DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E., Second Floor
Washington, DC 20002

Parents on behalf of STUDENT,[1]	)	Case Number:
Petitioners,	)	Hearing Date: August 2, 2011 Room 2006
v.	)	
THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	
Respondent.	)	Hearing Officer: Frances Raskin

HEARING OFFICER DETERMINATION

I. JURISDICTION

This proceeding was invoked in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 ("IDEIA"), and its implementing regulations at 20 U.S.C. §§ 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

II. BACKGROUND

Petitioners are the parents of an year-old, special education student who attends a District of Columbia elementary school. On June 6, 2011, Petitioners filed a Due Process Complaint Notice ("Complaint") against the District of Columbia Public Schools ("DCPS") pursuant to IDEA.

On June 8, 2011, this Hearing Officer was appointed to preside over this case. On June 21, 2011, Respondent DCPS filed a response to the Complaint ("Response"). Respondent filed its Response three days after the deadline established in IDEA.[2]

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[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

The parties participated in a resolution meeting on June 17, 2011. The parties were unable to resolve the Complaint but agreed to continue to work to resolve the Complaint through the end of the thirty-day resolution period. Thus, the resolution period ended on July 6, 2011. The parties agreed that the forty-five day, due process hearing timeline began on July 7, 2011.

On July 18, 2011, this Hearing Officer held a prehearing conference.[3] Marlon Charles, counsel for Petitioners, and Victoria Healy, counsel for Respondent DCPS, participated in the prehearing conference. On July 19, 2011, this Hearing Officer issued a prehearing conference summary and order.

The due process hearing convened at 10:00 a.m. on August 2, 2011.[4] At the outset of the hearing, this Hearing Officer entered the parties' respective five-day disclosures into evidence.[5]

After the parties provided opening statements, Petitioners testified and presented one witness. Respondent then presented two witnesses. After the parties presented oral closing arguments, the hearing concluded at 3:00 p.m. on August 2, 2011.

III. ISSUES PRESENTED

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

A. Whether Respondent denied the Student a free, appropriate, public education ("FAPE") by failing to timely identify the Student as a student with a disability, conduct evaluations of the Student in all areas of suspected disability, and determine her eligibility for specialized instruction and related services; and

B. Whether Respondent denied the Student a FAPE by failing to provide her an appropriate individualized educational program ("IEP") on May 27, 2011, that includes a behavioral intervention plan ("BIP") and provides psychological counseling to address her behavioral difficulties.

Petitioners request relief in the form of an order directing DCPS to fund an independent FBA and BIP, revise the Student's IEP to include the BIP and provide the Student psychological

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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).

[3] July 18, 2011, was the first date that both counsel were available for the prehearing conference.

[4] Although both counsel and this Hearing Officer timely appeared for the due process hearing, neither Petitioner was available until 9:54 a.m., when the Father arrived after taking care of an issue at his job.

[5] This Hearing Officer entered into evidence Petitioners' Exhibits 1-10, 14, and 15. Petitioners withdrew Exhibits 11, 12, and 13. This Hearing Officer entered into evidence Respondent's Exhibits 1-7.

counseling, and provide the Student compensatory education in the form of tutoring, counseling or other behavioral support services.

V. FINDINGS OF FACT

1. The Student is years old and in grade at a DCPS elementary school ("DCPS School") that she has attended at least since the second grade.[6]

2. During the 2008-2009 school year, when the Student was in third grade, she participated in the DC-CAS, which is standardized testing administered to all third-grade, District of Columbia students.[7] The testing results showed that the Student performed below basic in reading and math.[8] Her accuracy on the three reading content areas was between 11 percent and 27 percent.[9] Her accuracy on the five mathematic content areas was between 26 percent and 32 percent.[10]

3. During the 2008-2009 school year, the Student's mother ("Petitioner A") expressed concern to the Student's third-grade teacher that the Student was performing below her age and grade level in reading and math.[11] Petitioner asked the third-grade teacher to ensure that the Student was evaluated for special education.[12] The third-grade teacher responded that he did not think the Student needed special education.[13]

