

**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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<b>STUDENT,<sup>1</sup></b>	)	
	)	
<b>Petitioner,</b>	)	
	)	
v.	)	
	)	
<b>DISTRICT OF COLUMBIA PUBLIC SCHOOLS,</b>	)	
	)	
<b>Respondent.</b>	)	Hearing Officer: Frances Raskin

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**HEARING OFFICER DETERMINATION**

**I. JURISDICTION**

This proceeding was invoked in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 ("IDEA"), and its implementing regulations at 20 U.S.C. §§ 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title 38 of the District of Columbia Code, Subtitle VII, Chapter 25, and Title 5-E of the District of Columbia Municipal Regulations.

**II. BACKGROUND**

Petitioner is an \_\_\_\_\_-year-old student with a disability who attends a public senior high school in the District of Columbia. On June 23, 2011, Petitioner's parent ("Parent") filed a Due Process Complaint ("Complaint") against the District of Columbia Public Schools ("DCPS") pursuant to the Individuals with Disabilities Education Act ("IDEA").<sup>2</sup>

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<sup>1</sup> Personal identification information is provided in Attachment A.

<sup>2</sup> Petitioner's parent originally filed the Complaint on his behalf as Petitioner was \_\_\_\_\_ years old. During the pendency of the case, Petitioner turned 18 and became the petitioner in this case.

On June 24, 2011, this Hearing Officer was appointed to preside over this case. On July 7, 2011, Respondent DCPS filed a response to the Complaint ("Response"). Respondent filed its Response four days past the deadline established in IDEA.<sup>3</sup>

The parties participated in a resolution meeting on July 5, 2011. The parties were unable to resolve the Complaint and, on July 6, 2011, agreed in writing to proceed to a due process hearing. Thus, the resolution period ended on July 6, 2011. The parties agreed that the forty-five day, due process hearing timeline began on July 7, 2011.

On July 12, 2011, this Hearing Officer held a prehearing conference in which Marlon Charles, counsel for Petitioner, and Cherie Cooley, counsel for Respondent DCPS, participated. During the prehearing conference, the parties agreed to hold the due process hearing on August 29, 2011.

The due process hearing commenced at 9:00 a.m. on August 29, 2011. At the outset of the hearing, this Hearing Officer entered the parties' respective five-day disclosures into evidence.<sup>4</sup>

After the parties provided opening statements, the Student testified and called two witnesses, the Parent and his educational advocate ("Advocate"). Respondent then presented one witness, a school psychologist ("Psychologist"). After the parties presented oral closing arguments, the due process hearing concluded at 1:45 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 free, appropriate, public education ("FAPE") from June 23, 2009, through December 13, 2010, by placing him in an overly restrictive environment where he was unable to earn Carnegie units toward a diploma;

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<sup>3</sup> If a local education agency ("LEA") 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, the LEA 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). During the prehearing conference, counsel for Petitioner asserted that Petitioner was not prejudiced by Respondent's failure to file a timely Response.

<sup>4</sup> By agreement of Petitioner, this Hearing Officer entered into evidence Petitioner's Exhibits 2-14 and 17-18. This Hearing Officer entered into evidence Respondent's Exhibits 1-6.

B. Whether Respondent denied Petitioner a FAPE by developing an IEP on December 13, 2010, that failed to address his speech-language impairment through the provision of speech-language therapy, and failed to address his physical impairments through the provision of physical therapy services between December 13, 2010, and the end of the 2010-2011 school year.

Petitioner requests relief in the form of an order requiring Respondent to revise Petitioner's IEP to include speech-language therapy and physical therapy services. Petitioner further requests that this Hearing Officer award the Student compensatory education in the form of specialized instruction, speech-language therapy, and physical therapy.

## V. FINDINGS OF FACT

1. Petitioner has a physical disability that requires him to use an electric wheelchair to navigate his school and classroom.<sup>5</sup> He was born with brittle bone disease, which consists of fragile bones and progressive bone deformities of the ribcage and upper and lower extremities.<sup>6</sup>

2. In 2006, when Petitioner was \_\_\_\_\_ years old, his full-scale IQ was 75, which was in the below average range.<sup>7</sup> Petitioner's nonverbal reasoning abilities were much better developed than his verbal reasoning abilities.<sup>8</sup> Because of his unusually diverse abilities in verbal and nonverbal reasoning, Petitioner's full-scale IQ score may not have been the best representation of his general cognitive ability.<sup>9</sup>

