**DISTRICT OF COLUMBIA**
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**
Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

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PETITIONERS,
on behalf of STUDENT,[1]

Petitioners,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: January 29, 2013

Hearing Officer: Peter B. Vaden

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## HEARING OFFICER DETERMINATION

### INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioners (the "Petitioners" or "PARENTS"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("DCMR"). In their Due Process Complaint, Petitioners allege that DCPS denied Student a free appropriate public education ("FAPE") for the 2011-2012 and 2012-2013 school years, by failing to provide appropriate special education and related services and by failing to offer a suitable educational placement.

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[1] Personal identification information is provided in Appendix A.

Student, an AGE young man, is a resident of the District of Columbia. Petitioners' Due Process Complaint, filed on October 26, 2012, named DCPS as respondent. The undersigned Hearing Officer was appointed on October 31, 2012. The parties met for a resolution session on November 20, 2012 and were unable to reach an agreement. The 45-day deadline for issuance of this Hearing Officer Determination began on November 26, 2012. On December 12, 2012, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters. On December 20, 2012, the Chief Hearing Officer granted Petitioners' unopposed motion for a 22-day continuance, extending the due date for this decision to January 31, 2013.

The due process hearing was held before the undersigned Impartial Hearing Officer on January 16 through 18, 2013 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioners appeared in person, and were represented by PETITIONERS' COUNSEL. Respondent DCPS was represented by DCPS COUNSEL.

Petitioners called as witnesses, HS READING TEACHER, HS ENGLISH TEACHER, HS SCHOOL PSYCHOLOGIST, MOTHER, MS HISTORY TEACHER, MS SPECIAL EDUCATION TEACHER, MS SCIENCE TEACHER, DIRECTOR OF ADMISSIONS, NEUROPSYCHOLOGIST, HS SPECIAL EDUCATION COORDINATOR, and EDUCATIONAL CONSULTANT. DCPS called as its only witness BEHAVIOR SUPPORT SPECIALIST. Petitioners' Exhibits P-1 through P-22 and P-24 through P-54 were admitted into evidence without objection. (There was no Exhibit P-23.) DCPS offered no exhibits. Petitioners' Counsel made opening and closing statements. DCPS Counsel waived opening and made a closing statement. There was no request to file post-hearing briefs.

## JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

## ISSUES AND RELIEF SOUGHT

- WHETHER DCPS FAILED TO TIMELY AND PROPERLY EVALUATE STUDENT IN ALL AREAS OF SUSPECTED DISABILITIES, FOLLOWING REPEATED REQUESTS AND RECOMMENDATIONS FOR A SPEECH-LANGUAGE EVALUATION BEGINNING IN DECEMBER 2011;

- WHETHER DCPS DENIED STUDENT A FAPE BY FAILING TO PROVIDE HIM SPEECH AND LANGUAGE SERVICES AS PART OF HIS INDIVIDUALIZED EDUCATION PROGRAM ("IEP"), BEGINNING IN THE 2011-2012 SCHOOL YEAR;

- WHETHER DCPS DENIED STUDENT A FAPE BY FAILING TO PROVIDE PARENTS TIMELY ACCESS TO A JULY 2012 SPEECH-LANGUAGE EVALUATION REPORT FOLLOWING A SPEECH-LANGUAGE ASSESSMENT OF STUDENT;

- WHETHER STUDENT WAS DENIED A FAPE BY DCPS' OCTOBER 2011 IEP, AS AMENDED IN MARCH 2012, BECAUSE THE IEP FAILED TO PROVIDE ALL SPECIALIZED INSTRUCTION IN AN OUTSIDE OF GENERAL EDUCATION SETTING, BECAUSE THE IEP LACKED SPEECH-LANGUAGE GOALS AND SERVICES, BECAUSE THE IEP LACKED A BEHAVIOR INTERVENTION PLAN, BECAUSE THE IEP LACKED GOALS AND SERVICES TO ADDRESS STUDENT'S NEED TO DEVELOP HIS EXECUTIVE FUNCTIONING SKILLS, BECAUSE THE IEP LACKS GOALS AND SERVICES TO ADDRESS STUDENT'S NEED FOR DEVELOPMENT OF SELF-ADVOCACY SKILLS, BECAUSE THE IEP FAILS TO IDENTIFY STUDENT'S PRIMARY DISABILITY CLASSIFICATION AS MULTIPLE DISABILITIES, BECAUSE THE IEP LACKS GOALS AND SERVICES TO ASSIST STUDENT TO DEVELOP AGE-APPROPRIATE SOCIAL SKILLS, BECAUSE THE IEP LACKS SUFFICIENT SERVICES TO ENSURE STUDENT GETS TO CLASS ON TIME AND TO PROVIDE REDIRECTION WHEN HE IS INATTENTIVE, BECAUSE THE IEP LACKS PROVISION FOR HANDS-ON SMALL GROUP LEARNING ACTIVITIES AND BECAUSE THE IEP LACKS PROVISION FOR STUDENT'S NEED FOR READING MATERIALS AT HIS READING LEVEL OR RECORDED MATERIALS;

- WHETHER DCPS DENIED STUDENT A FAPE BY NOT PROVIDING ALL OF STUDENT'S 2011-2012 SCHOOL YEAR INSTRUCTION, INCLUDING FOR ELECTIVE CLASSES, IN SELF-CONTAINED CLASSROOMS;

- WHETHER DCPS DENIED STUDENT A FAPE BY REQUIRING HIM TO TAKE PRE-ALGEBRA IN SCHOOL YEAR 2011-2012 FOR WHICH HE WAS NOT ADEQUATELY PREPARED;

- WHETHER DCPS DENIED STUDENT A FAPE BY FAILING TO PROVIDE ADEQUATE SUPPORTS AND ADJUSTED EXPECTATIONS IN LIGHT OF STUDENT'S EXECUTIVE FUNCTIONING DEFICITS, DELAYS IN READING, UNRECOGNIZED LANGUAGE DEFICITS, THE SEVERITY OF HIS DISABILITY AND HIS IMMATURITY;

- WHETHER DCPS DENIED STUDENT A FAPE BY NOT MODIFYING HIS 2011 BIP TO MAKE THAT BIP EFFECTIVE FROM JANUARY 2012 THROUGH JUNE 2012;

