

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

Student Hearing Office
1150 Fifth Street, S.E.
Washington, DC 20003

STUDENT, through the legal guardian¹)) Petitioner,)) v.)) THE DISTRICT OF COLUMBIA) PUBLIC SCHOOLS,)) Respondent.)) Case Number:)) Hearing Dates: March 22- 23, 2011) Hearing Room: 2006)) Hearing Officer: Frances Raskin
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HEARING OFFICER DETERMINATION

I. JURISDICTION

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

II. BACKGROUND

Petitioner is the parent of (“Student”), a -year-old student with a disability who attends in the District of Columbia. On February 8, 2011, Petitioner filed a Due Process Complaint (“Complaint”) against the District of Columbia Public Schools (“DCPS”) pursuant to IDEA.

This Hearing Officer was appointed to preside over this case on February 10, 2011. Respondent DCPS filed a response to the Complaint on February 24, 2011.²

The parties participated in a resolution meeting on February 22, 2011. The parties were unable to resolve the Complaint and agreed to proceed to a due process hearing. Thus, the

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

resolution period ended on February 22, 2011. The parties agreed that the forty-five day, due process hearing timeline began on February 23, 2011.

On February 28, 2011, this Hearing Officer held a prehearing conference in which Alana Hecht, counsel for Petitioner, and Tanya Chor, counsel for Respondent DCPS, participated. This Hearing Officer issued a prehearing order on March 4, 2011.

On March 15, 2010, both parties filed their respective witness lists and five-day disclosures of proposed exhibits. The due process hearing commenced at 9:00 a.m. on March 22, 2011. At the outset of the hearing, this Hearing Officer entered into evidence the parties' respective exhibits.³

Petitioner testified at the hearing and presented the testimony of four other witnesses. Respondent presented the testimony of two witnesses, the Student's special education teacher and the school special education coordinator ("SEC"). After two days of testimony, the due process hearing concluded. Both parties filed written closing arguments on March 28, 2011.

III. MOTION TO STRIKE

During the prehearing conference on February 28, 2011, this Hearing Officer informed the parties that the deadline for their disclosures was 5:00 p.m. on March 15, 2011. This Hearing Officer suggested that counsel for Respondent propose a witness to provide testimony about alternate DCPS schools that could implement a 27.5 hour individualized educational program ("IEP") so that this hearing Officer has a range of placement options should she grant Petitioner's request for a "full-time" IEP for the Student. In the witness list and five-day disclosure that counsel for Respondent filed at 3:21 p.m. on March 15, 2011, no such witnesses or schools were listed.

At 5:04 p.m. on March 15, 2011, counsel for Respondent emailed opposing counsel and this Hearing Officer to inform them of two schools that could implement a 27.5-hour IEP for the Student. At 5:14 p.m., that same day, counsel for Respondent emailed opposing counsel and this Hearing Officer to suggest two other schools could implement a 27.5-hour IEP.

On March 17, 2011, Petitioner filed a Motion to Strike Emails from Record and to Preclude Testimony Regarding the Content of Those Emails ("Motion to Strike"). In the Motion to Strike, Petitioner argued that the emails of March 15, 2011, and any testimony about the schools listed in these emails, should be excluded from the record because they were not properly disclosed in Respondent's five-day disclosure. Petitioner also objected to the introduction of any such testimony on the grounds that she had been provided no notice of the testimony or the proposed locations of services and had not had an opportunity to investigate the appropriateness of these schools.

³ This Hearing Officer admitted into evidence Petitioner's exhibits 1, 3, 4, 6, 11, 15, 16, 19- 22, and 24-30. This Hearing Officer also admitted Petitioner's exhibit 7, pages 3-14 and 17. This Hearing Officer excluded Petitioner's exhibits 2, 5, 8-10, 12-14, 17-19, and 23. Also admitted were DCPS exhibit 1-5, 8, and 10-15. DCPS 6, 7, and 9 were not admitted into evidence.

At 10:26 a.m. on March 18, 2011, counsel for Respondent sent an email stating that, by email, Respondent was amending its five-day disclosure and witness list. Counsel for Respondent stated that she planned to call a witness to testify about two DCPS schools that could provide the Student 27.5 hours of specialized instruction and related services outside the general education environment. The two schools listed in the email were in addition to the five schools counsel for Respondent previously identified by email.

On March 19, 2011, Respondent filed an Opposition to Petitioner's Motion to Strike. Respondent asserted that Petitioner would not be prejudiced by testimony about the proposed schools because she was aware of this Hearing Officer's request that Respondent present evidence of alternate DCPS schools that could implement a 27.5 hour IEP.

