



Petitioner alleges that DCPS has denied Student a free appropriate public education (“FAPE”) by failing to provide an appropriate individualized education program (“IEP”) and placement for the Student as of March 14, 2012, as set forth further under the statement of Issues below.<sup>2</sup> DCPS filed a timely Response to the Complaint on February 28, 2013, which denies the allegations and asserts that the IEP and placement are appropriate.

The parties reported that a resolution meeting was held that did not result in an agreement. The parties also did not agree to end the 30-day resolution period early. The resolution period thus ended, and the original 45-day timeline for issuance of the Hearing Officer Determination (“HOD”) began, on March 22, 2013.

On April 4, 2013, a Prehearing Conference (“PHC”) was held to discuss and clarify the issues and requested relief. At the PHC, the parties reported that an annual IEP meeting was held on February 28, 2013, which did not result in any substantial changes to the IEP. The parties stipulated and agreed that Petitioner did not need to amend the Complaint to present any new issues since the 2/28/2013 IEP did not affect the IEP in the respects challenged by Petitioner. The parties also agreed to schedule the due process hearing for April 18, 2013. A Prehearing Order (“PHO”) was issued on April 5, 2013.

Petitioner then filed her five-day disclosures, as required, by April 11, 2013; DCPS requested a one-day extension to file its disclosures due to computer problems experienced in producing the disclosures. The parties ultimately agreed

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<sup>2</sup> Petitioner also claimed that DCPS failed to make an appropriate manifestation review decision, but withdrew this claim in writing on March 8, 2013.

to reschedule the due process hearing for April 26, 2013, and to extend the five-day disclosure date to April 19, 2013. Further disclosures were filed in a timely manner. Thereafter, a consent motion for continuance was granted by the Chief Hearing Officer to reschedule the hearing to May 17, 2013, and to extend the HOD timeline to May 27, 2013.

The Due Process Hearing was held in Hearing Room 2006 on May 17, 2013. Petitioner elected for the hearing to be closed. At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence without objection:

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

**Respondent's Exhibits: R-1 through R-6.**

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

**Petitioner's Witnesses:** (1) Student; (2) Parent-Petitioner; (3) Educational Advocate; and (4) Admissions Director, Private School.

**Respondent's Witnesses:** Special Education Teacher/Case Manager.

Oral closing arguments were presented on the record at the hearing.

## **II. JURISDICTION**

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* 5-E DCMR §§ 3029, 3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("SOP"). The statutory HOD deadline is May 27, 2013.

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

As noted in the PHO, the issues presented for determination at hearing are:

- 1. Failure to Provide Appropriate IEP and/or Placement (3/14/2012)** — Did DCPS deny the Student a FAPE by failing to provide an appropriate IEP (*i.e.*, one that was reasonably calculated to confer educational benefit) and/or educational placement for the Student as of **March 14, 2012**, in that he requires a **full-time, outside general education** program and placement?
- 2. Failure to Review and Revise the Student's IEP (end of 2011-12 SY)** — Assuming *arguendo* that the IEP and placement were appropriate as of March 14, 2012, did DCPS fail to review and revise the 3/14/2012 IEP in light of Student's academic and behavioral problems as of the end of the 2011-12 school year?

> Petitioner alleges that this failure constituted a substantive denial of FAPE, as well as a procedural violation of the IDEA; *see* 34 CFR Sections 300.323-24. If the Hearing Officer determines that such failure (if any) amounts to a procedural violation only, Petitioner must prove one or more of the substantive effects listed in 34 C.F.R. 300.513 (a) (2). *See Complaint* ¶ 17; *Prehearing Order*, ¶ 5.<sup>3</sup>

Petitioner requests that DCPS be ordered to: (a) fund placement and provide transportation to Private School; (b) fund an independent comprehensive psychological evaluation and an independent functional behavioral assessment (“FBA”); (c) convene a meeting of Student's multi-disciplinary Team (“MDT”) to review assessments and revise IEP; and (d) award appropriate compensatory education services for the period of FAPE denial (*i.e.*, 3/14/2012 to date) in the form of 1:1 academic tutoring and vocational training.

