

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office
Frances Raskin, Due Process Hearing Officer
1150 – 5th Street, S.E.; Room 3
Washington, D.C. 20003
(202) 698-3819
Facsimile: (202) 698-3825

Confidential

STUDENT, through the legal guardian ¹)	
)	
Petitioner,)	
)	Complaint Filed: December 18, 2008
v.)	
)	Hearing Dates: April 20, 2009
THE DISTRICT OF COLUMBIA)	May 5, 2009
PUBLIC SCHOOLS)	
)	
Respondent.)	
)	

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STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

Counsel for Petitioner: Domiento Hill, Attorney at Law
James Brown & Associates
1220 L Street NW, Suite 700
Washington, D.C. 20005
(202) 742-2000; Fax: 202-742-2098

Counsel for DCPS: Harsharen Bhuller, Esquire
Office of the General Counsel, DCPS
825 North Capitol Street, N.E.; 9th Floor
Washington, D.C. 20002
(202) 442-5000; Fax: (202) 442-5097

¹ Personal identification information is provided in Attachment A.

Jurisdiction

This hearing was invoked in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia ("District" or "D.C.") Municipal Regulations ("DCMR"), re-promulgated on February 19, 2003; and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

Introduction

Petitioner is the parent/guardian of a -year-old student ("Student") attending a District of Columbia Public School. The Student is classified as learning disabled and emotionally disturbed pursuant to IDEIA. On March 2, 2009, Petitioner filed a Due Process Complaint Notice ("Complaint") alleging that the District of Columbia Public Schools ("DCPS") denied the Student a free, appropriate, public education because (1) DCPS allowed the Student's November 5, 2007, individualized educational program ("IEP") to expire (2) the Student's current school is not an appropriate placement because it cannot implement the Student's IEP; (3) DCPS failed to provide the Student compensatory education as awarded at the September 23, 2008, meeting of the multi-disciplinary team ("MDT").

Counsel for DCPS provided this Hearing Officer a Response by email on March 17, 2009. It appears that counsel for DCPS did not file the Response in the Student Hearing Office. The Response admitted that the IEP expired on November 5, 2008, and needs to be updated. The Response admitted that DCPS attempted to hold a meeting on October 21, 2008, but the meeting had to be rescheduled because necessary participants failed to attend. The Response asserted that the Student's school is an appropriate placement. Finally, the Response asserted that any delay in providing compensatory education does not give rise to another denial of FAPE because compensatory education is a prospective remedy.

A prehearing conference took place on March 13 and 16, 2009. The due process hearing was scheduled for 9:00 a.m. on April 3, 2009. Because DCPS admitted that the Student did not have a current IEP, the issues were limited to whether DCPS provided the compensatory education ordered by the MDT and whether the Student's current placement was appropriate.

At the outset of the hearing, all exhibits were admitted, with the exception of Petitioner's Exhibits 22-24, report cards from the Student's previous middle school. These three documents were found not to be relevant to the sole remaining issue: whether the Student's current placement was appropriate. The hearing was continued to May 5, 2009, at 11:00 a.m. to allow the parties to attend an MDT meeting, at which the Student's IEP was to be developed, and to allow the representative from the non-public school to obtain data on the cost of attendance at that school and then resume her testimony.

III. RECORD

Due Process Complaint Notice, filed March 2, 2009;

DCPS *Response*, filed March 17, 2009;
Petitioner's Five-Day Disclosure, filed March 27, 2009 (Exhibits 1-27);
DCPS Five-Day Disclosure, filed March 27, 2009 (Exhibits 1-8);
DCPS Amended Disclosure Statement, dated April 24, 2009 (Exhibits 1-10);²
Compact Disc of Hearing conducted on April 3, 2009;
Petitioner's Unopposed Motion to Continue the Due Process Complaint Notice Hearing,
filed April 13, 2009;
Interim Order on Continuance, issued April 13, 2009;
Letter Motion for Continuance, filed April 23, 2009;
Interim Order on Continuance, issued May 1, 2009; and
Compact Disc of Hearing conducted on May 5, 2009.

IV. ISSUES PRESENTED

1. Whether DCPS denied the Student FAPE by failing to develop an appropriate IEP;
2. Whether DCPS failed to provide the Student compensatory education as ordered by the MDT; and
3. Whether DCPS denied the Student FAPE by failing to provide the Student an appropriate placement.

