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 8, 2011, Room 2006
v.	)	
THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	
Respondent.	)	Hearing Officer: Frances Raskin

OSSE STUDENT HEARING OFFICE 2011 AUG 30 AM 9:08

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 elementary school in the District of Columbia. . On June 15, 2011, Petitioner filed a Due Process Compliant ("Complaint") against the District of Columbia Public Schools ("DCPS") pursuant to the Individuals with Disabilities Education Act ("IDEA").

This Hearing Officer was appointed to preside over this case on June 17, 2011. On July 7, 2011, Respondent DCPS filed a response to the Complaint. Respondent filed its Response twelve 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

On June 27, 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 16, 2011.

On July 20, 2011, this Hearing Officer held a prehearing conference in which Domiento Hill, 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 28, 2011.

On August 1, 2011, the parties exchanged five-day disclosures, including witness lists and documents. The due process hearing commenced at 9:00 a.m. on August 8, 2011. This Hearing Officer admitted into evidence the Petitioner's five-day disclosures,[3] Respondent's disclosures,[4] and one Hearing Officer Exhibit[5] at the outset of the due process hearing.

At the due process hearing, Petitioner testified and presented the testimony of two witnesses on her behalf, her educational advocate ("Educational Advocate"), and the executive director ("Director") of a non-public school ("Non-Public School"). DCPS presented the testimony of two witness, the special education coordinator ("SEC") at the DCPS School and the school psychologist ("DCPS Psychologist"). After the parties provided oral closing arguments, the due process hearing concluded at 4:00 p.m. on August 8, 2011.

---

explanation of why the agency proposed or refused to take the action raised in the due process 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] Respondent objected to Petitioner's exhibits 11, 16-19, inclusive, 22, 23, and 25, on relevance grounds because they were generated outside the statute of limitations. This Hearing Officer overruled the objection on the grounds that, because there is no testimony preceding the introduction of an exhibit to establish its relevance in a due process hearing, she could not foresee how Petitioner may connect these documents to the claims certified for hearing. This Hearing Officer cautioned Petitioner that she would not consider these documents unless, through testimony, she connected them to the claims certified for adjudication. This Hearing Officer then admitted into evidence Petitioner's exhibits 1-10, inclusive, and 15-48. This Hearing Officer admitted into evidence Respondent's exhibits 1-4, inclusive, without objection.

[4] Respondent withdrew its exhibits 1,4, and 6 as they were duplicative of exhibits that Petitioner had disclosed. This Hearing Officer then entered into evidence Respondent's exhibits 2, 3, and 5 without objection.

[5] This exhibit was a March 16, 2011, closing order incorporating the terms of a settlement, which the parties had failed to include with their five-day disclosures.

III. ISSUES PRESENTED

This Hearing Officer certified the following issues for adjudication at the due process hearing:[6]

A. Whether DCPS denied the Student a free, appropriate, public education ("FAPE") by failing to include specialized instruction in his September 16, 2009, May 7, 2010, and June 7, 2011, individualized educational programs ("IEPs");

B. Whether DCPS denied the Student a FAPE by failing to provide him the speech-language services required by his September 16, 2009, IEP;

C. Whether DCPS denied the Student a FAPE by failing to include speech-language therapy services in his June 7, 2011, IEP;

D. Whether DCPS denied the Student a FAPE by failing to conduct a speech-language re-evaluation before deciding to terminate the speech-language services he had been receiving pursuant to his May 7, 2010, IEP; and

E. Whether DCPS denied the Student a FAPE since June 7, 2011, by failing to provide him full-time special education services in a therapeutic setting with behavioral supports.

Petitioner requests relief in the form of an order requiring DCPS to fund an independent speech-language assessment of the Student; revise the Student's IEP to include at least twenty-five hours per week of specialized instruction and sixty minutes of speech-language therapy; fund the Student's enrollment in a non-public school ("Non-Public School") with transportation; and provide the Student compensatory education.

