

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
December 11, 2013

PETITIONER on behalf of
STUDENT,¹

Petitioner,

v

Erin H. Leff, Hearing Officer

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent

HEARING OFFICER DETERMINATION
and Decision on Motion for Directed Verdict

STATEMENT OF THE CASE

On September 23, 2013, the student's grandmother and guardian, 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 filed a Response to Petitioner's Administrative Due Process Complaint Notice (HO 4) on October 1, 2013. This was within the 10 day timeline for filing a response established in 34 C.F.R. § 300.508(e)(1). A resolution meeting was held October 4, 2013. The parties were not able to reach an agreement and executed

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.

a Resolution Period Disposition Form on the same date so indicating. HO 6. The 45 day timeline began to run on October 24, 2013, the day after the 30 day resolution period ended.

On October 18, 2013, Petitioner filed a Motion to Strike and/or Limit DCPS' Defenses ("Motion")(HO 7), and Respondent timely filed an Opposition to Petitioner's Motion (HO 10) on October 24, 2013. I issued a Revised Order³ (HO 13) on this motion on October 27, 2013 granting the Motion and requiring DCPS to file an amended response in compliance with the IDEA no later than November 15, 2013. DCPS filed the amended response on November 14, 2013. HO 14. Following the Prehearing Conference held on October 24, 2013, Petitioner filed an unopposed Motion for Continuance (HO 8) on the same date, and I issued an order granting the requested continuance. HO 9. I issued a Prehearing Conference Order on October 26, 2013. HO 11. My Hearing Officer Determination is due on December 17, 2013.

At all times relevant to these proceedings Petitioner was represented by Nicholas Ostrem, Esq., and Tanya Chor, Assistant Attorney General, represented DCPS. By agreement of the parties, the hearing was scheduled for December 3 and 6, 2013. The hearing was held, and completed, on December 3, 2013⁴ in Room 2003 of the Student Hearing Office.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C. §§ 1400, *et seq*;
District of Columbia Code, §§ 38-2561.01, *et seq.*; federal regulations implementing IDEA, 34

³ I filed an Order and an Amended Order on this Motion on November 7, 2013 and November 11, 2013, respectively. The Revised Order directed these prior Orders be removed from the record in the instant matter. The substance of all three orders was the same. Each successive iteration of the Order corrected only inartful language or typographical errors.

⁴ This hearing was originally scheduled for two hearing days. On December 2, 2013 Petitioner's counsel notified me and opposing counsel that he had not been able to arrange the appearance of DCPS witnesses. I note he had not initiated the processes for compelling the attendance of witnesses discussed during the prehearing conference and identified in the Prehearing Conference Order. He also had not included Respondent's counsel in his efforts to obtain the appearance of DCPS witnesses. I further note Petitioner's counsel and Respondent's counsel disagreed about whether contact with Respondent's counsel was required for communication with DCPS witnesses. I was not asked to resolve this dispute and did not. The disagreement did not occur with sufficient time before hearing to have had any effect on the appearance of witnesses at the hearing. At hearing, Petitioner presented only one witness (who testified as to proposed remedy) in addition to her own testimony. No witnesses with educational experience and knowledge regarding Student's program and/or services testified. Respondent presented no witnesses and moved for a directed verdict. My determination is therefore based on Petitioner's testimony and the documentary evidence.

C.F.R. §§ 300.1, *et seq.*; and District of Columbia regulations at D.C. Mun. Reg. tit. 5-E §§ 3000, *et seq.*

ISSUES

The issues are:⁵

- 1) Whether DCPS’ denied Student a free appropriate public education (“FAPE”) by failing to implement his individualized education program(s) [“IEP(s)”] in the 2011 - 2012 school year; or
- 2) Whether DCPS denied Student a FAPE by failing to provide him as appropriate placement able to meet his individual and unique needs during the 2011-2012 school year.

RELIEF REQUESTED

Petitioner requested:

- 1) Funding of an independent evaluation by the Nonpublic Education Program with subsequent placement in the specific programs recommended in the evaluation for the duration recommended.
- 2) Convening of an IEP meeting within 15 days of the completion of the Nonpublic Education Program evaluation to review and revise the student’s IEP as appropriate.

