DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
1150 Fifth Street, S.E.
Washington, DC 20003

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STUDENT, through her legal guardians,[1]	)	
	)	
Petitioners,	)	Case Number:
	)	
v.	)	Hearing Dates:
	)	April 14, 15, and 19, 2010,
THE DISTRICT OF COLUMBIA	)	in Hearing Room 6A, and
PUBLIC SCHOOLS,	)	June 2 and 3, 2010, in Hearing Room 5A
	)	
Respondent.	)	

HEARING OFFICER DETERMINATION

Counsel for Petitioner: Matthew Bogin, Attorney at Law
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Counsel for DCPS: Daniel McCall, 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 Individuals With Disabilities Education Improvement Act ("IDEA") of 2004, codified at 20 U.S.C. §§ 1400 *et seq.*, D.C. Code §§ 38-2561.01 *et seq.*; and the regulations at 34 C.F.R. §§ 300.1 *et seq.*; and D.C. Mun. Reg. tit. 5-E §§ 3000 *et seq.*

II. BACKGROUND

Petitioners are the Mother and Father of a year-old, special education student ("Student") who attends a District of Columbia school.[2] Petitioners and the Student are residents of the District of Columbia.[3]

On March 11, 2010, Petitioners filed a Due Process Compliant Notice ("Complaint") against the District of Columbia Public Schools ("DCPS") and the Office of State Superintendent of Education ("OSSE"). On March 19, 2010, with the consent of all parties, this Hearing Officer dismissed OSSE from this action and consolidated this case with that of the Student's twin sister (case no. 2010-0257) for the due process hearing only.

In the Complaint, Petitioners allege that DCPS denied the Student a free, appropriate, public education ("FAPE") by failing to:

A. Convene an appropriate individualized educational program ("IEP") team by failing to include a general education teacher;
B. Consider all available evaluation reports;
C. Evaluate or observe the Student prior to developing the Student's IEP;
D. Develop an appropriate IEP, including an appropriate educational placement;[4] and
E. Provide Petitioners an opportunity to observe the proposed location of services and participate in the development of the Student's IEP.[5]

Petitioners seek an order requiring DCPS to reimburse them for all costs related to the provision of special education and related services to the Student during the 2008-2009 and 2009-2010 school years, including all costs incurred at the Non-Public School. Petitioners also seek an order placing the Student at the Non-Public School for the 2010-2011 school year at DCPS expense.

In its Response, filed on March 22, 2010, DCPS asserts that it reviewed all of the evaluation reports Petitioners provided and convened an appropriately constituted IEP team. DCPS asserts that it provided Petitioners and their educational advocate ("Advocate") a

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[2] DCPS Exhibit 2, p. 000006 (Annual Student Enrollment Form).
[3] Id. at p. 000007 (DC Residency Verification Form).
[4] This Hearing Officer interprets Petitioners' claims A-C as subsumed into claim D, as they are allegations of procedural violations that this Hearing Officer considers in determining whether DCPS denied the Student a FAPE. *See Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006).
[5] This claim asserts a procedural violation of IDEA. This Hearing Officer interprets this claim as subsumed into the question of whether DCPS provided the Student an appropriate IEP.

meaningful opportunity to participate in the meeting and placement decision, and that Petitioners and their Advocate fully participated.

DCPS asserts that it developed an IEP and placement that provides the Student a FAPE. DCPS asserts that the IEP is reasonably calculated to provide her with meaningful educational benefit. DCPS asserts that the Student's proposed placement represents the least restrictive environment for her. DCPS further asserts that the proposed location of services ("DCPS School") can implement the Student's IEP.

The due process hearing commenced on April 14, 2010. The parties' Five-Day Disclosures were admitted into evidence at the inception of the hearing. After two and a half days of testimony, the due process hearing was continued to June 2, 2010. After an additional two days of testimony, the hearing concluded on June 3, 2010.

III. RECORD

Due Process Complaint Notice, filed March 11, 2010;
Petitioners' Motion to Consolidate, filed March 15, 2010;
Notice of Withdrawal (against OSSE), filed March 16, 2010;
Interim Order, issued March 19, 2010;
DCPS Response, March 22, 2010;
Prehearing Notice, issued March 25, 2010;
Prehearing Conference Order, issued March 31, 2010;
Petitioners' Five-Day Disclosure Statement, listing eight witnesses and including twenty-one proposed exhibits, filed April 6, 2010;
DCPS Five-Day Disclosure; listing ten witnesses and including seven proposed exhibits, filed April 7, 2010;
Petitioners' Letter of Objection to DCPS Witness List, filed April 9, 2010;
Petitioner's (sic) Objections to DCPS' Witnesses and Documents, filed April 13, 2010;
Consent Motion for Continuance, filed April 20, 2010;
Continuance Order, issued April 29, 2010;
Demonstrative Exhibit (notes of Non-Public School Speech-Language Pathologist);[6] and
Petitioner Exhibit 22, admitted into evidence on June 2, 2010.

IV. ISSUES PRESENTED

This Hearing Officer interprets Petitioners' legal claims as whether DCPS denied the Student a FAPE by failing to provide the Student an appropriate IEP for the 2009-2010 school year.

[6] This document was developed at the hearing as a demonstrative exhibit, and was not admitted into evidence.

V. FINDINGS OF FACT

1. The Student is a -year-old, special-education student who is in the grade at a full-time, out-of-general-education, non-public school in the District of Columbia.[7]

2. The Student's most recent psycho-educational evaluation was conducted in 2007.[8] Her performance on the Wechsler Intelligence Scale for Children –Fourth Edition ("WISC-IV"), revealed that she has average cognitive abilities.[9] However, the Student's overall (Full-Scale IQ) score, which was at the nineteenth percentile, is not the best indication of her abilities as there were significant discrepancies among her scores on the subtests.[10] Even the General Ability Index ("GAI"), which is often a more accurate measure of a student's intellectual ability, masks disparate scores.[11] The Student's score on the GAI, which was at the 45th percentile and solidly in the average range, is a better indication of her thinking and reasoning abilities than the Full-Scale score.[12] However, a single number cannot accurately represent her abilities.[13]

3. On the WISC-IV, the Student demonstrated strengths on tasks of practical reasoning and categorization.[14] She showed that she has a solid fund of knowledge.[15] She had significant difficulties with certain types of visual analysis and organization, particularly when she needed to perform the work quickly.[16] She tended to work very slowly.[17]

4. The Student's verbal comprehension summary score was at the forty-seventh percentile, which within the average range of scores.[18] This score is derived from three subtests, similarities, comprehension, and vocabulary.[19] The Student performed best on the similarities subtest, which examines practical reasoning within a social context, earning a score in the seventy-fifth percentile.[20] In contrast, the Student had difficulty with the similarities subtest, which explores verbal reasoning abilities and required her to describe how two objects or concepts are alike.[21] Her score was at the twenty-fifth percentile, which is just within the average range.[22] The Student obtained scores at the sixty-third percentile on the supplemental information subtest, which required her to answer factual questions from a number of academic