3. In 2006, Petitioner's nonverbal reasoning abilities were in the average range and exceeded about thirty percent of his same-age peers.<sup>10</sup> Processing complex visual information by forming spatial images or part-whole relationships and/or by manipulating the parts to solve novel problems without words was one of Petitioner's strengths.<sup>11</sup> In other words, Petitioner's abilities were in the average range on tasks such as nonverbal concept formation, visual perception and organization, simultaneous processing, visual-motor coordination, learning, and separating figures and found in visual stimuli.<sup>12</sup>

4. In 2006, Petitioner's verbal reasoning abilities were in the borderline range and exceeded only three percent of his same age peers.<sup>13</sup> Making sense of complex verbal information and using verbal abilities to solve novel problems was a weakness for Petitioner.<sup>14</sup> In other words, Petitioner exhibited a weakness on tasks that require him to accurately read a

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<sup>5</sup> Petitioner Exhibit 3 at 1 (March 14, 2006, Psycho-Educational Evaluation).

<sup>6</sup> Petitioner Exhibit 5 (October 21, 2010, Report of Psychological Evaluation).

<sup>7</sup> Petitioner Exhibit 13 at 2.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 3.

<sup>10</sup> *Id.* at 4.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.* at 4.

<sup>13</sup> *Id.* at 2.

<sup>14</sup> *Id.*

series of printed words.<sup>15</sup> His verbal reasoning abilities may have been depressed as a result of missing critical developmental milestones due to medical complications and the time that he was not in school.<sup>16</sup>

5. In 2006, his working memory, i.e., ability to sustain attention, concentrate, and exert mental control, was in the average range, exceeding about forty-seven percent of his same-age peers.<sup>17</sup> Thus, his ability to sustain attention, concentrate, and exert mental control were better developed than his verbal reasoning abilities.<sup>18</sup>

6. In 2006, his processing speed, i.e., ability to process simple or routine visual material without making errors, was in the extremely low range, exceeding only 0.3 percent of his same-age peers.<sup>19</sup> Thus, he performed poorly when processing visual material quickly as compared to his nonverbal reasoning ability.<sup>20</sup> Because learning often involves a combination of routine information processing, such as reading, and complex information processing, such as reasoning, a weakness in the speed of processing routine information may make the task of comprehending novel information more time consuming and difficult.<sup>21</sup> Petitioner's weakness in simple visual scanning and tracking may have left him less time and energy for the complex task of understanding new material.<sup>22</sup>

7. In 2006, numerical operations were a particular area of difficulty for Petitioner.<sup>23</sup> His performance was in the extremely low range, exceeding only 0.1 percent of his same-age peers.<sup>24</sup> He had a specific weakness on tasks that required him to add two-digit numbers and subtract one-digit numbers.<sup>25</sup>

8. In 2006, he performed in the extremely low range on tasks that required him to correctly read a series of printed words.<sup>26</sup> His skills in this area exceeded those of only 0.1 percent of students his age.<sup>27</sup> He was unable to read the words "how," "people," "swim," and "fly."<sup>28</sup>

9. In 2006, he performed in the extremely low range on tasks that required him to correctly spell verbally presented words.<sup>29</sup> His skills in this area exceeded those of only 0.2

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<sup>15</sup> *Id.* at 3.

<sup>16</sup> *Id.* at 6.

<sup>17</sup> *Id.* at 3.

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

<sup>19</sup> *Id.*

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

<sup>21</sup> *Id.*

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

<sup>23</sup> *Id.* at 3.

<sup>24</sup> *Id.* at 5.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

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

<sup>29</sup> *Id.*

percent of students his age.<sup>30</sup> He was unable to spell the words “hand,” “candy,” “two,” and “right.”<sup>31</sup>

10. In 2006, the Student’s total repertoire of adaptive behavior and competencies reflected the discrepancies in his verbal and nonverbal reasoning abilities.<sup>32</sup> He was unable to articulate why police officers should wear uniforms or why one person should apologize to another person.<sup>33</sup> He was unable to explain how to make water boil, name the number of days in a week, or name the seasons of the year.<sup>34</sup> He had difficulties explaining how winter and summer were alike and how anger and joy were alike.<sup>35</sup> He had developmentally appropriate skills in the areas of language expression and social interaction.<sup>36</sup>

11. In early 2006, DCPS performed a psycho-educational evaluation of Petitioner.<sup>37</sup> The March 14, 2006, report of the evaluation recommended that Petitioner be educated in a full-time, special education program that focuses on the acquisition of vocational skills.<sup>38</sup>

