

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office  
810 First Street, NE, 2nd Floor  
Washington, DC 20002

OSSE  
Student Hearing Office  
March 04, 2014

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PETITIONER,  
on behalf of STUDENT,<sup>1</sup>

Date Issued: March 3, 2014

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Student Hearing Office,  
Washington, D.C.

Respondent.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (DCMR). In her Due Process Complaint, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) denied Student a FAPE by failing to comply with the IDEA's evaluation requirements, failing to develop appropriate Individualized Education Programs (IEP) and failing to implement Student's IEPs.

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<sup>1</sup> Personal identification information is provided in Appendix A.

Student, an AGE young man, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on December 19, 2013, named DCPS as respondent. The parties met for a resolution session on January 10, 2014 and were unable to reach an agreement. The 45-day time period for issuance of my Hearing Officer Determination began on January 19, 2014. On January 14, 2014, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was convened before the undersigned Impartial Hearing Officer on February 19, 2014 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner was represented by PETITIONER'S COUNSEL. DCPS was represented by DCPS' COUNSEL.

Before the start of the hearing, Petitioner's Counsel represented that Petitioner had become ill overnight and was unable to attend the hearing in person. She requested leave for Petitioner to participate by telephone. DCPS' Counsel objected to the request. Finding no prejudice to DCPS from Petitioner's request, I granted Petitioner leave to participate by telephone.

Petitioner testified by telephone, and called as witnesses, AUDIOLOGIST, EDUCATIONAL CONSULTANT, and READING CENTER DIRECTOR. DCPS called as witnesses, PROGRAM DIRECTOR and PROGRESS MONITOR. Petitioner's Exhibits P-1 through P-41 were admitted into evidence without objection, with the exception of Exhibit P-14 which was not offered. DCPS' Exhibits R-1 through R-22 were admitted without objection. Counsel for both parties made opening and closing statements.

Neither party requested leave to file a post-hearing brief.

## **JURISDICTION**

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

## **ISSUES AND RELIEF SOUGHT**

The issues to be determined in this case are:

- Whether DCPS denied Student a FAPE by failing to timely conduct a triennial evaluation by March 2012 with assessments, including but not limited to a Comprehensive Psychological Evaluation;
- Whether DCPS denied Student a FAPE by failing to evaluate him in all areas of suspected disabilities and/or failing to timely conduct or fund an Auditory Processing Evaluation;
- Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP on May 8, 2012 in that the IEP failed to address Student's needs because annual goals for reading, speech and behaviors were not appropriate;
- Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP on March 18, 2013, in that the IEP's reading, speech, and behavioral goals were not appropriate to address his disability;
- Whether DCPS denied Student a FAPE by failing to conduct an updated Functional Behavioral Assessment as initially requested in February 2013 and/or failing to appropriately revise Student's behavior plan to address behavior escalations and ongoing behavior concerns that commenced during the 2012-2013 school year;
- Whether DCPS denied Student a FAPE by failing to conduct to conduct a Level II Vocational Evaluation requested by the parent beginning in February 2013; and
- Whether, since January 2012, DCPS denied Student a FAPE by failing to provide him with speech and language and/or occupational therapy related services in accordance his IEPs.

For relief, Petitioner seeks an order for DCPS to fund independent evaluations of Student, to include a vocational evaluation, a Functional Behavioral Assessment (FBA) and all other necessary reevaluations and/or evaluations recommended by these assessments, and for DCPS to convene a multidisciplinary team (MDT) meeting to

review the evaluations and revise Student's IEP as appropriate. In addition, Petitioner seeks an award of compensatory education to compensate Student for educational harm resulting from DCPS' alleged failure to provide him an appropriate educational program since January 2012.

### **FINDINGS OF FACT**

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

1. Student, an AGE young man, resides with Petitioner in the District of Columbia. Testimony of Petitioner.

2. Petitioner is eligible for special education and related services under the primary disability classification, Multiple Disabilities, based upon coexisting impairments, Specific Learning Disability (SLD) and Other Health Impairment (OHI). Exhibit R-18.