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<sup>3</sup> As noted above, the parties have stipulated and agreed that Petitioner did not need to amend the Complaint to present any new issues under the 2/28/2013 IEP, since that annual review did not affect the IEP in the respects challenged by Petitioner. It merely adds a third point in time for the same alleged denial of FAPE.

As the party seeking relief, Petitioner was required to proceed first at the hearing and carried the burden of proof on the issues specified above. “Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a Free Appropriate Public Education (FAPE).” 5-E DCMR §3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). The hearing officer’s determination is based on the preponderance of the evidence standard, which generally requires sufficient evidence to make it more likely than not that the proposition sought to be proved is true.

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

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

1. Student is a 17-year old student who resides in the District of Columbia with Petitioner, who is his parent. *See Pet. Test.; Student Test.; P-1.*
2. Student has been determined to be eligible for special education and related services as a child with a disability under the IDEA. His primary disability is Other Health Impairment (“OHI”), due to problems related to his Attention Deficit Hyperactivity Disorder (“ADHD”) condition. He has received special education since the 5<sup>th</sup> grade. *See P-2; P-8; Pet. Test.*<sup>4</sup>
3. During the 2011-12 and 2012-13 school years, Student has attended District Charter. *Pet. Test.; Student Test.*

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<sup>4</sup> Student had previously been classified as having a Specific Learning Disability, but this was changed to OHI as a result of re-evaluation in 2010. *See P-8.* Both IEPs at issue in this case classify Student as having OHI. *See P-2; P-3.*

4. On or about March 14, 2012, DCPS convened a meeting of the Student's MDT/IEP Team at District Charter to review Student's academic and behavioral performances in order to conduct an annual review of his IEP. *P 4-1* (3/14/2012 meeting notes). Participants included Petitioner, Special Education Coordinator, Special Education Case Manager, General Education Teacher, Social Worker, and Student's Dedicated Aide. *Id.*
5. At the March 14, 2012 meeting, the MDT/IEP Team determined that the Student remained eligible for special education services as a student with an OHI, and it proceeded to develop an IEP. *P 4-2.*
6. The Student's IEP developed March 14, 2012 provided 20 hours per week of specialized instruction in a General Education setting, and 1.5 hours per week of behavioral support services (counseling) in an Outside General Education setting (one hour of direct services, and 30 minutes of consultative services). *P 3-6; P 4-3.* The IEP also provided the full-time support of a dedicated aide in the General Education setting. *Id.* Student's projected exit category was "H.S, Diploma," with a projected graduation date of 6/20/2014. *P 3-14.*
7. During the 2011-12 school year, Student thought he "did okay" under the 3/14/2012 IEP. *Student Test.* He testified that he generally understood the material, had an "okay relationship" with his teachers, and thought the special education assistance he received in the classroom was helpful. *Id.* He also testified that the dedicated aide support "worked out for me last year," as the aide helped him do his work in classes. *Id.* He would watch Student and tell him when to write down teacher instructions; Student could also ask him questions when he needed more help. *Id.*
8. At the end of the 2011-12 school year, Student nevertheless received failing grades in math, science, history, and foreign language, and he was retained

in the 10<sup>th</sup> grade. *See P-5* (2011-12 Final Report Card). He also earned a B in Language and Composition II, a C+ in English II, and a B in the Collegiate Prep Advisory course. *Id. See also Pet. Test.; Student Test.*<sup>5</sup>

