

On or about March 26, 2013, DCPS held a resolution meeting that did not result in an agreement. The 30-day resolution period then ended without agreement on March 31, 2013, and the 45-day HOD timeline expires on May 15, 2013.

On April 2, 2013, a Prehearing Conference (“PHC”) was held to discuss and clarify the issues and requested relief, and a Prehearing Order (“PHO”) was issued on April 3, 2013. At the PHC, the parties agreed to schedule the due process hearing for May 6, 2013. The parties then filed their five-day disclosures, as required, by April 29, 2013.

On April 26, 2013, DCPS filed a motion to dismiss, asserting that Petitioner’s claims and requested relief were barred by the doctrines of collateral estoppel and res judicata.² Petitioner filed an opposition to the motion on April 29, 2013, and the motion was considered and denied on the record at the outset of the due process hearing. The Hearing Officer found no merit to the motion. DCPS’ position appeared to rest on a prior Due Process Complaint filed by Petitioner in Case No. 2011-0783, which raised distinct “child find” pre-eligibility issues arising over six months before the actions complained of in this case. The earlier complaint was filed July 2011 and was dismissed in September 2011 based on an August 25, 2011 settlement agreement, which authorized independent evaluations and required DCPS to determine eligibility and develop an IEP for Student. The argument that this can have preclusive effect on a later dispute over the contents of the IEP, thereby insulating such program from scrutiny under the IDEA, is frivolous.³

The Due Process Hearing was held in Hearing Room 2004 on May 6, 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-24.

Respondent’s Exhibits: R-1 through R-9.

² The Hearing Officer notes that these defenses were not set forth in DCPS’ Response to the Complaint and were not asserted at the PHC. Moreover, at the PHC, DCPS’ counsel indicated no intention to file any prehearing motions.

³ The argument also appears contrary to the express language of the settlement agreement, which stated that it was in “full satisfaction and settlement” of all claims Petitioner asserted or could have asserted “as of the date of the signed Settlement Agreement.” August 26, 2011 SA, ¶ 10. Petitioner’s claims in this case concern IEPs developed in February 2012 and January 2013, based in large part on the independent psychological evaluation conducted in October 2011. All of these actions took place subsequent to the SA and Order of Withdrawal, and these new claims were not litigated or settled.

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

Petitioner’s Witnesses: (1) Parent-Petitioner; (2) Educational Advocate #1; (3) Educational Advocate #2; and (4) Dr. Natasha Nelson, Licensed Clinical Psychologist (Expert in Clinical Psychology/School Psychology).⁴

Respondent’s Witnesses: (1) General Education Teacher; (2) School Psychologist (Expert in Clinical Psychology/School Psychology); and (3) Dean of Students/LEA Representative.

The parties presented written closing arguments on May 10, 2013.

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 15, 2013.

III. ISSUES AND REQUESTED RELIEF

As specified in the PHO, the sole issue presented for determination at hearing was:

Failure to Develop Appropriate IEP – Did DCPS deny the Student a FAPE by failing to develop an appropriate IEP (*i.e.*, one that was reasonably calculated to confer educational benefit) on or about **February 24, 2012** and **January 24, 2013**, in that the IEPs: (a) lacked **specialized instruction outside the general education setting** (together with related goals) in the areas of reading, math and written expression; and (b) failed to include **counseling services or any other type of behavioral support**.

> Among other things, Petitioner alleges that the Student is not only speech/language impaired (“SLI”), but also has a **learning disability** for which she requires academic and functional goals designed to meet her needs, which are allegedly demonstrated in an October 2011 comprehensive psychological evaluation and her academic achievement test scores.

> **DCPS asserts that “[b]ased on a review of existing data, the team determined the student does not require academic or behavioral goals.”** *Response, p. 1.*

⁴ Dr. Nelson was found qualified as an expert in Clinical and School Psychology, over DCPS’ objection, based on her education, training, and professional experience as summarized in her Curriculum Vitae at P-23 and her testimony at hearing. DCPS’ School Psychologist was similarly qualified as an expert.

DCPS further asserts that the Student's IEP team "determined the student is not eligible for services as a student with a learning disability."

