

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

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Student Hearing Office
January 09, 2014

STUDENT, ¹)	
through the Parent,)	
)	Date Issued: January 9, 2014
Petitioner,)	
)	Hearing Officer: Virginia Dietrich
v.)	
)	
District of Columbia Public Schools)	
)	
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, _____ filed a due process complaint notice on October 16, 2013, alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Act (“IDEA”).

Petitioner specifically alleged that District of Columbia Public Schools (“DCPS”) had failed to (1) conduct a triennial evaluation of Student that included a comprehensive psychological assessment, a speech-language assessment, and an occupational assessment that included visual-perceptual, fine motor and sensory components; (2) develop an appropriate Individualized Education Program (“IEP”) in May 2013 that provided for a separate special education school and appropriate goals; (3) provide an appropriate speech-language goal in Student’s March 2012 IEP; (4) implement Student’s May 2013 IEP by not providing Student with all of the speech-language services, occupational therapy services and assistive technology required by the IEP; and (5) provide IEP services to Student in a classroom with his same aged peers.

DCPS’ position was that the IEP team had conducted a comprehensive review of pertinent data prior to the development of the 05/15/13 IEP; no additional assessments were needed to develop the 05/15/13 IEP or determine Student’s educational needs; the 05/15/13 IEP was appropriate and based on all available evaluative data; the speech-language goal in the

¹ Personal identification information is provided in Appendix A.

March 2012 IEP was appropriate; and the 05/15/13 IEP was being implemented. DCPS argued that if it committed any procedural violations of the IDEA, the violations were de minimus and did not rise to the level of a denial of a FAPE.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the IDEA, as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”), and 38 D.C. Code Section 2561.02(b), 2561.02(c).

Procedural History

The due process complaint was filed on 10/16/13. This Hearing Officer was assigned to the case on 12/13/13, replacing the initial hearing officer who had been assigned to the case on 10/18/13. DCPS filed a response to the complaint on 10/28/13 and made no challenges to jurisdiction.

Neither Petitioner nor DCPS waived the resolution meeting. The resolution meeting took place on 11/08/13, at which time parties agreed to let the 30-day resolution period expire prior to proceeding to a due process hearing. The 30-day resolution period ended on 11/15/13, the 45-day timeline to issue a final decision began on 11/16/13 and the final decision was due by 12/30/13. A prehearing conference took place on 11/19/13. A Prehearing Order was issued on 11/22/13.

The due process hearing was initially scheduled for 12/13/13. On the day of the hearing, Petitioner moved for a ten-day continuance, citing the illness of Petitioner and the unavailability of Respondent’s witness as reasons for the continuance. A ten-day continuance was granted on 12/16/13, thereby extending the final decision due date from 12/30/13 to 01/09/14.

The due process hearing was a closed hearing that took place on 01/03/14. Petitioner was represented by Joy Freeman-Coulbary, Esq.² DCPS was represented by Steven Rubenstein, Esq.³ Neither party objected to the testimony of witnesses by telephone. Petitioner participated in the hearing in person. Student’s father and paternal grandmother participated in the hearing in person until the testimony of Petitioner’s first two witnesses was concluded.

Petitioner’s disclosures, filed on 12/06/13, contained a list of seven witnesses and Exhibits P-1 through P-28. DCPS objected to the first listed witness on the basis that although the title of the witness was parent, Student’s name was listed. The Hearing Officer ruled that the error was harmless and did not prejudice DCPS in any way. In nearly all IDEA proceedings, the parent testifies. It was reasonable for DCPS to believe it was an editing error, especially when the second listed witness was Student. The first listed witness on the witness list was admitted into evidence over objection. The rest of the witness list was admitted into evidence without

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objection. DCPS objected to P-8, P-9, P-26, P-27 and P-28 on the grounds of relevancy. DCPS' objections were sustained; P-8, P-9, P-26, P-27 and P-28 were not admitted into evidence on the basis of relevancy. The remainder of Petitioner's exhibits was admitted into evidence without objection.

DCPS' disclosures, dated 12/06/13, contained a witness list of eight witnesses and Exhibits R-1 through R-27. Petitioner objected to the admission of R-8 on the grounds of relevancy. R-8 was admitted over objection. The remainder of Respondent's exhibits and the witness list were admitted into evidence without objection.

