DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE STUDENT HEARING OFFICE
2012 SEP 14 PM 12:44

Parent,[1] on behalf of,
Student,

Petitioner,

v.

District of Columbia Public Schools,
Respondent.

Date Issued: September 14, 2012

Hearing Officer: Melanie Byrd Chisholm

Case No: 2012-0478

Hearing Date: September 10, 2012

Room: 2004

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is a year old male, who is a grade student attending School A. The student's current individualized education program (IEP) lists Multiple Disabilities (MD) as his primary disability and provides for him to receive twenty-five (25) hours per week of specialized instruction outside of the general education setting, ninety (90) minutes per week of occupational therapy outside of the general education setting, ninety (90) minutes per week of physical therapy outside of the general education setting and one hundred twenty (120) minutes per week of speech language pathology outside of the general education setting.

On July 9, 2012, Petitioner filed a Due Process Complaint against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to provide the student with an appropriate IEP including assistive technology (AT) devices, goals and objectives for his AT, and by failing to provide the student and the student's teachers, related service providers, and parent with AT consultative services for 60 minutes a week; and by failing to provide the student with his recommended AT. As relief for this alleged denial of FAPE, Petitioner requested, *inter alia*, an IEP Team meeting, an IEP Team meeting to be held within five (5) business days to revise the student's IEP to include the agreed upon AT, draft appropriate goals and objectives related to AT, and add AT training for the student, teachers and parent for no less than six (6) months for one (1) hour per week; provide the student with all agreed upon AT equipment within ten (10) business days; and compensatory education.

[1] Personal identification information is provided in Appendix A.

On July 25, 2012, the parties participated in a Resolution Meeting and failed to reach an agreement during the meeting however the parties agreed to continue to attempt to resolve the matter during the 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline started to run on August 9, 2012, following the conclusion of the 30-day resolution period, and ends on September 22, 2012. The Hearing Officer Determination (HOD) is due on September 22, 2012.

On July 25, 2012, Respondent filed its Response to the Complaint. In its Response, Respondent asserted that the IEPs proposed for the student have been reasonably calculated to provide meaningful educational benefit in the student's least restrictive environment; the Petitioner failed to identify the IEP and its components upon which they are complaining; the due process complaint is insufficient; the December 2011 Settlement Agreement limits the claims of Petitioner up to and including such time when all AT data were reviewed, specifically, the April 3, 2012 and May 7, 2012 IEP meetings; evaluations for the student have been completed and reviewed; proposed equipment for the student has been ordered and once it arrives, DCPS will begin the training process for implementation; DCPS has provided the student with a FAPE; and DCPS is reviewing the appropriateness of the location of services for the student given that School A is unable to supply basic AT devices/equipment for the student.

On August 6, 2012, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issues, relief sought and related matters. The Hearing Officer issued the Prehearing Order on August 6, 2012. The Prehearing Order clearly outlined the issues to be decided in this matter. Both parties were given three (3) business days to review the Order to advise the hearing officer if the Order overlooked or misstated any item. Neither party disputed the issues as outlined in the Order. The issues as outlined in the Prehearing Order are: (1) Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate IEP, specifically, by failing to include appropriate AT devices[2], appropriate goals and objectives related to AT; and the related service of 60 minutes per week of AT consultative services on the student's IEP; and (2) Whether DCPS failed to provide the student a FAPE by failing to provide the student the AT devises as agreed upon by his IEP Teams on February 28, 2012, April 3, 2012 and May 7, 2012?

During the Prehearing Conference, the parties stipulated to the following facts:

1. The student is in need of AT devices.
2. With the exception of the lack of AT goals and objectives, the student's academic goals and objectives on his current IEP were appropriate on the date of the IEP Team meeting.

[2] The specific AT devices are: Vizzle software, Teachtown Basics software, Custom Board Premium for the student's iPad, keyguard on touchscreen, Proloquo2go, TouchChat or Comap for the student's iPad, kindergarten.com software, ilearntoTalk, MeMoves, Additional Pre-School Concepts, Stages 103, Dynavox Maestro with InerACT software, lightweight foam handles or good grips for feeding utensils, scooper plates and bowls, and a toilet safety seat.