Both parties discussed and agreed at the PHC that the disability classification of a student does not present a separate issue for hearing. **Specifically, the parties stipulated and agreed that the disability classification does not control or limit the services provided in an IEP, which must be based on determination of the student's educational needs regardless of disability classification.** See *Prehearing Order*, ¶ 5 & n. 1. This stipulation and agreement was confirmed at the outset of the due process hearing.

In her Complaint, and as discussed at the PHC, Petitioner requested that DCPS be ordered to: (a) revise Student's IEP to include academic goals in the areas of reading, math and written expression, and to provide specialized instruction in those areas outside the general education setting; (b) revise Student's IEP to include behavioral support services including weekly individual therapy; (c) conduct a functional behavior assessment ("FBA") and develop a behavior intervention plan ("BIP"); (d) conduct an updated comprehensive psychological evaluation; and (e) award appropriate compensatory education services during the period of the inappropriate IEPs. 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 -year old student who resides in the District of Columbia with Petitioner. She attends her neighborhood DCPS public elementary school ("School"), where she is currently in the grade. *Pet. Test.; Dean Test.*
2. Student has been determined to be eligible for special education and related services as a child with a disability under the IDEA. Student has a primary disability of Speech or Language Impairment ("SLI"). See *P-1; R-3*.
3. In October 2011, a Comprehensive Psychological Evaluation of Student was conducted independently at DCPS' expense pursuant to a settlement agreement between Petitioner and DCPS. The evaluation was conducted to obtain a better understanding of Student's cognitive, academic, and emotional functioning. A written report of evaluation was

prepared and delivered to DCPS on or about 10/26/2011, and an addendum to the report was prepared and delivered to DCPS on or about 11/9/2011. *P-11; P-12; Nelson Test.*

4. The comprehensive psychological evaluation included a clinical interview and series of tests, including: Wechsler Intelligence Scale for Children-Fourth Edition (“WISC-IV”); Woodcock-Johnson Test of Achievement, 3rd Edition (“WJ-III”), Behavior Assessment System For Children -2 (“BASC-2”) - Parent, Teacher, and Student Ratings; Attention Deficit Hyperactivity Disorder Test (“ADHDT”) – Parent; and Children’s Depression Inventory (“CDI”). *See P 11-1; Nelson Test.*
5. The comprehensive psychological evaluation found that Student’s general cognitive ability was within the Borderline range of intellectual functioning, as measured by the Full-Scale IQ (FSIQ composite score = 71), which was less than 97% of her age/grade peers. *P 11-10; Nelson Test.* Her academic achievement testing showed scores of 80 in Broad Math, 85 in Broad Reading, and 86 in Broad Written Language, all of which fell within the Low Average range. *P 11-11.* Overall, the evaluation found that her scores on all academic tasks were below age and grade expectancy and suggested the need for educational support in all academic areas (reading, math, written expression). The evaluation concluded that Student met criteria for Learning Disorder NOS and would benefit from specialized instruction to help her succeed academically. *P 11-12; Nelson Test.*⁵
6. With respect to emotional functioning, the comprehensive psychological evaluation found that Student appeared to be “experiencing some childhood depression and anxiety, especially in relation to her peers,” despite her non-clinical range self-reporting on the BASC-2. *P 11-11.* The evaluation also noted her history of diagnosis with Attention Deficit Hyperactivity Disorder (“ADHD), Combined Type, and found that she appeared to continue to meet criteria for diagnosis with that disorder. *Id. See also Nelson Test.*⁶

⁵ Student’s subtest scores in Passage Comprehension (80) and Applied Problems (76) were areas of significant weakness, where the evaluator found at least a two-year gap between chronological age and age-level test scores. *Id.; Nelson Test.* The evaluator also had concerns in Writing Fluency and Spelling, where the gap approximated 1.5 years. *Id.*

⁶ However, as noted in the evaluation Addendum, the ADHD teacher responses indicated a “Very Low Probability” of ADHD classification. *P 12-3.* Student’s Teacher reported no behaviors of concern for Student during the 2011-12 school year, as related to hyperactivity, inattention, and distractibility. *Id.* The report indicated that such behavioral difficulties were more readily seen the prior school year (2010-