4. During the 2008-2009 school year, the Student rarely followed directions, completed class work on time, worked well with others, or cooperated.[14] She rarely used her time wisely, completed and returned her homework, participated in class discussion, or made an effort.[15]

5. At the end of the first quarter of the 2008-2009 school year, the Student's teacher reported on the Student's third-grade report card that her inability to control her actions and excessive talking are affecting her ability to complete her work satisfactorily.[16] The teacher stated that the Student was reading at a first-grade level and struggled with basic comprehension

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[6] Testimony of the Student's mother ("Petitioner A"); Petitioner Exhibit 2 at 1 (March 22, 2011, Report of Confidential Psychological Evaluation).
[7] Testimony of the Student's father ("Petitioner B").
[8] Petitioner Exhibit 6 at 1 (Student Report of individual results on April 20, 2009, DC-CAS).
[9] *Id.* at 2.
[10] *Id.* at 3.
[11] Testimony of Petitioner A.
[12] *Id.*
[13] *Id.*
[14] Petitioner Exhibit 8 at 1 (DCPS Third Grade Report Card).
[15] *Id.*
[16] Petitioner Exhibit 8 at 3.

and vocabulary.[17] She reported that, in math, the Student lacks basic number sense and struggles with place value and addition and subtraction.[18]

6. At the end of the second quarter of the 2008-2009 school year, the Student's teacher reported on the Student's third-grade report card that her low motivation and inability to stay on task and follow directions have prevented her from moving past a first-grade reading level.[19] The teacher reported that the Student scored below 50 percent in the math and reading standards.[20]

7. At the end of the third quarter of the 2008-2009 school year, the Student's teacher reported on the Student's third-grade report card that she continued to struggle on basic math and reading concepts at the third-grade level.[21] The teacher reported that the Student's inability to follow directions and stay on task during math prevented her from completing work.[22] The teacher reported that the Student had reached only the second grade level in reading and was not prepared to be a successful fourth-grade student.[23]

8. By the end of the 2008-2009 school year, the Student had failed to master any of her academic subjects.[24] She was performing at the beginning or developing level in reading, English and language arts.[25] In mathematics, she was performing at the beginning or developing level in eight of ten topics.[26] She mastered the other two math topics.[27] Her performance in science was scattered, ranging from secure in some topics to developing in others.[28] In social studies, the Student failed to master four of five topics.[29] She failed to master any topics in art, health, and physical education.[30] This shows that the Student consistently failed to make progress during the 2008-2009 school year.[31]

9. At the end of the fourth quarter of the 2008-2009 school year, the Student's teacher reported that she required reading intervention to bring her to grade level as she performed at a second-grade level.[32] The teacher reported that the Student's score in reading and

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[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] Petitioner Exhibit 8 at 1.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* at 2.
[30] *Id.*
[31] Testimony of Advocate.
[32] Petitioner Exhibit 8 at 3.

math on her final exams was 40 percent.[33] The teacher recommended that the Student be retained in the third grade.[34] Yet, DCPS promoted the Student to the fourth grade.[35]

10. At the beginning of the 2009-2010 school year, when the Student started fourth grade, Petitioner A asked the Student's teacher to make sure the Student receives extra assistance in reading and math.[36] The Student never received this assistance.[37] Petitioner also asked the school social worker to ensure that the Student was evaluated for special education.[38] DCPS did not respond to this request.[39]

11. At the end of the second quarter of the 2009-2010 school year, the Student's teacher reported that the Student was not making adequate progress.[40]

12. In the third quarter of the 2009-2010 school year, the Student participated in the DC-CAS examination.[41] The testing results showed that the Student's accuracy on the three reading sections of the test was between 18 percent and 32 percent.[42] Her accuracy on the five mathematic sections was between 21 percent and 63 percent.[43] These results were "below basic" in reading and math.[44] Below basic is the lowest possible achievement level on the DC-CAS examination.[45] After Petitioner B was informed of the Student's performance on the DC CAS, he raised concerns with her teacher.[46]

