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

STUDENT,[1] **By and through PARENT,** ***Petitioner,*** **v.** **DISTRICT OF COLUMBIA PUBLIC SCHOOLS,** ***Respondent.***	))))))))))	**Bruce Ryan, Hearing Officer** **Issued: November 13, 2011**

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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 Complaint was filed July 15, 2011, on behalf of a year old student (the "Student") who resides in the District of Columbia and has been determined to be eligible for special education and related services under the IDEA. The Student currently attends a D.C. public charter school (the "Charter School"), for which DCPS acts as the local educational agency ("LEA").

As discussed further below, Petitioner claims that DCPS has denied the Student a free appropriate public education ("FAPE") in several respects during the period that she has attended the Charter School. DCPS filed its Response on August 1, 2011, which denied the allegations. DCPS asserts that it has not denied the Student a FAPE.

This case was originally assigned to Hearing Officer Ramona Justice, who held a Prehearing Conference ("PHC") on August 4, 2011, to discuss and clarify the pleadings and issues. On August 9, 2011, Hearing Officer Justice issued the Prehearing Order, which specified

[1] Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

the issues and requested relief as set forth in Part III below. The 30-day resolution period ended without resolution as of August 14, 2011. [2]

The Due Process Hearing was scheduled to begin on September 15, 2011, and five-day disclosures were timely filed by both parties on September 8, 2011. After the hearing was convened and certain evidentiary rulings were made, [3] the parties then agreed to continue the hearing to provide an opportunity to convene an IEP [4] team meeting on September 28, 2011.

On September 27, 2011, Petitioner's unopposed motion for continuance was granted by the Chief Hearing Officer for good cause shown. *See Interim Order on Continuance Motion (Sept. 27, 2011).* As the Order states, the purpose of the 09/28/2011 IEP team meeting was to review the independent educational evaluations obtained by Petitioner following the resolution meeting. The parties believed that returning to an IEP team meeting could resolve some or all issues in the du process complaint. *Id.* The hearing was rescheduled for October 19 and 24, 2011, and the 45-day IDEA timeline was extended to November 3, 2011. *Id.*

On October 4, 2011, the case was reassigned to this Hearing Officer. *See Notice of Hearing Officer Appointment (10/04/2011).* Following reassignment, on October 5, 2011, Petitioner filed a Motion for Admission of Independent Educational Evaluations requesting that the independent evaluations, which had now been reviewed by the IEP team on 09/28/2011, be admitted into evidence at the next hearing session. On October 11, 2011, DCPS filed a response opposing the motion. On October 12, 2011, Petitioner confirmed in writing that she did not wish to amend her due process complaint. Petitioner's counsel explained that "[a]s no new issues have been raised by any events or evaluations that took place subsequent to the filing of the complaint, there is no reason for Petitioner to amend her complaint or to submit additional disclosures." [5] The Hearing Officer attempted to schedule a further PHC, but was unsuccessful.

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[2] A resolution meeting was held on July 28, 2011, which did not resolve the Complaint, and the parties did not agree to end the 30-day resolution period early. *See Resolution Period Disposition Form,* dated July 28, 2011.

[3] Specifically, Hearing Officer Justice excluded two independent educational evaluations (comprehensive psychological and speech/language) offered by Petitioner on the basis that the evaluations did not exist at the time the complaint was filed and DCPS had not had an opportunity to review the evaluations at an IEP team meeting.

[4] IEP means Individualized Education Program under the IDEA.

[5] Email correspondence dated Oct. 13, 2011, from Petitioner's counsel to Hearing Officer and DCPS' counsel.

At the October 19, 2011, hearing session, the Hearing Officer granted Petitioner's Motion for Admission of Independent Educational Evaluations, in part, and admitted the evaluations into evidence for the reasons and purposes stated on the record. The Hearing Officer ruled that the evaluations and recommendations based thereon were admissible evidence under 34 C.F.R. 300.512 (b), as to the Student's current functioning and needs, which may be relevant to educational harm and appropriate remedies with respect to any denials of FAPE proved by Petitioner. The Hearing Officer ruled, however, that these post-IEP evaluations would not be relevant evidence to prove whether DCPS had acted reasonably or had denied the Student a FAPE on the basis of the information before it in December 2010.

Hearing sessions were then held on October 19, 24, and 27, and on November 2, 2011. Petitioner elected for the hearing to be closed, and Spanish-language interpreters were provided for each session. In order to accommodate the final hearing session, the Hearing Officer granted DCPS' unopposed motion for continuance for good cause shown. *See Interim Order on Continuance Motion (Oct. 31, 2011).* As the Order states, Petitioner's case in chief took longer than anticipated, due in part to the need for Spanish-language interpretation, as well as arguments on motions and objections. DCPS thus did not have sufficient time remaining to complete its case in the allotted schedule, and an additional hearing date was needed to present its remaining witness and a rebuttal witness by Petitioner. The parties therefore agreed to hold an additional hearing date on November 2 and to extend the 45-day timeline to November 13, 2011. The extension also allowed the submission of written closing statements by November 7, 2011.

During the Due Process Hearing, the following Documentary Exhibits were admitted into evidence:

Petitioner's Exhibits: P-1 through P-23.[6]

Respondent's Exhibits: DCPS-1 through DCPS-8.[7]

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[6] Exhibits P-3 through P-22 were admitted by Hearing Officer Justice at the 09/15/2011 hearing session without objection. Exhibit P-23 was admitted over DCPS' objection at the same session. Exhibits P-1 and P-2 were admitted by this Hearing Officer at the 10/19/2011 hearing session over DCPS' objections.