On March 21, 2011, Petitioner filed a Reply to Respondent's Opposition to Strike/Preclude ("Reply"). This Reply generally reiterated the arguments in Respondent's Motion to Strike.

On March 22, 2011, at the outset of the due process hearing, this Hearing Officer discussed the Motion to Strike, Opposition, and Reply with the parties. Counsel for Respondent clarified that a witness she had properly disclosed in Respondent's five-day disclosures could present testimony on the proposed alternative schools. She also clarified that Respondent planned to propose only the last two schools she disclosed on March 18, 2011.

This Hearing Officer informed the parties that the IDEA regulations specifically allow a party to prohibit the introduction of evidence not disclosed at least five business days prior to the due process hearing.⁴ This Hearing Officer found that it would be prejudicial to Petitioner to allow Respondent to use surprise evidence and testimony about potential locations of services that Petitioner had not had an opportunity to investigate and that were not disclosed in Respondent's five-day disclosures. For these reasons, this Hearing Officer orally granted the Motion to Strike.

IV. ISSUES PRESENTED

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

A. Whether DCPS denied the Student a free, appropriate, public education ("FAPE") by failing to convene an appropriate individualized educational program ("IEP") team on December 18, 2009, and developing an IEP that lacks (1) sufficient, measurable goals to address all of the Student's areas of disability, including the Student's speech-language impairment; (2) present levels of performance for each goal in the IEP; (3) sufficient hours of specialized instruction; and (4) an appropriate setting, i.e., outside the general education setting;

B. Whether DCPS denied the Student a FAPE by failing to provide the Student extended school year ("ESY") services during the 2010 summer even though it notified Petitioner in March 2010 that the Student required ESY; and

⁴ 34 C.F.R. § 300.512 (a)(3).

C. Whether DCPS denied the Student a FAPE by failing to convene an appropriate IEP team on November 22, 2010, and developing an IEP that failed to provide sufficient hours of specialized instruction and related services to address the Student's disabilities and an appropriate setting, i.e., outside general education.

For the reasons explained below, this Hearing Officer finds that Petitioner prevails on claims A and C. Petitioner failed to present any evidence to support a finding on claim B.⁵

V. FINDINGS OF FACT

1. The Student is a -year-old, special-education student who attends a District of Columbia elementary school.⁶ The Student's full-scale IQ is 52, which is below the first percentile of his same-age peers.⁷ The Student's global cognitive ability is at the fifth percentile of his same-age peers, which is in the borderline range.⁸ Overall, the Student's cognitive ability is moderately below average compared to similar age peers.⁹ His working memory, verbal and non-verbal reasoning are commensurate with his global intellectual ability.¹⁰

2. The Student's crystallized and verbal reasoning ability is in the tenth percentile, which is in the below average range.¹¹ His verbal reasoning, language development, fund of knowledge, and verbal analytical problem solving skills are below average.¹²

3. His fluid intelligence is in the sixth percentile, which is moderately below average.¹³ This suggests he has difficulty with non-verbal reasoning, including visual-spatial imagery, solving nonverbal analogies, and visual discrimination.¹⁴ His nonverbal reasoning is within the moderately below average range.¹⁵

4. The Student's working memory is in the fifth percentile, which is moderately below average.¹⁶ His auditory and visual working memory are evenly delayed.¹⁷ He has difficulty retelling a story and identifying stimuli previously seen.¹⁸ Overall, he has weaknesses in his ability to encode, store, and retrieve information obtained through auditory and visual

⁵ For this reason, this Hearing Officer declines to provide a detailed discussion of this claim.

⁶ Testimony of Petitioner.

⁷ Testimony of expert in clinical, educational, and school psychology ("Psychology Expert").

⁸ Petitioner Exhibit 6 at 35 (December 14, 2009, Psychological Evaluation Report).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

modalities.¹⁹

5. The Student's academic achievement is in the third percentile.²⁰ This is consistent with his cognitive ability as both are in the borderline range of functioning.²¹ His relative strength is in the area of general information, which indicates that he is aware of his environment and understands and generalizes materials found in the culture at large.²²

6. The Student's pre-reading skills are deficient.²³ His listening comprehension, ability to recognize letters of the alphabet and conventions are in the fifth percentile.²⁴ The Student's pre-mathematics skills also are in the fifth percentile.²⁵ He is unable to demonstrate basic number sense or solve a word problem using subtraction.²⁶ He is capable of counting low numbers.²⁷ The Student's written expression skills are in the fourth percentile.²⁸ His spoken language skills are poor.²⁹ His receptive and expressive language is in the sixth percentile.³⁰

