DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

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

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STUDENT HEARING OFFICE
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Parent, on behalf of STUDENT,[1]	)	
Petitioner,	)	Case Number:
v.	)	Hearing Date: December 1, 2010 Hearing Room 2004
THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	Hearing Officer: Frances Raskin
Respondent.	)	

HEARING OFFICER DETERMINATION

I. JURISDICTION

This proceeding was invoked in accordance with the 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 at 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 an year-old student ("Student") with a disability who attends a District of Columbia elementary school. On September 3, 2010, Petitioner filed a Due Process Compliant ("Complaint") against the District of Columbia Public Schools ("DCPS") pursuant to IDEA. This Hearing Officer was appointed to preside over this case on September 8, 2010.

On September 13, 2010, DCPS waived the resolution session. Respondent DCPS filed a response to the Complaint on September 15, 2010. On September 17, 2010, September 27, 2010, and October 5, 2010, this Hearing Officer held prehearing conferences in which counsel for both parties participated by telephone. On October 1, 2010, this Hearing Officer issued a Prehearing Order.

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

On October 7, 2010, Petitioner filed a motion seeking leave to amend the Complaint. This Hearing Officer granted the motion on October 12, 2010. That same day, Petitioner filed an Amended Due Process Complaint ("Amended Complaint"). DCPS filed an Amended Response to Petitioner's Complaint ("Amended Response") on October 22, 2010.

The parties participated in a resolution meeting on November 3, 2010. The parties were unable to resolve the Complaint and agreed to proceed to a due process hearing. The parties agreed that the forty-five day, due process hearing timeline began on November 4, 2010. On November 8, 2010, this Hearing Officer held a prehearing conference, in which counsel for both parties participated by telephone. On November 23, 2010, this Hearing Officer issued an Amended Prehearing Conference Summary and Order.

The due process hearing commenced on December 1, 2010.[2] At the outset of the hearing This Hearing Officer admitted into evidence Petitioner's exhibits one through twenty-two and DCPS exhibits one through six were admitted. Each party presented the testimony of three witnesses. After the parties presented oral closing arguments, the due process hearing concluded.

III. ISSUES PRESENTED

A. Whether DCPS denied the Student a free, appropriate, public education ("FAPE") by failing to provide sufficient hours of specialized instruction and adequate present levels of performance on the Student's individualized educational program ("IEP");

B. Whether DCPS denied the Student a FAPE by failing to his need for extended school year services during the 2010 summer; and

C. Whether DCPS denied the Student a FAPE by failing to implement his IEP from January 26, 2010, through the end of the 2009-2010 school year.

V. FINDINGS OF FACT

1. Petitioner is an eight-year-old, special-education student who is in the third grade at a DCPS elementary school.[3] In January 2010, an IEP team determined that the Student is eligible for special education as multiply disabled as a student with specific learning disabilities and other health impairment.[4]

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[2] This Hearing Officer is cognizant of the forty-five due process hearing timeline and apologizes for her failure to timely issue this decision. This Hearing Officer has been extremely ill since December 6, 2010, and was hospitalized several days. It is this Hearing Officer's hope that the delay in issuing this HOD has not inconvenienced the parties.
[3] Testimony of Petitioner, Educational Advocate.
[4] Petitioner Exhibit 2, pp. 3, 5.

2. In 2008, the Student was diagnosed with a seizure disorder.[5] He continues to have seizures and they include vacant staring spells, forgetfulness, and loss of memory for events as well as lack of environmental contact lasting for several seconds.[6]

3. The Student's general cognitive ability is within the average range of intellectual functioning, as measured by his full scale IQ of 93, which exceeds those of about thirty-two percent of children his age.[7] His verbal comprehension is in the average range, and exceeds those of about thirty-two percent of children his age.[8] His perceptual reasoning is low average and exceeds eighteen percent of children his age.[9] His working memory is average and exceeds about fifty-five percent of children his age.[10] The Student's processing speed also is average and exceeds sixty-six percent of children his age.[11]

4. The Student's language and sensorimotor skills are intact.[12] He has demonstrated significant weaknesses in memory and automacity for familiar information (e.g. rapid naming), which is not unexpected given his seizure disorder.[13] His phonological processing varies, and he has increased difficulty on tasks with an unfamiliar language base.[14]

5. The Student's reading, writing, and mathematical skills are significantly lower than would be expected given his age and cognitive ability.[15] He meets the criteria for learning disabilities in reading, math, and written language.[16] He also has memory weaknesses that impact his functioning at school.[17]

