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

RECEIVED
JUN 04 2010

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

HEARING OFFICER DETERMINATION

I. PROCEDURAL BACKGROUND AND RECORD

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.*, and its implementing regulations. The Complaint was filed March 8, 2010, against Respondent District of Columbia Public School ("DCPS"). It concerns a five-year old student (the "Student") who resides in the District of Columbia, currently attends a non-public school located in D.C. (the "Private School"), and has been determined to be eligible for special education and related services as a child with a disability under the IDEA.

Petitioner claims that DCPS has denied the Student a free appropriate public education ("FAPE") by failing to develop an appropriate individualized education program ("IEP") and to provide an appropriate placement as of February 23, 2010, and by committing certain procedural violations in connection with the 2/23/10 meeting of the Student's Multi-Disciplinary Team ("MDT"). The specific claims, sub-claims, and requests for relief are set forth in greater detail at pages 4 through 9 of the Complaint -*1*), and are summarized in Section II below.

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

DCPS filed a Response on March 18, 2010, asserting that DCPS has not failed to provide the Student a FAPE because, *inter alia*: DCPS and the proposed DCPS elementary school placement ("Proposed ES") are able to provide an appropriate education to this Student; DCPS does not agree that the Private School is the Least Restrictive Environment ("LRE"); and the parent "refused to enroll the student and allow the 30-day IEP meeting to occur." *DCPS' Response,* filed March 18, 2010, p. 3. In addition, DCPS asserts that any potential reimbursement award to Petitioner must be reduced or denied because the parent did not provide appropriate notice to DCPS of the enrollment of the Student in the Private School. *Id.* [2]

A resolution meeting was held on March 19, 2010, which did not resolve the complaint. *See* ·4. A Prehearing Conference was then held on April 9, 2010, at which the parties discussed and clarified the issues and requested relief. *Prehearing Order* (April 15, 2010), ¶ 7. Five-day disclosures were thereafter filed by both parties as directed, on or about May 3, 2010.

The Due Process Hearing was held in five sessions, on May 10, 11, 12, 13 and 19, 2010. Petitioner elected for the hearing to be closed. During the hearing, the following Documentary Exhibits were admitted into evidence:

Petitioner's Exhibits: ·1 through ·24.

DCPS' Exhibits: DCPS-1 through DCPS-11.

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

Petitioner's Witnesses: (1) Parent-Petitioner; the (2) Clinical Director, (3) Director of Audiology, and (4) Director of Psychology at the Private School; and four DCPS employees – (5) Special Education Teacher, (6) Speech/Language Pathologist ("SLP"), (7) Special Education Coordinator ("SEC"), and (8) Principal, Proposed ES.

---

[2] DCPS' Response also asserted a defense of "res judicata and/or claim preclusion" with respect to any claim concerning the IEPs or program originally developed in June 2009 at the public charter school ("Charter School") previously attended by the Student, based on a prior HOD issued October 8, 2009. Following detailed discussion of this issue at the April 9, 2010 Prehearing Conference, the Hearing Officer expressed the view that such defense would not apply here because, *inter alia,* (1) Petitioner does not assert any claim of denial of FAPE prior to 2/23/10, and (2) the prior HOD did not adjudicate any claims against DCPS. The Prehearing Order then directed that DCPS file an appropriate motion with supporting authorities in advance of the five-day disclosure date if it wished to argue otherwise and pursue this defense. *Prehearing Order,* April 15, 2010, p. 3. DCPS did not do so. Nor has it argued in its Closing Brief that the defense should apply to bar this action or any claim asserted herein.

DCPS' Witnesses: (1) Hearing Impaired Teacher; (2) DCPS Audiologist; (3) Special Education Specialist ("SES"); (4) Early Stages SLP; (5) Early Stages Special Assistant; and (6) Principal, Proposed ES (recalled as DCPS' witness).

This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1412 (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 is being issued within 10 days after the filing of written closing statements on May 24, 2010, pursuant to a joint motion for continuance.

II. ISSUES AND REQUESTED RELIEF

The Complaint listed 13 numbered items under "Issues for Hearing" and 15 numbered items under "Relief Sought." *-1*, pp. 7-9. The discussion and clarification at the Prehearing Conference resulted in the following interpretation and agreed groupings of issues being presented for determination at the Due Process Hearing (*see Prehearing Order,* ¶ 7):

(1) **Inappropriate IEP** – ***Did DCPS deny the Student a FAPE beginning 2/23/10 by failing to provide her with an appropriate IEP?*** Petitioner claims that the IEP created in June 2009 when she was enrolled at Charter School (and allegedly carried forward without change by DCPS on 2/23/10) was inappropriate for the Student, ***as of 2/23/10***, for the specific reasons cited in the Complaint. *See CR-1,* pp. 4-5, ¶¶ 1-8.

(2) **Inappropriate Placement** – ***Did DCPS deny the Student a FAPE beginning 2/23/10 by failing to provide her with an appropriate educational placement?*** , Petitioner alleges that the placement at Proposed ES is not appropriate, ***as of 2/23/10***, primarily "because the students with which she would be educated were not her age, were not developmentally close enough to her to provide an appropriate peer group, and did not include sufficient good peer language and social models." *-1*, p. 7, ¶ 1 (C). The specific aspects of the program and/or setting at Proposed ES alleged to be inappropriate are further detailed at pages 5-6 (paragraphs 1-9) of the Complaint. *Id.*, pp. 5-6, ¶¶ 1-9. The claim that a self-contained classroom at Proposed ES is not the LRE for the Student is also subsumed within this issue. *Id.*, pp. 5-6, ¶ 6.

(3) **Procedural Violations** — ***Did DCPS commit certain procedural violations of the IDEA and/or IDEA regulations in connection with the 2/23/10 MDT meeting?*** The specific allegations are set forth in the Complaint. *See CR-1,* p. 7. To be cognizable as a denial of FAPE, such violations must also have one or more of the substantive effects specified in 34 C.F.R. §300.513(a)(2).

The relief Petitioner requests includes: (a) appropriate findings of FAPE denial; (b) an order requiring DCPS to place and fund the Student at Private School with door-to-door transportation, prospectively; (c) reimbursement and/or "retroactive placement" at Private School back to February 24, 2010; and (d) an order that DCPS convene an MDT meeting within 30 calendar days of the HOD to revise the IEP for implementation at Private School. *See Prehearing Order,* ¶ 7, pp. 3-4; *Parent's Closing Argument and Summary of Evidence* (May 24, 2010), pp. 1-2, 24.

