

District of Columbia  
Office of the State Superintendent of Education  
Office of Review and Compliance  
Student Hearing Office  
Frances Raskin, Due Process Hearing Officer  
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**Confidential**

STUDENT, through the legal guardian<sup>1</sup> )  
 )  
 Petitioner, )  
 )  
 v. ) Hearing Dates: October 27, 2009,  
 ) October 28, 2009  
 ) November 12, 2009  
 )  
 THE DISTRICT OF COLUMBIA )  
 PUBLIC SCHOOLS, )  
 )  
 Respondent. )  
 )

**HEARING OFFICER DETERMINATION**

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

## **I. JURISDICTION**

This Hearing Officer has jurisdiction over this case pursuant to 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. DECISION**

For the reasons explained below, this Hearing Officer finds that DCPS denied the Student a Free, appropriate, public education ("FAPE") beginning with the IEP developed on February 10, 2009. This Hearing Officer finds that DCPS failed to develop appropriate individualized education programs ("IEPs") for the Student on February 10, 2009, or June 20, 2009. This Hearing Officer further finds that Petitioner failed to prove that DCPS materially failed to fully implement the Student's IEPs. Petitioner did prove, however, that DCPS failed to provide the individualized instruction and related services that the Student required. Thus, DCPS failed to provide the Student an appropriate educational placement. For these reasons, Petitioner prevailed on all claims and this Hearing Officer will order DCPS to reimburse Petitioner for the independent evaluations and fund the Student's tuition and transportation at the non-public school requested by Petitioner for the 2009-2010 school year.

## **III. BACKGROUND**

Petitioner is the parent of an eleven-year-old student ("Student") who attends a public school in the District of Columbia. Both Petitioner and the Student reside in the District of Columbia.

On August 13, 2009, Petitioner filed a Due Process Complaint Notice ("Complaint") District of Columbia Public Schools ("DCPS") alleging violations of the "IDEIA". Petitioner alleges that independent neuropsychological, developmental, and occupational therapy evaluations, obtained at Petitioner's expense, found that the Student has mixed receptive and expressive language disorder, attention deficit hyperactivity disorder ("ADHD"), and learning disabilities. Petitioner alleges that the evaluators recommended that the Student receive small group instruction in a language-based special education program as well as related services. Petitioner had requested that DCPS develop an IEP for the Student that would provide full-time specialized instruction out of the general education setting. Petitioner alleges that, on June 11, 2008, a multidisciplinary team ("MDT") developed an IEP that provided only part-time specialized instruction and did not incorporate the recommendations of the independent evaluators.

Petitioner alleges that an August 22, 2008, hearing officer determination ("HOD") found that the Student's IEP was not appropriate and ordered DCPS to fund an independent educational evaluation and convene an MDT/IEP meeting to review and revise the Student's IEP and discuss and determine placement. On August 27, 2008, DCPS held an MDT meeting but did not change

the Student's prior IEP except to add occupational therapy goals. Petitioner complains that the "IEP team merely signed off again on the IEP that was developed in June 2008 . . . . Only occupational therapy goals were added." Petitioner fails to mention that, in addressing Petitioner's allegations that the Student's June 2008 IEP was inappropriate, the August 22, 2008, HOD required only that DCPS "incorporate occupational therapy goals."

Petitioner alleges that a second HOD, issued on February 5, 2009, ordered DCPS to convene a placement meeting and offer the Student a placement in a full-time, special education program. Petitioner alleges that DCPS held the meeting as ordered and offered to place the Student in a DCPS school ("DCPS School 1"). Petitioner alleges that she refused the proposed placement because DCPS School 1 could not provide the Student full-time, specialized instruction outside the general-education setting. Petitioner alleges that DCPS subsequently issued a prior notice of placement ("PNOP") to DCPS School 1.

Petitioner alleges that DCPS subsequently issued a PNOP, without holding a placement meeting that included Petitioner, to another DCPS school ("DCPS School 2"). Petitioner further alleges that DCPS School 2 cannot meet the Student's educational needs because it is unable to address his language-based disabilities.

