

Hearing Officer Determination

Procedural History

Following the filing of the due process complaint on 4/23/14, this Hearing Officer was assigned to the case on 4/24/14. DCPS timely filed a response to the complaint on 5/2/14 and made no challenge to jurisdiction.

Neither Petitioner nor DCPS waived the resolution meeting, which took place on 5/14/14. At that time, the parties did not agree to end the resolution period early, so the standard 30-day resolution period ended on 5/23/14. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires an HOD by 7/7/14.

A prehearing conference was held on 5/28/14 and a Prehearing Order was issued on 5/30/14.

The due process hearing was a closed hearing that took place as scheduled on 6/17/14, beginning at 1:00 p.m., and 6/18/14, beginning at 9:30 a.m.

The parties did not discuss settlement at the due process hearing. Neither party objected to the testimony of witnesses by telephone. Petitioner participated in the hearing in person for most of the first day's session.

Petitioner's Disclosure statement, dated 6/10/14, consisted of a witness list of 6 witnesses and documents P-1 through P-20. Petitioner's documents were admitted into evidence over objections filed by Respondent on 6/11/14 and 6/12/14, which were responded to by Petitioner on 6/13/14.

Respondent's Disclosure statement, dated 6/10/14, consisted of a witness list of 6 witnesses and documents R-1 through R-11. Respondent's documents were admitted into evidence without objection.²

Petitioner presented 6 witnesses in her case in chief (*see* Appendix A):

- (1) Petitioner
- (2) Psychologist -- qualified without objection as an expert in Clinical Psychology
- (3) Outside Social Worker
- (4) Compensatory Education Planner -- qualified over objections as an expert in Compensatory Education Development Planning
- (5) Associate Head of Nonpublic School

² Pursuant to the Prehearing Order issued in this case, failure to note objections to the opposing party's disclosures results in the disclosures being admitted without objection.

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- (6) Outside Speech Pathologist -- qualified without objection as an expert in Speech and Language Pathology

Petitioner did not present any rebuttal witnesses.

Respondent presented 4 witnesses (*see* Appendix A):

- (1) School Social Worker -- qualified without objection as an expert in Social Work
- (2) General Education Reading Teacher (“General Education Teacher”)
- (3) Special Education Teacher
- (4) School Speech and Language Pathologist (“School Pathologist”) -- qualified without objection as an expert in Speech and Language Pathology and Audiology

The parties agreed to two stipulations:

1. Student is a child with a disability and a classification of Specific Learning Disability (“SLD”).
2. Student attended Public School for 2013/14.³

The issues to be determined in this Hearing Officer Determination are:

Issue 1 – Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP for Student on March 13, 2014, when DCPS increased the level of general education for Student despite teacher reports and an IEE indicating a more restrictive setting was needed.

Issue 2 – Whether DCPS denied Student a FAPE by failing to conduct a Functional Behavioral Assessment and develop a Behavioral Intervention Plan during the 2013/14 when (A) Student would “shut down” and refuse to follow classroom procedures and rules, and (B) Petitioner was frequently contacted by DCPS staff with concerns about Student’s behavior, including defiance and excessive sleeping in class.

Issue 3 – Whether DCPS denied Student a FAPE by failing to conduct a complete Speech and Language Evaluation by 9/30/13 when (A) DCPS only had a June 2010 evaluation, (B) Student did not respond to speech and language services and was regressing, and (C) a July 2013 IEE recommended the evaluation.

Issue 4 – Whether DCPS denied Student a FAPE by failing to provide an appropriate educational placement in a therapeutic and speech-and-language intensive day school for 2013/14 when Student (A) is receiving insufficient services and needs a school where staff can work with severe language delays according to the July 2013 IEE,

³ All dates herein in the format “2013/14” refer to school years.

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(B) has not received most of the speech and language services in his current IEP, and (C) is regressing in communication/speech and language.