7. The Student has adequate knowledge of the cultural milieu, and performs in the forty-fifth percentile on general information questions.³¹ He understands danger and is safety conscious, is able to identify body parts and basic shapes, and understands temporal concepts such as time duration and relating time to an activity.³² He is developing knowledge about his surroundings and the culture at large in spite of his cognitive weaknesses and academic limitations.³³

8. Overall, the Student is struggling cognitively.³⁴ Due to his cognitive and academic deficits, he has great difficulty comprehending the class work and keeping pace with his general education peers in a general education classroom.³⁵ His deficits in fine motor functioning and visual motor integration further compound his difficulties keeping up with his peers in a general education classroom.³⁶

9. In the general education classroom, the Student listens well and tries to behave but he

¹⁹ *Id.*

²⁰ *Id.* at 36.

²¹ *Id.* at 37.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 37.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Testimony of Psychology Expert.

³⁵ *Id.*

³⁶ *Id.*

has difficulty controlling himself.³⁷ The Student requires a significant amount of attention, small group instruction, verbal cueing, and redirection.³⁸ He requires additional time to complete tasks in academic settings.³⁹ He should receive multisensory instruction that pairs auditory and visual information.⁴⁰ He should receive scaffolding to improve his phonological processing.⁴¹

10. The Student should receive incremental rehearsal to improve his letter recognition, and continued reinforcement of pre-school skills such as tracing letters, his name and shapes; coloring in the lines; counting from one to twenty; identifying basic shapes and letters; recognizing patterns; attending to a story; attending to a task; making a connection between letters and sounds; and identifying key words from a book.⁴² He would benefit from learning nursery rhymes, short songs, and poems to build his auditory memory.⁴³ He also should engage in memory games, such as Old Maid, to improve his visual memory.⁴⁴

11. The Student would benefit from behavioral supports within the school setting that emphasize coping with inattentive, hyperactive behaviors and other issues affecting his growth and development.⁴⁵ The Student requires a one-to-one paraprofessional to keep him in his seat, help him maintain attention, and to address his emotions as well as his cognitive and academic deficits.⁴⁶

12. The Student's articulation is in the above-average range for his age and gender.⁴⁷ His intelligibility is appropriate, although he makes some errors in articulation.⁴⁸ However, his listening comprehension, oral expression, and retrieval skills are in the low average range for his age and gender.⁴⁹ His expressive and receptive single word vocabulary is in the below average range.⁵⁰ The Student requires thirty minutes of speech-language services twice a week, provided that he is working on strategies to develop self-control, attention, and concentration to increase his availability for learning.⁵¹

13. On December 9, 2009, while the Student was attending a public charter school ("Charter School"), DCPS developed a behavior intervention plan ("BIP") for him.⁵² The goal

³⁷ Petitioner Exhibit 6 at 52 (January 13, 2011, Review of Evaluation Meeting Notes).

³⁸ *Id.* at 38 (December 14, 2009, Psychological Evaluation Report).

³⁹ *Id.* at 40.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 41.

⁴⁶ Testimony of Psychology Expert.

⁴⁷ Petitioner Exhibit 25 at 2 (September 28, 2009, Speech and Language Evaluation Report).

⁴⁸ *Id.*

⁴⁹ *Id.* at 2.

⁵⁰ *Id.* at 3.

⁵¹ *Id.* at 4.

⁵² Petitioner Exhibit 6 at 10 (December 9, 2009, Behavior Intervention Plan).

of the BIP is for the Student to follow classroom rules and be safe throughout the school day.⁵³

14. The BIP provides that the school staff would meet with the Student in the morning to discuss his feelings and expectations for the day.⁵⁴ During this meeting, the staff would review the criteria for the Student to earn rewards during the day.⁵⁵

15. The BIP also provides that, when the Student is angry, frustrated, or aggressive, he would be given the choice of drawing a picture about what he is feeling and then discussing it with the staff to determine what he should do differently the next time.⁵⁶ It also provides that when the Student is off task, he would be placed in close proximity to the teacher and the teacher would give the Student verbal reminders, remind him of the class rules, and give him two prompts to return to the task.⁵⁷ The Student must then explain what rule he broke and what he could do differently.⁵⁸

16. If the Student performs according to the BIP, he could earn five stickers in a day.⁵⁹ The Student may earn one sticker for each of the four academic subjects and one for the morning meeting.⁶⁰ He also would receive other rewards, including picking his own library book and serving as line leader for lunch.⁶¹