Petitioner alleges that, at the February 10, 2009, meeting, DCPS agreed to conduct an updated occupational therapy evaluation and an assistive technology evaluation. Petitioner alleges that DCPS completed the occupational therapy evaluation in February 2009 and completed the assistive technology evaluation on April 23, 2009, but did not provide Petitioner the reports on the evaluations until July 20, 2009.

Petitioner alleges that DCPS failed to implement the Student's August 27, 2008 IEP. Petitioner should have raised this claim in the January 26, 2009, due process hearing.<sup>2</sup> Thus, Petitioner is precluded from introducing testimony or evidence related to this claim.<sup>3</sup> Petitioner also alleges that DCPS failed to implement the Student's February 10, 2009, IEP.

Petitioner alleges that she attended a July 20, 2009, MDT meeting at which the MDT reviewed the occupational therapy and assistive technology evaluations. Petitioner alleges that, at this meeting, the MDT revised the Student's IEP but did not incorporate into the IEP all of the recommendations of the Student's evaluations. Petitioner alleges that, at this meeting, DCPS again proposed placing the Student at DCPS School 2.

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<sup>2</sup> Claim preclusion, formerly known as *res judicata*, provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Comm'r v. Sunnen*, 333 U.S. 591, 597 (1948) (citing *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1877)).

<sup>3</sup> In practice, claim preclusion "bars a litigant from splitting claims into separate actions because once judgment is entered in an action it "extinguishes the plaintiff's claim . . . including all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." *Restatement (Second) of Judgments* §24 (1982).

Petitioner summarizes her legal claims as whether DCPS failed to:

- A. Provide the Student an appropriate educational placement;
- B. Develop an appropriate IEP for the Student on February 10, 2009, or June 20, 2009;
- C. Provide the related services on the Student's February 10, 2009 IEP, thereby failing to implement this IEP;
- D. Timely conduct an assistive technology assessment of the Student; and
- E. Timely review the Student's occupational therapy evaluation and assistive technology assessment, and review and revise the Student's IEP to incorporate the recommendations in these evaluations.

Petitioner seeks relief that includes an order requiring DCPS to provide the Student compensatory education and fund the Student's placement at a non-public school ("Non-Public School) with transportation and related services. Petitioner further requests that the Hearing Officer order DCPS to hold an MDT meeting within thirty days of the Student's placement at the Non-Public School to review and revise the Student's IEP to incorporate the recommendations of the Student's independent psychological, speech-language, and assistive technology evaluations. Finally, Petitioner requests that the Hearing Officer order DCPS to provide the Student compensatory education.

On August 25, 2009, counsel for DCPS filed a Response to Parent's Administrative Due Process Complaint Notice. DCPS denies that it failed to provide the Student an appropriate IEP that can meet the Student's needs. DCPS asserts that the Student's July 20, 2009, IEP provides the Student with 24.5 hours per week of specialized instruction, and one hour per week of speech-language therapy, one hour per week of occupational therapy and one hour per week of behavioral support services. DCPS further asserts that the Student's June 11, 2008, IEP provided the Student ten hours of specialized instruction and one hour per week of the aforementioned related services.

DCPS further asserts that, at a February 10, 2009, MDT meeting, DCPS proposed that the Student's IEP be updated to include additional hours of specialized instruction and placing the student at DCPS School 1 for services as the DCPS School 3, the school the Student was then attending, would be unable to implement this IEP. DCPS asserts that Petitioner rejected the proposed IEP and placement.<sup>4</sup>

DCPS asserts that it then responded with a PNOP to the Petitioner's requested school, DCPS School 2. DCPS asserts that DCPS School 2 is a full-time, out-of-general-education, educational facility for students with learning disabilities.

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<sup>4</sup> This is an equitable consideration that the Hearing Officer will take into account in deciding whether to award the Student compensatory education and the amount of any compensatory education award.