13. At the end of the third quarter of the 2009-2010 school year, the Student's teacher again reported that the Student was not making progress as expected in grade four.[47] At the end of the fourth quarter, the teacher recommended that the Student attend summer school to build on her reading and math skills.[48] The teacher also recommended that the Student Support Team review the Student's records and provide her additional services the next school year.[49]

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[33] *Id.*
[34] *Id.*
[35] *See* Petitioner Exhibit 9 (DCPS Fourth Grade Report Card) (showing that the Student was in the fourth grade during the 2009-2010 school year).
[36] Testimony of Petitioner.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] Petitioner Exhibit 9 at 3.
[41] Petitioner Exhibit 5 at 1 (Student Report of individual results on April 18, 2010, DC-CAS).
[42] *Id.* at 2.
[43] *Id.* at 3.
[44] *Id.*
[45] Testimony of Advocate.
[46] Testimony of Petitioner B.
[47] Petitioner Exhibit 9 at 3.
[48] *Id.*
[49] *Id.*

14. By the end of the 2009-2010 school year, the Student had failed to master any of her academic subjects.[50] She was performing at the beginning or developing level in every subject, including reading, English and language arts, math, science, and social studies.[51] This shows that the Student consistently failed to make adequate progress during the 2009-2010 school year.[52]

15. Considering the Student's failure to make adequate academic progress during the previous two school years, DCPS should have evaluated the Student by the end of her fourth-grade year.[53] Yet, DCPS did not evaluate the Student during the 2009-2010 school year, despite Petitioner's oral requests.[54] Instead, DCPS promoted the Student to the fifth grade against the recommendation of her teacher that she be retained in the fourth grade.[55]

16. After reviewing the Student's fourth-grade report card, Petitioner A discussed the Student's performance with her fourth-grade teacher.[56] The teacher informed Petitioner that the Student required one-on-one assistance to make progress.[57] The teacher informed Petitioner that he would inquire about getting the Student evaluated for special education and requested that Petitioner make a written request that the Student be evaluated.[58] Petitioner did not request in writing that the Student be evaluated.[59]

17. On October 4, 2010, the Student's teacher sent a notice to Petitioners stating that the Student was struggling in class.[60] The teacher reported that the Student had difficulty keeping up with some of her assignments.[61] The teacher further reported that the Student needed to work on her attitude and respect toward her classmates and teachers.[62] Around the end of October 2010, Petitioners informed the Student's teacher that they wanted DCPS to evaluate the Student to determine her eligibility for specialized instruction and related services.[63]

18. In October 2010, Petitioners retained the Advocate and then filed a due process complaint and requested that DCPS evaluate the Student and determine her eligibility for

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[50] Petitioner Exhibit 9 at 1.
[51] *Id.* at 1-2.
[52] Testimony of Advocate.
[53] *Id.*
[54] *Id.*; testimony of Petitioners.
[55] Testimony of Petitioners.
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] Petitioner Exhibit 7 (October 4, 2010, Deficiency Report).
[61] *Id.*
[62] *Id.*
[63] Testimony of Petitioner B.

specialized instruction and related services.[64] In December 2010, DCPS held a meeting to discuss which evaluations it would conduct.[65] Petitioners attended this meeting.[66]

19. Between August 2010 and March 2011, the Student's attention span, self-regulation, and social skills remained below par.[67] In homeroom, the Student failed to put forth the necessary motivation and effort to succeed.[68] The Student often was inattentive, distracted, and playful.[69] She reacted inappropriately to the teacher's prompts and warnings that were intended to redirect her.[70] She talked back to adults and appeared unconcerned about the consequences of her actions.[71]

20. On March 8, 2011, a DCPS School Psychologist conducted a psychological evaluation of the Student.[72] The evaluator found that the Student's general intellectual ability was in the borderline range and exceeded only 5 percent of her same-age peers.[73] The evaluator found that the Student met the criteria for specific learning disability.[74] The evaluator recommended that the Student receive psychological counseling to address and reverse her school-triggered inadequate self-regulation, anxiety, depression, poor social skills, and attention deficits.[75] The evaluator also recommended several strategies and interventions to address the Student's behavioral difficulties in the classroom.[76]

