

The parties participated in a resolution meeting on March 9, 2011. The parties were unable to resolve the Complaint and agreed to continue to negotiate through the end of the resolution period. The resolution period ended on March 20, 2011. The parties agreed that the forty-five day, due process hearing timeline began on March 21, 2011.

On March 28, 2011, this Hearing Officer held a prehearing conference in which Miguel Hull, counsel for Petitioner, and Victoria Fetterman, who appeared on behalf of counsel for Respondent DCPS, participated.

The due process hearing commenced on April 12, 2011. This Hearing Officer admitted into evidence Petitioner's exhibits one through eighteen and DCPS exhibits 1, 2, 5, and 6. Petitioner testified and presented the testimony of the Student, her educational advocate ("Advocate"), a psychologist ("Psychologist"), and a representative of Accotink Academy, a non-public school ("Non-Public School"). Respondent presented no witnesses. After the parties presented oral closing arguments, the due process hearing concluded on April 13, 2011.

III. ISSUES PRESENTED

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

Whether DCPS denied the Student a free, appropriate, public education ("FAPE") by developing an individualized educational program ("IEP") on February 11, 2011, that fails to provide sufficient hours of specialized instruction outside the general education setting to address the Student's low cognitive functioning and academic achievement.

IV. FINDINGS OF FACT

1. The Student is a _____ year-old, _____ grade student with an emotional disturbance who attends a District of Columbia public school.³ She struggles in her general education classes, in part because there are so many students in each class that she cannot get the assistance she requires.⁴ Each of her classes has at least twenty-five students.⁵ The students are often unruly in class and curse at the teachers when they attempt to maintain control.⁶ When the Student requests assistance with her work, her teachers do not have time to assist her.⁷

2. The Student has been the victim of bullying at school.⁸ Although she has not been physically assaulted, the bullying makes it difficult for her to concentrate in class.⁹ She

³ Testimony of Student; Petitioner Exhibit 2 (February 11, 2011, IEP).

⁴ Testimony of Student.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

often worries that the bullying students will be waiting for her once she leaves class.¹⁰ Although school personnel have met with the Student and her mother to discuss the bullying, the bullying has continued.¹¹ As a result, she has avoided school and, when at school, wandered the halls.¹² She constantly cries, is upset and repeatedly asks her mother if she can return to her elementary school.¹³ During October and November 2010, the Student attended school sporadically due to illness.¹⁴ She began attending school regularly in December 2010.¹⁵

3. The Student suffers from depression and low self-esteem.¹⁶ Although her depressive feelings stem from her difficulties in her current school, she has exhibited depressive symptomatology since the sixth grade.¹⁷ The symptoms of her depression include distractibility, inattentiveness, and hyperactivity.¹⁸ As a result, her depression is negatively impacting her school performance.¹⁹

4. The Student also has a learning disorder.²⁰ Her IQ is 77, which is a low score that indicates she has difficulties with verbal and non-verbal reasoning.²¹ Her overall cognitive abilities are impaired, which suggests that she will have difficulties keeping up with her same-age peers on a variety of verbal and non-verbal tasks.²² Because her verbal ability is equivalent to a child who is seven years and ten months of age, which is in the low range of functioning, it is likely that she has difficulty with age-level verbal communication, knowledge, and comprehension tasks.²³ Her thinking ability is equivalent to an eight-year-old child, which is in the low range of functioning.²⁴ This indicates that she has difficulty retrieving and reasoning with information stored in her long-term memory.²⁵ The Student's cognitive efficiency, i.e., her ability to process both verbal and nonverbal stimuli automatically, is in the average range of functioning for her age.²⁶ This suggests that her ability to process simple information is better developed than her verbal and thinking abilities.²⁷ Her working memory is equivalent to that of

¹⁰ *Id.*

¹¹ *Id.*

¹² Testimony of Educational Advocate.

¹³ *Id.*

¹⁴ Stipulation of parties.

