

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

810 First Street, N.E. 2d Floor  
Washington, DC 20002

OSSE  
Student Hearing Office  
May 21, 2013

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STUDENT, <sup>1</sup>	)	
	)	
<i>Petitioner,</i>	)	
v.	)	<b>Case No.</b>
	)	
<b>DISTRICT OF COLUMBIA</b>	)	<b>Bruce Ryan, Hearing Officer</b>
<b>PUBLIC SCHOOLS,</b>	)	
	)	<b>Issued: May 20, 2013</b>
<i>Respondent.</i>	)	
	)	

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**HEARING OFFICER DETERMINATION**

**I. INTRODUCTION AND PROCEDURAL BACKGROUND**

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent District of Columbia Public Schools (“DCPS”). The Administrative Due Process Complaint (“Complaint”) was filed by a 20-year old adult student (the “Student”) who resides in the District of Columbia and who has been determined to be eligible for special education and related services as a student with a disability under the IDEA.<sup>2</sup> Student attends a public charter school located in the District (“District Charter”), for which DCPS acts as the local education agency (“LEA”).

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<sup>1</sup> Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

<sup>2</sup> The Student Hearing Office originally received a copy of the Complaint on February 15, 2013, and issued a Notice of Hearing Officer Appointment on February 20, 2013. However, the parties stipulated and agreed that the Complaint was properly served on DCPS on February 25, 2013, which is the date DCPS received a copy of the Complaint via facsimile service for purposes of responding. Accordingly, the Hearing Officer issued an Order correcting the date of filing to February 25, 2013, for purposes of determining applicable timelines under the IDEA. *See Order*, dated Feb. 26, 2013.

Petitioner alleges that DCPS has denied Student a free appropriate public education (“FAPE”) by failing to evaluate Student, failing to develop and implement an appropriate individualized education program (“IEP”), and failing to provide an appropriate placement. DCPS filed a timely Response to the Complaint on March 7, 2013, which denies the allegations and asserts that the IEP and the placement/location of services are appropriate.

On or about March 14, 2013, DCPS held a resolution meeting that did not result in an agreement. The parties also did not agree to end the 30-day resolution period early. The resolution period ended without agreement on March 27, 2013, and the original 45-day timeline for issuance of the Hearing Officer Determination would have ended on May 11, 2013.

On April 3, 2013, a Prehearing Conference (“PHC”) was held to discuss and clarify the issues and requested relief. After discussing the time necessary to hear this matter, it was determined that approximately one full day of hearing time would be sufficient. However, the parties were unable to agree on a mutually available hearing date within the original HOD timeline due to scheduling conflicts. They agreed to schedule the Due Process Hearing for May 13, 2013, subject to the filing of a consent motion for a nine-day continuance to extend the HOD timeline.

On April 11, 2013, the Hearing Officer granted the parties’ joint motion for continuance extending the HOD timeline to May 20, 2013, and scheduling the hearing for May 13, 2013. A Prehearing Order (“PHO”) was also issued on April 11, 2013. On May 6, 2013, the parties filed their five-day disclosures, as required. Petitioner also filed requests for Notices to Appear for DCPS employee witnesses, but these requests were withdrawn after the parties agreed that witnesses would voluntarily appear on a mutually agreeable schedule.

The Due Process Hearing was held as scheduled on May 13, 2013. Petitioner elected for the hearing to be closed. At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence without objection:

**Petitioner’s Exhibits: P-1 through P-20.**

**Respondent’s Exhibits: R-1 through R-4.**

In addition, the following Witnesses testified on behalf of each party:

**Petitioner’s Witnesses:** (1) Student; (2) Parent; (3) Dr. Ida Jean Holman (Educational Advocate);<sup>3</sup> (4) Dr. Natasha Nelson (Expert Psychologist);<sup>4</sup> (5) Director of Psychological Services & Special Education Coordinator, Private School (“Priv. Sch.”); (6) Special Education Coordinator, District Charter (“SEC”); and (7) Special Education Teacher (“SET”), District Charter.

**Respondent’s Witnesses:** (1) Special Education Teacher (“SET”), District Charter; and (2) Assistant Principal, DCPS High School (“DCPS AP”).

The parties presented oral closing statements on the record at the conclusion of the May 13, 2013 hearing session.

## **II. JURISDICTION**

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* 5-E DCMR §§ 3029, 3030. This decision constitutes the Hearing Officer’s Determination (“HOD”) pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* (“SOP”). The HOD deadline is **May 20, 2013**.

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<sup>3</sup> Dr. Holman was proffered as an expert in Special Education with regard to development of IEPs and determination of placement for children with disabilities. DCPS objected to the proffer, and she was not accepted for the reasons stated on the record. *See Holman Test.; P-18. See also Appropriate Standard Practices*, § 9. B.; *Fed. R. Civ. P. 702*.

<sup>4</sup> Dr. Nelson was qualified and accepted as an expert in Clinical and Educational Psychology, including evaluation of students. Her resume is contained at Exhibit *P-19*. She has a Doctorate in Psychology, Clinical-School Program, from Yeshiva University and a Master of Arts in Educational Psychology from New York University; she is a licensed Clinical Psychologist with substantial post-doctorate professional experience; and she has evaluated over 400 students for eligibility and/or educational needs under the IDEA. *See Nelson Test. ; P-19. See also Appropriate Standard Practices*, § 9. B.; *Fed. R. Civ. P. 702*.

