District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office

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STUDENT HEARING OFFICE
2009 APR 27 AM 9: 19

Confidential

STUDENT, through the legal guardian[1]	)	
	)	
Petitioner,	)	
	)	
v.	)	Hearing Dates: April 8, 2009,
	)	April 15, 2009
	)	
THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	
	)	
	)	
Respondent.	)	
	)	

HEARING OFFICER DETERMINATION

Counsel for Petitioner: John Straus, Attorney at Law
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[1] Personal identification information is provided in Attachment A.

I. JURISDICTION

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

II. BACKGROUND

Petitioner is the mother of the Student, a -year-old, special education student at a District of Columbia Public Schools ("DCPS") middle school. Both Petitioner and the Student are residents of the District of Columbia. On February 25, 2009, Petitioner filed a Due Process Compliant Notice ("Complaint") alleging that DCPS denied the Student a free, appropriate, public education ("FAPE") by failing to:

A. Review and revise the Student's individualized educational program ("IEP") to reflect the findings and recommendations of the Student's social history and psychological evaluations;
B. Provide an appropriate educational placement for the Student; and
C. Provide the Student with appropriate special education and related services, thereby creating a right to compensatory education.

The remedies Petitioner seeks include (1) an order requiring DCPS to convene a meeting of the IEP team to review the Student's evaluations and revise the Student's IEP consistent with the findings and recommendations of the evaluations; and (2) an order requiring DCPS to fund the Student's placement in and transportation to a non-public, special education school, i.e., Academy.

On March 12, 2009, Counsel for Respondent filed a "Response to Petitioner's Due Process Complaint" on behalf of DCPS. The Response asserts that DCPS attempted to hold a meeting on February 12, 2009, and sent out a letter of invitation but received no reply. The Response further asserted that the special education coordinator at the School sent a second invitation proposing a meeting on March 13, 2009, and again received no response from Petitioner. Finally, the Response asserted that any delay in scheduling the meeting was not the fault of DCPS.

Counsel for Petitioner, counsel for DCPS, and this Hearing Officer participated in a prehearing conference on March 16, 2009. On April 8, 2009, this Hearing Office issued a prehearing order memorializing the prehearing conference.

The due process hearing commenced on April 8, 2009. Present at the hearing were Petitioner, counsel for Petitioner, counsel for DCPS, and this Hearing Officer. The parties' Five-Day Disclosures were admitted into evidence at the inception of the hearing.

III. RECORD

Due Process Complaint Notice, filed February 25, 2009;
DCPS *Response to Petitioner's Due Process Complaint*, filed March 12, 2009;
Petitioner's Five-Day Disclosure Statement, filed April 1, 2009 (Exhibits 1-21 attached);
DCPS Five-Day Disclosure Statement, March 24, 2009 (Exhibits 1-3 attached);
Petitioner's Supplemental Five-Day Disclosure, dated April 8, 2009, and unfiled (listing one supplemental witness);
DCPS Supplemental Five-Day Disclosure; dated April 8, 2009, and unfilled (listing six witnesses, including Petitioner, and Exhibits 1-3);
Attendance Sheet, dated April 8, 2009;
Attendance Sheet, dated April 15, 2009;
Compact Disc of Hearing conducted on April 8, 2009; and
Compact Disc of Hearing conducted on April 15, 2009.

IV. ISSUES PRESENTED

A. Whether DCPS denied the Student FAPE by failing to review and revise the Student's IEP to reflect the findings and recommendations of the Student's social history and psychological evaluations;

B. Whether DCPS denied the Student FAPE by failing to provide her an appropriate educational placement; and

C. Whether DCPS denied the Student FAPE by failing provide the Student with appropriate special education and related services, thereby creating a right to compensatory education.[2]

V. FINDINGS OF FACT

1. The Student is a -year-old, -grade, learning-disabled student who attends a District of Columbia middle school.[3]

2. Psychologist 1 conducted the Student's most recent comprehensive psychological evaluation and drafted the report dated January 27, 2009.[4] This evaluation was thorough, reliable, and well documented.[5]

