

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Office of Dispute Resolution  
810 First Street, NE, 2nd Floor  
Washington, DC 20002

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

Date Issued: August 27, 2016

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2016-0165

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Hearing Date: August 23, 2016

Respondent.

Office of Dispute Resolution, Room 2006  
Washington, D.C.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In her due process complaint, Petitioner alleges that DCPS’ June 21, 2016 Individualized Education Program (IEP) is inadequate to provide Student a free appropriate public education (FAPE). The parent also alleges that DCPS denied Student a FAPE by failing to comprehensively evaluate her with auditory processing and oral-motor speech assessments

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

Student, an AGE child, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on July 8, 2016, named DCPS as respondent. The undersigned Hearing Officer was appointed on July 11, 2016. The parties met for a resolution session on July 19, 2016 and were unable to reach an agreement. My final decision in this case is due by September 21, 2016. On July 19, 2016, I convened an on-the-record prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. On July 29, 2016, Petitioner filed a motion to establish, prehearing, a *prima facie* case, which motion I denied by an order issued on August 4, 2016.

The due process hearing was held before the undersigned Impartial Hearing Officer on August 23, 2016 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner participated by telephone, and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by SPECIAL EDUCATION COORDINATOR (SEC) and by DCPS' COUNSEL.

The Petitioner called as witnesses INDEPENDENT AUDIOLOGIST and EDUCATIONAL ADVOCATE. DCPS called as witnesses DCPS AUDIOLOGIST, SPEECH-LANGUAGE PATHOLOGIST (SLP) and SEC. Petitioner's Exhibits P-1 through P-19 and DCPS' Exhibits R-1 through R-15, with the exceptions of R-4 and R-7, were all admitted without objection. (DCPS did not offer exhibits marked R-4 or R-7.) At the beginning of the hearing, DCPS offered supplemental Exhibits R-17 and R-18, which had not been disclosed until the day before the hearing. I sustained Petitioner's objections to these exhibits as not timely disclosed. Counsel for Petitioner waived opening argument. DCPS' Counsel made an opening statement. At the conclusion of Petitioner's case in chief, I determined that Petitioner had made a *prima facie* showing

that DCPS' June 21, 2016 IEP was inadequate for Student and that the burden of persuasion as to the appropriateness of the IEP now fell on DCPS. Counsel for both parties made closing arguments. There was no request to file post-hearing briefs.

### **JURISDICTION**

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

### **ISSUES AND RELIEF SOUGHT**

The following issues for determination were certified in the July 27, 2016 Revised Prehearing Order:

1. Whether DCPS' June 21, 2016 IEP for Student is inappropriate because it provides, *inter alia*:
  - a) inappropriate present levels of performance;
  - b) inappropriately vague "access" and "progress" sections regarding the student's disability in relation to the general education setting/curriculum;
  - c) inappropriate baselines, thus making her goals inappropriate and not measurable;
  - d) an inappropriate social/emotional/behavioral goal;
  - e) insufficient hours of Specialized Instruction, related services, and consultation services;
  - f) an inappropriate setting for the related services (both the individual/group size and location of her settings);
  - g) insufficient other classroom aids and services for want of reference to other agency counseling services being provided;
  - h) no statewide assessment accommodations and
  - i) insufficient/no ESY related services or goals.
  
2. Did DCPS deny Student a FAPE by failing to comprehensively evaluate her in spring 2016 with auditory processing and oral-motor speech assessments as recommended by the independent speech-language evaluator, failing to evaluate in all areas of suspected disability and/or failing to comprehensively re-evaluate Student?

For relief, Petitioner requests that the Hearing Officer order DCPS to amend Student's IEP to provide appropriate present levels of performance, "access" and "progress" sections, annual goals, services, accommodations and ESY services; order

DCPS to fund independent auditory processing and oral-motor speech evaluations, and any other evaluation these evaluations recommend, at market rate; and order DCPS to convene an IEP team meeting, within 14 days of receiving the final independent evaluations, to review all independent evaluations, and review and revise Student's IEP, as appropriate.

