OSSE
Student Hearing Office
November 12, 2013

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

Parent,[1] on behalf of,
Student,
Petitioner,

Date Issued: November 9, 2013

v.

Hearing Officer: Melanie Byrd Chisholm

District of Columbia Public Schools,
Respondent.

Hearing Date: October 28, 2013

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is a attending School A. The student's current individualized education program (IEP) lists Intellectual Disability (ID) as his primary disability and provides for him to receive twenty-four (24) hours per week of specialized instruction outside of the general education setting.

On August 26, 2013, Petitioner filed a Due Process Complaint (Complaint) against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to comprehensively evaluate the student by failing to agree to conduct the auditory processing evaluation recommended by the speech and language evaluation conducted for the student in July 2013 and requested by the parent; refusing to amend the student's IEP to include the recommended speech and language goals and 2.5 hours of speech therapy per week; and failing to provide extended school year (ESY) services to the student for the 2013 summer. As relief for this alleged denial of FAPE, Petitioner requested audiological and auditory processing evaluations at fair market value; reconvene a multidisciplinary team (MDT) meeting to review the results of the evaluations and revise the student's IEP as appropriate; for the student's IEP to be amended to include not less than 2.5 hours of speech and language therapy per week and the goals recommended by the July 13, 2013 evaluation; and compensatory education.

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[1] Personal identification information is provided in Appendix A.

On September 3, 2013, Respondent filed a timely Response to the Complaint. In its Response, Respondent asserted that: a fully-comprehensive, well-experienced and knowledgeable MDT reviewed the student's July 19, 2013 Speech Language Evaluation and determined that audiological and auditory processing assessments were not required for the student; auditory testing is not appropriate for the student because the student has an IQ of 54 and students who are recommended for auditory testing have an IQ of at least an 80 and language scores of 80; the July 19, 2013 Speech Language Evaluation was deficient in certain areas; after review of the July 19, 2013 Speech Language Evaluation, the fully-comprehensive, well-experienced and knowledgeable MDT determined that 2.5 hours per week of speech-language services were not warranted for the student; in order to warrant 2.5 hours per week of speech-language services, the student would have needed to have at least a 15 point difference between receptive and expressive language skills; the MDT properly determined that two hours per month of speech-language services is appropriate for the student; upon review by the MDT, the student's speech-language goals on the student's IEP were determined to be appropriate for the student; the student's March 28, 2013 IEP includes ESY; ESY services were offered to the student and DCPS denies that transportation to ESY was not offered and/or that the Petitioner informed DCPS of a change in address.

The parties scheduled to hold a Resolution Meeting on September 18, 2013 however the Respondent's representative failed to appear. On September 18, 2013, the Petitioner filed a motion for the Hearing Officer to begin the 45-day timeline. During the prehearing conference, the parties agreed to attempt to reschedule the Resolution Meeting, if possible, on September 27, 2013. Therefore, on September 19, 2013, the Petitioner withdrew the motion to begin the 45-day timeline. Accordingly, the parties agreed that the 45-day timeline started to run on September 26, 2013, following the conclusion of the 30-day resolution period, and ends on November 9, 2013. The Hearing Officer Determination (HOD) is due on November 9, 2013.

On September 19, 2013, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issues, relief sought and related matters. The Hearing Officer issued the Prehearing Order on September 21, 2013. The Prehearing Order clearly outlined the issues to be decided in this matter. Both parties were given three (3) business days to review the Order to advise the Hearing Officer if the Order overlooked or misstated any item. Neither party disputed the issues as outlined in the Order.

On October 21, 2013, Petitioner filed Disclosures including twenty-six (26) exhibits and four (4) witnesses.[2] On October 21, 2013, Respondent filed Disclosures including six (6) exhibits and seven (7) witnesses.

The due process hearing commenced at approximately 9:34 a.m.[3] on October 28, 2013 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing . The Petitioner elected for the hearing to be closed. Petitioner's Exhibits 1-26 were admitted without objection. Respondent's Exhibits 1-6 were admitted without objection.

[2] A list of exhibits is attached as Appendix B. A list of witnesses who testified is included in Appendix A.
[3] At 9:00 a.m., the scheduled time to begin the hearing, counsel for Petitioner, counsel for Respondent and the Hearing Officer were present. The hearing began when the parent arrived.

