

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

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

Parents, on behalf of STUDENT,¹)	Case Number:
)	
Petitioners,)	Hearing Dates:
)	February 8 and 10, 2011
v.)	Room 2004
)	
THE DISTRICT OF COLUMBIA)	Hearing Officer: Frances Raskin
PUBLIC SCHOOLS,)	
)	
Respondent.)	

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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 ("IDEIA"), and its implementing regulations at 20 U.S.C. §§ 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

II. BACKGROUND

Petitioners are the parents of a year-old student ("Student") with a disability who attends a public elementary school in the District of Columbia. On December 30, 2010, Petitioners filed a Due Process Complaint ("Complaint") against the District of Columbia Public Schools ("DCPS") pursuant to the Individuals with Disabilities Education Act ("IDEA").

This Hearing Officer was appointed to preside over this case on January 3, 2011. DCPS filed a response to the Complaint ("Response") on January 19, 2011.

On January 20, 2011, the parties participated in a resolution meeting. They were unable to resolve the Complaint and agreed to proceed to a due process hearing. The parties agreed that the forty-five day, due process hearing timeline began on January 21, 2011.

¹ Personal identification information is provided in Attachment A.

On January 24, 2011, this Hearing Officer held a prehearing conference in which Miguel Hull, counsel for Petitioners, and Daniel McCall, counsel for Respondent DCPS, participated. This Hearing Officer issued a Prehearing Conference Summary and Order on January 27, 2011.

The due process hearing commenced on February 8, 2011. This Hearing Officer admitted into evidence the parties' respective five-day disclosures at the inception of the hearing.² During the two days of hearing, Petitioners presented the testimony of three witnesses, including the father of the Student. DCPS presented the testimony of three witnesses. The due process hearing concluded on February 10, 2011.

III. ISSUES PRESENTED.

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

Whether DCPS denied the Student a free, appropriate, public education ("FAPE) by failing to develop an appropriate individualized educational program ("IEP") on October 27, 2010, in that the IEP failed to provide the Student sufficient specialized instruction outside the general education environment.

Petitioners seeks relief in the form of an order requiring DCPS to amend the Student's IEP to provide her 27.5 hours of specialized instruction outside the general education setting, fund the Student's enrollment at the Non-Public School for the remainder of the 2010-2011 school year, and provide her compensatory education.

IV. FINDINGS OF FACT.

1. The Student is a -year-old, special-education student who is in the grade at a District of Columbia elementary school ("DCPS School").³ In 2005, the Student exhibited behavioral traits, including communication and social behaviors, that suggested a high probability of autism.⁴ Her cognitive abilities appeared to be significantly delayed, and she was diagnosed with pervasive developmental disorder, not otherwise specified ("NOS").⁵ She also was diagnosed with expressive and receptive language disorder and she exhibited mild to moderate hearing loss.⁶ The Student was found eligible for special education on February 13, 2008.⁷

2. The Student is functioning substantially below grade-level expectations and in the

² This Hearing Officer admitted Petitioners' Exhibits 1-21 and Respondent's Exhibits 1-10.

³ Petitioners Exhibit 5 at 1 (September 28, 2010, Report of Bilingual Psychological Evaluation); Petitioners Exhibit 4 at 1 (2010-2011 First Grade Report Card).

⁴ Petitioners Exhibit 5 at 2.

⁵ *Id.*

⁶ *Id.*

⁷ Stipulation of parties.

deficient range of cognitive potential.⁸ Her full scale IQ is 53, which is below the first percentile.⁹

3. Her verbal comprehension abilities are below the first percentile of her same-age peers and in the deficient range.¹⁰ Thus, her proficiency in understanding verbal information, thinking with words, and expressing thoughts in words is significantly below age-level expectations.¹¹

4. The Student's perceptual organizational abilities are in the third percentile, which is within the borderline range.¹² Her ability to solve nonverbal problems quickly and efficiently with visual information is in the borderline range.¹³ However, her skills in solving nonverbal problems are somewhat better developed than her skills in solving verbal problems.¹⁴ Thus, her comprehension improves substantially when information is presented in a visual and auditory manner simultaneously.¹⁵

