

this Hearing Officer placed this case on the expedited due process hearing timeline. On March 1, 2012, Respondent DCPS filed a timely response to the Complaint.²

On March 1, 2012, the parties participated in a resolution meeting but did not resolve the Complaint. Thus, the resolution period ended on March 2, 2012.³

This Hearing Officer issued a prehearing conference summary and order (“prehearing order”) on March 12, 2012. In the prehearing order, this Hearing Officer certified the following issues for hearing:

A. Whether Respondent denied Petitioner a free, appropriate, public education (“FAPE”) in January 2012, when, following a November 2011 suspension for eleven days, it suspended him for six days and (i) failed to conduct a manifestation determination review to determine whether the behavior that led to the suspension was a manifestation of his disability; (ii) failed to provide him educational services in an interim, alternative setting so as to allow him to continue to participate in the general education curriculum; and (iii) failed to conduct a functional behavioral assessment (“FBA”) and update his behavior intervention plan (“BIP”) to address the behaviors that led to the suspensions;

B. Whether Respondent denied Petitioner a FAPE on February 15, 2012, by failing to review his 2011 vocational assessment and discuss whether he was entitled to compensatory education, as required by June 2011 settlement agreement;

C. Whether Respondent denied Petitioner a FAPE on February 15, 2012, by developing an individualized educational program (“IEP”) that was not reasonably calculated to enable Petitioner to receive educational benefit because it (i) reduced his hours of specialized instruction and related services from 25.6 hours per week to 19.5 hours per week outside the general education environment; (ii) failed to provide one hour per week of direct speech language therapy and one hour per week of behavioral support services;⁵ (iii) failed to include an updated BIP to address the behaviors that led to his suspensions in November 2011 and January 2012 as well as his other behavior difficulties in school; and (iv) failed to include extended

² Respondent did not challenge the sufficiency of the Complaint.

³ The parties agreed that the twenty-school-day, due process hearing timeline began on February 18, 2012, the day after Petitioner filed the Complaint.

⁴ The prehearing conference was originally scheduled for March 7, 2012, but, because the parties were meeting on March 8, 2012, to try to resolve the claims in the Complaint, both counsel agreed that it should be held on March 8, 2012, so that the prehearing conference could include discussions about any agreements that were reached at the meeting.

⁵ Petitioner asserts that he requires 27.5 hours per week of specialized instruction and related services outside the general education environment, including one hour per week of direct speech-language services and one hour per week of behavioral support services.

school year services (“ESY”) for the 2012 summer even though, after breaks in the academic year, Petitioner has regressed and failed to make academic progress, and, after returning from these breaks, has failed to recoup the knowledge he lost within a reasonable amount of time; and

D. Whether Respondent denied Petitioner a FAPE on February 15, 2012, by developing an IEP that was not reasonably calculated to enable Petitioner to receive educational benefit because it failed to revise his transition plan to reflect the findings of Petitioner’s 2011 vocational assessment and develop appropriate goals in the areas of post-graduation employment and independent living skills.

The due process hearing commenced at 9:30 a.m. on March 19, 2012. At the outset of the hearing, counsel for Petitioner informed this Hearing Officer that the parties had resolved several of the claims in the complaint, including the expedited discipline claim. The parties informed this Hearing Officer that they had agreed to a compensatory education plan that resolves issues A and B, and any other issues for which Petitioner may be entitled to compensatory education. The parties informed this Hearing Officer that Respondent had agreed to fund a summer vocational program for Petitioner, which resolved his claim that his IEP should have provided ESY for the 2012 summer. Respondent also revised Petitioner’s IEP to provide 26 hours per week of specialized instruction outside the general education setting and agreed to fund an independent functional behavioral assessment (“FBA”) of Petitioner.

In light of these agreements, counsel for Petitioner withdrew claims A, B, C (i), and C (iv). Counsel for Petitioner indicated that Petitioner planned to proceed to hearing on the following claims:

A. Whether Respondent denied Petitioner a FAPE on February 15, 2012, by developing an individualized educational program (“IEP”) that was not reasonably calculated to enable Petitioner to receive educational benefit because it failed to provide (i) one hour per week of direct speech language therapy; and (ii) an updated BIP to address the behaviors that led to his suspensions in November 2011 and January 2012 as well as his other behavior difficulties in school; and

B. Whether Respondent denied Petitioner a FAPE on February 15, 2012, by developing an IEP that was not reasonably calculated to enable Petitioner to receive educational benefit because it failed to revise his transition plan to reflect the findings of Petitioner’s 2011 vocational assessment and develop appropriate goals in the areas of post-graduation employment and independent living skills.

