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

STUDENT, **By and through PARENT**[1] ***Petitioner,*** **v.** **DISTRICT OF COLUMBIA PUBLIC SCHOOLS,** ***Respondent.***	))))))))))	**Case No.** **Bruce Ryan, Hearing Officer** **Issued: May 11, 2011**

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HEARING OFFICER DETERMINATION

I. INTRODUCTION/ PROCEDURAL BACKGROUND

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent District of Columbia Public Schools ("DCPS"). The Complaint was filed February 18, 2011, on behalf of a year old student (the "Student") who resides in the District of Columbia and has been determined by DCPS to be eligible for special education and related services as a child with a disability under the IDEA. Petitioner is the Student's mother.

The Student currently attends a non-public, special education school located outside D.C. (the "Private School"), where she was parentally placed in October 2010. Prior to that, the Student attended two DCPS public schools during the past two school years – School A during the 2009-10 school year; and School B during the first month of the 2010-11 school year.

As described in greater detail below, Petitioner claims that DCPS has denied the Student a free appropriate public education ("FAPE") by, *inter alia*: (1) failing to develop an appropriate individualized education program ("IEP") for the Student; (2) failing to implement the Student's

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

IEPs as written; and (3) failing to provide notice of changes in placement and/or ensure parental participation in placement decisions. *See Due Process Complaint Notice* (Feb. 18, 2011), p. 8.

A resolution session was held on March 14, 2011, which did not resolve the Complaint. DCPS then filed a late Response on March 15, 2011, which asserts that DCPS has not denied the Student a FAPE. DCPS concedes, however, that there were missed services during the 2009-10 school year. *See Response* (March 15, 2011), p. 2.

On March 21, 2011, the case was reassigned to this Hearing Officer for further proceedings. The Hearing Officer then contacted the parties to schedule a Prehearing Conference ("PHC") and Due Process Hearing ("DPH"). The earliest dates available to both parties were April 14 for the PHC and April 28 and 29 for the DPH. The parties agreed that Petitioner would file an unopposed motion for continuance to accommodate the DPH dates, with written closings due May 4 and deadline for a Hearing Officer Determination of May 11, 2011. The motion was subsequently filed, and an Interim Order on Continuance Motion was granted and approved by the Chief Hearing Officer for 13 days.

The PHC was held on April 6, 2011, at which the parties discussed and clarified the issues and requested relief. Petitioner elected for the hearing to be closed. Five-day disclosures were then filed as agreed on April 22, 2011; and the DPH was held as scheduled on April 28 and 29, 2011. Additional hearing sessions on May 2 and 4, 2011, were required to complete the cross examination of DCPS witnesses and presentation of rebuttal testimony by Petitioner.

During the DPH, the following Documentary Exhibits were admitted into evidence:

Joint Exhibits: J-1 through J-52.

Petitioner's Exhibits: P-1 through P-8.

Respondent's Exhibits: R-1 through R-4.

All Exhibits were admitted without objection, except P-2 and P-6, which were admitted over DCPS' objections for the reasons stated on the record. In addition, the following Witnesses testified on behalf of each party at hearing:

Petitioner's Witnesses: (1) Parent; (2) Educational Advocate; (3) Clinical Director, Private School; and (4) H.S. Team Leader, Private School.

Respondent's Witnesses: (1) Social Worker #1, School A; (2) Social Worker #2, School A; (3) General Ed. Teacher, School A; (4) Special Ed. Teacher, School A; (5) Special Ed. Coordinator ("SEC"), School A; (6) SEC, School B; (7) School Psychologist; and (8) DCPS Progress Monitor.

II. JURISDICTION

The Due Process Hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029, E3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office/Due Process Hearing Standard Operating Procedures ("SOP").* The HOD deadline is May 11, 2011.

III. ISSUES AND REQUESTED RELIEF

As confirmed at the PHC and in opening statements at the DPH, the following issues were presented for determination at hearing:

(1) **Inappropriate IEP (2009-10 SY)** — Did DCPS deny the Student a FAPE by failing to develop an appropriate IEP (*i.e.*, one that is reasonably calculated to provide meaningful educational benefit) at an August 25, 2009 MDT/IEP team meeting?

Specifically, Petitioner alleges that the IEP was inappropriate in that: (a) the goals were not observable, measureable, or defined; (b) the IEP contained no meaningful or useful present levels of performance in several areas, for example social-emotional; (c) the IEP contained, in every area, "needs statements that are so general as to be useless"; and (d) baselines were missing in several areas.

