of DCPS OT.

21. Student's IEP dated _____ indicates she had shown increased alertness and interest in class activities. It states that with maximum support she was reaching her goals, that she smiled and made some vocalizations in response to stimulus and was showing interest in social interactions with other children. This IEP required Student use an activity chair and a stander in goal areas ranging from mathematics and reading to physical and occupational therapy. The IEP states the activity chair and stander will facilitate access to materials. The IEP indicates use of the stander will increase alertness. The IEP states Student can vocalize pleasure and displeasure and protest with vocalizations and notes her severely impaired language skills were impacting her ability to access the curriculum and communicate her wants and needs. It then states speech therapy is not warranted. The goals for occupational therapy were to increase her tolerance of standing in a stander and to tolerate sitting in an upright posture. P 9.

22. The results of the independent physical therapy evaluation of _____ were not accepted by DCPS. The independent physical therapy evaluation determined Student required direct services in order to access and benefit from her education. P 11; Testimony of PT; Testimony of DCPS PT.

23. The results of the independent speech language evaluation of _____ and _____ were not accepted by DCPS. The independent speech/language evaluation determined Student required direct services in order to access and benefit from her education. P 12; Testimony of SLP; Testimony of DCPS SLP.

24. The independent occupational therapy evaluation report of _____ was not accepted by DCPS. The independent occupational therapy evaluation determined Student

required direct services in order to access and benefit from her education. P 13; Testimony of OT; Testimony of DCPS OT

25. Student's IEP dated _____ indicates Student had had significant absences and her previously noted progress had undergone significant regression. It states she slept despite stimulation. It notes she no longer attempted to track the speaker or eye gaze. The activity chair and stander are not included in the IEP goals other than under physical therapy and occupational therapy. P 15.

26. During the DCPS assistive technology assessment of _____ Student was observed during story time. She was not wearing her hearing aids. She made vowel sounds when the teacher changed her position so that she was uncomfortable. The report recommended communicating with Student primarily through touch, establishing predictable routines, using hand over hand techniques and switch training for language modeling and teaching cause and effect. P 17.

27. Student's IEP of _____ which was developed without parental participation subsequent to the filing of the instant complaint,¹² incorporates some of the recommendations from the assistive technology assessment including the use of assistive technology equipment to aid Student in accessing the curriculum. The IEP also indicates Student does respond to sound by turning or lifting her head and that she can use eye gaze for up to 8 seconds. Multi-sensory approaches and training in the use of switch are also included. All related services remain consultative. P 18.

¹² As this IEP was developed after the filing of the Complaint it does not affect my determination regarding the issue in the Complaint. This IEP is addressed here for context.

DISCUSSION

The following discussion is based on my review of the exhibits introduced by the parties, witness testimony and the record in this case.¹³ While I find all but one of the witness' testimony presented in this matter to be credible,¹⁴ in that they testified truthfully to the facts as they understood them or believed them to be, some witnesses were more persuasive than others. In the discussion that follows I address witness credibility and persuasiveness when it is applicable to my determination herein.

Under the IDEA each local education agency is required to provide a free appropriate public education ("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 effect of the student's disability on his/her involvement and progress in the general curriculum; measurable annual academic and functional goals designed to meet the student's educational needs resulting from his/her

disability; a statement of the special education and related services, supplementary aids and services, and program modifications and supports to be provided to the student to allow him/her to advance toward attaining the IEP goals and progress in the general curriculum and to participate in nonacademic activities. In addition the extent of the student's participation with nondisabled peers must be addressed. 34 C.F.R. § 300.320. *See also*, D.C. Code § 30.3009. In developing the IEP the team is to consider the strengths of the child, the concerns of the parent for enhancing the education of the student, the results of the most recent evaluation and the academic, developmental and functional needs of the student. 34 C.F.R. § 300.324(a). *See also*, D.C. Code § 30.3007. For students who have visual impairments the team is to consider the use of Braille. 34 C.F.R. § 300.324(a)(1)(iii). The team also is to consider the communication needs of the student and for those who are deaf or hard of hearing, consider his/her language and communication needs including opportunities for direct communication with peers and professional personnel and direct instruction in the student's communication mode. 34 C.F.R. §300.324(a)(1)(iv). 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).

