DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

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

Parent, on behalf of STUDENT,[1]	)	Case Number:
Petitioner,	)	Hearing Date: August 12, 2011, Room 2003
v.	)	
THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	Hearing Officer: Frances Raskin
Respondent.	)	

OSSE
STUDENT HEARING OFFICE
2011 AUG 29 AM 9: 24

HEARING OFFICER DETERMINATION

I. JURISDICTION

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

II. BACKGROUND

Petitioner is the parent of a year-old student with a disability who attends a public school in the District of Columbia. On June 14, 2011, Petitioner filed a Due Process Compliant ("Complaint") against the District of Columbia Public Schools ("DCPS") pursuant to the IDEA.

On June 15, 2011, This Hearing Officer was appointed to preside over this case. On June 28, 2011, Respondent DCPS filed a response to the Complaint. Respondent filed its Response four days after the deadline mandated by IDEA.[2]

---

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

[2] If DCPS has not sent a prior written notice under 34 C.F.R. § 300.503 to the parent regarding the subject matter contained in the parent's due process complaint, DCPS must, within 10 days of receiving the due process complaint, send to the parent a response that includes (i) An explanation of why the agency proposed or refused to take the action raised in the due process

On June 24, 2011, the parties participated in a resolution meeting and agreed to continue their discussions through the end of the resolution period. The parties agreed that the forty-five day, due process hearing timeline began on July 15, 2011.

On July 20, 2011, this Hearing Officer held a prehearing conference in which Kiran Hassan, counsel for Petitioner, and Cherie Cooley, counsel for Respondent DCPS, participated. This Hearing Officer issued a prehearing conference summary and order ("prehearing order") on July 29, 2011. On August 2, 2011, this Hearing Officer issued a revised prehearing order, at the request of Petitioner, to clarify the relief Petitioner seeks in this proceeding.

On August 5, 2011, the parties exchanged five-day disclosures, including witness lists and documents.

The due process hearing commenced at 9:30 a.m. on August 12, 2011. This Hearing Officer admitted into evidence the parties' respective five-day disclosures at the inception of the hearing.[3] Petitioner testified and presented the testimony of three witnesses on her behalf, her educational advocate ("Educational Advocate"), an expert in clinical psychology and the psycho-educational and neuropsychological evaluation of students ("Psychological Expert"), and an outreach director for a service provider who developed a compensatory education plan for the Student ("Outreach Director"). DCPS presented no witnesses.

The due process hearing concluded at 2:15 p.m. on August 12, 2011. This Hearing Officer held the hearing record open until midnight on August 17, 2011, to allow the parties to file written closing arguments.[4]

III. ISSUES PRESENTED

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

A. Whether DCPS denied the Student a free, appropriate, public education ("FAPE") on February 10, 2011, and March 31, 2011, by failing to develop individualized educational programs ("IEP") that provided the Student sufficient hours of specialized education, a small

---

complaint; (ii) A description of other options that the IEP Team considered and the reasons why those options were rejected; (iii) A description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and (iv) A description of the other factors that are relevant to the agency's proposed or refused action. 34 C.F.R. § 300.508(e). Thus, the DCPS Response was due on June 25, 2011.

[3] This Hearing Officer excluded Petitioner's exhibits 1, and 3-5 as they were pleadings and orders, not probative evidence. This Hearing Officer admitted into evidence Petitioner's exhibit 2, and exhibits 6-36, inclusive, without objection. This Hearing Officer admitted into evidence Respondent's exhibits 1-4, inclusive, without objection.

[4] Respondent filed its written closing argument at 7:09 p.m. on August 17, 2011. Petitioner filed her written closing argument at 9:11 p.m. on August 17, 2011.

classroom setting with a small student-teacher ratio, and present levels of performance that reflect the Student's dyslexia; and

B. Whether DCPS denied the Student a FAPE by failing to provide him an appropriate placement on April 6, 2011, for the 2011-2012 school year.