(2) **Failure to Implement IEPs (2009-10 SY)** — Did DCPS deny the Student a FAPE by failing to implement the Student's IEPs as written during the 2009-10 school year?

Specifically, Petitioner alleges that DCPS failed to provide all of the services required under the IEPs dated 08/25/2009 and 01/29/2010 (*i.e.*, five hours/week pull-out and 10 hours/week inclusion specialized instruction, plus 30 minutes/week counseling).

(3) **Procedural – Notice of Placement/Parental Participation** — Did DCPS violate required procedures and deny the Student a FAPE by failing to provide notice of changes in placement and/or to ensure parental participation in placement decisions, at two points: (a) the Student's move

to the "downstairs program" at School A during the 2009-10 SY; and (b) the selection of School B for the 2010-11 SY?

(4) **Inappropriate IEP (2010-11 SY)** — Did DCPS deny the Student a FAPE by failing to develop an appropriate IEP (*i.e.*, one that is reasonably calculated to provide meaningful educational benefit) at a June 2010 MDT/IEP team meeting?

Specifically, Petitioner alleges that the June 2010 IEP was inappropriate in that: (a) baselines are either missing or inaccurate; and (b) goals do not address the Student's deficit areas as indicated on her 04/21/201 psychological evaluation.

(5) **Failure to Implement IEP (2010-11 SY)** — Did DCPS deny the Student a FAPE by failing to implement the Student's June 2010 IEP as written during the first month of the 20109-11 school year?

As relief, Petitioner requests that DCPS be ordered to fund: (a) the Student's placement at Private School, with transportation, back to the date of her unilateral placement by Petitioner; [2] and (b) a "compensatory education evaluation to be provided independently to develop a plan to determine the impact inappropriate IEPs and placements have had on [Student] and the amount of compensatory education needed 'to make her whole' as well as an MDT to review that evaluation within fifteen days of providing the evaluation to DCPS." *Complaint,* p. 8. [3]

IV. FINDINGS OF FACT

1. The Student is a -year old student who resides in the District of Columbia. Petitioner is the Student's mother. *Parent Test.*
2. The Student has been determined by DCPS to be eligible for special education and related services under the IDEA as a child with a disability. *J-5; J-16; J-25.* Her primary disability is Emotional Disturbance ("ED"). *Id.* She has experienced academic and behavioral difficulties throughout her schooling. *See Parent Test.*

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[2] At the PHC, it was discussed and agreed that this first request for relief consisted of two parts: (1) retroactive reimbursement subject to the requirements of 34 C.F.R. 300.148; and (2) prospective placement.

[3] DCPS' Response objected to this second item of relief as "inappropriate and beyond the relief available to a Petitioner under IDEA and *Reid.*" *Response,* p. 5. DCPS argued that Petitioner "must be prepared to present evidence before the hearing officer at the time of the hearing in order to meet the standards set out by the statute and the case law for compensation purposes as a matter of equitable relief." *Id.* At the PHC, this relief issue was discussed further, and it was agreed and ordered that compensatory education would need to be based on what evidence Petitioner shows at hearing, unless Petitioner could demonstrate adequate legal support for her evaluation request.

3. The Student currently attends Private School, where she is in the 8th grade. The Student has attended Private School since October 2010, when she was unilaterally placed there by Petitioner. *See __; Parent Test.*

4. On or about August 25, 2009, DCPS convened a meeting of the Student's MDT/IEP team to determine the Student's eligibility for special education and related services under the IDEA. She was determined to be eligible, with a primary disability of ED, and the team then developed an initial IEP. *J-4; J-5.* See also J-33 (08/21/2009 comprehensive psychological evaluation; recommending ED eligibility, and noting that "Behavioral support is strongly recommended.").