5. The Student's working memory is below the first percentile of her same-age peers.¹⁶ In general, her skills in attention, concentration, and mental reasoning are in the very low range.¹⁷ Her short-term auditory memory is in the deficient range, and she will have difficulty working on tasks that require her to immediately recall information.¹⁸ Additionally, her ability to recall, sequence, and manage information presented through auditory means is in the deficient range.¹⁹ This impedes her ability to learn new information in the classroom and recall that information, particularly when presented with tasks that require analysis, sequencing, and application such as reading comprehension and response to literature.²⁰

6. The Student's processing speed also is below the first percentile of her same-age peers.²¹ In general, her skills in speed of mental problem-solving, attention, and eye-hand coordination are in the low range.²² Her short-term visual memory and visual perceptual speed are delayed and in the deficient range.²³ This impedes her ability to work on tasks that require her to quickly understand and reason through information presented visually.²⁴ Given her

⁸ Petitioners Exhibit 5 at 3.

⁹ *Id.* at 9.

¹⁰ *Id.* at 4, 9.

¹¹ *Id.* at 4.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 4, 9.

¹⁷ *Id.* at 4.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 4, 5.

²¹ *Id.* at 4.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

deficits in sequencing and recalling information presented auditorily, she will struggle to understand information and solve problems within specific time limits.²⁵

7. The Student's academic skills are generally at or below kindergarten level, which is in the low range of her same-age peers.²⁶ Her ability to apply academic skills also is in the low range.²⁷ When compared to others at her grade level, she performs in the low average range in brief reading and brief writing.²⁸ In these areas, her achievement is comparable to a student who is in the early months of kindergarten.²⁹ While she is able to write a sentence when a picture cue and verbal prompt are provided, she is unable to generate sentences independently or write frequent-use sight words such as "cat."

8. Her spelling, passage-comprehension, and letter-word-identification skills also are in the mid-kindergarten level.³⁰ She is able to correctly write single letters, but cannot write simple words.³¹ Although she is able to identify a word accompanied by a picture, she is unable to read two words or a sentence.³² She is able to identify letters in isolation, and identify simple words but is unable to write these words in a sentence.³³

9. Her brief math skills are below the kindergarten level, which is in very low range of her same-age peers.³⁴ Her math calculation and applied-problems skills also are below kindergarten level.³⁵ While she is able to count with one-to-one correspondence, she is unable to add or subtract, even when pictures are presented.³⁶

10. In the classroom, the Student's adaptive skills, i.e., her typical performance of day-to-day activities required for personal and social sufficiency, are below expectations.³⁷ Her performance in talking, listening, reading, and writing is in the first percentile of her same-age peers.³⁸ She has moderately low adaptive skills in listening, paying attention, and understanding communication compared to other children her age.³⁹ She has low skills in using words and sentences to gather and provide information.⁴⁰ She also has moderately low adaptive skills in

²⁵ *Id.*

²⁶ *Id.* at 5.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 5.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

reading and writing compared to her same-age peers.⁴¹

11. The Student's daily living skills also are low; they correspond to the skills of a child four years and five months of age.⁴² Her skills in managing personal needs, understanding time, money and math are equivalent to a child at age four years and one month.⁴³ She has moderately low adaptive skills in following rules and routines, and performs at an age equivalent of four years and one month.⁴⁴ Her adaptive skills in taking care of her personal needs and her hygiene also are moderately low when compared to other children her age.⁴⁵

12. The Student's socialization skills, i.e., interaction with peers, her play skills, use of leisure time, and coping skills, are at the first percentile.⁴⁶ Thus, she has low adaptive skills in interacting and getting along with others when compared to other students of her age group.⁴⁷

13. Her level of adaptive functioning in the motor skills domain is in the first percentile.⁴⁸ Her use of her arms and legs for movement and coordination is low when compared to other students her age.⁴⁹ Her use of her hands and fingers to manipulate objects also is low when compared to her same-age peers.⁵⁰

14. Overall, the Student's behaviors are associated with traits typically exhibited by individuals with autism.⁵¹ She avoids establishing eye contact, stares at her hands, objects, or items in the environment for at least five seconds, and smells or sniffs objects.⁵² She speaks or signs with a flat tone and affect, and in abnormal rhythms.⁵³ She does not initiate conversations with peers or adults.⁵⁴ She looks away or avoids looking at the person speaking to her.⁵⁵ She also has the tendency to laugh or giggle inappropriately, resists physical contact from others, and shows no recognition that another person is present.⁵⁶

