

District of Columbia  
Office of the State Superintendent of Education  
Office of Review and Compliance  
Student Hearing Office  
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STUDENT HEARING OFFICE  
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**Confidential**

**STUDENT, through the legal guardians<sup>1</sup>** )  
 )  
 **Petitioner,** )  
 )  
 **v.** )  
 )  
 **THE DISTRICT OF COLUMBIA** )  
 **PUBLIC SCHOOLS,** )  
 )  
 **Respondent.** )  
 )

Hearing Dates:  
August 4, 2009,  
August 31, 2009,  
September 1, 2009

**HEARING OFFICER'S DECISION**

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<sup>1</sup> 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

The Student is a -year-old, special-education, -grade student ("Student") who attends a District of Columbia public senior high school. Both Petitioner and the Student reside in the District of Columbia.

On June 22, 2009, Petitioner filed an Administrative Due Process Complaint Notice ("Complaint") alleging that the District of Columbia Public Schools ("DCPS") failed to (1) develop an appropriate individualized educational program ("IEP") for the Student on June 10, 2009; (2) failed to provide the Student an appropriate compensatory education plan for the finding by a prior hearing officer that DCPS denied the Student a free, appropriate, public education ("FAPE") by failing to implement the Student's IEP,<sup>2</sup> (3) provide a suitable placement for the Student during the 2008-2009 school year; and (4) identify a suitable placement as ordered in a Hearing Officer Determination issued on April 27, 2009. Petitioner sought relief in the form of an order requiring DCPS to (1) amend the Student's IEP to require it to provide the Student twenty six hours of specialized instruction and correct the Student's disability classification to reflect his multiple disabilities; (2) provide the Student compensatory education services; and (3) fund the Student's placement at a non-public school and provide the Student transportation.

On July 10, 2009, counsel for DCPS filed a Response to Petitioner's Due Process Complaint ("Response"). The Response was eight days late. The Response summarily asserted that (1) the Student's IEP is reasonably calculated to provide him educational benefit and is based on the information in the Student's current evaluations and the reports from his teachers and parent; (2) DCPS proposed an appropriate compensatory education plan; and (3) an inclusion setting is the Student's least restrictive environment and his current school is able to implement his IEP. Thus, this Response failed to comply with the regulations implementing IDEA, specifically 34 C.F. R. § 300.508(e).<sup>3</sup>

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<sup>2</sup> This claim arose from a Hearing Officer Determination issued by another hearing officer on April 27, 2009. This Hearing Officer was assigned to this case on July 24, 2009, more than one month after Petitioner filed the instant Complaint.

<sup>3</sup> 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;**

The due process hearing convened on August 4, 2009. At the outset of the due process hearing on August 4, 2009, this Hearing Officer clarified the claims with both counsel and reviewed the previous hearing officer decision ("HOD") issued on April 27, 2009, and included in Petitioner's disclosures as Exhibit 31. The HOD found:

(1) Petitioner had no met her burden of proof on the claim that the Student's IEP was inappropriate because it failed to adequately address social-emotional concerns and/or does not provide the Student with the levels of service or setting that he requires;

(2) Petitioner met her burden of proof that DCPS failed to implement the Student's IEP because DCPS agreed at the due process hearing that the Student's placement<sup>4</sup> was not appropriate because it could not provide the Student all the pull-out instruction (15 hours per week) required by his IEP and the evidence demonstrated that DCPS had not provided the Student the fifteen hours of pull-out instruction required by his IEP; and

(3) Petitioner met her burden of proof that the Student's placement was inappropriate because DCPS admitted it was inappropriate and agreed that it constituted a denial of FAPE.<sup>5</sup>

Nonetheless, at the prior hearing, Petitioner did not seek an immediate alternate placement, but instead indicated her intention to work with DCPS in determining an alternate placement for the Student. Thus, the prior HOD ordered only that DCPS hold a meeting to review the Student's evaluations, which DCPS authorized on March 18, 2009, review and revise the Student's IEP, determine an appropriate placement, and issue a prior notice of placement for either a DCPS school or a non-public school.<sup>6</sup>

After reviewing the April 27, 2009, HOD with counsel, this Hearing Officer specified that the time period for the instant claims was from April 27, 2009, to the date the instant Complaint was filed. This Hearing Officer specified this time period because Petitioner had just litigated identical claims in the prior case, and these claims were decided in a hearing officer decision issued on April 27, 2009, with the exception of compensatory education.