3. The 2009 comprehensive psychological evaluation included a Weschsler Intelligence Scale assessment of the Student.[6] This assessment revealed that the Student's full scale IQ is 68, which conveys that her general intellectual functioning falls into the extremely low range.[7] Her

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[2] Counsel for Petitioner waived this claim at the end of the due process hearing.
[3] Testimony of Teacher 1; Testimony of Psychologist 1.
[4] *Id.*, Petitioner Exhibit 15.
[5] Testimony of Psychologist 2.
[6] Testimony of Psychologist 1.
[7] *Id.*; Petitioner Exhibit 15.

verbal comprehension[8] is extremely low; her perceptual reasoning[9] and working memory[10] are borderline, and her processing speed[11] is low average.[12]

4. The 2009 comprehensive psychological evaluation also included a Woodcock-Johnson test of achievement.[13] The Woodcock-Johnson is a widely used, comprehensive collection of tests designed to measure a Student's level of achievement in reading, mathematics, written language, and knowledge.[14] The Student scored in the very low range on her knowledge of vocabulary, low range in reading fluency, and very low range in word-attack skills.[15] She ranked in the low range for reading comprehension and reasoning, and in the low range for ability to identify words.[16] Her broad reading skills are at the second grade, second month level.[17]

5. The Student's broad written language skills are at the third grade, fifth month level.[18] The broad written language subtests were administered to ascertain the Student's knowledge of prewriting and spelling skills, writing fluency, and ability to convey ideas in writing.[19] During the spelling subtests, the Student relief heavily on the use of phonetic skills to spell words.[20] On the writing subtests (which measure her use of expression, vocabulary, and grammar), the Student had difficulty with subject-verb agreement, sentence fragments, sequencing of ideas, and main idea or topic sentences.[21]

6. The Student's achievement in mathematics placed her in the very low range.[22] She used repeated addition to solve multiplication problems, confused the multiplication and division signs, and had difficulty adding and subtracting money.[23] Her broad math skills are at the second

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[8] Verbal comprehension is one's ability to listen to a question, draw upon learned information from both formal and informal education, and reason through an answer. Petitioner Exhibit 15.
[9] Perceptual reasoning is one's ability to examine a problem, draw upon visual-motor and visual spatial skills, organize one's thoughts, create solutions, and then test these solutions. *Id.*
[10] Working memory is one's ability to memorize new information, hold it in short-term memory, concentrate, and manipulate that information to produce some result or reasoning processes. *Id.*
[11] Processing speed is one's abilities to focus attention and quickly scan, discriminate among, and sequentially order visual information. *Id.* It requires persistence and planning ability but is sensitive to motivation, difficulty working under a time pressure, and motor coordination. *Id.*
[12] *Id.*
[13] Testimony of Psychologist 1; Petitioner Exhibit 15.
[14] Petitioner Exhibit 15.
[15] Testimony of Psychologist 1; Petitioner Exhibit 15.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] Petitioner Exhibit 15.
[20] *Id.*
[21] *Id.*
[22] Testimony of Psychologist 1; Petitioner Exhibit 15.
[23] Petitioner Exhibit 15.

grade, fifth month level.[24]

7. The Beery-Buktenica test, which is a test of visual-motor integration, is designed to identify deficits in visual perception, fine motor skills, and hand-eye coordination.[25] The findings of this test suggest the Student has weak visual perceptual performance and significantly deficient motor control, which affects her visual-motor integration.[26] Thus, tasks such as handwriting, copying information from the blackboard and paper, and pencil math calculation may be laborious and frustrating for the Student as she may not be able to timely and accurately complete written work.[27]

