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

OSSE STUDENT HEARING OFFICE
2012 SEP 24 AM 8:48

STUDENT, a minor, by and through his Parent[1]

Petitioner,

v

Erin H. Leff, Hearing Officer

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION CORRECTED[2]

STATEMENT OF THE CASE

On June 25, 2012 Parent,[3] on behalf of her child ("Student"), filed an Administrative Due Process Complaint Notice ("Complaint"), HO 1,[4] requesting a hearing to review the identification, evaluation, placement or provision of a free, appropriate public education ("FAPE") to Student by District of Columbia Public Schools ("DCPS") under the Individuals with Disabilities Education Act, as amended ("IDEA"). 20 U.S.C.A. §1415(f)(1)(A).

Respondent DCPS filed a Response to Parent's Administrative Due Process Complaint Notice

[1] Personal identifying information is provided in Appendix A, attached hereto.
[2] This Hearing Officer Determination ("HOD") Corrected includes additional items that were taken into evidence but were inadvertently omitted from the original HOD filed on September 8, 2012 and clarification that the document identified as Exhibit 8 is not and never was part of the record in this matter. There are no substantive changes to the HOD. Therefore, the filing date of September 8, 2012 continues, and the right to appeal runs from the September 8, 2012 filing date. See also FNs 8 & 10, *Infra.*
[3] Student's grandmother was appointed the student's educational decision maker in January 2012 and served as parent in the instant matter
[4] Hearing Officer Exhibits will be referred to as "HO" followed by the exhibit number; Petitioner's Exhibits will be referred to as "P" followed by the exhibit number; and Respondent's Exhibits will be referred to as "R" followed by the exhibit number.

(HO 5) on July 6, 2012. A resolution meeting was held on July 11, 2012. The parties were not able to reach an agreement and executed a Resolution Period Disposition Form on the same date so indicating. HO 6. The 45 day timeline began to run on July 26, 2012, the day after the 30 day resolution period ended. Following the Prehearing Conference held on July 27, 2012,[5] I issued a Prehearing Conference Order on July 30, 2012. HO 7. My Hearing Officer Determination is due on September 8, 2012.

At all times relevant to these proceedings Petitioner was represented by Anna Myles-Primakoff, Esq. of the [6] and Assistant Attorney General, represented DCPS. By agreement of the parties, the hearing was scheduled for August 24, 29 and 31, 2012. The hearing was held as scheduled in Room 2007 of the Student Hearing Office on August 24, 2012

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2010); and the District of Columbia Municipal Regulations, Title 5e, Chapter 30, Education of Handicapped (2003).

ISSUES

During the Prehearing Conference I identified an IDEA statute of limitations issue, raised by Respondent in its Response to the Complaint that was relevant to four of the issues in the instant complaint. The parties submitted briefs on the IDEA two year statute of limitations as it applies to the instant matter. On August 16, 2012 I issued a Memorandum Opinion and Order (HO 13) finding the statute of limitations did apply to the instant matter. Therefore all issues were limited to events occurring between June 25, 2010 and June 25, 2012, the date the instant

[5] The Prehearing Order indicates it was held on June 27, 2012, which is incorrect, rather than July 26, 2012, which is the correct date.
[6] In addition to Ms. Myles-Primakoff, her supervisor, Lynne de Sarbo, attended all three days of hearings. Ms. De Sarbo conferred with Ms. Myles-Primakoff but did not examine witnesses or present argument. A clerk from the Children's Law Center also attended all three days of hearing.

complaint was filed. In addition, I found issues occurring between June 25, 2010 and June 25, 2012 regarding the implementation of the April 6, 2010 IEP also fell within the statute of limitations and could be addressed at hearing. The issues and requested relief that follow have been modified to reflect the time limitation imposed by the statute of limitations.

The issues are:

1) Whether DCPS failed to provide the student a free, appropriate public education when DCPS failed to:

   a. Identify Student as a child with multiple disabilities from June 25, 2010 through the present;
   b. Appropriately evaluate Student in all areas of suspected disability from June 25, 2010 until April 2012;
   c. Develop appropriate Individualized Education Programs ("IEPs") from June 25, 2010 through the 2011 – 2012 school years. The IEPs lacked adequate services, goals and accommodations;
   d. Provide Student an appropriate placement from June 25, 2010 through the present; and
   e. Implement Student's IEPs in the 2010 -2011 and 2011 -2012 school years; and

2) Whether Student is entitled to compensatory education.

RELIEF REQUESTED

Petitioner requested:

1) An IEP that classifies Student as being multiply disabled with disabilities of specific learning disability and other health impairment;
2) Full time placement at the School with all associated costs;
3) Provision of a Kurtzwell reader as recommended in the psycho-educational evaluation performed in April 2012 by Dr. Sheryl Frank; and
4) Compensatory education for the failure to provide an appropriate program and placement from June 25, 2010 to present.

SUMMARY OF THE EVIDENCE

A. Exhibits

Exhibits admitted on behalf of Petitioner are:

IEPs

P-1	02/10/2012	2012 IEP created by Browne EC

EVALUATIONS

P-2		DCPS Standardized Testing
P-3	06/22/2006	Comprehensive Psychological Evaluation by DCPS psychologist Terrance Beason, M.Ed., CAGS

EXPERT RESUMES

P-4		Dr. Sheryl J. Frank, Clinical Psychologist
P-5		Monica Maines, MS, CCC/SLP, Speech Language Pathologist
P-6		Dr. Sheila Iseman, Educational Expert

IEPS
CORRESPONDENCE

J-1	05/04/2012	2012 Amended IEP created by Browne EC
P-7	08/17/2012	Kingsbury Acceptance Letter
J-2	02/24/2011	2011 IEP created by Browne EC
P-8	05/23/2012	Letter regarding May 4, 2012 IEP Meeting
J-3	04/06/2010	2010 IEP created by Browne EC
P-9	03/06/2012	Letter requesting independent speech and language evaluation
P-10	02/29/2012	Letter regarding February 10, 2012 IEP Meeting

EVALUATIONS

P-11	02/10/2012	Letter requesting records (renewed request)
P-12	02/10/2012	Letter requesting independent psychological evaluation
J-5	05/01/2012	Psycho-educational evaluation by Dr. Sheryl J. Frank
P-13	01/25/2012	Speech and Language evaluation by Ms. Monica Maines
		Letter requesting records

OTHER

P-14	7/25/2012	Lindamood Bell Diagnostic Evaluation
P-15		Lindamood Bell 2011 Learning Center Results

Exhibits admitted on behalf of Respondent are:

R-1	IEP Signature Sheet	May 4, 2012
R-2	IEP Signature Sheet	February 24, 2011
R-3	IEP Signature Sheet	August 23, 2012
R-4	Evaluation Summary Report	May 4, 2012
R-5	IEP Amendment Form	April 4, 2012

Joint exhibits admitted on behalf of Petitioner and Respondent are:

IEP PROGRESS REPORTS

J-6	2011-2012 IEP Progress Reports
J-7	2010-2011 IEP Progress Reports

SERVICE TRACKERS

J-8	2012 Behavior Support Trackers
J-9	2012 Speech and Language Service Trackers

OTHER

J-10	2/5/2009	Consent to Evaluate signed by Ms. Rebekah Stover
J-11	5/4/2009	Eligibility Determination Report

Exhibits admitted by the Hearing Officer are:[7]

HO 1 Administrative Due Process Complaint Notice dated June 26, 2012
HO 2 Notice of Hearing Officer Appointment dated June 18, 2012
HO 3 Prehearing Conference Scheduling Letter (with attachment) dated June 29, 2012
HO 4 Prehearing Conference Notice (with attachment) dated July 4, 2012
HO 5 District of Columbia Public Schools' Response of July 5, 2012 to Petitioner's Due Process Complaint
HO 6 Resolution Period Disposition Form for meeting of July 11, 2012
HO 7 Prehearing Conference Order of July 30, 2012
HO 8 Resolution Period Disposition Form for meeting of June 28, 2012 (without forwarding email)[8]
HO 9 Petitioner's Brief Regarding the IDEA Statute of Limitations dated August 6, 2012
HO 10 District of Columbia Public Schools' Memorandum IDEA Statute of Limitations Expectations dated August 10, 2012
HO 11 Petitioner's Reply to District of Columbia Public Schools' Memorandum on IDEA Statute of Limitations Exceptions dated August 12, 2012
HO 12 Miscellaneous Email
- Email chain re attachment(s) to Respondents Memorandum of August 10, 2012