[7] Exhibits DCPS-1 through DCPS-6 were admitted without objection. Exhibits DCPS-7 (10/28/2011 IEP meeting notes) and DCPS-8 (CV of DCPS School Psychologist) were admitted over Petitioner's objections. DCPS-8 was submitted in a supplemental disclosure filed 10/19/2011, over five business days before DCPS began its case at the 10/27/2011 hearing session. *See Letter to Steinke,* 18 IDELR 739 (1992). The Hearing Officer also denied Petitioner's Motion in Limine, filed October 21, 2011, to the extent it applied to Exhibit DCPS-8.

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

> **Petitioner's Witnesses**: (1) Parent-Petitioner; (2) Ms. Monica Maines, independent Speech/Language Pathologist; (3) Dr. David Missar, independent Clinical Psychologist; (4) Dr. Sheila Iseman, Educational Consultant (on direct and rebuttal); (5) Investigator, Children's Law Center ("Invest."); and (6) Associate Head, Private School ("Priv. Sch.").
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> **Respondent's Witnesses**: (1) Special Education Teacher ("Sp. Ed. Teach."); (2) General Education Teacher ("Gen. Ed. Teach."); (3) DCPS Speech/Language Pathologist ("DCPS SLP"); (4) Charter School Clinical Psychologist ("Charter Psych."); (5) Special Education Coordinator ("SEC"); and (6) DCPS School Psychologist ("DCPS Psych.").

Petitioner filed a written closing argument on November 7, 2011. DCPS did not file any written closing argument.

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* DCMR §§ 5-E3029, E3030. 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 November 13, 2011.

III. ISSUES AND REQUESTED RELIEF

Pursuant to the August 9, 2011, Prehearing Order, the following issues were presented for determination at hearing:

> **(1) Inappropriate IEP.** — Whether DCPS denied the Student a FAPE by failing to develop an appropriate Individualized Education Program (IEP) for the Student on December 8, 2010, because the ***level of specialized instruction and behavioral support services*** prescribed in the IEP is insufficient to provide the Student access to the general education curriculum, and receive educational benefit, in violation of the IDEA, at 34 C.F.R. 300.320 and 300.324?
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> **(2) Inappropriate IEP.** — Whether DCPS denied the Student a FAPE by failing to develop an appropriate Individualized Education Program (IEP) for the Student on December 8, 2010, because the IEP does not include ***speech language therapy and extended school year services***, which the Student requires to access the general education curriculum, and receive educational benefit, in violation of the IDEA, at 34 C.F.R. 300.320 and 300.324?

(3) Inappropriate Placement. — Whether DCPS denied the Student a FAPE by failing to provide the Student an appropriate placement during the 2010/11 school year, because the nature of the Student's learning disability is such that the Student requires a ***full-time special education program, outside general education***, and the Student's current placement is unable to provide the Student the program required to access the general education curriculum, and receive educational benefit, in violation of the IDEA, at 34 C.F.R. 300.320 and 300.324?

(4) Procedural – IEP Team. — Whether DCPS denied the Student a FAPE on September 23, 2010 and December 8, 2010, because DCPS failed to properly convene an IEP team, by ensuring that the IEP team included a representative of the public agency who is qualified to provide, or supervise the provision of specially designed instruction to meet the unique needs of the Student; and knowledgeable regarding the general education curriculum and availability of resources of the public agency, in violation of the IDEA, at 34 C.F.R. 300.321(a)(4) and (e); and 300.322(a)? [8]

Petitioner requested the following relief: (a) an Order requiring DCPS to convene an IEP team meeting with the parent to review the independent evaluations, and review and revise the 12/08/2010 IEP as appropriate; [9] (b) an Order requiring DCPS to issue a Prior Written Notice authorizing funding of the Student's tuition and transportation at Private School for the 2011/12 school year; and (c) compensatory education services for the 2010/11 school year, consisting of tutoring services.

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. DCMR 5-3030.3; *see Schaffer* v. *Weast,* 546 U.S. 49 (2005). Petitioner also had the burden of proposing a well-articulated plan for compensatory education in accordance with *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005).

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[8] The above four issues are set forth as specified by Hearing Officer Justice in her August 9, 2011 Order. As the Order states, the "issues are limited to those raised in the Notice of Due Process Complaint dated July 15, 2011, ...as modified by this Order after the conduct of the pre-hearing conference." *Prehearing Conference Order (Aug. 9, 2011), p. 2.* At the October 19, 2011 hearing session, this Hearing Officer declined to expand the hearing issues beyond those specified in the Prehearing Order (such as a failure to implement the 12/08/2010 IEP or a failure to complete a timely triennial reevaluation, *see Complaint, p. 5*).

[9] This element of requested relief was effectively mooted by DCPS' convening of the September 28, 2011 IEP team meeting pursuant to the parties' agreement.

IV. FINDINGS OF FACT

1. The Student is a -year old child who resides with Petitioner in the District of Columbia. Petitioner is the Student's mother. *See Parent Test.*
2. The Student has been determined to be eligible for special education and related services under the IDEA as a child with a primary disability of Specific Learning Disability ("SLD"). *See P-7; R-1; R-2.*
3. The Student attends a D.C. public charter school (the "Charter School"), where she is currently in the 8th grade. DCPS acts as the LEA for the Charter School.
4. In August 2010, Petitioner enrolled the Student at Charter School in an effort to improve her academic performance. For the three years prior to that, the Student attended a different D.C. public charter school, which functioned as its own LEA. During that period, she struggled academically and behaviorally. *Parent Test.*
5. On or about September 23, 2010, an IEP team meeting was convened at Charter School. Participants included Petitioner, her attorney, and the SEC, Special Education Teacher, and Psychologist at Charter School. No representative of DCPS attended the meeting. *See P-9.*
6. At the 09/23/2010 meeting, Petitioner expressed concerns about the Student's academic functioning and described the difficulties she had experienced at the prior charter school. *See P-9*; *Parent Test.* The Special Education Teacher explained the inclusion setting being offered at Charter School and expressed the view that her "co-taught class appears to be appropriate for her at this time." *P-9, p. 1.* The Student was maintaining "C" grades or better in all her classes, and teachers reported no behavior concerns at this time. *Id., p. 2.* The main concern was homework, as she was "not completing and/or turning in the assignments regularly." *Id.*
7. At the 09/23/2010 meeting, Petitioner and her attorney asked if Charter School staff had noticed any signs of Attention Deficit Hyperactivity Disorder ("ADHD") in class, and it was reported that "this is not a concern at this time at [Charter School]." *P-9, p. 3.* The Charter School team members indicated that "classes here are very structured" and that the Student "has performed well thus far in this environment." *Id.* Petitioner also expressed concerns about homework assignments, and she was "given information to access [the Charter School's] database to view grades, homework, and Student's progress." *Id.* The teacher's