Parties declined to discuss settlement at the beginning of the due process hearing.

Petitioner presented three witnesses in her case in chief: advocate; Petitioner; and a witness who qualified as an expert in IEP development and in compensatory education development and implementation.

DCPS elected not to present any witnesses.

The issues⁴ to be determined in this Hearing Officer Determination are as follows:

Issue #1 - Whether DCPS denied Student a FAPE by failing to complete a triennial evaluation consisting of: a comprehensive psychological assessment that included cognitive and clinical components, as of June 2013; a speech-language assessment, as of June 2013; and an occupational therapy assessment that included visual-perceptual, fine motor and sensory components, as of July 2012.

Issue #2 – Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP; specifically, (a) the 05/15/13 IEP did not contain goals that were based on current formal assessments, (b) the 05/15/13 IEP did not contain goals that met Student's educational needs, and (c) because the 05/15/13 IEP mirrored the previous IEP, it was not uniquely tailored to meet Student's needs.

Issue #3 – Whether DCPS denied Student a FAPE by providing Student with an inappropriate IEP on 03/27/12; specifically, a speech-language goal(s) was not based on a current speech-language assessment.

Issue #4 - Whether DCPS failed to implement Student's 05/15/13 IEP since the beginning of the 2013/2014 school year: specifically, (a) Student did not receive all of the speech-language and occupational therapy services prescribed by the IEP, (b) Student did not receive assistive technology devices consisting of a tape recorder and calculator as required by the IEP, and (c) Student was not placed at a separate special education school where he would receive his special education services.

⁴ The issues as stated are based upon Petitioner's explanation of the issues at the beginning of the due process hearing. They mirror the issues defined in the Prehearing Order that was issued by the previous Hearing Officer, but are enumerated differently herein.

Issue #5 – Whether DCPS denied Student a FAPE by placing Student in a classroom during the 2013/14 school year that contained students who were three years younger than Student.

For relief, Petitioner requested a finding that Student had been denied a FAPE on the issues presented; funding at Kingsbury Day School (a nonpublic school placement); funding for an independent comprehensive psychological assessment, speech-language assessment and occupational therapy assessment; and a compensatory education award of 160 hours of 1:1 tutoring in academic subjects and 40 hours of behavioral support services, for the denials of a FAPE. Petitioner also requested that if a nonpublic school placement is not awarded, that the Hearing Officer order that the Multidisciplinary Team meet to review and revise the IEP as appropriate, DCPS to place Student in a class with his same age peers, and DCPS to fully implement Student's IEP.

Footnotes hereinafter refer to the testimony of a witness or an exhibit admitted into evidence.

Findings of Fact

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

#1. Petitioner, the mother of Student, is a resident of the District of Columbia.⁵ Student is a child with a Specific Learning Disability who has received special education services from DCPS at least since October 2008.⁶

#2. The last formal occupational therapy assessment was conducted on 07/28/09 to determine Student's initial need for occupational therapy intervention. Student was seven years old at the time.⁷ As a result of the assessment's findings and recommendations, Student began receiving occupational therapy services.⁸ Student continued to receive occupational therapy services from 2010-2013.⁹

#3. The last formal speech language reevaluation was completed on 07/30/09 to determine Student's current level of linguistic functioning and determine if Student continued to qualify for speech-language services.¹⁰ From 2009-2013, Student received speech-language services as part of his IEP.¹¹

#4. DCPS completed a Psychological Re-evaluation of Student on 06/18/10 to determine Student's current levels of adaptive functioning due to concerns from the Multidisciplinary

⁵ Petitioner.

⁶ P-2, R-1.

⁷ P-71-1, Petitioner.

⁸ P-17-8.

⁹ R-11, P-2-12, P-4-10, P-6-13, P-14, P-20.

¹⁰ P-21-1, Petitioner.

¹¹ R-11, P-2-12, P-4-10, P-6-13, P-13, P-14, P-20, P-21-1.