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[7] Testimony of Advocate.
[8] Petitioners Exhibit 5 (Confidential Report of Psycho-educational Evaluation).
[9] *Id.* at p. 4 (discussing Student's score on the General Ability Index).
[10] *Id.* (discussing Student's overall score).
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* Scores between the twenty-fifth percentile and the seventy-fifth percentile fall in the average range. *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*

fields and demonstrated that she had a solid fund of knowledge for her age.[23] She scored at the fiftieth percentile on the vocabulary subtest.[24] She often had difficulty retrieving assumed knowledge, indicating that she may have some unexpected gaps in her background knowledge.[25]

5. The Student's working memory summary score was at the ninth percentile, which is classified as a low average score.[26] This score was below expectation given the Student's verbal comprehension score. Working memory is important for many academic tasks, including taking notes while attending to instruction, and retaining information while reading, performing math calculations, and organizing one's thoughts for written expression.[27]

6. The subtests that contribute to the working memory score require attention, concentration, and auditory memory.[28] The Student's performance on two of these subtests was inconsistent.[29] She earned a score in the thirty-seventh percentile for her age on the letter-number sequencing test, which required her to listen to strings of mixed numbers and letters and then repeat the numbers in numerical order and the letters in alphabetical order.[30] She performed without error on strings of only two numbers and began making errors when rearranging strings of three items.[31] She performed inconsistently, answering more right than wrong, through strings of five items.[32] Such inconsistency means that the Student may not be sure of her work.[33]

7. She earned a much lower score at the second percentile on the digit-span subtest, which required her to repeat random strings of numbers in the same order she heard them or in the reverse order.[34] When she repeated the strings in a forward order, which is a hear-and-repeat exercise, she was consistently correct with strings of three digits.[35] When she repeated the strings in the reverse order, she obtained a maximum span of three items.[36] Thus, the Student showed weaknesses in both immediate auditory memory and in mentally juggling information.[37]

8. The perceptual reasoning score on the WISC-IV is derived from three subtests that examine visual analysis and visuospatial abilities.[38] The Student earned variable scores on these subtests, which combined produced a score at the forty-fifth percentile for her age, which is in

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[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*

the average range.[39] She earned her strongest score on the picture concepts subtest, which required her to categorize objects by grouping the pictures that are associated with each other in some way.[40] This task is much like the verbal similarities subtest, although it requires other abilities of visual searching and splitting attention.[41] She earned a score in the seventy-fifth percentile, which indicated that she was more capable of abstract thinking that her similarities score suggests.[42]

9. The Student earned a score in the fiftieth percentile for her age on the matrix-reasoning subtest, which required her to study a partially filled grid and then select the item that properly completes the matrix.[43] The Student had shown so much inconsistency on other tasks, however, that the test was continued past the stopping point.[44] That is, even though she had made the number of errors that should cause the test to be discontinued, she continued to work on additional items and answered many of them correctly.[45] If these responses were added to her subtest score, it would rise to the seventy-fifth percentile.[46]

10. The Student had significant difficulties with the block design subtest, in which she was required to duplicate geometric designs with colored blocks.[47] She earned a score at the sixteenth percentile, which is below average, compared to her same-age peers.[48] The Student seemed to understand what component blocks she needed to use, but she could not organize them properly.[49] Thus, her analysis was better than her execution.[50]

11. The Student's score on the processing speed index was well below expectation given her verbal comprehension score.[51] This test is composed of relatively simple, visually based tasks that require fast work.[52] The Student's score was at the fourth percentile of her same-age peers, which is classified as borderline.[53]

12. The Student earned discrepant scores on the subtests in the processing speed index, which correlates to a student's success in quickly producing accurate schoolwork.[54] She was especially slow when she had to write out her responses.[55] On the symbol search subtest, which

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[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*

required her to make rapid comparisons of symbols, the Student earned a score at the thirty-seventh percentile.[56] She made two errors on this task, suggesting that she could not have worked any faster and maintained acceptable accuracy.[57] The errors suggest difficulty with visual attention or visual working memory.[58]

13. She worked more slowly on the coding subtest, and earned a score in the second percentile.[59] For this task, she was shown a key listing pairs of numbers and symbols.[60] She was then given a series of randomly ordered numbers and asked to quickly write the corresponding symbol beneath each number.[61] The Student completed the practice items so slowly and painstakingly that the time pressure aspect of the test was repeated during the instructions.[62] This seemed to make little difference and, because she worked so slowly, she was given additional time to complete three rows of items.[63] A surprise immediate memory task showed that the Student had learned eight of the nine number-symbol associations, a score well within expectation.[64]

14. The Student took supplemental tests to more closely examine her word retrieval skills, ability to work with visuospatial material, memory, and ability to work under pressure.[65] These included tests from the Delis-Kaplan Executive Function System (D-KEFS) and tests from the Woodcock-Johnson III Psychoeducational Battery (WJ-III).[66]

15. The D-KEFS word fluency subtests had her generate lists of words under time pressure.[67] She earned a score at the fiftieth percentile on category fluency subtests, which required her to list words within specified categories that were related by their meaning.[68] In marked contrast, the Student had significant difficulty when asked to rapidly produce lists of words according to spelling characteristics.[69] Her performance on this subtest was in the fifth percentile, which is an impaired score.[70] Thus, her mental storage of words may not be easy for her to access under some circumstances.[71] Although many students who have problems with attention and executive function have difficulty sustaining their retrieval on this task, the Student

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[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*

showed consistent retrieval.[72]

16. However, problems with executive control were observed when she was asked to produce a list of items from alternating categories.[73] While she produced a fine number of items, she sometimes forgot to switch the categories.[74] Instead of producing an ABABAB pattern, as instructed, she produced an ABBAABBABABA pattern and it took some time for her to adjust to the proper response set.[75] She earned a category switching score at the sixteenth percentile, below expectation.[76]

17. The Student was asked to copy twelve Bender-Gestalt II designs and place them all on one sheet of paper.[77] She was able to fit all of her drawings on one page, but she was concerned about her ability to do so and thus made her drawings much smaller than the original.[78] Her drawings became larger as she worked and, by the end, she used about two thirds of the page.[79] She spent an inordinate amount of time on this task, taking well over three standard deviations longer than the usual time to complete it.[80] Despite her tremendous efforts, her accuracy score was at the fiftieth percentile for her age.[81]

18. On an immediate recall test, the Student showed recall that was within expectation.[82] The mean score for her age is 5.5 drawings, but she remembered seven.[83] She took just one standard deviation longer than the mean time to complete the memory condition and her accuracy score was at the fifty-fifth percentile.[84]

19. On the WJ III visual-auditory learning subtest, the Student was taught novel symbols to correspond to common words and then asked to "read" sentences composed of these symbols.[85] Students are corrected as they work, so they are given repeated exposure to the items.[86] It is thus a test of associative memory.[87] The Student became overloaded with the standard pace of this task and struggled with it.[88] Although she often made errors by producing synonyms for the labels rather than the exact name, she made errors of meaning as well.[89] Her

