

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office
Frances Raskin, Due Process Hearing Officer
1150 – 5th Street, S.E.; Room 3
Washington, D.C. 20003
(202) 698-3819
Facsimile: (202) 698-3825

Confidential

STUDENT, through the legal guardian¹)
)
Petitioner,)
)
v.)
)
THE DISTRICT OF COLUMBIA)
PUBLIC SCHOOLS,)
)
Respondent.)
)

Hearing Dates: September 9, 2009,
September 16, 2009

OSSE
STUDENT HEARING OFFICE
2009 SEP 28 PM 12:14

HEARING OFFICER DETERMINATION

Counsel for Petitioner:

Sarah Tomkins, Attorney at Law
Law Office of Donna L. Wulkan
1020 16th Street, NW, Ste. 602
Washington, DC 20036
(202) 682-3909; Fax: (202) 955-1015

Counsel for DCPS:

Kendra Berner, Attorney at Law
Office of the Attorney General
825 North Capitol Street, N.E.; 9th Floor
Washington, D.C. 20002
(202) 442-5000; Fax: (202) 442-5097

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 a _____-year-old, special education student ("Student") at a District of Columbia Public Schools ("DCPS") senior high school. Both Petitioner and the Student are residents of the District of Columbia.

On July 22, 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. Timely and comprehensively evaluate the Student upon the recommendation of his special education teacher and the request of Petitioner;
- B. Identify and address areas of the Student's disabilities;
- C. Provide the Student an appropriate individualized education program ("IEP") for the 2007-2008 and 2008-2009 school years and develop an IEP for the 2009-2010 school year; and
- D. Provide the Student an appropriate educational placement;² and ensure the Student makes adequate educational progress.

The remedies Petitioner seeks include a finding by this Hearing Officer that the Student is multiply disabled with mental retardation, learning disability, and other health impairment (Attention Deficit Hyperactivity Disorder). Petitioner seeks and order from this Hearing Officer requiring DCPS to fund independent speech-language and vocational assessments and to reimburse Petitioner for an independent educational evaluation she obtained at her own expense in June 2009. Petitioner further seeks an order from this Hearing Officer that (a) places the Student in a non-public, full-time, special education setting at DCPS expense; and (b) provides the Student compensatory education at DCPS expense.

² The Complaint alleges that DCPS failed to provide the Student an appropriate placement because it failed to develop an IEP for the Student for the 2009-2010 school year (and thus did not specify a placement for the Student for the 2009-2010 school year), and the Student's expired 2008-2009 IEP provided only part-time, special education services and instruction at _____ High School, which was insufficient because the Student requires a full-time, out-of-general-education placement

On August 14, 2009, counsel for DCPS filed a Response to Parent's Administrative Due Process Complaint ("Response"). The Response was filed more than ten days late.³ The Response asserts that DCPS provided Petitioner authorization to obtain the requested evaluations independently at DCPS expense and that DCPS will revisit the Student's disability classification once the evaluations are completed, submitted to DCPS, and reviewed by a multidisciplinary team ("MDT"). The Response asserts that a DCPS IEP team developed a new IEP for the Student on March 9, 2009, and that Petitioner participated by phone. It asserts that DCPS will revisit the IEP after the evaluations are reviewed, and that DCPS has provided the Student 100 percent special education classes, although this is not reflected in the Student's IEP. Finally, the Response asserts that the DCPS placement is appropriate for the Student.

During the prehearing conference on August 13, 2009, counsel for Petitioner informed opposing counsel and this Hearing Officer that the Student's independent psycho-educational evaluation had been completed, his speech and language would be completed before the due process hearing, and that Petitioner expected that the Student's vocational evaluation will be completed by mid-September. Counsel for Petitioner also clarified that Petitioner seeks an order changing the Student's disability classification from learning disabled to multiply disabled as a result of his mental retardation and learning disability with a secondary classification of other health impaired as a result of his attention deficit, hyperactivity disorder, as indicated in the psycho-educational evaluation.

The due process hearing commenced on September 9, 2009. The parties' Five-Day Disclosures were admitted into evidence at the inception of the hearing.⁴

³ As stated above, Petitioner filed her Complaint on July 22, 2009. If DCPS has not sent a prior written notice under 34 C.F.R. § 300.503 to the parent regarding the subject matter contained in the parent's due process complaint, DCPS must, within 10 days of receiving the due process complaint, send to the parent a response that includes--

- (i) An explanation of why the agency proposed or refused to take the action raised in the due process complaint;
- (ii) A description of other options that the IEP Team considered and the reasons why those options were rejected;
- (iii) A description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and
- (iv) A description of the other factors that are relevant to the agency's proposed or refused action.

34 C.F.R. 300.508(e).

⁴ Petitioner's Exhibits 3,4, and 5 were excluded from evidence at the due process hearing after this Hearing Officer ruled that they were not relevant to the instant case. These exhibits were requests for educational records from the Student's two elementary schools and his junior high school. These record requests were not designed to produce evidence relevant to the Student's current claims, all of which arose from alleged DCPS actions or omissions while the Student was in high school.