9. During the fall semester of the 2012-13 school year, Student's academic struggles increased. *See Student Test.* On or about November 16, 2012, District Charter sent a notice to Petitioner informing her that Student "is struggling to achieve the academic goals and targets set for him." *P-7.* Student was formally placed on academic probation due to his performance on the MAP (Measure of Academic Progress) tests for both Math and Reading. *Id.* Student scored 205 on the Math MAP and 198 on the Reading MAP. Each score was "below grade level and requires academic support." *Id.* The 11/16/2012 notice also informed Petitioner that Student had not scored passing grades for six courses during the 1<sup>st</sup> Quarter. *Id.*
10. As the 2012-13 school year has progressed, Student has sought extra help after school and on Saturday mornings, as well as occasionally during lunch, in additional general education sessions offered by District Charter. *Student Test.; Sp. Ed. Teacher Test.* He generally likes his teachers and gets along particularly well with his English teacher and advisor, who helps him to get more organized (*e.g.*, by using folders and written plans). *Student Test.* Student also has a new dedicated aide, which he said is "working out okay for the most part." *Id.* Significant progress has also been reported

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<sup>5</sup> During the 2011-12 school year, Student was also cited for several behavioral infractions and was suspended three of four times. *See Student Test.* On or about May 22, 2012, DCPS convened a meeting of the Student's MDT/IEP Team at District Charter to review Student's suspension for a recent 5/17/2012 altercation with another student and to conduct a manifestation determination review for the incident. *See R-4.* Due to what was termed an "administrative miscommunication," Student's suspension was recalled, and he was reinstated as of 5/18/2012. *R 4-2.* The MDT also determined that the behavior leading to Student's suspension was not a manifestation of his disability. *Id.*

behaviorally, as “[t]his year there has been a dramatic decrease in the number of times [Student] has been referred to discipline staff.” *R 3-6*.

11. On or about February 28, 2013, subsequent to the filing of the instant Complaint, DCPS convened a meeting of the Student’s MDT/IEP Team to conduct another annual review of the IEP. *See P-2; R-3*. Like the 3/14/2012 IEP, Student’s IEP developed 2/28/2013 provides 20 hours per week of specialized instruction in a General Education setting, and 1.5 hours per week of behavioral support services (counseling) in an Outside General Education setting (one hour of direct services, and 30 minutes of consultative services). *P 2-9*. The IEP also provides the full-time support of a dedicated aide in the General Education setting. *Id.*
12. At the February 28, 2013, meeting, the MDT/IEP Team determined that Student’s level of services should remain the same “[b]ased upon the teacher surveys indicating that ***lack of work completion*** is the primary reason for [Student’s] current academic performance.” *R 3-6* (emphasis added). *See also R 3-5* (“Submitting completed assignments in his classes is the greatest obstacle to [Student’s] progress in the general education curriculum.”). The meeting notes indicate that Parent agreed with this determination. *Id.*; *see also Spec. Ed. Teacher Test*. At the meeting, the Special Education Teacher summarized the teacher surveys as follows (*R 3-4*):

“[Student]’s teachers all reported that lack of work completion is the primary reason for [Student]’s grades. No teachers (with the exception of [Student]’s Geometry teachers) expressed in the surveys that [Student]’s grades are related to deficits in his content knowledge or skills. Most teachers reported that [Student] has issues staying focused in class, but all teachers listed interventions (i.e. scholar conference, change of seating, phone call home,

positive points) that have been effective in helping [Student] maintain focus.”<sup>6</sup>

13. The 2/28/2013 MDT also addressed the continued need for a dedicated aide, as follows: “Based on teacher reports and classroom observations, [Student] continues to require the part-time support of a dedicated aide to address his off-task behaviors during class and to provide [Student] with support in the areas of focus and organization. [Special Education Teacher] meets weekly with [Student]’s aide to monitor [Student]’s progress in the classroom.” *R 3-6. See also Sp. Ed. Teacher Test.; R 3-5 (Social Worker: Student “needs to continue to develop strategies to stay focused in class and increase his work completion”); R-5 (2/28/2013 IEP Meeting Teacher Surveys).*
14. In March 2013, while this case was pending, DCPS conducted a comprehensive psychological re-evaluation of Student at parent’s request, and the School Psychologist prepared a written report on April 11, 2013. *See P-19.* The re-evaluation collected updated cognitive, educational, and behavioral information as it pertains to his present levels of functioning in

