DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E.
Washington, D.C. 20002

2011 JUL 10 AM 9:13
STUDENT HEARING OFFICE

Parent, on behalf of, Student[1],	
Petitioner,	**Case Number:**
	Hearing Officer: James McKeever
v.	**Hearing Dates: June 27, 2011** **June 28, 2011**
THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS	**Room: 2006**
Respondent.	

HEARING OFFICER DETERMINATION

I. JURISDICTION

This proceeding was brought in accordance with the rights established under the Individuals with Disability Education Act 2004 ("IDEIA"), and its implementing regulations codified at 20 U.S.C. Section 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. INTRODUCTION AND PROCEDURAL BACKGROUND

Petitioner is the parent of Student, a year-old boy with a disability who attends a School in the District of Columbia. On May 24, 2011 Petitioner filed a Due Process Complaint ("Complaint") against the District of Columbia Public Schools ("DCPS") pursuant to the Individuals with Disabilities Education Act ("IDEA") alleging the DCPS failed to offer the Student a free and appropriate public education ("FAPE") during the 2010-2011 school year because the Individualized Education Plan ("IEP"), developed by DCPS on October 6, 2010, was not reasonably calculated to offer the Student an educational benefit.

[1] Case information listed at Appendix "A."

On June 3, 2011, I was appointed as the Hearing Officer to preside over this case.

On June 9, 2011, Respondent DCPS filed a response denying the allegations in the complaint and asserting that the Student was offered a FAPE for the subject school year because the IEP developed on October 6, 2010 was reasonably calculated to provide the Student an educational benefit at the time it was created.

Respondent did not challenge the sufficiency of the Due Process complaint.

On June 7, 2011, the parties participated in a resolution meeting. The parties were unable to resolve the complaint and agreed to proceed to a due process hearing. At the request of the parties, the resolution period ended on June 8, 2011 and the parties agreed that the forty-five day due process hearing timeline began on June 8, 2011. The compliance date for Hearing Officer Determination is July 22, 2011.

On June 15, 2011, I conducted a Prehearing Conference. Counsel for Petitioner and counsel for Respondent DCPS, participated in the Prehearing Conference.

On June 17, 2011, a Prehearing Summary and Order was issued. The issues identified for the hearing are set forth below.

On June 20, 2011, Petitioner filed her disclosures, which were marked for identification as Petitioner's Exhibits 1-43. Respondent did not disclose any documents.

On June 24, 2011, a second Prehearing Conference was held. During the conference, Respondent's attorney discussed the possibility of offering the Student's IEP from the 2009-2010 school year, when the Student attended school in North Carolina, at the hearing scheduled to commence on June 27, 2011. Petitioner's counsel advised at the time that she would object to any document offered into evidence at the impartial hearing if such document was not disclosed pursuant to the Prehearing Conference Order.

The Due Process hearing commenced on June 27, 2011 and continued on June 28, 2011. Petitioner's Exhibit's 1-43[2] were admitted into evidence

[2] A list of all Exhibits entered into evidence and those marked for Identification Only is annexed hereto at Appendix "B"

with the exception of Petitioner's Exhibit 31, which was marked for Identification Only.

Petitioner's Exhibits 5, 7, 8, 9, 11, 13 and 15 were admitted into evidence over the objection of the Respondent as Petitioner advised that these documents were not offered for the truth of the matter but rather evidence of Petitioner's attorney's correspondence with DCPS on behalf of the Petitioner.

Respondent did not offer the IEP from North Carolina into evidence at the impartial hearing.

The following witnesses testified on behalf of the Petitioner: Parent, Student, and Independent Psychologist, Ph.D., who evaluated the Student in April 2011, and who the parties stipulated was an expert in clinical psychology.

The following witnesses testified on behalf of the Respondent: Special Education Coordinator at DCPS High School ("SEC").

III. STIPULATION OF FACTS

1. Student is a Student with a disability entitled to special education and related services under IDEA. His current disability classification is Specific Learning Disability.

2. Independent Psychologist found in her Psychological Evaluation that Student's Anxiety Disorder manifests in somatic complaints, avoidant behavior and panic attacks.

3. Student's current Psychological Evaluation included interviews with Student and his mother regarding his experiences at School, and a review of some of Student's school records from the School as well as his other school placements. The records reviewed are listed on the report.

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4. Student's current psychological evaluation recommends that the Student be placed in a 100% special education school (out of the general education setting), with no more than ten students in the classroom and that he receive therapeutic support.

5. Student enrolled at High School for the 2010-2011 school year.

6. DCPS developed its first IEP for Student on October 6, 2010[3].

7. DCPS did not conduct any comprehensive psychological or psycho-educational testing of Student prior to developing the October 6, 2010 IEP.