In addition, Petitioner seeks an award of compensatory education for the denials of FAPE alleged in the complaint. In the alternative, Petitioner requests that the Hearing Officer order DCPS to convene an IEP team meeting to discuss and determine appropriate compensatory education or order DCPS to fund an independent compensatory education evaluation at market rate, without prejudice to the Petitioner's right to bring a new due process complaint to seek an appropriate compensatory education award.

### **FINDINGS OF FACT**

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

1. Student an AGE child resides in the District of Columbia with Mother. Exhibit P-14. Student is eligible for special education and related services as a child with a Speech or Language Impairment (SLI). Exhibit P-19. Student was initially referred for evaluation in October 2012. Exhibit R-15.

2. For the 2015-2016 school year, Student was enrolled in CITY SCHOOL where she was in the GRADE. At the end of the school year, Student was reported to have made "minimal and inconsistent" progress in Math and Reading and to have engaged in work avoidance behaviors such as asking to use the restroom, logging out of on-line activity, or distracting herself and others around her with off task behaviors. For

Written Expression, Student's progress was also reported as inconsistent in that some days she was able to focus and other days she engaged in work-avoidance behaviors. For Emotional, Social and Behavioral Development, Student was reported to have demonstrated development over the school year. She was reported to have initially struggled in the area of participating in class discussion and following directions, and to have made significant progress by the end of the school year. In the area of Motor Skills/Physical Development, Student demonstrated deficits in sensory processing, visual motor integration, motor planning of fine motor coordination tasks, cutting, drawing and handwriting skills. She also was observed to demonstrate challenges sitting and attending to the activities requested of her. Exhibit R-15.

3. Student's IEP team at City School convened on June 16, 2016 for the annual IEP review. Mother did not attend the meeting. Petitioner's counsel attended part of the meeting by telephone. Exhibit P-17, Testimony of SEC. The resulting IEP, finalized on June 21, 2016, provided annual goals for Mathematics, Reading, Written Expression, Communication/Speech and Language, Emotional, Social and Behavioral Development, and Motor Skills/Physical Development. For Special Education Services, the IEP provided for Student to receive 4 hours per month of Specialized Instruction in the General Education Setting. (Based on the testimony of SEC, I find that the IEP team's intent was to provide 4 hours per week and that the provision for 4 hours per month was a typographical error.) For related services, the IEP provided for 4 hours per month of Speech-Language Pathology, divided between in and outside of the General Education setting, and 180 minutes per month of Occupational Therapy (OT) outside General Education. The IEP also provided that Student would receive 30 minutes per month of Consultation Services for Behavioral

Support. Mother, through Petitioner's Counsel notified SEC on June 20, 2016 that the parent did not agree with the proposed IEP and believed that the hours of special education and related services were not sufficient. Counsel detailed at some length the parent's concerns. On June 28, 2016, SEC responded to counsel that IEP had been finalized, but that the school was "open to reasonable suggestions that would enhance the educational programming" for Student. Exhibit P-19.

4. The June 21, 2016 IEP provided that Extended School Year (ESY) services were required for the provision of FAPE to Student, including 30 minutes per day of Specialized Instruction, 2 hours per month of Speech-Language Pathology and 90 minutes per month of OT. Exhibit P-19. Student attended summer 2016 ESY and was reported by the ESY Coordinator to have done fine in the program. Testimony of SEC.

### **CONCLUSIONS OF LAW**

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

#### **Burden of Proof**

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the child's IEP or placement, or of the program or placement proposed by DCPS, the District shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the Petitioner shall retain the burden of production and shall establish a *prima facie* case

before the burden of persuasion falls on the District. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

### Analysis

A.

Did DCPS deny Student a FAPE by failing to comprehensively evaluate her in spring 2016 with auditory processing and oral-motor speech assessments as recommended by the independent speech-language evaluator, failing to evaluate in all areas of suspected disability and/or failing to comprehensively reevaluate Student?

