

**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
June 16, 2014

PETITIONER,
on behalf of STUDENT,¹

Date Issued: June 16, 2014

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Student Hearing Office,
Washington, D.C.

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came for a hearing 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 Student has been denied a free appropriate public education (FAPE) by DCPS' November 14, 2013 Individualized Education Program (IEP) and by a failure to implement his IEP services.

¹ Personal identification information is provided in Appendix A.

On May 1, 2014, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. Pursuant to the IDEA, the due process hearing was convened before this Impartial Hearing Officer on June 10, 2014 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. DCPS was represented by DCPS' COUNSEL. Mother testified, and called as witnesses EDUCATIONAL ADVOCATE 1, EDUCATIONAL ADVOCATE 2 and EDUCATIONAL ADVOCATE 3. DCPS called as witnesses SPEECH-LANGUAGE PATHOLOGIST and TRANSITION COORDINATOR. Petitioner's Exhibits P-1 through P-24 were admitted into evidence without objection. DCPS offered no exhibits. Counsel for both parties made opening statements and closing argument. Neither party requested leave to file a post hearing memorandum.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

- Whether DCPS' November 14, 2013 IEP is inappropriate for Student because it lacks current present levels of performance and appropriate goals in Math, Reading and Written Expression, lacks appropriate goals in transition planning, does not address Student's lack of progress in speech-language and, on account of Student's deficits in reading and writing, lacks sufficient support in all core subjects;
- Whether DCPS failed to implement Student's IEPs during the 2013-2014 school year by failing to provide Student specialized instruction during the first two weeks of the school year and/or by failing to provide him with related Speech and Language Therapy and Counseling Services as required by his IEP; and

- Whether DCPS denied Student a FAPE by not ensuring that the parent participated in the November 14, 2013 IEP meeting.

For relief, Petitioner requests an order for DCPS to ensure that Student's IEP is revised to provide pull-out services in reading, writing and mathematics and push-in services for other academic subjects, updated present levels of performance information, increased speech services, increased counseling services, and a revised transition plan with independent living goals. Petitioner also seeks an award of compensatory education for educational harm to student resulting from DCPS' alleged denials of FAPE in the 2013-2014 school year.

FINDINGS OF FACT

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

1. Student, a AGE youth resides with Mother in the District of Columbia. He is in the GRADE at CITY HIGH SCHOOL. Testimony of Mother.
2. Student is eligible for special education and related services as a student with Multiple Disabilities (MD) based upon concomitant impairments, Learning Disability and Other Health Impairment (Attention Deficit/Hyperactivity Disorder). Exhibit P-4, Testimony of Mother.
3. Prior to attending City High School, Student attended PCS MIDDLE SCHOOL for the preceding three school years. Testimony of Mother. PCS Middle School has elected to be treated as a local education agency (LEA) for purposes of the IDEA and the Rehabilitation Act of 1973, *see* 5-E DCMR § 924.2, and is as an independent LEA. Hearing Officer Notice.
4. Student's IEP was revised on December 12, 2012 at PCS Middle School.

Mother recalls that there was another IEP meeting close to summer 2013. Testimony of Mother. However, there was no PCS Middle School IEP, dated after December 12, 2012, offered into evidence. Student's first City High School IEP, dated November 14, 2013, states that Student's last IEP annual review meeting was December 12, 2012. I find, from the preponderance of the evidence, that Student's last PCS Middle School IEP was developed at the December 12, 2012 IEP team meeting.

5. On August 14, 2013, Petitioner's Counsel wrote SPECIAL EDUCATION COORDINATOR at City High School, by email, to inform her that Student would be attending City High School for the upcoming 2013-2014 school year and that Student's last IEP had been developed in July 2013 [*sic*]. Petitioner's Counsel reported that Student's last IEP provided five hours of Specialized Instruction outside the General Education setting and five hours of Specialized Instruction in General Education, as well as speech and language and counseling related services. Petitioner's Counsel requested that an IEP team meeting be scheduled for Student early in the new school year to discuss academic supports that Student required. Exhibit P-12.