8. The October 6, 2010, IEP provides Student with thirteen hours per week of Specialized Instruction in the general education setting, and thirty minutes per week of behavioral Support Services outside of the general education setting.

9. The October 6, 2010, IEP provides Student with three math goals and three reading goals.

10. The October 6, 2010 IEP provides Student with two social/emotional goals.

11. The enrollment at DCPS High School for the 2010-2011 school year was for over 800 Students.

12. The Parent, through counsel, requested authorization for an Independent Psychological/Psycho-Educational Evaluation of Student. The request stated that Student had not been comprehensively evaluated since 2004, and that prior to moving out of the District of Columbia, Student had a history of receiving full-time special education services out of the General Education setting. The letter was sent to Dr. Richard Nyankori, and a copy was provided to the Special Education Coordinator at School .

13. DCPS convened an MDT meeting on February 23, 2011. At the MDT meeting, the MDT Team Discussed Student's issues with avoidance behavior, especially in his Math Class. DCPS refused to revise Student's IEP or placement at that meeting. At that meeting, the parent, through counsel, informed DCPS about the Parent's concerns of the appropriateness of the Student's placement at School, given his history of full-time special education placement out of the general education setting.

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[3] Stipulation indicates October 10, 2010. Parties stated on the record that it was October 6, 2010.

14. On March 15, 2011, the parent, through counsel, provided DCPS with copies of Student's records from the Student's prior school placement in the District, and again expressed concerns regarding Student's educational placement. DCPS convened an MDT meeting on May 25, 2011 when DCPS met to review the Student's independent psychological evaluation.

15. Student's Academic Progress Report for his first semester of Algebra "1," stated that he was significantly below grade level, not performing in class commensurate with his ability, and struggled with "avoidance behaviors"--- giving up on work, and on himself.

16. At a May 25, 2011, meeting, DCPS' MDT Team agreed with the Parent and the recommendations of the Psychological Evaluation that Student required an increase in special education services, and developed an IEP for Student, which provided him with twenty-six hours of specialized instruction out of the general education setting, and an hour and a half of behavioral support services out of the general education setting.

17. DCPS granted the parent's request for a safety transfer at the June 7, 2011, Resolution Session. At that time, DCPS informed the Parent that the Student's safety transfer would be granted beginning with the 2011-2012 School Year.

III. ISSUES PRESENTED

The following issues were certified for adjudication at the due process hearing:

a. Whether DCPS denied the Student a FAPE by failing to assess the Student's level of social emotional functioning and by failing to develop goals to address this area of deficit when it developed the Individualized Education Plan on October 6, 2010;

b. Whether DCPS denied the Student a FAPE by reducing the Student's level of special education services as reflected on the IEP, dated October 6, 2010, without performing an educational assessment as to the Student's then current levels of academic performance;

c. Whether DCPS denied the Student a free and appropriate public education by recommending that the Student be placed in an inclusion class instead of a full-time special education class; and

d. Whether DCPS denied the Student a free and appropriate public education by failing to provide a safe school environment.

Petitioner requests relief in the form of funding for placement at a Non-Public School for the 2011-2012 school year and funding for one hour per week of "social skills" therapy during the 2011-2012 school year; and two hours per week of individual tutoring in reading and math during the 2011-2012 school year.

IV. FINDINGS OF FACT

Student is a -year-old boy classified with a specific learning disability who presently attends the grade at a DCPS High School. Student returned to the District of Columbia in June 2010 and entered the DCPS High School in September 2010. Student attended the 9th grade in Raleigh, North Carolina during the 2009-2010 school year. During the 2008-2009 school year, Student attended part of the 8th grade in Georgia. During the 2007-2008 school year, when the Student was in 7th grade, Student attended a Private, full-time special education school, which was funded by DCPS[4] pursuant to a settlement agreement after the parent filed a request for due process against a District of Columbia Charter school.

In September 2010, the Student was placed by DCPS in 9th grade classes because DCPS did not know whether Student had passed his 9th grade course work at his school in North Carolina (Testimony of SEC and Student).

On September 15, 2010, DCPS administered the Performance Learning Series in reading and math to obtain Student's current level of academic functioning (See, "P-23" page 3 and 4). In reading, the Student performed at a grade level equivalent ("GLE") of 6.1. In Math, the Student scored a GLE of 7.6. DCPS also administered the Ohio Assessment Scale to determine Student's current level of social/emotional functioning. The IEP indicates that by "his response, he expressed an interest in improving his emotions, being motivated to complete task [sic], obtain passing grades and concentrate, paying attention and completing tasks" (See, IEP at Exhibit "P-22" page 2).