5. The 08/25/2009 IEP required the following services: 10 hours per week of specialized instruction in a General Education setting; five (5) hours per week of specialized instruction in an Outside General Education setting; 30 minutes per *day* of behavioral support services in a General Education setting; and 30 minutes per *day* of behavioral support services in an Outside General Education setting. *See J-5, p. 4.*

6. During the 2009-10 school year, the Student attended School A, her neighborhood DCPS school. Her behavior issues continued, and to some degree worsened, as the school year progressed, according to Petitioner and some school personnel. The Student was highly distractible, was not engaging in classroom instruction, and had several disciplinary infractions. She was often allowed to read her own novels in class, while not paying attention to what the teacher was doing. *See Parent Test.; EA Test.; Social Worker Test.*

7. From the beginning of the 2009-10 school year until approximately December 2009, the Student did not receive any of the counseling services on her IEP because there was no social worker at School A during that time period. *See EA Test; Social Worker Test.* The Special Education Teacher also admitted that, during this same Fall 2009 time period, she did not provide the Student with all of the specialized instruction that her IEP required due to her servicing of other students in an inclusion setting. *See Sp. Ed. Teacher Test. See also School A SEC Test.* (Wilson reading program did not qualify as pull-out specialized instruction under IEP).

8. In mid-December 2009, the DCPS School Psychologist tested the Student specifically for ADHD, in response to a request from the EA. *J-36; Psychologist Test.* The psychologist

found that the Student did meet the conditions for ADHD, which would fall under the eligibility classification of OHI; however, she concluded that ED was still her primary disability in terms of impact on her learning. *Id.*

9. In January 2010, DCPS completed a functional behavior assessment ("FBA") and developed a behavior intervention plan ("BIP") for the Student. *J-39; J-40.*

10. On or about January 29, 2010, DCPS convened another meeting of the Student's MDT/IEP team, at which recent evaluations were reviewed and her IEP was reviewed and updated. See J-17. [4] The 01/29/2010 IEP continued to provide for 10 hours of inclusion and 5 hours of pull-out specialized instruction; but it reduced the level of behavioral support services to 30 minutes per *week* in a General Education setting. *See J-16, p. 6.* DCPS indicated in a Prior Written Notice ("PWN") issued that date to Petitioner that Student would continue to be classified as emotionally disturbed and continue to receive special education services in an inclusion setting at her home school. According to the PWN, the Student was "making progress in the inclusion setting especially in the area of reading... through the Wilson reading program." *J-15, p. 1.* The PWN further stated that a self-contained ED program was considered and rejected as too restrictive, and that a comprehensive speech/language evaluation was being requested. *Id., p. 2.*

11. Prior to DCPS Spring Break, in late February or March 2010, the Principal of School A (along with other administrators in the DCPS local region in which School A operated) developed a special program for students "with intense behavioral concerns." *J-26, p. 3.* The program consisted of the Student and 11 other children – both special education and general education students – who displayed consistently unacceptable and inappropriate behaviors in school. *Id.; School A SEC Test.* This special program was called "T-12," apparently named for 12 troubled students. It was located in a "remote location in the building" (*J-26, p. 3),* a self-contained classroom in the basement of the school with its own separate entrance and exit. *See School A SEC Test.* The students "were removed from having any contact with their

[4] Following the 08/25/2009 IEP meeting, the SEC received comments and objections to the IEP goals from the Student's educational advocate (EA) at a further meeting held in early October. Draft revisions were then sent to the EA, comments were returned, and the SEC proposed another meeting to discuss the goals. *See J-12; P-2; EA Test.; SEC Test.* Ultimately, DCPS developed a revised IEP on or about 01/29/2010, which Petitioner does not claim to be inappropriate in this proceeding.

peers." *J-26, p. 3.* All students received their academic instruction together, from both a general education teacher and a special education teacher. *Id.*

12. The Principal of School A then held an informal meeting over Spring Break with the parents of the affected students to explain the new program. Petitioner attended the meeting and objected to the Student's participation in the program. Despite the objection, the Student remained in the program. *See Parent Test.*

13. The T-12 program lasted approximately 6-8 weeks before it was terminated by DCPS officials because it had not been successful. *See J-26, p. 3; School A SEC Test.*

14. On or about April 21, 2010, Petitioner obtained an independent psychological evaluation of the Student and submitted the final report to DCPS. The results of this evaluation indicated that

15. On or about June 15, 2010, DCPS reconvened the Student's MDT/IEP team to review the independent psychological evaluation, DCPS continued to recommend the same 10 hours/week of inclusion, 5 hours/week of resource/pull-out instruction, and 30 minutes/week of counseling as provided in the 01/29/2010 IEP. Petitioner and the Student's educational advocate protested and requested a full-time, therapeutic program. The advocate also requested a classification of Multiple Disabilities ("MD"), for both ED and OHI/ADHD, but the SEC stated that this classification was not possible.