SUMMARY OF THE EVIDENCE

A. Exhibits

Exhibits admitted on behalf of Petitioner are:

P-1	12/21/2012	DCPS DIBELS Assessment
P-2	02/01/2013	Independent Comprehensive Psychological Evaluation
P-3	02/08/2013	Independent Speech-Language Evaluation
P-4	02/28/2013	Independent Auditory Processing Evaluation
P-5	05/22/2013	DCPS Vineland II Assessment
P-6	03/15/2012	Eligibility Determination Report
P-7	03/15/2012	Evaluation Summary Report
P-8	11/30/2012	Amended IEP

⁵ The two issues raised in this Complaint are plead in the alternative. It was expressly agreed that should I find in Petitioner’s favor as to Issue 1, Issue 2 would not be addressed, and it would be dismissed with prejudice. Issue 2 is to be addressed if I find against Petitioner on Issue 1.

P-9	05/24/2013	IEP Team Meeting Notes
P-10	06/17/2013	IEP
P-11	06/17/2013	Prior Written Notice
P-12	SY 11-12	Report Card
P-13	SY 11-12	Service Trackers
P-14	12/03/2012	Records Request
P-15	Undated	Educational Advocate Resume

Exhibits⁶ admitted on behalf of Respondent are:

R 1	IEP Signature Sheet	2/25/2011
R 2	ESY Eligibility Sheet	July 2011
R 3	IEP Amendment Form	11/16/2011
R 4	IEP Amendment	11/30/2012
R 5	IEP Amendment Form	11/30/2012
R 6	AED PWNs	2/27/2012
R 7	IEP Signature Sheet	1/10/2012
R 8	Educational Evaluation Report	Feb. 2012
R 9	Data Evaluation Review	3/14/2012
R 11	Disability Worksheet: SLD	3/15/2012
R 12	IEP Progress Report ESY 2012	7/27/2012
R 13	IEP Progress Report Advisory 1	11/14/2011
R 14	IEP Progress Report Advisory 2	2/6/2012
R 15	IEP Progress Report Advisory 3	4/30/2012
R 16	IEP Progress Report Advisory 4	6/13/2012
R 17	IEP Signature Sheet	1/17/2013
R 18	Procedural Safeguards Receipt	1/17/2013

Exhibits admitted by the Hearing Officer are:⁷

HO1	Administrative Due Process Complaint Notice filed September 23, 2013
HO2	Notice of Hearing Officer Appointment of September 24, 2013
HO 3	Prehearing Conference Scheduling Letter and Order re Timelines of September 25, 2013
HO4	District of Columbia Public School's [sic] Response to Parent's Administrative Due Process Complaint of October 1, 2013
HO5	Prehearing Notice of October 2, 2013
HO6	Resolution Period Disposition Form of October 4, 2013
HO7	Petitioner's Motion to Strike and/or Limit DCPS' Defenses of October 18, 2013
HO8	Petitioner's Motion for Continuance of October 24, 2013
HO9	Interim Order on Continuance Motion of October 24, 2013
HO10	Respondent's Opposition to Petitioner's Motion to Strike and/or Limit Defenses and Response of October 24, 2013

⁶ R 10 was a space holder. There was no exhibit. It is, therefore, omitted from the exhibit list here. R 19 was not relevant and was not admitted. R 20 was withdrawn.

⁷ Emails forwarding the documents of record to opposing counsel and the hearing officer are filed with the documents of record unless otherwise noted.

