

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

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

OSSE
Student Hearing Office
January 22, 2014

PETITIONER,
on behalf of STUDENT,¹

Date Issued: January 20, 2014

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (DCMR). In her Due Process Complaint, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) failed to provide Student appropriate Individualized Education Plans (IEP) and services for Autism Spectrum Disorder and other impairments in the 2011-2012, 2012-2013 and current school years.

¹ 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 October 21, 2013, named DCPS as respondent. The parties met for resolution sessions on November 4 and 19, 2013 and were unable to reach an agreement. On December 13, 2013, the Chief Hearing Officer granted a 17-day continuance, which extended the Hearing Officer Determination due date to January 21, 2014. On November 14, 2013, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was convened before the undersigned Impartial Hearing Officer on December 9, 2013 at the Student Hearing Office in Washington, D.C. The hearing which had been scheduled for December 9 through 11, 2013 had to be rescheduled after the first day because of weather-related closings in Washington, D.C. The hearing was resumed on January 6 and 8, 2014. The hearing, which was closed to the public, was recorded on an electronic audio recording device. All of the hearing was simultaneously interpreted for Mother, who is a native Spanish language speaker. Mother appeared in person, and was represented by PETITIONER'S COUNSEL. DCPS was represented by SPECIAL EDUCATION TEACHER and DCPS' COUNSEL.

Petitioner testified, and called as witnesses, PEDIATRICIAN, INDEPENDENT S/L PATHOLOGIST, INVESTIGATOR, and EDUCATIONAL CONSULTANT. DCPS called as witnesses ELL TEACHER 1, ELL TEACHER 2, SCHOOL SOCIAL WORKER, Special Education Teacher, and DCPS S/L PATHOLOGIST. Petitioner's Exhibits P-1 through P-70 were admitted into evidence without objection, with the exception of Exhibits P-1 through P-5 and P-19 which were admitted over DCPS' objections. DCPS' Exhibits R-1 through R-25 were admitted without objection, except for Exhibits R-10 and R-19, which were not offered. Counsel

for both parties made opening and closing statements. At the request of counsel for DCPS, the parties were granted leave, until January 10, 2014, to file post-hearing memoranda. Counsel for both parties filed post-hearing written argument.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The issues to be determined in this case are:

- Whether DCPS denied Student a free appropriate public education (FAPE) by failing to timely and fully evaluate him for all suspected areas of disability including for autism, Occupational Therapy (OT) and Speech Language (S/L) needs;
- Whether DCPS denied Student a FAPE by failing to provide an appropriate Individualized Education Plan since October 2011, including the April 22, 2011 IEP, the March 26, 2012 IEP, the March 22, 2013 IEP and the August 15, 2013 IEP amendment. Petitioner contends that these IEPs were inadequate because they lacked appropriate academic goals and speech goals, failed to provide services for autism disorder and S/L, failed to provide all academic services in an outside of general education setting, failed to provide appropriate behavioral support services, failed to offer Extended School Year (ESY) services and failed to provide appropriate in-school accommodations and modifications;
- Whether DCPS failed to implement Student's IEPs by not providing all of the hours of S/L and Behavioral Support services specified in the IEPs;
- Whether DCPS denied Student a FAPE in summer 2013 by failing to individually tailor the ESY program to Student, which resulted in regression and failing to provide adequate S/L and Behavioral Support services in Student's ESY program; and
- Whether DCPS failed to provide adequate notice to Parent of the March 22, 2013 IEP meeting so as to ensure her effective participation as part of the IEP team.

For relief, Petitioner seeks an order for DCPS to fund independent OT and Applied Behavioral Analysis (ABA) evaluations of Student; for DCPS to convene Student's IEP team to develop an appropriate IEP, to include, *inter alia*, increased S/L services, pull-out classes for all

core academic instruction, a social skills group, ESY, increased Behavioral Support and OT services, if warranted. In addition, Petitioner seeks an award of compensatory education for harm resulting from DCPS' alleged denial of FAPE to Student since October 2011.

STIPULATION

DCPS stipulates that as of the due process hearing date, Student continues to qualify for special education and related services as a child with a disability and that one of his impairments is Autism Spectrum Disorder (ASD). Stipulation of DCPS' Counsel.

FINDINGS OF FACT

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

1. Student, an AGE child, resides with Petitioner in the District of Columbia. Petitioner's native language is Spanish and Spanish is spoken in the home. Testimony of Mother.
2. Student was evaluated in late 2007 and early 2008, at the CARE Center (DCPS) and was found eligible to receive special education services with the disability classification Developmental Delay (DD). He received 27 hours per week of Specialized Instruction services in Reading, Written Expression and Mathematics and 60 minutes per week each of OT and S/L Pathology services. All services were provided outside general education. Exhibits P-1, P-41.
3. Since the 2009-2010 school year, Student has attended CITY ELEMENTARY SCHOOL, where he is currently in the GRADE. Testimony of Mother. Since the 2011-2012 school year, Student has received English as a second language instruction in an English Language Learners ("ELL") class. At the beginning of the 2011-2012 school year, Student did not speak any English. He is now at a "developing" English level. Testimony of ELL Teacher 1. At City Elementary School, Student is instructed in English. Testimony of ELL Teacher 2.

4. Prior to the 2010-2011 school year, Student was placed in a special needs classroom of less than 5 students. For the 2010-2011 school year, Student was placed in a general education classroom of 25 students with one teacher. Exhibit P-41.