8. The results of the 2009 comprehensive psychological evaluation indicate that the Student should continue to receive specialized instruction under the classification of learning disabled. A comparison between the Student's 2006 psycho-educational evaluation and the 2009 comprehensive psychological evaluation showed there was a dramatic decline in the Student's cognitive performance over a two-year period.[28] Of most concern is her verbal comprehension where there was a 20-point decrease over the two-year period.[29] These scores suggest that her cognitive abilities are decreasing over time.[30] Without further intervention, she is at risk of developing more academic failure and severe emotional and clinical impairment.[31]

9. At the time of the 2009 comprehensive psychological evaluation, the Student met the criteria of adjustment disorder with mixed anxiety and depressed mood disorder symptoms.[32] She often exhibits symptoms of extreme worry and depression in the school environment.[33] In addition, she has poor time management skills, inability to recall what has been taught, difficulty following oral and/or written directions, and a lack of overall organization in written notes and compositions.[34] As a result, situational and emotional stressors, poor coping skills, and feelings of low self-concept are affecting the Student's ability to perform at her optimal level in school.[35] Without further intervention, she is at risk for the development of more severe emotional and clinical impairment.[36]

10. The Student confided to Psychologist 1 that she experiences feelings of sadness, frustration, and worry.[37] These feelings may be related to her family stressors and her father's

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[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] Testimony of Psychologist 1; Petitioner Exhibit 15.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] Petitioner Exhibit 15.
[35] *Id.*
[36] *Id.*
[37] *Id.*

abandonment of her family.[38] Her father disappeared without notice four years ago.[39] These symptoms of impaired emotional functioning appear to have a direct impact on her performance in school.[40]

11. Further monitoring and therapy are warranted to gather additional clinical data and to assist the Student in transitioning in adolescent development.[41] The Student should be classified as multiple disabilities due to her learning disabilities, adjustment disorder and depressive anxiety.[42] She also needs a behavioral support plan to address her mood-related symptoms of anxiety and depression.[43] The Student would benefit from a minimum of one forty-five-minute session of individual counseling per week to address self-esteem and school adjustment.[44]

12. The Student should be placed in specialized educational program with a small student-teacher ratio where she would receive individualized attention with other students with similar needs.[45] She would benefit from having a coach or organizational tutor who will work with her to pre-teach foundational information.[46] This would assist in improving her basic literacy skills, organizational skills, homework completion, and planning.[47] She also would benefit from services by a reading specialist and a multi-sensory approach to learning.[48] The Student also should receive speech and language services.[49]

13. The Student should undergo another psycho-educational assessment within a year to address, among other things, the Student's clinical presentation.[50]

14. The Student's IEP developed on April 4, 2008, when the Student was still in elementary school.[51] The IEP required DCPS to provide the Student twenty hours of specialized instruction and one hour of speech-language therapy each week.[52] The Student was to spend 65 percent of the time out of the general education setting.[53]

15. At the Student's current school, she was in an inclusion setting where she received specialized instruction in a general education classroom until January 2009.[54] She was

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[38] *Id.*; testimony of Petitioner.
[39] Testimony of Petitioner; Petitioner Exhibit 14.
[40] Testimony of Psychologist 1; Petitioner Exhibit 15.
[41] Petitioner Exhibit 15.
[42] Testimony of Psychologist 1.
[43] Petitioner Exhibit 15; Testimony of Psychologist 1.
[44] Petitioner Exhibit 15.
[45] Testimony of Psychologist 1.
[46] Petitioner Exhibit 15.
[47] *Id.*
[48] *Id.*
[49] Testimony of Psychologist 1.
[50] Petitioner Exhibit 15.
[51] Petitioner Exhibit 10.
[52] *Id.*
[53] *Id.*
[54] Testimony of Teacher 2.

struggling and did not receive proper accommodations in this setting.[55] The Student's report card for the first advisory of the 2008-2009 school year shows that she failed science and mathematics, and received a D in language arts.[56] She had very good attendance, although she had excessive absences in world geography.[57]