### **III. ISSUES AND REQUESTED RELIEF**

As specified in the PHO, the issues presented for determination at hearing were:

1. **Failure to Re-evaluate** — Did DCPS deny the Student a FAPE by failing to re-evaluate Student timely, appropriately, and/or comprehensively, in violation of the IDEA and 34 C.F.R. 300.303?
  - > Petitioner alleged that DCPS has not performed any new or updated assessments since 2008.
  - > At the PHC, it was reported that DCPS had recently authorized independent educational evaluations (“IEEs”) in the areas of comprehensive psychological, adaptive functioning, speech/language, and vocational. Petitioner was not willing to withdraw the triennial re-evaluation claim/issue at that time.
  - >However, **at the start of the Due Process Hearing, Petitioner withdrew Issue #1 based on the IEEs having resolved this issue.**
2. **Failure to Develop Appropriate IEP (11/15/2012)** — Did DCPS deny the Student a FAPE by failing to provide an appropriate IEP (*i.e.*, one that was reasonably calculated to confer educational benefit) for the Student as of **November 15, 2012**, in that: (a) the **goals and objectives** needed to be changed and/or broken down since Student had not mastered them from the prior IEP; (b) the **baselines** needed to be changed since they were not measureable; and (c) Student needed a **dedicated aide** to access the general education curriculum? *See Complaint*, ¶¶10-20.
3. **Failure to Implement IEPs (12/14/2011 & 11/15/2012)** — Did DCPS deny the Student a FAPE by materially failing to implement Student’s **December 14, 2011** and **November 15, 2012** IEPs in that District Charter provided specialized instruction for **fewer hours** and in a **different setting** (general education/inclusion) than specified in the IEPs during the 2011-12 and 2012-13 school years?<sup>5</sup>
4. **Failure to Provide Appropriate Placement** — Did DCPS deny the Student a FAPE by failing to provide an appropriate placement for Student under the IDEA and D.C. Code § 38-2561.02 (b), since **December 2011**, in that (*inter alia*): (a) District Charter could not implement the Student’s IEP; (b) the program at District Charter was not appropriate for Student because she requires more supports than it can provide her; and (c) Student requires a different placement in a more restrictive environment? *See Complaint*, ¶¶ 28-33.

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<sup>5</sup> When the Complaint was filed and the PHC was held, Petitioner was alleging that both the 12/14/2011 and 11/15/2012 IEPs prescribed 24.5 hours per week of specialized instruction in an *outside* general education setting. *See P 1-2*. However, the actual IEP dated 11/15/2012 submitted in five-day disclosures prescribes such specialized instruction in a General Education (inclusion) setting. *P 7-11*. To the extent necessary, the above claims/issues were conformed to this evidence at hearing.

In her Complaint, and as discussed at the PHC, Petitioner requested that DCPS be ordered to: (a) fund placement and provide transportation to Private School; (b) fund and provide a dedicated aide; (c) convene an IEP Team meeting within 30 days of placement; and (d) award appropriate compensatory education services for the period of FAPE denial (*i.e.*, 12/14/2011 to date), to include a laptop computer. The Complaint also requested funding of independent evaluations, but Petitioner agreed that this request was moot in light of the IEE authorizations. *See Complaint; Prehearing Order*, ¶ 6.

#### **IV. FINDINGS OF FACT**

Based upon the evidence presented at the due process hearing, this Hearing Officer makes the following Findings of Fact:

1. Student is a 20-year old adult student who resides in the District of Columbia. *See Student Test; Parent Test.; P-1.*
2. Student has been determined to be eligible for special education and related services as a child with a disability under the IDEA. Her primary disability is Intellectual Disability or “ID” (also known as Mental Retardation). *See P-5; P-7; Parent Test.*
3. During the 2009-10 and 2010-11 school years, Student attended a non-public, special education vocational school located in the District of Columbia pursuant to an IEP and prior HOD . *Parent Test.; Student Test.; SET Test.*
4. At the conclusion of the 2010-11 school year, Parent enrolled Student at District Charter, a D.C. public charter school for which DCPS acts as the LEA, because she was not satisfied with the services Student was receiving at the vocational school. Student has continued to attend District Charter during the 2011-12 and 2012-13 school years. She is currently in the 12<sup>th</sup> grade. *Parent Test.; Student Test.*
5. On or about December 14, 2011, Student’s MDT met and developed an IEP, which provided 24.5 hours per week of specialized instruction, 60 minutes per week of behavioral support services, and 30 minutes per week of speech-language pathology services, all in an Outside General Education setting. *See P 5-8.* The IEP included

annual goals in the areas of Mathematics, Reading, and Written Expression; Communication/Speech and Language; and Emotional, Social and Behavioral Development. *P 5-3 – P 5-7*. Student also received accommodations in the classroom and on the State assessment, which is the DC CAS. *See P-5; R-4*.