The hearing concluded at approximately 2:53 p.m. on October 28, 2013, following closing statements by both parties.

Jurisdiction

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E-30.

ISSUES

The issues to be determined are as follows:

1. Whether DCPS failed to comprehensively evaluate the student, specifically by failing to conduct an auditory processing assessment as recommended in the student's July 19, 2013 Speech Language Evaluation, and if so, whether this failure constitutes a denial of a FAPE?
2. Whether DCPS denied the student a FAPE by failing to revise the student's IEP on August 14, 2013 to include two and one half (2.5) hours per week of speech-language services and the speech-language goals recommended in the student's July 19, 2013 Speech Language Evaluation?
3. Whether DCPS denied the student a FAPE by failing to implement the student's March 28, 2013 IEP, specifically by failing to submit accurate transportation information to the Office of the State Superintendent for Education (OSSE) thereby denying the student access to ESY services?

FINDINGS OF FACT

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

1. The student is a student with disabilities as defined by 34 CFR §300.8. (Stipulated Fact)
2. The student's intellectual ability is in the "severe intellectual disability" range. (Petitioner's Exhibit 4)
3. The student's verbal intelligence is at the 0.1 percentile. (Petitioner's Exhibit 4)
4. The student is classified as a student with an ID. (Petitioner's Exhibits 1 and 4; Respondent's Exhibits 2 and 5)
5. The student's speech is intelligible and he is clearly understood. (Petitioner's Exhibit 2)
6. The student's voice, articulation, fluency, rate of speech and rhythm are appropriate. (Petitioner's Exhibit 2)
7. The student has below normal development in vocabulary skills. (Petitioner's Exhibit 2; Independent Speech Language Pathologist's Testimony)

8. The student has severe expressive and receptive language delays. (Petitioner's Exhibits 2 and 5; Respondent's Exhibit 1; Independent Speech Language Pathologist's Testimony)
9. The student is able to follow complex directions containing location and conditional words. (Petitioner's Exhibit 2)
10. The student has far below average ability to use words and numbers in analyzing, expressing and communicating. (Petitioner's Exhibit 4)
11. The student has very low cognitive ability in all forms of information processing. (Petitioner's Exhibit 4)
12. The student follows directions well, comprehends passages well and works to find meaning of unfamiliar words. (Respondent's Exhibit 2 and 6; Special Education Teacher's Testimony)
13. The student is able to communicate his basic wants and needs, engages in cooperative behavior in the classroom setting, is attentive and always participates in activities. (Respondent's Exhibits 2 and 6; Special Education Teacher's Testimony)
14. The student needs speech-language services in order to improve his verbal comprehension, self-expression and interpersonal communication. (Petitioner's Exhibit 4; Respondent's Exhibit 1; Independent Speech Language Pathologist's Testimony)
15. The student has "incredible" participation in class and answers questions "all of the time." (Special Education Teacher's Testimony)
16. In November 2011, the student's communication skills had remained constant over several years. (Petitioner's Exhibit 2; Respondent's Exhibit 6)
17. In November 2011, the student's IEP Team decided to discontinue the student's speech-language services since the student had not demonstrated progress toward his speech-language goals. (Petitioner's Exhibit 23; Respondent's Exhibit 6; Parent's Testimony; DCPS Speech Language Pathologist 1's Testimony)
18. ESY was included on the student's March 28, 2013 IEP. (Stipulated Fact)
19. The student was to be provided ESY at School C. (Petitioner's Exhibit 16; Respondent's Exhibit 4)
20. The student's March 28, 2013 IEP prescribed ESY for four hours per day from July 8, 2013 through August 2, 2013. (Petitioner's Exhibit 1)
21. The student's March 28, 2013 IEP included ESY goals related to math, reading, written language and adaptive/daily living skills. (Petitioner's Exhibit 1; Respondent's Exhibit 3)
22. The student's March 28, 2013 IEP includes goals and modifications which address the student's low average auditory memory in the classroom, during tests and in academic courses. (Petitioner's Exhibits 1 and 4)
23. The student's transportation for ESY was scheduled to begin on July 8, 2013 and end on August 2, 2013.[4] (Petitioner's Exhibit 16; Respondent's Exhibit 4)
24. The transportation form provided to OSSE by DCPS included the student's address prior to July 3, 2013. (Petitioner's Exhibit 16; Respondent's Exhibit 4; Parent's Testimony)