III. FINDINGS OF FACT

1. The Student is a -year old student who resides in the District of Columbia, currently attends the Private School located in D.C. pursuant to parental placement, and has been determined to be eligible for special education and related services as a child with a disability under the IDEA.

2. When the Student was approximately years old, she was diagnosed with significant hearing loss in both ears. She currently wears hearing aids bilaterally. She also has been diagnosed with moderately severe delayed pragmatic language skills and delayed auditory-perceptual skills.

3. During the 2007-2008 and 2008-2009 school years, the Student attended the Charter School located in the District of Columbia, which operates as its own LEA. When the Student began attending the Charter School, she was in a full-time, out-of-general-education setting. After a few months, Petitioner and the other members of the MDT decided that the Student should be educated among regularly developing peers to assist her progress. *See DCPS-3,* p. 5 (10/8/09 HOD, Findings of Fact ¶ 2).

4. On or about December 2008, Petitioner first applied for admission to the private School on behalf of the Student. In January 2009, the Private School completed a speech/language evaluation of the Student.

5. On or about June 11, 2009, an MDT/IEP Team meeting was held at the Charter School, and an IEP was developed for the Student. The IEP provided for 12 hours per week of specialized instruction to be provided by a special education teacher, with 10 hours in the General Education setting and two (2) hours in the Special Education

setting. The IEP also provided for 3.5 hours per week of speech/language pathology services, 2.5 in General Education and 1.0 in Special Education; and it provided .25 hours per week of audiological consult services. *-9c; DCPS-2.* The Student's disability classification is listed as Speech Language Impaired, and the IEP includes annual goals in English/Language Arts, Math, Social Skills, and Communication. *Id.*

6. At the June 11, 2009 meeting, the MDT/IEP Team recognized that the Student suffered from hearing loss and required appropriate accommodations. *See DCPS-11,* 6/11/09 meeting notes at pp. 4, 6. Also, at the June 11, 2009 IEP meeting, the MDT discussed that "the Student required a small setting with amplification modifications to address the Student's hearing loss." *DCPS-3,* p. 000019 (10/8/09 HOD).

7. At the June 11, 2009 meeting, Petitioner was informed that the Student was aging out of the Charter School, which did not offer classes beyond the pre-Kindergarten level.

8. On or about July 17, 2009, Petitioner filed a due process complaint against the Charter School and DCPS challenging the actions taken at the June 11, 2009 meeting.

9. In early September 2009, Petitioner enrolled the Student in the Private School for the 2009-2010 school year. Petitioner has not paid any money to the Private School, and the Private School has not demanded the payment of any money for educating the Student up to this point. *See Parent Test.*

10. On or about September 17, 2009, an updated Cognitive Assessment of the Student was completed by a Pediatric Neuropsychologist at the Private School. *-9a.* The report found, among other things, that the Student has a full-scale IQ ("FSIQ") score in the Average range (95) but has a much higher Perceptual Reasoning IQ score (116). Her cognitive profile suggests that she possesses high-level abstract cognitive learning abilities, "but is at a notable disadvantage due to the time lost from appropriate language intervention." *Id., Cognitive Assessment Summary Report and Technical Data,* p. 3*; see also Psychology Director Test.*

11. On or about September 21, 2009, an updated Speech and Language Evaluation of the Student was completed by a Speech/Language Pathologist ("SLP") at the Private School. *-9a.* The evaluation reports a diagnosis for the Student of "bilateral sensor

neural hearing loss." *Id.,* p. 18. The "prognosis for continued improvement is good based on [the Student's] baseline strengths, motivation, and home and school support." *Id.* Among the recommendations in the report is that "[f]or [the Student] to be educated in a general education setting, it will be necessary for her to have full time speech and language services delivered in the classroom by a certified speech language pathologist." *Id.* The report also recommends "an intensive, oral language based learning environment with an emphasis on auditory-linguistic skill building and interactive opportunities for learning." *Id.*

12. On or about September 23, 2009, Hearing Officer Frances Raskin dismissed all claims against DCPS on the ground that it was not a proper party to the 7/17/09 complaint, because the Charter School was an independent LEA and the complaint alleged no wrongdoing by DCPS. *See Interim Order, Case No. 2009-1074* (issued Sept. 23, 2009).

13. On or about October 8, 2009, Hearing Officer Raskin issued an HOD dismissing the remainder of the 7/17/09 complaint with prejudice. The 10/8/09 HOD found that Petitioner failed to prove that the Charter School denied a FAPE either by (a) failing to include Petitioner in the development of the goals and objectives in the 6/11/09 IEP, or (b) failing to provide the Student an appropriate educational placement for the 2009-2010 school year. *See DCPS-3.* In addition, the 10/8/09 HOD found that Petitioner's claims had no foundation in fact and were frivolous. *Id.,* p. 9.

14. The 10/8/09 HOD found that all of the goals discussed at the June 11, 2009, IEP meeting were incorporated into the Student's IEP; and that Petitioner had never contacted the Charter School or otherwise attempted to communicate that she disagreed with these goals. *DCPS-3,* p. 000018.

15. On or about November 11, 2009, the Private School completed a referral of the Student for special education to the DCPS Private and Religious Office ("PRO"). *DCPS-10.* On or about December 17, 2009, Petitioner signed and submitted the completed referral forms to the PRO. *-9; Parent Test.* Petitioner attached the following documents with the referral and listed the documents on the first page: 6/11/09 IEP; 5/19/08 IEP; 2008 Psycho-educational Evaluation; 2007

Multidisciplinary Development Report; 2007 IFSP; June 2009 Audiometric Evaluations; and January 2009 SLP Report from the Private School. *DCPS-10.*

16. Petitioner was informed by the PRO that she should communicate regarding the referral with the SEC of the Student's neighborhood elementary school ("Neighborhood ES"). In addition to the documents listed on the referral form (*DCPS-10*), the SEC obtained copies of the September 2009 speech/language and cognitive evaluations from the parent via the PRO. *See Parent Test.; SEC Test.*

17. On or about February 23, 2010, DCPS convened a meeting of the MDT/IEP Team at the Neighborhood ES. The Team accepted the June 2009 IEP without any changes. The meeting notes state that the "IEP Specialized Instruction will be included or increased on the IEP within 30 days of the Proposed Placement." *DCPS-1,* p. 000002 (2/23/10 MDT meeting notes).