6. His mathematical abilities are consistently in the borderline range.[18] His ability to perform numerical operations on paper is at the seventh percentile, and his math reasoning ability is at the fifth percentile.[19]

7. He performs in the low average range in broad reading, exceeding only twenty-one percent of children his age.[20] While he is able to read single words when time constraints

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[5] Petitioner Exhibit 8, p. 2 (August 31, 2009, Report of Comprehensive Psychological Evaluation).
[6] *Id.*; Petitioner Exhibit 17, p. 1 (July 14, 2008, correspondence from Dr. Jayam Trouth, Howard Univ. Hospital).
[7] Petitioner Exhibit 13, p. 3 (Report of January-February 2009 Psychological Evaluation).
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] Petitioner Exhibit 8, p. 7.
[13] *Id.*
[14] *Id.*
[15] *Id.* at p. 8.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* at p. 12.

are not present, his word reading efficiency is poor.[21] This skill is necessary to read fluidly and within expected time frames.[22] His reading skills under untimed conditions are in the low average range as his sight-word reading is in the twenty-first percentile and his nonword reading is in the fourteenth percentile.[23] Under timed conditions, his skills on these tasks fall in the poor range at the fifth percentile, showing that he lacks automacity with reading.[24]

8. The Student performs in the very poor range at the first percentile on oral reading, which reflects his ability to read short passages aloud as quickly and accurately as possible and then answer questions about the passages.[25] His reading comprehension is very poor and he exhibits significant deficits in accuracy, rate and comprehension.[26] His reading comprehension is borderline and at the third percentile.[27]

9. His written language skills also are in the borderline range.[28] His spelling and written expression skills are at the fifth percentile.[29] The Student's phonological awareness is average, although his ability to segment non-words is below average and exceeds only sixteen percent of children his age.[30]

10. The Student's ability to produce verbal responses is average.[31] His ability to remember stories read to him is in the low average and in the sixteenth percentile.[32] He performs in the low average range and at the sixteenth percentile on recognition tests, in which he has to answer specific questions about a story read to him.[33] His ability to learn information presented verbally is at the sixteenth percentile, which is in the low average range.[34]

11. The Student's visuospatial skills, i.e., his ability to copy multidimensional geometric figures, are in the borderline range.[35] He has difficulty copying the designs and his pencil grip is awkward.[36] His sensorimotor skills, i.e., his ability to draw lines inside of tracks as quickly and carefully as possible, are in the average range and in the thirty-seventh percentile.[37]

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[21] *Id.*
[22] *Id.*
[23] *Id.* at p. 6.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.* at p. 13.
[31] *Id.* at pp. 4, 13.
[32] *Id.* at p. 5.
[33] *Id.*
[34] *Id.*
[35] *Id.* at pp. 5, 13.
[36] *Id.* at p. 5.
[37] *Id.*

12. The Student's ability to identify letters and numbers that are presented in a backwards orientation is very impaired.[38] He has particular difficulty identifying backward numbers.[39]

13. He may be experiencing some depressive symptoms such as sadness, loneliness, and feelings of ineffectiveness, appears to be shy and withdrawn, and is at-risk for developing an anxiety disorder.[40] His adaptive functioning is at the expected level for his age.[41] His social, leadership, self-care, and functional communication skills all are in the average range.[42]

14. The Student meets the criteria for speech-language impairment.[43] He has significant deficits in expressive language, specifically on word finding tasks that involve less frequently used and less over-learned material.[44] He performs in the fifth percentile on tests that require him to rapidly name colors and simple objects.[45] In contrast, on tasks that require him to rapidly name numbers and letters, he performs in the fiftieth and sixty-third percentiles, respectively.[46]

15. The Student also has impaired receptive language abilities.[47] His performance in semantics, i.e., vocabulary and word meaning, is significantly impaired.[48] His inability to understand the meaning of words spoken to him is a severe deficit that interferes with his ability to learn.[49]

16. In the area of morphological understanding, the Student has average abilities that fall in the twenty-third percentile.[50] He also performs in the average range, in the twenty-first percentile, in the area of syntax construction.[51] Thus, his knowledge and use of American English language are appropriate for his age.[52]