V. FINDINGS OF FACT

1. The Student is year-old, -grade, learning-disabled student who attends a District of Columbia middle school.³ Both the Student and Petitioner reside in the District of Columbia.⁴

2. An April 30, 2008, educational evaluation of the Student concluded that, when compared to others at his age level, his oral language skills are average.⁵ However his performance is low average in broad reading, mathematics, math calculation skills, and written expression.⁶ His performance is low in written language.⁷

3. A May 2008 cognitive/clinical evaluation diagnosed the Student with depressive disorder, not otherwise specified, and rule out dysthymic disorder.⁸ It also found that the Student

² It appears that DCPS counsel did not file this Disclosure Statement in the Student Hearing Office.

³ Petitioner Exhibit 8 (IEP).

⁴ *Id.*

⁵ Petitioner Exhibit 9.

⁶ *Id.*

⁷ *Id.*

⁸ Petitioner Exhibit 10.

had a learning disorder.⁹ The evaluation found that the Student's general cognitive ability was in the low average range (FISQ = 81).¹⁰ It found that his cognitive abilities were all in the low average range, with the exception of his working memory, which was in the average range.¹¹

4. None of the Student's evaluations suggested that he needed a full-time special education or therapeutic setting.¹²

5. The Student's last IEP developed on November 5, 2007, identifies the Student as learning disabled.¹³ The IEP was developed in the absence of Petitioner, although Petitioner's Educational Advocate was present.¹⁴

6. The November 5, 2007, IEP required the Student's specialized instruction to be provided in combination general education and resource classrooms, with the Student to be out of the general education setting for 50 percent of the school week.¹⁵ It provides that the Student is to receive fifteen (15) hours of specialized instruction and one hour of psychological counseling per week.¹⁶ However, every one of the Student's current classes, except for his history class, are special education ("resource") classes.¹⁷

7. The Student's class schedule for the 2008-2009 school year shows that, in every term of the school year, the Student had three special education classes and one general education class.¹⁸ Thus, the Student was in special education for 75 percent of the time, despite that his IEP requires him to be in special education classes for only 50 percent of the time.¹⁹ The Student had sixty-two unexcused absences from class between the start of the 2008-2009 school year and March 12, 2008.²⁰

8. On September 16, 2008, DCPS convened a meeting of the MDT team.²¹ Petitioner participated by telephone and Petitioner's Educational Advocate attended the meeting in person. The team reviewed the Student's May 13, 2008, social work evaluation, and April 30,

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Petitioner Exhibits 9-11; testimony of Educational Advocate.

¹³ *Id.*

¹⁴ *Id.* The development of this IEP was not an issue in this case.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Testimony of Petitioner.

¹⁸ Petitioner Exhibit 12; see also DCPS 5, identifying teacher of three of four of Student's classes as special education teacher; and Petitioner Exhibit 17 (notes of Petitioner's former Educational Advocate, stating that the meeting participants discussed the fact that Ron Brown does not offer inclusion classes).

¹⁹ See Petitioner Exhibit 8.

²⁰ DCPS Exhibit 7.

²¹ Petitioner Exhibit 15.

2008, educational assessment.²² The team was to return on September 23, 2008, to review the Student's May 2008 cognitive/clinical evaluation.²³

9. The MDT team reconvened on September 23, 2008.²⁴ The full IEP team did not attend the meeting, as the Student's special education and general education teachers were not present.²⁵ Petitioner and her Educational Advocate attended the meeting in person.²⁶ The team developed a compensatory education plan that required DCPS to provide the Student twenty hours of one-on-one tutoring by a DCPS tutor.²⁷

10. DCPS developed the Student's written compensatory education plan on September 26, 2008.²⁸ It specified that the compensatory education services to be provided were in the skill areas of reading, writing, reading comprehension, and vocabulary.²⁹ The plan specified that a special education teacher was to provide the Student his compensatory education services.³⁰ The goals and objectives on the Student's IEP were to be implemented in the compensatory education services.³¹

11. On October 29, 2009, DCPS convened a meeting of the MDT team.³² Petitioner attended the meeting and requested a new tutor to provide the compensatory education to the Student.³³ Because the School Psychologist was not present, the team could not continue the meeting to develop the Student's IEP.³⁴

12. On November 5, 2008, Petitioner's Educational Advocate observed the Student in his classroom.³⁵ The Student was sitting by himself with his coat on.³⁶ The classroom teacher conducted a timed multiplication test but the student did not participate.³⁷ The Student later explained that he did not have a pencil.³⁸ The Student often comes to class without a pencil.³⁹

²² *Id.*

²³ *Id.*

²⁴ Petitioner Exhibit 17.