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[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*

score in the seventeenth percentile was below the average range for her age.[90]

20. The Student showed better memory for the symbols when she was retested an hour later.[91] She earned a score at the forty-third percentile for the delayed condition.[92] Thus, the Student is capable of learning by association and just may need a slower pace of acquisition.[93]

21. Because the Student had such difficulty with the WISC-IV processing speed subtests, she was administered the processing speed subtests from the WJ-III.[94] She was extremely slow on these subtests as well, earning a cluster score at the second percentile.[95] On the WJ-III visual matching task, she was asked to circle two identical numbers in a row of numbers; she earned a score at the tenth percentile.[96] Her work was accurate but slow.[97]

22. On the decision speed subtest, she was asked to circle pictures of things that "go together," which bears some similarity to the WISC-IV picture concepts test.[98] The Student was especially slow on this task, and earned a score at the second percentile.[99] Although she made an error on a practice item, she performed the test without error.[100]

23. On the achievement portion of the WJ-III, the Student strongest area was in reading, although her comprehension falters when she moves away from narrative material to expository material.[101] She has a fine memory for narrative material but showed difficulty processing oral directions that depend on understanding grammatical information about order and sequence.[102] Her scores were below expectation on math and written language tests.[103]

24. On the WJ-III, the Student earned significantly discrepant scores in the oral language subtests.[104] On the story recall subtest, she was required to listen to short stories and then repeat them.[105] Her immediate recall was at the sixty-fifth percentile for her age and her delayed recall was at the fiftieth percentile.[106] Thus, she performed within expectation when processing and

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[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*

remembering narrative material.[107]

25. By contrast, the Student had difficulty processing important grammatical information on the understanding directions subtest.[108] For this task, she examined pictures and then listened to instructions that directed her to point to certain items in the pictures.[109] She did not seem to attend to or process grammatical words that indicated sequence but instead tended to point to the items in the same order that they were used in the directions.[110] That is, if she were directed to "point to the kettle after you point to the picture in the bookcase," she tended to point to the kettle first.[111] Her score was at the fifth percentile, which was below expectation.[112]

26. The Student's scores on the WJ-III tests of reading mechanics and comprehension were within expectation according to national normative data.[113] She earned a better score, at the sixty-first percentile, when reading single words out loud on the letter word identification subtest than she did when reading aloud English-like nonsense words on the word-attack subtest.[114] She earned a score at the twentieth percentile, which is low average, on the word attack subtest.[115]

27. The Student's reading comprehension is generally within expectation for her age.[116] She earned an average level score at the twenty-ninth percentile on the reading fluency subtest, which assess the efficiency of reading simple material under pressure.[117] She obtained a score at the fifty-fourth percentile for her age on the passage comprehension subtest.[118] For this task, she was asked to complete short passages that were each missing one word.[119]

28. The Student also was asked to read a long passage from the qualitative reading inventory, classified as an "upper middle school literature passage.[120] She read very slowly and made a number of errors, although she self-corrected many of them.[121] She earned an oral reading accuracy score at the independent level.[122]

29. On an expository passage, she read at an instructional level in terms of the number of reading errors she made.[123] Many of these errors did not affect the meaning of what she read,

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[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.* The Student was in grade at the time the test was administered.
[121] *Id.* The Student was in grade at the time the test was administered.
[122] *Id.*
[123] *Id.* The Student was in grade at the time the test was administered.

and thus her reading is classified as being at the independent level.[124] In responding to comprehension questions, she correctly answered eight of the test questions from the narrative passage, which is classified as an instructional level of performance.[125] She had much more difficulty with the expository passage, answering only three of ten questions correctly, which corresponds to a score at frustration level.[126] Thus, she is much better at comprehending stories than she at comprehending material that presents information.[127]

30. The Student's knowledge of math algorithms and facts was below expectation for her age.[128] On the untimed calculation subtest, the Student's performance was in the average range, at the twenty-fifth percentile for her age.[129] She sometimes made hand gestures to remind herself of the proper orientation of the numeral 4, but always wrote it correctly.[130] She did well in basic addition, subtraction, and multiplication, even with problems that involved carrying, regrouping, and renaming.[131] Although she showed the ability to add and subtract fractions, she made errors when the fractions had different denominators.[132] She did not attempt long division problems.[133]

31. She obtained a similar score at the twenty-first percentile when asked to solve oral story problems on the applied problems subtest.[134] She rarely used a pencil and paper to support her work, and when she did, her work was not efficient.[135] She also made errors with money problems and appeared to lose track of the coins she was working with.[136]

32. The Student obtained a score in the fifth percentile for her age on a math fluency test, which required her to solve simple math calculations under pressure.[137]

33. In written language, the Student had difficulty in organizing her thoughts when writing a story.[138] Her score on a formal test of spelling was at the twenty-ninth percentile for her age.[139] Her weaknesses in phonological decoding, which were apparent in her performance on the word-attack subtest, interfere with her spelling accuracy.[140]

34. On the highly structured task of writing fluency, the Student obtained a score at the

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[124] *Id.* The Student was in eighth grade at the time the test was administered.
[125] *Id.* The Student was in eighth grade at the time the test was administered.
[126] *Id.*
[127] *Id.*
[128] *Id.* The Student was in eighth grade at the time the test was administered.
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*

eighth percentile for her age.[141] On this task, she was instructed to produce short sentences that contained specified sets of words and that described accompanying pictures.[142] She generally produced simple sentences that related well to the pictures and that followed the instructions.[143] She showed some variety in her sentence structures.[144]

35. The Student's score on writing samples subtest was in the seventeenth percentile for her age.[145] This task assesses a student's skill at expressing her ideas in writing while conforming to particular instructions or contexts and requires more sophistication than the writing fluency subtest.[146]

36. On the test of Written Language 3, the Student was provided fifteen minutes to write a story to accompany a detailed picture.[147] She worked steadily but extremely slowly.[148] At the end of five minutes, she had written only one line.[149] After eleven minutes, she had written only three lines.[150] She took over twenty-five minutes to produce a sample.[151] While she showed fine basic spelling and punctuation, she was expected to use at least some advanced punctuation. As a result, her score in the contextual language category was at the twenty-fifth percentile in the contextual convections category.[152] Her writing vocabulary was within expectation, resulting in a score at the fiftieth percentile on the contextual language category.[153]

37. However, she had a difficult time organizing a sensible story.[154] Instead of using the picture as a theme and source of ideas, she used the plot and character names of one of her favorite books.[155] Her sentences were not in a well ordered sequence.[156] Thus, her score on the story construction category was well below expectation at the fifth percentile.[157]

38. The student was diagnosed in the first grade with attention difficulties, learning disabilities, and executive functioning problems.[158] The WJ-III revealed that she was progressing academically.[159] However, despite her generally fine reading, her relative

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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.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*

difficulties with decoding and understanding expository text indicate the she is likely to have problems with grade-level reading.[160] In addition to meeting the criteria for math, reading, and written expression disorders, the Student's slow processing and difficulties with attention and executive functioning have significant academic impact.[161]