- HO11 Prehearing Conference Order of October 26, 2013
- HO12 Petitioner's Reply to DCPS' Opposition to Petitioner's Motion to Strike and/or Limit DCPS' Defenses of October 27, 2013
- HO 13 Revised Order on Petitioner's Motion to Strike and/or Limit DCPS' Defenses of November 13, 2013
- HO 14 District of Columbia Public School's [sic] Amended Response to Parent's Administrative Due Process Complaint of November 14, 2013
- HO 15 Miscellaneous emails
- 9/25/13 from Petitioner re scheduling
 - Chain of 9/25 – 10/1 re scheduling
 - Chain of 10/2/13 re prehearing notice and resolution meeting
 - 10/23/13 from Respondent re telephone number for conference
 - 2 Chains of 11/7/13 re Order on Petitioner's Motion to Strike
 - 2 Chains of 11/7 - 11/8/13 re Amended Order on Petitioner's Motion to Strike
 - 11/13/13 chain re missing attachment
 - Chain of 11/11 – 11/13/13 re Amended and Revised Orders
 - 11/21/13 from Petitioner re DCPS' Amended Response
 - Chain of 11/25 – 11/26/13 re Petitioner's disclosures
 - 11/26/13 Respondent's counsel's out of office notification
 - Chain of 11/25 – 11/17/13 re Respondent's disclosures and objections to Petitioner and Hearing Officer exhibits
 - Chain of 11/26 – 11/27/13 re HO exhibit 15 (email of 11/21/13)
 - Chain of 12/2/13 re Petitioner's case presentation and Respondent's witnesses
 - 12/2/13 re Respondent calling witnesses on 12/3/13
- HO 16 List of Proposed Hearing Officer Exhibits filed November 22, 2013

B. Testimony

Petitioner testified and presented the following witness:

- Center Director Nonpublic Education Program (“Director”)

DCPS presented no witnesses.

FINDINGS OF FACT

Based upon the evidence presented, I find the following facts by a preponderance of the evidence:⁸

1. Student is 11 years old. He is assigned to the learning disabilities self-contained intermediate class room at Current DCPS ES for the 2013-2014 school year. He is classified as a

⁸ In the findings that follow I cite exhibit numbers and/or testimony as bases for the findings. Some exhibits were introduced by both Petitioner and Respondent. The citations to exhibits reference only one party's exhibits in those instances where both parties have introduced the same exhibit.

student with multiple disabilities (specific learning disabilities; other health impairment). P11; Testimony of Petitioner.

2. In the 2011-2012 school year, the time period at issue in this matter, Student attended third grade at Prior DCPS ES. He was classified as a student with specific learning disabilities. P 6; P 8; P 12; P 13; R 6; R 7; R 8; R 9; R 11; R 13; R 14; R 15; R 16; Testimony of Petitioner.

3. Student's January 10, 2012 IEP required he receive 10 hours of specialized instruction outside the general education setting each week. This IEP included goals in reading, written expression, mathematics and speech-language pathology. These 10 hours included 5 hours of reading, 3 hours of mathematics and 2 hours of written expression. Student also was to receive 1 hour of speech-language pathology outside of the general education setting weekly. Student qualified for Extended School Year services for the summer of 2012. He was to receive 60 minutes per day of instruction in reading and mathematics as well as 60 minutes of speech-language pathology services daily during the summer. The IEP in effect for Reporting Period 1 in the 2011-2012 school year included goals, including both different and identical goals, in the identical service areas as the January 10, 2012 IEP. P 8; R 13; R 14; R 15; R 16.

4. Student was required to receive one hour of speech-language therapy weekly during the 2011-2012 school year. He also was to receive one hour of speech-language therapy daily during the provision of Extended School Year services in July 2012. Student was scheduled to receive speech language services on Mondays during the school year. There were a total of 29 Mondays on which Student could have received services. In addition there were 14 Extended School Year school days in July 2012. This is a total of 43⁹ possible speech therapy sessions of one hour

⁹ Two of these hours were for services that were to have been provided in May 2012. There is no evidence regarding whether these two hours were or were not provided. Therefore, I have not included them in my calculations and make all determinations as to amount of provided and missed services based on a possible 41 hours of speech-language therapy.

duration that Student should have received. Student received 21.5 hours of speech-language therapy. The provider was not able to provide services for an additional 7 sessions for reasons such as holidays, Student absences and Student behavior precluding the receipt of services. Two additional hours of possible service time are removed from the number of possible hours of speech-language services for the reasons stated in FN 9. Student did not receive 12.5 hours of required speech language services. Student's speech-language deficits impact his ability to access the general education curriculum. P 3; P 8; P 13.

5. Petitioner observed Student in his classroom approximately twelve times during the 2011-2012 school year. She did not observe instruction that appeared to be special education instruction nor did she observe attempts to provide such instruction. She did not observe the delivery of speech-language services nor efforts to provide it. Testimony of Petitioner.