Petitioner requests relief in the form of an order requiring Respondent to revise the Student's IEP to provide the Student at least 27.5 hours of specialized instruction outside the general education setting, and to include present levels of performance that accurately reflect his current levels of academic performance. Petitioner also seeks an order requiring Respondent to fund the Student's enrollment in a non-public school ("Non-Public School"), with transportation. Finally, Petitioner seeks compensatory education in the form of tutoring for the Student.

IV. FINDINGS OF FACT

1. Petitioner is the mother of a -year-old student ("Student") who attends a public elementary school ("DCPS School").[5] During the 2010-2011 school year, the Student was in third grade.[6] He repeated the first and second grades.[7]

2. The Student was found eligible for specialized instruction and related services in 2009.[8] At that time, the Student's full-scale IQ was 81, which was in the low average range.[9] However, in the areas of functioning that make up the full-scale IQ, the Student's abilities vary significantly, making the full-scale IQ an inadequate summary of his unique set of thinking and reasoning abilities.[10] These areas are verbal comprehension, perceptual reasoning, working memory, and processing speed.[11]

3. The Student's verbal reasoning abilities are much better developed than his nonverbal reasoning abilities.[12] His verbal comprehension and verbal skills are in the average range.[13] Making sense of complex verbal information and using verbal abilities to solve novel problems is one of the Student's strengths.[14] In contrast, his nonverbal performance is in the borderline range.[15] Processing complex visual information by forming spatial images of part-whole relationships and/or by manipulating the parts to solve novel problems without using

---

[5] Testimony of Petitioner; Petitioner Exhibit 10 (March 31, 2011, IEP); Petitioner Exhibit 15 (June 24, 2009, Confidential Psycho-educational Evaluation).
[6] Testimony of Petitioner; Petitioner Exhibit 20 (DCPS Third Grade Report Card).
[7] Testimony of Petitioner.
[8] Testimony of Petitioner.
[9] Petitioner Exhibit 15 at 10.
[10] *Id.*
[11] *Id.* at 19.
[12] *Id.* at 3.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 10.

words is a weakness for the Student.[16]

4. The Student's verbal comprehension, i.e., verbal reasoning and complex formation, is in the average range.[17] His perceptual reasoning, i.e., nonverbal reasoning, is in the borderline range and exceeds those of only five percent of his peers.[18] This means that the Student has difficulty with spatial analysis, abstract thinking, and visual motor skills.[19] He also struggles with making visual abstractions, seeing visual themes, categorization, and sorting complex ideas and pictures.[20]

5. The Student's working memory, i.e., ability to sustain attention, concentrate, and exert mental control is in the average range.[21] His processing speed, i.e., ability to process simple or routine visual material without making errors, is in the borderline range and exceeds only two percent of his same-age peers.[22] Thus, processing visual material quickly is a weakness for the Student as compared to his verbal reasoning ability.[23] Because learning often involves a combination of routine information processing (such as reading) and complex information processing (such as reasoning), his weakness in the speed of processing routine information may make the task of comprehending novel information time-consuming and difficult.[24] This may leave him less time and mental energy for the complex task of understanding new material.[25]

6. In 2009, when he was eight years old and in the second grade,[26] the Student performed in the borderline range in overall reading skills.[27] His standard score on the Wechsler Individual Achievement Test (WIAT-II), in reading was 71, exceeding only three percent of his same-age peers.[28] His achievement in reading was much lower than expected for a child with his general cognitive ability.[29] He required intensive assistance to develop basic reading skills.[30]

7. In 2009, the Student's overall written language skills were in the low average range.[31] His standard score on the WIAT-II written language composition was 85, which

---

[16] *Id.*
[17] *Id.*
[18] *Id.* at 4.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.* at 4-5.
[26] *Id.* at 2.
[27] *Id.* at 5.
[28] *Id.*
[29] *Id.* at 6.
[30] *Id.*
[31] *Id.* at 5.