email addresses were also provided. *Id., p. 4.* The team then agreed to convene another meeting after updated academic achievement testing of the Student was completed. *Id.*

8. On November 3, 2010, the Charter School administered the Woodcock-Johnson III Normative Update Tests of Achievement ("W-J III") to the Student, with norms based on grade 7.2. *See P-3.* The testing found that her overall level of achievement was low. The Student demonstrated a significant weakness in broad mathematics, where she performed at a 3.3 grade equivalency level, which was considered very low. Her broad reading score (3.8 GE) was also low, and her broad written language score (4.0 GE) was low average. Within the reading area, she performed especially poorly on reading comprehension (2.9 GE) and fluency (2.8 GE). *Id.*
9. On or about December 8, 2010, a further IEP team meeting was convened at Charter School. The purpose of the meeting was to conduct an annual IEP review and to consider the Student's W-J III test scores. Participants included Petitioner, her attorney, the SEC, and Charter School Psychologist. No representative of DCPS attended the meeting. *See P-8.* Petitioner again expressed concern regarding the Student's academic progress. *Parent Test.*
10. At the 12/08/2010 IEP meeting, the team decided to increase the Student's specialized instruction from 10 to 15 hours per week to accommodate her Reading, Written Expression, and Math goals. *Id., p. 3.* Behavior support services were continued at the same level. *Id.* Extended School Year ("ESY") services were discussed and found not to be warranted at that time. *Id.,* p. 4; *see also P-7,* p. 9.
11. At the 12/08/2010 IEP meeting, "Parent made a request for 'Pull Out' Services, and it was explained that [Charter School] only offer[s] a full Inclusion Model of Specialized Instruction." *P-8, p. 3; see also Parent Test.* Instead, Charter School offered a supplemental tutoring program. *Id., p. 4.*
12. The Student's current IEP, as developed at the 12/08/2010 meeting, provides 15 hours per week of Specialized Instruction in a General Education setting and 30 minutes per week of Behavioral Support Services in an Outside General Education setting. *P-7,* p. 6. The IEP also provides Classroom Accommodations that include: repetition of directions; simplification and interpretation of oral directions; preferential seating; small group testing; breaks between subtests; and extended time on subtests. *Id.,* p. 8.

13. In January 2011, Petitioner visited Private School, and she decided that she wanted to enroll the Student there. *See Parent Test.* The Student was accepted into the program in March 2011. *Priv. Sch. Test.; Stipulation.* However, Petitioner did not inform DCPS or Charter School that she wanted to consider Private School or another full-time special education placement prior to filing her July 15, 2011 due process complaint. *Parent Test.; SEC Test.*
14. During the remainder of the 2010-11 school year, the Student struggled academically, especially in completing class work and homework assignments. *See Parent Test.; Iseman Test.* She nevertheless managed to earn five C's and a B on her year-end report card while being educated within a general education setting. *DCPS-6.* Petitioner did not request any further IEP meetings during this period. *Parent Test.*
15. On July 28, 2011, as a result of the resolution meeting held in this case, DCPS issued an Independent Educational Evaluation ("IEE") Authorization letter to Petitioner. The IEE letter authorized Petitioner to obtain an independent psychological evaluation and an independent speech/language evaluation of the Student at DCPS expense. *P-14; DCPS-5.*
16. In mid-August 2011, the Student was evaluated by Monica Maines, M.S., CCC/SLP, of the National Speech/Language Therapy Center, an independent speech/language pathologist. She prepared a written report dated August 11, 2011, which was provided to DCPS on September 6, 2011. *See P-2; P-11; P-12.* In her report, Ms. Maines diagnosed the Student as having a mixed receptive/expressive language disorder and made various educational recommendations. *P-2,* p. 5. Overall, she found the Student's receptive language skills to be severely delayed, and her expressive language skills to be moderately to severely delayed. *Id.,* p. 4. However, her performance varied significantly on individual subtests. Ms. Maines recommended (*inter alia*) that the Student receive one hour per week of individual pull-out language therapy and one hour per week of in-class language therapy, along with regular consultation between classroom staff and an SLP. *Id.,* p. 5. *See also Maines Test.*
17. In late August 2011, the Student was evaluated by David Missar, Ph. D., an independent clinical psychologist. Dr. Missar reviewed prior psycho-educational and speech/language evaluations, the November 2010 W-J III test scores, and a series of work samples from the 2010-11 school year. He also interviewed and tested the Student, and interviewed the parent. The areas of testing included a general cognitive assessment, a neuropsychological, and

personality testing. He then prepared a written report dated August 29, 2011, which also was provided to DCPS on September 6, 2011. *See P-1; P-11; P-12; Missar Test.*.