During the fall semester of the 2010-2011 school year, Student attended Algebra "A," World History and Geography "1," Extended Literacy "9," Physical Education "Team Sports" and General Music (See, Student Timetable at Exhibit "P-21").

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[4] I am advised that during this time, DCPS was both the SEA and the LEA in the District of Columbia.

On October 6, 2010, DCPS convened a Multidisciplinary Team ("MDT") and developed an IEP for the subject school year. The IEP recommended placement in an inclusion class with 13 hours of specialized instruction within the general education setting (See, IEP, dated 10/6/10, at Exhibit "P-22"). The IEP also recommended 30 minutes of behavioral supports outside of the general education setting.

The inclusion class consisted of both general education students and students classified with a disability. The classroom consisted of one general education teacher and one special education teacher.

The October 6, 2010 IEP indicates that Student "may need remediation in basic reading strategies in order to comprehend grade level and above grade level text without assistance," (IEP, at P- 21 page 3) and that Student's baseline math skills were "basic to intermediate computation without the use of a calculator" (IEP, at P- 21 page 4). For social/emotional and behavioral development, the IEP indicates that Student will learn to "control his anger" and "learn coping skills to avoid distractions" (IEP at P-21 page 2).

An undated progress report from Student's Algebra "1" teacher stated that Student "is significantly below grade level, performing on the 7th grade level. He is among the highest third of performers in the class, but his assessments are only showing about 50% mastery of covered standards & objectives. He is able to solve math problems that are really straight forward, but struggles significantly when asked to think critically or apply skills to new situations" (See, P-24, page 1). The report also indicated that Student "is severely lacking in algebra skills, but is supposed to be in Geometry (according to him-we're waiting for transcripts). I am very concerned about his ability to succeed in Geometry class." The report further indicated that Student "struggles with processing verbal instructions and frequently requires repetition or written directions. He also needs to work on advocating for himself and asking for assistance when he needs it" (P-24, page 2).

Student's report card for the fall semester, dated January 21, 2011, indicated that he earned a final grade of "C" in Algebra and a final grade of "C" in Extended Literacy. The report card also indicates that Student had 9 absences from math and 15 absences from Extended Literacy (Exhibit P-28).

On January 25, 2011, "as the result of an incident," Student was suspended for two school days. (Exhibit P-26). Student testified that he was suspended because he failed to report to detention after missing one of his classes. DCPS did not offer any evidence to contradict Student's testimony regarding the cause of the suspension.

On January 27, 2011, Student wrote a letter "to whom it may concern" regarding his fear of attending School because of the unsafe environment and regarding his placement in Geometry "2" when he had not had Geometry "1," among other things. The letter does not indicate to whom it was sent.

On February 23, 2011, a meeting was held between the Parent, the Student, the Parent's attorney and DCPS personnel to discuss the parent's request for an Independent Educational Evaluation. The meeting minutes indicate the parent and the Student were concerned that the Student could not complete Geometry B without having had Geometry A. The meeting minutes also indicate that when the Student "came back from GA, there was no knowledge of his previous private placement" (See, Exhibit ""P-27" page 2). The meeting minutes also indicate that the parent's request for an independent evaluation for a comprehensive "physiological[5]" was granted

On April 10, 2011 and April 11, 2011, an Independent Psychologist, (Ph.D), who is licensed in the District of Columbia, conducted a comprehensive psycho-educational evaluation of the Student.

Independent Psychologist's report, dated April 22, 2010, indicated that she administered the following evaluation procedures: Clinical interview with Student and Student's mother. The Wechsler Intelligence Scale for Children Fourth Edition ("WISC-IV"); Woodcock Johnson Tests of Achievement, Third Edition ("WJ-III); Personality Assessment Inventory-Adolescent ("PAI-A"); Rorschach Inkblot Method-Comprehensive System; Trauma Symptom Checklist for Children ("TSCC"); Behavior Assessment System for Children-Second Edition, Self Report of Personality Adolescent Version ("BASC-2-SRP"); and the Behavior Assessment System for Children-Second Edition, Parent Report of Personality Adolescent Version (BASC-2-PRP).

The WISC-IV results revealed a Full Scale Intelligence Quotient ("FSIQ") of 87, which placed Student in the low average range. However, the Independent Psychologist reported that because of significant variations in Student's performance among the indices, the Student's cognitive abilities were best illustrated by each index rather than by his FSIQ.

On the Working Memory Index ("WMI"), which assesses a Student's ability to "attend to and manipulate orally presented information," the Student scored a 102, which placed him in the average range. The Independent Psychologist noted, that "although this appeared to be an area of strength for the Student, the Student had significant difficulty processing more complex information, which was consistent with the Student's report

[5] The record confirms that the request was for a comprehensive psychological.

that he needs someone to explain complex directions to him in simpler terms."