5. Student's September 10, 2010 IEP provided that he would receive 5 hours per week of Specialized Instruction outside general education, 240 minutes per month of S/L services and 30 minutes per week of OT consultation services. Exhibit P-43. In January 2011, Student's teachers and other school staff reported that he was easily distracted and unable to remain focused on his classwork, but was able to do his classwork and complete it with one-on-one attention. Exhibit P-41.

6. A March 2011 developmental evaluation from CITY MEDICAL CENTER indicated that Student presented with a profile consistent with cognitive impairment and attention deficit hyperactivity disorder (ADHD). Exhibit P-43.

7. In April 2011, Student's Multidisciplinary Team (MDT) changed his disability classification to Multiple Disabilities (MD) based upon the underlying impairments Speech or Language Impairment and Other Health Impairment. Exhibit P-3.

8. At an April 29, 2011 IEP team meeting, the City Elementary School IEP team increased Student's Specialized Instruction Services to 10 hours per week outside general education and continued his S/L Pathology Services at four hours per month. At the request of Mother, the IEP team provided Student 240 minutes per month of Behavioral Support Services. The April 29, 2011 IEP does not provide for OT services. Exhibits P-7, P-8.

9. On his June 23, 2011 IEP Progress Report, Student was reported to be progressing on most of his IEP Annual Goals. He was reported to have mastered one Mathematics goal and three Behavioral Development goals and to have shown no progress on a

goal for Written Expression. Exhibit P-26.

10. In a September 21, 2011 school progress report, Student's regular education teacher reported that Student did well when she was at his group's table, but that he needed an aide to work with him at all times or a smaller class. Exhibit P-22. At the end of the Third Advisory period, April 25, 2012, the classroom teacher was complimentary about Student's classroom effort, but added that she would like to see him in a smaller setting where he could get more one-on-one instruction. Exhibit P-24.

11. At the end of the second reporting period for school year 2011-2012 (February 6, 2012), Student was reported to have mastered or to be progressing on all of his IEP academic and S/L annual goals, with the exception of one mathematics goal which had just been introduced. Special Education Teacher reported that none of Student's Behavioral Development goals had been introduced. Exhibit R-11.

12. At the March 26, 2012 IEP team annual review meeting, Student was reported to have done well on a recent listening comprehension test. His classroom teacher reported that Student's DIBELS early childhood literacy test scores indicated that he continued to have difficulty with reading, although his classroom performance showed that he was Progressing. Special Education Teacher stated that Student had "improved so much." Student's teachers and Social Worker reported that Student did not have a behavior problem. The classroom teacher reported that Student was comfortable in school and "love[d] to please." Special Education Teacher said Student cooperated and was able to complete an activity or task. Mother stated that behaviorally, Student had changed a lot and behaved much better at home. The IEP team determined that Student would continue to receive ten hours per week of Specialized Instruction

Services and four hours per month of S/L services. Student's Behavioral Support Services were reduced to 120 minutes per month. Exhibits P-9, P-10.

13. In the 2012-2013 school year, at the end of Reporting Period 1 (November 21, 2012), Student was reported to be progressing on several academic annual IEP goals, but had not made progress on three of five S/L goals. Special Education Teacher reported that Student preferred to work with teacher one to one to complete activities, and required prompting and redirection when he remained focused upon the assignment. Exhibit R-14.

14. Student's MDT team met on December 4, 2012 to review his progress. Special Education Teacher reported that it had been very difficult for Student to make the adjustment. She stated that when working with Student in a smaller or larger setting, he required a lot of repetition and consistently repeated what he had heard or learned. The MDT team determined that additional assessments, specifically psychological and S/L, were required. Exhibit P-11.

15. INDEPENDENT PSYCHOLOGIST conducted a comprehensive psychological evaluation of Student in March and April 2013. In his April 22, 2013 report, Independent Psychologist concluded that given Student's history of language delays, the subtests that comprise the Perceptual Reasoning Index (PRI) were a better estimate than Full Scale IQ testing of Student's problem solving and reasoning abilities. Overall, Student's performance on both clusters suggested a relative strength in visual processing and a relative weakness in general acquired information. Student's Working Memory Index (WMI) standard score of 71 was in the Very Low to Low range and equivalent to a percentile rank of 3. Student's Processing Speed Index (PSI) standard score of 56 was within the Very Low range. There was evidence that Student had difficulty understanding the instructions and responded randomly to items, even though instructions were repeated several times. Overall, the testing results indicated that

Student was likely to have considerable difficulty accurately performing cognitively on problems and activities considered manageable by other children his age. Exhibit P-47.

16. On academic achievement testing, using the Woodcock-Johnson Tests of Achievement - 3rd Edition (WJ-III Ach), results indicated that Student's overall academic functioning was within the Very Low range (Brief Achievement = 63); demonstrating that his overall academic skills were commensurate with his estimated cognitive functioning. Student's score of 60 (0.1 percentile) on the Brief Reading cluster was within the Very Low range. Analysis of the two subtests which comprise the Brief Reading cluster indicated that Student's reading of isolated words and his reading comprehension skills were equally underdeveloped. His reading was limited to the identification of letters and two letter words. On the Brief Mathematics cluster, Student obtained a score of 79, which fell within the Low to Low Average level of performance. On the Brief Writing cluster, Darwin obtained a score of 78 which fell within the Low to Low Average level of performance. Analyses of the subtests that comprise this cluster indicated that Student's spelling skills were limited to monosyllable words. Overall, Student's achievement in math and writing were better developed than his reading skills. Exhibit P-47.

