

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

Student Hearing Office
810 First Street, N.E.
Washington, D.C. 20002

Parent, on behalf of)	
STUDENT,¹)	
)	
Petitioner,)	
)	
v.)	
)	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,)	
)	
Respondent.)	

Hearing Officer: Frances Raskin

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

I. JURISDICTION

This proceeding was invoked in accordance with the Individuals With Disabilities Education Act ("IDEA"), as amended in 2004, codified at 20 U.S.C. §§ 1400, *et seq.*; the District of Columbia Code, §§ 38-2561.01, *et seq.*; the federal regulations implementing IDEA, 34 C.F.R. §§ 300.1, *et seq.*; and the District of Columbia regulations at D.C. Mun. Reg. tit. 5-E §§ 3000, *et seq.*

II. BACKGROUND

Petitioner is the parent of a _____-year-old student ("Student") with a disability. On April 6, 2012, Petitioner filed a due process complaint ("Complaint") against the District of Columbia Public Schools ("DCPS") alleging violations of the IDEA.

On April 10, 2012, this Hearing Officer was assigned to preside over this case. On April 18, 2012, Respondent DCPS filed a response to the Complaint.² Respondent filed its Response two days after the deadline established by IDEA.³

¹ Personal identification information is provided in Attachment A.
² Respondent did not challenge the sufficiency of the Complaint.
³ If Respondent has not sent a prior written notice under 34 C.F.R. § 300.503 to the parent regarding the subject matter contained in the parent's due process complaint, Respondent

On April 24, 2012, the parties participated in a resolution meeting but did not resolve the Complaint. The parties agreed to continue to work to resolve the Complaint through the end of the resolution session. Thus, the resolution period ended on May 6, 2012. The parties agreed that the forty-five day, due process hearing timeline began on May 7, 2012.

On May 10, 2012, this Hearing Officer held a prehearing conference in which Roberta Gambale, counsel for Petitioner, and Linda Smalls, counsel for Respondent, participated. During the prehearing conference, counsel agreed to schedule the due process hearing for June 12, 2012.

This Hearing Officer issued a prehearing conference summary and order ("prehearing order") on May 17, 2012. At the request of counsel for Petitioner, this Hearing Officer issued a revised prehearing order on June 7, 2012.

The due process hearing commenced at 9:00 a.m. on June 12, 2012. At the outset of the hearing, this Hearing Officer entered into evidence Petitioner's proposed exhibits⁴ and Respondent's proposed exhibits.⁵ Petitioner testified and presented no other witnesses on her behalf. Respondent rested on the record and presented no witnesses. After the parties presented oral closing arguments, the due process hearing concluded on June 12, 2012.

III. ISSUES PRESENTED.

This Hearing Officer certified the following issues for adjudication at the due process hearing:

A. Whether Respondent denied the Student a free, appropriate, public education ("FAPE") by failing to conduct a comprehensive psychological assessment in response to Petitioner's written request on October 4, 2011, and oral reiteration of that request on October 17, 2011;

must, within 10 days of receiving the due process complaint, send to the parent a response that includes (i) an explanation of why the agency proposed or refused to take the action raised in the due process complaint; (ii) a description of other options that the IEP Team considered and the reasons why those options were rejected; (iii) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and (iv) a description of the other factors that are relevant to the agency's proposed or refused action. 34 C.F.R. § 300.508(e).

⁴ This Hearing Officer admitted into evidence Petitioner's exhibits 1-2, and 4-14, inclusive. After Respondent objected to Petitioner's Exhibit 3, Petitioner withdrew pages 19-25 of this exhibit, which this Hearing Officer then identified as exhibit 3A. This Hearing Officer did not admit the remainder of Exhibit 3, i.e., pages 1-28, which is the Student's October 17, 2011, IEP, because Respondent had disclosed this IEP as R-4 and thus there was no need to admit the same document twice.

⁵ This Hearing Officer admitted into evidence Respondent's exhibits 1-7, inclusive.

B. Whether Respondent denied the Student a FAPE on October 17, 2011, by developing an individualized educational program (“IEP”) that lacks goals in mathematics to address his difficulties with applied problems, sufficient reading and writing goals,⁶ behavioral goals or a behavior implementation plan, testing accommodations,⁷ assistive technology (“AT”) that would enable the Student to communicate more effectively,⁸ and that fails to specify that the Student should take the alternate assessment rather than the regular statewide assessment; and

C. Whether Respondent denied the Student a FAPE on October 17, 2011, by developing an IEP that fails to provide the Student extended school year services (“ESY”) for the 2012 summer despite his significant deficits and evidence of regression.

Petitioner requests relief in the form of an order that requires Respondent to fund an independent comprehensive psychological assessment of the Student; review the assessment within fifteen days of receiving it, revise the Student’s IEP, and discuss placement and compensatory education. Petitioner seeks an order that requires Respondent to revise the Student’s IEP to incorporate goals in reading, writing, applied mathematics, and behavior, provide testing accommodations, and provide AT to the Student. Petitioner also seeks an order that requires Respondent to provide ESY and compensatory education to the Student.

IV. FINDINGS OF FACT

1. Petitioner is the mother of the Student.⁹ The Student is a -year-old young man who has completed his second year at a public senior high school.¹⁰ He is eligible for specialized instruction and related services as a student with an intellectual disability.¹¹

2. The Student has a long history of cognitive, language, adaptive functioning, and academic deficits.¹² His current full scale IQ is 60, which is in the deficient range of

⁶ Petitioner asserts that, in the area of reading, the IEP includes goals in reading comprehension and decoding but fails to address the Student’s deficits in all five areas of literature. Petitioner asserts that the Student’s reading goals assume that he reads on the third grade level while he actually comprehends material on the first grade, fifth month level. Finally, Petitioner asserts that, in writing, the IEP lacks goals to address the Student’s deficits in vocabulary and goals that address his need to learn to write sentences.