Counsel for Petitioner then informed this Hearing Officer that Petitioner was unable to appear at the due process hearing that day because his mother was in the hospital. Counsel for Petitioner requested that this case be placed on the forty-five-day due process hearing timeline. The parties agreed to reschedule the due process hearing for April 2, 2012.

The due process hearing reconvened at 11:00 a.m. on April 2, 2012. At the outset of the hearing, this Hearing Officer entered the parties' respective five-day disclosures into evidence.⁶

The parties waived opening statements. Petitioner called two witnesses, his educational advocate ("Advocate") and an expert in speech-language pathology ("Expert"). Respondent presented no witnesses and waived closing argument. After Petitioner presented an oral closing arguments, the due process hearing concluded at 12:30 p.m. on August 29, 2011.

IV. ISSUES PRESENTED

This Hearing Officer certified the following issues for adjudication at the due process hearing:

A. Whether Respondent denied Petitioner a FAPE on February 15, 2012, by developing an individualized educational program ("IEP") that was not reasonably calculated to enable Petitioner to receive educational benefit because it failed to provide (i) one hour per week of direct speech language therapy; and (ii) an updated BIP to address the behaviors that led to his suspensions in November 2011 and January 2012 as well as his other behavior difficulties in school; and

B. Whether Respondent denied Petitioner a FAPE on February 15, 2012, by developing an IEP that was not reasonably calculated to enable Petitioner to receive educational benefit because it failed to revise his transition plan to reflect the findings of Petitioner's 2011 vocational assessment and develop appropriate goals in the areas of post-graduation employment and independent living skills.

Petitioner requests relief in the form of an order requiring Respondent to revise Petitioner's IEP to include one hour per week of direct speech-language therapy, an updated BIP that reflects Petitioner's independent functional behavioral assessment ("FBA"), and a transition plan that reflects the findings of Petitioner's 2011 vocational assessment and includes goals in the areas of post-graduation employment and independent living skills.

V. FINDINGS OF FACT

1. Petitioner is an _____-year-old young man who is eligible for specialized instruction as a student with emotional disturbance.⁷ Petitioner is currently in the _____ grade at a public senior high school ("DCPS School") in the District of Columbia.⁸

2. In 2010, Petitioner was diagnosed with anxiety disorder, conduct disorder, cannabis

⁶ By agreement of Petitioner, this Hearing Officer entered into evidence Petitioner's Exhibits 1-45 and 51-52. This Hearing Officer entered into evidence Respondent's Exhibits 1-4.

⁷ Petitioner Exhibit 7 at 1 (January 26, 2012, report of comprehensive psychological evaluation); Respondent Exhibit 3 at 1 (March 7, 2012, IEP); Petitioner Exhibit 8 at 1 (August 5, 2011, Vocational Evaluation).

⁸ Petitioner Exhibit 7 at 11; Petitioner Exhibit 8 at 1.

abuse, and borderline intellectual functioning.⁹ He previously was diagnosed with attention deficit hyperactivity disorder.¹⁰

3. Petitioner's general intellectual ability is 71, which is in the low range in comparison to his same-age peers.¹¹ His academic performance is similarly low. In broad reading, he performs in the extremely low range, and at the level of a student in the seventh month of the third grade.¹² He has trouble pronouncing new vocabulary words and often struggles to spell grade-level words.¹³

4. In broad math, Petitioner performs in the extremely low range, at the equivalent of a student in the fifth month of third grade.¹⁴ He struggles to compute basic math operations involving integers, fractions, and decimals.¹⁵ He has difficulty performing grade-level mathematical tasks, is easily frustrated and often off-task.¹⁶ He can complete only small, simple tasks in twenty-minute increments.¹⁷

5. In broad written language, he performs in the very low range, at the equivalent of a student in the ninth month of third grade.¹⁸ He is not able to form complex and compound sentences.¹⁹

6. Petitioner performs in the low range on oral language tasks.²⁰ This suggests that he has difficulties listening to multi-step instructions, comprehending what is being asked, and executing the desired response.²¹ Additionally, his visual-motor integration is in the borderline range, which indicates that he lacks adequate motor skills to recreate printed designs using paper and pencil.²²

7. In class, Petitioner often calls out, acts out of control, uses foul language, and seeks attention while doing school work.²³ He can be talkative and disruptive.²⁴ sometimes has trouble remaining seated and disrupts others.²⁵ He has a short attention span and is easily distracted.²⁶ He

⁹ *Id.*

¹⁰ *Id.* at 10.

