DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E., 2nd floor
Washington, D.C. 20002

STUDENT, a minor, by and through his Parent[1]

Petitioner,

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

SHO Case No:
Erin H. Leff, Hearing Officer

OSSE STUDENT HEARING OFFICE
2011 OCT 11 AM 10:42

HEARING OFFICER DETERMINATION

STATEMENT OF THE CASE

On July 16, 2011 Parent, on behalf of her child ("Student"), filed an Administrative Due Process Complaint Notice ("Complaint"), HO 1,[2] requesting a hearing to review the identification, evaluation, placement or provision of a free, appropriate public education ("FAPE") to Student by District of Columbia Public Schools ("DCPS") under the Individuals with Disabilities Education Act, as amended ("IDEA"). 20 U.S.C.A. §1415(f)(1)(A) (Supp. 2010). Respondent filed a Response to Parent's Administrative Due Process Complaint Notice (HO 6) on July 25, 2011. A resolution meeting was held on July 15, 2011. The parties were not able to reach an agreement and executed a Resolution Period Disposition Form on July 18 and

[1] Personal identifying information is provided in Appendix A, attached hereto.
[2] Hearing Officer Exhibits will be referred to as "HO" followed by the exhibit number; Petitioner's Exhibits will be referred to as "P" followed by the exhibit number; and Respondent's Exhibits will be referred to as "R" followed by the exhibit number.

July 27, 2011 so indicating.[3] HO 7. As a result, the 45 day timeline began to run on July 28, 2011.

At all times relevant to these proceedings Petitioner was represented by the Children's Law Center.

I also held a prehearing status conference by telephone on August 24, 2011. In addition, at Petitioner's request, I held a telephone conference on August 30, 2011 to address whether Petitioner's educational consultant ("consultant")would be given access to Student's school to observe Student in his classes. I declined to Order the consultant be allowed to do so as there is no IDEA authority for such an order. I did, however, order that Petitioner's consultant would be allowed to remain in the hearing following her testimony. I did not grant Respondent's expert similar access to the hearing. However, at hearing, neither expert remained in the room during the testimony of other witnesses. DCPS did have a party representative in the room on September 1, 2011.

By agreement of the parties, the hearing was scheduled for September 1, and September 6, 2011. The hearing was held as scheduled at the Student Hearing Office in Room 2006 on September 1, 2011 and room 2009 on September 6, 2011. Petitioner's case presentation continued until after 1:30 PM on September 6, 2011. As a result the majority of Respondent's witnesses were no longer available. Therefore, Respondent requested a continuance to which Petitioner objected. On September 13, 2011 Chief Hearing Officer Merced granted the

[3] I also received a copy of the Resolution Disposition Form with only the DCPS representative's signature. HO 5.
[4] Respondent objected to the presence of a second supervisory attorney at the hearing. I allowed her to stay.

continuance. The hearing was reset for September 26, 2011 and held as scheduled in room 2003 of the Student Hearing Office.[5] The Hearing Officer Determination is to be issued by October 6, 2011.

On September 23, 2011, the Friday before the third hearing day, September 26, 2011, Petitioner filed a Motion for Sanctions alleging DCPS had not complied with my Order, issued on the record, that Student's stay-put placement was and that DCPS was to implement the existent IEP requiring full time placement outside the general education setting at pending my determination in the instant due process case. I sent counsel an email asking that they be prepared to address the Motion at the start of the hearing on September 26, 2011. At hearing, Respondent's counsel indicated he had computer problems and had not had the opportunity to review the motion. I granted him the opportunity to review the motion and file a response no later than September 28, 2011. Petitioner's Reply, if she chose to file one, was to be filed by September 30, 2011.[6] I stated I would address this motion in the instant HOD and do so below.[7]

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2010); and the District of Columbia Municipal Regulations, Title 5e, Chapter 30, Education of Handicapped (2003).

ISSUES

The issues are:

1) Whether DCPS denied Student a free, appropriate public education ("FAPE") by:

[5] Ms. Myles-Primakoff was not present for the third day of hearing.
[6] Respondent's counsel filed a response on September 30, 2011 and Petitioner filed a reply on October 3, 2011. On October 4, 2011, Respondent's counsel sent an email stating Petitioner "has filed a motion and not a reply, i.e. these are arguments which should have been made in an original motion. DCPS moves to strike the pleading."
[7] I address the Motion including Respondent's Response and Petitioner's Reply despite the late filings.

a. Failing to identify Student as a child with multiple disabilities;[8]

b. Failing to adequately evaluate Student in all areas of suspected disability in the last two years. No psychological assessment was completed and the speech assessment was inadequate. A full evaluation was not completed until the Independent Educational Evaluations were completed in June 2011. This was 4 years after the initial evaluation was completed;

c. Failing to develop appropriate IEPs, specifically,

   i. The April 15, 2009 IEP had out of date present levels of performance, inaccurate baseline data, inappropriate goals and services and no speech services were included in extended school year services;
   ii. The April 15, 2010[9] IEP contained the identical out of date present levels of performance and inaccurate baselines contained in the April 15, 2009 IEP. The goals in the 2010 IEP are meaningless in that they reference objectives that are no longer included in the IEP[10] and no speech services were included in extended school year services

d. Failing to implement the April 15, 2010 IEP. Speech was not provided as required by the IEP between September 2010 and March 2011;[11]

e. Reducing the amount of speech on Student's April 2011 IEP without prior notice to the parent;

f. Failing to provide Student an appropriate placement for the last two school years. Student requires a full time special education program that uses a multi-sensory approach to instruction and integrates speech services throughout the day. He needs to be outside of general education for the entire school day in order to make meaningful progress; and

2) Whether Student is entitled to compensatory education.

SUMMARY OF THE EVIDENCE

A. Exhibits

[8] My August 5, 2011 Prehearing Conference Order requires Petitioner to provide a nexus between the alleged misclassification and the alleged inappropriate individualized education programs ("IEPs") and placements.
[9] This IEP was signed April 23, 2010.
[10] The objectives had been included in the 2009 IEP.
[11] The issue regarding failure to implement the April 15, 2009 IEP was withdrawn.