39. The Student's speech-language evaluation, conducted in June 2008, revealed that her linguistic profile ranges from poor to above average across oral and written modalities.[162] She showed strength in aspects of auditory processing, oral phonology skills, and oral receptive language skills.[163] She showed weaknesses in other aspects of auditory processing, oral expressive language, rapid naming, reading fluency, and written language skills.[164]

40. Although the Student demonstrated a low average ability to listen to and repeat a series of words, she had marked difficulty repeating sentences of increasing length and complexity verbatim.[165] Her scores on the memory index indicated weaknesses in her ability to perform memory-based tasks of auditory processing.[166]

41. In the area of auditory cohesion, the Student showed solid abilities on the auditory comprehension subtest, which required her to process auditory information and subsequently answer factual questions concerning the content.[167] Her slightly below average score on a task designed to asses higher order linguistic processing indicated that she was not consistently able to understand inferences, implied meaning, and figurative language, or draw conclusions.[168]

42. Overall, weaknesses in auditory perceptual skills likely affect the Student's classroom performance as they impact her ability to follow classroom instructions as well as lectures presented orally.[169] Auditory processing difficulties also may affect her interactions with peers as they impact ability to process dialogue during conversation.[170]

43. The Student's ability to understand figurative language was less developed that her ability to make inferences.[171] Her performance indicated inconsistencies in receptive language skills.[172] For instance, she showed a significantly below average ability to isolate and explain ambiguous language.[173]

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[160] *Id.*
[161] *Id.*
[162] Petitioner Exhibit 6 (June 2008 Comprehensive Speech and Language Assessment).
[163] *Id.*
[164] *Id.*
[165] Petitioner Exhibit 7 (March 2009 Annual Speech Language Report).
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.*

44. She also demonstrated a borderline ability to create sentences using a provided picture prompt and three words.[174] Even on items in which she received full credit, she often required the maximum allowable time to provide her sentence.[175] In addition, sometimes she was unable to include all three target words in the sentence, and she constructed long, awkward sentence structures.[176] Thus, her performance suggested weaknesses integrating syntax (sentence structure) and semantics (meaning).

45. Weaknesses and variable skills in oral expressive language may impair the Student's higher level reading comprehension, comprehension of and participation in classroom discussions, social interactions, and appreciation of some forms of humor.[177]

46. The Student's linguistic profile as reflected in her test results has been corroborated in her performance during language therapy sessions as well as in the classroom setting at the Non-Public School.[178] In the classroom, she often appears inattentive during tasks/activities involving lengthy auditory information.[179] However, at times, she explicitly demonstrates understanding of the material by providing a relevant comment or giving an appropriate answer to a question.[180] There also are many instances when her attentional and auditory processing/memory difficulties interfere directly with her ability to independently follow instructions and comprehend lectures.[181] She has benefited from pairing auditor information with visual supports.[182] She also benefits from "hands-on" activities in which she can physically participate in the task at hand.[183]

47. The Student often participates willingly in the classroom but needs additional time to fully express her ideas.[184] Sometimes, her comments lack clarity due to language formation an/or organization weaknesses.[185] Thus, she benefits from using oral language organizations strategies, such as language grids and a "wh-" template, to help her express her ideas in a clear concise manner.[186] She benefits from audiotape activities in which she records speech samples while utilizing language organization strategies and then discusses her performance with a clinician.[187]

48. During conversation, the Student occasionally displays a tendency to offer a

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[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *Id.*

comment after the conversation or discussion has shifted focus.[188] Thus, she often benefits from clinician cues prompting her to monitor conversational shifts and use appropriate lead-in statements when offering a comment about a previously discussed topic.[189]

49. The Student's expressive language is characterized by reformulations and revisions.[190] She will start a sentence but then have to revise it.[191] Her sentences contain long pauses and numerous fillers.[192] Sometimes, when she is midway expressing a thought, she loses her train of thought entirely.[193]

50. Overall, language formulation and organization are an area of significant need for the Student.[194] She also has difficulty with word retrieval and as a result uses vague language and can be circumlocutious.[195] Thus, her expressive language can be repetitive and lengthy.[196]

51. The Student's difficulties with linguistic executive functioning impact her in all academic areas.[197] She has extreme difficulty initiating tasks and monitoring herself to make sure she is on task.[198] She often needs one-to-one prompting to continue working on a task.[199] For example, during her speech-therapy sessions, she may require generate only two or three sentences during the entire session.[200] She has significant difficulty moving herself from one sentence to the next.[201] Her oral expressive and receptive language deficits manifest in her reading and written language.[202]

52. At the Non-Public School, the Student receives speech-language therapy once a week individually and once a week in a small group of two students.[203] She also receives weekly integrated therapy in her English class.[204]

53. In her individual therapy sessions, the Student works on strategies to enhance her auditory memory.[205] She also works on strategies for vocabulary to address the gaps in her

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[188] *Id.*
[189] *Id.*
[190] Testimony of Non-Public School Speech-Language Pathologist ("SLP 1").
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] Testimony of SLP 1.
[204] *Id.*
[205] *Id.*

vocabulary and her difficulties in retrieving and using the vocabulary words that she knows.[206] She also works on interferential understanding and reading fluency.[207]

54. In the small group therapy sessions, the Student works linguistic processing and oral language.[208] The Student needs a lot of organizational strategies to help her express her ideas in a more concise and clear way.[209] This is important to allow her peers to fully engage with her in the conversation and not tune out because of the length of time that it takes the Student to express her ideas.[210] These tasks require a lot of effort from her.[211]

55. The Student's weekly integrated session helps her incorporate into the classroom setting the strategies and skills she acquires during individual and small group therapy.[212] The integrated therapy may assist her in using her auditory memory strategies while listening to a lecture or getting herself ready for a task by using self-talk strategies within the classroom.[213]

56. All of the strategies and tasks addressed in the Student's speech-language therapy sessions at the Non-Public School have been tailored to her individual needs.[214] The Student has practiced strategies to enhance her auditory memory, worked on tasks to address her difficulties with abstract and figurative language.[215] She has practiced strategies to structure her oral and written language, and practiced strategies in the area of linguistic executive functioning.[216] As a result of implementing these strategies in speech-language therapy, the Student is progressing toward using these strategies at a more independent level.[217]

57. The Student should continue to receive speech-language therapy at the frequency of one forty-five minute individual and one forty-five minute small group session per week.[218] The Student also requires integrated services (i.e., push-in) to be provided in the classroom to ensure that she maintains and transfers the skills she learns in therapy to the classroom and social settings.[219] The Student would have difficulty accessing the curriculum unless she receives speech-language therapy frequently in individual and small group session as well as therapy integrated into the classroom.[220]

58. The Student's Non-Public School IEPs address each of her speech-language

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[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] Testimony SLP 1.

weaknesses and provide the therapy she needs.[221] Because the Student is tested annually, the goals on these IEPS are individually designed to address the areas in which she exhibited below average performance on the evaluations.[222]