The content of an IEP is a team decision 34 C.F.R. §§ 300.320 – 300.323. *See also*, D.C. Code §§ 30.3007.1 & 3008.1. Teams are required to consider all the relevant information before them. *Id.* The IEP is to be reviewed at least annually, and it is to be revised to address any lack of expected progress toward the goals, information about the student provided by the parent, the child's needs or other matters. 34 C.F.R. § 300.324(b). In reviewing whether an IEP provides a student a FAPE as required by IDEA, a hearing officer must consider whether the district complied with IDEA's procedural requirements and determine whether the program was

reasonably calculated to enable the student to receive educational benefit. *Rowley*, 458 U.S. at 207.

In the instant matter there is no allegation that DCPS did not comply with procedural requirements. The only issue before me whether Student was denied a FAPE when DCPS failed to include provision of direct services in the areas of occupational therapy, physical therapy and speech-language pathology on Student's IEP. DCPS does not dispute that these direct services are not included on Student's IEP. Rather DCPS argues that Student cannot and has not benefitted from such direct services and, relatedly, that DCPS policy allows for the discontinuation of direct services in each of these areas because Student has shown no progress in any of these three areas for three years. DCPS also suggests that Student's absences are a basis for denying her direct services. DCPS further contends that Petitioner's experts' assessments and recommendations are not appropriate, and, finally, DCPS suggests that these three therapies for this student are not educational in nature but medical and, therefore, DCPS is not required to provide them. For the reasons that follow, I reject these arguments and find Student has been denied a FAPE by DCPS' failure to include physical therapy, occupational therapy and speech therapy as direct services on Student's IEP.

I start by defining what constitutes a FAPE for students with severe disabilities. It has been well settled law since the seminal case of *Timothy W. v. Rochester, New Hampshire School District*, 875 F. 2d 954 (1st Cir. 1989) that "the concept of education is necessarily broad with respect to severely and profoundly handicapped children, and '[w]here basic self-help and social skills such as toilet training, dressing, feeding and communication are lacking, formal education begins at that point.'" *Id.* at 970 citing *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269, 275 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981). In the instant matter it is clear that

Student, who is totally dependent in all areas, has needs for education in such basics including communication. As noted by the Court in *Timothy W.* many other cases have found that the education of a student with such severe disabilities as those of the instant student may consist largely of related services such as physical therapy, occupational therapy and/or speech therapy. *Id.* at 970 citing *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 176, 183 (3d Cir.1988) ("the physical therapy itself may form the core of a severely disabled child's special education," and the fact that such a child "may never achieve the goals set in a traditional classroom does not undermine the fact that his brand of education (training in basic life skills) is an essential part of [the Act's] mandate."); *DeLeon v. Susquehanna Community School District*, 747 F.2d 149, 153 (3d Cir.1984) ("[t]he educational program of a handicapped child, particularly a severely and profoundly handicapped child ... is very different from that of a non-handicapped child" and "[t]he program may consist largely of 'related services' such as physical, occupational, or speech therapy"); *Abrahamson v. Hershman*, 701 F.2d 223, 228 (1st Cir. 1983) ("Congress established a priority under the Act for the most severely retarded children, 20 U.S.C. § 1412(3), for many of whom, certainly, education will not consist of classroom training but rather training in very basic skills"); *Kruelle*, 642 F.2d at 693 ("the concept of education is necessarily broad" with respect to severely or profoundly retarded children); *Campbell v. Talladega County Board of Education*, 518 F.Supp. 47, 50 (N.D.Ala.1981) (the educational programs of children with severe handicaps consist of teaching them "functional" skills); *North v. District of Columbia Board of Education*, 471 F.Supp. 136, 141 (D.D.C.1979) (in ruling that a school district must provide residential placement for the severely handicapped plaintiff, the court noted that the educational, social, emotional, and medical problems were so intimately intertwined, it could not separate them); *School District of the Menomonee Area v. Rachel W.*, 1983-1984 EHLR

(Education for the Handicapped Law Report) DEC. 505:220,227 (occupational and physical therapy are to be considered educational services because education for severely handicapped children must be viewed broadly to include such therapies). This law is so well settled that it is difficult to find recent cases addressing the provision of these related services as part of FAPE for students with severe disabilities. Petitioner, however, did provide one relatively recent case, *Reed v. District of Columbia*, Civ. Action No. 03-1575 (CKK) (D.D.C. 2004) that addresses issues eerily similar to those before me.