18. On or about February 23, 2010, DCPS also provided Petitioner with a Prior Written Notice offering the "[Proposed] ES Hearing Impaired Program" as its offer of FAPE. *DCPS-1.* The Prior Notice states that the only document on which the placement was based was "the Current IEP dated 6/11/09." *14,* p.1. The SEC who organized the 2/23/10 MDT meeting confirmed that the team only considered the 6/11/09 IEP. *SEC Test.,* 5/10 Tr. at 258-59.

19. At the February 23, 2010 meeting, Petitioner requested that the IEP be changed and that the Student be placed at the Private School. *See Parent Test.; SEC Test.; 12* (parent comments). The DCPS team failed to acknowledge anywhere in the meeting notes or the Prior Notice that the parent had requested placement at the Private School and that DCPS refused to consider anything other than the Proposed ES. The February 23, 2010 Prior Notice also contained no explanation of why the team would not consider changing the IEP as requested by the parent.

20. At the February 23, 2010 meeting, the parent requested an inclusion program, but DCPS informed her that an inclusion program was not necessary as long as DCPS could implement the June, 2009 IEP at Proposed ES. The Proposed ES Hearing Impaired Program offered by DCPS was described as a self-contained Hearing

Impaired classroom with "potential for mainstreaming." *12* (parent comments); *see also Parent Test.; SES Test.*

21. The Proposed ES provides both hearing aids (if the child does not have her own) and FM devices for hearing impaired students in the program. There are at least four different FM frequencies in use within the classrooms at the Proposed ES. *See DCPS Audiologist Test.*

22. The Proposed ES Hearing Impaired Program was not an appropriate educational placement to meet the unique special education needs of the Student as of 2/23/10. The proposed placement required the Student to be educated with students who were younger than her, were not developmentally close enough to her to provide an appropriate peer group, and did not include adequate peer language and social models. [3] In addition, the Proposed ES program cannot implement the IEP as presently written (*i.e.,* to include 10 hours of specialized instruction in the general education setting), since all specialized instruction to pre-K hearing impaired students at this school appears to be provided in a self-contained classroom outside the general education setting. *See -12,* p. 2; *DCPS Audiologist Test.*

23. The Proposed ES Hearing Impaired Program into which DCPS proposed to place the Student does not enable the Student to be educated with children who are not disabled. The nature and severity of the Student's disability does not require her to be removed to a segregated, self-contained class for children with hearing impairments.

24. The Private School program proposed by Petitioner offers a less restrictive environment than the Proposed ES Hearing Impaired Program into which DCPS proposed to place the Student. The 6/11/09 MDT found "evidence that a more restrictive setting is not beneficial for her [and] that an inclusion setting is ideal for her development." *DCPS-11,* p. 86. The Student made little or no progress while in a self-contained classroom at the Charter School. *Id.; Parent Test.*

---

[3] DCPS witnesses testified that children of Kindergarten age in the DCPS Hearing Impaired Program are generally served at , with only Pre-K and younger students placed at the Proposed ES. *See Testimony of HI Teacher and Audiologist.* Ironically, although the Student was old enough for Kindergarten at the start of the 2009-10 SY and the Charter School maintained that she could not stay there because she needed to advance to Kindergarten, she was placed in the Proposed ES' Pre-K program rather than at

25. On or about March 4, 2010, Petitioner and representatives of the Private School visited the Proposed ES to observe the Hearing Impaired Program at the school. Petitioner concluded that the program was not appropriate for the Student and declined DCPS' offer of a placement there. In addition, Petitioner and two Private School witnesses testified that during this visit they were informed by the DCPS Audiologist and the Proposed ES Principal that the proposed placement was not appropriate for the Student, in part because of the ages of the other children in the self-contained classroom. *See Testimony of Parent, Private School Clinical Director, and Private School Director of Audiology; see also HO-1* (observation notes of Audiology Director).[4]

26. On or about March 19, 2010, a resolution meeting was held which did not result in a resolution of the complaint. DCPS offered to convene another IEP/resolution meeting to attempt to resolve the parent's concerns, but no further meeting was held until May 2010.

27. In late April 2010, DCPS staff conducted observations of the Student at the Private School.

28. On or about May 6, 2010, just two business days before the Due Process Hearing, DCPS convened a further meeting of the MDT/IEP Team to review recent evaluations and other information.

29. The Private School is able to implement the June 2009 IEP and would otherwise be an appropriate placement for the Student. *See Parent Test.; Private School Test.; see also DCPS-3,* p. 7, ¶ 12 (10/8/09 HOD findings).

[4] The DCPS Audiologist testified that she did not recall telling the parent or anyone else that the Proposed ES Hearing Impaired Program was not appropriate for the Student; and the Principal denied making the statements. However, the Hearing Officer finds the consistent testimony of the three witnesses for Petitioner to be more credible. Both Private School representatives testified that they had taken contemporaneous notes right after their visit on March 4th, , and the notes admitted as HO-1 corroborate their recollection.

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see Schaffer* v. *Weast,* 546 U.S. 49 (2005). This burden applies to any challenged action and/or inaction, including failures to provide an appropriate IEP and/or placement, as well as failures to implement an IEP.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. *See* DCMR 5-3030.3. The normal standard is preponderance of the evidence. *See, e.g., NG.* v. *District of Columbia,* 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw* v. *District of Columbia,* 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

B. Issues/Alleged Denials of FAPE

The Hearing Officer concludes that Petitioner has not carried her burden of proof on her claims under the first issue (inappropriate IEP); but Petitioner has met her burden of proof on claims made under the second issue (inappropriate placement) and third issue (procedural violations), to the extent set forth herein.

1. 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)). An IEP is a comprehensive written plan that must include, among other things: (1) "a statement of the child's present levels of academic achievement and functional performance, including ... how the child's disability affects the child's improvement and progress in the general education curriculum"; (2) "a statement of measurable annual goals, including academic and functional goals, designed to ... meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum...and meet each of the child's other education needs that result from the child's disability"; (3) "a description of how the child's progress toward meeting the annual goals...will be measured"; (4) "a statement of the special education and related services and supplementary aids and services ...and a statement of the

program modifications or supports for school personnel that will be provided for the child"; and (5) an explanation of the extent, if any, to which the child will not participate with nondisabled children in any regular classes. 20 U.S.C. 1414(d)(1)(A)(i).