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[38] *Id.* at pp. 7-8.
[39] *Id.*
[40] Id. at p. 7.
[41] *Id.*
[42] *Id.*
[43] Petitioner Exhibit 9.
[44] *Id.* at p. 2. Expressive language refers to a person's ability to express oneself based upon the person's ability to find the words to express thoughts and produce linguistically and grammatically correct sentences. *Id.* at p. 1.
[45] *Id.*
[46] *Id.*
[47] *Id.* at pp. 2-3. Receptive language relates to how well a person can take in and comprehend linguistic information, i.e., how well a person comprehends the linguistic meaning in messages. *Id.* at p. 2. This differs from auditory processing, which relates to how well a person takes in any auditory message with or without linguistic meaning attached to that message. *Id.*
[48] *Id.* at p. 2.
[49] *Id.*
[50] *Id.* pp. 2-3.
[51] *Id.* at p. 3.
[52] *Id.*

17. The Student demonstrates very severe problems in higher-level semantics (word meaning), i.e., the supralinguistic level.[53] On non-literal language tests, he obtained a standard score of zero, which is in the fourth percentile.[54] His severe basic semantic problems lead to more severe deficits at the high semantic levels of language.[55]

18. In the area of language processing,[56] the Student performs in the fifth percentile in comprehending linguistic information presented without many additional cues, such as visual and situational cues.[57] This impairs his ability to comprehend linguistic material he may hear or read.[58]

19. He also performs poorly in language processing related to reasoning with linguistic information.[59] He is unable to comprehend linguistic information and thus cannot readily and appropriately reason with and make sense out of the linguistic information he hears, and likely cannot make sense out of the information he reads.[60]

20. The Student visual perceptual skills are in the low average range and nineteenth percentile.[61] Weaknesses in visual perceptual abilities may impact functional tasks within the learning environment such as handwriting development, copying from the board, lining up math calculations, sequencing, understanding abstract math concepts such as fractions and decimals, keeping a place when reading, sound and symbol recognition, and spelling.[62]

21. His visual memory, i.e., the ability to recognize one stimulus item after a brief interval, is in the ninth percentile.[63] In the area of visual form constancy, i.e., the ability to identify a form regardless of size, orientation, or whether hidden within another form, is in the first percentile.[64] His visual sequential memory, i.e., the ability to remember a series of forms for immediate recall and to find among competing series, is in the second percentile.[65] In contrast, his visual discrimination, i.e., ability to discriminate dominant features of objects such as position, shape, form, and color, is in the seventy-fifth percentile.[66] Also in the average range are his abilities in the areas of visual spatial relationships, i.e., the ability to perceive the position

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[53] *Id.*
[54] *Id.*
[55] *Id.* The supralinguistic level of language is the lowest level of language processing but it pertains to knowledge of the nonliteral, higher linguistic level meanings of words. *Id.*
[56] Language processing refers to a person's cognitive processes involved in getting meaning out of linguistic information and using linguistic information to reason and learn. *Id.*
[57] *Id.* at p. 4.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] Petitioner Exhibit 11, p. 6 (August 5, 2009, report of Comprehensive Occupational Therapy Evaluation).
[62] *Id.*
[63] *Id.* at p. 5.
[64] *Id.*
[65] *Id.*
[66] *Id.*

of objects in relation to self and or other objects, and visual closure, i.e., the ability to identify a whole figure when only a part is presented.[67]

22. The Student appears able to process most tactile activities appropriately.[68] His proprioceptive system, i.e., his sense of his body's position in relation to people and objects, is intact as he is able to use information from his muscles and joints appropriately.[69] He appears to exhibit age-appropriate gross motor skills.[70] He demonstrates above average upper limb coordination, i.e., coordinating arm and hand movements for visual tracking and basic ball skills.[71]

23. He performs below average in the area of overall fine manual control, which encompasses control and coordination of the distal musculature of the hands and fingers, especially for cutting, grasping, writing, and drawing.[72] He has a particularly difficult time drawing through curved and crooked paths, folding paper, and cutting out a circular stimulus with accuracy and efficiency.[73]

24. The Student's difficulties coordinating and generalizing fine motor skills may impact his ability to perform daily living activities, complete classroom assignments, participate in games and activities, and transition between tasks.[74] It may also impact his ability to respond to information at a rate consistent with his peers.[75] For this reason, he requires extended time to complete writing, drawing, and organizing tasks within the classroom.[76] He also requires assignment adaption, classroom accommodations, and remediation activities.[77]

25. The Student's overall manual coordination is in the average range.[78] He has below average manual dexterity.[79] He has difficulties reaching, grasping, and displacing pennies, cards, or pegs in an efficient and timely manner.[80] He struggles with retrieving and displacing pegs using his dominant hand as well as retrieving and transferring pennies with both hands.[81]