3. Since the 2010-2011 school year, Student has been placed by DCPS at NONPUBLIC SCHOOL. Student is currently enrolled in GRADE at Nonpublic School's high school division. Exhibits P-20, P-25. Nonpublic School is a special day school for students with learning disabilities, behavioral disabilities and other disabilities. Testimony of Director. Since at least the 2011-2012 school year, Student has been placed in a full-time, outside of general education, special education setting. In addition to Specialized Instruction, Student's IEPs have provided, as related services, .5 hours per week of Occupational Therapy (OT), 1.5 hours per week of Behavioral Support Services and 1 hour per week of Speech-Language Pathology (S/L). Exhibits P-4, P-8, P-20.

4. In a May 17, 2013 independent Comprehensive Psychological Evaluation

report, LICENSED PSYCHOLOGIST reported that Student demonstrated “far below average” in verbal comprehension and in his ability to use words and numbers in analyzing, expressing and communicating; Student demonstrated “average” ability in his perceptual reasoning intelligence estimate in his ability to use pictures and physical manipulation in perceiving, analyzing and solving tasks; Student demonstrated “low average” working memory intelligence and “borderline” processing speed. Licensed Psychologist reported that significant differences in Student’s verbal comprehension and perceptual reasoning scores and a much smaller difference between Student’s working memory and perceptual reasoning ability were indicative that Student has a “learning disability” that is likely to disturb his academic education. On achievement testing, Student’s English oral language skills were average when compared to others at his age level. His overall level of achievement and academic skills tested very low. Student’s fluency with academic tasks and his ability to apply academic skills were both within the low range. When compared to others at his age level, Student’s performance was low average in math calculation skills; low in mathematics and written expression; and very low in broad reading, basic reading skills, and written language. Student’s total Academic Achievement tested in the Very Low Range and ranked at the 3.1 grade level.

Exhibit P-23.

5. On the behavioral assessments, Licensed Psychologist reported that Student struggles with “clinically significant” levels of hyperactivity, aggression, attention, learning and conduct problems. However, Student did not display hyperactivity, aggression, anxiety, depression, withdrawal or attention problems during the psychological evaluation. The behavioral ratings did not indicate any sign of emotional disturbance as a pervasive handicapping condition to his behavior in all

situations, but Student did appear to have specific emotional disruption to his learning and compliance with academic subjects in the afternoon school settings. Licensed Psychologist reported that Student appears to have attention deficit hyperactivity disorder (ADHD), but that Student takes medication that helps him overcome most of the hyperactivity problems in the mornings. Exhibit P-23.

6. Licensed Psychologist diagnosed Student with Attention-Deficit/Hyperactivity Disorder, NOS and Borderline Intellectual Functioning. Exhibit P-23.

7. Student was reevaluated for special education eligibility on November 4, 2013. Based upon existing data, the team determined that Student continued to be a student with a disability in need of special education and related services, based upon Multiple Disabilities (SLD and OHI). Exhibit R-17. Student's next preceding eligibility determination date was November 10, 2010. Exhibit R-1.

8. Pursuant to a settlement agreement between Mother and DCPS, Audiologist conducted a complete audiological (hearing) assessment of Student on February 1, 2011. In his report, Audiologist reported that Student had normal hearing. Based upon his review of testing of Student's cognitive abilities and academic achievement, Audiologist noted that Student's achievement was about two standard deviations lower than his cognitive skills. Audiologist hypothesized that Student's "extremely poor academic achievement scores" could be attributable to language processing and knowledge deficits and some possible auditory processing problems. Audiologist recommended, *inter alia*, that Student should have a comprehensive auditory processing assessment (APD assessment) to rule out any possible auditory processing problems contributing to his learning and language deficits. Exhibit P-1.

9. On March 18, 2011, DCPS convened an IEP meeting to review Audiologist's report and to finalize Student's IEP. Mother and EDUCATIONAL ADVOCATE 1 attended the meeting. Nonpublic School's audiologist stated that she supported an auditory processing evaluation because Student's December 2010 S/L evaluation showed that his receptive and expressive language was below average. The DCPS audiologist at the meeting stated she would take Student's most recent S/L and psychological evaluations to an audiological specialist on DCPS staff and that she would contact the DCPS progress monitor within 3 days to let her know about the APD evaluation. Exhibit P-17.

10. Student's IEP team reconvened on June 7, 2011. Mother and Educational Advocate 1 attended the meeting by telephone. At that meeting, the Nonpublic School audiologist reported that Student was receiving S/L services in 30 minutes sessions twice a week. She reported that in therapy, Student was typically an active participant and was making progress toward his S/L goals. The meeting notes do not indicate that there was any discussion of conducting an APD evaluation. Exhibit R-4.