6. Student made progress on his IEP goals during the 2011 -2012 school year. R 12; R 13; R 14; R 15; R 16.

7. Petitioner's January 10, 2012 IEP was amended November 30, 2012. The IEP amendment included only a correction of a typographical error. The content of the IEP remained the same as when written in January 2012. P 8.

8. Nonpublic Education Program provides services focused on improving sensory – cognitive functioning in relation to reading and mathematics. It provides intensive instruction. There are five possible specified programs provided. Each of them, in addition to sensory-cognitive development, address students' speech and language needs. The Nonpublic Education Program provides services to students ages 4 through adulthood. The students have a variety of profiles including some students who have disabilities such as learning disabilities, ADHD, autism, dysgraphia and dyslexia. The Nonpublic Education Program would be able to address

Student's needs through two of its programs – Seeing Stars and Visualizing and Verbalizing. Student would be evaluated by Nonpublic Education Program prior to being assigned to specific programs and determining the number of hours of service he requires for effective remediation. It is likely he would require 360 hours of service as an initial period. Testimony of Director.

ORDER RE MOTION FOR A DIRECTED VERDICT

On December 3, 2013, after Petitioner's counsel rested following presentation of her witnesses, Respondent's counsel moved for a directed verdict. Respondent's counsel argued there were four bases for the Motion:

1. Petitioner had not introduced the IEP for the 2011 -2012 school year;
2. Petitioner had not provided evidence regarding the content of the IEP for the 2011 - 2012 school year, although Respondent acknowledged there was some evidence as to the content in Respondent's exhibits;
3. Petitioner had presented no witnesses with knowledge of implementation of Student's IEP in the 2011-2012 school year; and
4. Petitioner does not have standing to raise issues regarding what occurred during the 2011-2012 school year as she was not Student's guardian/educational decision maker at that time.

Petitioner responded to Respondent's motion indicating that she need not produce the IEP to raise the instant issues, and further, that DCPS had not provided the IEP to Petitioner when records were requested.¹⁰ Counsel further argued that evidence had been introduced regarding the failure to implement Student's IEP. Petitioner herself had testified that she had visited Student's classroom during the 2011-2012 school year approximately 12 times and had not seen

¹⁰ I note that neither party was entirely correct. The IEP in effect beginning January 10, 2012 is included in Petitioner's Exhibit 8 which is an amended IEP of November 30, 2012. The IEP in effect prior to that date was not entered into evidence.

Student receive special education instruction or speech – language services. Petitioner’s counsel also stated that Petitioner had standing to bring the instant claim as the rights under IDEA had transferred to her. After hearing counsels’ arguments I held the Motion for a Directed Verdict in abeyance and stated I would issue my decision on this motion when I issued the Hearing Officer Determination.

A motion for a directed verdict must be resolved in the light most favorable to the party opposing the Motion. Under Federal Rule of Civil Procedure 50(a), a motion for directed verdict must be granted if “under the governing law, there can be but one reasonable conclusion as to the verdict. Brady v. Southern R. Co., 320 U. S. 476, 479-480 (1943). If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed. Wilkerson v. McCarthy, 336 U. S. 53, 62 (1949).” Anderson v. Liberty Lobby, Inc., 477 US 242, 251 (Sup.Ct. 1986). The inquiry is whether there is a sufficient disagreement to require submission to a trier of fact or whether the evidence is so one-sided that one party must prevail as a matter of law. *Id.* at 252 -253. The determination then is made in a fashion similar to that used when deciding a motion for summary judgment. If there is a basis by which the non-moving party could prevail, the motion should not be granted.

In the instant matter, Respondent’s Motion for a Directed Verdict is based on the position that Petitioner has failed to provide any evidence regarding the IEP that she contends was not implemented during the 2011-2012 school year. However, this is not correct. Petitioner, herself, testified as to her opinion that there was a failure to implement the IEP during multiple school visits. Petitioner further testified that Student’s placement was not appropriate. I note Petitioner also introduced the IEP that was in effect from January through June of the 2011 - 2012 school

year and speech-language service trackers for the entire school year¹¹ and for July 2012 when Extended School year services were provided.