12. By April 21, 2006, when Petitioner was \_\_\_\_\_ years old, he had achieved all of his IEP goals in physical therapy.<sup>39</sup> These goals had focused on his ability to maintain an upright, seated posture in an adapted classroom chair for up to thirty minutes while performing functional activities with both arms.<sup>40</sup> They had focused on helping him maintain an upright, sitting posture and balance without assistance while seated on the floor mat while performing bilateral, lower extremity exercises.<sup>41</sup> Petitioner accomplished all of these goals and his physical therapist determined that he no longer required physical therapy.<sup>42</sup> The physical therapist recommended that he continue to receive assistance and supervision by the classroom teacher and an aide.<sup>43</sup> The Parent agreed with the physical therapist’s recommendation to terminate Petitioner’s physical therapy services.<sup>44</sup>

13. On February 15, 2008, when Petitioner was fourteen years old, Respondent convened a meeting of Petitioner’s IEP team.<sup>45</sup> The Parent and Petitioner’s grandmother participated in the

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

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

<sup>32</sup> *Id.* at 3.

<sup>33</sup> *Id.* at 4.

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

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

<sup>36</sup> *Id.* at 6.

<sup>37</sup> Petitioner Exhibit 3.

<sup>38</sup> *Id.* at 6.

<sup>39</sup> Respondent Exhibit 5 at 2 (April 21, 2006, Physical Therapy Annual Report).

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

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

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Petitioner Exhibit 8 (February 15, 2008, IEP). This document contains Petitioner’s social security number. *Id.* at 3 (documented level of service page). This Hearing Officer will ensure that, in the certified record, this document is redacted to remove the social security number.

IEP meeting.<sup>46</sup> At the meeting, Petitioner's special education teacher informed the IEP team that he had attended school on only three days during the 2008-2009 school year.<sup>47</sup> She reported that, beginning on November 13, 2008, visiting instructional services ("VIS") were provided to Petitioner.<sup>48</sup> She reported that, as of September 2007, the Student had not received physical therapy because the VIS physical therapist was no longer under contract with DCPS.<sup>49</sup> The IEP team informed the Parent that the physical therapists who worked for DCPS were assigned to children who were attending DCPS schools.<sup>50</sup>

14. During the February 15, 2009, IEP meeting, the IEP team developed an IEP for Petitioner that provided that he was to receive thirty-one hours per week of specialized instruction outside the general education environment.<sup>51</sup> The IEP team's justification for this setting was that Petitioner was significantly below grade level and required intensive individualized instruction.<sup>52</sup>

15. The February 15, 2008, IEP also provided that Petitioner would receive one hour per week of physical therapy.<sup>53</sup> The IEP provided that the Student would continue to attend DCPS School 1 during the school year and for extended school year.<sup>54</sup> Petitioner signed the IEP and indicated that she agreed with its contents.<sup>55</sup>

16. In 2009, when Petitioner was fifteen years and eight months old, the fluency with which he performed academic tasks was negligible.<sup>56</sup> His fluency with mathematics problems was very limited.<sup>57</sup> Math tasks above the abilities of a typically developing student nine years old, were quite difficult for him.<sup>58</sup>

17. In 2009, his fluency with reading and writing tasks also was negligible.<sup>59</sup> His overall reading ability was below the first percentile of his same-age peers.<sup>60</sup> Reading tasks above the abilities of a typically developing student seven years and eight months old were quite difficult for him.<sup>61</sup> His broad written language, i.e., the production of written text, including spelling ability, writing fluency, and the quality of his written expression, was in the very low range and

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<sup>46</sup> Petitioner Exhibit 9 at 1 (February 15, 2008, Multidisciplinary Team Meeting Notes).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1, 3.

<sup>52</sup> *Id.* at 4.

<sup>53</sup> *Id.* at 1.

<sup>54</sup> *Id.* at 1, 7. *Id.* at 10 (February 6, 2008, Prior to Action Notice).

<sup>55</sup> *Id.* at 1.

<sup>56</sup> Petitioner Exhibit 4 at 2 (January 15, 2009, Educational Evaluation).

<sup>57</sup> *Id.* at 1,

<sup>58</sup> *Id.* at 1, 3.

<sup>59</sup> *Id.* at 2.

<sup>60</sup> *Id.* at 1, 3.