Team. This assessment determined that Student had no significant limitations in his everyday functioning.¹²

#5. Student received behavioral support services as part of his school curriculum from 2009-2013.¹³ In January 2013, Student demonstrated regression in his emotional, social and behavioral development at school.¹⁴ In February 2013, Student's behavior in class was characterized as highly distractible which took the focus away from what he was doing, seeking constant approval (attention seeking), talkative, and poor self-regulation; all of which impeded Student's academic progress.¹⁵ By the end of June 2013, it was clear that Student's behavior was detracting from his ability to focus in the classroom.¹⁶

#6. Student was reevaluated in math, reading and writing in an Educational Evaluation on 02/21/13 that used the Woodcock Johnson III, which is a formal testing assessment.¹⁷

#7. On 03/18/13, DCPS' school psychologist completed a written reevaluation of Student's educational functioning and needs. This Data Evaluation Review was conducted by DCPS' school psychologist and used a variety of data sources. The data sources included: the 06/18/10 Psychological Re-evaluation; the 02/21/13 Educational Evaluation; an IEP dated 03/27/12; a teacher interview dated 02/25/13; a classroom observation dated 02/26/13; school year 2012-2013 IEP progress report dated 01/29/13; reading test scores from November 2012 and February 2013; and mathematics and reading testing scores from April 2012 that were derived from the DC CAS.¹⁸

#8. The Data Evaluation Review indicated that as of 01/09/13, Student's reading fluency and comprehension skills were not progressing, despite interventions; Student's academic skills were strongest in mathematics with scores in the Low Average range; and Student demonstrated regression in his emotional, social and behavioral development, which was attributed to his difficulty focusing during instruction, requiring several prompts to follow directions, and his inconsistency in applying self-management skills in the classroom. Student's level of functioning and/or progress in the areas of speech-language and occupational therapy were not addressed in the Data Evaluation Review.¹⁹

#9. Student, _____ has attended Public School A since the beginning of the 2013/14 school year. At Public School A, Student receives special education services in a cluster program that is a self-contained program within a general education school; he does not mingle with the general education population.²⁰ Students in the cluster program enter the school through a different door than is used by the general education population and Student's

¹² R-17-1.

¹³ R-1-4, R-11-4, P-13, P-14, P-18, P-19.

¹⁴ R-17-2.

¹⁵ P-17-3.

¹⁶ R-17-3.

¹⁷ R-17-1, R-19-2.

¹⁸ R-17.

¹⁹ R-17.

²⁰ Petitioner, advocate.

classroom is secluded away from the other general education classrooms.²¹ Student's classroom at Public School A is populated by a teacher, an aide and 15 students. Some of Student's classmates are three years younger than he is.²²

#10. Prior to attending Public School A, Student attended Public School B, which was a separate day school that serviced only special education students.²³ An IEP was developed on 05/15/13 when Student attended Public School B. Public School B, named in the Student Information section of Student's 05/15/13 IEP, was provided only to identify the site location where Student was currently attending school. The IEP did not mandate that Student receive his special education services in a separate special education day school.²⁴

#11. On 05/15/13, in conjunction with developing an IEP, DCPS conducted a reevaluation.²⁵ The data used in the reevaluation process consisted of: the 02/21/13 Woodcock Johnson III assessment of reading, writing and mathematics skills; a formal Vineland Adaptive Behavior Scales assessment dated 06/15/10 which measured communication, socialization and daily living skills; a Speech and Language annual progress report dated 06/17/10 that indicated that Student had significant expressive language, receptive language, and phonological processing deficits that impacted his academic learning across the curriculum; informal classroom observations and behavior support services progress notes collected on 05/14/13 that revealed that Student's social/emotional/behavioral concerns of being highly distractible and poor regulation impeded his academic abilities; and handwriting samples and occupational therapy services progress notes collected on 02/25/13 that indicated that although Student was making progress towards his goals, his difficulties with visual motor skills greatly affected his academic abilities and availability for learning.²⁶

#12. Student's IEPs while at Public School A and Public School B prescribed exactly the same services in exactly the same setting, with the exception of behavioral support services which differed in quantity only.²⁷ IEP services from both the 03/27/12 and the 05/15/13 IEP prescribed 28 hours/week of specialized instruction, 4 hours/month of speech-language services, and 240 minutes/month of occupational therapy services; with all services to be provided outside of general education. Both IEPs provided for assistive technology for learning and studying that consisted of a calculator and a tape recorder.²⁸

#13. Since the beginning of the 2013/14 school year, DCPS has provided Student with a calculator as an assistive technology device, but Student has not been provided with a tape recorder.²⁹

²¹ Advocate.