exceeded only sixteen percent of his same-age peers.[32] His written expression skills were equivalent to a student in the second month of first grade.[33] His spelling ability was equal to a student in the ninth month of first grade.[34] His achievement was much lower than would be expected for a child with his general cognitive ability.[35] Thus, this is an area in which the Student required assistance to help him further develop his skills.[36]

8. In 2009, the Student's writing revealed significant delays in phonetics, reading, and visual processing.[37] He inverted letters such as "s," "g," and "b," which he wrote upside down, and substituted the letters "x" for "y" and "y" for "u."[38] His word composition was disorganized as he drew some letters big and others small, crammed letters and words together, and unevenly spaced them apart.[39] He was not able to use basic punctuation, including the period at the end of a sentence.[40] He also demonstrated significant grammar and sentence composition errors and basic copying errors.[41]

9. In 2009, the Student performed in the extremely low range in mathematics.[42] His standard score on the WIAT-II in mathematics was 64, exceeding only one percent of his same-age peers.[43] His achievement was much lower than would be expected for a child with his general cognitive ability.[44] This showed that he had not acquired basic math concepts and required intensive assistance to develop these skills.[45]

10. In 2009, the Student's oral expression skills were commensurate with his chronological age.[46] His standard score on the WIAT-II in oral expression was 106, which exceeded sixty-six percent of his same age peers.[47] However, his listening comprehension skills were significantly delayed.[48] His listening comprehension skills are likely impacted by his difficulties in working memory.[49]

---

[32] *Id.* at 6.
[33] *Id.*
[34] *Id.*
[35] *Id.* at 7.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.* at 5.
[43] *Id.*
[44] *Id.* at 7.
[45] *Id.*
[46] *Id.* at 5.
[47] *Id.* at 5, 19.
[48] *Id.* at 5.
[49] *Id.*

11. Thus, the Student has severe learning deficits in reading, phonological awareness, mathematics, and handwriting.[50] He shows signs of cognitive impairments in visual perception, and a mild speech and language impairment.[51] Being retained in school was not effective in addressing his learning issues.[52] He appears have stalled in his acquisition of basic academic knowledge and basic reading, mathematics, and handwriting.[53]

12. On April 6, 2010, DCPS convened a meeting of the Student's IEP team to review his June 24, 2009, psycho-educational evaluation.[54] Petitioner and her educational advocate attended the meeting.[55] The team reviewed the Student's cognitive functioning and academic performance scores on the WIAT-II.[56] The team noted that the Student had difficulty with visual processing; visual integration; motor planning, processing and sequencing; memory, and multi-step directions.[57]

13. The June 24, 2009, evaluation recommended that the Student be provided at least four hours per day of remedial special education services in the areas of reading, reading comprehension, mathematics, handwriting, and listening comprehension.[58] It recommended that this remedial instruction be provided one-to-one or in a small group of five children or less.[59] The evaluation also recommended that the Student be provided assistive technology to remediate his lack of basic skills.[60]

14. At the April 6, 2010, IEP meeting, the IEP team also reviewed the Student's January 7, 2010, neuropsychological evaluation.[61] They noted that the neuropsychological evaluation found that the Student met the criteria for cognitive disorder, not otherwise specified.[62] The neuropsychological evaluation found that the Student had a diffuse frontal lobe dysfunction affecting his ability to attend to tasks.[63] It revealed that the Student had problems with spatial orientation and integration.[64] The evaluation also diagnosed the Student with dyslexia.[65]

---

[50] *Id.* at 13.
[51] *Id.* at 14.
[52] *Id.*
[53] *Id.*
[54] Petitioner Exhibit 6 at 1 (April 6, 2010, DCPS MDT/IEP Meeting Notes).
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] Petitioner Exhibit 15 at 14.
[59] *Id.*
[60] *Id.*
[61] Petitioner Exhibit 6 at 2.
[62] *Id.* This class of disorders is characterized by cognitive dysfunction presumed to be due to the direct physiological effect of a general medical condition (en-utero insult). Petitioner Exhibit 16 at 10 (January 27, 2010, Report of Neuropsychological Evaluation).
[63] Petitioner Exhibit 16 at 10.
[64] *Id.*