IV. FINDINGS OF FACT

1. Petitioner is the mother of a year-old student ("Student") who attends a public elementary school ("DCPS School").[7]

2. In June 2008, when the Student was old, he received an occupational therapy evaluation.[8] The evaluator found that the Student had below average visual-motor integration, which exceeded only nine percent of his same-age peers.[9] Visual-

---

[6] In the prehearing order, this Hearing Officer certified two additional claims for adjudication but Petitioner withdrew those claims at the outset of the due process hearing. These claims alleged that DCPS denied the Student a FAPE by failing to develop a behavior intervention plan for the Student on June 7, 2011, and by failing to provide him extended school year services during the 2011 summer.

[7] Testimony of Petitioner; Petitioner Exhibit 5 at 1 (June 7, 2011, IEP); Petitioner Exhibit 7 at 1 (March 25, 2011, Report of Confidential Psycho-educational Evaluation).

[8] Petitioner Exhibit 14 at 1 (June 24, 2008, National Children's Center, Child Development Program, Occupational Therapy Evaluation).

[9] *Id.* at 3.

motor integration describes the child's ability to use his eyes to guide the movement of his arms and hands.[10]

3. The June 2008 occupational therapy evaluation also revealed that the Student exhibited a probable difference more than others in his auditory processing abilities and his oral sensory processing abilities.[11] The evaluator recommended that the Student receive occupational therapy services to improve his visual-motor integration skills[12] and to improve his attention span.[13]

4. In September 2008, when the Student was two years and six months old, he received a speech therapy evaluation.[14] The results of the evaluation indicated that the Student's receptive language abilities fell in the average range while his expressive language functioning was moderately delayed when compared to peers his chronological age.[15] Expressive language skills refer to how the Student communicated to make his wants and needs known.[16] The evaluator recommended that the Student receive individual or group speech therapy services for thirty minutes twice a week.[17]

5. Beginning in October 2008, the Student received occupational therapy and speech-language therapy at the National Children's Center.[18] Although he was years old, he was not speaking.[19] He also had difficulties managing his anger.[20]

6. On October 16, 2008, DCPS held a meeting of the Student's multidisciplinary team ("MDT").[21] Petitioner attended the MDT meeting.[22] At this time, the Student attended school through the Head Start program.[23]

7. At the October 16, 2008, meeting, the MDT agreed that the Student should receive an educational evaluation and speech-language and occupational therapy reviews.[24] Petitioner consented to the educational evaluation.[25] The MDT did not discuss the Student's behavioral

---

[10] *Id.*
[11] *Id.* at 4-5.
[12] *Id.* at 5. Visual-motor skills refer to eye-hand coordination. *Id.*
[13] *Id.* at 6.
[14] Petitioner Exhibit 15 at 1 (September 16, 2008, National Children's Center, Early Intervention Program, Speech Therapy Evaluation).
[15] *Id.* at 3.
[16] *Id.* at 2.
[17] *Id.* at 3.
[18] Testimony of Petitioner.
[19] *Id.*
[20] *Id.*
[21] Petitioner Exhibit 16 at 1 (October 16, 2008, MDT Meeting Notes).
[22] *Id.*
[23] Testimony of Petitioner.
[24] Petitioner Exhibit 16 at 1
[25] Petitioner Exhibit 18 at 1 (October 16, 2008, Consent for Evaluation).

difficulties.[26]

8. On November 13, 2008, DCPS conducted the speech and language evaluation review.[27] The review included a formal observation of the Student.[28] The review found that the Student's expressive language was mildly delayed when compared with his peers.[29] The review found that the Student required speech and language therapy.[30]

9. On November 13, 2008, DCPS reviewed the September 2008 speech and language evaluation of the Student.[31] DCPS found that the evaluation was valid.[32]

10. On February 5, 2009, DCPS conducted a developmental evaluation of the Student to determine his eligibility for special education and related services.[33] At the time of the evaluation, the Student was two years and eleven months old.[34] The evaluation found that the Student's adaptive, personal-social, and cognitive functioning was in the average range.[35]

11. On February 10, 2009, DCPS reviewed the Student's occupational therapy evaluation.[36] The review found that the Student was in the average range for grasping and below average for visual-motor skills.[37]