²² Petitioner.

²³ Petitioner, advocate.

²⁴ P-2.

²⁵ P-16-1.

²⁶ R-19.

²⁷ P-2, P-4.

²⁸ P-2-12, P-4-10.

²⁹ Petitioner.

#14. During the previous 2012/13 school year, Student showed progress in achieving his IEP goals in mathematics, reading, written expression, speech-language and motor skills/physical development. Student even mastered an IEP goal in both speech-language and motor skills/physical development at the end of the 2012/13 school year. However, Student did not show any progress towards achieving the majority of his IEP goals in the area of emotional/social/behavioral development during the 2012/13 school year.³⁰ In May 2013, Student's problem behaviors included exhibiting attention-seeking behavior, talkative, highly distractible and poor self-regulation; all of which impeded his academic abilities that were all below grade level at the time.³¹ At the IEP Team meeting on 05/15/13, behavioral support services were increased from 45 minutes/month to 240 min/month.³² During the current 2013/14 school year, Student made progress towards achieving the very same IEP goals in emotional/social/behavioral development.³³ Student also made progress on his academic reading and writing IEP goals in 2012 and 2013.³⁴

#15. There were only two days during the 2013/14 school year that Student missed all of his special education services. This two-day period occurred near the beginning of the school year as a result of Student being accused of sexual predation upon a younger student in the classroom. The investigation closed within a few days, with no negative stigma attached to Student. Shortly thereafter, another accusation against Student with the same younger child arose, but it did not rise to the level of a formal investigation. Other than this incident(s), the record contained no evidence of any problems between Student and any other younger classmate. During the 2013/14 school year, Student had not been suspended and Petitioner had never received any calls regarding Student's behavior other than the aforementioned incident.³⁵ There was no evidence in the record that this one isolated incident(s) negatively impacted Student's academic performance.

Conclusions of Law

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

The overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1.

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative

³⁰ R-21.

³¹ P-2-8.

³² P-2-12, P-4-10.

³³ R-27.

³⁴ R-15, R-16, R-21, R-27, P-10, P-11)

³⁵ Petitioner.

hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

Issue #1 - Whether DCPS denied Student a FAPE by failing to complete a triennial evaluation consisting of: a comprehensive psychological assessment that included cognitive and clinical components, as of June 2013; a speech-language assessment, as of June 2013; and an occupational therapy assessment that included visual-perceptual, fine motor and sensory components, as of July 2012.

Evaluation means procedures used in accordance with 34 CFR 300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. 34 CFR 300.15.

In conducting the evaluation, the public agency must: use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about the child; not use any single measure or assessment as the sole criterion for determining an appropriate educational program for the child; ensure that the child is assessed in all areas of suspected disability; and in evaluating each child with a disability, the evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified. 34 CFR 300.304.

As part of any reevaluation, the IEP Team must review existing evaluation data on the child, including evaluations and information provided by the parents of the child; current classroom-based, local, or State assessments, and classroom-based observations; 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 the educational needs of the child, the present levels of academic achievement and related developmental needs of the child, and whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP and to participate, as appropriate, in the general education curriculum. The public agency must administer such assessments and other evaluation measures as may be needed to produce the necessary data. 34 C.F.R. 300.305(a), 300.305(b).

"A public agency must ensure that a reevaluation of each child with a disability is conducted...(1) if the public agency determines that the educational or related services needs, including improved academic achievement and functional performance of the child warrant a reevaluation; or (2) if the child's parent or teacher requests a reevaluation." 34 C.F.R. 300.303(a). Additionally, 5 D.C.M.R. E- 3005.7 specifies the conditions under which DCPS

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shall conduct a reevaluation. “A reevaluation...shall be conducted at least once every three years, or more frequently if conditions warrant reevaluation; if the child’s parent or teacher requests a reevaluation; or before determining a child is no longer a child with a disability.”

Petitioner failed to meet her burden of proof that the cognitive component of a psychological evaluation was not completed triennially, beginning in June 2010. A formal assessment, the Woodcock Johnson III, which tested Student’s academic abilities in reading, writing and math, was completed in February 2013, which was within the three-year period beginning in June 2010.