¹⁵ *Id.*

¹⁶ Petitioner Exhibit 4 at 9, 10 (December 15, 2010, Report of Comprehensive Psychological Evaluation).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 14.

²¹ Testimony of Psychologist.

²² Petitioner Exhibit 4 at 13.

²³ *Id.* at 7, 16.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 7.

a child who is nine years, six months old.²⁸ As a result, she has some difficulty with short-term and working memory tasks, which will impact her ability to succeed academically.²⁹

5. The Student presents with difficulties in all areas of academic functioning, which will substantially interfere with her performance in school.³⁰ She performs at the fourth-grade level, which is in the low range of her same-age peers, in broad reading, i.e., reading speed, comprehension, and decoding.³¹ In broad mathematics, i.e., computation, mathematics reasoning, and problem solving, she performs at the fourth grade, ninth month level, which is in the low average range of functioning.³² She performs at the second-grade, eighth month level, which is in the very low range, in broad written language, i.e., her fluency of production and quality of expression in writing.³³ In oral language, i.e., listening ability, oral comprehension, and oral expression, the Student performs at the equivalent of a student in the first month of second-grade, which is in the very low range of functioning.³⁴

6. As a result of her depression, cognitive impairment, and low academic performance, the Student has does not find school a supportive place and has negative attitudes about her teachers.³⁵ She feels a sense of inadequacy about her ability to perform academically and that a lot of things that happen to her are out of her control.³⁶ She has an inability to develop relationships with peers due to her low self-esteem.³⁷

7. The Student also has difficulty concentrating on her schoolwork and getting to class because she is constantly plagued by these fear and anxiety about her safety and academic performance.³⁸ As a result, the Student has difficulty producing schoolwork, tends to withdraw from others and keep to herself, and is self-conscious about her difficulties in school.³⁹ She also has developed a pattern of missing school.⁴⁰

8. The Student requires full-time specialized instruction to address her difficulties in reading, math, and written language.⁴¹ She requires a small, student-teacher ratio of about five children to each teacher. She requires full-time, specialized instruction outside the general education setting.⁴² She would perform well in a school that is geared toward children with learning difficulties in all subjects that also will address her emotional needs, history of being

²⁸ *Id.* at 16.

²⁹ *Id.* at 8.

³⁰ *Id.* at 13.

³¹ *Id.* at 8, 16.

³² *Id.*

³³ *Id.* at 9, 16.

³⁴ *Id.*

³⁵ Testimony of Psychologist.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Petitioner Exhibit 15 (Attendance Summary, August 15, 2010 through February 11, 2011)

⁴¹ Testimony of Psychologist.

⁴² *Id.*

bullied, and how her academic performance will be affected if she is not feeling safe.⁴³ Due to her history of being taunted and bullied, she should receive group therapy to assist her in developing social skills.⁴⁴

9. On February 11, 2011, DCPS convened a meeting of the Student's IEP team, which included Petitioner, the Advocate, two regular education teachers, three special education teachers, a special education coordinator, a psychologist, and a social worker.⁴⁵ The purpose of the IEP meeting was to review the Student's recent independent psychological evaluation and determine her eligibility for special education and related services.⁴⁶ The Student's algebra teacher informed the team that the Student received a failing grade in her class the previous semester.⁴⁷ She informed the team that the Student was unable to follow the instruction and appeared lost.⁴⁸ On one math test, the Student wrote that the test was too hard and that she gave up.⁴⁹ She earned all Ds and Fs on her report card for the first semester of the 2010-2011 school year with the exception of art, in which she earned a C.⁵⁰ She is currently failing her math and science classes.⁵¹

10. At the February 11, 2011, meeting, the IEP team reviewed the December 15, 2010, Report of Comprehensive Psychological Evaluation.⁵² This was an initial evaluation of the Student, and the only evaluative data that the IEP team reviewed.⁵³