6. At the 12/14/2011 MDT/IEP Team meeting, Student was reported as having 38 unexcused absences through the 2d quarter of the 2011-12 school year, and she was failing five subjects. *P-6* (meeting notes). No behavior problems were presented. Teachers reported that Student generally was not completing her work in class. *Id.* Parent expressed concerns regarding whether Student was receiving sufficient hours of pull-out specialized instruction and whether Student was understanding the academic material. *See Parent Test.; P-6*. It was reported that Student was receiving only 19 hours of specialized instruction in a general education (inclusion) setting, and that District Charter could not implement a full-time, outside general education IEP. *P 6-3; Parent Test.; Holman Test.; SET Test*.
7. Due to the limitations of the District Charter program, the 12/14/2011 MDT/IEP Team discussed the possibility of placing Student at another school (Advanced Pathways) that was identified by DCPS at this meeting. *P-6; Parent Test.; Holman Test.; SET Test*. Parent then visited that school. However, parent learned that Student had earned insufficient credits toward graduation to be accepted there, so this alternative placement was not pursued further. *Parent Test*. No other placement options were discussed or proposed at this time, and Student finished the 2011-12 school year at District Charter.
8. In February 2012, District Charter submitted a formal request to DCPS' Office of Special Education, requesting consideration of an alternative placement. District Charter did not receive a response from DCPS to this request. *See Charter SEC Test.; SET Test*.
9. Also in February 2012, a DCPS School Psychologist conducted a Data Evaluation Review, which included classroom observation and teacher interviews to gain additional updated information concerning Student. *See R-4*. In Math, her teacher reported that Student "has difficulty using prior knowledge, which impacts her ability to make connections when new information is presented in class." *Id., p. 3*. He reported that Student "also has difficulty completing her class work assignments, has poor class participation, and at times presents with minimum effort when engaging in assignments."

*Id.* Student “understands and is able to complete basic math problems with the use of a calculator or with teacher assistance,” but she “has difficulty engaging in two-step math equations and word problems without assistance.” *Id.*

10. Overall, the DCPS School Psychologist found that Student continues to meet criteria for a disability classification of ID and “continues to present concerns in reading, math, and written expression,” with resulting academic performance below grade and age level. *R-4, pp. 3-4.* She also found that poor school attendance was impacting her ability to make adequate academic progress. *Id., p. 3.* However, she found that Student was able to benefit from the accommodations and modifications indicated on her IEP, which assisted her in accessing the general education curriculum. *Id., p. 4.*
11. Based on the February 2012 Data Evaluation Review and updated information, the DCPS School Psychologist made various recommendations regarding Student’s school environment and program. Among other things, the School Psychologist recommended that delivery of special education services and goals “should be focusing on real-life functional skills”; that Student “should be exposed to an intensive reading program to assist her reading skills”; that “she would benefit from increased writing opportunities” and “may benefit from using the computer to assist her in the mechanics of writing”; that information should be presented to Student in “chunks” rather than long assignments and presentations to increase her ability to retain information; that additional tutoring at school would provide beneficial academic support in a small setting; and that Student would benefit from an attendance contract. *R-4, pp. 5-6.*
12. At the end of the 2011-12 school year, Student received final grades of “F” (failing) in all her academic courses. *P-15; Parent Test.* The parties further stipulated that Student earned only 2.5 credits toward graduation that school year.
13. On or about November 15, 2012, DCPS convened an annual IEP meeting for Student. The MDT/IEP Team met to review Student’s progress and to review and revise her IEP, as appropriate. *R-2.* At this meeting, the Team developed an IEP, which continued the same type and amount of services as the 12/14/2011 IEP – *i.e.*, 24.5 hours per week of specialized instruction, 60 minutes per week of behavioral support services, and 30 minutes per week of speech-language pathology services. *See R-1; P-7.* However, the setting for the specialized instruction was changed to **General Education** (*i.e.*, inclusion).

*P 7-11*. The goals and objectives remained essentially the same as before. *P 7-5 – P 7-10*.

14. At the 11/15/2012 MDT/IEP Team meeting, the IEP Team discussed Student's current progress, attendance, and teacher reports. It was reported that Student had six unexcused absences, that she was also absent due to illness during the current school year, and that her attendance was affecting her grades and ability to learn. *R-2, p. 2*.<sup>6</sup> One of Student's general education teachers stated that a (special education) co-teacher assists in her classroom,<sup>7</sup> but that she "needs a lot of help." *Id.* Her English teacher reported that Student "is not progressing toward her Reading goals," and that she "does not ask for help, pay attention, or participate" in his class of 23 students. *Id.* The Special Education Teacher reported that Student "is a student who needs continuous prompts." *Id., p. 3*. Another Special Education Teacher reported that "he has worked with [Student] one-on-one, but she is not completing her assignments." *Id. See also Student Test.* (cross examination; agreed that she is not completing her homework assignments).
15. Also at the 11/15/2012 MDT/IEP Team meeting, Student said that she liked District Charter and desired to remain there, as opposed to returning to her prior vocational school. *R-2, p. 2*. She also wanted to remain on diploma track, if possible. *Id.* However, the "School Social Worker stated that [Student] cannot move forward if she does not know the material in the classroom." *Id.* The Special Education Teacher also noted that Student would have more freedom and flexibility if she selected the certificate track. *Id. See also Parent Test.* (current work is too hard for Student, although she needs to complete for diploma). The Team discussed that Student needed 11 more credits to graduate with a regular high school diploma, and that she may not be able to earn the