Petitioner requested the following relief:

1. DCPS to fund an independent Speech and Language Evaluation and an independent FBA.
2. DCPS to convene a multidisciplinary team (“MDT”) meeting within 10 business days of receiving the evaluations to modify Student’s IEP, as needed, and determine appropriate placement.
3. DCPS to fund a location chosen by Petitioner, including transportation as needed, at a day school able to provide Student intensive speech and language services and therapeutic support.
4. DCPS to develop and implement an appropriate BIP.
5. DCPS to fund a compensatory education plan, including academic tutoring and behavioral support services, if Student was improperly denied special education services.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact⁴ are as follows:

1. Student is a resident of the District of Columbia. Petitioner is Student’s maternal grandmother (“Grandmother”) who has educational decision-making authority for Student.⁵

2. Student is a child with a disability and a classification of Specific Learning Disability (“SLD”).⁶ Student has great difficulty communicating and being understood, so often says very little.⁷ Student has had difficulty speaking his entire life and often

⁴ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness’s testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer’s determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁵ Grandmother.

⁶ Stipulation 1.

⁷ Grandmother.

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“shuts down” when asked to repeat himself.⁸ Student has a Speech Sound Disability and has trouble with speech articulation and patterns, leaving out certain letters or sounds.⁹

3. Student is completing 4th Grade and attended Public School for 2013/14.¹⁰ Student’s IEP was revised on 3/13/14 to provide for 5 hours/week of specialized instruction in general education only, with related services of (i) 240 minutes a month of Speech-Language Pathology outside general education, (ii) 120 minutes a month of Behavioral Support Services inside general education, and (iii) 120 minutes a month of Behavioral Support Services outside general education.¹¹ Student arrived at Public School in 2013/14 with an IEP that was more restrictive, including specialized instruction outside general education.¹²

4. Student’s communication was very limited when he began at Public School.¹³ Due to a profound speech articulation delay, Student shies away from conversations and won’t answer questions.¹⁴ Limited speech production negatively impacts everything in the classroom setting, both academically and socially; social interaction is important to learning from peers and being able to ask questions and overcome challenges.¹⁵

5. Student’s difficulties with speech are so severe that people in various areas of his life are unable to understand him. For example, Outside Social Worker has interacted regularly with Student since October 2013 and has difficulty understanding Student. Outside Speech Pathologist has difficulty understanding Student, although he has met with him 7-8 times.¹⁶ General Education Teacher’s ability to understand Student increased from about 30% at the beginning of the year to 75-80% by the end of the year, largely due to getting used to hearing Student, rather than improvement in Student’s speech.¹⁷ Even Grandmother reports that she is not to be able to understand Student.¹⁸

6. Nor is Student’s speech the extent of his difficulties, as he has both academic and behavioral issues at school, including leaving the classroom and being unable to participate without being disruptive.¹⁹ During 2013/14, Grandmother was called by Public School weekly or even more often to go to school to assist with Student. Grandmother believes that Student’s inability to communicate caused him to act in ways that the school viewed as inappropriate.²⁰

⁸ Grandmother; P-10-4.

⁹ Psychologist.

¹⁰ Stipulation 2.

¹¹ P-3-10.

¹² Special Education Teacher.

¹³ General Education Teacher; School Pathologist.

¹⁴ Outside Speech Pathologist.

¹⁵ Psychologist.

¹⁶ Outside Speech Pathologist.

¹⁷ General Education Teacher.

¹⁸ Grandmother.

¹⁹ Psychologist.

²⁰ Grandmother.

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7. Student's teachers were concerned by Student often sleeping in class and the difficulty of waking him.²¹ When Grandmother stopped by Public School, Student was sometimes asleep.²² Student sometimes falls asleep in Outside Social Worker's car on the way to Student's speech appointment with Outside Speech Pathologist.²³ In addition to sleeping, Student often puts his head down to disengage, moans and whines, and occasionally has tried to leave the school building. Grandmother was contacted when Student tried to leave the building with questions about why he would try to leave.²⁴

8. Outside Social Worker has observed Student three times at school and twice in Aftercare. Student has consistently been disengaged from activities in class, whether or not he was sleeping. Classroom staff and the school principal, who was present in February 2014, confirmed to Outside Social Worker that it was "pretty typical" for Student not to be engaged, often putting his head down or sleeping.²⁵ Outside Social Worker attended the March 2014 IEP meeting in which there was discussion about Student not participating in school, being disengaged, nonverbal and even "catatonic,"²⁶ which certainly impacted Student's academics as discussed below. Even near the end of the school year, DCPS reports from a classroom observation of Student on 4/22/14 that he sat alone, turned away from the class and put his head down on the table when the class was instructed in an activity.²⁷