3. With the exception of consultative services for AT, the hours of specialized instruction and related services on the student's current IEP are appropriate for the student.

On August 31, 2012, Petitioner filed Disclosures including eighteen (18) exhibits and five (5) witnesses.[3] On September 5, 2012, Respondent filed Disclosures including three (3) exhibits and eight (8) witnesses. On September 5, 2012, the Respondent also filed a Motion to Continue.

On September 6, 2012, the Hearing Officer held a status conference to discuss Respondent's Motion to Continue. The Respondent represented that the Motion to Continue was filed to allow the Petitioner adequate time to prepare for the hearing since the Respondent filed its disclosures two (2) business days after the five (5) business day disclosure deadline. The Respondent's attorney explained that due to a calendaring error, the disclosure deadline was missed. The Petitioner objected to the Motion to Continue and stated that the Petitioner was ready to proceed to the due process hearing on the scheduled date. The Petitioner's attorney acknowledged that the exhibits disclosed by the Respondent had been disclosed to the Petitioner in a previous due process case and requested that the Hearing Officer bar the evidence of the witnesses not previously disclosed. The Hearing Officer denied the Petitioner's Motion to Continue and explained that the official denial of the motion would be verbally on the record at the beginning of the due process hearing.

The due process hearing commenced at approximately 9:30 a.m. on September 10, 2012 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2004. The Petitioner elected for the hearing to be closed. At the start of the hearing, the Hearing Officer denied Respondent's Motion to Continue filed on September 5, 2012.

Petitioner's Exhibits 1-18 were admitted without objection. Respondent's exhibits 1-3 were admitted without objection. The Petitioner objected to three (3) of the Respondent's eight (8) listed witnesses based on the fact that Respondent had not disclosed the names of the witnesses in a timely 5-day disclosure. The Hearing Officer found that Respondent could not offer Yair Inspector, the Compliance Specialist, as a witness but could call Jose Sejas and Ato Biney, AT Specialists, in order to create a complete record. Specifically, the Hearing Officer found that the testimony of Jose Sejas and Ato Biney would be necessary in determining the status of the orders for the AT devices.

Prior to opening statements by the parties, the parties stipulated to the following facts:

1. The student is a student with disabilities as defined by 34 CFR §300.8.
2. DCPS has provided Vizzle O software yet the software has yet to be installed.
3. DCPS has provided Clicker 5 software yet the software has yet to be installed.
4. DCPS has provided First Words and First Verbs software yet the software has yet to be installed.
5. DCPS has provided the student with an Apple iPad.
6. DCPS has provided the adapted chair and the chair is being used by the student.
7. DCPS has provided adaptive feeding equipment for the student.

[3] A list of exhibits is attached as Appendix B. A list of witnesses who testified is included in Appendix A.

8. DCPS has provided the adaptive toilet frame for the student.
9. DCPS has not yet submitted an order to a vendor for the Dynavox Maestro and accompanying interactive software.
10. School A accepted the student and represented that the school could implement the student's IEP.

At the close of Petitioner's case, the Respondent moved for a Directed Verdict on both issues as outlined in the Prehearing Order. The Hearing Officer granted a Directed Verdict for Issue #1 as outlined in the Prehearing Order, finding that the record did not contain evidence that the AT devices listed on the student's IEP were inappropriate, the student was in need of goals and objectives for AT or that the student needed additional related services regarding AT. The Hearing Officer denied the motion for Issue #2.

The hearing concluded at approximately 1:58 p.m. following closing statements by both parties.

Jurisdiction

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E-30.

ISSUE

The issue to be determined is as follows:

1. Whether DCPS failed to provide the student a FAPE by failing to provide the student the AT devises as agreed upon by his IEP Teams on February 28, 2012, April 3, 2012 and May 7, 2012?