Respondent further argued that Petitioner has no standing to bring a complaint regarding events that occurred prior to her becoming Student's guardian. I disagree. As Petitioner argued, and I agree, she currently holds the rights to bring actions under IDEA. She meets the definition of parent under IDEA which includes, among other individuals, a guardian authorized to act as the child's parent or a grandparent acting in the place of a biological parent with whom the child lives or an individual who is legally responsible for the child's welfare. 34 C.F.R. § 300.30(a)(3) and (4). IDEA does not limit a parent's rights to bring a due process complaint to the time period during which the individual is deemed a parent under the Act. Having met the definition of parent, Petitioner, under 34 C.F.R. § 300.507(a), may file a due process complaint on matters relating to the identification, evaluation or placement of child with a disability or the provision of a FAPE to the child. This is precisely what she has done.

Respondent's Motion for a Directed Verdict must fail as there is sufficient evidence in the record by which the Petitioner, the non-moving party, could prevail. Petitioner had standing to proceed. She presented evidence supporting her contentions that Student's IEP was not implemented and that his placement was not appropriate. I, therefore, find Respondent's Motion for a Directed Verdict must be denied. The facts before me are not so one sided as to require a decision in Respondent's favor as a matter of law. It is necessary that I review the facts and determine whether Petitioner has presented a case that will allow her to prevail.

¹¹ Service trackers for May 2012 were omitted from this exhibit.

DISCUSSION

The following discussion is based on my review of the exhibits introduced by the parties, witness testimony and the record in this case. I find all witness testimony presented in this matter to be credible.

1) *Whether DCPS' denied Student a FAPE by failing to implement his IEP(s) in the 2011 - 2012 school year*

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 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. 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).

In the instant matter, Petitioner has asserted Student was denied a FAPE because DCPS failing to implement the IEPs in effect during the 2011-2012 school year. The evidence as to the issue of failure to implement is scanty. In support of this contention, Petitioner provided the IEP in effect from January 10, 2012 through the end of the school year, the speech-language therapy services trackers for most of the school year as well as the Extended School Year program, and her own testimony. Petitioner also introduced numerous documents demonstrating Student's needs for service that would be relevant to a determination as to whether Student's IEPs were appropriate but are not relevant to the failure to implement issue before me. Yet Petitioner raised is no claim regarding whether the IEPs, as developed, were appropriate, that is whether the IEPs addressed Student's needs and provided him a FAPE during the 2011-2012 school year.

The only evidence supporting Petitioner's contention that Student did not receive his special education instructional services is Petitioner's testimony. She stated she visited Student's classroom approximately 12 times during the 2011-2012 school year and did not see any special education instructional services.¹² I find her testimony in this regard credible. However, it is not sufficient, in itself, to establish Student did not receive the special education instructional services required by his IEP. It is not clear, for example, in what setting she observed Student. The January 10, 2012 IEP required Student receive 10 hours of specialized instruction outside

¹² On cross-examination Petitioner's testimony demonstrated a basic understanding of the special education instruction process.

the general education setting each week. If Petitioner observed Student in the general education setting, there would have been no basis to determine whether Student was receiving his special education instructional services as he was not to receive them in that setting. If Petitioner observed him outside the general education setting, all the instruction he was receiving was special instruction and, without further evidence, I would have to conclude she was mistaken that he did not receive these services in such a setting. Moreover, assuming Petitioner is correct, and I do so here in order to give Petitioner's testimony as much weight as possible in reaching my determination, that Student did not receive special instruction during her 12 visits to his classroom, I cannot conclude this supports a finding that Student did not receive his special education services. Her statement is, by its nature, conclusory. She did not provide a recognizable factual basis for this conclusion. Moreover, not receiving special instruction for 12 days in a school year, does not address the remaining 168 school days.¹³ The evidence at to Student's low skill levels and failure to progress do not support a finding of failure to implement. This evidence, in my opinion, may address a failure to provide an appropriate IEP if data and analysis had been provided in this regard, but it was not as this issue was not raised. Finally, Petitioner's testimony regarding the failure to provide special instruction is that of a concerned, albeit knowledgeable, grandparent. She did not, and could not, provide testimony regarding facts and analysis of the data presented that would support a finding of a failure to implement the special instructional components of the IEPs in effect during the 2011-2013 school year. I note moreover, that I did not have the IEP that was in effect from the beginning of the 2011 – 2012 school year through January 10, 2012. I therefore do not have any idea what Student' was required to receive during this period of time. I also do not know when Petitioner's visit to

¹³ I note Respondent provided IEP progress reports showing Student had progressed on his IEP goals during the 2011-2012 school year.