[4] The Student Transportation Form indicates that the student's transportation was scheduled to begin on July 8, 2013 and end on August 2, 2012. The Hearing Officer concludes that the end date is a typographical error. The last IEP meeting date on the form is March 28, 2013 and the start date is July 8, 2013.

25. Prior to July 3, 2013, the parent gave School B his new address during a meeting at the school and called School C to provide his new address. (Parent's Testimony)
26. The student's family moved on July 3, 2013. (Parent's Testimony)
27. The parent's phone number did not change between March 28, 2013 and the start of ESY. (Parent's Testimony)
28. For the student's ESY period, the bus did not arrive at the student's address to transport the student to School C. (Parent's Testimony)
29. From July 8, 2013 through August 2, 2013, the parent did not attempt to contact School C again because the parent understood that he would receive a follow-up call from DCPS. (Parent's Testimony)
30. The parent did not receive any communication from DCPS before or during the ESY period. (Parent's Testimony)
31. The student did not attend ESY. (Parent's Testimony)
32. An independent speech-language evaluation was completed for the student on July 19, 2013. (Stipulated Fact)
33. The Independent Speech-Language Pathologist attributed the student's low scores on cognitive measures in part to speech-language and auditory processing deficits and questioned whether the student actually has "real" cognitive limitations. (Petitioner's Exhibit 5; Independent Speech Language Pathologist's Testimony)
34. The Independent Speech-Language Pathologist recommended an auditory processing evaluation based on the student's receptive language being poorer than the student's expressive language. (Petitioner's Exhibit 5; Respondent's Exhibit 1; Independent Speech-Language Pathologist's Testimony; DCPS Speech Language Pathologist 1's Testimony)
35. Within the July 19, 2013 Speech Language Evaluation, the evaluator recommended five speech-language goals for the student and speech-language services for 2.5 hours per week. (Petitioner's Exhibit 5, 10, 11, 12 and 13; Respondent's Exhibit 1; Independent Speech Language Pathologist's Testimony; DCPS Speech Language Pathologist 2's Testimony)
36. The speech-language goals provided in the July 19, 2013 Speech Language Evaluation were not developed in a meeting or with the input of IEP Team members who have worked with the student, observed the student in a school environment or assessed the student's present level of performance in an educational setting. (Petitioner's Exhibits 5, 10, 11, 12 and 13; Respondent's Exhibit 1; Independent Speech Language Pathologist's Testimony)
37. An MDT met on August 14, 2013 to review the July 19, 2013 Speech Language Evaluation. (Stipulated Fact)
38. On August 14, 2013, the student was reevaluated. (Respondent's Exhibits 2 and 5)
39. The August 14, 2013 IEP Team participants agreed that the student continued to be a student with disabilities with the classification of ID. (Respondent's Exhibit 2)
40. As a part of the August 14, 2013 reevaluation, the student's IEP Team used the student's independent July 19, 2013 Speech Language Evaluation, Vineland Adaptive Behavior Scales, classroom observations, the student's DC-CAS scores, the student's DC-BAS scores, portfolio assessments, classroom-based testing, student work samples, CASL scores and TAP-3 subtest scores to determine whether the student

continued to be a child with a disability and the content of the student's IEP. (Respondent's Exhibits 2 and 5)

