DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
810 First Street, N.E., Second Floor
Washington, DC 20002

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STUDENT HEARING OFFICE
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Parent, on behalf of STUDENT,[1]	)	
Petitioner,	)	Case Number:
v.	)	Hearing Date: December 13, 2010 Hearing Room 2004
THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	Hearing Officer: Frances Raskin
Respondent.	)	

HEARING OFFICER DETERMINATION

I. JURISDICTION

This proceeding was invoked in accordance with the Individuals With Disabilities Education Improvement Act of 2004 ("IDEA"), codified at 20 U.S.C. §§ 1400 *et seq.*, D.C. Code §§ 38-2561.01 *et seq.*; the federal regulations at 34 C.F.R. §§ 300.1 *et seq.*; and the District of Columbia regulations at D.C. Mun. Reg. tit. 5-E §§ 3000 *et seq.*

II. BACKGROUND

Petitioner is the grandmother and legal guardian of a -year-old, special education student ("Student") who is currently enrolled in a District of Columbia senior high school. On October 29, 2010, Petitioner filed a Due Process Complaint ("Complaint") against the District of Columbia Public Schools ("DCPS") pursuant to IDEA.

On November 2, 2010, this Hearing Officer was appointed to preside over this matter. On November 9, 2010, DCPS filed a Response to the Complaint.[2] The parties participated in a resolution session meeting on November 15, 2010. The parties did not resolve the Complaint and agreed to proceed to a due process hearing. The parties agreed that the forty-five day, due process hearing timeline began on November 16, 2010.

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[1] Personal identification information is provided in Attachment A.
[2] Respondent has not challenged the sufficiency of the Complaint.

On November 24, and December 2, 2010, this Hearing Officer held prehearing conferences in this matter. Harry Goldwater, counsel for Petitioner, and Laura George, counsel for Respondent DCPS, participated in the prehearing conferences by telephone. On November 23, 2010, this Hearing Officer issued a Prehearing Conference Summary and Order.

The due process hearing commenced on December 13, 2010. This Hearing Officer admitted into evidence Petitioner's exhibits one through eight and DCPS exhibits one through five. Petitioner was the only witness who presented testimony. After the parties presented oral closing arguments, the due process hearing concluded.

III. ISSUES PRESENTED

A. Whether DCPS failed to develop an appropriate individualized educational program ("IEP") for the Student for the 2009-2010 and 2010-2011 school years, including transition goals; and

B. Whether Petitioner's compensatory education plan places the Student in the position he would have been but for these denials of FAPE.

V. FINDINGS OF FACT

1. Petitioner is a ·year-old, special-education student who is in the grade at a DCPS senior high school.[3] He repeated the grade three times, in the 2007-2008, 2008-2009, and 2009-2010 school years.[4]

2. The Student is mildly mentally retarded.[5] His full-scale IQ is 62, which is in the first percentile.[6] His perceptual reasoning ability also is in the first percentile.[7] His working memory is average.[8] His processing speed is below the first percentile.[9] His general ability index also is below the first percentile.[10]

3. The Student's cognitive processing efficiency and speed are below the first percentile.[11] His perceptual reasoning is in the extremely low range.[12] This indicates that his spatial ability, perceptual organization, and attention to detail are extremely impaired.[13]

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[3] Testimony of Petitioner.
[4] Petitioner Exhibit 5 (June 2, 2010, Confidential Psychological Evaluation).
[5] DCPS Exhibit 4 (January 6, 2010, Review of Independent Psychological Evaluation).
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*

4. The Student's verbal comprehension index, i.e., his receptive and expressive language, abstract thinking, concept formation, and scholastic aptitude, is in the extremely low range.[14] This reflects insufficient learning in school.[15] The Student's processing speed is in the extremely low range.[16]

5. The Student's broad reading skills are equivalent to a student in the second month of second grade, which is below the first percentile of his same-age peers.[17] His math calculation skills and academic fluency are equivalent to a student in the fourth month of second grade, which is also below the first percentile.[18] His written expression skills are equivalent to a student in the beginning of second grade, also below the first percentile.[19]

6. The Student also suffers from an anxiety disorder and shows symptoms of depression.[20] He also has a reading disorder, which is characterized by academic functioning that is substantially below the expected range given the person's chronological age, measured intelligence, and age-appropriate education.[21]

7. The Student's most recent IEP was developed on May 28, 2008.[22] This IEP provides the Student 27.5 hours of specialized instruction and one hour of counseling per week outside the general education environment.[23] It also provides that the Student is to receive classroom modifications of extended time, and small group, multimodal instruction with visual cues.[24] The IEP contains a behavior intervention plan designed to address the Student's behaviors that interfere with his access to the curriculum.[25]

VI. CREDIBILITY DETERMINATIONS

Petitioner was the sole witness at the due process hearing and her testimony was credible.

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.[26] FAPE is defined as:

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[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] DCPS Exhibit 4 (May 28, 2008, IEP).
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] 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).

> [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)..."[27]

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.[28]

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.[29] In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.[30]

Once a procedurally proper IEP has been formulated, a reviewing court should be reluctant to second-guess the judgment of education professionals.[31] The court should not "disturb an IEP simply because [it] disagree[s] with its content."[32] 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."[33]

The burden of proof is properly placed upon the party seeking relief.[34] Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.[35]

VIII. DISCUSSION

A. DCPS Failed to Develop IEPs for the Student During the 2009-2010 and 2010-2011 School Years.

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[27] 20 U.S.C. § 1401 (9); 34 C.F.R. § 300.17.
[28] *Rowley,* 458 U.S. at 206-207.
[29] 34 C.F.R. § 300.513 (a)(2).
[30] *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted).
[31] *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990) (internal citation and quotations omitted).
[32] *Id.*
[33] *Id.*
[34] *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).
[35] 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).

