

**District of Columbia
Office of the State Superintendent of Education**

Student Hearing Office
810 First Street, N.E., Suite 2001
Washington, DC 20002

OSSE
Student Hearing Office
May 22, 2013

<p>STUDENT¹, By and through PARENT,</p> <p style="text-align: center;"><i>Petitioner,</i></p> <p>v.</p> <p>DISTRICT OF COLUMBIA PUBLIC SCHOOLS,</p> <p style="text-align: center;"><i>Respondent.</i></p>	<p>Case No.</p> <p>Impartial Hearing Officer: Charles M. Carron</p> <p>Date Issued:</p> <p>May 22, 2013</p> <p>Representatives:</p> <p>Roberta L. Gambale, Esq. for Petitioner</p> <p>Lynette A. Collins, Esq. for Respondent</p>
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HEARING OFFICER DETERMINATION

I. PROCEDURAL BACKGROUND

This is a Due Process Complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*

The DPC was filed March 29, 2013, on behalf of the Student, who resides in the District of Columbia, by Petitioner, the Student’s Parent, against Respondent, District of Columbia Public Schools.

¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

On April 2, 2013, the undersigned was appointed as the Impartial Hearing Officer.

On April 8, 2013, Respondent timely filed its Response, stating that Respondent has not denied the Student a free appropriate public education (“FAPE”).

The undersigned held a Prehearing Conference (“PHC”) by telephone on April 22, 2013, at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by April 26, 2013, unless extended by the parties’ mutual agreement, and that the Due Process Hearing (“DPH”) would be held on May 3, 2013, continuing on May 17, 2013.

No Resolution Session Meeting was held. The statutory 30-day resolution period ended on April 28, 2013. The 45-day timeline for this Hearing Officer Determination (“HOD”) started to run on April 29, 2013 and will conclude on June 12, 2013.

No motions were filed by either party and the DPH was held from 9:35 a.m. until 3:50 p.m. on May 3, 2013, and from 9:37 a.m. to 10:40 a.m. on May 17, 2013, at the Student Hearing Office, 810 First Street, NE, Room 2003, Washington, DC 20002. Petitioner elected for the hearing to be closed.

At the DPH, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner’s Exhibits: P-1 through P-38. ²

Respondent’s Exhibits: R-1 through R-5

Hearing Officer’s Exhibits: HO-1 through HO-7

² At the DPH, Petitioner withdrew page 13 of P-30 which relates to another student.

The following witnesses testified on behalf of Petitioner at the DPH:

(a) The Parent;

(b) Natasha Nelson, Ph.D., who, on *voir dire*, over Respondent's objection, was qualified as an expert in clinical and school psychology, including psychological evaluations;

(c) Mia Long, educational advocate, who testified as a fact witness; and

(d) Sharon Lennon, D.Ed., who, on *voir dire*, over Respondent's objection, was qualified as an expert in special education programming.³

The following witnesses testified on behalf of Respondent at the DPH:

(a) Samantha Kotey, District of Columbia Public Schools Office of Special Education Compliance Case Manager;

(b) the Assistant Principal/Special Education Coordinator, Attending School (the "Assistant Principal"); and

(c) the Special Education Teacher/Case Manager, Attending School (the "Case Manager").

The parties did not file written closing arguments or briefs.

II. JURISDICTION

The DPH was held pursuant to the IDEA, 20 U.S.C. §1415(f); IDEA's implementing regulations, 34 C.F.R. §300.511, and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029 and E3030. This decision constitutes the HOD pursuant to 20 U.S.C. § 1415(f), 34 C.F.R. §300.513, and §1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures*.

³ Dr. Lennon's education and experience minimally qualified her as an expert. As discussed in Section VIII *infra*, the undersigned found Dr. Nelson's testimony unpersuasive.

III. CIRCUMSTANCES GIVING RISE TO THE COMPLAINT

The circumstances giving rise to the Complaint are as follows:

The Student is male, Current Age, and attends Current Grade at a public school (the “Attending School”). The Student has been determined to be eligible for special education and related services as a child with a disability, Specific Learning Disability, under the IDEA.

Petitioner asserts that Respondent failed to allow the evaluator conducting the Student’s occupational therapy reassessment to access him while attending school and otherwise delayed reevaluation of the Student and modifications to his Individualized Education Program (“IEP”). Petitioner also asserts that the Student’s IEP developed on February 13, 2013, is inappropriate and denies the Student a free appropriate public education (“FAPE”). Respondent denies that it has violated any provision of IDEA.

IV. ISSUES

As confirmed at the PHC and in opening statements at the DPH, the following issues were presented for determination at the DPH:

(a) Did Respondent deny the Student a FAPE because his February 13, 2013 IEP lacked (i) social emotional goals, (ii) appropriate academic goals in reading and math, (iii) counseling services, and (iv) transportation services?

(b) Did Respondent deny the Student a FAPE by failing to allow the evaluator conducting the Student’s occupational therapy reassessment to access him while attending school, thereby improperly delaying the Student’s reevaluation in all suspected areas of disability and delaying modifications to his IEP?

(c) Did Respondent deny the Student a FAPE by delaying convening an IEP Team⁴ to discuss the Student's reassessments in areas other than occupational therapy and associated modifications in his IEP, until the completion of his occupational therapy assessment, thereby improperly delaying the Student's evaluation in all suspected areas of disability and delaying modifications to his IEP?

V. RELIEF REQUESTED

Petitioner requests the following relief:⁵

(a) a finding that the Student has been denied a FAPE;

(b) an Order that Respondent amend the Student's IEP to include one hour per week of individualized counseling, revised goals in reading and mathematics, and bus transportation; and

(c) an Order of compensatory education consistent with Petitioner's Compensatory Education Plan (the "Plan") timely filed on April 16, 2013.

⁴ The parties and the exhibits sometimes refer to this team as a Multidisciplinary Team ("MDT"). The difference is not material to resolution of the issues in this case.

⁵ Petitioner also seeks attorneys' fees and costs, which the undersigned lacks the authority to award.

VI. FINDINGS OF FACT

Jurisdiction

1. The Student is a male, Current Age. R-2-1.⁶
2. The Student resides in the District of Columbia. Testimony of the Parent.
3. The Student has been determined to be eligible for special education and related services under the IDEA as a child with a Specific Learning Disability. R-2-1.

Authorization for 2012 Independent Educational Evaluations

4. On April 20, 2012, the parties entered into a settlement agreement in Case No. 2012-0266, providing, *inter alia*, that the Parent was authorized to obtain an independent comprehensive psychological evaluation,⁷ an independent occupational therapy evaluation, and a speech/language assessment—all at the expense of the District of Columbia, to be completed within 45 days. P-26-2. The Parent was to send the evaluation(s) and report(s) to Samantha Kotey via email. *Id.*

5. The April 20, 2012 settlement agreement also provided that within 30 business days of receipt of the final evaluation report, DCPS would convene an IEP meeting, *inter alia*, to review the evaluations and assessment, and to review and revise the Student's IEP, if necessary. P-26-2. The settlement agreement further provided that “any time lines dependent upon receipt of the IEE will only begin upon receipt of the completed evaluation” by Ms. Kotey. *Id.*

⁶ When citing exhibits, the third range represents the page number within the referenced exhibit, in this instance, page 1.