17. The Student also would face consequences for failing to comply with the BIP.⁶² If he breaks a classroom rule, he would be given a verbal reminder of the appropriate alternate behavior and a reminder of the school rules.⁶³ If he breaks five classroom rules within ten minutes, and fails to follow the rules after five redirections, he would be removed from the classroom for no less than ten minutes to talk about the rules and why they are important.⁶⁴ If he continues to persist in the behavior after being reintroduced to the classroom, he would be required to call his parents and discuss his behaviors with them.⁶⁵

18. On December 18, 2009, DCPS convened a meeting to review his academic progress and his December 14, 2009, psychological evaluation.⁶⁶ Present at the meeting were a special education coordinator, a psychologist, and a local educational agency ("LEA") representative.⁶⁷

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* These subjects are emergent reading and writing, phonics center, math center, and social studies. *Id.*

⁶¹ *Id.* at 11.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Petitioner Exhibit 20 at 1 (December 18, 2009, Multidisciplinary Team Meeting Notes).

⁶⁷ *Id.*

Petitioner attended the meeting by telephone.⁶⁸

19. At the December 18, 2009, meeting, the IEP team developed an IEP for the Student.⁶⁹ The IEP team consisted of Petitioner, the Charter School vice principal and special education coordinator, the LEA representative, and one other individual.⁷⁰ The team developed goals in reading, social-emotional and behavioral development, and motor skills and physical development.⁷¹ For each of these areas on the IEP, the IEP team drafted detailed and extensive present levels of performance.⁷²

20. Although the Student's December 14, 2009, psychological evaluation, which DCPS conducted, identified weaknesses in written expression and mathematics,⁷³ the IEP team did not develop any IEP goals in these areas.⁷⁴ Even though this evaluation found that the Student exhibited significant deficits in all academic areas,⁷⁵ and that the Student's cognitive functioning and academic performance were in the borderline range,⁷⁶ the IEP team decided that the Student should receive only ten hours per week of specialized instruction in the general education setting.⁷⁷

21. The December 18, 2009, IEP provides that the Student would receive forty-five minutes per week of occupational therapy and one hour per week of behavioral support services outside the general education environment.⁷⁸ Although the Student's September 28, 2009, speech and language evaluation revealed that his expressive and receptive language skills are in the below average range, and recommended that he receive speech-language therapy,⁷⁹ the IEP team developed no speech-language goals nor prescribed any related services in this area.⁸⁰ The Student's September 28, 2009, speech and language evaluation was the only evaluative data upon which the IEP team could have relied in deciding not to include these services on the Student's IEP.

22. On March 10, 2010, DCPS convened a meeting to discuss its plans to change the Student's location of services from the Charter School to the elementary school he now attends ("DCPS School").⁸¹ Petitioner attended the meeting, as did a general education teacher, special education, and placement specialist.⁸² The Student had made no progress during the 2009-2010

⁶⁸ *Id.*

⁶⁹ Petitioner Exhibit 21 at 1 (December 18, 2009, IEP).

⁷⁰ *Id.*

⁷¹ *Id.* at 3-5.

⁷² *Id.*

⁷³ Petitioner Exhibit 6 at 37.

⁷⁴ *Id.*

⁷⁵ *Id.* at 36.

⁷⁶ *Id.*

⁷⁷ *Id.* at 7.

⁷⁸ *Id.*

⁷⁹ Petitioner Exhibit 25 at 3-4.

⁸⁰ Petitioner Exhibit 21 at 7.

⁸¹ Petitioner Exhibit 19 at 1 (March 10, 2010, Prior Notice).

⁸² *Id.*

school year, and Petitioner was repeatedly called to the school to address the Student's behavioral problems.⁸³

23. At the March 10, 2010, meeting, DCPS provided a prior written notice to Petitioner that indicated that the Student required a change in location because he required a full-time, out-of-general education setting.⁸⁴ DCPS found that neither the general education setting, nor the combination general education/special education setting, were appropriate for the Student.⁸⁵ Petitioner agreed to the change in location of services because DCPS represented that the new school would provide the Student specialized instruction outside the general education setting for the entire school day.⁸⁶ DCPS also informed her that the Student would receive ESY during the 2010 summer.⁸⁷

24. The Student began attending the DCPS School in March 2010.⁸⁸ In June 2010, Petitioner learned for the first time that the Student was not receiving full-time, specialized instruction outside the general education setting.⁸⁹ At this time, Petitioner also learned that the Student would not receive ESY during the 2010 summer.⁹⁰

25. On November 22, 2010, DCPS convened a meeting of the Student's IEP team.⁹¹ Present at the meeting were Petitioner, the Student's father, Petitioner's educational advocate, the Student's general education teacher, the Student's special education teacher, and the special education coordinator.⁹² The Student's occupational therapist participated in the meeting by phone.⁹³