15. The neuropsychological evaluation recommended that the Student be placed in a classroom with a low student-teacher ratio and specialized instruction in all academic subjects.[66] The evaluation also recommended that the Student receive after-school tutoring to provide a drill and review of the concepts taught in his classes.[67]

16. The IEP team discussed the fact that the neuropsychological evaluation revealed that the Student had difficulty with visual-spatial integration, motor planning, and multi-tasking.[68] The team noted that the Student had visual and auditory dyslexia.[69]

17. On December 13, 2010, the Student's IEP team met to develop an IEP for the Student.[70] The IEP team developed an IEP that provided the Student would receive ten hours per week of specialized instruction outside the general education setting, 2.5 hours per week of specialized instruction in written expression in the general education setting, five hours per week of specialized instruction in reading in the general education setting, and 2.5 hours per week of specialized instruction in mathematics in the general education setting.[71] The IEP also provided that the Student would receive one hour per week of speech-language therapy and one hour per week of occupational therapy, outside the general education setting.[72]

18. On February 10, 2011, DCPS convened a meeting of the Student's IEP team to discuss Petitioner's concerns about the Student's progress.[73] Petitioner and the Educational Advocate attended the meeting.[74] At the meeting, the Student's special education teacher ("Special Education Teacher") informed the team that the Student does not participate in classroom activities in the large classroom setting.[75] The Student's general education teacher ("General Education Teacher") stated that the Student would benefit from a small, intimate group setting.[76] The General Education Teacher stated that the Student has made little progress in his general education classes.[77] The Student's speech-language pathologist added that the Student is easily distracted in large settings and cannot focus.[78]

19. On February 10, 2011, the IEP team developed a draft IEP that provided the Student would receive ten hours per week of specialized instruction outside the general education setting,

---

[65] *Id.* at 11.
[66] *Id.*
[67] *Id.* at 13.
[68] Petitioner Exhibit 6 at 2.
[69] *Id.* at 1.
[70] Petitioner Exhibit 7 (December 13, 2010, IEP).
[71] *Id.*
[72] *Id.*
[73] Petitioner Exhibit 9 at 1 (Educational Advocate's Notes of February 10, 2011, IEP meeting).
[74] *Id.*
[75] *Id.* at 5.
[76] *Id.*
[77] *Id.*
[78] *Id.*

2.5 hours per week of specialized instruction in written expression in the general education setting, five hours per week of specialized instruction in reading in the general education setting, and 2.5 hours per week of specialized instruction in mathematics in the general education setting.[79] The IEP also provided that the Student would receive one hour per week of speech-language therapy and one hour per week of occupational therapy, outside the general education setting.[80]

20. On March 31, 2011, DCPS convened a meeting of the Student's IEP team to review and revise the Student's IEP.[81] Petitioner and the Educational Advocate attended the meeting.[82] The General Education Teacher reported that the Student is making no progress in his general education class.[83] The General Education Teacher again recommended that the Student be placed in a small group setting with accommodations.[84] Petitioner and the Educational Advocate requested that the IEP team amend the Student's IEP to provide full-time specialized instruction outside of the general education setting.[85] Petitioner and the Educational Advocate pointed out to the team that the June 24, 2009, psychological evaluation and the January 7, 2010, neuropsychological evaluation both recommended that the Student be educated one-to-one or in a small group setting.[86]

21. At the March 31, 2011, IEP meeting, DCPS offered to revise the Student's IEP to provide twenty hours per week of specialized instruction outside the general education setting.[87] Petitioner and the Educational Advocate rejected this suggestion, again requesting full-time specialized instruction outside of the general education setting.[88]