In *Reed*, the Court found DCPS had failed to provide the student a FAPE because the program and services offered to the student were not reasonably calculated to enable him to receive some educational benefit as required by *Rowley*. The student in *Reed*, although at 14 many years older than the instant student, had many significant disabilities (cerebral palsy, global developmental delays, hydrocephalus, orthopedic impairments, and marked intellectual disability) as does the student herein and was enrolled in the same school in which Student is currently enrolled. The *Reed* student, like the student in the instant matter, was nonverbal, dependent on others for self-care and used a wheel chair. Over time DCPS stopped providing the student in *Reed* both physical therapy and speech language therapy.¹⁵ Eventually the parent in *Reed* decided to obtain independent evaluations, and, subsequently, she requested the student receive physical therapy, speech therapy, occupational therapy and a communication system. Only occupational therapy was added to the *Reed* student's IEP and that only on a consultative basis. The independent evaluators hired by the parent in *Reed* determined, similarly to the instant matter, that the *Reed* student required physical therapy including a standing program and the use

of a gait trainer and speech-language therapy including the use of an augmentative/alternative communication system. The independent evaluators and service providers found the *Reed* student responded to interventions. Another similarity shared by the two cases is that the *Reed* student's speech language therapy had been discontinued due to a lack of progress, among other reasons. The Court found the *Reed* student's IEP was inappropriate, and he had not received educational benefit at Attending School.

At hearing, DCPS argued that the *Reed* case involved a different student, with different disabilities and different facts and, therefore, is inapposite to the instant matter. While I agree that there are some differences between *Reed* and the instant matter, *Reed* clearly is instructive here.¹⁶ Not only do the two cases involve students with multiple, severe disabilities, but the students also both were or are enrolled at Attending School. In both instances independent evaluators determined the students could benefit from direct related services that DCPS had chosen not to provide. In both instances the students showed responsiveness and gains from therapies provided to them outside the school environment that could have been and should have been provided within the school environment. The *Reed* court found the student would likely have advanced had he been provided the proper instruction and therapies, and the same can be found here. Fortunately, the instant student is only six years old and instruction and therapies can be initiated now rather than waiting, as in *Reed*, until she is a teenager.

Petitioner's Experts' Assessments and Recommendations and Proposed IEP Goals

Petitioner presented expert testimony in each of the related service areas in contention here. Each of these experts' reports provided analysis of Student's functional skills in her area of expertise, explained Student's need for direct therapy and made recommendations for direct

service for Student. Each expert also provided proposed goals in her area of expertise. Respondent countered these presentations with the reports rejecting Petitioner's experts' reports and testimony of the related service providers currently providing Student consultative services in each of these related service areas. DCPS argued that the DCPS witness' testimony should be given greater weight because these providers see her regularly. I note however that the DCPS service providers work almost entirely with classroom staff rather than Student as their services are consultative. Thus Respondent's argument that these witnesses' testimony should be given greater weight has little substance behind it. Moreover, the evidence presented by each of these related service providers, in my opinion, lacks persuasiveness. Rather than focusing on the needs of Student, each appeared to be focused on justifications for not providing direct service to Student. It is not coincidental that each of these witnesses insisted Student was not and had not made progress for at least three years and that she was unable to do so for a variety of reasons including excessive absences, medication and her disabilities themselves. In short, they all agreed she had plateaued. They offered no evidence suggesting they had attempted to revise Student's goal, attempt new approaches or in any other way adjust their work with Student in an effort to find an approach that would result in some success. In contrast, those individuals who were not her assigned therapists, including Petitioner, her experts, the DCPS Assistive Technology Manager, and, by report, Student's classroom teacher and the therapists currently providing her compensatory physical education and occupational therapy, found Student to be able to learn and respond to interventions at least some of the time.

I am concerned that the DCPS therapists were willing to stop direct services to a child who is currently only six years old.¹⁷ I am also concerned these therapists rejected the findings of the independent evaluators, although none of them suggested a new DCPS evaluation in any one

of the related service areas be conducted. As professionals who have chosen to work with students with disabilities, I give two of the three the benefit of a doubt and presume their opinions are founded on the information within their knowledge. I do not intend to suggest these two held any animosity toward Student or intent to misstate or mislead. Rather I conclude these two DCPS service providers lack the requisite information to address Student's complex and comprehensive needs. The third service provider, DCPS SLP, presented her testimony in a significantly different manner. I address her testimony separately below.