26. The Student also has impaired handwriting skills.[82] He makes errors in letter casing and formation, omits letters, reverses letters, poorly aligns his writing, and has a

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[67] *Id.*
[68] *Id.* at p. 2.
[69] *Id.*
[70] *Id.* at p. 3.
[71] *Id.* at p. 4.
[72] *Id.* at p. 3.
[73] *Id.*
[74] *Id.* at p. 4.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.* at p. 3.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.* at p. 4.

decreased ability to respond to dictation.[83] He displays an irregular writing movement pattern, and requires cues to sit upright.[84] He also demonstrates inconsistent positioning of a pencil as he alters his grasp from a dynamic to static position.[85] His writing speed falls just below age expectations.[86] He would benefit from therapeutic activities that promote overall development of writing skills to improve legibility, writing fluency, and overall writing mechanics.[87] He also will benefit from a formal handwriting program to assist in developing more legible and efficient writing patterns.[88]

27. The Student requires specialized instruction to address his learning disabilities in reading, mathematics, and written expression.[89] He requires full-time special education programming for the next two school years, as well as therapeutic support to address his anxiety and depressive symptoms.[90] In reading and writing, he should be provided a multi-sensory, phonetically based program.[91] Because he has average cognitive functioning, with the right supports, he could bring his academic performance up to grade level.[92]

28. In light of his speech-language impairments, the Student will need a great deal of speech-language services.[93] He requires pullout services to work on skills and strategies in each of his areas of weakness.[94] He also requires push-in speech-language services and consultative services between the speech-language pathologist and the classroom teacher(s) to incorporate the skills and strategies he learns in his pullout sessions into the classroom and academic work.[95]

29. The Student also requires thirty minutes per week of occupational therapy services to improve the deficit areas discussed herein and assist with developing classroom accommodations.[96] The occupational therapist should provide intervention to the Student in the classroom to promote carryover of the skills developed in therapy and further develop his skills.[97] The occupational therapist should consult and co-plan with the Student's teachers to assist him in accessing the curriculum.[98] The Student also should have access to a formalized handwriting program such as Handwriting Without Tears.[99]

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[83] *Id.* at p. 4-5.
[84] *Id.* at 5.
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] Petitioner Exhibit 8 at p. 9; Testimony of Independent Psychologist.
[90] *Id.*
[91] *Id.*
[92] Testimony of Independent Psychologist.
[93] Petitioner Exhibit 9 at p. 5.
[94] *Id.*
[95] *Id.*
[96] Petitioner Exhibit 11 at p. 7.
[97] *Id.*
[98] *Id.*
[99] *Id.*

30. The Student also should have access to software such as On Cloud Nine Math, which emphasizes math reasoning and computation and helps students conceptualize and verbalize the concepts underlying math processes.[100] To strengthen his written language skills, he should have access to software such as Kidspiration, which applies the principles of visual learning.[101] Given his memory weaknesses, he would benefit from a cognitive/memory training program such as Cogmed.[102] Finally, he should have access to books on tape, and be required to read along in the books while he listens, to address his reading disorder.[103]

31. The Student requires extended time on classroom assignments and exams, as well as standardized tests.[104] This accommodation will be of greater necessity as reading and writing demands increase as he proceeds to upper grade levels.[105]

32. Because of his severe delays and seizure disorder, which affects memory, retention, and processing, the Student is vulnerable to regression without consistent services.[106] As a result, he requires extended school year ("ESY") services to ensure that he does not lose skills over the summer months.[107]

33. On January 26, 2010, DCPS convened a meeting of the Student's IEP team.[108] Present at the meeting were a DCPS psychologist, occupational therapist, speech-language pathologist, special education teacher, general education teacher, compliance case manager, and special education coordinator.[109] Petitioner and her educational advocate also attended the meeting.[110]

34. At the January 26, 2010, meeting, the IEP team reviewed the Student's comprehensive psychological evaluation, social history assessment, speech-language evaluation, and occupational therapy evaluation.[111] These evaluations recommended that the Student receive full-time specialized instruction, related services in the areas of speech-language therapy, occupational therapy, and counseling.[112] The IEP team found the Student eligible for special education as a student with multiple disabilities as a result of his learning disabilities and other

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[100] Petitioner Exhibit 8 at p. 9.
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.* at p. 10.
[105] *Id.*
[106] Testimony of Independent Psychologist.
[107] Petitioner Exhibit 8 at p. 10.
[108] Testimony of Petitioner, DCPS Special Education Coordinator.
[109] Petitioner Exhibit 2, p. 1 (January 26, 2010, Multidisciplinary Team Meeting Notes).
[110] Testimony of Petitioner; Petitioner Exhibit 3, p. 1 (January 26, 2010, Advocate Notes).
[111] Petitioner Exhibit 2 at pp. 1-2.
[112] Petitioner Exhibits 8, 9, 11.