6. The only PCS Middle School IEP offered into evidence was dated November 21, 2011. Exhibit P-5. Neither the December 12, 2012 IEP nor any subsequent PCS Middle School IEP was offered into evidence. Mother testified that she did not receive copies of any PCS Middle School 2012-2013 IEPs and that she did not provide Student's PCS Middle School IEP to City High School. When Mother registered Student as a new student at City High School, she checked a box on the enrollment form to indicate that Student had an IEP from his previous school. Testimony of Mother.

7. At the beginning of the 2013-2014 school year, Student's City High School class schedule provided for only regular education classes. Mother telephoned the

principal's office to state that Student should be in special education classes. It took two weeks for City High School to revise Student's schedule. Testimony of Mother. I find, by the preponderance of the evidence, that after Mother's call, City High School adopted and implemented Student's December 12, 2012 PCS Middle School IEP. See Exhibit P-4 (referring to December 12, 2012 as the last IEP Annual Review Meeting Date).

8. Although the evidence does not establish when Student's PCS Middle School IEP was obtained by City High School, Speech-Language Pathologist's supervisor provide her a copy of the prior IEP in August 2013, and she understood from the beginning of the 2013-2014 school year that Student was to receive 60 minutes per week of Speech-Language services. Testimony of Speech-Language Pathologist.

9. Student's City High School IEP team convened for the annual review Student's IEP on November 14, 2013. Student attended the IEP meeting in person. Mother knew of the meeting date and arranged to attend by telephone. At the start of the IEP meeting, the IEP team had technical difficulties reaching Mother by telephone. Mother testified that she did not attend any of the meeting because of the technical difficulties. Transition Coordinator, who served as the LEA/School Representative at the IEP meeting, testified that the IEP team eventually did connect with Mother by telephone and that Mother spoke to the team members. Testimony of Mother, Testimony of Transition Coordinator. I found these witnesses to be equally credible. Because the evidence is in equipoise, I find that Mother did not carry her burden of proof to establish that she did not participate in the November 14, 2013 IEP meeting.

10. Following the November 14, 2013 IEP meeting, Mother spoke by telephone with City High School SPECIAL EDUCATION TEACHER. Special Education Teacher told Mother that the IEP team had sat down and looked over Student's last IEP.

He said they were going to make some changes. During the call, Special Education Teacher carried his telephone around to four of Student's teachers, who talked to Mother about how Student was doing. Mother did not request Special Education Teacher to reconvene the IEP meeting. She just waited to see what the school staff was going to do. Testimony of Mother.

11. The only PCS Middle School IEP offered into evidence dated from November 21, 2011. The 2011 IEP provided Student five hours (300 minutes) per week of Specialized Instruction in the General Education setting, five hours (300 minutes) per week outside General Education, 30 minutes per week of Behavioral Support Services and 60 minutes per week of Speech-Language Pathology. Exhibit P-5. Those services were not changed in Student's 2012-2013 school year PCS Middle School IEP.

Testimony of Mother.

12. Student's City High School November 14, 2013 IEP included the same Areas of Concern as the November 21, 2011 IEP, including Mathematics, Reading, Written Expression, Communication/Speech and Language and Emotional, Social and Behavioral Development. The November 14, 2013 IEP provided 450 minutes per week of Specialized Instruction outside General Education and 235 minutes of Mathematics services in the General Education setting. The City High School IEP team continued Student's Behavioral Support Services at 120 minutes per month and reduced Speech-Language Pathology from 60 minutes per week to 120 minutes per month. The November 14, 2013 IEP added a Post-Secondary Transition Plan for Student. Exhibits P-4, P-5.

13. The Present Levels of Performance statements, as well as the "Needs" and "Impact on the student" sections, in the November 21, 2011 IEP for Reading and for

Written Expression, were duplicated in the November 14, 2013 IEP. The Present Levels of Performance statement for Mathematics in the November 14, 2013 relies upon Student's Woodcock-Johnson III achievement scores from October 2011. The Needs and Impact sections for Mathematics in the November 14, 2013 IEP are copied, almost verbatim, from the 2011 IEP.

14. DCPS Service Trackers for Behavioral Support Services indicate that Student did not receive IEP counseling services until January 30, 2014. Student received 60 minutes of group counseling in January 2014, and 120 minutes per month in February, March and April 2014. Exhibit P-1.