- WHETHER DCPS FAILED TO PROVIDE A SUITABLE 2012-2013 PLACEMENT FOR STUDENT BECAUSE CITY HIGH SCHOOL'S ONLY READING PROGRAM, READING 180, DOES NOT MEET STUDENT'S NEEDS, BECAUSE CITY HIGH SCHOOL'S BLOCK PROGRAMMING IS INAPPROPRIATE FOR STUDENT BASED UPON HIS DISABILITIES, BECAUSE CITY HIGH SCHOOL'S LARGE ENROLLMENT SIZE PRECLUDES ASSURANCE OF STUDENT'S SAFETY IN THE BUILDING FOR AFTER HOURS TUTORING AND PROVISION OF NEEDED SUPERVISION BETWEEN CLASSES, BECAUSE CITY HIGH SCHOOL DOES NOT PROVIDE SELF-CONTAINED CLASSROOM INSTRUCTION FOR ELECTIVE COURSES, AND BECAUSE CITY HIGH SCHOOL DOES NOT ACCOMMODATE STUDENT'S DISABILITY NEEDS AT MEAL TIME IN THE SCHOOL CAFETERIA;

- WHETHER DCPS DENIED STUDENT A FAPE BY NOT DEVELOPING AND NOT IMPLEMENTING A BIP FOR STUDENT WHEN HE WAS PRESENTING WITH BEHAVIORAL CHALLENGES IN SY 2012-13; AND

- WHETHER DCPS DENIED STUDENT A FAPE BY LIMITING IN-SCHOOL ACCESS OF THE EDUCATIONAL CONSULTANT RETAINED BY PARENTS.

*See* Prehearing Order, Dec. 13, 2012.[2]

For relief, Petitioners seek an order for DCPS to fund Student's prospective enrollment at NON-PUBLIC SCHOOL for the remainder of the 2012-2013 school year, to develop a revised

[2] At the beginning of the hearing on January 16, 2013, Petitioners withdrew the additional pleaded issue of whether DCPS denied Student a FAPE by not providing information on his disabilities and IEP requirements to his general education teachers at the beginning of the 2011-2012 school year.

IEP for Student to be implemented at Non-Public School and to provide school transportation. In addition, Petitioners seek an award of compensatory education to provide Student the educational benefits that would have accrued from special education services, including speech-language services, which DCPS allegedly failed to provide him over the 2011-2012 and 2012-2013 school years.

## ADMISSIONS AND STIPULATIONS

At the due process hearing on January 16, 2013, Petitioners and DCPS stipulated on the record that Student requires a full-time Individualized Education Program ("IEP") for the remainder of the 2012-2013 school year. In its Response to the due process complaint, DCPS affirmatively alleged its agreement with Parents that Student "needs a different location of services to most effectively implement his IEP." *See* DCPS' Response to Administrative Due Process Complaint, p. 2. In addition, during the December 12, 2012 Prehearing Conference, DCPS, by its counsel, agreed with Petitioners that Student needs a location of services, different from CITY HIGH SCHOOL, where he is now enrolled, to most effectively implement his IEP.[3]

## FINDINGS OF FACT

After considering all of the evidence, as well as the arguments of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is an AGE resident of the District of Columbia, where he resides with his Parents and a sibling. Testimony of MOTHER.

2. For the 2012-2013 school year, Student is enrolled in the GRADE at City High School. For the 2011-2012 school year, he was enrolled in CITY MIDDLE SCHOOL.

[3] See Prehearing Order, *supra*, p. 3. At the end of the due process hearing, DCPS' counsel sought to withdraw this admission as a "mistake." The Prehearing Order required the parties to advise the Hearing Officer of any omission or misstatement within three business days of the Prehearing Order. DCPS did not timely notify the Hearing Officer of any misstatement in the Prehearing Order. Accordingly, DCPS will be held to this admission.

Testimony of Mother.

3. On March 28, 2012, Student was last found eligible for special education and related services. His primary disability classification is Multiple Disabilities ("MD"). Exhibit P-11.

4. Student has received special education services since he was in 4th Grade. Exhibit P-29. In a May 28, 2010 psychological evaluation, the examiner reported that then-current, survey-based, testing suggested that Student suffered from an attention disorder and weaknesses in executive functioning, believed to be the root of a specific learning disability. The 2010 psychological evaluation reported that Student's general cognitive ability was in the low-average range. His verbal comprehension and perceptional reasoning abilities were in the average range. His general working memory was in the low-average range, and his general processing speed abilities were in the average range. Student showed relative weaknesses in math reasoning and writing fluency. Student was reported to need support in learning coping skills to address his feeling of anxiety and to boost his self concept and self esteem. Exhibit P-27.

5. When Student entered City Middle School in 6th Grade, he was receiving 15 hours per week of Specialized Instruction and was provided a dedicated aide. At the end of his 6th Grade year, Specialized Instruction was reduced to 10 hours per week and the dedicated aide services were discontinued. Exhibit P-18.

6. Student's April 7, 2011 IEP at City Middle School provided 9 hours per week of Specialized Instruction in the general education setting and 30 minutes per week of Behavioral Support Services. Exhibit 8. For the 2010-2011 school year, Student earned satisfactory final grades for all of his courses, including four B's, two C's and one C-. Exhibit P-37.

7. Student's October 28, 2011 8th Grade IEP identified his primary disability as

Specific Learning Disability ("SLD"). The IEP reported that Student struggled to stay on-task, which negatively impacted his academic functioning. The IEP noted deficits in math calculation and reasoning skills, weakness in ability to comprehend grade-level reading material, weakness in written expression and lack of organization structure and depth in writing, and insufficient motivation to start and complete assignments. This IEP provided Student 10 hours per week of Specialized Instruction in the General Education setting and 120 minutes per month of Behavioral Support Services. Exhibit P-9.

8. In a December 2011 Functional Behavioral Assessment ("FBA"), Student's Multidisciplinary Team ("MDT team") at City Middle School reported that Student was demonstrating off-task behaviors in class that were impeding his completion of assignments, his focus on instruction and his performance on tests. The perceived function of the off-task behaviors was for Student to avoid difficult academic material. Student's low average cognitive functioning impeded his academic performance and his avoiding difficult academic tasks allowed him to avoid anxiety. His off-task behaviors were also considered to be a manifestation of his executive functioning deficits. The FBA also reported that Student scored 20 on the Beck Depression Inventory, which, according to the FBA, indicated borderline to moderate clinical depression. Exhibit P-27.

9. On December 7, 2011, Student's MDT team at City Middle School adopted a Behavior Intervention Plan ("BIP") for Student intended to assist him to remain on task during class time. The BIP was centered around a self-monitoring chart intended to assist Student with executive functioning challenges. Student was provided a chart form, for him and his teachers to check off in each class, to confirm whether he completed warm-ups for class, completed

classroom activities, and asked teachers for help. Exhibits P-10, P-54. The strategy was not effective. Testimony of MS History Teacher.