⁷ These evaluations sometimes were referred to by the parties, or in exhibits, as reevaluations or assessments. These differences in terminology are not material to resolution of the issues in this case.

6. On May 7, 2012, Ms. Kotey sent the IEE authorizations to the Parent via Petitioner's counsel. Testimony of Samantha Kotey.

The Student's 2012 Speech/Language Assessment

7. On May 19, 2012, Carolyn M. Ross, MS, CCC-SLP, a Speech-Language pathologist, conducted a speech/language assessment of the Student, and issued an undated report. P-2.

8. Ms. Ross concluded that the Student's overall language proficiency was within the average range and that he did not meet the criteria to receive special education related service as a student with a Speech Language Impairment. P-2-4.

9. Ms. Ross recommended various classroom accommodations. P-2-4.

10. Petitioner's counsel emailed Ms. Ross's report to Ms. Kotey on June 15, 2012. P-14-1.

The Student's 2012 Comprehensive Psychological Evaluation

11. On June 10, 2012, Natasha Nelson, Ph.D., a licensed clinical psychologist, and her Psychology Extern, Gisselle Spencer, M.Sc., conducted a comprehensive psychological evaluation of the Student, and issued a report on June 13, 2012. P-1-1.

12. Dr. Nelson identified the Student's speed of reading and verbal comprehension as significantly below his age and grade levels. P-1-7.

13. Dr. Nelson identified the Student's math abilities as at three or four grade levels below Current Grade, which the Student would be entering that fall. *Id.*

14. Dr. Nelson identified the Student's weaknesses in putting words together in a meaningful manner ("Writing Fluency and Writing Samples"). P-1-8.

15. In her testimony, Dr. Nelson admitted that she was not aware of the Student's Scholastic Reading Inventory ("SRI") score when she made her recommendations regarding reading instruction. Testimony of Dr. Natasha Nelson.

16. Dr. Nelson concluded that the Student's academic performance fell three to four grade levels below Current Grade and that he would "require supports in the classroom to help him with his grade-level work." P-1-13.

17. In her testimony, Dr. Nelson acknowledged that the Student's academic performance is consistent with his general intellectual ability as expressed in age- and grade-equivalents and percentiles. Testimony of Dr. Natasha Nelson.

18. Dr. Nelson confirmed the Student's prior diagnosis of "Learning Disorder NOS (Deficits in Reading, Math, and Written Expression)." P-1-14.

19. Dr. Nelson concluded that the Student did not have a social-emotional disorder, but was "At Risk" on several "domains" because of anxiety and dysthymia for which Dr. Nelson recommended at least 45 minutes per week of counseling. *Id.*, testimony of Dr. Natasha Nelson.

20. In her testimony, Dr. Nelson admitted that the Student is not diagnosed with dysthymia, which had been "ruled out." Testimony of Dr. Natasha Nelson.

21. Dr. Nelson did not observe the Student at school. *Id.*

22. Dr. Nelson does not know what percentage of teenagers are "At Risk" of anxiety or dysthymia. *Id.*

23. Dr. Nelson relied upon the Student's history and information from the Student, the Parent, and two of the Student's teachers in reaching her conclusions about the Student's social-emotional state and need for counseling services. *Id.*

24. The four individuals providing information on the Student's social-emotional state had widely varying points of view. *Id.*, P-1.

25. In her testimony, Dr. Nelson stated that she "wondered" whether horseplay at school affected the Student's social-emotional functioning. Testimony of Dr. Natasha Nelson.

26. Based upon all of Dr. Nelson's testimony and her report, the undersigned finds that Dr. Nelson over-weighted the opinions of the Parent and the teacher⁸ who believed the Student had social-emotional problems at school, and under-weighted the opinions of the Student and the teacher who believed the Student did not have serious social-emotional problems at school.

27. Based upon all of the record evidence, the undersigned finds that the Student does not demonstrate social-emotional problems at school, and is in fact well-adjusted in the school setting.

28. Dr. Nelson recommended various classroom accommodations, as well as additional instruction in math. P-1-14 and -15.

⁸ Dr. Nelson also exaggerated this teacher's concerns. While this teacher stated that the Student "becomes distracted and unfocussed when sitting with his friends" the teacher also noted that the Student "is able to recognize this, and sits with other students instead.... [The Student] gets along well with both his peers and teachers ... maintains good attendance and has never been suspended or expelled." P-1-3. Dr. Nelson's conclusions and recommendations regarding the Student's need for in-school counseling selectively relied upon this teacher's expressed concern about the Student becoming distracted and unfocussed, while ignoring the Student's ability to self-regulate by sitting away from his friends in class.

29. Dr. Nelson's report did not address the Student's ability to ride public transportation.⁹

30. Petitioner's counsel emailed Dr. Nelson's report to Ms. Kotey on June 15, 2012. P-14-1.

31. Dr. Lennon developed a compensatory education proposal (P-30) based upon Dr. Nelson's recommendations, without any additional testing or evaluation to determine (a) the Student's needs or (b) the educational deficits caused by Respondent's failure to adopt Dr. Nelson's recommendations by revising the specialized instruction and related services in the Student's IEP (Testimony of Dr. Sharon Lennon).

The Student's 2012 Occupational Therapy Evaluation

32. On September 19, 2012, Ms. Long emailed Kevin Parker, Parker Diagnostics, the firm that was to conduct the occupational therapy evaluation of the Student, asking the status of that evaluation, whether it had been completed, and whether the provider was having trouble contacting the Parent. P-9-1.

33. Later on September 19, 2012, Mr. Parker replied to Ms. Long that the occupational therapist who was to evaluate the Student "had a very difficult time reaching [the Student]" and offered to expedite the evaluation if the Student were available. *Id.*

34. On October 23, 2012, Ms. Long emailed Mr. Parker asking whether the occupational therapy evaluation was ready for the Student. P-10-1.

⁹ Dr. Nelson testified that the Student could have difficulty riding public transportation if there were route changes. Testimony of Dr. Natasha Nelson. The undersigned considers this testimony speculative and gives it no weight.

35. Later on October 24, 2012, Mr. Parker replied to Ms. Long, informing her that the occupational therapist who was to evaluate the Student had gone to the Student's school three times in the past week and reported that the school was not cooperative and would not tell her if the Student was in school, so she had gone to the school only to learn that the Student was on a field trip. *Id.*

36. Later on October 24, 2012, the Assistant Principal emailed Ms. Kotey, Ms. Long and Petitioner's counsel stating as follows: "The OT [occupational therapist] has not contacted the school once, she showed up yesterday asking if the student was present. She even admitted that she had not reached out to the school." R-5-23.¹⁰

37. On October 25, 2012, Ms. Long emailed the Assistant Principal and Mr. Parker, stating as follows: "I just wanted to bring you two together to schedule the OT's visit to [the Attending School]." R-5-26.