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<sup>6</sup> Specific teacher comments included the following: Student’s Algebra teacher reported that he “has a much better grasp of the content and his algebra skills have shown tremendous improvement”; and that he “is also exhibiting less behavior problems during class than last year.” *R 3-2.* She further reported that “the major obstacle to [Student’s] achievement is that he frequently does not turn in finished assignments. [Student] will work successfully on assignments during class, but when he takes these half-finished assignments home to complete they often never get turned in.” *Id.* As a result, the teacher has allowed Student to keep materials in the classroom and “has modified her homework assignments so that [Student] gets one homework sheet per week that is focused on reinforcing and practicing basic math skills (i.e., fractions).” *Id.* Student’s Geometry teacher made similar comments about his ability to do classroom assignments, but noted that he is “often off-task during class” and has difficulty focusing; he is currently in 8<sup>th</sup> period for Geometry, where he can receive small group and one-on-one attention.” *R 3-2 – R 3-3.* In English and History, teachers reported that he generally understood the material, but that he “is earning failing grades ... because he does not follow through to submit missing assignments.” *R 3-3. See also id.* (Biology: Student “has difficulties with completing and submitting assignments that are started in class.”); *R 3-4* (Spanish: Student “needs frequent check-ins during class to stay focused”); *R-5 (2/28/2013 Teacher Surveys).*

school. *P 19-1*. The re-evaluation report noted Student's "history of academic struggles due to significant symptoms of ADHD that he experiences in the school setting which have been noted to interfere with his learning process"; and that Student "continues to show symptoms of inattention that interfere with his executive functioning and independence."  
*Id.*

15. Overall, the 4/11/2013 report summarized the findings of Student's re-evaluation as follows (*R 19-10 – R 19-11*):

“[Student] showed strong memory abilities for both verbal and nonverbal stimuli. His lowest performing area was scored on the VIX [Verbal Ability on Reynolds Intellectual Assessment System], which indicates lower vocabulary acquisition, use of knowledge through verbal explanation, understanding of complex concepts when being spoken with in conversation or directions. He has slightly lower analytical abilities than his same-age peers as scored on the NIX. ***He may at times require more explanation of how to use what he has learned previously to accommodate new information or more complex information.*** At times, he may demonstrate that information is too ambiguous or incomplete and would need further explanation for how to apply the information. ***He is most significantly impacted in the areas of reading comprehension, math reasoning, and written language.*** Difficulty with certain math operations when performing calculation tasks is also evident. ***His learning is greatly impacted by symptoms of ADHD.***”

16. On or about April 12, 2013, DCPS convened a meeting of Student's MDT/IEP Team at District Charter to review Student's comprehensive psychological re-evaluation and to conduct a triennial eligibility review. *See R-6* (MDT meeting notes). Based upon the results of the re-evaluation, Student was determined to continue to qualify for special education and related services as a child with OHI due to his ADHD condition. *R 6-4; P-18* (4/12/2013 Final Eligibility Determination Report). The MDT reviewed the DCPS' School Psychologist's finding that Student "exhibits symptoms in

school consistent with his present code of OHI due to ADHD-Combined type (inattention, hyperactivity). *R 6-3.*<sup>7</sup> The MDT also reviewed the DCPS' School Psychologist's finding that Student's lowest performing areas of academic achievement were reading comprehension, math reasoning, and written expression." *R 6-3.*<sup>8</sup>