26. At the November 22, 2010, meeting, Petitioner requested that the IEP team revise the Student's IEP to include speech-language therapy.⁹⁴ The DCPS members of the IEP team responded that, because a speech-language therapist was not in attendance, they were unable to develop speech and language goals for the Student.⁹⁵

27. Petitioner requested that DCPS provide a one-on-one paraprofessional for the Student.⁹⁶ The DCPS special education coordinator responded that DCPS could not make a determination of whether the Student requires a dedicated aide because the full IEP team was not

⁸³ Testimony of Petitioner.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Testimony of Petitioner.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Petitioner Exhibit 16 at 1 (Advocate's November 22, 2010, IEP Meeting Notes).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 2.

⁹⁵ *Id.*

⁹⁶ *Id.* at 3.

participating in the meeting.⁹⁷ Petitioner also requested that DCPS provide the Student extended school year services (“ESY”) because of his deficits in academic performance.⁹⁸ DCPS responded that they would discuss ESY at a later date.⁹⁹ Petitioner also questioned why the Student was not receiving full-time specialized instruction outside the general education setting, as DCPS indicated in the March 10, 2010, prior notice.¹⁰⁰

28. At the November 22, 2010, meeting, the IEP team developed an IEP that provides the Student fourteen hours per week of specialized instruction outside the general education setting, one hour per week of specialized instruction in the general education setting, one hour per week of behavioral support services, and forty-five minutes per week of occupational therapy services.¹⁰¹ The IEP team was prevented from providing the Student more hours of specialized instruction by the computer program that generates all IEPs.¹⁰² The computer program required the IEP team to provide data that justified more hours of specialized instruction, in part because the DCPS School does not have the resources provide more than fourteen hours of specialized instruction outside the general education setting.¹⁰³

29. The IEP team also developed present levels of performance, needs statement, and impact statements, as well as annual goals in the areas of reading; emotional, social, and behavioral development; motor skills and physical development.¹⁰⁴

30. Although the Student’s September 28, 2009, speech and language evaluation revealed that his expressive and receptive language skills are in the below average range, and recommended that he receive speech-language therapy,¹⁰⁵ the IEP team developed no speech-language goals nor prescribed any related services in this area on the Student’s November 22, 2010, IEP.¹⁰⁶ The Student’s September 28, 2009, speech and language evaluation was the only evaluative data upon which the IEP team could have relied in deciding not to provide these services to the Student.

31. Although the Student’s December 14, 2009, psychological evaluation, which DCPS conducted, identified weaknesses in written expression and mathematics,¹⁰⁷ the IEP team did not develop any IEP goals in these areas.¹⁰⁸ Even though this evaluation found that the Student exhibited significant deficits in all academic areas,¹⁰⁹ and that the Student’s cognitive

⁹⁷ *Id.*

⁹⁸ *Id.* at 1.

⁹⁹ *Id.* at 4.

¹⁰⁰ *Id.* at 1.

¹⁰¹ *Id.* at 4; Respondent Exhibit 14 (November 22, 2010, IEP).

¹⁰² Testimony of Petitioner; DCPS special education coordinator (“SEC”).

¹⁰³ Testimony of SEC.

¹⁰⁴ Respondent Exhibit 14 at 2-5.

¹⁰⁵ Petitioner Exhibit 25 at 3-4.

¹⁰⁶ Petitioner Exhibit 21 at 7.

¹⁰⁷ Petitioner Exhibit 6 at 37.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 36.

functioning and academic performance were in the borderline range,¹¹⁰ the IEP team decided that the Student should receive only fifteen hours per week of specialized instruction.¹¹¹

32. The Student is currently receiving 11.75 hours of specialized instruction in a small group setting outside the general education setting.¹¹² He also receives instruction in a general education classroom that has twenty-five students.¹¹³ In the general education classroom, the Student is not on-task, and spends much of the time distracted by other activities.¹¹⁴

33. During the 2010-2011 school year, DCPS has continued to implement the Student's December 9, 2009, BIP. The Student has responded well to the BIP and his behavior has improved.¹¹⁵ However, his hyperactivity interferes with his learning in the general education classroom.¹¹⁶ In his special classes, such as art, physical education, and music, he is disruptive.¹¹⁷ He also is unable to settle down when waiting in the lunch line.¹¹⁸ He requires continuous one-to-one assistance and constant reminders and redirection.¹¹⁹