⁷ Petitioner asserts that the Student needs test questions read to him as a result of his deficits in reading comprehension.

⁸ Petitioner asserts that the Student requires an augmentative and alternate communication device.

⁹ Testimony of Petitioner.

¹⁰ *Id.*

¹¹ *Id.*; Respondent Exhibit 4 (October 17, 2011, IEP).

¹² Petitioner Exhibit 10 at 6 (October 20, 2009, report of Psychological Evaluation).

functioning.¹³ His verbal comprehension is below the first percentile of his typically developing students his age and in the deficient range.¹⁴ His perceptual reasoning is in the second percentile and in the deficient range.¹⁵ His working memory is in the third percentile and is in the low range of functioning.¹⁶ His processing speed is in the fourth percentile of his typically developing peers and in the low range.¹⁷

3. His overall adaptive functioning is in the first percentile and in the deficient range.¹⁸ His overall communication, academic, and self-direction skills are below the first percentile and in the deficient range.¹⁹ His overall self-care, community use, and health and safety skills are below the first percentile and in the deficient range.²⁰ His overall social and leisure skills are a relative strength, as they are in the tenth percentile and in the low-average range.²¹

4. The Student's presentation is consistent with a diagnosis of mild intellectual disability.²² As a result of his intellectual disability, the Student experiences difficulty maintaining his attention and/or concentration.²³

5. In 2009, the Student was performing below the first percentile of his typically developing peers in broad reading and in broad math.²⁴ His academic skills were similarly below age expectations as they were below the first percentile.²⁵

6. In 2010, when the Student was thirteen years old, his personal strengths were reflected by his deficient non-verbal reasoning, and very modest short-term memory and cognitive efficiency.²⁶ He displayed particularly delayed performance on tasks

¹³ Petitioner Exhibit 10 at 11.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 6. The Student has also been diagnosed with depressive disorder, not otherwise specified ("NOS"); anxiety disorder, NOS; and disruptive behavior disorder, NOS. *Id.* at 6-7.

²³ *Id.* at 6.

²⁴ *Id.* at 13.

²⁵ *Id.*

²⁶ Petitioner Exhibit 9 at 1-2 (May 21, 2010, Confidential Independent Educational Evaluation).

involving verbal comprehension.²⁷ His receptive vocabulary for standard English was within the deficient range and well below expectations for his age.²⁸

7. In 2010, as in 2009, the Student's social skills were in the low-average range.²⁹ His adaptive skills in all other areas were very deficient as compared to typically developing children his age.³⁰ His broad academic skills in reading and math were generally consistent with his deficient cognitive and adaptive-functioning abilities.³¹

8. In 2010, the Student was able to perform basic addition and subtraction operations.³² He had significant delays in all areas associated with written language.³³ He was willing to attempt oral reading in class and was able to spell some words when writing basic sentences.³⁴ He demonstrated considerable difficulty comprehending concepts presented.³⁵ He demonstrated difficulty with word recognition, vocabulary meaning, and overall comprehension of materials.³⁶ These deficits severely impact his overall skill acquisition and proficiency.³⁷

9. The Student needs an academic program that focuses on functional academics and vocational outcomes.³⁸ His instruction should be designed to help him learn to lead an independent life.³⁹ His academic goals should be designed with attention to functional outcomes, with vocational considerations taking priority.⁴⁰ In other words, rather than focusing on bringing his math and reading skills to grade level, his goals should focus on his development of math and reading skills tied to his vocational aspirations.⁴¹

10. The Student was comprehensively evaluated in 2009, when Petitioner obtained a comprehensive psychological evaluation from Johns Hopkins Department of Psychiatry and Behavioral Sciences.⁴² This evaluation included the Student's social, psychiatric, and educational history, as well as a review of his prior developmental, psycho-

²⁷ *Id.* at 2.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 3.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Petitioner Exhibit 10 at 9.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Petitioner Exhibit 10 at 1.

educational, and speech and language testing.⁴³ The evaluation reflected the results of assessment procedures administered to the Student as part of the evaluation, including behavioral observations and assessments of his cognitive processing and intellectual functioning; receptive language; adaptive functioning; executive functioning and attention; memory; fine-motor functioning; academic skills; and behavioral, emotional, and personality functioning.⁴⁴

11. In 2010, Respondent evaluated the Student's academic performance with a confidential educational evaluation.⁴⁵ The evaluator administered the ten subtests of the Wechsler Intelligence Scale for Children IV, which examined the Student's cognitive abilities in the areas of perceptual reasoning, verbal reasoning, working memory, and processing speed.⁴⁶ The evaluator also tested the Student's receptive vocabulary, adaptive behavior, attention, memory, and fine motor speed and dexterity.⁴⁷ The evaluator administered performance tests in broad math and broad reading.⁴⁸ Finally, the evaluator reviewed the Student's records, interviewed Petitioner and the Student's teacher, and conducted an observation of the Student's behavior during standardized testing.⁴⁹

12. On October 5, 2011, Petitioner submitted a request for a comprehensive psychological evaluation to the special education coordinator ("SEC") at the public senior high school the Student attends.⁵⁰ In the letter, Petitioner indicated that she would "wait for DCPS to complete the reevaluations of the Student" for a reasonable amount of time.⁵¹

13. On October 17, 2011, Respondent convened a meeting of the Student's IEP team to review and revise his IEP.⁵² Petitioner attended this meeting along with her educational advocate.⁵³ At the meeting, Petitioner orally reiterated her request for a comprehensive psychological evaluation of the Student.⁵⁴ Petitioner believed that, because he had matured in the time since his last comprehensive psychological evaluation, the

⁴³ *Id.* at 2.