FINDINGS OF FACT

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

1. The student is a student with disabilities as defined by 34 CFR §300.8. (Stipulated Fact)
2. The student is eligible in the disability category of MD, comprised of his orthopedic impairment and his speech language impairment. The student also has cerebral palsy, a seizure disorder and weak motor skills. (Petitioner's Exhibits 15 and 16; Respondent's Exhibit 3; Mother's Testimony)
3. The student is nonverbal. (Petitioner's Exhibits 6, 14 and 15; Respondent's Exhibit 3; IEP Coordinator's Testimony; Mother's Testimony)

4. The student's severe speech and language deficits significantly impact his ability to access the curriculum, effectively express himself, participate in discussion and interact with his peers. (Petitioner's Exhibits 6, 14, 15 and 16; Respondent's Exhibit 3; IEP Coordinator's Testimony; Mother's Testimony)
5. The student is able to use sounds, pictures and gestures to communicate his wants and needs and respond to stimuli. The student primarily uses the Picture Exchange Communication System (PECS) to communicate his needs. (Petitioner's Exhibits 6, 15 and 16; IEP Coordinator's Testimony; Mother's Testimony)
6. The student needs to be motivated to use PECS. (Petitioner's Exhibit 6; Mother's Testimony)
7. During the 2011-2012 school year, the student has displayed decreased motivation to communicate using PECS and, at times, was and is unwilling to use PECS. (Petitioner's Exhibit 6; IEP Coordinator's Testimony; Mother's Testimony)
8. The student is able to use some sign language however his aptitude for sign language is limited due to his poor motor skills. (Petitioner's Exhibits 6, 15 and 16; Mother's Testimony)
9. The student does not have a method for social communication. (Petitioner's Exhibit 6)
10. The student requires hand-over-hand support for many academic activities such as using manipulatives for math activities and using a pencil for writing activities. (Petitioner's Exhibits 14, 15 and 16; Respondent's Exhibit 3)
11. The student's distractibility, inconsistent attention to tasks, inconsistent levels of motivation, poor gross motor control and poor fine motor control impact his accuracy and ability to demonstrate his knowledge of concepts. (Petitioner's Exhibits 6, 15 and 16; Respondent's Exhibit 3; IEP Coordinator's Testimony; Mother's Testimony)
12. The student has extremely limited means to demonstrate or communicate his knowledge of the curriculum. (Petitioner's Exhibits 6, 15 and 16; IEP Coordinator's Testimony; Mother's Testimony)
13. The student requires a great deal of assistance in maintaining posture during seated activities. Without adaptive seating, the student is unable to sit upright without adult assistance. Because an adult must sit next to or behind the student in order to physically support the student, the student is unable to have face-to-face interactions with the adult, unable to receive cues from the adult and unable to attend to classroom tasks or participate meaningfully in educational activities. (Petitioner's Exhibits 6, 13, 14, 15 and 16; Respondent's Exhibit 3; IEP Coordinator's Testimony)
14. The student is in need of AT devices. (Stipulated Fact)
15. The student's January 13, 2012 Assistive Technology Evaluation includes general recommendations; a DynaVox Maestro, with specific recommendations for student training and use; an Apple iPad, with specific applications; software for a computer with a touch-screen for access; and training for the student, the student's educational team and the student's caregivers. (Petitioner's Exhibit 6)
16. On February 28, 2012, the student's IEP Team met to review the results of the student's AT evaluation. The IEP Team specifically discussed the recommendations for a DynaVox, Apple iPad, adapted chairs, adapted toilet seat and adapted feeding utensils. The IEP Team determined that a DynaVox was needed for the student, did not agree that an iPad should be incorporated into the student's program and noted the

"dire" need for an adaptive chair for the student. After conversations regarding specific AT devices, the IEP Team decided to accept wholesale the recommended AT devices that were included in the student's January 13, 2012 Assistive Technology Evaluation. (Petitioner's Exhibits 7, 14 and 18; IEP Coordinator's Testimony; Mother's Testimony)