41. At the August 14, 2013 IEP Team meeting, the DCPS Speech-Language Pathologist indicated that the agency felt that the independent evaluation did not meet agency criteria because the July 19, 2013 Speech Language Evaluation did not formally assess the student's receptive vocabulary skills and expressive vocabulary skills; informal/formal hearing and pragmatic language measures were not identified; total overall language scores, expressive language scores and receptive language scores were not reported; the evaluation indicated that the CTOPP was administered when, in actuality, the TAPS-3 was administered; and further discussions need to occur regarding the reference to the student's "mental age" scores reported from the CASL. (Respondent's Exhibits 1 and 2; DCPS Speech Language Pathologist 2's Testimony)
42. DCPS' reasoning for determining that the July 19, 2013 Speech Language Evaluation did not meet agency criteria was included in the August 27, 2013 Evaluation Summary Report. (Respondent's Exhibit 2)
43. On August 14, 2013, the parent, through his attorney, requested the 2.5 hours per week be added to the student's IEP however the DCPS members of the IEP Team recommended 30 minutes per week. (Petitioner's Exhibits 10, 11, 12 and 13; DCPS Speech Language Pathologist 2's Testimony)
44. On August 14, 2013, DCPS wanted to have input regarding the student's speech-language goals. (Petitioner's Exhibits 10, 11, 12 and 13)
45. On August 14, 2013, with the exception of speech-language goals and services, there was no disagreement as to the content of the student's IEP. (Petitioner's Exhibits 10, 11, 12 and 13)
46. The student's August 14, 2013 IEP Team agreed that speech-language services would be added to the student's IEP but disagreed to the amount of speech-language services. (Petitioner's Exhibits 10, 11, 12 and 13; DCPS Speech Language Pathologist 2's Testimony)
47. The student has demonstrated progress during the 2013-2014 school year. (Special Education Teacher's Testimony)

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments 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 special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. *See N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court of the United States held that the term "free appropriate public education" means "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped." The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seg., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

The IDEA regulations at 34 CFR §300.513(a)(2) state that 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.

Issue #1

Evaluation is defined as, "procedures used in accordance with §§300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." 34 CFR §300.15. In conducting an evaluation, an LEA must "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability" and the content of the child's IEP. 34 CFR §300.304(b).

IDEA regulations at 34 CFR §300.304(c)(6) require the public agency to ensure that evaluation of a child is sufficiently comprehensive to identify all the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified. The Petitioner argued that DCPS should have conducted an auditory processing assessment as recommended in the student's July 19, 2013 Speech Language Evaluation.

Here, it is important to note the distinction between "evaluation" and specific assessment tools. The IDEA does not require LEAs to administer every test requested by a parent or educational advocate. Rather, to ensure that a child with a disability receives a FAPE, an LEA must use "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information." *Long v. District of Columbia*, 780 F. Supp. 2d 49, (D.D.C. March 23, 2011) (quoting 20 U.S.C. § 1414(b)(2)(A)). A district has the prerogative to choose assessment tools and strategies. *See Amanda Ford v. Long Beach Unif. Sch. Dist.*, 291 F.3d 1086 (2002) (parents did not provide any empirical grounds on which to base a challenge to the district's choice in assessment tools and strategies).

The student was reevaluated on August 14, 2013. The IEP Team participants agreed that the student continued to be a student with disabilities with the classification of ID. As a part of the reevaluation, the student's IEP Team used the student's independent July 19, 2013 Speech Language Evaluation, Vineland Adaptive Behavior Scales, classroom observations, the student's

DC-CAS scores, the student's DC-BAS scores, portfolio assessments, classroom-based testing, student work samples, CASL scores and TAP-3 subtest scores to determine whether the student continued to be a child with a disability and the content of the student's IEP.

Pursuant to 34 CFR §300.502(c)(1), an independent educational evaluation must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child. There is no requirement in the IDEA, its implementing regulation, or the District of Columbia Code and Municipal Regulations that an IEP Team adopt all of the recommendations in an independent evaluation or any evaluation conducted on behalf of a student. Additionally, there is no requirement for a public agency to be compelled to consider the independent evaluation if it does not meet agency criteria. If the agency does not believe that the evaluation meets agency criteria, it is appropriate for the agency to explain to the parent why it believes that the evaluation does not meet agency criteria. *See Comments to the Federal Regulations*, 71 Federal Register 46540:46690 (14 August 2006).