Counsel for Petitioner represented that she would be presenting the evidence to support the compensatory education claim, including a compensatory education plan that complies with the requirements of *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005). This Hearing Officer also advised counsel for Petitioner that, in order for this Hearing Officer to place the Student in a full-time, out-of-general-education, non-public placement, counsel for Petitioner

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**(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) (emphasis added).

<sup>4</sup> This is the same placement, the DCPS senior-high school, at issue in this case.

<sup>5</sup> Petitioner Exhibit 31.

<sup>6</sup> See Petitioner Exhibit 31, page 7.

would have to prove that (1) the Student requires an IEP that provides the Student 27.5 hours of special education and related services and prove the required components of that IEP; (2) the Student's current placement continued to be inappropriate from April 27, 2009 to the date the Complaint was filed; (3) Petitioner's proposed placement would be appropriate for the Student and that this placement would be able to implement the Student's IEP as developed at the due process hearing; and (4) Petitioner's proposed placement is the least restrictive environment for the Student.

### **III. RECORD**

*Due Process Complaint Notice*, filed June 22, 2009;  
Notice of Prehearing Conference, issued on June 26, 2009;  
DCPS Response to Petitioner's Due Process Complaint, filed July 10, 2009;  
Petitioner's Five-Day Disclosures, listing eight witnesses and including 43 documents, filed on July 28, 2009; and  
DCPS Five-Day Disclosures, listing thirteen witnesses and including six documents, filed on July 28, 2009.

### **IV. ISSUES PRESENTED**

1. Whether DCPS denied the Student FAPE by failing to develop an appropriate IEP for the Student on June 10, 2009;
2. Whether DCPS denied the Student FAPE by failing to provide the Student an appropriate compensatory education plan to remedy the denial of FAPE found in the April 27, 2009, HOD as a result of the failure of DCPS to implement the Student's IEP;
3. Whether DCPS failed to provide the Student an appropriate placement from April 27, 2009, to the present; and
4. Whether DCPS failed to identify a suitable placement for the Student as ordered in a April 27, 2009, HOD.

### **V. FINDINGS OF FACT**

1. DCPS convened a meeting of the multidisciplinary team ("MDT") on June 10, 2009.<sup>7</sup> Petitioner was present at the June 10, 2009, MDT meeting.<sup>8</sup> The MDT reviewed the Student's evaluations and added speech-language therapy services and behavioral support services to the Student's IEP.<sup>9</sup>

2. The June 10, 2009, IEP requires DCPS to provide the Student 1.75 hours per week of specialized instruction in a general education setting, 2 hours per week of specialized instruction outside the general education setting, one hour per week of speech-language

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<sup>7</sup> Testimony of Petitioner.

<sup>8</sup> *Id.*; Petitioner Exhibit 6.

<sup>9</sup> Testimony of Petitioner, DCPS Special Education Coordinator.

pathology services and thirty minutes per week of behavioral support services.<sup>10</sup> The IEP identified the Student's primary disability as other health impairment ("OHI").<sup>11</sup>

3. The June 10, 2009, IEP includes a transition plan and indicates that the Student will be graduating with a diploma.<sup>12</sup> The Student is on a high-school sports team.<sup>13</sup>

4. At the June 10, 2009, meeting, the MDT issued a Prior Notice Letter that indicated that the Student was eligible for special education as OHI and expressive language disability.<sup>14</sup> The Prior Notice Letter did not provide a change in placement or setting for the Student, and thus he remained at his current school.<sup>15</sup> The MDT did not discuss compensatory education.<sup>16</sup>

5. The Student's February 6, 2009, IEP required DCPS to provide the Student 900 minutes (15 hours) per week of specialized instruction outside the general education setting.<sup>17</sup> The Student was projected to receive a high school diploma.<sup>18</sup> The team provided the Student fifteen hours of specialized instruction outside the general education setting based on a mistaken reading of the IEP developed at the Student's middle school.<sup>19</sup> The team mistakenly believed the IEP developed at the Student's middle school on November 6, 2007, required DCPS to provide him fifteen hours per week of specialized instruction.<sup>20</sup> The November 2007 IEP actually required the Student to receive fifteen hours per month of specialized instruction.<sup>21</sup> The November 2007 IEP specified that the Student was to receive 3.75 total hours per week of specialized instruction.<sup>22</sup>