11. Student received passing grades over the first three quarters of the 2011-2012 school year. At the end of the third quarter, May 7, 2012, his scores were all B's and C's except for a D+ in World History (due to his not turning in some assignments). Exhibit R-6. For the period December 2011 through May 2012, Student's S/L Provider reported that he was progressing on his Expressive Language-Receptive Language training. Exhibit R-7.

12. Student's IEP team at Nonpublic School convened on May 8, 2012 for an annual review of the IEP. Mother attended by telephone. The Meeting Notes reflect that the IEP team members developed annual goals based on full consideration of

Student's needs in academic areas of concern, as well as for Communication/Speech and Language, Social Emotional and Motor Skills/Physical Development. At the meeting, Mother did not express any concerns. Exhibits P-7, R-8.

13. On February 6, 2013, Petitioner's Counsel wrote Nonpublic School's former director by email that she had been retained to represent Mother. She wrote that according to Mother, Student had been suspended for over 10 school days and she was wondering whether an Manifestation Determination Review (MDR) was held and/or an updated FBA and behavior plan was in progress. She also asked the former director to forward to her Student's current transition plan along with any transition assessments conducted by the school or by DCPS. Exhibit P-36. On February 11, 2013, Petitioner's Counsel requested by email that the former director just send her the most recent IEP, transition plan, discipline records, service logs and recent evaluations. Exhibit P-35. On February 16, 2013, Petitioner's Counsel wrote the former director to request encounter tracking forms, related services logs, and Student's most recent FBA and behavior plan. In that email, Petitioner's Counsel wrote, "It may also be helpful to have an updated FBA and BIP - but it is my understanding that I need to go through DCPS for that." Exhibit P-34. The record does not establish that Mother, individually or through her attorney, actually requested DCPS to conduct an updated FBA or requested a Level II vocational assessment.

14. A meeting was convened on March 18, 2013 at Nonpublic School to review Student's IEP. Mother and Educational Advocate 2 attended. At the meeting, Student's teachers reported that his reading achievement scores were little changed from the year before and his math scores had decreased in most areas. At the meeting, the IEP team considered Student's Present Levels of Performance, Needs, Baselines and Goals for

academic areas of concern and for Behavioral Support Services, Speech and Language Therapy and Occupational Therapy. Exhibit R-13. EDUCATIONAL ADVOCATE 2 stated at the March 18, 2013 meeting that Student's low reading and math scores may be related to other impediments and she renewed the request that Student be evaluated for an auditory processing disorder. Exhibit P-9. The team scheduled another meeting to order an APD assessment and a psycho-educational evaluation of Student. Exhibit R-13.

15. Student's behavior issues were discussed at the March 18, 2013 IEP meeting. The team noted that Student's academic success was adversely affected by his disruptive behavior, his impulsivity and distractibility in the classroom setting, and that when not compliant with his medication, Student exhibited significant difficulty remaining on-task, following directions, and engaging appropriately with staff and peers. The team reported that Student benefitted from "small class size with low distractions, a behavior modification program, and social emotional counseling" and that Student can be redirected with moderate verbal prompts, accommodations (breaks), and consistent medication management. Exhibit R-13.

16. On April 2, 2013, DCPS approved Mother's request for an Independent Educational Evaluation (IEE) APD assessment of Student. Audiologist conducted an Auditory Information Processing Assessment on May 9, 2013. In his May 19, 2013 report, Audiologist reported that deficits in auditory processing were found for Student at the levels of phonological integration and organization/sequencing as well as a weakness with auditory lexical integration. He recommended auditory processing goals for Student for implementation by a S/L pathologist and a special education professional. Exhibit P-22. A meeting at Nonpublic School was held on November 4, 2013 to review the APD assessment. Exhibit P-29. Mother and Educational

Consultant attended by telephone. Exhibit P-20. Audiologist's May 19, 2013 report was reviewed at the meeting and his recommended goals were incorporated in the Reading and S/L Areas of Concern sections of the IEP. Testimony of Educational Consultant.