To be sufficient to confer 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); *J G. v. Abington School,* 51 IDELR 129 (E.D. Pa. 2008), slip op. at 8 ("while the proposed IEP may not offer [the student] the best possible education, it is nevertheless adequate to advance him a meaningful educational benefit. "). In addition, "[b]ecause the IEP must be 'tailored to the unique needs' of each child, *Bd. of Educ. v. Rowley,* 458 U.S. 176, 181 (1982), it must be regularly revised in response to new information regarding the child's performance, behavior, and disabilities, and must be amended if its objectives are not met. See 20 U.S.C. 1414 (b)-(d)." *Maynard v. District of Columbia,* 54 IDELR 158 (D.D.C. 2010), *slip op. at* p. 6.

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). 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); *see also Fuhrmann* v. *East Hanover Bd. of Educ.,* 993 F.2d 1031, 1040 (3d Cir. 1993) (whether an IEP is appropriate "can only be determined as of the time it is offered for the student, and not at some later date").

In her closing argument, Petitioner claims that the IEP adopted by DCPS on February 23, 2010 (in a form and content unchanged from June 11, 2009) has been shown to be inappropriate for several reasons. *See Parent's Closing Argument and Summary of Evidence,* pp. 12-15. However, a number of these alleged flaws were not originally raised in Petitioner's Complaint,

see *-1*, pp. 4-5, and thus may not be raised in this due process hearing. 34 C.F.R. 300.511(d).[5] As discussed further below, the Hearing Officer has carefully reviewed the evidence with respect to each of the remaining arguments, and concluded that none are sufficient to establish a denial of FAPE based solely on the content of the initial IEP adopted by DCPS as of February 23, 2010.

Inadequate Goals

Petitioner's Closing Argument primarily claims that the IEP created in June 2009 and carried forward by DCPS in February 2010 is inappropriate because it "lacks numerous important objectives that are included in the set of goals developed for [the Student] at the [Private] School for SY 2009-10." *Parent's Closing Argument and Summary of Evidence,* p. 13. She further claims that each goal should have been updated based upon the September 2009 testing results. *Id.,* p. 14. But of the 17 goals listed across five different areas, only two (*i.e.,* ability to talk about feelings, and ability to put on hearing aids) were even alleged in the Complaint as reasons why the IEP was inappropriate. *Compare id.,* pp. 13-14 *with* *-1,* pp. 4-5. While the IEP may not be perfect, the Hearing Officer finds that the omission of these two specific goals does not negate the fact that, overall, the IEP is at least "reasonably calculated to enable the child to receive educational benefits." *Rowley,* 458 U.S. at 207. Moreover, the prior HOD included as Findings of Fact that all of the goals discussed at the June 11, 2009, IEP meeting were incorporated into the Student's IEP; and that Petitioner had never contacted the Charter School or otherwise attempted to communicate that she disagreed with these goals. *DCPS-3,* p. 000018. [6]

Failure to Indicate Hearing Impairment

Petitioner next argues that the IEP is inappropriate "because there is nothing to inform the reader that this student has a hearing impairment or hearing loss." *Petitioner's Closing Argument,* p. 14; *see also* *1,* p. 4, ¶ 1. However, the 6/11/09 MDT meeting notes at which the IEP was originally developed clearly reflect the team's recognition that the Student suffered

[5] Moreover, the Prehearing Order confirming the discussion at the PHC expressly limited the inappropriate IEP issue to the specific grounds stated in the Complaint. *See Prehearing Order,* ¶ 7 (a).

[6] It is also worth noting that Petitioner failed to present the Private School educational program to DCPS for consideration at the 2/23/10 MDT meeting. Had Petitioner seen the goals in that document to be as important to developing an appropriate IEP as she now claims, one would have expected her to submit it to the team so it could be reviewed for that purpose.

from hearing loss and required appropriate accommodations. *See DCPS-11,* meeting notes at pp. 4, 6. *See also DCPS-3,* p. 000019 (10/8/09 HOD finding that "[a]t the June 11, 2009, IEP meeting, the MDT discussed that the Student required a small setting with amplification modifications *to address the Student's hearing loss*") (emphasis added). While the IEP document does not on its face dually classify the Student as both Hearing Impaired and Speech/Language Impaired, Petitioner has not shown that this omission caused any misinformation about or failure to address specific educational needs resulting from such additional disability. *See, e.g.,* 34 C.F.R. 300.320 (a)(2).

Insufficient Hours of Special Education

Petitioner claims that the IEP's provision of 12 hours of specialized instruction and 3.5 hours of speech/language services provides inadequate support for the Student. *Pet's Closing Argument,* p. 15; *-1,* p. 4, ¶ 2. Petitioner claims that the Student requires full-time support of a speech/language pathologist for 100% of the school day, which DCPS witnesses thought was unprecedented. She also argues that in Section XII of the IEP, all of the areas should be marked, rather than just Reading, Math, and Speech/Language. *Id.; -1,* p. 4, ¶ 5. However, based on the present record, the Hearing Officer concludes that Petitioner has not carried her burden of proving that such increased volume of services is necessary. As noted above, the law does not require DCPS to "maximize" the Student's potential or provide the "best possible education." DCPS need only offer an IEP that is "sufficient to confer some educational benefit upon the handicapped child." *Rowley,* 458 U.S. at 200.

Amplification Equipment

Finally, Petitioner argues that "the mere statement 'amplification equipment' does not specify whether hearing aids are necessary or an FM tuner would suffice"; and that there is "also no information provided for the setting, frequency provider or beginning date, all boxes that were left blank for amplification." *Closing Argument,* p. 15; *see also -1,* p. 4 ("no indication of where she needs it and how many hours a week it is needed, which is essential information"). However, all of the testimony confirmed that this item has not been interpreted as having any time or space limitations. For example, the Proposed ES Hearing Impaired Program offered by DCPS to implement this IEP includes both hearing aids (provided by the school if the child does not have her own) and FM devices. There are at least four different FM frequencies in use within

the classrooms at the Proposed ES. *See DCPS Audiologist Test.* Thus, while additional specificity should be provided in the IEP, this deficiency does not appear likely to cause a deprivation of educational benefit to the Student.