III. RECORD

Due Process Complaint Notice, filed July 22, 2009;
DCPS Response to Petitioner's Due Process Complaint, filed August 14, 2009;
Petitioner Letter Motion for Continuance, filed August 17, 2009;
Prehearing Order, issued September 8, 2009;
Continuance Order, issued September 10, 2009;
Petitioner's Five-Day Disclosure Statement, filed April 1, 2009 (Exhibits 1-21 attached);
DCPS Five-Day Disclosure Statement, listing six witnesses and including thirty-three proposed exhibits, filed September 1, 2009;
DCPS Five-Day Disclosure; listing eight witnesses and including three proposed exhibits, filed September 2, 2009;⁵ and
Revised Prehearing Conference Order, issued September 16, 2009.⁶

IV. ISSUES PRESENTED

Petitioner's claim regarding the IEP developed on April 23, 2007, is beyond the statute of limitations. As a result, this Hearing Officer is time barred from considering it.⁷

This Hearing Officer interprets Petitioner's remaining claims as essentially:

- A. Whether DCPS failed to timely and comprehensively evaluate the Student upon the recommendation of his special education teacher and Petitioner's request;
- B. Whether DCPS failed to provide the Student an appropriate individualized education program ("IEP) for the 2008-2009 and 2009-2010 school years;⁸ and
- C. Whether DCPS failed to provide the Student an appropriate educational placement.⁹

V. FINDINGS OF FACT

1. The Student is a _____ year-old, _____ -grade, special-education student who

⁵ Counsel for Petitioner received these disclosures at 7:00 p.m. on September 1, 2009. Counsel for Petitioner asserted that she was not prejudiced by DCPS counsel's late filing.

⁶ This Hearing Officer revised the prehearing order at Petitioner's request.

⁷ The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint. 34 C.F.R. § 300.507.

⁸ Petitioner's claims that DCPS failed to identify and address areas of the Student's disabilities is subsumed into the issue of whether DCPS failed to develop appropriate IEPs for the Student.

⁹ Petitioner's claim that DCPS failed to ensure the Student makes adequate educational progress is subsumed into the question of whether DCPS failed to provide the Student an appropriate educational placement.

attends a District of Columbia middle school.¹⁰ As a child, the Student did not learn on the same pace as his siblings, which Petitioner first noticed when the Student was three years old.¹¹ At age three, the Student could not identify colors and shapes.¹² Petitioner was evaluated while in preschool, and the evaluation showed that he had borderline intelligence.¹³ The Student did not progress in preschool, and by second grade he still could not identify colors and did not know the alphabet.¹⁴

2. DCPS conducted a psycho-educational reevaluation of the Student on March 27, 2006.¹⁵ At the time, the Student was twelve years old and in the seventh grade.¹⁶ The reevaluation included the Kaufman Brief Intelligence Test (K-BIT) and the Kaufman Test of Educational Achievement (K-TEA).¹⁷ The K-BIT is essentially just a screening measure generally used for normally functioning people to confirm there has not been a significant change in IQ.¹⁸

3. The K-BIT indicated that the Student's composite IQ was 102, which placed him in the sixty-third percentile or average range.¹⁹ This score was widely discrepant from his testing and the evaluation provided no indication of how his intellectual functioning spiked to an average range in just two years from his past evaluation.²⁰ The Student's spike in IQ score alone should have prompted the evaluator to immediately follow up with more comprehensive testing.

4. On the K-TEA, the Student obtained a composite grade equivalent score of 2.7 that was commensurate with an age equivalent of eight years.²¹ His performance on individual subtests showed that he was beginning third grade skills in math (3.1). His reading and reading comprehension level was at grade level 2.8.²² His spelling level was at grade level 1.8.²³

5. The Student's K-TEA scores were in the deficient to borderline ranges.²⁴ Despite these low scores placing the Student four to five years behind his same-age, typically developing peers, the DCPS evaluator found that "his performance . . . would not support mental retardation.

¹⁰ Testimony of Petitioner.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Petitioner Exhibit 20.

¹⁶ *Id.*

¹⁷ *Id.* The K-BIT is an intelligence instrument designed to measure verbal and non-verbal intelligence. *Id.* The K-TEA is designed to examine mastery of academic skills in mathematics, reading and reading comprehension, and spelling. *Id.*

¹⁸ Testimony of Psychologist.

¹⁹ *Id.*; see Petitioner Exhibit 23 (summarizing 2006 re-evaluation).

²⁰ Testimony of Psychologist.

²¹ Petitioner Exhibit 20. The number 2.7 connotes second grade, seventh month. Testimony of psychologist.

²² *Id.*

²³ *Id.*

²⁴ Petitioner Exhibit 23.

The basis of his continued low academic performance is unsubstantiated.”²⁵

6. The Student’s April 2006 IEP identified his disability classification as learning disabled (“LD”).²⁶ Petitioner attended the meeting at which this IEP was developed by a DCPS IEP team.²⁷ The IEP team classified the Student at learning disabled despite that they knew his classification should be mental retardation (“MR”) because the team did not want the MR label to follow the Student for the rest of his life.²⁸

7. Petitioner prevailed on the Student’s former school to retain him in eighth grade.²⁹ The Student was unable to complete his assignments and did not learn anything in school.³⁰

8. DCPS conducted an educational evaluation of the Student on June 3, 2008.³¹ The evaluation included a Woodcock-Johnson III test of achievement.³² The Student’s performance on the Woodcock-Johnson showed his scores in broad reading to be at a grade equivalent of 2.4; broad math at 2.8; and broad written language at grade equivalent of 1.8. The Student’s basic reading skills were at grade equivalent 2.3, reading comprehension 1.7, math calculation skills 3.0, math reasoning 2.3, and written expression at grade equivalent 2.0. The Student’s passage comprehension was at grade equivalent 1.4, spelling at 1.5, and reading vocabulary at 2.0.³³ These scores show that the Student had not progressed academically since 2006, and has regressed in some areas.