<sup>61</sup> *Id.*

blow the first percentile of his same-age peers.<sup>62</sup> He had difficulty on tasks measuring effective expression in written language above the abilities of a typically developing student eight years and seven months of age.<sup>63</sup>

18. During the 2009-2010 school year, Petitioner attended a school for students with physical and cognitive disabilities (“DCPS School 1”).<sup>64</sup> On January 6, 2010, Respondent issued a prior written notice informing the Parent that Petitioner would remain at DCPS School 1.<sup>65</sup> Respondent informed the Parent that, due to the severity of his disability, the Petitioner required a full-time, special education setting to address his physical and educational needs.<sup>66</sup> The notice stated that the multidisciplinary team (“MDT”) had determined that this setting was Petitioner’s least restrictive environment at that time.<sup>67</sup>

19. On September 1, 2010, the Parent entered into a settlement agreement with Respondent.<sup>68</sup> In the settlement agreement, the parties agreed that the Parent was entitled to obtain independent psychological, adaptive, occupational therapy, vocational, assistive technology, and independent speech and language assessments at Respondent’s expense.<sup>69</sup> The parties further agreed that, within twenty business days of receipt of the final independent assessment report, Respondent would convene an IEP meeting to review the assessments and review and revise Petitioner’s IEP, if necessary, discuss the location of services, and discuss compensatory education, if warranted.<sup>70</sup>

20. The September 1, 2010, settlement agreement stated that it was in full satisfaction and settlement of all the claims that the Parent asserted or could have asserted within the statute of limitations as of the date of the agreement.<sup>71</sup> The Parent signed the settlement agreement, indicating her agreement with its terms, on September 1, 2010.<sup>72</sup>

21. At the beginning of the 2010-2011 school year, the Parent removed Petitioner from DCPS School 1 and enrolled him in DCPS School 2, a public senior high school.<sup>73</sup> Petitioner has adjusted well to DCPS School 2 and made many friends.<sup>74</sup> Since Petitioner has attended DCPS School 2, he has not received physical therapy or speech-language therapy.<sup>75</sup>

22. In October 2010, when Petitioner was seventeen years and five months of age, his

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Testimony of Petitioner.

<sup>65</sup> Petitioner Exhibit 2 at 1 (January 6, 2010, Prior Written Notice).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Respondent Exhibit 2 at 1, 3 (September 1, 2010, Settlement Agreement).

<sup>69</sup> *Id.* at 2.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 3.

<sup>72</sup> *Id.*

<sup>73</sup> Testimony of the Parent.

<sup>74</sup> Testimony of Petitioner.

<sup>75</sup> *Id.*

general intellectual ability was significantly impaired.<sup>76</sup> He performed significantly below average overall.<sup>77</sup> His verbal ability was in the borderline range and his nonverbal ability was significantly low or deficient.<sup>78</sup> His visual-motor integration skills were very well developed and in the high average range.<sup>79</sup>

23. In October 2010, his functioning for verbal reasoning and crystallized intelligence functioning was moderately below average and in the borderline range.<sup>80</sup> His nonverbal reasoning and problem solving abilities were significantly below average.<sup>81</sup> Contrary to his performance in 2006, Petitioner no longer exhibited a significant difference between his verbal and nonverbal abilities.<sup>82</sup>

24. In October 2010, his ability to store and retrieve verbal and nonverbal stimuli, i.e. his verbal memory and nonverbal memory, was solidly average.<sup>83</sup> Petitioner demonstrated strength in visual-motor skills for paper-pencil tasks.<sup>84</sup> However, timed tasks may pose some difficulty for him.<sup>85</sup>

25. In October 2010, Petitioner's achievement in reading, math, and written language skills.<sup>86</sup> His overall achievement was comparable to a nine-year-old, typically developing student in the sixth month of third grade.<sup>87</sup> His general academic skills, fluency, and applications were very low and within the second to fourth grade range.<sup>88</sup>

26. In October 2010, Petitioner performance in broad reading was the equivalent of a student who is eight years and four months old and beginning the third grade.<sup>89</sup> He demonstrated some basic phonemic awareness and phonetics application skills.<sup>90</sup> His skills for applying phonetic principles in reading isolated, multi-syllabic words are comparable to a student nine years and five months old who is in the first month of fourth grade.<sup>91</sup> His reading fluency and passage comprehension skills were at the beginning second grade level.<sup>92</sup>

27. In broad mathematics, Petitioner had very low achievement, although his math skills

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<sup>76</sup> Petitioner Exhibit 5 at 3.

<sup>77</sup> *Id.* at 4.

<sup>78</sup> *Id.* at 4, 6.

<sup>79</sup> *Id.* at 6.