¹¹ Petitioner Exhibit 7 at 5.

¹² *Id.* at 6.

¹³ Respondent Exhibit 3 at 3.

¹⁴ Petitioner Exhibit 7 at 6.

¹⁵ Respondent Exhibit 3 at 2.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Petitioner Exhibit 7 at 7.

¹⁹ Respondent Exhibit 3 at 4.

²⁰ Petitioner Exhibit 7 at 7.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 8.

²⁴ *Id.* at 11.

²⁵ *Id.* at 8.

²⁶ *Id.* at 9.

has difficulty getting to class on time and is frequently absent.²⁷

8. Petitioner often gets failing grades, sometimes does not complete tests, and has reading and spelling difficulties.²⁸ He is unclear when presenting ideas, has trouble explaining the rules of games to others, and has difficulties with functional communication.²⁹ When offered assistance, including one-on-one instruction, he often will refuse to receive help.³⁰

9. Petitioner acts without thinking and cannot wait his turn.³¹ He breaks rules just to see what will happen, lies, sneaks around, and often gets in trouble.³² He seems unaware of others, babbles to himself, and says things that make no sense.³³ He complains when asked to do things differently, is stubborn, and does not adjust well to new teachers.³⁴

10. Petitioner's communication abilities are in the overall below average to severe range.³⁵ He has difficulty formulating sentences of increasing length and complexity.³⁶ He also has difficulty identifying and verbalizing relationships among words.³⁷ He has difficulty answering wh-questions (who, what, when, where, and why) in response to verbally presented information.³⁸

11. Petitioner's expressive and receptive language abilities are below average in the severe range.³⁹ Articulation, fluency, and pragmatics are Petitioner's relative strengths.⁴⁰

12. On August 8, 2011, Petitioner participated in a vocational assessment.⁴¹ Petitioner's highest levels of vocational interest are within the artistic, selling, mechanical, industrial, business detail, and humanitarian areas.⁴² During informal discussions, Petitioner indicated that he wants to attend college and major in business.⁴³

13. Interests in the mechanical area may include applying mechanical principles and using tools or machines.⁴⁴ Jobs associated with this area may involve activities such as

²⁷ *Id.* at 11.

²⁸ *Id.* at 9.

²⁹ *Id.* at 9, 11.

³⁰ Respondent Exhibit 3 at 2, 3, 4.

³¹ Petitioner Exhibit 7 at 9, 11.

³² *Id.*

³³ *Id.* at 12.

³⁴ *Id.* at 9, 12.

³⁵ Petitioner Exhibit 52 at 5 (August 16, 2011, report of speech and language evaluation).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Petitioner Exhibit 8 at 1.

⁴² *Id.* at 4.

⁴³ *Id.*

⁴⁴ *Id.*

engineering and related technical-scientific work, operating and maintaining mechanical equipment in a factory or laboratory, operating land or water vehicles, or building and repairing things.⁴⁵

14. Industrial job paths may include repetitive, regular work activities in a factory setting such as sorting, inspecting, and weighing manufactured goods.⁴⁶ Due to his interest in this area, Petitioner also may enjoy machine set-up or supervising workers.⁴⁷

15. Business interests may include tasks such as office work, serving as an office manager, bookkeeper, receptionist, or secretary.⁴⁸ Petitioner's interests in the selling area shows that he likes persuading people to buy something.⁴⁹ Jobs that satisfy this interest involve selling products or services in stores, offices, or customers' homes.⁵⁰ Petitioner also may satisfy this interest by engaging in business negotiations, advertising, or buying and selling products.⁵¹

16. Humanitarian areas include helping people with physical, social, emotional, or religious challenges.⁵² Jobs in this area are related to caretaking, counseling, nursing, therapy, or rehabilitation.⁵³

17. Petitioner has very low aptitude in understanding and using words efficiently, comprehending language, and expressing ideas clearly.⁵⁴ His ability to compute math accurately and efficiently also is very low.⁵⁵ His ability to visualize two and three dimensional objects in space and mentally manipulate objects is very low, as is his ability to coordinate his eye-hand movements and perform manual tasks quickly.⁵⁶

18. Overall, Petitioner's ability to perform independent work-related tasks is very low.⁵⁷ He will require a high level of support and supervision.⁵⁸ He will require verbal cues to problem solve, maintain safety, and sequence through appropriate steps when engaged in work-related tasks.⁵⁹ He requires extended time on most tasks and presents with language learning and motor delays that impact his ability to perform.⁶⁰

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 5.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 8.