12. On March 9, 2009, a DCPS convened a meeting of the Student's eligibility team.[38] Petitioner attended this meeting.[39] The team found that the Student was not eligible for special education.[40]

13. On September 14, 2009, DCPS convened a meeting of the Student's IEP team.[41] Petitioner attended this meeting.[42] At the time of the September 14, 2009, meeting, the Student was three years and seven months old.[43] He was in pre-kindergarten and exhibiting difficulties

---

[26] Testimony of Petitioner.
[27] Petitioner Exhibit 20 at 1 (November 13, 2008, Speech and Language Evaluation Review).
[28] *Id.*
[29] *Id.* at 3.
[30] *Id.* at 4.
[31] Petitioner Exhibit 21 at 1 (November 13, 2008, Review of Independent Assessment).
[32] *Id.*
[33] Petitioner Exhibit 24 at 1, 4 (February 5, 2009, Developmental Evaluation).
[34] *Id.* at 1.
[35] *Id.* at 4.
[36] Petitioner Exhibit 22 (February 10, 2009, Occupational Therapy Independent Evaluation Review).
[37] *Id.* at 3.
[38] Petitioner Exhibit 25 (March 9, 2009, Eligibility Meeting Report).
[39] *Id.*
[40] *Id.*
[41] Petitioner Exhibit 28 at 1 (September 14, 2009, IEP).
[42] *Id.*
[43] *Id.*

with behavior and learning.[44]

14. At the September 14, 2009, IEP meeting, the IEP team found that the Student was eligible for special education as a student with a speech and language impairment.[45] The IEP team developed an IEP for the Student.[46] The IEP team developed annual goals in the area of communication and speech and language, and decided that the Student would receive thirty minutes per week of speech language pathology outside the general education setting and thirty minutes per week in the general education setting.[47] The September 14, 2009, IEP included no academic goals and provided no specialized instruction.[48]

15. On September 8, 2009, the Student's teacher filled out a report stating that the Student came to school crying, On September 21, 2009, the teacher reported that the Student pushed another student down, took a toy from the student, and kicked him.[50] On October 6, 2009, the teacher reported that the Student refused to participate in the instruction and ran around the classroom throwing books from the shelf.[51] On November 4, 2009, the teacher reported that the Student's sister brought him to class that day.[52] When the Student's sister attempted to hang up the Student's coat, the Student turned around and attacked her.[53] On November 10, 2009, the Student refused to cooperate in the classroom activity and instead walked around the classroom.[54]

16. On December 1, 2009, the teacher reported that the Student needed a lot of work on his social behaviors.[55] The teacher reported that he could not sit down like other children, he kicks, throws chairs, and walks around the classroom all day.[56] He refused to follow directions.[57] On January 29, 2010, the teacher reported that the Student still walked around the classroom, refused to join group activities, distracted the class while the other children were learning, pulled other students' hair and threw blocks, books, and crayons on them.[58] He threw chairs.[59] On March 2, 2010, the Student's teacher reported that the Student kicks, fights, and throws things to his peers for no reason.[60] The teacher reported that he did not follow classroom

---

[44] Testimony of Petitioner.
[45] Petitioner Exhibit 28 at 1.
[46] *Id.*
[47] *Id.* at 3.
[48] *Id.*
[49] Petitioner Exhibit 26 at 1 (Individual Observation and Anecdotal Record).
[50] *Id.*
[51] *Id.* at 2.
[52] *Id.* at 3.
[53] *Id.*
[54] *Id.*
[55] Petitioner Exhibit 29 at 1 (School Year 2009-2010 Teacher Comments).
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*

rules, walked around the classroom, climbed on chairs and tables, and distracted other students.[61]

17. On March 22, 2010, the principal of the DCPS School sent a letter to Petitioner informing her that the Student was exhibiting disruptive and disrespectful behavior in the classroom.[62] In the letter, the principal requested that Petitioner spend a week volunteering in the Student's class to help encourage his positive behavior.[63] At this time, the Student was old.[64]