16. On December 9, 2008, DCPS convened a meeting of the multidisciplinary team ("MDT").[58] The Student's math teacher reported that the Student needed more intensive assistance and was being pulled out of her inclusion class to receive specialized instruction.[59] Her language arts teacher reported that the Student needs additional support to boost her confidence.[60] The team reported that the Student has no behavioral problems.[61]

17. In mid-January 2009, Teacher 1 and Teacher 2 informed DCPS that their students with learning disabilities were not progressing in the inclusion setting and their needs were not being met according to their IEPs.[62] Teacher 1 and Teacher 2 recommended that the students with learning disabilities be placed in a smaller, structured environment out of the general education setting.[63] The school created a new class pursuant to the recommendation of Teacher 1 and Teacher 2.[64] Almost all of the students in this class have learning disabilities.[65] At this time, the Student was transferred to the smaller, structured, out-of-general-education classroom.[66] She currently receives specialized instruction in this out-of-general-education classroom.[67] The classroom has fifteen students and one teacher for each subject.[68] Both Teacher 1 and Teacher 2 provide academic instruction to the Student in this setting and the change in setting has led to improvements in the Student's academic progress.[69] The Student has made progress toward her goals in language arts and is getting a B in both language arts and geography.[70]

18. On March 30, 2009, after the Complaint was filed, DCPS held a meeting of the MDT.[71] The team reviewed the Student's comprehensive psychological evaluation.[72] The MDT

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[55] Petitioner Exhibit 13 (notes of former educational advocate); testimony of Teacher 1.
[56] Petitioner Exhibit 11. The Student should not have earned Fs on her report card because of her disability and accommodations. Testimony of Teacher 1. The school should have already changed these grades. *Id.*
[57] *Id.*
[58] Petitioner Exhibit 13.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] Testimony of Teacher 1.
[63] Testimony of Teacher 1.
[64] *Id.*
[65] Testimony of Teacher 2.
[66] *Id.*
[67] *Id.*
[68] Testimony of Teacher 2.
[69] Testimony of Teacher 1 and Teacher 2.
[70] Testimony of Teacher 2.
[71] Petitioner Exhibit 17; testimony of Teacher 1.

did not review and develop the Student's new IEP, despite that this was part of the purpose of the meeting.[73] The IEP was presented to the MDT in its final form.[74] The IEP requires that the Student receive twenty hours of specialized instruction and one hour of speech-language pathology each week.[75] The MDT also recommended an occupational therapy evaluation for the Student.[76]

19. At the March 30, 2009, meeting, the Educational Advocate questioned some of the IEP goals as not measurable. These goals lack baseline information.[77] Without baseline data on the Student's performance, it is not possible to accurately assess the Student's academic progress.[78]

20. The Student has been accepted for placement at a non-public school.[79] All of the students at the non-public school are classified as students with disabilities under IDEIA.[80] The Student would be placed in a classroom of eleven students, one certified teacher, and one teacher's aide who is not a certified teacher.

21. The non-public school could implement the Student's IEP.[81] If the Student were placed at the non-public school, her IEP would have to be changed to provide 27.5 hours of specialized instruction to fit the non-public school's environment.[82] This school would not provide the Student any interaction with non-disabled peers.

VI. CREDIBILITY DETERMINATIONS

The testimony of all the witnesses at the hearing was credible. Teacher 1 and Teacher 2 forthrightly admitted that the student's with disabilities were not academically progressing in the inclusion setting. The Educational Advocate's testimony was corroborated by the testimony of the other witnesses, including Teacher 1 and Teacher 2, both of whom were called by counsel for DCPS. Her testimony was further corroborated by the MDT notes and the Student's March 30, 2009, IEP.