²⁵ *Id.*; Testimony of Petitioner.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Petitioner Exhibit 19.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Petitioner Exhibit 8 (Oct. 29, 2008, MDT Notes).

³³ *Id.*

³⁴ *Id.*

³⁵ Testimony of Educational Advocate.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Testimony of Student's Special Education Teacher.

13. The class also worked on an assignment.⁴⁰ The Student did not work on the assignment because he did not have a pencil.⁴¹ The Student told the teacher that the work was too easy for him.⁴² The teacher did not offer the Student a pencil or review the assignment with him to ascertain whether he was able to complete it.⁴³

14. Only two or three of the students in the classroom were working on the assignment.⁴⁴ The teacher worked briefly with each student, but most of the time the students were not receiving any instruction.⁴⁵ Generally, there is no teacher's aide in the classroom.⁴⁶

15. The Educational Advocate reviewed the Student's assignment packet.⁴⁷ The English assignment, a short story with questions to be answered, was on about the third-grade level.⁴⁸ The Student reads and comprehends fifth grade material.⁴⁹ The Student's math assignment included twenty multiplication problems.⁵⁰ Tutor 1 did not provide the Student all of the services required by the Student's compensatory education plan.⁵¹

16. The Student's compensatory education plan was not properly implemented. He worked with two tutors, only one of whom was a special education teacher as required by the plan.⁵² Tutor 1 worked with the Student on his reading goals, including reading comprehension and vocabulary.⁵³ Petitioner had shown Tutor 1 the Student's IEP.⁵⁴

17. Tutor 1 often did not show up for scheduled tutoring sessions with the Student.⁵⁵ Tutor 1 asked Petitioner to sign off on a form showing the dates and times on which Tutor 1 provided the Student tutoring services.⁵⁶ Petitioner refused to sign because Tutor one had left blank several spaces at the top of the form, and these spaces could be filled in later to give the impression that Tutor 1 provided more tutoring hours than she actually did.⁵⁷

⁴⁰ Testimony of Educational Advocate.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Testimony of Student's Special Education Teacher.

⁴⁷ Testimony of Educational Advocate.

⁴⁸ *Id.*

⁴⁹ Testimony of Student's Special Education Teacher.

⁵⁰ Testimony of Educational Advocate.

⁵¹ Testimony of Petitioner, Tutor 1.

⁵² Testimony of Tutor 1 and Tutor 2.

⁵³ Testimony of Tutor 1.

⁵⁴ *Id.*

⁵⁵ Testimony of Petitioner.

⁵⁶ *Id.*

⁵⁷ *Id.*

18. Tutor 2 has been a special education teacher since 2000.⁵⁸ He is certified in k-12 special education and currently teaches at a DCPS high school.⁵⁹ Tutor 2 provided eight hours of math tutoring to the Student between November and December 2008.⁶⁰ He did not review the Student's IEP, although he discussed the IEP with Petitioner.⁶¹ One of the tutoring sessions was solely a placement math test.⁶² Thus, Tutor 2 provided only seven hours of math tutoring to Petitioner.⁶³

19. DCPS developed an IEP for the Student on December 1, 2008.⁶⁴ Neither Petitioner nor her Educational Advocate was present at the meeting at which the IEP was developed.⁶⁵ This IEP provided that the Student would receive specialized instruction for fourteen hours per week outside the general education setting.⁶⁶ It also provided that the Student would receive one "min" per week of psychological counseling.⁶⁷

20. The Student has been accepted for admission to the _____ Academy a non-public, full-time, special education placement.⁶⁸ _____ is a therapeutic day program for students with learning disabilities and emotional disturbance.⁶⁹ The Student would be placed in a class of eight students (including him) that is taught by one special education teacher.⁷⁰ Two assistants are also present in the classroom, but these assistants are not certified teachers.⁷¹ _____ could implement the Student's IEP.⁷²

21. There are no general education students at _____ If the Student attended his IEP would have to be revised so that he could be placed in a full-time, special education setting.⁷³ The cost of attending _____ is _____ per school year, which is ten months.⁷⁴ Providing the Student one hour of psychological counseling per week would cost _____

⁵⁸ Testimony of Tutor 2.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ DCPS Exhibit 9.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* This Hearing Officer interprets "min" as minute, and although it may be a typo, it renders this IEP inappropriate because, elsewhere in the IEP, the IEP team recognizes that the Student attends counseling regularly, and that the Student "need [sic] social and emotional support as indicated in his goals." DCPS Exhibit 9. *See also* Petitioner Exhibit 10 (clinical evaluation recommending continuation of school-based counseling as well as family counseling).