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."[36] The IEP is the centerpiece of special education delivery system.[37]

The term "educational placement" refers to the type of educational program prescribed by the IEP.[38] "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.[39]

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs,[40] establishes annual goals related to those needs,[41] and provides appropriate specialized instruction and related services.[42] The program must be implemented in the least restrictive environment ("LRE").[43] For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression."[44]

In developing an IEP, the IEP team must consider the strengths of the child; concerns of the parents for enhancing the education of the child; the results of the initial or most recent evaluation of the child; and the academic, developmental, and functional needs of the child.[45] An IEP must include a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum.[46]

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.[47]

DCPS stipulated that it failed to develop IEPs for the Student during the 2009-2010 and 2010-2011 school years. Considering the Student's severely impaired cognitive abilities and

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[36] *Rowley*, 458 U.S. at 188-89 (citation omitted).
[37] *Lillbask ex rel. Mauclaire v. Conn. Dep't of Educ.*, 397 F.3d 77, 81 (2d Cir. 2005) (internal quotation marks omitted).
[38] *T.Y. v. N.Y. Dept. of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009) (citation omitted).
[39] *Id.*
[40] 34 C.F.R. § 300.320 (a) (1).
[41] 34 C.F.R. § 300.320 (a) (2).
[42] 34 C.F.R. § 300.320 (a) (4).
[43] 20 U.S.C. § 1412 (a) (5); 34 C.F.R. §§ 300.114 (a) (2), 300.116 (a) (2).
[44] *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).
[45] 34 C.F.R. § 300.324 (a).
[46] 34 C.F.R. § 300.320 (a) (1); 5 D.C.M.R. § 3007.2 (a).
[47] *Branham v. Dist. of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) (citing *Rowley*, 458 U.S. at 202).

extremely low academic achievement, it is likely that he continues to require full-time specialized instruction outside the general education setting as provided in his May 28, 2008, IEP.

Thus, DCPS denied the Student a FAPE by failing to draft an IEP for the Student during the 2009-2010 and 2010-2011 school years. However, Petitioner has not shown that the Student is entitled to any remedy for these denials of FAPE.[48]

B. Petitioner Failed to Prove that Her Compensatory Education Plan Would Place the Student in the Position he Would Have Been but for the Failure of DCPS to Develop IEPs During the 2009-2010 and 2010-2011 School Years.

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."[49] 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."[50]

"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."[51] This inquiry is only the first step in determining whether the Student is entitled to compensatory education. A compensatory education award is an equitable remedy that "should aim to place disabled children in the same position they would have occupied but for the school district's violations of the IDEA."[52]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."[53] This standard "carries a qualitative rather than quantitative focus," and must be applied with flexibility rather than rigidity.[54]

Here, DCPS admitted that it failed to develop IEPs for the Student for the 2009-2010 and 2010-2011 school years. However, Petitioner presented no compensatory education plan and no testimony to support an award of compensatory education to the Student.[55] Thus, Petitioner

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[48] This month, DCPS sent a Letter of Invitation to Petitioner and her counsel for a meeting to draft an IEP for the Student. DCPS Exhibit 1.
[49] *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).
[50] *Id.*
[51] *Peak v. District of Columbia*, 526 F. Supp. 2d 32, 36 (D.D.C. 2007).
[52] *Reid*, 401 F.3d at 518, 523.
[53] *Id.* at 524.
[54] *Id.*
[55] In the second prehearing conference and at the outset of the due process hearing, this Hearing Officer advised counsel for Petitioner that he must present a compensatory education plan and testimony to show that the requested compensatory education would place the Student in the position he would have been but for the failure of DCPS to develop IEPs for him in the 2009-

failed to show that any amount of compensatory education would compensate the Student for these alleged denials of FAPE.

ORDER

Based upon the evidence and testimony at the due process hearing, it is this 30th day of December 2010 hereby:

ORDERED that the Complaint is dismissed with prejudice.

By: /s/ *Frances Raskin*
Frances Raskin
Hearing Officer

NOTICE OF APPEAL RIGHTS

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

Distributed to:

Harry Goldwater, counsel for Petitioner
Laura George, counsel for Respondent
Hearing Office
dueprocess@dc.gov

2010 and 2010-2011 school years. After being advised at the outset of the due process hearing that Petitioner would be the only witness on her behalf, this Hearing Officer even questioned whether Petitioner was ready to proceed that day. This Hearing Officer also questioned whether Petitioner's counsel was familiar with the requirements of *Reid*, 401 F.3d 516, to which counsel for Petitioner asserted he was. Nonetheless, counsel for Petitioner failed to present any substantial testimony at the due process hearing. Petitioner testified about the Student in general but did not present any testimony about his performance in school, whether he attended school regularly, or any other aspect of his academic functioning. This Hearing Officer cautioned counsel for Petitioner at the outset of the hearing that he would not be able to prove the claims in the Complaint without additional witness, he failed to present any other witnesses or even any documents, such as a compensatory education plan, to support Petitioner's request for compensatory education. It was apparent to this Hearing Officer that counsel for Petitioner utterly failed to prepare for the due process hearing.