34. During the 2010-2011 school year, in the general education classroom, the Student very often acts without thinking, without regards to the consequences.¹²⁰ He often has difficulty waiting his turn and his demands must be met immediately.¹²¹ He often talks excessively, interrupts or intrudes on others, and blurts out answers.¹²² He often has difficulty remembering rules and restrictions, is easily over-stimulated and excitable, has difficulty remaining in his seat, is always on the go, and does things in a loud or noisy way.¹²³

35. In the general education classroom, the Student often begins assignments before receiving instructions, rushes through assignments without regard for accuracy or quality, fails to finish schoolwork, chores, or duties, and fails to pay close attention to details and makes careless mistakes.¹²⁴ He often fidgets with his hands and feet, is easily distracted by extraneous stimuli, daydreams, does not seem to listen or hear all of what is said to him, and does not follow through when given directions.¹²⁵ He is disorganized and forgets or loses things.¹²⁶

¹¹⁰ *Id.*

¹¹¹ *Id.* at 7.

¹¹² Testimony of Student's special education teacher ("Special Education Teacher").

¹¹³ Testimony of SEC.

¹¹⁴ Testimony of Educational Advocate.

¹¹⁵ Testimony of Special Education Teacher, SEC; Petitioner Exhibit 6 at 15 (January 13, 2011, Meeting Notes).

¹¹⁶ Petitioner Exhibit 6 at 15.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Petitioner Exhibit 6 at 26 (January 11, 2011, Teacher Questionnaire).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

36. In early 2011, DCPS provided the Student a pressure vest.¹²⁷ This vest has assisted the Student in remaining in his seat.¹²⁸ While he previously was able to attend to a task for only two minutes, he now can pay attention for four minutes at a time.¹²⁹

37. The Student has made progress on his occupational therapy goals and can now write his name in all capital letters.¹³⁰ He still requires hand-over-hand assistance to write letters.¹³¹ He still cannot count and does not know the entire alphabet.¹³²

38. The DCPS School is not the appropriate setting for the Student, in part because it does not have the resources to provide the Student the intensity of specialized instruction he requires.¹³³ The Student is not making progress in the general education classroom.¹³⁴ As a result, in December 2010, the Special Education Coordinator began a search for alternative schools that could provide the services the Student needs.¹³⁵ She stopped searching when she was informed that the Student would have to be reevaluated before she could justify a more restrictive setting.¹³⁶ DCPS is currently in the process of re-evaluating the Student.¹³⁷

39. The Non-Public School would be an appropriate setting for the Student. The Non-Public School program focuses on skill acquisition, reading, math, and general academic skill acquisition, speech and language, occupational therapy, and social skill development.¹³⁸ The typical class at the Non-Public School has eight students, a head special education teacher, and two assistant teachers.¹³⁹ Each classroom has an assigned speech and language therapist, occupational therapist, and social worker.¹⁴⁰

40. At the Non-Public School, the Student would be placed in a classroom with seven other students with similar academic and cognitive functioning.¹⁴¹ This classroom has four teachers so the Student would receive a lot of one-on-one instruction.¹⁴² The Non-Public School will provide the Student thirty hours of specialized instruction outside the general education

¹²⁶ *Id.*

¹²⁷ Petitioner Exhibit 6 at 14 (January 13, 2011, Meeting Notes); testimony of DCPS occupational therapist ("Occupational Therapist").

¹²⁸ Testimony of Occupational Therapist.

¹²⁹ *Id.*

¹³⁰ *Id.*; testimony of Petitioner.

¹³¹ Testimony of Occupational Therapist.

¹³² Testimony of Petitioner; Occupational Therapist.

¹³³ Testimony of SEC.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Testimony of Non-Public School Assistant Director.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

environment.¹⁴³ The Non-Public School can implement the goals on the Student's November 22, 2010, IEP.¹⁴⁴ The first day of the 2011-2012 school year at Non-Public School is July 5, 2011.

41. The testimony of all the witnesses at the hearing was credible with the exception of portions of the testimony of the SEC. This Hearing Officer finds that the SEC was generally credible, and unusually forthcoming. The only exception was when the SEC strayed outside her area of expertise.¹⁴⁵ In all, DCPS presented no testimony that contradicted the testimony of Petitioner's witnesses on the issues in this case.