2. Inappropriate Placement Claims

"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). *See also T.T. v. District of Columbia,* 48 IDELR 127 (D.D.C. 2007) ("Once developed, the IEP is then implemented through appropriate placement in an educational setting suited to the student's needs"). Like the IEP, a child's educational placement must be "reasonably calculated" to confer educational benefit. *Board of Education* v. *Rowley,* 458 U.S. 176 (1982). The placement also must be based upon the child's IEP and be in conformity with the least restrictive environment ("LRE") provisions of the IDEA. *See* 34 C.F.R. §§ 300.114 -300.116; DCMR §§ 5-3011, 5-3013; *Roark* v. *District of Columbia,* 460 F. Supp. 2d 32 (D.D.C. 2006).

As noted above, the Complaint alleges that DCPS' proposed placement of the Student in the Proposed ES Hearing Impaired Program was not appropriate, as of 2/23/10, because (*inter alia*) the students with which she would be educated were not her age, were not developmentally close enough to her to provide an appropriate peer group, and did not include sufficient good peer language and social models." *-1*, p. 7, ¶ 1 (C); *see also id.*, p. 5, ¶¶ 2-3. The Complaint also alleges that several other aspects of the program are not inappropriate, including: (a) the lack of a low-noise environment; (b) distracting behaviors of other students; (c) unavailability of a sound field FM system beyond the self-contained classroom; [7] and (d) lack of specialized instruction being provided in a general education or inclusion setting that should be the LRE for the Student. *Id.*, pp. 5-6, ¶¶ 1, 3-4, 6-7. In her Closing Argument (at pp. 6-12), Petitioner focuses most of her attention on the proposed placement's alleged non-conformity with LRE requirements, which the Hearing Officer concludes she has demonstrated by a preponderance of the evidence.

[7] As noted above, the evidence at hearing did not support this contention.

The IDEA and its implementing regulations require each public agency to ensure that:

> "(i) *To the maximum extent appropriate*, children with disabilities... are educated with children who are nondisabled; and (ii) special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. 300.114 (a); *see also* 20 U.S.C. 1412(a)(5); DCMR 5-E3011.1.

The rules further specify that public agencies cannot "remove a child from age appropriate regular classrooms solely because of needed modifications in the general education curriculum." 34 C.F.R. 300.116 (e); *see also* DCMR 5-E3013.4.

Here, DCPS offered the Proposed ES Hearing Impaired Program for the Student, based exclusively on the June 11, 2009 IEP, according to the Prior Written Notice, *-14*. At the meeting the parent requested an inclusion program, but DCPS informed her that an inclusion program was not necessary as long as DCPS could implement the June, 2009 IEP at Proposed ES. The proposed placement was described as a self-contained Hearing Impaired classroom with "potential for mainstreaming." *-12* (parent comments); *see also Parent Test.; SES Test.* As Petitioner correctly points out, "[u]nfortunately, both then and now, DCPS is not clear about what that will mean at [Proposed ES] in practical terms because no one really knows." *Pet's Closing Argument,* p. 6. [8] What is clear, however, is that a program that offers ***more inclusion*** and ***less removal*** is a less restrictive environment -- as DCPS has argued in numerous other cases. And the IDEA mandates that DCPS offer the Student LRE "to the maximum extent appropriate." 34 C.F.R. 300.114 (a). [9]

---

[8] The Special Education teacher at the 2/23/10 MDT meeting was not familiar with the Proposed ES Hearing Impaired Program and deferred to the SES. The SLP in attendance had experience with the hearing impaired program when it was housed at Van Ness ES, several years ago, and only knew about its present offering through reports of a colleague. The Early Stages SLP had only passing familiarity with the program as a result of her office being located in the Proposed ES building for a year. And the Hearing Impaired teacher who testified has also never worked there, though she had some knowledge from being part of the Hearing Impaired program. *See Testimony of Sp. Ed. Teacher, SLP, Early Stages SLP, and HI Teacher.*

[9] *See, e.g., L.B. v Nebo School District*, 41 IDELR 206, 379 F.3d 966 (10th Cir. 2004); *Sacramento City Unified Sch. Dist. v Rachel H.* 4 F.3d 1398, 20 IDELR 812 (9th Cir. 1994); *Oberti v Board of Educ. of Borough of Celmenton School District*, 995 F.2d 1204 (3d Cir. 1993); *Daniel R.R v State Bd. of Education*, 874 F.2d 1036, (5th Cir 1989).

Moreover, while DCPS argues that the Proposed ES Hearing Impaired Program has "options for mainstreaming" (*DCPS' Closing Brief,* p. 5, ¶ 10), the only concrete proposal that Petitioner could assess was what was prescribed on the IEP and Prior Notice or discussed at the 2/23/10 IEP meeting. Under the IDEA, "parents are not required to wait and see a proposed IEP in action before concluding that it is inadequate and choosing to enroll their child in an appropriate private school." *N.S. v. District of Columbia,* Civ. Action No. 09-621 CKK (D.D.C. May 4, 2010), *slip op.* at 23-25 (*citing Forest Grove Sch. Dist. v. T.A.,* 129 S. Ct. 2484, 2492-93 (2009)). The Hearing Officer therefore cannot rely on "evidence about what services could have been provided by [Proposed ES] instead of considering what services [or placement] were actually called for by the IEP or adequately discussed at the IEP meeting." *N.S., slip op.* at 25. Nor has DCPS ever offered any other proposed public (or private) school placement for the Student.

DCPS also argues that it was appropriate for it to offer the Proposed ES Hearing Impaired Program as an initial placement and "provide the parent notice of the site of [Proposed] ES for implementation for a thirty-day period." *DCPS' Closing Brief,* p. 4, ¶ 8; *see also id.*, pp.6-7 ("primary issue alleged in this case is whether DCPS denied a FAPE to the student in accepting the 6/11/09 IEP for the initial 30-day period at [Proposed] ES"); *SES Test.* The only authority suggested by DCPS' counsel for this approach is the IDEA regulation governing children who "transfer public agencies in the same State ... within the same school year," 34 C.F.R. 300.323 (e). *See, e.g.,* 5/10 Tr. at 89. That provision requires the new LEA to provide FAPE, including "services comparable to those described in the child's IEP from the previous agency" until the LEA either "adopts" the prior IEP or develops and implements a new IEP that meets IDEA requirements. *Id.* However, this regulation is inapposite under the facts of this case since the Student did not actually transfer directly between the Charter School and DCPS, much less "within the same school year." *Maynard v. District of Columbia,* 54 IDELR 158 (D.D.C. 2010), *slip op.* at 8-9 (construing comparable language in Section 300.323(f)). Accordingly, DCPS was required to develop its own appropriate IEP and placement upon enrollment (as a non-attending student) and referral of the Student through the PRO process. *Id.,* p. 9.