The testimony of Psychologist 1 was largely corroborated by Psychologist 2. Although Psychologist 2 is employed by DCPS, he forthrightly praised conclusions of the 2009 comprehensive psychological evaluation conducted by Psychologist 1. However, Psychologist 1 exhibited bias in discussing the Student's placement. He stated that DCPS was not equipped to

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[72] Petitioner Exhibit 17.
[73] Testimony of Educational Advocate and Teacher 1.
[74] *Id.*
[75] Petitioner Exhibit 17 (March 30, 2009, IEP).
[76] *Id.* (MDT notes).
[77] Testimony of Educational Advocate; Petitioner Exhibit 17.
[78] Testimony of Educational Advocate.
[79] Testimony of Private School Admissions Director.
[80] *Id.*
[81] *Id.*
[82] *Id.*

properly educate students with disabilities, in part because of a lack of resources and the volume of students requiring specialized instruction. He had no knowledge that the Student's setting changed in January 2009 from an inclusion setting to a small, structured, out-of-general education environment. Further, he stated that DCPS would not be able to educate the Student in this environment or in a pull-out environment where she would be working with a teacher and only one other student, at most. This conflicted directly with his own testimony that the Student should be in a setting where the student teacher ratio is no more than 4:1. He appeared to believe that the non-public school at which the Student had been accepted, and that he recommended, provided such low student-teacher ratios. In actuality, the student-teacher ratio at the non-public school was only slightly lower than at the Student's current placement (11:1 vs. 15:1). He gave short-shrift to the idea that students with disabilities should be given the opportunity to interact with non-disabled peers when possible, despite admitting that this is a requirement of IDEIA.

VII. CONCLUSIONS OF LAW

The burden of proof is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005). Under IDEIA, a Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence. 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).

IDEA guarantees children with disabilities the right to a free and appropriate public education with services designed to meet their individual needs. 20 U.S.C. §§ 1400(d)(1)(A),1412(a)(1). 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)..."

20 U.S.C. § 1401(9), 34 C.F.R. § 300.17, 30 DCMR Sec. § 3001.1.

Special education is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability." 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, 30 DCMR Sec. § 3001.1. 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." *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982) (citation omitted). DCPS is obligated to provide a FAPE "for all children residing in the state between the ages of 3 and 21, inclusive." 34 C.F.R. § 300.101.

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. 20 U.S.C. § 1415 (f)(3)(E)(ii). In other words, an IDEA claim is viable only if those procedural

violations affected the student's *substantive* rights. *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted). *Accord, Kruvant v. District of Columbia,* 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying relief under IDEA because "although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents' request, the [parents] have not shown that any harm resulted from that error").[83]

VIII. DISCUSSION

A. Petitioner Established by a Preponderance of the Evidence that DCPS denied the Student FAPE by Failing to Provide an Appropriate Educational Placement.

IDEIA "imposes no clear obligation upon the District of Columbia beyond the requirement that [disabled] children receive some form of specialized education."[84] The District is required only to make available a "basic floor of opportunity" that is "reasonably calculated to enable the child to receive educational benefits . . . sufficient to confer some educational benefit upon the [disabled] child," or a program "individually designed to provide educational benefit."[85]

To the maximum extent possible children with disabilities should be educated with children who are non-disabled.[86] 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.[87]

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

[84] *Kerkam v. McKenzie*, 882 F.2d 884, 886 (D.C. Cir. 1988) (citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 195 (1982)).

[85] 882 F.2d at 886.

[86] 34 C.F.R. § 114 (a)(2)(i).

[87] *Id.* at 114 (a)(2)(ii).

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.

D.C. Code § 38-2561.02.

In a perfect world, Petitioner would receive one-on-one instruction and a multitude of services to address her suspected disabilities. However, IDEIA does not require DCPS to "maximize the potential" of this Student.[88] Rather, it only has to provide a "basic floor of opportunity."[89]

Here, the Student was placed in a mainstream setting that even her teachers admitted prevented her from achieving any academic progress. The 2009 comprehensive psychological evaluation shows that the Student has made absolutely no educational progress in three years. Thus, DCPS denied the Student a free, appropriate public education for at least three years.[90] However, the testimony of both of the Student's teachers established that the voluntary change in the Student's placement by DCPS has made a marked difference in the Student's progress. The Student is now in a small, structured setting with a low student-teacher ratio and is being educated with peers with similar disabilities. This is an appropriate setting for the Student, albeit three years too late.