7. In November 2011, a Functional Behavior Assessment (“FBA”) was conducted independently. The FBA was conducted to identify behaviors that influenced Student’s academic performance in school and to make recommendations concerning development of an individualized behavior plan. A written report of evaluation was prepared and delivered to DCPS on or about 11/9/2011. *P-13*.
8. The independent FBA notes a history of poor behaviors in the school setting during the prior school year (2010-11). However, based on current teacher reports and classroom observations, Student seemed to be more on task and did not display significant behavioral difficulties in school as of November 2011. *P 13-4 – P 13-5. See also Nelson Test.* (noting Student had history of aggressive behaviors in class, but such behaviors were not observed by independent FBA evaluator).
9. In November 2011, a Speech and Language Evaluation of Student was also conducted independently. The evaluation was conducted to assess Student’s current communication skills and to determine current levels of performance in that area. A written report of evaluation was prepared and delivered to DCPS on or about 11/12/2011. *P-14*.
10. The results of the Speech and Language Evaluation revealed Student’s communications abilities to be in the overall moderate range. *P 14-5*. According to the report, Student’s “weaknesses are displayed across specific language areas including her difficulty to follow directions with embedded concepts, formulating grammatically correct sentences, identifying relationships amongst words, and answering wh-questions from verbally presented information”. *Id.* The evaluator also found that Student’s expressive language was more advanced than her receptive language abilities as measured by the CELF IV test. *Id.*
11. On or about January 5, 2012, DCPS issued a Prior Written Notice (“PWN”) notifying Petitioner that based on the information gathered from the independent evaluations, the MDT/IEP Team determined that Student should receive speech-language services. *P 7-1*.
12. On or about January 24, 2012, DCPS’ School Psychologist conducted a review of Student’s independent psychological evaluation. *R-4*. The DCPS School Psychologist

11) and that Student had taken medication for her ADHD diagnosis for at least six months. *Id. See also Nelson Test.; R-4, p. DCPS000030* (“Behaviorally, the teacher ratings revealed no elevations in the clinically significant range on any measures.”).

concluded that Student did not qualify as “other health impaired” because her current evaluation indicated that she did not have ADHD, as she was not currently exhibiting such behaviors at school and was making academic progress this year. *Id.*, p. DCPS000035. The School Psychologist also found that Student did not qualify as learning disabled because she has not had research-based interventions to address her weaknesses that have not worked. The School Psychologist noted that she had interventions to increase her reading fluency and reading comprehension, which had led to some improvements. In addition, the School Psychologist found her weaknesses could be attributed to her lack of instruction the previous school year due to behavioral concerns, and that such behavioral concerns were no longer present. *Id.* Finally, while she found Student to be about a year behind in most academic areas, she noted that Student was closer to average (*i.e.*, primarily in the 2d or 3d quartile in her class) when measured against her “academic cohorts.” R-4, p. DCPS000032; *School Psych. Test. See also P-5* (1/27/2012 Analysis of Existing Data); *P-3* (1/31/2012 Evaluation Summary Report).

13. On or about January 27, 2012, DCPS prepared and issued an Analysis of Existing Data and a Final Eligibility Determination Report. *P-4; P-5*. DCPS found that Student was a child with a disability who needed special education and related services. Student was found to have a Speech or Language Impairment, and her disability impacted her participation in the general curriculum in the area of Communications/Speech and Language. *P 4-1–4-2*.
14. On or about January 31, 2012, DCPS also issued an Evaluation Summary Report, which summarized the specific evaluations being reviewed. *P-3; R-3; see School Psych. Test*. The report found, *inter alia*, that Student “presents with language weaknesses that may impact her ability to access the general education curriculum. She has difficulty following directions, establishing relationships between words, forming grammatically correct sentences, and answering ‘wh’ questions.” *R-3, p. DCPS000017*.
15. On or about February 24, 2012, Student’s MDT/IEP Team met and developed an initial IEP, which provided Student zero (0) minutes per day of specialized instruction and 240 minutes per month of Speech-Language Pathology services in an Outside General Education setting. *See P 1-4*. The IEP included annual goals in the area of

Communication/Speech and Language. *P 1-2*. Petitioner and/or Student's educational advocate inquired concerning additional academic and behavioral support services, but the Team declined to include such services in the IEP. *See Pet. Test.; EA #1 Test*.