18. With respect to his cognitive assessment, Dr. Missar found the Student's overall intellectual functioning to be in the Borderline range (FSIQ of 74), but with significant variation among the various subscales especially on non-verbal tasks. *P-1,* pp. 6-7. Her lowest scores were in the areas of processing speed and working memory. *Id.; Missar Test.* On academic achievement, Dr. Missar re-administered the W-J III, which again showed the Student's math skills to be her most significant area of weakness. *Id.,* pp. 8-9. And across all three areas (reading, math, and written expression), Dr. Missar found that the Student's poor processing speed drove down her scores on timed tests (*e.g.*, fluency measures)
19. Dr. Missar's ultimate clinical diagnoses for the Student included: (a) ADHD, Primarily Inattentive Type (which he labeled as the "most significant diagnostic impression")[10]; (b) Dysthymic Disorder ("ongoing, and more mild, depressive symptoms"); and (c) learning disorders in Reading, Math, and Written Expression. *P-1,* pp. 12-13. He also made various educational recommendations, including: placement in a school for children with specific learning disabilities; small class size and a low student to teacher ratio (no more than 10-12 students in a class and a student/teacher ratio of no more than 5 to 1); and multisensory instruction (verbal, visual, hands-on). *Id.,* p. 13.
20. On or about September 28, 2011, DCPS convened another meeting of the Student's MDT/IEP team. The purpose of the meeting was to review the independent evaluations obtained by Petitioner as a result of the 07/28/2011 IEE letter. *See DCPS-7.* Participants at this meeting included: (a) Petitioner, her attorney, her investigator, and the independent psychologist who conducted the evaluation; (b) the SEC, psychologist, speech pathologist, and General Education Teacher at Charter School; and (c) DCPS' psychologist and LEA representative. *Id.*
21. At the 09/28/2011 meeting, the DCPS Psychologist reported on the independent psychological evaluation. She noted two discrepancies in the report (regarding scores for Matrix Reasoning and Visual Puzzles) that needed to be clarified before the team could

[10] The primary ADHD diagnosis was consistent with an earlier psychological evaluation of the Student conducted by her previous public charter school at the end of the 2009-10 school year. *See P-4* (Confidential Psychological Evaluation, dated 06/18/2010), p. 6.

complete its review. *DCPS-7*, p.1. She also noted that the evaluation did not include input from Charter School staff or a classroom observation, which ordinarily should be included. *Id.*, pp. 1-2. *See also DCPS Psych. Test.; Missar Test.* (cross examination).

22. Also at the 09/28/2011 meeting, the DCPS Speech Pathologist reported on the independent speech/language evaluation. She found that the Student was performing below average overall compared to her peers, and recommended that the Student receive 45 minutes per week of direct therapy services. *DCPS-7*, p. 2. *See also DCPS SLP Test.*
23. The weight of the evidence indicates that the December 8, 2010 IEP was reasonably calculated to provide meaningful educational benefit to the Student at the time it was developed. Petitioner has not shown that Student required more services at that time.
24. The weight of the evidence indicates that the Charter School was capable of fully implementing the requirements of the December 8, 2010 IEP. Petitioner has not shown that Charter School constituted an inappropriate school or program during the 2010-11 school year.
25. The weight of the evidence indicates that the Student did not require a full-time special education program in an outside general education setting as of December 8, 2010.
26. DCPS failed to ensure that the Student's IEP team included a representative of DCPS at meetings held on September 23, 2010, and December 8, 2010. DCPS' procedural failure impeded the Student's right to a FAPE and significantly impeded Petitioner's opportunity to participate in the decision-making process regarding the provision of FAPE to the Student.

V. DISCUSSION AND CONCLUSIONS OF LAW

A. Issues/Alleged Denials of FAPE

The IDEA requires that all students be provided with a Free Appropriate Public Education ("FAPE"). FAPE means:

> [S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)..." 20 U.S.C. § 1401(9); *see also* 34 C.F.R. § 300.17; DCMR 5-E3001.1.

As noted above, in this case Petitioner claims that DCPS denied the Student a FAPE by failing to develop an appropriate individualized education program ("IEP") at a December 8, 2010 meeting (**Issues 1 and 2**), and by failing to provide an appropriate placement for the Student during the 2010-11 school year (**Issue 3**). In addition, Petitioner claims that DCPS committed procedural violations of the IDEA by failing to properly convene an IEP team for meetings on September 23 and December 8, 2010 (**Issue 4**).

For the reasons discussed below, the Hearing Officer concludes that Petitioner has failed to meet her burden of proving that DCPS denied the Student a FAPE under Issues 1 through 3. However, Petitioner has met her burden of proof on Issue 4 in that DCPS failed to ensure that the Student's IEP team included a representative of DCPS who was (*inter alia*) knowledgeable about the availability of resources of the public agency, at meetings held on September 23 and December 8, 2010. As a result, DCPS has been unable to collaborate with Charter School as to available options and resources beyond the full-inclusion model to meet the unique special education needs of the Student in this case. The Hearing Officer finds that this procedural violation by DCPS has significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the Student.

Issues 1 and 2: Inappropriate IEP Claims

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 also* 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1. To be sufficient to provide FAPE under the IDEA, an "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), slip op. at 6, *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).

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). "One of the purposes of the IEP is to ensure that the services provided are formalized in a written document that can be assessed by parents and challenged if necessary." *N.S. v. District of Columbia,* 709 F. Supp. 57, 73 (D.D.C. 2010); *Alfono v. District of Columbia,* 422 F. Supp. 2d 1, 6 (D.D.C. 2006). In the event of such 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).

In this case, the Hearing Officer concludes that Petitioner has not proved by a preponderance of the evidence that the December 8, 2010 IEP was not "reasonably calculated to confer educational benefits on the child," on any of the four grounds alleged in the Complaint and specified in the Prehearing Order. Accordingly, DCPS prevails on Issues 1 and 2.