On the Perceptual Reasoning Index,("PRI") a measure of nonverbal reasoning, the Student scored a 94, which placed him in the average range.

On the Verbal Comprehension Index ("VCI"), a measure of a Student's verbal abilities, the Student's score was 83, which placed him in the low average range.

On the Processing Speed Index ("PSI"), which is a measure of the Student's ability to process simple visual information quickly, the Student scored 80, which placed him in the low average range. The Independent Psychologist noted that this was an area of weakness for the Student and, as a result, it will take the Student "longer than his peers to complete visually mediated tasks, including written work." A Confidence Interval of 95% was noted for the above referenced indices (See, P-18, page 5).

The report indicated that the Student's results on the Woodcock Johnson-III (which is an individually administered test of academic achievement that has a variety of subtests which assess diverse academic skills, including math and reading), raged from the 5th grade to the 7th grade and were similar to an individual who is currently in the 6th grade. At the time of the testing, the Student was in 10th grade. The Independent Psychologist opined that the Student met the criteria for a reading and a math disorder (Exhibit P-18, page 7).

With respect to "emotional functioning," the Independent Psychologist's testing revealed that the Student is experiencing a significant level of "fear and anxiety" due to the traumatic events that he has experienced in the past, such as being threatened by another student with a knife;[6] observing blood on the walls at school and his fear of being "jumped" at school. The Independent Psychologist opined that the Student's "anxiety is interfering with his ability to be succeed at school, as his focus is on his safety, not on learning." (Exhibit P-18, page 7). The Independent Psychologist also opined that although the Student does not currently meet the full criteria for Post-traumatic Stress Disorder and Acute Stress Disorder, the Student is experiencing some of the symptoms consistent with these disorders and that his anxiety level is causing somatic symptoms, such as "headaches and stomach aches." (Exhibit P-18, 7).

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[6] Student testified that although this incident occurred a block away from the School, he was still afraid because the attempted assault was by another student at the School.

The Independent Psychologist's diagnostic impressions of the Student were Anxiety Disorder, NOS; Attention Deficit/Hyperactivity Disorder[7], predominately Inattentive Type; Reading Disorder and Mathematics Disorder.

The Independent Psychologist recommended that the Student change schools and be placed in a small, structured classroom with no more than 10 Students in order to minimize distractions and to address Student's ADHD and address his academic delays. The Independent Psychologist also recommended that Student be placed in a self contained school ("100% special education setting") because the Student does not fully understand his typically developing peers and is "more comfortable when he with other Students with learning disabilities." (See, Exhibit P-18, paged 8).

On May 25, 2011, DCPS developed another IEP after reviewing the psychological evaluation report prepared by the Independent Psychologist. This IEP recommended 26 hours per week of specialized instruction outside of the general education setting to address the Student's academic delays, and 90 minutes of behavioral supports per week outside the general education setting to address his coping skills and his anxiety. (See, P-30, page 8).

On or about June 7, 2011, the Student was granted a "safety transfer" from his current School for the 2011-2012 school year.

By letter dated June 13, 2011, the Student's mother was advised that the Student was accepted into the Non-Public School for the 2011-2012 school year. (Exhibit P-34).

The Non-Public School is an approved, private, special education school that services only students with learning disabilities from age 5 to 18. The Non-Public School's core curriculum builds a foundation of basic reading, writing and math skills and reflects the state standards for the District of Columbia Public Schools. Tuition is (Exhibit P-34).

On June 20, 2010, a compensatory education plan was developed in consultation with the Independent Psychologist after she completed her evaluation of the Student. The compensatory education plan recommends funding for one hour per week of social skills therapy and two hours per week of individual tutoring in reading and math during the 2011-2012 school year.

On June 28, 2011, DCPS stipulated that Student would receive an educational benefit from the Non-Public School proposed by the parent.

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[7] Parent testified that the Student was diagnosed with ADHD at age 7.

V. STATUTORY AND LEGAL FRAMEWORK

The IDEA was enacted "to ensure that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). It requires all states and the District of Columbia to provide resident children with disabilities a FAPE designed to meet their unique needs. *Id.* § 1412(a)(1).