38. On October 26, 2012, the Assistant Principal replied to Mr. Parker, Ms. Long, Ms. Kotey and Petitioner's counsel asking what day the occupational therapist was planning to come. R-5-24.

39. On November 16, 2012, Mr. Parker emailed Ms. Long stating that he "had to find another OT willing to do the referral because the OT we originally hired to do this referral sent it back to us saying it was taking up time trying to schedule. I didnt (sic)

¹⁰ The Assistant Principal testified that the occupational therapist arrived at the Attending School with no prior contact, on a day when all of the rooms that could be used for evaluation already were in use. Testimony of Assistant Principal. The Assistant Principal initially testified that this occurred in December 2012 or January 2013, but upon questioning by the undersigned and being shown her email (R-5-23), she corrected her testimony to reflect the fact that the occupational therapist had come to the Attending School on October 23, 2012. The undersigned does not consider this incorrect date citation reflect adversely on the Assistant Principal's credibility.

agree with her but nonetheless we have an OT going out today to work with [the Student]. I know this has taken months. Hopefully he has success today.” P-11-1.

40. On December 10, 2012, Petitioner’s counsel emailed Ms. Kotey to advise her that “[w]e are still having problems getting the OT [occupational therapy evaluation] completed for [the Student]. Apparently the School refused to allow the prior provider access. We have therefore decided to utilize a different company—Interdynamics Inc. in Lanham Md. They are on your lists of approved providers. The evaluators want to conduct the evaluation in their offices on Friday, December 14 at 1 p.m. The parent will need transportation to and from the facility with [the Student] and is asking DCPS to provide it.” P-13-1.

41. The undersigned rejects Petitioner’s assertion that the Attending School refused to allow access to the occupational therapist initially hired by Parker Diagnostics. The only evidence that this occurred was a statement by the (unnamed) occupational therapist to Mr. Parker, relayed to Petitioner’s educational advocate. Testimony of Mia Long. This is double-hearsay, as neither the occupational therapist nor Mr. Parker testified. The Assistant Principal flatly denied that this had occurred and testified that the occupational therapist herself admitted that this had not occurred. Testimony of Assistant Principal, R-5-23. Although the Assistant Principal’s testimony about the statement by the occupational therapist is (single) hearsay, the undersigned finds it credible because (a) Mr. Parker in an email rejected the occupational therapist’s assertion of scheduling difficulties (P-11-1), and (b) the entire course of conduct of the Assistant Principal and Ms. Kotey evidenced by the emails and testimony in the record reflects cooperation rather than interference.

42. On December 14, 2012, Joylynn D. Wills, MGA, OTR/L, Occupational Therapist, conducted an occupational therapy evaluation of the Student and issued an undated report. P-3.

43. Ms. Wills found the Student's gross motor and fine motor skills to be within normal limits. P-3-4.

44. Ms. Wills identified the Student's weaknesses in visual perceptual discrimination, comprising visual closure (the ability to imagine what an incomplete shape should look like) and visual figure-ground perception (the ability to distinguish foreground from background figures)—both of which are required for reading and interpreting visual information. P-3-3 and -4.

45. Ms. Wills recommended a six-month trial of occupational therapy in the Student's school program, one time per week for 30-45 minutes, "to work on remedial and compensatory activities to address the visual perception deficits." P-3-4.

46. Ms. Wills recommended other accommodations in the classroom. *Id.*

47. On January 30, 2013, Ms. Long emailed Ms. Wills' Report to Ms. Kotey. P-12-1.

48. Based upon all of the record evidence, the undersigned finds that Petitioner, through her legal representative, educational advocate, and the firms she chose to conduct the Student's occupational therapy evaluation, was entirely responsible for the delays in the independent occupational therapy evaluation. In particular, (a) the occupational therapy evaluation was authorized by Respondent on April 20, 2012 (P-26-2); (b) Petitioner apparently engaged Parker Diagnostics to conduct several evaluations, including the occupational therapy evaluation, but Petitioner's representatives did not

follow up with Parker Diagnostics to determine the status of the occupational therapy evaluation for five months—until September 19, 2012 (P-9-1); (c) the delay in conducting the occupational therapy evaluation up to September 19, 2012 was due to difficulties the occupational therapist had in contacting the Student (P-9-1), not to any action or inaction by Respondent; (d) Petitioner’s representatives did not follow up with Parker Diagnostics for another month, until October 23, 2012 (P-10-1); (e) several days later, on October 26, 2012, Respondent offered to accommodate the occupational therapist’s visit (R-5-24); (f) three weeks later, on November 16, 2012, the firm Petitioner had selected to conduct the occupational therapy evaluation, while not agreeing that the occupational therapist had experienced scheduling difficulties, assigned a different occupational therapist (P-11-1); (g) almost another month elapsed until December 10, 2012, when Petitioner’s representatives requested transportation for the Student and the Parent to the occupational therapist’s office for the evaluation on December 14, 2012 (P-13-1); and (h) Petitioner did not provide the report of the evaluation to Respondent until January 30, 2013 (P-12-1).

49. The undersigned further finds that in view of the repeated month-long gaps (and one five-month-long gap) during which Petitioner’s representatives failed to take any action to have the occupational therapy evaluation conducted in a timely manner, Petitioner acted in bad faith in asserting that the delays were caused by Respondent. In particular, the undersigned finds that Petitioner’s counsel failed to demonstrate due diligence with regard to the occupational therapy evaluation, which was an Independent Educational Evaluation within the control of Petitioner and her representatives.

50. On February 11, 2013, Candace Harris, OTR/L, DCPS Occupational Therapist, reviewed Ms. Wills' evaluation and report. R-4-1. Ms. Harris found that Ms. Wills' testing and assessment materials and procedures were valid, reliable and accurate, but that Ms. Wills' report did not review relevant background information and did not describe the Student's performance in the current school environment, and that Ms. Wills had not even contacted the school to determine the impact of the Student's deficits within the school environment. *Id.* Ms. Harris also found that Ms. Wills' conclusions were not supported by the data provided and that additional information was needed, *i.e.*, a more specific assessment to determine which area of visual perception the Student had difficulty with. *Id.* In addition, Ms. Harris recommended an ophthalmic evaluation to rule out visual acuity problems. *Id.*

Scheduling of the Student's IEP Meetings

51. On August 30, 2012, Ms. Long emailed Ms. Kotey requesting an IEP Team meeting and proposing several dates. P-14-6 and -7.

52. Later on August 30, 2012, Ms. Kotey responded to Ms. Long, asking the purpose of the meeting so she could determine if her attendance was required. P-14-6.