DCPS asserts that Petitioner did not consent to the PNOP to DCPS School 2 and did not consent to the February 10, 2009, IEP, even though staff at elementary school ("DCPS School 3") had advised Petitioner that the Student may have required additional services. As a result, the Student remained in DCPS School 3 until he graduated in June 2009. DCPS asserts that, by refusing the February 10, 2009, IEP and PNOP to DCPS School 2, Petitioner waived any claim that DCPS failed to provide the Student a free, appropriate, public education from February 2009 through the conclusion of the 2008-2009 academic year. DCPS further asserts that the Student made academic progress on every IEP goal while he was at DCPS School 3 and thus DCPS did not deny the Student a FAPE.

DCPS denies Petitioner's allegation that it denied the Student a FAPE by failing to develop an appropriate IEP on July 20, 2009. DCPS asserts that the July 2009 IEP was reasonably calculated to provide the Student a FAPE.<sup>5</sup> Finally, DCPS denies that it failed to timely conduct the Student's assistive technology assessment.

On August 26, 2009, the Hearing Officer held a prehearing conference in the above matter. Participating in the prehearing conference were Elizabeth Jester, counsel for Petitioner, and Daniel Kim, counsel for Respondent. On September 28, 2009, counsel for Petitioner filed a Motion for Continuance requesting that the due process hearing be continued to October 27, and 28, 2009. This Hearing Officer issued a continuance order setting the hearing for Petitioner's requested dates on October 9, 2009. This Hearing Officer issued a prehearing order on October 14, 2009, a revised prehearing order on October 15, 2009, and in response to objections from counsel for Petitioner, a second revised prehearing order on October 26, 2009. Both parties exchanged five-day disclosures on October 20, 2009.

The due process hearing commenced on September 9, 2009. Petitioner's Exhibits 1-2,<sup>6</sup> 9-17,<sup>7</sup> 20-23,<sup>8</sup> 25-28,<sup>9</sup> and 31-35 were admitted into evidence at the inception of the hearing.<sup>10</sup> Respondent's Exhibits 1-14, 17, 19-20 also were admitted into evidence.<sup>11</sup>

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<sup>5</sup> DCPS must prove that the IEP addresses "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." 30 DCMR § 3002.1(f).

<sup>6</sup> Petitioner Exhibit 3 included MDT Meeting Notes and an IEP from August 27, 2008. Exhibit 4 is the Student's IEP from June 11, 2008. Petitioner Exhibit 5 is the MDT Meeting Notes from June 11, 2008. Petitioner Exhibit 6 is the Student's IEP from November 7, 2005. Petitioner Exhibit 7 is the Student's 2004 IEP. Petitioner Exhibit 8 is the Student's 2003 IEP. The Student's IEPs prior to 2008 are not relevant and are beyond the statute of limitations.

<sup>7</sup> Petitioner Exhibit 18 is entitled "Response to Intervention from General Education For Special Education's Eligibility Decision for [Student]." This document was created by the Student's general education teacher for the 2007-2008 academic year. Petitioner Exhibit 19 included various progress reports from the 2007-2008 academic year.

<sup>8</sup> Petitioner Exhibit 24 was not admitted as it was created only days before Petitioner filed her Complaint and may have been created in anticipation of litigation.

<sup>9</sup> Petitioner did not reference Exhibit 29 during the due process hearing and thus they were not admitted into evidence. The Educational Expert testified at length about Petitioner Exhibit 30.

#### IV. RECORD

Due Process Complaint Notice, filed August 13, 2009;  
DCPS Response to Petitioner's Administrative Due Process Complaint, filed August 26, 2009;  
Petitioner Letter Motion for Continuance, filed September 28, 2009;  
Continuance Order, issued October 9, 2009;  
Prehearing Conference Order, issued October 14, 2009;  
Revised Prehearing Conference Order, issued October 14, 2009;  
Petitioner's Five-Day Disclosure Statement, filed October 20, 2009 (identifying seven witnesses and including 36 proposed exhibits);  
DCPS Five-Day Disclosure Statement, filed October 20, 2009 (listing thirteen witnesses and including twenty proposed exhibits);  
Second Revised Prehearing Conference Order, issued October 26, 2009;  
Petitioner Closing Argument (written), filed November 17, 2009;  
DCPS Closing Argument (written), filed November 17, 2009; and  
Petitioner's Rebuttal to DCPS Closing Argument (written), filed November 19, 2009.<sup>12</sup>