59. She also has benefited from the low student-teacher ratio, hands on learning, focus on inferential and higher language skills, and from working with teachers who understand her learning style and are willing to modify the curriculum to meet her needs.[223] The Student requires this type of environment in order to feel comfortable and make gains in executive functioning.[224]

60. The IEPs the Non-Public School developed for the Student are appropriate to meet her needs.[225] They contemplate the effect of the Student's strengths and weakness in each content area.[226] The goals are based on baseline information and are measurable and observable, and they contain clear impact statements, modifications, and accommodations.[227] Moreover, the goals and specialized instruction span across multiple curriculum areas.[228] The Student requires integrated services, which the IEPs provide.[229]

61. The Student has been bullied by other students since her early years in elementary school.[230] In second grade, the Student was continually excluded from play groups on the school playground.[231]

62. In January 2009, the Mother first enrolled the Student at the DCPS School as a "non-attending" Student.[232] That same month, Petitioners retained the Advocate to assist them with the DCPS IEP process.[233] The Advocate then observed the Student in the academic environment.[234]

63. In February 2009, DCPS sent Petitioners a letter notifying them that the DCPS Private-Religious Office had reviewed the Student's "referral packet" for consideration of special education services and had forwarded the referral packet to the DCPS School.[235] The letter suggested that Petitioners contact the Special Education Coordinator ("SEC") at the DCPS

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[221] Testimony of SLP 1.
[222] *Id.*
[223] Testimony of SLP 1.
[224] *Id.*
[225] Testimony of Advocate re: Petitioners' Exhibit 2-4.
[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] *Id.*
[230] Testimony of Father.
[231] *Id.*
[232] DCPS Exhibit 1 (Annual Student Enrollment Form for school year 2008-2009).
[233] Testimony of Mother.
[234] Testimony of Advocate. The Advocate continued to observe the Student throughout spring of 2009, and observed her four times in the 2009-2010 school year. *Id.*
[235] DCPS Exhibit 2.

School.[236]

64. Subsequently, the Advocate and Petitioners participated in several multidisciplinary team ("MDT") meetings with DCPS to discuss the Student, her current evaluations, and whether DCPS needed to conduct any re-evaluations or further evaluate the Student. [237] During those meetings, each of which lasted several hours, Petitioners and the Advocate provided to the DCPS MDT the Student's 2008-2009 Non-Public School IEP, as well as her psycho-educational, speech and language, and occupational therapy evaluations.[238] The MDT reviewed these evaluations and the Non-Public School IEP, and indicated that it did not need any more evaluative data on the Student in order to develop an IEP and placement for her.[239]

65. On May 12, 2009, DCPS convened an IEP meeting.[240] The DCPS staff members present at the meeting were the SEC ("SEC 1"), School Psychologist, Speech-Language Pathologist ("SLP-2"), and Occupational Therapist.[241] Several members of the Non-Public School staff, including the Academic Coordinator, High School Coordinator, and Speech-Language Pathologist, also attended the meeting.[242] Also attending were the Advocate and the Father.[243]

66. The Father shared with the IEP team his concerns about the Student.[244] The Non-Public School participants in the meeting imparted their knowledge of the Student's cognitive profile and academic achievement, her speech-language and executive functioning limitations, as well as her academic and social needs. The Non-Public School participants also shared with the IEP team their views of the programming the Student required to access the curriculum.[245]

67. The IEP team found the Student eligible for special education and related services.[246] The IEP team also indicated that it would incorporate into an IEP all of the information provided by Petitioners, the Advocate, and the Non-Public School participants in the meeting.[247]

68. DCPS then attempted to incorporate the entire Non-Public School IEP in the DCPS IEP.[248] However, the IEP team's ability to translate all of the components of the Non-Public

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[236] *Id.*
[237] Testimony of Advocate.
[238] *Id.*, referring to Petitioners' Exhibits 2 (Nov. 6, 2008, IEP), 5 (Oct. 2007 psycho-educational evaluation), and 6 (June 2008 comprehensive speech and language report) . Petitioners subsequently forwarded to the DCPS MDT the Student's May 21, 2009, Non-Public School IEP. Testimony of Advocate.
[239] *Id.*
[240] *Id.*; testimony of Mother; DCPS Exhibit 3.
[241] DCPS Exhibit 3.
[242] *Id.*; Testimony of SLP-1, High School Coordinator, Advocate.
[243] Testimony of Advocate, Father; DCPS Exhibit 3.
[244] Testimony of Father.
[245] *Id.*
[246] *Id.*; testimony of Advocate, High School Coordinator, SLP-1, and SEC 1.
[247] *Id.*
[248] Testimony of SEC 1.

School IEP was constrained by their use of a computer program called "Easy IEP."[249] The IEP team openly discussed the failings of Easy IEP, including the program's inability to capture annual goals in a measurable way.[250]

69. As a result, the annual goals on the DCPS IEP address many behaviors and skills that are not observable or measurable.[251] The evaluation procedures and schedule are essentially the same for each goal. This is due to a default in the program that specifies the same procedures and schedule for every goal on the IEP.[252] As a result, the DCPS IEP fails to capture the observation and measurement procedures and schedule that the Student requires to ensure she makes academic progress.[253] Evaluation procedures and schedule are really important for the Student because she needs very strict procedures and weekly evaluations so that she is instructed and corrected frequently enough for her to make progress.[254]

70. The IEP lacks goals for linguistic ambiguity and figurative language within the text.[255] This an area of weakness for the Student, yet the DCPS fails to address it.[256]

71. Although the DCPS IEP identifies the Student's needs in written expression, the goals fail to address her difficulties with sentence structure and sentence variation.[257] The IEP also lacks a goal to address her inability to follow directions. The IEP also lacks goals to address the use of vocabulary in written language, which is an area of difficulty for the Student.[258]

72. The Student also requires individual and small group therapy, neither of which appear on the DCPS IEP.[259] The IEP also fails to address her social pragmatic weaknesses, and thus would not allow her to progress in this area.[260]

73. The DCPS IEP also fails to include a sufficient list of classroom accommodations on the IEP even though the Non-Public School staff explained the accommodations that the Student requires to be successful.[261] Thus, the DCPS IEP lacks the supplementary aids, services, accommodations, methods, goals, and evaluation methods that the Student requires to make academic progress.[262]

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[249] Testimony of Advocate.
[250] *Id.*
[251] *Id.*
[252] Testimony of Advocate.
[253] *Id.*
[254] *Id.*
[255] Testimony of SLP-1.
[256] *Id.*
[257] *Id.*
[258] *Id.*
[259] *Id.*
[260] *Id.*
[261] Testimony of Advocate.
[262] *Id.*

74. The DCPS IEP also lacks sufficient details in the Student's transition plan. [263] The annual goals each contain only a single sentence.[264] The first annual goal states simply "[The Student] will complete goals related to her post-secondary education goals to attend college."[265] The third goal, pertaining to "independent living," states only that the Student "will acquire the necessary skills for independent living.[266] Both of these goals fail to provide any further detail, baselines, and any observation and measurement procedures.[267]

75. The IEP specifies the Student's placement (hours and location of special education and related services) as twenty-four hours of specialized instruction, forty-five minutes per week of occupational therapy, sixty minutes of speech-language pathology, and forty-five minutes per week of behavioral support services (counseling).[268] It specifies that the Student will receive all of her specialized instruction and related services outside the general education setting.[269]

76. However, the DCPS School Psychologist explained the team felt that the Student would be challenged by attending the DCPS School[270] She explained that counseling was necessary to address the social emotional concerns that would arise as a result of the Student's challenges attending the DCPS School.[271] Presumably, these challenges include her interactions with general education students during transitions between classes.