Student's classroom occurred. Therefore, I do not know how many of the visits occurred during this time period. In sum, Petitioner has not met her burden as to failure to implement the special instruction Student was required to receive during the 2011 -2012 school year, and, for the preceding reasons, I cannot find that DCPS failed to implement the special instruction required by Student's IEP during the 2011-2012 school year.

In contrast, Petitioner has provided evidence showing that DCPS did not implement the speech-language therapy required by Student's IEPs in the 2011-2012 school year. The service trackers and the IEP dated January 10, 2013 make clear Student was to receive 1 hour of speech-language therapy per week during the school year and 1 hour of speech-language services daily during extended school year. He did not receive these services as required. The services trackers show Student was scheduled to receive speech language services on Mondays during the school year. There were a total of 29 Mondays on which Student could have received services during the school year. In addition there were 14 Extended School Year school days in July 2012. This is a total of 43 possible speech therapy sessions of one hour duration that Student should have received. As two of the Monday sessions would have occurred in May and as there were no services tracker records provided for May 2012, I am decreasing the number of possible speech therapy sessions from 43 to 41. The provider was not able to provide services for an additional 7 sessions for reasons such as Student's absence or lack of cooperation with the provider. Student actually received 21.5 hours of speech-language therapy in this time period. He did not receive 12.5 hours of required speech language services that could have been provided. This is a total of approximately 30% of the services required by Student's IEP. The 30% decrease in the provision of speech-language services constitutes a particularly large percentage of missed services when viewed in the context of the provider's choosing to schedule Student's services on Mondays, a

day on which there are many scheduled holidays. The Monday scheduling resulted in eliminating the possibility of 7 additional speech-language therapy sessions, or approximately an additional 14% reduction. Thus Student did not receive more than 40% of the speech-language services indicated as needed under the weekly service delivery (and daily extended school year service) schedule stated in his IEP.

Petitioner argues the amount of speech-language service provided is a material deviation from that required by Student's IEP, and I agree. In *Wilson v. District of Columbia*, 770 F.Supp.2d 270 (DDC 2011), the Court, citing *Catalan ex rel. E.C. v. District of Columbia*, 478 F.Supp.2d 73, 75 (D.D.C.2007), *aff'd sub. nom. E.C. v. District of Columbia*, No. 07-7070 (D.C.Cir. Sept. 11, 2007), opined that a denial of FAPE under a failure to implement claim could be found where it is established that there was a material deviation from the IEP. The Court further noted that such a finding obviated the need for a finding of educational harm for a petitioner to prevail. *Wilson* at 274-275. Here, Petitioner has demonstrated Student did not receive a large percentage of the speech language services required by his IEP. The percentage is large enough that it must be deemed to constitute a material deviation. At best Student did not receive over 30% of his required speech-language services and it could be argued that he did not receive over 40% of his required speech-language services. In either case, this constitutes a material deviation. Under this analysis, Respondent's reliance on *Reid v. District of Columbia*, 401 F.3d 295 (4th Cir. 2005) requiring a finding of the harm incurred by Student is misplaced.

For the forgoing reasons, I find by a preponderance of the evidence that DCPS failed to provide Student a FAPE by failing to implement his IEPs during the 2011-2012 school year.

2) *Whether DCPS denied Student a FAPE by failing to provide him as appropriate placement able to meet his individual and unique needs during the 2011-2012 school year*

As noted above, this issue was plead in the alternative. That is, I was not to address Issue 2) if I found in Petitioner's favor as to Issue 1, denial of FAPE based on a failure to implement Student's IEPs in the 2011-2012 school year. I have made such a finding. However, the finding was based solely on the failure to provide Student speech-language services. I found that Petitioner did not meet her burden as to failure to implement the IEP due to a failure to provide the special instruction required by Student's IEP. Therefore, I address here whether DCPS denied Student a FAPE by failing to provide him an appropriate placement in the 2011-2012 school year as Petitioner did not prevail as to all components of Issue 1.