<sup>80</sup> *Id.* at 4.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 5.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

varied across skill areas.<sup>93</sup> He performed in the low average range in calculations or numerical operations.<sup>94</sup> He performed slight better on untimed calculations than in most other academic tasks.<sup>95</sup> His skills in math calculation were equivalent to a student aged eleven years and three months and in the ninth month of fifth grade.<sup>96</sup> His performance in applied problems, i.e., math reasoning, was low and equivalent to a student ten years and one month old.<sup>97</sup> Petitioner's performance in math fluency was more deficient, as his skills were comparable to a student eight years and two months old.<sup>98</sup> His difficulty in math fluency may be due to his physical disability.<sup>99</sup>

28. Petitioner's broad written language achievement in October 2010 was very low.<sup>100</sup> He performed at the level of a student eight years and four months old and in beginning of third grade.<sup>101</sup> His spelling skills were equivalent to those of a student eight years and three months old in the ninth month of second grade.<sup>102</sup> His writing fluency skills were equivalent to a student in the first month of second grade.<sup>103</sup> When not under time pressure, and correct spelling is not required, Petitioner showed relatively strong skills, though not at age or grade level, in expressive writing.<sup>104</sup> He performed in the average range on writing samples.<sup>105</sup> His performance in writing fluency was very low and equivalent to a student seven years and five months old and in the first month of second grade.<sup>106</sup>

29. In October 2010, an independent evaluator conducted a psychological evaluation of Petitioner.<sup>107</sup> The evaluator found that the evaluation results suggested that Petitioner had an intellectual disability, but that previous testing did not validate this conclusion.<sup>108</sup> The evaluator surmised that his skills were declining as he matured, which is often the case when a student has learning disabilities, his learning opportunities were interrupted, or his programming was inadequate.<sup>109</sup> The evaluator diagnosed Petitioner with a learning disorder not otherwise specified.<sup>110</sup> A subsequent adaptive assessment determined that Petitioner did not have an

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 5, 8.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* Petitioner performance was equivalent to a student twelve years and ten months old and in the fourth month of seventh grade. *Id.* at 8.

<sup>106</sup> *Id.*

<sup>107</sup> Petitioner Exhibit 5.

<sup>108</sup> *Id.* at 6.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

intellectual disability.<sup>111</sup>

30. A September 15, 2010, evaluation revealed that Petitioner's receptive and expressive language skills are in the significantly deficient range.<sup>112</sup> He is unable to understand and express age-expected vocabulary words, which hinder his ability to adequately process or obtain the intended meaning of spoken and written language.<sup>113</sup> He would benefit from language intervention that would focus on improving his overall receptive and expressive language skills.<sup>114</sup> The evaluator recommended that he receive speech and language therapy three times a week for thirty minutes per session.<sup>115</sup>

31. On November 15, 2010, DCPS convened a meeting of Petitioner's MDT team.<sup>116</sup> Petitioner, the Parent, and the Advocate attended the meeting.<sup>117</sup> Petitioner was attending DCPS School 2 at the time of the meeting.<sup>118</sup> The IEP team reviewed Petitioner's September 15, 2010, speech and language assessment, October 21, 2010, adaptive assessment, and the October 21, 2010, report of Petitioner's psychological assessment.<sup>119</sup>

32. In discussing the September 15, 2010, speech and language assessment, the IEP team noted that Petitioner was discharged from speech and language therapy in 2005 with the Parent's consent.<sup>120</sup> The Parent agreed that Petitioner did not need speech and language services in 2005.<sup>121</sup>

33. At the November 15, 2010, meeting, the Special Education Coordinator ("SEC") of DCPS School 2 explained that Petitioner was in classes where he could earn Carnegie units toward a high school diploma.<sup>122</sup> The SEC reported that Petitioner also has one small class, a learning lab.<sup>123</sup> The MDT team discussed Petitioner's progress and agreed that he did not require assistance with writing or the use of classroom assistance.<sup>124</sup> The team agreed that Petitioner required a nurse to assist him during the day.<sup>125</sup>

34. At the November 15, 2010, meeting, the Advocate requested that the MDT team

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<sup>111</sup> Petitioner Exhibit 6 at 2 (October 21, 2010, Adaptive Assessment).

<sup>112</sup> Petitioner Exhibit 10 at 7 (September 15, 2010, Speech and Language Evaluation).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Petitioner Exhibit 12 at 1 (November 15, 2010, MDT Meeting Notes); Respondent Exhibit 4 at 1 (same).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 1-2.