10. On January 3, 2012, Parents, by email, requested DCPS to fund Independent Educational Evaluations ("IEE") of Student, including neuropsychological, clinical psychological and language evaluations. Exhibit P-54.

11. Neuropsychologist conducted an IEE assessment at Student on January 30, 2012. Exhibit P-28. In her February 29, 2012 neuropsychological evaluation, Neuropsychologist reported that Student showed markedly impaired cognitive and behavioral functioning. He exhibited deficits in perceptual reasoning, processing speed, executive function and language function. In addition, he exhibited significant emotional dysregulation and difficulties with attention and concentration, which most likely exacerbated his cognitive deficits. Neuropsychologist reported that Student met the diagnostic criteria for Learning Disorder, Not Otherwise Specified; Attention Deficit Hyperactivity Disorder ("ADHD"), Predominantly Inattentive Type, severe; and Depressive Disorder, Not Otherwise Specified (underlying anxiety component). Neuropsychologist recommended that Student be transitioned to a structured classroom environment, with a smaller student to teacher ratio, for one on one instruction (3 students to 1 teacher) throughout the school day. She reported that this school environment was necessary for Student to develop the type of control strategies needed for more complex aspects of executive function and would be necessary for Student to learn better emotional control strategies, which are also critical to higher order cognitive functions. Exhibit P-28, Testimony of Neuropsychologist.

12. Neuropsychologist also recommended that it would be beneficial for Student to receive speech and language therapy to help him acquire the basic building blocks for receptive

and expressive language function, which is integral to the development of higher order cognitive functions. Exhibit P-28.

13. Student's MDT team at City Middle School met to consider the IEE neuropsychological evaluation on March 28, 2012 and revised Student's IEP. The team agreed that Student would benefit from smaller class size. Parents requested that Student be instructed in all subjects in a small, structured classroom setting, but City Middle School did not have this capability. Preferring that Student "graduate" from City Middle School with his peers, Parents requested that he remain at City Middle School for the rest of the 2011-2012 school year. Exhibits P-17, P-18.

14. At the end of the March 28, 2012 MDT team meeting, City Middle School representatives decided to offer Student pull-out services in History and Science. Testimony of MS History Teacher. Student's IEP was revised to provide 20 hours per week of Specialized Instruction for Math, English, History and Science, all outside of the general education setting. His Behavioral Support Services were increased from 120 minutes per month to 50 minutes per week. Exhibit P-11.

15. At the March 28, 2012 MDT meeting, Parents requested that Student be placed in a full-time, non-public, special education placement for the 2012-2013 school year. Exhibits P-17, P-18.

16. For the rest of the 2011-2012 school year, MS Special Education Teacher instructed Student 1:1, in the Assistant Principal's office, in History and Science. Student's performance in the 1:1 setting was inconsistent. At times he would learn the content. At other times, he would not work and did not learn. Testimony of MS Special Education Teacher.

17. On May 23, 2012, Student's MDT team convened at City Middle School to address the Parents' January 3, 2012 request for an IEE speech-language evaluation. MS SCHOOL PSYCHOLOGIST reported at the meeting that Student had difficulty with reading, language, and getting thoughts down on paper, which indicated to her a speech-language disability. Student's teachers observed that in class, it was taking Student a few moments to form his responses. Special Education Teacher noted Student's need to have instructions and directions repeated as well as the significant amount of time Student required to respond verbally to questions and to formulate his thoughts. The MDT team agreed that a DCPS speech pathologist would assess Student in pragmatic language, receptive and expressive language, and auditory processing. The team did not agree to Parents' request to fund an IEE speech-language evaluation. Exhibit P-19.

18. On June 29, 2012, DCPS SPEECH PATHOLOGIST conducted a speech-language assessment of Student. As of August 6, 2012, Parents had not received a copy of the speech-language assessment report. Exhibit P-54. At an IEP 30-day review meeting at City High School on September 27, 2013, it was discovered that the validity of the scoring on the DCPS speech-language evaluation report was suspect because an incorrect birthdate for Student had been used. Exhibit P-21. Ultimately, DCPS agreed to fund's Student's retesting by an independent speech language pathologist. Exhibit P-24.

19. INDEPENDENT SPEECH-LANGUAGE PATHOLOGIST assessed Student on November 21, 2012. In her findings, Independent Speech-Language Pathologist reported, *inter alia*, that Student presented with a mild expressive language disorder and a severe receptive language disorder, characterized by difficulty with oral formulation, difficulty following directions, difficulty with age-appropriate vocabulary, difficulty listening to auditorily presented

material, and difficulty answering questions regarding main idea, details, sequencing, and predicting. Student's receptive language score indicated that he may have significant difficulty following along in the classroom. Student also demonstrated difficulty with higher level language skills such as inferencing, sequencing and problem solving. Independent Speech-Language Pathologist diagnosed Student with a Mixed Receptive and Expressive Language Disorder. She recommended that Student would benefit from a small class size with additional adult support to help him with directions, concepts and higher level language skills. Exhibit P-31. Mother provided the report to DCPS on December 11, 2012. Exhibit P-53. As of the date of the due process hearing, DCPS had not instituted speech-language services for Student. Testimony of Mother.

20. On June 27, 2012, Parents made a written request to the Special Education Coordinators at City Middle School and City High School to place Student at Non-Public School, at public expense, for the 2012-2013 school year. As justification for this request, Parents stated that "Student needs a well thought out, coherent educational program for students with learning disabilities, attention and executive function challenges in a small non-public school with small classes, teachers who are trained and experienced working with students with language-based learning disabilities and individualization to meet his needs. He needs a small nurturing environment where he feels safe and where he will have the support he needs to address his executive functioning and social skills deficits. Exhibit P-54. The City High School Special Educational Coordinator spoke to Mother by telephone and explained that City High School had not yet had the opportunity to provide instruction to Student or determine his needs. She indicated that the IEP team at City High School would be convened for a 30-day review, to reassess Student's needs, after the start of the 2012-2013 school year. Testimony of HS Special

Education Coordinator.

21. Student enrolled in City High School for the 2012-2013 school year. He was placed in self-contained classes for all courses except for Army JROTC, Physical Education (Team Sports) and Art. Exhibit P-34, Testimony of HS Special Education Coordinator.