⁵⁹ *Id.* at 5.

⁶⁰ *Id.*

19. Petitioner has average ability to discriminate words, numbers, symbols, and graphic material.⁶¹ His average perceptual skills indicate that he may do well in activities such as proofreading, copy editing, and nonverbal tasks that require attention to detail and rapid visual discriminations.⁶²

20. The vocational assessment found that Petitioner would benefit from opportunities to engage in work sampling, job carving, and job coaching given his relatively narrow career interests and abilities.⁶³ He also could benefit from guidance in obtaining healthy leisure pursuits, considering his history of involvement with a negative peer group.⁶⁴ The assessment recommended that Petitioner's transition plan provide him an opportunity to explore his vocational interests, explore job and volunteer opportunities, follow through with college opportunities and investigate scholarship and financial aide options.⁶⁵

21. The vocational assessment recommended that Petitioner participate in activities requiring the use of resource materials such as dictionaries, encyclopedias, community resources, maps, and phone books.⁶⁶ It recommended that his school program provide him with a variety of pre-vocational opportunities to assist him with sharpening his skills, including reading basic maps, planning and outlining bus and Metro trips, basic money management, and health and safety activities (i.e., knowing who his doctors are and where their offices are located and what to do in an emergency).⁶⁷

22. The vocational assessment recommended that Petitioner receive exposure in filling out applications and other paperwork accurately and legibly.⁶⁸ It also recommended that, in pursuit of his interest in attending college, Petitioner should investigate programs and resources for students with disabilities at the university level.⁶⁹ The staff assisting him with his planned transition to college should discuss with him his need for continued academic support, organizational skills, and independent living skills.⁷⁰ Finally, the assessment recommended that the team working with Petitioner investigate the Vault Career website, which lists some of the top business-related internships for high school students.⁷¹

23. On August 11, 2011, Petitioner participated in a speech-language assessment.⁷² Due to Petitioner's extensive speech-language deficits, the evaluator recommended that Petitioner receive sixty minutes per week of direct speech and language therapy in the school setting.⁷³

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 7.

⁶⁴ *Id.*

⁶⁵ *Id.* at 8.

⁶⁶ *Id.* at 9.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 10.

⁷² Petitioner Exhibit 52 at 1.

⁷³ *Id.* at 5.

The assessment recommended six IEP goals and objectives to increase his receptive and expressive language skills.⁷⁴ The IEP goals and objectives that the assessment recommended would require Petitioner to (1) formulate simple, grammatically correct sentences in verbal and written expression; (2) recall sentences, directions, and instructions of varying length and complexity; (3) identify and express relationships between classroom-related vocabulary in the form of analogies; (4) answer wh-questions from verbally presented information in reference to main idea, predicting, inferencing, details, and sequencing; (5) provide synonyms and antonyms in structured activities; and (6) identify and state a logical relationship between two words in a list of four words.⁷⁵

24. On February 15, 2012, Respondent convened a meeting of Petitioner's IEP team to review Petitioner's independent speech and language assessment and his vocational assessment.⁷⁶ Petitioner and his educational advocate participated in the meeting.⁷⁷ The IEP team was unable to review Petitioner's vocational assessment because no one at the meeting was qualified to review it.⁷⁸

25. Even though Petitioner's independent speech and language assessment recommended that his IEP provide him sixty minutes per week of direct speech-language therapy, the DCPS speech-language therapist suggested that Petitioner receive only thirty minutes of consultative services per month.⁷⁹ The DCPS speech-language therapist explained that the speech-language therapist assigned to Petitioner would work with his teacher and consult on how to best work with Petitioner and meet his needs.⁸⁰ The DCPS speech-language therapist explained that the speech-language therapist assigned to Petitioner also could also come into his classroom to work with him.⁸¹

26. Petitioner requires sixty minutes per week of direct speech-language to access the curriculum.⁸² By participating in speech-language therapy for one hour per week, Petitioner would increase his expressive and receptive language skills and develop compensatory strategies that he can carry throughout life after graduation.⁸³

27. At the February 15, 2012, meeting, the IEP team also discussed Petitioner's behavioral difficulties.⁸⁴ They discussed that most of his behavioral infractions occurred outside the classroom.⁸⁵ He gets in arguments and misses class.⁸⁶ He also had been suspended after

⁷⁴ *Id.*

⁷⁵ *Id.* at 5-6.