15. The Student fits the profile of autism.⁵⁷ In addition, her deficits in verbal comprehension, working memory, and processing speed directly impact her ability to read, write,

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 6.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 6-7.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Petitioners Exhibit 5 at 7.

and comprehend material on her current grade level.⁵⁸

16. The Student would benefit from frequent repetition and daily rehearsal of information to aid her in understanding and learning classroom tasks.⁵⁹ She is a visual learner, i.e., she is better able to understand and analyze information when it is presented visually and language is not involved.⁶⁰ Her comprehension improves substantially when visual and verbal/auditory information is presented simultaneously.⁶¹ However, her proficiency at understanding and completing work is adversely affected when specific time limits are imposed.⁶²

17. Information should be presented to the Student in small steps to aid recall, and she should be given extended time to comprehend information presented in the classroom.⁶³ Directions should be repeated and rephrased due to her deficits in working memory.⁶⁴ Her instruction should incorporate visual models, and her work assignments should be segmented.⁶⁵ She requires a classroom with reduced stimuli to enhance her focus on the task at hand.⁶⁶ He also requires verbal and visual prompts to redirect her, promote eye contact, and improve her attention to task.⁶⁷

18. The Student should be taught self-monitoring strategies to decrease her echolalia, i.e., her tendency to parrot what has been said to her.⁶⁸ She also requires continued support of small-group, cooperative play activities to increase her social interactions and strengthen her social skills.⁶⁹ These activities should include rehearsal and modeling of social interactions and encourage her to approach other students and ask questions such as whether she can join their play activity.⁷⁰

19. On October 27, 2010, DCPS convened a meeting of the Student's IEP team to review her bilingual psychological evaluation that DCPS conducted the previous month.⁷¹ Present at the meeting were the Student's father ("Petitioner A"), Petitioners' Educational Advocate, the DCPS Psychologist who conducted the evaluation, the Student's general education and special education teachers, the DCPS elementary school Special Education Coordinator ("SEC"), and a DCPS compliance case manager.⁷² The Student's related service providers, the Speech and

⁵⁸ *Id.* at 7.

⁵⁹ *Id.* at 4, 7.

⁶⁰ *Id.* at 7.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 8.

⁶⁵ *Id.* at 7.

⁶⁶ *Id.* at 7.

⁶⁷ *Id.* at 7.

⁶⁸ *Id.* at 7.

⁶⁹ *Id.* at 7.

⁷⁰ *Id.* at 7.

⁷¹ Petitioners Exhibit 9 at 1 (Advocate's Notes of October 27, 2010, IEP meeting)

⁷² DCPS Exhibit 4 at 26.

Language Pathologist, Occupational Therapist, and physical therapist, were not present at the meeting.⁷³ At the meeting, the IEP team agreed that the Student continues to be eligible for special education with a disability classification of autism spectrum disorder.⁷⁴ Petitioners' Educational Advocate requested an evaluation to rule out autism.⁷⁵

20. At the October 27, 2010, IEP meeting, the IEP team developed an IEP for the Student.⁷⁶ The IEP team included in this IEP the same academic goals as were on the Student's prior IEP, developed in April 2010, because the Student was still working on mastering these goals.⁷⁷ The DCPS members of the IEP team agreed to provide the Student seventeen hours and forty-five minutes per week of specialized instruction and related services outside the general education setting.⁷⁸ The IEP team determined that the Student requires fifteen hours per week of specialized instruction outside the general education setting, including five hours per week of specialized instruction in mathematics and ten hours per week of specialized instruction in reading.⁷⁹ The team also agreed that the Student requires one hour per week of occupational therapy, one hour per week of speech-language therapy, and forty-five minutes per week of physical therapy.⁸⁰

21. Petitioners' Educational Advocate requested that the IEP team provide the Student a total of 27.5 hours of specialized instruction and related services outside the general education environment.⁸¹ The Advocate requested that the IEP reflect the speech and language therapy that the Student was receiving in her classroom.⁸² The Advocate also requested that DCPS place the Student at a separate, special education day school, provide a dedicated aide for the Student, and provide her 120 hours of tutoring as compensatory education.⁸³ DCPS denied these requests.⁸⁴

22. The Advocate also requested that DCPS provide applied behavioral analysis ("ABA") to address the Student's autism.⁸⁵ The special education teacher responded that she was providing ABA to the Student.⁸⁶

23. At the DCPS School, the Student's general education classroom has twenty-four

⁷³ *Id.*; Petitioners Exhibit 9 at 1; Testimony of Speech and Language Pathologist, Occupational Therapist.