The IDEA aims to guarantee children with disabilities a FAPE by requiring states and the District of Columbia to institute a variety of detailed procedures. "'[T]he primary vehicle for implementing'" the goals of the statute "'is the [IEP], which the [IDEA] mandates for each child.'" Harris v. District of Columbia, 561 F. Supp 2d 63, 65 (D.D.C. 2008) *(citing* Honig v. Doe, 484 U.S. 305, 311-12 (1988)). An IEP is a written statement that includes, among other things: (i) a statement of the child's present levels of academic achievement and functional performance; (ii) a statement of measurable annual goals, including academic and functional goals; (iii) a description of the child's progress in meeting those goals; (iv) a statement of the special education and related services and supplementary aids and services to be provided to the child; and (v) an explanation of the extent, if any, to which the child will not participate with nondisabled children in any regular classes. *Id.* § 1414(d)(1)(A)(i). An "IEP Team" -- which consists of the parents of the child with disability, not less than one regular education teacher of the child (if applicable), not less than one special education teacher or provider of the child, and a representative of the local education agency -- is charged with developing, reviewing, and revising a child's IEP. See id. § 1414(d)(1)(B) (defining an IEP Team). Because the IEP must be "tailored to the unique needs" of each child, *Bd. of Educ. v. Rowley,* 458 U.S. 176, 181 (1982), it must be regularly revised in response to new information regarding the child's performance, behavior, and disabilities, and must be amended if its objectives are not met. See, 20 U.S.C. §§ 1414(b)-(d). In order to be sufficient to confer a FAPE upon a given child, an IEP must be "reasonably calculated to enable the child to receive educational benefits." *Rowley,* 458 U.S. at 207. Each local educational agency is required to have an IEP in effect for each child with a disability in the agency's jurisdiction at the beginning of each school year. 20 U.S.C. § 1414(d)(2)(A).

The IDEA requires that children with disabilities be placed in the "least restrictive environment" so that they can be educated in an integrated setting with children who are not disabled to the maximum extent appropriate. See § 1412(a)(5)(A). The IDEA also guarantees parents of

disabled children the opportunity to participate in the evaluation and placement process. See §§ 1414(f), 1415(b)(1).

Finally, Impartial Hearing Officers have broad discretion to grant such relief as they deem appropriate. See, U.S.C. 1415(i)(2)(C)(iii).

VI. BURDEN OF PROOF

Pursuant to 5 D.C.M.R. § 3030.3, the burden of proof shall be the responsibility of the party seeking relief. In this case, the parent the burden of proof rests with the parent.[8]

VII. ANALYSIS AND CONCLUSIONS OF LAW

The first issue raised is whether the Petitioner established by a preponderance of evidence that DCPS denied the Student a FAPE by failing to develop an appropriate IEP for the Student on October 6, 2010, when the Student returned to DCPS from North Carolina where the Student had been receiving special education services.

DCPS contends that a FAPE was provided because the services offered to the Student on the October 6, 2010 IEP were "comparable to the services" provided in North Carolina.

Section 300.323 (f) of the Code of Federal Regulations, which governs the transfer of IEPs for disabled children who transfer schools from another State, provides:

> If a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency--: (1) Conducts an evaluation pursuant to Sections 300.304 through 300.306 (if determined to be necessary by the new public agency); and (2) develops, adopts, and implements a new IEP, if appropriate that meets the applicable requirements in sections 300.320 through 300.324. 34 C.F.R. Section 300.323.(f). (Emphasis Added)

In Maynard ex rel. G.M. v. District of Columbia, 54 IDELR 158, 701 F. Supp. 2d 116 (U.S. District Court, District of Columbia, April 5, 2010), the Court held that Section 300.323.(f) was not applicable, in part, because the

[8] See, *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

Student transferred schools during the summer, which was not "within the same school year." Id 121. As such, the Court found that DCPS could not simply offer comparable services, but was required to develop its own IEP for the Student prior to the school year. Id 121. (See, Advisory Letter of the United States Department of Education, Office of Special Education & Rehabilitative Services, March 25, 2009, which provides guidance on the services that must be provided to a "child with a disability [who] is withdrawn from the public school setting for home schooling or attendant in a private school...and then subsequently return[ed] to a public school settling," and explaining that "once a child with a disability re-enrolls in the public school, the local educational agency has an obligation to convene an IEP meeting and develop an appropriate IEP for the child."); See also 34 C.F.R. Section 300.323(a) ("At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in Section 300.320.").

In this case, it is undisputed that the subject Student transferred schools during the summer of 2010, which is not within the same school year. It is also undisputed that the Student enrolled at the DCPS High School at the beginning of the 2010-2011 school year. As such, based on the holding in Maynard ex rel, *supra,* DCPS could not meet its FAPE obligations by simply offering "comparable services" based on the out of State IEP, but was required to develop its own IEP for the Student prior to the start of the School year (34 C.F.R. Section 300.323(a)). Accordingly, even if the record demonstrated that DCPS offered the Student "comparable services" based on the Student's North Carolina IEP during the 2010-2011 school year, this is insufficient to determine whether the Student was offered a FAPE during the subject school year.[9]

Pursuant to 34 C.F.R. §300.101 a "free and appropriate public education" ("FAPE") must be available to all children residing in the State between the ages of 3 and 21[10], including children with disabilities who have been suspended or expelled from school, as provided for in §300.530(d). 20 U.S.C. §1412(1).