15. Service Trackers for Speech-Language Pathology indicate that Student began receiving Speech-Language services on September 9, 2013. He received 310 minutes of services in September 2013, no services in October 2013, 120 minutes of services in November 2013, no services in December 2013, January 2014, February 2014 and March 2014. Exhibit P-2. The missed services in February and March 2014 were due to weather-related school closures and student unavailability. Speech-Language Pathologist missed at least 5-6 days of scheduled sessions in fall 2013 and she has made up at least 5 of those days. Testimony of Speech-Language Pathologist. I found Speech-Language Pathologist to be a credible witness. I found Mother's testimony to the effect that Student had told her he was not pulled out for speech-language services less persuasive, because Mother did not have first-hand knowledge.

16. On his 2013-2014 school year report card, for the First Term, Student received a B+ in English, D in French, D in Biology, F in Algebra, and C in World History. At the end of the Third Term, he earned a B in English, C- in French, C in Biology, B- in Algebra, B in World History. Exhibit P-11.

17. As of the due process hearing date, IDEA reevaluations of Student were underway. Mother was informed by DCPS that after the reevaluations were completed, everything was “on the table” in terms of making changes to Student’s IEP. Testimony of Mother.

CONCLUSIONS OF LAW

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

Burden of Proof

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

- Did DCPS deny Student a FAPE by not ensuring that Mother participated in the November 14, 2013 IEP meeting?

The IDEA requires that for all IEP team meetings, the education agency take steps to ensure that the parent is present or is afforded the opportunity to participate, including—

- (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and
- (2) Scheduling the meeting at a mutually agreed on time and place.

34 CFR § 300.322(a). In this case, Mother alleges that she had notice of the scheduled November 14, 2013 IEP meeting for Student, and that she had arranged to attend by telephone. She testified, however, that she was unable to attend because of technical

problems connecting by telephone and that the school staff held the IEP meeting without her. Mother's testimony that she did not attend the meeting was rebutted by Transition Specialist, who testified that the telephone connection was eventually made and that Mother spoke by telephone with the IEP team members. Moreover, in a December 27, 2013 email to Special Education Coordinator concerning the IEP meeting, see Exhibit P-13, Educational Advocate 2 did not claim that Mother did not attend, but that the parent was requesting a copy of the IEP "that was discussed at the meeting." I find that Mother has not proven that the November 14, 2013 IEP meeting was held without her.

- Is DCPS' November 14, 2013 IEP inappropriate for Student because it lacks current present levels of performance and appropriate goals in Math, Reading and Written Expression, lacks appropriate goals in transition planning, does not address Student's lack of progress in speech/language and, on account of Student's deficits in reading and writing, lacks sufficient support in all core subjects?

Mother contends that City High School's November 14, 2013 IEP is inappropriate for Student because of out-of-date Present Levels of Performance, inappropriate annual goals, insufficient speech and language services and insufficient special education services in core academic subjects. In *K.S. v. District of Columbia*, 962 F.Supp.2d 216 (D.D.C.2013), U.S. District Judge Boasberg reviewed case law precedents on the requirements for an appropriate IEP:

The IEP must be formulated in accordance with the terms of IDEA and "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Rowley*, 458 U.S. at 204, 102 S.Ct. 3034. IDEA also requires that children with disabilities be placed in the "least restrictive environment" so that they can be educated in an integrated setting with children who do not have disabilities to the maximum extent appropriate. See [20 U.S.C.] § 1412(a)(5)(A). . . . IDEA provides a "basic floor of opportunity" for students, *Rowley*, 458 U.S. at 201, 102 S.Ct. 3034, rather than "a potential-maximizing education." *Id.* at 197 n. 21, 102 S.Ct. 3034; see also *Jenkins v. Squillacote*, 935 F.2d 303,

305 (D.C.Cir.1991) (inquiry is not whether another placement may be “*more* appropriate or better able to serve the child”) (emphasis in original); *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir.2009) (IDEA does not guarantee “the best possible education, nor one that will maximize the student’s educational potential”; instead, it requires only that the benefit “‘cannot be a mere modicum or *de minimis*; rather, an IEP must be likely to produce progress, not regression or trivial educational advancement.’”) (quoting *Cypress–Fairbanks Indep. Sch. Dist. v. Michael F. ex rel. Barry F.*, 118 F.3d 245, 248 (5th Cir.1997)). Consistent with this framework, “[t]he question is not whether there was more that could be done, but only whether there was more that had to be done under the governing statute.” *Houston Indep. Sch. Dist.*, 582 F.3d at 590.