22. On March 31, 2011, DCPS developed a final IEP for the Student.[89] This IEP also provided the Student twenty hours per week of specialized instruction outside the general education setting.[90] The IEP team also provided that the Student would receive sixty minutes per week of speech-language therapy and sixty minutes per week of occupational therapy outside the general education setting.[91]

23. During the 2010-2011 school year, the Student's general education classroom had

---

[79] Petitioner Exhibit 8 at 7 (February 10, 2011, IEP).
[80] *Id.*
[81] Petitioner Exhibit 11 at 1 (Educational Advocate's Notes of March 31, 2011, IEP meeting)
[82] Petitioner Exhibit 10 at 1 (March 31, 2011, IEP).
[83] *Id.* at 2.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at 3.
[88] *Id.*
[89] Petitioner Exhibit 10 at 1.
[90] *Id.* at 7.
[91] *Id.*

20-25 children and one teacher, the General Education Teacher.[92] During the 2010-2011 school year, the Student should have been educated in a classroom with low student teacher ratio, in order to receive adequate support to address his deficits in all academic areas.[93] He requires a small classroom and low student-teacher ratio to address his difficulties with writing, lining up math problems, working quickly on tests, and multitasking.[94] The Student multitasks when listening to the teacher while taking notes.[95]

24. Additionally, all of the evaluations of the Student since 2009 suggest that the Student requires full-time special education services.[96] Due to his deficits in core areas (reading math, and writing), the Student is unable to make academic progress in the general education classroom.[97]

25. The present levels of performance ("PLOPS") on the Student's December 13, 2010, and March 31, 2011, IEPs do not accurately reflect the Student's performance.[98] The PLOPs do not reflect the data in the Student's June 24, 2009, psycho-educational evaluation or his January 27, 2010, neuropsychological evaluation.[99] The PLOPs also failed to reflect that the Student's performance was impaired by his dyslexia.[100] Without accurate PLOPs, the Student's teachers cannot measure his progress on his IEP goals.[101]

26. Between June 2009 and July 2011, the Student's academic performance dropped in reading, writing and mathematics.[102] Thus, during these two years, he regressed in all core academic areas.[103]

27. The Student's regression was caused by the failure of DCPS to develop IEPs for the Student that provided appropriate goals, and accurate PLOPs, and sufficient hours of specialized instruction outside the general education setting.[104] Because the Student has regressed in his academic functioning, he should receive an assessment designed to determine the amount of compensatory education required to determine how much tutoring would be required for the

---

[92] Testimony of Educational Advocate.
[93] Testimony of Psychological Expert.
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.* The Psychological Expert arrived at this opinion by comparing the Student's academic performance scores in his June 24, 2009, psycho-educational evaluation with his academic performance scores in the July 26, 2011, comprehensive psychological evaluation.
[103] *Id.*
[104] Petitioner Exhibit 36 at 1 (August 2011 Compensatory Education Proposal).

Student to regain the skills he lost during the 2010-2011 school year.[105]

V. CONCLUSIONS OF LAW

The burden of proof is properly placed upon the party seeking relief.[106] Under IDEA, the Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.[107] The burden of proof by a preponderance of evidence requires the trier of fact to find that the existence of a fact is more probable than its nonexistence before she may find in favor of the party who has the burden of persuasion.[108] In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it.[109] Unlike other standards of proof, the preponderance standard allows both parties to share the risk of error in roughly equal fashion,[110] except that when the evidence is evenly balanced, the party with the burden of persuasion must lose.[111]

IDEA guarantees children with disabilities the right to a free and appropriate public education with services designed to meet their individual needs.[112] FAPE is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability."[113] FAPE "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."[114]

DCPS is obligated to provide a FAPE "for all children residing in the state between the ages of 3 and 21, inclusive."[115] In deciding whether DCPS provided the Student a FAPE, the inquiry is limited to (a) whether DCPS complied with the procedures set forth in IDEA; and (b) whether the Student's IEP reasonably calculated to enable the Student to receive educational benefits.[116]

---

[105] *Id.*
[106] *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).
[107] 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).
[108] *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted).
[109] *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), aff'd, 512 U.S. 246 (1994).
[110] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted).
[111] *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).
[112] 20 U.S.C. §§ 1400(d)(1)(A),1412(a)(1).
[113] 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, D.C. Mun. Reg. tit. 30 § 3001.1.
[114] *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89 (1982) (citation omitted).
[115] 34 C.F.R. § 300.101.
[116] *Rowley* at 206-207.