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<sup>6</sup> Parent and Student conceded that Student's attendance problems have continued into the 2012-13 school year, in significant part due to Student's child-care responsibilities involving her infant son. *See Parent Test.; Student Test.*

<sup>7</sup> It is unclear how many of Student's classes have included specialized instruction (inclusion) support this school year. Student stated that she was getting inclusion support in her World History class, but the Team reported that she was not receiving this help in her science classes. *Student Test.; R-2, p. 2*. Parent also testified that teachers had told her that assistance was also sometimes provided in a resource room, although such services are not specified on her IEP. *Parent Test.; see also Charter SEC Test.* (special education teacher provides resource room assistance during science class in lieu of inclusion support); *SET Test.* .

necessary credits if she stays at District Charter. *R-2, pp. 2-3*. The Team discussed the possibility of providing a dedicated aide for Student, with some teachers indicating that she would benefit from such service, *SET Test.*, but the LEA felt “there is not enough data to say that [Student] needs a Dedicated Aide.” *Id., p. 3*. The Team also stated that it “will come back to the table to discuss ESY.” *Id.*

16. DCPS did not offer or propose any alternative placement at the 11/15/2012 MDT/IEP Team meeting. Following the meeting, however, another referral was made to DCPS’ Office of Special Education, and DCPS informed District Charter that it planned to “look into other schools that could serve [Student’s] needs.” *Charter SEC Test.* Parent and Student also visited Private School and one other non-public school/program to determine if they would be appropriate to meet Student’s needs. *Parent Test.*
17. On or about December 20, 2012, Student was conditionally accepted at Private School, contingent upon the successful completion of the enrollment process and the securing of necessary funding. *P-17; Priv. Sch. Test.* The Private School witness testified that the school generally provides special education services within an “inclusion model.” *Priv. Sch. Test.*
18. In April, 2013, while this proceeding was pending, an updated comprehensive psychological evaluation of Student was conducted independently at DCPS’ expense. *P-10*. The evaluation included a clinical interview, classroom observation, and a variety of testing methods including: Woodcock-Johnson III Tests of Cognitive Abilities (“WJ Cognitive”); Woodcock-Johnson III Tests of Achievement (“WJ Achievement”); Berry-Buktenica Developmental Test of Visual-Motor Integration; Behavior Assessment System For Children, 2d Edition (“BASC-2”) - Parent, Teacher, and Student Ratings; and Attention Deficit Hyperactivity Disorder Test (“ADHDT”). *P 10-1 – P 10-3*. A written report of evaluation was completed and issued April 29, 2013, which assesses Student’s current cognitive, academic, and social-emotional functioning, and identifies factors that impact her ability to perform effectively in the classroom. *See P 10-16 – P 10-1; Nelson Test.* In addition, an independent Adaptive Evaluation and independent Speech/Language Evaluation were also completed at this time. *See P-11; P-12.*
19. Cognitively, the 4/29/2013 comprehensive psychological evaluation noted severe deficits. *See P-10; Nelson Test.* Student received the following scores on the WJ

Cognitive tests: General Intellectual Ability (GIA) = 51 (Very Low); Verbal Ability = 67 (Very Low); Thinking Ability = 65 (Very Low); and Cognitive Efficiency = 46 (Very Low). *P 10-17.*

20. Academically, the 4/29/2013 comprehensive psychological evaluation report found that Student was struggling across the board. *See P-10; Nelson Test.* Student received the following scores on the WJ Achievement tests: Broad Reading = 57 (Very Low); Broad Math = 45 (Very Low); Broad Written Language = 59 (Very Low); and Oral Language = 53 (Very Low). *P 10-17.* Thus, the report found that her academic scores were all substantially below age and grade expectancies. Reading and Math were at the 2d grade equivalent; Written Language was at the 3d grade level; and Oral Language was at the 1<sup>st</sup> grade level. *Id.* Comparison with Student's 2008 academic testing scores suggested limited academic growth over the past 4 1/2 years. *Id.; Nelson Test.*
21. The 4/29/2013 comprehensive psychological evaluation report confirms Student's diagnosis and disability classification of Intellectual Disability (Mental Retardation). *P 10-17.* It also finds that Student would meet criteria for Dysthymic Disorder (state of depression) due to her feelings of sadness about her academic struggles and difficulties at home. *Id. See also Nelson Test.*
22. At hearing, the parties stipulated and agreed that DCPS had recently authorized independent educational evaluations ("IEEs") in the areas of comprehensive psychological, adaptive functioning, speech/language, and vocational; and that DCPS' issuance of these IEEs fully resolved Petitioner's claim/issue relating to re-evaluations.

## **V. DISCUSSION AND CONCLUSIONS OF LAW**

As the party seeking relief, Petitioner was required to proceed first at the hearing and carried the burden of proof on the issues specified above. "Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a Free Appropriate Public Education (FAPE)." 5-E DCMR §3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). The Hearing Officer's determination is based on the preponderance of the evidence standard,

which generally requires sufficient evidence to make it more likely than not that the proposition sought to be proved is true.

### **A. General Legal Background**

FAPE means “special 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)...” 20 U.S.C. § 1401(9); *see* 34 C.F.R. § 300.17; DCMR 5-E3001.1.