9. A DCPS MDT/IEP team at the Student’s middle school developed the Student’s June 13, 2008, IEP without the involvement of Petitioner.³⁴ Petitioner was in the hospital for lung surgery at the time of the meeting at which the team developed the Student’s IEP.³⁵

10. The Student’s June 13, 2008, IEP identifies the Student as LD.³⁶ The IEP provided that the Student was to receive fifteen hours of specialized instruction and one hour of speech-language therapy each week.³⁷ Fifteen hours of specialized instruction was insufficient to meet the Student’s needs.³⁸

11. The June 2008 IEP identified the Student’s placement as combination general

²⁵ Petitioner Exhibit 20.

²⁶ Petitioner Exhibit 11.

²⁷ *Id.*; Testimony of Petitioner.

²⁸ Testimony of Petitioner.

²⁹ *Id.*

³⁰ *Id.*

³¹ Petitioner Exhibit 22.

³² *Id.*

³³ *Id.*

³⁴ Testimony of Petitioner; Petitioner Exhibit 17 (June 13, 2008, IEP) (stating “parent unable to attend due to hospitalization.”)

³⁵ *Id.*

³⁶ Petitioner Exhibit 17.

³⁷ *Id.* at 1.

³⁸ Testimony of Psychologist.

education and resource class and stated that the Student participated in non-academic subjects with non-disabled peers.³⁹ This was an inappropriate setting for the Student because his cognitive abilities were too limited for him to perform in a combination setting.⁴⁰

12. Despite his first-grade, seven month, equivalent score in reading comprehension, the Student's IEP required him to "recall main idea, setting, sequence of events in a reading selection to improve reading comprehension with 80 percent accuracy."⁴¹ Despite his performance at a second-grade equivalent in written expression, the short-term objectives on the Student's IEP required him to compose short paragraphs and essays in written format with 80 percent accuracy.⁴²

13. Despite his 2.3 grade equivalent score in math reasoning, the short-term objectives on the Student's IEP required him to solve problems using graphs with 80 percent accuracy.⁴³ Despite the Student's first grade, seven month, equivalent score in reading comprehension and 2.3 grade score in math reasoning, the short-term objectives required him to "solve word problems that requires (sic) 1 step to solve (add, subtract, multiply, and divide) with 80 percent accuracy."⁴⁴

14. The Student's cognitive ability was too limited for the goals and objectives on the June 2008 IEP to be appropriate.⁴⁵ They are designed for a student with a specific learning disability.⁴⁶ Additionally, the IEP contains no present levels of performance.⁴⁷

15. The June 2008 IEP indicates that the Student will take an alternate assessment, labeled "Portfolio." Yet the IEP lacks the requisite statement of why the child cannot participate in the regular assessment and why the particular alternate assessment selected is appropriate for the child.⁴⁸

16. The June 13, 2008, MDT notes include a statement by the Student's physical education and health teacher that the Student was "highly ineffective; very poor academically, and failed the course."⁴⁹ The teacher also stated that the Student was "very limited!!!"⁵⁰

17. The Student's special education teacher reported that the Student's testing scores ranged from upper first grade to lower- and mid-second grade.⁵¹ This teacher also stated that the

³⁹ Stipulation by DCPS counsel; Petitioner Exhibit 17 at 5.

⁴⁰ Testimony of Psychologist.

⁴¹ *Id.* at 3.

⁴² *Id.*

⁴³ *Id.* at 6

⁴⁴ *Id.*

⁴⁵ Testimony of Psychologist.

⁴⁶ *Id.*

⁴⁷ *Id.*; Petitioner Exhibit 17.

⁴⁸ See 34 C.F.R. § 300.320 (a) (6).

⁴⁹ Petitioner Exhibit 18.

⁵⁰ *Id.*

⁵¹ *Id.*

Student's "demeanor in class is complacent and he tends to lack the drive to start and finish activities and even one on one work is slow."⁵² Another of the Student's special education teachers added a separate note stating that "[d]ue to his low functioning with his schoolwork I think it may be helpful to [the Student] if he received more testing to see if he requires more assistance in the classroom."⁵³

18. The Student enrolled in a DCPS senior high school in August 2009.⁵⁴ At this school, the other students teased the Student and called him names, including "retarded."⁵⁵ They assaulted and robbed the Student, took his money, his lunch, and his shoes.⁵⁶ Petitioner informed the Student's teachers of the abuse the Student endured at the hands of his peers but the name-calling persisted.⁵⁷

19. DCPS developed the Student's IEP dated March 9, 2009, on June 15, 2009, without the participation of Petitioner.⁵⁸ Petitioner received no prior notice of the June 15, 2009, meeting at which the IEP was developed.⁵⁹ Petitioner was at work at the time of the meeting.⁶⁰ The Student's teacher contacted Petitioner at work and informed Petitioner that the meeting would proceed by conference call.⁶¹ Petitioner informed the Student's teacher that she was unable to participate by telephone and did want to conduct the IEP meeting by phone.⁶²

20. The June 15, 2009, IEP indicated that Petitioner attended the meeting held by conference call.⁶³ Petitioner did not sign the IEP, either to indicate she attended or that she approved of the IEP.⁶⁴

21. The June 15, 2009, IEP specifies that the Student is to receive fifteen hours of specialized instruction and sixty minutes of speech therapy each week.⁶⁵ It includes no short-term objectives or baseline information for math, reading, and written expression.⁶⁶ The student's post-secondary education and training annual goal on the IEP was for the Student to "be able to complete job applications and write resumes." It identified his employment annual goal as being "able to attend career fairs, and writing job application and resume workshops."