This position was recently confirmed by OSEP in response to a request for guidance "regarding the status of children with disabilities who return to public school after being parentally-placed in a private school or home schooled for a period of time." *Letter to Goldman,*

53 IDELR 97 (OSEP March 26, 2009). The writer requested "clarification as to whether the 'break' in public schooling necessitates 'starting over' with regard to identification, evaluation, and the provision of a [FAPE] to the student via an IEP." *Id.*, p. 1. OSEP replied in the negative. It advised that the child in these circumstances "remains a child with a disability and is eligible for special education and related services" (assuming the child has not aged out, graduated, moved to another state, or determined no longer eligible). *Id.*, pp. 1-2. [10] "Further, once a child with a disability re-enrolls in the public school, the [LEA] has an obligation to convene an IEP meeting and develop an appropriate IEP for the child. 34 CFR 300.324(b)." *Id.*, p. 2. The failure to do so constitutes a denial of FAPE. *See Maynard, slip op. at 9 (citing Letter to Goldman).*

The evidence establishes that the self-contained classroom at the Proposed ES Hearing Impaired Program into which DCPS proposed to place the Student was not an appropriate educational placement to meet the identified needs of the Student as of 2/23/10. The proposed placement required the Student to be educated with students who were younger than her, were not developmentally close enough to her to provide an appropriate peer group, and did not include adequate peer language and social models. In addition, the Proposed ES program cannot implement the IEP as presently written (*i.e.*, to include 10 hours of specialized instruction in the general education setting), since all specialized instruction to pre-K hearing impaired students at this school appears to be provided outside the general education setting. That certainly was what the parent heard communicated at the 2/23/10 MDT meeting -*12,* p. 2), and DCPS has not presented evidence to the contrary in this hearing. *See also DCPS Audiologist Test.*

Finally, as noted above, the placement has been shown not to be in conformity with LRE requirements, *see* 34 C.F.R. 300.116. DCPS has not presented any evidence suggesting that the nature or severity of this Student's disability requires her to be removed to a segregated class for children with hearing impairments at the Proposed ES. To the contrary, in developing the current IEP, the 6/11/09 MDT found "evidence that a more restrictive setting is not beneficial for her [and] that an inclusion setting is ideal for her development." *DCPS-11,* p. 86. The Student

[10] Therefore, this also is not a situation in which DCPS first makes an eligibility determination and then has 30 days to conduct a meeting to develop an initial IEP. 34 C.F.R. 300.323(c)(1). Here, the Student remained eligible, and DCPS adopted the IEP and made a placement decision at the 2/23/10 meeting.

made little or no progress while in a self-contained classroom at the Charter School. *Id.; Parent Test.; see also DCPS-3,* p. 5, Findings of Fact ¶ 2 ("When the Student began attending the charter school, she was in a full-time, out-of-general-education setting. After a few months, Petitioner and the other members of the MDT decided that the Student should be educated among regularly developing peers to assist her progress."). Petitioner's experts also testified consistently that the Student requires an inclusion model with age appropriate peers to facilitate her development. *See Testimony of Private School Clinical Director, Director of Psychology, and Director of Audiological Services.* It is not appropriate or consistent with LRE requirements for DCPS to educate the Student in a class with 3 to 4 year olds solely because she may be behind her age peers academically and require some modifications in the general education curriculum. *See* 34 C.F.R. 300.116 (e); DCMR 5-E3013.4.

Accordingly, the Hearing Officer concludes that Petitioner has carried her burden of proving that the Proposed ES program offered by DCPS does not constitute an appropriate placement that can meet the unique special education needs of the Student and fulfill the requirements of her IEP.

3. Procedural Violations

Petitioner argues that DCPS has also committed "multiple serious procedural violations" that together have denied FAPE to the Student. *Pet's Closing Argument,* p. 16; *see also 1,* pp. 7-9. The Hearing Officer concludes that Petitioner has carried her burden of proof on at least two of her claims. The Hearing Officer finds that procedural violations have occurred in these respects and have resulted in a denial of FAPE in accordance with the criteria set forth in 34 C.F.R. 300.513 (a). The key claims are discussed further below. [11]

[11] The Hearing Officer concludes that the remainder of the alleged procedural violations cited in Petitioner's Closing Argument either are relatively minor defects or are not cognizable in this hearing because they were not raised in the original Complaint, 34 C.F.R. 300.511(d). The latter category includes: the failure to include certain members of the MDT; the failure to initiate a Student Evaluation Plan; and the failure to ensure that the placement decision was made by a group of persons knowledgeable about the child. *See Pet's Closing Argument,* pp. 17-18, 21-22.

Failure to Consider Updated Evaluations

The Prior Notice states that the only document on which the placement was based was "the Current IEP dated 6/11/09." *14,* p.1. The SEC who organized the 2/23/10 MDT meeting confirmed that the team only considered the 6/11/09 IEP. *SEC Test.,* 5/10 Tr. at 258-59. DCPS had received from the parent the September 2009 Speech/Language evaluation by the Private School, with the attached cognitive evaluation by its Director of Psychology. *SEC Test.* DCPS had a legal obligation to consider all of the information provided by the parent relevant to the Student's needs in February 2010, including the recent evaluations, 34 C.FR. 300.324(a), but it did not do so. The SEC explained that he had received these two reports, but had not noticed that they were conveying assessments conducted after the June 2009 IEP had been written. Had he realized that, he testified that he would have had them reviewed by DCPS professionals. *Id.* The evidence shows that this procedural inadequacy "impeded the child's right to a FAPE" or, at the very least, "significantly impeded 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) (i), (ii). *See also Lesesne v. District of Columbia,* 447 F. 3d 828 (D.C. Cir. 2006).

Inadequate Notice

The public agency is required to provide prior written notice to the parent whenever it "***refuses to initiate or change the identification, evaluation, or educational placement*** of the child or the provision of FAPE to the child," 34 CFR 300.503(a)(2) (emphasis added); and the notice must contain an "explanation of ***why the agency*** proposes or ***refuses to take the action***" as well as a "description of each evaluation procedure, assessment, record or report of the agency used as a basis for the proposed or refused action." *Id.,* 300.503 (b) (2), (3) (emphasis added). At the February 23, 2010 meeting, Petitioner requested that the IEP be changed and that the Student be placed at the Private School. *See Parent Test.; SEC Test.; CR-12* (parent comments). The DCPS team failed to acknowledge anywhere in the meeting notes or the Prior Notice that the parent had requested placement at the Private School and that DCPS refused to consider anything other than the Proposed ES. The February 23, 2010 Prior Notice also contained no explanation of why the team would not consider changing the IEP as requested by the parent. Again, the evidence shows that this procedural inadequacy "impeded the child's right to a FAPE" or, at the

very least, "significantly impeded 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)(i),(ii).