⁶⁸ Petitioner Exhibit 25, Testimony of Anne Warnke.

⁶⁹ Testimony of Anne Warnke.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

\$5,181 per school year.⁷⁵ DCPS provides transportation to the campus in Springfield, Virginia, which is a thirty-forty minute commute from Washington, D.C.⁷⁶ All 180 students at are funded by DCPS.⁷⁷

VI. CREDIBILITY DETERMINATIONS

The Educational Advocate was a credible witness. The Educational Advocate's testimony was largely uncontroverted, although she had limited knowledge of the Student, other than what was reported in his evaluations.

Tutor 1 was not credible in most of her testimony. She testified that she tutored the Student for four to five days a week for one to two hours between September and October. She admitted that she did not tutor the Student every week during that time; however, if she had tutored the Student for only two to three weeks, she would have completed the hours required by the compensatory education plan, depending on whether she tutored the Student for one or two hours. The testimony of Tutor 1 was contradicted by Petitioner and Tutor 2. This Hearing Officer finds that Tutor 1 was not a credible witness.

Tutor 2 was a credible witness. His testimony was uncontroverted.

Petitioner was credible in that her testimony was largely uncontroverted. She was familiar with the Student's IEP and school schedule, and no witness contradicted her testimony on those issues. The only area where there were discrepancies in Petitioner's testimony were the minor details about exactly when and how much tutoring Tutor 1 provided the Student tutoring. Petitioner appeared to be both involved and well versed in the Student's education, although when she testified by telephone from her home she became quite angry and out of control. Nonetheless, this Hearing Officer finds that Petitioner was a credible witness.

Anne Warnke was a credible witness. Her testimony was uncontroverted.

VII. CONCLUSIONS OF LAW

The burden of proof is properly placed upon the party seeking relief.⁷⁸ Under IDEIA, a Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.⁷⁹

IDEIA requires DCPS to assure a "free appropriate public education" ("FAPE") for all

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

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

disabled children.⁸⁰ A free, appropriate public education “consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.”⁸¹ DCPS is obligated to provide a FAPE “for all children residing in the state between the ages of 3 and 21, inclusive.”⁸²

In matters alleging a procedural violation, a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child’s right to FAPE, significantly impeded the parent’s opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.⁸³ In other words, an IDEA claim is viable only if those procedural violations affected the student’s substantive rights. *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted). *Accord, Kruvant v. District of Columbia*, 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying relief under IDEA because “although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents’ request, the [parents] have not shown that any harm resulted from that error”).⁸⁴

VIII. DECISION

A. Petitioner Established by a Preponderance of the Evidence that DCPS Failed to Provide the Student an Appropriate IEP.

The IEP is “the centerpiece of the statute’s education delivery system for disabled children.”⁸⁵

⁸⁰ 20 U.S.C. § 1412(1).

⁸¹ *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89 (1982) (citation omitted).

⁸² 34 C.F.R. § 300.101.

⁸³ 20 U.S.C. § 1415 (f)(3)(E)(ii).

⁸⁴ See also, *C.M. v. Bd. of Educ.*, 128 Fed. Appx. 876, 881 (3d Cir. 2005) (per curiam) (“[O]nly those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable.”); *M.M. ex rel. D.M. v. Sch. Dist.*, 303 F.3d 523, 533-34 (4th Cir. 2002) (“If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations.”); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990) (en banc) (“[P]rocedural flaws do not automatically render an IEP legally defective”) (citations omitted); *W.G. v. Bd. of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992) (rejecting the proposition that procedural flaws “automatically require a finding of a denial of a FAPE”); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990) (rejecting an IDEA claim for technical noncompliance with procedural requirements because the alleged violations did not result in a “substantive deprivation” of student’s rights); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990) (refusing to award compensatory education because procedural faults committed by Board did not cause the child to lose any educational opportunity).

⁸⁵ *Honig v. Doe*, 484 U.S. 305, 311 (1988).