18. Throughout the 2009-2010 school year, the Student was unable to stay in his seat, and he often threw objects, hit other students, and walked out of classroom.[65] He was regularly sent to principal's office or was placed in in-school suspension ("ISS").[66] He spent so much time in the principal's office and ISS that he did not have time to learn.[67] The Student's behavior was so disruptive that Petitioner had to come to his school and sit with him in his class for part of the day.[68] As the school year progressed, his behavior worsened.[69]

19. On May 7, 2010, DCPS convened a meeting of the Student's IEP team.[70] Petitioner attended this meeting.[71] At the time, the Student was old.[72]

20. At the May 7, 2010, meeting, the IEP team determined that the Student remained eligible for special education as a student with a speech-language impairment.[73] The IEP team developed an IEP for the Student that provided two annual goals in speech and language.[74] The IEP team decided that the Student would receive sixty minutes per week of speech-language pathology outside the general education setting.[75] The May 7, 2010, IEP contained no academic goals and provided no specialized instruction.[76]

21. On November 10, 2010, the Student received an independent psychiatric evaluation.[77] At that time, the Student was in pre-kindergarten at the DCPS School.[78] The

---

[61] *Id.*
[62] Petitioner Exhibit 31 (March 22, 2010, Letter from DCPS School Principal, to Petitioner).
[63] *Id.*
[64] Testimony of Petitioner.
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] Petitioner Exhibit 32 at 1 (May 7, 2010, IEP).
[71] *Id.*
[72] *Id.* at 1-2.
[73] *Id.*
[74] *Id.*
[75] *Id.* at 3.
[76] *Id.*
[77] Petitioner Exhibit 33 (November 10, 2010, Psychiatric Evaluation).
[78] Petitioner Exhibit 7 at 3. (March 25, 2011, Comprehensive Psychological Evaluation).

Student exhibited no psychosis.[79] However, he failed to perceive that his role was to be a compliant four-year-old boy.[80] His memory fluctuated, his fund of knowledge was delayed, and his judgment and insight were weak.[81]

22. In the November 10, 2010, psychiatric evaluation, the evaluator diagnosed the Student with a disruptive behavior disorder, speech disorder, and budding attention deficit hyperactivity disorder ("ADHD").[82] She found that the Student was too chaotic and undersocialized and "in dire need of full-time special education services."[83]

23. Petitioner provided a copy of the psychiatric evaluation to the SEC of the DCPS School.[84] The SEC informed Petitioner that the Student would not receive behavioral support services because there were many other children in the school whose behavior was worse than his.[85]

24. On March 7, 2011, the Student' teacher wrote a letter recommending that the Student receive behavioral therapy services.[86] The teacher reported that the Student exhibits behaviors that disrupt the school day, are injurious to himself and other students, and are destructive to the classroom environment.[87] She stated that, due to his behavior, the Student had to be removed from class and other areas of the school building by the school security, guidance counselors, and the ISS coordinator on several occasions.[88]

25. On March 25, 2011, the Student received an independent comprehensive psychological evaluation.[89] The Student's teacher reported to the evaluator that, although the Student exhibits behavioral difficulties, he performs at grade level academically.[90]

26. The Student's full scale IQ is 90, which is in the average range of intellectual functioning.[91] His verbal comprehension, i.e., ability to reason with the use of words, is average.[92] His nonverbal and verbal perceptual reasoning abilities are average, as is his general fund of knowledge.[93] His visual and motor integration skills are slightly below average.[94]

---

[79] Petitioner Exhibit 33 at 4.
[80] *Id.*
[81] *Id.*
[82] *Id.* at 4.
[83] *Id.* at 5.
[84] Testimony of Petitioner.
[85] *Id.*
[86] Petitioner Exhibit 41 (March 7, 2011, letter from teacher).
[87] *Id.*
[88] *Id.*
[89] Petitioner Exhibit 7.
[90] *Id.* at 3.
[91] *Id.* at 5.
[92] *Id.* at 5-6.
[93] *Id.* at 6.
[94] *Id.* at 9.