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.[117] In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.[118]

VI. DISCUSSION

A. Petitioner Proved that DCPS Denied the Student a FAPE by Failing to Develop Appropriate IEPs and Provide the Student an Appropriate Educational Placement During the 2010-2011 School Year.

The IEP is the centerpiece of special education delivery system.[119] The adequacy of the student's IEP is determined by whether the student has "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."[120] IDEIA does not require that the services provided maximize each child's potential.[121]

FAPE "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."[122] The IEP is the centerpiece of special education delivery system.[123]

In developing an IEP, the IEP team must consider the strengths of the child; concerns of the parents for enhancing the education of the child; the results of the initial or most recent evaluation of the child; and the academic, developmental, and functional needs of the child.[124] An IEP must include a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum.[125] The services provided to the child in the IEP must address all of the child's identified special education and related services and must be based

---

[117] 20 U.S.C. § 1415 (f)(3)(E)(ii).
[118] *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").
[119] *Lillbask ex rel. Mauclaire v. Conn. Dep't of Educ.*, 397 F.3d 77, 81 (2d Cir. 2005) (internal quotation marks omitted).
[120] *Rowley*, 458 U.S. at 201 (1982).
[121] *Id.* at 198.
[122] *Rowley*, 458 U.S. at 188-89 (citation omitted).
[123] *Lillbask ex rel. Mauclaire v. Conn. Dep't of Educ.*, 397 F.3d 77, 81 (2d Cir. 2005) (internal quotation marks omitted).
[124] 34 C.F.R. § 300.324 (a).
[125] 34 C.F.R. § 300.320 (a) (1); 5 D.C.M.R. § 3007.2 (a).

on the child's unique needs and not on the child's disability.[126]

The term "educational placement" refers to the type of educational program prescribed by the IEP.[127] "Educational placement" refers to the general educational program, such as the classes, individualized attention, and additional services a child will receive, rather than the "bricks and mortar" of the specific school.[128]

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs,[129] establishes annual goals related to those needs,[130] and provides appropriate specialized instruction and related services.[131] The program must be implemented in the least restrictive environment ("LRE").[132] For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression."[133]

Here, DCPS ignored the findings and recommendations of the Student's June 24, 2009, psycho-educational evaluation. This evaluation recommended that the Student be provided at least four hours per day of remedial special education services in the areas of reading, reading comprehension, mathematics, handwriting, and listening comprehension.[134] It recommended that this remedial instruction be provided one-to-one or in a small group of five children or less.[135] The evaluation. also recommended that the Student be provided assistive technology to remediate his lack of basic skills.[136]

On April 12, 2010, and again on December 13, 2010, DCPS failed to follow the evaluator's recommendation that the Student receive all of his instruction outside the general education environment.[137] Instead, DCPS developed IEPs that provided the Student two hours per day of specialized instruction.[138] As a result, between April 12, 2010, and March 31, 2011, the Student received most of his instruction in a classroom of 20-25 students.[139] As the General Education Teacher noted at two separate IEP meetings, this prevented the Student from making any academic progress.

---

[126] D.C. Mun. Reg. tit. 30 § 3002.1(f).
[127] *T.Y. v. N.Y. Dept. of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009) (citation omitted).
[128] *Id.*
[129] 34 C.F.R. § 300.320 (a) (1).
[130] 34 C.F.R. § 300.320 (a) (2).
[131] 34 C.F.R. § 300.320 (a) (4).
[132] 20 U.S.C. § 1412 (a) (5); 34 C.F.R. §§ 300.114 (a) (2), 300.116 (a) (2).
[133] *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).
[134] Petitioner Exhibit 15 at 14.
[135] *Id.*
[136] *Id.*
[137] Respondent presented no evidence to show that the IEP team found that this evaluation was invalid or that it relied on other evaluations in developing the Student's IEP.
[138] Petitioner Exhibit 7 at 7.
[139] Testimony of Educational Advocate.