⁴⁴ *Id.* at 2-6.

⁴⁵ Petitioner Exhibit 9 at 1.

⁴⁶ *Id.*

⁴⁷ *Id.* at 1-2.

⁴⁸ *Id.* at 2.

⁴⁹ *Id.* at 3.

⁵⁰ Petitioner Exhibit 1 at 1 (October 5, 2011, letter from Roberta Gambale to DCPS Special Education Coordinator, Records Specialist, and Placement Monitor).

⁵¹ *Id.*

⁵² Testimony of Petitioner; Respondent Exhibit 3 at 1 (October 17, 2011, IEP meeting notes); Respondent Exhibit 4 at 1 (Signatures of IEP Team Participants); 2-18 (IEP).

⁵³ Testimony of Petitioner.

⁵⁴ *Id.*

Student should be reevaluated.⁵⁵ At the meeting, the IEP team agreed that Respondent would conduct a comprehensive psychological evaluation of the Student.⁵⁶

14. At the October 17, 2011, meeting, the Student's special education teacher discussed his performance in school, and informed the IEP team that he was progressing toward meeting his IEP math goals.⁵⁷ She informed the IEP team that the Student was working on speed drills and multiplication and becoming more self-sufficient in taking notes.⁵⁸ Another teacher reported that the Student was putting more effort into his class work.⁵⁹

15. At the October 17, 2011, meeting, Petitioner reported that the Student's confidence had improved and that he communicated more with people outside of his class.⁶⁰ She reported that he takes public transportation to school because he no longer wants to ride the school bus.⁶¹ Petitioner also reported that the Student had difficulty with words that end in "s."⁶² Petitioner was referring to the Student's difficulties in written expression when he has to transform the endings of single nouns with endings such as "s," "e," and "y" to plural noun endings such as "es" and "ies."⁶³

16. The Student's speech-language pathologist reported that the Student's intelligibility was a weakness in that he often dropped off the ending of sounds of words.⁶⁴ She said that this impacted his ability to communicate his message.⁶⁵ She said he needed cues to provide correct answers, needed to improve on his grammar and punctuation, and that all of his teachers and coaches understand him moderately.⁶⁶

17. At the October 17, 2011, meeting, the speech-language pathologist informed the team that an augmentative and alternate communication device would not be appropriate for the Student as this device is designed for use by nonverbal and autistic children.⁶⁷ She offered to create a low-tech device for the Student to use for safety purposes.⁶⁸

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Respondent Exhibit 3 at 1.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Testimony of Petitioner.

⁶⁴ Respondent Exhibit 3 at 1.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 2.

⁶⁸ *Id.*

18. At the October 17, 2011, meeting, the IEP team revised the Student's IEP.⁶⁹ The IEP team developed annual goals in the areas of mathematics, reading, and written expression.⁷⁰ The IEP team also developed goals in the areas of communication/speech and language, and emotional, social and behavioral development.⁷¹

19. At the October 17, 2011, meeting the IEP team determined that the Student would receive 27.5 hours per week of specialized instruction outside the general education setting, 240 minutes per month of speech-language pathology outside the general education setting, and ninety minutes per month of behavioral support services outside the general education setting.⁷² The IEP team, with the exception of Petitioner and her educational advocate, decided that the Student did not require ESY for the 2012 summer.⁷³

20. At the time the October 17, 2011, IEP was developed, the Student had demonstrated strength in the area of math fluency as he was performing at the level of a student in the first month of third grade.⁷⁴ He was performing on the level of a student in the third month of second grade in broad math.⁷⁵ He was able to adequately perform basic addition and subtraction operations with speed and accuracy at the second grade level.⁷⁶ He also was able to compute one-digit multiplication problems.⁷⁷

21. However, the Student's fluency in correctly executing higher-level operations was significantly compromised as math concepts become more complex and abstract.⁷⁸ His difficulty comprehending and applying the skills necessary to solve problems using higher-level math concepts significantly impacted his ability to demonstrate successful grade-level performance in the general education curriculum.⁷⁹

22. The October 17, 2011, IEP contains four annual goals in the area of mathematics.⁸⁰ The first goal requires the Student to collect and organize data using information obtained from observations, measurements, surveys, or experiments, with teacher assistance, four out of five times with eighty percent accuracy.⁸¹ The second goal requires the Student to create a table and extend and recognize the linear pattern by its

⁶⁹ *Id.* at 3; Respondent Exhibit 4.

⁷⁰ Respondent Exhibit 4 at 2-5.

⁷¹ *Id.* at 7-9.

⁷² *Id.* at 10.

⁷³ *Id.* at 13; testimony of Petitioner.