16. On or about June 22, 2010, the last day of school, another MDT meeting was held primarily to address placement. The team also expanded the Student's program to include full-time services, but only after it was reported that she had set fire to a trash can in the girls' bathroom while the June 15 meeting was in progress. She was then "removed from [School A] in handcuffs and charged with arson." *J-26, p. 2.* "At that point the entire IEP team agreed that [Student] needed a more restrictive placement." *Id. See also J-23* (6/15/10 Incident Information Report); *Social Worker Test.* (testifying that she recommended 30 minutes/day of counseling as of June 2010, because Student needed individual therapeutic support on a daily basis).

17. On or about July 30, 2010, DCPS convened yet another MDT meeting for the primary purpose of addressing placement and setting for services. The parent attended the meeting.

At the meeting, it was discussed and agreed that the Student could indeed be classified as multiply disabled (MD), with both ED and OHI for his ADHD. *J-29.* It was also discussed and agreed that the Student needed a full-time special education program in a more restrictive setting, with 25 hours/week of specialized instruction and 2.5 hours/week of behavioral support services Outside General Education. *Id.; J-29.* However, it appears that no DCPS official knowledgeable about specific school placement options attended the meeting. Accordingly, a Prior Written Notice was issued for a full-time program (27.5 hours) in a special education setting, but without specifying a particular school at that point. *J-28; School A SEC Test.*

18. On August 3, 2010, DCPS issued a Prior to Action Notice proposing a "Change in Placement" for the Student from School A to School B. *J-49.* The Notice stated that a "full-time, self-contained special education setting is being recommended" and "the team agreed to this change." *Id.* The Notice further stated that a "combination of inclusion and pull-out was considered and rejected as leading to school failure." *Id.* The Student was placed at School B because School A could not implement either the 06/22/2010 or 07/30/2010 IEPs. *See School A SEC Test.*

19. The services provided on the July 30, 2010 IEP were available to the Student at School B as of the beginning of the 2010-11 school year; and School B was able to implement the requirements of that IEP. *See School B SEC Test.* The Student was placed into School's B's ED program in an 8th grade classroom with six other ED students, one special education teacher, and one teacher assistant/paraprofessional. *Id.* The required hours of IEP services were provided to the Student in the correct (outside general education) setting, according to the testimony of the School B SEC. *Id.*

20. The Student began attending School B in late August 2010, at the start of the 2010-11 school year. According to the School B SEC, the Student attended school for about 20 days (intermittently) at the beginning of the 2010-11 SY; she was "doing well," although attendance was poor; and she was responding to both instruction and therapy.[5] *School B SEC*

[5] While the Student continued to read novels in class sometimes (as she had done repeatedly at School A), the SEC testified that the professional staff at School B had some success connecting this behavior to her classroom instruction by incorporating summaries of what she was reading, etc. According to the SEC, they "met her where she was" and worked with her in that context. *School B SEC Test.*

Test. However, other evidence shows that she continued to experience some behavior and disciplinary problems. *See P-5* (two-day suspension for 09/21/10 fighting incident); *J-31* (daily point sheets for 09/09, 09/16 and 09/20); *Parent Test.; School B SEC Test.* (cross examination re cell phone incident on second day of school).

21. On or about September 29, 2010, Petitioner's attorney sent a letter to DCPS' attorney and the School B SEC to inform them that the Student would be placed at Private School 10 business days from the date of the letter. The letter stated that the Student had not been provided a FAPE at School B and that Petitioner requests DCPS funding of the Private School placement, with transportation. *See P-7.*

22. Since attending Private School, the Student has received educational benefit from the program. When the Student arrived, she had difficulties with her focus, distractibility, peer relations, and anxiety to new situations. *See Clinical Director Test.* While some of these problems have continued, the Student has made progress in terms of her social/emotional functioning and behaviors. *Id.* She has also progressed academically, earning mostly Bs and Cs on her report cards. *Id.* [6]

V. DISCUSSION AND CONCLUSIONS OF LAW

A. Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see Schaffer* v. *Weast,* 546 U.S. 49 (2005). This burden applies to any challenged action and/or inaction, including failures to evaluate, develop an appropriate IEP, or implement an IEP as written. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. *See* DCMR 5-E3030.3. The recognized standard is preponderance of the evidence. *See, e.g., N.G.* v. *District of Columbia,* 556 F. Supp. 2d 11

[6] Certain witnesses were asked about development of a further IEP dated March 24, 2011 (subsequent to the resolution period) as well as a 03/23/11 Woodcock-Johnson test. However, since no such documents were included in either party's five-day disclosures or submitted into evidence, testimony on these points was not permitted.