9. Student began going to the Outside Speech Pathologist in about April 2014, but sometimes refused to attend his appointments.²⁸ Outside Speech Pathologist has problems working with Student, as Student doesn't want to engage. Student has missed 3-4 sessions and has refused to engage about half the times he has been physically present.²⁹

10. Student essentially did not receive the speech-language services in his IEP for most of 2013/14, although School Pathologist did offer the services to Student.³⁰ Student refused to cooperate and attend sessions, even though he initially was offered a reward of stickers. Later, a reward of extra computer time was offered, after talking to Student's teachers to see what had worked previously. But that didn't work either and no other rewards were offered. Interactions gradually improved with Student after input from School Social Worker in March 2013, direct assistance from School Social Worker in late April 2014 and then one-on-one engagement in May 2014.³¹

²¹ General Education Teacher.

²² Grandmother.

²³ Outside Social Worker.

²⁴ Grandmother.

²⁵ Outside Social Worker.

²⁶ *Id.*

²⁷ R-5-3.

²⁸ Outside Social Worker.

²⁹ Outside Speech Pathologist.

³⁰ School Pathologist; P-8.

³¹ School Pathologist.

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11. In the general education classroom, if Student didn't want to do something, he just wouldn't do it; about once a week when he didn't want to do something he would fall on the floor, although his behavior improved around March 2014. The issue of Student sleeping in class also improved later in 2013/14.³²

12. Student's IEP Progress Report dated 2/27/14 indicates that for Communication/Speech and Language in Reporting Period 1 Student was Regressing, while in Reporting Period 2 there was No Progress.³³

13. Student's Report Card indicates that he received the lowest rating for virtually every category for the first three quarters.³⁴ Student's fourth quarter grades improved some, with a few categories increasing to "Developing." In Writing and Language, it was progress for Student to be writing at all, as initially he wouldn't write anything. Student's writing is below grade level, possibly at a high 2nd Grade level.³⁵ Student was reading in front of the class by the end of 2013/14; other students had the materials so they could follow what Student was reading.³⁶

14. Despite the severity of Student's issues with speech, until an independent evaluation was performed early in 2014, Student's previous speech evaluation had been in 2010.³⁷ Student needs intensive speech therapy, plus there is a need to rule out things that may be holding back Student's speech-language skills.³⁸ Nonetheless, DCPS proposed reducing Speech-Language Pathology by half in Student's 3/13/14 IEP.³⁹

15. Grandmother wonders whether Student could benefit from having alternative ways of communicating, such as sign language, given the severity of his speech issues.⁴⁰ Psychologist recommended that Student receive a comprehensive Augmentative and Alternative Communication (AAC) assessment to see what technology could help Student communicate.⁴¹ DCPS staff also recommended considering an assistive technology assessment.⁴²

16. While DCPS had agreed to conduct any assessments recommended by Psychologist that the independent evaluation did not cover, DCPS did not complete an

³² General Education Teacher.

³³ P-5-2.

³⁴ P-6.

³⁵ General Education Teacher.

³⁶ *Id.*

³⁷ School Pathologist.

³⁸ Outside Speech Pathologist; P-9-10.

³⁹ School Pathologist.

⁴⁰ Grandmother.

⁴¹ Psychologist.

⁴² P-11-10.