17. At the April 12, 2013 meeting, Petitioner and Student's educational advocate requested that District Charter and DCPS take the following actions: (a) conduct an FBA and develop an appropriate BIP to address Student's difficulty in completing assignments; (b) revise his IEP to provide a full-time, outside general education program because they believe that inclusion services are not working effectively for him; (c) discuss compensatory education services for the period beginning 3/14/2012; and (d) consider credit recovery to enable him to graduate. *See EA Test.*
18. Through the 3d Quarter of the 2012-13 school year, Student has earned grades of C in English III, Health, and Collegiate Prep Advisory, but F's in all other courses. *See P-20.* Student can still earn passing grades if he can demonstrate mastery of the "learning outcomes" specified for each course by the end of the 4<sup>th</sup> Quarter. *Sp. Ed. Teacher Test.* The learning outcomes

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<sup>7</sup> DCPS' School Psychologist reported (*inter alia*) that Student "continues to struggle with sustained attention and mental effort when performing long or difficult tasks"; that teacher raters agreed that Student "struggles with concentration in school and he has a difficult time keeping his mind on task for long periods of time"; that when she observed him in class, Student "was very distracted by his seat partner and engaged in frequent off-task conversation"; and that she "supports the parent's recommendation for [Student] to have timed, short-term goals to assist him in becoming independent when completing his work". *R 6-2 – R 6-4.*

<sup>8</sup> On the Kaufman Test of Educational Achievement, 2d Edition ("KTEA-II"), Student had an Index Score of 78 in Reading Comprehension (GE = 6.5); an Index Score of 78 on Math Concepts & Applications (GE = 4.1); and an Index Score of 80 on Written Expression (GE = 4.2). *P 19-12.* Letter & Word Recognition (101; GE 12.6) and Spelling (123; GE 12.2) were found to be areas of strength. *Id.*

generally comprise 75% of Student's grade this school year (up from 55% in SY 2011-12) under District Charter's "outcome-based assessment" grading system. *Id.*

19. Student has three adults in most or all of his classes – a general education teacher, a special education teacher, and his dedicated aide. *See Pet. Test.*
20. Student's attendance record has generally been good this school year, and absences have not adversely affected his academic performance. *See R 5-; R-2; Sp. Ed. Teacher Test.*

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

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

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

The "primary vehicle" for implementing the goals of the IDEA is the IEP, which the statute "mandates for each child." *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (*citing Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). *See* 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1. "The IEP must, at a minimum, `provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Reid v. District of Columbia*, 401 F. 3d 516, 519 (D.C. Cir. 2005), *quoting Board of Education v. Rowley*, 458 U.S. 176, 200, 207 (1982). *See also Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988); *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009) ("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.’). 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 Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 29 (1<sup>st</sup> Cir. 2008) (IEP viewed “as a snapshot, not a retrospective”). However, an LEA also must periodically update and revise an IEP “in response to new information regarding the child’s performance, behavior, and disabilities.” *Maynard v. District of Columbia*, 54 IDELR 158 (D.D.C. 2010), *slip op. at p. 6*; *see* 34 C.F.R. 300.324.

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

Educational placement under the IDEA must be “based on the child’s IEP.” 34 C.F.R. 300.116 (b) (2). DCPS must also ensure that its placement decision is made in conformity with the Least Restrictive Environment (“LRE”) provisions of the IDEA. *See* 34 C.F.R. §§ 300.114-300.116. The IDEA requires each public agency to ensure that “[t]o the maximum extent appropriate, children with disabilities ... are educated with children who are nondisabled,” and that “removal of children with disabilities from the regular educational environment occurs only if the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. §1412 (a) (5); 34 C.F.R. §300.114 (a) (2). *See also* DCMR §5-E3011.1; *e.g.*, *Daniel R.R. v. El Paso*, 874 F.2d 1036 (5<sup>th</sup> Cir. 1989).