DCPS must ensure that the IEP team for each child with a disability includes the parents of the child, not less than one regular education teacher of the child, and not less than one special education teacher of the child.⁸⁶ DCPS must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP team meeting or are afforded the opportunity to participate.⁸⁷ If neither parent can attend an IEP team meeting, DCPS must use other methods to ensure parent participation, including individual or conference telephone calls.⁸⁸

A meeting may be conducted without a parent in attendance.⁸⁹ In this case, the public agency must keep a record of its attempts to arrange a mutually agreed upon time and place, such as (1) detailed records of phone calls made or attempted and the results of those calls; (2) copies of correspondence sent to the parents and any responses received; and (3) detailed records of visits made to the parent's home or place of employment and the results of those visits.⁹⁰

One of the important policies underlying the need for an accurate written IEP is "to serve a parent's interest in receiving full appraisal of the educational plan for her child, allowing a parent both to monitor her child's progress and determine if any change to the program is necessary."⁹¹ Thus, DCPS must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child.⁹² Procedural inadequacies that seriously infringe the parents' opportunity to participate in the IEP formulation process clearly result in the denial of a free and appropriate public education ("FAPE").⁹³

Here, the Response filed by Counsel for DCPS admitted that the Student's IEP expired on November 5, 2008. Although DCPS developed a new IEP on December 1, 2008, neither Petitioner nor her Educational Advocate was present at the IEP meeting. DCPS presented no evidence that it had personally contacted Petitioner, other than faxes sent to Petitioner's attorney. The invitation for the December 1, 2008, meeting at which the IEP was developed was faxed to the law firm representing Petitioner on the same day as the meeting occurred and provided no optional dates and times. DCPS Exhibit 6. This is not sufficient notice in any forum. DCPS presented no testimony about its attempts to contact Petitioner for any of the other proposed dates and times for the IEP meeting.

B. Petitioner Failed to Establish by a Preponderance of the Evidence that DCPS Failed to Provide the Student an Appropriate Placement.

⁸⁶ 34 C.F.R. § 300.321.

⁸⁷ 34 C.F.R. § 300.322 (a).

⁸⁸ *Id.* at (c).

⁸⁹ 34 C.F.R. § 300.322 (d).

⁹⁰ *Id.*

⁹¹ *Alfano et al. v. District of Columbia*, 442 F.Supp.2d 1, 6 (DDC 2006) (citing *Mewborn v. Gov't of Dist. Of Columbia*, 360 F.Supp.2d 138, 143 (DDC 2005)).

⁹² 34 C.F.R. § 300.501 (c)(1).

⁹³ *See, e.g., W.G. v. Board of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992).

When an IEP is developed, the school district must determine an appropriate placement for the child that is designed to meet the child's needs as set out in the IEP.⁹⁴ Placement decisions must be made in conformity with the child's IEP.⁹⁵ Thus, the placement should not dictate the IEP but rather the IEP determines whether a placement is appropriate.⁹⁶

To the maximum extent possible children with disabilities should be educated with children who are non-disabled.⁹⁷ Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.⁹⁸

IDEA requires that unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.⁹⁹ In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of the services that he or she needs.¹⁰⁰ A child with a disability is not removed from education in age appropriate regular classrooms solely because of needed modifications in the general education curriculum.¹⁰¹ Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.¹⁰²

To the maximum extent appropriate, children with disabilities, including children in public or private institutions with other care facilities, are to be educated with children who are nondisabled.¹⁰³ This requirement also applies to non-academic and extracurricular services and activities such as recess, meals, athletics, counseling, groups, and clubs.¹⁰⁴

In the District of Columbia, special education placements shall be made in the following order or priority, provided, that the placement is appropriate for the student and made in accordance with IDEA:

- (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school;
- (2) Private or residential District of Columbia facilities; and

⁹⁴ 34 C.F.R. § 300.116 (b) (2).

⁹⁵ 34 C.F.R. § 300.116 (a)(2)(b), D.C. Mun. Regs. Tit. 5 § 3013 (2006).

⁹⁶ See *Rourke v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006).

⁹⁷ 34 C.F.R. § 114 (a)(2)(i).

⁹⁸ *Id.* at 114 (a)(2)(ii).

⁹⁹ 34 C.F.R. § 300.116 (c).

¹⁰⁰ 34 C.F.R. § 300.116 (d).

¹⁰¹ *Id.* at (e).

¹⁰² 34 C.F.R. § 300.114 (a)(2)(ii).