VI. CONCLUSIONS OF LAW

The burden of proof is properly placed upon the party seeking relief.¹⁴⁶ Under IDEA, a Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.¹⁴⁷

IDEA guarantees children with disabilities the right to a free and appropriate public education with services designed to meet their individual needs.¹⁴⁸ 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)...¹⁴⁹

Special education is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability."¹⁵⁰ 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."¹⁵¹

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ For example, the SEC testified that a student's IQ is not static until he reaches his early teen years. This testimony was contradicted by the testimony of the Psychology Expert that IQ scores are generally static over time. This Hearing Officer placed more weight on the testimony of the Psychology Expert because the SEC lacks expertise in this area. The SEC also was not credible when she testified that the IEP team had no evaluations that recommended the Student receive speech and language services.

¹⁴⁶ *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

¹⁴⁷ 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).

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

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

¹⁵⁰ 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, 30 DCMR Sec. § 3001.1.

¹⁵¹ *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89 (1982) (citation omitted).

DCPS is obligated to provide a FAPE "for all children residing in the state between the ages of 3 and 21, inclusive."¹⁵² 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.¹⁵³

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.¹⁵⁴ In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.¹⁵⁵

Once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals.¹⁵⁶ The court should not "disturb an IEP simply because [it] disagree[s] with its content."¹⁵⁷ 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."¹⁵⁸

VII. DISCUSSION

A. Petitioner Proved that DCPS Denied the Student a FAPE by Failing to Convene an Appropriate IEP Team on December 18, 2009, and Failing to Develop an IEP that Met the Student's Needs.

An LEA must ensure that the IEP Team for each child with a disability includes the parents of the child; at least one regular education teacher of the child (if the child is, or may be, participating in the regular education environment); at least one special education teacher of the child; and an individual who can interpret the instructional implications of evaluation results.¹⁵⁹ The IEP team also must include a representative of the LEA who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; is knowledgeable about the general education curriculum; and is knowledgeable

¹⁵² 34 C.F.R. § 300.101.

¹⁵³ *Rowley* at 206-207.

¹⁵⁴ 20 U.S.C. § 1415 (f)(3)(E)(ii).

¹⁵⁵ *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").

¹⁵⁶ *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990) (internal citation and quotations omitted).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ 34 C.F.R. § 300.321 (a).

about the availability of resources of the public agency.¹⁶⁰

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."¹⁶¹ IDEIA does not require that the services provided maximize each child's potential.¹⁶²

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.¹⁶³ 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.¹⁶⁴

An IEP also must include a statement of measurable annual goals.¹⁶⁵ For children with disabilities who take alternate assessments aligned to alternate academic achievement standards, the IEP must contain a description of benchmarks or short-term objectives.¹⁶⁶ If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or district-wide assessment of student achievement, the IEP must include a statement of why the child cannot participate in the regular assessment and why the particular alternate assessment selected is appropriate for the child.¹⁶⁷

On December 18, 2009, DCPS convened an IEP team that consisted of the Petitioner, the Charter School vice principal, a special education coordinator, the LEA representative, and one other individual. DCPS failed to include the Student's special and general education teachers and his related services providers. Despite that no one at the meeting was qualified to interpret the results the Student's speech and language evaluation, or discuss the Student's academic needs, DCPS developed an IEP for the Student on that day.

The December 18, 2009, IEP failed to meet the Student's needs. While the IEP team developed goals in reading, social-emotional and behavioral development, and motor skills and physical development, and provided detailed and extensive present levels of performance in these areas, it ignored the Student's deficits and needs in other areas, including speech-language, written expression, and mathematics. Moreover, even though the Student had significant deficits in all academic areas, and his cognitive functioning and academic performance were in the borderline range, the IEP team decided that the Student should receive only ten hours per week of specialized instruction in the general education setting.

¹⁶⁰ *Id.*

¹⁶¹ *Rowley*, 458 U.S. at 201 (1982).

¹⁶² *Id.* at 198.

¹⁶³ 34 C.F.R. § 300.324 (a).

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

¹⁶⁵ 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).

¹⁶⁶ 34 C.F.R. § 300.320 (2)(ii).

¹⁶⁷ 34 C.F.R. § 300.320 (a) (6).

The decision of the IEP team to omit goals in math, written expression, and speech and language contradicted the recommendations of the September 28, 2009, Speech and Language Evaluation Report and the December 14, 2009, Psychological Evaluation Report. Thus, the December 18, 2009, IEP was not reasonably calculated to provide academic benefit to the Student.

Petitioner proved by a preponderance of the evidence that the general education setting is inappropriate for the Student. Petitioner further proved that DCPS has failed to provide the Student the small, special education setting with intensive, individualized special education instruction that he required. However, Petitioner failed to prove that the Student was entitled to ESY during the 2010 school year.¹⁶⁸

Thus, DCPS denied the Student a FAPE by failing to convene an appropriate IEP team and subsequently develop an appropriate IEP for the Student on December 18, 2009.