HO 13 Memorandum Opinion and Order re Statute of Limitations filed August 16, 2012
HO 14 Petitioner's Compensatory Education Plan dated August 9, 2012 (with attached email chain regarding receipt of the plan)[9]
HO 15 Petitioner's closing Argument filed September 3, 2012[10]

[7] Emails, constituting documents of record, forwarding the following documents to opposing counsel and the hearing officer are filed with the document unless otherwise noted.
[8] This exhibit is listed in error. No such document was part of the instant record.
[9] HO 13 and 14 were first identified as hearing officer exhibits at hearing on August 24, 2012. HO 14 was admitted over Respondent's objection that it was not offered by Petitioner. I admitted the document over Respondent's objection. The compensatory education plan was required by my prehearing order and constituted part of the record.

B. Testimony

Petitioner testified and presented the following witnesses:

- Monica Maines, MS, CCC/SLP, admitted as an expert in speech language evaluation and services in the context of special education
- Associate Head of the School
- Associate Center Director, Lindamood-Bell
- Sheila Iseman, Ph.D., admitted as an expert in special education placement and programming and compensatory education[11]
- Sheryl J. Frank, Ph.D., admitted as an expert in psycho-educational evaluations and child psychology in the context of special education

DCPS presented the following witnesses:

- Special Education Teacher, Campus
- Math Teacher, Campus
- Special Education Coordinator, School
- English teacher, Campus[12]

FINDINGS OF FACT

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

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[10] The parties agreed to file written closing argument rather than making verbal closing statements on the record. Petitioner's closing was filed on September 3, 2012, as agreed, and Respondent's closing (now identified as Exhibit 16) was timely filed August 31, 2012. The List of Proposed Hearing Officer Exhibits (now identified as Exhibit 17) also was inadvertently omitted from the exhibits identified herein. Hearing Officer exhibits 13 through 17 were not originally included in the exhibits I introduced, and exhibits 16 and 17 were not identified in the HOD filed September 8, 2012.

[11] Dr. Iseman was admitted as an expert, as indicated, over Respondent's counsel's objection that Dr. Iseman's experience with special education involved primarily elementary and younger students, that Dr. Iseman had not implemented IEPs (although her testimony indicated she had) and her experience in IEP meetings was in 1990. In admitting Dr. Iseman as an expert as defined herein, I identified Dr. Iseman's extensive experience and expertise, including experience with students in many age ranges.

[12] Ms. Philyaw was called on rebuttal regarding the testimony of Dr. Iseman

1. Student is years old. He currently attends School as a grade student. He attended Campus (" ") for 6 through 8th grades and Elementary School for kindergarten through 5th grades. P 1; J 1; J 2; J 3; J 4; Testimony of Petitioner; Testimony of Sheppard; Testimony of Nantais; Testimony of Henderson; Testimony of Philyaw; Testimony of Iseman.

2. In 2006, following completion of the second grade, Student was found eligible for special education as a student with a specific learning disability. At the time Student was identified following the completion of his second grade year, Student was approximately one half to one year behind in reading. Student continues to have learning disabilities. He has a reading disability as reflected in identified needs in both decoding and reading comprehension. He also has a disability in written language.[13] P 3; J 2; J 3; Testimony of Franck.

3. Student is personable and appears to be interested in completing high school and starting a career in professional sports. He is of approximately average intelligence. Student currently is approximately 4 to 6 years behind in reading. He is both overwhelmed and embarrassed by his deficits in reading. As a result Student does not attend class regularly. He sometimes skips school completely and sometimes skips particular classes. Even when he attends class Student is not consistently engaged in classroom activities. He will sometimes act up, and, on other occasions, he will put his head on his desk and sleep or otherwise refuse to perform classwork. Participation in sports is a strong motivator for Student. He also responds positively to individual attention provided in the classroom or in small classes. Testimony of Petitioner; Testimony of Nantais; Testimony of Henderson; Testimony of Philyaw; Testimony of Iseman.

4. Student lived with his mother until approximately December 2010. He left her home due to an altercation with his mother's boyfriend. Student then lived at Boys Town, a group home

[13] These are the same disabilities supporting Student's original classification as an eligible student under IDEA.

setting, for approximately 5 months. After the group home Student was placed in foster care until September 2011 when he was placed with his grandmother. She became his educational decision maker in January 2012. Prior to his grandmother becoming educational decision maker, Student's mother or a social worker from the District of Columbia Child and Family Services Agency ("CFSA") served as Student's educational decision maker. Student's grandmother was unaware he had an IEP until Student moved in with her. Testimony of Petitioner; J1; J2; J3; P1.

5. Student's April 6, 2010 IEP includes:

a. Three goals in written expression. Student is to receive special instruction in written expression for 2 hours per week in the general education setting;
b. Three goals in reading. Student is to receive special instruction in reading for 3 hours per week in the general education setting;
c. Classroom and state assessment accommodations.

There are no other services on this IEP. The Present Level of Performance statement in reading references the Wide Range Achievement Test administered in the beginning of the 2009 -2010 school year on which the student achieved a grade level equivalence of 4th grade. It also references earlier testing completed in June 2006 on which Student achieved a grade equivalence of 6th grade. The Needs Section identifies decoding and reading comprehension as areas of concern, and the Impact Section indicates materials should be presented in chunks, and Student should have small group instruction and extended time for reading assignments.

In the area of Written Expression reference is made to the Wechsler Individual Achievement Test ("WIAT"), but no date of administration is provided. On this test Student was determined to be spelling at a first grade level. Needs are identified in phonetics. It is recommended that the length of writing assignments be modified and that Student be allowed to use a computer for some assignments. He is to receive remedial instruction in English to build writing and spelling skills. J 3.

Student's mother signed the cover sheet of this IEP on 8/23/10. R 3.

6. Student's February 24, 2011 IEP includes:

a. Student receiving special instruction for 5 hours per week in the general education;
b. Three goals each in reading and written expression identical to the goals found in the April 6, 2010 IEP;
c. Classroom and state assessment accommodations identical to those in the April 6, 2010 IEP.

There are no other services on this IEP. Student is projected to graduate with a high school diploma.

The present level of performance in reading indicates Student is enrolled in two reading intervention program (Read 180 and Just Words) and is showing progress. It also notes Student's improved classroom behavior. The needs have been expanded to identify more specific areas for reading remediation and the accommodations under the Impact Section of this IEP include one on one reading time with a teacher or peer tutor.

Under written expression, this IEP identifies the WIAT as having been administered in 2006. New approaches have been added under Needs and Impact including keeping a daily journal, explicit instruction in the three key phases of instruction and chunking writing assignments.

This Student's social worker from the Department of Child and Family Services ("CFSA") in this meeting and signed the IEP. J 2.

7. Student's February 10, 2012 IEP requires Student receive:

a. Special instruction in general education for 4.5 hours per week;
b. Three goals in written expression.[14] Student is to receiver special instruction in written expression for 2 hours per week in the general education setting;
c. Three goals in reading.[15] Student is to receive special instruction in reading for 4.5 hours per week in the general education setting; and
d. Extended School Year services to address 6 goals[16] in reading and written language through 4 hours of specialized instruction outside the general education setting each day.

The IEP includes an expanded list of classroom and state assessment accommodations. There are no other services on this IEP. Student is projected to graduate with a high school diploma. P 1.