There was no evidence in the record that the clinical portion of a psychological evaluation, which would have assessed Student’s emotional and behavioral functioning, was ever completed in June 2010. Although there was evidence in the record that a Psychological Re-evaluation was completed on 06/18/10, that Psychological Re-evaluation was not made part of the record. The only information in the record was that the Psychological Re-evaluation was conducted to determine Student’s adaptive level of functioning. There was insufficient evidence in the record for the Hearing Officer to conclude that DCPS failed to reevaluate Student’s emotional and behavior functioning via a formal psychological assessment, within the three year period beginning June 2010 and ending June 2013.

DCPS must assess Student in all areas of suspected disability and this is part of the reevaluation process. 34 C.F.R. 300.304(c)(4). DCPS should have conducted a formal assessment in the area of emotional/social/behavioral functioning, typically associated with the clinical components of a comprehensive psychological assessment. Petitioner claims that DCPS should have conducted a formal emotional/social/behavioral assessment as of June 2013, and the Hearing Officer determines that the record supports her position by a preponderance of the evidence. Student’s behaviors that impacted learning warranted it. Student received counseling as behavioral support services as part of his school curriculum from 2009-2013. From January – June 2013, Student’s behavior in school was remarkable to the extent that he had regressed in emotional, social and behavioral development, which impeded his academic progress. Petitioner testified credibly that no formal comprehensive psychological evaluation was completed during the past three years. Petitioner met her burden of proof that DCPS failed to conduct a formal emotional/social/behavioral assessment within the past three years.

A formal Speech-Language Re-Evaluation was last completed on 07/30/09. Student’s IEPs from 2009-2013 all provided for speech-language services. Petitioner credibly testified that a formal speech-language evaluation had not been completed during the past three years. Petitioner met her burden of proof that DCPS failed to conduct a triennial speech-language evaluation, beginning on 07/30/12. Student had long standing speech-language deficits that impacted his educational performance. A formal speech-language evaluation was warranted. The IDEA mandated that current speech-language data be made available to determine Student’s educational needs.

A formal occupational therapy assessment was last completed on 07/28/09. Student’s IEPs from 2009-2013 all provided for occupational therapy services. Petitioner credibly testified that an occupational therapy assessment had not been completed during the past three years.

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Petitioner met her burden of proof that DCPS failed to conduct a triennial occupational therapy evaluation since 07/28/12. It was important that current occupational therapy data be available to determine Student's present levels of academic achievement and related developmental needs.

The harm is implied. In order to properly program for the Student, present levels of functioning need to be determined, at least once every three years, pursuant to 34 C.F.R. 300.303(a), 300.305. IDEA guarantees this for Student. Student was denied a FAPE. The failure of DCPS to conduct triennial evaluations in the areas of social/emotional/behavioral functioning, occupational therapy and speech-language significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to her child. The fact that Student was making progress on his IEP goals in 2012 and 2013 is irrelevant. Student had an absolute right to be formally assessed every three years. Under the IDEA, DCPS had an affirmative obligation to complete the assessments.

Issue #2 – Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP; specifically, (a) the 05/15/13 IEP did not contain goals that were based on current formal assessments, (b) the 05/15/13 IEP did not contain goals that met Student's educational needs, and (c) because the 05/15/13 IEP mirrored the previous IEP, it was not uniquely tailored to meet Student's needs.

This entire allegation is speculative. Petitioner failed to meet her burden of proof that the goals were inappropriate because they were not based on current formal assessments or that the goals did not meet Student's needs. Without having the results of formal and current behavioral, speech-language and occupational therapy assessments, it is impossible to determine whether or not the IEP contained inappropriate goals in these areas or whether the IEP failed to meet Student's current educational needs. The record demonstrated that Student was making progress towards achieving his IEP goals in all areas of concern. Although Student did not make any progress on his behavioral/emotional/social goals during the 2012/13 school year, he made progress during the 2013/14 school year following an increase in his behavioral support services. The record indicated that a current formal assessment, i.e., the Woodcock Johnson III that was administered on 02/21/13, which measured Student's reading, writing and mathematics performance levels, was taken into consideration when developing the 05/15/13 IEP.