<sup>120</sup> *Id.* at 2.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

revise Petitioner's IEP to place him in some general education courses.<sup>126</sup> The Parent and the Advocate expressed their desire for Petitioner to be placed in classes where he could earn a diploma rather than the certificate awarded to special education students upon graduation.<sup>127</sup> The DCPS compliance case manager stated that DCPS did not approve of DCPS School 2 as the placement for Petitioner.<sup>128</sup>

35. At the end of the meeting, the Advocate informed the MDT team that Petitioner's occupational therapy and assistive technology evaluations would be completed in December 2010.<sup>129</sup> The Advocate suggested that the MDT team reconvene in January 2011.<sup>130</sup> The MDT team agreed to reconvene to review Petitioner's occupational therapy and assistive technology evaluations, discuss placement, revisions to Petitioner's IEP, and compensatory education.<sup>131</sup>

36. On December 13, 2010, DCPS reconvened the meeting of Petitioner's MDT team.<sup>132</sup> The Parent and the Advocate participated in the meeting.<sup>133</sup> Petitioner did not participate.<sup>134</sup> The Parent and the Advocate expressed their opinion that Petitioner qualified for and required speech and language services.<sup>135</sup> The DCPS members of the MDT team disagreed.<sup>136</sup>

37. At the December 13, 2010, meeting, Petitioner's learning lab teacher reported on his progress.<sup>137</sup> She stated that, although Petitioner has difficulty copying from the blackboard, he is able to keep up with the class.<sup>138</sup> The Parent again informed the MDT team that her goal was to have Petitioner placed in a full-time, general education setting.<sup>139</sup>

38. The Advocate stated that Petitioner was on the certificate track for four years at DCPS School 1.<sup>140</sup> At the time of the December 13, 2010, meeting, Petitioner was in all special education courses.<sup>141</sup>

39. The majority of the MDT team agreed that Petitioner should be placed on a high school diploma track.<sup>142</sup> The MDT team drafted an IEP for Petitioner that placed him on a

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 3.

<sup>132</sup> Petitioner Exhibit 11 (December 13, 2010, MDT Meeting Notes).

<sup>133</sup> *Id.* at 1.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 2.

diploma track.<sup>143</sup> The SEC of DCPS School 2 requested that Petitioner's new IEP begin on January 24, 2011.<sup>144</sup> The Parent agreed.<sup>145</sup>

40. Petitioner's December 13, 2010, IEP provides that he was to receive twenty-six hours per week of specialized instruction outside the general education setting until January 21, 2011.<sup>146</sup> The IEP provides that Petitioner is to receive 19.5 hours per week of specialized instruction in the general education setting beginning on January 22, 2011.<sup>147</sup> It also provides that Petitioner is to receive 6.5 hours per week of specialized instruction outside the general education setting beginning on January 23, 2011.<sup>148</sup> The IEP provides that Petitioner will receive no related services such as speech and language therapy.<sup>149</sup> On December 13, 2010, the Parent signed the IEP but did not indicate that she agreed with its contents.<sup>150</sup>

41. During the first half of the 2010-2011 school year, Petitioner's classes were all special education classes outside the general education setting.<sup>151</sup> His first advisory grades were all Bs.<sup>152</sup> His second advisory grades were Fs because Petitioner was hurt in an automobile accident and missed thirty-six days of school during the second advisory.<sup>153</sup> Petitioner did not receive visiting instructional services during this time.<sup>154</sup> Petitioner returned to school on January 24, 2011.<sup>155</sup>

42. During the second half of the 2010-2011 school year, Petitioner was in all general education classes.<sup>156</sup> He received the assistance of an aide and performed well in all of his classes.<sup>157</sup> He received two As and two Bs, and earned four Carnegie units toward a diploma, by the end of the school year.<sup>158</sup>

43. The Advocate recommended compensatory education for Petitioner from September 10, 2010, through January 24, 2011.<sup>159</sup> The Advocate based his recommendation of 200 hours of tutoring in math, reading, and writing, to compensate for the time Petitioner spent in special education classes when he should have been in general education classes.<sup>160</sup> The Advocate

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<sup>143</sup> *Id.*

<sup>144</sup> Petitioner Exhibit 11 at 2.

<sup>145</sup> *Id.*

<sup>146</sup> Petitioner Exhibit 7 at 5 (December 13, 2010, IEP); Respondent Exhibit 1 at 5).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 1.

<sup>151</sup> Petitioner Exhibit 17; testimony of Petitioner.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*; testimony of the Parent.

<sup>154</sup> Testimony of the Parent.

<sup>155</sup> *Id.*; testimony of Petitioner.

<sup>156</sup> Testimony of Petitioner.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Testimony of Advocate.