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AAC because School Pathologist didn't feel it was needed.⁴³ An Audiological evaluation was also needed, but there is no evidence that DCPS ever made any referral.⁴⁴

17. Student was not able to complete the CELF-4 test on three occasions in late April 2014, as he would often "moan, cover his eyes, move his chair away from the table and/or finally, leave the room."⁴⁵

18. Psychologist was unable to do verbal subtests with Student and determine his social-emotional and academic abilities in July 2013 because of his very minimal level of speech. Cognitively, Student is low average to average, but Psychologist suspects a greater potential because Student appeared not to be putting forth full effort. Student was above average in testing where he could respond by pointing to objects.⁴⁶

19. An FBA would be helpful to determine a behavior plan, which Student needs. An FBA would determine the settings that are most difficult for Student and where he experiences success and build on those successes.⁴⁷ An FBA should have been developed before now, due to the behaviors at school all year. Student needs a behavioral plan for in-class and out-of-class, to be able to spot trigger points before Student shuts down.⁴⁸

20. School Social Worker did not know that Student had tried to leave school and acknowledged that a pattern of leaving school during school hours would be the sort of extreme behavior addressed by an FBA.⁴⁹ Further, if Student "sat staring angrily" at the teacher (as reported in DCPS's Classroom Observation report for the LRE review at R-5-4), School Social Worker would want to figure out why and acknowledged that an FBA looks at those sorts of causes. DCPS's Classroom Observation recommended consideration of an FBA and development of a BIP.⁵⁰

21. DCPS was aware as of 3/13/14 that Student's behavior impedes his learning or that of other children.⁵¹

22. School Social Worker agreed with the Psycho-Educational Evaluation recommending that a developmental pediatrician be consulted about nutrition and other causes that might relate to Student having low energy and falling asleep in class.⁵²

⁴³ School Pathologist.

⁴⁴ School Pathologist; R-4-5; P-13-4.

⁴⁵ R-4-4.

⁴⁶ Psychologist.

⁴⁷ *Id.*

⁴⁸ Compensatory Education Planner.

⁴⁹ School Social Worker.

⁵⁰ R-5-10.

⁵¹ P-3-2; Special Education Teacher.

⁵² School Social Worker; P-9.

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Student responded to being woken up in the classroom by sometimes having temper tantrums, crying and saying he was sleepy.⁵³

23. In general education, Student has difficulty with academic activities and staying focused when required to work independently. While of average intellect, Student is not making progress in general education and is not accessing the curriculum.⁵⁴

24. The hours in Student's 3/13/14 IEP were not adequate; he needed more specialized instruction and a speech-language therapist who could work with him inside and outside the classroom. Student needs as few transitions as possible in his school day until he can handle them, and needs as much individual attention as possible.⁵⁵

25. Student progressed during 2013/14 from a reading level of "I" at the beginning to level "L" at the end. However, Student had also been at level "L" at the end of 3rd Grade, before regressing over the summer, so he did not progress in reading during an entire calendar year.⁵⁶ Level "L" is a 3rd Grade level; 4th Grade begins with level "P."⁵⁷

26. Student had a similar pattern with his speaking and willingness to trust adults and attend speech sessions, as it was very difficult to engage Student during 2012/13 until the very end of the school year when he "blossomed," and then regressed over the summer with a change of schools and was back at square one. It took Student until the end of 2013/14 to again make progress, although he had not caught up with 2012/13. Summer sessions would be helpful as Student has been responding to interactions recently and that might avoid regression over the summer.⁵⁸ Student's Amended IEP on 5/21/14 provided for summer services, as well as restoring 5 hours of specialized instruction outside general education.⁵⁹

27. Public School began behavioral support services for Student in his 3/13/14 IEP.⁶⁰ The Public School psychologist reviewed Student's July 2013 psychological evaluation and at the 3/13/14 meeting agreed that Student would benefit from increased services.⁶¹

28. School Social Worker added Student to her caseload on 3/13/14 and began working on communication and self-esteem, and providing behavioral support to him in class.⁶² Student began gaining confidence in himself and made friends in class and at

⁵³ School Social Worker.

⁵⁴ Psychologist.

⁵⁵ *Id.*

⁵⁶ General Education Teacher.

⁵⁷ *Id.*

⁵⁸ School Pathologist.

⁵⁹ P-4-17, 18; P-4-12.

⁶⁰ P-3-10.

⁶¹ School Social Worker.