17. In the May 8, 2012 IEP Post-Secondary Transition Plan, for Student's long range employment goals, it was reported that Student was interested in learning more about becoming a firefighter, Metro bus/rail driver or professional athlete. For a long range post secondary education and training goal, the plan stated that Student will attend the Cadet Training Program for Fire Fighting. Exhibit P-8. In the November 4, 2013 IEP, Student's attending a post secondary program that offers football was added as a long range post secondary education and training goal. Exhibit P-20.

18. At the May 8, 2012 IEP meeting, Student reported he had only seen his OT provider two times since the start of the school year. Exhibit R-8. According to the DCPS "Service Trackers" for OT, covering February 2, 2012 through May 17, 2012, Student was provided OT services on a weekly basis and the OT provider was unavailable for two out of some 15 sessions. Exhibit R-11.

19. DCPS offered in evidence S/L Service Trackers for the period covering December 11, 2011 through June 4, 2012 and for the entire 2012-2013 school year. These records show that except for January and February 2012, the Student was regularly provided S/L services until October 2, 2012. There was no other evidence offered at the due process hearing about Student's non-receipt of S/L services in January and February 2012. Beginning October 5, 2012, the Service Trackers report that Student repeatedly refused S/L services. Student refused S/L therapy, or was absent from school, for over 25 sessions between October 5, 2012 and the end of the school year. He received S/L services for only some 15 sessions during this period.

Exhibits R-7, R-12.

## **CONCLUSIONS OF LAW**

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

### **Burden of Proof**

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

### **Analysis**

#### **a. Reevaluations**

- Did DCPS deny Student a FAPE by failing to timely conduct a triennial reevaluation, due by March 2012, with assessments, including but not limited to a Comprehensive Psychological Evaluation?
- Did DCPS deny Student a FAPE by failing to conduct an updated FBA as initially requested by the parent in February 2013 and/or by failing to appropriately revise Student's behavior plan to address behavior escalations and ongoing behavior concerns that commenced during the 2012-2013 school year?
- Did DCPS deny Student a FAPE by failing to conduct to conduct a Level II vocational evaluation requested by the parent beginning in February 2013?

Petitioner asserts that Student was denied a FAPE by DCPS' alleged failure to conduct special education reevaluations in 2012 and 2013. The purpose of an evaluation, under the IDEA, is to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. *See* 34 CFR § 300.15. The IDEA requires that a reevaluation of each child with a disability is

conducted at least once every three years and sooner, if the child's parent or teacher requests a reevaluation or if the LEA determines that the needs of the child warrant a reevaluation. *See* 34 CFR § 300.303. Petitioner contends that DCPS denied Student a FAPE by not conducting a triennial reevaluation by March 2012. However, Student's triennial reevaluation was not due in 2012. He had been reevaluated, and his special education eligibility confirmed, on November 10, 2010. Therefore, the next triennial reevaluation was not due until November 2013. DCPS did conduct a timely reevaluation on November 4, 2013.

Petitioner's Counsel also contends that she requested an updated FBA and a Level II vocational assessment for Student beginning in February 2012. In her closing argument, Petitioner's Counsel cited her emails to Nonpublic School in February 2013 as the source for the requests. I have reviewed those emails, Exhibits P-34 through P-36. These emails concern counsel's request for Student's records, including "his current transition plan, along with any transition assessments conducted at the school or by DCPS." In a February 15, 2013 email, counsel wrote "It may be helpful to have an updated FBA and BIP - but it is my understanding that I need to go through DCPS for that." The evidence does not establish that the parent, personally or by her counsel, requested DCPS or Nonpublic School to conduct an FBA or a Level II Vocational Assessment during the 2012-2013 school year. (Both an FBA and a vocational assessment were completed on Student following the November 2, 2013 IEP meeting.)

There is also insufficient evidence to establish whether DCPS failed to appropriately revise Student's behavior plan to address behavior escalations and ongoing behavior concerns that commenced during the 2012-2013 school year. Student's behavior issues were discussed at the March 18, 2013 IEP meeting. The team

noted Student's academic success was adversely affected by his disruptive behavior, his impulsivity and distractibility in the classroom setting, and that when not compliant with his medication, Student exhibited significant difficulty remaining on-task, following directions, and engaging appropriately with staff and peers. The team reported that Student benefitted from "small class size with low distractions, a behavior modification program, and social emotional counseling" and that Student can be redirected with moderate verbal prompts, accommodations (breaks), and consistent medication management. The IDEA requires that a student's IEP team consider behavioral interventions for a student, whose behavior impedes his learning.