22. At a September 27, 2012 30-day review meeting of Student's City High School MDT team, HS Reading Teacher reported that Student was easily distracted and needed prompting to continue assignments. HS English Teacher reported that Student was out of focus, not 100%. There appeared to be a retention problem. His handwriting was illegible and his quiz grades reflected that he was not getting the information. A school social worker informed the team that Student's responses on a recently administered Ohio Mental Health Scale indicated that Student was clinically significant for depression and potential for self-injury. Exhibits P-20, P-21.

23. At an October 6, 2012 meeting of Student's City High School MDT team, Educational Consultant reiterated Parent's request that Student be placed at Non-Public School. HS Special Education Coordinator stated that DCPS wanted to gauge Student's progress for the school's first advisory period, which ended on November 2, 2012. Exhibits P-24, P-25.

24. On a November 2, 2012 City High School Report to Parents, Student was reported to be earning a B+ in World History, C+ in Algebra I, D in Reading Resources, C in Biology I, C in Army ROTC and B in Phys Ed (Team Sports). He was failing English I. Exhibit P-34.

25. At the November 20, 2012 resolution meeting in this case, Special Education Coordinator acknowledged that a letter from Student's physician indicated that Student's emotion condition was interfering with his functioning and because of Student's elevated levels

of anxiety, he may need a more restrictive learning environment than City High School can provide. Exhibit P-5.

26. On a December 7, 2012 Report to Parents, Student's teachers reported that he was at risk of failing English I and Algebra I. Reports from his other classes, except for Army JROTC, were also unsatisfactory. Exhibit P-35.

27. Non-Public School is a college preparatory school, grades 5 through 12, for students with language-based learning disabilities. The school's current enrollment is 65 students including 50 students in the high school. All students have a language-based disability and/or are coded for Other Health Impairment (ADHD or Attention Deficit Disorder). Every student at Non-Public School has an IEP or an individual program plan. Testimony of Director of Admissions.

28. In the high school classes at Non-Public School, there is a maximum of 8 students per classroom, taught by a single teacher. Reading classes are smaller. The school day begins with an advisory period with 4 students per class. In addition to core-content substantive classes, each Student is placed in a reading tutorial class for a full-period every day. Testimony of Director of Admissions.

29. All academic teachers at Non-Public School have a certificate in special education or are working toward certification. Some Non-Public School teachers, including the science teacher, math teacher and social studies teacher, are dual-certified in their academic subject content. Testimony of Director of Admissions.

30. Non-Public School also has, on staff, 2 full-time and 1 part-time social worker, a speech-language specialist and an part-time occupational therapist. A counselor is available to work with students on social skills. Testimony of Director of Admissions.

31. Non-Public School is located in suburban Maryland. The tuition cost is approximately $36,000 per year. Testimony of Director of Admissions.

32. Non-Public School has a full Certificate of Approval ("COA") issued by the D.C. Office of the State Superintendent of Education ("OSSE") to nonpublic schools and programs that meet federal and District standards. Testimony of Director of Admissions.

33. Student has been accepted for admission at Non-Public School for the remainder of the 2012-2013 school year. The admissions committee reviewed Student's IEP and educational records and felt he was an appropriate candidate for admission. Student made a 2-day visit to Non-Public School and was able to shadow students to classes. Following that visit, an acceptance letter was sent to Parents. When Student met Director of Admissions, Student was excited about attending Non-Public School. He was alert and wanted to participate in the program. Testimony of Director of Admissions.

## CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

### Burden of Proof

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioners in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

### Legal Standard for Prospective Non-Public Placement

Petitioners assert that Student is entitled to funding from DCPS for a private placement in this case, because DCPS allegedly violated the IDEA and denied Student a FAPE by failing to

provide him an appropriate IEP and placement for the 2011-2012 and 2012-2013 school years. The purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for future education." 20 U.S.C. § 1400(d)(1)(A). *Johnson v. District of Columbia*, 873 F.Supp.2d 382, 384 (D.D.C.2012). To achieve this purpose, the IDEA extends federal funding to the states to provide disabled schoolchildren with a FAPE. 20 U.S.C. § 1412(a)(1)(A). To provide a FAPE, the school district is obligated to devise an IEP for each eligible child, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *School Comm. of the Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir.1991); *District of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir.2010). Furthermore, if no public school is available to provide sufficient support services to ensure a FAPE for the child, then DCPS "must pay the costs of sending the child to an appropriate private school." *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 518-19 (D.C.Cir.2005) (quoting *Jenkins, supra*, 935 F.2d at 305); *Branham v. Gov't of the District of Columbia*, 427 F.3d 7, 8–9 (D.C. Cir.2005); *L.R.L. ex rel. Lomax v. District of Columbia*, 2012 WL 4789532 (D.D.C.2012).

The IDEA establishes detailed procedures for the development and review of the IEP, a plan designed by a team consisting of school district educators and administrators, education experts, and, of vital importance, the child's parents. The FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. District of Columbia,* 846 F.Supp.2d 197, 202

(D.D.C.2012) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).) The minimum standard set out by the Supreme Court in determining whether a child is receiving a FAPE, or the "basic floor of opportunity," is whether the child has "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005) (quoting *Rowley*, 458 U.S. at 201.) The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children. *Id.* at 198 (internal quotations and citations omitted.) Congress, however, "did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir.1985).

"The question of whether a public school placement is appropriate rests on '(1) whether DCPS has complied with IDEA's administrative procedures and (2) whether or not the IEP . . . was reasonably calculated to provide some educational benefit to [the student.]'" *J.N. v. District of Columbia*, 677 F.Supp.2d 314, 322 (D.D.C. 2010) (quoting *Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 80 (D.D.C.2004)) A hearing officer may award appropriate equitable relief, including a prospective private placement, when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia,* 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d 7, 11–12 (D.C.Cir.2005)).

## ANALYSIS

In this case, Petitioners have enumerated a rather comprehensive list of issues, which I

group, as follows, for analysis:

Failure to Evaluate:

- Whether DCPS failed to timely and properly evaluate Student in all areas of suspected disabilities, following Parents' repeated requests and recommendations for a speech-language evaluation beginning in December 2011;

- Whether DCPS denied Student a FAPE by failing to provide Parents timely access to a July 2012 speech-language evaluation report following a speech-language assessment of Student.