⁶² *Id.*

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school. Student became more engaged, talking back and forth with his peers and initiating conversations.⁶³

29. School Pathologist was not successful in working with Student until after she consulted several times with School Social Worker after 3/13/14. Using strategies to gain trust, including interacting with Student on the playground and having lunch with him, recent progress has been made with Student.⁶⁴

30. By the end of 2013/14, Student was making “very good gains,” in learning how to interact with others.⁶⁵ Student is beginning to trust adults in the Public School setting. Student has asked questions of both his general education and special education teachers, such as “could he go to the bathroom” and “could he get a drink,” and others that went beyond Student’s basic needs.⁶⁶ General Education Teacher confirms that Student is able to ask basic questions.⁶⁷

31. School Social Worker believes that Student’s behaviors do not show him disengaged from his class since she began working with him in March 2013.⁶⁸ School Social Worker sees Student in the classroom almost daily and he is engaged with the group and plays with his peers on the playground.⁶⁹ Student works on a classroom computer with classmates and talks with them in computer jargon.⁷⁰

32. Student’s general education teacher developed rapport with Student around March 2014 and can get answers from Student now and can get him to do things he would not do before.⁷¹ Student’s special education teacher also had to work to gain his trust.⁷²

33. School Social Worker, an expert in Social Work, believes it would be a setback to Student to be removed from Public School for the next school year, as he has not had sufficient stability in his schooling, having attended 3-4 schools recently; nor has he had stability in his interactions with adults in his life. He is now happy and engaged at Public School, where his two younger siblings also attend. Student is now benefitting and making gains at Public School.⁷³ Full-time special education is not needed for Student, as he is making good progress, and can be educated in general education.⁷⁴

34. The compensatory education plan is based on the missed services Student should have received. Apart from 3 sessions in October 2013, Student missed all other speech

⁶³ *Id.*

⁶⁴ School Social Worker; School Pathologist.

⁶⁵ School Social Worker; R-4-2.

⁶⁶ School Social Worker.

⁶⁷ General Education Teacher.

⁶⁸ School Social Worker, R-5-3.

⁶⁹ School Social Worker.

⁷⁰ General Education Teacher; Special Education Teacher.

⁷¹ General Education Teacher.

⁷² Special Education Teacher.

⁷³ School Social Worker.

⁷⁴ Special Education Teacher.

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services during 2013/14, according to DCPS's Service Tracker (P-8) which covers 10/4/13 through 4/21/14, generally because Student did not make himself available. Student needs at least 40 hours of compensatory education focusing on speech services in order to recover what he didn't receive and to put him in the position he would have been in, had he received services throughout 2013/14.⁷⁵

35. Student would have benefited from behavioral support services throughout the entire 2013/14 school year.⁷⁶ Student needs 20 hours of compensatory education behavioral support/counseling services focused on helping him manage his behavior or ask for assistance when needed to put him in the position he would have been at this point.⁷⁷

36. Student needs another 20 hours of compensatory education tutoring focused on the academic aspects of the classroom that Student missed, to at least partially restore him to where he would have been at this point.⁷⁸

Conclusions of Law

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

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). To that end, DCPS must have procedures in place to ensure that all children with disabilities, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located and evaluated. This obligation extends to children who are suspected of being a child with a disability and in need of special education, even though they are advancing from grade to grade. 34 C.F.R. 300.111, 5 D.C.M.R. E-3002.1(d).

The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. District of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children. *Rowley*, 458 U.S. at 198. Congress, however, "did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985).

⁷⁵ Compensatory Education Planner; P-19-2; P-8.

⁷⁶ School Social Worker.

⁷⁷ Compensatory Education Planner; P-19-2.

⁷⁸ Compensatory Education Planner; P-19-3.

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“The IEP is the ‘centerpiece’ of the IDEA’s system for delivering education to disabled children,” *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (3d Cir. 2010), quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and is the primary vehicle for providing FAPE. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003). At the beginning of each school year, DCPS must have an IEP in effect for each child with a disability within its jurisdiction. 34 C.F.R. 300.323.

In addition, DCPS must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR 300.114.

“Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5 D.C.M.R. E-3030.3. The burden of proof is on the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005).

A Hearing Officer’s determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child’s *substantive* rights.