The “primary vehicle” for implementing the goals of the IDEA is the IEP, which the statute “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)). *See* 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1. “The IEP must, at a minimum, provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Reid v. District of Columbia*, 401 F. 3d 516, 519 (D.C. Cir. 2005), *quoting Board of Education v. Rowley*, 458 U.S. 176, 200, 207 (1982). *See also Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988). The “IEP must be ‘reasonably calculated’ to confer educational benefits on the child, but it need not ‘maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.” *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009).

Judicial and hearing officer review of IEPs is “meant to be largely prospective and to focus on a child’s needs looking forward; courts thus ask whether, at the time an IEP was created, it was ‘reasonably calculated to enable the child to receive educational benefits.’” *Schaffer v. Weast*, 554 F.3d 470,477 (4th Cir. 2009) (*citing Rowley*, 458 U.S. at 207). “[A]n individualized education program (“IEP”) is a snapshot, not a retrospective. In striving for “appropriateness,” an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.” *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1041 (3d Cir. 1993) (citations omitted). *See also Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 29 (1<sup>st</sup> Cir. 2008) (same); *Adams v. State of Oregon*, 195 F. 3d 1141, 1149 (9<sup>th</sup> Cir. 1999) (same). In the event of challenge, the issue of

whether an IEP is appropriate is a question of fact for hearing. *See, e.g., S.H. v. State-Operated School Dist. of Newark*, 336 F. 3d 260, 271 (3d Cir. 2003).

“Designing an appropriate IEP is necessary but not sufficient. DCPS must also implement the IEP, which includes offering placement in a school that can fulfill the requirements set forth in the IEP.” *O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008). Moreover, statutory law in the District of Columbia requires that “DCPS shall place a student with a disability in an appropriate special education school or program” in accordance with the IDEA. D.C. Code 38-2561.02 (b). *See also Branham v. District of Columbia*, 427 F. 3d 7, 12 (D.C. Cir. 2005), *citing McKenzie v. Smith*, 771 F.2d 1527, 1534-35 (affirming “placement based on match between a student’s needs and the services offered at a particular school”).

Educational placement under the IDEA must be “based on the child’s IEP.” 34 C.F.R. 300.116 (b) (2). DCPS must also ensure that its placement decision is made in conformity with the Least Restrictive Environment (“LRE”) provisions of the IDEA. *See* 34 C.F.R. §§ 300.114-300.116. The IDEA requires each public agency to ensure that “[t]o the maximum extent appropriate, children with disabilities ... are educated with children who are nondisabled,” and that “removal of children with disabilities from the regular educational environment occurs only if the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. §1412 (a) (5); 34 C.F.R. §300.114 (a) (2). *See also* 5-E DCMR §3011.1; *e.g., Daniel R.R. v. El Paso*, 874 F.2d 1036 (5<sup>th</sup> Cir. 1989).

As the statute and regulations indicate, the failure to provide services in conformity with a student’s IEP can constitute a denial of FAPE. *See* 34 C.F.R. § 300.17(d). In order to constitute a denial of FAPE, however, courts have held that the aspects of an IEP not followed must be “substantial or significant,” and “more than a *de minimus* failure”; in other words, the deviation from the IEP’s stated requirements must be “material.” *Catalan v. District of Columbia*, 478 F. Supp. 2d 73 (D.D.C. 2007), *quoting Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341,349 (5th Cir. 2000). *See also Wilson v. District of Columbia*, 111 LRP 19583 (D.D.C. 2011) (“Although the D.C. Circuit has not yet squarely addressed the question of what standard governs failure-to-implement claims under the IDEA, the consensus approach to this question among the federal courts that have addressed it has been to adopt the standard

articulated by the Fifth Circuit in *Houston Independent School District v. Bobby R.*”); *S.S. ex rel. Shank v. Howard Road Academy*, 585 F. Supp. 2d 56, 68 (D.D.C. 2008); *Catalan v. District of Columbia*, 478 F. Supp. 2d at 76 (failure to implement claims require “contextual inquiry into the materiality (in terms of impact on the child's education) of the failures to meet the IEP's requirements”).

## **B. Issues/Alleged Denials of FAPE**

The Hearing Officer concludes as follows: Issue 1 has been fully resolved and was withdrawn at hearing. On Issues 2, 3, and 4, Petitioner met her burden of proof, for the reasons and to the extent discussed below.

### **Issue 1: Failure to Re-evaluate**

As noted above, Issue 1 was withdrawn by Petitioner at hearing because DCPS' issuance of IEE authorizations fully resolved this issue. DCPS now must convene an MDT/IEP Team meeting to review the independent evaluations.

### **Issue 2: Failure to Develop Appropriate IEP (11/15/2012)**

As noted above, an IEP must be reasonably calculated to confer meaningful educational benefits on the disabled child, based on the information available to the Team at the time it is created. To the extent discussed below, the Hearing Officer concludes that Petitioner proved her claim by a preponderance of the evidence.