⁷⁶ Petitioner Exhibit 3 at 1-4; testimony of Advocate.

⁷⁷ *Id.* at 1.

⁷⁸ Testimony of Advocate.

⁷⁹ *Id.*; Petitioner Exhibit 3 at 1.

⁸⁰ Petitioner Exhibit 3 at 1.

⁸¹ *Id.*

⁸² Testimony of Speech-Language Expert.

⁸³ *Id.*

⁸⁴ Petitioner Exhibit 3 at 2; testimony of Advocate.

⁸⁵ Petitioner Exhibit 3 at 2.

⁸⁶ *Id.*

incidents in the school gymnasium.⁸⁷ Petitioner's advocate informed the team that his BIP had not been revised since the previous year even though he had been suspended several times for theft since that BIP was developed.⁸⁸

28. Petitioner's current IEP, developed on March 7, 2012, provides that he is to receive twenty-six hours per week of specialized instruction outside the general education setting, one hour per week of behavioral support services outside the general education setting, and ninety minutes per month of speech-language consultation services.⁸⁹

29. Petitioner's March 7, 2012, IEP includes a post-secondary transition plan.⁹⁰ The transition plan reflects that Petitioner's post-secondary goal is to attend college and major in business.⁹¹ His highest level of interest is in the artistic and selling, mechanical and business areas.⁹² Jobs associated with this area may include activities such as engineering and related technical-scientific work.⁹³

30. In the area of post-secondary education and training, the transition plan includes a long-range goal that Petitioner will attend a vocational program to increase his work skills.⁹⁴ It includes a single short-term goal that specifies that Petitioner will research three vocational programs, in Washington DC, Maryland, or Virginia, that focus on industrial, mechanical, and business management vocations.⁹⁵ The goal specifies that Petitioner will complete applications and apply for one of these programs by March 2013.⁹⁶

31. In the area of employment, the transition plan includes a long-range goal that, upon graduation from high school, Petitioner will participate in a supported employment program in the mechanical, industrial, and business industries.⁹⁷ This section of the transition plan provides three short-term goals.⁹⁸ The first goal anticipates that, by March 2013, Petitioner will complete at least fifty hours of community service by volunteering in a local business to gain skills from a community business owner.⁹⁹ It specifies that he will participate in the daily aspects of running a business that focuses on fashion design and marketing.¹⁰⁰

⁸⁷ Testimony of Advocate; Petitioner Exhibit 27 (November 17, 2011, Notice of Proposed Disciplinary Action).

⁸⁸ Testimony of Advocate; Petitioner Exhibit 43 (March 7, 2011, Notice of Final Disciplinary Action; Petitioner Exhibit 44 (May 5, 2011, Notice of Final Disciplinary Action).

⁸⁹ Respondent Exhibit 3 at 10.

⁹⁰ *Id.* at 14.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 15.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 16.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

32. The second short-term goal in the area of employment anticipates that, by March 2012, Petitioner will identify the three most important reasons to have a clear record regarding his future plans for employment.¹⁰¹ Because Petitioner has been involved in the justice system, he will need to understand the steps needed to prepare to gain employment.¹⁰²

33. The short-term goal in the area of employment anticipates that, by March 2013, Petitioner will learn at least two additional skills that will assist him to gain employment, i.e., he will create and correctly format a business letter and will maintain personal records.¹⁰³

34. The transition plan reflects that, in terms of independent living, Petitioner requires assistance with daily living tasks such as personal grooming and hygiene, locating housing, household management, and using public transportation.¹⁰⁴

35. In the area of independent living, the transition plan includes a long-range goal that anticipates that Petitioner will live independently after graduation from high school.¹⁰⁵ The transition plan contains one short-term goal in this area.¹⁰⁶ The short-term goal anticipates that Petitioner will learn to balance and manage a monthly budget and a checking account that includes income based on a vocational salary.¹⁰⁷