17. The student's March 9, 2012 IEP includes five math goals, thirteen (13) reading goals, seven adaptive/daily living skills goals, ten communication/speech language goals and twenty-one (21) physical development goals. All of the student's math and reading goals, one of his adaptive/daily living skills goals, four of his communication/speech language and three of the student's physical development goals reference the aid of AT devices, determined as necessary for the student during the February 28 2012 IEP Team meeting, in order for the student to master the goal. Eight of the remaining goals reference the aid of other AT equipment/devices (walker, adapted pencil grip, adapted writing materials, adapted scissors and ramps) not specifically discussed by the February 28, 2012 IEP Team. (Petitioner's Exhibits 7 and 14)
18. The student's academic goals and objectives on his March 9, 2012 IEP are appropriate. (Stipulated Fact)
19. The student's March 9, 2012 IEP lists the AT devices of: walker, adaptive feeding equipment, touch screen, communication device, Dynamic AAC device, computer software, educational language applications, focus and attention application, educational concept applications, early vocabulary software and adaptive skills software. At the meeting, DCPS could not give a timeline for the delivery of the AT equipment. (Petitioner's Exhibits 7 and 14)
20. The student's March 9, 2012 IEP does not indicate whether the student is eligible for extended school year (ESY) services. (Petitioner's Exhibit 14)
21. On April 3, 2012, the student's IEP Team reconvened to review the student's progress and develop an annual IEP for the student. At the meeting, it was noted that none of the AT equipment had been provided for the student. The team also acknowledged that the PECS system was a placeholder until the DynaVox was available for the student's use and that AT equipment was necessary in order for the student to progress toward his goals and access the curriculum. (Petitioner's Exhibit 9)
22. On May 7, 2012, the student's IEP convened. At the May 7, 2012 IEP Team meeting, the team initially disagreed as to the necessity of an adaptive toilet seat however DCPS ultimately agreed that the adaptive toilet seat would be provided for the student. The team also noted that the AT equipment that the February 28, 2012 IEP Team determined was necessary for the student had yet to be provided. DCPS informed the team that the delay in acquiring the equipment was the result of procurement problems with vendors and that some of the recommended software had arrived and was available at the DCPS central office. (Petitioner's Exhibit 10)
23. On May 18, 2012, School A acknowledged receipt of the Apple iPad, a protective case, a plate scooper, Clicker software, First Words and First Verbs software. The Proloquo2go application for the Apple iPad was noted but not confirmed as received. (Petitioner's Exhibit 12; Stipulated Facts)

24. DCPS has provided Vizzle O software yet the software has yet to be installed. (Stipulated Fact)
25. DCPS has provided the adapted chair which is being used by the student. The adapted chair was received in late May 2012. (Stipulated Fact; IEP Coordinator's Testimony)
26. DCPS has provided adapted feeding equipment for the student, which is being used by the student. On August 24, 2012, School A confirmed receipt of adaptive feeding utensils. (Stipulated Fact; Petitioner's Exhibit 17)
27. DCPS has provided the adaptive toilet frame for the student. On August 24 2012, School A confirmed receipt of the toileting system. At that time, School A informed DCPS that the toileting system required assembly and installation. (Stipulated Fact; Petitioner's Exhibit 17)
28. DCPS has not yet submitted an order to a vendor for the Dynavox Maestro and accompanying interactive software. (Stipulated Fact)
29. The student was placed in School A by the Office of the State Superintendent of Education (OSSE) when the local educational agency (LEA) in which the student was enrolled ceased operating. (Mother's Testimony)
30. School A accepted the student and represented that the school could implement the student's IEP. (Stipulated Fact)

CONCLUSIONS OF LAW

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

Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. *See N.G. v. District of Columbia,* 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

In *Board of Education v. Rowley,* 458 U.S. 176 (1982), the Supreme Court of the United States held that the term "free appropriate public education" means "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped." The Court in *Rowley* stated that the Act does not require that the special education services 'be sufficient to maximize each child's potential 'commensurate with the opportunity provided other children.'" Instead, the Act requires no more than a "basic floor of opportunity" which is met with the provision of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 200-203. The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to

whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seg., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

The IDEA imposes strict procedural requirements on educators to ensure that a student's substantive right to a "free appropriate public education" is met. 20 U.S.C. § 1415. The IDEA regulations at 34 CFR §300.513(a)(2) state that in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit.