<sup>160</sup> *Id.*

recommended that Petitioner receive this compensatory education to assist him in passing the general education classes and so that he will be able to fill his schedule with general education classes.<sup>161</sup> The Advocate believed that Petitioner received two special education classes in addition to his general education classes during the last half of the 2010-2011 school year.<sup>162</sup> The Advocate stated that Petitioner will continue to require special education classes in math and reading and writing to succeed in his general education classes.<sup>163</sup> The Advocate believes that taking these special education classes will prevent Petitioner from earning a diploma because he must earn twenty credits in the three years he has remaining in high school.<sup>164</sup> The Advocate suggested that the 200 hours of tutoring could obviate the need for Petitioner to take special education classes.<sup>165</sup>

44. The Advocate provided credible testimony regarding Petitioner's cognitive abilities and academic performance. He easily recalled the details of the meetings he attended, the content of Petitioner's December 13, 2010, IEP, and his difficulties in school. He provided forthright testimony about Petitioner's continued need for special education classes outside the general education environment even though this is not what the Parent was seeking for Petitioner. However, his testimony regarding Petitioner's school schedule and his need for compensatory education was unsupported by the testimony and documentary evidence.

45. Petitioner was a credible witness. He testified accurately and honestly about his performance in school and his educational desires.

46. The Parent was a credible witness to the extent of the information she provided. She had limited knowledge of the facts in this case, Petitioner's cognitive functioning and academic performance, his evaluations and IEPs.

47. The Psychologist was a credible witness, although she had limited knowledge of the Student and limited recollection of the events in this case.

## 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.<sup>166</sup> FAPE is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability."<sup>167</sup> 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."<sup>168</sup>

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(1).

<sup>167</sup> 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, D.C. Mun. Reg. tit. 30 § 3001.1.

<sup>168</sup> *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89 (1982) (citation omitted).

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.”<sup>169</sup> 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.<sup>170</sup> The IEP is the centerpiece of special education delivery system.<sup>171</sup>

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.<sup>172</sup> In other words, an IDEA claim is viable only if those procedural violations affected the student’s *substantive* rights.<sup>173</sup>

The burden of proof is properly placed upon the party seeking relief.<sup>174</sup> A petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.<sup>175</sup> 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.<sup>176</sup> In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it.<sup>177</sup> Unlike other standards of proof, the preponderance-of-evidence standard allows both parties to share the risk

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<sup>169</sup> 34 C.F.R. § 300.101.

<sup>170</sup> *Rowley* at 206-207.

<sup>171</sup> *Lillbask v. Conn. Dep’t of Educ.*, 397 F.3d 77, 81 (2d Cir. 2005) (internal quotation marks omitted).

<sup>172</sup> 20 U.S.C. § 1415 (f)(3)(E)(ii).

<sup>173</sup> *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).

<sup>174</sup> *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

<sup>175</sup> 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).

<sup>176</sup> *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted).

<sup>177</sup> *Greenwich Collieries v. Director, Office of Workers’ Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), *aff’d*, 512 U.S. 246 (1994).

of error in roughly equal fashion,<sup>178</sup> except that when the evidence is evenly balanced, the party with the burden of persuasion must lose.<sup>179</sup>

## VII. DISCUSSION

### A. Petitioner Failed to Prove that DCPS Denied Him a FAPE from June 23, 2009, through December 13, 2010, by Placing Him in an Overly Restrictive Environment Where He was Unable to Earn Carnegie Units Toward a Diploma.

The IEP is the centerpiece of special education delivery system.<sup>180</sup> 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."<sup>181</sup> IDEA does not require that the services provided maximize each child's potential.<sup>182</sup>

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.<sup>183</sup>

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs,<sup>184</sup> establishes annual goals related to those needs,<sup>185</sup> and provides appropriate specialized instruction and related services.<sup>186</sup> 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.<sup>187</sup> 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.<sup>188</sup> For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression."<sup>189</sup>

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<sup>178</sup> *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted).

<sup>179</sup> *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

<sup>180</sup> *Lillbask ex rel. Mauclair v. Conn. Dep't of Educ.*, 397 F.3d 77, 81 (2d Cir. 2005) (internal quotation marks omitted).

<sup>181</sup> *Rowley*, 458 U.S. at 201 (1982).

<sup>182</sup> *Id.* at 198.

<sup>183</sup> 34 C.F.R. § 300.324 (a).

<sup>184</sup> 34 C.F.R. § 300.320 (a) (1).

<sup>185</sup> 34 C.F.R. § 300.320 (a) (2).

<sup>186</sup> 34 C.F.R. § 300.320 (a) (4).

<sup>187</sup> 34 C.F.R. § 300.320 (a) (1); 5 D.C.M.R. § 3007.2 (a).

<sup>188</sup> D.C. Mun. Reg. tit. 30 § 3002.1(f).