I address first the issue of whether DCPS denied Student a FAPE by not conducting a sufficiently comprehensive special education reevaluation in spring 2016. In June 2016, the City School multidisciplinary team (MDT) determined that Student continued to be eligible for special education as a child with a Speech or Language Impairment. Petitioner contends that DCPS' spring 2016 reevaluation of Student was not sufficiently comprehensive because DCPS did not conduct auditory processing and oral motor speech assessments, as recommended by Independent Audiologist in a September 12, 2015 Independent Education Evaluation (IEE) Speech-Language Assessment report. DCPS responds that the additional assessments recommended by Independent Audiologist were not suitable for Student.

The IDEA regulations, 34 CFR § 300.305(a), provide that, as part of an initial evaluation and any reevaluation, the IEP Team and other qualified professionals, as appropriate, must review existing evaluation data on the child, including—

- (i) Evaluations and information provided by the parents of the child;
- (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and
- (iii) Observations by teachers and related services providers

and, on the basis of that review and input from the child's parents, identify what additional data, if any, are needed to determine whether the student is a child with a disability and the educational needs of the child. *See* 34 CFR § 300.305(a). The regulations further provide that the evaluation conducted by the public agency 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. *See* 34 CFR § 300.304(b)(1). The IDEA does not require that a particular type of evaluation be conducted to establish a child's eligibility; rather, the evaluation requirements in §§ 300.530 through 300.536 are sufficiently comprehensive to support individualized evaluations on a case-by-case basis, including the use of professional staff appropriately qualified to conduct the evaluations deemed necessary for each child. *See* Federal Policy and Guidance – OSEP Memorandum, *Analysis of Comments and Changes*, Attachment 1 (May 4, 2000). The Act leaves the selections of testing and evaluation materials and the procedures to be used for evaluations and reevaluations to the individual states, with the understanding that all IDEA requirements must be satisfied. *See Letter to Shaver*, 17 IDELR 356 (OSERS 1990).

At the time of Student's June 2016 IEP review, Student's IEP team had, *inter alia*, a Speech-Language Evaluation completed by a DCPS Speech-Language Pathologist in May 2015, Independent Audiologist's September 2015 IEE Speech-Language Assessment, and the results of the Goldman Fristoe Test of Articulation 3 (GFTA-3) administered in June 2016. A DCPS Speech-Language Pathologist attended the June 16, 2016 IEP meeting to interpret the results of these assessments for the IEP team.

In his testimony at the due process hearing, Independent Audiologist testified

that Student's "biggest problem" was speech intelligibility and that she needed additional assessments of auditory processing and an oral motor functioning to inform the IEP team on her speech-language needs. DCPS' experts testified that the additional assessments Independent Audiologist recommended were not appropriate. DCPS Audiologist testified that the American Speech-Language Hearing Association's (ASHA) and the American Academy of Audiology's "best practice" guidelines were not to conduct an auditory processing assessment on a child as young as Student, because her auditory system would not yet be fully developed. SLP testified that Student's oral motor functioning was established when the Goldman Fristoe Test of Articulation was administered in June 2016. DCPS' Speech-Language experts testified credibly that Independent Audiologist's September 2015 evaluation of Student did not comply with ASHA's best practice guidelines and I found the District's experts to be more credible witnesses. I conclude that Petitioner has not met her burden of proof that DCPS' spring 2016 reevaluation of Student was insufficiently comprehensive for want of auditory processing or oral motor functioning assessments.

B.