11. After reviewing the psychological evaluation, the IEP team agreed to find the Student eligible for special education services as a student with a specific learning disability.⁵⁴ Although the psychological evaluation found that the Student met the criteria for an emotional disturbance, the DCPS members of the IEP team did not reach agreement on this issue.⁵⁵

12. Petitioner and her advocate requested that the IEP team adopt all of the recommendations of the psychological evaluation.⁵⁶ They requested that the IEP team develop an IEP for the Student that provides her full-time special education services in all academic areas and social-emotional counseling.⁵⁷ The DCPS members of the IEP team instead developed an

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Petitioner Exhibit 2 at 1 (February 11, 2011, IEP Meeting Participants).

⁴⁶ Petitioner Exhibit 3 at 1 (February 14, 2011, Advocate Meeting Notes).

⁴⁷ Petitioner Exhibit 3 at 1.

⁴⁸ Testimony of Advocate.

⁴⁹ *Id.*

⁵⁰ *Id.*; Petitioner Exhibit 5 at 1 (January 21, 2011, Report to Parents on Student Progress).

⁵¹ Testimony of Educational Advocate.

⁵² *Id.*; Petitioner Exhibit 6 (February 8, 2011, Review of Independent Educational Evaluation); Petitioner Exhibit 9 (February 11, 2011, Disability Worksheet).

⁵³ Petitioner Exhibit 6 at 1; Petitioner Exhibit 11 (Analysis of Existing Data).

⁵⁴ Petitioner Exhibit 3 at 1; Petitioner Exhibit 2 at 2 (February 11, 2011, IEP).

⁵⁵ *Id.*; Petitioner Exhibit 4 at 14; Petitioner Exhibit 6 at 3; Petitioner Exhibit 9 at 1.

⁵⁶ Petitioner Exhibit 3 at 1.

⁵⁷ *Id.*; testimony of Advocate.

initial IEP for the Student that provides four annual goals in mathematics, four annual goals in reading, and four annual goals in written expression.⁵⁸

13. The DCPS members of the IEP team decided that the Student would receive three hours per week, and five hours per month, of specialized instruction on her IEP.⁵⁹ The IEP team informed Petitioner and her Advocate that the school would address all of the Student's IEP goals during the three hours per week she would spend in the inclusion setting, i.e., a general education class co-taught by a general education teacher and a special education teacher.⁶⁰ They further informed Petitioner and her advocate that the Student would work on academic projects during the five hours per month she received specialized instruction outside the general education setting.⁶¹

14. On February 11, 2011, the IEP team also included in the Student's IEP ninety minutes per month of behavioral support services.⁶² Petitioner and her advocate requested that the IEP team include more counseling in the Student's IEP to address her depressive disorder and the school phobias she was developing.⁶³ The DCPS members of the IEP team responded that the school may provide the Student additional counseling but declined to increase the counseling hours on her IEP.⁶⁴

15. The Non-Public School is a small, therapeutic school that serves students with various disabilities, including learning disabled and emotionally disabled students.⁶⁵ No general education students attend the Non-Public School.⁶⁶ Most of the classrooms at the Non-Public School have only ten students and some classes have only six students.⁶⁷ The Students in each class stay together as a group throughout the school day.⁶⁸ Each classroom has at least one special education teacher while some classes have a teaching assistant or a one-to-one teacher as well.⁶⁹ The students at the Non-Public School may earn high school credits (Carnegie units) if they are capable of doing so.⁷⁰

16. Every student at the Non-Public School has a behavioral intervention plan.⁷¹ They also have access to behavioral counselors and therapists at all times.⁷² At the Non-Public

⁵⁸ Petitioner Exhibit 2 at 3-12.

⁵⁹ Petitioner Exhibit 2 at 12.

⁶⁰ Petitioner Exhibit 3 at 1; Petitioner Exhibit 2 at 12.

⁶¹ *Id.*

⁶² Petitioner Exhibit 2 at 12.