(D.D.C. 2008); *Holdzclaw* v. *District of Columbia,* 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

B. Issues/Alleged Denials of FAPE

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

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

In this case, Petitioner has proved by a preponderance of the evidence that DCPS denied the Student a FAPE under **Issues ...**, but she has not proved that DCPS denied the Student a FAPE under **Issues ....**

1. Failure to Develop an Appropriate IEP (2009-10 SY)

Under Issue 1, Petitioner claims that the August 25, 2009 IEP was inappropriate (*i.e.*, was not reasonably calculated to provide meaningful educational benefit to the Student), for several reasons. The Hearing Officer concludes that Petitioner has met her burden of proof on this issue.

The "primary vehicle" for implementing the goals of the IDEA is the IEP, which the statute "mandates for each child." *Harris v. District of Columbia,* 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (*citing Honig v. Doe,* 484 U.S. 305, 311-12 (1988)). An IEP is a comprehensive written plan that must include, among other things: (1) "a statement of the child's present levels of academic achievement and functional performance, including ... how the child's disability affects the child's improvement and progress in the general education curriculum"; (2) "a statement of measurable annual goals, including academic and functional goals, designed to ... meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum...and meet each of the child's other education needs that result from the child's disability"; (3) "a description of how the child's progress toward meeting the annual goals...will be measured"; (4) "a statement of the special

education and related services and supplementary aids and services ...and a statement of the program modifications or supports for school personnel that will be provided for the child"; and (5) an explanation of the extent, if any, to which the child will not participate with non-disabled children in any regular classes. 20 U.S.C. 1414(d)(1)(A)(i). *See also* 34 C.F.R. 300.320; DCMR 5-E3009.1.

To be sufficient to provide FAPE under the IDEA, an "IEP must be 'reasonably calculated' to confer educational benefits on the child, but it need not 'maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children." *Anderson* v. *District of Columbia,* 109 LRP 18615 (D.D.C. 2009), slip op. at 6, *quoting Board of Education* v. *Rowley,* 458 U.S. 176,200,207 (1982). [7] 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.'" [8] Moreover, DCPS 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.

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). "Ultimately, the question ...is whether or not [the] defects in the ...IEP are so significant that [DCPS] failed to offer [the Student] a FAPE." *N.S. v. District of Columbia,* 2010 WL 1767214, Civ. Action No. 09-621 (CKK) (D.D.C. May 4, 2010), p. 20).

In this case, Petitioner has shown by a preponderance of the evidence that the 08/25/2009 IEP included the following significant deficiencies: [9]

(a) The IEP contains no measurable annual goals in the area of Emotional, Social, and Behavioral Development. The single annual goal states merely that the Student "will

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[7] *See also Kerkam v. McKenzie,* 862 F. 2d 884 (D.C. Cir. 1988); *J G. v. Abington School,* 51 IDELR 129 (E.D. Pa. 2008), slip op. at 8 ("while the proposed IEP may not offer [the student] the best possible education, it is nevertheless adequate to advance him a meaningful educational benefit. ").

[8] *Schaffer* v. *Weast,* 554 F.3d 470,477 (4th Cir. 2009) (citing *Rowley,* 458 U.S. at 207); *see also Fuhrmann* v. *East Hanover Bd. of Educ.,* 993 F.2d 1031, 1040 (3d Cir. 1993) (whether an IEP is appropriate "can only be determined as of the time it is offered for the student, and not at some later date").

[9] *See J-5; EA Test.; Petitioner's Closing Argument, pp. 2-3.*

demonstrate Improve [sic] social emotional functioning in the areas of compliance behavior and interpersonal skills." *J-5, p. 3.* There is no statement of specific needs, and the baseline is identified simply as "Below average social emotional functioning." *Id.* Since no specific baseline is identified, it is not possible to measure progress in this area. These provisions create impermissibly vague guideposts and immeasurable goals, which fail to comply with IDEA requirements.

(b) The IEP contains no Present Level of Performance ("PLOP") or baseline at all for math calculation and math reasoning. *See J-5, p. 2*; *EA Test.* Again, since no PLOP or baseline is identified, no measurement of growth is possible. Moreover, absent explanation, the annual goal to "demonstrate at least 3-6 months growth in math skills" (*J-5, p. 2*) appears to call for an inappropriately low level of progress over the course of a full school year.