Is DCPS' proposed June 21, 2016 IEP for Student inappropriate because it provides, *inter alia*:

- a) inappropriate present levels of performance;
- b) inappropriately vague "access" and "progress" sections regarding the student's disability in relation to the general education setting/curriculum;
- c) inappropriate baselines, thus making her goals inappropriate and not measurable;
- d) an inappropriate social/emotional/behavioral goal;
- e) insufficient hours of Specialized Instruction, related services, and consultation services;
- f) an inappropriate setting for the related services (both the individual/group size and location of her settings);
- g) insufficient other classroom aids and services for want of reference to other agency counseling services being provided;

- h) no statewide assessment accommodations and
- i) insufficient/no ESY related services or goals.

Following an IEP team meeting for Student on June 16, 2016, DCPS finalized a revised IEP for Student on June 21, 2016. Petitioner contends that the June 21, 2016 IEP is inappropriate both as to the Present Levels of Performance and Annual Goals and as to the IEP services provided. DCPS responds that the June 21, 2016 IEP is appropriate for Student as written, but that it is willing to further address the parent's concerns.

In *Moradnejad v. District of Columbia*, No. 14–1159, 2016 WL 1275577 (D.D.C. Mar. 31, 2016), the Court adopted the Report and Recommendation of U.S. Magistrate Judge G. Michael Harvey, which explained how a court or a hearing officer must assess an IEP:

The Supreme Court explained in [*Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)] that a court's assessment of an IEP involves two inquiries:

First, has the State complied with the procedures set forth in the [IDEA]? And second, is the [IEP] developed through the [IDEA's] procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

*Rowley*, 458 U.S. at 206–07, 102 S.Ct. 3034. Courts have consistently underscored that the “appropriateness of an IEP is not a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so.” *K.S. v. Dist. of Columbia*, 962 F.Supp.2d 216, 221 (D.D.C.2013) (citing *Thompson R2–J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148–49 (10th Cir.2008)); *Rowley*, 458 U.S. at 200, 102 S.Ct. 3034 (finding that the IDEA does not require that IEPs “maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children,” only that they be “reasonably calculated to enable the child to receive educational benefits”); *N.T. v. Dist. of Columbia*, 839 F.Supp.2d 29, 33 (D.D.C.2012) (“While the District of Columbia is required to provide students with a public education, it does not guarantee any particular outcome or any particular level of education.”).

*Moradnejad, supra.*

Petitioner has not raised an IDEA procedural issue with respect to the development of Student's IEP. Therefore, I turn to the second prong of the *Rowley* inquiry: Was the June 21, 2016 IEP reasonably calculated to enable Student to receive educational benefits? "The IDEA requires IEPs to include, among other things: (1) 'a statement of the child's present levels of academic achievement and functional performance, including . . . how the child's disability affects the child's involvement and progress in the general education curriculum'; (2) 'a statement of measurable annual goals, including academic and functional goals, designed to . . . meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum . . . [and] meet each of the child's other education needs that result from the child's disability'; (3) 'a description of how the child's progress toward meeting the[se] annual goals . . . will be measured'; and (4) 'a statement of the special education and related services and supplementary aids and services . . . to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child.'" *N.S. ex rel. Stein v. District of Columbia*, 709 F. Supp. 2d 57, 60 (D.D.C. 2010), citing 20 U.S.C. § 1414(d)(1)(A)(i).

In her testimony, Petitioner's expert, Educational Advocate, opined that the Present Levels of Performance (PLOPs) and annual goals in the June 21, 2016 IEP are inadequate in a number of respects. For each academic area of concern, Educational Advocate testified that the IEP's description of how Student's disability affects her access to and progress in the general education curriculum was wanting in detail. However, as SEC explained, in the IEP's Communication/Speech and Language area of

concern, the IEP team stated that Student's overall intelligibility and deficits in auditory comprehension impact her overall comprehension in all academic areas, hindering her access to and progress in the general education curriculum. For the respective academic areas of concern, the IEP repeats that Student's speech and language disability affects her access to and progress in the general education curriculum. I find that this was an adequate description of how Student's Speech-Language Impairment affects her involvement and progress in the general education curriculum.