#### V. ISSUES PRESENTED

This Hearing Officer interprets Petitioner's remaining claims as essentially as whether DCPS failed to:

- A. Develop appropriate IEP for the Student on February 10, 2009, and June 20, 2009;<sup>13</sup>
- B. Implement the Student's February 10, 2009 IEP;<sup>14</sup>

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<sup>10</sup> Counsel for DCPS requested authentication of Petitioner Exhibit 28, and the Hearing Officer reserved admission of this exhibit, as well as exhibits 3-8, 18-19, 24, 29-30, 36 until they were authenticated or relied upon by witnesses who testified during the due process hearing. All of these exhibits, with the exception of Petitioner

<sup>11</sup> DCPS Exhibits 16 and 18 were transcripts from prior due process hearings. This Hearing Officer informed the parties that she would not review these transcripts the only testimony and exhibits that are relevant to her decision are those admitted at the instant due process hearing.

<sup>12</sup> This Hearing Officer revised the prehearing order at Petitioner's request.

<sup>13</sup> Petitioner alleges that these IEPs fail to address the Student's ADHD, receptive and expressive language disorder, and fine/gross motor deficits. Petitioner further that the Student's February 10, 2009, and June 20, 2009, IEPs fail to include indicators of whether the Student is achieving the goals on those IEPs. Petitioner further alleges that DCPS failed to include in these IEPs the recommendations of the Student's assistive technology, occupational therapy, and psychological evaluations. To prevail, Petitioner will be required to prove that the IEPs are not reasonably calculated to produce meaningful educational benefits. *Rowley*, 458 U.S. at 199; *Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C. 2005). IDEIA does not require that the services provided maximize each child's potential. *Id.* at 198.

C. Provide the Student an appropriate educational placement.<sup>15</sup>

## VI. FINDINGS OF FACT

The Student is an [REDACTED] d, [REDACTED], special-education student who attends a District of Columbia middle school.<sup>16</sup>

The Student presents with fairly severe speech and language disability.<sup>17</sup> Petitioner obtained a degree in speech-language pathology in order to help the Student with his disability.<sup>18</sup>

The Student has a very depressed ability to respond to receptive language and a depressed ability to respond.<sup>19</sup> His ability to express himself in contextual situations is poor.<sup>20</sup> His ability to use language to communicate his needs, establish friendships, and in social situations also is poor.<sup>21</sup>

The Student has a mixed receptive and expressive language disorder that affects him in every aspect of his life.<sup>22</sup> The Student has difficulty understanding anything that involves language, and this affects every one of his classes in school.<sup>23</sup> Children who have these difficulties are confused with the nuances of social interaction, poor understanding of nonverbal communication.<sup>24</sup>

The Student has a poor ability to use language to self-organize to perform tasks.<sup>25</sup> The Student shows strengths in decoding and reading but his ability to understand what he has reads is very poor.<sup>26</sup> He has limited ability to use language to communicate his needs, establish friendships, and interact socially.<sup>27</sup> In all areas of language, he is struggling.<sup>28</sup>

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<sup>14</sup> As explained above, Petitioner will be confined to contesting the implementation by DCPS of the Student's February 10, 2009, IEP because her claim regarding the August 27, 2008, IEP is *res judicata*.

<sup>15</sup> Petitioner will be precluded from litigating the appropriateness of the Student's placement prior to January 19, 2009, because at any time up to that date, Petitioner could have amended her complaint to include this issue. *See Sunnen*, 333 U.S. at 597.

<sup>16</sup> Testimony of Petitioner, Student.

<sup>17</sup> Testimony of Speech-Language Pathology Expert.

<sup>18</sup> Testimony of Petitioner.

<sup>19</sup> Testimony of Speech-Language Pathology Expert.

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

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

<sup>22</sup> Testimony of Expert in Clinical Psychology.

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

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

<sup>25</sup> Testimony of Speech-Language Pathology Expert.