Exhibits admitted on behalf of Petitioner found in Appendix B are:

P-1	4/23/2011	2011 IEP created by School
P-2	4/28/2011	April 28, 2011 Letter to regarding April 2011 IEP
P-3	4/12/2011	MDT notes from April 12, 2011 meeting
P-4	3/23/2011	MDT notes from March 23, 2011 meeting
P-5	9/21/2010	MDT notes from September 21, 2010 meeting
P-6	4/15/2010	April 2010 IEP created by School
P-7	2/16/2010	February 2010 IEP created by School
P-8	4/15/2009	2009 IEP created by School
P-9	7/14/2011	Speech evaluation by Delivery notification and DCPS email acknowledging receipt
P-10	6/23/2011	Psycho-educational evaluation by Dr. Katherine Martin; June 23, 2011 Letter to Mr. Carter with Psycho-educational evaluation attached
P-11	11/01/2010	Speech evaluation by Ms.Verafrances Soso
P-12	9/20/2010	Data Evaluation Review by DCPS Psychologist
P-13	2/9/2007	Psychological evaluation by Dr. Denise Daniels
P-14		Speech services trackers from the 2010-2011 school year
P-15		MS, CCC/SLP, Speech Language Pathologist
P-16		Dr. Katherine Martin, Psychologist
P-17		Robert Felton, Education Expert
P-20		NCLB information regarding Student's teacher at
P-21		Lindamood Bell 2010 Learning Center Results

Exhibits admitted on behalf of Respondent found in Appendix C are:

R 1		Service Trackers
R-2		Progress Reports
R-3		DCCAS Alternate Assessment Form
R-4	5/2/10	Disability Worksheet
R-5		Data Evaluation Review
R-6	2/16/10	IEP
R-7	2/16/10	PWN
R-8	4/23/10	IEP
R-9		Speech Dismissal and Evaluation
R-10	3/29/11	LOI
R-11	4/6-7/11	Letters to attorney Primakoff

Exhibits admitted on behalf of Hearing Officer found in Appendix D are:

1	Administrative Due Process Complaint Notice dated July 1, 2011
2	Notice of Hearing Officer Appointment dated July 6, 2011
3	Prehearing Conference Scheduling Letter and Timeline Order of July 8, 2011
4	Prehearing Conference Notice of July 19, 2011
5	Due Process Complaint Disposition Form executed by DCPS only July 18, 2011
6	DCPS Response dated July 25, 2011 to Administrative Due Process Complaint
7	Due Process Complaint Disposition Form executed July 18 & July 27, 2011
8	Prehearing Conference Order dated August 5, 2011
9	Prehearing Conference Order Errata dated August 12, 2011
10	Miscellaneous emails
11	Proposed Hearing Officer Exhibits
12	Memorandum and Order August 31, 2011
13	Motion for Continuance September 7, 2011
14	Petitioner Opposition to Respondent DCPS' Motion for Continuance 9/9/11
15	Order Granting Continuance 9/13/11
16	Motion for Sanctions against DCPS 9/23/11
17	District of Columbia Public School's Response to Petitioner's Motion for Sanctions 9/30/1

B. Testimony

Petitioner[12] presented the following witnesses:

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- Robert Felton as an expert in developing IEPs, particularly for students with mental retardation or intellectual disabilities, and in placements of these students and to a limited extent as an expert in compensatory education

- Monica Maines, CCC/SLP, as an expert in speech language evaluation and services in the educational model

- Katherine Martin, Ph. D., as an expert in special education evaluation, services and placement

- Associate Center Director,

- Director of the Lower and Middle school,

DCPS presented the following witnesses:

[12] Petitioner did not attend the hearing due to illness. She participated by telephone in a part of the hearing.

- School Psychologist, DCPS
- Special Education Teacher, DCPS
- Special Education Specialist, DCPS
- Special Education Coordinator, DCPS

FINDINGS OF FACT

Based upon the evidence presented, I find the following facts by a preponderance of the evidence:

1. Student is years old. He is in the grade at His IEP requires placement in a self-contained classroom.[13] Student has a mild to moderate intellectual disability[14] and an expressive/receptive language disability. Testimony of Testimony of Testimony of Maines; P 8; P 6; P 1.
2. Student lived with his mother until she died suddenly. He was about years old at the time. Student's grandfather became his guardian. His great aunts also cared for Student and when his grandfather subsequently died one of his aunts became his current guardian. However, both aunts continue to care for Student. Testimony of P 10.
3. Student repeated the first grade three times. He had excessive absences his first two years in first grade. He began attending school regularly during his third year in first grade. He spoke very little at age 8. Testimony of Testimony of Martin; Testimony of P 10.

[13] Petitioner's filed a Motion, described above, indicating that Student is no longer in a self contained classroom at Kramer. He is currently attending general education classes with some unspecified amount of pull-out services. Petitioner asks for sanctions because placing Student in general education classes is a violation of stay put and my Order that he be maintained in his stay put placement for the duration of this due process hearing. I also note this placemetn is not in compliance with Student's IEP.

[14] Student's scores suggest his potential is in the mild range.

4. Student was first evaluated for special education eligibility in February 2007 when a psychological evaluation was completed. P 13. In September 2010 a psychologist completed a data evaluation review, and a speech evaluation also was completed in November 2010. P 11; P 12.
5. Student's overall cognitive ability is extremely low. There is significant discrepancy between his non-verbal and language based abilities with his language based skills being much lower than his non-verbal skills. His extremely weak language based skills impact his learning because instruction tends to be language based. Testimony of Martin; P 10.
6. Student has a mixed expressive/receptive language disorder. His speech language skills are significantly delayed. His ability to use and understand language is delayed. His spontaneous language is immature, and he has word finding difficulties. Student's language disorder creates difficulty in his following directions, understanding the vocabulary in reading, making his wants and needs known and keeping up with his peers in conversation. In the classroom Student requires visual supports, language to be broken down to make it more readily understandable, repetition of directions and monitoring to assure he understands the task assignments. He needs two hours of individual, speech/language therapy outside the classroom and 1 hour of speech/language therapy in the classroom on a weekly basis. Testimony of Maines; P 9.
7. Student is able to progress in the development of language skills. The recommendation to discontinue speech language therapy made in November 2010 due to Student's significant speech language delays and very limited improvement in therapy was inappropriate. There was no meeting to discuss the proposed removal of speech therapy

from Student's IEP because the speech language therapist retired. Testimony of Testimony of Maines; P11.