- Physical therapy

Petitioner's physical therapy expert convincingly testified to and provided a report establishing the need to establish sitting, standing and mobility programs for Student. She addressed the potential negative effects of not initiating such programs as well as the benefits that would accrue from such programs including increased alertness which will make Student available for learning. This witness also addressed the need for proper positioning, training of classroom staff to assure they understand both positioning and equipment, the need for Student to be active and for assuring equipment was properly adjusted to fit Student. The witness' well supported opinion was that Student required both direct and consultative physical therapy to progress.

DCPS PT began working with Student last year. At that time Student had been previously assigned to physical therapy on a consultative basis only. DCPS PT noted she had reviewed Student's records, and Student had not progressed when receiving direct service. She stated Student was placed in a stander daily. Petitioner's expert stated, however, that the stander available for Student is old and as a result Student cannot be properly positioned in it. DCPS PT rejected the recommendations in PT's report. She stated Student had no voluntary movement

although numerous other individuals disagree. She stated training Student to use a gait trainer or a power wheelchair is inappropriate due to her lack of muscle strength and limited vision. This criticism both misses the point of training and suggests the Student should not be allowed to participate in an activity due to her disability rather than attempting to address necessary accommodations as required. DCPS PT specifically stated Student does not need direct service because she does not show signs of readiness. This view is particularly disturbing as it creates a situation in which Student's disability is used to deny her service. That lack of service will create regression which will then be used to show again that Student is not ready for service. IDEA does not require a student show readiness for service. Rather, it requires that programs and services be provided to address a student's identified needs. Student has many identified needs for physical therapy. PT was able to devise recommendations and goals to address these needs. DCPS PT's failure or inability to design such recommendations and/or goals is not a basis for denying Student direct PT services.¹⁸ Finally despite reviewing PT's report and stating it is inconsistent and inaccurate, DCPS PT found there was no need for additional information. She stated that of the 5 goals PT proposed for Student three were not educationally relevant and two could be done by consultation. I disagree and adopt these proposed goals as part of the remedy ordered herein.

- Occupational Therapy

Petitioner's occupational therapy expert convincingly testified to and provided a report establishing the need to provide Student direct occupational therapy services. She specifically

noted that direct occupational therapy services would increase Student's arousal level making her more available for learning. She stressed the need for an occupational therapist to work directly with Student's sensory, vestibular and proprioceptive systems to be able to make necessary and appropriate adjustments to therapeutic interventions as Student develops. She indicated occupational therapy will help Student become more available for learning by addressing Student's needs in range of motion, volitional movement, cause and effect, endurance and arousal level.

DCPS OT indicated she has worked with Student for a little more than 4 years. She has provided Student both direct and consultative services. She states she saw no progress after three years of direct services so moved her from direct services to consultative.¹⁹ DCPS OT stated that Student does not require direct occupational therapy due to her low arousal level and her need for hand over hand assistance. She also noted Student's many absences, her low arousal level and her illness as contraindications for direct services. DCPS OT stated she spoke to Student's classroom teacher monthly, as required, and Student was making no progress. DCPS OT recommended, in her review of OT's report, that Student receive an assistive technology evaluation.²⁰ As with physical therapy Student has many identified needs for occupational therapy. OT was able to devise recommendations and goals to address these needs. DCPS OT's

failure or inability to design such recommendations and/or goals is not a basis for denying Student direct PT services.²¹ Finally despite reviewing OT's report and rejecting it, DCPS OT found there was no need for additional information. She indicated all goals could be provided through consultation. I disagree and adopt these proposed goals as part of the remedy ordered herein.

- Speech/language therapy

SLP convincingly testified and provided a report establishing Student's behavior indicated communicative intent in that she made vowel sounds to express discomfort, smiled at her mother and teacher's voices, tracked the teacher and students with her eyes as well as tracking toys. Student also showed some volitional movement of her head in response to sound. SLP indicated that increased tactile and auditory stimulation would increase Student's arousal level. SLP established Student's need for direct speech/language therapy.