(c) The IEP's reading and written expression goals of "at least six months growth" (*J-5, p. 2*), with no detailed way to measure such "growth," appear to be similarly inadequate.

(d) In all four areas, the statements of the Student's "needs" and the "impact on the Student" employ virtually identical language that is essentially meaningless. *See J-5, pp. 2-3* (Student "needs to improve her ...skills"; and "Disability negatively impacts her performance in the academic environment").

The Hearing Officer concludes that the foregoing defects in the 08/25/2009 IEP are so significant that DCPS failed to offer the Student a FAPE. Accordingly, Petitioner prevails on Issue 1.

2. Failure to Implement IEPs (2009-10 SY)

Petitioner next claims that DCPS denied the Student a FAPE by failing to implement the Student's 08/25/2009 and 01/29/2010 IEPs as written, in that DCPS allegedly failed to provide all of the services required under those IEPs (*i.e.*, 5 hours/week pull-out and 10 hours/week inclusion specialized instruction, plus 30 minutes/week counseling).

As the statute indicates, the failure to provide services in conformity with a student's IEP can constitute a denial of FAPE. *See* 34 C.F.R. §300.17(d). However, "a party challenging the implementation of an IEP must show more than a *de minimus* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEPs, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit." *Wilson v. District of Columbia*, 111 LRP 19583 (D.D.C. March 18, 2011), slip op. at 5 (*quoting Houston Independent School District v. Bobby R.,* 200 F.3d 341, 349 (5th Cir. 2000) for consensus approach to this question among the federal courts"). A "material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." *Wilson, quoting Howard Road Academy,* 585 F. Supp. 2d at 68. *See also Catalan* v. *District of Columbia,* 478 F. Supp. 2d 73 (D.D.C. 2007), *quoting Bobby R* (aspects of an IEP not followed must be "substantial or significant," and "more than a *de minimus* failure"; in other words, the deviation from the IEP's stated requirements must be "material."); *S.S. ex rel. Shank v. Howard Road Academy,* 585 F. Supp. 2d 56, 68 (D.D.C. 2008).

DCPS concedes that for approximately the first half of the 2009-10 school year, the Student did not receive the counseling services on her IEP because there was no social worker at School A during that time period. *See EA Test; Social Worker Test.; Findings* ¶ 6. The evidence also shows that the Student did not receive all of her pull-out specialized instruction, both when she was and when she was not in the T-12 program. *See Spec. Ed Teacher Test.; J-24.* The pull-out instruction under the Wilson Reading Program was provided by a general education "reading coach" without assistance from a special education teacher (*J-24, p. 2*), and thus did not fulfill the latter IEP requirements. The Student's BIP also could not be implemented when she was in the T-12 program. *Id.*

The Hearing Officer concludes that these failures constitute material deviations from the IEP requirements. Accordingly, Petitioner prevails on Issue 2.

3. Placement/Parental Participation

The IDEA requires that parents have meaningful participation in the placement decisions involving their child. *See* 20 U.S.C. 1414(e); 34 CFR 300.116(a) (1), 300.327. Specifically,

each public agency must "ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child." *Id.,* 1414(e); 300.327. The team does not have to agree with the parent's proposal or concerns,[10] but it is required to listen to the parent's concerns and consider them, rather than issuing unilateral decrees. DCPS also is permitted to conduct its own investigation and identification of possible placement sites (*i.e*, those that meet regulatory requirements and have available space and resources to accommodate a particular student), as long as the parent participates meaningfully in the placement process. Meaningful participation necessarily includes being part of the discussion of appropriate and available schools, as well as the ultimate team placement determination. [11]

On the basis of the evidence presented, the Hearing Officer concludes that DCPS failed to provide notice of what amounted to a change in placement and failed to ensure parental participation in the decision to move the Student into the T-12 program at School A for approximately 6-8 weeks during the spring semester of the 2009-10 school year. The evidence shows that the Student was harmed educationally and was denied a FAPE by this action.