Insufficient evidence was presented to enable the Hearing Officer to conclude that the current goals in the 05/15/13 IEP were inappropriate for Student in and of themselves. Although Petitioner's expert in IEP development testified that the IEP goals were inappropriate because they were based on a 2nd grade level, there was no evidence that this grade level was inappropriate for Student. The Woodcock Johnson III, administered just three months before the IEP was developed, revealed that Student was achieving on a second grade level in math and on a 1.3 – 2.1 grade level in written expression. Petitioner's expert witness rendered opinions based only on review of the disclosures that were admitted into the record. The expert's opinions were given very little weight because the expert had never met Student, never assessed Student, never observed Student in school and had not participated in the development of the IEP. There was evidence in the record that during the 2013/14 school year, Student made progress towards achieving his IEP goals in the areas of mathematics, written expression, speech-language,

occupational therapy and behavioral support. This evidence strongly countered Petitioner's assertion that the goals were inappropriate.

Petitioner failed to offer any proof and failed to meet her burden of proof that because the IEP goals in the 05/15/13 IEP mirrored the goals in the previous IEP, the goals were inappropriate. During the 2013/14 school year, Student made progress towards achieving all of the IEP goals that had been introduced.

Issue #3 – Whether DCPS denied Student a FAPE by providing Student with an inappropriate IEP on 03/27/12; specifically, the speech-language goal(s) was not based on a current speech-language assessment.

This allegation is also speculative. Without the results of a current speech-language assessment, it is impossible to determine whether the speech-language goal would be the same or different. Petitioner failed to meet her burden of proof on this issue.

Issue #4 - Whether DCPS failed to implement Student's 05/15/13 IEP since the beginning of the 2013/2014 school year; specifically, (a) Student did not receive all of the speech-language and occupational therapy services prescribed by the IEP, (b) Student did not receive assistive technology devices consisting of a tape recorder and calculator as were required by the IEP, and (c) Student was not placed at a separate special education school where he would receive his special education services.

(a) Petitioner failed to meet her burden of proof that Student failed to receive all of the speech-language services and occupational therapy services prescribed by the IEP. Petitioner credibly testified that Student missed only two days of school during the 2013/14 school year, but there was no evidence that Student missed any speech-language or occupational therapy services during those two days. Conceivably, the most services that Student could have missed would have been one hour of speech-language and one hour of occupational therapy services in those two days time. And, even if Petitioner had proven that Student had missed one hour of related services in each category, it would have been extremely difficult for Petitioner to prove educational harm as a result of only one missed hour in each related services category.

(b) Petitioner failed to meet her burden of proof that Student was denied a FAPE due to the non-provision of assistive technology devices consisting of a tape recorder and calculator. Petitioner credibly testified that Student had been provided with a calculator. And, although Petitioner was believable that Student had not been provided with a tape recorder for his use, Petitioner did not proffer any evidence that showed that the absence of a tape recorder had a negative educational impact on Student. There wasn't even any evidence in the record as to the specific conditions for which the tape recorder was to be used, other than for learning and studying. Although DCPS committed a procedural violation of the IDEA by not providing Student with all of the services required by his IEP, pursuant to 34 C.F.R. 300.323(c)(3), Petitioner failed to show that Student was deprived of an educational benefit or that his right to a FAPE was impeded. On this record, the Hearing Officer cannot conclude that Student was denied a FAPE because DCPS failed to provide him with a tape recorder during the 2013/14 school year.

(c) Student's IEP did not require that he be provided with special education services in a separate day school. The 05/15/13 IEP simply indicated in the Student Information section that Student's current location of services was Public School B; the IEP did not state that a separate special education day school was the least restrictive environment in which the IEP could be implemented. In this jurisdiction, it has been established that the school designated by the public agency to implement the child's IEP is the location of services. *Johnson v. District of Columbia*, 2012 L 883125 (D.C.C., March 16, 2012). While the IDEA requires parental participation in educational placement decisions, it does not mandate that parents be involved with site selection. *White v. Ascension Parish School Board*, 343 F.3d 373 (5th Cir. 2003), 39 IDELR 182. Therefore, a change in site location is an administrative decision solely within the discretion of DCPS provided that the assignment is made consistent with the child's IEP and the decision of the group determining placement. Federal Register, Vol. 71, No. 156, p. 46,588 (2006).