53. Later on August 30, 2012, Ms. Long responded to Ms. Kotey, stating that the meeting was pursuant to the settlement agreement [authorizing the Student's evaluations], and that Ms. Kotey should contact Petitioner's counsel to schedule the meeting. *Id.*

54. Later on August 30, 2012, Ms. Kotey emailed Petitioner's counsel and Ms. Long, stating that she still was waiting for the occupational therapy evaluation. *Id.* Ms.

Kotey asked Petitioner’s counsel and Ms. Long if they proposed to move forward with a meeting without the occupational therapy evaluation. *Id.*

55. Later on August 30, 2012, Petitioner’s counsel replied to Ms. Kotey stating that they expected to have the occupational therapy evaluation shortly, but they were “concerned about the team reviewing the psychological [evaluation] since it recommends services – he isn’t currently receiving.” P-14-5.

56. Later on August 30, 2012, Ms. Kotey replied to Petitioner’s counsel stating, “Ok. So are you saying you want to convene twice?” *Id.*

57. Later on August 30, 2012, Petitioner’s counsel replied to Ms. Kotey, stating “Not unless necessary—but I do want to make sure [the Student’s] needs are being addressed. To that end can we set a date?” *Id.*

58. Later on August 30, 2012, Ms. Kotey replied to Petitioner’s counsel stating that she would forward Petitioner’s emails to the school and get back to Petitioner’s counsel when the school advised what dates were available. P-18-1.

59. On August 31, 2012, Ms. Kotey emailed Petitioner’s counsel stating that the school was unavailable on the dates proposed but was available on September 27, 2012 at 1:00 p.m. P-14-4 and -5.

60. Later on August 31, 2012, Petitioner’s counsel emailed Ms. Kotey to state that if she was not available, Ms. Long should be able to sit in for her, but that they would need to check with the Parent to ascertain her availability. P-14-4.

61. Later on August 31, 2012, Ms. Kotey replied to Petitioner’s counsel as follows: “Ok no problem. Let me know when you’ve had a chance to figure it out. Thanks.” P-22-3.

62. On September 11, 2012, Ms. Kotey emailed Petitioner's counsel to ask whether she was able to get in contact with the Parent to see if she was available on September 27, 2012. P-20-1.

63. Later on September 11, 2012, Petitioner's counsel replied to Ms. Kotey that the date and time should work for them, and requested a confirmation. *Id.*.

64. Later on September 11, 2012, Ms. Kotey emailed a confirmation to Petitioner's counsel. *Id.*

65. Later on September 11, 2012, Petitioner's counsel emailed Ms. Kotey asking for a formal confirmation letter listing the participants and purpose of the meeting. P-21-1.

66. Later on September 11, 2012, Ms. Kotey replied to Petitioner's counsel stating as follows: "Sure no problem but since you requested the meeting prior to the completion of all outstanding evaluations, can you please inform me of what the purpose is so that I know what to include? Thanks." *Id.*

67. Later on September 11, 2012, Petitioner's counsel replied to Ms. Kotey stating that the purpose of the meeting was to "review the evaluations completed and revise the student's IEP as appropriate in light of the findings. Among other things, parent is very concerned about counseling being added as a related service to the IEP as recommended." P-22-1.

68. Later on September 11, 2012, Ms. Kotey replied to Petitioner's counsel stating as follows: "Got it. Thanks. Also, will the outstanding [occupational therapy] evaluation be completed by then? This is important so that I know whether or not an [occupational therapist] is necessary." *Id.*

69. Later on September 11, 2012, Petitioner's counsel replied stating that she expected the occupational therapy evaluation to be available by then. R-5-17.

70. On September 27, 2012, Ms. Kotey emailed Petitioner's counsel and Ms. Long to ask whether the IEP Team meeting scheduled for that afternoon was going forward, in view of Petitioner's counsel's representation that she was only interested in having one meeting, and that the occupational therapy evaluation would be provided to Respondent prior to the meeting. P-12-1 and -2. Ms. Kotey stated that Respondent had not received the occupational therapy evaluation and would prefer to postpone the meeting until all outstanding evaluations were received. *Id.*

71. Later on September 27, 2012, Ms. Long responded to Ms. Kotey, advising her that Petitioner's counsel was unavailable, and that the occupational therapy evaluation was not ready. P-12-1.

72. Later on September 27, 2012, Ms. Long advised Ms. Kotey that "it is okay to postpone" and that she would "get back with dates." *Id.*

73. Later on September 27, 2012, Ms. Kotey reported that she would schedule with the school as soon as she received the occupational therapy evaluation. *Id.*

74. The undersigned finds that Respondent was ready, willing and able to proceed with the IEP Team meeting on September 27, 2012, and that the meeting was postponed because of Petitioner's counsel's prior indication that she wanted one rather than two meetings, which was reinforced by Ms. Long's statement that "it is okay to postpone."

75. On December 10, Petitioner's counsel emailed Ms. Kotey to advise her that "[w]e are still having problems getting the OT completed for [the Student]. Apparently the School refused to allow the prior provider access. We have therefore decided to

utilize a different company—Interdynamics Inc. in Lanham Md. They are on your lists of approved providers. The evaluators want to conduct the evaluation in their offices on Friday, December 14 at 1 p.m. The parent will need transportation to and from the facility with [the Student] and is asking DCPS to provide it.” P-13-1.

76. On January 30, 2013, Ms. Long emailed the occupational therapy evaluation to Ms. Kotey and asked her for dates the school could offer to review the evaluation. P-12-1.

77. Also on January 30, 2013, Petitioner’s counsel’s Legal Assistant Rene Soto sent a letter to Ms. Kotey attaching a copy of the occupational therapy evaluation and stating as follows: “Pursuant to the attached settlement agreement, DCPS shall convene a BLMDT/IEP meeting to review this and any other assessments within 30 business days.” P-27-1. The letter did not assert that Respondent had been remiss in not scheduling such a meeting prior to January 30, 2013, or that Respondent had an obligation to schedule a meeting prior to 30 business days after January 30, 2013 [*i.e.*, approximately March 15, 2013]. *Id.*

78. On January 31, 2013, Ms. Kotey emailed the Parent, Ms. Long and Petitioner’s counsel advising them that an MDT meeting was being scheduled to review the independent psychological evaluation, review the independent speech and language assessment, review the independent occupational therapy evaluation, and review/revise the Student’s IEP if necessary. P-24-2. Ms. Kotey offered three dates, at noon each date, and identified the MDT members and the location of the meeting. *Id.*

79. Later on January 31, 2013, Ms. Long replied to Ms. Kotey stating that she had schedule conflicts on the dates and times proposed, and offering alternative dates and times. P-24-1.