First, the Hearing Officer agrees with Dr. Holman's testimony that (a) the goals and objectives on the 11/15/2012 IEP needed to be changed and/or broken down since Student had not mastered them from the prior IEP, and (b) the baselines needed to be changed since they were not adequately measureable and were not directly related to the goals in some areas (*e.g.*, reading and math). *See Holman Test.* This is further supported by the findings of the DCPS School Psychologist in February 2012 and the teacher reports at the 11/15/2012 meeting. *See R-2; R-4.*

In addition, the Hearing Officer concludes that DCPS did not have a sufficient basis to eliminate all specialized instruction outside general education in light of Student's serious and continued academic struggles. While Petitioner did not allege or prove that she needs a full-

time, outside general education program, the evidence supports Student's demonstrated need (both currently and as of November 15, 2012) for some pull-out specialized instruction in at least her most critical areas of academic need, in order to provide meaningful educational benefit. This would appear to require at least five hours of specialized instruction per week outside general education in math, as well as intensive reading instruction. Student is 20 years old and in the 12<sup>th</sup> grade, yet is performing at no more than a 2d to 3d grade level in most areas of reading and math. Moreover, while eliminating all pull-out instruction, the 11/15/2012 IEP itself inconsistently stated that Student "continues to need small group instruction and one to one sessions in math when the need arises." P 7-5; see *Holman Test*.

Finally, the 11/15/2012 Team discussed Student's request for a dedicated aide for Student, but the LEA felt that "not enough data" supported this request at that time. R-2, p. 3. While this might have been reasonable in the context of an IEP that continued to provide pull-out instruction either one-on-one or in small groups, it was not objectively reasonable to decline such service under an IEP providing all instruction in an inclusion setting for a student who was severely challenged cognitively and academically. Contemporaneous teacher reports indicated that Student was not progressing toward her Reading goals, needed "continuous prompts" and "a lot of help" in the classroom, did not understand the material, and was not completing assignments. See *Findings*, ¶¶ 14-15. Moving forward, the Team's decision on whether Student does or does not require a dedicated aide to access the curriculum may depend on the overall setting for her specialized instruction (*i.e.*, partial inclusion or full-time pull-out) and the school/program in which she is prospectively placed, as well as review of all updated evaluations. See *Order*.

### **Issue 3: Failure to Implement IEPs (12/14/2011)**

As noted above, the failure to provide services in conformity with a student's IEP generally constitutes a denial of FAPE where the aspects of an IEP not followed are "substantial or significant," and "more than a *de minimus* failure." *Catalan v. District of Columbia*, 478 F. Supp. 2d 73 (D.D.C. 2007), quoting *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000). See also *Wilson v. District of Columbia*, 111 LRP 19583 (D.D.C. 2011) (noting "consensus approach to this question among the federal courts that have addressed it"); *S.S. ex rel. Shank v. Howard Road Academy*, 585 F. Supp. 2d 56, 68 (D.D.C. 2008); see 34 C.F.R. §

300.17(d). The adjudication of “failure to implement” claims also requires “contextual inquiry into the materiality (in terms of impact on the child's education) of the failures to meet the IEP's requirements”. *Catalan, supra*, 478 F. Supp. 2d at 76.

In this case, Student’s IEP dated December 14, 2011 required that she receive 24.5 hours of specialized instruction in an Outside General Education setting. Testimony presented in DCPS’ own case established that District Charter could not implement this essentially full-time, out-of-general education IEP. *See SET Test.* (DCPS direct examination). Instead, the record is clear (and essentially undisputed) that Student received at most 19 hours of specialized instruction in a General Education (inclusion) setting from 12/14/2011 until her IEP was changed on November 15, 2012.<sup>8</sup>

The Hearing Officer finds that this amounted to a substantial or significant deviation from IEP requirements for nearly a year, and that Student’s education was materially impacted especially by the failure to provide instruction in a pull-out setting. Student made little progress academically, failed most of her courses, and did not earn any substantial credits toward graduation. Accordingly, Petitioner met her burden of proof on Issue 3.

#### **Issue 4: Failure to Provide Appropriate Placement**

As noted above, DCPS must offer placement in an appropriate school or program that can fulfill the requirements set forth in an appropriate IEP, and must ensure that its placement decision is made in conformity with the Least Restrictive Environment (“LRE”) provisions of the IDEA. *See* D.C. Code 38-2561.02 (b); *McKenzie v. Smith*, 771 F.2d 1527, 1534-35 (D.C. Cir. 1985); *O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008).

In this case, Petitioner proved by a preponderance of the evidence that District Charter could not implement the requirements of the December 2011 IEP during the 2011-12 and 2012-13 school years because it was not able to provide 24.5 hours of specialized instruction in an Outside General Education setting. While enrollment in charter schools is a matter of parental choice under D.C. law, and Parent voluntarily enrolled Student at District Charter in August 2011, DCPS as LEA had an obligation to propose an appropriate alternative placement once it

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<sup>8</sup> Due to the change to an Outside General Education setting for specialized instruction, Petitioner has not proved that DCPS failed to implement the requirements of the 11/15/2012 IEP.

became clear that District Charter could not meet Student's defined special education needs. *See* 5-E DCMR §§ 3019.4, 3019.8 (a). This should have been clear by at least February 2012, when DCPS' School Psychologist conducted her review. There is also evidence that District Charter requested a DCPS placement review during the same general time period, but that no viable options were identified or proposed by DCPS at that time.