17. Assessments of Student's Behavioral/Emotional Functioning indicated At-Risk levels of hyperactivity, At-Risk to Clinically Significant levels of Atypical Behaviors, Clinically significant Levels of Social Withdrawal, At-Risk to Clinically Significant level of Inattention and At-Risk range related to adaptability, social skills and functional communications. On the Children Autism Rating Scale - Second Edition, Standard Version Observation Form (CARS-2) Student obtained a score of 36 which was consistent with mild-to-moderate symptoms of Autism Spectrum Disorder. Areas that significantly impacted his score included: a) consistent aloofness

to or unawareness to what others are doing; b) emotional response is often inhibited or excessive; c) has difficulty with changes in his routine; d) unusual visual response (will often stare through people or into space); e) has varied response to sounds; and f) verbal communication is preoccupied with echolalia or excessive questioning. Independent Psychologist concluded these results suggested that Student met the criteria for Autistic Disorder. Exhibit P-47.

18. Independent Psychologist recommended, *inter alia*, that Student needed greater one-on-one interactions with his teachers and that he would benefit from placement in a low student-to-teacher ratio learning environment that is carefully planned and consistently implemented in terms of the physical arrangement, schedule of activities, and expected behaviors because this would increase the automaticity of Student's cognitions, allowing him to focus his cognitive resources on higher order cognitions (*i.e.*, analysis and understanding of new material), rather than the distractions that occur in a general education classroom; that Student would benefit from a Behavior Intervention Plan based on the data from a Functional Behavioral Assessment (conducted by a trained behavior analyst or school psychologist); and that Student would benefit from participating in a social skills group to help him learn and practice appropriate social skills. Exhibit P-47.

19. LICENSED S/L PATHOLOGIST conducted a bilingual Speech and Language Reassessment of Student in April and May 2013. In her May 10, 2013 report, Licensed S/L Pathologist found that Student continued to show evidence of a severe oral communication disorder that may impact academic performance. Significant language processing and production deficits related to language content, language form, and language use were found in the presence of low expressive and receptive vocabulary. Articulation, voice quality and fluency skills ability

were found to be within normal limits for his age and gender. She reported that these deficits may impact Student's ability to (1) follow lengthy oral and written directions; (2) formulate grammatically correct sentences for oral and written language tasks; (3) participate appropriately in oral language activities; and (4) understand the meaning of lengthy, complex oral language presented by teachers. She recommended that Student would continue to benefit from direct speech and language therapy, focused on vocabulary development, language comprehension, consistent use of basic grammatical structures and pragmatic skill development. Exhibit P-48.

20. On March 22, 2013, prior to completion of the independent psychological and S/L reevaluations of Student, Student's IEP team convened for an annual IEP review. At that meeting, Student's teachers reported progress by Student in ESL, reading, written expression and improvement with working independently. The IEP team decided that Student should receive ten hours per week of Specialized Instruction (nine hours outside and one hour inside General Education), four hours per month of S/L Pathology and 120 minutes per month of Behavioral Support Services. The LEA representative stated that the team would reconvene upon receipt of the independent reevaluations of Student. Exhibits P-12, P-13.

21. At the end of the fourth reporting period for school year 2012-2013 (June 20, 2013), Student was reported to be progressing on all of his March 22, 2013 IEP goals, except for his S/L goal to use a complete sentence to describe events, toward which he made no progress, and on one math goal and two S/L goals which had not been, or had just been, introduced. Special Education Teacher reported that Student had shown a lot of progress in the area of math, had increased his ability to use phonics and word analysis skills when decoding, had improved in reading sight words, and had improved in writing his ideas and completing written assignments. Social Worker reported that Student had made significant progress following directions and

responding appropriately to verbal prompts, and had shown progress toward being able to independently stay on task and complete his assignments. Exhibit P-33.

22. Student attended an Extended School Year (ESY) program at City Elementary School in summer 2013 and was reported as Progressing on his March 22, 2013 IEP academic goals. Exhibit P-34.

23. On June 13, 2013, an IEP team meeting was convened to review Student's IEE psychological and S/L reevaluations, which had been provided to DCPS on June 7, 2013. Independent Psychologist and Licensed S/L Pathologist reviewed their evaluations for the IEP team. Special Education Coordinator stated that the DCPS representatives needed time to complete reviews of the IEE assessments and stated that the IEP team would meet again over the summer. On August 15, 2013, at the urging of Petitioner's Counsel, an IEP meeting was again convened. Most of the DCPS representatives at the meeting were part of a summer IEP team and did not know the Student. The team agreed to change Student's disability classification to Autism but decided it did not have sufficient data to change Student's placement to a full time special education placement, which Mother thought was necessary. Exhibits P-19, P-16.

24. At the August 15, 2013 IEP meeting, Petitioner's counsel requested an OT reevaluation of Student, which, as of November 19, 2013, was in progress. Exhibits P-19, R-24.

25. On November 4, 2013, at a Resolution Session meeting after the due process complaint was filed in this case, City Elementary School LEA REP stated that the school IEP team was thinking about suggesting that Student be placed in a full-time high functioning autism program. Exhibit R-23, Testimony of Investigator. However, at the next Resolution Meeting on November 19, 2013, LEA Rep proposed to increase Student's Specialized Instruction hours to 12 hours per week, of which two hours would be "push-in" and 10 hours "pull-out." DCPS'

autism coordinator explained that City Elementary School did not have a program for children with high-functioning autism (FHA), and she stated that Student did not need an FHA program. Exhibit P-24. Mother and DCPS were unable to reach an agreement through the resolution process.