health impairment.[113] At the meeting, Petitioner gave her consent for DCPS to provide special education and related services to the Student.[114]

35. At the January 26, 2010, meeting, the IEP team recommended that the Student receive one hour of psychological counseling, one hour of direct speech-language services, thirty minutes of occupational therapy, 7.5 hours of specialized instruction, and 17.5 hours of general education instruction per week.[115] Petitioner's educational advocate objected to the hours of specialized instruction and asserted that the Student should receive specialized instruction for all twenty-five hours he is in the classroom, including one-on-one instruction.[116] Petitioner and her advocate asserted that the IEP team's recommendation of 7.5 hours of specialized instruction was insufficient to meet the Student's needs.[117]

36. At the January 26, 2010, meeting, the IEP team drafted an IEP for the Student that provides that he was to receive 8.5 hours of specialized instruction in the general education setting.[118] It also provides that the Student is to receive thirty minutes of behavioral support services outside the general education setting, thirty minutes of behavioral support services in the general education setting, sixty minutes of speech-language pathology outside the general education setting, and thirty minutes per week of occupational therapy outside the general education setting.[119] Contrary to the recommendations in the Student's August 31, 2009, comprehensive psychological evaluation and August 5, 2009, occupational therapy evaluation, the IEP team did not provide the Student in-class or testing accommodations in the January 26, 2010, IEP.[120]

37. DCPS did not implement the January 26, 2010, IEP until May 2010.[121] On or about May 19, 2010, the DCPS SEC contact Petitioner and requested that she come to the Student's school to sign the IEP.[122] The SEC had not previously asked Petitioner to sign the IEP.[123] Petitioner complied with the SEC's request and signed the IEP on May 21, 2010.[124] Only after Petitioner signed the IEP did DCPS begin implementing the IEP.[125]

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[113] Petitioner Exhibit 2 at p. 2; Petitioner Exhibit 3 at p. 3.
[114] Testimony of Petitioner.
[115] *Id.*
[116] *Id.*
[117] Petitioner Exhibit 3 at p. 4.
[118] Petitioner Exhibit 1 at p. 8 (January 26, 2010, IEP).
[119] *Id.*
[120] Petitioner Exhibit 1 at pp. 8-9, Exhibit 8 at p. 10, Exhibit 11, p. 4.
[121] Testimony of Petitioner, DCPS SEC.
[122] *Id.*
[123] *Id.* Petitioner recalls signing the IEP at the January 26, 2010, meeting, although she may have just signed the sign-in section of the IEP rather than the line that indicates she agrees with its contents and/or consents to the provision of the special education and related services to the Student. Testimony of Petitioner.
[124] *Id.*; Petitioner Exhibit 22, p. 1.
[125] Testimony of DCPS SEC.

38. From January 26, 2010, to the May 21, 2010, the Student made little academic progress.[126] He only began making academic progress when DCPS began implementing his IEP in late May 2010.[127]

39. In November 2010, DCPS convened a meeting of the Student's IEP team to review his physical therapy evaluation.[128] The IEP team also updated the present levels of performance on the Student's IEP to reflect his current functioning.[129] The team did not update the Student's academic and related services goals, but instead extended the anticipated date of achievement for each of the goals on the IEP from January 26, 2011, to November 2, 2011.[130] Thus, from January 2010 to November 2010, the Student made no meaningful progress on these goals.[131]

40. The Student's current special education classroom has seven students including him.[132] The Special Education Teacher is using Fundations, a software program designed to assist the Student with phonics and writing.[133] The Student uses a graphic organizer, and works with manipulatives to improve his fine motor development.[134] He receives 7.5 hours of week of specialized instruction outside the general education environment.[135]

41. The Student's general education classroom has sixteen students including him.[136] He receives one hour of specialized instruction from the Special Education Teacher in his general education classroom.[137] Although the Student is below third-grade level in reading, his social studies and science textbooks are geared to students who read on the third-grade level.[138]

42. If the Student's IEP were changed to provide him full-time specialized instruction, the DCPS School would not be able to implement this IEP.[139]

43. The Non-Public School is located in Washington, D.C. and is an approved DCPS non-public school.[140] The school serves students with a variety of learning disabilities as well as