Beginning November 15, 2012, Student's IEP was revised to prescribe an inclusion program that District Charter may be capable of implementing. The Hearing Officer has determined that the 11/15/2012 IEP should have included some hours of specialized instruction outside general education (primarily in math and reading), as well as appropriate adjustments in goals and baselines, in order to provide meaningful educational benefit to Student. The evidence is unclear as to whether District Charter can materially implement such a partial-inclusion IEP, and whether the school/program would be otherwise appropriate to meet Student's needs under such revised IEP. Without determining whether DCPS denied FAPE by failing to place Student into an appropriate school/program since 11/15/2012, DCPS will be ordered to (a) review Student's updated evaluations, (b) review and revise her IEP, and (c) discuss and determine placement for the 2013-14 school year prospectively, subject to any further due process challenge by Petitioner. *See Order.*

### **C. Appropriate Relief**

The IDEA authorizes the Hearing Officer to fashion "appropriate" relief, *e.g.*, 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia*, 401 F.3d 516, 521-24 (D.C. Cir. 2005). Based on the evidence presented at the due process hearing, the findings and conclusions above, and relevant equitable considerations, the Hearing Officer concludes that the relief set forth below is appropriate to address the violations and denials of FAPE found herein. The relief includes both injunctive relief and compensatory education services, as specified herein.

As suggested by the analysis under Issue 4 above, Petitioner's request for private placement relief is premature, as DCPS should first have the opportunity to review the recent independent evaluations, review and revise the IEP as appropriate, and discuss and determine an appropriate public or non-public placement for the 2013-14 school year. Provided the placement

is appropriate and made in accordance with the IDEA, DCPS public schools are prioritized by statute above private facilities located in the District of Columbia. *See* D.C. Code 38-2561.02 (c). Moreover, it is unclear whether either Private School or DCPS High School can successfully accommodate the amounts of pull-out specialized instruction that Student may be found to require under a revised IEP based on updated evaluations, since both schools appear to utilize primarily an “inclusion” delivery model. *See Priv. Sch. Test.; DCPS AP Test.*<sup>9</sup>

Compensatory education is one of the equitable remedies available to a hearing officer, exercising his authority to grant “appropriate” relief under IDEA. Under the theory of ‘compensatory education,’ courts and hearing officers may award ‘educational services...to be provided prospectively to compensate for a past deficient program.’” *Reid v. District of Columbia*, 401 F. 3d 516, 521 (D.C.Cir. 2005) (quotations omitted). Compensatory education is fact-specific relief designed to compensate a student for the educational benefits of which he or she was deprived. *See, e.g., Gill v. District of Columbia*, 751 F. Supp. 2d 104, 110-12 (D.D.C. 2010); *Friendship Edison Public Charter School v. Nesbitt*, 532 F. Supp. 2d 121, 125 (D.D.C. 2008). An IDEA petitioner generally has the burden of proposing a well-articulated plan demonstrating what it is he wants and the reasoning why his request would ameliorate the denial of FAPE, although a court or hearing officer ultimately must determine what is equitable. *Gill, supra. See also Reid*, 401 F. 3d at 523-24 (“compensatory education involves discretionary, prospective, injunctive relief crafted by a court [and/or hearing officer] to remedy what might be termed an educational deficit created by an educational agency’s failure over a given period of time to provide a FAPE to a student”).

In this case, the Hearing Officer has determined that DCPS denied the Student a FAPE by (a) failing to implement her December 14, 2011, by failing to provide at least 24.5 hours of specialized instruction in an Outside General Education setting, (b) failing to develop an appropriate IEP on November 15, 2012, and (c) failing to place Student into an appropriate school or program that could implement her IEP from at least February through November 2012. DCPS thereby deprived the Student of the educational benefits of such services for these periods of time.

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<sup>9</sup> The DCPS Assistant Principal testified that the ID students at High School generally receive their specialized instruction in an inclusion setting, with no more than five hours of pull-out services. There are presently only one or two ID students in the 12<sup>th</sup> grade at that school. *See DCPS AP Test.*

Petitioner has further shown that this denial has caused educational harm to the Student that entitles her to an award of compensatory education reasonably designed to compensate the Student for these deprived educational benefits. Although attendance issues have also contributed, without the necessary support, Student's unaddressed weaknesses adversely affected her ability to access the curriculum across multiple academic areas. As a result, Student appears to have made little if any academic progress over the relevant period of time. *See Holman Test.; Nelson Test.; Parent Test.; Findings, supra.*

The Hearing Officer does not have available standardized academic achievement test scores for the precise beginning and end dates of the FAPE denials found herein. However, reasonable proxies exist in the form of Student's November 2008 WIAT and April 2013 Woodcock-Johnson, which can provide some useful measurements. In November 2008, Student's standard scores on the WIAT were 40 in Mathematics, 48 in Reading, and 59 in both Written Language and Oral Language. *P 9-15.* In April 2013, Student's standard scores on the Woodcock-Johnson are 45 in Broad Math, 57 in Broad Reading, and the same 59 in Written Expression. *P 10-20.* These new standard scores roughly translate into grade equivalencies of 2.7, 2.9, and 3.7, respectively, and show little academic progress over a period of some 4 ½ years.<sup>10</sup> Indeed, the earlier scores fall mostly within the 95% Band of the new scores. *Id.* Moreover, certain sub-test areas of particular concern like Reading Comprehension actually show flat or *declining* scores. *Compare P 9-15* (Reading Comprehension = 51; Numerical Operations = 44) *with P 10-20* (Passage Comprehension = 47; Math Calculation Skills = 43). *See also Nelson Test.*<sup>11</sup>