<sup>189</sup> *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).

Here, Petitioner asserts that Respondent denied him a FAPE by failing to place him in general education classes during the 2009 summer, during the 2009-2010 school year, and at the beginning of the 2010-2011 school year. The psychological evaluation of March 14, 2006, and the educational evaluation of January 15, 2009, found that Petitioner had extremely low cognitive functioning and that his academic performance was significantly below his grade level. His March 14, 2006, psychological evaluation recommended that he be placed in a special education setting where he would receive vocational education.

Petitioner has presented no evidence to show that these evaluations were invalid or that DCPS had data that contradicted their findings. Petitioner failed to prove that DCPS erred in relying on these evaluations in determining his placement for the 2009 summer and the 2009-2010 school year.

Additionally, the Parent signed a settlement agreement on September 1, 2010. In signing this settlement agreement, the Parent agreed that all claims prior to this date were satisfied by the agreement. Petitioner thus waived Petitioner's right to bring any claims that existed prior to September 1, 2010. Thus, these claims are barred.

Petitioner failed to show that DCPS had any new data to suggest that, after September 1, 2010, the Student's cognitive functioning or academic performance had improved to the extent that he should be placed in all general education classes. Further, the Parent did not request that DCPS place Petitioner on a diploma track until the meeting on November 15, 2010. At that meeting, Petitioner agreed that DCPS could wait until January 24, 2011, to implement Petitioner's IEP. Additionally, Petitioner was out of school due to an auto accident until January 24, 2011.

Thus, Petitioner failed to prove that DCPS denied him a FAPE. Thus, Petitioner is not the prevailing party on this claim.

**B. Petitioner Failed to Prove that DCPS Denied Him a FAPE by Developing an IEP on December 13, 2010, that Failed to Address his Speech-Language Impairment through the Provision of Speech-Language Therapy, and Failed to Address his Physical Impairments through the Provision of Physical Therapy Services between December 13, 2010, through the end of the 2010-2011 School Year.**

DCPS presented no evidence to rebut the findings of the September 15, 2010, speech-language evaluation that Petitioner requires 90 minutes per week of speech-language therapy to address his receptive and expressive speech-language deficits. Thus, by failing to include speech-language therapy on Petitioner's December 13, 2010, IEP, DCPS failed to accurately

reflect the results of evaluations to identify the student's needs,<sup>190</sup> and establish annual goals related to those needs.<sup>191</sup>

Thus, Petitioner proved that DCPS denied him a FAPE by failing to include speech and language therapy in his December 13, 2010, IEP. This Hearing Officer will order Respondent to revise Petitioner's IEP to provide 90 minutes per week of speech-language therapy.

Petitioner failed to prove that DCPS denied him a FAPE by failing to provide him physical therapy. Petitioner introduced no evidence to show that the Student currently requires physical therapy. Moreover, in 2006, the Parent agreed that Petitioner had mastered all of his physical therapy goals and no longer required physical therapy services.

### **C. Petitioner Failed to Prove that the Student is Entitled to Compensatory Education.**

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."<sup>192</sup> 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."<sup>193</sup>

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." *Reid*, 401 F.3d at 518, 523. A compensatory education "award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401 F.3d at 524. This standard "carries a qualitative rather than quantitative focus," and must be applied with "[f]lexibility rather than rigidity." *Id.* at 524.

Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies.<sup>194</sup> Others may need extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.<sup>195</sup>

Here, Petitioner presented no evidence that his compensatory education plan was designed to remedy past deficiencies in his educational programming. Rather, the compensatory

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<sup>190</sup> See 34 C.F.R. § 300.320 (a) (1).

<sup>191</sup> See 34 C.F.R. § 300.320 (a) (2).

<sup>192</sup> *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).

<sup>193</sup> *Peak v. District of Columbia*, 526 F. Supp. 2d 32, 36 (D.D.C. 2007).

<sup>194</sup> *Reid*, 401 F.3d at 524.

<sup>195</sup> *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).

education plan Petitioner proposed was designed to ensure his future success in school. Thus, it was not replacement of educational services Petitioner should have received in the first place. It was 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.

Thus, Petitioner failed to prove that the Student is entitled to compensatory education.

### **ORDER**

Based upon the Findings of Fact and Conclusions of Law herein, on this 8th day of September 2011, it is hereby:

**ORDERED** that, within twenty school days, Respondent shall amend Petitioner's IEP to provide him ninety (90) minutes per week of speech and language therapy through the end of the 2011-2012 school year, as recommended in Petitioner's September 15, 2010, speech-language evaluation and 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).