Failure to Develop Appropriate IEPs for the 2011-2012 School Year:

- Whether DCPS denied Student a FAPE by failing to provide him speech and language services as part of his IEP, beginning in the 2011-2012 school year;

- Whether Student was denied a FAPE by DCPS' October 2011 IEP, as amended in March 2012, because the IEP failed to provide all specialized instruction in an outside of general education setting, because the IEP lacked speech-language goals and services, because the IEP lacked a behavior intervention plan, because the IEP lacked goals and services to address Student's need to develop his executive functioning skills, because the IEP lacks goals and services to address Student's need for development of self-advocacy skills, because the IEP fails to identify Student's primary disability classification as MD, because the IEP lacks goals and services to assist Student to develop age-appropriate social skills, because the IEP lacks sufficient services to ensure Student gets to class on time and to provide redirection when he is inattentive, because the IEP lacks provision for hands-on small group learning activities and because the IEP lacks provision for Student's need for reading materials at his reading level or recorded materials;

- Whether DCPS denied Student a FAPE by not providing all of Student's 2011-2012 school year instruction, including for elective classes, in self-contained classrooms;

- Whether DCPS denied Student a FAPE by requiring him to take pre-Algebra in School Year 2011-2012 for which he was not adequately prepared;

- Whether DCPS denied Student a FAPE by failing to provide adequate supports and adjusted expectations in light of Student's executive functioning deficits, delays in reading, unrecognized language deficits, the severity of his disability and his immaturity.

- Whether DCPS denied Student a FAPE by not modifying his December 7, 2011 BIP to make that BIP effective from January 2012 through June 2012;

Failure to Provide Suitable IEP Placement for the 2012-2013 School Year:

- Whether DCPS failed to provide a suitable 2012-2013 placement for Student because City High School's only reading program, Reading 180, does not meet Student's needs, because City High School's block programming is inappropriate for Student based upon his disabilities, because City High School's large enrollment size precludes assurance of Student's safety in the building for after hours tutoring and provision of needed supervision between classes, because City High School does not provide self-contained classroom instruction for elective courses, and because City High School does not accommodate Student's disability needs at meal time in the school cafeteria;

- Whether DCPS denied Student a FAPE by not developing and not implementing a BIP for Student when he was presenting with behavioral challenges in SY 2012-2013.

Other Issues:

- Whether DCPS denied Student a FAPE by limiting in-school access of the educational consultant retained by Parents.

1. DID DCPS DENY STUDENT A FAPE BY FAILING TO CONDUCT A TIMELY SPEECH-LANGUAGE EVALUATION WHEN REQUESTED BY THE PARENTS?

On January 3, 2012, Parents requested DCPS to fund IEE reevaluations[4] of Student, including a neuropsychological evaluation and a language evaluation. Student's MDT team did not address Parents' request for a speech-language evaluation until May 23, 2012 at an MDT meeting. At that meeting, School Psychologist and Student's teachers reported their impressions which endorsed the likelihood that Student had a speech-language disability. Following repeated reminders from Parents, DCPS SPEECH PATHOLOGIST conducted a speech-language evaluation of Student on June 29, 2012. The results were not made available to Parents until

[4] Once a child has been fully evaluated, a decision has been rendered that a child is eligible for services under the Act, and the required services have been determined, any subsequent evaluation of a child, that assesses skills that were not previously assessed, would constitute a "reevaluation." *See* U.S. Dept. of Education, Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Rule, Analysis of Comments and Changes, 71 Fed. Reg. 46640 (August 14, 2006).

near the beginning of the 2012-2013 school year. Due to errors made by DCPS Speech Pathologist, a new, independent, speech-language evaluation had to be conducted, which was provided to DCPS in December 2012. In this second evaluation, INDEPENDENT SPEECH PATHOLOGIST found, *inter alia*, that Student has a severe receptive language disorder and recommended that he would benefit from a small class size with additional adult support to help him with directions, concepts and higher level language skills. Parents contend that Student was denied a FAPE by DCPS' delay in completing the speech-language evaluation and its failure to provide Student speech-language services. I agree.

Subject to limitations not applicable in this case, the IDEA requires that a Local Education Agency ("LEA") must ensure that a reevaluation of each child with a disability is conducted if the LEA determines that the child's related services needs warrant a reevaluation or if the child's parents request it. *See* 34 CFR § 300.303. In this case, Parents requested that Student be evaluated for speech language needs in January 2012. No action was taken until Student's MDT team endorsed his need for a speech-language evaluation at the May 23, 2012 MDT meeting. DCPS' failure to ensure that a speech-language assessment of Student was timely conducted was a procedural violation of the IDEA. *Cf., e.g., Kruvant v. District of Columbia*, 99 Fed. Appx. 232, 233, 44 IDELR 127 (D.C.Cir. 2004) (Failure to timely conduct initial eligibility evaluation). Procedural violations of the IDEA which result in loss of educational opportunity to the Student are actionable. *See, e.g., Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006). It is evident from teacher and staff reports at the May 23, 2012 MDT meeting, as confirmed by Independent Speech Pathologist's 2012 speech language assessment, that Student required speech-language pathology services to assist him to benefit from special education. *See* 34 CFR § 300.34(a). I find that DCPS' failure to evaluate student for a suspected speech-language disability, when requested by Parents in January 2012,

and its failure to timely implement speech-language services, resulted in a loss of educational opportunity and a denial of FAPE to Student.[5]

2. WAS STUDENT DENIED A FAPE BECAUSE DCPS' OCTOBER 28, 2011 AND MARCH 28, 2012 IEPS WERE NOT REASONABLY CALCULATED TO PROVIDE HIM EDUCATIONAL BENEFIT?

a. October 28, 2011 IEP

Petitioners' second set of issues pertain to Student's 2011-2012 school year IEPs, as developed on October 28, 2011 and revised on March 28, 2012. Parents contend that the October 28, 2011 IEP was inappropriate because (i) it omitted speech-language goals and services; (ii) it did not provide all specialized instruction in an outside of general education setting; (iii) it lacked a behavior intervention plan; (iv) it lacked goals and services to address Student's deficits in executive functioning, self-advocacy skills, and social skills; and (v) because the IEP failed to identify Student's primary disability classification as MD.