⁷⁴ *Id.* at 27; Petitioners Exhibit 7 (October 27, 2010, IEP).

⁷⁵ DCPS Exhibit 4 at 28.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ DCPS Exhibit 4 at 28; testimony of Educational Advocate.

⁸² DCPS Exhibit 4 at 28; Petitioners Exhibit 9 at 3.

⁸³ Petitioners Exhibit 9 at 3; testimony of Educational Advocate.

⁸⁴ DCPS Exhibit 4 at 29.

⁸⁵ Petitioners Exhibit 9 at 3.

⁸⁶ *Id.*

students and one teacher.⁸⁷ In this setting, the Student is unable to follow directions or understand the instruction.⁸⁸ Even when the general education teacher works one-on-one with the Student, she cannot remain focused on the task at hand.⁸⁹ When the teacher directs the class to turn to a particular page in a book, the Student is unable to do so, in part because of her limited understanding of numbers.⁹⁰ The Student is unable to provide answers to questions the teacher posed; she opens her mouth but was unable to produce a sound.⁹¹ The Student is unable to keep up with the rest of the class, and is distracted much of the time.⁹² The Student is making less than minimal progress in the general education setting.⁹³

24. The Student's special education classroom has only six students, three first graders and three kindergarteners.⁹⁴ The Student is able to work on the classroom assignments in this setting with repetition of directions and assistance from the special education teacher.⁹⁵ She is more confident in this setting, requests assistance when she needs to, and has established relationships with the other students.⁹⁶

25. The Student has made appropriate academic progress in the special education setting at the DCPS School.⁹⁷ She also has received all of the related services required by her October 27, 2010, IEP.⁹⁸

26. A DCPS school week consists of 32.5 hours of school time, of which 27.5 hours are spent in the classroom.⁹⁹ The Student's October 27, 2010, IEP provides her fifteen hours of specialized instruction and 2.75 hours of related services outside the general education setting per week.¹⁰⁰ Thus, she is in the general education setting for just under ten hours per week, or two hours per day.¹⁰¹ During the time she is in the general education setting, the Student receives math and reading instruction, even though she is unable to achieve success in these

⁸⁷ DCPS Exhibit 4 at 27; testimony of Educational Advocate.

⁸⁸ Testimony of Educational Advocate.

⁸⁹ *Id.*

⁹⁰ Testimony of Educational Advocate.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Petitioner Exhibit 3 at 1 (January 23, 2011, email from general education teacher to Educational Advocate).

⁹⁴ Testimony of Educational Advocate; DCPS Exhibit 4 at 27.

⁹⁵ Testimony of Educational Advocate.

⁹⁶ *Id.*

⁹⁷ Stipulation of parties.

⁹⁸ *Id.*

⁹⁹ Testimony of DCPS Special Education Coordinator ("SEC"). *See also* Petitioners Exhibit 4 at 1; Petitioner Exhibit 7 at 8 (Least Restrictive Environment section of October 27, 2010, IEP) (stating that the Student cannot participate in math and reading in the general education classroom due to her disability).

¹⁰⁰ Petitioner Exhibit 7 at 7.