80. Later on January 31, 2013, Ms. Faulkner-Jones replied to Ms. Long and Petitioner's counsel confirming February 12, 2013 at noon. *Id.*

81. Based upon all of the record evidence, the undersigned finds that Petitioner, through her legal representative, educational advocate, and the firms she chose to conduct the Student's occupational therapy evaluation, was entirely responsible for the delays in scheduling and convening the Student's IEP Team meeting. In particular, (a) Petitioner's representatives first requested an IEP Team meeting on August 30, 2012 (P-14-6 and -7); (b) Respondent replied the same day, clarifying the purpose of the meeting and desired attendees, and asking whether Petitioner wished to move forward with an IEP Team meeting without the occupational therapy evaluation and convene a second time when that evaluation was available (P-14-5 through -7), to which Petitioner's representative responded ambiguously and requested that a date be set for the meeting (P-14-5); (c) the very next day, Respondent emailed Petitioner's counsel proposing a date and time for the meeting, to which Petitioner's counsel responded that she would check with the Parent to ascertain her availability (P-14-4 and -5); (d) Petitioner's counsel took no action for almost two weeks until September 11, 2012, when Respondent emailed her to ask whether the Parent was available for the meeting on September 27, 2012, to which Petitioner's counsel replied accepting that date and time (P-20-1) even though the occupational therapy evaluation had not been conducted (P-21-1, P-22-1) because Petitioner's counsel expected that evaluation to be available by then (R-5-17); (e) on

September 27, 2012, not having received the occupational therapy evaluation, Respondent emailed Petitioner's counsel and educational advocate to ask whether the meeting that afternoon was going forward in view of Petitioner's counsel's representation that she was only interested in having one meeting, and that the occupational therapy evaluation would be provided to Respondent prior to the meeting, to which Petitioner's educational advocate responded that Petitioner agreed to postpone the meeting and would provide dates (P-12-1 and -2); (f) Petitioner and her representatives took no action for two and a half months, until December 10, 2012, when Petitioner's counsel emailed Respondent to advise that the occupational therapy evaluation was scheduled for later that week (P-13-1); (g) although the occupational therapy evaluation took place on December 14, 2012 (P-3), Petitioner's representatives did not provide the report to Respondent until six weeks later, on January 30, 2013, at which time Petitioner's educational advocate asked Respondent for dates for a meeting to review the evaluation (P-12-1) and Petitioner's counsel's Legal Assistant noted that Respondent had 30 business days, *i.e.*, until mid-March, 2013, to convene the meeting (P-27-1); (h) Respondent replied the next day, offering three dates and times for a meeting (P-24-1 and -2) to which Petitioner's educational advocate replied that she had schedule conflicts on the dates and times proposed and offered alternative dates and times (P-24-1); and (i) the meeting convened on February 12, 2013 (P-4-1), which was 13 calendar days (and only 10 business days) after Petitioner's request for the meeting and a full month before Respondent's deadline to convene the meeting (P-26-2) as acknowledged by Petitioner's representatives (P-27-1).

82. The undersigned further finds that Petitioner acted in bad faith in asserting that the delays were caused by Respondent when in fact these delays were caused by failures of due diligence on the part of Petitioner’s representatives. This finding is based upon the following: (a) the repeated month-long gaps (and one months-long gap) during which Petitioner’s representatives failed to request scheduling of the IEP Team meeting, (b) Petitioner’s initial request that no meeting be held until all evaluations had been completed, (c) Petitioner’s delays in obtaining the occupational therapy evaluation, (d) Petitioner’s concurrence in postponing a tentatively scheduled meeting until that evaluation was completed, and (e) Respondent’s pattern of prompt and positive responses to Petitioner’s requests to schedule meetings.

The Student’s Need for Behavioral Support Services

83. The Parent testified that the Student needs counseling because he “needs to know how to express himself,” he “isolates, keeps everything in—feelings, attitudes, emotions. When it comes out, it comes out wrong”; however, on cross-examination, the Parent acknowledged that the Student is not isolated at school. Testimony of the Parent.

84. The Parent testified that she had received calls¹¹ from the Student’s school advising her that the Student had two or three outbursts; however, the Student did not receive an in-school or out of school suspension for his conduct. *Id.*

85. The Assistant Principal testified that the Student is a pleasure to have in class, is respectful, has friends at the Attending School, is very involved in the “school culture,”

¹¹ The Parent did not say when she received those calls, which might have been in a prior school year.

participates in three sports, and attends after-school tutorials; and that any social-emotional issues have “no impact on his academic progress.” Testimony of the Assistant Principal.

86. The Attending School has a social worker that all students may see. *Id.*

87. The Student has demonstrated no attention issues, self-esteem issues, anxiety issues, or behavioral concerns at school during the 2012-2013 school year. Testimony of the Case Manager.

88. The Student does not tend to isolate himself at school. *Id.*

89. The Student is a “model student-athlete.” *Id.*

90. Based upon all of the record evidence, the undersigned finds that the Student does not require counseling or other behavioral support services.

The Student’s Need for Transportation Services

91. At the time the Student began attending the Attending School, it was his neighborhood school. Testimony of the Parent.

92. When the Student began attending the Attending School, Respondent was providing school bus transportation; however, in February 2013, Respondent discontinued that transportation. *Id.*

93. Since school bus transportation was discontinued, the Student has been riding public transportation, *i.e.*, Metrobus. *Id.*

94. Initially, the Parent was not comfortable with the Student riding Metrobus; however, she acknowledges that now that the Student is riding Metrobus “he’s more confident ... He rides the bus pretty good.” *Id.*

95. However, the Parent remains concerned that the Metrobus might turn around and the Student could get lost, so she wants him to ride the school bus instead. *Id.*

96. The Parent is not aware of any time that the Metrobus turned around or otherwise failed to bring the Student to his regular bus stop. *Id.*

97. The Assistant Principal testified that the Attending School had been the Student's home school (*i.e.*, he lived within the boundary of the Attending School) when he began attending and the school was walking distance from his home; however, the Parent subsequently moved outside the school boundary and decided not to transfer the Student to his new neighborhood school, so he continued to attend the Attending School, but as an "out of boundary" student not entitled to transportation at Respondent's expense. Testimony of the Assistant Principal.¹²

98. The Student has been riding Metrobus in the afternoon after school sports apparently without incident or problem. *Id.*

99. The undersigned finds the Parent's concern about the Metrobus turning around and the Student getting lost to be speculative.

¹² The only transportation issue that is cognizable in the instant case is whether the Student's disabilities preclude him from taking public transportation to school. Much of the discussion at the February 12, 2013 IEP Team meeting, and at the DPH, addressed Respondent's transportation policy regarding non-disabled students (and students whose disabilities do not qualify them for transportation), including (a) whether such a Student who changes residence and elects to continue to attend his or her former "home school" as an "out of boundary" student is entitled to have Respondent pay for public transportation (Metrobus or Metrorail); and (b) whether the answer is different if Respondent initiates the "out of boundary" school assignment. Whether Petitioner is entitled to have the Student's Metrobus fare paid by Respondent under a policy not dictated by IDEA is beyond the scope of this DPC proceeding.