8. Student's May 4, 2012 includes:

a. Special instruction in the general education setting for 4.5 hours per week;
b. Three goals in written expression.[17] Student is to receiver special instruction in written expression for 2 hours per week in the general education setting;
c. Three goals in reading.[18] Student is to receive special instruction in reading for 7.5 hours per week in the general education setting;[19]

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[14] The goals in written expression are not the same as the goals in the February 24, 2011 IEP.
[15] The goals in reading are not the same as the goals in the February 24, 20122 IEP
[16] These are the same goals for reading and written language that are, according to the IEP, to be addressed during the school year.
[17] The goals in written expression are the same as the goals in the February 10, 2012 IEP.
[18] The goals in reading are the same as the goals in the February 10, 2012 IEP.
[19] This is the number of hours of service Student had been receiving throughout the school year. Testimony of XXX

d. Three goals in speech-language services. Student is to receive speech-language services for 1 hour per week in the general education setting;
e. Three goals in Emotional, Social, Behavioral Development. Student is to receive behavior support services for 45 minutes per week outside the general education Setting;
f. Extended School year services to address 6 goals[20] in reading and written expression for 4 hours per day outside the general education setting; and
g. Transition services.

The IEP includes the expanded list of classroom and state assessment accommodations. There are no other services on this IEP. Student is projected to graduate with a high school diploma. J 1.

9. The 5/4/12 Amended IEP was amended to include, among other items, the actual number of hours of special instruction Student had been receiving during the 2011-2012 school year. Testimony of Nantais.

10. In February and March 2012, Petitioner requested, respectively, an independent speech and language evaluation and an independent psychological evaluation. The independent psycho-educational evaluation report by Dr. Shirley Frank was issued 4/11/12, and the independent speech and language report by Monica Maines was issued 5/1/12. P 9; P 1; J 4; J 5.

11. Student's expressive language skills are his strength. They are in the low average range. His receptive language skills are scattered, with some areas of strength and some areas of weakness. His particularly low receptive vocabulary is caused, at least in part, by his reading difficulties. A diagnosis is not appropriate due to the great variability in Student's speech language performance. P 5; Testimony of Maines.

12. Student has language based disabilities in reading and written language. In reading he has difficulties in decoding words and in comprehension. Student's expressive language skills are inconsistent but fall, overall, within the normal range. In contrast, Student has significant disabilities in receptive language. He also exhibits impairments in executive functioning in the

[20] These are the same goals for reading and written language that are, according to the IEP, to be addressed during the school year.

abilities to initiate activities, plan and organize activities, organize materials and emotional control. In addition Student has attention deficit hyperactivity disorder ("ADHD") Inattentive Type. J 4; J 5; Testimony Iseman; Testimony of Maines; Testimony of Frank.

13. Student has made approximately 1 to 2 years' progress in 6 years of schooling with special education services. He has the ability to achieve at or about the average range with appropriate interventions and supports. That is, with appropriate intervention Student would be able to make about one year's progress in one year of education. Testimony of Iseman; Testimony of Frank; Testimony of Gustafson.

14. Assessments of Student and his classroom performance yield discrepant results. For example, he had scores in reading ranging from the 0 grade level to the 4th grade level within a similar time frame. He had similar results in written language, and in math, Student's scores ranged from showing a deficit to being at grade level. P 2; J 1; J 4; Testimony of Iseman; Testimony of Frank; Testimony of Henderson; Testimony of Nantais.

15. Student received a score of proficient on the DCCAS in mathematics. This means he is on grade level in math. Although his performance can be erratic, Student is able to access the grade level curriculum and able to think about math in an abstract manner. When Student received poor grades in math in 8th grade it was due to his not completing homework or classroom assignments. It was not due to an inability to do the work. Testimony of Nantais; Testimony of Henderson.

16. Student has some emotional and behavioral issues that have impacted his education. He has a history of poor attendance and fighting in school. These behaviors improved when he moved in with his grandmother. He also was suspended once for smoking marihuana in 7th grade. In addition Student is both frustrated and embarrassed by his reading disabilities causing

him to sometimes avoid school work or not complete class work and assignments. Without intensive intervention he is at high risk for dropping out of school. Testimony of Iseman; Testimony of Frank.

17. Student requires small classes with supports designed to help him access the curriculum. He needs a structured classroom environment with small classes and minimal distractions. He needs tutoring to both help him make up for the deficits in his current skills and to help him develop successful approaches to learning. Testing should take place in a quiet room with minimal distractions. He should be allowed to write his answers in test booklets or on test sheets rather than being required to write answers on separate sheets. Long tests and assignments should be broken down into smaller tasks with interim deadlines. Student also requires one on one support from each of his teachers and assistance in structuring his assignments and activities. He should be seated away from distractions and in proximity to the teacher.

He requires a structured reading program taught in a small group in a special education setting. The reading program should address phonemic awareness, phonological processing, comprehension and fluency. Student needs visual supports, repetition of directions, the opportunity to restate and confirm his understanding of directions, and breaks. Student also requires a Kurzweil reader. In writing Student requires specific instruction in basic writing skills, proofreading and note taking.

J 4; Testimony of Frank; Testimony of Iseman; Testimony of Maines; Testimony of Nantais.

18. Coolidge class periods are 80 minutes in length. Most Coolidge general education classes have 25 to 27 pupils enrolled. Coolidge is able to implement Student's current IEP as written. Student's current schedule includes Learning Lab, English (extended literacy). Algebra 1, and JROTC. Learning Lab is a special education, self-contained class that provides support for

Student in relation to his general education classes. Student's current IEP requires 11 hours of special instruction per week. He receives these hours in Learning Lab, English and Algebra. English and Algebra are co-taught classes so each class has a general and a special education teacher. If Student requires additional assistance in reading he will be able to enroll in Read 180 rather than JROTC. Coolidge will be able to make an after school tutor available to Student once Petitioner receives and completes the necessary paperwork, and his teachers are available for additional help during the school day. Testimony of Sheppard.

19. Student will be able to graduate from high school with a standard DCPS diploma if he attends Coolidge. He may or may not be able to graduate in four years depending on the classes in which he enrolls. A 30 day review meeting will be held at Coolidge to determine whether Student's current IEP is appropriate. If the IEP team determines Student needs additional services Coolidge is able to provide Student self- contained special education classes. These classes are taught by teachers with dual certification in special education and the subject matter so students earn credits toward graduation in core subjects when enrolled in these classes. If, in the alternative, Student requires enrollment in Learning Lab every semester, he would still be able to graduate on time if he took classes in night school or summer school Student would be able to graduate with a regular high school diploma if he meets all the high school graduation requirements. However, it may take him more than 4 years to accomplish this goal depending on the number of elective classes such as Learning Lab and Read 180 Student takes and his willingness or ability to take night classes or summer school classes. Testimony of Sheppard.

20. Student will be at increased risk of dropping out if he continues to struggle with academic achievement in high school. Testimony of Iseman; Testimony of Frank.

21. Lindamood –Bell is a program designed to provide educational assistance to students with learning difficulties in reading and mathematics. Students who participate in the program have various disabilities. It is an intensive program that recommends provision of services for 4 hours per day, five days per week. Students typically make one to two years growth, as measured by Lindamood Bell assessments, after six to eight weeks of services at this intensity of service delivery. If students participate in the program at a lower level of service intensity they will make slower progress. Lindamood Bell recommends Student complete 200 to 240 hours of service in reading and perhaps 240 to 480 hours of service in math, to be determined at a later date based on Student's progress in reading. P 15; Testimony of Coppersmith.

22. Student's compensatory education plan requests 480 hours of Lindamood Bell instruction because Student was denied a FAPE for the 2009-2012, 2010-2011 and 2011-2012 school years. HO 14.