6. The DCPS Placement Specialist attended the June 10, 2009, MDT meeting.<sup>23</sup> At the meeting, the Placement Specialist pointed out the MDT's error on the Student's February 6, 2009, IEP, and that the 2007 IEP actually required the Student to receive only 3.75 hours of specialized instruction.<sup>24</sup> After the MDT recognized its error in interpreting the November 2007

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<sup>10</sup> Petitioner Exhibit 5.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Testimony of Psychologist.

<sup>14</sup> Petitioner Exhibit 5.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Petitioner Exhibit 10.

<sup>18</sup> *Id.*

<sup>19</sup> Testimony of DCPS Placement Specialist.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*; Petitioner Exhibit 16, page 1.

<sup>22</sup> *Id.*

<sup>23</sup> Testimony of Placement Specialist.

<sup>24</sup> *Id.*; see Petitioner Exhibits 10, 16.

IEP, it developed the June 10, 2009, IEP to comport with the Student's November 2007 IEP.<sup>25</sup> The Student does not require fifteen hours of specialized instruction.<sup>26</sup>

7. At the June 10, 2009, DCPS proposed two DCPS high schools as alternate placements for the Student.<sup>27</sup> Petitioner rejected both placements.<sup>28</sup>

8. Since 2007, the Student's academic skills have improved dramatically, especially in math.<sup>29</sup> The Student has made significant progress since 2008 as well.<sup>30</sup> A public school placement is appropriate for the Student as long as he receives appropriate accommodations.<sup>31</sup> The Student needs a small classroom with no more than eight students and two teachers.<sup>32</sup> As long as the Student's current placement is able to address the Student's speech and language difficulties, behavioral problems, impulsivity and attention issues, and academic weaknesses, this placement would be appropriate for the Student.<sup>33</sup>

9. The Student does not require specialized instruction in math.<sup>34</sup> He would be able to progress to grade level skills with tutoring only.<sup>35</sup> The Student requires specialized instruction in vocabulary, and reading.<sup>36</sup> Based on his deficits, he does not need intensive remediation all subjects.<sup>37</sup> However, the Student's current placement cannot provide him the specialized instruction required by his current IEP.<sup>38</sup>

## VI. CREDIBILITY DETERMINATIONS

This Hearing Officer found the testimony of all witnesses at the due process hearing credible. The Psychologist who made frank assertions of the Student's educational needs. The DCPS placement specialist's testimony was uncontroverted and buttresses by the documents Petitioner entered into evidence at the hearing.

## VII. CONCLUSIONS OF LAW

The burden of proof is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

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<sup>25</sup> Testimony of DCPS Placement Specialist.

<sup>26</sup> *Id.*; Testimony of Psychologist.

<sup>27</sup> Testimony of DCPS Placement Specialist.

<sup>28</sup> *Id.*

<sup>29</sup> Testimony of Psychologist.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Testimony of Special Education Coordinator.

**A. Petitioner Failed to Present any Evidence that DCPS Failed to Develop an Appropriate IEP.**

Once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals.<sup>39</sup> The court should not “disturb an IEP simply because [it] disagree[s] with its content.”<sup>40</sup> 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.”<sup>41</sup>

The IEP provides the Student special education instruction out of the general education setting and related services for 3.75 hours per week. Petitioner failed to present any evidence about the that the Student requires more specialized instruction outside the general education setting. Rather, her own psychologist testified that the Student does not require intensive instruction in all areas, and that he requires specialized instruction only in vocabulary and reading.

Moreover, the DCPS Placement Specialist provided a logical explanation for why the MDT reduced the specialized instruction and related services on the Student's IEP from fifteen hours per week to 3.75 hours. Petitioner's own exhibits entered into evidence at the due process hearing provide ample evidence of the veracity of this testimony.

Thus, Petitioner failed to establish by a preponderance of the evidence that DCPS failed to develop an appropriate IEP.