In the case of a child whose behavior impedes the 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 CFR § 300.324(a)(2)(i). Here, the evidence does not establish whether the March 18, 2013 IEP (which was not introduced into evidence) did, or did not, appropriately address Student's behaviors. Petitioner has not met her burden of proof on this issue.

#### b. APD Assessment

- Did DCPS deny Student a FAPE by failing to evaluate him in all areas of suspected disabilities and/or by failing to timely conduct or fund an Auditory Processing Evaluation?

Petitioner contends that DCPS failed to evaluate Student in all areas of suspected disabilities because it did not conduct an auditory processing evaluation when recommended by Audiologist in his February 1, 2011 Audiological Assessment Report. For a student already determined eligible for special education and related services, as part of any reevaluation, the LEA must administer such assessments and other evaluation measures as may be needed to determine whether the student continues to have a disability, and what are his educational needs. *See* 34 CFR § 300.305(a), (c). In

his February 1, 2011 report, Audiologist recommended that Student should have a comprehensive auditory processing assessment (APD assessment) to rule out any possible auditory processing disorder. The APD assessment was not conducted until Educational Advocate 2 renewed the assessment request at a March 18, 2013 IEP meeting. DCPS issued an IEE authorization for the assessment on April 2, 2013.

DCPS contends that Petitioner's claim that DCPS denied Student a FAPE by not conducting the APD assessment in 2011 is barred by the IDEA's two-year statute of limitations. I agree. The Act requires that the due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint. *See* 34 CFR § 300.507(a)(2). Audiologist's recommendation for an APD assessment was discussed at the March 8, 2011 IEP meeting, which was attended by Mother and Educational Advocate 1. The DCPS representative promised a response within three days. The evidence does not establish how DCPS responded. Student's next IEP meeting was convened on June 7, 2011 and Mother and Educational Advocate 1 attended. There is no evidence that Student's need for an APD assessment was discussed at the June 7, 2011 meeting. I find that, at least by the June 7, 2011 IEP meeting, Petitioner knew or should have known, that DCPS had not conducted the APD assessment recommended four months earlier by Audiologist.

Petitioner's Counsel attempts to sidestep the two-year statute of limitations by arguing that DCPS had an ongoing duty to conduct an APD assessment, especially considering that when Audiologist conducted the assessment in May 2013, he determined that Student had deficits in auditory processing. However, under the IDEA, it is the responsibility of the IEP team and other qualified professionals to decide if

additional data are needed to determine the educational needs of the child. *See* 34 CFR § 300.305(a)(2); *Letter to Anonymous*, 48 IDELR 136 (OSEP 2007). Here, there was no evidence that, between the March 8, 2011 and March 18, 2013 IEP meetings, Student's IEP team found that it needed an APD assessment to determine Student's educational needs.

Petitioner's due process complaint in this case was filed on December 19, 2013 – more than two years after Petitioner knew or should have known that DCPS had not conducted the APD assessment recommended by Audiologist. Therefore, I conclude that this claim is barred by the IDEA's two-year statute of limitations.

c. IEP Annual Goals

- Did DCPS deny Student a FAPE by failing to develop an appropriate IEP on May 8, 2012, because the IEP annual goals for reading, speech and behaviors were not adequate?
- Did DCPS deny Student a FAPE by failing to develop an appropriate IEP on March 18, 2013, in that the IEP's reading, speech, and behavioral goals were not appropriate to address his disability?

Petitioner contends that the annual goals in Student's May 8, 2012 IEP and March 18, 2013 IEP were not adequate because they did not include the goals recommended by Audiologist following his May 2013 APD assessment of Student. The IDEA requires that each student's IEP must include a statement of measurable annual goals, including academic and functional goals, designed to,

(A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(B) Meet each of the child's other educational needs that result from the child's disability.

*See* 34 CFR § 300.320(a)(2)(i). *See, also, Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct.

592, 598 (1988) (IEP sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives.)