27. The Student's processing speed, i.e., ability to process simple or routine visual material without making errors, is borderline.[95] His processing speed exceeds that of only five percent of his same-age peers.[96] Thus, his ability to complete timed, visual-motor reasoning tasks in the classroom is significantly lower than that of his peers in the same age range.[97] This suggests that he has difficulty working on written tasks quickly and accurately.[98]

28. Academically, the Student's performance ranges from low average to average.[99] His functioning is underdeveloped in brief reading, spelling, and applied problems.[100] His difficulties with inattention, distractibility, and impulsivity are negative affecting his academics.[101] Thus, he requires full-time, specialized instruction in all academic areas.[102]

29. The student meets the criteria for oppositional defiant disorder, ADHD, and developmental delays.[103] He should be placed in a classroom with a low student-teacher ratio.[104] He also would benefit from weekly play therapy so that he can learn appropriate ways to express his anger and frustration.[105]

30. On March 28, 2011, the Student received an independent occupational therapy evaluation.[106] The Student was five years old at the time of the evaluation.[107] The evaluator interviewed the Student's teacher as part of the evaluation.[108] The teacher reported to the evaluator that she had significant concerns regarding the Student's academic difficulties as related to his distractibility and short attention span.[109] The teacher reported that the Student retains information from stories and every day activities very well.[110] She expressed concerns about his emotional behavior and the frequency with which he gets upset, kicks, hits, and destroys the classroom environment.[111]

31. The Student's fine motor precision, fine motor integration, and fine manual control are below average.[112] Difficulty coordinating may negatively impact the Student's ability to complete classroom assignments, participate in games and activities, and respond to information

---

[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.* at 10.
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] Petitioner Exhibit 6 (March 28, 2011, Occupational Therapy Evaluation).
[107] *Id.* at 1.
[108] *Id.* at 2.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.* at 3.

at a rate consistent with his peers.[113] He would benefit from therapeutic activities that promote overall development of writing skills in terms of improving legibility, writing fluency, and overall writing mechanics.[114] He also will benefit from a formal handwriting program to assist him in developing more legible and efficient writing patterns and building upon overall writing skills.[115] Difficulty with writing can significantly impact the Student's ability to complete classroom work, access the curriculum, and keep pace with others.[116]

32. The Student's manual dexterity is above average, while his upper limb coordination and manual coordination are average.[117] His visual motor integration is average.[118] His visual perceptual skills are low.[119] He seems to have difficulty attending to specific details regarding size, space, directionality, and orientation.[120]

33. The Student's motor coordination is below average.[121] On tasks that require motor coordination, he requires cues to not omit items and to work in a left to right sequential order.[122] While below average, his motor coordination abilities are better developed than his visual perceptual skills.[123]

34. The Student appears to have deficits in processing visual information.[124] He has difficulty matching colors, numbers, shapes or sizes, completing puzzles, coordinating his eyes for following a moving object, keeping his place when reading, and copying from the board or his desk.[125]

35. In terms of auditory processing, the Student has difficulty paying attention to what is said to him and he is easily distracted by sounds.[126] His difficulties processing sensory information may impact his ability to perform in the educational environment.[127]

36. The Student requires direct occupational therapy services to assist him in the development of skills, classroom strategies, and compensatory techniques for his deficits.[128] He should receive occupational therapy for thirty minutes per week.[129] He also should receive

---

[113] *Id.* at 4.
[114] *Id.* at 5.
[115] *Id.*
[116] *Id.*
[117] *Id.* at 3.
[118] *Id.* at 5.
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.* at 6.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.* at 7.
[129] *Id.*

classroom accommodations.[130]

37. The Student frequently becomes frustrated and has trouble making his needs known in an appropriate manner.[131] The Student is easier to handle in a small group or individually, does not easily accept changes in routines, and is apt to be impulsive, heedless, and accident prone.[132] The Student has marked mood variations and tends to have outbursts and tantrums.[133] On occasion, the Student has difficulty getting along with other children, has a tendency to withdraw from groups, displays challenging classroom behaviors when demands are made, and avoids eye contact.[134] The Student is unable to perform in a large, whole classroom, group setting.[135]

38. Between May 7, 2010, and May 6, 2011, the DCPS speech-language pathologist provided the Student direct services on thirty-eight of the fifty-five days he was available for services.[136] The speech language pathologist failed to provide the Student speech-language therapy on seventeen days, or approximately thirty percent of the services required by his May 7, 2010, IEP.