77. The Advocate and the Father responded that any placement for the Student that would generate frustration and dysregulation would be inappropriate.[272] They also explained that they opposed removing the Student from class to attend counseling because she would miss classroom instruction.[273] The Advocate, Father, and Non-Public School staff also expressed their opposition to placing the Student in the general education setting for any amount of time.[274]

78. The DCPS IEP team members acknowledged that, in developing the Student's placement, they were constrained by the resources of the DCPS School.[275] They explained that they did not have authority to place the Student in a placement other than what was available at the DCPS School.[276] Thus, the Student's placement was driven by DCPS resources rather than the Student's individualized needs.

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[263] *Id.*
[264] *See* DCPS Exhibit 3.
[265] *Id.*
[266] *Id.*
[267] *Id.*
[268] DCPS Exhibit 3. The Advocate testified that the IEP provides that the Student will spend about five hours in the general education setting. Since the IEP contains no mention of general education classes, it is not clear whether the Advocate's assertion is correct.
[269] *Id.*
[270] Testimony of Advocate.
[271] *Id.*
[272] *Id.*
[273] *Id.*
[274] *Id.*
[275] *Id.*
[276] *Id.*

79. The IEP team explained that they were crafting the Student's IEP for a program that they did not have in place but were hoping to have in place.[277] The Special Education Coordinator explained that she was hoping that over the summer, DCPS would provide the DCPS School more resources so that they could implement the Student's IEP.[278]

80. DCPS failed to include a general education teacher in the development of the IEP.[279] The general educator would have provided information on general education curriculum.[280] Without input from a general education teacher, the IEP team cannot develop an IEP that ensures the student will be able to access the general curriculum and earn her Carnegie units.[281] The Student is on track to earn a diploma, and thus must earn Carnegie units.[282] Moreover, the IEP team did not explain how it arrived at the number of hours, if any, the Student would be placed in the general education setting.[283]

81. The IEP team was unable to produce a final IEP at the May 2009 IEP meeting.[284] Nonetheless, the IEP team issued a prior notice of placement for the DCPS School.[285]

82. As of June 3, 2009, Petitioners still had not received a copy of the Student's draft IEP.[286] On August 13, 2009, Petitioners emailed to DCPS a signed copy of the IEP.[287] On the front page of this IEP was a statement by the Mother stating "My signature authorizes DCPS to provide special education and related services to [the Student], and to make FAPE available to her. However, I do not agree with the contents of this IEP or placement."[288]

83. In September and October 2009, the Father attended further meetings at the DCPS School.[289] Present at these meetings were the new Special Education Coordinator (SEC-2), the School Psychologist, and a supervisor.[290] The meetings concerned the Student's 2009-2010 class schedule.[291] Petitioners did not receive the final class schedule until October 2009.[292]

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[277] *Id.*
[278] *Id.* (referring to conversation with SEC-1).
[279] *Id.*
[280] *Id.*
[281] *Id.*
[282] *Id.*
[283] Petitioner Exhibit 20.
[284] *Id.*
[285] *Id.*
[286] *Id.*
[287] Petitioner Exhibit 20.
[288] *Id.*
[289] Testimony of Father.
[290] *Id.*
[291] *Id.*
[292] Petitioner Exhibit 12.

84. The Supervisor described the schedule as a "block schedule," which compressed a full year of course work into a single semester.[293] After several iterations, DCPS provided the Father a copy of the Student's schedule.[294] The Father immediately indicated that he disapproved of schedule as too intense to accommodate the Student's cognitive and academic deficits.[295]

85. In fall 2009, Petitioners observed classes at the DCPS School.[296] In October 2009, the Father observed a special education geometry class.[297] He noted that most of the students were not paying attention to teacher and the classroom was somewhat chaotic.[298] The students were not taking in what was being taught in the class and instead were talking to each other and walking around classroom.[299]

86. The mother visited the DCPS School four times in October and November 2009.[300] Her general impression was that the hallways were extremely chaotic, sometimes to the point of feeling threatening.[301] In one of the classes on the Student's schedule, the Mother observed students blurting out, cursing, and stomping feet.[302] Other students were flirting with girls and talking among themselves while the teacher was talking.[303]

87. In another classroom, the Mother observed students burping, around, taking orders for lunch, and defying the teacher's commands.[304] The teacher had to use her cell phone to call and ask that the student be removed.[305]

88. The Student would not feel safe in this environment.[306] Nor would she be able to focus or learn.[307] The Student also would not benefit from exposure to non-disabled peers, even if some of those students had higher social-pragmatic skills.[308] This applies to every content area, every classroom, lunch, music.[309]

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[293] Testimony of Father.
[294] *Id.*
[295] *Id.*
[296] Testimony of Petitioners.
[297] Testimony of Father.
[298] *Id.*
[299] *Id.*
[300] Testimony of Mother.
[301] *Id.*
[302] *Id.*
[303] *Id.*
[304] *Id.*
[305] *Id.*
[306] *Id.*
[307] *Id.*
[308] Testimony of SLP 1.
[309] *Id.*

89. Nonetheless, Petitioners did not share their observations and concerns with SEC-2 or anyone else at DCPS.[310] They also did not request any changes to the IEP.[311]

VI. CREDIBILITY DETERMINATIONS

The testimony of all the witnesses at the hearing was credible with the exception of the testimony of DCPS SEC 1 and 2. This Hearing Officer especially did not find credible their testimony about the ability of DCPS to implement the Student's IEP as it was contradicted by both the Advocate and the Father.

The Advocate was admitted as an expert in special education, with a particular emphasis on learning disabled children, analysis and development of IEPs, interpretation of evaluative data, and evaluating programs and placements. She testified credibly and knowledgeably about the Student's individualized needs, the DCPS IEP process, and the appropriateness of the Non-Public School.

The Non-Public School Speech-Language Pathologist also was especially credible. She was admitted as an expert in speech-language pathology, and testified knowledgeably about the Student's individualized needs, the appropriateness of the Non-Public School placement, and the flaws in the DCPS IEP.

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.[312] 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)..."[313]

In deciding whether DCPS provided the Student a FAPE, the inquiry is limited to (a) whether DCPS complied with the procedures set forth in IDEIA; and (b) whether the Student's IEP is reasonably calculated to enable the Student to receive educational benefit.[314]

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,

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[310] *Id.*
[311] *Id.*
[312] 20 U.S.C. §§ 1400(d) (1)(A),1412 (a) (1); *Bd. of Education v. Rowley*, 458 U.S. 176, 179-91 (1982); *Shaffer v. Weast*, 546 U.S. 49, 51 (2005).
[313] 20 U.S.C. § 1401 (9); 34 C.F.R. § 300.17.
[314] *Rowley,* 458 U.S. at 206-207.