The non-public school would not allow the Student to interact with non-disabled peers. Because the Student currently does not have a full-time (27.5 hours) IEP, the non-public school is not the least restrictive environment. Moreover, the non-public school would have to change the Student's IEP to fit their curriculum, which is impermissible under IDEIA.

B. Petitioner Proved by a Preponderance of the Evidence that DCPS Denied the Student a Free, Appropriate, Public Education When it Failed to Develop an Appropriate IEP for the Student.

Once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals.[91] The court should not "disturb an IEP simply because [it] disagree[s] with its content."[92] The court is obliged to "defer

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[88] . *McKenzie*, 882 F.2d at 886 (noting that the Supreme court stressed the lack of any such requirement four separate times in *Rowley*, 458 U.S. at 189, 197 n. 21, 198, 199).
[89] 882 F.2d at 886.
[90] The statute of limitations in IDEIA is two years, and thus this Hearing Officer can order a remedy only for the past two years, despite that the Student was denied a FAPE for three years
[91] *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990) (internal citation and quotations omitted).
[92] *Id.*

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."[93]

Each public agency must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child.[94] If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the public agency must use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing.[95] A placement decision may be made by a group without the involvement of a parent, if the public agency is unable to obtain the parent's participation in the decision. In this case, the public agency must have a record of its attempt to ensure their involvement.[96]

Procedural inadequacies that seriously infringe the parents' opportunity to participate in the IEP formulation process clearly result in the denial of a free and appropriate public education ("FAPE"). *See, e.g., W.G. v. Board of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992).

Here, the March 30, 2009, IEP was not developed by a team that included the parent but instead was presented to the team as a finished product with little time for discussion.[97] This impeded Petitioner's right to participate in her child's educational planning.

Moreover, the IEP is inappropriate in that it lacked baseline data that would allow the Student's teachers to properly measure her progress. Thus, DCPS denied the Student a FAPE.

ORDER

Upon consideration of Petitioner's requests for a due process hearing, the parties' Five-Day Disclosures, and the testimony at the hearing, it is this 25th day of April 2009 hereby:

ORDERED that within 20 business days, DCPS shall convene the MDT team to revise the Student's IEP to include one hour of social-emotional counseling per week, two and a half hours of tutoring to improve the Student's knowledge of fundamental concepts in English and mathematics;

IT IS FURTHER ORDERED that DCPS shall provide extended school year services to the Student;

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[93] *Id.*
[94] 34 C.F.R. § 300.501 (c)(1).
[95] 34 C.F.R. § 300.501 (c)(3).
[96] 34 C.F.R. § 300.501 (c)(4).
[97] Testimony of Teacher 1, Teacher 2, and Educational Advocate.

IT IS FURTHER ORDERED that DCPS shall conduct an educational evaluation of the Student within two weeks of the completion of the extended school year and a psychoeducational evaluation on or before April 25, 2010;

IT IS FURTHER ORDERED that Petitioner shall obtain an independent occupational therapy evaluation of the Student at DCPS expense on or before May 15, 2009;

IT IS FURTHER ORDERED that DCPS shall convene the MDT by June 1, 2009, review the occupational therapy evaluation and revise the Student's IEP as appropriate;

IT IS FURTHER ORDERED that DCPS shall convene the MDT within two weeks of the beginning of the 2009-2010 school year to review the educational evaluation and revise the Student's IEP as appropriate;

IT IS FURTHER ORDERED that DCPS shall ensure that either the Parent or the Student's Educational Advocate is present at the MDT meeting before proceeding with the meeting;

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

IT IS FURTHER ORDERED that this Order is effective immediately.

/s/
Frances Raskin
Hearing Officer

NOTICE OF 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. § 415(i)(2).

Issued: April 25, 2009

Distributed to:

John Strauss, Attorney at Law
Candace Sandifer, Attorney at Law
Hearing Office