8. Student's IEPs, in the past, have generally required he receive one hour of speech language pathology service outside of general education per week. Student's April 2011 IEP decreased his hours of speech/language pathology service to 120 minutes per month (approximately 30 minutes per week). Student did not receive speech/language services during extended school year ("ESY") programming under his April 2009 IEP. Student did receive speech/language services during ESY programming under his April 2010 IEP. P 1; P 6; P 7; P 8; R 2.
9. Student's 4/23/10 IEP requires he receive 1 hour of direct speech/language pathology services outside the general education setting per week. Between September 2010 and the end of March 2011, Student received only 4 hours of direct speech/language services and 30 minutes of consultative services. In addition, notes indicate efforts were made to provide two additional hours of speech/language services in March, but Student was absent on one occasion and unavailable on another. P 6; P 14
10. Student has memory problems. He does not retain information. At the end of a school day he will remember what he has been taught during that day. By the next day he frequently needs prompts. As a result his progress is slow and made in small, incremental steps. Testimony of
11. Student has very poor academic skills. His limited cognitive capacity indicates he will not acquire skills at the rate of his non-disabled peers. He currently is functioning at the end of the first grade level in reading and written language and at the end of the second grade

level in math. He shows some higher level skills at approximately the second grade level in some of his classes. Testimony of Martin; Testimony of P 8.

12. Student is immature and does not know how to interact with his nondisabled peers. His peers bully him. He does not have well developed adaptive functioning skills. His weakest adaptive functioning area is communication. He struggles to carry on a conversation. Testimony of Testimony of P 10; P 11.

13. Student's grandfather and/or great aunts attended his IEP meetings in 2009, 2010, and 2011. They did not disagree with the content of the IEPs. The IEPs were implemented as written. Student's teachers reported he made progress. Testimony of Testimony of P 1; P 6; P 7; P 8.

14. Student's IEPs are not appropriate to his needs. Despite teacher reports, Student has made minimal progress under these IEPs. The 2009 IEP has present levels of performance that are based on two year old data. There are no functional goals. Student's needs for social skills training are not addressed. In 2010 Student was assigned to the regular testing track. Student cannot read so it is unlikely this test is appropriate. Student's 2011 IEP has goals that are beyond his abilities when compared to the psychological evaluation dated 6/23/10. Testimony of Testimony of Martin; Testimony of Maine; P 1; P 6; P 7; P 8; P 10

15. Student requires an education program designed to address his needs. He needs to be in a small, self-contained classroom with a small teacher student ratio. The program should include instruction in functional skills and involve real situations that will help student gain knowledge that he can generalize and use. Student needs a program with limited distractions. Student requires instruction in social skills. Speech should be integrated into

the program. Some involvement with general education peers, such as at lunch, would be appropriate if the interactions are planned and both the general education students and the teachers are trained to facilitate the interaction. Student needs one-on-one assistance. The one-on-one assistance in a self contained classroom provides the consistency and the kind of instruction Student requires. Testimony of Testimony of

16. Student is not in a self contained classroom this school year. He is in general education classrooms with some pull out services being provided. However, Student's current IEP requires 26.5 hours of specialized instruction outside the general education environment per week. There was no IEP meeting held regarding the change of instructional setting from self contained to general education. Testimony of

17. DCPS has proposed placing Student at School. The program is an alternative education program. All the students in the program are working at the pre-K to second grade level. There is no community based instruction. Speech is integrated in the classroom based on the requirements of students' IEPs. The program for students with intellectual disabilities at this school does not have a good reputation. Testimony of Felton; Testimony of

18. provides programs to assist students with the mechanics of reading including decoding, reading fluency, spelling and sight word recognition. P 20.

serves children with learning disabilities, autism spectrum disorders and intellectual disabilities as well as children without disabilities. Students generally receive 4 to 5 hours of programming, in addition to their time in school, five days per week. At this pace of intervention students generally achieve 1 to 2 years growth in six to eight weeks. If a student receives fewer hours of service per week, it will take more time to achieve

equivalent growth. programming must be provided at least 1 to 2 hours per day 5 days per week. Testimony of

19. Student was screened for his appropriateness for by the Associate Center Director. She is not a certified reading specialist nor a certified special educator in any jurisdiction. Testimony of

20. is a full time, separate, private, special education school serving students with developmental delays, autism and multiple disabilities. Classrooms have 8 students with one teacher and a para-educator. Speech services as well as other related services are integrated within the instructional program. Pull out services are provided as required by students' IEPs. Community based instruction is part of the program, and it is through the community based instruction that students have opportunities to interact with those who do not have disabilities. provides education in functional skills and social skills. Student visited and appeared to benefit from the teaching strategies used. Student has been accepted at He would be assigned to a classroom that specializes in educating students with intellectual disabilities. Testimony of Testimony of P 19.

DISCUSSION

The following discussion is based on my review of the exhibits introduced by the parties, witness testimony and the record in this case. While I find all witness testimony presented in this matter to be credible, some witnesses were more persuasive than others. Where these differences in persuasiveness are relevant to my determination, I so indicate.

Under the IDEA each local education agency is required to provide a FAPE to each student found eligible for special education and related services. A FAPE is:

> Special education and related services that . . . are provided at public expense, under public supervision and direction, and without charge; . . . [m]eet the standards of the [state educational agency] . . . [i]nclude an appropriate preschool, elementary school, or secondary school education . . . ; and . . .[a]re provided in conformity with an . . .IEP that meets the requirements of [the IDEA regulations].

34 C.F.R. § 300.17. *See also*, D.C. Code § 30.3001.1.

Issues 1 through 6 below address alleged denials of FAPE.

Whether DCPS denied Student a FAPE by failing to identify Student as a child with multiple disabilities

Whether DCPS denied Student a FAPE by failing to adequately evaluate Student in all areas of suspected disability in the last two years. No psychological assessment was completed and the speech assessment was inadequate. A full evaluation was not completed until the Independent Educational Evaluations were completed in June 2011. This was 4 years after the initial evaluation was completed

Issues 1 and 2, above, are grouped for discussion herein because the IDEA issues involved are either similar or identical.