¹⁰¹ *Id.*; Testimony of DCPS SEC. The SEC testified that the Student would spend 3.5 hours per week in the general education setting. This calculation does not comport with the rest of her testimony and likely due to an inadvertent error in addition.

subjects in this setting.¹⁰²

27. The Student is making progress on her speech and language goals.¹⁰³ However, she still demonstrates difficulty in the general education setting because she does not receive the support she requires in that setting.¹⁰⁴ She is not yet able to carry over the progress she has made on her speech-language goals into the general education setting, is not engaged, and does not participate in the discussion.¹⁰⁵ She still has difficulty with multi-step directions.¹⁰⁶ Due to her speech and language difficulties, it is premature for the Student to be in the general education environment.¹⁰⁷

28. The Student also is making progress on her occupational therapy goals.¹⁰⁸ Nonetheless, she has difficulty completing assignments because of her deficits in fine motor skills.¹⁰⁹ She has particular difficulties in the general education setting.¹¹⁰ In the special education classroom, the Student is more successful because she is given extra time to complete assignments, word banks to assist her in finding the right words, and models to provide her examples for completing her work.¹¹¹

29. The Non-Public School serves students with language, sensorimotor, and learning disabilities, as well as high-functioning autistic students.¹¹² These autistic students make up 60 percent of the student body in the Non-Public School's elementary school.¹¹³ Students at the Non-Public School have no interaction with non-disabled peers at school.¹¹⁴

30. At the Non-Public School, each classroom has a maximum of ten students, and one teacher, and one teaching assistant.¹¹⁵ The Non-Public School incorporates related-service providers into the classroom.¹¹⁶ During the language arts instruction, which comprises about 90 minutes of each day, the Non-Public School integrates speech and language pathologists into the classroom.¹¹⁷

31. The Non-Public School also provides GIR Floor Time for the autistic students for

¹⁰² Testimony of DCPS SEC.

¹⁰³ Testimony of DCPS Speech and Language Pathologist.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Testimony of DCPS Occupational Therapist.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Testimony of Non-Public School Educational Director.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

about half an hour each day.¹¹⁸ This technique is designed to address the students' social-emotional functioning and help them interact with their peers.¹¹⁹ The Non-Public School also provides a movement class in which the occupational therapists provide services to students.¹²⁰ Occupational therapists also assist students with visual perceptual skills and math.¹²¹

32. The Student has been accepted for admission to the Non-Public School.¹²² The Non-Public School has been approved by DCPS.¹²³ It is an appropriate setting for the Student.¹²⁴ The Non-Public School can meet the Student's academic needs and provide the interventions she requires to address her disability.¹²⁵

33. None of the witnesses for DCPS contradicted or otherwise undermined the testimony of Petitioners' witnesses. Additionally, the testimony of the DCPS Occupational Therapist and Speech and Language Pathologist corroborated the testimony of Petitioners' witnesses. Thus, the testimony of each of the witnesses at the due process hearing was credible.

V. CONCLUSIONS OF LAW

The burden of proof is properly placed upon the party seeking relief.¹²⁶ Under IDEA, the Petitioners must prove the allegations in the due process complaint by a preponderance of the evidence.¹²⁷ The burden of showing something by a preponderance of evidence simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before she may find in favor of the party who has the burden of persuasion.¹²⁸ In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it.¹²⁹ Unlike other standards of proof, the preponderance standard allows both parties to share the risk of error in roughly equal fashion,¹³⁰ except that when the evidence is evenly balanced, the party with the burden of persuasion must lose.¹³¹

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

¹²⁷ 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).

¹²⁸ *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted).

¹²⁹ *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), *aff'd*, 512 U.S. 246 (1994).

¹³⁰ *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted).

¹³¹ *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

IDEA guarantees children with disabilities the right to a free and appropriate public education with services designed to meet their individual needs.¹³² FAPE is defined as “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability.”¹³³ 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.”¹³⁴

DCPS is obligated to provide a FAPE “for all children residing in the state between the ages of 3 and 21, inclusive.”¹³⁵ 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.¹³⁶

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.¹³⁷ In other words, an IDEA claim is viable only if those procedural violations affected the student’s *substantive* rights.¹³⁸

VI. DISCUSSION

Petitioners Proved that DCPS Denied the Student a FAPE by Failing to Develop an Appropriate IEP for the Student on October 27, 2010, and that the Student Requires Full-Time, Specialized Instruction Outside the General Education Setting.

The IEP is the centerpiece of special education delivery system.¹³⁹ The adequacy of a 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

¹³² 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(1).

¹³³ 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, D.C. Mun. Reg. tit. 30 § 3001.1.

¹³⁴ *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89 (1982) (citation omitted).

¹³⁵ 34 C.F.R. § 300.101.

¹³⁶ *Rowley* at 206-207.