100. Based upon all of the record testimony regarding transportation, the undersigned finds that the Student did not and does not have a need for school bus transportation based upon his disability.

The Student's Need for Specialized Instruction

101. The Student currently is earning grades of A and B (Testimony of the Parent) and is on the honor roll (Testimony of the Assistant Principal).

102. The Student's teachers have matched his math instruction to his individualized needs through the use of a "playlist" that monitors the gaps between his current achievement and the Current Grade standard, and through direct encounters with teachers, online assignments, and online tutoring. Testimony of the Assistant Principal.

103. The Student's math "playlist" addresses geometry, solving word problems, measurements and applications. *Id.*

104. During the 2012-2013 school year to date, the Student has made substantial academic progress ("grown tremendously"), has completed all necessary projects, is on the honor roll, and has been considered for the "most improved student" award. Testimony of the Case Manager.

105. The Case Manager testified that all of the Student's teachers characterized the Student as a "solid student," above average, with no behavioral concerns in the classroom. *Id.*

106. An observer in the classroom would not identify the Student as a "special needs" student. *Id.*

The February 12, 2013 IEP Team Meeting¹³

107. At noon on February 12, 2013, Ms. Long emailed the Assistant Principal and Ms. Kotey itemizing the Parent’s concerns and requests for services. P-14-9. Through her educational advocate, the Parent requested (a) that the reading, writing and math services be provided outside general education; (b) that the Student’s IEP include reading goals of fluency, passage comprehension and vocabulary acquisition; (c) that the Student’s IEP include math goals of solving word problems, applications of math concepts to real world applications, measurement/geometry, and math fluency; (d) that the Student’s IEP include writing goals of producing “BCR’s” related to what he was being taught in various classes, subject-verb agreement, and the use of higher tiered vocabulary in paragraphs; (e) counseling services; (f) continued provision of occupational therapy services regarding handwriting and copying; (g) a statement on the record that the occupational therapy evaluation was attempted by another company but was delayed due to school imposed obstacles; (h) compensatory education via increased interaction with a counselor; and (i) a report on how the Student was performing so far that year. *Id.*

108. At 12:04 p.m., Ms. Kotey emailed Ms. Long asking whether the Parent would be attending the meeting. P-25-3.

109. At 12:07 p.m., Ms. Long replied to Ms. Kotey that the Parent would participate by telephone. *Id.*

¹³ The undersigned finds that the Student’s academic performance and social-emotional functioning at the beginning of March 2012—almost a year before the February 12, 2013 IEP Team meeting—are not material to his performance and functioning during the time period at issue in the instant case; accordingly, the undersigned has not summarized in this HOD the testimony and exhibits regarding that time period.

110. At 12:14 p.m., Ms. Kotey informed Ms. Long that they were waiting for the speech pathologist. *Id.*

111. Later on February 12, 2013, a meeting was held of the Student's IEP Team, without the Parent in attendance although Petitioner's educational advocate, Ms. Long, did participate by telephone. P-4-1.

112. The IEP Team concluded that the Student required additional classroom supports in math to complete grade level work. P-4-2.

113. The IEP Team established as an annual goal in math that the Student would be able to apply number theory concepts, including "prime factorization and relatively prime numbers," to the solution of problems in four out of five trials with at least 80% accuracy. *Id.*

114. Ms. Long expressed her view that the Student required more specific math goals, particularly word problems applying math to real world problems and math fluency, but the Assistant Principal was insistent that additional goals were not required. Testimony of Mia Long.

115. The IEP Team concluded that the Student required intensive classroom interventions to help his reading. P-4-3.

116. Based upon [Dr. Nelson's comprehensive] psychological evaluation of the Student and observations of the Student by the IEP Team, the IEP Team established as an annual goal in reading that the Student would be able to identify and analyze basic story elements for four out of five trials with at least 80% accuracy. Testimony of the Case Manager, P-4-3.

117. Ms. Long expressed her view that the Student required a specific reading fluency goal and a vocabulary goal, but the Assistant Principal refused. Testimony of Mia Long.

118. The IEP Team incorporated elements of the Current Grade “Common Core Standard” into the Student’s IEP to address his need to improve reading comprehension.¹⁴ Testimony of the Case Manager, R-2-3.

119. The IEP Team concluded that the Student required additional classroom supports to help him with his grammar, sentence mechanics and overall written planning. P-4-4.

120. The IEP Team established as an annual goal in writing (*i.e.*, written expression) that the Student would be able to demonstrate use of capitalization and punctuation rules and the use of subject-verb agreement for four out of five trials with at least 80% accuracy. *Id.*

121. Ms. Long testified that sub-goals in the areas of reading fluency, reading comprehension and vocabulary, and math were required so that the Student could be taught by a special education teacher. Testimony of Mia Long.¹⁵

122. The IEP Team incorporated elements of the Current Grade “Common Core Standard” into the Student’s IEP to address his need to improve his written expression,

¹⁴ At the DPH, Petitioner’s counsel focused on the fact that the selected Common Core Standards were not labeled as “short term goals” in the Student’s IEP. While the IEP could be improved by making it more clear that these Standards are the Student’s short term goals to achieve the annual goals, the undersigned does not find the IEP to be deficient as currently written.

¹⁵ When questioned by the undersigned, Ms. Long admitted that she is unaware of any provision of IDEA that requires specialized instruction to be provided by a certified special education teacher. Testimony of Mia Long.

specifically his ability to respond to a text and make arguments. Testimony of the Case Manager, R-2-4.

123. With regard to the Student's occupational therapy needs, the IEP Team reviewed Ms. Wills' evaluation, while noting that in the classroom, the Student consistently completed visual perception challenges independently and with 95% accuracy. P-4-5.

124. The IEP Team established as an annual visual perceptual goal that the Student would be able to complete age appropriate visual perceptual challenges independently in four out of five tasks. *Id.*

125. The IEP Team determined that the Student should receive four hours per week of specialized instruction in each of the following, all in general education: reading, mathematics, and written expression. P-4-6. This was a total of two hours more of specialized instruction than provided in the Student's March 6, 2012 IEP, although four of the hours of specialized instruction in the March 6, 2012 IEP were provided outside general education. P-6-6.

126. The IEP Team also determined that the Student should receive 30 minutes per month of occupational therapy (P-4-6), a decrease from 120 minutes per month in his March 6, 2012 IEP (P-6-6).

127. Ms. Long stated that the Student should have behavioral support services, specifically counseling, because she was "hoping" he would have someone to go to when he felt he could not complete his homework, someone who could help him cope with homework. Testimony of Mia Long.

128. The Student's teachers expressed that he was not exhibiting behavioral problems at school (Testimony of the Case Manager, testimony of Mia Long) and that there was no educational impact from any social-emotional deficits the Student might have (Testimony of Samantha Kotey).

129. The IEP Team discussed the Student's failure earlier in the school year to complete math homework and the strategies that had been developed to address that issue. Testimony of the Case Manager.