The student's August 14, 2013 IEP Team considered the July 19, 2013 Speech Language Evaluation however the DCPS Speech-Language Pathologist, as a member of the student's IEP Team, clearly indicated that the agency felt that the independent evaluation did not meet agency criteria. Specifically, the agency stated that the July 19, 2013 Speech Language Evaluation did not formally assess the student's receptive vocabulary skills and expressive vocabulary skills; informal/formal hearing and pragmatic language measures were not identified; total overall language scores, expressive language scores and receptive language scores were not reported; the evaluation indicated that the CTOPP was administered when, in actuality, the TAPS-3 was administered; and further discussions need to occur regarding the reference to the student's "mental age" scores reported from the CASL. This reasoning was included in the August 27, 2013 Evaluation Summary Report.

The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence. *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted). In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it. *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), affd, 512 U.S. 246 (1994). Unlike other standards of proof, the preponderance of evidence standard allows both parties to share the risk of error in roughly equal fashion, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted). Except that when the evidence is evenly balanced, the party with the burden of persuasion must lose. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion.

In this proceeding, the Petitioner carries the burden of persuasion. On one side, the Independent Speech-Language Pathologist provided heartfelt testimony that the student was in need of an auditory processing assessment based on his analysis of a 2008 psychological report which stated that the student had normal cognitive test results and the unusual condition of

overall receptive language being poorer than expressive language thereby suggesting that the student's cognitive scores were based on auditory processing deficits rather than intellectual disability. The Hearing Officer finds it difficult to agree with this analysis. First, all psychological testing, administered by psychologists, who are the appropriate professionals to recommend a disability label, of the student included in the record revealed an intellectual disability. Next, the Hearing Officer does not read the student's 2008 Psychological Evaluation to say that the student had normal cognitive test results. Further, no IEP Team member, the persons charged with making a final determination of the student's disability category, questioned the student's disability classification. Additionally, with the exception of speech-language goals discussed in Issue #2, there was no disagreement as to the content of the student's IEP. The student's academic goals, adaptive/daily living goals and specialized instruction were all agreed upon by the student's IEP Team. Finally, the student's IEP Team was not compelled to accept all of the recommendations in the independent evaluation, especially when the agency did not believe that the evaluation met agency standards.

On the other side, the DCPS Speech-Language Pathologist 1 testified that an auditory processing assessment was not appropriate for the student because the student does not have an average IQ. The Hearing Officer is disturbed by this testimony. If there are sound, researched justifications for not administering auditory processing assessments to student with IDs, these were not provided by the witness. Further, a student's IEP Team should make decisions based on the individual student, not what appears to be an arbitrary cutoff for when assessments can be administered. However, the DCPS Speech-Language Pathologist 2 offered additional reasons for why DCPS declined to conduct the auditory processing assessment recommended by the Independent Speech-Language Pathologist. Specifically, the DCPS Speech-Language Pathologist 2 testified that an auditory processing assessment cannot be administered to the student in the absence of expressive and receptive language scores. The absence of the student's expressive and receptive language scores was one of the factors which led DCPS to conclude that the July 19, 2013 Speech Language Evaluation did not meet agency standards.

Because neither side is more convincing than the evidence offered in opposition to it, the Hearing Officer concludes that the Petitioner did not meet its burden with respect to Issue #1.[5]

Issue #2

The Petitioner alleged that DCPS denied the student a FAPE by failing to revise the student's IEP on August 14, 2013 to include 2.5 hours per week of speech-language services and the speech-language goals recommended in the student's July 19, 2013 Speech Language Evaluation.

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides appropriate specialized instruction and related services. *See* 34 CFR 300.320(a). For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression." *Walczak v. Florida Union Free Sch. Dist.,* 142

[5] Although the Hearing Officer did not find a denial of a FAPE for Issue #1, the Hearing Officer strongly suggests that DCPS convene another IEP Team meeting for the student to make an individual determination as to whether an auditory processing assessment is necessary for the student.

F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted). Whether the program set forth in the IEP constitutes a FAPE is to be determined from the perspective of what was objectively reasonable to the IEP team at the time of the IEP, and not in hindsight. *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, *citing Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.

A student's IEP must be designed to meet the student's unique needs and be reasonably calculated to provide the student with some educational benefit, but the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. *(Rowley, supra,* 458 U.S. 176 at p. 200.) For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression." *Walczak v. Florida Union Free Sch. Dist.,* 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).