CONCLUSIONS OF LAW

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

Burden of Proof

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

Analysis

- 1. Did DCPS deny Student a FAPE by failing to timely and fully evaluate him for all suspected areas of disability including for autism, Occupational Therapy (OT) and Speech Language (S/L) needs?**

The first issue raised by Mother is whether DCPS failed to conduct appropriate special education evaluations of Student. At closing argument, Petitioner's counsel conceded that DCPS had not failed to conduct appropriate S/L evaluations but maintained that DCPS should have evaluated Student for suspected autism and should have conducted a more comprehensive OT assessment to evaluate Student's sensory needs.

Student was evaluated in late 2007 and early 2008, at the CARE Center (DCPS) and was found eligible to receive special education services with the disability classification

Developmental Delay (DD). He was provided full-time special education in a resource room setting with only five students until the 2010-2011 school year. In the winter of 2011, DCPS conducted a triennial reevaluation of Student, including an educational assessment, a S/L assessment, a Social History assessment, a Psychological assessment, and an OT assessment. Based upon that data, Student's MDT team determined that he continued to be eligible for special education services as a Student with Multiple Disabilities (Speech-Language Impairment and OHI-ADHD). On December 18, 2012, DCPS authorized Mother to obtain a publicly-funded IEE comprehensive psychological reassessment of Student. In his April 22, 2013 report, Independent Psychologist diagnosed Student with mild to moderate autistic disorder. At an August 15, 2013 IEP meeting for Student, Petitioner's counsel requested an OT reevaluation of Student, which, as of November 19, 2013, was in progress.

U.S. Department of Education regulations require that, as part of a special education reevaluation, the LEA must administer such assessments as may be needed to produce the data needed to determine (i) whether a child is a child with a disability and (ii) what are the educational needs of the child. *See* 34 CFR § 300.305(a), (c). The LEA must ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, communicative status and motor abilities. 34 CFR § 300.304(c)(4). Decisions regarding the areas to be assessed are determined by the suspected needs of the child. Office of Special Education and Rehabilitative Services, U.S. Department of Education, Analysis of Comments and Changes, 71 Fed. Reg. 46643 (2006).

In this case, DCPS conducted extremely comprehensive, bilingual, reevaluations of this Student in 2011. Petitioner contends that DCPS should have also evaluated Student specifically

for autism. On October 23, 2012, Student's pediatrician provided a letter which diagnosed Student with autism and other disorders. The evidence does not establish when Mother provided that letter to DCPS. However, on December 18, 2012, DCPS authorized Mother to obtain an independent comprehensive psychological assessment of Student. On August 15, 2013, following receipt of Independent Psychologist's comprehensive psychological in June 2013, Student's IEP team changed his disability classification to Autism.

The IDEA does not set a time frame within which an LEA must conduct a reevaluation after receiving a request from a student's parent. *See Herbin ex rel. Herbin v. District of Columbia*, 362 F.Supp.2d 254, 259 (D.D.C.2005). In light of the lack of statutory guidance, *Herbin* concluded that "[r]evaluations should be conducted in a 'reasonable period of time,' or 'without undue delay,' as determined in each individual case." *Id.* (quoting Office of Special Education Programs Policy Letter in Response to Inquiry from Jerry Saperstone, 21 IDELR 1127, 1129 (1995)). *See, also, Smith v. District of Columbia*, 2010 WL 4861757, 3 (D.D.C. Nov. 30, 2010). I find that in this case, DCPS authorized Mother to obtain an IEE psychological reevaluation of Student within a reasonable period of time of DCPS' receipt of Pediatrician's October 23, 2012 letter concerning the autism diagnosis.

Petitioner also contends that DCPS' OT evaluations of Student were not sufficiently comprehensive. Petitioner did not offer any competent evidence that the OT evaluations were not adequate. I conclude, therefore, that Petitioner has not shown that DCPS failed to assess Student in all areas related to his suspected disabilities.

2. Did DCPS deny Student a FAPE by failing to provide him appropriate IEPs since October 2011?

Petitioner contends that Student's City Elementary School IEPs, beginning with his April 29, 2011 IEP, were all inappropriate because they lacked appropriate academic goals and speech

goals, failed to provide services for autism disorder and S/L disorders, failed to provide all academic services in an outside of general education setting, failed to provide appropriate behavioral support services, failed to offer Extended School Year (ESY) services and failed to provide appropriate in-school accommodations and modifications. DCPS maintains that the IEPs were all appropriate and enabled Student to benefit educationally.

An IEP is the vehicle used by an IEP team to assess a student's needs and assign a commensurate learning environment. *See, e.g., Gill v. District of Columbia*, 751 F.Supp.2d 104, 108 (D.D.C.2010). The IEP team examines the student's educational history, progress, recent evaluations, and parental concerns prior to implementing a FAPE for the student. *Id.* At a minimum, the IEP and the corresponding FAPE must "provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). To determine whether a FAPE has been provided, a hearing officer must determine "[f]irst, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act'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." *A.M. v. District of Columbia*, 2013 WL 1248999, 11 (D.D.C.2013), quoting *Rowley, supra*, 458 U.S. at 206-07.