⁵² *Id.*

⁵³ Petitioner Exhibit 18.

⁵⁴ Testimony of Petitioner.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Testimony of Petitioner. Although this IEP is dated March 9, 2009, the meeting actually occurred by conference call on June 15, 2009. *See* DCPS Exhibit 1.

⁵⁹ Testimony of Petitioner.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ DCPS Exhibit 1.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

22. The June 2009 IEP indicated that the Student would receive a high school certificate in 2012.⁶⁷ It also indicated that the Student would be able to take the DC-CAS, i.e., he would be tested with non-disabled peers.⁶⁸

23. The June 2009 IEP lacked a brief statement describing the Student's needs that require removal from the general education environment.⁶⁹ Rather, it includes a typewritten note under the heading "General" that indicates the Student is placed in the general education setting.⁷⁰ The Student's accommodations include peer/individual tutoring; small group work; praise for effort; define appropriate behavior; daily schedule period; computers; and calculators.⁷¹

24. Petitioner's Educational Advocate recently visited the Student's school.⁷² The Special Education Coordinator ("SEC") printed out the Student's schedule for the Advocate.⁷³ The schedule indicated that the Student should be in mainstream classes, possibly with an aide.⁷⁴ The Student's IEP indicates that his goals are on grade level.⁷⁵ This setting is inappropriate for a student with the Student's level of cognitive functioning and he cannot possibly do the work indicated on his IEP.⁷⁶

25. The SEC informed the Advocate that the Student does not attend class regularly and often roams the halls.⁷⁷ Petitioner often receives calls from the Student's school that state he missed class.⁷⁸

26. The Student was not in his scheduled class; he was in the special education classroom for students with mental retardation.⁷⁹ The special education teacher informed the advocate that the Student was in general education classes for the first half of the 2008-2009 school year but this was not appropriate for the Student so he was placed in a special education class.⁸⁰ The special education teacher cannot state whether the Student is MR.⁸¹

27. The SEC also informed the Advocate that the Student was not LD but emotionally

⁶⁷ *Id.*

⁶⁸ Petitioner Exhibit 19 at 4; *see* Petitioner Exhibit 17 at 5 for description of DC-CAS.

⁶⁹ Petitioner Exhibit 19.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Testimony of Advocate.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*; Testimony of Petitioner.

⁷⁷ Testimony of Advocate.

⁷⁸ Testimony of Petitioner.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Testimony of special education teacher.

disturbed.⁸²

28. On August 13, 2009, DCPS provided Petitioner authorization to obtain an independent speech-language evaluation and a vocational assessment at DCPS expense.⁸³ DCPS also offered to reimburse Petitioner for the June 25, 2009, psycho-educational evaluation conducted by the Psychologist.⁸⁴

29. The July 3, 2009, report on the Student's June 25, 2009, psychological/psycho-educational evaluation included a Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV).⁸⁵ On the WISC-IV, the Student obtained a full scale IQ of 52, placing him below 99 percent of his peers (first percentile) in the deficient range of functioning.⁸⁶ The Student's verbal comprehension index is 71, his working memory index 65, and processing speed index 62.⁸⁷ The Student's lowest score on the WISC-IV was his score of 47 on the perceptual reasoning index.⁸⁸ This last score deflated the Student's full scale IQ disproportionately and his true full scale IQ rests closer to the mid-sixties.⁸⁹

30. This cognitive profile has profound impact on the Student's functioning in school.⁹⁰ Because the Student has tremendous deficits in every cognitive function, all of his other functions such as executive functioning, planning, taking notes, and processing speed, also are limited.⁹¹

31. The Student also has deficiencies in attention and executive functioning.⁹² He struggles greatly with taking one piece of information and attaching it to another piece of information.⁹³ His ability to hold more than one piece of information in his memory and utilize that information is very limited.⁹⁴ His ability to plan and organize also is limited.⁹⁵ The Student would have great difficulty completing a task that has more than one step in the directions, which hampers his ability to process classroom instruction.⁹⁶

32. The Student's visual-motor integration is an area of particular weakness.⁹⁷ On the Bender Gestalt, a task that required him to produce an increasingly difficult series of geometric

⁸² Testimony of Advocate.

⁸³ DCPS Exhibit 2.

⁸⁴ *Id.*

⁸⁵ Petitioner Exhibit 23.