The main problem with Petitioner's case is that virtually all of her evidence challenging the adequacy of the December 8, 2010 IEP concerns events that post-dated the 12/08/2010 IEP meeting. Dr. Iseman and the Children's Law Center investigator testified concerning classroom observations they conducted at Charter School between April and September 2011. *Iseman Test.; Invest. Test.* Dr. Missar and Ms. Maines testified concerning their psychological and speech/language evaluations of the Student conducted in August 2011. *Missar Test.; Maines Test.* Even the class work/homework samples submitted in evidence were drawn primarily from calendar year 2011. *See P-10,* pp. 10-28. None of this evidence proves that the 12/08/2010 IEP was not reasonably calculated to enable the Student to receive educational benefit, focusing on the Student's needs looking forward at the time the IEP was created. As for the information that was before the IEP team at the time of its December 8, 2010 meeting, Petitioner has not shown that it compelled a different level of services than those provided in the IEP, for the reasons discussed further below.

Level of specialized instruction

With respect to the level of specialized instruction on the December 8, 2010 IEP, Petitioner relies principally on the November 2010 W-J III academic achievement test scores, which show the Student performing several grade levels below her then current class placement (7th grade). For the most part, the test results are similar to those recorded by Dr. Missar in

August 2011. *Compare P-1 with P-3.* Dr. Missar testified that the scores were "consistently below" what he would have expected based on her cognitive abilities, and that providing 15 hours of specialized instruction was insufficient to address her needs ("tantamount to putting a band-aid on a wound"). *Missar Test.* However, while Dr. Missar has exceptional professional qualifications, *see P-17,* the Hearing Officer finds that the credibility of Dr. Missar's testimony and recommendations in this particular case are diminished by his failure to observe the Student in a school setting or to obtain any teacher reports, as well as the uncorrected data errors in his written report.

Moreover, Petitioner has not challenged the content of any of the IEP goals adopted at that meeting, and has not shown that the Student could not make progress toward achieving those goals based on the services provided. In fact, the Student's 11/17/2010 IEP Progress Report commented that she was "on track to mastery" of one math goal and "progressing in the use of strategies to solve word problems" under another math goal. *DCPS-3,* p. 000028. Her reading fluency was also reported as improving, and she was making progress on her other reading goals, although comprehension skills were "in need of much more remediation." *Id.,* p. 000029. In addition, at the time of the meeting, the Student was receiving all "B" and "C" grades in the general education curriculum. *DCPS-6* (Advisory 1 & Advisory 2 report card grades). *See also Sp. Ed. T. Test.* (testifying to adequacy of services, *i.e.,* 5 hours per academic area, and success experienced in general education setting during 2010-11 school year); *Gen. Ed. T. Test.* (Student earned grades in general education math course); *Charter Psych. Test.* (Student's ability to do work when motivated); *SEC Test.* (appropriateness of service hours and validity of grades).

Based on all of the information reviewed[11] – including the W-J test scores, grades, and teacher input – the 12/08/2010 IEP team appears to have reasonably determined that the Student was making academic progress, but that the progress was slow in critical areas. Therefore, the team decided not only that the Student remained eligible as a child with a Specific Learning Disability, but that her specialized instruction hours should be ***increased from 10 to 15 hours per week*** to accommodate the Reading, Math, and Written Expression goals on her IEP. The Hearing Officer cannot say that the educators were wrong in this judgment, or that providing this

[11] *See* 34 C.F.R. 300.304(b)(1)(ii).

level of specialized instruction was not reasonably calculated to confer meaningful educational benefit on the Student, based on her academic and functional needs at that time.[12]

Behavioral support services

Dr. Missar conceded that the 30 minutes per week of behavioral support services provided by the 12/08/2010 IEP was adequate and consistent with his recommendations, although he thought that services should be provided in individual rather than group sessions. *See Missar Test.* Moreover, the 12/08/2010 IEP indicates that, at that time, the Student had "been demonstrating cooperative behavior in the classroom with peers and teachers." *P-7,* p. 4. It also notes that "her attitude has improved and she is less defiant than in the past...she has become more open in expressing her feelings and appears to be more aware of the impact her behavior has on others." *Id.* In addition, the 11/17/2010 IEP progress report indicates that the Student was progressing on all her Emotional, Social, and Behavior Development goals at that time. *DCPS-3,* p. 000030. These areas were reviewed by the Charter School Psychologist at the 12/08/2010 IEP meeting, and there is no indication that Petitioner raised any concern with the level of these services at that time. *See P-8,* p. 3. Accordingly, the Hearing Officer concludes that this element of Petitioner's inappropriate IEP claim is not supported by the evidence, including the testimony of Petitioner's own expert.

Speech/language therapy services

Petitioner next claims that the 12/08/2010 IEP "is inappropriate because it failed to address [Student]'s severe receptive and expressive language deficits." *Petitioner's Closing Argument,* p. 6. Petitioner contends that the Student's deficits "have been evident for at least the past school year, if not for years before," and have adversely impacted her education during that time period. *Id.,* p. 7. However, the evidence in support of this claim is weak.

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[12] There was some indication in the record that the Student may actually have received a portion of her specialized instruction within a smaller "pull-out" group of approximately six (6) students during the 2010-11 school year. *See Sp. Ed. T. Test.* However, because the small group included some non-disabled students, the instruction was still considered to be delivered in a "General Education" setting. *Id.; SEC Test.* DCPS' witnesses agreed, however, that the IEP did not specify any such "small group" instruction as part of the Student's written educational program. Since "[o]ne of the purposes of the IEP is to ensure that the services provided are formalized in a written document that can be assessed by parents and challenged if necessary," *N.S. v. District of Columbia,* 709 F. Supp. 57, 73 (D.D.C. 2010); *see also Alfono v. District of Columbia,* 422 F. Supp. 2d 1, 6 (D.D.C. 2006), this matter should also be addressed at the IEP team meeting being ordered herein. *See discussion in Part B infra.*

Petitioner's primary evidence is an evaluation conducted eight months after the fact, by an independent SLP who did not begin working with the Student until August 2011, never observed the Student in school, and did not obtain any information from current or former teachers. *See Maines Test.; P-2.* The evaluator also noted that a previous bilingual speech/language evaluation conducted in May 2005 "showed skills to be at age level in both receptive and expressive language skills"; and that "[s]ubsequent evaluations in the area of speech and language were not conducted and/or were not available for review." *P-2,* p. 2.[13] As Petitioner correctly points out, DCPS' speech/language pathologist testified that she agreed with the findings in Ms. Maines' report, but her agreement did not occur until the 09/28/2011 IEP team meeting during the pendency of this proceeding. *See DCPS-7; DCPS SLP Test.*

Accordingly, the Hearing Officer concludes that Petitioner failed to prove this element of her inappropriate IEP claim by a preponderance of the evidence.