Before reaching the substantive concerns about Student's IEPs, I first consider a separate procedural compliance issue raised by Petitioner. Petitioner alleges that DCPS failed to provide her adequate notice of a March 22, 2013 IEP annual review meeting. Petitioner knew about the meeting and attended, but she claims that Special Education Coordinator had not told her it was to be an IEP meeting. Petitioner did not tell her attorney about the meeting. The IDEA

regulations require that the LEA must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, by, *inter alia*, notifying parents of the purpose, time, and location of the meeting and who will be in attendance. *See* 34 CFR § 300.322(a). DCPS produced at the due process hearing a copy of a March 2, 2013 letter of invitation, printed in English and Spanish, notifying Mother of the March 26, 2013 meeting. The English version of the invitation states that the purpose of the meeting was to conduct an annual review of Student's IEP. As noted, Mother did attend the meeting and was an active participant. Student's bilingual ELL teacher served as translator for Mother. I find that Petitioner has not shown that DCPS failed to ensure that she had the opportunity to participate at the March 22, 2013 IEP meeting.

Turning next to the second, substantive, prong of the IEP inquiry, I consider whether the respective IEPs were reasonably calculated to enable Student to receive educational benefits. Petitioner's complaint concerns the appropriateness of Student's April 29, 2011 IEP, March 26, 2012 IEP and March 22, 2013 IEP (amended on August 15, 2013). The IDEA's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. District of Columbia*, 846 F.Supp.2d 197, 202 (D.D.C.2012) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).)

The April 29, 2011 IEP

Student's April 29, 2011 IEP provided that he would receive 10 hours per week of Specialized Instruction outside the General Education setting, four hours per month of S/L Pathology and 240 minutes per month of Behavioral Support Services. DCPS asserts that Mother's challenge to the 2011 IEP is barred by the IDEA's two-year statute of limitations. *See*

20 U.S.C. § 1415(b)(6)(B); *Clay v. District of Columbia*, 831 F.Supp.2d 36, 50 (D.D.C. 2011) (Statute provides “[a]n opportunity for any party to present a complaint . . . which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint[.]”) Mother filed her complaint in this case on October 21, 2013. She attended the April 29, 2011 IEP meeting and knew, or should have known, about the content of the IEP. I find that Petitioner’s claims concerning the content of the April 29, 2011 IEP are barred by the two-year statute of limitations.

Petitioner’s counsel attempts to surmount the two-year limitations bar by arguing that DCPS denied Student a FAPE by not revising the 2011 IEP, sometime in the 2011-2012 school year, before the March 26, 2012 IEP annual review meeting. The IDEA requires that a child’s IEP team review the IEP not less than annually and revise the IEP, as appropriate, to address any lack of expected progress toward annual goals and in the general curriculum, the results of any reevaluation, information about the Student provided by the parents, the Student’s anticipated needs and other matters. *See* 34 CFR § 300.324(b). The evidence at the hearing did not establish a lack of progress by Student. Indeed, at the end of the Second Advisory period, Student was reported as “Mastered” or “Progressing” on almost all of his 2011 IEP annual goals. His teacher reported that Student “continues to work hard. He is very eager to answer questions and to express himself during class discussions. He requires one on one attention to master assignments/concepts. He is a joy to have in class.” Petitioner has not pointed to any reevaluation, meeting request by the parent, or other event that would have triggered a requirement for DCPS to convene Student’s IEP team before the annual review meeting in March 2012. I find, therefore, that Petitioner has not shown facts that would have required Student’s IEP team to have reviewed the April 29, 2011 IEP sooner than the statutory annual

review date.

The March 26, 2012 IEP

The City Elementary School IEP team convened on March 26, 2012 for the annual review of Student's IEP. At that meeting, which Mother attended, Student's regular education and special education teachers reported that Student had done very well on a reading comprehension test. They reported his strengths – reading fluency, math calculation, and good handwriting – and weaknesses – reading comprehension, math problem solving. Special Education Teacher reported that Student had “improved so much.” The school social worker reported that Student had mastered many of his behavioral goals and the S/L pathologist reported that Student had improved since the prior year. The 2012 IEP team continued Student's ten hours per week of Specialized Instruction (with one hour moved to the general education classroom setting) and four hours per month of S/L Pathology. The team reduced Student's Behavioral Support Services to 120 minutes per month.

Petitioner's expert, Educational Consultant, opined that the March 26, 2012 IEP annual goals were not appropriate because the goals were written “way above” Student's abilities, as identified in the IEP's Baselines, and were not likely to be achievable in one year. The IDEA requires that each child's IEP must include annual goals to enable the child to be involved in and make progress in the general education curriculum. *See* 34 CFR § 300.320(a)(2). Even if Educational Consultant is correct that the March 26, 2012 IEP annual goals were beyond Student's reach, that does not mean that the goals would not have enabled Student to be involved in and make progress in the general education curriculum or that the IEP was inappropriate. *See, e.g., Tice By and Through Tice v. Botetourt County School Bd.*, 908 F.2d 1200, 1207-1208 (4th Cir.1990) (Court should not disturb an IEP simply because we disagree with its content. Rather, we must defer to educators' decisions as long as an IEP provided the child “the basic

floor of opportunity that access to special education and related services provides.” (quoting, *Rowley, supra* 458 U.S. at 201)).