Additionally, DCPS failed to incorporate the data from the Student's June 24, 2009, psycho-educational evaluation and January 27, 2010, neuropsychological evaluation in the PLOPs in his IEP. DCPS failed to develop any goals or provide any assistive technology to address the Student's dyslexia. As a result, by the end of the 2010-2011 school year, the Student had regressed in reading, writing, and mathematics.

Thus, Petitioner proved that DCPS denied the Student a FAPE by failing to develop appropriate IEPs, and provide the Student an appropriate educational placement, during the 2010-2011 school year.

B. Petitioner Failed to Prove that the Non-Public School Would Meet the Student's Individualized Needs and is His Least Restrictive Environment.

The 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.[140] 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.[141] 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.[142]

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 (3) facilities outside of the District of Columbia.[143]

To the maximum extent possible children with disabilities should be educated with children who are non-disabled.[144] 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.[145]

An award of private-school placement is not, like a tutoring award, retrospective relief designed to compensate for *yesterday's* IDEA violations, but rather prospective relief aimed at ensuring that the child receives *tomorrow* the education required by IDEA.[146] The considerations relevant to determining whether a particular placement is appropriate for a particular student include the nature and severity of the student's disability; the student's specialized educational needs; the link between those needs and the services offered by the

---

[140] 34 C.F.R. § 300.116 (c).
[141] 34 C.F.R. § 300.116 (d).
[142] *Id.* at (e).
[143] D.C. Code § 38-2561.02.
[144] 34 C.F.R. § 114 (a)(2)(i).
[145] *Id.* at 114 (a)(2)(ii).
[146] *Branham v. District of Columbia*, 427 F.3d 7, 11 (D.C. Cir. 2005) (emphasis in original).

school; the placement's cost; and the extent to which the placement represents the least restrictive environment.[147]

Here, Petitioner failed to present any evidence regarding the class size, method of instruction, and student body at the Non-Public School. Petitioner presented no evidence on the type of specialized instruction and related services the Non-Public School provides, and how it delivers any such instruction/related services. Petitioner also failed to present any evidence on how the Non-Public School would address the Student's disabilities, including his dyslexia. Additionally, Petitioner failed to present evidence of whether the Non-Public School can implement the Student's IEP and whether it would be the Student's least restrictive environment.

In other words, Petitioner failed to present any evidence that placing the Student at the Non-Public School would ensure the Student receives the education required by IDEA.[148] Thus, Petitioner failed to prove that the Non-Public School can meet the Student's individualized needs or is his least restrictive environment.

C. Petitioner Proved that the Student is Entitled to Compensatory Education.

Where a school system fails to provide special education or related services to a disabled student, the student is entitled to compensatory education, "i.e., replacement of educational services the child should have received in the first place."[149] Because compensatory education is a remedy for past deficiencies in a student's educational program, a finding as to whether a student was denied a FAPE in the relevant time period is a "necessary prerequisite to a compensatory education award."[150]

This inquiry is only the first step in determining whether the Student is entitled to compensatory education. A compensatory education award is an equitable remedy that "should aim to place disabled children in the same position they would have occupied but for the school district's violations of the IDEA."[151] A compensatory education "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."[152] This standard

---

[147] *Id.* at 12 (citing *Rowley*, 458 U.S. at 202) (noting that "sufficient educational benefit" will vary from child to child); *McKenzie v. Smith, 771 F.2d 1527, 1531 (D.C. Cir. 1985)* (affirming district court's placement decision that took into consideration the student's "individual needs"); *id. at 1534-35* (affirming private placement based on match between a student's needs and the services offered at a particular school)).