130. The IEP Team determined that the Student did not require behavioral support services. P-4.

131. The IEP Team determined that the Student did not qualify for school bus transportation based upon disability¹⁶ and that he did not qualify for Metrobus at Respondent's expense because it was his home school. Testimony of Mia Long.

132. Ms. Long expressed that she did not think this was the Student's home school; rather, that the Student had been "sent" there by Respondent. *Id.*

133. Ms. Long stated that the Parent could not afford public transportation (*i.e.*, Metrobus) and requested that the Student's IEP include transportation for that reason. Testimony of Mia Long, testimony of Samantha Kotey. Ms. Long did not articulate at the IEP Team meeting any justification for transportation based upon the Student's disability. *Id.*

¹⁶ A substantial emotional or physical disability (Testimony of Ms. Kotey) or cognitive or behavioral issue (Testimony of the Assistant Principal) is required to justify school bus transportation based upon disability. The record in the instant case does not explain why the Student was receiving school bus transportation prior to February 2013—a fact that is not material to deciding the issues in this case.

134. Based upon all of the record evidence, the undersigned finds that by February 12, 2013, the Student's academic performance had improved substantially from earlier in the 2012-2013 school year, and he was presenting no behavioral or other social-emotional problems at school; accordingly, the undersigned finds that the IEP developed at the February 12, 2013 meeting was reasonably calculated to provide educational benefit to the Student.¹⁷

Communication Subsequent to the February 12, 2013 IEP Team Meeting Regarding the Student's IEP

135. On February 14, 2013, Ms. Long spoke with Ms. Kotey to convey the Parent's reasons for requesting counseling services for the Student. P-5.

136. On February 15, 2013, Ms. Long emailed Ms. Kotey itemizing the Parent's dissent to the Student's proposed IEP. P-25-1. The Parent's disagreements were as follows: (a) that the Student needed more than one math goal; (b) that the Student's math baselines were not appropriate; (c) that the Student needed more than one reading goal; (d) that the Student's reading baselines were not appropriate; (e) that the Student needed more than one writing goal; (f) that the Student's writing baseline was not appropriate; (g) that the Student needed counseling services; (h) that the Student should have compensatory education for counseling; and (i) that the Student should receive "pull out" services in reading, writing and math. P-25-1 and -2. The Parent proposed revisions to the IEP. *Id.*

¹⁷ In view of the fact that the Student will start a new school (high school) in the fall of 2013, adding more specific sub-goals or short term goals to his IEP might well benefit the Student by ensuring that his future teachers continue to address his specific gaps in these subject areas. However, an IEP is not required to maximize a child's potential, only to provide an educational benefit. *See, Conclusions of Law 6 and 14 infra.*

137. On March 8, 2013, Ms. Long emailed Ms. Kotey and the Assistant Principal stating that she had received no response to her February 15, 2013 request; that she did not have the Student's final IEP; and that the Parent had called that morning very upset that the Student had not been picked up that morning. P-25-5. Ms. Long asked Ms. Kotey and The Assistant Principal to send her the "finalized" IEP as soon as possible. *Id.*

138. Later on March 8, 2013, Ms. Kotey replied to Ms. Long apologizing, and stating that it was her understanding that the Case Manager would be addressing her concerns via email a few weeks earlier. P-25-10. Ms. Kotey stated that she would forward a copy of the IEP "by next Friday at the latest." *Id.* Ms. Kotey stated that she did not know what Ms. Long meant by the Student not being picked up because at the meeting the Assistant Principal had explained that the Student was not eligible for bus transportation to the Attending School. *Id.*

VII. BURDEN OF PROOF

In a special education DPH, the burden of persuasion is on the party seeking relief. DCMR § 5-E3030.3; *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the Hearing Officer by a preponderance of the evidence. DCMR § 5-E3022.16; *see also*, *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 17 n.3 (D.D.C. 2008).

The opinion testimony of an educational advocate who has not been qualified and admitted as an expert witness is "inadmissible to prove anything." *Gill v. District of Columbia*, 770 F. Supp. 2d 112 (D.D.C. 2011). Accordingly, the undersigned precluded

Ms. Long, who had not been proposed or qualified as an expert, from providing opinion testimony.

VIII. CREDIBILITY

The undersigned found all of the witnesses to be credible, to the extent of their first hand knowledge or professional expertise, with the following exceptions:

The concern the Parent expressed (in her testimony and through her educational advocate) about the Student riding Metrobus instead of a school bus was not credible. Several times the Parent testified that the Student had gained confidence riding Metrobus, albeit accompanied by his brother. Given the statements by Petitioner's advocate at the IEP Team meeting that the Parent could not afford the cost of Metrobus, the concern about the Metrobus someday turning around and the Student becoming lost did not ring true. Rather, the cost of Metrobus, rather than the Student's needs, appears to be the Parent's motivation for requesting school bus transportation.

Dr. Nelson's conclusions and recommendations regarding the Student's instructional needs disregarded his relatively low intelligence, and her conclusions and recommendations regarding the Student's social-emotional needs relied selectively upon information from two sources (while practically ignoring information from two other sources). In addition, Dr. Nelson made recommendations regarding the Student (a) assuming that he had dysthymia, even though that diagnosis had been ruled out by a prior evaluation (and was not supported by her own evaluation) and (b) ignoring the incidence of dysthymia and anxiety in the teenage population generally. In short, Dr. Nelson appears to have started with the goals of finding unmet educational and social-

emotional needs and recommending services to meet those needs, then worked backward to try—in this case unsuccessfully—to justify those findings and recommendations.

Dr. Lennon’s compensatory education plan (the “Plan”) prescribing 144 hours of tutoring and 24 hours of counseling (P-30-6 and -7) was based entirely upon the instruction and services recommended in Dr. Nelson’s psychological evaluation report (Testimony of Dr. Sharon Lennon), which the undersigned has discounted for the reasons discussed in the preceding paragraph. Dr. Lennon did not know what instruction the Student was receiving at the Attending School. *Id.* In addition, the Plan incorrectly assumed that Respondent should have revised the Student’s IEP to provide additional specialized instruction and related services starting at the beginning of the 2012-2013 school year. *Id.*¹⁸ Finally, upon questioning by the undersigned, Dr. Lennon testified—incredibly—that she is able to devise a compensatory education plan for a student without knowing the student’s intellectual ability, and that she would recommend the same compensatory education plan for students with widely varying intellectual abilities. *Id.*

IX. CONCLUSIONS OF LAW

Purpose of the IDEA

1. The IDEA is intended “(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further

¹⁸ Because the undersigned has found that the Student’s IEP was appropriate without the specific specialized instruction and related services recommended by Dr. Nelson, no compensatory education is warranted and Dr. Lennon’s Plan is nugatory.

education, employment, and independent living [and] (B) to ensure that the rights of children with disabilities and parents of such children are protected...” 20 U.S.C.

§ 1400(d)(1). *Accord*, DCMR § 5-E3000.1.