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.[315] In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.[316]

Once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals.[317] The court should not "disturb an IEP simply because [it] disagree[s] with its content."[318] 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."[319]

The burden of proof is properly placed upon the party seeking relief.[320] Under IDEIA, a Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.[321]

VIII. DISCUSSION

A. Petitioners Proved that DCPS Failed to Provide the Student an Appropriate IEP for the 2009-2010 School Year.

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."[322] The IEP is the centerpiece of special education delivery system.[323]

IDEA does not specify the specific level of educational benefits that must be provided through the child's IEP, nor is the LEA required to maximize the child's potential.[324] 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

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[315] 34 C.F.R. § 300.513 (a)(2).
[316] *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").
[317] *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990) (internal citation and quotations omitted).
[318] *Id.*
[319] *Id.*
[320] *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).
[321] 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).
[322] *Rowley*, 458 U.S. at 188-89 (citation omitted).
[323] *Lillbask ex rel. Mauclaire v. Conn. Dep't of Educ.*, 397 F.3d 77, 81 (2d Cir. 2005) (internal quotation marks omitted).
[324] *Rowley,* 458 U.S. at 188, 99.

child; and the academic, developmental, and functional needs of the child.[325] 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.[326]

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs,[327] establishes annual goals related to those needs,[328] and provides appropriate specialized instruction and related services.[329] The program must be implemented in the least restrictive environment.[330] For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression."[331] As discussed herein, DCPS failed to develop an appropriate IEP for the Student.[332]

As discussed above, the limitations of the Easy IEP program DCPS used to generate the Student's IEP led to the development of annual goals that are neither observable nor measurable. For many of the goals, the IEP fails to reflect the Student's baseline performance. Thus, it is unlikely this IEP will produce progress.

Most of the annual goals on the Student's IEP include scant direction into how the Student's progress is to observed or measured. They each contain stock language that is a default in the Easy IEP program, including meaningless statements such as "observation/each nine weeks; practice and drill/each nine weeks." Thus, the DCPS IEP fails to capture the observation and measurement procedures and schedule that the Student requires to ensure she makes academic progress.

The speech-language goals on the IEP also fail to address significant areas of the Student's weakness. Thus, DCPS failed to develop an IEP that accurately reflects the results of evaluations to identify the student's needs and establishes annual goals related to those needs.

The IEP also contains insufficient and inappropriate related services. For example, the Student needs more frequent S&L therapy. As a single, sixty-minute session is not enough for her to progress in this area. She also requires integrated and small group therapy, neither of which the IEP provides.

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[325] 34 C.F.R. § 300.324 (a).
[326] 34 C.F.R. § 300.320 (a) (1); D.C. Mun. Reg. tit. E § 3007.2 (a).
[327] 34 C.F.R. § 300.320 (a) (1).
[328] 34 C.F.R. § 300.320 (a) (2).
[329] 34 C.F.R. § 300.320 (a) (4).
[330] 20 U.S.C. § 1412 (a) (5); 34 C.F.R. §§ 300.114 (a) (2), 300.116 (a) (2).
[331] *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).
[332] The term "educational placement" refers only to the general type of educational program in which the child is placed. *T.Y. v. N.Y. Dept. of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009) (citation omitted). "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. *Id.*

The DCPS IEP also fails to include a sufficient list of classroom accommodations on the IEP even though the Non-Public School staff provided explicit detail to the IEP team on the accommodations that the Student requires to be successful. Thus, the DCPS IEP lacks the supplementary aids, services, and accommodations that the Student requires to make academic progress.

Moreover, the Student's transition plan is woefully inadequate. The annual goals each contain only a single sentence. The first annual goal states simply "[The Student] will complete goals related to her post-secondary education goals to attend college." The third goal, pertaining to "independent living," states only that the Student "will acquire the necessary skills for independent living. Neither of these goals provide any further detail, baselines, and any observation and measurement procedures.

DCPS also failed to include a general education teacher in the IEP team.[333] As explained above, without input from a general education teacher, the IEP team could not determine whether the student will be able to access the general curriculum in order to earn Carnegie units required for a diploma. Although the failure by DCPS to constitute a proper IEP team is a procedural violation, in this case its failure to include a general education teacher significantly impeded the parent's opportunity to participate in the decision-making process.[334]

Thus, DCPS failed to develop an IEP that accurately reflects the results of evaluations to identify the student's needs, provides annual goals related to those needs, and provides appropriate specialized instruction and related services. The DCPS IEP does not ensure that the Student will receive "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" and earn a diploma. Instead, as discussed above, DCPS developed an IEP that fits the services available at the DCPS School. Thus, DCPS denied the Student a FAPE by failing to draft an IEP individually tailored to her specific needs.

However, this is not the end of the inquiry. Petitioners must demonstrate that the services selected by the parent, i.e., the Non-Public School, are appropriate under the Act, and that equitable considerations support the parent's claim for reimbursement.[335]

When a state receiving IDEA funding fails to give a disabled child such an education, the child's parent may remove the child to an appropriate private school and then seek retroactive tuition reimbursement from the state.[336] A court may award tuition reimbursement "if it appears

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[333] 34 C.F.R. § 300.321 (general education teacher is an essential member of an IEP team).

[334] During the IEP-development process, parental involvement is critical; indeed, full parental involvement is the purpose of many of the IDEA's procedural requirements. *See*, e.g., *M.M. v. Sch. Bd. of Miami-Dade County*, 437 F.3d 1085, 1095 (11th Cir. 2006); *Weber v. Cranston Sch. Comm.*, 212 F.3d 41, 51 (1st Cir. 2000); 34 C.F.R. § 300.345.

[335] *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369-70 (1985).

[336] *See Burlington*, 471 U.S. at 369-70. The court found that this type of retroactive relief was appropriate as it would merely require the state to "belatedly pay expenses that it should have paid all along." *Id. at 370-71. See also Knight by Knight v. District of Columbia,* 877 F.2d 1025

(1) that the proposed IEP was inadequate to afford the child an appropriate public education, and (2) that the private education services obtained by the parents were appropriate to the child's needs."[337]

In determining the appropriate placement for a child, preference given to the least restrictive environment.[338] Further, mainstreaming of children eligible for special education services under the IDEA is "not only a laudable goal but is also a requirement of the Act."[339] If no public school can accommodate the student's needs, the government is required to place the student in an appropriate private school and pay the tuition.[340]

Courts have identified a set of considerations relevant to determining whether a particular placement is appropriate for a particular student, including 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.[341]

Placement decisions must be made in conformity with the child's IEP.[342] Thus, the placement should not dictate the IEP but rather the IEP determines whether a placement is appropriate.[343] 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 IDEIA:

> (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.[344]

Here, DCPS failed to offer the Student an appropriate IEP and placement. As discussed above, the Non-Public School is the Student's least restrictive environment.[345] She is significantly impaired in her relations with peers, has been repeatedly bullied when exposed to

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(D.C. Cir. 1989).