⁸⁶ *Id.*; Testimony of Psychologist.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Testimony of Psychologist.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

designs, the Student earned a standard score of 60, in the borderline range and equivalent performance of a child who is seven years and nine months old.⁹⁸ His hand-eye coordination is limited in all areas, i.e., taking in information, processing the information, and then providing output.⁹⁹ This deficiency affects the Student's ability to copy letters and words and is exhibited in his great difficulty in executing these tasks.¹⁰⁰

33. The Student's IQ dropped fifty points from his last evaluation, which was a screening test performed by DCPS in 2006.¹⁰¹ Such a significant drop in IQ does not occur unless a person experiences a head trauma or severe brain disease such as encephalitis.¹⁰² Thus, it is likely that the DCPS evaluator made a mistake administering or scoring the 2006 screening test.¹⁰³ The Student's disability classification should have been MR on his 2006 IEP and on every IEP since then.¹⁰⁴

34. DCPS does not dispute that the Student's disability classification should be MR.¹⁰⁵ Nevertheless, the Student is not currently assigned to the DCPS MR Cluster at The Student was in an MR class for the first week of the 2009-2010 school year, but had not been in that class for two weeks at the time of the due process hearing.¹⁰⁷ Currently, the Student is in mainstream classes and belongs in the MR program.¹⁰⁸ He should receive full-time specialized instruction and related services to address his cognitive and academic deficits as well as his developing emotional issues.¹⁰⁹

35. The Student is performing on a grade equivalent of 2.6 in broad math, 3.4 in math calculation, 2.5 in broad reading, and grade equivalent of 2.0 in basic reading skills.¹¹⁰ He is performing at a grade equivalent of 1.9 in broad written language and 2.5 in written expression.¹¹¹ The Student's total achievement score is a grade equivalent of 2.4.¹¹² The total achievement score indicates that, overall, the student regressed by three months of achievement since the 2006 evaluation.¹¹³

36. The results of the Student's personality testing are suggestive of his feeling mildly

⁹⁸ Petitioner Exhibit 23.

⁹⁹ Testimony of Psychologist.

¹⁰⁰ *Id.*

¹⁰¹ Petitioner Exhibit 23; Testimony of Psychologist.

¹⁰² Testimony of Psychologist.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Stipulation by DCPS counsel during its opening argument at due process hearing.

¹⁰⁶ Testimony of DCPS Special Education Teacher, Educational Advocate.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Stipulation by DCPS counsel.

¹¹⁰ Petitioner Exhibit 23.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

depressed and having difficulty communicating his feelings.¹¹⁴ Despite having some limited insight into these, testing suggests that William's self-perception is negative when he compares himself with others.¹¹⁵ He also manifests low self-esteem and significant feelings of insecurity and inadequacy in dealing with problems.¹¹⁶ His view of himself, his goals, and his place in the world are all pessimistic and he feels helpless to change his circumstances.¹¹⁷

37. The Student's IEP should reflect that his disabilities are (a) mild mental retardation; (b) attention deficit hyperactivity disorder ("ADHD"), predominantly inattentive type; (c) mixed receptive-expressive language disorder; and (d) learning disorder not otherwise specified.¹¹⁸ The Student requires a full-time, psycho-educational, day-school setting that focuses on student with mild mental retardation.¹¹⁹ He should be in a small class with no more than four students, a low student-teacher ratio, and individualized instruction.¹²⁰ The Student also needs a dedicated aide to assist him in focusing and absorbing information.¹²¹ The Student also requires weekly counseling to address his emotional difficulties related to his social problems and his emotional fragility.¹²² The Student should continue speech-language therapy to address his expressive-receptive language disorder.¹²³ The Student also requires occupational therapy to address his visual-motor integration problems.¹²⁴

38. From 2006 to the present, DCPS failed to reflect the Student's proper disability classification of multiply disabled ("MD").¹²⁵ DCPS failed to provide the Student appropriate special education services, and thereby robbed him of any opportunity to make social and academic gains.¹²⁶ In 2005 or 2006, around the time DCPS developed IEPs for the Student with an LD classification, the Student's cognitive and academic deficiencies began to stagnate.¹²⁷ To address the Student's failure to progress and regression, the Student requires additional instruction in reading and writing.¹²⁸ The Student is currently limited to recognizing letters and very simplistic words and putting them together in simple sentences.¹²⁹

39. The Student's verbal scores show that he could make significant progress but his

¹¹⁴ Petitioner Exhibit 23.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*; testimony of Psychologist.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*; see also, Petitioner Exhibit 24 (undated speech-language evaluation) (finding that the Student's expressive language and receptive language skills are below age and adjusted cognitive expectations and that he presents with a mild to moderate articulation disorder).

¹²⁴ Testimony of Psychologist.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

ability to read and write phonetically is currently non-existent.¹³⁰ Had DCPS provided the Student an appropriate education since the IEP was developed in 2006, he would have been functioning three to four grade levels below his current grade.¹³¹ Instead, due to mistakes and neglect by DCPS, the Student is currently functioning seven to eight grade levels below his current grade.¹³²

40. The Student requires a Linda Mood Bell program so that he can develop the skills he would have developed had he been provided an appropriate IEP and educational placement over the last two years.¹³³ This program would enable the Student to make the gains in reading and math that he was unable to make due to the failure of DCPS to provide the Student the specialized instruction and related services he required.¹³⁴

41. The non-public school proposed by Petitioner is a full-day, therapeutic, special education school that serves students with autism, mental retardation, and emotional disturbance.¹³⁵ The school is licensed by DCPS.¹³⁶ It is a twelve-month program that provides related services, including in-house counseling, occupational therapy, and speech and language services.¹³⁷

42. All classes at this school currently have no more than six students, and are taught by certified special education teachers.¹³⁸ The school provides IEP aides, as needed.¹³⁹ Eighty percent of the Student's classes would be academic and twenty percent would be vocational, with related services factored in. The Student would be on a certificate track.¹⁴⁰

43. Mental retardation is one of the primary handicaps of the students at the non-public school.¹⁴¹ Many of the students have secondary conditions such as speech-language impairment and ADHD.¹⁴² Several students have the same profile as the Student.