Issue 1 – Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP for Student on March 13, 2014, when DCPS increased the level of general education for Student despite teacher reports and an IEE indicating a more restrictive setting was needed.

IDEA regulations require that a student’s IEP team review the student’s IEP periodically and revise his IEP, as appropriate, to address any lack of expected progress toward the IEP annual goals and in the general education curriculum. *See* 34 C.F.R. 300.324(b). At the time of the 3/13/14 IEP meeting, Student was doing very poorly academically, with the lowest possible grades and an inability to read as well as he had the year before. Further, Student was not receiving any of his badly-needed speech therapy.

In the face of this, however, DCPS at the 3/13/14 IEP meeting proposed to reduce by half the amount of speech therapy in Student’s IEP and did reduce the amount of Student’s specialized instruction. An IEP is to be amended if its objectives are not met, but amendment is expected to move in the correct direction. 20 U.S.C. § 1414(d)(4); *Loren F. ex rel. Fisher v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir. 2003).

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“[A]cademic progress is an ‘important factor’ among others in ascertaining whether the student’s IEP was reasonably calculated to provide educational benefit.” *See also, CJN v. Minneapolis Pub. Sch.*, 323 F.3d 630, 642 (8th Cir. 2003), *citing Rowley*, 458 U.S. at 202, 102 S.Ct. 3034; *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 168 (D.D.C. 2005) (highly relevant whether student was making progress and experiencing meaningful educational benefit from the IEP).

Student was not making progress and was not receiving meaningful educational benefit when his IEP Team met on 3/13/14. DCPS finally did include behavioral support and add Student to the caseload of School Social Worker. School Social Worker began working closely with Student and helped School Pathologist to begin working successfully with Student on his speech therapy. Student began making progress after March 2014.

Student had not cooperated by attending his speech therapy sessions prior to 3/13/14, even though DCPS made them available. *Garcia v. Board of Educ. of Albuquerque*, 2007 WL 5023652, (D.N.M. 2007) (IDEA does not provide a remedy where access to a free and appropriate public education is wide open, but the student refuses the numerous and extensive educational opportunities afforded).

However, Student’s lack of cooperation only excuses DCPS if it has made all reasonable efforts to work with Student and gain his cooperation. Congress recognized in the IDEA that “social and emotional problems are not *ipso facto* separable from the learning process.” *Indep. Sch. Dist. No. 284 v. A.C.*, 258 F.3d 769, 776–77 (8th Cir. 2001). The IDEA requires, in the case of a child whose behavior impedes the child’s learning or that of others, that the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 34 C.F.R. 300.324(a)(2)(i); *Harris v. District of Columbia*, 561 F. Supp. 2d 63 (D.D.C. 2008).

In Student’s case, DCPS made insufficient efforts to encourage cooperation through offering stickers and extra computer time, but DCPS did not succeed in making progress with Student until after School Social Worker began working with Student and provided suggestions to School Pathologist on how to work with Student. DCPS did not explain why it waited to take those steps until the end of the 2013/14 school year.

Petitioner met her burden of proof on Issue 1, as DCPS should have begun much earlier in 2013/14 the steps that were later successful in engaging Student. Further, Student’s IEP in 3/13/14 should have increased specialized instruction for Student to address his special education needs.

Issue 2 – *Whether DCPS denied Student a FAPE by failing to conduct a Functional Behavioral Assessment and develop a Behavioral Intervention Plan during 2013/14 when (A) Student would “shut down” and refuse to follow classroom procedures and rules, and (B) Petitioner was frequently contacted by DCPS staff with concerns about Student’s behavior, including defiance and excessive sleeping in class.*

An FBA is essential to addressing a child’s behavioral difficulties. *Harris*, 561 F. Supp. 2d at 68. As noted above, in the case of a child whose behavior impedes the

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child's learning or that of others, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies to address that behavior. 34 C.F.R. 300.324. Here, it is clear that Student was having behavioral difficulties, but they were not addressed adequately by DCPS, particularly prior to 3/13/14.