36. The transition plan does not include long-range or short-term goals in the area of post-secondary education, despite that Petitioner expressed an interest in attending college and major in business. It does indicate that Petitioner will graduate high school with a diploma.¹⁰⁸

37. Neither Petitioner nor his mother participated in the development of this IEP, although the Advocate was a member of the IEP team that developed the IEP.¹⁰⁹

38. On March 7, 2012, the Advocate sent an email to the special education coordinator at the DCPS School and Petitioner's DCPS case manager and algebra teacher outlining Petitioner's objections to the IEP, in particular the failure to provide him sixty minutes per week of direct speech-language therapy.¹¹⁰

39. On March 9, 2012, Respondent developed a BIP for Petitioner.¹¹¹ The BIP addressed the following target behaviors: inappropriate verbal interactions with classmates, truancy from class, social problem solving; noncompliance with directions from adults; and physical and

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 17.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 19.

¹⁰⁹ Petitioner Exhibit 7 at 1.

¹¹⁰ Petitioner Exhibit 1 (March 7, 2012, email).

¹¹¹ Respondent Exhibit 3 (March 9, 2012, BIP).

verbal aggression toward other students.¹¹² The BIP includes intervention strategies and positive behavior supports, including a requirement that Petitioner meet with the social worker twice a week to develop pro-social problem solving and conflict resolution skills.¹¹³ The BIP provides a list of rewards Petitioner will earn for compliant behavior and a list of consequences that will be imposed when he demonstrates noncompliant and inappropriate behavior.¹¹⁴ The BIP does not address Petitioner's behaviors, i.e., stealing, that prompted his previous suspensions.¹¹⁵

40. The Advocate was a credible witness. She had extensive knowledge of the facts in this case, Petitioner's cognitive functioning and academic performance, his evaluations and IEPs. Her recall of the discussions at the February 15, 2012, and March 7, 2012, meetings was corroborated by the documents in evidence.

41. The Expert was a credible witness. Her testimony was corroborated by Petitioner's speech and language assessment and by the testimony of the Advocate.

VI. 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.¹¹⁶ FAPE is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability."¹¹⁷ It "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."¹¹⁸

Each local education agency ("LEA") is obligated to provide a FAPE "for all children residing in the state between the ages of 3 and 21, inclusive."¹¹⁹ In deciding whether an LEA provided a FAPE to a student, the inquiry is limited to (a) whether the LEA complied with the procedures set forth in IDEA; and (b) whether the student's IEP is reasonably calculated to enable him/her to receive educational benefits.¹²⁰ The IEP is the centerpiece of special education delivery system.¹²¹

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

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

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

¹¹⁷ 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, D.C. Mun. Reg. tit. 30 § 3001.1.

¹¹⁸ *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89 (1982) (citation omitted).

¹¹⁹ 34 C.F.R. § 300.101.

¹²⁰ *Rowley* at 206-207.

¹²¹ *Lillbask v. Conn. Dep't of Educ.*, 397 F.3d 77, 81 (2d Cir. 2005) (internal quotation marks omitted).

regarding provision of FAPE, or caused the child a deprivation of educational benefits.¹²² In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.¹²³

The burden of proof is properly placed upon the party seeking relief.¹²⁴ A petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.¹²⁵ The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence.¹²⁶ In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it.¹²⁷ Unlike other standards of proof, the preponderance-of-evidence standard allows both parties to share the risk of error in roughly equal fashion,¹²⁸ except that when the evidence is evenly balanced, the party with the burden of persuasion must lose.¹²⁹

¹²² 20 U.S.C. § 1415 (f)(3)(E)(ii).

¹²³ *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted). See also *C.M. v. Bd. of Educ.*, 128 Fed. Appx. 876, 881 (3d Cir. 2005) (per curiam) (“[O]nly those procedural violations that result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable.”); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990) (en banc) (“[P]rocedural flaws do not automatically render an IEP legally defective”) (citations omitted); *W.G. v. Bd. of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992) (rejecting the proposition that procedural flaws “automatically require a finding of a denial of a FAPE”); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990) (rejecting an IDEA claim for technical noncompliance with procedural requirements because the alleged violations did not result in a “substantive deprivation” of student's rights); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990) (refusing to award compensatory education because procedural faults did not cause the child to lose any educational opportunity).

¹²⁴ *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

¹²⁵ 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).