16. Petitioner continued to have concerns regarding behavioral issues at school thereafter. *See Pet. Test*. In September 2012, Student was disciplined for an incident involving defiant behavior toward her teachers, running out of class without permission, and bullying of a classmate. *See P-16*. There were also some other behavioral issues at the beginning of the 2012-13 school year. *Teacher Test.; Dean Test*. Overall, however, the evidence suggests that Student's behaviors did not adversely affect her learning or that of other students as the 2012-13 school year progressed. *See Teacher Test.; P-17 (Report Card); Dean Test*, (characterizing Student as "one of the best behaved" and a "different student" compared with August 2012) .
17. On or about January 24, 2013, the Student's MDT/IEP Team met and developed an IEP, which continued the same services as the 2/24/2012 IEP – *i.e.*, 240 minutes per month of Speech-Language Pathology services in an Outside General Education setting. *See P 2-4*. Petitioner did not participate in this meeting.
18. In early April 2013, after the Complaint was filed, Student's educational advocate administered informal teacher assessments in reading and math. She found that Student's reading comprehension skills were at approximately the 2d grade level and that she also displayed significant weaknesses in certain math areas. *See P-20; EA #2 Test*.
19. Student does not currently receive, and has never received, any specialized instruction in any academic areas or any behavioral support services. Apart from her SLP services and a 504 plan, Student has not received any interventions that are not offered to all regular education students.
20. For most of the 2012-13 school year, Student's ■■■ grade class at the School has been comprised of six (6) students including Student. Instruction was delivered in this small group setting by a general education teacher who was able to provide more intensive, differentiated reading and math instruction to Student. However, the class has recently expanded to 12 students including ■■■ and ■■■ graders. Three of these students are pulled out for some specialized instruction. *See Teacher Test.; Dean Test*. Student's class size for next year has not been determined.

21. Student has not received formal standardized testing of her academic achievement subsequent to November 2011. However, she continues to be behind age- and grade-level standards and would benefit from additional academic tutoring. *See Teacher Test.; see also R-5 (DIBELS testing); P 2-2 (1/24/2013 IEP)* (Student “would benefit from strategies that teach visualization and verbalization techniques”).
22. The parties stipulated and agreed that Student’s disability classification does not control or limit the services provided in her IEP, which must be based on determination of Student’s educational needs regardless of disability classification. *See Prehearing Order, ¶ 5 & n. 1.*
23. Testimony at hearing indicated that an MDT/IEP Team meeting was scheduled for May 9, 2013. The parties agreed to report on the results of such meeting along with written closing statements, to the extent relevant to any requested relief in this case. It was reported that the IEP Team decided that DCPS would conduct an updated comprehensive psychological evaluation and an updated FBA for Student, and that Petitioner had executed a consent form for DCPS to conduct these evaluations.⁷

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.

⁷ See email correspondence from Petitioner’s counsel dated May 9, 2013, attaching written closing statement and 5/9/2013 MDT meeting notes. DCPS’ counsel submitted no additional or different report.

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 (1st Cir. 2008) (same); *Adams v. State of Oregon*, 195 F. 3d 1141, 1149 (9th 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 (5th 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. Issue/Alleged Denial of FAPE – Failure to Develop Appropriate IEPs (February 2012 & January 2013)

As noted above, an IEP must be reasonably calculated to confer meaningful educational benefits on the disabled child at the time it was created. In this case, Petitioner alleges that DCPS denied the Student a FAPE by failing to develop such an appropriate IEP on or about February 24, 2012 and January 24, 2013, in that the IEPs: (a) lacked specialized instruction outside the general education setting (together with related goals) in the areas of reading, math and written expression; and (b) failed to include counseling services or any other type of behavioral support.

Consistent with the IDEA and the parties’ prehearing stipulation, Student’s disability classification does not control or limit the services that may be provided in her IEP. Rather, the content of Student’s IEP must be based on determination of her educational needs regardless of disability classification. *See Prehearing Order*, ¶ 5 & n. 1; 34 C.F.R. §§ 300.320, 300.324. While the nature of a child’s disability may well inform those needs, a child must only be found to have one of the disabilities enumerated in 34 C.F.R. § 300.8 in order to qualify for whatever special education and related services she may require.