The student's voice, articulation, fluency, rate of speech and rhythm are appropriate. He is intelligible and clearly understood. However, the student has below normal development in vocabulary skills and has severe expressive and receptive language delays. The student's verbal intelligence is at the 0.1 percentile and he has far below average ability to use words and numbers in analyzing, expressing and communicating. The student has very low cognitive ability in all forms of information processing. However, the student is able to follow complex directions containing location and conditional words, comprehends passages well and works to find meaning of unfamiliar words. The student is able to communicate his basic wants and needs, engages in cooperative behavior in the classroom setting, is attentive and always participates in activities.

In November 2011, the student's communication skills had remained constant over several years. At that point, the student's IEP Team decided to discontinue the student's speech-language services since the student had not demonstrated progress toward his speech-language goals. Although the student's March 28, 2013 IEP did not prescribe any speech-language services, the student's March 28, 2013 IEP included goals and modifications which addressed the student's low average auditory memory in the classroom, during tests and in academic courses.

The student's IEP Team met on August 14, 2013 to reevaluate the student. As a part of the reevaluation, the student's IEP Team reviewed the student's independent July 19, 2013 Speech Language Evaluation. Within the July 19, 2013 Speech Language Evaluation, the evaluator recommended five speech-language goals for the student and speech-language services for 2.5 hours per week. The Independent Speech Language Pathologist testified that he "assumed" that the student was not performing well in school because learning is language based and if the student is unable to understand the meaning of words than he will not make progress.

The student's August 14, 2013 IEP Team agreed that speech-language services would be added to the student's IEP but disagreed to the amount of speech-language services. The parent, through his attorney, requested the 2.5 hours per week however the DCPS members of the IEP Team recommended 30 minutes per week. Additionally, DCPS wanted to have input regarding the student's speech-language goals.

Related services are supportive services as are required to assist a child with a disability to benefit from special education. *See* 34 CFR §300.34. The Independent Speech-Language Pathologist testified that the recommendation of 2.5 hours per week of speech-language services was derived from the calculation that it would take 30 minutes per week for each of the five recommended speech-language goals in order to correct the student's deficits in one year.

"Nowhere in *Rowley* is the educational benefit defined exclusively or even primarily in terms of correcting the child's disability." *Klein Ind. Sch. Dist. v. Hovem*, 690 F.3d 390 (5th Cir. August 6, 2012). In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. *See Gregory K v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.

The student needs speech-language services in order to improve his verbal comprehension, self-expression and interpersonal communication however the Independent Speech Language Pathologist's conclusion that the student is not progressing in school and will not progress without 2.5 hours per week of speech-language services is not supported by the record. The Special Education Teacher testified that the student has demonstrated "a lot" of growth. The student has "incredible" participation in class and answers questions "all of the time." The student is able to follow complex directions containing location and conditional words, comprehends passages well and works to find meaning of unfamiliar words. The student is able to communicate his basic wants and needs, engages in cooperative behavior in the classroom setting, is attentive and always participates in activities.

An IEP is a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with §§300.320 through 300.324. *See* 34 CFR §300.320(a). The speech-language goals provided by the Independent Speech Language Pathologist were not developed in a meeting. They were not developed with the input of IEP Team members who have worked with the student, observed the student in a school environment or assessed the student's present level of performance in an educational setting. While evaluator may suggest goals, it is inappropriate for the Hearing Officer to accept wholesale goals that were developed without adequate team participation.

Pursuant to 34 CFR §300.502(c)(1), an independent educational evaluation must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child. There is no requirement in the IDEA, its implementing regulation, or the District of Columbia Code and Municipal Regulations that an IEP Team adopt all of the recommendations in an independent evaluation or any evaluation conducted on behalf of a student.

The Hearing Officer concludes that DCPS considered the student's independent July 19, 2013 Speech Language Evaluation and did not deny the student a FAPE by failing to wholly adopt the evaluator's recommendations. The Independent Speech Language Pathologist applied an incorrect standard in determining the amount of speech-language services the student. First, related services are not designed to correct a child's disability. Further, the IDEA does not require school districts to provide instruction or services that maximize a student's abilities.

DCPS is only required to provide an IEP that is reasonably calculated to enable the child to receive educational benefit.