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

Petitioner claims that Student “requires a *full-time, out of general education* program and placement” (*P* 1-4; emphasis added), rather than an *inclusion* program, in order to address his unique special education needs resulting from his OHI/ADHD disability.<sup>9</sup> Under the PHO issues and as confirmed at hearing, Petitioner alleges that Student’s need for a full-time, outside general education program should have been apparent to DCPS at three different points in time: (1) when the *March 14, 2012 IEP* was developed; (2) as of the *end of the 2011-12 school year*, given Student’s academic and behavioral problems under the 3/14/2012 IEP; and (3) when the *February 28, 2013 IEP* was developed.

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<sup>9</sup> This is the only basis on which Petitioner challenges the IEPs or placement as not being reasonably calculated to confer meaningful educational benefit under *Rowley*. For example, she does not challenge any goals, accommodations, or other specific elements of the IEPs.

For the reasons discussed herein, the Hearing Officer concludes that Petitioner failed to prove by a preponderance of the evidence that Student required a *full-time, out of general education* program at any of the three alleged points in time. However, Petitioner did prove that, at least *as of February 2013*, Student needs additional academic support in the form of some specialized instruction outside the general education classroom (beyond the inclusion support specified in his IEP), and thus that the 2/28/2013 IEP is not reasonably calculated to confer meaningful educational benefit to this extent. Accordingly, the Hearing Officer finds that Petitioner has met her burden of proof *in part*.<sup>10</sup>

As noted above, the IDEA requires each public agency to ensure that “[t]o the maximum extent appropriate, children with disabilities ... are educated with children who are nondisabled,” and that “removal of children with disabilities from the regular educational environment occurs only if the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. §1412 (a) (5); 34 C.F.R. §300.114 (a) (2). *See also* DCMR §5-E3011.1; *e.g.*, *Daniel R.R. v. El Paso*, 874 F.2d 1036 (5<sup>th</sup> Cir. 1989). In this case, Petitioner did not establish that Student’s OHI/ADHD disability is so severe that he cannot be educated primarily in regular classes with supplementary aids and services, including his dedicated aide. Thus, Petitioner has not shown that a full-time, outside general education program – much less, a special therapeutic school – is Student’s LRE. Petitioner has also failed to prove that District Charter is unable to implement the

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<sup>10</sup> The Hearing Officer finds that the evidence was insufficient to prove that such additional academic support was required to provide educational benefit as of either March 14, 2012, or June 2012, based on the information available to the IEP Team at those points in time. During the 2012-13 school year, Student’s academic performance appeared to worsen, resulting in academic probation in November 2012, and additional evaluative data was obtained supporting the need for increased intervention.

requirements of Student's IEP, even if it were revised as discussed below to include some specialized instructional support outside the general education classroom.

At the same time, a preponderance of the evidence indicates that Student's LRE is at least a combination setting. The evidence shows that use of a dedicated aide has been successful in addressing much of Student's off-task behaviors during class and in providing support in focus and organization within the general education setting (along with other measures such as seating changes). This appears to have resulted in significant behavioral improvements that can help Student access the general curriculum in an inclusion environment. But more direct instructional intervention and support appears to be needed to produce the necessary academic improvements. While an IEP does not guarantee success, the evidence strongly suggests that Student would benefit from some specialized instructional support in a pull-out setting to reinforce teaching in the general education classroom and to address his areas of greatest academic weakness.

As confirmed in the recent re-evaluation, Student's learning is greatly impacted by his ADHD condition. Student continues to struggle with sustained attention and mental effort when performing long or difficult tasks; completing and submitting assignments poses a very significant obstacle to his progress in the general education curriculum; and he has struggled more this school year than the previous school year. *See Findings, ¶¶ 14-16; Student Test.; Sp. Ed. Teacher Test.* Moreover, this is not a case where a student fails to avail himself or herself of educational opportunities afforded under an IEP. By all accounts, Student attends school regularly and also participates in voluntary after-school and weekend help sessions. But Student is still failing most of his courses.

