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Office of Review and Compliance
Student Hearing Office
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OSSE
STUDENT HEARING OFFICE
2009 SEP 28 PM 12: 23

Confidential

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

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

HEARING OFFICER DETERMINATION

Counsel for Petitioner: Sarah Tomkins, Attorney at Law
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¹ Personal identification information is provided in Attachment A.

I. JURISDICTION

This proceeding was invoked in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 (“IDEIA”), 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia (“District” or “D.C.”) Municipal Regulations (“DCMR”), re-promulgated on February 19, 2003; and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

II. BACKGROUND

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

On July 22, 2009, Petitioner filed a Due Process Compliant Notice (“Complaint”) alleging that DCPS denied the Student a free, appropriate, public education (“FAPE”) by failing to:

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

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

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

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

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

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

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

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

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

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

III. RECORD

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

IV. ISSUES PRESENTED

- A. Whether DCPS failed to timely and comprehensively evaluate the Student upon the recommendation of his special education teacher and the request of Petitioner;⁷
- B. Whether DCPS failed to identify and address areas of the Student's disabilities;
- C. Whether DCPS failed to provide the Student an appropriate individualized education program ("IEP) for the 2007-2008 and 2008-2009 school years
- D. Whether DCPS failed to develop an IEP for the 2009-2010 school year; and
- E. Whether DCPS failed to provide the Student an appropriate educational placement and ensure the Student makes adequate educational progress.

V. FINDINGS OF FACT

1. The Student is a _____ year-old, _____-grade, special education student who attends a District of Columbia middle school.⁸ As a child, the Student did not learn on the same pace as his siblings, which Petitioner first noticed when the Student was three years old.⁹ At age three, the Student could not identify colors and shapes.¹⁰ Petitioner was evaluated while in

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

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

⁷ This issue will not be addressed in this decision because DCPS authorized Petitioner to obtain independent evaluations at DCPS expense, and thus there is no relief for this Hearing Officer to order.

⁸ Testimony of Petitioner.

⁹ *Id.*

¹⁰ *Id.*

preschool, and the evaluation showed that he had borderline intelligence.¹¹

2. The Student did not progress in preschool, and by second grade he still could not identify colors and did not know the alphabet.¹²

3. The Student's April 2006 IEP identified his disability classification as learning disabled ("LD").¹³ Petitioner attended the meeting at which this IEP was developed by a DCPS IEP team.¹⁴ The IEP team classified the Student as learning disabled despite that they knew his classification should be mental retardation ("MR") because the team did not want the MR label to follow the Student for the rest of his life.¹⁵

4. Petitioner prevailed on the Student's former school to retain him in eighth grade.¹⁶ The Student was unable to complete his assignments and did not learn anything in school.¹⁷

5. At the DCPS senior high school the Student currently attends, the other students teased the Student and called him names, including "retarded."¹⁸ They assaulted and robbed the Student, took his money, his lunch, and his shoes.¹⁹ Petitioner informed the Student's teachers of the abuse the Student endured at the hands of his peers but the name-calling persisted.²⁰

6. A DCPS MDT/IEP team at the Student's middle school developed the Student's June 13, 2008, IEP without the involvement of Petitioner.²¹ Petitioner was in the hospital for lung surgery at the time of the meeting at which the team developed the Student's IEP.²²

7. The Student's June 13, 2008, IEP identifies the Student as LD.²³ The IEP provides that the Student was to receive fifteen hours of specialized instruction and one hour of speech-language therapy each week.²⁴ It identifies the Student's placement as combination general education and resource class and states that the Student participates in non-academic subjects with non-disabled peers.²⁵ The IEP reflects that the Student takes an alternate assessment

¹¹ *Id.*

¹² *Id.*

¹³ Petitioner Exhibit 11.

¹⁴ *Id.*; Testimony of Petitioner.

¹⁵ Testimony of Petitioner.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*; Petitioner Exhibit 17 (June 13, 2008, IEP) (stating "parent unable to attend due to hospitalization.")

²² *Id.*

²³ Petitioner Exhibit 17.