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[126] Testimony of Petitioner, Educational Advocate.
[127] Testimony of Educational Advocate; Respondent Exhibit 5, pp. 30-35 (November 22, 2010, Progress Report); Petitioner Exhibit 21, p. 3 (November 2, 2010, Advocate Notes from IEP meeting); Testimony of DCPS Special Education Teacher,
[128] Petitioner Exhibit 21, p. 1.
[129] Testimony of Educational Advocate; Petitioner Exhibits 4 (Draft September 22, 2010, IEP), and 7 (same).
[130] *Id.*
[131] Testimony of Educational Advocate.
[132] Testimony of Special Education Teacher.
[133] *Id.*
[134] *Id.*
[135] Testimony of DCPS SEC.
[136] Testimony of General Education Teacher.
[137] Testimony of Special Education Teacher.
[138] Testimony of General Education Teacher.
[139] Testimony of the DCPS SEC.
[140] Testimony of Associate Head of Non-Public School.

a variety of other disabilities, including other health impairments, autism, speech-language impairment, hearing impairment, and cerebral palsy.[141] The lower school, which currently serves forty-four elementary school students, has a reading specialist who provides assistance to students in their classrooms on decoding, encoding, and reading fluency skills.[142]

44. The Non-Public School has accepted the Student for enrollment and can meet his needs.[143] It can assist him in learning and developing strategies to compensate for his disabilities.[144] The school would provide the Student access to a curriculum calibrated to DCPS standards and specialized instruction to remediate his learning disabilities in reading, written expression, and math.[145] The Non-Public School also can provide the Student periodic one-on-one instruction.[146] The Student would be able to receive a DCPS diploma at the Non-Public School.[147]

45. At the Non-Public School, the Student would be in a class of six students from eight to ten years old.[148] The students in this classroom also have language difficulties that impact their ability to read, write, and access the curriculum.[149] A certified special education teacher and an assistant teacher would work with the students in this class.[150] The Student would receive speech-language therapy in the classroom to assist him when he is working on vocabulary and comprehension.[151]

46. While the Student would not have any interaction with non-disabled peers at the Non-Public School, the school is committed to returning students to less restrictive settings when they are ready to return to a general education environment.[152] At this time, the Student would not benefit from a less restrictive setting because he needs intense instruction in basic reading, math, and written expression.[153] These needs impede the Student's ability to access the entire curriculum, not just reading, math, and written expression.[154]

47. The Non-Public School also would provide the Student accommodations, including listening to books on tape and access to computer programs that help with reading and comprehension.[155] The Non-Public School also provides standard testing accommodations.[156]

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[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.*; Testimony of Independent Psychologist.
[154] *Id.*
[155] Testimony of Associate Head of Non-Public School.

VI. CREDIBILITY DETERMINATIONS

The testimony of all the witnesses at the hearing was credible. This Hearing Officer did not credit the testimony of the Special Education Teacher and General Education Teacher that the Student does not require a full-time special education program. These witnesses were not familiar with the Student's evaluations, and thus their opinions of the Student's needs were not well informed, although they are familiar with his present levels of performance and academic progress.

VII. CONCLUSIONS OF LAW

IDEA guarantees children with disabilities the right to a free and appropriate public education with services designed to meet their individual needs.[157] FAPE is defined as:

> [S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)..."[158]

In deciding whether DCPS provided Petitioner a FAPE, the inquiry is limited to (a) whether DCPS complied with the procedures set forth in IDEA; and (b) whether Petitioner's IEP is reasonably calculated to enable Petitioner to receive educational benefit.[159]

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.[160] In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.[161]

Once a procedurally proper IEP has been formulated, a reviewing court should be reluctant to second-guess the judgment of education professionals.[162] The court should not

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[156] *Id.*
[157] 20 U.S.C. §§ 1400(d) (1)(A), 1412 (a) (1); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-91 (1982); *Shaffer v. Weast*, 546 U.S. 49, 51 (2005).
[158] 20 U.S.C. § 1401 (9); 34 C.F.R. § 300.17.
[159] *Rowley,* 458 U.S. at 206-207.
[160] 34 C.F.R. § 300.513 (a)(2).
[161] *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted).
[162] *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990) (internal citation and quotations omitted).

"disturb an IEP simply because [it] disagree[s] with its content."[163] The court is obliged to "defer to educators' decisions as long as an IEP provided the child the basic floor of opportunity that access to special education and related services provides."[164]

The burden of proof is properly placed upon the party seeking relief.[165] Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.[166]

VIII. DISCUSSION

A. Petitioner Proved That DCPS Denied the Student a FAPE by Failing to Provide Sufficient Hours of Specialized Instruction on his January 26, 2010, IEP.