With respect to Mathematics, Educational Advocate testified that the PLOPs for mathematics were not current, because they were based on assessments from the middle of the 2015-2016 school year, instead of end-of-year assessments. DCPS' witness, SEC explained that the IEP team used the middle-of-year assessments because, as of the June 16, 2016 IEP team meeting, Student's end-of-year data for mathematics had not yet been received. Educational Advocate also testified that the Mathematics annual goals and baselines were not appropriate because there was only one baseline for two annual goals. This is not correct. The IEP includes separate baselines for the respective Mathematics goals.

For Reading, Educational Advocate opined that the baselines for the Annual Goals are inappropriate because they do not quantify on a percentage basis Student's ability to retell details/main ideas or to blend sounds. Similarly, for Written Expression, Educational Advocate opined that the PLOPs were not appropriate because they were descriptive, but lacked quantitative levels. However, the IDEA regulations do not require that the PLOP's be stated in a quantified or percentage format. See 34 C.F.R. § 300.320(a)(1); *Pohorecki v. Anthony Wayne Local Sch. Dist.*, 637 F. Supp. 2d 547, 556 (N.D. Ohio 2009) (No requirement that an IEP include specific data points.)

Educational Advocate also criticized the IEP's baselines for Written Expression as having nothing to do with the annual goals. This is incorrect. See, for example Annual Goal 1 and baseline:

*Annual Goal*

*After a read aloud of a poem, nursery rhyme or story, when given a sentence stem to express an opinion (e.g. "I like \_\_\_ because \_\_\_\_.") Student will independently complete the sentence . . . for 4 out of 5 trials.*

*Baseline*

*Student is unable to write why she like a particular detail in a story.*

Exhibit P-19. The annual goal to complete a sentence about why Student likes a story is clearly related to the baseline of being unable to write why she likes a detail in a story.

Educational Advocate also stated, incorrectly, that the Annual Goals for Written Expression are not measurable. On its face, for "4 out of 5 trials" is a measurable goal.

For Communication/Speech and Language, Educational Advocate expressed similar concerns about the PLOPs, Annual Goals and Baselines. In fact, the PLOPs, Annual Goals and Baselines for Communication/Speech and Language are reasonably detailed and I find they are adequate to meet the requirements of the IDEA. *See Stein, supra. Cf. Z.B. v. District of Columbia*, Civil Action No. 15-1037, 116 LRP 36599, (D.D.C. Aug. 24, 2016) (Ideal or perfect plan is not required.).

For the Emotional, Social and Behavioral Development area of concern, Educational Advocate opined that the IEP should have included the data from Student's IEE evaluations. However, those evaluations were conducted in September and October 2015. The June 21, 2016 IEP references the more recent data from a June 2016 Strengths and Difficulties Teacher Questionnaire and input from Student's teacher and support staff. As Educational Advocate testified, it is "critical" to include current data

on Student in her IEP. I find that DCPS has shown that the IEP team's reliance on the Strength and Difficulties Teacher Questionnaire and on teacher input was not inappropriate.

In sum, I find that DCPS has met its burden of persuasion to demonstrate that the Present Levels of Performance and Annual Goals content of the June 21, 2016 IEP was not inappropriate.

Educational Advocate also testified to her views regarding the hours of services and educational setting proposed for Student in the June 21, 2016. Specifically, she opined that the IEP provision for 4 hours per month of Specialized Instruction was "woefully" insufficient. (The hearing evidence established that 4 hours *per month* was a typographical error and that the IEP team decided on 4 hours *per week*.) Educational Advocate asserted that Student required 4 hours per day of Specialized Instruction. SEC, who was not disclosed as an expert, testified that the IEP team decided on only 4 hours per week of Specialized Instruction, because Student qualified for special education based upon her Speech or Language Impairment, not because of academic concerns. The IEP team decided to provide at least nominal Specialized Instruction services, because if the IEP did not provide any special education, then Student could not be offered the IEP related services she needs.