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

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

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

The Student is struggling in his classes at his current school.<sup>29</sup> At many times, he appeared to be in his own world, and often appeared to be lost in thought when he received auditory stimuli.<sup>30</sup> When the Student was not on task, his teacher berated him for not following the class.<sup>31</sup> The teacher did not appear to understand his language needs and did not work with him to overcome his deficits in speech and language.<sup>32</sup>

The Student requires a teaching method that incorporates multisensory input at all times because his auditory channel is extremely weak and he has difficulties with spatial awareness.<sup>33</sup> The Student needs to be engaged visually, motorically, and auditorily to be able to engage in his academics.<sup>34</sup> His classroom instructions must be provided in small chunks, and the classroom teacher should regularly check in with the Student to ensure he understands instructions before going on.<sup>35</sup>

The Student's current school, DCPS School 2, does not use a multisensory approach in classroom instruction.<sup>36</sup> The atmosphere at this school is not conducive for a child with auditory processing and receptive language issues.<sup>37</sup> The Student requires personal assistive technology to engage in the classroom instruction, but he was not provided this technology in his classroom.<sup>38</sup> Moreover, the Student's teachers are not programming for the extent of his language disability.<sup>39</sup>

The speech-language goals on the Student's July 20, 2009, IEP do not address the student's executive functioning or auditory memory deficits.<sup>40</sup> The goals do not indicate when the speech-language pathologist would be working with the Student on social pragmatic skills.<sup>41</sup> All of the speech language goals fall short of the Student's needs and do not address the complexity of the academics the Student will be expected to master.<sup>42</sup>

The Students February 10, 2009, and July 20, 2009, IEPs fail to provide baselines of the Student's academic performance in many of the academic goals.<sup>43</sup> Baselines must be provided on a student's IEP so his instructors can measure his progress.<sup>44</sup> The speech and language goals

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

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

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

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

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

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

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

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

<sup>37</sup> *Id.*

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

<sup>39</sup> *Id.*

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

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

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

<sup>43</sup> *Id.*; Petitioner Exhibits 1 and 2.

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

on the July 20, 2009, IEP that contain baselines, but these baselines are expressed in percentages.<sup>45</sup> A percentage is not specific and should be accompanied by a narrative.<sup>46</sup>

At the February 10, 2009, IEP meeting, Petitioner provided input on to the Student's goals.<sup>47</sup> The MDT incorporated none of Petitioner's recommendations into the Student's IEP.<sup>48</sup> In fact, the IEP did not reflect the MDT's discussion.<sup>49</sup>

The Student's goals remained the same on the February 10, 2009, and July 20, 2009, IEPs.<sup>50</sup> These also are the same goals that appear on the Student's June 11, 2008 IEP.<sup>51</sup> Thus, the Student made no academic progress achievement between June 2008 and July 2009.<sup>52</sup>

At the February 10, 2009, IEP meeting, the MDT offered to place the Student in a DCPS school ("DCPS School 1").<sup>53</sup> Petitioner rejected this proposed placement because DCPS School 1 could not provide the Student full-time, specialized instruction outside the general-education setting. Nonetheless DCPS issued a PNOP to DCPS School 1.<sup>54</sup>

DCPS subsequently ascertained that DCPS School 1 could not implement the Student's IEP.<sup>55</sup> DCPS then issued another PNOP, without holding a placement meeting that included Petitioner, to DCPS School 2.<sup>56</sup> Although Petitioner did not believe this school was appropriate for the Student, she decided to wait and see if the Student made progress at DCPS School 2.<sup>57</sup> The Student currently attends DCPS School 2.<sup>58</sup>

The Student requires specialized instruction that emphasizes language in all areas of instruction.<sup>59</sup> He needs vocabulary building and language building before every lesson.<sup>60</sup> The Student also requires visual representation in conjunction with vocabulary so that he learns vocabulary before performing assignments or participating in instruction in any academic area.<sup>61</sup> To accommodate his language-based disability, all introductions of all of the Student's lessons must be language and vocabulary based.<sup>62</sup> The Student requires lots of visual cues and his

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<sup>45</sup> Petitioner Exhibit 1.

<sup>46</sup> Testimony of Educational Expert.

<sup>47</sup> Testimony of Petitioner.

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

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

<sup>50</sup> Testimony of Educational Expert; Petitioner Exhibits 1 and 2.