Predetermined Placement

The IDEA requires that parents have meaningful participation in the placement decision. *See* 34 CFR 300.116(a)(1); *id.,* 300.327 ("each public agency must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child"). As Petitioner points out, the team does not have to agree with the parent's proposal or concerns, but it is required to listen to the parent's concerns and consider them, rather than issuing unilateral decrees. Petitioner contends that DCPS did not do so in this case, arguing that the placement decision was effectively made before the 2/23/10 meeting by the SES, based solely upon his review of the 6/11/09 IEP and his off-line discussions with the Principal of the Proposed ES. *See Testimony of Parent, SES, and SEC. See also Pet's Closing Argument,* p. 20 ("Having the parent present in the group when the placement is announced by DCPS does not provide the parent with meaningful input into the placement decision or honest group membership in the group making the placement decision."). Nevertheless, the Hearing Officer concludes that the record and applicable case law do not support Petitioner's contention that placement was impermissibly predetermined. *See Paolella v. District of Columbia,* 210 F. App'x 1, 3 (D.C. Cir. 2006 (unpublished) (finding that parents had meaningful opportunity to participate in student's placement determination in part by helping to develop the IEP, informing DCPS that they preferred he remain in the private school he was then attending, and visiting the DCPS-suggested school); *T.T. v. District of Columbia,* 48 IDELR 127 (D.D.C. 2007) (parent found to have participated meaningfully in placement process, despite pre-meeting investigation and identification of possible placement site(s) by Site Review Committee).

C. Appropriate Equitable Relief

Having found a denial of FAPE as discussed above, the IDEA authorizes the Hearing Officer to fashion "appropriate" relief, *e.g.,* 20 U.S.C. §141S(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter,* S10 U.S. 7, IS-16 (1993); *Reid v. District o/Columbia,* 401 F.3d 516, 521-23 (D.C. Cir. 2005). Based on the record developed at hearing, the Hearing Officer has exercised his discretion to order appropriate equitable relief as described below.

In this case, Petitioner primarily seeks placement at the Private School, going forward and "retroactive to February 24, 2010." *Pet's Closing Argument,* p. 1. "Since the parent has not paid for the tuition and related services provided to her daughter at [Private] School ... she is not seeking reimbursement. However, she is seeking a retroactive placement to February 24, 2010, from the date on which her daughter was offered services by DCPS at the [Proposed ES] Hearing Impaired program." *Id.,* pp. 1-2.

In the first place, the Hearing Officer does not comprehend Petitioner's asserted distinction between "reimbursement" (which Petitioner says she does not seek) and "retroactive placement" (which she does request). As the U.S. Court of Appeals for the District of Columbia Circuit has explained, "an award of private-school placement is not...retroactive relief designed to compensate for *yesterday's* IDEA violations, but rather prospective relief aimed at ensuring that the child receives *tomorrow* the education required by IDEA." *Branham v. District of Columbia*, 427 F.3d 7, 11 (D.C. Cir. 2005) (emphasis in original). Indeed, the *Burlington* decision itself appears not to reflect the distinction suggested by Petitioner. Rather, the Supreme Court there held that "appropriate relief" under the IDEA may include either a "prospective injunction ... placing the child in a private school" or "retroactive reimbursement to parents as an available remedy in a proper case." *School Comm. of Burlington v. Dept. of Ed. of Mass.,* 471 U.S. 359, 369-70 (1985). Thus, the Hearing Officer concludes that Petitioner's request for "retroactive placement" as opposed to "retroactive reimbursement" is simply an effort to sidestep apparent problems with obtaining reimbursement relief in this case – either from the standpoint of failure of proof regarding Petitioner's financial responsibility,[12] or from the standpoint of notice or other equitable considerations. *See DCPS' Closing Brief,* pp. 7-9 (discussing *Forest Grove*); *cf.* 34 C.F.R. 300.148.

With respect to prospective private placement awards, *Branham* makes clear that they "must be tailored to meet the child's specific needs" through a fact-intensive inquiry. *Id.* at 11-12. "To inform this individualized assessment, '[c]ourts [and hearing officers] fashioning [such]

[12] As DCPS points out (*DCPS' Closing Brief,* p. 6, ¶ 15), the parent testified that she has not paid any money to the Private School and that the Private School has not requested the payment of any money for educating the Student. *Parent Test.* And while Petitioner's Closing Argument now claims that "she is obligated to do so based upon papers she had signed in the spring of 2009," she concedes that the tuition and other fees contract was not entered in the record. *Pet's Closing Argument and Summary of Evidence,* p. 1 & n. 2.

discretionary equitable relief under IDEA must consider all relevant factors.'" *Id.* at 12, *quoting Florence County School District Four v. Carter*, 510 U.S. 7, 16 (1993); *see also Reid v. District of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005). The relevant considerations in determining whether a particular placement is appropriate for a particular student include the following:

> "the nature and severity of the student's disability, the student's specialized educational needs, the link between these needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment." *Branham*, 427 F.3d at 12, *citing Board of Education v. Rowley*, 458 U.S. 176, 202 (1982).

"Because placement decisions implicate equitable considerations, moreover, courts [and hearing officers] may also consider the parties' conduct." *Id.; Reid,* 401 F.3d at 524.

Some of these factors clearly support the requested placement, including the fact that the Private School program would appear to represent a less restrictive environment than DCPS' proposed placement. The Private School also appears fully capable of providing all of the specialized instruction and related services required by the Student's current IEP;[13] and the program it offers is closely linked to many of the Student's particular special education needs. On the other hand, the cost is higher than many other non-public schools in the area; the current school year is now almost over; and it appears there may be other public-school alternatives (*e.g.,* that the IEP team may wish to consider which could offer the Student an appropriate placement going forward for the 2010-11 SY.