23. Student has been accepted at Kingsbury Day School ("Kingsbury") which is a full time, nonpublic, special education school. It serves students with learning disabilities and attention disorders as well as students with other disabilities. Students who graduate from Kingsbury receive both a Kingsbury and a DCPS diploma. Kingsbury provides education consistent with the DCPS content standards and is beginning to implement the common core curriculum standards recently adopted by DCPS.[21] The ninth grade teachers are both content and special education certified.[22] Kingsbury has athletic programs[23] and is developing opportunities for its students to attend classes with nondisabled peers at other schools. Classes at Kingsbury are small, with a teacher student ratio of 1 to 7 or 8, including teacher assistants. In addition to

[21] These are a group of common standards by subject area adopted by many states with the goal of creating common national academic standards.
[22] The ninth grade math teacher position is vacant. An offer has been made to an individual to fill that position who also has dual certification.
[23] Students also are able to participate in athletic programs at DCPS schools.

providing special instruction and related services as required by Student's IEP, Kingsbury would also be able to provide Student access to a tutor as part of intensive reading intervention and to work on particular problematic skill areas. Student would be able to obtain additional reading support/instruction through various reading programs such as Lexia (to address decoding and phonemic awareness), Wilson reading, Odyssey Compass Learning (to address comprehension) and visualizing-verbalizing training. P 7; Testimony of Gustafson.

DISCUSSION

The following discussion is based on my review of the exhibits introduced by the parties, witness testimony and the record in this case. Some of the witness testimony presented in this matter raises credibility issues. Some of the witness had interests or biases that clearly affected their testimony. This is not to suggest that the witnesses were intentionally misleading or dishonest. Rather, I am concerned that the witnesses in question had a clear bias that was apparent during their testimony. As a result, in making factual determinations, I attempted, whenever possible to make factual determinations regarding these witness' testimony, when relevant, that was supported by documentary evidence and/or on testimony that appeared to present less of a bias. In some instances the particular witness' bias was more apparent than in others. In some instances the witness testimony was more persuasive than in others. I

I found Dr. Iseman's testimony to be particularly concerning. She is a knowledgeable and experienced educator who is a zealous advocate. Her efforts to present her view of Student's needs were impacted by this zealousness thus undercutting her credibility. For example, when testifying regarding her observation of Student at Browne, she described one of the adults, a volunteer, in Student's English class as a high school student, then modified this statement,

under further questioning to indicate the volunteer was uncertified and untrained. Ms. Nantais, however, identified this volunteer as a City Year volunteer who is trained by DCPS and as part of Americorp. She added the volunteer was working on her masters' degree in education at Johns Hopkins University. In another instance, Dr. Iseman testified Student's English teacher stated Student should have been retained at an earlier grade. The teacher, Ms. Philyaw, however, credibly testified she had not said this, that she had merely stated DCPS policy regarding the grades (3d, 5th and 8th) in which students are retained. In making this credibility assessment I emphasize that I am not attributing intent to Dr. Iseman's misstatements. Rather I am identifying her tendency to overstate her position thus undercutting her credibility.

In contrast, I found Dr. Frank to be an especially credible witness. Her testimony reflected clear and thoughtful ideas, conclusions and opinions that appeared to be focused on Student's individual needs and abilities.

Where the differences in persuasiveness and credibility of these witnesses, or others, are relevant to my determination, I so indicate in the discussion that follows.

1)a. Whether DCPS failed to provide Student a free, appropriate public education when DCPS failed to identify Student as a child with multiple disabilities from June 25, 2010 through the present

Under the IDEA all children with disabilities who are in need of special education and related services must be identified. 34 C.F.R. § 300.111. The IDEA defines a child with a disability as a child evaluated in accordance with IDEA requirements as having one of thirteen specified disabilities, including among others, specific learning disabilities and multiple disabilities. *See*, 34 C.F.R. § 300.8.

In the instant matter, Student, from the date of his original eligibility determination in 2006 through the present has been classified as a student with specific learning disabilities. There

is no disagreement regarding Student's learning disabilities. Petitioner argues DCPS did not provide Student a FAPE because Student was not identified as having multiple disabilities based on having both specific learning disabilities and attention deficit hyperactivity disorder which falls within the Other Health Impaired classification. *See* 34 C.F. R. § 300.8(c)(9) (i). Petitioner argues both on a child find violation and inappropriate evaluation in as the basis for the claim regarding the failure to classify Student as multiply handicapped denying him a FAPE. I disagree. I find Petitioner's argument to be both confused and misguided.

The child find argument under 34 C.F.R. § 300.111 cannot be supported. Child find addresses the identification of potentially eligible, special education students and the evaluation of these students to assure they are included in IDEA services if appropriate. There is no doubt Student was identified and has been receiving IDEA services for approximately 6 years. At the time Student was identified following the completion of his second grade year, Student was approximately one half to one year behind in reading. Having identified Student as eligible for special education when he showed learning difficulties in his second grade year DCPS has met the child find requirement. While this eligibility determination is outside the two year statute of limitations in effect under this complaint, it is noted here as foundation for my finding there is no child find issue in the matter herein. Student was identified and has been identified as a student eligible for special education and related services under the IDEA at all times relevant to the instant matter. A dispute regarding classification is not a basis for finding a failure to comply with the child find requirement.

The argument regarding Student's current classification category, specific learning disability rather than multiple disabilities, also is not a basis for finding a denial of FAPE. While every special education student must be included in one of the thirteen classification categories,

the categories themselves do not control the services provided to the student, and it is the programs and services in the IEP that define the student's FAPE. The classification categories are statistical warehouses used for various statistical and research purposes. A FAPE, in contrast, is an individualized determination based on the needs of the particular child identified in the IEP. Students with identical classifications may receive entirely different services, and students with different classifications may receive identical services based on their identified needs. It is the needs of the child that determine FAPE, not the label under which the student receives services.

Petitioner raises the alleged need to classify Student under the multiple disability classification in the context of the independent psycho-educational and speech evaluations performed in April and May of 2012 that determined, among other items, Student had ADHD and receptive language issues. Dr. Iseman testified that this knowledge should be attributed to DCPS prior to these evaluations having been completed, stating, for example, that Student's 2/24/11 IEP was not appropriate[24] because Student was not classified as having multiple disabilities. This position requests that I find DCPS had knowledge of these coexistent disabilities prior to their having been identified through evaluation. This is classic bootstrapping, and I decline to apply knowledge retroactively. Petitioner has not provided, nor could she provide any evidence to support this position. She was not involved with Student's education prior to the 2011-2012 school year, nor were her experts. There is no evidence that anyone questioned Student's classification prior to the 2012 assessments.

Subsequent to the 2012 psycho-educational and speech language evaluations, an IEP meeting was held on May 4, 2012. Nantais testified that at that meeting, the team determined to continue Student's eligibility as a student with specific learning disabilities. The team, she stated, determined changing Student's classification would not make him more successful and was

[24] I discuss the appropriateness of Student's IEPs Infra under Issue 1)c.

concerned about the stigma attached to the multiple disability label. Nantais testified that even without the change in classification, DCPS could provide the additional services identified as needed based on the independent evaluations.

For these reasons I find, by a preponderance of the evidence, that Student was not denied a FAPE by DCPS' failure to identify Student as a student with multiple disabilities.

1)b. Whether DCPS failed to provide Student a free, appropriate public education when DCPS failed to appropriately evaluate Student in all areas of suspected disability from June 25, 2010 until April 2012

The IDEA requires a reevaluation of an eligible student with a disability occur at least once every three years unless the parent and the school district agree a reevaluation is not necessary. 34 C.F.R. §300.303(b)(2). The student is to be assessed in all areas of suspected disability. 34 C.F.R. §300.304(c)(1)(iv)(4). The test instruments used by the evaluators are to be technically sound. 34 C.F.R. §300.304(b)(3). As part of the reevaluation, the IEP team is to review existing evaluation data and determine what additional data, if any, is needed. . 34 C.F.R. §300.305(a).