21. On April 6, 2011, DCPS conducted a functional behavioral assessment ("FBA") of the Student.[77] Petitioners disagree with the contents and conclusions of the FBA.[78]

22. On May 6, 2011, DCPS convened a meeting of the Student's IEP team.[79] Petitioner A, the Student, and the Advocate attended the IEP meeting.[80] The IEP team found the Student eligible for specialized instruction as a student with a learning disability.[81] The IEP team developed an IEP for the Student that included annual goals in math, reading, and written expression.[82] The IEP team agreed to provide the Student ten hours per week of specialized

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[64] *Id.*; DCPS Exhibit 1 at 4 (October 28, 2010, Resolution Meeting Notes).
[65] Testimony of Petitioner B.
[66] Testimony of Petitioners.
[67] Petitioner Exhibit 2 at 2 (March 22, 2011, Report of Confidential Psychological Evaluation).
[68] *Id.* at 3.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] Petitioner Exhibit 2.
[73] *Id.* at 6.
[74] *Id.* at 12.
[75] *Id.*
[76] *Id.* at 13.
[77] Respondent Exhibit 4 at 13.
[78] Testimony of Advocate.
[79] Respondent Exhibit 5 at 29 (May 6, 2011, IEP).
[80] *Id.*
[81] *Id.*; testimony of Advocate.
[82] Respondent Exhibit 5 at 30-32.

instruction outside the general education setting.[83] The IEP team declined to provide the Student the counseling services recommended in the DCPS psychological evaluation.[84]

23. On May 27, 2011, DCPS convened a meeting of the Student's IEP team.[85] At this meeting, the Advocate and Petitioner A requested that DCPS develop a behavior intervention plan for the Student.[86] The IEP team rejected this request.[87] The team agreed that, they would reconvene to address the Student's behavioral progress after her IEP was in place for forty-five days.[88] The IEP team agreed that, if warranted, they would develop behavioral goals for the Student at this meeting.[89]

24. The Student performed poorly throughout the 2010-2011 school year.[90] She made no academic progress from the fourth grade through the fifth grade.[91]

25. The Student requires one-on-one tutoring, for four hours per week, outside of the school day, to remedy her deficits in reading, writing, and mathematics.[92] She requires 50 hours of tutoring in reading and written expression, and 60 hours of tutoring in math.[93]

V. CONCLUSIONS OF LAW

The burden of proof is properly placed upon the party seeking relief.[94] Under IDEA, the Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.[95] The burden of showing something by a preponderance of evidence simply requires the trier of fact to believe 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.[96] In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it.[97] Unlike other standards of proof, the preponderance standard allows both

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[83] *Id.* at 35.
[84] *Id.*; Petitioner Exhibit 2 at 12.
[85] Respondent's Exhibit 6 at 40 (Notes from May 27, 2011, IEP Meeting).
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] Testimony of Petitioner.
[91] *Id.*
[92] Testimony of Advocate.
[93] *Id.*
[94] *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).
[95] 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).
[96] *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted).
[97] *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), aff'd, 512 U.S. 246 (1994).

parties to share the risk of error in roughly equal fashion,[98] except that when the evidence is evenly balanced, the party with the burden of persuasion must lose.[99]

IDEA guarantees children with disabilities the right to a free and appropriate public education with services designed to meet their individual needs.[100] FAPE is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability."[101] 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."[102]

DCPS is obligated to provide a FAPE "for all children residing in the state between the ages of 3 and 21, inclusive."[103] In deciding whether DCPS provided the Student a FAPE, the inquiry is limited to (a) whether DCPS complied with the procedures set forth in IDEIA; and (b) whether the Student's IEP reasonably calculated to enable the Student to receive educational benefits.[104]

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.[105] In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.[106]

VI. DISCUSSION

A. Petitioner Established by a Preponderance of the Evidence that DCPS Violated Its Child Find Obligations Under IDEA .

Among the specific conditions a state must satisfy is the requirement that it demonstrate that "all children residing in the state who are disabled, regardless of the severity of their