⁷⁴ Respondent Exhibit 4 at 2.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 2-3

⁸¹ *Id.* at 2.

rule, with assistance, seven out of eight times with eighty percent accuracy.⁸² The third goal requires the Student to compute two- to four-digit multiplication and division problems with eighty percent accuracy in seven out of eight trials.⁸³ The fourth goal requires the Student to describe, model, draw, compare, and classify two- to three-dimensional shapes with eighty percent accuracy in seven of eight trials.⁸⁴

23. At the time the October 17, 2011, IEP was developed, the Student demonstrated relative strength in the area of reading fluency as he performed on the level of a student in the seventh month of second grade.⁸⁵ His other relative strength was letter-word identification, as he performed on the level of a student in the fifth month of second grade.⁸⁶ The Student appeared to be comfortable reading in class and, with assistance, would volunteer to read in small groups, with peers, or individually to the teacher.⁸⁷

24. In passage comprehension, the Student performed on the level of a student in the fifth month of first grade.⁸⁸ He performed at the level of a student in the second month of second grade in broad reading.⁸⁹ When given assistance with word recognition and meaning, he continued to struggle with overall comprehension of text and recalling facts and details.⁹⁰ He continued to need assistance with word recognition and meaning, required prompts and assistance with interpreting passages, and cues and assistance in recalling facts and details.⁹¹

25. When he was presented with reading comprehension tasks and assignments beyond the second-grade level, the Student became easily distracted and did not respond well to redirection.⁹² He eventually becomes uncooperative in completing the assignment and simply refuses to participate.⁹³ This response to grade-level instruction inhibited his progress in the general education curriculum.⁹⁴

26. The Student's October 17, 2011, IEP contains two annual goals in the area of reading.⁹⁵ The first goal requires him to consistently determine the relevant meaning of

⁸² *Id.* at 2.

⁸³ *Id.* at 3.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 4.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 3.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 4-5.

words in second-grade level expository text with high interest and low readability.⁹⁶ The second goal requires him to identify the elements of the story in third-grade level reading passages and analyze how major events lead from problem to solution.⁹⁷

27. At the time the October 17, 2011, IEP was developed, the Student exhibited relative strengths in written language in the areas of writing samples, with a grade equivalency of 2.2, and broad written language, with a grade equivalency of 2.0.⁹⁸ On weekly assignments, the Student was able to formulate short sentences that communicate main ideas and thoughts without the benefit of grammatical structure.⁹⁹ He had difficulty formulating his ideas utilizing structural analysis in written expression.¹⁰⁰ His limited use of vocabulary impeded his ability to write complete sentences, the foundation for paragraph and essay writing.¹⁰¹

28. When required to complete a difficult task, the Student refused to attempt to write the assignment regardless of prompts and encouragement, which led to behavioral outbursts.¹⁰² His limited skills in written expression, combined with his inappropriate behavioral responses to prompts and encouragement, hindered him from demonstrating progress in the general curriculum.¹⁰³

29. The October 17, 2011, IEP contains three annual goals in the area of written expression.¹⁰⁴ The first goal requires the Student to write up information on a topic that includes clear focus, sensibly ordered ideas, and sufficient supporting detail while using an outline and an exemplar, and while being provided teacher assistance.¹⁰⁵ The second goal requires the Student, with teacher assistance, to revise his draft of a composition to identify words and phrases that he could add to improve sentence formation and word choice and improve the logic and organization of the composition.¹⁰⁶ The third goal provides that, using orthographic patterns and rules for spelling from a third-grade word list, the Student would correctly spell a set of five words.¹⁰⁷

30. The October 17, 2011, IEP also contains three annual goals in the area of emotional, social, and behavioral development.¹⁰⁸ It provides that he would receive

⁹⁶ *Id.* at 4.

⁹⁷ *Id.* at 5.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 6

¹⁰¹ *Id.*

¹⁰² *Id.* at 5.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 6.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 8-9.

classroom accommodations, including repetition of directions, a location with minimal distractions, small group testing, the use of calculators, the option to provide oral responses to tests, breaks between subtests, breaks during a subtest, and extended time on subtests.¹⁰⁹ The IEP further provides that the Student would take the regular statewide assessment with accommodations, including repetition of directions, a location with minimal distractions, small group testing, the use of calculators, the option to provide oral responses to tests, breaks between subtests, breaks during a subtest, and extended time on subtests.¹¹⁰

31. The Student's academic transcript indicates that he passed all of his classes during the 2010-2011 school year and during the first half of the 2011-2012 school year.¹¹¹ The Student also passed all of his classes in the third term of the 2011-2012 school year.¹¹² As of June 5, 2012, the Student had earned eleven credits toward a high school certificate of completion and a cumulative grade point average of 2.8.¹¹³

32. Nonetheless, Petitioner believes that the Student has not made much academic progress since the end of the 2009-10 school year.¹¹⁴ Although he now writes full sentences, he does not punctuate his sentences properly or at all.¹¹⁵ She does not believe that he has made progress in reading, spelling, or comprehension.¹¹⁶

33. The Student's January 22, 2010, IEP provided that he was to receive ESY services during the summer of 2010.¹¹⁷ Petitioner enrolled him in ESY that year.¹¹⁸ Petitioner believes that the Student should receive extended school year services during the 2012 summer to prevent him from losing the academic knowledge and skills he gained during the 2011-2012 school year.¹¹⁹

34. Between October 17, 2011, and the date she filed the Complaint, Petitioner took no steps to follow up on her written request for a comprehensive psychological evaluation of the Student.¹²⁰ After filing the Complaint, on April 19, 2012, Petitioner sent

¹⁰⁹ *Id.* at 12.

¹¹⁰ *Id.*

¹¹¹ Respondent Exhibit 6 at 1 (DCPS Transcript of the 2010-2011 school year and the first half of the 2011-2012 school year.)

¹¹² Respondent Exhibit 5 at 1 (May 10, 2012, Report to Parents on Student Progress).