**B. Petitioner Failed to Present any Evidence that DCPS Failed to Provide the Student an Appropriate Placement.**

IDEIA “imposes no clear obligation upon the District of Columbia beyond the requirement that [disabled] children receive some form of specialized education.” *Kerkam v. McKenzie*, 882 F.2d 884, 886 (D.C. Cir. 1988) (citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 195 (1982)). The District is required only to make available a “basic floor of opportunity” that is “reasonably calculated to enable the child to receive educational benefits . . . sufficient to confer some educational benefit upon the [disabled] child,” or a program “individually designed to provide educational benefit.” *Kerkam*, 882 F.2d at 886.

Petitioner's own witness, the Psychologist, testified that the Student would progress academically at the DCPS high school. Petitioner presented no evidence to counter the Psychologist's testimony. Thus Petitioner offered no evidence that this placement would affect the Student's substantive rights. See *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48

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<sup>39</sup> *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990) (internal citation and quotations omitted).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

(D.D.C. 2007) (upholding placement in public school).

While Petitioner may have preferred the non-public school, IDEA guarantees special education students only a “basic floor of opportunity.” See *Rowley*, 458 U.S. at 200 (“basic floor of opportunity” consists of access to specialized instruction and related services individually designed to provide educational benefit). Moreover, Petitioner presented no evidence that the Student’s current placement at the DCPS senior high school would not provide the Student the requisite basic floor of opportunity.

Thus, Petitioner failed to establish by a preponderance of the evidence that DCPS failed to provide an appropriate placement for the Student. Nonetheless, because the Student’s current placement cannot implement the Student’s current IEP, specifically the 3.75 hours of specialized instruction outside the general education setting, this Hearing Officer will order the MDT to reconvene and place the Student at a DCPS public high school that can implement the Student’s IEP.

**C. Petitioner Failed to Provide any Evidence that Would Entitle the Student 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.

In *Reid*, the Court rejected “cookie-cutter” or mechanical remedies, such as awarding one hour of compensatory instruction for each hour that the student was denied FAPE, and stressed that the Hearing Officer must take into account individual assessments of the student and focus on the student’s individual needs. 401 F.3d at 523-24. An arbitrary compensatory education award will never pass muster under the *Reid* standard. *Mary McLeod Bethune Day Academy Public Charter School v. Bland*, Civil Action No. 07-1223(D.D.C Feb. 20, 2008) at \*9 (citing *Reid* at 525).

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). The findings in this Decision are that DCPS denied the Student a FAPE. This inquiry, however, 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, Petitioner presented no evidence of the amount of compensatory education to which the Student was due, much less the specific subject areas the compensatory education is to address. Petitioner placed in evidence no compensatory education plan and presented no testimony to guide this Hearing Officer in awarding compensatory education. Thus, Petitioner failed to meet her burden on this issue.

**C. Petitioner Failed to Prove that DCPS failed to Offer an Alternate Placement to the Student.**

Petitioner presented no testimony to rebut the Placement Specialist’s testimony that, at the June 10, 2009, MDT meeting, the MDT presented two public high schools to Petitioner as alternate placements for the Student. Thus, Petitioner failed to meet her burden on this issue.

**ORDER**

Upon consideration of Petitioner' request for a due process hearing, the parties' Five-Day Disclosures, and the testimony at the hearing, it is this 11th day of September 2009 hereby:

**ORDERED** that DCPS shall convene a meeting to discuss placement and place the Student at a DCPS public high school that is equipped to implement the Student's current IEP, provide the Student specialized instruction in vocabulary and English, at a minimum, in a small, structured setting, with a small student-teacher ratio, that allows the Student to earn a high school diploma, and access to the general-education student population;

**IT IS FURTHER ORDERED** that DCPS shall convene this meeting on or before September 25, 2009, and shall include Petitioner and the Student in the meeting, and

**IT IS FURTHER ORDERED** that this Order is effective immediately.

/s/

Frances Raskin  
Hearing Officer

**Notice of Right to Appeal Hearing Officer's Decision and Order**

This is the final administrative decision in this matter. Any party aggrieved by the findings and/or decision may bring a civil action in any state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy within ninety (90) days of the entry of the Hearing Officer's Decision, in accordance with 20 U.S.C. Section 1415(i)(2)(B).

Issued: September 11, 2009

Copies to:

Roberta Gambale  
Kendra Berner  
Hearing Office  
DCPS

## **APPENDIX A**