The IDEA requires that all students identified as potentially disabled be provided an individualized, initial evaluation. 34 C.F.R. § 300.301. In conducting the evaluation, the public agency, here, Respondent DCPS, must administer assessments and other evaluation measures needed to determine whether the student is a child with a disability as defined under 34 C.F.R. § 300.8; 34 C.F.R. § 300.305(c). The assessment data also is to be used, should the student be found eligible for special education and related services, in developing the student's individualized education program ("IEP"). 34 C.F.R. § 300.324(a)(iii).

In the instant matter Student was found eligible for services as a student with intellectual disabilities (also known as mental retardation). 34 C.F.R. § 300.8(c)(6). Student also has an expressive/receptive speech language impairment. Petitioner contends that the failure to identify

Student as a student with multiple disabilities (intellectual disability and speech/language impairment) has denied Student a FAPE. This is a difficult argument to make in that the Analysis of Comments and Changes appended to the final regulations when they were published specifically state, "Special education and related services are based on the identified needs of the child and not on the disability category in which the child is classified." Federal Register, Vol.71, No. 1567, August 14, 2006, p. 46549. My August 5, 2011 Prehearing Conference Order therefore required Petitioner to establish a nexus between the failure to identify Student as a student with multiple disabilities and the alleged inappropriate IEPs and placements. I find Petitioner has not met the burden of persuasion under regarding this issue. While it is true DCPS has not effectively addressed Student's speech language impairment (See discussion below under Issues 3, 4 and 5), this failure on DCPS' part would not have been corrected by identifying Student as a student with multiple disabilities. The failure to address Student's speech language disability impairment is a failure of IEP construction and implementation. Student's speech language needs were identified. I therefore find Petitioner has failed to establish by a preponderance of the evidence that DCPS' failure to classify Student as having multiple disabilities denied Student a FAPE. Petitioner has not met the burden of demonstrating a causal connection between Student's disability category and DCPS failure to adequately address Student's needs on his IEPs and its further failure to assure the IEPs were implemented as written.

Under IDEA, after initial evaluation,

> A public agency must ensure that a reevaluation of each child with a disability [i]s conducted . . . [i]f the public agency determines that the educational or related service needs, . . . warrant a reevaluation:

34 C.F.R. § 300.303(a).

At a minimum, reevaluations are to occur at least once every three years unless the public agency and parent agree a reevaluation is not necessary. 34 C.F.R. § 300.303(b).

In the instant matter, the evaluation and re-evaluation process has been limited. It has failed to comprehensively assess Student's needs. The initial evaluation of February 2007 assessed Student's cognitive functioning, his visual motor integration skills and his academic achievement. Student was found to be functioning in the low to extremely low range in all areas. A need for adaptive functioning evaluation was identified but never completed. A recommendation for another evaluation the following year was recommended but not implemented. A speech evaluation completed in November 2010 recommended dismissing Student from services despite finding his performance was in the very poor range of functioning. Rather than addressing his needs, the report essentially recommended ignoring his needs because his speech language needs were significant and he was making little progress. Such an approach is *contra* both the spirit and intent of IDEA. Students with great needs that are difficult to address are not to be denied or overlooked. *See*, *Timothy W., v. Rochester N.H. Schl. Dist.*, 875 F.2d 954, (U.S. Ct. App. 1st Cir. 1989). IDEA is intended to assure the rights of all students with disabilities are protected and, therefore, their educational needs addressed. 34 C.F.R. § 300.300.1(b).

In sum, over the course of the last four years Student has received a psychological evaluation in February 2007, a data evaluation review by a psychologist in September 2010, a speech evaluation in November 2010 and two independent educational evaluations, a psycho-educational in June 2011 and a speech in July 2011. Once the initial evaluation was completed, evaluations that could have composed a re-evaluation were completed a little more than three years later. Therefore, I cannot agree Student did not receive a re-evaluation. I acknowledge that

this re-evaluation process was slightly delayed in that it took place more than three years after the initial evaluation and I recognize the process was not thorough in that it did not assess all areas of suspected disability. That said, the independent psychological and speech evaluations completed in 2011 have addressed the inadequacy of DCPS' re-evaluation process. I find, therefore, Petitioner has not established by a preponderance of the evidence that Student had not been re-evaluated in the last two years I further find that Petitioner has established by a preponderance of the evidence that Student was not appropriately evaluated in all areas of suspected disability by DCPS and therefore was denied a FAPE.

3. Whether DCPS denied Student a FAPE by failing to develop appropriate IEPs, specifically,

> *i. The April 15, 2009 IEP had out of date present levels of performance, inaccurate baseline data, inappropriate goals and services and no speech services were included in extended school year services;*
> *ii. The April 15, 2010[15] IEP contained the identical out of date present levels of performance and inaccurate baselines contained in the April 15, 2009 IEP. The goals in the 2010 IEP are meaningless in that they reference objectives that are no longer included in the IEP[16] and no speech services were included in extended school year services.*

As noted above, a FAPE is

> Special education and related services that . . . are provided at public expense, under public supervision and direction, and without charge; . . . [m]eet the standards of the [state educational agency] . . . [i]nclude an appropriate preschool, elementary school, or secondary school education . . . ; and . . .[a]re provided in conformity with an . . .IEP that meets the requirements of [the IDEA regulations].

34 C.F.R. § 300.17. *See also*, D.C. Code § 30.3001.1.

An IEP is a written statement that includes, in pertinent part, the eligible student's: present levels of academic and functional performance; the effect of the student's disability on his/her involvement and progress in the general curriculum; measurable annual academic and

[15] This IEP was signed April 23, 2010.
[16] The objectives had been included in the 2009 IEP.

functional goals designed to meet the student's educational needs resulting from his/her disability; a statement of the special education and related services, supplementary aids and services, and program modifications and supports to be provided to the student to allow him/her to advance toward attaining the IEP goals and progress in the general curriculum and to participate in nonacademic activities. In developing the IEP the team is to consider the strengths of the child, the concerns of the parent for enhancing the education of the student, the results of the most recent evaluation and the academic, developmental and functional needs of the student. 34 C.F.R. § 300.324(a). *See also*, D.C. Code § 30.3007. If a student's behavior impedes the student's learning or that of other students, the team is to consider interventions and strategies to address the behavior. *Id.* An IEP that memorializes the team's FAPE determination must be designed to provide the student with some educational benefit. *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176, 203-204 (1982).