The question of whether an IEP is appropriate rests on "(1) whether DCPS has complied with IDEA's administrative procedures and (2) whether or not the IEP . . . was reasonably calculated to provide some educational benefit to [Student.]" *See J.N. v. District of Columbia*, 677 F.Supp.2d 314, 322 (D.D.C. 2010). Because Petitioner has not alleged that DCPS failed to comply with the IDEA's IEP administrative procedures, I proceed directly to the second prong of the inquiry. The measure and adequacy of an IEP is determined as of the time it is offered to the student. *See, e.g., S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008). "Judicial review of IEPs under the IDEA is meant to be largely prospective and to focus on the child's needs looking forward; courts thus ask whether, at the time an IEP was

[5] Having found that DCPS denied Student a FAPE by failing to implement speech-language services in the Spring of 2012, I do not reach Petitioners' separate issue of whether DCPS denied Student a FAPE by not providing them timely access to DCPS Speech-Language Pathologist's July 2012 evaluation report.

created, it was reasonably calculated to enable the child to receive educational benefits." *S.H. v. Fairfax Cnty. Bd. of Educ.*, 2012 WL 2366146, 13 (E.D. Va.2012). Therefore, the adequacy of the October 28, 2012 IEP must be examined as of the date it was developed, not from a later vantage point.

Student's last City Middle School IEP, prior to the October 28, 2011 IEP review, was developed on April 7, 2011. It provided Student 9 hours per week of Specialized Instruction, all in the general education setting. Under that IEP, Student apparently made educational progress, earning satisfactory final grades for all of his courses, including four B's, two C's and one C-. The evidence does not show that at the October 28, 2011 IEP meeting, either Parents or Student's teachers proposed significant IEP revisions. The October 28, 2011 IEP continued and marginally increased Student's special education services from the successful prior year IEP. I find that Parents have not established that, as of October 28, 2011, when this IEP was created, it was not reasonably calculated to provide Student educational benefit.

Parents also contend that the October 28, 2011 IEP was deficient because it did not include a Behavior Intervention Plan ("BIP"). The IDEA requires, in the case of a child whose behavior impedes his learning or that of others, that the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 20 U.S.C. § 1414(d)(3); 34 CFR § 300.324(a)(2)(i). At the October 28, 2011 IEP meeting, the IEP team decided to conduct a functional behavioral assessment ("FBA") of Student as a precursor to developing a BIP. The FBA was conducted in November 2011, followed by development of a BIP for Student on December 7, 2011. The IDEA does not require that a BIP be incorporated into a child's IEP. *See School Bd. School Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1011 (8th Cir. 2006). In this case, DCPS moved promptly to assess Student's behavior and develop a BIP for him. I find that Parents have not established that Student was denied a FAPE by DCPS' not

including a BIP in Student's October 28, 2011 IEP.

Parents also complain that City Middle School did not modify Student's BIP at a January 9, 2012 MDT meeting. At that meeting, Mother described the BIP as "not working." However MS Special Education Teacher stated that she needed more time with the BIP. The focus of the December 7, 2011 BIP was a check-off form for Student and his teachers to sign off on his behavior efforts. The form was changed on December 19, 2012 to make it more teacher-driven. I find that DCPS was not required by the IDEA to revise Student's BIP a second time, only one month after it was implemented. *Cf., e.g., Gill v. District of Columbia*, 770 F.Supp.2d 112, 116 (D.D.C.2011) (While DCPS is required to provide students with disabilities with a public education, IDEA does not guarantee any particular outcome or any particular level of education.)

Finally, I find that the IEP team's failure to classify Student as Multiply Disabled, prior to the March 28, 2012 IEP revision, did not deny Student a FAPE. Under 20 U.S.C. § 1412(a)(3)(B), LEAs are not required to classify IDEA-qualifying students into a specific category; rather the focus of the mandate is on adequacy of services:

> Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in section 1401 of this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this subchapter.

*Id.* The IDEA "charges a school with the responsibility of developing an appropriate education, not with coming up with a proper label." *Heather S. v. Wisconsin*, 125 F.3d 1045, 1055 (7th Cir.1997).

b. The March 28, 2012 IEP

Student's City Middle School IEP team met on March 28, 2012 to consider Neuropsychologist's February 29, 2012 report and to revise Student's IEP. At that meeting, Parents requested that Student be instructed in a small, structured setting for all classes, as was

recommended by Neuropsychologist. City Middle School was unable to provide this setting for all of Student's classes and Parents wanted Student to finish the school year there. DCPS agreed to provide Student 20 hours of Specialized Instruction, outside of the general education setting, for Math, English, Science and Social Studies. Because City Middle School did not have a resource room for Science and Social Studies, it arranged for MS Special Education Teacher to instruct Student 1:1 in these courses in an administrator's office. DCPS also increased Student's Behavioral Support Services to 50 minutes per week. Parents contend that the resulting March 28, 2012 IEP was inappropriate because it did not address Student's need to develop his executive functioning skills; did not provide goals and services to address Student's need for development of self-advocacy skills; did not provide goals and services to assist Student to develop age-appropriate social skills; did not provide services to ensure Student gets to class on time and to provide redirection when he is inattentive; and did not offer hands-on small group learning activities and reading materials at Student's reading level or recorded materials.

While an IEP under the IDEA must be reasonably calculated to furnish educational benefits to the child and must be developed with parental involvement, it does not have to include all the wishes of a child's parents. *See, e.g., Long v. District of Columbia*, 780 F.Supp.2d 49, 58 (D.D.C.2011), citing Rowley, 458 U.S. at 189–90; *Kerkam v. McKenzie*, 862 F.2d 884, 886 (D.C.Cir.1988) ("[P]roof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the Act.") Except for the significant omission to provide speech-language services, I find that the March 28, 2012 IEP has not been shown by Parents not to have been reasonably calculated to provide Student educational benefit. In fact, Student's grades for the 4th term of 2012-2013 school year, after the IEP class changes were implemented, improved significantly over his grades for the 2nd and 3rd term marking periods and Student was able to matriculate on schedule from middle school to high school. *See,*

*e.g.*, *Suggs v. District of Columbia*, 679 F.Supp.2d 43, 52 (D.D.C.2010) (Hearing Officer should consider whether child made adequate progress under his IEP.)

3. Did DCPS fail to provide Student a suitable IEP Placement for the 2012-2013 School Year?

On June 28, 2012, Parents made a formal written request to the special education coordinators at City Middle School and City High School to place Student, at public expense, at Non-Public School. HS Special Education Coordinator advised Mother by telephone that a decision on Student's non-public placement would be deferred until Student's MDT team convened for 30-day IEP review meeting after Student started at City High School. Student was enrolled in City High School for the 2012-2013 school year. He was placed in self-contained classes for all courses except for Army JROTC, Physical Education (Team Sports) and Art. Although it appears that City High School was implementing Student's March 28, 2012 IEP, he did not make adequate educational progress. At the November 20, 2012 resolution meeting in this case, HS Special Education Coordinator acknowledged that a letter from Student's physician indicated that Student's emotion condition was interfering with his functioning and because of Student's elevated levels of anxiety, he may need a more restrictive learning environment than City High School can provide. On a December 7, 2012 Report to Parents, Student's teachers reported that he was a risk of failing English I and Algebra I. Reports from his other classes, except for Army JROTC were also unsatisfactory. DCPS' Counsel stipulated at the due process hearing that Student now requires a full-time IEP for the remainder of the 2012-2013 school year.