44. The Student would receive individualized programming and individual support at the non-public school.¹⁴³ In addition to several vocational programs that align with the Student's interests and capabilities, such as culinary arts, and horticulture, the school has an independent living program that would help the Student develop life skills, functional skills, and vocational

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Testimony of Psychologist.

¹³⁴ *Id.*

¹³⁵ Testimony of non-public school Executive Director.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

skills.¹⁴⁴ Thus, the non-public school would be an appropriate educational setting for the Student.

VI. CREDIBILITY DETERMINATIONS

The testimony of all the witnesses at the hearing was credible. DCPS presented no testimony that contradicted the testimony of Petitioner's witnesses. The sole DCPS witness, the Special Education Teacher testified consistently with Petitioner's witnesses, and thus DCPS presented no testimony to counter Petitioner's evidence at the hearing.

VII. CONCLUSIONS OF LAW

The burden of proof is properly placed upon the party seeking relief.¹⁴⁵ Under IDEA, a Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.¹⁴⁶

IDEA guarantees children with disabilities the right to a free and appropriate public education with services designed to meet their individual needs.¹⁴⁷ 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)...¹⁴⁸

Special education is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability."¹⁴⁹ 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."¹⁵⁰

¹⁴⁴ *Id.* The Student currently lacks basic self-help skills and does not know how to use the telephone and appears not to know how to use a stove. Testimony of High School Director. The Student did not even know how to make a sandwich. *Id.*

¹⁴⁵ *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

¹⁴⁶ 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).

¹⁴⁷ 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(1).

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

¹⁴⁹ 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, 30 DCMR Sec. § 3001.1.

¹⁵⁰ *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89 (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.”¹⁵¹ In deciding whether DCPS provided the Student a FAPE, the inquiry is limited to (a) whether DCPS complied with the procedures set forth in IDEIA; and (b) whether the Student’s IEP reasonably calculated to enable the Student to receive educational benefits.¹⁵²

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.¹⁵³ In other words, an IDEA claim is viable only if those procedural violations affected the student’s *substantive* rights.¹⁵⁴

Once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals.¹⁵⁵ The court should not “disturb an IEP simply because [it] disagree[s] with its content.”¹⁵⁶ 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.”¹⁵⁷

VIII. DISCUSSION

A. Petitioner Proved that DCPS Failed to Timely and Comprehensively Evaluate the Student But Already Obtained the Relief She Was Seeking.

A public agency must ensure that a reevaluation of each child with a disability is conducted if the child’s parent or teacher requests a reevaluation.¹⁵⁸ Re-evaluations should be conducted in a “reasonable period of time,” or “without undue delay,” as determined in each individual case.¹⁵⁹ The parent of a child with a disability has the right to obtain an independent

¹⁵¹ 34 C.F.R. § 300.101.

¹⁵² *Rowley* at 206-207.

¹⁵³ 20 U.S.C. § 1415 (f)(3)(E)(ii).

¹⁵⁴ *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted). *Accord, Krivant 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”).

¹⁵⁵ *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990) (internal citation and quotations omitted).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ 34 C.F.R. § 300.303 (a)(2).

¹⁵⁹ *Herbin v. District of Columbia*, 362 F. Supp. 2d 254, 259 (D.D.C. 2005) (upholding hearing officer’s determination that four-month delay in reevaluating a student with a current IEP was not unreasonable) (citations omitted).

educational evaluation (“IEE”) at public expense if the parent disagrees with the evaluation obtained by the public agency.¹⁶⁰

Here, on June 13, 2008, the Student’s teacher recommended that DCPS re-evaluate the Student to ascertain whether he requires more assistance in the classroom.¹⁶¹ DCPS conducted no further testing. More than one year later, on June 19, 2009, Petitioner requested in writing that DCPS fund an independent comprehensive psychological and psycho-educational evaluation for the Student.¹⁶² On August 13, 2009, DCPS authorized Petitioner to obtain an independent speech-language evaluation and a vocational assessment at DCPS expense.¹⁶³ DCPS further offered to reimburse Petitioner for the expense of the comprehensive psychological and psycho-educational evaluation conducted by the Psychologist.

Thus, Petitioner obtained the relief requested for the failure by DCPS to timely and comprehensively evaluate the Student.

B. DCPS Failed to Develop Appropriate IEPs for the Student for the 2008-2009 and 2009-2010 School Years.

Petitioner proved by a preponderance of the evidence that DCPS failed to develop appropriate IEPs for the Student for the 2008-2009 and 2009-2010 school years. The defects in the Student’s IEPs are so numerous as to render these IEPs utterly inappropriate. First, DCPS failed to show that it made any reasonable efforts to include Petitioner in the development of these IEPs. Second, as discussed below, these IEPs are not specially designed to meet the unique needs of the Student or reasonably calculated to provide the Student meaningful educational benefits.