Courts have consistently underscored that the “appropriateness of an IEP is not a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so”; thus, “the court judges the IEP prospectively and looks to the IEP’s goals and methodology at the time of its implementation.” Report² at 11 (citing *Thompson R2–J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148–49 (10th Cir.2008)). Academic progress under a prior plan may be relevant in determining the appropriateness of a challenged IEP. *See Roark ex rel. Roark v. Dist. of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C.2006) (“Academic success is an important factor ‘in determining whether an IEP is reasonably calculated to provide education benefits.’”) (quoting *Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 522 (6th Cir.2003)); *Hunter v. Dist. of Columbia*, No. 07–695, 2008 WL 4307492, at *9 (D.D.C. Sept. 17, 2008) (citing cases with same holding). . . .

An IEP, nevertheless, need not conform to a parent’s wishes in order to be sufficient or appropriate. *See Shaw v. Dist. of Columbia*, 238 F.Supp.2d 127, 139 (D.D.C.2002) (IDEA does not provide for an “education . . . designed according to the parent’s desires”) (citation omitted). While parents may desire “more services and more individualized attention,” when the IEP meets the requirements discussed above, such additions are not required. *See, e.g., Aaron P. v. Dep’t of Educ., Hawaii*, No. 10–574, 2011 WL 5320994, at *32 (D.Hawai’i Oct. 31, 2011) (while “sympathetic” to parents’ frustration that child had not progressed in public school “as much as they wanted her to,” court noted that “the role of the district court in IDEA appeals is not to determine whether an educational agency offered the best services available”); *see also D.S. v. Hawaii*, No. 11–161, 2011 WL 6819060, at *10 (D.Hawai’i Dec. 27, 2011) (“[T]hroughout the proceedings, Mother has sought, as all good parents do, to secure the best services for her child. The role of the district court in IDEA appeals, however, is not to determine whether an educational agency offered the best services, but whether the services offered confer the child with a meaningful benefit.”).

² U.S. Magistrate Judge Kay’s Report and Recommendation, June 10, 2013

K.S., 962 F.Supp.2d at 220-222.

i. Present Levels of Performance

In developing an IEP, an IEP team is directed to “review existing evaluation data on the child, including—(i) evaluations and information provided by the parents of the child; (ii) current classroom-based, local, or State assessments, and classroom-based observations; and (iii) observations by teachers and related services providers.” 20 U.S.C. § 1414(c)(1)(A). “[O]n the basis of that review,” the IEP team must then “identify what additional data, if any, are needed to determine,” among other things, “the present levels of academic achievement” of a student. *Id.* § 1414(c)(1)(B). *See D.B. v. New York City Dept. of Educ.* 966 F.Supp.2d 315, 329 -330 (S.D.N.Y.2013). The IDEA requires the statement of a child’s present levels of performance in the IEP to include how the child’s disability affects his involvement and progress in the general education curriculum. *See Department of Education, Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46662 (August 14, 2006).

Petitioner’s expert, Educational Advocate 1, opined that the statements of Present Levels of Performance for the academic areas of concern in Student’s November 14, 2013 IEP were inadequate, because the statements referenced Woodcock-Johnson III educational testing (W-J III) conducted in 2007 and appeared to be identical to the present levels statements in the 2011 IEP. Educational Advocate 1 is correct that the Present Levels of Performance (as well as the “Needs” and “Impact on the student” sections) in the 2013 IEP, for Reading and for Written Expression, were lifted, verbatim, from the November 21, 2011 IEP. The Present Levels of Performance statement for Mathematics in the November 14, 2013 relies upon WJ-III scores from 2011 rather than the 2007 scores. However, the Needs and Impact sections for Mathematics are copied,

almost verbatim, from the 2011 IEP.