The evidence shows that the primary reasons for Student’s continued failing grades are his “lack of work completion” (*R 3-6*), as well as his need for “more explanation of how to use what he has learned previously to accommodate new information or more complex information” (*P 19-10*) – both of which appear to be directly related to the challenges posed by his disability, and likely could be successfully addressed in one-on-one or small-group specialized instruction outside of general education. *See Findings*, ¶¶ 12-15. Such additional support cannot be provided solely by a general education teacher as part of general make-up or tutoring time, such as 8<sup>th</sup> period;<sup>11</sup> and in any event must be specified in the written IEP document.<sup>12</sup> Student appears to be most significantly impacted in the areas of reading comprehension, math reasoning, and written language. Hence, pull-out specialized instruction should focus on these areas, for a minimum of one to two hours per day (5-10 hours per week).

### **C. Appropriate Relief**

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

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<sup>11</sup> *See, e.g., R 5-4* (2/25/2013 Spanish teacher comment that she “was struggling to support him in 8<sup>th</sup> period where, if I am not standing over his shoulder, he does not complete much work independently as he gets distracted, but I did not receive follow up on ideas for supporting him in this way. I know I am failing to meet [Student]’s needs as a general educator, but do not know how to do this.”).

<sup>12</sup> *See N.S. v. District of Columbia*, 709 F. Supp. 57, 73 (D.D.C. 2010); *Alfono v. District of Columbia*, 422 F. Supp. 2d 1, 6 (D.D.C. 2006).

the violations and denials of FAPE found herein. Petitioner has not shown that her requested private placement relief is appropriate; but other appropriate equitable relief is granted for the adjudicated denial of FAPE. The relief includes both injunctive relief and compensatory education services, as specified herein.

### ***Request for Private Placement Relief***

As suggested by the analysis above, Petitioner's request for private placement relief is not supported by the evidence or by the limited nature of the FAPE denial found herein. Petitioner has not shown that a full-time, outside general education program – much less, a special therapeutic school – is Student's LRE. Petitioner has also failed to prove that District Charter is unable to implement the requirements of Student's IEP, once it is revised consistent with this HOD to include some specialized instructional support outside the general education classroom. Moreover, Petitioner's witnesses did not adequately explain how Private School would be an appropriate match between Student's needs and the services offered in its program, which is primarily geared to the needs of learning disabled students and only secondarily to OHI/ADHD students. *Priv. Sch. Test.*; see *Branham v. District of Columbia*, 427 F. 3d 7, 12 (D.C. Cir. 2005); *McKenzie v. Smith*, 771 F.2d 1527, 1531 (D.C. Cir. 1985).

If it turns out that District Charter cannot fulfill the requirements of a revised IEP as described in this HOD, then District Charter must request action by DCPS, and DCPS must meet its IDEA obligation to offer placement in an appropriate school or program that can meet those requirements prior to the start of the 2013-14 school year. See D.C. Code 38-2561.02 (b); 5-E DCMR §§ 3019-4, 3019.8 (a); see also *McKenzie v. Smith*, 771 F.2d 1527, 1534-35 (D.C. Cir. 1985); *O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008).

### ***Compensatory Education***

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

In this case, the Hearing Officer has determined that DCPS denied the Student a FAPE by failing to develop an IEP that provided at least a minimum amount of specialized instruction (*i.e.*, 5-10 hours per week) in an Outside General Education setting in order to address his areas of greatest academic weakness and to assist him in completing class work assignments. The Hearing Officer finds that DCPS should have done so by at least the February 2013 annual review, based on the information available regarding Student’s needs and progress at District Charter. DCPS has thereby deprived the Student of the educational benefits of

such services for approximately the past three months of the 2012-13 school year, and will likely continue to do so for the remaining month of the SY before the IEP is reviewed and revised.

Petitioner has further shown that this denial has caused educational harm to the Student that entitles him to an award of compensatory education reasonably designed to compensate the Student for these deprived educational benefits. Without the necessary support, Student's unaddressed weaknesses have adversely affected his ability to access the curriculum and make progress across multiple academic areas. He has continued to struggle to achieve passing grades and recently tested well below grade level in reading comprehension, math reasoning, and written expression.