²⁴ *Id.*

²⁵ *Id.*

described as “Level V, Portfolio.”²⁶

8. The June 13, 2008, MDT notes include a statement by the Student’s physical education and health teacher that the Student is “highly ineffective; very poor academically, and failed the course.” The teacher also stated that the Student was “very limited!!!” The Student’s special education teacher reported that the Student’s testing scores ranged from upper first grade to lower- and mid-second grade.²⁷ Another of the Student’s special education teachers added a separate note stating that “[d]ue to his low functioning with his schoolwork I think it may be helpful to [the Student] if he received more testing to see if he requires more assistance in the classroom.”²⁸

9. DCPS developed the Student’s IEP dated March 9, 2009, on June 15, 2009, without the participation of Petitioner.²⁹ Petitioner received no prior notice of the June 15, 2009, meeting at which the IEP was developed.³⁰ Petitioner was at work at the time of the meeting.³¹ The Student’s teacher contacted Petitioner at work and informed Petitioner that the meeting would proceed by conference call.³² Petitioner informed the Student’s teacher that she was unable to participate by telephone and did want to conduct the IEP meeting by phone.³³

10. The June 15, 2009, IEP indicated that Petitioner attended the meeting held by conference call.³⁴ Petitioner did not sign the IEP, either to indicate she attended or that she approved of the IEP.³⁵

11. The June 15, 2009, IEP specifies that the Student is to receive fifteen hours of specialized instruction and sixty minutes of speech therapy each week.³⁶ It includes no short-term objectives or baseline information for math, reading, and written expression.³⁷ The student’s post-secondary education and training annual goal on the IEP was for the Student to “be able to complete job applications and write resumes.” It identified his employment annual goal as being “able to attend career fairs, and writing job application and resume workshops.” The IEP indicated that the Student would receive a high school certificate in 2012.³⁸

12. On August 13, 2009, DCPS provided Petitioner authorization to obtain an

²⁶ *Id.*

²⁷ *Id.*

²⁸ Petitioner Exhibit 18.

²⁹ Testimony of Petitioner. Although this IEP is dated March 9, 2009, the meeting actually occurred by conference call on June 15, 2009. *See* DCPS Exhibit 1.

³⁰ Testimony of Petitioner.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ DCPS Exhibit 1.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

independent speech-language evaluation and a vocational assessment at DCPS expense.³⁹ DCPS also offered to reimburse Petitioner for the June 25, 2009, psycho-educational evaluation conducted by the Psychologist.

13. The July 3, 2009, report on the Student's June 25, 2009, psycho-educational evaluation included a review of the Student's past evaluations.⁴⁰ A 2008 educational assessment by DCPS revealed that the Student's math performance was at a third-grade level and his reading and writing performance was at a second-grade level.⁴¹

14. The Student's full scale IQ is fifty two, placing him in the deficient range of functioning.⁴² The Student's verbal comprehension index is 71, his working memory index 65, and processing speed index 62.⁴³ The Student's lowest score on the WISC-IV was his score of 47 on the perceptual reasoning index.⁴⁴ This last score deflated the Student's full scale IQ disproportionately and his true full scale IQ rests closer to the mid-sixties.⁴⁵

15. This cognitive profile has profound impact on the Student's functioning in school.⁴⁶ Because the Student has tremendous deficits in every cognitive function, all of his other functions such as executive functioning, planning, taking notes, and processing speed, also are limited.⁴⁷

16. The Student's IQ dropped fifty points from his last evaluation, which was a screening test performed by DCPS in 2006.⁴⁸ Such a significant drop in IQ does not occur unless a person experiences a head trauma or severe brain disease such as encephalitis.⁴⁹ Thus, it is likely that the DCPS evaluator made a mistake administering or scoring the 2006 screening test.⁵⁰ The Student's disability classification should have been MR on his 2006 IEP and on every IEP since then.⁵¹

17. The Student is performing on a grade equivalent of 2.6 in broad math, 3.4 in math calculation, 2.5 in broad reading, and grade equivalent of 2.0 in basic reading skills.⁵² He is performing at a grade equivalent of 1.9 in broad written language and 2.5 in written expression.⁵³

³⁹ DCPS Exhibit 2.

⁴⁰ Petitioner Exhibit 23.

⁴¹ *Id.*

⁴² *Id.*; Testimony of Psychologist.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Testimony of Psychologist.

⁴⁷ *Id.*

⁴⁸ *Id.*; Testimony of Psychologist.

⁴⁹ Testimony of Psychologist.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Petitioner Exhibit 23.

⁵³ *Id.*

The Student's total achievement score is a grade equivalent of 2.4.⁵⁴

18. The Student's disabilities are (a) mild mental retardation; (b) attention deficit hyperactivity disorder ("ADHD"), predominantly inattentive type; (c) mixed receptive-expressive language disorder; and (d) learning disorder not otherwise specified.