⁶³ Petitioner Exhibit 3 at 1.

⁶⁴ *Id.*

⁶⁵ Testimony of Assistant Educational Director of Non-Public School.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

School, the Student would receive group counseling that is geared toward the development of social skills.⁷³

17. At the Non-Public School, the Student would be placed in an eighth-grade class with six other students.⁷⁴ Most of the students in this class, like the Student, are three to four years behind their grade-level peers in academics.⁷⁵

18. This Hearing Officer finds that each of the witnesses at the due process hearing provided credible testimony with the exception of portions of the Student's testimony.⁷⁶ Moreover, DCPS presented no testimony to contradict the testimony of Petitioner's witnesses.

VII. CONCLUSIONS OF LAW

IDEA guarantees children with disabilities the right to a free and appropriate public education with services designed to meet their individual needs.⁷⁷ 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)...⁷⁸

In deciding whether DCPS provided Petitioner a FAPE, the inquiry is limited to (a) whether DCPS complied with the procedures set forth in IDEA; and (b) whether Petitioner's IEP is reasonably calculated to enable Petitioner to receive educational benefit.⁷⁹

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.⁸⁰ In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.⁸¹

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ The Student denied skipping class, and this testimony was contradicted by the testimony of Petitioner, the Advocate, and the documents in evidence.

⁷⁷ 20 U.S.C. §§ 1400(d) (1)(A), 1412 (a) (1); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-91 (1982); *Shaffer v. Weast*, 546 U.S. 49, 51 (2005).

⁷⁸ 20 U.S.C. § 1401 (9); 34 C.F.R. § 300.17.

⁷⁹ *Rowley*, 458 U.S. at 206-207.

⁸⁰ 34 C.F.R. § 300.513 (a)(2).

⁸¹ *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted).

The burden of proof is properly placed upon the party seeking relief.⁸² Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.⁸³

VIII. DISCUSSION

A. Petitioner Proved that DCPS Denied the Student A FAPE When it Developed an IEP on February 11, 2011, that Failed to Meet the Student's Unique Needs.

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."⁸⁴ The IEP is the centerpiece of special education delivery system.⁸⁵

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs,⁸⁶ establishes annual goals related to those needs,⁸⁷ and provides appropriate specialized instruction and related services.⁸⁸ The program must be implemented in the least restrictive environment ("LRE").⁸⁹ For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression."⁹⁰

Here, DCPS failed to consider the Student's needs when it developed the IEP on February 11, 2011. The IEP team ignored the findings and recommendations of the sole evaluation of the Student, which recommended that she receive specialized instruction in all academic areas due to her low cognitive functioning. The IEP team also failed to recognize that the Student's depression impeded her academic progress and her need for regular individual and group therapy.

Instead, the IEP team developed an IEP that would provide minimal support to the Student and likely guarantee her continued failure. Thus, the IEP that DCPS developed on February 11, 2011, failed to reflect the results of the Student's recent evaluation, failed to provide appropriate specialized instruction and related services, and failed to reflect the Student's need for a more restrictive environment. Thus, DCPS failed to develop an IEP for the Student that was reasonably calculated to enable her to receive educational benefit.

⁸² *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

⁸³ 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).

⁸⁴ *Rowley*, 458 U.S. at 188-89 (citation omitted).

⁸⁵ *Lillbask ex rel. Mauclair v. Conn. Dep't of Educ.*, 397 F.3d 77, 81 (2d Cir. 2005) (internal quotation marks omitted).

⁸⁶ 34 C.F.R. § 300.320 (a) (1).

⁸⁷ 34 C.F.R. § 300.320 (a) (2).

⁸⁸ 34 C.F.R. § 300.320 (a) (4).

⁸⁹ 20 U.S.C. § 1412 (a) (5); 34 C.F.R. §§ 300.114 (a) (2), 300.116 (a) (2).

⁹⁰ *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).