Extended school year services

Individualized determinations about ESY services are made through the IEP process. ESY services "must be provided ***only if*** a child's IEP Team determines, ***on an individual basis***...that the services are ***necessary for the provision of FAPE*** to the child." 34 CFR 300.106 (a) (2) (emphasis added); *see also* DCMR 5-E3017.2; 71 *Fed. Reg.* 46,582 (Aug. 14, 2006). Petitioner had the burden to present sufficient evidence to prove that ESY services were necessary for the provision of FAPE to the Student. *See Schaffer* v. *Weast,* 546 U.S. 49 (2005); DCMR 5-E3030.3. The Hearing Officer concludes that Petitioner failed to prove this claim by a preponderance of the evidence.

The purpose of ESY services is generally to prevent severe or substantial regression of skills that would jeopardize the benefits gained over the school year, such that a student would fail to recoup those lost skills within a reasonable period of time. *See, e.g., Alamo Heights Independent School Dist. v. State Board of Education,* 790 F. 2d 1153, 1158 (5th Cir. 1986); *J.P. ex rel. Popson v. West Clark Community Schools,* 230 F. Supp. 2d 910, 940 (S.D. Ind. 2002).

[13] In her testimony at hearing, Ms. Maines was unable to offer a reasoned opinion as to when the Student's receptive/expressive language disorder would have begun to manifest itself between mid-2005 and August 2011, other than what she was told by Petitioner. *See Maines Test.* And Petitioner's educational consultant Dr. Iseman could only testify (as a non-expert in this area) that she believed the Student needed speech/language services back to April 28, 2011, the date of her first observation, which was nearly five months after the 12/18/2010 IEP meeting. *Iseman Test.*

"The regulations give the IEP Team the flexibility to determine when ESY services are appropriate, depending on the circumstances of the individual child." 71 Fed. Reg. 46, 582 (Aug. 14, 2006). Moreover, States have "considerable flexibility in determining eligibility for ESY services and establishing State standards for making ESY determinations." *Id.* Eligibility for ESY services must be considered on an annual basis as part of the IEP process for every student with a disability.

In this case, the 12/08/2010 meeting notes indicate that the IEP Team discussed ESY services and determined that they were not warranted for the Student for the 2011 summer. This is an individualized decision that the team makes annually. Petitioner failed to present sufficient evidence to prove that the team was wrong. Dr. Missar merely testified that he believed ESY services would "help remediate" harm caused by an otherwise inadequate IEP. *Missar Test.* Petitioner did not establish the need for ESY at the time of the 12/08/2010 meeting by showing, with any specificity, what critical skills would be jeopardized by a break in service, the likelihood of significant regression, and/or the amount of time needed for recoupment.[14] *See, e.g., Kenton County Sch. Dist. v. Hunt.*,41 IDELR 259 (6th Cir. 2004) (finding testimony "inadequate to meet the high burden ... imposed on those who propose an ESY for inclusion in the child's IEP"); *MM v. Sch. Dist. of Greenville County,* 303 F.3d 523, 537-38 (4th Cir. 2002) ("ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.").

* * * * *

DCPS does have an obligation to periodically update and revise an IEP "in response to new information regarding the child's performance, behavior, and disabilities."*Maynard v. District of Columbia,* 54 IDELR 158 (D.D.C. 2010), *slip op. at* p. 6; *see* 34 C.F.R. 300.324. Normally, this is done on an annual basis, but DCPS cannot allow an insufficient program to continue in effect for a student when a new evaluation or other information becomes available that may demonstrate a lack of educational benefit. Hence, at the September 28, 2011 meeting, DCPS was responsible for reviewing the results of the independent evaluations it authorized and

[14] *See OSSE Memorandum,* dated March 10, 2011 (establishing criteria for IEP Teams to apply in determining a student's eligibility for ESY services, including (1) impact of break in service on critical skills, (2) degree of regression of critical skills, and (3) the time required for recoupment of critical skills).

making any appropriate adjustments to the Student's program. However, Petitioner chose not to amend her complaint to challenge any proposed change or refusals to change the IEP at that meeting as a denial of FAPE. Accordingly, no such issue could be presented for determination at the due process hearing in this case. *See* 34 C.F.R. 300.511(d).[15]

At the 09/28/2011 IEP team meeting to review the independent evaluations, the team determined that the Student needed at least 45 minutes of speech/language services per week to address expressive/receptive language deficits shown by Ms. Maines August 2011 evaluation. The team also determined that certain discrepancies existed in Dr. Missar's evaluation report that required correction before its results could be accepted. *See DCPS-7; Charter Psych. Test.; DCPS Psych. Test.* Accordingly, DCPS should now act to revise the IEP to include speech/language services. Assuming a corrected version of Dr. Missar's evaluation report is submitted by Petitioner within the next 10 days, DCPS should also review the results of that corrected report and revise the IEP as appropriate to account for this new information. *See Order.* An IEP team meeting to accomplish these tasks may usefully be combined with the next annual IEP meeting in December 2011. *Cf.* 34 C.F.R. 300.324(a)(5).