¹⁰³ 34 C.F.R. 300.114 (2) (i).

¹⁰⁴ 34 C.F.R. § 300.117.

(3) Facilities outside of the District of Columbia.¹⁰⁵

The only testimony Petitioner provided about the inappropriateness of Petitioner's placement was the testimony of the Educational Advocate, who observed the Student for one hour. While the Student may make more educational progress in a smaller class, the IDEIA does not require DCPS to provide the best possible education to each student.

In a perfect world, Petitioner would receive one-on-one instruction and a multitude of services to address her suspected disabilities. However, IDEIA does not require DCPS to "maximize the potential" of this Student.¹⁰⁶ While Petitioner may have preferred Accotink Academy, IDEA guarantees special education students only a "basic floor of opportunity."¹⁰⁷

Petitioner failed to present any testimony to show that DCPS is not providing the Student access to specialized education and related services. To the contrary, the testimony presented by Petitioner established that the Student is receiving more specialized instruction than his IEP provides.

Finally, the proposed placement at the non-public school would be highly inappropriate. It would not be the least restrictive environment for this Student.¹⁰⁸ Most egregiously, the non-public school would revise the Student's IEP to fit their curriculum not his individual needs, which is impermissible under IDEIA.

Thus, Petitioner failed to establish by a preponderance of the evidence that DCPS failed to provide an appropriate placement for the Student.

C. Petitioner Established by a Preponderance of the Evidence that DCPS Failed to Implement the Compensatory Education Plan.

The DCPS compensatory education plan specified that the compensatory education services to be provided were in the skill areas of reading, writing, reading comprehension, and vocabulary. The plan specified that only a special education teacher could provide the Student his compensatory education services. The goals and objectives on the Student's IEP were to be implemented in the compensatory education services.

Instead, the Student received tutoring from a general education teacher in English and from a special education teacher in math. The math tutor failed to tie the instruction to the goals and objectives of the Student's IEP and the English tutor was not credible.

¹⁰⁵ D.C. Code § 38-2561.02.

¹⁰⁶ *McKenzie*, 882 F.2d at 886 (noting that the Supreme court stressed the lack of any such requirement four separate times in *Rowley*, 458 U.S. at 189, 197 n. 21, 198, 199).

¹⁰⁷ *See Rowley*, 458 U.S. at 200 ("basic floor of opportunity" consists of access to specialized instruction and related services individually designed to provide educational benefit).

¹⁰⁸ *See* 34 C.F.R. § 300.114 (a) (2) (i).

Thus, Petitioner proved that DCPS failed to implement the Student's compensatory education plan. However, this is only a procedural error and does not constitute a denial of FAPE because the compensatory education plan was a remedy ordered in a prior Hearing Officer Determination that was prospective in nature. The compensatory education plan was generated as a result of a denial of FAPE, and thus it cannot create a denial of FAPE if not followed.

ORDER

Upon consideration of Petitioner's request for a due process hearing, the response thereto, and the testimony and exhibits presented at the due process hearing, this 15th day of May 2009, it is hereby

ORDERED that the DCPS shall fund 20 hours of compensatory education in the skill areas of reading, writing, reading comprehension, and vocabulary, to be provided by independent tutor(s) certified in special education, and designed to implement the goals and objectives of the Student's IEP, at a cost not to exceed an hour;

IT IS FURTHER ORDERED that within ten school days, DCPS shall convene a meeting of the MDT to review and revise the Student's IEP;

IT IS FURTHER ORDERED that DCPS shall ensure the participation of Petitioner and, at the request of Petitioner, any professionals who conducted the Student's evaluations, at every meeting at which DCPS plans to review the Student's evaluations or review or revise the Student's IEP, including the meeting required by this Order, and

IT IS FURTHER ORDERED that DCPS shall receive one day of delay for every day of delay caused by Petitioner, her counsel, or her educational advocate; and

IT IS FURTHER ORDERED, that this Order is effective immediately.

/s/
Frances Raskin
Hearing Officer

Notice of Right to Appeal Hearing Officer's Decision and Order

This is the final administrative decision in this matter. Any party aggrieved by the findings and/or decision may bring a civil action in any state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy within ninety (90) days of the entry of the Hearing Officer's Decision, in accordance with 20 U.S.C. Section 1415(i)(2)(B).

Copies to:
Domiento Hill, counsel for Petitioner
Harsharen Bhuller, counsel for Respondent
Student Hearing Office