¹³⁷ 20 U.S.C. § 1415 (f)(3)(E)(ii).

¹³⁸ *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted). *Accord, Kruvant v. District of Columbia*, 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying relief under IDEA because “although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents’ request, the [parents] have not shown that any harm resulted from that error”).

¹³⁹ *Lillbask ex rel. Mauclaire v. Conn. Dep’t of Educ.*, 397 F.3d 77, 81 (2d Cir. 2005) (internal quotation marks omitted).

handicapped child.”¹⁴⁰ IDEIA does not require that the services provided maximize each child’s potential.¹⁴¹

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.¹⁴² 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.¹⁴³ 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.¹⁴⁴

Here, the testimony of all of the witnesses who testified, including the DCPS Speech and Language Pathologist and Occupational Therapist, established that general education classroom is not an appropriate setting for the Student. As a result of her cognitive delays, speech-language impairment, and fine motor deficits, the Student cannot process or keep pace with the instruction in the general education classroom, in part because she does not receive the assistance she requires in that setting.

The testimony of the witnesses, as well as the documents admitted into evidence, showed that DCPS was aware of the nature of Student’s disability when it developed her October 27, 2010, IEP. At the October 27, 2010, meeting, the DCPS psychologist reviewed the Student’s September 28, 2010, Bilingual Psychological Evaluation. This was the same psychologist who conducted this evaluation.

The September 28, 2010, psychological evaluation found that the Student meets the profile of autism. It further found that the Student’s pervasive delays impacted her ability to make academic progress in all subjects. It recommended that her instruction be provided in small steps to aid recall, and that she be given extended time to comprehend information presented in the classroom. It recommended that directions be repeated and rephrased due to her deficits in working memory, her instruction incorporate visual models, and her work assignments should be segmented. It further recommended that she be placed in a classroom with reduced stimuli to enhance her focus on the task at hand.

In other words, the DCPS psychological evaluation unequivocally supported full-time, specialized instruction outside the general education environment for the Student. This is exactly what Petitioners’ Educational Advocate requested.

The Student’s related service providers, the Speech and Language Pathologist and Occupational Therapist, both testified that the Student was not able to make progress in the general education environment. These related service providers certainly would have shared

¹⁴⁰ *Rowley*, 458 U.S. at 201 (1982).

¹⁴¹ *Id.* at 198.

¹⁴² 34 C.F.R. § 300.324 (a).

¹⁴³ 34 C.F.R. § 300.320 (a) (1); 5 D.C.M.R. § 3007.2 (a).

¹⁴⁴ D.C. Mun. Reg. tit. 30 § 3002.1(f).

these same findings with the IEP team. Yet, DCPS failed to include them in the October 27, 2010, meeting and in the development of the IEP.

On October 27, 2010, DCPS developed an IEP that provided that the Student would receive general education instruction in the general education setting for more than one third of her school day. The Student was unable to keep pace with the instruction in the general education classroom, access the curriculum, or overcome the stimuli of a classroom of twenty-five students. In developing this IEP, DCPS utterly ignored its own psychological evaluation, which unequivocally established that the Student requires full-time, individualized instruction and related services in a small setting for the entirety of the school day.

Thus, Petitioners has proved by a preponderance of the evidence that DCPS denied the Student a FAPE in developing an inappropriate IEP on October 27, 2010. Petitioners further proved, in part through the testimony of the DCPS related service providers and through the DCPS psychological evaluation, that the Student requires an IEP that provides at least 27.5 hours per week of specialized instruction and related services outside the general education setting.

B. Petitioners Proved that the Non-Public School is Appropriate for the Student.

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.¹⁴⁵ In 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.¹⁴⁶ 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.¹⁴⁷

The term “educational placement” refers to the type of educational program prescribed by the IEP.¹⁴⁸ “Educational placement” refers to the general educational program, such as the classes, individualized attention, and additional services a child will receive, rather than the “bricks and mortar” of the specific school.¹⁴⁹

The considerations relevant to determining whether a particular placement is appropriate for a particular student include the nature and severity of the student's disability; the student's specialized educational needs; the link between those needs and the services offered by the school; the placement's cost; and the extent to which the placement represents the least restrictive environment.¹⁵⁰

¹⁴⁵ 34 C.F.R. § 300.116 (c).