[148] *Branham*, 427 F.3d at 12 (reversing District Court order requiring DCPS to fund non-public school for student because, in part, the record contained no information about the services the non-public school would provide, the cost of those services, whether those services would meet the student's needs, or whether the school would provide the least restrictive appropriate educational environment).

[149] *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).

[150] *Peak v. District of Columbia*, 526 F. Supp. 2d 32, 36 (D.D.C. 2007).

[151] *Reid*, 401 F.3d at 518, 523.

[152] *Id.* at 524.

"carries a qualitative rather than quantitative focus," and must be applied with "[f]lexibility rather than rigidity."[153]

Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies.[154] Others may need extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.[155]

Here, DCPS denied the Student a FAPE by failing to provide him an appropriate IEP and placement during the 2010-2011 school year. The evidence is undisputed that the Student regressed in all core academic areas as a result. Thus, the Student is entitled to compensatory education.

Petitioner presented a compensatory education plan that included a recommendation that the Student be awarded 100 hours of tutoring, 20 hours of occupational therapy, and 30 hours of speech and language therapy.[156] However, this plan contemplates that the Student was denied a FAPE for the 2009-2010 school year as well as the 2010-2011 school year. It provides no breakdown of the amount of compensatory education the Student is due for each year, and no explanation of how the person who prepared the plan arrived at her recommendation.

Additionally, Petitioner failed to present any testimony to support her compensatory education plan. The Outreach Director, who testified in support of the compensatory education plan, appeared to have no knowledge of how it was developed and how it should be interpreted if the Student was denied a FAPE for only one year. The Outreach Director also failed to explain how the compensatory education plan would remedy the Student's deficits that resulted from the denial of FAPE during the 2010-2011 school year. Because Petitioner failed to present testimony from the person who authored the plan, which left this Hearing Officer with insufficient information to award compensatory services.

Therefore, Petitioner proved by a preponderance of the evidence that the Student is entitled to compensatory education but not the amount of compensatory education to which the Student is entitled. Thus, Hearing Officer will order a Linda Mood Bell evaluation to determine what compensatory services would be required to address the Student's deficits.

---

[153] *Id.*
[154] *Id.*
[155] *Id. See also Thomas v. District of Columbia*, 407 F.Supp.2d 102, 115 (D.D.C. 2005) (noting that it is conceivable that no compensatory education may be required for a denial of FAPE if, for example, the student would not benefit from the additional services).
[156] Petitioner Exhibit 36 at 2.

ORDER

Based upon the Findings of Fact and Conclusions of Law herein, on this 28th day of August 2011, it is hereby:

ORDERED that, on or before September 16, 2011, DCPS shall amend the Student's IEP, consistent with the recommendations in this decision, to revise the present levels of performance to reflect the data in the July 26, 2011, psychological evaluation and the Student's dyslexia, specify that he shall receive specialized instruction in all subjects throughout the school day, and provide strategies and accommodations to address his dyslexia;

IT IS FURTHER ORDERED that, on or before September 16, 2011, DCPS shall amend the Student's IEP to specify that his least restrictive environment is an out-of-general-education class, with a low student-teacher ratio not to exceed ten students to each teacher, for the entire school day; and

IT IS FURTHER ORDERED that, on or before September 30, 2011, DCPS shall fund a Linda Mood Bell assessment, at a cost not to exceed The Linda Mood Bell evaluation shall ascertain the services the Student requires to remedy his deficits in reading, writing, and mathematics that resulted from the denial of FAPE during the 2010-2011 school year. DCPS shall then fund the services recommended by the Linda Mood Bell evaluation.

By: /s/ *Frances Raskin*
Hearing Officer

NOTICE OF APPEAL RIGHTS

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

Distributed to:

Kiran Hassan, Attorney at Law
Cherie Cooley, Attorney at Law
Student Hearing Office
DCPS