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. Under the IDEA, the continuum of alternative placements ranges from full time placement in a general education classroom to full time placement in a separate facility to instruction at home or in an institution, with numerous intervening placement possibilities. 34 C.F.R. 300.115. Under most circumstances a particular school is not at issue when placement is discussed, and I find here that Prior DCPS ES, the school Student attended in the 2011-2012 school year, is not the determinative factor as to Student's placement at that time. In arguing that Respondent did not provide Student an appropriate placement in the 2011-2012 school year, Petitioner relies on her testimony that the school was not appropriate and on the documentary evidence indicating Student has low level skills, especially in reading and writing, and further that he has made little progress. I note Petitioner's testimony is reliant on the documentary evidence provided so provides no additional evidence in this regard. Moreover, as stated *Supra*, this evidence addresses the appropriateness of

Student's program and not placement. Yet an issue as to the appropriateness of Student's program has not been raised. Student's placement, at least from January 10, 2012 onward, in the 2010-2011 school year was a combination placement that included both pull-out special education instruction in a separate special education classroom and pull-out speech-language services as well as instruction in the general education classroom. Petitioner provided no evidence as to the appropriateness of this combination placement.

In making this determination I recognize that Petitioner identified many apparent problems during her visits to Student's classroom in the 2011-2012 school year, and I accept her judgments in this regard. For example, Student had difficulty sitting in his seat, ran in and out of the classroom and did not focus on the instruction being provided. These factors however, do not, in and of themselves or in combination with his poor skills and lack of progress, lead to a conclusion that Student's placement was inappropriate. While Student's placement may have been inappropriate Petitioner has not met the burden of demonstrating it was, in actuality, an inappropriate placement. She has identified clear educational issues that might have been addressed through the development of an IEP designed to address Student's needs or through a different placement or both. Petitioner has not provided a supportable basis for reaching a determination regarding the appropriateness of Student's placement for implementing an IEP that must be assumed to have addressed his educational needs as no issue has been raised in this regard. I note further, that Student's 2013-1014 school year placement in a full-time, separate special education program cannot be used to retroactively determine that Student's placement in the 2011-2012 school year was not appropriate.

I, therefore, conclude, for the foregoing reasons, that Petitioner has not met her burden of proof as to Student's having been denied a FAPE in the 2011-2012 school year because DCPS failed to provide him an appropriate placement.

The Remedy

Petitioner has requested assessment and services through Nonpublic Education Program. The program provides services that are designed to address deficits in sensory and cognitive functioning that impact a student's ability to develop academic reading and math skills. These services also address a student's speech-language needs.

Student's most recent speech-language assessment indicates his poor speech-language skills impact his ability to access the general education curriculum. Therefore, a program, such as the one provided by Nonpublic Education Program, designed to address speech-language deficits as well the skills underlying academic deficits is an appropriate remedy in the instant matter. However, Director was unable to provide a basis for establishing the hours of service Student would require and focused on his academic deficits whereas, Student, here, is entitled to a remedy based on the failure to provide speech-language services as required in the 2011- 2012 school year. As Student was not provided up to a maximum of almost 45% of the speech-language services described in his IEP, I conclude he is entitled to sufficient services to make up for an entire year of speech-language services as such services are by their nature cumulative in effect. The effect of the significant loss of services is compounded by the delay in receiving those services. Therefore, Student's remedy is to total two times the total number of hours of service that should have been provided in the 2011-2012 school year or 86 hours.

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 implement his IEP in the 2011-2012 school year. DCPS did not provide the speech-language services required by his IEP. Petitioner did not meet her burden as to the alleged failure to provide the special education instructional hours required by this IEP.
2. Petitioner did not meet her burden as to the alleged failure to provide Student an appropriate placement in the 2011-2012 school year.

ORDER

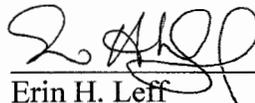
Based upon the above Findings of Fact and conclusions of law, it is hereby ordered that:

1. Respondent's Motion for a Directed Verdict is DENIED.
2. Respondent is to fund Student's assessment by the Nonpublic Education Program.

Following this assessment DCPS is to fund Student's receiving services through the Nonpublic Education Program in those parts of its program the Nonpublic Education Program deems appropriate. DCPS is to fund a maximum of 86 hours beyond the hours required for assessment.

IT IS SO ORDERED:

December 11, 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).