The content of an IEP is a team decision 34 C.F.R. §§ 300.320 – 300.323. *See also*, D.C. Code §§ 30.3007.1 & 3008.1. Teams are required to consider all the relevant information before them. *Id.* In reviewing whether an IEP provides a student a FAPE as required by IDEA, a hearing officer must consider whether the district complied with IDEA's procedural requirements and determine whether the program was reasonably calculated to enable the student to receive educational benefit. *Rowley,* 458 U.S. at 207. To find a denial of FAPE based on the failure to develop an appropriate IEP I must answer two questions.

> First, has [DCPS] complied with the procedures set forth in the [IDEA]? And second, is the individualized educational program developed through the [IDEA]'s procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the [DCPS] has complied with the obligations imposed by Congress . . . . *Rowley,* 458 U.S. at 206-07. Accordingly, [I] must analyze (1) whether the IEP designed for [Student] was procedurally deficient, and (2) whether, given the contours of the IEP,

> [Student] was receiving sufficient educational benefits to meet the requirements of a FAPE.

N.S., by his parents, Bruce and Susan STEIN, et al., v. District of Columbia, et al., 709 F. Supp. 2d 57 (U.S. Dist. Ct. DC 2010)

Here, there is no question raised regarding the district's compliance with IDEA procedural requirements. The only questions are whether the IEPs at issue are calculated to enable the student to receive educational benefit. The IDEA requirements for an IEP are clearly defined within the regulations. Petitioner specifies multiple failures in the content of the 2009 and 2010 IEPs that she claims resulted in a denial of FAPE to Student. First, Petitioner states the present levels of performance and baselines[17] found in these IEPs are out of date. An IEP must include, "A statement of the child's present levels of academic achievement and functional performance, including – (1) How the child's disability affects the child's involvement and progress in the general education curriculum. . . ." 34 C.F.R. § 300.320(a)(1)(i). A review of the IEPs reveals that the old data is, as Petitioner claims, the source of the baselines on the IEPs. In both 2009 and 2010 the present levels of educational performance sections for reading, mathematics and written expression refer to the data from the evaluation performed in February 2007. In 2010 there is a small addition to the mathematics data based on the administration of one math subtest of the Woodcock Johnson III indicating Student's performance since the 2007 evaluation had remained "flat with no significant development." All of the information on Student's present levels of performance describes a student who is functioning years below his chronological age and making little, if any, progress in school. The repetition of information

[17] There is no requirement either in IDEA or the D.C. Code that baselines, labeled as such, be included in an IEP. However, IEPs are to include measurable goals and a description of how progress toward meeting the goals will be measured. 34 C.F.R. § § 300.320(a)(2) & (3). To meet these requirements an IEP must make clear what the student knows at the point the IEP is drafted so that the goals can be measurable and the student's progress actually measured. Therefore, I address the baselines as part of the requirement for present levels of performance.

from one IEP to the next with almost no updates based on Student's classroom performance or other measures suggests DCPS confuses the need to perform triennial re-evaluations with the sources of data that can be used to update present levels of performance.

Petitioner's second claim is that the goals on these IEPs are inappropriate. The 2009 IEP includes one goal in each academic area (reading, math and written expression). Each goal states Student will demonstrate 10 months growth with 80% accuracy and then references 3 or 4 short term objectives that are included in the particular subject area on the IEP. The speech goal on the 2009 IEPs simply states Student will increase expressive and receptive language skills to 80% accuracy and then lists 5 short term objectives. In reviewing these goals and objectives it is not clear, and Petitioner has not established by a preponderance of the evidence, the basis for claiming these goals are inappropriate. Although it could be argued that the goals were inartfully constructed, the short term objectives provide sufficient information to deem the goals appropriate.

However, a review of the 2010 IEP leads to an entirely different result. The 2010 IEP includes the same goals as those found on the 2009 IEP. That is, goals state Student will demonstrate 10 months growth in the given subject area with 80% accuracy in reference to short term objectives. Yet these goals are, as Petitioner contends, meaningless. They are meaningless because there are no short term objectives included in any subject area. Thus the goals do not define how they address the child's educational needs. 34 C.F.R. § 300.320(a)(2). They simply state Student will achieve 10 months growth with 80% accuracy. There is no way to determine what it is Student is to learn, what he is expected to accomplish.

Petitioner further disputes the goals included in the 2009 IEP and 2010 IEP arguing that Student's lack of progress from one year to the next combined with the replication of goals,

however poorly drafted in 2010, indicate the IEP is not providing Student a FAPE, and in so arguing Petitioner cites *Polk v. Cent. Susquehanna Intermediate Unit 16*, 62 F.3d 520 (3d Cir. 1995). I am not convinced, however, that *Polk* supports the notion that the repetition of goals from one IEP to the next without progress is a denial of FAPE. The *Polk* court stated at 531, "In any event, appropriateness is judged prospectively so that any lack of progress under a particular IEP, assuming *arguendo* that there was no progress, does not render that IEP inappropriate. . . ." Furthermore, Student's 6th grade math teacher testified credibly that Student made progress in math. He noted the progress was based on the standards of progress for students who are mentally disabled and that Student was working at a Kindergarten to lower first grade level. This math teacher further testified that Student could not generalize skills and had great difficulty retaining information for more than a few hours. He also testified that he had discussed student's language issues with his other teachers and was told his language issues were characteristic of those students who had mental retardation. The 2009 – 2010 school year Special Education Coordinator from also testified that Student's teachers reported he made progress. The testimony supporting a finding of progress is scant, and the documentary evidence also is limited. At best, recent evaluations show Student's performance showed minimal progress and/or regression over the course of years. Yet this does not support the notion that the IEPs were not designed to provide Student FAPE. Instead, I find the April 2009 IEP despite its flaws in failing to include up to date present levels of performance was developed in a manner so as to provide Student a FAPE. On the other hand, the April 2010 IEP was so poorly constructed as to be fatally flawed. That 2010 IEP not only lacked updates to the present levels of performance but the goals themselves were meaningless. They clearly had been copied from the prior IEP without being read as the necessary objectives which gave the goals meaning were not included.