With respect to the placement decision for the 2010-11 school year, the Hearing Officer concludes that DCPS also failed to ensure that the parent participated meaningfully in the placement process. However, Petitioner has not shown that this procedural error caused educational harm to the Student or otherwise resulted in a substantive denial of FAPE. *See* 34 C.F.R. 300.513 (a) (2); *Lesesne v. District of Columbia,* 447 F. 3d 828 (D.C. Cir. 2006). There is no claim that the most recent (07/30/2010) IEP is not reasonably calculated to provide educational benefit to the Student, and the evidence shows that School B can fully implement this appropriate IEP.

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[10] *See, e.g., T.Y. v. New York City Dept. of Educ.,* 2009 U.S. App. LEXIS 22238 (Oct. 9, 2009), at *5 (parents entitled to "input" into, not "veto" over, school choice).

[11] *See, e.g., Paoella v. District of Columbia,* 210 F. Appx. 1 (D.C. Cir. 2006) (DCPS' designation of a particular public school conformed with IDEA's placement requirements where record showed that parents "had a meaningful opportunity to participate" and "placement suggested by DCPS was not predetermined"); *T.T. v. District of Columbia,* 48 IDELR 127 (D.D.C. 2007) ("The IDEIA requires that the parents of a student with a disability be members of any group making a decision regarding the student's placement....In [DCPS'] typical placement process, the [DCPS] placement recommendations are then "offer[ed] to the parent during an MDT placement meeting.").

4. Failure to Develop an Appropriate IEP (2010-11 SY)

Petitioner also claims that DCPS denied the Student a FAPE by failing to develop an appropriate IEP at a series of meetings in June 2010. Specifically, Petitioner alleges that the June 2010 IEP was inappropriate in that: (a) baselines are either missing or inaccurate; and (b) goals do not address the Student's deficit areas as indicated on her 04/21/201 psychological evaluation.

Having reviewed the June 2010 IEP and the testimony and other evidence related to this claim,[12] the Hearing Officer concludes that Petitioner has failed to meet her burden of proof on this issue. She has failed to show by a preponderance of the evidence that this IEP was not reasonably calculated to enable the child to receive educational benefits, at the time it was developed.

5. Failure to Implement IEP (2010-11 SY)

Finally, Petitioner claims that DCPS denied the Student a FAPE by failing to implement the Student's IEP when she attended School B during the first month of the 2010-11 school year. However, there was scant evidence adduced on this issue. It consisted mostly of the parent's testimony concerning (a) a single incident of fighting, (b) reports she received that the Student sometimes read her own book in class, and (c) her belief that the Student "did not have easy access to her counselor." *Petitioner's Closing Argument, pp. 7-8; see Parent Test.*

The Hearing Officer must weight this testimony against the other, largely undisputed evidence showing that the services on the IEP were available to the Student at School B as of the beginning of the 2010-11 school year; and that School B was able to implement fully the requirements of that IEP. *See School B SEC Test.; Findings* ¶ 19. The Hearing Officer concludes that Petitioner has not proved by a preponderance of the evidence that DCPS failed to implement substantial or significant provisions of the IEP – or, in other words, deviated materially from IEP requirements – during the few short weeks that the Student attended School B. The Student simply was not there long enough for anyone reasonably to make such judgment.

C. Requested 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). The primary relief sought in this case is tuition reimbursement/placement at Private School, back to the date of the Student's unilateral placement. Petitioner also requests certain relief regarding compensatory education.

Retroactive Reimbursement

IDEA provides that "a court or a hearing officer may require the agency to reimburse the parents for the cost of [private school] enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate." 34 C.F.R. § 300.148 (c); *see also Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 12-13 (1993); *School Comm. of Burlington v. Department of Educ.,* 471 U.S. 359, 369-70 (1985); *Roark v. District of Columbia,* 460 F. Supp. 2d 32 (D.D.C. 2006). Moreover, "equitable considerations are relevant in fashioning relief," *Burlington,* 471 U.S. at 374, and courts and hearing officers have "broad discretion" in the matter. *Id.* at 369. The Hearing Officer therefore "must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required." *Carter,* 510 U.S. at 16; *see also Forest Grove Sch. Dist. v. T.A.*, 557 U.S. __, 129 S. Ct. 2484 (2009).

IDEA further provides that the cost of reimbursement may be reduced or denied if: (1) "at the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP team ...[of] their intent to enroll their child in a private school at public expense"; or (2) at least 10 business days prior to removal, the parents did not give written notice of their intent to the public agency; or (3) "upon a judicial finding of unreasonableness with respect to the actions taken by the parents." 34 C.F.R. §300.148 (d). *See also Forest Grove Sch. Dist. v. T.A.*, 557 U.S. __, 129 S. Ct. 2484 (2009).