A free appropriate and public education "consists of educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." Bd. Of Education v. Rowley, 458 U. 176, 188-89, 73 L. Ed. 2d 690, 102 S. 0.3034 (1982). In Rowley, a child is deprived of a free and appropriate public education: (a) If the LEA violated

[9] The North Carolina IEP was not produced by either party at the impartial hearing and as such I can not make this finding.
[10] Age 22 in the District of Columbia

the IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon the child's right to a free and appropriate public education, or if the IEP is not reasonably calculated to enable a child to receive educational benefits.

Here, the record evidence reveals that when the Student enrolled at the DCPS School in September 2010, the Parent advised DCPS that her son required special education services. The Parent testified that when she met with the DCPS Special Education Coordinator, SEC (who testified at the hearing on behalf of DCPS), she produced the Student's North Carolina IEP and the Student's records from the Private Day school that DCPS funded during the 2007-2008 school year, which was a full-time Special Education School.

Under its "child find" mandate, DCPS has an affirmative duty to "identify, locate, and evaluate" a potentially disabled child. 20 U.S.C. §1412(a) (3) (A); 34 C.F.R. §§300.111(a); DCMR 5-E3002.1(d); see IDEA Public Charter School v. McKinley, 570 F. Supp. 2d 28 (D.D.C. 2008). As part of both an initial evaluation and any re-evaluation, DCPS must, among other things, ensure that the child "is assessed in all areas related to the suspected disability," and that the evaluation is "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified." 34 C.F.R. §300.304 (c) (4), (6); see id, §§ 300.303, 300.305, 300.324.

In this case, the record shows that DCPS knew that the Student was classified as a student with a disability and that the student was entitled to receive special education services in September, 2010. DCPS also knew that the student had lived outside the District for well over one year. Nevertheless, the only testing DCPS preformed in order to develop the IEP at issue was the "Performance Learning Series[11]" in reading and math, and the Ohio Assessment Scale[12], which was insufficient to ascertain all of the child's special education and related service needs. Based on the facts before them, DCPS should have conducted an initial evaluation, or a reevaluation, in order to "sufficiently identify all of the child's special education and related services needs before it developed the subject IEP. 34 C.F.R. §300.304 (c) (4), (6). DCPS failure to do so resulted in a denial of FAPE for this student for the 2010-2011 school year.

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[11] Theses tests are not norm-referenced tests that would show how the Student functions in reading and math compared to his peers.

[12] Independent Psychologist testified that the Ohio Assessment Scale is simply a behavior checklist administered to all students and that it is not a valid assessment of a students' social/emotional functioning.

Additionally, although the limited academic testing performed by DCPS in September, 2010 revealed that the Student was four years behind in reading and three years behind in math, the IEP team continued to recommend that the Student be placed in a general education setting with limited specialized instruction. Clearly, the record shows that at the time of the IEP meeting, DCPS was aware of the Student's significant academic deficits, which warranted something more than part-time specialized instruction within the general education setting.

Further, DCPS' decision to place the Student in 9th grade classes, instead of 10th grade classes, while they waited for the Student's transcript from North Carolina, was arbitrary and inappropriate. Nothing in the record suggests that this course of action was rooted in any kind of educational philosophy, nor was there any evidence that this course of action would have offered the Student an educational benefit. (Bd. of Educ. v. Rowley, 458 U.S. 176, 181 (1982)).

The record shows that later in the school year, DCPS moved the Student from Algebra "1" to Geometry "2"[13] without providing the Student with any instruction for Geometry "1." Significantly, DCPS moved the Student to Geometry "2" knowing that he had struggled with Algebra "1" (See, Exhibit P-24). Additionally, the SEC confirmed that DCPS failed to change the Student's math goals on his IEP when they made this transfer.

With respect to the Student's social/emotional functioning, one of the two social emotional goals on the subject IEP indicates that Student will "control his anger," yet nothing in the record suggests that the Student had any anger issues. Indeed, the SEC testified at the hearing that she was surprised to learn that there was a goal for the Student to deal with his anger because she knew that the student did not have any anger issues.

Finally, although DCPS suggested that the Student's poor performance at School resulted from the Student's excessive absences and his failure to avail himself of after school tutoring services,[14] the record clearly shows that the Student's poor performance in school was due to a failed IEP and the inappropriate placement decisions made by DCPS.