DCPS contends that the information available to the IEP Team shows that Student needed special education “in the form of speech-language pathology services exclusively.” *DCPS’ Closing Argument*, p. 3. Petitioner claims that the same evidence shows Student needed both specialized instruction and counseling services as of the dates that the IEPs were developed.

Specialized Instruction

“Special education” under the IDEA generally “means *specialty designed instruction*, at no cost to the parents, *to meet the unique needs of a child with a disability ...*” 34 C.F.R. § 300.39 (a) (1) (emphasis added). “Specially designed instruction,” in turn means “adapting as appropriate to the needs of an eligible child ... the content, methodology, or delivery of instruction” in order (i) “to address the *unique needs* of the child *that result from the child’s disability*,” and (ii) “to ensure access of the child to the general curriculum.” *Id.*, § 300.39 (b) (3)

(emphasis added). In addition, “special education” may include related services such as speech-language pathology services, if they otherwise meet the statutory definition. *Id.*, § 300.39 (a) (2).

DCPS argues that Student is not eligible for any specialized instruction because she “has not been diagnosed as a student with a disability that would require such additional services” and SLP services are the only form of special education “that relates to her disability.” *DCPS’ Closing Argument*, p. 2. This argument appears to come very close to resurrecting (contrary to the parties’ stipulation) the disclaimed position that “disability classification,” rather than educational needs, should control the services provided in a child’s IEP.

Similarly, while the School Psychologist conducted a very thorough review of the independent psychological evaluation (augmenting it with additional teacher and classroom-based measurements) and presented credible expert testimony, her analysis focused on determining whether Student was eligible under the OHI and SLD disability categories. However, at that point, Student had already been determined to be an eligible child with a disability under the IDEA (namely, SLI), and the issue became one of determining her educational needs for purposes of designing a program that would provide meaningful educational benefit. .

Regardless of whether Student did or did not qualify as learning disabled, the evidence shows that (a) Student presented with speech/language impairments that impacted her ability to access the general education curriculum (*e.g.*, difficulty following directions, establishing relationships between words, etc.); (b) that she had significant academic weaknesses, particularly in reading comprehension and math applied problems, as measured by the regularly utilized Woodcock-Johnson III Tests of Achievement conducted in November 2011; (c) that she would likely benefit from working with a special education teacher during a portion of her English and math classes in particular; and (d) that her academic struggles may relate at least in part to her established disability. *See Findings of Fact, supra*. This is more than sufficient to warrant inclusion of some amount of specialized instruction as part of Student’s IEP, consistent with the above statutory criteria.

Petitioner asserts that five (5) hours per week of specialized instruction, either in an inclusion or pull-out setting – along with appropriate academic goals in the areas of reading, math, and written expression – would have been sufficient to address Student’s needs when the

February 2012 and January 2013 IEPs were developed. The Hearing Officer agrees, and concludes that this level of services would have been reasonably calculated to confer meaningful educational benefits based on the information available to the IEP teams on those dates.

Going forward, DCPS will need to convene an IEP Team meeting to review the results of the updated assessments it has just initiated, and then review and revise the IEP contents including any amounts of specialized instruction that may be needed and the setting for such instruction.

Behavioral Support Services

In the case of child whose behavior impedes the child's learning or the learning of others, the IEP Team *must* "consider use of positive behavioral interventions and supports, and other strategies, to address that behavior". 34 C.F.R. § 300.324 (a) (2). Again, it does not matter whether the child's primary disability classification is OHI, ED, or something else. The test is the effect of the behaviors on the learning of the disabled child or other students.

Behavioral support in the form of counseling services provided by social workers, psychologists, or other qualified personnel are also specifically included within the statutory definition of "related services." *See* 34 C.F.R. § 300.34 (a), (c) (2). "Related services" under the IDEA mean "transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education" *Id.*, § 300.34 (a).