While 2.5 hours per week of speech-language services was beyond DCPS' obligation to provide a FAPE to the student, DCPS' proposal of two hours per month was not likely to produce progress. DCPS previously removed the student from speech-language services for lack of progress and, while the record does not include the amount of speech-language services on the student's previous IEPs, the student's below normal development in vocabulary skills, severe expressive and receptive language delays, extremely low verbal intelligence and far below average ability to use words and numbers in analyzing, expressing and communicating necessitate more than two hours per month to address. The Hearing Officer concludes that one hour per week of speech-language services were necessary to provide the student with a FAPE.

The Petitioner met its burden with respect to Issue #2 related to speech-language services for more than two hours per month.

Issue #3

The IDEA at 34 CFR §300.323(c)(2) requires each public agency to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. A material failure to implement a student's IEP constitutes a denial of a free appropriate public education. *Banks ex rel. D.B. v. District of Columbia*, 720 F. Supp. 2d 83, 88 (D.D.C. 2010).

The student's March 28, 2013 IEP included ESY goals related to math, reading, written language and adaptive/daily living skills. The student's March 28, 2013 IEP prescribed ESY for the student for four hours per day from July 8, 2013 through August 2, 2013. The student's transportation for ESY was scheduled to begin on July 8, 2013 and end on August 2, 2013 and the student was to be provided ESY at School C. The Parent testified that he knew on June 29, 2013 that the family would be moving. The student's family moved on July 3, 2013. The transportation form provided to OSSE by DCPS included the student's address prior to July 3, 2013. While the Parent's testimony was somewhat muddled regarding when he provided his new address to DCPS, the Parent provided creditable testimony that he gave School B his new address during a meeting at the school and called School C to provide his new address. The parent's phone number did not change between March 28, 2013 and the start of ESY.

For the student's ESY period, the bus did not arrive at the student's address to transport the student to School C. During this time, the parent did not attempt to contact School C again because the parent understood that he would receive a follow-up call from DCPS. The parent did not receive any communication from DCPS before or during the ESY period regarding transportation or the student's attendance. Consequently, the student did not attend ESY.

In failure-to-implement claims, the consensus among federal courts has been to adopt the standard articulated by the Fifth Circuit. *E.g., S.S. v. Howard Rd. Acad.,* 585 F. Supp. 2d 56, 67 (D.D.C. 2008). In *Houston Independent School District v. Bobby R.,* 200 F.3d 341 (5th Cir. 2000), the Firth Circuit held that "to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of

that IEP, and, instead, must demonstrate that the ... authorities failed to implement substantial or significant provisions of the IEP." *Id.* at 349; *see also Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) ("[A] material failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP."). "[C]ourts 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." *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). What provisions are significant in an IEP should be determined in part based on "whether the IEP services that were provided actually conferred an educational benefit." *Bobby R.*, 200 F.3d at 349, n. 2. Failure to provide the services must deprive the student of educational benefit. *See Savoy v. District of Columbia*, 2012 WL 548173, 112 LRP 8777 (D.D.C. 2012).

The Respondent argued that the student was not academically harmed by missing ESY and that there was some onus on the parent to call more than one time regarding transportation. The Hearing Officer is not persuaded by these arguments. First, by virtue of ESY being included on the student's IEP, the student's IEP Team determined that ESY was necessary for the student to maintain critical skills and be provided a FAPE. Next, the Petitioner was not required to demonstrate that the student suffered harm by the failure of DCPS to implement the student's IEP. The Petitioner only had to prove that DCPS failed to implement substantial or significant provision of the student's IEP. Finally, a student's parent does not bear the responsibility of ensuring that an LEA provides a related service, in this case, transportation. The parent took the initiative to find out an appropriate place to call to inform DCPS of the family's change in address and called to inform DCPS of the family's change in address. While it may have been helpful for the parent to call multiple times to procure transportation, the parent was not required to do so.

The Hearing Officer concludes that DCPS denied the student a FAPE by failing to implement the student's March 28, 2013 IEP, specifically by failing to provide updated transportation information to OSSE, thereby denying the student access to ESY services. *See Wilson v. District of Columbia*, 770 F. Supp. 2d 270 (D.D.C. March 18, 2011) (the District of Columbia's delay in arranging transportation services caused a 9-year-old boy to miss three weeks of his four-week ESY program thereby constituting a material implementation failure).