<sup>51</sup> Testimony of Educational Expert; Petitioner Exhibit 4.

<sup>52</sup> Testimony of Educational Expert.

<sup>53</sup> Testimony of Petitioner.

<sup>54</sup> Testimony of Educational Expert; Petitioner Exhibit 20.

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

<sup>56</sup> *Id.*; Petitioner Exhibit 23.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

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

<sup>60</sup> *Id.*

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

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

classroom must be organized to provide him regular visual cues to help him organize the information presented to him.<sup>63</sup>

To address his attention deficit, hyperactivity disorder (“ADHD”), the Student also needs social cluing so he knows where he is supposed to be at all times and knows who, what, where, when, and why upon entering the classroom.<sup>64</sup> He requires a clearly outlined and organized social rubric, e.g., instruction on how to enter the classroom and clear identification of the materials that will be required for the lesson.<sup>65</sup> Those materials also must be clearly locatable (on desk before he begins).<sup>66</sup> Lesson and activities must be laid out step by step before the lesson is begun.<sup>67</sup>

Children with ADHD need routines that are the same every day so they can organize their bodies and minds.<sup>68</sup> Students with ADHD also must be taught in a classroom with a small adult-student ratio because they have social issues that interfere with their ability to understand their own space as well as how they interact with peers and adults.<sup>69</sup> These children need highly structured environments and lessons broken down into small parts so they can see how the small parts interact to make the whole lesson.<sup>70</sup>

The Student’s classrooms have small student-teacher ratios of about eight or ten students per teacher.<sup>71</sup> The Student’s language arts classroom lacked smart boards (visual representations of lessons) or other technology designed to assist students with vocabulary.<sup>72</sup> On a visit to the Student’s current school, DCPS School 2, the Educational Expert observed that the instruction provided in the classrooms was general education, one-size-fits-all instruction.<sup>73</sup> On another visit, the Education Expert noted that the Student was not engaging in the classroom discussion and it was clear that he did not understand the lesson.<sup>74</sup> The teacher did not break the lesson into small parts and there was no indication of the beginning, middle, or end of the lesson.<sup>75</sup> The teacher did not use visual aides or provide individualized instruction to any of the students.<sup>76</sup> During this time, the Student was not engaged in the lesson.<sup>77</sup>

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

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

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

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

<sup>68</sup> *Id.*

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

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

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

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

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

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

<sup>76</sup> *Id.*

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

Despite that assistive technology is probably the most critical part of his program, the Student did not have access to a computer during the instruction in his language-arts classroom.<sup>78</sup> [REDACTED] struggles with written expression and handwriting.<sup>79</sup> His handwriting was not efficient and was laborious compared to his word processing.<sup>80</sup> The Student also has difficulty lining up math problems.<sup>81</sup>

The Student needs access to computer with specialized software in order to complete written or reading assignments at school and home.<sup>82</sup> He also needs an electronic graphic organizer to assist him with mapping the main idea and to organize his thoughts prior to working on any assignment.<sup>83</sup> However, for the assistive technology to be effective, the Student's teachers, parents, and anyone else who will be working with him on assignments need training in the technology because the software programs are complex.<sup>84</sup>

The Student also requires school-based counseling.<sup>85</sup> He has a long history of experiencing anxiety in social situations.<sup>86</sup> This anxiety is likely exacerbated by his language disability, as he lacks confidence in his ability to communicate effectively and engage in age-appropriate social interactions.<sup>87</sup>

His school must have an on-site therapist to work with the Student, check in with him, and work with his teachers.<sup>88</sup> Therapeutic interventions will help the Student target social skills, emotional expression, and coping skills to further address his symptoms of anxiety and depression.<sup>89</sup>

The program offered at the Student's current school, DCPS School 2, is not appropriate to meet his needs, and thus would cause major academic regression.<sup>90</sup> If the Student is not in a program that meets his needs, he would have reduced self-esteem and develop introverted behaviors and a weakened ego.<sup>91</sup> If the Student remains in a program that is not language-based or otherwise meet the Student's needs there is a risk he will withdraw and there is a possibility he will develop an aversion to school.<sup>92</sup> The Student needs to feel a part of the classroom, part of

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<sup>78</sup> *Id.*

<sup>79</sup> Testimony of Assistive Technology Evaluator.