Student's behavior certainly interfered with his own learning, and no doubt impeded others as well, as he would have tantrums and throw himself on the floor when he did not want to do something, which happened about once a week until around March 2014. Earlier in 2013/14, Student was regularly sleeping in class and crying or reacting negatively if awakened. He was often moaning and engaging in other conduct that would have been distracting from learning for himself and others.⁷⁹

School Social Worker acknowledged that she not know that Student had tried to leave school and stated that a pattern of leaving school during school hours would be the sort of extreme behavior addressed by an FBA. Further, if Student "sat staring angrily" at his teacher (as reported in DCPS's Classroom Observation report for the LRE review at R-5-4), School Social Worker would want to figure out why and agreed that an FBA looks at those sorts of causes. DCPS's Classroom Observation recommended consideration of an FBA and development of a BIP.⁸⁰

Psychologist, who evaluated Student in July 2013, stated that an FBA would be helpful to determine a behavior plan, which Student needs. Psychologist explained that an FBA would determine the settings that are most difficult for Student, where he experiences success, and build on those successes. Compensatory Education Planner asserted that an FBA should have been developed before now, due to the behaviors at school all year. DCPS staff recommended consideration of an FBA and a BIP. Compensatory Education Planner explained that Student needs a behavior plan for in-class and out-of-class, to be able to spot trigger points before Student shuts down.

DCPS denied Student a FAPE in this case by failing to conduct an FBA and develop a BIP. *Long v. District of Columbia*, 780 F. Supp. 2d 49, 61 (D.D.C. 2011) (DCPS's failure to complete an FBA and BIP, when warranted, will constitute a denial of a FAPE). Petitioner met her burden of proof on this issue. DCPS must ensure an FBA is completed, followed by preparation of a BIP.

Issue 3 – Whether DCPS denied Student a FAPE by failing to conduct a complete Speech and Language Evaluation by 9/30/13 when (A) DCPS only had a June 2010 evaluation, (B) Student did not respond to speech and language services and was regressing, and (C) a July 2013 IEE recommended the evaluation.

The IDEA requires that a reevaluation of each student with a disability be conducted at least once every three years or sooner, if Student's parent or teacher requests a reevaluation, or if the Local Educational Agency ("LEA") determines that the needs of the student warrant a reevaluation. 34 C.F.R. 300.303. A failure to timely

⁷⁹ DCPS documents also state that Student would kick and hit classmates, although that was contested by DCPS witnesses. P-11-6.

⁸⁰ R-5-10.

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reevaluate is a procedural violation of IDEA. *See Smith v. District of Columbia*, 2010 WL 4861757, *3 (D.D.C. 2010). Procedural violations do not, in themselves, mean a student was denied a FAPE. *See Schoenbach v. District of Columbia*, 309 F. Supp. 2d 71, 78 (D.D.C. 2004). Student must demonstrate an “educational harm” in order to establish denial of FAPE based on a procedural violation. *See, e.g., Taylor v. District of Columbia*, 770 F. Supp. 2d 105, 109-110 (D.D.C. 2011).

Here, Student – who can hardly make himself understood and received virtually no educational benefit for most of 2013/14 – did not have any updated speech and language assessments from June 2010 until early 2014, a violation of the triennial review requirement, and some needed assessments have not been completed even yet. Taken together, delay in some assessments and failure to complete others – along with the educational harm suffered by Student – is a denial of FAPE. Petitioner has met her burden of proof on Issue 3.

Specifically, DCPS has not completed all the assessments it agreed to conduct or that DCPS staff testified would be important.⁸¹ These include:

- (i) a comprehensive Augmentative and Alternative Communication (AAC) assessment, to determine whether there are ways to boost Student’s abilities to communicate to reduce his frustrations in not being able to make himself understood;
- (ii) an Audiological assessment, to ensure that his speech and language issues are not related to hearing problems; and
- (iii) consultation with a developmental pediatrician to determine if there is any physical basis for Student’s lack of energy and frequent sleeping in class (notwithstanding the issue of Student sleeping in class improved later in 2013/14).

34 C.F.R. 300.304(c)(4) (the LEA must ensure that a child is assessed in all areas related to the suspected disability, including, if appropriate, *health*, vision, *hearing*, social and emotional status, general intelligence, *communicative status* and motor abilities).