Petitioner proposes five hours per week of individual academic tutoring services over the next calendar year to assist in providing the educational benefits that likely would have accrued from the services that the Student missed between December 2011 and the present. *See P-20;*

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<sup>10</sup> Student's scores on the Scantron Performance Assessment also showed a Grade Level Equivalency of 2.7 in Math as of May 2012. *See P 7-5.*

<sup>11</sup> Dr. Nelson testified that despite an IQ score of 51, one can reasonably expect improved academic achievement from Student over time, given her analysis of subtest scores at *P 10-20.* For example, Dr. Nelson noted Student's standard score of 83 on Verbal-Auditory Learning, which directly correlates to reading ability potential, and her standard score of 81 on Spatial Relations, which is an important measurement of non-verbal reasoning. *Nelson Test.* DCPS did not rebut this credible expert testimony.

*Holman Test.* The 1:1 academic tutoring should focus on Student's areas of deficit that failed to improve significantly during the period of missed services, with particular emphasis on intensive reading and math instruction designed to remediate her deficits and help to achieve her IEP goals and earn credits toward graduation. *Id.* The tutor can also assist with homework assignments and can reinforce or re-teach concepts in that context. *Id.* And the laptop computer responds to a specific identified need for assistance with writing, which was recommended over a year ago by the DCPS School Psychologist. The Hearing Officer finds that this remedy is supported by the record evidence, including the testimony of Petitioner's witnesses and the substantial documentary evidence adduced at hearing, as summarized herein. These services are fact-specific and are well suited to remedy the specific harm suffered by the Student.

## **Vi. ORDER**

Based upon the above Findings of Fact and Conclusions of Law, the stipulations of the parties at hearing, and the entire record herein, it is hereby **ORDERED**:

- 1. Within 30 calendar days** of this Order (*i.e.*, by **June 19, 2013**), Respondent District of Columbia Public Schools ("DCPS") shall convene a meeting of the Student's MDT/IEP Team for the following purposes:
  - (a)** review the independent educational evaluations ("IEEs") of the Student in the areas of comprehensive psychological, adaptive functioning, speech/language, and vocational. assessment, to the extent the reports of such evaluations have been completed and submitted to DCPS by **June 1, 2013**;
  - (b)** review any other updated information concerning Student's academic and behavioral progress under Student's individualized education program ("IEP") dated November 15, 2012;
  - (c)** review and revise, as appropriate, the goals and services in the IEP in the areas of Reading, Writing, Written Expression; Communication/Speech and Language; Social, Emotional, and Behavioral Development; and Post-Secondary Transition Planning;

- (d) discuss and determine whether Student requires a dedicated aide to obtain educational benefit and to access the curriculum during any time periods she is in a General Education setting;
- (e) discuss and determine whether Student requires Extended School Year (“ESY”) services on her IEP;
- (f) discuss and determine whether Student’s appropriate exit category under her IEP should remain a High School Diploma or should be changed to a Certificate of Completion; and
- (g) discuss and determine an appropriate public or non-public school/program in which to place the Student pursuant to the IDEA and D.C. Code § 38-2561.02 (b).
2. The IEP developed pursuant to paragraph 1 above shall provide specialized instruction in all academic areas, including: (a) at least **five (5) hours** of specialized instruction in **Math** in an **Outside General Education** setting; and (b) some intensive instruction in **Reading**, either one-on-one or in small groups.
  3. Any school/program in which DCPS proposes to place the Student pursuant to paragraph 1 above must (a) be able to implement Student’s revised IEP, (b) be appropriate for Student’s needs, and (c) be a school/program in which Student can make adequate progress toward her IEP goals before exiting special education by Age 22.
  4. As **compensatory education**, Respondent DCPS shall pay for (a) **five (5) hours per week** of **one-to-one academic tutoring services** that are received by the Student, beginning **June 1, 2013**, and ending **June 1, 2014**, not to exceed **250 hours** in total; and (b) a **laptop computer**, together with related software, that is reasonably capable of assisting Student with the mechanics of writing in her class work. The tutoring services shall focus primarily on developing Student’s basic math and reading skills. The services shall be performed by qualified independent provider(s) of Petitioner’s choice at hourly rates not to exceed the current established OSSE-approved rates for such services. The laptop computer and software shall be provided to Student by **July 1, 2013**.

5. Any delay in meeting any deadline in this Order caused by Petitioner or Petitioner's representatives (*e.g.*, absence or failure to attend a meeting, or failure to respond to scheduling requests) shall extend the deadline by the number of days attributable to such delay.
6. Petitioner's other requests for relief in his Due Process Complaint filed and served February 25, 2013, are hereby **DENIED**; and
7. The case shall be **CLOSED**.



Dated: May 20, 2013

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Impartial Hearing Officer

### **NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia court of competent jurisdiction or in a District Court of the United States, without regard to the amount in controversy, within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).