B. Petitioner Proved that DCPS Denied the Student a FAPE by Failing to Convene an Appropriate IEP Team and Develop an Appropriate IEP for the Student on November 22, 2010.

Petitioner proved by a preponderance of the evidence that DCPS similarly failed to develop an appropriate IEP for the Student on November 22, 2010.

Although DCPS included the Student's general education and special education teachers in the development of this IEP, once again it failed to invite a speech-language pathologist to discuss and develop speech and language goals for the Student. Although the Student's September 28, 2009, speech and language evaluation revealed that his expressive and receptive language skills are in the below average range, and recommended that he receive speech-language therapy, the IEP team developed no speech-language goals nor prescribed any related services in this area on the Student's November 22, 2010, IEP.

Once again, the IEP team developed goals in reading, social-emotional and behavioral development, and motor skills and physical development. Once again, the team developed detailed and extensive present levels of performance in these areas. And once again, the IEP team ignored the Student's deficits and needs in other areas, including written expression, and mathematics. Moreover, even though the Student had significant deficits in all academic areas, and his cognitive functioning and academic performance were in the borderline range, the IEP team decided that the Student should receive only fifteen hours per week of specialized instruction. The team's rationale for this decision was that the computer program would not allow it to provide more hours of specialized instruction to the Student.

When Petitioner requested that DCPS provide a one-on-one paraprofessional for the Student, the DCPS special education coordinator responded that DCPS could not make a determination of whether the Student requires a dedicated aide because the full IEP team was not

¹⁶⁸ Petitioner introduced no evidence, other than her own testimony, that the Student had show sufficient regression on prior breaks in the school year to warrant ESY.

participating in the meeting. Yet, DCPS never convened another meeting to discuss this issue.

Thus, DCPS once again failed to develop an IEP that was 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.

C. Petitioner Proved that the Student Requires a Full-Time, Therapeutic, Placement in a Nonpublic School.

The IDEA 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.¹⁶⁹ 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.¹⁷⁰ 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.¹⁷¹

The term “educational placement” refers to the type of educational program prescribed by the IEP.¹⁷² “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.¹⁷³

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.¹⁷⁴

To the maximum extent possible children with disabilities should be educated with children who are non-disabled.¹⁷⁵ 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.¹⁷⁶

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

¹⁶⁹ 34 C.F.R. § 300.116 (c).

¹⁷⁰ 34 C.F.R. § 300.116 (d).

¹⁷¹ *Id.* at (e).

¹⁷² *T.Y. v. N.Y. Dept. of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009) (citation omitted).

¹⁷³ *Id.*

¹⁷⁴ *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) (citing *Rowley*, 458 U.S. at 202).

¹⁷⁵ 34 C.F.R. § 114 (a)(2)(i).

¹⁷⁶ *Id.* at 114 (a)(2)(ii).

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.¹⁷⁷

Due to the Student's low cognitive functioning and academic performance, the general education setting is inappropriate for the Student. Instead, he requires a small, special education setting with a low student-teacher ratio in a separate special education school. He requires intensive, individualized special education instruction. Thus, Petitioner proved by a preponderance of the evidence that the Non-Public School is an appropriate setting for the Student.

ORDER

Upon consideration of Petitioner's requests for a due process hearing, the exhibits and the testimony admitted at the hearing, it is this 8th day of April 2011 hereby:

ORDERED that Petitioner's Motion to Strike is granted;

IT IS FURTHER ORDERED that, on or before April 25, 2011, DCPS shall revise the Student's IEP to provide him full-time specialized instruction in a small, special education setting, as well as speech-language therapy, occupational therapy, and counseling in accordance with the findings herein;

IT IS FURTHER ORDERED that DCPS shall implement the Student's IEP, as revised in accordance with this Order and the findings herein, at least until the end of the 2010-2011 school year;

IT IS FURTHER ORDERED that, on or before April 25, 2011, DCPS shall provide the Student a one-to-one paraprofessional until the end of the 2010-2011 school year;

IT IS FURTHER ORDERED that the Student shall attend the Non-Public School at DCPS expense for the 2011-2012 school year beginning on July 5, 2011; and

IT IS FURTHER ORDERED that DCPS shall provide the Student transportation services to and from the Non-Public School for the 2011-2010 school year beginning on July 5, 2011.

By: /s/ Frances Raskin
Frances Raskin
Hearing Officer

¹⁷⁷ D.C. Code § 38-2561.02.

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).

Distributed to:

Alana Hecht, Attorney at Law
Tanya Chor, Attorney at Law
Hearing Office
DCPS