39. On June 7, 2011, DCPS convened a meeting of the Student's IEP team.[137] Petitioner and the Educational Advocate attended the IEP team meeting.[138] The IEP team found the Student eligible for special education with the disability classification of other health impairment.[139] The IEP team developed annual goals for the Student in the areas of emotional, social, and behavioral development and motor skills and physical development, i.e., occupational therapy.[140]

40. Petitioner and the Educational Advocate requested that the IEP team provide the Student academic support, stating that he was currently a year behind academically.[141] The DCPS members of the IEP team disagreed and stated that they would not provide the Student academic support in his IEP.[142] The DCPS members of the IEP team also discharged the Student from speech-language services based solely on the recommendation of the speech-language therapist.[143] The speech-language therapist reported that the Student had mastered all of his

---

[130] *Id.* at 8.
[131] *Id.* at 2.
[132] *Id.*
[133] *Id.*
[134] *Id.* at 2-3.
[135] *Id.*
[136] Petitioner Exhibit 46 (Service Trackers from May 7, 2010, through May 6, 2011).
[137] Petitioner Exhibit 5 (June 7, 2011, IEP and Advocate's meeting notes).
[138] *Id.* at 1.
[139] *Id.*
[140] *Id.* at 3-6.
[141] Petitioner exhibit 5 at 11 (Educational Advocate's June 7, 2011, IEP meeting notes).
[142] *Id.*
[143] *Id.* at 11, 13 (May 16, 2011, Completion of Services Form).

speech-language goals.[144]

41. The June 7, 2011, IEP provides that the Student is to receive thirty minutes per week of occupational therapy and thirty minutes per week of behavioral support services outside the general education setting.[145] The IEP provides the Student will receive no specialized instruction.[146]

42. The Student still has difficulty writing his name and recognizing his name in writing.[147] He recognizes only seventeen letters of the alphabet.[148] He is able to count to fourteen in sequence but then begins to skips numbers when counting higher than fourteen.[149] He sometimes mixes up numbers past the number five by sight, but can identify the numbers 1,2,3,4, and 5.[150] The Student is not on target in academic achievement for a five year old.[151]

43. During the 2010-2011 school year, the Student failed to make academic progress.[152] The Student's teacher informed Petitioner that the Student did not make academic progress because he was absent from the classroom on many occasions due to his behavior.[153]

44. This Hearing Officer finds that Petitioner was a credible witness at the due process hearing. She was forthright about the Student's difficulties and the documentary evidence corroborated her testimony.

45. This Hearing Officer finds that the Educational Advocate and the SEC were credible witnesses. Their testimony largely was corroborated by the documents in evidence and the testimony of other witnesses at the due process hearing.

V. CONCLUSIONS OF LAW

The burden of proof is properly placed upon the party seeking relief.[154] Under IDEA, the Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.[155] 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

---

[144] *Id.* at 13.
[145] *Id.* at 7.
[146] *Id.*
[147] Testimony of Petitioner.
[148] Petitioner Exhibit 5 at 15 (June 7, 2011, Final Eligibility Report).
[149] *Id.*
[150] *Id.*
[151] Testimony of Petitioner.
[152] Testimony of Educational Advocate regarding meeting in January 2011.
[153] *Id.*
[154] *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).
[155] 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).

favor of the party who has the burden of persuasion.[156] In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it.[157] Unlike other standards of proof, the preponderance standard allows both parties to share the risk of error in roughly equal fashion,[158] except that when the evidence is evenly balanced, the party with the burden of persuasion must lose.[159]

IDEA guarantees children with disabilities the right to a free and appropriate public education with services designed to meet their individual needs.[160] FAPE is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability."[161] 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."[162]

DCPS is obligated to provide a FAPE "for all children residing in the state between the ages of 3 and 21, inclusive."[163] 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.[164]

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.[165] In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.[166]

---

[156] *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted).
[157] *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), aff'd, 512 U.S. 246 (1994).
[158] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted).
[159] *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).
[160] 20 U.S.C. §§ 1400(d)(1)(A),1412(a)(1).
[161] 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, D.C. Mun. Reg. tit. 30 § 3001.1.
[162] *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89 (1982) (citation omitted).
[163] 34 C.F.R. § 300.101.
[164] *Rowley* at 206-207.
[165] 20 U.S.C. § 1415 (f)(3)(E)(ii).
[166] *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").