Petitioner also notes neither of these two IEPs provides student a FAPE because neither of them includes speech/language services under extended school year services. The April 2009 IEP does not include any extended year services. Petitioner has not established Student was determined to require ESY services in the summer of 2009. Therefore, there is no basis to determine a failure to provide speech services during the summer of 2009 was a denial of FAPE.[18] The April 2010 IEP, on the other hand, includes extended school year services, and the services identified do not include speech. However, there is an Extended School Year Progress Report dated July 23, 2010 indicating Student was making progress in speech. Therfore, I cannot find there was a denial of FAPE based on a failure to include speech in the ESY programming provided to Student in the summer of 2010.[19]

DCPS argues that Student's IEPs were designed to provide educational benefit, that he did receive educational benefit and, moreover, his guardians attended the IEP meetings and signed the IEPs indicating their agreement with them thereby precluding future disagreement. I have already addressed the content of the two IEPs at issue here. While I agree the 2009 IEP was designed to provide Student educational benefit, the same cannot be said about the 210 IEP. DCPS' view that Student received educational benefit is not founded on evidence. Despite some of his teachers' assertions, the recent June psycho-educational evaluation does not support a finding that Student is receiving educational benefit. His academic test results show decreases in achievement. The one teacher who testified noted Student had trouble retaining information and his progress was very slow. He stated his other teachers indicated this was typical of students with intellectual disabilities. Again, it appears those who have the responsibility of assisting

[18] The evidence regarding Student's disabilities and related educational needs suggests he would have been eligible for ESY services under this IEP. DCPS should have made an ESY determination. However, Petitioner has not raised this as an issue so I cannot address it here.

[19] I note that it would have been preferable to include speech in the ESY services included on this IEP and the failure to do so is another example of poor drafting.

Student and educating him are using his disabilities as an explanation for why he cannot learn rather than attempting to determine what approaches or techniques can be employed to address Student's needs and help him learn. Finally, DCPS is correct that Student's guardians signed the IEPs at issue here and that indicating their agreement. That said, this is not a bar to Petitioner's subsequently bringing a due process complaint regarding these IEPs. IDEA has no requirement that a parent or guardian sign the IEP indicating approval. Therefore, the fact that a parent or guardian does sign the IEP does not bar him or her from subsequently raising claims that the IEP in question denied the student a FAPE. *See,* Letter to Lipsett, Office of Special Education Programs, 52 IDELR 47 (2008).

I therefore find by a preponderance of the evidence that Student's April 2009 IEP provided Student a FAPE. It was designed to address Student's needs and provide him some educational benefit. I further find by a preponderance of the evidence that Student's April 2010 IEP was not designed to provide Student some educational benefit, and he was denied a FAPE.

4. Whether DCPS denied Student a FAPE by failing to implement the April 15, 2010 IEP. Speech was not provided as required by the IEP between September 2010 and March 2011

As noted above, special education and related services are to be provided in conformity with an IEP that meets the requirements of the IDEA regulations. 34 C.F.R. § 300.17. *See also,* D.C. Code § 30.3001.1. In the instant matter, the 4/15/10 IEP required Student receive one hour of speech language services per week outside the regular education setting. Between September 2010 and the end of March 211 Student received only 4 hours of direct, speech language services and 30 minutes of consultative services. While there is documentation indicating that efforts were made to provide Student two additional hours of speech language services, the number of hours of speech/language services provided Student were far fewer than those required for the

provision of FAPE as defined by the IEP drafted by DCPS. This failure to provide the required number of hours of service was acknowledged by DCPS. For a student with the significant speech/language disability that Student has, this failure to provide required services is particularly noteworthy. I find, by a preponderance of the evidence that DCPS denied Student a FAPE by failing to provide Student speech/language services as required by his April 15, 2010 IEP.

5. Whether DCPS denied Student a FAPE by reducing the amount of speech on Student's April 2011 IEP without prior notice to the parent

Each time a public agency, here DCPS, proposes to change the provision of FAPE to a student receiving special education and related services under IDEA, the public agency must provide prior written notice that includes a description of the proposed action, an explanation of why the agency is taking the action, a description of all information forming the basis for the proposed action, a description of procedural safeguards, sources to obtain assistance in understanding the relevant provisions of IDEA, and a description of the other options the team considered and why they were rejected. 34 C.F.R. § 300.503(a) & (b). As FAPE is the program and services described on a student's IEP, 34 C.F.R. § 300.17. *See also*, D.C. Code § 30.3001.1, any change to that IEP is a change to the provision of FAPE and requires the parent receives this notice.

Student's April 2010 IEP required Student receive one hour of speech language pathology services per week. Student's April 2011 IEP requires he receive 120 minutes of speech language pathology services per month. This is approximately a 50% decrease in speech language services. Therefore, Petitioner should have received prior written notice regarding this proposed change. An IEP can serve as the required prior written notice as long as the IEP and

other documents received by the parent meet the requirements of 34 C.F.R. § 300.503. See Federal Register, Vol.71, No. 1567, August 14, 2006, p. 46691. Here the IEP and documents received at the IEP meeting meet the requirements for prior written notice other than providing a description of why the team is taking the action and the other options considered. I note, however, that Petitioner was accompanied to the IEP by her attorney and an investigator from the Children's Law Center. These individuals, even if Petitioner was not willing to ask for this information, were able to ask for and obtain this additional information. In fact, according to the minutes from this meeting, the advocate asked questions regarding the impact of speech on Student and requested compensatory services for undelivered speech services. I, therefore, find Petitioner was provided prior written notice regarding the reduction in speech language services. The failure to provide two aspects of the required written notice, under the specific circumstances described here was a procedural error that did not result in harm to Student and did not constitute a denial of FAPE.