In addition, the relative equities in this case based on the parties' conduct suggest that DCPS should be given a further opportunity to convene a complete IEP team to review and consider all updated information, prior to the beginning of the next school year. Petitioner decided to educate the Student in the Private School long before any dispute arose with DCPS over the provision of FAPE, having first signed a contract in spring 2009 (even before leaving the Charter School) and then enrolled her there in early September 2009. While Petitioner properly followed the DCPS PRO referral process *-9c; Parent Test.)*, the evidence suggests that she may not have had any real intention of developing a plan for the Student to attend a

[13] The evidence is not entirely clear, however, as to exactly what specialized instruction is being provided directly by special education teachers, as opposed to SLP "co-teachers" in the Student's classrooms. This may be an issue to discuss at the next MDT/IEP Team meeting.

DCPS public school.[14] Moreover, Petitioner has been less than forthcoming with DCPS about some of the details of the Private School program -- including failing to provide a copy of the written goals that she subsequently criticized DCPS for not incorporating into its own IEP at the 2/23/10 meeting. Finally, once DCPS received the referral package from Petitioner, it had only a limited opportunity (between mid-December and February[15]) to evaluate and observe the Student to assess her disabilities and assist in developing the content of her IEP. *Id.,* pp. 7-9, *citing Forest Grove Sch. Dist. v. T.A.,* 129 S. Ct. 2484 (2009) (relevant factors that courts and hearing officers are directed to consider in reimbursement cases include adequacy of notice provided by parents as well as school district's opportunities for evaluating the child). Certainly this is not a case like *Wirta v. District of Columbia,* 859 F. Supp. 1, 4-5 (D.D.C. 1994) (finding "no authority which permits a school system a second opportunity to ... propose an alternative placement where its failure to do so in the first instance violated the requirements of the Act."), in which DCPS essentially "defaulted on its obligations under the IDEA" by unreasonably delaying any offer of FAPE.

On balance, and based on all the evidence presented at the due process hearing, the Hearing Officer concludes that an interim placement at the Private School through the end of the current school year (*i.e.,* the 2009-10 SY that was the subject of this complaint and hearing) would constitute appropriate equitable relief under the circumstances. This is intended as a temporary placement until the end of the 2009-10 school year, pending completion of the IEP process for the 2010-11 school year. *See, e.g., Verhoeven v. Brunswick Sch. Comm.,* 207 F. 3d 1 (1st Cir. 1999); *Leonard v. McKenzie*, 869 F.2d 1558 (D.C. Cir. 1989); *Green v. District of Columbia,* 45 IDELR 240 (D.D.C. 2006). The Student's MDT/IEP Team should meet to review and revise the IEP, as appropriate, and to discuss and determine an appropriate placement for the

---

[14] *See DCPS' Closing Brief,* p. 9. However, the Hearing Officer rejects DCPS' characterization of Petitioner's conduct as an improper "attempt to play the system 'fast and loose' [to] get a private education at public expense." *Id.; see, e.g., Kitchelt v. Weast,* 42 IDELR 58, n. 1 (D. Md. 2004) (fact that parents may believe from beginning that public school system cannot provide a FAPE does not disqualify reimbursement, "so long as they continue in good faith (e.g., no intentional delays, no obstructions) to participate in the development of an IEP and placement in the public school system....[T]he key consideration is that the parents pursue in good faith the development of the IEP and the possibility of public school placement."). Here, there is no evidence to support DCPS' counsel's assertion that the parent "took no effort to work as a collaborative partner with DCPS." *DCPS' Closing Brief,* p. 7.

[15] The Hearing Officer may take judicial notice of the fact that winter break interrupted the school calendar and several severe snow storms disrupted normal business in Washington, DC, during this time period.

2010-11 SY. Such meeting(s) may also be combined with an annual review under 34 C.F.R. 300.324(b) since the current IEP was developed in June 2009. The Team should consider the appropriateness of the Private School program in which the Student presently appears to be successful, as well as any DCPS public placement options such as the Kindergarten and/or 1st grade hearing impaired program at DCPS shall be obligated to fund the Student's attendance at the Private School through the end of the current school year, and until such time as the Student's educational placement changes

The Hearing Officer will also exercise his discretion to grant other equitable relief, as set forth in the accompanying Order below, which is designed to ensure that further MDT review of this Student's educational program takes account of all relevant information and complies with all required procedures in a timely manner.

V. ORDER

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

1. The Student shall be placed at on an interim basis, commencing immediately, until the completion of the 2009-2010 school year. DCPS shall provide funding and transportation for the Student to through the end of the current school year, and until such time as the Student's educational placement changes.

2. Within **30 calendar days** of this Order (*i.e.,* **by July 3, 2010**), DCPS shall convene a meeting of the Student's MDT/IEP Team with all necessary members, including: the Parent, an educational audiologist, a speech/language pathologist, a teacher of the hearing impaired, a general education teacher, and a school psychologist.

3. At the IEP meeting convened pursuant to Paragraph 2, the MDT/IEP Team shall: (a) review all updated information, including results of the most recent evaluations of the Student and the Student's progress made toward IEP goals during the 2009-10 school year; (b) review and revise, as appropriate, the Student's IEP dated July 11, 2009, to meet the Student's unique needs that result from her disability; and (c) discuss and determine a proposed placement for the 2010-2011 school year in an appropriate school program that can fulfill the requirements of the revised or restated IEP, and in light of the findings and conclusions of the HOD. Programs to be considered include Hearing Impaired Program, and any other appropriate public or non-public program identified by DCPS and/or the Parent. DCPS shall issue any notice of proposed placement within **10 days** of the MDT/IEP meeting.

4. The MDT/IEP Team shall also meet to discuss and determine whether any additional services may be appropriate to meet the unique needs of the Student and to compensate for any failure to provide FAPE to the Student since February 24, 2010.
5. All written communications from DCPS concerning the above matters shall include copies to counsel for Petitioner, Margaret A. Kohn, Esq., 1320 19th Street, NW, Suite 200, Washington, DC 20036, via facsimile (202-667-2302), or via email (Margaret.kohn07@gmail.com).
6. Any delay in meeting any of the deadlines in this Order caused by Petitioner or Petitioner's representatives (*e.g.*, absence or failure to attend a meeting, or failure to respond to scheduling requests) shall extend the deadlines by the number of days attributable to such delay.
7. Petitioners' other requests for relief contained in the Due Process Complaint filed March 8, 2010, are hereby **DENIED**.
8. This case shall be, and hereby is, **CLOSED.**

IT IS SO ORDERED.

Dated: June 3, 2010

Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

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