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

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

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

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

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

<sup>85</sup> Petitioner Exhibit 11.

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

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

<sup>88</sup> Testimony of Expert in Clinical Psychology.

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

<sup>90</sup> Testimony of Educational Expert.

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

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

the school, and part of the school community.<sup>93</sup> If he does not feel stable, he will regress in academics, social-emotional development, and self-esteem.<sup>94</sup>

The non-public school offers a language-based curriculum.<sup>95</sup> The school integrates assistive technology into the curriculum and each student has access to a computer every day.<sup>96</sup> The students also have access to books on tape and videos of the curriculum so they can visualize it in addition to the verbal instruction.<sup>97</sup> The non-public school also provides software that assist students with organizing their thoughts and using vocabulary.<sup>98</sup> The non-public school provides daily therapy to assist students with communication, self-advocacy, and working independently.<sup>99</sup> The school can provide speech-language and occupational therapy in individual sessions and integrated into the classroom.<sup>100</sup> It also provides counseling to its students. The non-public school can provide the Student a FAPE.<sup>101</sup>

## VII. CREDIBILITY DETERMINATIONS

The testimony of all Petitioner's witnesses at the hearing was credible. While the testimony of most of the DCPS witnesses was credible, none of them contradicted the testimony of Petitioner's witnesses, except on minor details that would not change the outcome of this case.

## VIII. CONCLUSIONS OF LAW

The Hearing Officer's inquiry in this case is twofold. First, has the State complied with the procedures set forth in the Act? *Bd. of Education v. Rowley*, 458 U.S. 176, 206 (1982). Second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? *Id.* at 207-07. If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. *Id.* at 207.

The burden of proof is properly placed upon the party seeking relief.<sup>102</sup> Under IDEIA, a Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.<sup>103</sup>

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

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

<sup>95</sup> Testimony of Non-Public School Education Director.

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

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

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

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

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

<sup>101</sup> *Id.*

<sup>102</sup> *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

<sup>103</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).

IDEA guarantees children with disabilities the right to a free and appropriate public education with services designed to meet their individual needs.<sup>104</sup> 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)...<sup>105</sup>

Special education is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability."<sup>106</sup> 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."<sup>107</sup>

DCPS is obligated to provide a FAPE "for all children residing in the state between the ages of 3 and 21, inclusive."<sup>108</sup> In deciding whether DCPS provided the Student a FAPE, the inquiry is limited to (a) whether DCPS complied with the procedures set forth in IDEIA; and (b) whether the Student's IEP reasonably calculated to enable the Student to receive educational benefits.<sup>109</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>110</sup> In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.<sup>111</sup>

## IX. DISCUSSION

### A. DCPS Failed to Develop Appropriate IEPs for the Student on February 10, 2009, and July 20, 2009.

<sup>104</sup> 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(1).

<sup>105</sup> 20 U.S.C. § 1401(9), 34 C.F.R. § 300.17, 30 DCMR Sec. § 3001.1.

<sup>106</sup> 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, 30 DCMR Sec. § 3001.1.

<sup>107</sup> *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89 (1982) (citation omitted).

<sup>108</sup> 34 C.F.R. § 300.101.

<sup>109</sup> *Rowley* at 206-207.

<sup>110</sup> 20 U.S.C. § 1415 (f)(3)(E)(ii).

<sup>111</sup> *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted). *Accord, Krivant 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").

Once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals.<sup>112</sup> The court should not “disturb an IEP simply because [it] disagree[s] with its content.”<sup>113</sup> 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.”<sup>114</sup>

Petitioner proved by a preponderance of the evidence that DCPS failed to develop appropriate IEPs for the Student on February 10, 2009, and July 20, 2009. The defects in the Student's IEPs are so numerous as to render these IEPs utterly inappropriate. First, DCPS failed to show that it made any reasonable efforts to include Petitioner in the development of these IEPs. Second, as discussed below, these IEPs are not specially designed to meet the unique needs of the Student or reasonably calculated to provide the Student meaningful educational benefits.