Petitioner argues Student was not assessed in all areas of suspected disability[25] and as a result Student has incurred educational harm. Petitioner states DCPS failed to evaluate Student for ADHD, speech-language impairments and social emotional behavioral needs. In making this argument Petitioner relies on the results of the 4/11/12 psycho-educational evaluation, the 5/1/12 speech-language evaluation and the testimony of the experts regarding these evaluations. In so doing, as noted *Supra*. Petitioner suggests that the findings from the evaluations in 2012 should be retroactively applied to DCPS' knowledge of Student in prior years thus failing to evaluate Student in all areas of suspected disability. Petitioner provides little evidence for these assertions. Her evidence is primarily dependent on her experts' statements that Student would have been demonstrating

[25] In making this argument Petitioner acknowledges Student's last re-evaluation in 2009 is outside the IDEA two year statute of limitation. Petitioner contends, however, that Student's behavior and performance provide sufficient notice to DCPS that Student required additional evaluations in the last two years.

indications of these additional impairments for at least the two year period preceding the independent evaluations, and I do not question their testimony that such disabilities do not would have been manifest for some time. The issue, however, is whether DCPS had knowledge suggesting the need for evaluation in these areas, and I find Petitioner has not met her burden of proof as to this issue.

Petitioner's witnesses as well as the school district witnesses testified to many educational and behavioral issues demonstrated by Student in the last two years. Petitioner's witnesses and school district witnesses also testified to Student's variable skill levels, his inconsistent performance, his variable participation and his erratic attendance. Any or all of these inconsistencies could be attributed to Student's choosing not to perform as readily as they could have been attributed to Student's disabilities. For a teacher, Student's skills in expressive language could serve to mask his deficits in receptive language. Even Student's receptive language skills were so scattered that Maines would not make a diagnosis. As discussed *Supra* I decline to make a retroactive application of knowledge. However, I still must determine whether DCPS had independent knowledge during the two year period at issue here that would have required an evaluation in additional areas of possible disability not identified until the 2012 independent evaluations discussed herein.

- *ADHD*

Dr. Frank testified that it was likely that Student's attentional difficulties began to manifest in the classroom years ago. However, there is no evidence to support this assertion other than Dr. Frank's testimony. There are no documents suggesting Student had attentional issues, and Student's teacher's described many classroom behaviors some of which may have been suggestive of attentional issues and some of which may not have been. They also described classroom behaviors that suggested Student was able to attend, at least some of the time. While Dr. Frank's expertise is clear and her testimony credible, I cannot attribute current behavior to the past. It is easy to recognize precursors of current behavior in past behavior because the lens through which you look is shaded by current knowledge.

For example, Student's failure to attend class can now be recognized as related to his frustration and embarrassment regarding his learning disabilities. However, at the time this was particularly problematic it could also have been attributed to Student's disinterest in school, problems outside of school or possible drug usage. In a similar vein, Student's failure to complete assignments in class can now be attributed to his difficulty in reading and writing. However, until DCPS received the 2012 speech language evaluation reflecting the variability in Student's language skills, Student's expressive language skills most likely served to hide his receptive language issues in the classroom. Finally, Student is extremely motivated by participation in sports and his behaviors during football season were notably different than during other times of the school year. This ability to demonstrate more compliant behavior at least some of the time could lead teachers to conclude Student's behaviors possibly suggesting attentional problems were voluntary.

- *Speech-language concerns*

Ms. Maines, in contrast to Dr. Frank, did not suggest earlier issues related to receptive language. She noted, moreover, that in some areas of receptive language Student was within normal limits and in others he was low. In the expressive language area Student has good skills. It is difficult to reconcile this description of Student's language disability with Petitioner's position that DCPS should have known Student needed speech language services to help him with comprehension. Dr. Iseman testified to this and it is an example of how her over zealousness undercut her credibility. Student was and is able to engage in conversations and discussions of multiple subjects. His abilities in expressive language served to obfuscate his difficulties in receptive language. DCPS cannot be viewed to have known of Student's language disability.

- *Social/emotional/behavioral support*

Dr. Frank also testified to Student's need for behavior intervention services to address his frustration and resultant reactive behavior regarding his learning disabilities, and with this I agree. While his behavior has improved since moving to Petitioner's home, he has consistently exhibited

maladaptive behaviors in the last two years. DCPS teachers testified, for example, to Student's disengaging from classroom activities, refusing to complete work, keeping his head on his desk, or acting up with his classmates. All of these behaviors interfered with his learning and contributed to his limited educational progress. DCPS did not address these behaviors in a comprehensive manner. Instead teachers tried various approaches, many of which worked at least some of the time. An evaluation of Student's social/emotional/behavioral needs was called for under these circumstances and was not.

For the reasons discussed above I find, by a preponderance of the evidence, that DCPS failed to provide Student a FAPE when it failed to evaluate Student in the area of social/ emotional/ behavioral functioning, an area DCPS should have identified as one of suspected disability from June 25, 2010 through April 12, 2012.

1)c. Whether DCPS failed to provide Student a free, appropriate public education when DCPS failed to develop appropriate IEPs from June 25, 2010 through the 2011 – 2012 school years. The IEPs lacked adequate services, goals and accommodations

1)e. Whether DCPS failed to provide the student a free, appropriate public education when DCPS failed to implement the student's IEPs in the 2010 -2011 and 2011 -2012 school years

These two issues will be discussed together as the facts and law relevant to these issues are similar.

Under the IDEA each local education agency is required to provide a free appropriate public education ("FAPE") to each student found eligible for special education and related services. A FAPE is:

> Special education and related services that . . . are provided at public expense, under public supervision and direction, and without charge; . . . [m]eet the standards of the [state educational agency] . . . [i]nclude an appropriate preschool, elementary school, or secondary school education . . . ; and . . .[a]re provided in conformity with an . . .IEP that meets the requirements of [the IDEA regulations]. 34 C.F.R. § 300.17. See also, D.C. Code § 30.3001.1.

An IEP is a written statement that includes, in pertinent part, the eligible student's: present levels of academic and functional performance; the effect of the student's disability on his/her involvement and progress in the general curriculum; measurable annual academic and functional goals designed to meet the student's educational needs resulting from his/her disability; a statement of the special education and related services, supplementary aids and services, and program modifications and supports to be provided to the student to allow him/her to advance toward attaining the IEP goals and progress in the general curriculum and to participate in nonacademic activities. In addition the extent of the student's participation with nondisabled peers must be addressed. 34 C.F.R. § 300.320. See also, D.C. Code § 30.3009. In developing the IEP the team is to consider the strengths of the child, the concerns of the parent for enhancing the education of the student, the results of the most recent evaluation and the academic, developmental and functional needs of the student. 34 C.F.R. § 300.324(a). *See also*, D.C. Code § 30.3007. If a student's behavior impedes the student's learning or that of other students, the team is to consider interventions and strategies to address the behavior. Id. An IEP that memorializes the team's FAPE determination must be designed to provide the student with some educational benefit. *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176, 203-204 (1982) (*"Rowley"*).

The content of an IEP is a team decision 34 C.F.R. §§ 300.320 – 300.323. See also, D.C. Code §§ 30.3007.1 & 3008.1. Teams are required to consider all the relevant information before them. *Id.* In reviewing whether an IEP provides a student a FAPE as required by IDEA, a hearing officer must consider whether the district complied with IDEA's procedural requirements and determine whether the program was reasonably calculated to enable the student to receive

educational benefit. *Rowley*, 458 U.S. at 207. Here, there is no question raised regarding the district's compliance with IDEA procedural requirements. The only questions are whether the IEPs at issue are calculated to enable Student to receive educational benefit.