DCPS SLP's testimony, in opposition to providing direct services, raised some significant concerns. Although numerous other individuals had found Student responding, at least some of the time, to voices, DCPS SLP denied this ever occurred. She also expressly stated Student's vowel sounds that others connected to expression of discomfort did not indicate communicative intent. DCPS SLP added Student has no purposeful movement,²² doesn't attend, doesn't imitate and shows no desire to learn a concept like cause and effect. DCPS SLP also stated when asked about the inclusion of switch training on Student's IEP that she was opposed to its inclusion. I note this was a recommendation made both by Petitioner's experts as well as DCPS' assistive technology manager. Unlike DCPS OT and DCPS PT, this individual appears to have totally discounted Student and determined that any efforts to educate

or train Student are without value. She evidenced a closed mind as to Student's possible development beyond her current levels. Moreover, her testimony was presented with apparent animus. As a result of this extremely negative view I find DCPS SLP's testimony to lack credibility and I do not consider it in my determination. As with occupational therapy and physical therapy I adopt the speech/language goals proposed by SLP as part of the remedy ordered herein.

Attendance

DCPS argues that Student's absenteeism is a basis for denying her direct service. Yet Student's absences are due, at least in part, to her disabilities. She has been absent for medical appointments, illnesses, seizures and surgery. Again DCPS appears to be denying Student needed services due to her disabilities rather than making efforts to provide accommodations. For example, if Student is known to have continued and on-going absences DCPS could choose to develop a program, as part of her IEP, to provide services when she is absent if she is able to participate in the services at home or in the hospital. This has not occurred. Instead her disabilities have been used to deny her service. I note that DCPS even refused to provide physician ordered physical therapy following Student's surgery stating it was medical and not educational. As discussed herein, Student's physical disabilities directly affect her availability for education, and as noted above, for a student with significant disability this type of service is where education starts. *See Timothy W., Supra.* DCPS has created a closed system precluding Student from receiving needed services under IDEA. First DCPS denies Student services because she is not regularly attending school due to her disabilities and disability related illness and surgery, and then DCPS refuses to provide service that might increase her physical ability to attend school thereby potentially exacerbating Student's disability related attendance issues.

Petitioner's Experts' Proposed IEP Goals

Each of Petitioner's experts provided proposed IEP goals for Student in the expert's area of expertise. DCPS argued that these goals should have been provided to the IEP team for their consideration before being presented at a due process hearing. I note there is no such requirement in IDEA. Further, in the instant matter, I do not know how this could have occurred. The

IEP does not include direct services in occupational therapy, physical therapy and speech/language pathology.²³ The DCPS service providers recommended against direct service and no direct service in these areas can be found in Student's IEP. Petitioner, through her advocate, indicated consultation services were not sufficient. However, DCPS team members disagreed. The IEP does not add direct service in any of these areas.

Therefore, any effort Petitioner made to present direct service goals in these areas would have been rejected. The purpose of this matter has been for me to determine whether this failure to include direct related services on Student's IEP is a denial of FAPE. Evidence as to proposed direct service goals is relevant to my determination, and I conclude the goals provided by Petitioner's experts are appropriate, and as stated above, I adopt these goals and include them in my order.

For the reasons discussed above I find, by a preponderance of the evidence, that DCPS' failure to develop an IEP on including speech/language therapy, occupational therapy and physical therapy as direct services denied Student a FAPE. The IEP without these direct services was not reasonably calculated to enable Student to receive some educational benefit

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law that DCPS denied Student a FAPE by failing to develop an appropriate IEP that included speech/language therapy, occupational therapy and physical therapy as direct services on 14, 2013.

ORDER

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

1. Within 10 school days of DCPS' receipt of this Hearing Officer Determination, DCPS shall convene an IEP meeting, including Petitioner and her advisors if she chooses to have them present, to revise Student's IEP to include direct services in physical therapy, occupational therapy and speech/language services as well as the consultative services and equipment identified below.

a. **Physical Therapy:** Student's IEP shall indicate she is to receive 60 minutes of direct service and 30 minutes of consultation per week. Consultation may be faded to 15 minutes per week, as appropriate, with agreement from Petitioner. Student is to be provided a Rifton Chair, a Stander and a Lying System (not a bean bag chair).²⁴ The additions to Student's IEP are to include the following goals:

1. In order to increase and maintain functional range of motion within her lower extremities, Student will tolerate positioning in a prone or supine stander with weekly modifications to increase hip and knee extension by 1 degree (as measured by a licensed PT with a goniometer). This stander will also be able to abduct to at least 15 degrees on each side (30 degrees total) and have foot plates that are adjustable in all three planes and can accommodate her leg length discrepancy. It will also

²⁴ There was testimony at hearing suggesting that the stander and Rifton chair available to Student cannot be appropriately adjusted to fit her needs. DCPS is to assure the equipment made available to Student can be appropriately adjusted, and if it cannot, new, appropriately adjustable equipment is to be ordered within 3 business days of the IEP meeting.

need modified laterals to assist with her spine deformity. Her legs will also be slowly abducted by 1 degree per week until she is at her maximal tolerated position.