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>115</sup> IDEA does not require that the services provided maximize each child's potential.<sup>116</sup>

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.<sup>117</sup> 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.<sup>118</sup>

An IEP also must include a statement of measurable annual goals.<sup>119</sup> The goals on the February 10, 2009, and July 20, 2009 IEPs lacked meaningful baselines. Without these baselines, the Student's teachers would not be able to accurately gauge his progress. Moreover, without baseline data, it is impossible to ascertain whether these goals are specifically tailored to the Student's disabilities.

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<sup>112</sup> *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990) (internal citation and quotations omitted).

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

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

<sup>115</sup> *Rowley*, 458 U.S. at 201 (1982).

<sup>116</sup> *Id.* at 198.

<sup>117</sup> 34 C.F.R. § 300.324 (a).

<sup>118</sup> 34 C.F.R. § 300.320 (a) (1); 5 D.C.M.R. § 3007.2 (a).

<sup>119</sup> 34 C.F.R. § 300.320 (a) (2) (i); 5 D.C.M.R. § 3007.2 (b) (annual goals must include short-term instructional objectives).

DCPS failed to comply with the procedures set forth in IDEIA by failing to develop IEPs that were reasonably calculated to enable the Student to receive educational benefits. Thus, Petitioner established by a preponderance of the evidence that DCPS denied the Student a FAPE.

**B. Petitioner Failed to Prove that DCPS Failed to Implement the Student's February 10, 2009, IEP.**

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

"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." *Peak v. District of Columbia*, 526 F. Supp. 2d 32, 36 (D.D.C. 2007). Here, DCPS denied the Student a FAPE in failing to develop an appropriate IEP for the Student and failing to provide an appropriate educational placement.

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.

Petitioner presented insufficient testimony to prove that DCPS materially failed to implement the Student's IEP. The remedy for failing to implement the Student's IEP would be compensatory education, but Petitioner failed to present sufficient evidence that the Student was entitled to compensatory education or to present a compensatory education plan that meets the *Reid* standard i.e., replacement of educational services the child should have received in the first place.

**C. DCPS Denied the Student FAPE by Failing to Provide an Appropriate Educational Placement.**

The IDEIA requires that unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.<sup>120</sup> In

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<sup>120</sup> 34 C.F.R. § 300.116 (c).

selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of the services that he or she needs.<sup>121</sup> A child with a disability is not removed from education in age appropriate regular classrooms solely because of needed modifications in the general education curriculum.<sup>122</sup>

Placement decisions must be made in conformity with the child's IEP.<sup>123</sup> Thus, the placement should not dictate the IEP but rather the IEP determines whether a placement is appropriate.<sup>124</sup> 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 IDEIA:

- (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.<sup>125</sup>

Here, DCPS arbitrarily issued a PNOP to a school that could not implement the Student's IEP and then, without holding the required placement meeting with Petitioner, issued a PNOP to DCPS School 2. As the testimony overwhelmingly established, DCPS School 2 is not providing individualized instruction and assistive technology individually designed to provide educational benefit. The Student has not mastered his IEP goals in more than two years, which in itself shows that he has made no educational progress at DCPS School 2 or 3.

Thus, Petitioner proved that DCPS failed to comply with the procedures set forth in IDEIA by failing to include Petitioner in the placement decision. Petitioner also proved that DCPS also failed to place the Student in educational settings were reasonably calculated to enable the Student to receive educational benefits.

Thus, Petitioner proved by a preponderance of the evidence that DCPS denied the Student a FAPE.

### ORDER

Upon consideration of Petitioner's requests for a due process hearing, the DCPS Response thereto, the exhibits and the testimony admitted at the hearing, it is this 22nd day of November 2009 hereby:

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<sup>121</sup> 34 C.F.R. § 300.116 (d).

<sup>122</sup> . Id. at (e)

<sup>123</sup> 34 C.F.R. § 300.116 (a)(2)(b), 5 D.C.M.R. § 3013 (2006).

<sup>124</sup> See, *Rourke v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006).

<sup>125</sup> D.C. Code § 38-2561.02.