DCPS argues, *citing Schaefer v. Weast*, 554 F.3d 470 (4th Cir 2009), that in determining whether an IEP is appropriate, I must look at the IEP as of the date it was written to determine whether, at that point in time, it was reasonably calculated to provide the student educational benefit, but the *Schaefer v. Weast* matter cited addressed whether a Federal District Court had to consider evidence regarding a Student's IEP that was developed after the due process decision in the matter. Clearly that case is inapposite to the matter before me. Yet the concept is applicable. Here, Petitioner argues I should consider the results of evaluations performed in 2012 to find IEPs developed before the evaluations and reports existed and find the evaluations to be a reasonable basis for finding these pre-existing IEPs to be inappropriate. I decline to do so. This is, in my view, bootstrapping, as discussed *Supra*. It takes current knowledge and asks that I find DCPS had or should have had this knowledge years before it was developed. This is in my view illogical and unjustified. My conclusion regarding the retroactive application of current knowledge, however, does not necessarily result in a finding that Student's IEPs were appropriate. I must determine whether the special instruction goals, related services goals and accommodations found in each IEP were reasonably calculated to provide some educational benefit. *Rowley* at 203. Petitioner, citing *Suggs v. District of Columbia*, 675 F.Supp.2d 43 (D.C. Cir. 2010), argues an IEP may not be considered to be reasonably calculated to provide educational benefit if a particular service not offered to the child appears likely to resolve or ameliorate his educational difficulty. *Id.* at 52.

As stated repeatedly Petitioner's first contention, that Student's IEPs were not reasonably calculated to provide him educational benefit because he was not classified as having multiple disabilities must fail. Classification does not determine the programs and services to be included in

Student's IEP. Moreover, Petitioner's second assertion regarding the inappropriateness of the IEP based on Dr. Iseman's assertion that Student should have received speech and social/emotional services also must fail as it was based on the retroactive application of current knowledge I previously rejected. I must, therefore, determine whether, apart from these items, each of the IEPs before me is reasonably calculated to provide Student educational benefit.

Petitioner alleges the 2/24/11 IEP was inappropriate because it did not provide sufficient academic services given Student's long standing deficits in reading and written language combined with his limited academic growth in reading and written language since he was first found eligible for special education. Petitioner's witness, Dr. Iseman, testified that Student should have been provided both more hours of special instruction in reading and a structured reading program,[26] and with this I agree. The appropriateness of the interventions provided by DCPS, Read 180 and Just Word, must be questioned based on Student's ability, as reported by Iseman and Frank, to make year for year progress, and the actual, limited progress Student made. At the start of the 2010-2011 school year Student, who was in 7th grade, was reading at the 0 to 4th grade level depending on the test used for assessment. He was enrolled in two reading intervention programs, Read 180 and Just Words. The test for Read 180 showed he had made two years of improvement, from 0 to the 2nd grade level by the date 2/24/11 IEP was developed. He also had made some progress in Just Words which helps students with decoding, encoding and reading for meaning, but based on overall reading skills the progress was limited. The IEP as written provided similar special education programs and services to those that had been provided on Student's prior IEP under which he had made little, if any, educational progress. The IEP, therefore, cannot be deemed to be designed to provide Student some educational benefit.

[26] There is evidence showing Student was provided structured reading programs, Read 180 and Just Words. The 2011 IEP indicates he is making progress with these interventions. The progress, however, is minimal.

Dr. Iseman testified the goals on Student's IEPs were not measurable, and while I disagree with this assessment as to some of the goals, it is accurate as to other goals. The 2011 IEP includes three reading goals that appear measurable on the face of the document. However, two of the three goals are written in reference to increasing Student's skill level and no baselines are provided against which increases could be measured. The third goal requires that Student complete grade level assignments in comprehension and related areas with 80% accuracy using a reader or an audio tape. The three written language goals in this IEP also do not include baselines. However they are written in a manner that is measurable.[27] The present level of performance section does not provide express data regarding student's level of performance so progress is not possible to measure.

Respondent counters Petitioner's argument stating Student received reading supports and services designed to address Student's needs including Read 180 and Just Words as well as co-teaching. Instead, DCPS claims, Student's failure to progress is not due to an inappropriate IEP but due to Student's poor attendance and his decisions not to take advantage of the programs and services offered. This argument, in my opinion, is akin to blaming Student for the effects of his disability rather than taking action, as required by IDEA to create an IEP designed to address each of Student's identified needs including his emotional response to his poor academic achievement in reading that lead to his absenteeism and work avoidance among other behaviors.

Petitioner also states Student's IEP is inappropriate because Student was not provided Extended School Year ("ESY") services. Extended school year services are generally required only when an IEP team determines a student is likely to incur skill regression during extended

[27] Petitioner's witnesses repeatedly questioned whether the goals on Student's IEPs were measurable. Several witnesses testified they did not understand the numerical standards set and others suggested the goals were not sufficiently detailed. In making these statements, it is my opinion the witnesses neither understood the general nature of IEP goals not recognized that objectives are no longer IEP requirements. Further, while it is clear from the testimony and a review of the IEP goals themselves that the goals are poorly articulated this limitation alone would not be sufficient for my finding the IEPs to be inappropriate.

school breaks such as summer vacation such that the regression will substantially thwart the goal of meaningful progress. *See MM v School District of Greenville County* (4th Cir. 2002) ("*MM*"). Student's failure to progress over the last six years may or may not be attributable to such regression. Petitioner, however, has not met the burden of proof regarding this issue. There has been no such showing. Dr. Iseman's statement of need for ESY does not substantiate the potential regression identified in *MM.*, and Petitioner provided no other evidence in this regard.

Dr. Iseman testified similarly regarding the appropriateness of the 2/10/12 IEP and the 5/4/12 IEP as she had regarding the 2/24/11 IEP. She noted the goals were the same, and again noted that the IEPs show Student was not making progress. She added 2/24/12 IEP did not address all of Student's needs. For example, there was no goal to address his poor attendance and when DCPS could not explain why Student's attendance issue which was noted as significant until he moved to petitioner's house had not been addresses. Dr. Iseman, in another example of over zealousness, also testified the IEP was inappropriate because it did not include transition goals, but such goals are not required until the IEP in effect when the child turns 16. 34 C.F.R. § 300.320(b); *See also*, D.C. Code § 30.3009.3. Dr. Iseman expressed additional concerns regarding the classroom accommodations duplicating those for testing and being inappropriate to the classroom setting in some instances.

Petitioner's position is that Student has made minimal progress since his initial classification and in particular in the last two school years. The continuation of goals from one IEP to the next with no effort to address Student's lack of progress combined with the limited amount of special instruction and poorly articulated goals cannot be deemed to have been designed to provide Student educational benefit, and with these critiques of Student's program

and services I agree. It is hard to understand how DCPS could allow a student who was able to learn and progress to languish in general education with minimal hours of special instruction, reading interventions and supports. Student continued to be assigned to reading programs that had not yielded results. As he aged and became more frustrated and embarrassed by his learning disabilities Student's response was to remove himself from the stressful classroom environment either through absenteeism or through refusal to participate in class or homework activities. Rather than recognizing this behavior for what it was, as a request for additional assistance, DCPS used these behaviors as bases for excusing their lack of new or additional interventions on Student's behalf.

Student's experience in math is instructive. Math is Student's strength, and DCCAS testing results show he is performing on grade level. Initially DCPS recognized this strength and placed Student in a more advanced math class in eighth grade. Student cut this class. Again, rather than attempting to work with Student and determine the reasons for this maladaptive behavior, DCPS moved Student to a less demanding math class. Counseling interventions were not included in his IEP until May 2012, almost the end of the school year. The relative stasis in Student's academic performance, combined with his newly identified needs for intensive speech/language intervention, behavioral intervention and intensive reading and writing intervention demonstrate a need for more extensive services than those provided in the May 2012, DCPS IEP.

I therefore find, by a preponderance of the evidence, DCPS has filed to provide Student a FAPE by failing to develop appropriate IEPs from June 25, 2010 through the 2011-2012 school year.