Issue 4 – *Whether DCPS denied Student a FAPE by failing to provide an appropriate educational placement in a therapeutic and speech-and-language intensive day school for 2013/14 when Student (A) is receiving insufficient services and needs a school where staff can work with severe language delays according to the July 2013 IEE, (B) has not received most of the speech and language services in his current IEP, and (C) is regressing in communication/speech and language.*

A special education day school is not the Least Restrictive Environment (“LRE”) for Student at this time. 300 C.F.R. 300.114(a)(2)(i). Credible testimony indicated that Student has been negatively impacted by changing schools in the past and that it might well set him back to face another change of schools for the coming school year.

⁸¹ DCPS had agreed to complete whatever assessments Psychologist recommended that the Outside Pathologist did not conduct.

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Importantly, Public School claims that it is now on the right track and has been making good progress with Student since the changes implemented on 3/13/14. DCPS witnesses testified that this progress can continue at Public School, but might be interrupted by a transfer to Nonpublic School. This is the basis for continuing with the educational placement for Student in Public School at this time.

Compensatory Education Request

Petitioner seeks an award of compensatory education to compensate for DCPS's denial of FAPE in 2013/14. Compensatory education is educational service that is intended to compensate a disabled student who has been denied the individualized education guaranteed by the IDEA. Compensatory education is designed to place disabled children in the same position they would have occupied but for the school district's violations of IDEA. The proper amount of compensatory education, if any, depends upon how much more progress a student might have shown if he had received the required special education services, and the type and amount of services that would place the student in the same position he would have occupied but for the LEA's violations of the IDEA. *See Walker v. District of Columbia*, 786 F. Supp. 2d 232, 238-239 (D.D.C. 2011), *citing Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005).

The challenge of determining what additional educational benefits would have accrued, if DCPS had been proactive in addressing Student's avoidance of speech therapy and provided Student a FAPE throughout 2013/14, does not permit the effort to be avoided. *See Henry v. District of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required "to have a perfect case to be entitled to compensatory education." *See Cousins v. District of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C.2012) (citations omitted).

Here, Student did not receive his greatly-needed speech therapy throughout most of 2013/14. Additional tutoring is appropriate to address Student's academic deficiencies, while behavioral support and counseling are needed to make both his speech therapy and tutoring more effective. Accordingly, Compensatory Education Planner's proposal for (i) 40 hours of speech services, (ii) 20 hours of behavioral support/counseling services, and (iii) 20 hours of tutoring, appears reasonably calculated to provide the educational benefits that likely would have accrued from special education services which DCPS should have supplied Student in the first place during 2013/14. *See Reid*, 401 F.3d at 524; *Gill*, 770 F. Supp. 2d at 116-117. As ordered below, DCPS shall promptly fund independent compensatory education services.

ORDER

Petitioner has met her burden of proof as set forth above. Accordingly, **it is hereby ordered that:**

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(1) DCPS shall conduct a Functional Behavioral Assessment, and develop and implement an appropriate BIP based on the FBA, within 30 school days from the beginning of 2014/15.

(2) DCPS shall convene a multidisciplinary team meeting within 30 school days of completing the FBA to review and modify Student's IEP as appropriate.

(3) DCPS shall provide a letter of funding within 10 business days for an independent (i) comprehensive Augmentative and Alternative Communication (AAC) assessment, (ii) Audiological assessment, and (iii) consultation with a developmental pediatrician to address Student's low energy/sleeping during class.

(4) DCPS shall convene a multidisciplinary team meeting within 30 school days of receiving the results from (3) above, to review and modify Student's IEP as appropriate.

(5) DCPS shall provide a letter of funding within 10 business days for independent compensatory education consisting of (i) 40 hours of speech services from a certified speech-language pathologist, (ii) 20 hours of behavioral support/counseling services, and (iii) 20 hours of tutoring in academic subjects.

(6) Any and all other claims and requests for relief are **dismissed with prejudice**.

IT IS SO ORDERED.

Dated: July 4, 2014

/s/ *Keith Seat*

Keith L. Seat, Esq.
Hearing Officer

NOTICE OF RIGHT TO APPEAL

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