If these Present Levels of Performance in the November 14, 2013 IEP were accurate, it would mean that Student did not progress academically over his last two school years at PCS Middle School or during his first three months at City High School. In that case, the City High School IEP team would have been required to significantly increase Student's Specialized Instruction services to address the supposed lack of progress. *See Schroll v. Bd. of Educ. Champaign Cmty. Unit. Sch. Dist. # 4*, No. 06–2200, 2007 WL 2681207, at *4–*5, 2007 U.S. Dist. LEXIS 62478, at *12 (C.D.Ill. Aug. 10, 2007) (“An IEP is not inappropriate simply because it does not change significantly on an annual basis[, but] . . . if the student made no progress under a particular IEP in a particular year, . . . the propriety of an identical IEP in the next year may be questionable.”)

The November 14, 2013 IEP team made only minor changes to Student's Specialized Instruction services. The likely explanation for this is that the Present Levels of Performance data in the November 14, 2013 IEP were neither current nor accurate. For example, the Present Level of Educational Performance for Reading in the 2013 IEP states that, “According to Reading A-Z, [Student's] reading skills are at a first-grade level.” However, it was reported on an October 7, 2011 Psychological and Educational Reevaluation that Student scored at the 2.9 grade equivalent on Broad Reading (Borderline), using the WJ-III achievement tests. I conclude that the Present Levels of Performance for Mathematics, Reading and Written Expression in the November 14, 2013 City High School IEP were simply copied from a prior PCS Middle School IEP. Clearly, these Present Levels of Performance statements do not meet the IDEA's requirement to state, accurately, Student's present levels of performance or how

his disability affects his involvement and progress in the general education curriculum.

ii. IEP Goals

The IDEA requires the IEP to include “a statement of measurable annual goals, including academic and functional goals, designed to . . . meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum . . . [and] meet each of the child’s other education needs that result from the child’s disability.” 20 U.S.C. § 1414(d)(1)(A)(i)(II).

Educational Advocate 1 opined that the Annual Goals in Student’s November 14, 2013 IEP were inappropriate because many goals were duplicated from the November 21, 2011 IEP – indicating to the witness that Student had not made any progress over the preceding two years. The expert is correct that in the November 14, 2013 IEP, the single annual goal for Reading was repeated verbatim from one of the Reading goals in the November 21, 2011 IEP. However, new annual goals were developed for Mathematics and Written Expression. I conclude that the annual goal for Reading in the November 14, 2013, copied from the 2011 IEP, does not meet the IDEA requirement to include annual goals designed to meet the child’s needs that result from his disability to enable him to be involved in and make progress in the general education curriculum.

The failures to include appropriate Present Levels of Performance and appropriate Reading goals in Student’s IEP were procedural violations of the IDEA. Procedural violations of IDEA do not, in themselves, mean a child was denied a FAPE. *See Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 78 (D.D.C.2004). Only those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable. *See Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006). However, “[o]ne of

the purposes of the IEP is to ensure that the services provided are formalized in a written document that can be assessed by parents and challenged if necessary. See *Alfono v. District of Columbia*, 422 F.Supp.2d 1, 6 (D.D.C.2006) ('[A] written, complete IEP is important to serve a parent's interest in receiving full appraisal of the educational plan for her child, allowing a parent to both monitor her child's progress and determine if any change to the program is necessary.')

N.S. ex rel. Stein v. District of Columbia, 709 F.Supp.2d 57, 73 (D.D.C.2010). In the present case, by duplicating outdated and inaccurate Present Levels of Performance and by copying Student's annual goal for Reading from a prior IEP, DCPS failed to offer Student a "complete" IEP in the November 14, 2013 document. I conclude that these deficiencies deprived Mother of her IEP participation rights, in that the IEP, as written, did not provide a "full appraisal" of the educational plan for Student. This rendered the November 14, 2013 IEP inadequate, resulting in a denial of FAPE to Student.

Petitioner also contends that the transition goals in the November 14, 2013 IEP are inappropriate. The IDEA requires that beginning not later than the first IEP to be in effect when the child turns 16, the IEP must include—

- (1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and
- (2) The transition services (including courses of study) needed to assist the child in reaching those goals.