At the due process hearing, DCPS Behavior Support Specialist testified that DCPS could place Student in a full-time self contained program at another District high school (CITY HIGH SCHOOL 2). However, prior to the hearing, DCPS did not identify this setting for Student. In

*Eley v. District of Columbia*, 2012 WL 3656471, 7 (D.D.C. 2012), U.S. Magistrate Judge Facciola discussed the importance of identifying a location, or particular school, where the IEP is to take place, citing *A.K. ex rel. J.K. v. Alexandria City School Board*, 484 F.3d 672, 681 (4th Cir.2007). In *A.K*, the Fourth Circuit Court of Appeals explained that "[t]he identification of a particular school in the IEP indicates to the parents that the school district has carefully considered and selected a school that will meet the unique needs of the student. Conversely, an offer that fails to identify the school at which special educational services are expected to be provided may not be sufficiently specific for the parents to effectively evaluate." *A.K., supra*, at 680.

Under the IDEA, a DCPS is required to ensure that a child's IEP Team revises the IEP, as appropriate, to address, *inter alia*, any lack of expected progress toward the IEP annual goals and in the general education curriculum. 34 CFR § 300.324(b). "An IEP may not be reasonably calculated to provide benefits if, for example, a child's social behavior or academic performance has deteriorated under his current educational program; the nature and effects of the child's disability have not been adequately monitored; or a particular service or environment not currently being offered to a child appears likely to resolve or at least ameliorate his educational difficulties." *See Suggs, supra* at 51-51 (citations omitted.) Even if the program at City High School 2 could fulfill Student's educational needs – which was not established at the due process hearing – the "courthouse steps" offer to place Student there came too late. *Cf.* 34 CFR § 300.508(e)(e) (LEA response to a due process complain shall include a description of other options that the IEP Team considered and the reasons why those options were rejected.) When, by the end of the 2012-2013 first advisory period, it had become evident that Student's behavior and academic performance had deteriorated at City High School and he needed a full-time special education placement, DCPS should have convened Student's IEP team to revise his IEP

and identify an appropriate school for Student to attend. DCPS' failure to do so denied Student a FAPE. *See Eley, supra* at 8.[6]

Parents also contend that DCPS denied Student a FAPE because it did not develop a new BIP for Student to address his 2012-2013 school year behavior challenges at City High School. I do not find that DCPS denied Student a FAPE by not developing and implementing a BIP for his placement at City High School, because the evidence shows that even with an updated BIP, City High School would be unable to provide sufficient support services to ensure a FAPE for Student.

4. Did DCPS deny Student a FAPE by limiting in-school access of the educational consultant retained by Parents?

Parents contend that DCPS denied Student a FAPE, because City High School would not allow Educational Consultant to observe Student in his classroom unless he signed a confidentiality agreement, which contained language which was unacceptable to Educational Consultant. The objected-to language provides,

> I understand and agree that I may not disclose information about any District of Columbia Public Schools' student obtained by me during the course of my observation(s) under any circumstances, as required by law[.]

Exhibit P-46. Educational Consultant refused to sign the agreement and did not observe Student at City High School[7]. The IDEA imposes an obligation on school districts to ensure that the parents of a disabled child be afforded the opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child and the provision of a free

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[6] Having found that DCPS denied Student a FAPE by not revising his IEP and identifying a new placement after Student's performance deteriorated at City High School, it is unnecessary to reach the other specific deficiencies alleged by Parents with regard to the City High School program, *e.g.*, sufficiency of the Read 180 program, the school's large enrollment, block programing, etc.

[7] Educational Consultant was able to observe student in the classroom when he was still at City Middle School. Testimony of Educational Advocate.

and appropriate public education to the child. 34 C.F.R. § 300.322. Other individuals who have knowledge or special expertise regarding the child, are also to be afforded the opportunity to participate in such meetings, when invited by the parents. 34 C.F.R. § 300.321(a)(6). However, nothing in the IDEA imposes any obligation on school districts to ensure that parents of a disabled child – or their designated experts – be afforded an opportunity to engage in civil court discovery-like practices on school premises during school hours, such as, classroom observations and teacher interviews designed to assess the appropriateness of a child's placement, or to assess the quality of an LEA's educational program. Even the IDEA's independent evaluation provision provides for an expert to evaluate whether a child has a disability and the nature and extent of the special education and related services that the child needs, not to evaluate the LEA's placement, or its educational programs. 34 C.F.R. §§ 300.15, 300.502. *See Matter of B.L.,* 31 IDELR 42 (Ore.St. Edu.Agency 1999). I find, therefore, that DCPS did not violate the IDEA or deny Student a FAPE by requiring Educational Consultant to sign its confidentiality agreement as a condition to making a classroom observation.

REMEDY

In this decision, I have found that DCPS denied Student a FAPE by failing to provide him speech-language services beginning in the second half of the 2011-2012 school year and by not timely revising Student's IEP and placement in the 2012-2013 school year. Petitioners' requested remedy is for DCPS to be ordered to fund Student's enrollment at Non-Public School for the remainder of the 2012-2013 school year and for Student to be awarded compensatory education.

Private Placement at Non-Public School

"Where a public school system has defaulted on its obligations under the IDEA, a private school placement is 'proper under the Act' if the education provided by said school is 'reasonably calculated to enable the child to receive educational benefits.'" *Wirta v. District of Columbia*, 859 F.Supp. 1, 5 (D.D.C. 1994), quoting *Rowley, supra*, 458 U.S. at 176, 102 S.Ct. at 3034. *See, also, e.g., N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008). An award of private-school placement is "prospective relief aimed at ensuring that the child receives tomorrow the education required by IDEA." *Branham v. Gov't of the District of Columbia*, 427 F.3d 7, 11 (D.C. Cir.2005).