¹¹³ Respondent Exhibit 6 at 2 (Letter of Understanding)

¹¹⁴ Testimony of Petitioner.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*; Petitioner Exhibit 4 at 15 (January 22, 2010 IEP).

¹¹⁸ Petitioner Exhibit 6 at 1 (ESY Enrollment Form and attachments, signed April 8, 2010).

¹¹⁹ Testimony of Petitioner.

¹²⁰ Testimony of Petitioner.

another letter requesting this evaluation.¹²¹ As in the October 17, 2011, letter, Petitioner again stated that she would “wait for DCPS to complete the reevaluations of the Student” for a reasonable amount of time.¹²²

35. This Hearing Officer finds that Petitioner was a credible witness, although her expectations for the Student may be overly optimistic. While she expects that the Student should be performing on a fifth or sixth grade level, her expectations are belied by the documentary evidence in the record, including the independent psychological evaluations that recommended that the Student focus on gaining functional academic skills rather than striving to perform on a particular grade level.

36. Additionally, Petitioner forthrightly admitted that she did not follow up on her request for a comprehensive psychological evaluation before filing the due process complaint. She also acknowledged the Student’s progress in writing, including that he could write sentences even though he could not punctuate them correctly.

V. CONCLUSIONS OF LAW

The purpose of IDEA is “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs.”¹²³ Implicit in the congressional purpose of providing access to a FAPE is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.¹²⁴

FAPE is defined as:

Special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the State Education Agency . . . include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program.¹²⁵

¹²¹ Petitioner Exhibit 2 at 1 (April 19, 2012, letter from Roberta Gambale to DCPS Principal, Special Education Coordinator, Records Specialist, and Placement Monitor).

¹²² *Id.*

¹²³ *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-91 (1982); *Hinson v. Merritt Educ. Ctr.*, 579 F. Supp. 2d 89, 98 (2008) (citing 20 U.S.C. § 1400(d)(1)(A)).

¹²⁴ *Rowley*, 458 U.S. at 200; *Hinson*, 579 F. Supp. 2d. at 98 (citing *Rowley*, 458 U.S. at 200).

¹²⁵ 20 U.S.C. § 1401 (9); 34 C.F.R. § 300.17.

A school district need not maximize the potential of children with disabilities, but the door of public education must be opened in a meaningful way, and the IEP must provide the opportunity for more than only "trivial advancement."¹²⁶

In matters alleging a procedural violation, a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.¹²⁷ In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.¹²⁸

The burden of proof is properly placed upon the party seeking relief.¹²⁹ Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.¹³⁰ The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence.¹³¹ In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it.¹³² Unlike other standards of proof, the preponderance-of-evidence standard allows both parties to share the risk of error in roughly equal fashion,¹³³ except that when the evidence is evenly balanced, the party with the burden of persuasion must lose.¹³⁴

¹²⁶ *P. v. Newington Bd. of Educ.*, 546 F.3d 111 (2nd Cir. 2008) (citations omitted).

¹²⁷ 34 C.F.R. § 300.513 (a)(2).

¹²⁸ *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted).

¹²⁹ *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

¹³⁰ 20 U.S.C. § 1415 (i)(2)(c). *See also Reid*, 401 F.3d 516, 521 (D.C. Cir. 2005) (discussing standard of review).

¹³¹ *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted).

¹³² *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), *aff'd*, 512 U.S. 246 (1994).

¹³³ *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted).

¹³⁴ *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

VI. DISCUSSION

A. **Petitioner Failed to Prove that Respondent denied the Student a FAPE by Failing to Conduct a Comprehensive Psychological Evaluation in Response to Petitioner's Written Request of October 4, 2011, and Oral Reiteration of the Request on October 17, 2011.**

An evaluation consists of procedures used to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.¹³⁵ A reevaluation is defined as an evaluation conducted after the initial evaluation.¹³⁶

A public agency must ensure that a reevaluation of each child with a disability is conducted if the child's parent or teacher requests a reevaluation, but not more than once a year unless the parent and public agency agree otherwise.¹³⁷ Reevaluations should be conducted in a "reasonable period of time," and "without undue delay," as determined in each individual case.¹³⁸

As part of any reevaluation, the IEP team, and other qualified individuals,¹³⁹ must review existing evaluation data, and identify what additional data are needed, if any, to determine if the child continues to have a disability and to determine the educational needs of the child.¹⁴⁰ The IEP team also shall determine whether the child continues to need

¹³⁵ 34 C.F.R. § 300.15. In the District of Columbia, an evaluation includes a review by an IEP team of information provided by parents; existing data; and results of assessment procedures used to determine the child's present level of performance, educational needs, whether a child has a disability, and the nature and extent of the special education and related services that the child needs. D.C. Mun. Reg. tit. 5-E § 3001.1.

¹³⁶ D.C. Mun. Reg. tit. 5-E § 3001.1.

¹³⁷ 34 C.F.R. § 300.303 (a)(2).

¹³⁸ *Herbin v. District of Columbia*, 362 F. Supp. 2d 254, 259 (D.D.C. 2005) (upholding hearing officer's determination that four-month delay in reevaluating a student with a current IEP was not unreasonable) (citations omitted).

¹³⁹ 34 C.F.R. § 300.305(a). These "other qualified professionals" include professionals, who may not be a part of the child's IEP team, in the group that determines whether additional data are needed to make an eligibility determination and determine the child's educational needs.