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[12] *See, e.g., J-25; EA Test.; Parent Test.; SEC Test.*

In this case, the Hearing Officer concludes that Petitioner has not established the first prong of the *Carter/Burlington* test – *i.e.*, that the LEA did not make FAPE available to the Student in a timely manner prior to her enrollment in Private School. While denials of FAPE did occur during the 2009-10 school year at School A, the evidence shows that by the beginning of the 2010-11 school year, DCPS had made FAPE available to the Student. It did so pursuant to the new IEP developed over the 2010 summer and the 08/03/2010 placement of the Student at School B, which could implement that IEP. DCPS had thus put in place a revised program offering full-time specialized instruction outside the general education setting, along with expanded hours of daily counseling services, to respond to the Student's unique special education needs. Accordingly, the Hearing Officer does not reach the second prong of the test – *i.e.,* whether the private placement is appropriate.

Compensatory Education

Compensatory education is an equitable remedy 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 at 521 (quotations omitted*)*. Generally, if a parent presents evidence that her child has been denied a FAPE, she has met her burden of proving that the child may be entitled to compensatory education. *Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland,* 534 F. Supp. 2d 109 (D.D.C. 2008); *Henry v. District of Columbia,* 55 IDELR 187 (D.D.C. 2010). "In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." 401 F.3d at 524. *See also Friendship Edison Public Charter School v. Nesbitt*, 532 F. Supp. 2d 121, 125 (D.D.C. 2008).

In this case, Petitioner demonstrated that DCPS denied the Student a FAPE during the 2009-10 school year by failing to develop an appropriate IEP, failing to implement the IEP as written, and failing to ensure parental participation in a placement decision in spring 2010. Petitioner has further shown that these failures have resulted in harm to the Student. For example, the Student's grade level equivalent scores in basic reading, reading comprehension,

and written expression as shown on her IEPs at both the ***beginning*** and ***end*** of the 2009-10 school year are the same – *i.e.*, 4.8 in basic reading, 3.1 in reading comprehension, 2.3 for writing sample, and 5.7 for writing fluency – thus showing no apparent progress over the course of the year. Comparison of the social/emotional goals also suggests a lack of progress during that time period; and DCPS' own witnesses indicate that the Student did not benefit social-emotionally from the T-12 program. *See P-4.*

Based on careful consideration of all the testimony and evidence adduced in this case, the Hearing Officer concludes that compensatory education services in the form set forth in the Order below would be an appropriate equitable remedy under the circumstances. The plan meets the *Reid* standard because it has been shown to be (a) reasonably calculated to provide the educational benefits that likely would have accrued from special education services that DCPS should have supplied in the first place during the relevant time period, and (b) reasonably tailored to the unique needs and deficits of Petitioner. It is also consistent with the compensatory education plan proposed by DCPS during resolution, as an approximation of the type and amount of services needed to compensate for the denials of FAPE. *See J-52.* For example, the additional counseling intervention will help ensure that social-emotional goals that previously should have been defined are now met; and the academic tutoring will provide some of the educational benefits that would have accrued from pull-out specialized instruction that should have been supplied to the Student at School A.

Finally, Petitioner has not cited any support for the funding of a "compensatory education study" to determine an appropriate award or relief (*Pet's Closing Argument, at 10)*, and the Hearing Officer declines such request as inconsistent with his authority under *Reid.* Moreover, Petitioner has not moved for a further continuance to allow such evidence to be developed.

VI. ORDER

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

1. DCPS shall fund the following **compensatory education services** for the Student: (a) 50 hours of specialized instruction in the areas of reading, math, and written expression, by an independent provider of the parent's choice to be completed by November 15, 2011, at a rate not to exceed per hour; and (b) 25 hours of counseling, by an independent provider of the parent's choice to be completed by November 15, 2011, at a rate not to exceed per hour;

2. Within **30 calendar days**, DCPS shall convene a meeting of the Student's MDT/IEP team including Petitioner to discuss and determine the Student's school placement and/or location of services for the 2011-12 school year, with Petitioner fully participating in such discussion and determination.

3. Petitioner's other requests for relief in her Due Process Complaint filed February 18, 2011 are hereby **DENIED;**

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

IT IS SO ORDERED.

Dated: May 11, 2011

Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

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