The Petitioner met its burden with respect to Issue #3.

<u>Requested Relief</u>

IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* ". . .the inquiry must be fact-specific and . . . the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F. 3d 516 at 524, 365 U.S. App. D.C. 234 (D.C. Cir 2005) citing *G.ex. RG v Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4 h Cir. 2003).

The Petitioner requested compensatory education as relief for DCPS' denial of FAPE. When an LEA deprives a child with a disability of a FAPE in violation of the IDEA, a court and/or Hearing Officer fashioning appropriate relief may order compensatory education. *Reid* at 522-523. *See also Peak v. District of Columbia*, 526 F. Supp. 2d 32, 36, 49 IDELR 38 (D.D.C. 2007). If a parent presents evidence that her child has been denied a FAPE, she has met her burden of proving that the child may be entitled to compensatory education. *Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland*, 534 F. Supp. 2d 109, 49 IDELR 183 (D.D.C. 2008); *Henry v. District of Columbia*, 55 IDELR 187 (D.D.C. 2010).

The starting point for calculating a compensatory education award is when the parent knew or should have known of the denial of a FAPE. The duration is the period of the denial. 20 U.S.C. §1415(f)(3)(C); 20 U.S.C. §1415(b)(6)(B); *See also Reid*, 401 F.3d at 523; *Brown v. District of Columbia*, 568 F. Supp. 2d 44, 50 IDELR 249 (D.D.C. 2008) *citing Peak v. District of Columbia*, 526 F. Supp. 2d 32, 49 IDELR 38 (D.D.C. 2007). The Hearing Officer finds that the starting point of the denial of FAPE related to speech-language services is August 14, 2013. Since August 14, 2013, there have been 11 weeks of school. The starting point of the denial of FAPE related to ESY services was July 8, 2013 and the end point of the denial of a FAPE was August 2, 2013.

An award of compensatory education must be reasonably calculated to provide the educational benefits that likely would have accrued. *Reid*, 401 F.3d at 524. The student's March 28, 2013 IEP provided for the student to receive ESY services for four hours per day for four weeks. Therefore, DCPS failed to provide the student 80 hours of specialized instruction. The Hearing Officer concluded that the student's August 14, 2013 IEP should have revised the student's IEP to prescribed one hour per week of speech-language services. Therefore, DCPS failed to provide the student 11 hours of speech-language services.

For these denials of a FAPE, the Petitioner requested 80 hours of independent academic tutoring and 20 hours of independent speech-language services. However, *Reid* rejects and outright "cookie-cutter approach," (i.e. an hour of compensatory instruction for each hour that FAPE was denied. *Reid*, 401 F.3d at 523.

One-on-one tutoring is a more intensive form of instruction and allows a student to progress at a faster rate than receiving instruction in a group environment. The Hearing Officer concludes that an appropriate compensatory education award is for the student to be provided with one-on-one tutoring, for 26.5 hours to compensate for the specialized instruction missed by the student for the July 8, 2013 through August 2, 2013 ESY period and independent speech-language services for 5.5 hours to compensate for the speech-language services not provided to the student from August 26, 2013 through present.

ORDER

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

1. Issues #1 is **dismissed** with prejudice.

2. Within 10 school days of the date of this Order, or on a date mutually agreed upon by the parties, DCPS convene an IEP Team meeting to amend the student's IEP to include one hour per week of speech-language services outside of the general education setting.
3. That DCPS provide a total of 26.5 hours of independent one-on-one tutoring for the student, at a rate not to exceed the Office of the State Superintendent's (OSSE's) established rate for this service, to be completed by April 11, 2014.
4. That DCPS provide a total of 5.5 hours of independent one-on-one speech-language services for the student, at a rate not to exceed OSSE's established rate for this service, to be completed by January 24, 2014.
5. All other relief sought by Petitioner herein is **denied**.

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 USC §1415(i).

Date: November 9, 2013

Melanie Byrd Chisholm
Hearing Officer