Based on the foregoing, the record supports a finding that DCPS failed to offer the Student a FAPE for the 2010-2011 school year because the IEP, dated October 6, 2010, was not "tailored to the unique needs" of the Student and was not reasonably calculated to enable the Student to

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[13] Geometry was a two part, year long course.

[14] The after school tutoring services was available to all students at the High School and was not specialized instruction.

receive educational benefits, *Bd. of Educ. v. Rowley,* 458 U.S. 176, 181 (1982).

Based on the foregoing, the record evidence demonstrates that the Petitioner has established by a fair preponderance of evidence that DCPS failed to offer the Student a FAPE for the 2010-2011 school year.

I note that the record does not support an adverse credibility finding with respect to any witness who testified at the hearing.

School Safety Issue:

Petitioner also alleges that the Student was denied a FAPE because DCPS failed to provide a safe school environment.

Here, the record shows DCPS was not aware of the Student's safety concerns until a second IEP meeting was convened on May 25, 2011. Although the record includes a letter from the Student referencing his security concerns, dated January 27, 2011, the letter is addressed "To Whom It May Concern" and does not include an address for DCPS. Additionally, the SEC testified that she was not aware of any safety issues involving the Student until the IEP meeting on May 25, 2011. At that time, the school principal indicated that the Student would receive a safety transfer[15] for the 2011-2012 school year and the Student was permitted to remain home for the remainder of the 2010-2011 school year. As such, I do not find that the record evidence supports a finding of a denial of FAPE based the alleged failure to provide a safe school environment.

VIII PLACEMENT AT A NON-PUBLIC SCHOOL

Petitioner requests an Order directing DCPS to fund the student placement at an approved, Non-Public School for the 2011-2012 school year.

The IDEA requires that children with disabilities be placed in the "least restrictive environment" ("LRE") so that they can be educated in an integrated setting with children who are not disabled to the maximum extent appropriate. See § 1412(a)(5)(A).

Pursuant to 34 C.F.R. Section 300.116(c), "Unless the child with a disability requires some other arrangement, the child is educated in the school that she or she would attend if non-disabled."

[15] The student was officially offered the safety transfer during the resolution meeting held on June 7, 2011.

Pursuant to 34 C.F.R. Section 300.116(d)(e) "in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of service that he or she needs. "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. 34 C.F.R. Section 300.116(e).

In Branham v. District of Columbia, 427 F.3d 7, 12 (D.C. Cir. 2005), the court held that an award of private-school placement is prospective relief aimed at ensuring that the child receives *tomorrow* the education required by IDEA. The conditions 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 cost; and the extent to which the placement represents the least restrictive environment. See Rowley, 458 U.S. at 202 (noting that "sufficient educational benefit" will vary from child to child).

In the District of Columbia, special education placements shall be made in the following order of priority, provided that the placement is appropriate for the student and made in accordance with the IDEA: (1) DCPS schools, or the District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) private or residential District of Columbia facilities; and (3) facilities outside of the District of Columbia. D.C. Code Section 38-2561.02.

In this case, DCPS developed another IEP, on May 25, 2011, after reviewing the psychological evaluation report prepared by the Independent Psychologist. This IEP recommended 26 hours per week of specialized instruction outside the general education setting to address the Student's academic delays and 90 minutes of behavioral supports per week outside of the general education setting to address the Student's coping skills anxiety issues (See, Exhibit P-30, page 8).

The Independent Psychologist's diagnostic impressions for the Student were Anxiety Disorder, NOS; Attention Deficit/Hyperactivity Disorder, predominately Inattentive Type; Reading Disorder and Mathematics Disorder.

The Independent Psychologist recommended that the Student change schools and be placed in a small, structured classroom with no more than 10 Students in order to minimize distractions and to address Student's ADHD and his academic delays. The Psychologist also recommended that the Student be placed in a self contained school ("100% special education setting") because the Student does not fully understand his typically

developing peers and is "more comfortable when he is with other Students with learning disabilities." (See, Exhibit P-18, paged 8).

The proposed Non-Public School is an approved, private special education school that services only Students with learning disabilities from age 5 to 18. The Non-Public School's core curriculum builds a foundation of basic reading, writing and math skills and reflects the state standards for the District of Columbia Public Schools. The class size in no more than 10 students and the tuition is a year (Exhibit P-34).

DCPS stipulated on the record that the Non-Pubic School would provide an educational benefit to the Student.

Based upon on these facts, I find that the proposed Non-Public School is appropriate because it can provide the specialized instruction that the Student needs; in a setting with minimal distractions which will enable student to access the curriculum and obtain a meaningful educational benefit.

I also find that placement at the proposed Non-Public School is the least restrictive environment for this Student because the record demonstrates that the Student "does not fully understand his typically developing peers," and because the student is more comfortable and less anxious when he is with other Students who have learning disabilities.