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[98] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted).
[99] *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).
[100] 20 U.S.C. §§ 1400(d)(1)(A),1412(a)(1).
[101] 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, D.C. Mun. Reg. tit. 30 § 3001.1.
[102] *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89 (1982) (citation omitted).
[103] 34 C.F.R. § 300.101.
[104] *Rowley* at 206-207.
[105] 20 U.S.C. § 1415 (f)(3)(E)(ii).
[106] *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").

disability, and who are in need of special education and related services are identified, located, and evaluated."[107] This "child-find" obligation extends to all children suspected of having a disability, not just children who are ultimately found to have disabilities.[108] The scope of the child-find duty includes children who are suspected of having a disability even though they are advancing from grade to grade.[109]

The duty to locate and complete the evaluation of a student starts "as soon as a student is identified as a potential candidate for special education services."[110] Once a child is identified, the local education agency ("LEA"), i.e., DCPS, is then obligated to determine whether the student is in fact a child with a disability.[111] The IEP team must conduct an initial evaluation to determine whether a child is a child with a disability and to determine the educational needs of the child.[112]

DCPS must evaluate a child suspected of having a disability within 120 days from the date the student was referred for an evaluation.[113] As part of an initial evaluation, the IEP team and other qualified professionals, as appropriate, must (1) review existing evaluation data on the child, including evaluations and information provided by the parents of the child.[114] On the basis of that review, and input from the child's parents, the IEP team must identify what additional data, if any, are needed to determine whether the child is a child with a disability and the educational needs of the child.[115]

An LEA's failure to comply with its child-find obligation may constitute a denial of FAPE.[116] This is not the end of the inquiry, however. The dispositive issue is whether the student was harmed by the LEA's failure to comply with its obligations.[117] In other words, to succeed on a procedural claim, parents must demonstrate that the school district's procedural violations affected their child's ability to receive the educational benefit that the IDEA

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[107] 20 U.S.C. §§ 1412(2)(C);1414(a)(1)(A); *Integrated Design & Elecs. Acad. Pub. Charter Sch. v. McKinley*, 570 F. Supp. 2d 28, 30 (D.D.C. 2008).
[108] *McKinley*, 570 F. Supp. 2d at 34-35 (citing 34 C.F.R. § 300.111(c)(1); *N.G. v District of Columbia*, 556 F. Supp. 2d. 11, 25 (D.D.C. 2008).
[109] *Kruvant v. District of Columbia*, 2005 U.S. Dist. LEXIS 34045, 25-26 (D.D.C. Aug. 10, 2005).
[110] *McKinley*, 570 F. Supp. 2d at 28-30 (citing, e.g., *Hawkins*, 539 F. Supp. 2d 108; *Abramson*, 493 F. Supp. 2d at 85).
[111] *Abramson*, 493 F. Supp. 2d at 85).
[112] 20 U.S.C. § 1414(a)(1)(C)(i).
[113] D.C. Code § 38-2561.02.
[114] 34 C.F.R. § 300.305.
[115] *Id.*
[116] *Hawkins ex rel. D.C. v. District of Columbia*, 539 F. Supp. 2d 108, 113-14 (D.D.C. 2008); *District of Columbia v. Abramson*, 493 F. Supp. 2d 80, 85 (D.D.C. 2007).
[117] *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").

requires.[118] If a disabled child received a FAPE in spite of a technical violation of the IDEA, the LEA has fulfilled its statutory obligations.[119]

The threshold issue in this case is when DCPS suspected or should have suspected the Student was a child with a disability under IDEA. The IDEA defines a "child with a disability" as a child with a listed disorder or "specific learning disabilities" who, "by reason thereof, needs special education and related services."[120]

Here, DCPS should have suspected that the Student was a child with a disability by the end of her fourth-grade year. The Student had failed to make adequate progress in the third and fourth grades. Also, at the end of the Student's fourth-grade year, her teacher recommended that the SST team review the Student's records to determine whether she needed additional assistance. The Student's teacher also recommended that the Student be retained in the fourth grade. Despite the Student's failing to master grade-level standards in third and fourth grades, her teacher's referral to the SST team, and the teacher's recommendation that the Student be retained, DCPS did not evaluate her.