The IEP is the primary vehicle for ensuring that a disabled child's educational program is individually tailored based on the child's unique abilities and needs. *See* 20 U.S.C. §1414(d); 34 CFR §§300.320-300.324. The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical, and vocational needs. *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996). The IDEA at 34 CFR §300.323(c)(2) requires each public agency to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. A material failure to implement a student's IEP constitutes a denial of a free appropriate public education. *Banks ex rel. D.B. v. District of Columbia,* 720 F. Supp. 2d 83, 88 (D.D.C. 2010).

In failure-to-implement claims, the consensus among federal courts has been to adopt the standard articulated by the Fifth Circuit. *E.g., S.S. v. Howard Rd. Acad.,* 585 F. Supp. 2d 56, 67 (D.D.C. 2008). In *Houston Independent School District v. Bobby R.,* 200 F.3d 341 (5th Cir. 2000), the Firth Circuit held that "to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the ... authorities failed to implement substantial or significant provisions of the IEP." *Id.* at 349; *see also Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J,* 502 F.3d 811, 822 (9th Cir. 2007) ("[A] material failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP."). "[C]ourts applying [this] standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld." *Wilson v. District of Columbia,* 770 F. Supp. 2d 270, 275 (D.D.C. 2011). What provisions are significant in an IEP should be determined in part based on "whether the IEP services that were provided actually conferred an educational benefit." *Bobby R.,* 200 F.3d at 349, n. 2. Failure to provide the services must deprive the student of educational benefit. *See Savoy v. District of Columbia*, 2012 WL 548173, 112 LRP 8777 (D.D.C. 2012).

In the present matter, the student is a student with significant needs. The student is a nonverbal student and requires hand-over-hand support for many academic activities such as using manipulatives for math activities and using a pencil for writing activities. The student is able to use sounds, pictures and gestures to communicate his wants and needs and respond to

stimuli. In the school setting, the student primarily uses PECS to communicate. The student is able to use some sign language however his aptitude for sign language is limited due to his poor motor skills. The student's distractibility, inconsistent attention to tasks, inconsistent levels of motivation, poor gross motor control and poor fine motor control impact his accuracy and ability to demonstrate his knowledge of concepts. It is uncontested that the student has extremely limited means to demonstrate or communicate his knowledge of the curriculum.

The student requires a great deal of assistance in maintaining posture during seated activities. Without adaptive seating, the student is unable to sit upright without adult assistance. At these times, because an adult must sit next to the student in order to physically support the student, the student is unable to have face-to-face interactions with the adult, unable to receive cues from the adult and unable to attend to classroom tasks or participate meaningfully in educational activities. During the 2011-2012 school year, the student has displayed decreased motivation to communicate using PECS and, at times, was and is unwilling to use PECS. In order for PECS to be beneficial, the student must be motivated to use the symbols.

On February 28, 2012, the student's IEP Team met to review the results of the student's AT evaluation. The IEP Team specifically discussed the recommendations for a DynaVox, Apple iPad, adapted chairs, adapted toilet seat and adapted feeding utensils. The IEP Team determined that a DynaVox was needed for the student, did not agree that an iPad should be incorporated into the student's program and noted the "dire" need for an adaptive chair for the student. After conversations regarding specific AT devices, the IEP Team decided to accept wholesale the recommended AT devices that were included in the student's January 13, 2012 Assistive Technology Evaluation. The recommendations include general recommendations, a DynaVox Maestro, with specific recommendations for student training and use; an Apple iPad, with specific applications; software for a computer with a touch-screen for access; and training for the student, the student's educational team and the student's caregivers. The student's IEP lists the AT devices of: walker, adaptive feeding equipment, touch screen, communication device, Dynamic AAC device, computer software, educational language applications, focus and attention application, educational concept applications, early vocabulary software and adaptive skills software. At the meeting, DCPS could not give a timeline for the delivery of the AT equipment.