Finally, I find that the Non-Public School's annual tuition of is not unreasonable.[16]

Accordingly, Petitioner's request for funding by DCPS at the proposed Non-Public School for the 2011-2012 school year, is granted.

VIII COMPENSATORY SERVICES

Petitioner requests an order directing DCPS to fund one hour per week of social skills therapy for the Student during the 2011-2012 school year.

Where a school system fails to provide special education or related services to a disabled student, the student is entitled to compensatory education, which is the replacement of educational services that the child should have received in the first place. Reid v. District of Columbia, 401 F 3d. 516 (D.C. Cir. 2005). Because compensatory education is a remedy for past

[16] Branham v. District of Columbia, 427 F.3d 7, 12 (D.C. Cir. 2005),

deficiencies in s 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).

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, *supra*, at 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. Id. at 524. The standard "carries a qualitative rather than quantitative focus," and must be applied with "[f]lexibility rather than rigidity." Id.

As indicated above, Petitioner has proven that the Student was denied a FAPE for the 2010-2011 school year based on the flawed IEP, which was developed on October 6, 2011. As such, the Student is entitled to compensatory education. (See, The Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland, 534 F. Supp. 2d 109, 115 (D.D.C. 2008)). The record shows that DCPS did not develop an appropriate IEP until May 25, 2011. As such, the question that remains is how to craft an award that would adequately compensate the Student for the denial of a free and appropriate public education he was entitled to from October 6, 2010 to May 25, 2011.

In support of her request for "social skills therapy," Petitioner indicates in her proposed "compensatory education plan[17]" (Exhibit P-43), that the Student's Anxiety Disorder caused the student to "avoid classes and miss instruction" (P-43, page 3). The plan further indicates that had the student been assessed properly at the beginning of the school year, DCPS would have known of the Student's anxiety disorder and addressed it accordingly. I disagree.

Here, the record shows that the student's anxiety disorder developed over the course of the year due to his perceived fear and the alleged threats from other students. There is insufficient evidence to suggest that the Student had an anxiety disorder in October 2010 when DCPS developed the IEP at issue. As such, I find that Petitioner has failed to demonstrate how one hour per week of "social skills' therapy" during the 2011-2012 school year would remedy the denial of FAPE found above. Accordingly, Petitioner's request for an Order directing DCPS to fund one hour per week of "social skills therapy" during the 2011-2012 school year, is denied.

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[17] The Compensatory Education Plan was developed in consultation with the Independent Psychologist.

Petitioner also requests an order directing DCPS to fund two hours per week of tutoring services in reading and math for the Student during the 2011-2012 school year.

In support of her request for "tutoring services," petitioner indicates in the proposed "compensatory education plan" (Exhibit P-43), that the denial of FAPE to the Student severally impacted the Student academically and that although DCPS knew that the Student was at least 3 grade levels behind at the time they developed the October IEP, DCPS only provided the Student with part-time specialized instruction. I agree.

The record shows that the results of the Woodcock Johnson Test of Achievement III, reported by the Independent Psychologist in April of 2011, demonstrated that the Student was further behind in reading and math than he was when the DCPS performed their testing in September 2010. Assuming the results of DCPS' testing were valid, the record shows that the student regressed in reading and math from September 2010 to April 2011. As such, based on the insufficient amount of specialized instruction offered to the Student by DCPS during this time frame, I find that an award of compensatory services in the form of tutoring two hours per week in reading and math during the 2011-2012 school year is appropriate because it should place the student in the position he should have been in had DPCS provided the student with reading and math services in beginning of the school year. As such, Petitioner's request for two hours per week of tutoring in reading and math during the 2011-2012 school year is granted.

Lastly, Petitioner requests that the tutoring services be provided by an independent provider of the parent's choice, but does not provide the an hourly rate for the services. As such, DCPS shall fund the tutoring services at a rate not to exceed the average rate DCPS pays for tutoring children in the District of Columbia.

ORDER

Based upon the Findings of Fact and Conclusions of Law herein, on this 15th day of July, 2011, it is hereby

ORDERED that, on or before August 15, 2011, DCPS shall provide funding for the Student to attend the Non-Public School for the 2011-2012 school year and arrange for the Student's transportation.

ORDERED that, on or before August 15, 2011, DCPS shall fund two hours per week of tutoring services by an independent provider of the parent's choice at a rate not to exceed the average rate DCPS pays for tutoring children in the District of Columbia.

Dated July 15, 2011

By: /s/ *James McKeever*
Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer's Determination 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. Section 1415(i)(2).

Distributed to:

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Student Hearing Office
DCPS