IDEA requires that special education and related services are to be provided to a student in conformity with his/her IEP. Petitioner provided little evidence regarding the failure to implement IEPs, with some exceptions as noted below. In general, Petitioner relied heavily on Dr. Iseman who while clearly knowledgeable, allowed her zealous advocacy to color her testimony. For example, Dr. Iseman testified that during her observation of Student in math, Student was not involved or working and his head was on his desk, but Student's math teacher credibly testified most of the time Dr. Iseman was in the math classroom she was involved in at her desk involved in conversation with the teacher. While Dr. Iseman's conversation with the teacher does not preclude her having observed Student as well and while I also question teacher's recollection of Student's behavior on the particular day during the observation, I cannot determine there was a failure to implement the IEP based on this minimal observation at the end of the school year, and Dr. Iseman's willingness to reach a conclusion as to IEP implementation throughout the year based on this minimal observation is questionable. Dr. Iseman was in the class for a few minutes on one day. Thus Dr. Iseman't testimony regarding Student overall receipt of IEP required programs creates an impression that it was made with the intent of proving Student was not receiving the IEP services. Yet I note, even if it is true that student did not always participate and did not always turn in work and did not always go to class ready to work, as testified to by both petitioner's and Respondent's witnesses, this does not prove a failure of implementation. Rather it reflects a struggling student who was not willing, or not able, to do what was requested all the time. DCPS cannot be held responsible for Student's lack of willingness or refusal to participate. However, DCPS can be held responsible for addressing Student's inability to participate. With the exception of the specific failures to implement identified below, Petitioner has not met her burden of proof as to this issue.

Student's 2/24/11 IEP required he be provided a reader or audio tape for his third reading goal. Student's special education teacher, Ms. Nantais, testified he had not been provided a reader or audiotape for any of his grade level textbooks. The IEP explains Student is unable to access his education without such accommodations[28]yet none was provided. It is therefore clear Student's IEP was not implemented.

I therefore find by a preponderance of the evidence that Student was denied a FAPE when DCPS failed to provide him the technology and/or assistance required for him to access his grade level texts under the 2/24/11 IEP.

1) d. Whether DCPS failed to provide the student a free, appropriate public education when DCPS failed to provide the student an appropriate placement from June 25, 2010 through the present

Student's placement at Coolidge currently provides the hours of service contained in Student's 5/4/12 IEP. He receives for 14 hours of special instruction and 1.75 hours of related services per week. The Special Education Coordinator credibly testified regarding the possibility of revising Student's IEP, if it appeared necessary, at the 30 day review meeting that has been scheduled. She made clear there were additional options available to address Student's educational needs including separate special education classes taught by dually certified teachers, tutoring, on-going support in learning lab and Read 180, a structured reading program. This is clearly a wide range of possibilities. Yet Student is a 15 year old who has spent 6 years in special education making only about 1 to 2 years' progress in reading and written language.

DCPS argues that his limited progress can be attributed first, to his poor attendance in 6th and 7th grades and some drug use in 7th grade and then to his choosing not to engage in his education. This argument, in my view, blames the student for his disabilities. Student has

[28] I note in this instance Dr. Frank's assessment report indicating the need for a Kurzweil reader is consistent with an earlier need identified by DCPS

significant learning disabilities as well as, we now know, receptive language deficits and ADHD. He was classified as eligible for special education following his second grade year. Since his initial classification he has made little progress, and DCPS has allowed him to languish and blamed him for his lack of progress. While it is true that neither his mother, who was his guardian and education decision maker for most of this time nor his CFSA social worker who also service in this capacity for a period of time questioned his program, services or progress, they are not educational experts. DCPS, it appears, allowed Student to tread water not progressing and falling further and further behind as his classmates swam ahead. What was a recognizable, though relatively small learning deficit became larger and larger with each passing year. When external factors arose that very well may have contributed to Student's lack of progress, DCPS chose not to act. DCPS, for example, recognized Student's serious absenteeism and did not develop a plan nor write a goal to address this issue. When Student was found smoking marijuana he was suspended, but no other interventions were attempted. Either of these situations should have alerted DCPS to the need for intervention such as counseling, but no such intervention occurred until after Petitioner became Student's educational decision maker in January 2012.

Petitioner recognized Student's educational needs and pushed DCPS to act. She asked for independent educational evaluations. DCPS provided them, and new disabilities and needs were identified. Counseling and speech therapy were added to Student's IEP, and additional needs were recognized. DCPS argues that all this is sufficient and they should be held responsible for Student's lack of progress up to this point. Petitioner argues I should take knowledge now available to DCPS and find the placements developed prior to this knowledge were not

appropriate and denied Student a FAPE by attributing the knowledge backwards. I decline to accept either of these positions as posited.

Since June 15, 2010, DCPS had provided Student a program involving minimal interventions in an inclusion setting. While the hours of service on Student's IEPs have increased slowly overtime, the focus has been inclusion. Under IDEA students are to be educated with their nondisabled peers to the maximum extent appropriate. 34 C.F.R. §300.114(a)(2). DCPS argues, and I agree, that Student's placements in the 2010 - 2011 and 2011 – 2012 school year were appropriate. These placements were made based on the knowledge of Student's disabilities and needs available to Respondent at the time these placements were determined. However, Once Student received the independent speech and psycho-educational evaluations in April and May 2012, the extent of Student's needs for both program and placement became apparent.

Dr. Frank's testimony regarding her psycho-educational assessment clearly demonstrated Student's needs for more intensive special education. Dr. Frank was an extremely credible witness. She explained her findings thoroughly and established the bases for her diagnoses and recommendations. Many of Dr. Frank's findings were supplemented by Ms. Maines' speech language evaluation and relied on by Dr. Iseman in her testimony. DCPS witnesses did testify to some views of Student that were different than Dr. Frank's to some degree. The greatest disagreement was in the area of math where Dr. Frank indicated Student needed math interventions in addition to reading, written language and speech, and Student's math teacher testified Student was performing math at grade level. It appears that some of this disagreement may be attributed to Student's erratic performance as well as the difference between testing and performance in non-testing, classroom situations. Whatever the explanation, Student's needs in reading, written language and speech language are so extensive that I determine this

disagreement does not impact my finding as to Student's current placement needs.[29] For the reasons that follow, I find the placement identified in Student's 5/4/12 IEP does not provide him an appropriate placement.

Dr. Frank testified Student has ADHD, disabilities in reading and written language, an impairment of executive functioning and social/emotional/behavioral issues. Ms. Maines testified that Student has particular needs in receptive language that impact his ability to learn in the general education environment. This array of disabilities and needs cannot, in my opinion, be addressed in an IEP with the limited number of hours contained in Student's current IEP nor, in my opinion, can the majority of Student's needs be appropriately addresses, as provided in the current IEP, in the general education setting.

Dr. Frank and Dr. Iseman have posited Student needs to be educated in a full time, special education setting. They agree he requires such a setting to remediate his academic deficiencies. Both Dr. Frank and Dr. Iseman have recommended that this setting be the Day School. In making this recommendation, Dr. Frank has emphasized the need for Student to have extensive support both from teachers and through technology. She has stated Student requires teachers who are trained to work with Students who have both learning disabilities and ADHD. All three of Petitioner's experts emphasize the need for Student to be in a small classroom with no more than 5 to 10 students per teacher and minimal distractions. Dr. Frank notes that the programs and services DCPS have provided Student have not worked. She, therefore, suggests an alternative, should be tried.

There is no question that would be able to provide the instruction Student requires. The program is designed to address the needs of students with disabilities similar to those of Student. provides small classes, individualized instruction and integrated

[29] In the discussion that follows I will not discuss the disagreement regarding Student's needs in math further.

related services in the academic setting. Student would be with others struggling with learning issues similar to his own and therefore less likely to feel embarrassed or feel the need to avoid the work because his skills are so noticeably below those of his classmates. Kingsbury also provides opportunities for Student to participate in sports, something important to Student and a source of motivation, either at Kingsbury or at his DCPS high school. Finally Kingsbury is developing opportunities for its students to attend classes with nondisabled peers in other school settings when appropriate.