19. The Student requires a full-time, psycho-educational day-school setting that focuses on student with mild mental retardation.⁵⁵ He should be in a small class with no more than four students, a low student-teacher ratio, and individualized instruction.⁵⁶ The Student also needs a dedicated aide to assist him in focusing and absorbing information.⁵⁷ The Student also requires weekly counseling to address his emotional difficulties related to his social problems and his emotional fragility.⁵⁸ The Student should continue speech-language therapy to address his expressive-receptive language disorder.⁵⁹ The Student also requires occupational therapy to address his visual-motor integration problems.⁶⁰

20. From 2006 to the present, the Student was not classified as MR and not provided appropriate special education services, which was robbed him of opportunity to make social and academic gains.⁶¹ His cognitive and academic deficiencies began to be limited in at least 2005 or 2006, around the time his IEPs were developed with LD as a classification.⁶² To address the lost time, the Student requires additional instruction in reading and writing because he is currently limited to recognizing letters and very simplistic words and putting them together in simple sentences.⁶³

21. The Student's verbal scores show that he could make significant progress but his ability to read and write phonetically is currently non-existent.⁶⁴ Had the Student received an appropriate education since the IEP was developed in 2006, he could have been functioning three to four levels below his current grade, rather than his current functioning of seven to eight levels below his current grade.⁶⁵ A Linda Mood Bell program for the Student would help the Student develop the skills he would have developed had he been provided an appropriate IEP and educational placement during the last two years.⁶⁶

⁵⁴ *Id.*

⁵⁵ Testimony of Psychologist; Petitioner Exhibit 23.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*; see also, Petitioner Exhibit 24 (undated speech-language evaluation) (finding that the Student's expressive language and receptive language skills are below age and adjusted cognitive expectations and that he presents with a mild to moderate articulation disorder).

⁶⁰ Testimony of Psychologist.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Testimony of Psychologist.

22. On September 2, 2009, an educational advocate visited the Student's school.⁶⁷ The special education coordinator printed out the Student's schedule for the advocate.⁶⁸ The Student was not in his scheduled classes but in the special education classroom.⁶⁹ The special education teacher informed the advocate that the Student was in general education classes for the first half of the 2008-2009 school year but this was not appropriate for the Student so he was placed in a special education class.⁷⁰ The special education teacher cannot state whether the Student is MR.⁷¹

23. The non-public school proposed by Petitioner would be an appropriate setting for the Student.

VI. CREDIBILITY DETERMINATIONS

The testimony of all the witnesses at the hearing was credible. Teacher 1 and Teacher 2 forthrightly admitted that the student's with disabilities were not academically progressing in the inclusion setting. The Educational Advocate's testimony was corroborated by the testimony of the other witnesses, including Teacher 1 and Teacher 2, both of whom were called by counsel for DCPS. Her testimony was further corroborated by the MDT notes and the Student's March 30, 2009, IEP.

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). Under IDEIA, a Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence. 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).

IDEA guarantees children with disabilities the right to a free and appropriate public education with services designed to meet their individual needs. 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(1). 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)..."

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

⁶⁷ Testimony of Advocate.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Testimony of special education teacher.

Special education is defined as “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability.” 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, 30 DCMR Sec. § 3001.1. 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.” *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982) (citation omitted). DCPS is obligated to provide a FAPE “for all children residing in the state between the ages of 3 and 21, inclusive.” 34 C.F.R. § 300.101.

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. 20 U.S.C. § 1415 (f)(3)(E)(ii). In other words, an IDEA claim is viable only if those procedural violations affected the student’s *substantive* rights. *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted). *Accord, Kruvant v. District of Columbia*, 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying relief under IDEA because “although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents’ request, the [parents] have not shown that any harm resulted from that error”).⁷²

VIII. DISCUSSION

A. Petitioner Established by a Preponderance of the Evidence that DCPS denied the Student FAPE by Failing to Provide an Appropriate Educational Placement.

IDEIA “imposes no clear obligation upon the District of Columbia beyond the requirement that [disabled] children receive some form of specialized education.”⁷³ The District

⁷² See also, *C.M. v. Bd. of Educ.*, 128 Fed. Appx. 876, 881 (3d Cir. 2005) (per curiam) (“[O]nly those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable.”); *M.M. ex rel. D.M. v. Sch. Dist.*, 303 F.3d 523, 533-34 (4th Cir. 2002) (“If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations.”); *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 committed by Board did not cause the child to lose any educational opportunity).

⁷³ *Kerkam v. McKenzie*, 882 F.2d 884, 886 (D.C. Cir. 1988) (citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 195 (1982)).