VI. DISCUSSION

A. Petitioner Failed to Prove that DCPS Denied the Student a FAPE by Failing to Include Specialized Instruction in his September 16, 2009, and May 17, 2010, IEPs.

Under IDEA, the term "child with a disability" is defined as "a child (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . ., orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) *who, by reason thereof, needs special education and related services.*"[167] Under IDEA, ADHD that meets these criteria is considered an "other health impairment,"[168] while oppositional defiant disorder is considered an emotional disturbance.[169]

The IEP is the centerpiece of special education delivery system.[170] 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."[171] IDEIA does not require that the services provided maximize each child's potential.[172]

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.[173] 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

---

[167] *Id.* (emphasis added) (citing 20 U.S.C. § 1401).

[168] Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or *attention deficit hyperactivity disorder*, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and (ii) *Adversely affects a child's educational performance.* 34 C.F.R. § 300.8 (c)(9) (emphasis added).

[169] Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and *to a marked degree that adversely affects a child's educational performance*: (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors; (B) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (C) inappropriate types of behavior or feelings under normal circumstances; (D) a general pervasive mood of unhappiness or depression; and (E) a tendency to develop physical symptoms or fears associated with personal or school problems. 34 CFR § 300.8 (c)(4)(i) (emphasis added).

[170] *Lillbask ex rel. Mauclaire v. Conn. Dep't of Educ.*, 397 F.3d 77, 81 (2d Cir. 2005) (internal quotation marks omitted).

[171] *Rowley,* 458 U.S. at 201 (1982).

[172] *Id.* at 198.

[173] 34 C.F.R. § 300.324 (a).

progress in the general education curriculum.[174] 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 on the child's unique needs and not on the child's disability.[175]

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs,[176] establishes annual goals related to those needs,[177] and provides appropriate specialized instruction and related services.[178] The program must be implemented in the least restrictive environment ("LRE").[179] For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression."[180]

Here, DCPS failed to include specialized instruction in the Student's September 16, 2009, IEP. While this violates IDEA in that it specifies that a student must require specialized instruction to be found eligible for IDEA services, including related services such as speech-language therapy, Petitioner failed to show that the Student required specialized instruction. Additionally, Petitioner failed to show that the Student failed to make academic progress as a result of not receiving specialized instruction.

Thus, Petitioner failed to prove that the Student was denied a FAPE due to the failure of DCPS to include specialized instruction in his September 16, 2009, IEP.

B. Petitioner Proved that DCPS Denied the Student a FAPE by Failing to Include Specialized Instruction in his May 7, 2010, and June 7, 2011, IEPs.

By May 7, 2010, the Student had spent an entire school year exhibiting disruptive and dangerous behaviors in the classroom. Throughout the 2009-2010 school year, the Student's teacher had filled out numerous reports detailing the Student's behavioral difficulties. Because the Student refused to participate in classroom activities, he missed classroom instruction.

Nonetheless, DCPS failed to develop behavioral interventions to address the Student's behavioral difficulties. DCPS also failed to consider that the Student required a smaller environment or additional academic support. Instead, DCPS allowed the Student's behavior to continue to deteriorate.

On May 7, 2010, DCPS again developed an IEP that provided the Student no specialized instruction and no behavioral support services. As a result, by June 7, 2011, the Student was one year behind his same-age peers in academic performance.

---

[174] 34 C.F.R. § 300.320 (a) (1); 5 D.C.M.R. § 3007.2 (a).
[175] D.C. Mun. Reg. tit. 30 § 3002.1(f).
[176] 34 C.F.R. § 300.320 (a) (1).
[177] 34 C.F.R. § 300.320 (a) (2).
[178] 34 C.F.R. § 300.320 (a) (4).
[179] 20 U.S.C. § 1412 (a) (5); 34 C.F.R. §§ 300.114 (a) (2), 300.116 (a) (2).
[180] *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).