6. Whether DCPS denied Student a FAPE by failing to provide Student an appropriate placement for the last two school years. Student requires a full time special education program that uses a multi-sensory approach to instruction and integrates speech services throughout the day. He needs to be outside of general education for the entire school day in order to make meaningful progress

After a school district develops an IEP that meets all of a student's educational needs, it must identify a placement in which to implement the IEP. The placement is to be in the least restrictive environment in which the IEP can be implemented. 34 C.F.R. §§ 300.114 – 300.118. *See also*, D.C. Code §§ 30.3011 – 30.3013. The removal of a student with disabilities from the regular education environment is to occur "only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. § 300.114(a)(2)(ii). Each local education agency must have a

continuum of alternative placements, including instruction is regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, available. 34 C.F.R. § 300.115. The placement decision is to be made by a group of individuals, including the parents. 34 C.F.R. § 300.116(a)(1); 34 C.F.R. § 300.327; 34 C.F.R. § 300.501(b) and (c). Moreover, the placement decision must conform with the LRE provisions cited above. 34 C.F.R. § 300.116(a)(2).

The regulations make clear that placement decisions involve more than the determination of the number of hours of service a student is to receive under his/her IEP. That is, the number of hours of service does not address where along the continuum of services as identified under IDEA a student's program will be implemented. *See* 34 C.F.R. § 300.115. The selected placement must be able to implement the IEP as written in order to provide FAPE to the student. DCPS for the last two years has provided Student with a placement in a full time, self contained, special education environment within a DCPS public school. This placement was able to implement the 2009 IEP which I found provided Student a FAPE despite the alleged lack of speech during ESY.

Student's placement for the 2010-2011 school year requires a more complex analysis. The April 2010 IEP, as discussed above, did not provide Student a FAPE. The present levels of performance did not provide sufficient information from which to develop appropriate goals, and the goals developed were essentially meaningless as they contained no information as to what student was expected to learn during the year. Furthermore, there is almost no evidence demonstrating Student received educational benefit from this IEP in the 2010- 2010 school year. It is important to note that my finding that the placement at Kramer was appropriate in the 2009-2010 SY does not lead to an automatic finding that it was also appropriate in the subsequent

school year. Over the course of time, Student's educational needs resulting from his disabilities changed. His IEPs, rather than recognizing the need for more intensive services and services of a different nature, did not. While I am willing to accept DCPS assessment in the 2009-2010 school year that the program and services were meeting Student's needs, this is not the case in 2010-2011 (nor now). The longer Student goes without progressing, the more significant his needs become. DCPS has failed to recognize this and has, in fact, created an IEP with fewer services and at the same time has moved Student to the standard testing track rather than the alternative track. This configuration of services cannot and does not adequately address Student's needs. The placement implementing the program under the 2010 IEP therefore cannot be appropriate because the program is not appropriate.

DCPS has proposed Student be placed at School in a self-contained program including 26.5 hours of specialized instruction outside the general education environment and each week as well as 120 minutes of speech/language pathology services outside the general education environment each month. This program is essentially a duplicate of the program student has received for the last two years, but with a smaller number of speech language service hours each month. Rather than addressing Student's needs, I find this program has been shown not to address his needs. DCPS has failed to provide this student a FAPE. They failed to adequately evaluate his needs. They failed to adequately address his needs, and they have therefore failed to provide him a placement able to meet his needs. Moreover, they have proposed placing him in a program that their own staff testified is not good. While IDEA does not require students receive programs that provide the best possible services, IDEA does require the program and services and thus the placement be appropriate. A program that is described as "not good" cannot be deemed, in my opinion, to be appropriate.

As I am requiring the IEP be amended to include some significant changes the current placement which I have determined is not appropriate cannot be deemed appropriate to implement the new IEP. I recognize IDEA provides a clear preference for placement in a student's neighborhood school with his/her age appropriate, non-disabled peers. 34 C.F.R. §§ 300.114 & 300.116. However, this is not the only placement available. IDEA includes a continuum of placements ranging from the general education classroom to residential or hospital placements. 34 C.F.R. § 300. 115. Here I am finding, based on preponderance of that DCPS proposed placement at School is not appropriate; the placement that is the least restrictive environment in which an appropriate IEP can be implemented is the School. 34 C.F.R. §§ 300.114 – 300.118. *See also*, D.C. Code §§ 30.3011 – 30.3013. I further find, by a preponderance of the evidence that Ivymount is able to provide the program and services Student requires.

7. Whether Student is entitled to compensatory education.

Under *Reid*, a hearing officer may award compensatory education services that compensate for a past deficient program. *Reid v. District of Columbia,* 401 F. 3d 516, 365 U.S. App. D.C. 234 (D.C. Cir 2005) *citing G.ex. RG v Fort Bragg Dependent Schools,* 343 F.3d 295, 309 (4th Cir. 2003). IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* ". . .the inquiry must be fact-specific and . . . 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." *Reid* at 524.

In the instant matter, Petitioner has established that DCPS 1) did not provide Student adequate evaluations in all areas of suspected disability; 2) the present levels of performance on

Student's April 2009 and April 2010 IEPs were not appropriate; 3) Student's April 2010 IEP did not contain appropriate goals; 4) Student did not receive the speech language services required by his April 2010 IEP between September 2010 and the end of March 2011; and 5) Student's 2010-2011 placement was not appropriate. As a result of these failures to provide FAPE Student was harmed in that his significant academic and speech/language issues were not addressed appropriately. The extent of the harm includes the loss of hours of speech service in the 2010 – 2011 and a loss of needed services and an appropriate placement in the 2010- 2011 school year. Petitioner asks that I award Student a large number of hours of tutoring services as well as additional speech language services as compensatory education for these losses.

I am not willing, however, to award services. The testimony did not convince me that would be able to effectively provide the services and the programs to address the extensive needs of Student. The program is staffed by individuals certified in These individuals are not presented as having knowledge or expertise regarding students with significant intellectual disabilities or as being having expertise in reading. The Associate Center Director testified that the program had served students with intellectual disabilities but this testimony appeared as an effort to "cover the bases." I did not find her testimony in this regard to be credible. I was not convinced any staff had significant experience or knowledge regarding students with intellectual disabilities. This was further support in my opinion, by the program approach which is to generally provide 4 or 5 hours of services per day in addition to a student's regular school program. An exhausting schedule that I cannot support for a student with intellectual disabilities and speech language disabilities as extensive as those of the student before me. Finally, as I am ordering Student attend Ivymount, a program designed to address Student's learning and language needs the

addition of significant tutoring appears to be excessive. The consensus of the experts was that Student can learn and that he needs to be taught in the type of environment with the type of instruction provided by does not provide this type of environment or instructional process.