34 CFR § 300.320(b). The postsecondary goals identified for Student in the November 14, 2013 IEP are to attend college and seek employment as an Automotive Technician. Transition Specialist testified that these goals were based upon a transition skills inventory assessment required by DCPS and were appropriate for Student. Educational

Advocate 2 testified that the transition plan should have included “Life-Skill” goals. However, independent living skills goals are only required “where appropriate.” See 34 CFR § 300.320(b)(1), *supra*. Petitioner has not shown that independent living skill goals are either needed by or appropriate for this Student, who is only in the GRADE.

iii. IEP Speech and Language Services

Speech and language services for Student were halved in the November 14, 2013 IEP to 120 minutes per month. Petitioner contends that this reduction in services was inappropriate. Speech-Language Pathologist testified that Student has made gains in the classroom this school year with reading comprehension and expressive communication. Although Speech-Language Pathologist’s services to Student have been irregular until the spring of 2014, she cites Student’s progress in the classroom as well as her own impressions of Student in support of the appropriateness of reducing Student’s speech and language services in the 2013 IEP. Petitioner adduced no competent evidence that the speech and language services offered Student in this IEP were not reasonably calculated to provide him educational benefits or that he continues to require 240 minutes per month of these services. I find that Petitioner has not met her burden of proof on this claim.

iv. Specialized Instruction in Core Subjects on account of Student's deficits in Reading and Writing

The November 14, 2013 IEP provides Student 450 minutes per week of Specialized Instruction outside the General Education setting and 235 minutes per week of Mathematics services in General Education. Educational Advocate 1 opined that Student requires at least three hours per day (900 minutes per week) of Specialized Instruction, because the IEP reports that Student’s “reading skills are at a first-grade

level.” However, that grade equivalency was based upon an undated Reading A-Z assessment of Student made prior to 2011. When Student was administered the W-J III achievement test in October 2011, he was functioning in the Borderline range (2.9 grade equivalent) in Reading. (See Exhibit P-7. There are no more recent formal assessments in the hearing record.) Educational Advocate 1 did not conduct her own educational assessment of Student, and, in fact has never met him. Educational Advocate testified that she reviewed Petitioner’s exhibits. However, she relied upon an out-of-date reading assessment, when there was more recent data available in those exhibits. I find that her opinion merits little, if any, weight.

Student’s GRADE report card shows that his grades have generally improved over the current school year. For the First Term, he received a B+ in English, D in French, D in Biology, F in Algebra, and C in World History. At the end of the Third Term, he earned a B in English, C- in French, C in Biology, B- in Algebra, B in World History. These grades support Speech Language Pathologist’s testimony that Student is making gains this 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 Petitioner has not met her burden of proof to establish that the hours of Specialized Instruction provided in the November 14, 2014 IEP were not appropriate, *i.e.*, not reasonably calculated to enable Student to receive educational benefits.

- Has DCPS failed to implement Student’s IEPs during the 2013-2014 school year by failing to provide Student specialized instruction during the first two weeks of the school year and/or by failing to provide Student with related Speech and Language Therapy and Counseling Services as required by his IEP?

Petitioner contends that in the 2013-2014 school year, DCPS has failed to

implement Student's IEP in two respects. First, after Student transferred from PCS Middle School to City High School, there was a two-week delay in providing special education services. Second, City High School failed to provide Student much of his IEP behavioral support and speech-language related services. The IDEA is violated when a school district deviates materially from a student's IEP. *See Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir.2000). A petitioner "must show more than a *de minimis* failure to implement all elements of [the student's] IEP, and instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP in order to prevail on a failure-to-implement claim. Courts applying this standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld." *See Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268 (D.D.C.2013) (citations and internal quotations omitted.)

With regard to the claim that DCPS failed to implement Student's IEP for the first two weeks of the 2013-2014 school year, Petitioner frames the issue incorrectly. For children who transfer between LEAs within the same state, the IDEA requires:

If a child with a disability (who had an IEP that was in effect in a previous public agency in the same State) transfers to a new public agency in the same State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency either—

- (1) Adopts the child's IEP from the previous public agency; or
- (2) Develops, adopts, and implements a new IEP that meets the applicable requirements in §§300.320 through 300.324.

34 CFR § 300.323(e) (emphasis supplied). Because Student transferred from PCS

Middle School to DCPS over the 2013 summer break, he did not enroll in DCPS “within the same school year.” Therefore the IDEA intrastate transferee provision did not apply and DCPS was not obligated to implement the PCS Middle School IEP.