SEC's explanation reflects a misunderstanding of the IDEA's related services provisions. It is correct that a child may not be provided IEP related services unless she also requires special education. *See* 34 CFR §§ 300.34(a). 300.8(a)(2); *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. at 46569 (Nothing in the IDEA or in the definition of related services requires the provision of a related service to a child unless the child's IEP Team has determined that the related service is

required in order for the child to benefit from special education.) However, a child, like Student, who has been identified with a Speech or Language Impairment, and as a result of the disability needs special education, must receive both Specialized Instruction and related services.

The evidence in this case establishes that Student needs Specialized Instruction. The June 21, 2016 IEP states that under her prior November 25, 2015 IEP, Student had made only minimal and inconsistent progress in Reading, Math and Writing. (Because the November 15, 2015 IEP was not offered into evidence, the hearing record does not establish what special education and related services were provided to Student in the 2015-2016 school year.) On this evidence, I find that DCPS has not met its burden of persuasion that 4 hours per week of Specialized Instruction, as provided in the June 21, 2016 IEP, was reasonably calculated to provide educational benefits to Student. *See K.S. v. District of Columbia*, 962 F.Supp.2d 216, 221 (D.D.C.2013) (IDEA requires that the benefit cannot be a mere modicum or de minimis.) However, I did not find Educational Advocate's testimony persuasive that Student requires 4 hours per day of Specialized Instruction. Educational Advocate did not attend the June 16, 2016 IEP team meeting and did not observe Student at school during the 2015-2016 school year. In her testimony, she provided no reasoned support for why Student requires 4 hours per day of Specialized Instruction in order to be involved in and make progress in the general education curriculum. *See 34 CFR § 300.320(a)(4)*.

With regard to the lack of direct Behavioral Support Services in the June 21, 2016 IEP, the IEP indicates that Student had responded positively to her classroom behavior management system and was receiving in-school individual counseling from a D.C. Department of Behavioral Health clinician. The IEP states that Student had adjusted to

the routines and expectations of her classroom environment and was making progress. Apparently, on that basis, the IEP team decided that Student did not require direct Behavioral Support Services as part of her IEP. The IEP provides for 30 minutes per month of consultative Behavioral Support Services. Educational Advocate opined that Student required direct services. However, her opinion was based upon the October 25, 2015 IEE psychological evaluation. As noted above, Educational Advocate did not attend the June 16, 2016 IEP meeting or observe Student in the classroom in the 2015-2016 school year. I find that Educational Advocates' opinion on Student's ongoing need for Behavioral Support Services is entitled to little weight and I conclude that DCPS has met its burden of persuasion that the IEP team's decision to provide only consultation Behavioral Support Services was appropriate.

Educational Advocate also opined that the IEP should have provided for classroom accommodations for statewide assessments. However SEC testified that statewide assessments are not administered at Student's grade level and that Student would not take statewide assessments during the time period covered by the June 21, 2016 IEP. I conclude that DCPS has met its burden of persuasion that Student did not require accommodations for statewide assessments in her current IEP.

Lastly, Educational Consultant opined that Student should have received 4 hours per day of Specialized Instruction and Behavioral Support Services in her summer 2016 ESY program. The IEP provided for 30 minutes per day of ESY Specialized Instruction and no Behavioral Support Services. "ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months. . . . However, the mere fact of likely regression is not a sufficient basis, because

all students, disabled or not, may regress to some extent during lengthy breaks from school. ESY Services are required under the IDEA only when such regression will substantially thwart the goal of ‘meaningful progress.’ *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 184 (3d Cir.1988).” *MM ex rel. DM v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 537–38 (4th Cir. 2002); *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 68-69 (D.D.C. 2008) (adopting the *MM* standard.)