I remain concerned, however, about the relative dearth of speech language services provided to Student in the past two years and the current IEP proposing to provide him even fewer hours. Again the experts were clear. Student needs and can benefit from intensive speech/language service. I, therefore, find that Student should receive compensatory education for DCPS' failure to provide adequate speech language services to student in compliance with his IEP. In addition to the speech language services provided as part of his regular program at Student is to receive one additional hour of speech language services either in the classroom or on a pull-out basis, as determined by the speech language pathologist providing the services at Ivymount for the duration of the 2011- 2012 school year including summer school.[20] The speech language pathologist convincingly testified that this amount of compensatory education would place Student in the position he would have been had he received all services as mandated by his IEP.

Motion for Sanctions

Petitioner's Motion for Sanctions filed September 23, 2011 asks that I sanction DCPS for its failure to fulfill its obligations after stay put was invoked and for its disregard of my September 6, 2011 Order on the record that DCPS was to provide a fulltime, out of general education placement for Student at School pending the Hearing Officer

[20] The speech language report recommended one additional hour of speech language therapy throughout the school year. The report was written in July 2011. Therefore, the recommendation for the school year would have covered the entire school year if the recommendation was implemented at that time. I have extended the compensatory speech language services through the summer of 2012 to provide a similar amount of compensatory services since there was a delay in their implementation.

Determination in this matter. I issued this Order pursuant to IDEA which requires a child involved in a due process complaint to remain in his or her current educational placement. 34 C.F.R. § 300.518(a).

Petitioner filed the instant Due Process Complaint on July 5, 2011. On July 25, 2011, DCPS issued a prior notice of placement ("PNOP") for School. The PNOP states, "DCPS proposes to change the student's placement to for the 2011-2012 SY. Petitioner invoked the stay put requirement of IDEA, and Student remained at his then current placement. At the hearing on October 6, 2011 DCPS school psychologist, appeared as a witness. She testified Student was not in a self-contained, special education classroom this school year. Rather, he was in an inclusion program. There had been no IEP meeting to change student's stay put placement. I, therefore, issued an order, on the record when the issue was raised by Petitioner, that Student was to receive a program and services as required by his IEP at School until I issued an HOD . Petitioner's Motion for Sanctions alleges Student remains in an inclusive education program rather than the full time, out of general education program required by his IEP despite my Order. Petitioner asks that I sanction DCPS.

DCPS responds that I have no authority to issue sanctions. In the alternative, DCPS argues that Petitioner received the PNOP for ; and took the Student to for enrollment.[21] DCPS further asserts that staffing changes at prevent the school from being able to implement the IEP as written, and that is able to implement the IEP as written. While this may be the case, and I recognize DCPS counsel did suggest that this might be the case on October 6, 2011, DCPS made no official response to my Order either to Petitioner's counsel or myself prior to the filing of Petitioner's Motion for Sanctions. At least, DCPS counsel

[21] I note this PNOP was issued subsequent to the filing of this due process complaint.

had an obligation to affirmatively respond to my Order after investigating whether it were possible to implement the IEP at DCPS did not have and does not have the authority to choose NOT to implement the IEP as written during the pendency of this hearing. If a change in location was required, the need to change location should have been brought formally to me as I had issued an Order.

Petitioner's Reply to DCPS Response to Petitioner's motion for Sanctions addresses hearing Officer authority to issue sanctions. I do not agree with DCPS' email characterizing this Reply as a new motion. DCPS suggests that Petitioner has made new arguments in this Reply. I disagree. Petitioner's original Motion states I have the authority to issue sanctions. DCPS' counsel disagreed and Petitioner's counsel has replied by providing specific bases for that authority. There are no new arguments here, only the provision of legal authority. That said, I decline to issue sanctions in this matter. Rather I admonish DCPS counsel for failing to inform me that the terms of my September 6, 2011 Order could not be met, and I admonish DCPS for failing to comply with the IDEA mandated stay put procedures and for changing Student's placement from self contained to inclusion without a required IEP meeting.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law as follows:

1. DCPS did not deny Student a FAPE by failing to identify him as a student with multiple disabilities.
2. DCPS re-evaluated Student within the last two years.
3. DCPS denied Student a FAPE by failing to appropriately evaluate Student in all areas of suspected disability.

4. Student's April 2009 IEP provided Student a FAPE.
5. DCPS denied Student a FAPE because his April 2010 IEP did not provide Student address Student's educational needs and did not provide him some educational benefit.
6. DCPS denied Student a FAPE by failing to provide Student speech/language services as required by his April 15, 2010 IEP between September 2010 and the end of March 2011.
7. The failure to provide two aspects of the required written notice, under the specific circumstances described here, was a procedural error that did not result in harm to Student and did not constitute a denial of FAPE.
8. The placement at school was appropriate in the 2009 -2010 school year. The placement at School was not appropriate in the 2010 – 2011 school year and, therefore, denied Student a FAPE.
9. The appropriate placement for the 2011-2012 school year is School
10. Student is to receive compensatory education is the amount of one hour of additional speech language therapy per week for the remainder of the 2011- 2012 school year through the summer of 2012.

ORDER

Based upon the above Findings of Fact and conclusions of law, it is hereby ordered that:

1. Within 10 business days, DCPS shall provide Student a prior notice of placement to the School. Student shall attend The School at DCPS expense

for, at a minimum, the 2011-2012 school year including services provided, if determined to be appropriate, during the summer of 2012.

2. DCPS shall provide funding for all related costs required for Student to attend the School including related services and transportation to and from the School, as required, for educational and IEP program purposes;

3. DCPS is to convene an MDT meeting, to include relevant staff from The School and Petitioner and her educational advocate, to make any IEP changes required by this determination including identifying The School as the school Student will be attending. The IEP shall address each of the recommendations found in the psycho-educational evaluation dated June 23, 2011 by Dr. Katherine Martin and each of the recommendations found in the speech evaluation dated July 14, 2011 by Monica Maines.

4. In addition to funding Student's attendance at the School including all related costs, DCPS shall fund one hour of speech language therapy per week as compensatory education as specified herein.

IT IS SO ORDERED:

October 8, 2011
Date

Erin H. Leff
Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision 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 Decision of the Hearing Officer in accordance with 20 USC §1451(i)(2)(B).