Notwithstanding, DCPS violated the IDEA by failing to have an IEP in effect for Student at the beginning of the 2013–2014 school year. Public agencies need to have a means for determining whether children who move into the LEA’s jurisdiction during the summer are children with disabilities and for ensuring that an IEP is in effect at the beginning of the school year. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46682 (August 14, 2006). City High School did provide special education and related services to Student beginning two weeks after school started, apparently implementing Student’s last PCS Middle School IEP.³ The two-week delay was a procedural violation of the IDEA. *See* 20 U.S.C. § 1414(d)(2)(A); *K.E. v. District of Columbia*, 2014 WL 242986, 7 (D.D.C. Jan. 23, 2014) (Plain mandate of the IDEA that a district should have an IEP in place “[a]t the beginning of each school year.”)

Although a procedural violation may rise to the level of a denial of a FAPE, “an IDEA claim is viable only if those procedural violations affected the student’s substantive rights.” *Lesesne, supra*, 447 F.3d at 834; *K.E., supra* at 5-6, citing, *Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 811–12 (5th Cir.2003) (“procedural defects alone do not constitute a violation of the right to a FAPE unless

³ Mother testified that she thought a revised IEP for Student was developed at PCS Middle School near the summer of 2013 and Petitioner’s Counsel wrote Special Education Coordinator that Student’s last IEP was developed in July 2013. However, the November 14, 2013 City High School IEP states that Student’s last IEP annual review meeting date was December 6, 2012. No more recent PCS Middle School were offered in evidence. I have found, by the preponderance of the evidence, that Student’s last PCS Middle School IEP dated from December 6, 2012.

they result in the loss of an educational opportunity”); *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir.2001) (“a procedural violation of the IDEA is not a *per se* denial of a FAPE; rather, a school district's failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents”).

In the present case, the evidence establishes that some 12 days before the start of the 2013-2014 school year, Petitioner’s Counsel informed Special Education Coordinator, by email, that Student would be enrolling in City High School, and that he was a child with a disability and had a current IEP from PCS Middle School. Further, DCPS’ Speech Language Pathologist testified that she had received Student’s PCS Middle School IEP from her superiors in August 2013 and knew what speech and language services were required. I find, therefore, that DPCS was on notice in August 2013 that Student was a child with a disability and the District was obligated to ensure that there was an IEP in effect for him at the beginning of the 2013-2014 school year. By September 9, 2013, DCPS had effectively adopted, and was implementing, Student’s December 6, 2012 PCS Middle School IEP. I conclude that Student suffered a loss of educational opportunity and was denied a FAPE by this two week delay in providing special education and related services to him. *Cf. K.E., supra* at 7 (DCPS’ failure to have IEP in place, for two weeks at start of school, causes Court to find that Student was denied a FAPE.)

The hearing evidence also establishes that in the 2013-2014 school year, Student was not provided all of the Behavioral Support Services and Speech-Language Services required by his IEP. Under both the December 6, 2012 PCS Middle School IEP and the November 6, 2013 City High School IEP, Student was to receive 120 minutes per month

of Behavioral Support Services. City High School did not begin providing Behavioral Support Services to Student until January 30, 2014. No explanation for why these services were not provided earlier in the school year was given at the due process hearing. I find that, prior to January 30, 2014, DCPS failed to provide some eight hours Behavioral Support Services required by Student's IEP. This was a failure to implement a substantial provision of the IEP.

Under Student's PCS Middle School IEP, he was to receive 60 minutes per week of speech and language services. This was reduced to 120 minutes per month in the November 14, 2013 IEP. Speech-Language Pathologist testified that she missed at least five to six sessions of speech-language services due to her not being available and that in May and June 2014, she had made up at least five sessions with Student. I conclude that Petitioner has not shown that the remaining unfulfilled hours of prescribed speech and language services constituted more than a *de minimis* failure to implement the speech-language element of his IEPs. *See Johnson, supra. v. District of Columbia*, 962 F.Supp.2d 263, 268 (D.D.C.2013).