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."[167] The IEP is the centerpiece of special education delivery system.[168]

The term "educational placement" refers to the type of educational program prescribed by the IEP.[169] "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.[170]

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs,[171] establishes annual goals related to those needs,[172] and provides appropriate specialized instruction and related services.[173] The program must be implemented in the least restrictive environment ("LRE").[174] For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression."[175]

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

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[163] *Id.*
[164] *Id.*
[165] *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).
[166] 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).
[167] *Rowley*, 458 U.S. at 188-89 (citation omitted).
[168] *Lillbask ex rel. Mauclaire v. Conn. Dep't of Educ.*, 397 F.3d 77, 81 (2d Cir. 2005) (internal quotation marks omitted).
[169] *T.Y. v. N.Y. Dept. of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009) (citation omitted).
[170] *Id.*
[171] 34 C.F.R. § 300.320 (a) (1).
[172] 34 C.F.R. § 300.320 (a) (2).
[173] 34 C.F.R. § 300.320 (a) (4).
[174] 20 U.S.C. § 1412 (a) (5); 34 C.F.R. §§ 300.114 (a) (2), 300.116 (a) (2).
[175] *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).

evaluation of the child; and the academic, developmental, and functional needs of the child.[176] 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.[177]

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.[178]

Here, the Student has learning disabilities that impede his performance in all academic areas.[179] At the time the IEP team drafted his IEP, the team had just reviewed the evaluative data that revealed that the Student's reading comprehension was borderline and at the third percentile, his mathematical abilities were consistently in the borderline range, and he performs at the twenty-first percentile in broad reading. This evaluative data also revealed that the Student performs in the very poor range at the first percentile on oral reading and that his written language skills are in the borderline range. The evaluations also showed that he has a severe speech-language impairment, low average visual-perceptual skills, and that his visual memory is in the ninth percentile.

In all, the evaluations the team reviewed on January 26, 2010, revealed that the Student requires full-time specialized instruction. Yet the IEP team decided that he should spend most of his time in the general education environment. It appears that the IEP team developed an IEP that fit the programs available at the Student's school, rather than to meet his individualized needs. In so doing, the IEP team denied the Student a FAPE.

Moreover, the August 5, 2009, occupational therapy evaluation showed that the Student needed classroom and testing accommodations, including extended time to complete writing, drawing, and organizing tasks within the classroom. The evaluation further recommended that he receive adapted assignments and remediation activities. The IEP team reviewed this evaluation at the January 26, 2010, IEP meeting. Yet, the team failed to include any accommodations in the Student's IEP. In so doing, the IEP team denied the Student a FAPE.

Thus, Petitioner proved by a preponderance of the evidence that DCPS denied the Student a FAPE by failing to draft an appropriate IEP on January 26, 2010, or thereafter.

Petitioner further proved that the Non-Public School can meet the Student's needs, and that the Student requires such an intensive and restrictive program to make meaningful academic progress and access the general education curriculum. Thus, this Hearing Officer will order

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[176] 34 C.F.R. § 300.324 (a).
[177] 34 C.F.R. § 300.320 (a) (1); 5 D.C.M.R. § 3007.2 (a).
[178] *Branham v. Dist. of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) (citing *Rowley*, 458 U.S. at 202).
[179] Testimony of Independent Psychologist, Associate Head of Non-Public School.

DCPS to fund the Student's enrollment at the Non-Public School for the remainder of the 2010-2011 school year.

B. Petitioner proved that DCPS denied the Student a FAPE by failing to address his need for ESY during the 2010 summer.

Each public agency must ensure that extended school year services are available as necessary to provide FAPE.[180]

Here, the August 31, 2009, independent psychological evaluation concluded that, because of his severe delays and seizure disorder, the Student is vulnerable to regression without consistent services. As a result, he requires extended school year ("ESY") services to ensure that he does not lose skills over the summer months.

When it drafted the Student's January 26, 2010, IEP, the IEP had just reviewed the August 31, 2009, independent psychological evaluation. The evaluation discusses at length the Student's memory, retention, and processing deficits. The team's refusal to provide the Student ESY for the 2010 summer failed to take into account the Student's individualized needs. Thus, by failing to provide the Student ESY, the IEP team denied the Student a FAPE.

Thus, Petitioner proved by a preponderance of the evidence that DCPS denied the Student a FAPE by failing to provide the Student ESY for the 2010 summer.