Petitioner offered no evidence that the benefits Student gained during the 2015-2016 regular school year would have been jeopardized if she did not receive more than 30 minutes per day of Specialized Instruction in the ESY program. There was also no evidence that Student’s benefits from the regular school year would have been jeopardized if she did not receive Behavioral Support Services in the ESY program. Moreover, SEC testified that the ESY Coordinator reported that Student had done fine in the summer program. I find that DCPS has met its burden of persuasion that for Student’s ESY program, 30 minutes per day of Specialized Instruction, and no provision for Behavioral Support Services, as specified in the June 21, 2016 IEP, was reasonably calculated to provide educational benefit to Student.

For speech and language related services, Independent Audiologist opined that as of the time of his evaluation of Student in September 2015, Student needed 30 minutes per day of Speech-Language Pathology services if provided in a group setting, or 30 minutes, three times per week, if provided in an individual setting. DCPS’ expert, SLP, disagreed with that recommendation because Student was reported to be making progress on her SLI deficits, based on the Goldman Fristoe evaluation administered in June 2016. The City School speech-language pathologist who provided services to Student and most recently evaluated her did not testify at the due process hearing.

Without his testimony, or other satisfactory justification for the IEP team's decision to limit Student's Speech-Language Pathology services to 2 hours per month, I conclude that DCPS has not met its burden of persuasion that the hours of Speech-Language Pathology services in the June 21, 2016 IEP were reasonably calculated to provide Student educational benefits.

Finally, Petitioner alleged in her complaint that the June 21, 2016 IEP provided for an inappropriate setting for related services and insufficient other classroom aids and services, for want of reference to other agency counseling services being provided. Petitioner offered no evidence in support of these claims and I find that on these issues, she failed to establish a *prima facie* case.

#### Remedy

In this decision, I have determined that DCPS did not carry its burden of persuasion that the June 21, 2016 IEP was reasonably calculated to enable Student to receive educational benefits. Specifically, I have determined that DCPS did not establish that the IEP's provisions for 4 hours per week of Specialized Instruction and 2 hours per month of Speech-Language Pathology were appropriate to address Student's "minimal and inconsistent" progress under her prior IEP. The hearing evidence did not establish what level of Specialized Instruction and Speech-Language Pathology Services is needed to enable Student to be involved in and make progress in the general education curriculum. *See* 34 CFR § 300.320(a)(4).

For relief, Petitioner requests, *inter alia*, that the hearing officer order DCPS to amend Student's IEP to provide appropriate special education and related services. Under the IDEA, it is the responsibility of a child's IEP team, including the parent and other individuals who have knowledge or special expertise regarding the child, to review

the IEP and make necessary revisions. *See* 34 CFR §§ 300.321(a), 300.324. I will order DCPS to convene Student’s IEP team to review all of the current information on Student, determine whether additional data are needed, and revise her IEP as appropriate.

Petitioner also requested compensatory education services to compensate Student for alleged shortcomings in her summer 2016 ESY program. If a parent has established a denial of the education guaranteed by the IDEA, the hearing officer must undertake “a fact-specific exercise of discretion” designed to identify those compensatory services that will compensate the student for that denial. *See Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011) I have determined that Student was not denied a FAPE by inadequacies in the ESY program. Therefore, compensatory education relief is not warranted.

**ORDER**

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

ORDERED:

1. Within 15 schools days of issuance of this decision, PCS shall convene Student’s IEP team, including the parent, to review and revise, as appropriate, Student’s IEP, in accordance with this decision, following the procedures set forth in 34 CFR § 300.320, *et seq.* DCPS shall ensure that Student’s IEP team is provided all additional data needed by the team to determine Student’s needs for Specialized Instruction and Related Services, including, if warranted, an updated Speech/Language evaluation and further ensure that the revised IEP provides sufficient Specialized Instruction and Speech-Language Pathology services to address Student’s “minimal and inconsistent” progress under her prior IEP.
2. All other relief requested by the Petitioner herein is denied.

Date: August 27, 2016

s/ Peter B. Vaden  
Peter B. Vaden, Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

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

cc: Counsel of Record  
Office of Dispute Resolution  
Chief Hearing Officer  
OSSE Division of Specialized Education  
DCPS Resolution Team