In the 2012 IEP, the IEP team developed annual goals for reading, speech and behaviors (Social Emotional) which were based upon the team's express consideration of Student's then-present levels of performance. For each area of concern, the meeting notes reflect that the team developed annual goals for Student, which were focused on meeting his needs resulting from his disabilities. At both the May 8, 2012 and March 18, 2013 IEP meetings, all of Student's IEP goals were reviewed by the team members, including Mother who attended both meetings and Educational Advocate 2, who attended the 2013 meeting. There was no evidence that any team member disagreed with the annual goals in either IEP.

At the due process hearing, Audiologist criticized the annual goals in the May 8, 2012 IEP because the goals did not address Student's phonological processing issues, as reported in Audiologist's May 1, 2013 APD assessment. Generally, an IEP is reviewed prospectively – not in hindsight. As the U.S. District Judge Huvelle has observed, “[b]ecause the question . . . is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so, . . . the measure and adequacy of an IEP can only be determined as of the time it is offered to the student. . . . Neither the [IDEA] nor reason countenance ‘Monday Morning Quarterbacking’ in evaluating the appropriateness of a child’s placement.” *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008), quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir.2008). Obviously, the May 8, 2012 IEP team did not have

access to Audiologist's May 1, 2013 APD assessment. Assuming that the phonological processing goals proposed by Audiologist, which the IEP team incorporated in the November 4, 2013 IEP, are needed at this time to enable Student to be involved in and make progress in the general education curriculum, Petitioner has not shown when the May 8, 2012 IEP was developed, the annual goals were inadequate or that the IEP was not reasonably calculated for Student to receive educational benefits. *See Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 3051 (1982). The March 18, 2013 IEP was not offered into the record at the due process hearing and none of the witnesses testified about its content. Therefore, I find that Petitioner has not shown that the annual goals in the 2013 IEP were not appropriate for Student.

d. Failure to Implement OT and S/L Related Services

- Did DCPS deny Student a FAPE by failing to provide him, since January 2012, speech and language and/or occupational therapy related services in accordance with his IEPs?

For her last claim, Petitioner alleges that DCPS has failed to implement fully Student's IEP S/L and OT services since January 2012. Student's IEPs during the period provided one hour per week of Speech-Language Pathology and 30 minutes per week of Occupational Therapy. DCPS contends that Mother has failed to present adequate evidence in support of this claim.

The standard for failure-to-implement claims, used by the U.S. District courts in this jurisdiction, was formulated by the Fifth Circuit in *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir.2000). This standard requires that a petitioner "must show more than a *de minimis* failure to implement all elements of [the student's] IEP, and instead, must demonstrate that the school board or other authorities

failed to implement substantial or significant provisions of the IEP” in order to prevail on a failure-to-implement claim. *Johnson v. District of Columbia* 2013 WL 4517176, 4 (D.D.C. Aug. 27, 2013) (quoting *Bobby R.*, 200 F.3d at 349). Courts applying this standard have focused on the proportion of services mandated to those actually provided, and the goal and import, as articulated in the IEP, of the specific service that was withheld. *Id.* (quotation and citation omitted.)

In this case, it was the Petitioner’s burden of proof to establish, by a preponderance of the evidence, that DCPS had not implemented Student’s IEPs. However, before me, there is only fragmentary evidence of the OT and S/L services provided to Student beginning January 2012 and I find that determining whether DCPS failed to implement significant portions of Student’s OT and S/L services is an exercise in speculation. Mother testified that she did not know whether S/L or OT services were provided to Student. Petitioner’s only evidence on this issue was Student’s assertion at the May 8, 2012 IEP meeting that he had only been provided OT services two times that year. (Student did not testify at the due process hearing.) As shown below, that assertion is not credible. For its part, DCPS, which does not have the burden of proof, offered into evidence only selected “Service Trackers” on which Student’s S/L and OT providers had recorded their services.

Student’s May 2012 assertion that he had seen his OT provider only two times since the start of the 2011-2012 school year is not borne out by the Service Trackers. The OT Services Trackers for the period February 2, 2012 through May 17, 2012 show that Student was provided OT services on a weekly basis and the OT provider was unavailable for only two of some 15 sessions. (No OT Service Trackers were offered into evidence for the 2012-2013 or current school years.)

DCPS' S/L Services Trackers cover the period from December 2011 through the end of the 2012-2013 school year. These records do not show that Student was offered S/L services in January or February 2012. While the apparent non-provision of services for those weeks raises questions about DCPS' implementation of S/L services, before concluding that Student was denied a FAPE during that period, a fact-finder would need evidence on, for example, whether the services were actually omitted or the records are simply incomplete, whether there was a justification if the services were not provided, whether Student was available for services during the period, whether the services were made up later, and whether there was educational harm. I find that Petitioner has not met this evidentiary burden.