Educational Consultant also testified that 2012 IEP was deficient for want of a behavior intervention plan (BIP). The IDEA does not require that a BIP be incorporated into a child’s IEP. *See School Bd. School Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1011 (8th Cir. 2006). The Act does require that, in the case of a child whose behavior impedes his learning or that of others, the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 20 U.S.C. § 1414(d)(3); 34 CFR § 300.324(a)(2)(i). At the March 26, 2012 IEP meeting, Student’s teachers and Social Worker reported that Student did not have a behavior problem. The classroom teacher reported that Student was comfortable in school and “love[d] to please.” Special Education Teacher said Student cooperated and was able to complete an activity or task. Social Worker said Student “does not have a behavior problem.” (Mother likewise affirmed that Student had changed a lot and behaved much better at home.) I find, therefore, that Petitioner has not shown that, at the time March 26, 2012 IEP was developed, Student had behavior issues for which his IEP team was required to develop a BIP or other behavioral interventions and supports.

Petitioner contends that the March 26, 2012 IEP should have included an ESY program for Student. 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. *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 68 -69 (D.D.C. 2008) citing *MM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 537–38 (4th Cir.2002). Petitioner presented no persuasive evidence that at the time the March 26, 2012 IEP was developed, Student had a need for ESY services to avoid jeopardizing his educational gains during the regular school year.

Finally, Educational Consultant opined that at the time the 2012 IEP was developed Student required Specialized Instruction for all of his core academic instruction and that the IEP did not contain sufficient accommodations and modifications to ensure that Student could access his education. In coming to this opinion, Educational Consultant focused on Student's academic achievement as measured by the WJ-III Ach achievement tests administered by Independent Psychologist in spring 2003. However, the appropriateness of an IEP placement is judged prospectively, not by the effectiveness of the program in hindsight. *See, e.g., S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56 (D.D.C. 2008):

[B]ecause the question . . . is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so, . . . the measure and adequacy of an IEP can only be determined as of the time it is offered to the student. . . . Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement.

Id. 66-67 (quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir.2008) (internal quotation marks and citation omitted).

Student's March 26, 2012 IEP carried over, generally unchanged, the Specialized Instruction services from his 2011 IEP. At the end of the Advisory Period preceding the March 26, 2012 IEP meeting, Student was reported as "Mastered" or "Progressing" on almost all of his 2011 IEP annual goals. His teachers and related services providers had only positive reports at the IEP meeting about Student's progress and improvement over the school year. Academic progress is one of the "yardsticks" used by courts to assess the validity and sufficiency of an IEP. *See, e.g., Smith v. District of Columbia*, 846 F.Supp.2d 197, 201 (D.D.C. 2012). I find that by continuing Student's successful academic program in the March 26, 2012 IEP the City Elementary School IEP team provided Student personalized instruction with sufficient support services to permit him to benefit educationally from that instruction. *See Id.* Parent has not shown that Student was denied a FAPE by the March 26, 2012 IEP.

The March 22, 2013 IEP (Revised August 15, 2013)

Prior to the March 22, 2013 IEP meeting, DCPS issued funding authorizations for Mother to obtain independent comprehensive psychological and S/L evaluations of Student. Pending receipt of the completed assessments, the City Elementary School IEP team met on March 22, 2013 for Student's annual IEP review meeting and continued Student's Specialized Instruction and Related Services unchanged from his March 26, 2012 IEP.

Petitioner's Counsel provided the 2013 IEE reevaluation reports to DCPS until June 7, 2013. In the IEE psychological evaluation, Independent Psychologist diagnosed Student with mild to moderate Autistic Disorder. He reported, *inter alia*, that Student needed greater one-on-one interactions and that Student would benefit from placement in a low student to teacher ratio learning environment allowing him to focus his cognitive responses on higher order cognitions rather than the distractions that occur in a general education classroom.

The IDEA regulations require an LEA to ensure that the IEP team revises a child's IEP, as appropriate, to address the results of reevaluations, such as the IEE psychological and S/L reevaluations of Student obtained by the Petitioner in this case. After Petitioner's Counsel forwarded the 2013 IEE reevaluations to DCPS on June 7, 2013, DCPS convened a IEP meeting on June 13, 2013. However the DCPS representative indicated that DCPS had not completed written reviews of the reevaluations and was not prepared to make a placement decision. DCPS did not reconvene an IEP team to review the 2013 IEE reevaluations until August 15, 2013. The August 15, 2013 IEP team changed Student's disability classification to Autism, but the DCPS representatives indicated they had no data available to determine whether Student needed a full-time placement. As of the due process hearing date, except for changing Student's disability classification to Autism, Student's IEP team had still not revised the March 22, 2013 IEP.

DCPS' failure to ensure that Student's IEP team timely considered the 2013

psychological and S/L reevaluations and made appropriate revisions to the March 22, 2013 IEP, before the beginning of the 2013-2014 school year, was a procedural violation of the IDEA. *See D.R. ex rel. Robinson v. Government of District of Columbia*, 637 F.Supp.2d 11, 18-19 (D.D.C. 2009). Such delays are actionable only if “those procedural violations affected the student's substantive rights.” *Id.* A delay does not affect substantive rights if the student’s education would not have been different had there been no delay. *Id.* In this case, DCPS’ delay has affected Student’s substantive rights. When the parties in this case convened for the resolution meeting in November 2013, the DCPS representatives agreed that Student requires more comprehensive services for his Autism Spectrum Disorder disability. (DCPS initially proposed placing Student in a full time program for high functioning children with autism.) Had DCPS ensured that Student’s IEP team made timely and appropriate revisions to Student’s IEP after DCPS received the IEE evaluations in June 2013, Student could have received appropriate IEP services from the beginning of the 2013-2014 school year. I conclude, therefore, that Student has been denied a FAPE since the beginning of the 2013-2014 school year.