¹²⁶ *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted).

¹²⁷ *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), *aff'd*, 512 U.S. 246 (1994).

¹²⁸ *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted).

¹²⁹ *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

VII. DISCUSSION

A. Petitioner Proved that Respondent Denied Him a FAPE by Failing to Include Direct Speech-Language Services in the March 7, 2012, IEP.

The IEP is the centerpiece of special education delivery system.¹³⁰ 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."¹³¹ IDEA does not require that the services provided maximize each child's potential.¹³²

In developing an IEP, the IEP team must consider the strengths of the child; the parents' concerns 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.¹³³

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs,¹³⁴ establishes annual goals related to those needs,¹³⁵ and provides appropriate specialized instruction and related services.¹³⁶ The 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.¹³⁷ The services provided to the child in the IEP must address all of the child's identified special education and related services and must be based on the child's unique needs and not on the child's disability.¹³⁸ For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression."¹³⁹

Here, Petitioner asserts that Respondent failed to incorporate the findings and recommendations of the speech-language assessment and vocational assessment in the March 7, 2012, IEP. In support of this assertion, Petitioner proved that his expressive and receptive language abilities are in the overall below average to severe range. He has difficulty formulating sentences of increasing length and complexity. He also has difficulty identifying and verbalizing relationships among words. He has difficulty answering wh-questions (who, what, when, where, and why) in response to verbally presented information.

On February 15, 2012, Respondent convened a meeting of Petitioner's IEP team to

¹³⁰ *Lillbask ex rel. Mauclaire v. Conn. Dep't of Educ.*, 397 F.3d 77, 81 (2d Cir. 2005) (internal quotation marks omitted).

¹³¹ *Rowley*, 458 U.S. at 201 (1982).

¹³² *Id.* at 198.

¹³³ 34 C.F.R. § 300.324 (a).

¹³⁴ 34 C.F.R. § 300.320 (a) (1).

¹³⁵ 34 C.F.R. § 300.320 (a) (2).

¹³⁶ 34 C.F.R. § 300.320 (a) (4).

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

¹³⁸ D.C. Mun. Reg. tit. 30 § 3002.1(f).

¹³⁹ *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).

review his independent speech and language assessment, which was conducted on August 11, 2012. This assessment recommended that, in order to access the curriculum, Petitioner's IEP should provide him sixty minutes per week of direct speech-language therapy. The assessment recommended six IEP goals and objectives to increase his receptive and expressive language skills.

At the February 15, 2012, IEP meeting, Respondent reviewed this assessment but simply chose to ignore its findings and recommendations. Instead of adopting the recommendation of the independent assessment and revising Petitioner's IEP to include sixty minutes of direct speech-language therapy, Respondent opted to provide one hour per month of consultative services.¹⁴⁰ Respondent also adopted none of the goals recommended by the assessment, thus creating an IEP for Petitioner that failed to accurately reflect the results of the independent assessment.

By failing to revise Petitioner's IEP to provide the sixty minutes per week of direct speech-language services recommended by his independent assessment, and develop speech-language goals related to Petitioner's speech and language needs, Respondent developed an IEP that was not reasonably calculated to provide Petitioner educational benefit.

Thus, Petitioner proved that Respondent denied him a FAPE.

B. Petitioner Failed to Prove that Respondent Denied Him a FAPE by Failing to Revise his Behavior Intervention Plan.

In the case of a child whose behavior impedes the child's learning or that of others, the team also must consider the use of positive behavioral interventions and supports, and other strategies to address that behavior.¹⁴¹ Thus, an FBA is an essential first step toward addressing a child's behavioral difficulties.¹⁴²

After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, as appropriate, the LEA also must conduct an FBA of the student and develop behavioral intervention services and modifications that are designed to address the behavioral violation so that it does not recur.¹⁴³

Here, Petitioner was suspended at least twice prior to the February 2012 meeting. Petitioner presented testimony that Respondent failed to revise his BIP at this meeting. However, Petitioner did not present any evidence regarding the March 9, 2012, BIP and whether it was designed to address his behavioral difficulties. Although the March 9, 2012, BIP does not address Petitioner's past incidents of theft, Petitioner did not present any evidence to show that he continues to steal or has been disciplined for stealing since the February 2012 meeting.

¹⁴⁰ Respondent presented no evidence to show that Petitioner's independent speech-language evaluation was invalid or that other data contradicted its findings and recommendations.