As compensatory education in this case, Petitioner proposes (1) an FBA and BIP to address Student's failure to complete work assignments; (2) a credit recovery program for classes Student failed this school year and also last school year since the 3/14/2012 IEP; and (3) 30 hours of individual academic tutoring to assist Student in successfully completing credit recovery courses. *See P-11; EA Test.* Although this proposal appears designed to compensate for missed services of broader scope (*i.e.*, full-time, outside general education) over a broader time period (*i.e.*, March 2012 to date) than adjudicated herein, similar elements would assist in providing the educational benefits that likely would have accrued from the specialized instruction support the Hearing Officer finds Student has missed since February 2013.

The Hearing Officer finds that this remedy (as set forth in the Order below) is supported by the record evidence, including the testimony of Petitioner's witnesses and the substantial documentary evidence adduced at hearing, as

summarized herein. These services are fact-specific and are well suited to remedy the specific harm suffered by the Student.

### ***Review and Revision of IEP***

The Hearing Officer does not wish to preempt the judgment and discretion of the professional educators and other members of Student's MDT/IEP Team in crafting the IEP in detail, provided it includes at least the above minimum amount of pull-out instruction (*i.e.*, 5-10 hours per week) in small groups or one-on-one. The Team should carefully review the results of the recent re-evaluation and Student's progress at the end of the 2012-13 school year to determine more precisely what specific amounts and types of specialized instruction would benefit Student. The Team should also review and revise the IEP's academic goals consistent with the provision of pull-out specialized instruction. Such revised goals should include timed, short-term goals to assist Student in becoming more independent when completing his work, as recommended by DCPS' School Psychologist.

## **VI. ORDER**

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

1. Within **30 calendar days** of this Order (*i.e.*, by **June 26, 2013**), Respondent District of Columbia Public Schools ("DCPS") shall convene a meeting of the Student's MDT/IEP Team to review and revise Student's individualized education program ("IEP") dated February 28, 2013, as follows:
  - (a) In the "**Special Education Services**" section of the IEP, add "Specialized Instruction" in an "Outside General Education" setting, in an amount to be determined by the MDT/IEP Team sufficient to provide appropriate academic support consistent with this HOD; *provided* such amount is **no less than five (5) hours per week**;

(b) In the “**Present Levels of Performance and Annual Goals**” section of the IEP, review and revise the annual goals in the areas of “Reading,” “Mathematics,” and “Written Expression,” as necessary to guide the delivery of the additional hours of specialized instruction outside general education consistent with this HOD; *provided* that such goals include **timed, short-term goals to assist Student in becoming more independent when completing his work**, as recommended by DCPS’ School Psychologist at the April 12, 2013 MDT/IEP Team meeting..

2. Within **30 calendar days** of this Order (*i.e.*, by **June 26, 2013**), DCPS shall also conduct a **functional behavior assessment (“FBA”)** and develop a **behavior intervention plan (“BIP”)** to address Student’s persistent failure to complete work assignments.
3. As additional **compensatory education**, Respondent DCPS shall pay for **30 hours of one-to-one academic tutoring services** for the Student. The tutoring services shall focus primarily on (a) developing Student’s skills in reading comprehension, math reasoning, and written expression, and (b) assisting Student in successfully completing credit recovery courses for any classes Student fails during the 2012-13 school year. The services shall be performed by qualified independent providers of Petitioner’s choice at hourly rates not to exceed the current established OSSE approved rates in the District of Columbia for such services. Unless the parties agree otherwise, these services shall be completed by no later than **May 27, 2014**.
4. Petitioner’s other requests for relief in her Due Process Complaint filed February 20, 2013, are hereby **DENIED**; and
5. The Complaint is **DISMISSED, With Prejudice**.



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Impartial Hearing Officer

Dated: May 27, 2013