Petitioner failed to meet her burden of proof that DCPS failed to implement Student's IEP by failing to place him in a separate special education school for the 2013/14 school year. Moreover, the cluster program at School A arguably could be considered a separate special education school because the students in Student's cluster program were completely segregated from the general education students, although co-located in the same physical building. The IEPs in existence at both schools contained identical services in the identical setting; i.e., the same number of hours of specialized instruction, speech-language and occupational therapy services, outside of general education. The only thing that changed was the site of services from School B to School A.

Issue #5 – Whether DCPS denied Student a FAPE by placing Student in a classroom during the 2013/14 school year that contained students who were three years younger than Student.

Free appropriate public education or FAPE means special education and related services that are provided at public expense, meet the standards of the State Education Agency, include an appropriate school and are provided in conformity with the IEP. 34 C.F.R. 300.17.

In determining the educational placement of a child, the public agency must ensure that the child's placement is based on the child's IEP and is as close as possible to the child's home. 34 C.F.R. 300.116(b).

Petitioner failed to meet her burden of proof on this issue. Nothing in the IEP or the IDEA requires Student to receive classes with other students who are his exact same age. There was no evidence in the record that receiving services with younger students negatively impacted Student's overall academic or behavioral performance in school. Student experienced an isolated incident with one younger child in the classroom at the beginning of the school year that required police intervention. That one incident resolved within a few days, with no negative stigma attached to Student. Other than that one incident and another suspected incident with the same child shortly thereafter, there was no other evidence in the record that placement of Student in a class with younger children presented a problem or interfered with Student's ability to derive

educational benefit from classroom instruction. DCPS did not deny Student a FAPE by placing him in a classroom with students who were as much as three years younger than he was.

Compensatory Education

“When a school district deprives a disabled child of free appropriate public education in violation of the Individuals with Disabilities Education Act, a court fashioning “appropriate” relief, as the statute allows, may order compensatory education, i.e., replacement of educational services the child should have received in the first place.” *Reid v. District of Columbia*, 43 IDELR 32 (2005).

The qualitative standard for determining compensatory education is that “compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district’s violations of IDEA.” *Id.*

Compensatory education cannot be awarded on this record. Without the completed clinical, speech-language and occupational therapy assessments, it is impossible to determine any harm or educational losses over the years that may have occurred due to possible inappropriate goals or IEPs based on the lack of current speech-language, occupational therapy and emotional/social/behavioral assessments. Petitioner may preserve her compensatory education claim until after the ordered assessments are completed.

ORDER

(1) DCPS shall complete: (A) a formal assessment that measures Student’s social, emotional and behavioral functioning, (B) a formal speech-language assessment, and (C) a formal occupational therapy assessment that includes visual-perceptual, fine motor and sensory components; no later than 30 calendar days from the date that Petitioner’s consent is obtained. DCPS shall take affirmative steps to obtain Petitioner’s consent for all assessments no later than five school days from the date of this Order; or

(2) DCPS may authorize funding for the afore-ordered assessments to be completed, and if so, authorization of independent assessments shall be issued by DCPS no later than 5 school days from the date of this Order. Failure to issue authorization for funding within 5 school days shall obligate DCPS to complete the assessments within 30 calendar days of obtaining Petitioner’s consent; and

(3) DCPS shall convene a Multidisciplinary Team meeting to review the completed assessments, and review and revise the IEP, as appropriate, within 30 calendar days of either completing the last of the assessments or receiving the last of the independent assessments; and

(4) Petitioner’s compensatory education claim is preserved and reserved pending the completion of an emotional/social/behavioral assessment, a speech-language assessment and an occupational therapy assessment; and

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(5) Any delay caused by Petitioner or Petitioner's representative shall extend the deadline for DCPS' performance, day for day; and

(6) All other requested relief is denied.

IT IS SO ORDERED.

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).

Date: January 9, 2014

/s/ Virginia A. Dietrich
Hearing Officer

Copies to:

Petitioner: (U.S. mail)

Petitioner's Attorney: Joy Freeman-Coulbary, Esq. (electronically)

DCPS' Attorney: Steven Rubenstein, Esq., Tanya Chor, Esq. (electronically)

DCPS (electronically)

SHO (electronically)