The adequacy of the student’s IEP is determined by whether the student has “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.”¹⁶⁴ IDEIA does not require that the services provided maximize each child’s potential.¹⁶⁵

In developing an IEP, the IEP team must consider the strengths of the child; concerns of the parents for enhancing the education of the child; the results of the initial or most recent evaluation of the child; and the academic, developmental, and functional needs of the child.¹⁶⁶ 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.¹⁶⁷

¹⁶⁰ 34 C.F.R. § 300.502 (b)(1).

¹⁶¹ Petitioner Exhibit 18.

¹⁶² Petitioner Exhibit 7.

¹⁶³ DCPS Exhibit 2.

¹⁶⁴ *Rowley*, 458 U.S. at 201 (1982).

¹⁶⁵ *Id.* at 198.

¹⁶⁶ 34 C.F.R. § 300.324 (a).

¹⁶⁷ 34 C.F.R. § 300.320 (a) (1); 5 D.C.M.R. § 3007.2 (a).

An IEP also must include a statement of measurable annual goals.¹⁶⁸ For children with disabilities who take alternate assessments aligned to alternate academic achievement standards, the IEP must contain a description of benchmarks or short-term objectives.¹⁶⁹ If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or district-wide assessment of student achievement, the IEP must include a statement of why the child cannot participate in the regular assessment and why the particular alternate assessment selected is appropriate for the child.¹⁷⁰

IDEA also guarantees parents of disabled children the opportunity to participate in the evaluation and placement process.¹⁷¹ One of the policies underlying the need for an accurate written IEP is “to serve a parent’s interest in receiving full appraisal of the educational plan for her child, allowing a parent both to monitor her child’s progress and determine if any change to the program is necessary.”¹⁷²

Thus, DCPS 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.¹⁷³ 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”).¹⁷⁴

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.¹⁷⁵ 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.¹⁷⁶

Here, DCPS developed the Student’s 2008 and 2009 IEPs without the parent’s participation. DCPS made no showing that it even attempted to provide the parent reasonable notice of the IEP meeting or made other reasonable efforts to include the parent in the development of the Student’s IEP. This impeded Petitioner’s right to participate in her child’s educational planning.

¹⁶⁸ 34 C.F.R. § 300.320 (a) (2) (i); 5 D.C.M.R. § 3007.2 (b) (annual goals must include short-term instructional objectives).

¹⁶⁹ 34 C.F.R. § 300.320 (2)(ii).

¹⁷⁰ 34 C.F.R. § 300.320 (a) (6).

¹⁷¹ 20 U.S.C. § 1414(f), 1415(b).

¹⁷² *Alfano et al. v. District of Columbia*, 442 F. Supp. 2d 1, 6 (D.D.C. 2006) (citation omitted).

¹⁷³ 34 C.F.R. § 300.501 (c)(1).

¹⁷⁴ See, e.g., *W.G. v. Board of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992).

¹⁷⁵ 34 C.F.R. § 300.501 (c)(3).

¹⁷⁶ 34 C.F.R. § 300.501 (c)(4).

Moreover, DCPS incorrectly identified the Student's disability on his 2008-2009 and 2009-2010 IEPs. This was a result of an incorrectly scored and/or administered screening test conducted by DCPS, which resulted in an artificially inflated IQ score. As a result, DCPS developed goals and objectives on the 2008-2009 IEP that were not specifically tailored to the Student's abilities. The goals on the 2009-2010 lack short-term objectives, despite that the Student should be taking an alternate assessment. These goals also are not specifically tailored to the Student's abilities.

DCPS failed to comply with the procedures set forth in IDEIA by failing to include Petitioner in the preparation of the Student's IEPs for the 2008-2009 and 2009-2010 school years. DCPS also failed to develop IEPs that were reasonably calculated to enable the Student to receive educational benefits. Thus, Petitioner established by a preponderance of the evidence that DCPS denied the Student a FAPE.

C. DCPS Denied the Student FAPE by Failing to Provide an Appropriate Educational Placement.

The IDEIA requires that unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.¹⁷⁷ In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of the services that he or she needs.¹⁷⁸ A child with a disability is not removed from education in age appropriate regular classrooms solely because of needed modifications in the general education curriculum.¹⁷⁹

Placement decisions must be made in conformity with the child's IEP.¹⁸⁰ Thus, the placement should not dictate the IEP but rather the IEP determines whether a placement is appropriate.¹⁸¹ 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.¹⁸²

Here, DCPS arbitrarily changed the Student's disability classification from mental retardation to learning disabled, which affected the level of academic instruction and supports the

¹⁷⁷ 34 C.F.R. § 300.116 (c).

¹⁷⁸ 34 C.F.R. § 300.116 (d).

¹⁷⁹ Id. at (e).

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

¹⁸¹ See, *Rourke v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006).

¹⁸² D.C. Code § 38-2561.02.

Student received. The Student's psycho-educational evaluation shows that the Student has made absolutely no educational progress in three years.

The Student is currently in the general education setting. The Student's test scores show that his academic functioning is seven to eight years behind his grade, yet the IEP team placed the Student in a general education class. The Student on his own initiative attempted to return to the special education classroom, only to be transferred back to the general education setting. Considering that this Student is mostly performing on a second-grade level, a tenth-grade, general education classroom is an inappropriate learning environment for him.