The DCPS S/L Service Trackers do indicate that Student was regularly provided S/L services from March 2012 until October, 2012. Beginning October 5, 2012 the Service Trackers report that Student repeatedly refused to attend S/L therapy. According to the records, Student refused S/L therapy, or was absent from school, for over 25 sessions between October 5, 2012 and the end of the school year. He only received services for some 15 sessions during this period.<sup>2</sup> (No records of S/L services for the 2013-2014 school year were offered into evidence.)

Based on the very limited evidence before me, I find that Petitioner has not met her burden of proof to establish that DCPS materially deviated from Student's IEP

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<sup>2</sup> At the March 18, 2013 IEP team meeting, the S/L pathologist reported that Student's participation in therapy was inconsistent. It was incumbent upon the IEP team to consider whether Student's refusal to attend S/L sessions was related to his disability and, if so, to attempt to address his nonattendance through the IEP. *Cf. Springfield School Committee v. Doe*, 623 F.Supp.2d 150, 161 (D.Mass. 2009) (IEP team needs to consider whether school truancy is related to a student's disability and, if it is, address it through the IEP.) Because the March 18, 2013 IEP was not offered into evidence, whether or how the IEP team considered Student's inconsistent S/L participation and addressed it in his IEP was not shown.

provisions for OT and S/L services. The OT Service Tracker records cover only 3½ months, and during that period the OT provider was unavailable for only two of 15 sessions. The S/L records cover the second half of the 2011-2012 school year and all of the 2012-2013 school year. Except for January and February 2012, the evidence shows that from January 2012 through the present, Student missed only two S/L sessions due to the S/L provider's unavailability. Even if I were to assume that DCPS is at fault for not providing S/L services to Student in January or February 2012, the evidence would only establish that Student was not offered some nine hours of S/L services during the 20 school month period from January 2012 through the hearing date. I find that this evidence is insufficient to establish that DCPS failed to implement substantial or significant provisions of the Student's IEPs, as required by the *Bobby R.* standard. *Cf. Johnson, supra* 9 (only slight deviation when school capable of providing with 91% of the hours of specialized instruction required by IEP); *Savoy v. Dist. of Columbia*, 844 F.Supp.2d 23, 34 (D.D.C.2012) (finding that a difference of less than one hour per week was not material); *Catalan ex rel. E.C. v. Dist. of Columbia*, 478 F.Supp.2d 73, 76 (D.D.C.2007) (holding that failure to receive "a handful of sessions" of therapy and therapist's shortening of several other sessions was not material). I conclude that Petitioner has not met her burden of proof to establish that DCPS denied Student a FAPE by not providing a substantial or significant portion of his OT and/or S/L services after January 2012.<sup>3</sup>

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<sup>3</sup> Neither did Petitioner establish any educational harm resulting from the alleged failure to provide the services or what compensatory education award would be needed to remedy any such harm. *See, e.g., Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011) (The proper amount of compensatory education, if any, depends upon how much more progress a child might have shown if he had received the required special education services and the type and amount of services that would place the child in the same position he would have occupied but for the LEA's violations of the IDEA. (*Id.*, citing *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005))).

### Summary

In this decision, Petitioner asserts claims against DCPS for failure to timely conduct special education evaluations of Student, inadequate annual goals in Student's IEPs, and failure to implement Student's IEP OT and S/L services since January 2012. I have found that Petitioner's claim that DCPS failed to conduct a auditory processing assessment when recommended by Audiologist in February 2011 is barred by the IDEA's two-year statute of limitations. I have found that DCPS' November 2013 triennial reevaluation of Student was timely and that Petitioner did not meet her burden of proof to establish that DCPS was required to conduct additional assessments or that Student's March 18, 2013 IEP did not appropriately address his behavior issues. Lastly, I have found that Petitioner has not met her burden of proof to show that DCPS failed to implement substantial or significant portions of Student's IEPs.

### ORDER

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

- All relief requested by Petitioner herein is denied.

Date: March 3, 2014

s/ Peter B. Vaden  
Peter B. Vaden, 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).