¹⁴¹ 34 C.F.R. § 300.304.

¹⁴² *Harris*, 561 F. Supp. 2d at 68.

¹⁴³ *Id.* at (d)(1)(ii).

Thus, Petitioner has failed to prove that Respondent denied him a FAPE.

C. Petitioner Proved that Respondent Denied Him a FAPE by Failing to Develop a Post-Secondary Transition Plan that Reflects His Individualized Needs.

Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and the transition services (including courses of study) needed to assist the child in reaching those goals.¹⁴⁴

Transition services include a coordinated set of activities for a child with a disability, designed within an outcome-oriented process, that promote movement from school to post-school activities including post-secondary education; vocational training; integrated employment, including supported employment; continuing and adult education; or independent living.¹⁴⁵ Transition services include activities based on the individual child's needs, taking into account the child's preferences and interests including instruction, related services, community experiences, development of employment and other post-school adult living objectives; acquisition of daily living skills, if appropriate; and a functional vocational evaluation, if appropriate.¹⁴⁶ Transition services for children with a disability may be special education, if provided as specially designed instruction, or related services, if required to assist a child with a disability to benefit from special education.¹⁴⁷

Here, Respondent developed a long term goal that would provide Petitioner opportunities to engage in work sampling, job carving, and job coaching given his relatively narrow career interests and abilities, as recommended by the vocational assessment. The March 7, 2012, transition plan includes three concrete short-term objectives in the area of employment. The first goal anticipates that, by March 2013, Petitioner will complete at least fifty hours of community service by volunteering in a local business to gain skills from a community business owner. It specifies that he will participate in the daily aspects of running a business that focuses on fashion design and marketing. These objectives are directly tied to Petitioner's goals of running his own business.

Respondent failed to address Petitioner's other areas of interest and need in his March 7, 2012, transition plan. Respondent failed to include in the transition plan strategies to encourage Petitioner to obtain healthy leisure pursuits, explore his vocational interests, explore job and volunteer opportunities, or follow through with college opportunities and investigate scholarship and financial aid options. Respondent also failed to provide Petitioner goals and services that will enable him to be successful living independently after he completes high school.

¹⁴⁴ 34 C.F.R. § 300.320 (b).

¹⁴⁵ D.C. Mun. Regs. tit. 5-E § 3001.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

The vocational assessment recommended that Petitioner participate in activities requiring the use of resource materials such as dictionaries, encyclopedias, community resources, maps, and phone books. It recommended that his school program provide him with a variety of pre-vocational opportunities to assist him with sharpening his skills, including reading basic maps, planning and outlining bus and Metro trips, basic money management, and health and safety activities (i.e., knowing who his doctors are and where their offices are located and what to do in an emergency). Yet, the transition plan Respondent developed on March 7, 2012, includes none of these activities.

Rather, Respondent developed a vague and unverifiable transition plan as part of Petitioner's March 7, 2012, IEP. It includes a single short-term goal that specifies that Petitioner will research three vocational programs, in Washington DC, Maryland, or Virginia, that focus on industrial, mechanical, and business management vocations. The goal specifies that Petitioner will complete applications and apply for one of these programs by March 2013. This goal includes no training or education that will assist Petitioner in obtaining admission to these programs or that will ensure his success once he is there.

In other words, Petitioner proved that Respondent failed to develop appropriate measurable postsecondary goals, based upon his transition assessment. Petitioner proved that Respondent failed to develop transition goals related to training, education, and independent living skills. Petitioner further proved that Respondent failed to specify the transition services (including courses of study) that he would receive in order to assist him reaching his goals.

Thus, Petitioner proved that Respondent denied him a FAPE.

ORDER

Based upon the Findings of Fact and Conclusions of Law herein, on this 15th day of April 2012, it is hereby:

ORDERED that, within twenty school days of this Order, Respondent shall amend Petitioner's IEP to provide him sixty (60) minutes per week of speech and language therapy, and develop goals that incorporate the recommendations of August 16, 2011, speech-language assessment report, consistent with the findings of this HOD; and

IT IS FURTHER ORDERED that, within twenty school days of this Order, Respondent shall amend Petitioner's transition plan to reflect the findings and recommendations of his August 5, 2011, transition assessment, consistent with the findings of this HOD.

By: /s/ Frances Raskin
Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 1415(i)(2).