¹⁴⁰ 34 C.F.R. § 300.305(a)(2)(i)(B). *See also* D.C. Mun. Reg. tit. 5-E § 3005.4 (IEP team, including other qualified professionals, must determine, in the case of a reevaluation of a child, (1) whether the child continues to have a disability; (2) the present levels of performance and educational needs of the child; (3) whether the child continues to need special education and related services; and (4) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general curriculum).

special education and related services, and whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.¹⁴¹ The IEP team need not convene a meeting to conduct this review.¹⁴²

Here, Petitioner requested a reevaluation of the Student on October 5, 2011. Petitioner testified that Respondent agreed to conduct this evaluation. Yet, Petitioner took no further steps to ensure the evaluation was completed in a timely fashion, despite asserting that she felt that it should be done because he son had matured and may have new or different needs.¹⁴³

Further, Petitioner failed to show that the Student was harmed by Respondent's failure to conduct a comprehensive psychological evaluation. The Student had been comprehensively reevaluated twice in the previous three years, once in 2009 and again in 2010. Petitioner presented no evidence to show that his academic, social, or behavioral needs had changed since 2010.¹⁴⁴

Thus, Petitioner failed to prove that the Student was denied a FAPE when Respondent failed to conduct a psychological reevaluation in response to Petitioner's request.

¹⁴¹ 34 C.F.R. § 300.305 (a)(2)(iii)-(iv).

¹⁴² 34 C.F.R. § 300.305 (b).

¹⁴³ The failure of Petitioner to follow up on her request for a reevaluation of the Student is especially troubling considering that she has been represented by counsel at all times relevant to the claims in the Complaint. See Respondent Exhibit 2 at 2, 10 (September 30, 2010, hearing officer determination) (index of names reveals that Petitioner was represented by the same counsel in that case).

¹⁴⁴ Additionally, at the outset of the due process hearing, counsel for Respondent provided counsel for Petitioner a copy of a psychological evaluation that Respondent had completed on June 7, 2012. This Hearing Officer provided counsel for Petitioner an opportunity to review the evaluation, discuss it with her client, and decide whether to proceed on this claim. After spending a few minutes reviewing the evaluation, counsel for Petitioner asserted that it was not a "comprehensive" psychological evaluation as Petitioner had requested and that Petitioner would not withdraw this claim. After Petitioner objected that Respondent did not include this evaluation in its disclosures, and thus the document was not admitted into evidence, this Hearing Officer informed the parties that she would take judicial notice that Respondent provided to Petitioner a document entitled "psychological evaluation." but that she would not consider this document, or Respondent's provision of it to Petitioner, in deciding this issue.

B. Petitioner Failed to Prove that Respondent Denied the Student a FAPE on October 17, 2011, by Developing an IEP that Lacks Goals in Mathematics to Address His Difficulties with Applied Problems, Sufficient Reading and Writing Goals, Behavioral Goals or a Behavior Implementation Plan, Testing Accommodations, AT that Would Enable the Student to Communicate More Effectively, or Because the IEP Fails to Specify that the Student Should take the Alternate Assessment Rather than the Regular Statewide Assessment.

School districts must ensure that "all children with disabilities residing in the State . . . who are in need of special education and related services" are identified.¹⁴⁵ Once such children are identified, a team, including the child's parents and select teachers, as well as a representative of the local educational agency with knowledge about the school's resources and curriculum, develops an individualized education program for the child.¹⁴⁶ The IEP must, at a minimum, provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.¹⁴⁷

The IEP team must review a student's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved.¹⁴⁸ The IEP team must revise the IEP, as appropriate, to address any lack of expected progress toward the annual goals and, if appropriate; the results of any re-evaluation, or information about the child provided to, or by, the parents.¹⁴⁹

Additionally, if the parent obtains an independent educational evaluation at public expense, or shares with the public agency an evaluation obtained at private expense, the IEP team must consider the results of the evaluation, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child.¹⁵⁰ In other words, an appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs,¹⁵¹ establishes annual goals related to those needs,¹⁵² and provides appropriate specialized instruction and related services.¹⁵³

In developing an IEP, the IEP team must consider the strengths of the child; concerns of the parents for enhancing the education of the child; the results of the initial or most recent evaluation of the child; and the academic, developmental, and functional needs

¹⁴⁵ *Branham v. District of Columbia*, 368 U.S. App. D.C. 151, 427 F.3d 7, 8 (D.C. Cir. 2005) (citing *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005)).

¹⁴⁶ *Branham*, 427 F.3d at 8.

¹⁴⁷ *Id.* (citing *Rowley*, 458 U.S. at 203).

¹⁴⁸ 34 C.F.R. § 300.324 (b)(1).

¹⁴⁹ *Id.*

¹⁵⁰ 34 C.F.R. § 300.502 (c)(1).

¹⁵¹ 34 C.F.R. § 300.320 (a) (1).

¹⁵² *Id.* at (a) (2).

¹⁵³ *Id.* at (a) (4).

of the child.¹⁵⁴ An IEP must include a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum.¹⁵⁵

An IEP must include a statement of measurable annual goals.¹⁵⁶ For children with disabilities who take alternate assessments aligned to alternate academic achievement standards, the IEP must contain a description of benchmarks or short-term objectives.¹⁵⁷ If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or district-wide assessment of student achievement, the IEP must include a statement of why the child cannot participate in the regular assessment and why the particular alternate assessment selected is appropriate for the child.¹⁵⁸

The adequacy of the student's IEP is determined by whether the student has "access to specialized instruction and related services which are individually designed to provide educational benefit."¹⁵⁹ For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression."¹⁶⁰ IDEA does not require that the services provided maximize each child's potential.¹⁶¹

An IEP is a snapshot in time and should not be viewed in retrospective.¹⁶² In striving for appropriateness, an IEP must take into account what was, and was not, objectively reasonable at the time the IEP was promulgated.¹⁶³

Once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals.¹⁶⁴ The court

¹⁵⁴ 34 C.F.R. § 300.324 (a).