As noted above, an IEP must be reasonably calculated to confer meaningful educational benefits on the disabled child. With respect to behavioral support in this case, the Hearing Officer concludes that Petitioner failed to prove by a preponderance of the evidence that weekly individual counseling services needed to be included in either the February 2012 or January 2013 IEPs in order to provide educational benefit to Student, based on the information available to the MDT/IEP teams at the time they were created. According to the independent evaluator, Student was displaying significantly less behavior concern in school by November 2011, compared with the prior school year. This finding is supported by teacher reporting, as well as the evaluator's own classroom observations. *See, e.g., P 13; Nelson Test.; Findings, ¶ 8.* Both the Dean and Teacher also supported this conclusion in their testimony. *See Dean Test.; Teacher Test.* Finally, Dr. Nelson further testified that she had not observed or evaluated Student at any time after

November 2011, and thus was not in position to assess any behavioral concerns either over the remainder of the 2011-12 school year or during the 2012-13 school year. *Nelson Test* (cross examination).

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). As noted above, Petitioner requested that DCPS be ordered to: (a) revise Student’s IEP to include academic goals in the areas of reading, math and written expression, and to provide specialized instruction in those areas outside the general education setting; (b) revise Student’s IEP to include behavioral support services including weekly individual therapy; (c) conduct a functional behavior assessment (“FBA”) and develop a behavior intervention plan (“BIP”); (d) conduct an updated comprehensive psychological evaluation; and (e) award appropriate compensatory education services during the period of the inappropriate IEPs. *See Complaint; Prehearing Order*, ¶ 6.

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 in the Order below is appropriate to address the denial of FAPE found herein. Petitioner’s requested relief under item (a) above shall be granted; item (b) above shall be denied; and items (c) and (d) are deemed mooted by the results of the May 9, 2013 MDT meeting. In addition, Petitioner’s request for compensatory education relief (item (e) above) shall be granted in part, for the reasons discussed below.

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 failing to provide at least five (5) hours of specialized instruction in her IEPs from February 2012 to the present. DCPS thereby deprived the Student of the educational benefits of these services for the last few months of the 2011-12 school year and most of the 2012-13 school year. Petitioner has shown that this 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. See *P-21* (compensatory education proposal); *Pet. Test.*; *EA #2 Test.*; *Nelson Test*. Without the necessary academic support, Student’s unaddressed weaknesses adversely affected her ability to access the curriculum across multiple academic areas.

Petitioner proposes 30 hours of academic tutoring in reading, writing and math. See *P-21*; *EA #2 Test*. DCPS did not contradict this evidence or present an alternative proposal in the event it were found to have denied a FAPE to Student. The Hearing Officer concludes that the proposed 30 hours of individual academic tutoring are necessary and sufficient to provide the educational benefits that likely would have accrued from the specialized instruction that Student missed between February 2012 and the present. The Hearing Officer believes these services are fact-specific and are well suited to remedy the specific harm suffered by the Student. The 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.

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 14, 2013**), and unless and until the IEP is further amended by the MDT/IEP Team for school year 2013-14 based on any updated assessments and other information, Respondent District of Columbia Public Schools (“DCPS”) **shall amend the Student’s individualized education program (“IEP”) dated January 24, 2013**, as follows:
 - (a) In the “**Special Education Services**” section of the IEP, add five (5) hours per week of “Specialized Instruction” in an appropriate setting to be determined by the MDT/IEP Team, consistent with this HOD;
 - (b) In the “**Present Levels of Performance and Annual Goals**” section of the IEP, develop and incorporate appropriate annual goals in the areas of “**Reading,**” **Mathematics,**” and “**Written Expression,**” consistent with this HOD.
2. DCPS may elect to combine the IEP meeting specified in paragraph 1 with review of the updated comprehensive psychological evaluation and FBA initiated as a result of the May 9, 2013 meeting, to the extent such reports are available. The IEP Team (with Petitioner participating) shall retain full discretion to decide on any appropriate revisions of the IEP based on such updated information, including provisions with respect to specialized instruction and setting, going forward.
3. As **compensatory education**, Respondent DCPS shall pay for **30 hours** of one-to-one **academic tutoring services** for the Student. The services shall be performed by qualified independent providers of Petitioner’s choice at hourly rates not to exceed the current established OSSE approved rates in the District of Columbia for such services. Unless the parties agree otherwise, these services shall be completed by no later than **May 15, 2014**.
4. Petitioner’s other requests for relief in her Due Process Complaint filed March 1, 2013, are hereby **DENIED**; and
5. The case shall be **CLOSED**.



Impartial Hearing Officer

Dated: May 15, 2013

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).