[337] *Id.* at 370; *see also Florence County*, 510 U.S. at 15-16 (emphasizing that award of tuition reimbursement is discretionary).

[338] *34 C.F.R. ß 300.116.*

[339] *Roark v. District of Columbia, 460 F. Supp.2d 32, 43 (D.D.C. 2006)* (quoting *DeVries v. Fairfax County Sch. Bd., 882 F.2d 876, 878 (4th Cir. 1989))*; *Rowley, 458 U.S. at 201* ("The Act requires participating States to educate handicapped children with non-handicapped children whenever possible.").

[340] 20 U.S.C. § 1412(a) (10) (B) (I); *see also Burlington*, 471 U.S. at 369.

[341] *Branham*, 427 F.3d at 12 (citing *Rowley*, 458 U.S. at 202).

[342] 34 C.F.R. § 300.116 (a)(2)(b), 5 D.C.M.R. § 3013 (2006).

[343] *See, Rourke v. District of Columbia,* 460 F.Supp.2d 32, 44 (D.D.C. 2006).

[344] D.C. Code § 38-2561.02.

[345] Counsel for DCPS tried to establish the special education teachers and related service providers may not meet DCPS licensing requirements. However, state special education requirements do not apply to private parental placements. *Florence County, 510 U.S. at 13.*

general education students, and requires a small, structured setting to make educational progress. Thus, the record supports a finding that the Non-Public School is appropriate for the student.

Petitioners proved by a preponderance of the evidence that DCPS failed to develop an appropriate IEP for the Student for the 2009-2010 school year. Thus, Petitioners proved by a preponderance of the evidence that DCPS denied the Student a FAPE.

Petitioners seek as a remedy, reimbursement for their costs incurred at the Non-Public School for the 2008-2009 and 2009-2009 school years. Petitioners failed to prove that they are entitled to reimbursement for the expenses of the Student's education during the 2008-2009 school year. Petitioners did not refer the Student to DCPS for evaluation and IEP development until January 2009. DCPS developed the Student's IEP approximately four months later, which was in compliance with the District of Columbia statute that establishes the timeframe for initial evaluations.[346] At the time DCPS finalized the IEP, only a few weeks remained in 2008-2009 school year. Thus, Petitioners are not entitled to reimbursement for this school year.

Moreover, the cost of reimbursement may be reduced or denied if at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or ten business days prior to the removal of the child from the public school, the parents did not give written notice to the public agency of this information.[347]

Petitioners did not give the required ten-day notice to DCPS before unilaterally placing her in the non-public school for the 2009-2010 school year. Additionally, although they indicated on the first page of the draft IEP their disagreement with its contents, this is insufficient. They failed to provide a list of their concerns about the IEP to DCPS.[348]

In another case, this may lead to a reduction in the reimbursement for the costs incurred in educating the Student during the 2009-2010 school year.[349] In this case, Petitioners went to

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[346] Once a child has been referred to an IEP team for an eligibility determination, the IEP team must conduct an "initial evaluation" which "shall consist of procedures (I) to determine whether a child is a child with a disability . . . within 60 days of receiving parental consent for the evaluation, or, if the State establishes a timeframe within which the evaluation must be conducted, within such timeframe; and (II) to determine the educational needs of such child." 20 U.S.C. § 1414(a)(1)(C)(i). In the District of Columbia, DCPS shall evaluate a child suspected of having a disability within 120 days from the date the student was referred for an evaluation. D.C. Code § 38-2561.02

[347] 20 USC § 1412(a)(10)(C)(iii); *Forest Grove Sch. Dist. v. T.A.*, 577 U.S. ____ (2009).

[348] The testimony and evidence introduced at the due process hearing did not provide any indication that Petitioners explained their concerns about the IEP at any of the meetings that occurred after Petitioners received a copy of the draft IEP.

[349] The cost of reimbursement may be reduced or denied if at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to

extraordinary lengths to cooperate with DCPS and thus should not be penalized for ensuring the Student is provided a FAPE.

ORDER

Upon consideration of Petitioners' request for a due process hearing, the exhibits and the testimony admitted at the hearing, it is this 15th day of June 2010 hereby:

ORDERED that the Student shall attend the non-public school at DCPS expense for the 2010-2011 school year;

IT IS FURTHER ORDERED that DCPS shall reimburse Petitioners for all tuition, related services, and other costs related to the Student's attendance at the Non-Public School during the 2009-2010 school year;

IT IS FURTHER ORDERED that Petitioners' request for reimbursement for tuition, related services, and other costs related to the Student's attendance at the Non-Public School during the 2008-2009 school year is **DENIED**; and

IT IS FURTHER ORDERED that this Order is effective immediately.

By: /s/ *Frances Raskin*
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).

Distributed to:

Matthew Bogin, counsel for Petitioners
Daniel McCall, counsel for Respondent
Hearing Office

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provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or ten business days prior to the removal of the child from the public school, the parents did not give written notice to the public agency of this information. 20 USC § 1412(a)(10)(C)(iii).

dueprocess@dc.gov

APPENDIX A

Emily Hensley v. District of Columbia Public Schools
Docket No. 2010-0257

Student	Emily Hensley
Date of Birth	October 25, 1993
Student ID No.	9254728
Petitioners (specific relationship)	Nancy and Jon Hensley, parents
Petitioners' Educational Advocate	Michelle Davis
Non-Public School	The Lab School of Washington
Non-Public School Speech Language Pathologist	Kathryn Riverso
Non-Public School Social Worker	Shannon Fine
Non-Public School Occupational Therapist	Christine Chang*
Non-Public School Academic Director	Karen Duncan*
Non-Public School High-School Coordinator	Lisa McMahon
DCPS Special Education Coordinator 1	Tamara Clemmons
DCPS Special Education Coordinator 2	Mary Phillips
DCPS Speech-Language Pathologist	Denyese Thomas
DCPS School Psychologist	Toni Atkins-Williams

* This witness did not testify at the due process hearing. The other witnesses listed in the table testified at the hearing with the exception of the Student.

DCSHO: Re: Emily Hensley, Case # 2010-0257 From <Frances.Raskin@dc.gov>

admin@dcsho.i-sight.com [admin@dcsho.i-sight.com]

RECEIVED
JUN 16 2010

Sent: Wednesday, June 16, 2010 12:04 AM

To: McCall, Daniel (DCPS-OGC); Matthew.Bogin@boginlaw.com

Cc: Student Hearing Office (OSSE); Due, Process (OCTO)

Attachments: EH HOD.pdf (311 KB)

** NOTE: Please do not modify subject line when replying **
** This email was sent by Frances Raskin <mailto: Frances.Raskin@dc.gov> **

Dear counsel,
I just realized that the HOD had an incorrect case number on the first page and appendix. A corrected version is attached.
Sincerely,
Frances Raskin
Special Education Hearing Officer
Mobile: (202) 330-1742
Office: (202) 506-7801