REMEDIES

For relief in this case, Petitioner requests that DCPS be ordered to convene Student's IEP team to review and revise his IEP. Because I have found that Student has been denied a FAPE by the November 14, 2013 IEP, which fails to meet the requirements of the IDEA for appropriate and accurate Present Levels of Performance and annual goals, I will order DCPS to convene Student's IEP team, including the parent to review, and revise his IEP in conformity with 34 CFR § 300.324. It was established at the due process hearing that Student is being reevaluated at the present time. Therefore, I will order DCPS to promptly reconvene Student's IEP team upon receipt of the

completed IDEA reevaluations.

Compensatory Education

Petitioner also seeks a compensatory education award. 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*, 952 F.2d 31, 42-43 (D.D.C.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 my May 1, 2014 Prehearing Order in this case, I alerted the parties that to establish a basis for a compensatory education award, the Petitioner must be prepared at the hearing to document with exhibits and/or testimony “the correct amount or form of compensatory education necessary to create educational benefit” to enable the hearing officer to project the progress Student might have made, but for the alleged denial of FAPE, and further quantitatively defining an appropriate compensatory education award. I informed the parties that if an adequate record were not established,

the Hearing Officer may be obliged to deny a compensatory education award or to continue the hearing for the Petitioner to offer additional evidence sufficient to support the claim for compensatory education.

In this decision, I have found that Student was denied a FAPE by DCPS' failure to provide IEP services for the first two weeks of the 2013-2014 school year, by DCPS' failure to implement his Behavioral Support Services until late January 2014 and by DCPS' inclusion of inaccurate, out of date, Present Levels of Performance and the inappropriate Reading goal in Student's November 14, 2013 IEP. In the first two weeks of the 2013-2014 school year, Student was not provided some 20 hours of Specialized Instruction and three hours of related services. In addition, I have found that City High School failed to provide Student some eight hours of Behavioral Support Services required by his IEP.

At the due process hearing in this case, Petitioner called Educational Advocate 3 to testify about a compensatory education plan she proposed. This witness recommends that Student be awarded 140 hours of specialized tutoring in the core academic subjects, and 28 hours each of independent counseling and speech and language services. The hours of compensatory services recommended by Educational Advocate 3 bear no relation whatever to replacement of educational services Student should have received in the first place. *See Reid, supra*, 401 F.3d at 518. Moreover, Educational Advocate 3 testified that her recommendation for 140 hours of compensatory specialized tutoring was based upon her understanding that DCPS failed to provide Student full-time Specialized Instruction, requested by the parent, for the November 14, 2014 IEP. However, there was no evidence in this case that Student required full-time special education in order to receive educational benefits from his IEP. Educational Advocate 3

has never met Student or conducted any type of assessment to determine the specific educational deficits caused by DCPS' denials of FAPE. For all these reasons, I find Educational Advocate 3's compensatory education proposal wholly unpersuasive.

I find that Petitioner has not met her burden to present evidence regarding Student's "specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *See Reid, supra*, 401 F.3d at 526. No credible evidence was introduced which would enable the Hearing Officer to project the additional educational benefits that likely would have accrued to Student from the special education services DCPS should have supplied in the first place. *See Id.* at 524. While a Court has discretion to take additional evidence concerning the appropriate compensatory education due a student, *see Gill v. District of Columbia*, 751 F.Supp.2d 104, 114 (D.D.C.2010), *aff'd.*, *Gill v. District of Columbia*, 2011 WL 3903367, 1 (D.C. Cir. Aug. 16, 2011), under the IDEA, I am constrained to issue my final Hearing Officer Determination within 45 days of the end of the resolution period (in this case by June 18, 2014). *See* 34 CFR § 300.515(a). Therefore, I will deny, without prejudice, Petitioner's request for a compensatory education award.

ORDER

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

ORDERED:

- i. DCPS shall ensure that upon receipt of Student's IDEA reevaluations, which were being conducted at the time of the due process hearing, Student's IEP team is promptly convened to review and revise his IEP in conformity with 34 CFR § 300.324 and this decision. The revision of Student's IEP shall be completed, at latest, in time to be implemented beginning the first day of the 2014-2015 school year;
- ii. Petitioner's request for compensatory education is denied without prejudice; and

iii. All other relief requested by Petitioner in this matter is denied.

Date: June 16, 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).