C. Petitioner proved that DCPS denied the Student a FAPE by failing to implement his IEP from January 26, 2010, through the end of the 2009-2010 school year.

The IEP is "the centerpiece of the [] education delivery system for disabled children."[181] Each public agency must ensure that, as soon as possible following the development of an IEP, special education and related services are made available to the child in accordance with the child's IEP.[182]

Here, the IEP team met on January 26, 2010, and found the Student eligible for special education and related services. At the January 26, 2010, meeting, Petitioner consented to the provision of special education and related services to the Student. The IEP team then developed an IEP for the Student. For some reason, Petitioner did not sign this IEP, perhaps because she was never asked to sign it.

It is undisputed that, from January 26, 2010, until May 21, 2010, DCPS did not

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[180] 34 C.F.R. §300.106.
[181] *Honig v. Doe*, 484 U.S. 305, 311 (1988).
[182] 34 C.F.R. § 300.323 (c) (2).

implement the Student's IEP. The DCPS SEC claimed that DCPS could not implement the IEP without first obtaining Petitioner's signature authorizing it to initiate the provision of IEP services to the Student. However, the DCPS SEC admitted that he did not even attempt to contact Petitioner to sign the IEP prior to late May 2010.

DCPS provided no explanation for why it allowed the Student to languish in general education classes for five months without making any effort to obtain written authorization from Petitioner to implement the Student's IEP. By failing to more diligently attempt to obtain Petitioner's signature on the IEP, and by failing to implement this IEP for five months, DCPS denied the Student a FAPE.

Thus, Petitioner proved by a preponderance of the evidence that DCPS denied the Student a FAPE by failing to implement the Student's IEP from January 26, 2010, to May 21, 2010.

D. Petitioner failed to prove that her compensatory education plan would remedy the Student's educational deficits that resulted from these denials of FAPE.

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."[183] An award of compensatory education "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA."[184]

"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."[185] 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."[186]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."[187] This standard "carries a qualitative rather than quantitative focus," and must be applied with flexibility rather than rigidity.[188]

Here, DCPS denied the Student a FAPE in failing to develop an appropriate IEP, failing to provide the Student ESY, and failing to implement his IEP from January through May 2010.

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[183] *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).
[184] *Id.*
[185] *Peak v. District of Columbia*, 526 F. Supp. 2d 32, 36 (D.D.C. 2007).
[186] *Reid*, 401 F.3d at 518, 523.
[187] *Id.* at 524.
[188] *Id.*

Petitioner presented a compensatory education plan that recommended 100 hours of tutoring in the form of one-to-one instruction in reading, math, and written language.[189] The plan also recommended working memory training in the form of the Cogmed program, at a cost of $1850.00 for twenty-five, forty-five-minute sessions over nine weeks, a laptop computer, and Kidspiration and Cloud 9 Math software.[190] Additionally, Petitioner requested a Lindamood Bell assessment to help determine the Student's need for further academic support.

Petitioner presented no evidence at the due process hearing to show that this compensatory education plan would to place the Student in the same position he would have occupied but for the failure by DCPS to develop an appropriate IEP, provide him ESY services, or implement his IEP for five months in the 2009-2010 school year. The Educational Advocate who drafted the plan testified that she could not remember how she arrived at one hundred hours of tutoring. This fails to satisfy the *Reid* standard.[191] Thus, Petitioner failed to show that her compensatory education plan would compensate the Student for the denials of FAPE.

ORDER

Based upon the evidence and testimony at the due process hearing, it is this 30th day of December 2010 hereby:

ORDERED that, on or before January 14, 2010, DCPS shall develop an IEP for the Student that is consistent with this hearing officer determination, provides the Student full-time specialized instruction outside the general education environment, a therapeutic environment that provides speech-language and occupational therapy in the classroom as well as on a pull-out basis, all necessary related services consistent with the recommendations of the Student's independent evaluations, and classroom and testing accommodations, adapted assignments and remediation activities;

IT IS FURTHER ORDERED that DCPS shall bear the expense of a evaluation to determine whether the Student is entitled to compensatory education and the amount and type of compensatory education to which he may be entitled; and

IT IS FURTHER ORDERED that DCPS shall bear all expenses of the Petitioner's attendance at the Non-Public School for the remainder of the 2010-2011 school year with transportation.

By: /s/ *Frances Raskin*
Frances Raskin
Hearing Officer

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[189] Petitioner Exhibit 19 (Compensatory Education Proposal).
[190] *Id.*
[191] 401 F.3d at 524.

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:

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