Instead, DCPS promoted the Student to the fifth grade. It wasn't until after Petitioners filed a due process complaint in October 2010, that DCPS agreed to evaluate the Student. DCPS did not complete the Student's initial evaluation until near the end of the 2010-2011 school year. In the meantime, the Student foundered during her fifth grade year and failed to make adequate progress.

Thus, Petitioners proved by a preponderance of the evidence that DCPS denied the Student a FAPE.

B. Petitioners Failed to Prove that Respondent Denied the Student a FAPE by Failing to Develop an IEP on May 27, 2011, that Includes a BIP and Provides Psychological Counseling to Address Her Behavioral Difficulties.

Although Petitioners proved that DCPS failed to follow the recommendations of the psychological evaluation that the Student receive related services in the form of psychological counseling, Petitioners failed to present any evidence that this caused the Student to suffer educational detriment. Petitioners presented no evidence on the Student's behavioral difficulties in the classroom after DCPS developed the IEP in early May 2011. Petitioners also presented no evidence to show that the Student was harmed by the failure of DCPS to develop a BIP.

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[118] *Roark v. District of Columbia*, 460 F. Supp. 2d 32, 42 (D.D.C. 2006) (citing *Lesesne*, 447 F.3d at 834).

[119] *See*, e.g., *Hung Hanh Thi Nguyen v. District of Columbia*, 681 F. Supp. 2d 49, 51 (D.D.C. 2010) (upholding hearing officer who found that, although the student suffered from depression and a mood disorder, he did not suffer an emotional disturbance because "[t]he record is, at best, inconclusive that [the student's] emotional problems adversely affect his educational performance"); *M.M. ex rel. D.M. v. Sch.* Dist., 303 F.3d 523, 533-34 (4th Cir. 2002).

[120] 34 C.F.R. § 300.8 (emphasis added).

Thus, Petitioners failed to prove that DCPS denied the Student a FAPE.

C. Petitioners 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."[121] 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."[122]

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."[123] 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."[124]This standard "carries a qualitative rather than quantitative focus," and must be applied with "[f]lexibility rather than rigidity."[125]

A Petitioner certainly need not "have a perfect case to be entitled to a compensatory education award." Rather, once a Petitioner has established that she is entitled to an award, a hearing officer may not simply refuse to grant one.[126] Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies.[127] Others may need extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.[128]

Here, DCPS denied the Student a FAPE for the past three years. As a result, the Student is entitled to compensatory education, in the form of one-on-one tutoring, for four hours per week, outside of the school day, to remedy her deficits in reading, writing, and mathematics. The Student is entitled to 50 hours of tutoring in reading and written expression, and 60 hours of tutoring in math.

This tutoring will assist the student in progressing to near her current grade level in

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[121] *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).
[122] *Peak v. District of Columbia*, 526 F. Supp. 2d 32, 36 (D.D.C. 2007).
[123] *Reid*, 401 F.3d at 518, 523.
[124] *Id.* at 524.
[125] *Id.*
[126] *Stanton v. District of Columbia, 680 F. Supp. 2d 201, 207 (D.D.C. 2010).*
[127] *Reid*, 401 F.3d at 524.
[128] *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).

reading, writing and mathematics.[129] It will assist the Student in accessing the curriculum and achieving educational success in her sixth-grade year.[130] Thus, it will place the Student in the position she would have been but for the denial of FAPE.

ORDER

Based upon the Findings of Fact and Conclusions of Law herein, on this 20th day of August 2011, it is hereby:

ORDERED that DCPS shall provide the Student compensatory education, in the form of 50 hours of tutoring in reading and written expression, and 60 hours of tutoring in math, to be provided one-on-one, for four hours per week, outside of the school day.

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:

Marlon Charles, Attorney at Law
Victoria Healy, Attorney at Law
Student Hearing Office
DCPS

[129] Testimony of Advocate.
[130] *Id.*