Issue 3: Inappropriate Placement Claim

"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). In determining educational placement, D.C. law requires that "DCPS shall place a student with a disability in an ***appropriate special education school or program*** in accordance with [the state statute] and the IDEA." D.C. Code §38-2561.02 (emphasis added).[16] In addition, each public agency (including DCPS) must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities, 34 C.F.R. § 300.115(a); and they must

[15] As the Hearing Officer explained in writing prior to the hearing and orally on the record at the outset of the October 19, 2011 hearing session, absent an amendment, evidence concerning the August 2011 independent evaluations and the September 2011 IEP meeting could only be relevant to issues of equitable relief in the event Petitioner otherwise proved a denial of FAPE based on the allegations in the original Complaint.

[16] *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***") (emphasis added); *Jenkins v. Squillacote*, 935 F. 2d 303, 305 (D.C. Cir. 1991) ("If no ***suitable public school*** is available, the District must pay the costs of sending the child to an ***appropriate private school***.") (emphasis added).

ensure that the placement decision is "based on the child's IEP" and is in conformity with Least Restrictive Environment ("LRE") provisions of the IDEA. 34 C.F.R. § 300.116.

Children who attend public charter schools and their parents retain all rights under these provisions, even though students are initially enrolled there by parental choice. *See* 34 C.F.R. § 300.209.[17] Pursuant to the District of Columbia School Reform Act of 1995, a public charter school may elect to have DCPS serve as its LEA for purposes of the IDEA. *See* D.C. Code §38-1802.02; 5-E DCMR §3019.2 (such schools are referred to as "District Charters"). Where a public charter school so elects – as Charter School as done here – DCPS is responsible for meeting all IDEA requirements. 5-E DCMR §3019.4. These include ensuring that a continuum of alternative placements is available to meet a student's needs. OSSE regulations further provide that if a District Charter "anticipates that it may be unable to meet its obligation to provide a free appropriate public education (FAPE) to a child with a disability currently enrolled in its program, it shall make an appeal to DCPS consistent with the policies, procedures, and guidelines established by DCPS for District Charters." 5-E DCMR §3019.8(a).

For the reasons discussed in more detail under Issue 4 below, the evidence shows that DCPS failed to take necessary steps to fulfill all of its LEA obligations in this case. However, despite DCPS' procedural errors, the Hearing Officer concludes that the Student was placed in a school or program that was able to fulfill the requirements of the December 8, 2010 IEP, which has not been shown to be inappropriate at the time it was developed. Charter School was voluntarily selected by Petitioner at the beginning of the 2010-11 school year, and Charter School was able to offer the 15 hours per week of specialized instruction and 30 minutes per week of behavioral support services specified in the IEP, within the General Education setting, as provided in the IEP.

Moreover, Petitioner has not established that the nature of the Student's learning disability is such that the Student requires a full-time special education program outside general education. Nor has she shown that the 2010-11 placement was unable to provide the Student the program required for her to access the general education curriculum and receive educational benefit, in violation of the IDEA. *See Prehearing Conference Order (Aug. 9, 2011), p. 2.*

[17] Enrollment in a public charter school is open to all residents and wards of the District of Columbia regardless of disability or special needs. 5-E DCMR §3019.1.

Notably, the Student was able to earn passing grades in all of her academic subjects in the general education curriculum during the 2010-11 school year, despite receiving no pull-out instruction at all.[18]

Accordingly, the Hearing Officer concludes that Petitioner has failed to prove by a preponderance of the evidence that DCPS denied the Student a FAPE by failing to provide the Student an appropriate placement during the 2010/11 school year.

Issue 4: Procedural – IEP Team

IDEA regulations require that the public agency (LEA) ensure that the IEP Team includes, *inter alia*, "a representative of the public agency who – (i) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (ii) is knowledgeable about the general education curriculum; and (iii) is knowledgeable about the availability of resources of the public agency." 34 C.F.R. § 300.321(a)(4). In the case of District Charters, this team participation requirement dovetails with the requirements of 5-E DCMR §3019.8 (a), requiring collaboration between the charter school and DCPS in meeting the FAPE/placement needs of disabled students.

In this case, it is undisputed that no DCPS representative attended either the September 23 or December 8, 2010 IEP team meetings. DCPS simply responds that "it is not required to attend IEP meetings at [Charter School]." *Response* (Aug. 1, 2011), p. 3. But this is contrary to the explicit requirements of the IDEA and the OSSE's implementing regulations. In maintaining such position during the 2010-11 school year, DCPS effectively abdicated its LEA responsibilities to Charter School. Although it appears that Charter School did not "appeal" to, or collaborate with, DCPS pursuant to 5-E DCMR §3019.8 (a), that does not excuse DCPS from meeting its own LEA obligations in this case. The Hearing Officer therefore concludes that DCPS violated the requirements of 34 C.F.R. § 300.321(a)(4).

Under IDEA, "a hearing officer's determination of whether a child received FAPE must be based on substantive grounds." 34 C.F.R. §300.513(a)(1). Thus, in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE "only if the

[18] *Cf. Rowley, supra,* 458 U.S. at 203 & n. 25 (academic progress as measured by public school grading and advancement system "constitutes an important factor in determining educational benefit," which can be dispositive in an appropriate case).

procedural inadequacies – (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit." *Id.* § 300.513 (a)(2). *See also Lesesne v. DC,* 447 F.3d 828, 834 (D.C. Cir. 2006); 20 U.S.C. §1415(f)(E).