DCPS also has presented an alternative to the program and placement contained in Student's current IEP. The special education coordinator ("SEC") testified that Student, if deemed appropriate could be enrolled in separate special education classes at that would allow him to earn core course credit needed for graduation if his current program was determined to be inappropriate. The SEC further testified to the range of classes available to Student and to various configurations that would allow him to graduate with a high school diploma, although not necessarily in four years.[30] She added tutoring services of an unspecified nature also would be available.

In reaching a determination as to the appropriate placement for Student at this time I note I am concerned about DCPS' cavalier attitude regarding Student's academic struggles in the past. I am concerned that DCPS was more interested in justifying their minimal interventions than in developing a program to address Student's needs. I am not convinced that DCPS has the services needed to, provide Student an appropriate education at nor am I convinced Student requires full time separate special education as argued by Petitioner. Further, the evidence regarding Student's interest in sports and its being a source of motivation for him was

[30] Dr. Iseman had originally testified that should Student attend and take on-going special education classes he would not be able to graduate. She eventually modified this testimony to state he would not graduate on time and this would increase the likelihood of his dropping out.

substantial. I hesitate to place him in a school such as that will make access to sports more limited than in public school. That said I must focus first on Student's academic needs.

Student remains years behind his current grade level and has many deficits in reading and written language. DCPS has provided Student reading intervention in reading including Read 180 and Just Word. These interventions have not worked. Yet DCPS is suggesting the possibility of Student again receiving Read 180 reading intervention at Repeating what has not remediated Student's reading deficits appears to be a poor option at this point in time. Student is entering high school and has limited time to address his learning needs. Dr. Frank's suggestion that it is time to try an alternative approach seems appropriate in the circumstances before me. I am not convinced that Student will be able to receive an appropriate education at I do not make this decision lightly. There are many conflicting factors and for the alternative placement at to provide Student a FAPE, there must be extensive cooperation among and Petitioner, as identified below in the discussion of the remedy and my Order.

I therefore find by a preponderance of the evidence that the DCPS did not deny Student a FAPE based on the placements provided him from June 25, 2010 until the development of the May 4, 2012 IEP. I further find that the placement under IEP developed on May 4, 2012 IEP denied Student a FAPE.

2) Whether the student is entitled to compensatory education.

Having found DCPS denied Student a FAPE for its failure to evaluate Student in the social/emotional/behavior area, to provide Student appropriate IEPs June 25, 2010 through the present, to implement the 2/24/11 IEP to allow him to access grade level texts and to provide Student an appropriate IEP under the May 4, 2012 IEP, I must determine whether Student is

eligible for compensatory education. A hearing officer may award compensatory education services for past deficient programs. *Reid v. District of Columbia*, 401 F.3d 516, 365 U.S.App. D.C. 234 (D.C. Cir. 2005), *citing G. ex. RG v. Fort Bragg Dependent Schools*, 354 F.3d 295, 309 (4th Cir. 2003). IDEA remedies are equitable remedies requiring flexibility based on 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* at 524.

In the instant matter, Petitioner has established Student was denied a FAPE and Student is entitled to compensatory education. The compensatory education plan presented by Petitioner, however, is not helpful. The plan requests 480 hours of Lindamood Bell instruction because Student was denied a FAPE for the 2009-2012, 2010-2011 and 2011-2012 school years. The receipt of services in the 2009-2010 school year is outside the applicable two year IDEA statute of limitations. It had been excluded from consideration by my Memorandum Opinion and Order of August 16, 2012. Dr. Iseman testified to petitioner's compensatory education plan. When asked how she had determined Student needed 480 hours of Lindamood Bell service, Dr. Iseman replied this was the amount of time the programs under Lindamood Bell require. Both Dr. Iseman and from Lindamood Bell were particularly concerned that Student receive instruction in the visualizing-verbalizing program as they thought this was essential for increasing Student's reading comprehension. It is noteworthy that this particular type of instruction is available at

When asked whether the compensatory education recommendation addressed three years of compensatory services as stated in the August 9, 2012 letter or two years of missed services as

limited by my Memorandum Opinion and Order, Dr. Iseman replied two, and in this she was not credible. Accepting this statement would require I accept Student required the same number of service hours whether he was being compensated for two years or three years of service. Combined with Dr. Iseman's inability to explain how she determined the number of compensatory needed by Student results in my reaching the conclusion that the proposed compensatory education plan does not meet *Reid* and is not acceptable.

This does not mean, however, that Student should not receive compensatory education. Again Dr. Frank was helpful. Dr. Frank testified that in order to address Student's educational losses in the last two years, Student would require private placement and one-on-one tutoring outside the school day. This tutoring is to be focused on assisting Student with organization, studying for tests, assistance with homework and further assistance in reading. The tutor should be trained in reading programs for LD and ADHD students or a special education teacher. Dr. Frank further recommended Student be tutored twice a week for one to three hours at each session, suggesting he receive a total of 5 hours per week. The amount of time and frequency could be modified as Student progressed. She further testified that some of the tutoring services could be provided in during study time during the regular school day.

Considering Student's needs for compensatory services and the comprehensiveness of the program I find, by a preponderance of the evidence, 5 hours of supplemental tutoring per week for two years through a program selected by Petitioner with assistance of Dr. Frank, Dr. Iseman or another advisor of Petitioner's choosing will provide Student the compensatory services to which he is entitled. The provision of compensatory services is to be coordinated with

Student's school and participation in sports as long as Student participates in his school based educational program.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law as follows:

1. Student was not denied a FAPE by DCPS' failure to identify Student as a student with multiple disabilities;
2. Student was denied a FAPE by DCPS' failure to evaluate Student in the area of social/ emotional/ behavioral functioning, an area DCPS should have identified as one of suspected disability from June 25, 2010 through April 12, 2012;
3. Student was denied a FAPE by DCPS' failure to develop appropriate IEPs from June 25, 2010 through the 2011-2012 school year;
4. Student was denied a FAPE when DCPS failed to provide him the technology and/or assistance required for him to access his grade level texts under the 2/24/11 IEP;
5. The placement provided Student from June 25, 2010 until the development of the May 4, 2012 IEP did not deny him a FAPE;
6. The placement provided Student under the IEP developed on May 4, 2012 IEP denied him a FAPE; and
7. Student is entitled to compensatory education as defined above.

ORDER

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

1. DCPS is to fund Student's placement at the School with all associated costs, including transportation. DCPS is to make the necessary arrangements for Student

to begin attending as soon as possible and, in no event, later than 10 school days following the receipt of this Hearing Officer Determination.

2. Student is to be given the opportunity to participate in DCPS sports programs to the extent he meets the program standards. Student is to continue to attend on a regular basis and participate in the educational program in order to be granted the opportunity to participate in DCPS sports programs.

3. Within 30 days of Student's enrollment at School an IEP meeting is to be convened. It shall include representatives of both DCPS and School, Petitioner and her legal and educational advisors, if she chooses to have them present and Student. At this meeting the team shall review Student's IEP and make the necessary changes to provide Student a FAPE at The participants in this IEP meeting shall review, discuss and consider including the recommendations in Dr. Frank's psycho-educational evaluation of April 11, 2012 and Ms. Maines' speech/language evaluation of May 1, 2012. This is not to suggest that these recommendations must be included but rather that they provide possibilities for assisting Student to progress.

4. Student is to be provided compensatory education in the form of tutoring for a total of 5 hours per week for two years. The tutoring sessions are to occur either one or two times per week and they are not to prevent Student's participation in his school day no

sports. Any changes to the duration or frequency of these tutoring sessions is to be based solely on Student's progress. Petitioner and her advisors, if she so chooses, must agree to the changes before they can occur.

Original signed September 8, 2012
Date

Erin H.Leff
Hearing Officer

Corrected version signed:

September 28, 2012
Date

Erin H. Leff
Hearing Officer

Please note, No appeal rights are attached to this corrected Hearing Officer Determination. As stated in FN 2, Supra, the corrections to this HOD do not involve substantive matters. The corrections only involve corrections to the identified hearing officer exhibits. See FNs 2,8, and 10.