The Apple iPad was recommended in the student January 13, 2012 Assistive Technology Evaluation yet the evaluator noted that the student requires a great deal of assistance when using the iPad. The evaluator stated that, "In terms of accessing curriculum and communicating however the iPad is not key guarded and is not the right fit for access, language layout, durability or customizability for ongoing usage." Initially, the student's February 28, 2012 IEP Team did not agree that the Apple iPad was a necessary device for the student but ultimately decided to accept all recommended devices in the evaluation.

On March 9, 2012, DCPS finalized the IEP pursuant to the IEP Team meeting on February 28, 2012. The student's IEP includes five math goals, thirteen (13) reading goals, seven adaptive/daily living skills goals, ten communication/speech language goals and twenty-one (21) physical development goals. All of the student's math and reading goals, one of his adaptive/daily living skills goals, four of his communication/speech language and three of the

student's physical development goals reference the aid of AT devices, determined as necessary for the student on February 28, 2012, in order for the student to master the goal. Eight of the remaining goals reference the aid of other AT equipment/devices (walker, adapted pencil grip, adapted writing materials, adapted scissors and ramps) not at issue in this case.

On April 3, 2012, the student's IEP Team reconvened to review the student's progress and develop an annual IEP for the student. At the April 3, 2012 IEP Team meeting, it was noted that none of the AT equipment had been provided for the student. The team also acknowledged that the PECS system was a placeholder until the DynaVox was available for the student's use and that AT equipment was necessary in order for the student to progress toward his goals and access the curriculum. At the May 7, 2012 IEP Team meeting, the team initially disagreed as to the necessity of an adaptive toilet seat however DCPS ultimately agreed that the adaptive toilet seat would be provided for the student. The team also noted that the AT equipment that the February 28, 2012 IEP Team determined was necessary for the student had yet to be provided. DCPS informed the team that the delay in acquiring the equipment was the result of procurement problems with vendors and that some of the recommended software had arrived and was available at the DCPS central office.

On May 18, 2012, School A acknowledged receipt of the Apple iPad, a protective case, a plate scooper, Clicker software, First Words and First Verbs software. The Proloquo2go application for the Apple iPad was noted but not confirmed as received. The adapted chair was received at the end of May 2012. On August 24, 2012, School A confirmed receipt of adaptive feeding utensils, and a toileting system. At that time, School A informed DCPS that the toileting system required assembly and installation.

The Respondent argued that School A is an inappropriate location of services for the student because School A represented that it could implement the student's IEP when it accepted the student and suggested that any fault that may be found should be attributed to the inappropriate location of services. The Hearing Officer is not swayed by this argument. First, location of services was not at issue in the case. Second, the LEA has the obligation and responsibility of implementing the student's IEP, not a specific school or location of services. The student's IEP was written by a team which included representatives from DCPS, DCPS staff members have been intimately involved in the procurement of AT devices for the student and DCPS is responsible for providing a location of services which is appropriate for the student. The fact that the location of services for the student was determined by OSSE when the student's prior LEA ceased operation, is irrelevant.

The Hearing Officer concludes that by failing to provide the AT equipment listed in the student's IEP within a reasonable amount of time after the development of the IEP, DCPS failed to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP as required by 34 CFR §300.323(c)(2). The Respondent argued that this failure was a procedural violation that did not violate the substantive rights of the student. An "IDEA claim is viable only if ...procedural violations affected the student's substantive rights." *Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828,834 (D.C.C. 2006). The Hearing Officer disagrees with this conclusion.