B. Petitioner Proved that the Non-Public School is an Appropriate Placement for the Student.

The term “educational placement” refers to the type of educational program prescribed by the IEP.⁹¹ “Educational placement” refers to the general educational program, such as the classes, individualized attention, and additional services a child will receive, rather than the “bricks and mortar” of the specific school.⁹²

The considerations relevant to determining whether a particular placement is appropriate for a particular student include the nature and severity of the student's disability; the student's specialized educational needs; the link between those needs and the services offered by the school; the placement's cost; and the extent to which the placement represents the least restrictive environment (“LRE”).⁹³

Here, the DCPS School is not Petitioner’s LRE.⁹⁴ The DCPS School is an especially treacherous environment for Petitioner due to her low self-esteem and history of being bullied. Additionally, the DCPS School does not provide the small, structured environment that has allowed Petitioner to feel secure and make academic progress. Petitioner established that the Student requires a therapeutic educational environment that provides full-time, specialized instruction in classrooms with a low student-teacher ratio. This is exactly the environment that the Non-Public School provides.

Thus, Petitioner proved by a preponderance of the evidence that the Non-Public School is an appropriate setting for the Student and her LRE.

C. Petitioner Failed to Present Sufficient Evidence for This Hearing Officer to Award Compensatory Education to the Student.

When 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.”⁹⁵ 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.”⁹⁶

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.”⁹⁷ A compensatory education award must be “reasonably calculated to provide the educational benefits that likely

⁹¹ *T.Y. v. N.Y. Dept. of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009) (citation omitted).

⁹² *Id.*

⁹³ *Branham*, 427 F.3d at 12 (citing *Rowley*, 458 U.S. at 202).

⁹⁴ See D.C. Mun. Reg. tit. 5-E § 3013 (in selecting the LRE, consideration shall be given to any potential harmful effect on the child or on the quality of services that the child needs).

⁹⁵ *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).

⁹⁶ *Reid*, 401 F.3d at 518.

⁹⁷ *Peak v. District of Columbia*, 526 F. Supp. 2d 32, 36 (D.D.C. 2007).

would have accrued from special education services the school district should have supplied in the first place.”⁹⁸ This standard carries a qualitative rather than quantitative focus, and must be applied with flexibility rather than rigidity.⁹⁹

Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies.¹⁰⁰ Others may need extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.¹⁰¹

Although the psychologist testified that that the Student should receive compensatory education in the form of forty-eight hours of tutoring in reading, writing, and mathematics, and twelve hours of study skills assistance, she failed to identify any specific deficiencies that were the result of the failure of DCPS to develop an appropriate IEP for the Student. Rather, she testified that she had not met the Student or tested her since December 2010. Thus, she had no knowledge of the Student’s academic performance after the IEP was developed and her recommendations could not possibly have been designed to remedy the deficiencies in her IEP.

Although the Student may be entitled to compensatory education as a result of the failure of DCPS to develop an appropriate IEP, this Hearing Officer finds that Petitioner failed to present sufficient evidence to support such an award.

ORDER

Based upon the Findings of Fact and Conclusions of Law herein, it is this 4th day of May 2011 hereby:

ORDERED that, on or before May 20, 2011, DCPS shall convene a meeting of the Student’s IEP team to revise her IEP to provide 27.5 hours per week of specialized instruction, outside the general education setting, as well as sixty minutes per week of individual and at least thirty minutes per week of group counseling; and

IT IS FURTHER ORDERED that DCPS shall bear all expenses of the Petitioner’s attendance at the Non-Public School for the remainder of 2010-2011 school year and the 2011-2012 school year.

By: /s/ Frances Raskin
Frances Raskin
Hearing Officer

⁹⁸ *Reid*, 401 F.3d at 524.

⁹⁹ *Id.* at 524.

¹⁰⁰ *Reid*, 401 F.3d at 524.

¹⁰¹ *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).

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).

Distributed to:

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