DCPS admitted at the due process hearing that the Student's disability classification should be at least MR and that he should have a full-time IEP. Yet DCPS has taken no steps to ensure the Student is in a setting where he can access the academic instruction. Instead, DCPS made placement decisions without Petitioner's participation and without regard for the Student's cognitive functioning.

Petitioner proved by a preponderance of the evidence that the general education setting is inappropriate for the Student. Petitioner further proved that DCPS has failed to provide the Student the small, therapeutic, special education setting with intensive, individualized special education instruction that he requires. Thus, Petitioner proved that DCPS failed to comply with the procedures set forth in IDEIA by failing to include Petitioner in placement decisions for the 2008-2009 and 2009-2010 school years. Petitioner also proved that DCPS also failed to place the Student in educational settings were reasonably calculated to enable the Student to receive educational benefits.

Finally, Petitioner proved that the Student requires speech and language therapy to address his expressive language disorder, occupational therapy to address his visual integration disability, and counseling to address his low self-esteem and fragile emotional state. He needs a small student-teacher ratio and tutoring. Although DCPS provided the Student sixty minutes of weekly speech-language therapy, it failed to recognize the Student's needs for other related services and a structured learning environment with ample support.

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

D. The Student is Entitled to Compensatory Education.

Where a school system fails to provide special education or related services to a disabled student, the student is entitled to compensatory education, "i.e., replacement of educational services the child should have received in the first place." *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). An award of compensatory education "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA." *Reid*, 401 F.3d at 518.

"Because compensatory education is a remedy for past deficiencies in a student's

educational program,” a finding as to whether a student was denied a FAPE in the relevant time period is a “necessary prerequisite to a compensatory education award.” *Peak v. District of Columbia*, 526 F. Supp. 2d 32, 36 (D.D.C. 2007). Here, DCPS denied the Student a FAPE in failing to develop an appropriate IEP for the Student and failing to provide an appropriate educational placement.

This inquiry is only the first step in determining whether the Student is entitled to compensatory education. A compensatory education award is an equitable remedy that “should aim to place disabled children in the same position they would have occupied but for the school district’s violations of the IDEA.” *Reid*, 401 F.3d at 518, 523. A compensatory education “award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” *Reid*, 401 F.3d at 524. This standard “carries a qualitative rather than quantitative focus,” and must be applied with “[f]lexibility rather than rigidity.” *Id.* at 524.

Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. *Reid*, 401 F.3d at 524. Others may need extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE. *Id.* See also *Thomas v. District of Columbia*, 407 F.Supp.2d 102, 115 (D.D.C. 2005) (noting that it is conceivable that no compensatory education may be required for a denial of FAPE if, for example, the student would not benefit from the additional services).

Here, the Student’s disability classification was incorrect for at least the past three years; his IEP stated that he was learning disabled whereas he was actually MD, including MR and LD. As a result, DCPS failed to provide the Student an appropriate IEP, appropriate specialized instruction, and appropriate related services, which robbed him of opportunity to make social and academic gains. Over the past three years, ever since the Student’s IEPs identified him with an LD classification, the student regressed academically.

To address the Student’s lost educational opportunity, the Student requires additional instruction in reading and writing because he is currently limited to recognizing letters and very simplistic words and putting them together in simple sentences. The Student could make significant progress but his ability to read and write phonetically is currently non-existent. Had the Student received an appropriate education since his 2006 IEP was developed, he may have been functioning three to four levels below his current grade, rather than foundering at seven to eight levels below his current grade.

The Student requires a Linda Mood Bell program to develop the skills he would have developed had he been provided an appropriate IEP and educational placement during the last two years. This program would enable the Student to make the gains in reading and math that he was unable to make due to his lack of services over the past two plus years.

Therefore, Petitioner proved by a preponderance of the evidence that the Student is entitled to compensatory education.

ORDER

Upon consideration of Petitioner's requests for a due process hearing, the exhibits and the testimony admitted at the hearing, it is this 26th day of September 2009 hereby:

ORDERED that within 10 school days, DCPS shall convene the MDT to revise the Student's IEP to reflect a disability classification of multiply disabled due to his mild mental retardation; ADHD inattentive type; mixed receptive-expressive language disorder; and learning disorder not otherwise specified;

IT IS FURTHER ORDERED that DCPS shall revise the Student's IEP to reflect that he is to receive full-time specialized instruction in a small, therapeutic setting, as well as speech-language therapy, occupational therapy, and counseling;

IT IS FURTHER ORDERED that the Student shall attend the non-public school at DCPS expense for the 2009-2010 and 2010-2011 school years;

IT IS FURTHER ORDERED that DCPS shall provide the Student transportation services to and from the non-public school on school days;

IT IS FURTHER ORDERED that DCPS shall ensure that Petitioner and the Student are present at all future IEP/MDT meetings before proceeding with any meeting regarding the Student's IEP;

IT IS FURTHER ORDERED that DCPS shall fund Petitioner's compensatory education plan, to include one hour per week of individualized tutoring in basic mathematics through the Linda Mood Bell program through the 2009-2010 school year;

IT IS FURTHER ORDERED that DCPS shall and fund social skills therapy for the Student twice a week through the 2009-2010 school year; and

IT IS FURTHER ORDERED that this Order is effective immediately.

/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:

Sarah Tomkins, Attorney at Law
Kendra Berner, Attorney at Law
Hearing Office