Thus, Petitioner proved that DCPS denied the Student a FAPE by failing to address the Student's behavioral and academic difficulties in the May 7, 2010, IEP.

By June 7, 2011, DCPS had reviewed three evaluations that recommended full-time specialized instruction for the Student. All three evaluations reported that the Student's behavior interfered with his academic progress. The psychological evaluation identified specific deficits in processing speed and attention that hindered the Student's academic performance and ability to access the curriculum. Yet, again, DCPS failed to include specialized instruction in the Student's IEP, which ensures that the Student will fall further behind his classmates.

Thus, Petitioner proved that DCPS denied the Student a FAPE by failing to address the Student's behavioral and academic difficulties in the June 7, 2011, IEP.

C. Petitioner Failed to Prove that the Student Requires Full-Time Special Education Services in a Therapeutic Setting with Behavioral Supports.

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.[181] 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.[182] 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.[183]

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.[184]

To the maximum extent possible children with disabilities should be educated with children who are non-disabled.[185] 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.[186]

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

[181] 34 C.F.R. § 300.116 (c).
[182] 34 C.F.R. § 300.116 (d).
[183] *Id.* at (e).
[184] D.C. Code § 38-2561.02.
[185] 34 C.F.R. § 114 (a)(2)(i).
[186] *Id.* at 114 (a)(2)(ii).

ensuring that the child receives *tomorrow* the education required by IDEA.[187] 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 school; the placement's cost; and the extent to which the placement represents the least restrictive environment.[188]

Here, the Student has not yet received specialized instruction. Thus, this Hearing Officer cannot determine whether he will be able to access the curriculum at the DCPS School once he receives this instruction. It would be premature to place the Student in a full-time special education setting before ascertaining whether he can achieve academic success in a less restrictive environment.

Thus, Petitioner failed to prove that Student requires a full-time therapeutic environment.

D. Petitioner Failed to Prove that the Student Was Denied a FAPE by Not Receiving All of His Speech-Language Therapy Sessions and by Being Exited from Specialized Instruction.

While Petitioner proved that the Student did not receive all of his speech-language therapy sessions, she failed to present any evidence that the Student suffered any harm as a result. Thus, she failed to prove that he was denied a FAPE.

Similarly, Petitioner proved that DCPS may have committed a procedural violation in exiting the Student from speech-language services without first evaluating him or reviewing his records. However, Petitioner failed to present any evidence to show that the Student still requires speech-language services or suffered any harm. Thus, she failed to provide that the Student was denied a FAPE.

E. Petitioner Failed to Present Any Evidence to Show that the Student was 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."[189] 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

---

[187] *Branham v. District of Columbia*, 427 F.3d 7, 11 (D.C. Cir. 2005) (emphasis in original).
[188] *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)).
[189] *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).

compensatory education award."[190]

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."[191] 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."[192] This standard "carries a qualitative rather than quantitative focus," and must be applied with "[f]lexibility rather than rigidity."[193]

Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies.[194] Others may need extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.[195]

Here, Petitioner proved that DCPS denied the Student a FAPE by failing to provide him specialized instruction during the 2010-2011 school year. However, Petitioner presented no compensatory education plan or any testimony to support an award of compensatory education

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, Petitioner failed to prevail on this request for relief.

---

[190] *Peak v. District of Columbia*, 526 F. Supp. 2d 32, 36 (D.D.C. 2007).
[191] *Reid*, 401 F.3d at 518, 523.
[192] *Id.* at 524.
[193] *Id.*
[194] *Id.*
[195] *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).

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 30, 2011, DCPS shall amend the Student's IEP, consistent with the findings of this decision, to provide him at least ten hours of specialized instruction in his core academic subjects, a small setting with a low student-teacher ratio in which the Student is to receive this specialized instruction, and strategies and accommodations to address his behavioral difficulties.

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:

Domiento Hill, Attorney at Law
Cherie Cooley, Attorney at Law
Student Hearing Office
DCPS