2. In order to increase endurance, volitional movement, and overall functional performance, Student will participate in some sort of physical activity in which her heart rate increases by 15-30 beats per minute as measured by a qualified PT or RN. This could be an adapted bike, gait trainer, swimming, etc.
3. Student will be repositioned every hour between her wheelchair (which will only be reclined 15% of the day), a secondary seat which has anterior inclination and a tray on which her elbows and forearms can support her trunk, and a lying system which maintains her head, spine, hips and knee in neutral alignment (NOT a bean bag).
4. Student will participate in sit-to-stand transfers by lifting her head and taking 10-15% of her body weight through her legs when supported by an adult. This will require daily practice and at least 3 trials 3x/day. This can be monitored and delivered weekly by the PT so as to progress appropriately.
5. Student will tolerate her AFO's and knee immobilizers daily for a total of 6 hours/day until she can achieve neutral extension. A qualified PT will monitor and deliver this weekly so he/she can recommend necessary adjustments.

b. **Occupational therapy:** Student's IEP shall indicate she is to receive 30 minutes of direct service and 15 minutes of consultation per week. The additions to Student's IEP shall include the following goals:

1. In order to increase and maintain functional range of motion within her upper extremities, Student will tolerate passive range of motion exercises to her upper extremities (all joints: fingers, wrists, elbows, shoulders) at least once per day in 9/10 attempts without resistance.
2. In order to increase endurance, volitional movement, and overall functional performance, Student will participate in fine motor tasks that are rich in visual/auditory stimulation and require sustained grasp on an objects for at least 10 seconds in 4/5 trials.
3. Student will sustain attention and a consistent state of arousal/alertness during a therapeutic task for 5 minutes with moderate cues in 4/5 trials.

4. Student will participate in play/educational activities by depressing a switch²⁵ activated device with either hand in 5/10 opportunities after assistance is provided for optimal positioning/set-up.
- c. **Speech/language therapy:** Student's IEP shall indicate she is to receive 30 minutes of direct service 4 times a week and 30 minutes of consultation per month. The additions to Student's IEP shall include the following goals:
1. Student will demonstrate an understanding of cause and effect with 70% accuracy over 3 consecutive sessions.
 2. Student will utilize her communication device²⁶ to (a) participate in activities (such as story time or morning circle) and (b) greet adults/peers with 70% accuracy over three consecutive sessions.
 3. Student will attend to an activity (such as story time or morning circle) for 5- 10 minutes over 3 consecutive sessions.
 4. Student will imitate non-speech sounds with 70% accuracy over 3 consecutive sessions.
 5. Student will imitate early developing sounds /p,b,m/ with 70% accuracy over 3 consecutive sessions.

2. Any changes to the above specified additions to Student's IEP are to be made only with express agreement of Petitioner, and her advisors if she chooses to include them in the IEP process, at an IEP meeting for the year term of the IEP revision ordered herein. Any suggested changes proposed by DCPS must be based on documentation establishing Student has met/not met the specific goal. If Student does not meet the goal, the team is to consider alternatives to the direct service goals

²⁵ The method for depressing a switch shall be the same as that on which Student is currently being trained during her home based compensatory occupational and physical therapy sessions. That is, if the therapists providing these services at home are using a head activated switch, a head activated switch is to be used in school. If the therapists at home are using a hand activated switch, a hand activated switch is to be used at school. In sum, the school personnel are to use the same type of switch and methodology currently being used with Student. The school is not to change it. If a similar switch is not available at school, it shall be ordered within 3 business days of the IEP meeting.

²⁶ This communication device shall use the switch activation process on which Student is being trained.

specified here rather than discontinuing direct service.

3. Petitioner's school based occupational therapist and physical therapist are to consult with the therapists providing Student's services at home. The school based therapists are to assure the services provided in school are consistent with those provided at home with which Student is reported to be having success.

4. As I have found Student's current school based speech/language therapist lacked credibility and displayed animas toward Student, DCPS is to assign a different speech language pathologist to provide Student the speech/language services specified herein.

IT IS SO ORDERED:

October 14, 2013
Date



Erin H. Leff
Hearing Officer

NOTICE OF RIGHT TO APPEAL

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