3. Did DCPS fail to implement Student’s IEPs by not providing all of the hours of Speech Language services specified in the IEPs?

Student’s March 26, 2012 and March 22, 2013 IEPs provided that he would receive four hours per month of S/L Pathology services outside the General Education setting. From the beginning of January 2013 until May 7, 2013, a period of 16 school weeks, DCPS did not provide S/L services to Student because the provider was on maternity leave. (Exhibits P-38, P-61). DCPS, therefore, failed to provide Student approximately 16 hours of S/L services required by his IEP. The IDEA is violated when a school district deviates materially from a student’s IEP. *See Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) (“[A] material failure to implement an IEP violates the IDEA. A material failure occurs when

there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP."); accord *S.S. ex rel. Shank v. Howard Road Acad.*, 585 F. Supp. 2d 56, 68 (D.D.C. 2008); *Catalan v. District of Columbia*, 478 F.Supp.2d 73, 75 (D.D.C.2007). *Wilson v. District of Columbia*, 770 F.Supp.2d 270, 275 (D.D.C.2011). I find that DCPS' failure to provide Student S/L services from January until May 2013 was a material deviation from his IEP, and therefore a denial of FAPE. Petitioner also alleges that in both the 2011-2012 and 2012-2013 school years, Student missed a significant number of S/L service hours, that were not made up, when the S/L pathologist was in other meetings or absent, when Student was busy with other school activities or there was a long weekend. Courts applying the *Van Duyn* standard "have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld." *Johnson v. District of Columbia*, 2013 WL 4517176, 4 (D.D.C. Aug. 27, 2013) (citations and internal quotations omitted.). I find that such occasional missed S/L services due to conflicts arising Student's other activities, school closings or unavoidable provider absences are a "minor discrepancy" and do not rise to the *Van Duyn* material failure to implement standard.

In her due process complaint, Petitioner also alleged that DCPS failed to implement all of Student's behavioral support services in the 2011-2012 and 2012-2013 school years. Student's 2011 and 2012 IEPs both provided that he would receive 120 minutes per month of behavioral support services. School Social Worker's un rebutted testimony established that since the 2011-2012 school year, he has provided Student 30 minutes per week of behavioral support services, as required by the IEPs. I find that Petitioner has not shown that DCPS failed to implement the behavioral support services mandated by Student's IEPs.

4. Did DCPS deny Student a FAPE in summer 2013 by failing to individually

tailor the ESY program to Student, which resulted in regression and by failing to provide adequate S/L and Behavioral Support services in Student's ESY program?

Extended School Year (ESY) services are necessary to a FAPE when the benefits a child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months. *MM ex rel. DM v. School Dist. of Greenville County*, 303 F.3d 523, 537-538 (4th Cir. 2002) “The determination whether services beyond the regular school day are essential for the child to receive any educational benefit is necessarily fact and case specific.” *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 980 (4th Cir.1990). “[T]he 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.” *MM, supra*, quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 184 (3d Cir.1988). “A student’s ESY is substantively appropriate if it is individually tailored and consistent with the student’s needs and ‘reasonably calculated to enable the child to receive educational benefits.’” *Pachl ex rel. Pachl v. School Bd. of Independent School Dist. No. 11* 2005 WL 428587, 14 (D.Minn. 2005), quoting *Rowley, supra*, 458 U.S. at 206-07.

Student’s March 22, 2013 IEP provided that Student would receive ESY services over the summer break, including 19 hours per week of Specialized Instruction outside General Education and 30 minutes per week of S/L Pathology. In her due process complaint, Petitioner contends that these services were insufficient to prevent regression. However, there was no evidence adduced at the due process hearing that the ESY program in the March 22, 2013 IEP was not reasonably calculated for Student to receive educational benefits. *Cf. Pachl, supra* (A student’s ESY is an individualized extension of specific services beyond the school year that is designed to make the level of regression and recoupment comparable to nondisabled peers,

rather than facilitate educational progress.) Petitioner has not met her burden of proof on this claim.

Remedy

Special Education Hearing Officers have broad discretion in ordering relief under the IDEA. *See, e.g., G.G. ex rel. Gersten v. District of Columbia*, 924 F.Supp.2d 273, 281 (D.D.C.2013) (Once a court holds that the public placement violated the IDEA, the court enjoys broad discretion in granting such relief as it determines is appropriate.) In this decision, I have found that DCPS denied Student a FAPE by failing to timely convene Student's IEP team to review and revise his IEP after receiving his 2013 IEE psychological and S/L reevaluations. Petitioner's expert, Educational Consultant, observed Student at City Elementary School during the current school year in both the general education setting and the special education pull-out classroom. He observed that in the latter setting, which had only four students, Student performed quite well. However, in the general education setting with 15 students, Student was distracted by the greater sensory stimuli and did not remain on task when the teacher was attending to other children.