The Petitioner presented persuasive evidence that the student was in need of a DynaVox and an adapted chair in order to access the curriculum. The Hearing Officer concludes that the failure of DCPS to ensure that as soon as possible following the development of the IEP, AT devices were made available to the child in accordance with the child's IEP constitutes a denial of FAPE for the student. In this case, 26 of the student's 56 IEP goals reference the use of AT equipment determined necessary for the student during his February 28, 2012 IEP Team meeting for the student to progress. The IEP Coordinator testified that until the adapted chair was available, the student's aide was unable to work with the student, in a meaningful way, on his IEP goals because of the difficulty in having the student in a position where he was able to participate in instruction. Without the DynaVox, the student is unable to demonstrate his acquisition of knowledge in academic areas because of his extreme communication deficits and his unwillingness to consistently use PECS. Although the Parent provided testimony that the student has made progress toward many of his IEP goals, DCPS' failure to provide a DynaVox and an adapted chair as soon as possible constitutes a material failure to implement significant provisions of the student's IEP. While the student has been provided some educational benefit, the educational benefit began *after* the provision of the adapted chair and has not been meaningful because the student is unable to communicate his knowledge of the curriculum.

While the Hearing Officer acknowledges the complexity and delay which often accompanies government fiscal procurement, this challenge is not a defense in failing to provide the student a FAPE. The IEP Team agreed on February 28, 2012 that the student needed a DynaVox and an adapted chair. The adapted chair was not provided to the student until late May 2012 and on the date of the due process hearing, the Dynavox had yet to be ordered.

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 v. District of Columbia*, 401 F. 3d 516 at 524, 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).

In the instant matter, Petitioner has established that the student was denied a FAPE when DCPS failed to ensure that as soon as possible following the development of the IEP, AT devices were made available to the child in accordance with the child's IEP. An equitable remedy is for DCPS to be ordered to provide the AT equipment necessary for the child to receive a FAPE as soon as possible and to provide compensatory education for the time period DCPS should have provided the equipment but did not. This time period is a reasonable time after February 28, 2012 through the end of May 2012 for the adapted chair and a reasonable time after February 28, 2012 through present for the DynaVox. The student's March 9, 2012 IEP does not indicate whether the student is eligible for ESY. Based on the extent of the procurement process, the Hearing Officer concludes that 30 calendar days would be a reasonable time for DCPS to provide equipment after the IEP Team determined the equipment was necessary.

Although the Petitioner requested compensatory education, the Petitioner presented no evidence of appropriate compensatory education for the student. The Parent testified that she "needs someone to come to the house to help" but offered no specific testimony as to compensatory education. However, if a parent present evidence that her child has been denied a FAPE, she has met her burden of proving that the child may be entitled to compensatory education. *Banks v. District of Columbia*, 478 F. Supp. 2d 73, 47 IDELR 223 (D.D.C. 2007). In crafting the remedy, the Hearing Officer must engage in a fact-intensive analysis that includes individualized assessments of the student so that the ultimate award is tailored to the student's unique needs. *Mary McLeod Bethune Day Academy Pub. Charter Sch. v. Bland,* 555 F. Supp. 2d 130, 50 IDELR 134 (D.D.C. 2008) (*quoting Reid*, 401 F.3d 524). Here, given the student's distractibility, inconsistent attention to tasks and inconsistent levels of motivation, the Hearing Officer finds that short, frequent one-on-one tutoring is appropriate to provide the educational benefits that likely would have accrued from special education services with appropriate AT devices that DCPS should have supplied.

ORDER

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

1. Within fifteen (15) school days from the date of this Order, DCPS provide a Dynavox Maestro with InerACT software to the student.
2. Within five (5) school days after the receipt of the Dynavox Maestro, DCPS provide at least four (4) hours of training to the student's parent, teachers and related service providers on the use of the device.
3. After the receipt of the DynaVox Maestro, DCPS provide the student training with an AT specialist 60 minutes per week for four (4) weeks to ensure the proper implementation of the DynaVox Maestro.
4. DCPS provide the student with compensatory education for thirty (30) minutes per day, for three (3) days per week, for fifteen (15) weeks in the form of one-on-one tutoring, at a rate not to exceed per hour. The tutoring must be completed within six (6) months from the date of this Order.
5. All other relief sought by Petitioner herein is **denied**.

NOTICE OF RIGHT TO APPEAL

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

Date: September 14, 2012

Melanie Byrd Chisholm
Hearing Officer