¹⁵⁵ 34 C.F.R. § 300.320 (a)(1); D.C. Mun. Reg. tit. 5-E § 3009.1 (a); *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F. Supp. 2d 152, 159 (2005) (finding that an IEP must include measurable goals and benchmarks to measure the child's progress toward the annual goals).

¹⁵⁶ 34 C.F.R. § 300.320 (a) (2) (i); D.C. Mun. Reg. tit. 5-E § 3007.2 (b) (annual goals must include short-term instructional objectives).

¹⁵⁷ 34 C.F.R. § 300.320 (2)(ii).

¹⁵⁸ 34 C.F.R. § 300.320 (a) (6).

¹⁵⁹ *Rowley*, 458 U.S. at 201 (1982).

¹⁶⁰ *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).

¹⁶¹ *Id.* at 198.

¹⁶² *Mandy S. v. Fulton County Sch. Dist.*, 205 F. Supp. 2d 1358, 1367 (N.D. Ga. 2000) (citations omitted).

¹⁶³ *Id.*

¹⁶⁴ *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990) (internal citation and quotations omitted).

should not “disturb an IEP simply because [it] disagree[s] with its content.”¹⁶⁵ The court is obliged to “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.”¹⁶⁶

Academic, Behavioral, and Speech-Language Goals

On October 17, 2011, the Student’s IEP team, which included Petitioner, developed an IEP for the Student. The IEP team reviewed the Student’s present levels of performance, and incorporated this data in his IEP. Based on these present levels of performance, and his academic needs, the IEP team developed annual goals in the areas of reading, mathematics, and written expression. The IEP team also developed annual behavioral and social emotional goals as well as speech-language goals.

Petitioner presented no evidence to show that she or her educational advocate disagreed with the content of the IEP at the time it was developed or when it was provided to her several weeks later. Petitioner also presented no testimony to show that the goals in the October 17, 2011, IEP were not likely to produce academic progress.

While Petitioner had high hopes that her son may be performing on a sixth-grade level by now, her expectations are not borne out by the record. Even the Student’s independent comprehensive psychological evaluation, which Petitioner obtained from Johns Hopkins, concludes that his IEP team should focus on his acquisition of functional academic skills, not grade-level proficiency.

Thus, Petitioner presented no evidence to prove that the Student’s academic, behavioral, and speech-language goals were not reasonably calculated to enable the Student to receive academic benefits. Thus, Petitioner failed to prove that Respondent denied the Student a FAPE.

Testing Accommodations

Contrary to Petitioner’s assertions in the Complaint, the Student’s October 17, 2011, IEP provides both classroom and testing accommodations. It provides that he is to receive classroom accommodations, including repetition of directions, a location with minimal distractions, small group testing, the use of calculators, the option to provide oral responses to tests, breaks between subtests, breaks during a subtest, and extended time on subtests.

The IEP further provides that the Student is to take the regular statewide assessment with accommodations, including repetition of directions, a location with minimal distractions, small group testing, the use of calculators, the option to provide oral responses to tests, breaks between subtests, breaks during a subtest, and extended time on subtests.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

Petitioner presented no testimony and introduced no documentary evidence to show that the Student needs test questions be read to him. Nor did Petitioner present any evidence to show how the Student was harmed by not having test questions read to him. Thus, Petitioner failed to show that the classroom and test accommodations in the October 17, 2011, IEP fail to provide the Student a basic floor of opportunity. Thus, Petitioner failed to prove that Respondent denied the Student a FAPE by failing to provide these accommodations.

Assistive Technology

An assistive technology device is any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability.¹⁶⁷ In developing each child's IEP, the IEP team must consider whether the child needs assistive technology devices and services.¹⁶⁸

Petitioner testified that the speech-language pathologist promised to provide an alternative augmentative communications device ("AACD") to the Student to assist him in communicating. She also testified that the speech-language pathologist did not offer to create a low-tech device for the Student at the October 17, 2011, meeting. Petitioner further testified that the IEP team agreed that the Student required an AACD.

Petitioner's testimony on this issue does not comport with the meeting notes from the October 17, 2011, IEP meeting. The notes show that, in actuality, the speech-language pathologist informed the IEP team that AACDs are designed for use by nonverbal and autistic students and thus would not be appropriate for the Student. The notes further show that the speech-language pathologist offered to create a low-tech device for the Student.

Additionally, Petitioner failed to show that the Student suffered any detriment from the failure of Respondent to provide the Student an AACD. Thus, Petitioner failed to show that Respondent denied the Student a FAPE by failing to provide him assistive technology.

Alternate Assessment

Petitioner presented no testimony or documentary evidence to show that the Student must take an alternate assessment. The only evidence Petitioner presented was her own testimony, corroborated by the Student's IEPs from 2009 and 2010, that the Student took the alternate assessment in prior years.

Petitioner presented no testimony or documentary evidence to show that the Student was harmed in any way as a result of taking the statewide assessment with

¹⁶⁷ 34 C.F.R. § 300.5. The term does not include a medical device that is surgically implanted, or the replacement of such device. *Id.*

¹⁶⁸ 34 C.F.R. § 300.324 (a)(2)(v).

accommodations. For these reasons, Petitioner failed to show that Respondent denied the Student a FAPE by failing to specify in his IEP that the Student was to take an alternate assessment.