Reevaluation

2. Unless the parent and the local educational agency agree that a reevaluation is unnecessary, a reevaluation of a child with a disability must be conducted at least once every three years, or more frequently if conditions warrant reevaluation, if the child’s parent or teacher requests a reevaluation, or before determining that a child is no longer a child with a disability; but no more frequently than once a year unless the parent and the local educational agency agree otherwise. 20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.303; DCMR § 5-E3005.7.

3. In the instant case, the parties did not “agree otherwise,” and Respondent authorized IEEs. Findings of Fact 4 and 6.

FAPE

4. The IDEA requires that all students be provided with a free appropriate public education (“FAPE”). FAPE means:

special education and related services that –

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. §1401(9); *see also*, 34 C.F.R. §300.17 and DCMR § 5-E3001.1.

IEP

5. The “primary vehicle” for implementing the goals of the IDEA is the individualized education program (“IEP”) which the IDEA “mandates for each child.” *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). The IDEA defines IEP as follows:

(i) In general The term “individualized education program” or “IEP” means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

(I) a statement of the child’s present levels of academic achievement and functional performance, including—

(aa) how the child’s disability affects the child’s involvement and progress in the general education curriculum;

(bb) for preschool children, as appropriate, how the disability affects the child’s participation in appropriate activities; and

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child’s other educational needs that result from the child’s disability;

(III) a description of how the child’s progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

(VI)

(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412 (a)(16)(A) of this title; and

(bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why—

(AA) the child cannot participate in the regular assessment; and

(BB) the particular alternate assessment selected is appropriate for the child; [and]

(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications

20 U.S.C. §1414(d)(1)(A).

6. To be sufficient to provide FAPE under the IDEA, an “IEP must be ‘reasonably calculated’ to confer educational benefits on the child ... but it need not ‘maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.’” *Anderson v. District of Columbia*, 606 F. Supp. 2d 86, 92 (D.D.C. 2009), quoting *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 200, 207 (1982)(“*Rowley*”).

[T]he “basic floor of opportunity” provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

Rowley, 458 U.S. at 201.

7. The Local Educational Agency, in this case Respondent, “has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive FAPE.” *Schoenbach v. District of Columbia*, 36 IDELR 67, 106 LRP 46342 (D.D.C. 2006). IEP decisions are not made by majority vote. Rather, “[i]f the team cannot reach consensus, the public agency must provide the parents with prior written notice of the agency's proposals or refusals, or both, regarding the child's educational program, and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing.” *Id.*, citing 34 C.F.R. Part 300, Appendix A -- Notice of Interpretations, 64 Fed. Reg. 12,473 (1999).

8. IDEA does not provide that the Student's education will be designed according to the parent's desires. *Shaw v. District of Columbia*, 238 F. Supp. 2d 127 (D.D.C. 2002).

9. The IDEA requires that special education be provided in the "Least Restrictive Environment" (LRE):

To the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. §1412(a)(5)(A). *Accord*, DCMR 5-E3011.1. *See also*, 34 C.F.R.

§ 300.114(a)(2).

10. Dr. Nelson's recommendation that the Student receive specialized instruction in a "pull out" setting (P-1-14), *i.e.*, outside general education, would be more restrictive than his current IEP which provides for specialized instruction in general education (P-4-6).

11. Because the Student's current IEP is reasonably calculated to provide an educational benefit (Finding of Fact 134), and the Student is in fact making academic progress (Findings of Fact 101 and 104), adopting Dr. Nelson's recommendation would be more restrictive, and hence regressive for the Student.

12. The Student currently is riding public transportation (Metrobus) and developing self-confidence doing so. Findings of Fact 93, 94 and 98. Adopting Petitioner's request that Respondent transport him via school bus would be more restrictive, and hence regressive for the Student because he would not engage with non-disabled peers on the school bus (which Respondent provides only for students with disabilities).

13. Parental choice does not supersede the LRE requirement. *See* 71 Fed. Reg. 46541 (August 14, 2006).

14. Even if the changes to the Student's IEP recommended by Petitioner's representatives at the February 12, 2013 IEP Team meeting and afterward would have improved the IEP and maximized the Student's potential, Respondent was not required to adopt those recommendations. *Kerkam v McKenzie*, 862 F.2d 884 (D.C. Cir. 1988) ("Thus, proof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the Act.").

15. Based upon the entire record, the undersigned concludes that the Student's IEP developed February 12, 2013, was reasonably calculated to provide educational benefit and satisfied Respondent's obligations under IDEA, and that Respondent was not responsible for any delays in amending the Student's IEP.¹⁹

Summary

16. Respondent did not deny the Student a FAPE with regard to his February 13, 2013 IEP because (a) the Student does not require social emotional goals, (b) the Student's academic goals in reading and math are appropriate, (c) the Student does not need counseling services, and (d) the Student does not need transportation services.

¹⁹ Even if Respondent had been responsible for some of the delay in revising the Student's IEP (which is not supported by the record), that delay did not result in a denial of FAPE because the Student was making academic progress to the point that he is now on the honor roll. Where, as here, the Student was "not harmed by the delay because he was receiving a beneficial education throughout the process," any delay in revising his IEP "must be 'disregarded as harmless.'" *O.O. by Pabo v. District of Columbia*, 573 F. Supp. 2d 41 (D.D.C. 2008), quoting *Razzaghi v. District of Columbia*, 44 IDELR 271, 106 LRP 83 (D.D.C. 2005), quoting *Hymes v. District of Columbia*, 42 IDELR 266, 105 LRP 9227 (D.D.C. 2005).

Moreover, adopting the changes recommended by Petitioner and her representatives would be inconsistent with the Student's LRE under IDEA.

17. Respondent did not deny the Student a FAPE by failing to allow the evaluator conducting the Student's occupational therapy reassessment to access him while attending school; rather, Respondent was at all times willing to allow the evaluator to access the Student while attending school and the delays in conducting the occupational therapy reassessment, reevaluating the Student, and modifying his IEP based upon the occupational therapy evaluation were entirely the fault of Petitioner, the evaluators she selected, her counsel and her educational advocate.

18. Respondent did not deny the Student a FAPE by delaying convening an IEP Team to discuss the Student's reassessments in areas other than occupational therapy and associated modifications in his IEP, until the completion of his occupational therapy assessment, thereby improperly delaying the Student's evaluation in all suspected areas of disability and delaying modifications to his IEP; rather, it was Petitioner, through her counsel and educational advocate, who initially requested postponing, and subsequently concurred in further postponing the IEP Team meeting until all evaluation reports were complete.

X. ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED that Petitioner's DPC dated March 29, 2013, is dismissed in its entirety, with prejudice.

Dated this 22nd day of May, 2013.



Charles Carron
Impartial Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Impartial Hearing Officer is final, except that any party aggrieved by the findings and decision of the Impartial Hearing Officer shall have 90 days from the date of the decision of the Impartial 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).