In this case, I have found that DCPS denied Student a FAPE, by failing to convene Student's IEP team to revise his IEP and identify an appropriate new placement for Student, when it became evident that Student's behavior and performance had deteriorated at City High School and that he required a full-time IEP. A private school placement award is, therefore, proper under the IDEA, provided the education offered by the private school is reasonably calculated to enable Student to receive educational benefits. Placement awards must be tailored to meet the child's specific needs. *Branham, supra*, at 9. To inform this individualized assessment, courts have identified a set of considerations "relevant" to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. *Id.* at 12. Pursuant to the *Branham* guidance, I will address each of these considerations in turn.

a. Nature and Severity of Student's Disability

The undisputed evidence in this case establishes that Student's primary disability is MD

and that he requires full-time special education programing in an outside-of-general education setting.

b. Student's Specialized Educational Needs

According to Educational Consultant, Student presents with reading comprehension deficits exacerbated by his speech-language disorder. Student is overwhelmed by the loud, busy environment at City High School with its large student population. He requires a small, all special education, school that can provide him specialized instruction and related services in an integrated program. Student also needs to be placed with a peer group at his academic level.

c. Link between Student's Needs and the Services Offered by Private School

Non-Public School is a small, all special education, school. It offers a 1:8 student-teacher ratio, with smaller reading tutorial classes. All academic teachers are certified in special education or are working toward certification. Student will be able to receive speech-language services from a specialist on staff and behavioral support counseling.

d. Cost of Placement at Private School

Non-Public School has a full Certificate of Approval from the D.C. Office of the State Superintendent of Education. The tuition is around $36,000 per year. DCPS offered no evidence that tuition expenses at this private school are higher than costs at other OSSE-approved nonpublic day schools serving MD students.

e. Least Restrictive Environment

The IDEA requires school districts to place disabled children in the least restrictive environment possible. *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) (citing 20 U.S.C. § 1412(a)(5); 34 C.F.R. 300.550; DCMR tit. 5, § 3011 (2006)). The unrefuted testimony in the present case established that Student requires a full-time education program in a small school environment. DCPS has not identified a viable, appropriate

alternative placement to Non-Public School, which would still allow Student to interact at school with his non-disabled peers. *See Board of Educ. of Murphysboro Community Unit School Dist. No. 186 v. Illinois State Bd. of Educ.*, 41 F.3d 1162, 1168 (7th Cir.1994) (Court not required to locate another school that would satisfy the least restrictive alternative requirement based on the entire pool of schools available, but rather was required simply to determine whether that one available choice would provide an appropriate education.)

Based upon the foregoing, I conclude that the education that would be provided to Student by Non-Public School is reasonably calculated to enable him to receive educational benefits and that this private placement is proper under the IDEA.

Compensatory Education

Once a student has established a denial of the education guaranteed by the IDEA, the hearing officer must undertake "a fact-specific exercise of discretion" designed to identify those compensatory services that will compensate the student for that denial. Compensatory education is educational service that is intended to compensate a disabled student who has been denied the individualized education guaranteed by the IDEA. Compensatory education is designed to place disabled children in the same position they would have occupied but for the school district's violations of IDEA. The proper amount of compensatory education, if any, depends upon how much more progress a child might have shown if he had received the required special education services and the type and amount of services that would place the child in the same position he would have occupied but for the LEA's violations of the IDEA. *See Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011) (citing *Reid v. District of Columbia*, *supra*, 401 F.3d at 518.)

Parents' expert, Educational Consultant, opined that Student requires 1:1 tutoring services to compensate for DCPS' not providing Full-time Specialized Instruction, outside of the

general education setting, since the beginning of the 2011-2012 school year. He recommends that Student receive 4 hours per day of 1:1 Extended School Year ("ESY") tutoring in July/August 2013. Assuming that Educational Consultant's recommendation was based upon DCPS' 6-week summer school calendar, his recommended award totals 120 hours of 1:1 tutoring. Although I found Educational Consultant to be a credible witness, he based his opinion upon his conclusion that DCPS did not offer Student appropriate IEPs for six advisory periods, including four advisory periods in school year 2011-2012 and two advisory periods in school year 2012-2013. I have found that Parents did not establish that either the October 28, 2011 IEP or the March 28, 2012 IEP was not appropriate, except for the omission of speech-language services in the latter. I do find that Student was denied a FAPE when DCPS did not timely revise his IEP and placement after the end of the first advisory period in school year 2012-2013, and that 1:1 tutoring in an appropriate equitable remedy. Therefore, instead of 120 hours of tutoring, as recommended by Educational Consultant, I will order DCPS to provide Student 20 hours of 1:1 academic tutoring.

Educational Consultant also opined that Student should be provided eight 1-hour speech-language sessions to compensate for his not receiving speech-language services for 36 weeks in 2011-2012 and 18 weeks in the current school year. He opined that since Student should receive speech-language services at Non-Public School for the remainder of 2012-2013 school year, providing additional speech-language services to Student during the regular school year would be counter-productive. He recommended that Student be provided 8 1-hour sessions of compensatory speech-language services during the summer period, which would allow Student to catch up on material in which he had not made meaningful progress. Student's City Middle School MDT team convened on March 28, 2012 to review the IEE neuropsychological assessment. I find that if DCPS had promptly responded to Parents' January 2012 to conduct a

speech-language evaluation, the MDT team should have included speech language services in the March 28, 2012 revised IEP. Student should therefore be compensated for missing approximately 20 weeks of speech-language services in school years 2011-2012 and 2012-2013. Accepting Educational Consultant's opinion that providing additional speech-language services during the school year would be counterproductive, I will grant Parents' request for a compensatory award of 8 1-hour speech-language sessions during the summer of 2013.

ORDER

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

1. DCPS shall place Student, at public expense, at Non-Public School for the remainder of the 2012-2013 school year and shall, within 10 school days of this order, convene Student's IEP team to revise his IEP in accordance with this decision and to effect Student's placement at Non-Public School. The revised IEP shall, *inter alia*, provide for full-time Specialized Instruction in an outside of general education setting and for the provision of speech-language services as a related service. DCPS shall ensure that a Non-Public School representative attends the IEP meeting pursuant to 34 CFR § 300.325(a)(2);

2. If requested by Petitioners, DCPS shall provide school transportation for Student in accordance with DCPS school transportation policy;

3. DCPS shall provide Student 20 hours of 1:1 academic tutoring during the 2013 summer break as compensatory education for its failure to develop an appropriate revised IEP for Student after the first advisory period in school year 2012-2013;

4. DCPS shall provide Student eight 1-hour speech-language sessions during the 2013 summer break as compensatory education for educational harm resulting from its failure to assess Student's speech-language needs and to institute speech-language services fallowing Parent's January 2012 evaluation request; and

5. All other relief requested by the parties herein is denied.

Date: January 29, 2013

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state 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 Hearing Officer Determination in accordance with 20 U.S.C. §1415(I).