C. Petitioner Failed to Prove that Respondent Denied the Student a FAPE on October 17, 2011, by Developing an IEP that Fails to Provide the Student ESY for the 2012 Summer.

ESY services are organized, educational programs designed for disabled children that occur outside the regular school year, e.g., summer programs.¹⁶⁹ Each public agency must ensure that extended school year services are available as necessary to provide FAPE.¹⁷⁰ Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, that the services are necessary for the provision of FAPE to the child.¹⁷¹ A public agency may not limit extended school year services to particular categories of disability; or unilaterally limit the type, amount, or duration of those services.¹⁷²

IDEA, the District of Columbia Code, and the District of Columbia Municipal Regulations do not include specific criteria for determining whether a child qualifies for ESY services,¹⁷³ other than the requirement that ESY be provided if it is necessary to provide FAPE to a child.¹⁷⁴ Many states design ESY services to address a child's problems with regression and recoupment.¹⁷⁵ These states focus on a child's "likelihood of regression or retention" and difficulties recouping previously learned concepts in making ESY eligibility determinations.¹⁷⁶

Thus, in many states, ESY Services are only necessary when the benefits a disabled child gains during the regular school year will be significantly jeopardized if he is not

¹⁶⁹ M.M. v. School District of Greenville County, 303 F.3d 523, 528 n. 9 (4th Cir. 2002).

¹⁷⁰ 34 C.F.R. § 300.106 (a).

¹⁷¹ 34 C.F.R. § 300.106 (a)(2). See also D.C. Mun. Reg. tit. 5-E § 3017.1.

¹⁷² 34 C.F.R. § 300.106 (a)(3); D.C. Mun. Reg. tit. 5-E § 3017.3.

¹⁷³ See, e.g., *Letter to Myers*, 213 IDELR 255 (OSEP 1989) (stating that IDEA regulations neither establishes standards for ESY programs nor specifies the circumstances in which ESY is needed).

¹⁷⁴ Comments to IDEA regulations, 71 Fed. Reg. 46582 (2006).

¹⁷⁵ *Letter to Myers*, 213 IDELR 255; Comments to IDEA regulations, 71 Fed. Reg. 46582 stating that these concepts are derived from well-established judicial precedents). See, e.g., *Johnson v. Bixby Independent School District 4*, 921 F.2d 1022 (10th Cir. 1990); *Crawford v. Pittman*, 708 F.2d 1028 (5th Cir. 1983); *GARC v. McDaniel*, 716 F.2d 1565 (11th Cir. 1983).

¹⁷⁶ *Letter to Myers*, 213 IDELR 255.

provided with an educational program during the summer months.¹⁷⁷ Other states determine that that ESY Services are warranted only when they prevent significant regression of skills or knowledge that would seriously affect a disabled child's progress toward self-sufficiency.¹⁷⁸

Additionally, states may use recoupment and retention as their sole criteria, but they are not limited to these standards and have considerable flexibility in determining eligibility for ESY services.¹⁷⁹ While children with disabilities need not actually experience regression in their skills before an IEP team may find them eligible for ESY, the IEP team must have a reasonable basis for concluding that regression would occur without the provision of summer programs or services.¹⁸⁰

Nonetheless, the determination whether services beyond the regular school day are essential for the child to receive educational benefit is necessarily fact and case specific.¹⁸¹ Because a showing of actual regression is not required, a disabled child's need for ESY Services may be established by expert testimony, based on a professional individual evaluation.¹⁸² However, the mere fact of likely regression is not a sufficient basis, because all students, disabled or not, may regress to some extent during lengthy breaks from school.¹⁸³ ESY Services are required under the IDEA only when such regression will substantially thwart the goal of "meaningful progress."¹⁸⁴

Here, Petitioner presented no evidence, other than her stated concerns that the Student would not retain all that he had learned in the 2011-2012 school year, to prove that the Student requires ESY during the 2012 summer. Petitioner provided no evidence, either documentary or testimonial, to show that the Student's regression over the summer would substantially thwart his academic progress or that it would affect his progress toward self-sufficiency. Nor did Petitioner provide any proof that the Student would experience regression over the summer or have difficulties recouping previously learned concepts.

Thus, Petitioner failed to prove that Respondent denied the Student a FAPE by failing to include ESY services in his October 17, 2011, IEP.

¹⁷⁷ *M.M. v. School District of Greenville County*, 303 F.3d 523, 537-38. See also *Alamo Heights Indep. Sch. Dist. v. State Board of Education*, 790 F.2d 1153, 1158 (5th Cir. 1986); *Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1028 (10th Cir. 1990).

¹⁷⁸ *Cordrey v. Euckert*, 917 F.2d 1460, 1474 (6th Cir. 1990).

¹⁷⁹ 71 Fed. Reg. 46582; Letter to Myers,

¹⁸⁰ See *Letter to Anonymous*, 22 IDELR 908 (OSEP 1995).

¹⁸¹ *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 980 (4th Cir. 1990).

¹⁸² *M.M.*, 303 F.3d at 538.

¹⁸³ *Id.*

¹⁸⁴ *Id.* (citing *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 184 (3rd Cir. 1988)).

ORDER

Based upon the findings of fact and conclusions of law herein, it is, this eighteenth day of June 2012, hereby ordered that the Complaint is dismissed with prejudice.

By: /s/ Frances Raskin
Frances Raskin
Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is a final determination on the merits. Any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action, with respect to the issues presented at the due process hearing, in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 1415(i)(2).