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.”⁷⁴

To the maximum extent possible children with disabilities should be educated with children who are non-disabled.⁷⁵ Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.⁷⁶

Once an IEP is developed, the school district must determine an appropriate placement for the child that is designed to meet the child’s needs as set out in the IEP. Placement decisions must be made in conformity with the child’s IEP. 34 C.F.R. § 300.116 (a)(2)(b), D.C. Mun. Regs. Tit. 5 § 3013 (2006). Thus, the placement should not dictate the IEP but rather the IEP determines whether a placement is appropriate. See, *Rourke v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006). In the District of Columbia, special education placements shall be made in the following order or priority, provided, that the placement is appropriate for the student and made in accordance with IDEA:

- (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school;
- (2) Private or residential District of Columbia facilities; and
- (3) Facilities outside of the District of Columbia.

D.C. Code § 38-2561.02.

Here, the Student’s psycho-educational evaluation shows that the Student has made absolutely no educational progress in three years. Thus, DCPS denied the Student a free, appropriate public education for at least three years.⁷⁷ Thus, DCPS denied the Student a FAPE.

B. Petitioner Proved by a Preponderance of the Evidence that DCPS Denied the Student a Free, Appropriate, Public Education When it Failed to Develop an Appropriate IEP for the Student.

Once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals.⁷⁸ The court should not

⁷⁴ 882 F.2d at 886.

⁷⁵ 34 C.F.R. § 114 (a)(2)(i).

⁷⁶ *Id.* at 114 (a)(2)(ii).

⁷⁷ The statute of limitations in IDEIA is two years, and thus this Hearing Officer can order a remedy only for the past two years, despite that the Student was denied a FAPE for three years

⁷⁸ *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990) (internal citation and quotations omitted).

“disturb an IEP simply because [it] disagree[s] with its content.”⁷⁹ 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.”⁸⁰

IEPs must include “a statement of the child’s present levels of educational performance, ... a statement of measurable annual goals, a statement of the special education and related services [and] the anticipated frequency, location and duration of those services... to be provided to the child...” 20 U.S.C. ¶ 1414(d)(1)(A). 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.” *Rowley*, 458 U.S. at 201 (1982). IDEIA does not require that the services provided maximize each child’s potential. *Id.* at 198. Thus, the question is whether the IEP is reasonably calculated to produce meaningful educational benefit. *Id.* at 199; *Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C. 2005).

In developing an IEP, 34 C.F.R. 300.324 requires the IEP Team to consider (i) the strengths of the child; (ii) concerns of the parents for enhancing the education of the child; (iii) the results of the initial or most recent evaluation of the child; and (iv) the academic, developmental, and functional needs of the child. Additionally, 30 DCMR § 3002.1(f) requires that, “the services provided to the child 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.” (Emphasis added). Thus, an IEP is developed to reflect the student’s unique needs separate and distinct from any particular education program. “The IEP is in brief a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs. *School Committee of the Town of Burlington v. Department of Education of the Commonwealth of Massachusetts et al.*, 105 S.Ct. 1996, 2002 (1985).

IDEA also guarantees parents of disabled children the opportunity to participate in the evaluation and placement process. See 20 U.S.C. § 1414(f), 1415(b). One of the important policies underlying the need for an accurate written IEP is “to serve a parent’s interest in receiving full appraisal of the educational plan for her child, allowing a parent both to monitor her child’s progress and determine if any change to the program is necessary. *Alfano et al. v. District of Columbia*, 442 F.Supp.2d 1, 6 (DDC 2006) (citing *Mewborn v. Gov’t of Dist. Of Columbia*, 360 F.Supp.2d 138, 143 (DDC 2005). Thus, DCPS must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent’s child.⁸¹ Procedural inadequacies that seriously infringe the parents’ opportunity to participate in the IEP formulation process clearly result in the denial of a free and appropriate public education (“FAPE”). See, e.g., *W.G. v. Board of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ 34 C.F.R. § 300.501 (c)(1).

If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the public agency must use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing.⁸² A placement decision may be made by a group without the involvement of a parent, if the public agency is unable to obtain the parent's participation in the decision. In this case, the public agency must have a record of its attempt to ensure their involvement.⁸³

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

Finally, Petitioner proved that the Student is entitled to compensatory education.

ORDER

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

ORDERED that within 10 school days, DCPS shall convene the MDT to revise the Student's IEP to reflect a disability classification of multiply disabled, as a result of the Student's mental retardation and learning disability, and speech language impaired;

IT IS FURTHER ORDERED that DCPS shall provide extended school year services to the Student;

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

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

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

IT IS FURTHER ORDERED that this Order is effective immediately.

⁸² 34 C.F.R. § 300.501 (c)(3).

⁸³ 34 C.F.R. § 300.501 (c)(4).

/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. § 415(i)(2).

Distributed to:

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