¹⁴⁶ 34 C.F.R. § 300.116 (d).

¹⁴⁷ *Id.* at (e).

¹⁴⁸ *T.Y. v. N.Y. Dept. of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009) (citation omitted).

¹⁴⁹ *Id.*

¹⁵⁰ *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) (citing *Rowley*, 458 U.S. at 202).

To the maximum extent possible children with disabilities should be educated with children who are non-disabled.¹⁵¹ Special classes separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.¹⁵²

In the District of Columbia, special education placements shall be made in the following order or priority, provided, that the placement is appropriate for the student and made in accordance with IDEA: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) private or residential District of Columbia facilities; and (3) facilities outside of the District of Columbia.¹⁵³

As stated above, Petitioners proved that, due to the severity of her disability, the Student requires an IEP that provides at least 27.5 hours per week of specialized instruction and related services outside the general education setting. The Non-Public School can provide both the setting and the specialized instruction that the Student requires to access the curriculum. The Non-Public School will provide the intensive instruction in the small setting that she requires to make academic progress. The Non-Public School will address her profound social and communication deficits which prevent her from making progress in the general education environment.

While the Student will not have access to non-disabled peers at the Non-Public School, the DCPS Speech and Language Pathologist established that the Student currently lacks the skills to communicate and interact with non-disabled peers. Until such time as she develops these skills, the Non-Public School is her least restrictive environment. Thus, the Non-Public School is appropriate.

C. Petitioners 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."¹⁵⁴ 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."¹⁵⁵

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

¹⁵¹ 34 C.F.R. § 114 (a)(2)(i).

¹⁵² *Id.* at 114 (a)(2)(ii).

¹⁵³ D.C. Code § 38-2561.02.

¹⁵⁴ *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).

¹⁵⁵ *Peak v. District of Columbia*, 526 F. Supp. 2d 32, 36 (D.D.C. 2007).

district's violations of the IDEA."¹⁵⁶ 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."¹⁵⁷ This standard "carries a qualitative rather than quantitative focus," and must be applied with "[f]lexibility rather than rigidity."¹⁵⁸

A Petitioner does not have to present "a perfect case to be entitled to a compensatory education award."¹⁵⁹ However, even if entitlement to an award is shown through a denial of a free and appropriate public education, "[i]t may be conceivable that no compensatory education is required for the denial of [a free and appropriate public education]. . . either because it would not help or because [the student] has flourished in his current placement."¹⁶⁰

Here, however, Petitioners failed to prove that the Student had suffered any educational detriment as a result of the failure by DCPS to develop an appropriate IEP on October 27, 2010. In other words, Petitioners failed to introduce any evidence in the record "supporting a finding that the [Student]. may have suffered a setback in [her] educational development as a result of this denial of FAPE."¹⁶¹ Thus, Petitioners failed to establish that the Student was entitled to compensatory education.

ORDER

Based upon the Findings of Fact and Conclusions of Law herein, on this 6th day of March 2011, it is hereby:

ORDERED that, on or before March 21, 2011, DCPS shall revise the Student's IEP to provide her 27.5 hours of specialized instruction and related services, outside the general education setting, consistent with this decision; and

IT IS FURTHER ORDERED that, on or before March 21, 2011, DCPS shall provide funding and transportation for the Student to attend the Non-Public School for the remainder of the 2010-2011 school year.

By: /s/ Frances Raskin
Hearing Officer

¹⁵⁶ *Reid*, 401 F.3d at 518, 523.

¹⁵⁷ *Id.* at 524.

¹⁵⁸ *Id.*

¹⁵⁹ *Stanton ex rel. K.T. v. Dist. of Columbia*, 680 F. Supp. 2d 201, 206-207 (D.D.C. 2010).

¹⁶⁰ *Thomas v. Dist. of Columbia*, 407 F. Supp. 2d 102, 115 (D.D.C. 2005).

¹⁶¹ *See Phillips v. District of Columbia*, 2010 U.S. Dist. LEXIS 94954 at **22-23 (D.D.C. September 13, 2010).

NOTICE OF APPEAL RIGHTS

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

Distributed to:

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Student Hearing Office
DCPS