Educational Consultant recommended that Student be placed in a self-contained special education setting for all of his core curriculum subjects, but that Student would benefit from interaction with nondisabled peers at other school times such as lunch and "specials" classes. Educational Consultant has extensive experience working with children with autism spectrum disorders. For eight years, he was Director of Autism Education Programs for a group of schools in Maryland serving children with autism and other emotional disorders. I found his testimony, which was not refuted by any DCPS witness, to be credible. Accordingly, I will order DCPS to convene Student's IEP team to provide Student a placement in accordance with Educational Consultant's recommendation.

Independent S/L Pathologist opined that considering the severity of Student's language processing disability, it would have been appropriate to increase Student's S/L services to five to six hours per month beginning with the April 29, 2011 IEP. This expert has never observed Student in school or spoken with his teachers or S/L service providers. DCPS S/L Pathologist, who has worked with Student since 2010, testified that Student is making some progress under his current IEP program of four hours per month of S/L services. Her testimony is supported by Student's IEP Progress Reports, including the November 7, 2013 report, in which this provider reported that Student was progressing on four of his five IEP S/L annual goals. I found this witness' testimony more persuasive than that of Independent S/L Pathologist. Therefore, I will not require DCPS to increase Student's regular IEP S/L services.

Petitioner also seeks an award of compensatory education. The IDEA gives hearing officers "broad discretion" to award compensatory education as an "equitable remedy" for students who have been denied a FAPE. *See Reid v. District of Columbia*, 401 F.3d 516, 522-523 (D.C. Cir. 2005). A compensatory education award must "rely on individualized assessments" after a "fact specific" inquiry. *Id.* at 524. "In formulating a new compensatory education award, the hearing officer must determine 'what services [the student] needs to elevate him to the position he would have occupied absent the school district's failures.'" *Stanton v. Dist. of D.C.*, 680 F.Supp.2d 201, 206 (D.D.C. 2010) (quoting *Anthony v. District of Columbia*, 463 F.Supp.2d 37, 44 (D.D.C. 2006); *Reid*, 401 F.3d at 527.) *See, also, e.g., Turner v. District of Columbia*, 2013 WL 3324358, 10 -11 (D.D.C. July 2, 2013). 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. *Gill v. District of Columbia*, 770 F.Supp.2d 112, 116-117 (D.D.C.2011), *aff'd.*, *Gill v. District of Columbia*, 2011 WL 3903367, 1 (D.C. Cir. Aug. 16, 2011).

In this decision, I have found that Student has been denied a FAPE by DCPS' failure to convene Student's IEP team to make appropriate revisions to his IEP before the beginning of the 2013-2014 school year. I found persuasive Educational Consultant's testimony that based upon the findings in Independent Psychologists's April 22, 2013 report and other data, Student requires placement in a small-group education setting for all of his core academic subjects – for 20 to 25 hours per week. Under Student's March 22, 2013 IEP, he has only been provided nine hours per week of Specialized Instruction outside the General Education setting. Educational Consultant recommended compensatory education in the form of 120 hours of direct tutoring, including 60 hours in Reading, and 30 hours each in Written Expression and Mathematics. However, Educational Consultant based his recommendation upon his opinion that Student was denied a FAPE since the April 2011 IEP, a period of approximately two and one-half school years. I have found that Petitioner has only established that Student has been denied a FAPE for approximately one-fifth of that time period – since the beginning of the 2013-2014 school year. Accordingly, I will order DCPS to provide Student 24 hours of direct tutoring as a compensatory education remedy for DCPS' failure to make appropriate revisions to Student's IEP before the beginning of the 2013-2014 school year.

In addition, I have found that DCPS denied Student a FAPE by failing to implement the S/L services required by Student's IEPs from January to May 2013 resulting in Student's missing approximately 16 hours of S/L services required by the IEPs. Independent S/L Pathologist recommended that Student receive one hour per week of additional S/L services for the remainder of the school year to make up for the missed services. I find that this recommendation is appropriate and supported by the evidence, and I will order DCPS to provide these additional S/L services as a compensatory education remedy.

SUMMARY

In this decision, I have found that DCPS has denied Student a FAPE by failing to ensure that his IEP team made appropriate revisions to his March 22, 2013 IEP after receiving the 2013-IEE psychological and S/L reevaluations. I will order DCPS to convene the IEP team to revise Student's IEP, as appropriate, including, specifically, to provide all of Student's core academic course instruction in a self-contained small classroom setting. I have also found that DCPS denied Student a FAPE by failing to provide his IEP S/L services from January to May 2013. As compensatory education remedies for DCPS' denials of FAPE, I will order DCPS to provide Student 24 hours of direct academic tutoring, and one additional hour per week of S/L services for the rest of the school year.

ORDER

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

1. Within ten school days of issuance of this Order, DCPS shall reconvene Student's IEP team to review the 2013 psychological and S/L reevaluations, to consider all other relevant data pursuant to 34 CFR § 300.324 and to revise, as appropriate, Student's IEP. The revised IEP shall provide, *inter alia*, for Student's placement in a self-contained, small classroom, setting for all of his core academic course instruction;
2. DCPS shall provide Student, as compensatory education, (a) one additional hour per week of S/L Pathology services, beginning no later than February 10, 2014, for the remainder of the regular school year and (b) 24 hours of direct, one-on-one, tutoring in Reading, Written Expression and/or Mathematics as may be reasonably determined by DCPS to be most beneficial to Student. Provision of these tutoring services shall be completed within a reasonable period, but not later than by the end of the 2014 DCPS ESY program; and

3. All other relief requested by Petitioner herein is denied.

Date: January 20, 2014

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

NOTICE OF RIGHT TO APPEAL

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