In this case, Petitioner has shown that DCPS' procedural violation – at least at the December 8, 2010 meeting – had the effect of significantly impeding the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child. 34 C.F.R. §300.513(a)(2)(ii). The 12/08/2010 IEP team meeting notes indicate that when Petitioner made a request for "pull-out" services at this meeting, the IEP team merely "explained that [Charter School] only offer[s] a full Inclusion Model of Specialized Instruction."). *P-8, p. 3.* The IEP team did not discuss the substance of the parent's request (*e.g.*, whether the Student's significant academic deficits required that at least some portion of her specialized instruction be delivered in a smaller, pull-out setting outside of the general education classroom) before summarily rejecting it based on the offerings of the school rather than an assessment of the Student's unique special education needs. [19] Clearly, this was not an adequate response. As the OSSE has explained in several recent state complaint decisions: "Only offering an inclusion program is soundly contrary to the spirit of the IDEA even if ... PCS has elected DCPS as its LEA for special education purposes. Such action fails to afford parents with the opportunity to have their child receive necessary special education services in the school of the parent's choice." *OSSE Letter of Decision, State Complaint #010-015* (June 27, 2011), p. 5; *OSSE Letter of Decision, State Complaint #010-006* (Jan. 21, 2011), p. 10. *See also N.S. v. District of Columbia,* 709 F. Supp. 2d 57 (D.D.C. 2010) (decision to provide inclusion, as opposed to pull-out, specialized instruction cannot be driven by the school's needs rather than the student's).

B. <u>Appropriate Relief</u>

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.*

[19] *See also SEC Test.* (testifying on cross examination that Charter School employed a "full-inclusion model" and "that's it...We are a school of choice."); *id.* (If students want more than that, DCPS as the LEA can provide other placement options).

District of Columbia, 401 F.3d 516, 521-24 (D.C. Cir. 2005). In this case, the Hearing Officer will order DCPS to convene and participate in an MDT/IEP team meeting to address the matters set forth herein.

Specifically, DCPS shall (1) revise the Student's IEP to provide at least 45 minutes per week of direct speech/language therapy services, effective 09/28/2011; (2) review a corrected report of independent psychological evaluation to be prepared by Dr. David Missar, assuming Petitioner submits such a corrected report or addendum within 10 calendar days of this Order; (3) review the Student's progress over the past year, including during the 2011-12 school year to date at Charter School; (4) assess whether, given the Student's academic achievement test scores and other updated information concerning her performance, behavior, and disabilities, the Student needs to receive some or all of her specialized instruction in an Outside General Education setting; [20] and (5) if so, whether Charter School can meet those needs and constitute an appropriate placement, or whether DCPS needs to provide any additional resources and/or support to Charter School to enable it to meet the Student's needs within the Charter School building. As noted above, given the timing of this Order, DCPS should attempt to consolidate the IEP team meeting for these purposes with the annual IEP meeting for this Student. *Cf.* 34 C.F.R. 300.324(a)(5).

The Hearing Officer declines to order any other relief requested by Petitioner, including prospective private placement and compensatory education, because Petitioner did not prove (a) that the 12/08/2010 IEP and 2010-11 school year placement were inappropriate, (b) that DCPS' procedural violations deprived the Student of educational benefit, or (c) that the Student suffered any specific educational harm from the violations. Even assuming *arguendo* that such deprivation of educational benefit and/or harm had occurred, Petitioner's compensatory education plan would not be reasonably calculated to provide the missing educational benefits. [21]

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[20] For example, recent observations by Petitioner's educational consultant and investigator indicate that the Student has struggled to complete work in larger general education classrooms without any individual pull-out instruction. Teachers have also reported that she does not finish all class assignments and does not hand in many of her homework assignments. In addition, the evidence shows that the Student is forced to miss electives like art and music in order to attend a "math lab" – a situation that could potentially be ameliorated by her receiving more intensive specialized instruction outside the general education classroom. *See Iseman Test.; Invest Test.*

[21] As explained at hearing and in Petitioner's written closing argument (pp. 11-13), her plan of 540 hours of individual tutoring and 50 hours of individual speech/language therapy services (*P-23*) is based on the difference between what the 12/08/2010 IEP provided and what Petitioner claimed should have been provided in an appropriate IEP (*i.e.*, full-time specialized instruction and at least two hours of speech/language therapy). However, those IEP claims have been rejected.

VI. ORDER

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

1. Within **30 calendar days** of this Order (*i.e.*, by **December 13, 2011**), DCPS shall convene a meeting of the Student's MDT/IEP Team with all necessary members, including Petitioner, relevant Charter School staff, DCPS Psychologist, and one or more DCPS LEA representatives, consistent with the findings and conclusions of this HOD. The meeting shall also serve as the Student's annual IEP meeting to update her December 8, 2010 IEP.

2. Specifically, at the meeting convened pursuant to paragraph 1 of this Order, DCPS shall ensure that the IEP Team takes the following actions:

   (a) revise the 12/08/2010 IEP to provide a minimum of 45 minutes per week of direct speech/language therapy services in an Outside General Education setting, effective 09/28/2011, along with measureable annual goals in this area;

   (b) review a corrected report of independent psychological evaluation prepared by Dr. David Missar, and determine whether this evaluation requires any changes in the content of the IEP; provided, however, that Petitioner submits such corrected report or addendum to DCPS within **10 calendar days** of this Order;

   (c) review the Student's progress over the past year and assess whether, given the Student's academic achievement test scores and other updated information concerning her performance, behavior, and disabilities, the Student needs to receive some or all of her specialized instruction in an Outside General Education setting;

   (d) review and determine whether Charter School can meet the Student's needs (as updated pursuant to this Order) and can constitute an appropriate placement; and/or whether DCPS needs to provide any additional resources or support to Charter School to enable it to meet the Student's needs within the Charter School building.

3. Petitioner's other requests for relief in her Due Process Complaint filed July 15, 2011, are hereby **DENIED.**

4. This case shall be, and hereby is, **CLOSED**.

Dated: November 13, 2011

Impartial Hearing Officer